Torts:
Cases & Context

CONIC 3.β *(BETA)* EDITION

Volume Three

Liability Relating to Healthcare
Strict Liability
Remedies
Special Issues with Parties and Actions

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This is ***Torts: Cases and Context***, ***Conic 3.β (Beta) Edition, Volume Three***. It is the third volume of the author-revised third edition, in the intentional-torts-first configuration, created in 2026. ("Conic" designates the author's own edition in intentional-torts-first configuration, and 3.β (Beta) indicates the third generation of revisions for the book as a whole.)

This edition combines material from Volume One and Volume Two, published in 2024 and 2025, respectively, of the Pylon 2.1 Edition (which is in the negligence-first configuration).

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As compared to the first edition, Pylon 2.0 made many substantive changes, including adding substantial material, deleting substantial material, and re-writing substantial material. Pylon 2.1 made updates (including regarding references to state statutory law and various references to the current status of things) and made some substantive changes.

This Conic 3.β (Beta) Edition incorporates substantial changes and substantial new material. See details below.

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What's New in 3.β (Beta)

This 3.β (Beta) edition features substantial changes, additions, and re-writing.

[more detail, pending]

Finely granulated section numbering facilitates assignments of only particular portions of chapters without using page numbers. Typography has been re-thought and re-implemented. New in-document coding facilitates use of navigation tools.

Selected new content worth a particular mention:

[pending]

Design, format, typography

The manuscript has been substantially reformatted. In response to teacher feedback, I have added fine-grained section numbering to enable teachers to assign any parts they like without referring to page numbers. (Page numbers can shift for those using the DOCX file. This new section numbering is hard-coded and won't shift.) I put a number on any section that I could imagine anyone assigning separately.

Typography has been substantially changed and smartened. In response to student feedback, I've used a different font for case readings (Tinos). The idea is to readily distinguish judicial text from the expository portions of the book (EB Garamond). In addition, the sans-serif font from the cover (Raleway) has been incorporated throughout the book as the type for headings.

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About the Author

Eric E. Johnson is a professor of law at the University of Oklahoma College of Law.

Professor Johnson archives a large volume of free materials at ericejohnson.com, including dozens of essay exams, banks of multiple-choice questions, free/open-source casebooks, problem sets, how-to guides, tip sheets on exam techniques and student writing, and much more.

He has taught Torts since 2007. Other courses he's taught include Antitrust, Mass Media Law, Entertainment Law, Sports Law, Employment Law, Sales Law, Intellectual Property, Copyright, Patent Law, Trademarks, Science & Law seminar, and writing courses. Johnson's research interests include intellectual property and the intersection of law, science, and risk. Links to publications, more bio info and a CV are at ericejohnson.com.

Before joining academia, Johnson practiced law in Los Angeles. He litigated matters concerning television programming, video games, and real estate. He also worked in-house doing transactional work concerning sports programming on cable television networks.

Before law school, Johnson was a top-40 radio disc jockey in his hometown of Reno, Nevada.

A huge way Eric E. Johnson counts success in his career is how useful his freely distributed materials are. So please consider reaching out via contact info at ericejohnson.com.

Edits and Style Conventions

Unconventional Editing Marks

I've used some unconventional marks in the cases and quotes to indicate edits.

They may look weird, but it's about trying to make the text as readable as possible while preserving useful information about the fidelity of the text.

The superscript tilde ˜ denotes an ellipsis (deleted/omitted matter).

Curly brackets { } indicate an insertion, which may be accompanied by a deletion.

The superscript pilcrow ⁋ denotes an inserted paragraph break.

Superscripted angle brackets ˂˃ indicate material moved into the above-the-line text from a footnote.

Rationales: The tilde is meant to be unobtrusive compared to strings of dots or asterisks. I've often opted for the curly variety to differentiate my use of brackets from the court's. Inserting paragraph breaks helps aerate dense text. And a zero-tolerance policy for footnotes helps the text to be more accessible and more easily ported to other formats. (Footnotes are a brilliant device in a manuscript on printed paper matter, but they become a terrible mess for formats like web, e-book, audio, etc.)

Citation Style

This casebook intentionally eschewed the Bluebook and other formalized citation systems in favor of simple conventions.

This book generally embraces the simplest possible way of constructing the court/year parenthetical when citing a case. The state abbreviation alone means that state's highest court. Paired with "App." it designates an intermediate state appeals court. The highest federal court (the U.S. Supreme Court) gets "U.S." Lower state courts that aren't the standard intermediate appellate variety get an abbreviation that's sensible. Lower federal courts get their expected abbreviations.

The court-designating abbreviations are generally used without regard to whether they are paired with a reporter cite and what that might be. (Sometimes you can tell a court from the reporter abbreviation. Sometimes you can't. Sometimes it'll mislead you. Regardless, why assume readers have memorized coverage of reporter series?) States get their conventional newspaper-style abbreviations (nix the Bluebook).

Some examples:

Moore v. U.C. Regents (Cal. 1990)

Snow v. City of Columbia, 305 S.C. 544, 552-53 (S.C. App. 1991)

Harrington v. McCarthy, 169 Mass. 492 (Mass. 1897)

Martin v. Reynolds Metals Co., 221 Or. 86 (Ore. 1959)

Anderson v. WROC-TV, 109 Misc.2d 904 (N.Y. App. 1981)

People v. Segal, 78 Misc.2d 944 (N.Y. City Crim. Ct. 1974)

Food Lion v. Capital Cities / ABC (4th Cir. 1999)

New York Times v. Sullivan, 376 U.S. 254 (U.S. 1964)

Unmarked Edits Generally

Key to making a casebook is editing down cases. Many of these edits have been marked as described above. But there are many edits of included case text (and perhaps other readings) that are not marked within the text.

In general, whole citations and portions of citations have been liberally removed from the readings. Parallel citations have been removed generally. In some cases, punctuation was changed to accommodate cites that were eliminated without notation.

Footnote references and footnotes have been removed without notation.

Where a reading's original formatting didn't matter as to substance but could matter as to the reader's convenience, it may have been changed. Sometimes court opinions employ strange or awkward formatting – usually in connection with citations. In many such cases alterations were made to fit conventions and serve readability. In particular, spaces have been added or deleted in cases where the observed style was unconventional and jarring. Typesetting for citations may have been changed, such as from lower-case to small-caps for titles of journals. Formatting of headings has been changed. In cases where case names were printed in roman type, case names have generally been italicized. Quotation marks around blockquote may have been altered. Lengthy portions of quoted material may have been re-set as blockquotes. Dashes and ellipses have generally been set in a uniform typographical style regardless of how they appeared in the original document.

Official headnote references have been eliminated. In addition, I have sought to remove all indicia of additions to any text made by unofficial publishers.

The author attributions at the beginnings of case readings, in general, are not attributable to the original source. In various places, the spelled-out word "section" may have been replaced with the § symbol.

Case citations may have been changed so that where the court uses a secondary-reference citation style, if it is the first reference in the case as it appears in edited form in this casebook, the secondary-reference cite has been replaced with the full citation as is appropriate for use on first reference.

Idiosyncratic Unmarked Edits in this Volume

[pending]

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I want to offer my sincere and heartfelt thanks to my colleagues in the faculty, staff, and administration at both OU and UND for their considerable support.

Beyond the walls of my own schools, many others lent me their time and advice to help with this book. That includes those who have generously written me to point out errors in earlier editions. I am in your debt. Thank you.

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In addition, I want to thank many people who have helped me in indirect but important ways by having illuminating discussions with me about torts – discussions that ultimately helped me frame the explanations that appear in this book. Those people include Paul Gowder, Sanne Knudsen, Sandra Sperino, John L. Watts, Bruce L. Hay, Guido Calabresi, Daniel J. Crothers, T. Joe Johnson, Zane Johnson, Sarah Johnson, and, most especially, my own torts teacher, Jon Hanson.

With regard to producing this book on a free/open-access/open-source basis, special thanks to Deb Quentel and everyone at CALI for supporting the original manuscript, to type designers Georg Duffner, Octavio Pardo, Matt McInerney, Pablo Impallari, Rodrigo Fuenzalida, and Eben Sorkin for their surpassing and exquisite open fonts, and to James Grimmelmann, Terry Fisher, Brian Frye, and Greg R. Vetter, for knowledge, trail blazing, and collateral support.

Most of all, I want to acknowledge and thank my students, particularly my torts students at the University of Oklahoma and the University of North Dakota. Over the years, my students have been genuine partners in helping me grow as a teacher and academic. And with this casebook, in particular, so many students have gone out of their way to give me suggestions, corrections, nudges, observations, and insights. That goes many years back with regard to the early forms of the materials that evolved into this book. And their help continues to today. I have to give a particular shoutout to my 2014-2015 and 2015-2016 torts students, who went above-and-beyond-the-call in helping me ferret out typos and rework unclear passages in the pre-publication draft of the original edition. Needing to err on the side of student privacy, I am making no attempt to list names, but I am truly indebted to my students. Thank you.

Dedication

For my mom, Gretchen Johnson

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Hey!

Hey Students: Actually Read This Short, Helpful Note

Key tips:

- If you're looking at the DOCX file, you'll want to download the three fonts it uses. They are all free. (See "Typography," above.)
- If you are using the DOCX file, your page numbers may shift, depending on your application and its settings (though getting the fonts may help).
- If you are using the PDF file, look for the navigation feature or interactive table-of-contents feature that many PDF readers have. The PDF file of this book should have coding that facilitates such features.
- You can – completely legally – not only copy this book, but also remix it into something new, and then distribute your resulting creation. See "Open, Share-It-Forward Licensing, Etc.," above. (I hope some of you might! Let me know if you do!)

Something you must understand about where this book is coming from: This casebook was written, in all sincerity, to help you as much as possible to learn what will be useful to you as a lawyer in the real world. Undoubtedly, it is not perfect in that regard. But any shortcomings are not for lack of sincere effort to direct this book entirely to the project of moving you toward successful legal practice.

Many law students have been on the receiving end of grim and bitter stories about law school. They've been told that law school doesn't teach you what is useful to practicing law. That it's just something you have to go through.

Some of this sour view originates from law school alumni who had bad experiences in the classroom. Why so? Some well-meaning teachers aim to teach straightforwardly and provide real-world-useful knowledge but just don't succeed with a few (or many) students for some reason. Some well-

meaning teachers may feel constrained by tradition or expectations to obfuscate the material or to overindulge in theoretical aspects. (There used to be much more of that than there is these days.) And pretty much every teacher can have a bad year. But nearly all law professors care greatly about their students learning that which is actually important and useful. Could a bitter alumnus have had a teacher who was, in fact, an arrogant humbug who actually delighted in torturing students and placing an arbitrary and pointless hurdle in their path to a law career? It's possible, but having been on both sides of the fence, I can tell you those people are incredibly rare. The fact is, teaching well is hard, and sincere effort doesn't always appear as such to students.

But that's not all of what fuels a grim, bitter outlook on law school. Quite a bit originates from – and I don't want to belabor this, but it's true – folks who profit from sowing suspicion and fear. Sometimes it's indirectly, in the form of clicks and follows. Sometimes it's directly, in the form of fee-paid services.

At any rate, many – perhaps most – law students would be shocked as to how useful and on-point their legal education turns out to be in practice.

Recently, someone I know was accused of violating a city ordinance. They wrote up a letter to the city making numerous legal arguments, and they showed me what they got back. The letter they received from the city attorney was courteous and even kind as it went through the legal issues. And that was nice. But what I couldn't get over was how the city attorney's response read exactly like a top-of-the-class essay answer to a law-school issue-spotter exam question. It was so on-point for what I'd been recently trying to communicate to students that I wanted to copy it and wave it around in class as proof to my students of the usefulness of what they are learning. "See! Here it is!" I wanted to shout. But, of course, it wasn't mine to do that with.

All this is to earnestly urge you to please take this book, your Torts course, and all of your law teachers with a presumption of good faith. Doing so will serve you best as a budding lawyer. And, as a bonus, it will likely make all of law school a good deal more pleasant.

One more thing: This casebook is free. I do not make any money from it. But I do like to keep score. So if you find this casebook is helpful to you, please consider dropping me a quick note. I also greatly appreciate suggestions for improvement.

Often, a note from a student is the only way I know my casebook is being used at a particular school. And, the book's adoption, as well as anything nice said about it, is useful in the sorts of reports that all faculty have to write for reviewing committees, the dean, the provost, etc.

Here's wishing you all the best!

– EEJ (Contact me via ericejohnson.com.)

Teachers/Faculty: Please Read This Short, Helpful Note

Please let me know if you adopt this book! It's wonderfully fulfilling to know the book's getting used, and, as I'm sure you can imagine, it's useful to have the data point for doing that paperwork we all do for committees and the administration.

Also, I'm happy to share what resources I have with you. And I'd be happy to chat with you about teaching Torts. Maybe you can benefit from hearing about missteps I've made over about 20 years of teaching this subject. Or whatever else! Please reach out!

– EEJ (Contact me via ericejohnson.com.)

Liability Relating to Healthcare

24. Healthcare Tort Liability

"Like a surgeon – hey! Cuttin' for the very first time!
Like a surgeon. Here's a waiver, for you to sign."

— "Weird Al" Yankovic, 1985

A. Lead-in

The healthcare setting is a fertile one for torts. So many things can go wrong in the course of diagnoses, drug treatments, and surgeries. Of course, automobiles and roadways provide many opportunities for accidents as well, but hospitals and physicians tend to have one thing that the average driver does not – deep pockets. The confluence of injuries to fuel complaints and money to pay judgments makes healthcare a uniquely important setting for tort law.

At this point, you have learned the basics of negligence law, and thus you know most of what is relevant to lawsuits against physicians and hospitals. But there are a few important things to add. This chapter covers some additional common-law doctrine that applies to healthcare torts.

There are three aspects of common-law torts in the healthcare context that are covered in this chapter.

First, in a medical malpractice action for negligence, the standard of care is different. As is famously illustrated by Judge Learned Hand's opinion in *The T.J. Hooper*, 60 F.2d 737 (2d Cir. 1932), the custom or standard practice of an industry is not dispositive when it comes to determining the standard of care. In *The T.J. Hooper*, the ocean-going tugboat industry had an established pattern of practice – or "custom" – of not equipping their vessels with radios to receive weather reports. Judge Hand determined the whole

industry was being unreasonable, i.e., negligent – breaching their duty of care. Across the general landscape of negligence, the standard practice of an entire industry can be found unreasonable and thus held to fall below the standard of care by which defendants are judged. That is not the case, however, with medical malpractice.

Medical custom – what physicians generally call the "standard practice" or "standard of care" – is the benchmark for determining breach of duty in the context of medical malpractice negligence claims. This means that what is called "standard of care" in medical jargon ends up dictating what we refer to as the "standard of care" in legal jargon.

Second, the intentional tort of battery has a unique role in the medical setting. The healthcare version of battery, called **medical battery**, provides a way for patients to sue physicians who treat them beyond the scope of the patient's consent. Consistent with battery doctrine, and in distinction to negligence, a medical battery action has no requirement of showing damages or an injury.

Third, there is a kind of claim that is unique to healthcare: the action for **informed consent**. The informed consent action is generally available where a patient was not apprised of an important risk necessary to make an informed decision about treatment, and the patient then suffers the negative consequence associated with the undisclosed risk.

B. The Standard of Care for Healthcare Professionals in Negligence Actions

B.1. Basics

Most cases falling under the label "medical malpractice" are negligence cases. Examples of medical malpractice negligence actions would include suits arising from an internist who prescribes a drug contraindicated by something in the patient's history or a radiologist who fails to see a tumor that other radiologists would have seen.

There is a key difference between negligence law generally and negligence law as applied to physicians: the standard of care. Physicians are considered *professionals*, and for professionals, the standard of care is not that of a reasonable person, but is instead **the knowledge and skill of the**

minimally competent member of that professional community. Another way of putting this is that custom becomes dispositive in cases of professional negligence. Is it the prevailing custom for neurosurgeons to order an MRI scan before undertaking a scheduled brain surgery? If so, then failing to do this is a breach of the duty of care. If not, then there is no breach – even if the plaintiff can demonstrate that a practice of doing so would be prudent.

This way of setting the standard of care works both for and against physicians. On the one hand, hewing to custom keeps a physician insulated from malpractice judgments – even where the hypothetical reasonable physician might be more cautious. On the other hand, deviating from custom – even when doing so would seem reasonable – exposes the physician to liability.

This standard for professional negligence is objective, and it is calibrated in accordance with the community of professionals in the defendant's practice. If the defendant is a general dentist, then the standard is the minimally qualified member of the relevant community of general dentists. If the defendant is a cardiologist, then the standard is the minimally qualified member of the relevant community of cardiologists. By saying the standard is objective, we mean that it is the same standard for all members of the professional community. That is, the standard of care is not adjusted in favor of professionals who have lower levels of experience, skill, or knowledge. Thus, it does not matter whether a physician is just out of medical school and doesn't know much yet – the physician must come up to the level of the standard of practice of the relevant professional community. Also, the standard of practice will evolve over time. What starts as an obscure technique may gain enough acceptance to become standard practice. Thus, negligence law puts the onus on physicians and other healthcare professionals to stay up to date.

There is an important exception or caveat to this objective standard: If a physician has superior knowledge or skills, then those ratchet up the standard of care. That is consonant with the regular reasonable-person standard of care for negligence cases generally. An expert skier on the slopes, for instance, is held to the standard of what a reasonable person with those expert abilities would do in the situation.

Let's suppose a particular physician, Dr. D, has learned of obscure research showing that persons taking herbal supplement X are likely to suffer heart valve damage if they simultaneously take a certain prescribed medication Y. Suppose further that every other physician in the world does not know of this research, and that the state of practice is for physicians to prescribe Y without regard to whether patients are taking X. If Dr. D knows that a patient is taking X and prescribes Y anyway, Dr. D is liable for the resulting heart valve damage – notwithstanding the fact that any other physician would have done the same thing.

One more thing to bear in mind: The objective standard of care for professionals applies only when they are accused of negligence in the course of their professional practice. If an orthopedist drives her car into your mailbox, the standard applied will be that of the hypothetical reasonable person and not that of the knowledge and skill of the minimally competent orthopedist.

B.2. The Role of Expert Testimony

The fact that the professional standard of care is defined with objective reference to the professional community means that it is almost always the case that expert testimony will be needed to establish the standard of care. In practice, this makes medical negligence actions expensive to litigate. It also changes the role of the jury. Instead of jurors asking themselves what is reasonable, jurors are generally left to choose between the competing views of the plaintiff's expert and the defendant's expert. Thus, a medical negligence case can often come down to whether the plaintiff's expert or the defendant's seems more knowledgeable and credible.

Expert testimony is not always necessary. Some cases can be prosecuted based on common knowledge. If a surgeon mistakenly cuts off the wrong limb or removes the wrong kidney, no expert testimony is necessary to show that the standard of care has been breached. Another example is leaving foreign objects inside a patient, such as surgical sponges. In fact, a sponge left inside the body cavity is a leading example of the doctrine of *res ipsa loquitur* in action. One way to think about cases such as these is that they really are not medical malpractice cases at all, since medical knowledge and skill are not at issue. Most medical malpractice cases, however, involve a question of professional judgment. In such cases, the question of whether the physician

used appropriate professional judgment will require the testimony of a medical expert.

B.3. How the Professional Community is Defined

Since the standard of care is defined by the professional community, a key question concerns how to define the "community." The analysis of what constitutes the relevant community involves issues of both specialty and geography.

Exactly what skills and knowledge a physician is expected to have depends on whether or not the physician has a specialty, and, if so, what that specialty is. Physicians who are general practitioners are held to a different and lower standard than specialists. If a general practitioner prescribes an aerosol inhaler for asthma, the standard is different and lower than a pulmonologist who writes the prescription. For the general practitioner, the standard of care is set by the knowledge and skill level of a minimally competent general practitioner. For the pulmonologist, it is what is the knowledge and skill level of a pulmonologist. By the way, holding one's self out to the public as a specialist is generally what counts for being held to the higher standard of knowledge and skill of a specialist.

Geography may be relevant as well. Historically, professional communities were conceived of as being local. If the question of negligence concerns a physician practicing in Ridgefield, population 20,000, then the standard of care is set by the customs, skills, and level of knowledge of Ridgefield physicians. So the question of whether a physician in a particular town was negligent required getting experts from that city to testify as to the standard practice in that town. Such a requirement, as you might imagine, works greatly to the benefit of defendant physicians in small cities and towns. First, it allows small-town medical care to be held to a lower standard than in the big cities. And the lower the standard, the easier it is for physicians to escape liability. But there is another, sharper advantage for physicians in smaller locales when the standard of care is defined locally. Professionals in small locales are often unwilling to testify against one another. Without an expert to testify as to the standard of care in the community, the lawsuit may be stopped in its tracks.

Because of the recurrent problem of a lack of willing experts, the trend in the law has been to move away from defining professional communities in

this way. The more favored alternatives are (1) to use a national standard, or (2) to use a nonparticularized local standard, meaning that the standard is defined with reference to a *similar* city or town. The similar-communities standard means that experts for small towns and cities can be found across the country if necessary.

A typical way for courts to define professional communities is to use a similar-geographical-place standard for general practitioners and to use a national standard for members of a medical specialty. Thus, a cardiothoracic surgeon practicing in a city of a few thousand people will be held to the same standard as cardiothoracic surgeons in a megalopolis of millions.

B.4. Problems for Professional Medical Negligence

A. Delinda, a medical doctor practicing as a general practitioner, was trying her best when she prescribed sploramoxacin to her patient, Perry. Based on lab results, Delinda figured that Perry had a bacterial infection that was causing him pain in his lower left side – around the site of a deep cut he had gotten while hiking. Delinda also knew that sploramoxacin was a good broad-spectrum antibiotic. Most physicians would have done exactly what Delinda did. Unknown to Delinda, the Nashlanta Journal of Medicine had published an article in the previous week showing that sploramoxacin was contraindicated in cases of lower-left-side pain because of a newly identified condition named Lower Left Syndrome. (The Nashlanta Journal of Medicine is a relatively obscure journal which few people read.) While Lower Left Syndrome presents with all the symptoms of a bacterial infection, it is in fact caused by a eukaryotic plasmodium. Generally, the body's natural defenses will destroy the plasmodia in two to three weeks without treatment. If, however, sploramoxacin is administered in patients with Lower Left Syndrome, the body's natural defenses against the plasmodium are lowered, and the plasmodium will attack the liver, causing liver failure. This is what happened to Perry. Will Perry prevail in a lawsuit against Delinda?

B. Same as A., but suppose Delinda had happened to have read the article on Lower Left Syndrome before she saw Perry. Different result?

C. Same as A., but suppose the standard of practice in a case such as Perry's was to use an expensive test that not only indicates infection, but also

discerns the difference between a bacterial infection and a plasmodial infection. (And note that antibiotics do not work against plasmodia.) Different result?

D. Same as A., but suppose immediately before seeing Delinda, Perry consumed a substantial quantity of snasmygla cheese, which, as researchers will soon find out, has precisely the same effect as sploramoxacin in lowering the body's natural defenses to the eukaryotic plasmodium. Different result?

B.5. Professional Negligence Outside the Healthcare Setting

The professional standard of negligence that applies to medical doctors and dentists applies to non-healthcare professionals as well, such as accountants, architects, engineers, veterinarians, and attorneys. That is to say that these professionals, when sued for negligence in the course of their professional practice, are held to a standard of care that is dictated by the custom or standard of practice that prevails in the relevant community of professionals – what the reasonable person would do is irrelevant. (Attorney malpractice is, of course, an important area of the law for budding lawyers to be familiar with. But we will leave an in-depth treatment of the topic for your professional responsibility course.)

Whether or not something counts as a "profession" can be a tricky question. In general, a profession for the purpose of assigning a standard of care in negligence is one that consists primarily of intellectual labor and that requires higher education.

Plumbers, electricians, and carpenters, for instance, are not considered professionals in the negligence context – even though their work requires a great deal of knowledge. Meanwhile, surgeons are considered professionals, even though their work might be considered primarily manual as opposed to intellectual.

C. Medical Battery

Medical battery is an intentional tort cause of action that can be alleged against a physician or other healthcare provider who performs a course of treatment without the patient's consent.

What we are calling "medical battery" is not really a separate tort; instead it is really just a particular factual context for the tort of battery. The intentional torts, including battery, are covered elsewhere in this casebook. In case you have not studied battery yet, you will need the basics of the doctrine to be able to understand actions for medical battery.

The intentional tort of battery requires that the defendant inflict a harmful or offensive touching on the plaintiff's body. Consent is an affirmative defense. To break it down into elements, battery – including medical battery – requires that the defendant (1) undertook an act, (2) with intent, effecting a (3) harmful or offensive (4) touching of the plaintiff.

The harmfulness or offensiveness element and the affirmative defense of consent are key to preventing the tort of battery from getting out of control. People touch each other's bodies all the time, rarely accruing claims for battery. The reason why most touches do not create liability is that nearly all touches are either not harmful or offensive, or else they are consented to.

Now that you understand the basics of battery, you can see some key differences between the negligence cause of action and the battery cause of action. Unlike a prima facie case for negligence, a claim for battery does not require an injury. That makes a battery claim, at least in that sense, easier to bring. But there is a tradeoff. Unlike negligence, which works for accidents, a claim for battery requires intent, which can make a battery claim harder to bring.

This book's particular coverage of the tort of battery explores in more detail what it means for a touching to be "harmful or offensive." In the medical context, however, this is not a difficult requirement for plaintiffs to meet. Cutting into someone or introducing a medical instrument into a bodily orifice certainly counts as harmful or offensive.

The key issue for medical battery is generally whether there was consent. Physicians touch patients all the time, and almost always, that touching is in accordance with the patient's consent. To be valid, consent does not have to be in writing. It does not even need to be expressed orally. Consent can be implied. When a patient opens up his mouth to say "ahh," permission to insert a tongue depressor into the patient's mouth is implied.

There is one important and constantly recurring circumstance in which physicians touch patients without any consent whatsoever: the emergency room. When an unconscious patient is brought into an emergency room, the

consent to touching the patient is said to be "implied by law." This means that even though there is no actual consent, the law will pretend that there is consent for public-policy reasons. After all, if every unconscious patient given emergency treatment was able to win a lawsuit for battery, there would be a steep decline in emergency services.

Now that you have a firmer grasp of when medical battery claims will not arise, you can more readily discern the relatively rare circumstances in which they will arise. In particular, a common scenario that creates liability for medical battery is when a physician goes further with a touching than the patient consented to.

C.1. Case: *Mohr v. Williams* (Minn. 1905)

C.1.a. Advance Notes

The following case is the classic example of how a medical battery results when a physician goes beyond the patient's scope of consent.

C.1.b. Opinion

Mohr v. Williams

Supreme Court of Minnesota
June 23, 1905

ANNA MOHR v. CORNELIUS WILLIAMS. Nos. 14,312, 14,360 - (94, 95). Opinion by Brown, J., Jaggard, J. took no part.

Justice CALVIN L. BROWN:

Defendant is a physician and surgeon of standing and character, making disorders of the ear a specialty, and having an extensive practice in the city of St. Paul. He was consulted by plaintiff, who complained to him of trouble with her right ear, and, at her request, made an examination of that organ for the purpose of ascertaining its condition. He also at the same time examined her left ear, but, owing to foreign substances therein, was unable to make a full and complete diagnosis at that time. The examination of her right ear disclosed a large perforation in the lower portion of the drum membrane, and a large polyp in the middle ear, which indicated that some of the small bones of the middle ear (ossicles) were probably diseased. He informed plaintiff of the result of his examination, and advised an operation for the purpose of removing the polyp and diseased ossicles. After

consultation with her family physician, and one or two further consultations with defendant, plaintiff decided to submit to the proposed operation. She was not informed that her left ear was in any way diseased, and understood that the necessity for an operation applied to her right ear only. She repaired to the hospital, and was placed under the influence of anesthetics; and, after being made unconscious, defendant made a thorough examination of her left ear, and found it in a more serious condition than her right one. A small perforation was discovered high up in the drum membrane, hooded, and with granulated edges, and the bone of the inner wall of the middle ear was diseased and dead. He called this discovery to the attention of Dr. Davis – plaintiff's family physician, who attended the operation at her request – who also examined the ear and confirmed defendant in his diagnosis. Defendant also further examined the right ear, and found its condition less serious than expected, and finally concluded that the left, instead of the right, should be operated upon; devoting to the right ear other treatment. He then performed the operation of ossiculectomy on plaintiff's left ear; removing a portion of the drum membrane, and scraping away the diseased portion of the inner wall of the ear. The operation was in every way successful and skilfully performed. It is claimed by plaintiff that the operation greatly impaired her hearing, seriously injured her person, and, not having been consented to by her, was wrongful and unlawful, constituting an assault and battery; and she brought this action to recover damages therefor.~

We come then to a consideration of the questions presented by defendant's appeal from the order denying his motion for judgment notwithstanding the verdict. It is contended that final judgment should be ordered in his favor for the following reasons: (a) That it appears from the evidence received on the trial that plaintiff consented to the operation on her left ear. (b) If the court shall find that no such consent was given, that, under the circumstances disclosed by the record, no consent was necessary. (c) That, under the facts disclosed, an action for assault and battery will not lie; it appearing conclusively, as counsel urge, that there is a total lack of evidence showing or tending to show malice or an evil intent on the part of defendant, or that the operation was negligently performed.

We shall consider first the question whether, under the circumstances shown in the record, the consent of plaintiff to the operation was necessary.~ We have given it very deliberate consideration, and are unable to concur with counsel for defendant in their contention that the consent of plaintiff was unnecessary.

The evidence tends to show that, upon the first examination of plaintiff, defendant pronounced the left ear in good condition, and that, at the time plaintiff repaired to the hospital to submit to the operation on her right ear, she was under the impression that no difficulty existed as to the left. In fact, she testified that she had not previously experienced any trouble with that organ. It cannot be doubted that ordinarily the patient must be consulted, and his consent given, before a physician may operate upon him.

It was said in the case of *Pratt v. Davis*: "Under a free government, at least, the free citizen's first and greatest right, which underlies all others – the right to the inviolability of his person; in other words the right to himself – is the subject of universal acquiescence, and this right necessarily forbids a physician or surgeon, however skilful or eminent, who has been asked to examine, diagnose, advise, and prescribe (which are at least necessary first steps in treatment and care), to violate, without permission, the bodily integrity of his patient by a major or capital operation, placing him under an anaesthetic for that purpose, and operating upon him without his consent or knowledge."

1 KINKEAD TORTS, § 375, states the general rule on this subject as follows: "The patient must be the final arbiter as to whether he shall take his chances with the operation, or take his chances of living without it. Such is the natural right of the individual, which the law recognizes as a legal right. Consent, therefore, of an individual, must be either expressly or impliedly given before a surgeon may have the right to operate."~

It is not, however, contended by defendant that under ordinary circumstances consent is unnecessary, but that, under the particular circumstances of this case, consent was implied; that it was an emergency case, such as to authorize the operation without express consent or permission.~ The medical profession has made signal progress in solving the problems of health and disease, and they may justly point with pride to the advancements made in supplementing nature and correcting deformities, and relieving pain and suffering~, but we are aware of no rule or principle of law which would extend to [a physician] free license respecting surgical operations. Reasonable latitude must, however, be allowed the physician in a particular case; and we would not lay down any rule which would unreasonably interfere with the exercise of his discretion, or prevent him from taking such measures as his judgment dictated for the welfare of the patient in a case of emergency. If a person should be injured to the extent of rendering him unconscious, and his injuries were of such a nature as to

require prompt surgical attention, a physician called to attend him would be justified in applying such medical or surgical treatment as might reasonably be necessary for the preservation of his life or limb, and consent on the part of the injured person would be implied. And again, if, in the course of an operation to which the patient consented, the physician should discover conditions not anticipated before the operation was commenced, and which, if not removed, would endanger the life or health of the patient, he would, though no express consent was obtained or given, be justified in extending the operation to remove and overcome them.

But such is not the case at bar. The diseased condition of plaintiff's left ear was not discovered in the course of an operation on the right which was authorized, but upon an independent examination of that organ, made after the authorized operation was found unnecessary.~

The last contention of defendant is that the act complained of did not amount to an assault and battery. This is based upon the theory that~ the absence of a showing that defendant was actuated by a wrongful intent, or guilty of negligence, relieves the act of defendant from the charge of an unlawful assault and battery.

We are unable to reach that conclusion,~ [i]f the operation was performed without plaintiff's consent, and the circumstances were not such as to justify its performance without, it was wrongful; and, if it was wrongful, it was unlawful. As remarked in 1 JAGGARD, TORTS, 437, every person has a right to complete immunity of his person from physical interference of others, except in so far as contact may be necessary under the general doctrine of privilege; and any unlawful or unauthorized touching of the person of another, except it be in the spirit of pleasantry, constitutes an assault and battery. In the case at bar,~ whether defendant's act in performing the operation upon plaintiff was authorized was a question for the jury to determine. If it was unauthorized, then it was, within what we have said, unlawful. It was a violent assault, not a mere pleasantry; and, even though no negligence is shown, it was wrongful and unlawful.~

The amount of plaintiff's recovery, if she is entitled to recover at all, must depend upon the character and extent of the injury inflicted upon her, in determining which the nature of the malady intended to be healed and the beneficial nature of the operation should be taken into consideration, as well as the good faith of the defendant.

Orders affirmed.

C.1.c. Check-Your-Understanding Questions About *Mohr*

A. Would Anna Mohr have been able to recover in negligence? Why or why not?

B. Would Mohr have had a cause of action if she had been brought to the hospital unconscious and the surgery had been necessary on an emergency basis?

C.1.d. Questions to Ponder About *Mohr*

A. Do you think plaintiffs such as Anna Mohr should have a cause of action even in circumstances such as these where no harm is actually done?

B. If there is an interest in making sure that physicians do not exceed the scope of a patient's consent, could that be better handled through professional rules that are enforced by licensing boards? Or is the tort system a proper tool to use? Why or why not?

D. Informed Consent

An informed-consent action alleges that a patient was harmed by a physician's failure to disclose risks associated with medical treatment.

Informed-consent actions are something of a battery-negligence hybrid. That is, they have some things in common with the intentional tort of battery, and some things in common with the tort of negligence. As a matter of pleading, informed-consent actions might be brought as either an intentional tort or as negligence. Indeed, whether an informed-consent action is pled as an intentional tort or negligence may have important ramifications for what deadline applies for purposes of the statute of limitations (which typically is longer for negligence). Whether an informed-consent action is brought as an intentional tort or a negligence claim may also be important for determining whether a judgment would be covered by insurance (generally insurance covers negligence but not battery). But as a conceptual matter, it is probably best to think of informed-consent actions as a breed of their own.

In general, an informed-consent action requires the following to be proved:

1. A risk should have been disclosed.
2. The risk was not disclosed.
3. The patient would have made a different decision about treatment if the risk had been disclosed.
4. The patient was injured as a result.

Let's look at an example of an easy prima facie case.

> ***Example: Spinal Injection*** – Suppose a man went to his physician with a complaint of moderate back pain. The physician suggested injecting a new drug directly into the spinal canal. The trials of this drug, used in this way, indicated a one-in-10 chance that permanent partial paralysis would result. The physician did not, however, disclose this risk. If the physician had disclosed the risk, the patient never would have agreed to the procedure – especially since the back pain was not severe. But, being ignorant of the risk, the patient consented to the procedure. Unfortunately, the patient suffered paralysis as a result. Is there a good claim for informed consent? Yes. The patient will prevail in an informed-consent action. Why? There was a risk that should have been disclosed, the risk was not disclosed, the patient would have made a different decision if the risk had been disclosed, and the patient was injured. All the elements are met.

Let's discuss the requirements of an informed-consent action in a bit more detail:

1. The risk should have been disclosed. – The risk must be of the type that should have been disclosed in order for the patient to make an informed decision about the course of treatment. There are two schools of thought on how to decide if the risk was of the type that should have been disclosed. One is to judge it by the standard of the reasonable physician. If the reasonable physician would have disclosed the risk, then this element of the informed-consent action has been fulfilled. This approach is sometimes called the **physician rule**. The other school of thought is that the risk should be disclosed if it would be "material" to the reasonable patient. The word "material" here is related to the word "matter." A material risk is one that would *matter* to the patient's decision. This approach is sometimes called the **patient rule**.

2. The risk was not disclosed. The physician must omit to disclose the risk at issue. This requirement is generally a question of factual evidence to be submitted to the jury. In order to have evidence of the disclosure of risks readily available, it is common for physicians to ask patients who are about to undergo surgery or other invasive procedures to sign documents acknowledging that the risks have been explained to them.

3. The patient would have made a different decision about treatment if the risk had been disclosed. If, despite the risk, the patient would have gone ahead with the course of treatment anyway, then there is no claim. This requirement is essentially an actual causation requirement. If the patient would have had the treatment anyway, then it is not possible to say that *but for* the failure of the physician to disclose the risk, the patient would not have suffered the injury. There are two different approaches to this causation requirement. Some courts use a "subjective" standard, asking whether the particular plaintiff who is bringing the suit would have made a different decision. Other courts use an "objective" standard, asking whether the hypothetical reasonable patient would have made a different decision in awareness of the risk. The objective standard represents a slight departure from straightforward but-for causation.

4. The patient was thereby injured. In general, the patient must have suffered a bad outcome that counts as an injury. It is clear that an injury is required when the informed-consent action is brought as a form of negligence. In the absence of an injury, it may be possible to allege a claim of informed-consent as a battery action.

D.1. Case: *Largey v. Rothman* (N.J. 1988)

D.1.a. Advance Notes

The following is a leading case discussing in depth the question of whether an informed-consent action should use the physician perspective to determine what risks should be disclosed (the physician rule) or the patient perspective to determine what risks are material (the patient rule). You will notice that this case generally refers to the physician rule as the "'professional standard' rule," and the patient rule as the "'prudent patient' rule."

D.1.b. Opinion

Largey v. Rothman

Supreme Court of New Jersey
May 5, 1988

JANICE LARGEY AND JOSEPH LARGEY, PLAINTIFFS-APPELLANTS, v. DONALD ROTHMAN, M.D., DEFENDANT-RESPONDENT. No. A-52. Justices Clifford, Handler, Pollock, Garibaldi, and Stein. All for reversal with none opposed.

PER CURIAM

This medical malpractice case raises an issue of a patient's informed consent to treatment. The jury found that plaintiff Janice Largey had consented to an operative procedure performed by the defendant physician. The single question presented goes to the correctness of the standard by which the jury was instructed to determine whether the defendant, Dr. Rothman, had adequately informed his patient of the risks of that operation.

The trial court told the jury that when informing the plaintiff Janice Largey of the risks of undergoing a certain biopsy procedure, described below, defendant was required to tell her "what reasonable medical practitioners in the same or similar circumstances would have told their patients undertaking the same type of operation." By answer to a specific interrogatory on this point, the jurors responded that defendant had not "fail[ed] to provide Janice Largey with sufficient information so that she could give informed consent" for the operative procedure. On plaintiffs' appeal the Appellate Division affirmed in an unreported opinion, noting that the trial court's charge on informed consent followed the holding in *Kaplan v. Haines,* 96 N.J. Super. 242, 257 (App.Div. 1967), which this Court affirmed on the basis of the Appellate Division's opinion, 51 N.J. 404 (1968).

Plaintiffs argued below, and repeat the contention here, that the proper standard is one that focuses not on what information a reasonable doctor should impart to the patient (the "professional" standard) but rather on what the physician should disclose to a reasonable patient in order that the patient might make an informed decision (the "prudent patient" or "materiality of risk" standard). The latter is the standard announced in *Canterbury v. Spence*, 464 F.2d 772 (D.C.Cir. 1972). The Appellate Division rejected the *Canterbury* standard, not because it disagreed with that standard but because the court felt itself bound, correctly, by the different standard of *Kaplan*, which represents "the latest word" from this Court.

On plaintiffs' petition we granted certification, to address the correct standard for informed consent. We now discard *Kaplan's* "reasonable physician" standard and adopt instead the *Canterbury* "reasonable patient" rule. Hence, we reverse and remand for a new trial.

I

The narrow issue before us can be placed in satisfactory context by our adopting in pertinent part the Appellate Division's recitation of the facts. In the quoted passage as well as henceforth in this opinion, the word "plaintiff" refers to plaintiff Janice Largey.

> In the course of a routine physical examination plaintiff's gynecologist, Dr. Glassman, detected a "vague mass" in her right breast. The doctor arranged for mammograms to be taken. The radiologist reported two anomalies to the doctor: an "ill-defined density" in the subareola region and an enlarged lymph node or nodes, measuring four-by-two centimeters, in the right axilla (armpit). The doctor referred plaintiff to defendant, a surgeon. Defendant expressed concern that the anomalies on the mammograms might be cancer and recommended a biopsy. There was a sharp dispute at trial over whether he stated that the biopsy would include the lymph nodes as well as the breast tissue. Plaintiff claims that defendant never mentioned the nodes.
>
> Plaintiff submitted to the biopsy procedure after receiving a confirmatory second opinion from a Dr. Slattery. During the procedure defendant removed a piece of the suspect mass from plaintiff's breast and excised the nodes. The biopsies showed that both specimens were benign. About six weeks after the operation, plaintiff developed a right arm and hand lymphedema, a swelling caused by inadequate drainage in the lymphatic system. The condition resulted from the excision of the lymph nodes. Defendant did not advise plaintiff of this risk. Plaintiff's experts testified that defendant should have informed plaintiff that lymphedema was a risk of the operation.
>
> Defendant's experts testified that it was too rare to be discussed with a patient.
>
> Plaintiff and her husband, who sued *per quod*, advanced two theories of liability * * *. They claimed that they were never told that the operation would include removal of the nodes and therefore that procedure constituted an unauthorized

battery. Alternatively, they claimed that even if they had authorized the node excision, defendant was negligent in failing to warn them of the risk of lymphedema and therefore their consent was uninformed. The jury specifically rejected both claims.

II

The origins of the requirement that a physician obtain the patient's consent before surgery may be traced back at least two centuries. See *Slater v. Baker & Stapleton*, 95 *Eng.Rep.* 860 (K.B.1767). The doctrine is now well-embedded in our law. In *Schloendorff v. The Soc'y of the N.Y. Hosp.*, 211 *N.Y.* 125 (1914), Justice Cardozo announced a patient's right to be free of uninvited, unknown surgery, which constitutes a trespass on the patient: "Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages." Earlier case law recognized that theories of fraud and misrepresentation would sustain a patient's action in battery for an unauthorized intervention. Although that cause of action continues to be recognized in New Jersey, there is no "battery" claim implicated in this appeal because the jury determined as a matter of fact that plaintiff had given consent to the node excision performed by Dr. Rothman.

Although the requirement that a patient give consent before the physician can operate is of long standing, the doctrine of *informed* consent is one of relatively recent development in our jurisprudence. It is essentially a negligence concept, predicated on the duty of a physician to disclose to a patient such information as will enable the patient to make an evaluation of the nature of the treatment and of any attendant substantial risks, as well as of available options in the form of alternative therapies.

An early statement of the "informed consent" rule is found in *Salgo v. Leland Stanford, Jr. Univ. Bd. of Trustees*, 154 *Cal.App.*2d 560 (Dist.Ct.App.1957), in which the court declared that "[a] physician violates his duty to his patient and subjects himself to liability if he withholds any facts which are necessary to form the basis of an intelligent consent by the patient to the proposed treatment." *Salgo* recognized that because each patient presents a "special problem," the physician has a certain amount of discretion in dismissing the element of risk, "consistent, of course, with the full disclosure of facts necessary to an informed consent."

Further development of the doctrine came shortly thereafter, in *Natanson v. Kline*, 186 *Kan.* 393 (1960), which represented one of the leading cases on informed consent at that time. In *Natanson* a patient sustained injuries from excessive doses of radioactive cobalt during radiation therapy. Even though the patient had consented to the radiation treatment, she alleged that the physician had not informed her of the nature and consequences of the risks posed by the therapy. Thus, the case sounded in negligence rather than battery. The court concluded that when a physician either affirmatively misrepresents the nature of an operation or fails to disclose the probable consequences of the treatment, he may be subjected to a claim of unauthorized treatment. The *Natanson* court established the standard of care to be exercised by a physician in an informed consent case as "limited to those disclosures which a reasonable medical practitioner would make under the same or similar circumstances." At bottom the decision turned on the principle of a patient's right of self-determination:

> Anglo-American law starts with the premise of thorough self-determination. It follows that each man is considered to be master of his own body, and he may, if he be of sound mind, expressly prohibit the performance of life-saving surgery, or other medical treatment. A doctor might well believe that an operation or form of treatment is desirable or necessary but the law does not permit him to substitute his own judgment for that of the patient by any form of artifice or deception.

After *Salgo* and *Natanson* the doctrine of informed consent came to be adopted and developed in other jurisdictions, which, until 1972, followed the "traditional" or "professional" standard formulation of the rule. Under that standard, as applied by the majority of the jurisdictions that adopted it, a physician is required to make such disclosure as comports with the prevailing medical standard in the community – that is, the disclosure of those risks that a reasonable physician in the community, of like training, would customarily make in similar circumstances. A minority of the jurisdictions that adhere to the "professional" standard do not relate the test to any kind of community standard but require only such disclosures as would be made by a reasonable medical practitioner under similar circumstances. In order to prevail in a case applying the "traditional" or "professional" standard a plaintiff would have to present expert testimony of the community's medical standard for disclosure in respect of the procedure in question and of the defendant physician's failure to have met that standard.

In both the majority and minority formulations the "professional" standard rests on the belief that a physician, and *only* a physician, can effectively estimate both the psychological and physical consequences that a risk inherent in a medical procedure might produce in a patient. The burden imposed on the physician under this standard is to "consider the state of the patient's health, and whether the risks involved are mere remote possibilities or real hazards which occur with appreciable regularity * * *." A second basic justification offered in support of the "professional" standard is that "a general standard of care, as required under the prudent patient rule, would require a physician to waste unnecessary time in reviewing with the patient *every* possible risk, thereby interfering with the flexibility a physician needs in deciding what form of treatment is best for the patient."

It was the "professional" standard that this Court accepted when, twenty years ago, it made the doctrine of informed consent a component part of our medical malpractice jurisprudence. *See Kaplan v. Haines*. In falling into step with those other jurisdictions that by then had adopted informed consent, the Court approved the following from the Appellate Division's opinion in *Kaplan*:

> The authorities * * * are in general agreement that the nature and extent of the disclosure, essential to an informed consent, depends upon the medical problem as well as the patient. Plaintiff has the burden to prove what a reasonable medical practitioner of the same school and same or similar community, under the same or similar circumstances, would have disclosed to his patient and the issue is one for the jury where, as in the case *sub judice*, a fact issue is raised upon conflicting testimony as to whether the physician made an adequate disclosure.

In 1972 a new standard of disclosure for "informed consent" was established in *Canterbury v. Spence*. The case raised a question of the defendant physician's duty to warn the patient beforehand of the risk involved in a laminectomy, a surgical procedure the purpose of which was to relieve pain in plaintiff's lower back, and particularly the risk attendant on a myelogram, the diagnostic procedure preceding the surgery. After several surgical interventions and hospitalizations, plaintiff was still, at the time of trial, using crutches to walk, suffering from urinary incontinence and paralysis of the bowels, and wearing a penile clamp.

The *Canterbury* court announced a duty on the part of a physician to "warn of the dangers lurking in the proposed treatment" and to

"impart information [that] the patient has every right to expect," as well as a duty of "reasonable disclosure of the choices with respect to proposed therapy and the dangers inherently and potentially involved." The court held that the scope of the duty to disclose

> must be measured by the patient's need, and that need is the information material to the decision. Thus the test for determining whether a particular peril must be divulged is its materiality to the patient's decision: all risks potentially affecting the decision must be unmasked. And to safeguard the patient's interest in achieving his own determination on treatment, the law must itself set the standard for adequate disclosure.

The breadth of the disclosure of the risks legally to be required is measured, under *Canterbury*, by a standard whose scope is "not subjective as to either the physician or the patient,"; rather, "it remains *objective* with due regard for the patient's informational needs and with suitable leeway for the physician's situation." A risk would be deemed "material" when a reasonable patient, in what the physician knows or should know to be the patient's position, would be "likely to attach significance to the risk or cluster of risks" in deciding whether to forego the proposed therapy or to submit to it.

The foregoing standard for adequate disclosure, known as the "prudent patient" or "materiality of risk" standard, has been adopted in a number of jurisdictions.

The jurisdictions that have rejected the "professional" standard in favor of the "prudent patient" rule have given a number of reasons in support of their preference. Those include:

> (1) The existence of a discernible custom reflecting a medical consensus is open to serious doubt. The desirable scope of disclosure depends on the given fact situation, which varies from patient to patient, and should not be subject to the whim of the medical community in setting the standard.
>
> (2) Since a physician in obtaining a patient's informed consent to proposed treatment is often obligated to consider non-medical factors, such as a patient's emotional condition, professional custom should not furnish the legal criterion for measuring the physician's obligation to disclose. Whether a physician has conformed to a professional standard should * * * be important [only] where a pure medical judgment is involved, e.g. in ordinary

> malpractice actions, where the issue generally concerns the quality of treatment provided to the patient.
>
> (3) Closely related to both (1) and (2) is the notion that a professional standard is *totally* subject to the whim of the physicians in the particular community. Under this view a physician is vested with virtually unlimited discretion in establishing the proper scope of disclosure; this is inconsistent with the patient's right of self-determination. As observed by the court in *Canterbury v. Spence*: "Respect for the patient's right of self-determination * * * demands a standard set by law for physicians rather than one which physicians may or may not impose upon themselves."
>
> (4) The requirement that the patient present expert testimony to establish the professional standard has created problems for patients trying to find physicians willing to breach the "community of silence" by testifying against fellow colleagues.

Taken together, the reasons supporting adoption of the "prudent patient" standard persuade us that the time has come for us to abandon so much of the decision by which this Court embraced the doctrine of informed consent as accepts the "professional" standard. To that extent *Kaplan v. Haines* is overruled.

As indicated by the foregoing passages~, the policy considerations are clear-cut. At the outset we are entirely unimpressed with the argument, made by those favoring the "professional" standard, that the "prudent patient" rule would compel disclosure of *every* risk (not just *material* risks) to *any* patient (rather than the *reasonable* patient). As *Canterbury* makes clear,

> [t]he topics importantly demanding a communication of information are the inherent and potential hazards of the proposed treatment, the alternatives to that treatment, if any, and the results likely if the patient remains untreated. The factors contributing significance to the dangerousness of a medical technique are, of course, the incidence of injury and the degree of harm threatened.

The court in *Canterbury* did not presume to draw a "bright line separating the significant [risks] from the insignificant"; rather, it resorted to a "rule of reason," concluding that "[w]henever non-disclosure of particular risk information is open to debate by reasonable-minded men, the issue is one for the finder of facts." The point assumes significance in this case because defendant argues that

the risk of lymphedema from an axillary node biopsy is remote, not material. Plaintiff's experts disagree, contending that she should have been informed of that risk. Thus there will be presented on the retrial a factual issue for the jury's resolution: would the risk of lymphedema influence a prudent patient in reaching a decision on whether to submit to the surgery?

Perhaps the strongest consideration that influences our decision in favor of the "prudent patient" standard lies in the notion that the physician's duty of disclosure "arises from phenomena apart from medical custom and practice": the patient's right of self-determination. The foundation for the physician's duty to disclose in the first place is found in the idea that "it is the prerogative of the patient, not the physician, to determine for himself the direction in which his interests seem to lie." In contrast the arguments for the "professional" standard smack of an anachronistic paternalism that is at odds with any strong conception of a patient's right of self-determination.

Although today's decision marks the first time we have confronted directly the choice between the "professional" and "prudent patient" standards, and hence to that extent our stated preference for the latter represents a clear break with the past, surely the considerations that we have identified as having played a significant role in that choice are familiar features of our case law. For example, just two terms ago we declared that "[t]he doctrine of informed consent presupposes that the patient has the information necessary to evaluate the risks and benefits of all the available options and is competent to do so."

III

Finally, we address the issue of proximate cause. As with other medical malpractice actions, informed-consent cases require that plaintiff prove not only that the physician failed to comply with the applicable standard for disclosure but also that such failure was the proximate cause of plaintiff's injuries.

Under the "prudent patient" standard "causation must also be shown: *i.e.*, that the prudent person in the patient's position would have decided differently if adequately informed." As *Canterbury* observes,

> [t]he patient obviously has no complaint if he would have submitted to the therapy notwithstanding awareness that the risk was one of its perils. On the other hand, the very purpose of the disclosure rule is to protect the patient against consequences which, if known, he would have avoided by foregoing the treatment. The more difficult

> question is whether the factual issue on causality calls for an objective or a subjective determination.

Canterbury decided its own question in favor of an objective determination. The subjective approach, which the court rejected, inquires whether, if the patient had been informed of the risks that in fact materialized, he or she would have consented to the treatment. The shortcoming of this approach, according to *Canterbury*, is that it

> places the physician in jeopardy of the patient's hindsight and bitterness. It places the factfinder in the position of deciding whether a speculative answer to a hypothetical question is to be credited. It calls for a subjective determination solely on testimony of a patient-witness shadowed by the occurrence of the undisclosed risk.

The court therefore elected to adopt an objective test, as do we. Because we would not presume to attempt an improvement in its articulation of the reasons, we quote once again the *Canterbury* court:

> Better it is, we believe, to resolve the causality issue on an objective basis: in terms of what a prudent person in the patient's position would have decided if suitably informed of all perils bearing significance. If adequate disclosure could reasonably be expected to have caused that person to decline the treatment because of the revelation of the kind of risk or danger that resulted in harm, causation is shown, but otherwise not. The patient's testimony is relevant on that score of course but it would not threaten to dominate the findings. And since that testimony would probably be appraised congruently with the factfinder's belief in its reasonableness, the case for a wholly objective standard for passing on causation is strengthened. Such a standard would in any event ease the fact-finding process and better assure the truth as its product.

IV

The judgment of the Appellate Division is reversed. The cause is remanded for a new trial consistent with this opinion.

D.1.c. Questions to Ponder About *Largey*

A. Which is better, the physician rule (a/k/a the "'professional standard' rule") or the patient rule (a/k/a the "'prudent patient' rule")? Why?

B. Assuming that a jurisdiction opts for the patient rule, do you agree with the *Largey* court that the causation standard should be objective? Or should it be subjective? Stated differently, should the plaintiff have a cause of action if the hypothetical prudent patient would have made a different decision had the risk been disclosed? (The objective causation standard.) Or should it only matter whether the particular plaintiff would have made a different decision had the risk been disclosed? (The subjective causation standard.)

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Strict Liability

25. Strict Liability for Animals and Ultrahazards

"Oooh.' 'Ah.' That's how it always starts. But then later, there's running and, and screaming."

– Dr. Ian Malcolm, *The Lost World: Jurassic Park*, 1997

A. Lead-in

The dominant form of legal action for compensation following an injury is the action for negligence. The action for negligence involves the injured plaintiff showing that the defendant was somehow blameworthy in causing the plaintiff's injury. In particular, laying blame is harnessed to a concept of carelessness. In the abstract wisdom of tort law, the thinking goes like this: Because the defendant was not appropriately careful, it is sensible to blame the defendant for injuries caused by that lack of care, thereby holding the defendant responsible for the injury. To put it another way, with negligence, the law is saying something like, "You are responsible for the damages caused by this incident because *you did something wrong*. And what you did wrong was *not being careful enough*."

Strict liability presents a stark contrast – it is missing the idea of blameworthiness that is at negligence's core. Where strict liability applies, the law will hold a defendant responsible *even though the defendant did nothing wrong* – that is, regardless of whether the defendant was being careful or not.

At first blush, it might seem extremely unfair that the law would make people responsible for accidents even when they did nothing wrong. And perhaps most of the time it would be. But strict liability only is available

under very particular circumstances. You might find, as many others do, that in these limited circumstances, liability without blameworthiness seems instinctively fair.

Let's jump into an example. Suppose you decide to hold a pyrotechnic demonstration in a crowded downtown area. Your plan is to wow a crowd of onlookers with fireballs created with a gasoline-air mixture and generous heaps of aluminum perchlorate as well as other fireworks ingredients. (Aluminum perchlorate is the same compound that was used for the Space Shuttle's solid rocket boosters.) In this situation, if someone gets hurt by an errant fireball, strict liability applies. Carefulness will be irrelevant.

To emphasize the point, you could hire a team of the world's leading chemists and pyrotechnics experts and give them an unlimited budget for safety. It still wouldn't change anything. That's strict liability: If you set off explosive fireballs in the middle of downtown, you are on the hook if anything goes wrong.

It is as if the law says, "I don't care how careful you say you were. It doesn't matter. You're the one who decided to stage a pyrotechnic display downtown. So, you are responsible if anyone gets hurt or anyone's property gets damaged."

There are defenses and limits to the doctrine. These are important to keep in mind because they do a lot of work to make strict liability conform to intuitive notions of fairness. If, for instance, at your downtown pyrotechnics display, some onlookers break past barricades and climb up a structure to get right up next to the fireballs, then the onlookers have brought the injury upon themselves, and you will be relieved of liability. (The defense of comparative fault or assumption of risk will do the trick.).

B. Strict Liability Basics, and Negligence Compared

Here are the elements of the cause of action for strict liability:

> A plaintiff can establish **a prima facie case for strict liability** by showing: (1) the defendant owed the plaintiff an absolute duty of safety in regard to some condition or activity, and that condition or activity was (2) an actual cause and (3) a proximate

> cause of (4) an injury to the plaintiff's person or physical property.

Compare that to the cause of action for negligence:

> A plaintiff can establish **a prima facie case for negligence** by showing: (1) the defendant owed the plaintiff a duty of due care, (2) the defendant breached that duty, and that breach was (3) an actual cause and (4) a proximate cause of (5) an injury to the plaintiff's person or physical property.

You can see that the first two elements of the negligence case (duty of care and breach) have been replaced by a single element of an "absolute duty of safety." The rest of the cause of action is exactly the same as negligence. Actual causation is the same. Proximate causation is the same. The requirement that the plaintiff prove the existence of damages is the same. And, as it turns out, the same defenses that apply in a negligence case generally apply in a strict liability case as well.

Since those topics have all been covered in this casebook under the heading of negligence, the main thing we have to do in this chapter is to investigate the first element – the "absolute duty of safety." After that, we will then look at the economics of strict liability, discuss how defenses and limitations constrain strict liability's scope, and finally we will see strict liability in action at trial.

C. The Absolute Duty of Safety

At the outset, a terminology note is in order. When it comes to talking about the "absolute duty of safety," some commentators take issue with the use of the word "absolute." They note that the duty is not technically "absolute." And they have a point. When it comes to law, almost nothing is truly absolute. Indeed, there are various limitations on strict liability, including proximate causation and comparative fault. Yet if you think of "absolute duty" as a term of art, there is no danger of confusion. The phrase "absolute duty" signifies that there is no need to show that the defendant did something wrong.

If you've become familiar with the cause of action for negligence, it might seem strange that the law would ever impose liability without fault. Indeed,

scholars and judges have puzzled over whether strict liability is justified – in particular, many have questioned whether it is economically sound.

For the moment, however, it is helpful to realize that there is, at least, an intuitive sense in which we all recognize that some situations are appropriate for responsibility without fault. We have all heard someone say something like, "Okay, you can do it, but if something goes wrong, it's your butt on the line." Strict liability is when tort law says this to society at large.

So when does the law give this eyebrow-raised admonition? Here are the five general categories where the absolute duty of safety is imposed:

- wild animals
- trespassing livestock
- domestic animals with known vicious propensities
- ultrahazardous activities
- defective products

These categories do the lion's share of work in bending strict liability doctrine to conform to our intuitions of fairness. You can see immediately that this list is quite circumscribed, yet the categories carved out by strict liability – particularly the last two – have considerable economic significance.

The category of defective products requires considerable elaboration, so it is the subject of its own chapter (*eodem*, infra), which follows immediately after this one. In this chapter, we focus on the first four categories.

D. Animals

D.1. Basics

Of the categories for the imposition of an absolute duty of safety, three of the five have to do with animals. Those are wild animals, trespassing livestock, and domestic animals with a known, vicious propensity.

D.2. Wild Animals

The first concerns **wild animals** – "ferae naturae" in Latin. If you keep a wild animal, then you are liable for whatever damage it causes. Memo to general counsels for zoos and circuses: If a lion escapes and hurts someone, you're on the hook.

What counts as a wild animal? Wild animals are defined in contradistinction to domestic animals: Wild animals are animals that are not domesticated. Domesticated animals – in Latin "domitae naturae" or "mansuetae naturae" – are those that have been bred to be helpful to humans. Some examples are dogs, cats, cows, pigs, and chickens. So, if it hasn't been bred to be helpful to humans, it is wild.

It is important to keep in mind that whether an animal is wild has nothing to do with whether it seems dangerous. A lion is wild, of course, but so is a baby deer. If the baby deer you are keeping somehow causes someone injury, then you are on the hook for the damage – notwithstanding whatever cuteness it may radiate.

Whether or not an animal is wild also has nothing to do with whether it is being kept as a pet. If you keep a non-domesticated animal as a pet, it's still wild. Stories occasionally pop up in the news about someone keeping a tiger as a pet. If you own a tiger, be aware that it doesn't matter if the tiger sits still while you dress it in funny outfits and has never eaten anything other than kibble from a bag: it's still a wild animal. And strict liability applies if it injures anyone.

An animal can be tamed and still be wild. Taming and domestication are two different things. An animal can be tamed during its lifetime, but a single animal cannot be domesticated. Domestication is something that happens over generations of animal breeding, and it is only this process that brings animals out of the realm of strict liability.

Of course, not all wild animals give rise to strict liability – only those that the defendant is keeping or possessing. A wild animal roaming across the defendant's property will not bring about strict liability. But doing something to keep the animal around – confining it, or maybe just feeding it and encouraging it to linger – will bring about an absolute responsibility for injuries it causes.

D.3. Trespassing Livestock

D.3.a. In general

The second category imposing an absolute duty of safety is **trespassing livestock**. The first example to leap to mind might be something like an escaped bull that gores a neighbor. Certainly those facts would bring about

the application of strict liability. But the rationale for the trespassing livestock doctrine is not so much that livestock are a threat to people, but rather that they are a threat to agriculture. That is, the archetypal injury in a strict liability action for trespassing livestock would be crops that have been eaten or trampled.

Suppose a farmer is growing corn. Next door, a rancher has 200 pigs. The pigs escape their pen and tear up the corn field, rendering the year's crop a total loss. The farmer can sue the rancher in strict liability, and the rancher is on the hook – no matter how careful the rancher was in attempting to confine the pigs.

D.3.b. Fence In vs. Fence Out

There is an important difference among jurisdictions in the application of strict liability in the case of trespassing livestock. The default is "fence in," meaning that it's up to keepers of livestock to keep their animals penned up – or else be liable for whatever damage they cause. In some places, however, the onus is on farmers to "fence out" marauding livestock. Respectively, these are *fence-in jurisdictions* and *fence-out jurisdictions.*

The fence-in/fence-out rule could be set at the level of the state, the county, or even a subdivision of a county. It's frequently a matter of statutory law. Roughly speaking, farm country tends to follow the fence-in rule, while ranch country tends to opt for the fence-out rule. So, in general, if you want to grow crops in ranch country, you'll need to build a fence. If you want to raise livestock in farm country, you'll need to pen them in.

A key point to remember is that "livestock" is a distinct categorization from "domesticated animals." Cattle qualify both as livestock and as domesticated animals. But dogs and cats, while domesticated, are not livestock. The distinction is important, because it means that trespassing cats and dogs do not give rise to strict liability under the common law.

What animals count as livestock? Cattle, sheep, pigs, and horses definitely count as livestock. Cats and dogs do not. In general, livestock are animals raised by people as part of a farming or ranching operation. But the exact definition of "livestock" is not entirely settled. Various cases, regulations, statutes, and other authorities define the term in different ways. Many definitions require animals to be domesticated to qualify as livestock. But not all. Non-domesticated elk, for instance, might qualify as "non-

traditional" livestock if they are raised for food. But at the end of the day, whether wild animals can be counted as livestock does not matter much for purposes of strict liability. If a wild animal escapes its enclosure and trespasses on someone else's property, it creates strict liability for its owner merely by virtue of being a wild animal. Its additional qualification as livestock for strict-liability purposes would be redundant.

D.4. Domestic Animals with Known, Vicious Propensities

The third category of animal-related strict liability concerns **domestic animals with known, vicious propensities**. Theoretically, this could apply to a number of creatures, but as a practical matter, we are really talking about dogs that bite people. This doctrine is the subject of an enormous amount of neighborhood lore. Some people – even some lawyers – call this the "one bite rule" and recite the doctrine as "every dog gets one free bite." But that description is highly inaccurate. The real rule is more complicated.

Strict liability applies under the common law when the keeper of the animal has subjective knowledge of some propensity of the animal to cause harm. Thus, if a dog has previously bitten a person without provocation, the dog's keeper has subjective knowledge such that the next person to be bitten will be able to recover under strict liability.

Where this departs from the "one free bite" idea is that, in reality, a dog does not need to bite someone in order to give that dog's keeper knowledge of its abnormal propensity to cause harm. For instance, if the dog was tied up and mistreated, and then exhibited abnormal aggression toward people, that might well be enough for strict liability to apply – even if the dog had yet to bite someone. Some courts have held that a "beware of dog" sign constituted evidence that an owner had the requisite knowledge of a dog's dangerous propensity.

Another problem with the free-bite paraphrasing is that it ignores the fact that a dog-bite victim can always sue in negligence. Suppose an untrained Rottweiler has a brand-new owner. Strict liability for a known dangerous propensity cannot apply because the owner has no knowledge about the dog – much less any knowledge of dangerous propensities. Thus, strict liability will not apply. But if the Rottweiler's owner leaves a small child alone with the animal, and if the child is bitten, a jury would likely find the Rottweiler's

owner liable in negligence because the reasonable person would not leave a small child alone with an untrained Rottweiler.

It also is frequently possible for dog bite victims to sue using the doctrine of negligence per se. For example, suppose an ordinance requires dogs to be leashed while in the city park. An injury caused by an unleashed dog in the park could then subject the dog's keeper to automatic liability via negligence per se.

The common law and ordinances are not the only important source of law on dog bites. In many states, statutory law specifically controls liability for dog bites. Frequently, such statutes dictate that dog owners are liable for all injuries their dog causes, with a few exceptions, such as that the victim was trespassing or that the victim provoked the dog.

It should be kept in mind that while strict liability for domestic animals with dangerous propensities is, in practice, mostly about dogs, it also applies to other domestic animals, including livestock. If a horse is known to have kicked people, then the horse's keeper may be held strictly liable for subsequent kicking injuries.

Finally, in many jurisdictions, it is important not just that the domesticated animal is known to be vicious, but that its vicious propensity is somehow abnormal. A bull, for instance, is *normally* dangerous. Given such a rule, a person injured by a charging bull (assuming the bull is not trespassing) cannot use strict liability to sue for injuries sustained in the charge. As a general matter, such a person could still recover using negligence – so long as they could prove all the elements, including a breach of the duty of due care. But as the next case shows, at least one court didn't see it that way.

D.5. Case: Bard v. Jahnke

D.5.a. Advance notes

The following case covers much of the law regarding strict liability for domestic animals. Additionally, it shows judges taking different sides on the issue of whether strict liability should entirely displace negligence in the domestic animal context.

D.5.b. Opinion

Bard v. Jahnke

Court of Appeals of New York
May 2, 2006

6 N.Y.3d 592. Larry BARD et al., Appellants, v. Reinhardt JAHNKE, Individually and Doing Business as Hemlock Valley Farms, Respondent, et al., Defendant. Counsel for appellants: John Scarzafava of the Law Firm of Scarzafava & Basdekis of Oneonta. Counsel for respondent: Thomas J. Hickey of Hickey, Sheehan & Gates, P.C. of Binghamton.

Judge Susan Phillips READ:

The accident underlying this litigation occurred on September 27, 2001 at Hemlock Valley Farms in Otsego County, a dairy farm owned and operated by defendant Reinhardt Jahnke and his wife in partnership with their two sons. At roughly 8:00 A.M., plaintiff Larry Bard, a self-employed carpenter, arrived at the farm to meet defendant John Timer, another self-employed carpenter. One of Jahnke's sons had asked Timer to repair ripped cow mattresses in a certain section—called the "low cow district"—of the farm's free-stall dairy barn. This large barn, which was divided into several sections, housed approximately 400 cows at the time, 130 of them in the low cow district. The repair work involved chiseling off the bolts fastening the damaged mattresses to the concrete base of a stall, stretching the mattresses and then refastening the bolts. Timer had asked Bard the day before if he would be interested in helping him carry out this task, and Bard had replied that he would.

Timer, who had performed carpentry and odd jobs on the farm for about four or five years, walked Bard through the dairy barn, pointing out some of the projects that he had completed and where the milking parlor was. Timer took Bard to the barn's low cow district, told him how to start the mattress repairs, and then left to complete another chore, planning to return shortly. Neither Timer nor Bard saw a bull; Bard testified that he saw no farm animals at all in the barn when he walked through it with Timer. From his previous work at the farm, Timer knew there was a bull at another barn about a quarter-mile distant from the dairy barn. Prior to Bard's accident, he did not know that at all times there was a bull present in the dairy barn's low cow district.

Bard retrieved some tools from his truck and started to work at about 8:30 A.M. He testified that a number of cows wandered into the

area as he was working. Further, he was "familiar with working in and around cows," which would "come up, drool on you, lick on you and everything else," and that he didn't "usually pay much attention to them." At about 9:00 A.M., as Bard was down on his knees removing bolts, he first noticed a bull "[w]hen he stepped in behind him" and "bellered" within a distance of two to three feet. Bard testified that he "slowly kind of looked around, and didn't know what to do at that point." As he "went to stand up," the bull "took [him] in the chest. [The bull] charged [him] then [and] proceeded to start slamming [him] into the pipes" in the stall. No one else was present in the low cow district at the time. Neither Jahnke nor anyone else associated with the farm knew ahead of time that Timer planned to repair the mattresses that day, or that Bard would be working for Timer to carry out this task.

Bard pulled himself outdoors through an opening at the bottom of the barn, and crawled over to his truck, where he lay for "quite awhile to get some wind and establish what was going on." He caught the attention of someone working in the field, whom he asked to call an ambulance. Bard's injuries included fractured ribs, a lacerated liver and exacerbation of a preexisting cervical spine condition.

The hornless dairy bull who injured Bard was named Fred. He was about 1½ years old, and had been the resident "cleanup" bull at the farm for at least six months prior to September 27, 2001.~ Fred was housed and roamed freely in the low cow district of the dairy barn so that he might impregnate cows stabled there who had failed to conceive by artificial insemination. Before this accident, Fred had concededly never threatened or injured any other farm animal or human being. As was the case with all the dairy bulls ever owned by Jahnke, a longtime dairy farmer, Fred was never chained, caged or barricaded within the barn. Prior to September 27, 2001, none of the bulls on any of the farms worked on or owned by Jahnke had ever acted aggressively toward, or injured, another farm animal or human being.

Bard, with his wife suing derivatively, commenced an action against both Jahnke and Timer to recover damages for his personal injuries, alleging causes of action sounding in strict liability and negligence.~ [The] Supreme Court granted defendants' motions for summary judgment~.

The Appellate Division affirmed~. Noting that a bull is a domestic animal as defined in Agriculture and Markets Law § 108(7) and citing our recent decision in *Collier v. Zambito,* 1 N.Y.3d 444 (2004), the Court concluded that Jahnke was not liable for Bard's injuries unless he knew or should have known of the bull's vicious or violent propensities. The

Court noted that the record contained no evidence of this, and "[t]o the contrary, it contains competent evidence establishing that, prior to [Bard's] accident, the subject bull had never injured another person or animal or behaved in a hostile or threatening manner."

Bard had submitted the affidavit of a professor of animal science, who opined that "bulls, in particular breeding bulls, are generally dangerous and vicious animals," and that therefore Jahnke should have restrained the bull or warned Bard of its presence. The Court found this affidavit unavailing, especially in light of its "consistent[ ], and recently[ ] reiterated" view that "the particular type or breed of domestic animal alone is insufficient to raise a question of fact as to vicious propensities."~

Only two years ago, in *Collier,* we restated our long-standing rule

> "that the owner of a domestic animal who either knows or should have known of that animal's vicious propensities will be held liable for the harm the animal causes as a result of those propensities. Vicious propensities include the propensity to do any act that might endanger the safety of the persons and property of others in a given situation."

Once this knowledge is established, the owner faces strict liability.<Our rule is virtually identical to Restatement (Second) of Torts § 509(1) (1977): "A possessor of a domestic animal that he knows or has reason to know has dangerous propensities abnormal to its class, is subject to liability for harm done by the animal to another, although he has exercised the utmost care to prevent it from doing the harm.">~

{W}hile knowledge of vicious propensities "may of course be established by proof of prior acts of a similar kind of which the owner had notice," a triable issue of fact as to whether the owner knew or should have known that its animal harbored vicious propensities may be raised by proof of something less. In *Collier,* a case in which a dog bit a child, we gave the example of evidence that a dog had, for example, "been known to growl, snap or bare its teeth," or that "the owner chose to restrain the dog, and the manner in which the dog was restrained." [Additionally, *Collier* states:] "~an animal that behaves in a manner that would not necessarily be considered dangerous or ferocious, but nevertheless reflects a proclivity to act in a way that puts others at risk of harm, can be found to have vicious propensities—albeit only when such proclivity results in the injury giving rise to the lawsuit."

Here, Fred had never attacked any farm animal or human being before September 27, 2001. He had always moved unrestrained within

the limits of the barn's low cow district, regularly coming into contact with other farm animals, farm workers and members of the Jahnke family without incident or hint of hostility. He had never acted in a way that put others at risk of harm. As a result, Bard cannot recover under our traditional rule.

Bard therefore argues alternatively that he can recover under a common-law cause of action for negligence, as expressed in Restatement (Second) of Torts § 518, Comments *g* and *h.* This common-law cause of action is, he claims, separate and apart from and in addition to our traditional rule.

Section 518 provides generally that the owner of a domestic animal, which the owner does not know or have reason to know to be abnormally dangerous, is nonetheless liable if he intentionally causes the animal to do harm, or is negligent in failing to prevent harm. Comment *g,* "*Knowledge of normal characteristics "* provides that "[i]n determining the care that the keeper of a not abnormally dangerous domestic animal is required to exercise to keep it under control, the characteristics that are normal to its class are decisive, and one who keeps the animal is required to know the characteristics.~"

Comment *h,* "*Animals dangerous under particular circumstances*" states that "[o]ne who keeps a domestic animal that possesses only those dangerous propensities that are normal to its class is required to know its normal habits and tendencies. He is therefore required to realize that even ordinarily gentle animals are likely to be dangerous under particular circumstances and to exercise reasonable care to prevent foreseeable harm. Thus the keeper of even a gentle bull must take into account the tendencies of bulls as a class to attack moving objects~."

Building on these provisions and their specific references to bulls, Bard contends that because Fred was not only a bull, but a breeding bull housed with the herd over whom he exercised dominance, Jahnke was negligent in failing to restrain Fred, or to warn non-farm personnel of his presence. But this is no different from arguing that Jahnke was negligent in that he *should have known* of Fred's vicious propensities because—as plaintiffs' expert put it—"bulls, in particular breeding bulls, are generally dangerous and vicious animals."

As already noted, an animal's propensity to cause injury may be proven by something other than prior comparably vicious acts. As a result, a common shorthand name for our traditional rule—the "one-bite rule"—is a misnomer. We have never, however, held that

particular breeds or kinds of domestic animals are dangerous, and therefore when an individual animal of the breed or kind causes harm, its owner is charged with knowledge of vicious propensities. Similarly, we have never held that male domestic animals kept for breeding or female domestic animals caring for their young are dangerous as a class. We decline to do so now, or otherwise to dilute our traditional rule under the guise of a companion common-law cause of action for negligence. In sum, when harm is caused by a domestic animal, its owner's liability is determined solely by application of the rule articulated in *Collier.*

Accordingly, the order of Appellate Division should be affirmed, with costs.

Chief Judge KAYE and Judges CIPARICK and GRAFFEO concur with Judge READ.

D.5.c. Dissent by Smith

Judge ROBERT S. SMITH, dissenting:

Under the Restatement (Second) of Torts, the owner of a domestic animal who does not know or have reason to know that the animal is more dangerous than others of its class may still be liable for negligently failing to prevent the animal from inflicting an injury. This Court today becomes the first state court of last resort to reject the Restatement rule. I think that is a mistake.~

In this case, as the majority seems to recognize, a jury could have found Jahnke to be negligent, though he had no reason to think that Fred was any more dangerous than any other breeding bull. An expert's affidavit provides the unsurprising information that all breeding bulls are dangerous, because they "have high libido," and "will challenge or attack ... unknown individuals, in order to establish dominance over the herd." Jahnke knew that Fred was in the low cow district of the dairy barn, and a jury could have found that he was negligent in failing to impart this information to Timer; Jahnke knew that Timer worked in that barn from time to time, though he did not know that Timer had arranged for Bard to work there on the day of the accident. The record shows that, if Timer or Bard had known of Fred's presence, either of them could easily have erected a partition to exclude Fred from the area where Bard was working.

Thus, if ordinary negligence principles apply here, this case should not have been dismissed. The Restatement says that ordinary

negligence principles do apply~. Courts in at least 20 states appear to follow the Restatement rule~.

Before today, our Court's opinions were consistent with the Restatement rule. Our most recent case involving animal inflicted injuries, *Collier v. Zambito,* 1 N.Y.3d 444 (2004), did not address the question of whether general negligence principles were applicable in such cases. *Collier* involved the rule, correctly stated by the majority here, that an owner who knows or has reason to know of an animal's dangerous propensities faces strict liability~. The only issue in *Collier* was whether the defendant should have known of the dangerous propensities of her dog.~

No opinion of our Court before today announced the rule, now adopted by the majority, that the strict liability involved in *Collier* is the only kind of liability the owner of a domestic animal may face—that, in other words, there is no such thing as negligence liability where harm done by domestic animals is concerned.~

{I}n *Dickson v. McCoy,* 39 N.Y. 400, 401 (1868), a case involving a horse turned loose in a public street, Judge Dwight of our Court stated a rule like that of the Restatement: "It is not necessary that a horse should be vicious to make the owner responsible for injury done by him through the owner's negligence."~

The rule the majority adopts is contrary to simple fairness. Why should a person who is negligent in managing an automobile or a child be subject to liability, and not one who is negligent in managing a horse or bull? Why should a person hit by a subway train be able to recover and one hit by a breeding bull be left without a remedy? I think there are no good answers to these questions, and it is possible to imagine future cases that will put the rule adopted by the majority under strain. Suppose, for example, a variation on the facts of *Collier*: What if defendant there had encouraged a child to play not with a grown dog, but with a litter of puppies, thus predictably provoking an otherwise gentle mother dog to rage? Or suppose facts like those in *Duren v. Kunkel*, 814 S.W.2d 935 (Mo. 1991), where a bull was stirred to attack because his owner negligently caused him to be driven through an area where fresh blood was on the ground? In such a case, we could either deny recovery to a deserving plaintiff, despite negligence more blatant than what Jahnke is accused of here, or we could invent a "mother dog" exception or a "fresh blood" exception to the rule adopted in this case. I think it would be wiser to follow the Restatement rule, as has almost every other state that has considered the question.

Judges G.B. SMITH and ROSENBLATT concur with Judge R.S. SMITH.

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D.6. Check-Your-Understanding Questions About Strict Liability and Animals

A. Suppose an exotic rancher raises non-domesticated ostriches for meat, eggs, feathers, and leather. Some ostriches leave the ranch and enter a patio café where they seriously injure a patron. Can the injured patron recover in strict liability? Why or why not?

B. A plaintiff sues a zoo for injuries sustained because of an escaped boa constrictor. The snake did not actually touch the plaintiff. Instead, the snake killed the plaintiff's friend's pet cat. But because of the cat's death, the plaintiff's friend was not available to help the plaintiff repair a stair railing, as had been the plan. The plaintiff was injured when the railing collapsed because it hadn't been repaired. Can the plaintiff recover against the zoo in strict liability?

E. Ultrahazardous or Abnormally Dangerous Activities

E.1. Basics, Terminology Issues

In addition to the specific categories that the law sets out for strict liability in connection with animals, there is the large, general category of strict liability for "ultrahazardous" or "abnormally dangerous" activities.

This is another place where terminology might lead you to misunderstand the doctrine. Note that "ultrahazardous" and "abnormally dangerous" are not two different categories, but rather two different labels for one category. The courts employ the two terms about equally today. The American Law Institute favored "ultrahazardous" in its First Restatement of Torts, but then switched to "abnormally dangerous" for its Second Restatement. Both terms, however, have potential problems.

The danger posed by the term "abnormally dangerous" is that you might think the words mean what they say. That is, you might think that for an

activity to qualify as "abnormally dangerous," it needs to present a danger that is not normal. That, however, is not correct. There are many abnormal dangers that do not qualify for strict liability, and many familiar risks from common activities that do. "Abnormally dangerous" must be thought of as a term of art.

The hazard posed by the term "ultrahazardous" is that you might think that it is the magnitude of the potential harm that causes something to qualify as an ultrahazard. But something can be "ultrahazardous" even if it threatens only one person. What is good about "ultrahazardous" as a label, however, is that it is clearly a made-up word, and thus it is easily identifiable as a term of art.

In this book, we'll use both terms as synonyms.

E.2. What Activities Qualify as Ultrahazardous or Abnormally Dangerous?

E.2.a. Basics

What causes something to qualify as an ultrahazardous or abnormally dangerous activity for strict liability purposes? There is no simple, concise answer. With animals, the qualifications for strict liability are fairly specific. By contrast, the category of strict liability for ultrahazardous activities is a more recent development in the law, and its boundaries are considerably fuzzier.

The core idea is less about the characteristics of the activity and more about a policy judgment that people who undertake certain activities must be responsible for any harm that results, regardless of how much care is taken. The policy judgment inherent in the task mirrors the policy judgment involved in deciding whether a defendant owes a duty of care for purposes of a negligence action. And as is the case with the existence of a duty in negligence, whether an activity qualifies for strict liability is generally a legal question – to be determined by a court, rather than a jury.

E.2.b. Categories Held to Ultrahazardous

Here are some examples of activities that have been held to give rise to strict liability under the ultrahazardous classification:

- blasting

- fumigation
- crop dusting
- activities involving nuclear reactions or radioactivity
- pile driving
- oil drilling
- activities involving explosives or highly toxic chemicals (including manufacturing, transporting, storing, and using)

You can see that many of these activities are quite "normal" in the sense that they go on all the time. To the extent one could say that there is something abnormal about them, perhaps it is that relatively few people in society engage in them. There are many farmers, for instance, but there are comparatively few providers of crop-dusting services. And while everybody uses gasoline and other products derived from petroleum, very few people in society go drilling for petroleum.

E.2.c. Unifying Theories of the Ultrahazardous

There's no hard and fast rule about what activities qualify as ultrahazardous. Some oft-repeated, key ideas are that the danger cannot be eliminated even with utmost care and the uncommonness of the activity.

Legal scholar Richard A. Epstein has written, "There is no obvious conceptual line that walls off abnormally dangerous activities from their relatively benign counterparts." Nonetheless, Epstein sees a thread that binds them all together: "Ultrahazardous activities and substances all fall into the class where small triggers, physical or chemical, can release far larger forces." Richard A. Epstein, *Torts*, p. 348 (1999). That does seem like a useful way to try to conceptualize the pith of the doctrine.

Another way to try to make sense of strict liability for abnormally dangerous activities is to note the conceptual similarities with the doctrine of strict liability for wild animals. Take, for instance, Justice Blackburn's pronouncement in *Rylands*, below, that whoever "brings, or accumulates, on his land anything which, if it should escape, may cause damage to his neighbour, he does so at his peril." That language could be talking about a lion just as much as it could be talking about a huge volume of water or a concentration of radionuclides.

The authors of the Restatement have put together a list of factors that some courts have considered when deciding whether an activity should

qualify as ultrahazardous and thus giving rise to strict liability. The Second Restatement's factors are:

> (a) existence of a high degree of risk of some harm to the person, land, or chattels of others;
> (b) likelihood that the harm that results from it will be great;
> (c) inability to eliminate the risk by the exercise of reasonable care;
> (d) extent to which the activity is not a matter of common usage;
> (e) inappropriateness of the activity to the place where it is carried on; and
> (f) extent to which its value to the community is outweighed by its dangerous attributes.

Restatement (Second) of Torts, § 520. These factors are perhaps best thought of as a list of things to think about in working through the policy choice of whether to classify an activity as ultrahazardous. In that sense, they seem quite useful – they may help a court ensure they are thinking thoroughly about the issues.

But using the Restatement § 520 factors as a "test" seems perilous. The factors seem manipulable and not very determinative, nor do they seem very predictive of legal outcomes. Consider as candidates for ultrahazardous classification (1) crop dusting, and (2) letting your 16-year-old drive your car to the movie theater.

Crop dusting can pose a high degree of risk to people and to crops (if the wrong crops are sprayed). On the other hand, crop dusting is extremely common in farm country, extremely appropriate to the place (being farm country), stupendously valuable to the community (as it can fantastically increase yield and food production), and it's quite possible to eliminate risk by waiting for appropriate weather conditions, taking care with records and maps to spray only in the right places, and to ensure the area to be sprayed is clear of wandering people. The factors make crop dusting seem like it shouldn't be an ultrahazard, yet it is an archetypal example of an ultrahazardous activity giving rise to strict liability.

Meanwhile, giving your keys to your 16-year-old involves an unquestionably high degree of risk of potentially catastrophic harm to people and property. Arguably both the probability that something can go wrong and the magnitude of the potential loss greatly eclipse crop dusting,

especially when you consider that a single vehicular collision can kill many people. What's more, there's nothing you can do to reduce the risk. You'll say "Be careful!" of course. Even though you know it's more performative than precautionary. Of course, one can say laudatory things about the community value of teenagers driving to the movies. But anything that can be said will be feeble compared to food production. But an ultrahazard? Hardly.

At the end of the day, perhaps the best way of predicting whether an activity might be considered an ultrahazard is to reference the list of canonical examples of ultrahazardous activities and reason by analogy. That list is: blasting, fumigation, crop dusting, pile driving, oil drilling, and activities involving explosives, highly toxic chemicals, radioactivity, or nuclear reactions. If the candidate activity is not already on that list, how much is it like things already on the list?

E.3. Case: Rylands v. Fletcher

E.3.a. Advance notes

The case credited with starting the general doctrine of strict liability for ultrahazards is the classic English case of *Rylands v. Fletcher*.

E.3.b. Opinion

Rylands v. Fletcher

House of Lords
July 17, 1868

3 HL 330, [1868] UKHL 1. JOHN RYLANDS AND JEHU HORROCKS, PLAINTIFFS v. THOMAS FLETCHER, DEFENDANT.

The Lord Chancellor, Lord CAIRNS (Hugh Cairns, 1st Earl Cairns):

My Lords, in this case the Plaintiff~ is the occupier of a mine and works under a close of land. The Defendants are the owners of a mill in his neighbourhood, and they proposed to make a reservoir for the purpose of keeping and storing water to be used about their mill upon another close of land, which, for the purposes of this case, may be taken as being adjoining to the close of the Plaintiff, although, in point of fact, some intervening land lay between the two. Underneath the close of land of the Defendants on which they proposed to construct their

reservoir there were certain old and disused mining passages and works. There were five vertical shafts, and some horizontal shafts communicating with them. The vertical shafts had been filled up with soil and rubbish, and it does not appear that any person was aware of the existence either of the vertical shafts or of the horizontal works communicating with them. In the course of the working by the Plaintiff of his mine, he had gradually worked through the seams of coal underneath the close, and had come into contact with the old and disused works underneath the close of the Defendants.

In that state of things the reservoir of the Defendants was constructed. It was constructed by them through the agency and inspection of an engineer and contractor. Personally, the Defendants appear to have taken no part in the works, or to have been aware of any want of security connected with them. As regards the engineer and the contractor, we must take it from the case that they did not exercise, as far as they were concerned, that reasonable care and caution which they might have exercised, taking notice, as they appear to have taken notice, of the vertical shafts filled up in the manner which I have mentioned. However, my Lords, when the reservoir was constructed, and filled, or partly filled, with water, the weight of the water bearing upon the disused and imperfectly filled-up vertical shafts, broke through those shafts. The water passed down them and into the horizontal workings, and from the horizontal workings under the close of the Defendants it passed on into the workings under the close of the Plaintiff, and flooded his mine, causing considerable damage, for which this action was brought.~

My Lords, the principles on which this case must be determined appear to me to be extremely simple. The Defendants, treating them as the owners or occupiers of the close on which the reservoir was constructed, might lawfully have used that close for any purpose for which it might in the ordinary course of the enjoyment of land be used; and if, in what I may term the natural user of that land, there had been any accumulation of water, either on the surface or underground, and if, by the operation of the laws of nature, that accumulation of water had passed off into the close occupied by the Plaintiff, the Plaintiff could not have complained that that result had taken place. If he had desired to guard himself against it, it would have lain upon him to have done so, by leaving, or by interposing, some barrier between his close and the close of the Defendants in order to have prevented that operation of the laws of nature.

As an illustration of that principle, I may refer to a case which was cited in the argument before your Lordships, the case of *Smith v. Kenrick* in the Court of Common Pleas.

On the other hand if the Defendants, not stopping at the natural use of their close, had desired to use it for any purpose which I may term a non-natural use, for the purpose of introducing into the close that which in its natural condition was not in or upon it, for the purpose of introducing water either above or below ground in quantities and in a manner not the result of any work or operation on or under the land, – and if in consequence of their doing so, or in consequence of any imperfection in the mode of their doing so, the water came to escape and to pass off into the close of the Plaintiff, then it appears to me that that which the Defendants were doing they were doing at their own peril; and, if in the course of their doing it, the evil arose to which I have referred, the evil, namely, of the escape of the water and its passing away to the close of the Plaintiff and injuring the Plaintiff, then for the consequence of that, in my opinion, the Defendants would be liable. As the case of *Smith v. Kenrick* is an illustration of the first principle to which I have referred, so also the second principle to which I have referred is well illustrated by another case in the same Court, the case of *Baird v. Williamson*, which was also cited in the argument at the Bar.

My Lords, these simple principles, if they are well founded, as it appears to me they are, really dispose of this case.

The same result is arrived at on the principles referred to by Mr. Justice Blackburn in his judgment, in the Court of Exchequer Chamber, where he states the opinion of that Court as to the law in these words: "We think that the true rule of law is, that the person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril; and if he does not do so, is *primâ facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by shewing that the escape was owing to the Plaintiff's default; or, perhaps, that the escape was the consequence of *vis major*, or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient. The general rule, as above stated, seems on principle just. The person whose grass or corn is eaten down by the escaping cattle of his neighbour, or whose mine is flooded by the water from his neighbour's reservoir, or whose cellar is invaded by the filth of his neighbour's privy, or whose habitation is made unhealthy by the fumes and noisome vapours of his neighbour's alkali works, is damnified without any fault of his own; and it seems but reasonable

and just that the neighbour who has brought something on his own property (which was not naturally there), harmless to others so long as it is confined to his own property, but which he knows will be mischievous if it gets on his neighbour's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief could have accrued, and it seems but just that he should at his peril keep it there, so that no mischief may accrue, or answer for the natural and anticipated consequence. And upon authority this we think is established to be the law, whether the things so brought be beasts, or water, or filth, or stenches."

My Lords, in that opinion, I must say I entirely concur. Therefore, I have to move your Lordships that the judgment of the Court of Exchequer Chamber be affirmed, and that the present appeal be dismissed with costs.

Lord CRANWORTH (Robert Rolfe, 1st Baron Cranworth):

My Lords, I concur with my noble and learned friend in thinking that the rule of law was correctly stated by Mr. Justice Blackburn in delivering the opinion of the Exchequer Chamber. If a person brings, or accumulates, on his land anything which, if it should escape, may cause damage to his neighbour, he does so at his peril. If it does escape, and cause damage, he is responsible, however careful he may have been, and whatever precautions he may have taken to prevent the damage.~.

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F. The Economics of Strict Liability

F.1. Discussion

Strict liability has been a focal point for theorists of law and economics. They question whether strict liability can be justified as sound economic policy.

Negligence, in general, does not face this criticism. The doctrine of negligence seems to lend itself to economic justification quite readily: We want to provide an incentive for people to engage in the appropriate level of care when undertaking their activities. Therefore, we hold them liable when injury results from their care falling below this level.

So, since we have negligence, why should we ever need strict liability? If we want to encourage transporters of explosives to engage in the appropriate level of care, then why not leave intact the requirement that plaintiffs prove negligence?

A response might be to say that there are some activities that are potentially so socially pernicious, we not only want people to be careful, we want them to think long and hard about whether they should engage in the activity at all. If people are responsible for all injuries caused by a certain activity – regardless of how careful they are – then people might engage in that activity less often, or they might move the location of their activity to someplace where less harm is likely to result if something goes wrong.

F.2. *[omitted from Beta]*

[omitted from Beta]

G. Defenses and Limitations on Strict Liability

G.1. Discussion

In general, the same defenses that apply to negligence also apply to strict liability, with one important exception: Contributory negligence, in those jurisdictions still using it, is generally *not* considered a viable defense in a strict liability action.

Other defenses apply as they would with negligence. Comparative negligence, in those jurisdictions following it, functions as a defense for strict liability as it does for negligence: The plaintiff's negligence will serve to reduce the total recovery. The only sticky issue is the name "comparative *negligence*." Indeed, comparative negligence is often called "comparative fault" – at least in part so that it does not seem out of place in the strict liability context.

Assumption of the risk also may be used as a defense in strict liability situations as well, and where it applies, it will bar recovery altogether.

There is also an important limitation on strict liability that grows out of the application of proximate causation. For strict liability to apply, there must be a tight connection between the means of injury and the reason for invoking strict liability.

An example will illustrate this: Suppose the defendant retail store is cleaning floors with a nuclear vacuum cleaner. The plaintiff trips over the vacuum when a careless employee pushes it into the plaintiff's path, and as a result the plaintiff suffers a broken arm. The plaintiff can sue in negligence, but a cause of action for strict liability will not apply. Why not? After all, nuclear technologies are generally categorized as ultrahazardous. The plaintiff's problem lies in proximate causation. Proximate causation is lacking for strict liability because the ultrahazardous nature of the activity is not germane to the injury. Stated in other terms: The strict liability case here fails the harm-within-the-risk test: Was the kind of harm suffered by the plaintiff the kind that caused the absolute duty of safety to arise? No, so strict liability does not apply.

Note that the plaintiff could still sue in negligence. Proximate causation will not be a problem in the negligence case, since there is a tight connection between the careless pushing of the vacuum cleaner and the plaintiff's broken bone.

Another limitation on strict liability comes out of a line of cases holding that strict liability for abnormally dangerous activities will not apply where the injury would not have occurred but for an abnormally sensitive plaintiff.

G.2. Case in Point: *Foster v. Preston Mill* (Wash. 1954)

(blast rattled mink ranch)

In the famous case of *Foster v. Preston Mill Co.,* 44 Wash.2d 440 (Wash. 1954), the defendant's blasting operations disturbed operations on a nearby mink ranch. The ranch's manager testified that after a blast rattled cages, mother minks would run back and forth and kill their kittens. Between 35 and 40 kittens were killed this way, according to testimony. The court refused to apply strict liability, writing:

> The relatively moderate vibration and noise which appellant's blasting produced at a distance of two and a quarter miles was no more than a usual incident of the ordinary life of the community. The trial court specifically found that the blasting did not unreasonably interfere with the enjoyment of their property by nearby landowners, except in the case of respondent's mink ranch.

> It is the exceedingly nervous disposition of mink, rather than the normal risks inherent in blasting operations, which therefore must, as a matter of sound policy, bear the responsibility for the loss here sustained. We subscribe to the view˜ that the policy of the law does not impose the rule of strict liability to protect against harms incident to the plaintiff's extraordinary and unusual use of land.

H. Strict Liability at Trial: *Silkwood v. Kerr-McGee*

H.1. Advance Notes

The following case nicely illustrates how strict liability can work to the benefit of a plaintiff by short-circuiting the many pitfalls of a negligence case. Unlike most of the case readings in this book, this is not a judicial opinion written by a judge. Instead, it is a neutral view of the facts, followed by the closing argument of one of the attorneys.

H.2. Background Facts

Silkwood v. Kerr-McGee

U.S. District Court for the Western District of Oklahoma
1979

Bill M. SILKWOOD, Administrator of the Estate of Karen G. Silkwood, deceased, Plaintiff, v. Kerr-McGee CORPORATION et al., Defendants. Civ. A. No. 76-0888-Theis. In the United States District Court for the Western District of Oklahoma. Hon. Judge Frank G. Theis, U.S. District Judge, District of Kansas, sitting by designation. Except for the first paragraph and the last two paragraphs, the facts derive nearly verbatim from James F. McInroy, "A True Measure of Exposure: The Karen Silkwood Story," 23 *Los Alamos Science* 252 (1995).

The FACTS:

In August 1972, Karen Silkwood took a job as a technician at the Cimarron Fuel Fabrication Site in Crescent, Oklahoma, operated by Kerr-McGee Corporation. The plant produced mixed-oxide plutonium-uranium fuel for use in power-generating nuclear reactors. As a plant worker, Silkwood became involved in the Oil, Chemical & Atomic Workers Union and participated in a strike. Later, in the fall of 1974, Silkwood investigated health and safety issues on behalf of the union and reported serious violations to the Atomic Energy Commission.

On November 5, 1974, Silkwood was working in a glovebox in the metallography laboratory where she was grinding and polishing plutonium pellets that would be used in fuel rods. At 6:30 p.m., she decided to monitor herself for alpha activity with the detector that was mounted on the glove box. The right side of her body read 20,000 disintegrations per minute, or about 9 nanocuries, mostly on the right sleeve and shoulder of her coveralls. She was taken to the plant's Health Physics Office where she was given a test called a "nasal swipe," which measures a person's exposure to airborne plutonium, but might also measure plutonium that got on the person's nose from their hands. The swipe showed a radioactivity level of 160 disintegrations per minute ("dpm"), a modest positive result.

The two gloves in the glovebox Silkwood had been using were replaced. Strangely, the gloves were found to have plutonium on the "outside" surfaces that were in contact with Silkwood's hands; no leaks were found in the gloves. No plutonium was found on the surfaces in the room where she had been working, and filter papers from the two air monitors in the room showed that there was no significant plutonium in the air. By 9:00 p.m., Silkwood's cleanup had been completed, and as a precautionary measure, Silkwood was put on a program in which her total urine and feces were collected for five days for plutonium measurements. She returned to the laboratory and worked until 1:10 a.m., but did no further work in the glove boxes. As she left the plant, she monitored herself and found nothing. Silkwood arrived at work at 7:30 a.m. on November 6. She examined metallographic prints and performed paperwork for one hour, then monitored herself as she left the laboratory to attend a meeting. Although she had not worked at the glovebox that morning, the detector registered alpha activity on her hands. Health physics staff members found further activity on her right forearm and the right side of her neck and face, and proceeded to decontaminate her. At her request, a technician checked her locker and automobile with an alpha detector, but no activity was found.

On November 7, Silkwood reported to the health physics office at about 7:50 in the morning with her bioassay kit containing four urine samples and one fecal sample. A nasal swab was taken, and significant levels of alpha activity were detected (about 45,000 disintegrations per minute (dpm) in each nostril and 40,000 dpm on and around her nose). This was especially surprising because her left nostril had been almost completely blocked since a childhood accident. Other parts of her body also showed significant alpha activity (1,000 to 4,000 dpm on her

hands, arm, chest, neck, and right ear). A preliminary examination of her bioassay samples showed extremely high levels of activity (30,000 to 40,000 counts per minute in the fecal sample). Her locker and automobile were checked again, and essentially no alpha activity was found.

Following her cleanup, the Kerr-McGee health physicists accompanied her to her apartment, which she shared with another laboratory analyst, Sherri Ellis. The apartment was surveyed. Significant levels of activity were found in the bathroom and kitchen, and lower levels of activity were found in other rooms.

On November 13, 1974, when Silkwood was driving her white Honda Civic to meet a reporter from the New York Times to deliver documents concerning health and safety violations at the plant, she was killed in a suspicious accident. No other cars were involved. Many suspected that Silkwood was murdered.

The plaintiff's attorney was Gerry L. Spence of Spence, Moriarity & Schuster of Jackson Hole, Wyoming. Kerr-McGee was represented by William G. Paul of Crowe, Dunlevy, Thweatt, Swinford, Johnson & Burdick of Oklahoma City.

H.3. Closing Argument by Spence

GERRY L. SPENCE, Esq., delivered the plaintiff's CLOSING ARGUMENT:

~Well, what we're going to talk about here isn't hard. If a country lawyer from Wyoming can understand it – if I can explain it to my kids – if Mr. Paul [lead defense attorney] can understand it – and his kids – then we all can understand it.

"What's going on, and who proves what?" Well, we talked about "strict liability" at the outset, and you'll hear the court tell you about "strict liability," and it simply means: "If the lion got away, Kerr-McGee has to pay."

It's that simple. That's the law. You remember what I told you in the opening statement about strict liability? It came out of the Old English common law. Some guy brought an old lion on his ground, and he put it in a cage – and lions are dangerous – and through no negligence of his own – through no fault of his own, the lion got away.

Nobody knew how – like in this case, "nobody knew how." And, the lion went out and he ate up some people, and they sued the man. And they said, you know, "Pay. It was your lion, and he got away." And, the man says, "But I did everything in my power. I had a good cage, had a

good lock on the door. I did everything that I could. I had security. I had trained people watching the lion. And it isn't my fault that he got away." Why should you punish him? They said, "We have to punish him. We have to punish you; you have to pay. You have to pay because it was your lion – unless the person who was hurt let the lion out himself."

That's the only defense in this case. Unless in this case Karen Silkwood was the one who intentionally took the plutonium out, and "let the lion out," that is the only defense, and that is why we have heard so much about it.

Strict liability: If the lion gets away, Kerr-McGee has to pay. Unless Karen Silkwood let the lion loose.

What do we have to prove? Strict liability. Now, can you see what that is? The lion gets away. We have to do that. It's already admitted. It's admitted in the evidence. They admit it was their plutonium. They admit it's in Karen Silkwood's apartment. It got away. And, we have to prove that Karen Silkwood was damaged. That's all we have to prove.

Our case has been proved long ago, and I'm not going to labor you with the facts that prove that. It's almost an admitted fact, that it got away, and that she was damaged.

Does Silkwood prove how the lion got away? You remember this – Mr. Paul walking up to you and saying, at the beginning of the trial, "Listen, it's important to find out how the lion got away." Well, it is important, because they have to prove how. But we don't. And the court will instruct you on that. As a matter of fact, I think you will hear the court say exactly this, and listen to the instruction: It is unnecessary for you to decide how plutonium escaped from the plant – how it entered her apartment – or how it caused her contamination, since it is a stipulated fact – stipulated between the parties – that the plutonium in Silkwood's apartment was from the defendants' plant.

So, the question is, "Who has to prove how the lion got away?" They have to prove it. They have to prove that Karen Silkwood carried it out. If they can't prove that by a preponderance of the evidence, they've lost. Kerr-McGee has to prove that.

Why? Well, it's obvious. It's their lion – not Karen Silkwood's lion. It's the law. It's that simple.

Now, I told you there was only one legal defense, didn't I? That's defense of Karen Silkwood having supposedly taken this stuff from the plant. Well, I'll tell you a bigger defense than that, and that's getting drowned in mud springs. Now, that isn't an original statement by me.

One of my favorite – I guess my favorite – jurist, and one you know very well, has an old saying he has told us many times. He says if you want to clear up the water, you've got to get the hogs out of the spring. And, if you can't get the hogs out of the spring, I guarantee you can't clear up the water. And I want you to know that getting jurors confused is not a proper part of jurisprudence, and getting people down in mud springs is not the way to try a case.

Somehow, somebody has the responsibility, as an attorney, to help you understand what the issues are – to come forward and hold their hand out and say: These are the honest issues, this is the law, this is what you can rely on, because I am reliable, and I'm not going to confuse you with irrelevancies and number-crunching and number games and word games and gobbledy-gook and stuff and details – and on and on and on. And the thing that I say to you is: Keep out of the mud springs in your deliberations.

You are not scientists. I'm not a scientist – my only power is my common sense. Keep out of the mud springs. You'll be invited there. Use your common sense. You'll be invited to do number-crunching of your own. You'll be invited to play word games. You'll be invited to get into all kinds of irrelevancies. And I only say to you that you have one hope – don't get into mud springs. Keep your common sense, and take it with you into the jury room.~

SPENCE delivered the rebuttal for plaintiff's CLOSING ARGUMENT:

~The issue that seems to be one that everyone wants to talk about is not really an issue – it is the only possible defense that Kerr-McGee has, and it is one that they have talked about. We are right back where we started from: "If the lion gets away, Kerr-McGee has to pay."

You remember Mr. Paul was critical of me for not trying to explain to you how the lion got away. Do you remember his criticalness, his sort of accusation that somehow we had failed in our obligation?

It is like this – listen to the story: "My lion got away. Why is my lion on your property?" That is the question he asked me. "Why is my lion on your property? It is on your property. Tell me why my lion is on your property. Explain it."

And, I say, "But, ah hah, ah hah, ah hah." And, he says: "It wasn't there two hours ago. It wasn't there last night." And, he says, "Wait a minute. Your kids don't get along with my kids. That is why my lion is on your property." And, then he says, "Why did you let my lion eat you?

You let my lion on your property," he says. "I accuse you – I accuse you – I blame you, and why don't you explain it?"

And, I say, "But, it isn't my lion; it is your lion. It is your lion that got away."

Now, the court says – and I want this, I want to put it to rest, because I don't want you jumping in mud springs on this one – there are too many other places for you to jump into mud springs on. Please hear it. It is unnecessary for you to decide how plutonium escaped from the plant, how it entered her apartment, or how it caused her contamination, since it is a stipulated fact that the plutonium in Karen Silkwood's apartment was from the defendants' plant.

Now, Mr. Paul, that is why we haven't explained how your lion got on our property. The court says that is not our obligation. It is your lion, Mr. Paul. You must explain it.

[The law says] that it is for the defendants to prove to you, by a preponderance of the evidence, that it was Karen Silkwood who took it. Failing their proof – please hear the word "proof" – it is the word "proof" – failing which proof Kerr-McGee has to pay.

The lion got away, Karen Silkwood was damaged. Does Karen Silkwood prove how the lion got away? The court says no. You will hear it again tomorrow. Why? Because it is their lion.

So if the lion got away, and Kerr-McGee can't prove how, then Kerr-McGee has to pay. Now, that's the law, the law of strict liability, and it is that simple.

Now, I heard Mr. Paul say this: "My heart reaches out praying for answers based upon the evidence." "Praying for answers based upon the evidence."

I would think he would pray for answers based upon the evidence, because he hasn't got any.

He doesn't have any more now that he ever did. All that you ever heard Mr. Paul say, as he stood up here and pointed his finger toward Karen Silkwood – and I want you to stop and remember, ladies and gentlemen, please, that this is a free country – and the one thing that makes this country different from all the other countries in the world is that when somebody makes the accusation against a citizen of this country, alive or dead, they have to make the proof.

Mr. Paul doesn't have the right to come into a court and say, "I think this happened." and "I think that happened." and "Maybe this happened." and "Isn't it probable that that happened." and "I think the

circumstances of this, and the circumstances of that." And to take a whole series of unrelated events and put them together and try to tell you somehow that I have the responsibility that the judge and the law doesn't place upon me, and to mislead you in that fashion. And I'm angry about that.

I expect that when a corporation of the size of this one comes into this courtroom that they should bring to you honest, fair, documented evidence, that they shouldn't hide behind little people, and that they should bring you the facts that they know.

Now, listen. I have some problems here in being straight with you, and I want to put them right here on the table. If we want to play guess-um – that is, point the finger, the game of playing, of pointing the finger – I can play that game. But when I do that I become as bad as Mr. Paul. You want me to do that? Is that the way you want to decide the case? Tell me. If that is the way you think the case ought to be decided in a court of American jurisprudence, to see who can make the biggest accusations against the other one, then I'm willing to play that game. But, when I do it, I want you to know it isn't right, because I can't prove that any more than they can prove it.

I can give you motive. What was the motive for them to do that? "She was a troublemaker. She was doing union negotiations. She was on her way – she was gathering documents – every day in that union, everybody in that company, everybody in management knew that." Nobody would admit it, but they knew it.~

Compare the motive, just for the fun of it. Supposing that you've got to weigh those motives. Here is Karen Silkwood. The motive was she was furious. We found out that she wasn't furious. Their own witness, Mr. – what is his name – Phillip, says she was miffed, wasn't that the word? Their witness, under oath, said she was miffed. "Was she furious?" "No, she wasn't furious. She was miffed." "She was furious," he said.

Did Karen Silkwood – and you have listened to her voice talking in private to Steve Wodka {a union official} – did she sound like a kook to you? Did she sound nuts? Did she sound like she was acting under some kind of compulsive behavior that suggested it? There isn't any proof to that. It comes out of Mr. Paul's mouth. He says it over and over, and over, and over, and over again.

Compare that motive with the motive of people to stop her. "She knew too much." What would she do had she gotten to the New York Times? These people, if you want to talk about motives, had a motive to

stop her, and she was stopped. We are not to talk about her – I won't talk about it – but she never got there with her X rays.

Now, I don't think that is the way I want to defend my case. I don't think that is the way I want to present it to you. I've only brought these matters out because in the course of this trial it seems too patently unfair to continually point their finger at a woman who can't defend herself about matters that they have no proof of and never had any proof of to begin with, and knew from the beginning that they would never have any more proof of, as evidenced by Mr. McGee's initial letter: "It is not likely that the source of her contamination will ever be known."

He knew that. Mr. Paul knew it. It was the only thing available to them, and I congratulate them for making a lot out of that, but it is sad to me that they didn't call the witnesses that knew – they didn't give us the information, and that is sad to me.

It is sad to me that one of the mightiest – you know, in history it will go down, this case, I can see it in the history books: "One of the mightiest corporations of the United States of America, a multinational corporation, with, two billion dollars in assets, and two billion dollars in annual income, goes down in history with all that power, with all of those resources, with the only thing that they could do was to accuse, and not prove."

Well, the key – please forgive my raging, but you are listening to a man who is angry – the key, ladies and gentlemen, is simple. I will have to tell you what it is. It is proof. They have the burden of proving that she took it. The judge says they have the burden to proving it. They have to prove it by a preponderance of the evidence.

Now, that is something, that phrase "preponderance of the evidence," which you will hear His Honor use tomorrow, isn't just a phony phrase. It means the greater weight of the evidence. There isn't any evidence here that she did it, not one iota of evidence. There are only the accusations. But, if there was any evidence, it would have to be the greatest weight of evidence, not suspicions, not the greatest weight of suspicions, not the one who can accuse the worst – but the greatest weight of the evidence.

The burden of proof is on the defendant Kerr-McGee Nuclear Corporation to establish that Karen Silkwood took the plutonium from work to her apartment where she was injured. That is the court's instruction.

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H.4. Questions to Ponder About *Silkwood v. Kerr-McGee*

A. To the extent you can extrapolate from this example, how is a closing argument to a jury different from a judge's written opinion? How are they similar?

B. What was your reaction to this as a law student? Do you think your reaction would have been different if you had read this before beginning law school? What do you think your reaction would have been if you had sat through the entire trial and were watching it in person?

C. Mr. Spence uses a powerful metaphor for legally irrelevant arguments and evidence: He calls them "mud springs." What does Mr. Spence point out as being legally irrelevant on Kerr-McGee's side of the case? How much of that do you agree is actually irrelevant?

D. Does Mr. Spence lead the jury into mud springs himself? If so, how and for what purpose?

E. One might say that judges are not immune from getting into mud springs in their written opinions. Can you think of anything you've read in a judicial opinion that strikes you as mud springs?

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26. Products Liability

"Happy Fun Ball! ... Get one today!
Warning: Pregnant women, the elderly, and children under 10 should avoid prolonged exposure to Happy Fun Ball. Caution: Happy Fun Ball may suddenly accelerate to dangerous speeds. ... Do not taunt Happy Fun Ball."

– *Saturday Night Live*, 1991

A. Introduction

We live in a consumer society, where all of us are constantly bombarded with marketing aimed at getting us to buy more stuff. In America's early days, what we now think of as "products" were rarities. Items used in the household were commonly handmade by a member of that household. People made their own clothing, canned their own fruit, and built their own furniture. Other items were made in one-off fashion by craftspeople – cobblers made shoes, coopers made barrels, blacksmiths made hardware. Mass manufacturing changed all that. In 1893, the first Sears Roebuck & Company catalog was distributed, offering for sale jewelry and watches, and by the next year, saddles, bicycles, baby carriages, firearms, clothing, and many other items.

Today, we are dependent in our modern lives on an uncountable multitude of commercial firms to provide us with the items we use minute by minute. And many of these products have the potential to hurt us. When things go wrong, doctrines of products liability provide a way for those injured to shift the cost onto sellers, distributors, and manufacturers.

B. Multiple Theories of Recovery for Products Liability

There are multiple ways for a plaintiff to sue for damages stemming from a product. Three in particular are important: warranty, negligence, and strict products liability. A plaintiff might sue on all three theories in the same lawsuit.

The first important theory for recovery in products liability is a **warranty** theory. Warranties used as a basis for suit can be express or implied. Except for the section you are reading now, this book will not discuss warranty actions. (Many law schools offer a course called Sales, and Sales courses usually explore warranty liability in some depth.) Two important concepts about warranty actions are worth highlighting here. The first important concept is that ***a warranty is not a particular kind of contract***. A warranty might be a provision in a contract, but a warranty is capable of its own legal existence outside of the context of a contract. So, in contrast to a typical breach-of-contract action, a warranty action can exist without privity. That is, while a person generally must be a party to a contract to sue for breach of contract, warranty claims often arise even without the existence of a buyer/seller relationship between the plaintiff and defendant. Also, a warranty can be enforceable through a legal action without consideration or mutuality of obligation, which are two cornerstones of contractual liability. You might ask, how can it be that a warranty doesn't need to be a contract to be enforceable? The reason is that state and federal law provides an independent form of action for breach of warranty. Put still another way, contract law is not required for warranties because warranties are enforceable under warranty law. Warranties are perhaps best thought of as their own beast – neither contract, nor tort, nor property. The second important concept you should know is that ***warranties can provide a basis for suit even where there is no personal injury or property damage***. That is, a product breaking down and needing replacement could give rise to a breach-of-warranty action. A suit in negligence or strict liability, by contrast, requires a showing of personal injury or property damage.

The next theory that can be used for products liability is a **negligence** theory. For the most part, a negligence suit for products liability proceeds as any other negligence suit would – although some jurisdictions have different

or additional requirements for a negligence action concerning products. As with other negligence actions, a products liability action in negligence requires showing a relevant duty of care and a breach of that duty. As a general matter, proving a negligence-based product liability claim tends to be more difficult than proving a parallel strict liability claim. Nonetheless, there are circumstances under which it makes sense for a plaintiff to pursue a products liability action in negligence. In some jurisdictions, the law may not make strict liability available for certain kinds of product injuries, in which case negligence is the required path to recovery. Moreover, negligence might be a tactical choice, since it may allow for the introduction at trial of evidence of carelessness – evidence that, without the negligence action – might be deemed irrelevant and therefore inadmissible. Perhaps most importantly, as will be discussed below, strict products liability requires showing the existence of a defect, and negligence has no such requirement. So if proving a defect is problematic, a negligence action may allow recovery where strict products liability will not. A final reason a plaintiff might pursue a negligence claim in the products context is that negligence might reach some defendants that strict liability cannot reach. So when thinking through a products liability problem, keep negligence in mind as a possible path to recovery.

Notwithstanding the potential applicability of warranty claims and negligence claims in the injurious product context, the rest of this chapter is concerned with the tort claim of strict liability for defective products, often called **strict products liability**. As you will see, the key to proving a case for strict products liability is showing the existence of a product *defect.* If the product can be shown to be defective, then, for eligible defendants – namely manufacturers, distributors, and retailers – it will not matter whether due care was taken or not. That being said, we will see that the determination of what counts as a "defect" is in some ways similar to the determination of whether the defendant has breached the duty of care.

C. The Elements of Strict Products Liability

The formulation of the elements of an action for strict liability differ somewhat among courts, as so much in the common law does. Here, however, is a solid formulation that captures the essentials:

> A plaintiff can establish a prima facie case for **strict products liability** by showing: The defendant (1) was engaged in the business of selling or supplying the product at issue, whether as a manufacturer, distributor, or retailer, (2) the product was defective when sold or supplied, (3) the product reached the plaintiff in essentially unchanged condition, and the defect was (4) an actual cause and (5) a proximate cause of (6) an injury to the plaintiff's person or physical property.

It is instructive to compare the elements of strict products liability to negligence:

> A plaintiff can establish a prima facie case for **negligence** by showing: (1) the defendant owed the plaintiff a duty of due care, (2) the defendant breached that duty, and that breach was (3) an actual cause and (4) a proximate cause of (5) an injury to the plaintiff's person or physical property.

You can see that the requirement in negligence that the defendant owes the plaintiff a duty of care is replaced by the requirement in strict products liability with the commercial selling/supplying requirement. And the breach element is replaced by a requirement that the plaintiff show there was a defect. (We will see that what the plaintiff must do to prove a defect is in many ways similar to what a plaintiff must do to prove a breach of the duty of care.) Actual causation, proximate causation, and the injury requirement are the same, although it is possible to find some differences from jurisdiction to jurisdiction.

Our focus in this chapter will be on elements 1 and 2, since they are the places where strict products liability departs from negligence.

D. Sale by a Commercial Manufacturer, Distributor, or Retailer

D.1. Discussion

Strict products liability is notable for its range of eligible defendants. Manufacturers, distributors, and retailers can all be held liable. To be liable, an entity merely needs to be in the business of supplying products of the kind at issue and must have supplied the particular product at issue in a defective

state. It does not matter whether the defendant introduced the defect into the product.

This feature of strict products liability has tremendous practical importance for a plaintiff. Suppose you purchase a defective bottle of soda pop from a sidewalk vendor. (Bottled pop is a good example because it was the product at issue in many early cases.) The sidewalk vendor of a bottle of soda pop might be judgment-proof – meaning that the vendor won't have enough money to pay a substantial judgment. But the manufacturer and the distributor will likely have deep enough pockets to be useful defendants. Alternatively, suppose you go to a large retailer – something along the lines of Target or Walmart – and purchase an off-brand portable electric heater, which has a defect and starts a fire. The heater might have been made overseas by a company that does no direct business in the United States. Merely finding out the identity of such a manufacturer could be difficult, and serving a summons could be a practical impossibility. But there is no need to get the manufacturer into court, since you can sue the retailer.

It is also very important to notice that there is no requirement that the defendant sold the defective product *to the plaintiff*. The plaintiff need not be connected through any stream of transactional relationships to the defendant. The plaintiff could have received the defective product as a gift. The plaintiff could even be an injured bystander – one who never touched the product, much less purchased it.

Strict products liability applies to entities engaged in the business of supplying products. While generally this is discussed in terms of a "sale," other forms of commercial transactions – such as leasing – will qualify as well. The supplier must, however, be *commercial*. If you hold an occasional garage sale, you will not be considered a commercial supplier for purposes of strict products liability.

It might seem unfair for the retailer to be on the hook for a defect that originated with a foreign manufacturer. But that is not necessarily what happens in reality. A goliath retailer like Walmart can easily shift that burden right back onto the foreign manufacturer. Smaller retailers – ones that do not deal directly with overseas manufacturers – can shift the burden back onto the distributors they deal with. Those distributors, in turn, can reach the manufacturer. The point is that instead of the injured person needing to figure out who is the truly responsible party, the injured person can sue

whomever is most convenient, and the burden of laying blame among manufacturers, distributors, and retailers becomes a problem for those parties to sort out among themselves – normally in a separate lawsuit.

The way in which strict products liability works to draw lines of responsibility and liability among far-flung parties, and the rationale for doing so, is the subject of two famous cases. In *Escola v. Coca-Cola Bottling of Fresno*, 24 Cal.2d 453 (Cal. 1944), a claim stemming from an exploding pop bottle was approved as a negligence claim on the basis of res ipsa loquitur. The most remarkable part of the case was an influential concurrence, in which Justice Roger J. Traynor set out an argument and a blueprint for a doctrine of strict liability for defective products. The sequel, *Greenman v. Yuba Power Products*, 59 Cal.2d 57 (Cal. 1963), was a majority opinion by Justice Traynor. *Greenman* brought the analysis of the *Escola* concurrence into the fold of the majority, explicitly embracing strict products liability into the common law of torts.

D.2. *[omitted from Beta]*

[omitted from Beta]

E. What Constitutes a Product

Strict products liability applies only to damages caused by a *product*. In general, a product is a tangible item that is created by humans to be sold or otherwise commercially distributed.

There is a trend in business to call everything a "product" – even services. A bank might advertise, "Talk to us about our full range of investment products." Business-marketing jargon aside, however, banking and investment services are not really products. And products liability does not extend to services, activities, or conditions.

On the other hand, commercially prepared foods *are* products. This is true even though it a restaurateur might blanch at the idea of offering a menu of "appetizer products."

Thinking of restaurant food is also a good reminder that products come in many shapes, sizes, and price ranges. When talking about strict products liability, it is common think in terms of a factory model, where an assembly line churns out "widgets" of some sort. This model makes for good examples,

and, indeed, it was factory production and attenuated chains of distribution that spurred the development of strict products liability doctrine. But contemporary products liability can extend to everything from a handmade refrigerator magnet purchased through Etsy to a multi-million-dollar jumbo jet.

Although products are generally tangible, movable items, some authorities have extended the definition of products in order to expand the scope of strict products liability. Some authorities include real property as a product in certain contexts, such as when houses are produced in a way that is analogous to the mass manufacturing of more traditional products. Some authorities even consider electric-utility services to implicate strict products liability. In doing so, they call electricity a product, even though with AC power, nothing tangible actually flows from the power plant to the customer. Of course, the motivation for expanding the definition of products in these ways comes from an understanding of the underlying policy rationale of strict products liability.

F. What Constitutes a Defect

F.1. Basics

Not every product-caused injury implicates products liability. The injury must have been caused by a *defect* in the product. Every car accident, for instance, involves a product – the car, namely. But only a relatively few car accidents happen because of an automobile defect.

The question of whether a particular product is defective is where most of the action is in a products-liability dispute. Questions of commercial sale and whether something is a product are usually straightforward. But whether or not something counts as a defect will almost always be hotly contested in litigation, and it is the issue for which products liability has the most developed doctrine.

F.2. Defect Categories

Courts and commentators have divided the universe of potential product defects into three categories: design defects, manufacturing defects, and warning defects.

A design defect is one where the product's design is defective. For instance, the engineers got their calculations wrong – or never did any calculations. A manufacturing defect stems from something gone wrong in the manufacturing process – perhaps a missing bolt, a weak weld, a bad batch of ingredients or materials. A warning defect is where the product should have carried a warning to help the consumer avoid danger.

In terms of what is necessary to resolve a claim about an alleged defect, it is not necessary – at least as a matter of logic, theory, or practical necessity – to determine which category a defect falls into. At the end of the day, it does not make a difference in terms of liability. No matter what kind of defect it is, so long as it qualifies as a defect, then it gives rise to strict liability.

Suppose our brand-new, totally untampered-with coffee maker suddenly explodes, hurting us and damaging the kitchen area. Is that a manufacturing defect or a design defect? Hmmm. From our perspective, it could be either. Splattered with hot coffee and picking glass out of our hair, we just know something is deeply wrong with that coffee maker, and after we get medical care, we're going to sue.

Yet some courts require the plaintiff to characterize the nature of the defect. As exemplified by the case of *In re Toyota Motor Corp. Unintended Acceleration* (*eodem*, infra), that can put the plaintiffs in quite a bind. Even the best engineers working for the defendant might not understand why a product has exhibited surprising, violent tendencies.

At any rate, even if a plaintiff is not required to classify a defect as a design defect, manufacturing defect, or warning defect, the tripartite division of the defect universe can be helpful in understanding the subject as a whole, including how different tests are brought to bear.

F.3. Manufacturing Defects

Manufacturing defects result when something goes wrong in the manufacturing process causing a product to differ from its intended design. A bad weld or a missing bolt are examples.

Strict liability for manufacturing defects is very much like strict liability for ultrahazardous activities. Carefulness is irrelevant. The focus is on the kind of danger the product presents.

The archetypal birthplace of a manufacturing defect is on the factory floor. The person whose actions are most closely connected with the genesis of a manufacturing defect is likely a worker earning an hourly wage.

Some commentators describe a manufacturing defect as occurring when one individual item coming off the assembly line is different from all the other items. This can be a helpful way to think of the concept of a manufacturing defect, just keep in mind that multiple items or even entire lots could share the same manufacturing defect. Mold contamination, for instance, could cause millions of units of processed food to be defective.

Of course, not every variation on the manufacturing line will render a product defective for purposes of strict products liability. Under the influential § 402A of the Restatement (Second) of Torts, a product is defective where it is "unreasonably dangerous to the user or consumer or to his property." So some things that are defects from the perspective of a quality inspector at the factory are not defects for the purpose of tort law. A blue car that comes off the assembly line with one red door would be rejected by the quality-control team. And a blemish in the finish on a fender might be called a "paint defect." But for something to be a defect in the tort sense, it must render the product unreasonably dangerous. A red door or fender blemish might be annoying to look at, but it doesn't make a car more dangerous.

The § 402A definition is useful in pairing down the universe of potential defects by specifying that a defect, to count, must make the product unreasonably dangerous. But the definition leaves unanswered the question of what it means to be unreasonably dangerous.

One way the courts have conceptualized whether a product is unreasonably dangerous is the **consumer-expectations test**. This test asks whether a reasonable consumer would expect the danger alleged to have developed into the plaintiff's injury. Under this view, a kitchen knife is not unreasonably dangerous on account of it being sharp enough to cut deeply into flesh. Why not? The reasonable consumer expects a kitchen knife to be sharp enough to cut flesh.

On the other hand, suppose a kitchen knife is prone to suddenly splintering when pressed on a cutting board, or has a tendency for the blade to disengage from the hilt and careen upward in the direction from which pressure is applied. Consumers would not expect this kind of behavior from

a kitchen knife; thus, these things would indicate that the product is defective.

So, using the consumer-expectations test, an actionable manufacturing defect occurs when both: (a) the product differs in its manufacturing from its intended design and, (b) that difference renders the product "unreasonably dangerous" so that a reasonable consumer would not have expected to be harmed by it.

F.4. Design Defects

A design defect is a problem with how the product was designed. A decision by managers to save money by gluing parts rather than welding them, for instance, could be an example of a design defect. A mistake by an engineer in composing lines of software code to be used in a controller unit might be another example of a design defect.

In contrast to manufacturing defects, the archetypal birthplace of a design defect is not on the factory floor but up in the office tower. And instead of being a one-off bad unit that makes it past inspectors, the archetypal design defect can be found in all units coming off the assembly line that share the same design.

A design defect could reflect fine choices made in the blueprints for a product. Examples could include making a strut too thin or placing two moving components too close to one another. But the defect could also result from the natural properties of materials. Asbestos, for instance, which is a naturally occurring mineral, may be found to make asbestos insulation defective on account of its friability and capacity to interact pathogenically with lung tissue. The design defect could also be the failure to install a safety feature. That is, the defect might not be what the product has, but what the product lacks, such as an electrical failsafe, a mechanical interlock, or a flame arrestor.

While the cause of action for design defects is correctly called "strict products liability," it works in practice less like strict liability for ultrahazardous activities, and more like negligence. That is because determining what counts as a design defect involves an inquiry that is similar to deciding whether a defendant has breached the duty of due care.

A design defect might result from a company lagging behind others in the industry when it comes to adopting a safer technology, rendering its products more dangerous than those of competitors. On the other hand, an entire industry's products could prove defective so long as there was a feasible safer design that could have been adopted and would have prevented the plaintiff's injury.

In deciding whether an aspect of a product's design has rendered it unreasonably dangerous, courts sometimes employ the consumer-expectations test. That test, however, can lead to some strange results in design defects cases. Take portable gasoline containers, which went through an industry-wide re-design a few years ago. Suppose that consumers are aware that the re-designed containers are prone to spills and sprays of gasoline. Because of this knowledge, consumers might expect the modern gasoline containers to be unsafe, and thus a court might hold that an injured plaintiff fails the consumer-expectation test, even if there was an easy fix to the design that could have prevented all injuries.

This sort of argument has been successful in court. For instance, in *Orfield v. International Harvester Co.,* 535 F.2d 959 (6th Cir 1976), the Sixth Circuit held that where a bulldozer lacked a canopy or cage and, therefore, obviously left the operator vulnerable to being crushed by falling trees, the operator could not succeed with a design defect claim for failure to pass the consumer-expectations test.

On the other hand, the consumer-expectations test could also lead to pro-consumer results that seem incongruous. Suppose an important product is designed with state-of-the-art technology and no safer alternative exists, yet it injures a plaintiff in a way that no consumer would expect. A broad application of the consumer-expectation test might allow recovery in such a situation, even though it would seem to run counter to the spirit of the doctrine.

An alternative to the consumer-expectations test, preferred by many authorities for alleged design defects, is the **risk-utility test**, which is also called the "risk-benefit test." This test balances the risk of the product and cost of a design change on the one hand, against the benefits of a safer design on the other hand.

The risk-utility test bears strong similarities to negligence. In fact, the risk-utility test is really the same as the Hand Formula for negligence, in

which there is liability if the burden of undertaking a precaution is outweighed by the probability of a loss multiplied by the magnitude of the loss. (See the section titled "The Negligence Calculus," in Chapter 6 of Volume One.) The Hand Formula, however, is explicitly invoked in negligence cases only infrequently, with far more attention heaped on it by scholars than judges. By contrast, the risk-utility test is bread-and-butter doctrine for products liability.

F.5. Warning Defects

A warning defect arises where the problem is not with the product as such, but instead with the instructions or information provided with the product. A weak, easily deformed carabiner keyring that, by its appearance, looks like it could be used to support the weight of a rock climber, might be defective if it does not clearly indicate that it is not to be used for climbing. (Check a nearby carabiner – you may find exactly this warning.)

Warning defects can be thought of as a particular category of design defects, where the "design" comprises the instructions written on the product and in the accompanying documentation.

G. Case: In Re Toyota Unintended Acceleration

G.1. Advance Notes

This case considers claims of manufacturing defect, design defect, and warning defect, and it analyzes those claims under the heightened pleading requirements set forth in the recent "Twiqbal" decisions of the U.S. Supreme Court interpreting the Federal Rules of Civil Procedure.

G.2. Opinion

In re Toyota Motor Corp. Unintended Acceleration Marketing, Sales Practices and Products Liability Litigation

U.S. District Court for the Central District of California
December 9, 2010

754 F.Supp.2d 1208. Case No. 8:10ML 02151 JVS (FMOx).

Judge JAMES V. SELNA:

This multi-district litigation arises out of Plaintiffs' purchase of vehicles designed, manufactured, distributed, marketed and sold by Defendants Toyota Motor Corporation dba Toyota Motor North America, Inc. ("TMC"), and its subsidiary, Toyota Motor Sales, U.S.A., Inc. ("TMS") (collectively, "Toyota" or "Defendants"). Presently before the Court are Toyota's Motions to Dismiss claims asserted by Plaintiffs claiming personal injury and/or wrongful death as a result of events of sudden, unintended acceleration ("SUA") of Toyota vehicles.

This ruling applies to all of Toyota's Motions to Dismiss, unless otherwise noted.~

I. *Factual Allegations*

In support of its Motions to Dismiss certain personal injury/wrongful death complaints, Toyota cites to four exemplar complaints. The complaints collectively raise the following claims under California law: (1) negligence, (2) products liability, (3) breach of express and implied warranties, and (4) fraudulent concealment.~ As it must pursuant to the relevant legal standard, for the purposes of Toyota's Motions to Dismiss, the Court accepts as true all well-pled factual allegations set forth in the complaints.

A. *Roberts*

Plaintiff Omar Roberts ("Roberts") is a resident of Brooklyn, New York. Roberts was the owner of a 2009 Toyota Camry. On October 7, 2008, Roberts was driving his Toyota Camry at a safe rate of speed when the vehicle "suddenly accelerated at a high rate of speed and he was unable to stop the vehicle by braking." Roberts' car struck the car in front of him, and as a result of the collision, Roberts suffered numerous traumatic injuries, including broken legs and torn tendons. Residual effects of the accident continue to impact Roberts' daily life, including his mobility. At all relevant times, Roberts was unaware of his vehicle's hidden defects.

B. *Scott*

Plaintiffs Saundra Hill Scott ("Mrs. Scott") and Raleigh Scott ("Mr. Scott"), husband and wife, reside in Lee County, Florida. On April 12, 2010, while Mrs. Scott was driving her 2004 Toyota Prius in Miami Gardens, Florida, the Prius suddenly and unexpectedly accelerated. Mrs. Scott attempted to control the sudden acceleration by stepping on the brake pedal. However, the vehicle would not stop and instead

accelerated through four lanes of traffic, and collided with a fence and a tree. The Florida Traffic Crash Report associated with the incident read, "Driver 1 stated the accelerator of the vehicle got stuck and she could not control the vehicle." The crash resulted in injury and damage to Mrs. Scott. Toyota never provided a warning to Mrs. Scott regarding the dangerous propensities of her vehicle.

C. *Akamike*

Plaintiff Romanus Akamike ("Akamike") is a resident of Texas. Akamike purchased a 2007 Toyota Camry, alleging that at the time of purchase, he thought "he was investing in a safe and reliable vehicle" and that he was "unaware of the vehicle's concealed and potentially lethal defects of which Toyota was or should have been aware." On December 15, 2009, Akamike was driving his Toyota Camry when his car "suddenly accelerated, causing the car to flip several times before coming to a stop." Akamike suffered general bruising over his entire body, left shoulder pain, and a large subdural hematoma. The day after the accident, Akamike "was found unresponsive" and transported by ambulance to a nearby medical center, where he was diagnosed as having a head injury. He was taken by helicopter to a different facility, where he had brain surgery and was discharged on December 19, 2009. Since the accident, Akamike alleges that he has undergone brain surgery and physical therapy as a result of his injuries.

D. *Riegel Breit*

Plaintiff Suzanne Riegel Breit ("Riegel Breit") is a resident of Virginia and is the administrator for the estate of Decedent Wava Joy Riegel ("Riegel"). On September 24, 2009, Riegel was driving her 2010 Toyota Camry in an intended and foreseeable manner when it suddenly and unexpectedly accelerated. The vehicle collided with a tree, resulting in fatal injuries to Riegel. Riegel Breit alleges that at no time prior to September 24, 2009 was Riegel warned of the dangerous propensities within Riegel's Camry.

II. *Legal Standard*

To survive a motion to dismiss under Fed.R.Civ.P. 12(b)(6), a plaintiff must state "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007).

III. *Plaintiffs' Products Liability~ Claims*

Toyota argues that Plaintiffs' products liability and negligence claims are deficient under *Twombly* and *Iqbal* because they fail to offer specific allegations of an actual defect in Toyota's electronic throttle control system ("ETCS" or "ETCS-i"). According to Toyota, Plaintiffs do not identify or describe any alleged defect in the ETCS-i, or sufficiently allege that the ETCS-i defect was a substantial factor in causing any of the accidents that led to Plaintiffs' injuries. Instead, Plaintiffs rely on conclusory allegations regarding past incidents of SUA events compiled from media reports, NHTSA databases, and third party complaints. In Toyota's view, because products liability and negligence claims must be plausible, Plaintiffs' failure to identify "what specific defect, if any, is causing the alleged [SUA] events" renders their allegations insufficient. Thus, Toyota reasons, Plaintiffs' products liability and negligence claims should be dismissed because Plaintiffs have "concluded, not shown, that the subject accidents were caused by a specific defect in the ETCS-i." Toyota concludes, therefore, that "[i]f the holdings of *Iqbal* and *Twombly* have any purpose, it is that the Toyota Defendants do not have to guess or speculate as to Plaintiffs' allegation of the cause of the alleged acceleration events."

Plaintiffs respond that they properly allege that their Toyota vehicles are defective because they suddenly accelerate on their own and lack a brake override system to prevent, mitigate, or stop an SUA event. Plaintiffs allege that their vehicles failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner, and Plaintiffs argue that they are not required to plead, let alone prove at trial, a more specific "defect" to prevail under California design defect law. Moreover, under *Twombly* and *Iqbal,* Plaintiffs contend that their claims suffice because " 'the very nature of a products liability action' makes it difficult 'to know with specificity before discovery what was the likely source of the defect,' or 'to pinpoint a specific source of a defect.'" Thus, Plaintiffs argue that by "detailing the product's problem, the consequences of that problem," alleging that Plaintiffs "used the product," and the "consequences that occurred[,]" their allegations "are more than sufficient" under *Iqbal* to "nudge claims across the line from conceivable to plausible." Plaintiffs describe in detail the SUA problem with Toyota vehicles, the alleged causes of SUA, Plaintiffs' use of the products in an ordinary and reasonably foreseeable manner, and the adverse consequences of that use. For these reasons, Plaintiffs argue that Toyota's motion should be denied.

A. *Products Liability Claims*

"A manufacturer may be held strictly liable for placing a defective product on the market if the plaintiff's injury results from a reasonably foreseeable use of the product." *Saller v. Crown Cork & Seal Co., Inc.,* 187 Cal.App.4th 1220, 1231 (2010). California recognizes strict liability for three types of products liability claims: design defects, manufacturing defects, and warning defects.

Here, each exemplar complaint asserts products liability claims for design and warning defects. It appears that the *Scott* and *Riegel Breit* complaints also assert claims for manufacturing defects. The Court addresses the sufficiency of the pleadings under each theory of liability.

1. *Design Defects*

"Defective design may be established under two theories: (1) the consumer expectations test, which asks whether the product performed as safely as an ordinary consumer would expect when used in an intended and reasonably foreseeable manner; or (2) the risk/benefit test, which asks whether the benefits of the challenged design outweigh the risk of danger inherent in the design." The consumer expectations test is used when "'the product is one within the common experience of ordinary consumers.'" If the facts do not "permit an inference that the product's performance did not meet minimum safety expectations of its ordinary users," the design defect must be analyzed under the risk-benefit test.

To meet the strictures of *Twombly* and *Iqbal,* Plaintiffs should identify which design defect theory is being utilized and allege facts to support that theory. For example, under the "consumer expectations test," plaintiff "'should *describe how* the [product] failed to meet the minimum safety expectations of an ordinary consumer'" of that product. Similarly, under the "risk-benefit test," a plaintiff "should allege that the risks of the design outweigh the benefits, and then "explain how the particular design of the [product] caused [plaintiff] harm"." A bare allegation that the product "suffered from a 'design defect' is an insufficient legal conclusion" under *Twombly* and *Iqbal.*

Here, the Court finds that the exemplar complaints allege sufficient facts under both the consumer expectations and risk-benefit tests. For example, the *Roberts* complaint alleges that Plaintiff was "driving at a safe rate of speed" when the "vehicle suddenly accelerated at a high rate of speed." Plaintiff was "unable to stop the vehicle by braking" and consequently "struck the car ahead of him," resulting in numerous injuries including "broken legs and torn tendons." Plaintiff further

alleges that Toyota vehicles with "the electronic throttle control system ... contain design defects that cause sudden and uncontrolled acceleration to speeds of up to 100 miles per hour or more," and that these vehicles are defective because they experience SUA events and "lack a mechanism, such as a brake override system, to prevent, mitigate, or stop [an SUA] event. Plaintiff identifies three design defects that cause or contribute to SUA events, including: (1) an inadequate fault detection system, (2) an ETCS system that is "highly susceptible to malfunction caused by various electronic failures, including ... short circuits, software glitches, and electromagnetic interference from outside sources," and (3) the absence of a brake override system. According to Plaintiff, "[t]hese defects alone, or in combination, render certain Toyota vehicles unreasonably dangerous and unable to perform as an ordinary consumer would expect." By 2007, Toyota was aware that a brake override system could prevent the SUA defect and "could have easily implemented a brake override system," but instead "hid the problem and proposed inadequate and misleading solutions" that led to "numerous fatalities and injuries, including those suffered by Plaintiff." Based on the foregoing, Plaintiff brings claims for design defects under the consumer expectations test and risk-benefit test.

The Court has no trouble discerning sufficient facts in the *Roberts* complaint that support a design-defect claim under the consumer expectations test and the risk-benefit test. Under the consumer expectations test, Toyota vehicles do not meet consumer expectations because they suddenly and unexpectedly accelerate and cannot be stopped upon proper application of the brake pedal, which happened to Plaintiff Roberts and caused his crash and injuries. Similarly, under the risk-benefit test, the ETCS-i system is defective because it causes SUA events owing to an inadequate fault detection system, electronic failures, and the absence of a brake override system, and the risks of SUA are not outweighed by any purported benefits.

Toyota argues that Plaintiffs "fail to identify a defective cause of the alleged acceleration incidents" and, as an issue of "fair notice," Plaintiffs must state "what is allegedly wrong with the vehicles other than conjecture that a brake override system could prevent an occurrence." Toyota demands a level of specificity that is not required at the pleadings stage. The defect is identified: Plaintiffs' cars suddenly and unexpectedly accelerate and do not stop upon proper application of the brake pedal. Causes of the defect are identified: an inadequate fault detection system and electronic failures. An alternative design (that allegedly would have prevented the defect from injuring

Plaintiffs) is identified: a brake override system. These allegations do more than merely recite the elements required for design defect claims under California law, and plausibly give rise to an entitlement to relief.

Accordingly, Toyota's motion is denied as it pertains to Plaintiffs' allegations of design defects.

2. *Warning Defect*

Under a "warning defect" theory, "a product may be defective even though it is manufactured or designed flawlessly." *Saller,* 187 Cal.App.4th at 1238. Liability under this theory "requires that the manufacturer knows, or should have known, of the danger of the product at the time it is sold or distributed," and that "the plaintiff prove that defendant 'did not adequately warn of a particular risk that was known or knowable in light of the generally recognized and prevailing best scientific and medical knowledge available at the time of the manufacture and distribution.'"

Here, the Court finds that the exemplar complaints allege sufficient facts to establish a claim for a "warning defect." For example, the *Roberts* complaint alleges the danger of SUA, and that "Toyota was aware of the defective nature of the acceleration control and throttle system in its vehicles since at least 2002, but failed to adequately and accurately disclose these facts to Plaintiff, the public, and NHTSA." Paragraphs 49 through 78 contain allegations about Toyota's knowledge of the alleged defects, including numerous consumer complaints and investigations by NHTSA. Paragraphs 105 through 125 contain allegations that Toyota concealed the danger of these defects from the public, including hiding reports of SUA and denying that SUA existed. Paragraphs 126 through 129 contain allegations that Toyota tried to cover up the alleged ETCS-i defects by focusing on mechanical problems with the floor mats and sticky pedals. Plaintiff also alleges that he did not know of the dangers of SUA.

Taken together, these allegations are sufficient to support a claim under a warning defect theory of liability: the particular risk allegedly known by Toyota was SUA, and that risk was not disclosed to Plaintiff. To the extent that Toyota argues more specificity is required, the Court disagrees.

Accordingly, Toyota's motion is denied as it pertains to Plaintiffs' allegations of warning defects.

3. *Manufacturing Defects*

Under a "manufacturing defect" theory, "'a defective product is one that differs from the manufacturer's intended result or from other ostensibly identical units of the same product line.'" *Lucas,* 726 F.Supp.2d at 1154. The "manufacturing defect" theory posits that "a suitable design is in place, but that the manufacturing process has in some way deviated from that design." *In re Coordinated Latex Glove Litig.,* 99 Cal.App.4th 594, 613 (2002). To satisfy *Twombly* and *Iqbal,* plaintiffs should "*identify/explain how* the [product] either deviated from [defendant's] intended result/design or *how* the [product] deviated from other seemingly identical [product] models."~

Here, the Court finds that the *Scott* and *Riegel Breit* complaints do not adequately assert claims for manufacturing defects under *Twombly* and *Iqbal.* For example, the *Scott* complaint alleges that the "ETCS systems and their various components were defectively designed *and manufactured* in that they were highly susceptible to malfunction caused by various electronic failures, including but not limited to short circuits and electromagnetic interference from electromagnetic sources outside the vehicle." (italics added). Plaintiff further alleges that "the Subject Prius, which was being used in a reasonably foreseeable manner, failed to perform as an ordinary consumer would have expected, *failed to conform with its manufacturing specifications,* failed to contain adequate warnings, and its design was a substantial factor in causing injuries." (italics added). Taken together, these two allegations seemingly allege a manufacturing defect. However, the *Scott* complaint does not offer any allegations of how the vehicle deviated from Toyota's intended design or other product models. *See Lucas,* 726 F.Supp.2d at 1155. Instead, the *Scott* complaint offers bare allegations of a manufacturing defect, and thus dismissal is warranted.

Accordingly, Toyota's motion is granted as it pertains to Scott and Riegel Breit's allegations of manufacturing defects. The dismissal is without prejudice.⤷Leave to amend should be granted when amendment would not be futile. Because it is conceivable that Plaintiffs could allege facts sufficient to support a claim under a manufacturing defects theory of liability, the Court grants leave to amend.⤶

With respect to Plaintiffs' design and warning defect claims, Toyota cannot credibly claim that it does not comprehend Plaintiffs' theory from the pleadings, nor that it is handicapped in responding to the Complaint.~

IT IS SO ORDERED

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G.3. Postscript on In re Toyota Motor Corp. Unintended Acceleration

Although the plaintiffs in *In re Toyota* contended that Toyota hid information about unintended acceleration events, the car company trumpeted its openness and denied that defects were to blame for the plaintiffs' injuries. In November 2013, Carly Schaffner, spokesperson for Toyota Motor Sales U.S.A., was quoted as saying in an e-mail about the litigation before Judge Selna, "Despite nearly three years of litigating this case and unprecedented access to Toyota's source code, plaintiff's counsel have never replicated unintended acceleration in a Toyota vehicle and have failed to demonstrate that any alleged defect actually caused the accident at issue in this case."

About a month later, however, Judge Selna announced that Toyota was asking for a temporary halt to the litigation to begin an "intensive settlement process."

Something had changed, causing Toyota's sudden move to resolve the tort cases against it.

One factor seems to have been a parallel criminal prosecution being pursued against Toyota. The U.S. Department of Justice charged Toyota with committing criminal wire fraud in the course of covering up safety problems. Wire fraud, under 18 U.S.C. §1343, requires a scheme to intentionally deceive someone in order get money from them, plus the use of interstate wire communications (such as telephone or internet) to accomplish this.

The DOJ action ended in March 2014 when Toyota agreed to pay a record fine of $1.2 billion and to submit to independent monitoring as part of a deferred prosecution agreement. Toyota also signed a statement saying, "Toyota admits that it misled U.S. consumers by concealing and making deceptive statements about two safety issues affecting its vehicles … "

The Toyota episode suggests how criminal law and administrative regulations can interact with tort liability in the defective products area.

G.4. Reading: DOJ Press Release on Toyota Unintended Acceleration

The U.S. Department of Justice issued a press release following its deferred prosecution agreement with Toyota. The document provides a fuller account of the facts leading up to Toyota's decision to start settling the cases against it.

Justice Department Announces Criminal Charge Against Toyota Motor Corporation and Deferred Prosecution Agreement with $1.2 Billion Financial Penalty

United States Department of Justice Office of Public Affairs
March 19, 2014

~In the fall of 2009, Toyota deceived consumers and its U.S. regulator, the National Highway Traffic Safety Administration ("NHTSA"), by claiming that it had "addressed" the "root cause" of unintended acceleration in its vehicles through a limited safety recall of eight models for floor-mat entrapment, a dangerous condition in which an improperly secured or incompatible all-weather floor mat can "trap" a depressed gas pedal causing the car to accelerate to a high speed. Such public assurances deceived customers and NHTSA in two ways: First, at the time the statements were made, Toyota knew that it had not recalled some cars with design features that made them just as susceptible to floor-mat entrapment as some of the recalled cars. Second, only weeks before these statements were made, Toyota had taken steps to hide from NHTSA another type of unintended acceleration in its vehicles, separate and apart from floor-mat entrapment: a problem with accelerators getting stuck at partially depressed levels, known as "sticky pedal."

Floor-Mat Entrapment: A Fatal Problem

Toyota issued its misleading statements, and undertook its acts of concealment, against the backdrop of intense public concern and scrutiny over the safety of its vehicles following a widely publicized Aug. 28, 2009 accident in San Diego, Calif., that killed a family of four. A Lexus dealer had improperly installed an incompatible all-weather floor mat into the Lexus ES350 in which the family was traveling, and that mat entrapped the accelerator at full throttle. A 911 emergency call made from the out-of-control vehicle, which was speeding at over 100

miles per hour, reported, "We're in a Lexus ... and we're going north on 125 and our accelerator is stuck ... there's no brakes ... we're approaching the intersection ... Hold on ... hold on and pray ... pray." The call ended with the sound of the crash that killed everyone in the vehicle.

The San Diego accident was not the first time that Toyota had faced a problem with floor-mat entrapment. In 2007, following a series of reports alleging unintended acceleration in Toyota and Lexus vehicles, NHTSA opened a defect investigation into the Lexus ES350 model (the vehicle involved in the 2009 San Diego accident), and identified several other Toyota and Lexus models it believed might likewise be defective. Toyota, while denying to NHTSA the need to recall any of its vehicles, conducted an internal investigation in 2007 which revealed that certain Toyota and Lexus models, including most of the ones that NHTSA had identified as potentially problematic, had design features rendering entrapment of the gas pedal by an all-weather floor mat more likely. Toyota did not share these results with NHTSA. In the end, the Company negotiated a limited recall of 55,000 mats (no vehicles) – a result that Toyota employees touted internally as a major victory: "had the agency ... pushed for recall of the throttle pedal assembly (for instance), we would be looking at upwards of $100 million + in unnecessary costs."

Shortly after Toyota announced its 2007 mat recall, company engineers revised internal design guidelines to provide for, among other things, a minimum clearance of 10 millimeters between a fully depressed gas pedal and the floor. But Toyota decided those revised guidelines would only apply where a model was receiving a "full model redesign" – something each Toyota and Lexus model underwent only about once every three to five years. As a result, even after the revised guidelines had been adopted internally, many new vehicles produced and sold by Toyota – including the Lexus ES350 involved in the 2009 San Diego accident – did not comply with Toyota's 2007 guidelines.

After the fatal and highly publicized San Diego accident, Toyota agreed to recall eight of its models, including the ES350, for floor-mat entrapment susceptibility. Thereafter, as part of an effort to defend its brand image, Toyota began issuing public statements assuring customers that this limited recall had "addressed the root cause of unintended acceleration" in its U.S.-sold vehicles.

As Toyota knew from internal testing it had completed by the time these statements were made, the eight-model recall had not in fact "addressed the root cause" of even the floor-mat entrapment problem.

Models not recalled – and therefore still on the road – bore design features rendering them just as susceptible to floor-mat entrapment as those within the recall population. One engineer working at a Toyota facility in California had concluded that the Corolla, a top-selling car that had not been recalled, was among the three "worse" vehicles for floor-mat entrapment. In October 2009, Toyota engineers in Japan circulated a chart showing that the Corolla had the lowest rating for floor-mat entrapment under their analysis. None of these findings or this data were shared with NHTSA at the time.

The Sticky Pedal Problem

What is more misleading, at the same time it was assuring the public that the "root cause" of unintended acceleration had been "addressed" by the 2009 eight-model floor-mat entrapment recall, Toyota was hiding from NHTSA a second cause of unintended acceleration in its vehicles: the sticky pedal. Sticky pedal, a phenomenon affecting pedals manufactured by a U.S. company ("A-Pedal Company") and installed in many Toyota brand vehicles in North America as well as Europe, resulted from the use of a plastic material inside the pedals that could cause the accelerator pedal to become mechanically stuck in a partially depressed position. The pedals incorporating this plastic were installed in, among other models, the Camry, the Matrix, the Corolla, and the Avalon sold in the United States.

The sticky pedal problem surfaced in Europe in 2008. There, reports reflected instances of "uncontrolled acceleration" and unintended acceleration to "maximum RPM," and customer concern that the condition was "extremely dangerous."

In early 2009, Toyota circulated to European Toyota distributors information about the sticky pedal problem and instructions for addressing the problem if it presented itself in a customer's vehicle. These instructions identified the issue as "Sudden RPM increase/vehicle acceleration due to accelerator pedal sticking," and stated that should a customer complain of pedal sticking, the pedal should be replaced with pedals manufactured by a company other than A-Pedal Company. Contemporaneous internal Toyota documents described the sticky pedal problem as a "defect" that was "[i]mportant in terms of safety because of the possibility of accidents."

Toyota did not then inform its U.S. regulators of the sticky pedal problem or conduct a recall. Instead, beginning in the spring of 2009, Toyota quietly directed A-Pedal Company to change the pedals in new productions of affected models in Europe, and to plan for the same

design changes to be rolled out in the United States (where the same problematic pedals were being used) beginning in the fall of 2009. The design change was to substitute the plastic used in the affected pedal models with another material and to change the length of the friction lever in the pedal.

Meanwhile, the sticky pedal problem was manifesting itself in U.S. vehicles. On or about the same day the San Diego floor-mat entrapment accident occurred, staff at a U.S. Toyota subsidiary in California sent a memorandum to staff at Toyota in Japan identifying as "critical" an "unintended acceleration" issue separate and apart from floor-mat entrapment that had been identified in an accelerator pedal of a Toyota Matrix vehicle in Arizona. The problem identified, and then reproduced during testing of the pedal on Sept. 17, 2009, was the sticky pedal problem. Also in August, the sticky pedal problem cropped up in a U.S. Camry.

On Sept. 9, 2009, an employee of a U.S. Toyota subsidiary who was concerned about the sticky pedal problem in the United States and believed that Toyota should address the problem prepared a "Market Impact Summary" listing (in addition to the August 2009 Matrix and Camry) 39 warranty cases that he believed involved potential manifestations of the sticky pedal problem. This document, which was circulated to Toyota engineers and, later, to staff in charge of recall decisions in Japan, designated the sticky pedal problem as priority level "A," the highest level.

By no later than September 2009, Toyota recognized internally that the sticky pedal problem posed a risk of a type of unintended acceleration – or "overrun," as Toyota sometimes called it – in many of its U.S. vehicles. A September 2009 presentation made by a manager at a U.S. Toyota subsidiary to Toyota executives gave a "current summary of O/R [overrun] types in NA [North American] market" that listed the three confirmed types as: "mat interference" (i.e., floor-mat entrapment), "material issue" (described as "pedal stuck and ... pedal slow return/deformed") and "simultaneous pedal press" by the consumer. The presentation further listed the models affected by the "material issue" as including "Camry, Corolla, Matrix, Avalon."

Hiding Sticky Pedal from NHTSA and the Public

As noted, Toyota had by this time developed internal plans to implement design changes for all A-Pedal-Company-manufactured pedals in U.S. Toyota models to address, on a going-forward basis, the

still-undisclosed sticky pedal problem that had already been resolved for new vehicles in Europe. On Oct. 5, 2009, Toyota engineers issued to A-Pedal Company the first of the design change instructions intended to prevent sticky pedal in the U.S. market. This was described internally as an "urgent" measure to be implemented on an "express" basis, as a "major" change – meaning that the part number of the subject pedal was to change, and that all inventory units with the old pedal number should be scrapped.

On Oct. 21, 2009, however, in the wake of the San Diego floor-mat entrapment accident, and in the midst of Toyota's discussions with NHTSA about its eight-model entrapment recall, engineers at Toyota and the leadership of Toyota's recall decision group decided to cancel the design change instruction that had already been issued and to suspend all remaining design changes planned for A-Pedal Company pedals in U.S. models. U.S. Toyota subsidiary employees who had been preparing for implementation of the changes were instructed, orally, to alert the manufacturing plants of the cancellation. They were also instructed not to put anything about the cancellation in writing. A-Pedal Company itself would receive no written cancellation at this time; instead, contrary to Toyota's own standard procedures, the cancellation was to be effected without a paper trail.

Toyota decided to suspend the pedal design changes in the United States, and to avoid memorializing that suspension, in order to prevent NHTSA from learning about the sticky pedal problem.

In early November 2009, Toyota and the leadership of a U.S. Toyota subsidiary became aware of three instances of sticky pedal in U.S. Corollas. Shortly thereafter, the leadership of the recall decision group within Toyota discussed a plan to finally disclose the sticky pedal problem to NHTSA. The recall decision group was aware at this time not only of the problems in the three Corollas in the United States but also of the problems that had surfaced in a Matrix and a Camry in August 2009 and been reproduced through testing in September 2009. The group was also familiar with the sticky pedal problem in Europe, the design changes that had been implemented there, and the cancellation and suspension of similar planned design changes in the United States. Knowing all of this, the group's leadership decided that (a) it would not disclose the September 2009 Market Impact Summary to NHTSA; (b) if any disclosure were to be made to NHTSA, it would be limited to a disclosure that there were some reports of unintended acceleration apparently unrelated to floor-mat entrapment; and (c) NHTSA should be told that Toyota had made no findings with respect

to the sticky pedal problem reflected in the reports concerning the three U.S. Corollas, and that the investigation of the problem had just begun.

On Nov. 17, 2009, before Toyota had negotiated with NHTSA a final set of remedies for the eight models encompassed by the floor-mat entrapment recall, Toyota informed NHTSA of the three Corolla reports and several other reports of unintended acceleration in Toyota model vehicles equipped with pedals manufactured by A-Pedal Company. In Toyota's disclosure to NHTSA, Toyota did not reveal its understanding of the sticky pedal problem as a type of unintended acceleration, nor did it reveal the problem's manifestation and the subsequent design changes in Europe, the planned, cancelled, and suspended design changes in the United States, the August 2009 Camry and Matrix vehicles that had suffered sticky pedal, or the September 2009 Market Impact Summary.

Toyota's Misleading Statements

After the August 2009 fatal floor-mat entrapment accident in San Diego, several articles critical of Toyota appeared in U.S. newspapers. The articles reported instances of Toyota customers allegedly experiencing unintended acceleration and the authors accused Toyota of, among other things, hiding defects related to unintended acceleration.

On Nov. 25, 2009, Toyota, through a U.S. subsidiary, announced its floor-mat entrapment resolution with NHTSA. In a press release that had been approved by Toyota, the U.S. subsidiary assured customers: "The safety of our owners and the public is our utmost concern and Toyota has and will continue to thoroughly investigate and take appropriate measures to address any defect trends that are identified." A spokesperson for the subsidiary stated during a press conference the same day, "We're very, very confident that we have addressed this issue."

In truth, the issue of unintended acceleration had not been "addressed" by the remedies announced. A-Pedal Company pedals which could experience stickiness were still on the road and still, in fact, being installed in newly-produced vehicles. And the best-selling Corolla, the Highlander, and the Venza – which had design features similar to models that had been included in the earlier floor-mat entrapment recall – were not being "addressed" at all.

Again, on Dec. 23, 2009, Toyota responded to media accusations that it was continuing to hide defects in its vehicles by authorizing a U.S.

Toyota subsidiary to publish the following misleading statements on the subsidiary's website: "Toyota has absolutely not minimized public awareness of any defect or issue with respect to its vehicles. Any suggestion to the contrary is wrong and borders on irresponsibility. We are confident that the measures we are taking address the root cause and will reduce the risk of pedal entrapment." In fact, Toyota had "minimized public awareness of" both sticky pedal and floor-mat entrapment. Further, the measures Toyota had taken did not "address the root cause" of unintended acceleration, because Toyota had not yet issued a sticky pedal recall and had not yet recalled the Corolla, the Venza, or the Highlander for floor-mat entrapment.

Toyota's False Timeline

When, in early 2010, Toyota finally conducted safety recalls to address the unintended acceleration issues it had concealed throughout the fall of 2009, Toyota provided to the American public, NHTSA and the United States Congress an inaccurate timeline of events that made it appear as if Toyota had learned of the sticky pedal in the United States in "October 2009," and then acted promptly to remedy the problem within 90 days of discovering it. In fact, Toyota had begun its investigation of sticky pedal in the United States no later than August 2009, had already reproduced the problem in a U.S. pedal by no later than September 2009, and had taken active steps in the months following that testing to hide the problem from NHTSA and the public.

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G.5. Questions to Ponder About *In re Toyota Motor Corp.*

A. Three spheres of law played a part in the Toyota unintended acceleration controversy: federal regulation, federal criminal law, and tort law. Are all three necessary? Do you think the full story would have come to light if legal action occurred in only one sphere or two?

B. Do you agree with the Judge Selna's opinion that the plaintiffs' allegations are sufficient under modern pleading requirements? Should they be? What is to be made of Toyota's argument that it lacked "fair notice" of what was allegedly wrong with the vehicles.

C. If Toyota had continued to vigorously defend the civil lawsuits against it following the announcement of the deferred prosecution agreement,

what do you think would have been the result? If you were advising Toyota on how to proceed, what factors would you take into account? What are the pros and cons of continuing a hardline defensive posture versus openly soliciting settlements?

H. Problem: Hot Water

Tomorrow Temp, a manufacturer, is the exclusive supplier of water heaters to Home Hangar, a retail chain of do-it-yourself stores. Tomorrow Temp's XH-70 model has a temperature-control adjustment knob near the bottom of the unit. The knob is set to the off position when the black line on the face of the knob points straight down – 6 o'clock if it were a clockface. Directly below the knob, on the control-unit faceplate, is the word OFF. The knob can be turned clockwise until it reaches the 5 o'clock position, where the faceplate has the word HIGHEST. The only other indications on the faceplate are 10 regularly spaced black dots arranged in a circle around the knob between OFF and HIGHEST.

Three customers – Alexis, Burton, and Charlie – bought the XH-70 at Home Hangar and installed it themselves. Alexis's unit was manufactured first, followed by Burton's and then Charlie's. Another person, Dinara, didn't buy an XH-70, but she stayed in a house where one was installed.

Alexis likes hot water, so she set the temperature control to the 3 o'clock position. For her first shower, she turned the faucet lever to the hottest setting and let the water run for a couple of minutes. She then walked under the spray of water. The water was so hot that she received third-degree burns. She required weeks of hospitalization and extensive skin grafts.

Burton set the temperature control to the 12 o'clock position. Burton's shower has separate hot and cold knobs. He turned both on for a mixture and let the shower warm up. He then walked under the stream of water and received second and third degree burns. His injuries required emergency room treatment and follow-up outpatient care. Unlike Alexis's unit, Burton's later-manufactured unit has a sticker above the temperature control unit that states "WARNING: EXTREMELY HOT WATER CAN BURN." Tomorrow Temp began adding the sticker to all new XH-70 units after receiving various customer complaints.

Charlie set the temperature control to the 10 o'clock position. His bathtub has separate hot and cold taps. He made a bath using only the hot tap, and then he waited 10 minutes before getting in. The water was so hot that he received second- and third-degree burns over most of his body. Like Burton's unit, Charlie's unit shipped with the warning sticker above the control knob. In addition, Charlie's unit included an updated 67-page instruction manual. Thanks to complaints from the likes of Alexis and Burton, the manual that shipped with Charlie's unit contains the following statement on page 59:

> "Tomorrow Temp water heaters are powerful because our customers have told us they want to be able to fill a bathtub, leave the house for two hours, and come back to a bath that is still steamy hot. If you do not need this capability – perhaps because you take showers or because you use the bathtub relatively soon after filling it – then you should turn the temperature control knob to the 8 o'clock position or lower. Otherwise, you run the risk of having uncomfortably hot or even scalding water."

Dinara was housesitting at a home where an XH-70 had been installed by a professional contractor. The water heater – an older unit without either the warning sticker or the updated instructional manual – had not been adjusted since it was installed by the contractor. When Dinara arrived at the house, one of the first things she did was look at the water heater. Always thoughtful of others, Dinara wanted to keep utility usage down during her stay. Plus, she was concerned about safety – after all, she had recently seen something on the television news about burns from super-heated tap water. Seeing that the temperature control had been set to a position between the 4 o'clock dot and the HIGHEST setting, Dinara decided to turn the knob down to below the 7 o'clock dot. Unfortunately for Dinara, in this particular water heater, the temperature control assembly underneath the faceplate was inserted backward at the factory. Because of this, "turning down" the temperature actually caused the water temperature to go up. When Dinara took a shower, she received extensive third degree burns requiring skin grafts and months of hospitalization.

Questions:

A. Analyze Alexis's case for products liability.

B. Analyze Burton's case for products liability.

C. Analyze Charlie's case for products liability.

D. Analyze Dinara's case for products liability.

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Remedies

27. General Issues in Remedies

"For every evil under the sun,
There is a remedy, or there is none.
If there be one, try and find it;
If there be none, never mind it."

– Mother Goose Nursery Rhyme, recorded in 1765

A. Lead-in

It has sometimes been said that a law without a remedy is a suggestion.

One can spend so much time thinking about the elements of and defenses to tort liability, that remedies might be forgotten. Yet remedies are the point on the horizon towards which all of the plaintiff's ships are steered and around which all the defendant's battlements are arrayed. Without remedies, everything else is irrelevant.

This chapter discusses some basic remedies concepts in broad outline. In the following chapters, we will explore two aspects of remedies in more detail: compensatory damages and punitive damages.

B. Legal and Equitable Remedies

Since the American court system descended from that of England, it maintains remnants of a distinction that pervaded the English courts – that between "law" and "equity." English courts of law impaneled juries and practiced the common-law method, with the actions of a court in any given case being bound by precedent of courts that had considered similar cases in the past. The English courts of equity descended from the use of royal power

to grant remedies based on notions of fairness, and they were unconstrained by precedent.

The English courts of law and equity also offered different remedies. Courts of law were limited in the remedies they could provide. For the most part, courts of law awarded damages, but they could also award some non-damages remedies, such as *replevin*, which allows for the pre-trial seizure of a wrongfully taken chattel, and *ejectment*, which can be used to force a defendant off the plaintiff's land. Courts of equity, sitting without juries, had broad power to fashion remedies on the basis of what seemed appropriate. Notably, equitable courts could issue an injunction, in which a party was ordered to specifically perform some action or refrain from performing some action.

In the United States, the distinction between courts of law and courts of equity has mostly vanished. One jurisdiction where the distinction remains alive and well is Delaware. In the First State, the Court of Chancery, which handles a heavy caseload owing to the great number of corporations registered in Delaware, is an equitable court in the classical tradition. The Delaware Court of Chancery measures its jurisdiction in equity in terms of the jurisdiction that was exercised by the High Court of Chancery of Great Britain at the time the American colonies formally separated themselves from British authority.

For the most part, the remaining distinction between legal and equitable relief in American law concerns whether or not the party seeking the remedy will be entitled to a jury. A suit for damages – owing to its legal nature – can be accompanied by a demand for a jury trial. This is important for plaintiffs' attorneys who often anticipate receiving a more favorable result from a jury than they would get from a judge sitting alone. In contrast, the decision as to whether or not to grant an injunction is generally left to a judge sitting alone. By seeking an equitable remedy, a plaintiff often loses the right to a jury.

C. Damages

An award of damages is a legal remedy ordering the defendant to pay money to the plaintiff.

At common law, there are three types of damages: compensatory damages, punitive damages, and nominal damages. The most basic kind of

damages award is for **compensatory damages**. These are damages to compensate the plaintiff for harm endured, and they are measured by the amount needed to make the plaintiff whole again. Compensatory damages, the subject of the next chapter, are focused on the plaintiff and are concerned with the plaintiff's experience. By contrast, **punitive damages** are aimed at punishing the defendant. The focus is not on the plaintiff, but on the defendant – whether the defendant acted with intent, malice, recklessness, etc. Then there are **nominal damages** – damages in name only. As discussed in connection with intentional torts, nominal damages are a symbolic amount, such as $1, which indicates that the plaintiff has proved the invasion of a legally protected right, even if no other damages are proved.

Other sorts of damages are created by statute. The variety of statutory causes of action on the books corresponds to a variety of damages schemes. For instance, in copyright law, successful plaintiffs can get a measure of compensatory damages determined by the defendant's profits derived from the infringement, or the plaintiff's lost sales, whichever is larger. Sometimes this amount, however, is trifling or nonexistent. In such cases, copyright holders who registered their copyright claim early enough will have the option of electing what are called **statutory damages**. In copyright, statutory damages are a minimum of $750 per infringement, even if the defendant acted innocently and without any commercial effect. 17 U.S.C. § 504. For willful infringers, per-infringement statutory damages can swell to $150,000. *Id.* Statutory damages can be found in state statutes as well. In California, a statute providing a cause of action for unauthorized use of a person's name, image, or likeness – called right-of-publicity infringement – provides for statutory damages of a minimum of $750. Cal. Civil Code § 3344.

Another species of damages created by statute is **treble damages**, where the plaintiff receives a total award of three times the computed compensatory damages. Treble damages are allowed in cases analogous to those supporting an award of punitive damages in common-law torts. Examples of statutes authorizing treble damages are civil racketeering suits, civil antitrust violations, patent infringement, and trademark infringement.

D. Additur and Remittitur

When a jury reaches a verdict that assesses a certain amount of damages, the parties can argue to the court that the amount needs to be increased or decreased. An increase or decrease of a jury's computation of damages can be accomplished through the twin doctrines of additur and remittitur. ("Additur" rhymes loosely with "mad at her," and "remittitur" sounds something like "ree-mitt-it-urr.")

Additur and remittitur involve some sleight of hand. A judge may not directly increase or decrease a jury verdict. Instead, at the urging of one party, the court can threaten to order a new trial unless the other party agrees to accept a less favorable assessment of damages.

With additur, a plaintiff moves for a new trial if she or he believes the defendant has been undeservedly blessed with a lowball jury verdict. Assuming the court agrees that the measure of damages is too low, the court offers the defendant the chance to submit to an increased award – augmented to the point the court thinks is appropriate – instead of having the court grant the plaintiff's motion for a new trial.

In truth, additur is not much of a choice. If the defendant insists on a new trial, the award could be even bigger. If the new trial produces the same verdict or one even more favorable to the defendant, then the defendant faces the prospect of yet another additur.

Remittitur is the opposite. The defendant moves for a new trial on the ground that the plaintiff's award of damages is unreasonably large. The court agrees that the measure of damages is too much. Before ordering a new trial, the court offers the plaintiff the chance to take a reduced damage award – winnowed down to what the court thinks is appropriate. Again, it's not much of a choice, because if the plaintiff does go through a new trial, there is nothing to stop the plaintiff from facing remittitur again.

Although it seems counterintuitive, remittitur, while lowering the amount of damages, can be seen as doing the plaintiff a favor, since going through a new trial likely would only make things worse.

E. Attorneys' Fees

At the end of the day, the lawyers need to be paid. You might think it would be fair for the losing side of a lawsuit to pay the attorneys' fees of the

winning side. Indeed, that is how it is done in most of the world. In the United States, however, each party is expected to bear its own costs, including paying their own lawyers, unless there is a contract or statute that requires an award of such fees to the prevailing side. The doctrine that everyone pays their own lawyers is called **the American Rule**.

The default rule in nearly every other country is called **the English Rule**. Under the English Rule, the losing side pays the winning side's fees. This rule is founded on the idea that since legal representation is a practical necessity in a lawsuit, forcing the side that was right all along to absorb the cost of that representation is a wrong that should be avoided.

The English Rule arguably aids the administration of justice by keeping marginal claims out of court. Yet it can also have a disproportionate effect of discouraging poorer parties from suing wealthier ones. Just as wealthier people tend to spend more on their houses and cars, so too they tend to spend more on their lawyers. The same is true for large versus small businesses. As a result, under the English Rule, when a David takes on a Goliath, the parties face asymmetrical risks. If David unsuccessfully sues Goliath, Goliath's victory, coming with an award of fees, could wipe out David's business entirely. In contrast, if Goliath wants to sue David, it faces minimal risk. Even if Goliath loses, David's fees can be readily absorbed into the bottom line.

Not only are the risks disproportionate under the English Rule, so are the benefits. After all, the more a defendant spends on attorneys' fees – crafting better arguments, filing more motions, digging deeper with research and discovery, etc. – the more likely it is that the defendant will win and not have to pay any of those costs. By the same token, comparatively richer plaintiffs face proportionally smaller disincentives to filing marginal lawsuits. Not only can they better absorb a loss, and not only can they increase their odds of winning through extravagant spending on lawyers, but they also stand a better chance of getting a favorable settlement, since the defendant is likely looking to get out early and cut its losses.

There seems to be little question that the English Rule would be fair if attorneys' fees were always kept low and affordable, and if courts never reached an unjust result. The American Rule, however, takes a more realist attitude in this regard. The emphasis is on access to the courts and not repelling plaintiffs because of their inability to bear the risk of paying the other side's fees.

Despite the broad rejection of the loser-pays system in the United States, there is a well-recognized **bad-faith exception to the American Rule**. As a court in the District of Columbia explained,

> A court may award attorneys' fees against a party who has acted in bad faith, vexatiously, wantonly, or for oppressive reasons in connection with the litigation. This bad faith exception is intended to punish those who have abused the judicial process and to deter those who would do so in the future. Courts also may award attorneys' fees against a party who exhibits a willful disobedience of a court order. In awarding attorneys' fees, however, a party is not to be penalized for maintaining an aggressive litigation posture, nor are good faith assertions of colorable claims or defenses to be discouraged. In attempting to deter bad faith litigation through attorney fee awards, the court must scrupulously avoid penalizing a party for a legitimate exercise of the right of access to the courts. For this reason, the standards of bad faith are necessarily stringent. Under these stringent standards, the awarding of attorneys' fees for bad faith litigation is proper only under extraordinary circumstances or when dominating reasons of fairness so demand.

In re Est. of Delaney, 819 A.2d 968, 997-98 (D.C. App. 2003) (cites and internal quotes omitted).

The bad-faith exception is not generally motivated by a desire to help worthy parties. Instead, the idea is "to punish those who have abused the judicial process and to deter those who would do so in the future." *Synanon Found., Inc. v. Bernstein,* 517 A.2d 28, 37 (D.C. App. 1986).

In addition to the bad-faith exception to the American Rule, many statutory causes of action come with fee-shifting provisions.

Sometimes statutes give courts discretion to award fees to the prevailing party where doing so would serve the interests of justice. Such flexibility allows courts to follow a bear-your-own-fees model in close cases where both sides could have reasonably thought they were likely to prevail. Yet the court can order fees from a plaintiff who pursued a non-meritorious case or from a bratty, foot-shuffling defendant who insisted on being taken to court rather than paying what was owed.

Other statutes are more aligned with the straight-up loser-pays English Rule. An example of this kind of provision is found in California's right of publicity statute, Cal. Civil Code § 3344, which provides, "The prevailing party in any action under this section shall also be entitled to attorney's fees and costs."

The case of *Kirby v. Sega of America, Inc.,* 144 Cal.App.4th 47 (Cal. App. 2006) shows how such a provision can work. The plaintiff, Kierin Kirby, is a singer best known as the singer for the group Dee-Lite, which produced the 1990 one-hit-wonder "Groove is in the Heart." Kirby sued videogame-maker Sega for right-of-publicity infringement based on Sega's in-game depiction of a character named Ulala in "Space Channel 5," a video game first released in North America in 2000. Kirby alleged that Ulala's look was a ripoff of Kirby's style. Ulala sported a cheerleader-type midriff-exposing outfit with a prominent "5," worn with platform boots, pigtails, and a blue jet-pack. Kirby produced evidence of having worn cheerleader-type skirts, cropped tops with numerals on the chest, a blue backpack, hair in pigtails, and similar footwear. Kirby sued both under the common-law right of publicity and under Cal. Civil Code § 3344. Both claims are similar, although § 3344 offers some potential upside with statutory damages in exchange for showing that the defendant "knowingly" appropriated the claimant's identity.

The case was close on many fronts, but Kirby lost on appeal. When she did, because she had alleged § 3344, she was ordered to pay attorneys' fees of more than $608,000. The appeals court wrote:

> Kirby concedes section 3344's directive that fees "shall" be awarded to the prevailing party in a statutory appropriation action is clearly mandatory. Nevertheless, she argues the statute should be applied permissively and only in cases in which the suit is deemed frivolous or brought in bad faith or without substantial justification. Otherwise, she insists, the statute "presents a clear disincentive for plaintiffs to enforce ... ." Her argument is misdirected. The mandatory fee provision of § 3344(a) leaves no room for ambiguity. Whether the course is sound is not for us to say. This is the course the Legislature has chosen and, until that body changes course, we must enforce the rule. The fee award was proper.

Kirby, 144 Cal.App.4th at 62.

On top of the $608,000 in fees from trial court proceedings, Kirby was ordered to pay the additional fees incurred by Sega in the appeal.

If Kirby had alleged only the common-law tort of right of publicity, she would not have been exposed to the downside of paying Sega's legal bills. It's an important lesson to remember in practice: Always think about liability for attorneys' fees when suing on a contract or statutory cause of action.

Another important difference between the United States and other countries on the question of attorneys' fees is whether **contingency fees** are allowed. Instead of paying an hourly rate for a lawyer, plaintiffs in the U.S. can hire a willing lawyer on a contingent basis, such that the lawyer only gets paid if the client obtains a recovery.

The permissiveness toward contingency fees in the United States is largely unique in the world. American plaintiffs' attorneys paid on a contingency fee basis typically take 33% to 40% of a recovery. As a point of comparison, England allows "conditional fees," but at a lower rate – no more than double what the lawyer would have charged by the hour. Most other countries ban contingent fee arrangements outright.

The American contingent fee system allows plaintiffs to avoid some of the risks posed by lawsuits. Specifically, it allows plaintiffs to avoid the risk of uncompensated attorneys' fees, should they lose their suit. This risk is instead shifted to the plaintiff's attorney. The attorney is able to absorb that risk by taking on a basket of representations, where winners will offset losers.

Those who laud the contingency fee system say it offers a means for deserving plaintiffs to get representation regardless of their financial wherewithal. Those who condemn contingency fees say they encourage wasteful litigation.

Contingency fees do not cover litigation costs apart from attorney fees. That is, they do not cover filing fees and expert-witness fees. Plaintiffs remain responsible for these, although in many places lawyers may make an arrangement by which they advance those costs to a plaintiff with the anticipation that they will write them off as a loss in the event the plaintiff does not prevail.

F. Taxation of Damages

Taxation of damages can be complicated. In general, however, the tax treatment of compensatory damages is based on "the origin of the claim" – that is, what the damages are replacing. Damages for the cost of property repairs may not be taxed at all, or in some cases, they might be treated as capital gains. Damages for lost wages or lost business earnings are typically taxed as income.

An important exception to the origin-of-the-claim doctrine is § 104(a)(2) of the Internal Revenue Code, which excludes from taxable income compensatory damages "received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal physical injuries or physical sickness." Any damages springing from physical injury are tax-free under this provision. That includes medical expenses, pain and suffering, and even lost wages – so long as the primary injury sued on is physical.

Punitive damages and interest are taxable. This is so even if they stem from a physical injury.

Settlements are taxed the same as if they were judgments. And because tax treatment is different depending on what the damages are meant to address, when lawyers are negotiating a settlement, they should keep the tax consequences in mind. If the plaintiff and defendant agree to characterize settlement amounts in certain ways, that could have an effect on the plaintiff's tax burden. It is often a good idea to consult a tax attorney when thinking about how to structure a settlement.

G. Taxes and Fees: The Bottom Line

Attorneys' fees can interact with taxes to produce some surprisingly low recoveries for plaintiffs. Suppose the plaintiff, having hired an attorney on a contingency-fee basis, receives a $1 million judgment. If the plaintiff owes taxes on this amount, the plaintiff owes the taxes on the *entire* amount – without first deducting the fees. The tax bill will probably be around $350,000. Then the plaintiff must pay the attorney's contingency fee. Suppose that fee is 38% or $380,000. Subtracted from the $650,000 remaining after taxes, that leaves the plaintiff with $270,000. So far, the

government and the lawyer have gotten far more than the plaintiff. But the plaintiff still does not get to keep all of what remains. The plaintiff must pay the various litigation costs – charges for court filings, deposition stenographers, videographers, and, of course, expert witnesses. Expert fees in particular can be enormous. A plaintiff's experts might include scientists, accountants, and medical doctors. One study found that the average fee for a medical expert witness is $555 per hour, with many experts requiring a minimum number of hours for testifying at trials and depositions. Experts' travel costs must be reimbursed, and some require first-class travel as a condition of signing a retainer agreement. The more complex the case, the higher the expert fees are likely to be. In its patent infringement suit against Samsung, Apple Computers paid an accounting expert $1.75 million in fees to come up with a multi-billion damages figure to propose to the jury.

It all adds up. It is not uncommon that after paying taxes, attorneys' fees, and litigation costs, a successful but unlucky plaintiff may net virtually nothing.

H. Injunctions

Aside from an award of money, plaintiffs can ask the court for an order compelling the defendant to undertake some action or refrain from undertaking some action. The generic form of this remedy is called an injunction, and it is equitable in character, meaning it is for the judge to grant, and not within the province of a jury.

Injunctions are not as common as damages awards in the tort context. But they are often the go-to remedy in property-based torts, where a plaintiff may want the court to enjoin future trespasses or nuisances. And, although rare, injunctions can be issued as a prophylactic measure in an incipient negligence context, where the plaintiff convinces the court that the defendant is unreasonably risking injury to the plaintiff.

In general, to obtain an injunction, the applicant must convince the court of three things: (1) the lack of an adequate remedy at law, (2) feasibility of enforcement, and (3) that the balance of hardships tilts in the plaintiff's favor. Let's look at each of these in more detail.

First, for an injunction to be appropriate there must be **no adequate remedy at law**. That is to say, in order to be entitled to an equitable remedy,

the plaintiff must show that no legal remedy would sufficiently protect the plaintiff's interests. Usually this means showing that an award of damages would be inadequate to make up for the harm. Often, an injunction applicant will allege "irreparable harm," that is, harm that cannot be repaired later on with money. Loss of life, for instance, is irreparable harm. The destruction of property having sentimental value could also be considered irreparable harm.

Second, an injunction will only be ordered if it is **feasible to enforce**. That is, a court will not issue pointless injunctions. The court may decline an injunction as infeasible where it lacks the jurisdiction necessary to enforce the injunction through contempt proceedings. Here is another point of contrast with the legal remedy of damages awards: When it comes to damages, courts will award them on a nominal basis, even though an award of $1 might seem economically pointless.

Third is the sine-qua-non requirement for injunctions – the determination that **the balance of hardships** tilts in favor of the party seeking the injunction. In keeping with their character as equitable remedies, injunctions require a balancing of the equities, taking into account the relative burdens placed on the parties by the issuance of an injunction or the lack of one. Where a plaintiff is merely inconvenienced, while the defendant is heavily hamstrung in conducting normal business, then a court will deny an injunction as a remedy – even if the plaintiff's underlying claim is a winning one.

Fourth is the required showing that the injunction is in the public interest, or at least not contrary to it. This fourth element is not universally articulated as a separate requirement, but it is obligatory in all federal courts. See, e.g., *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006).

While a regular injunction is a remedy ordered after a full trial, there is also the possibility of getting a **preliminary injunction** before trial. A preliminary injunction can be obtained right at the beginning of a case – long before the factual record is fully developed through the discovery process. The outcome of a preliminary injunction hearing can be dramatic, as a preliminary injunction normally will endure until the conclusion of trial. That means it might last years.

The requirements for obtaining a preliminary injunction are stated differently by different courts, but the essential ingredients are: (1) likelihood

of success on the merits and (2) irreparable harm. Stated less tersely, for a preliminary injunction: First, the plaintiff must convince the court the plaintiff is likely to eventually succeed on the injunction claim on the basis of its substantive merit after the process of discovery and trial has been run to its conclusion. (Note that this element of a preliminary injunction functionally incorporates the four elements listed above for a permanent injunction.) Second, the plaintiff must convince the court that the plaintiff will suffer irreparable harm unless preliminary relief is ordered in the meantime. Sometimes courts articulate additional requirements that echo or amplify the regular injunction requirements. For instance, a court might say that for a preliminary injunction the balance of hardships must tip "sharply" in the plaintiff's favor.

A preliminary injunction always requires prior notice be delivered to the defendant and a chance for the defendant to appear in court to oppose the injunction. Usually court rules require delivery of notice at least several days before a hearing is held on the matter.

For plaintiffs who can't wait that long, there is the possibility of a **temporary restraining order**. A "TRO," as it's called, can be issued, if necessary, on an *ex parte* basis – that is, without the other party being present or even notified. Because of due process concerns, a TRO lasts only a very short time, usually in the range of 10 to 14 days – about the amount of time necessary to set up a proper preliminary injunction hearing. The requirements for a TRO are generally the same as for the preliminary injunction, with the exception of the relaxed notice requirement.

H.1. Problem: Injunction on Ivan

Patricia is irritated that Ivan, while on his way to school every day, trespasses over a portion of her land consisting of a three-foot-wide dirt strip. In addition to seeking nominal damages for past trespasses, Patricia wants an injunction to prevent future trespasses. Ivan complains that if he cannot walk over the dirt strip, he will have to walk an additional hour out of his way to and from school each day.

How should a court rule on a request for a temporary restraining order, preliminary injunction, and permanent injunction?

I. Other Legal and Equitable Remedies

In addition to damages, injunctions, and awards of fees, there are other types of remedies as well. Without going into detail, the following will give you an idea of the range of what is out there.

Some remedies are **restitutionary**. Instead of seeking to make a plaintiff whole after a loss, a restitutionary remedy seeks to take away from the defendant a wrongful gain. One form of such a remedy is **quasi-contract**, a legal remedy where a court orders the defendant to pay to the plaintiff the amount the plaintiff likely would have been able to get if the parties had negotiated a contract ahead of time. If a defendant were somehow to save $10,000 on transportation costs by trespassing over the plaintiff's land, the quasi-contract remedy would allow the plaintiff to get an award of $10,000 – despite having suffered no damage.

The legal remedy of **replevin** allows a plaintiff to use an abbreviated fast-track court process to get back a wrongfully seized chattel without having to go through a full trial. The corresponding legal remedy of **ejectment** provides plaintiffs a fast-track procedure to throw a trespassing defendant off of the plaintiff's land.

An equitable restitutionary remedy known as **constructive trust** allows a court to treat the defendant as holding the plaintiff's wrongfully taken property "in trust" for the plaintiff. This remedy allows a plaintiff to capture any increases in value of the property during the time the defendant is in possession of it. Also, constructive trust can be very advantageous if the defendant is at risk of insolvency, because constructive trust can allow the plaintiff to get preferential treatment as a creditor in bankruptcy proceedings.

A similar equitable restitutionary remedy called **equitable lien** enables a court to use its equity power to impose a lien on property of the defendant. Some jurisdictions don't distinguish much between equitable lien and constructive trust. But at least on a conceptual level, with constructive trust, the whole property is construed to be held for the plaintiff. Equitable lien, however, is like a mortgage or security interest: Multiple parties might have an equitable lien on the same piece of property. For instance, a large house built with fraudulently misappropriated funds from several parties might

give each of those aggrieved parties an equitable lien. As with constructive trust, an equitable lien can be very advantageous for the holder in bankruptcy, making it more likely that the plaintiff will get paid.

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28. Compensatory Damages

If you see me walking down the street
Staring at the sky and draggin' my two feet
You just passed me by; it still makes me cry
But you can make me whole again

— Atomic Kitten, 2001

A. Lead-in

The central idea of compensatory damages is to compensate a plaintiff for an injury. This is sometimes described as "making the plaintiff whole." In other words, compensatory damages are about making the plaintiff as well off as the plaintiff would have been had the tortious conduct not occurred.

Damages are meted out in dollars. Thus, the aim is to award the plaintiff an amount of money such that if the plaintiff were hypothetically sent back in time to the point before the compensable injury happened, the plaintiff would be indifferent when faced with the choice of (1) nothing happening or (2) suffering the injury and getting the damages award.

This is a fiction, of course. Imagine having the choice of (1) nothing happening or (2) having the roof of your home cave in and getting a check to cover the repairs and the expense of living in a hotel for a while. Who would be indifferent to that?

Moreover, it is entirely impossible to conceive of being indifferent to the loss of a loved one. The conceptual troubles begin to mount when you consider this kind of question: How much money would you have to be offered before you would be indifferent to the loss of a parent, spouse, or child? One might say that "no amount of money" could compensate for this

loss. So, does that mean it would take an *infinite* amount of money? Of course, there's no such thing as an infinity of money in the real world. But let's take that idea as far as we can: Suppose your child is killed through the negligence of a large multinational oil company. Should you then get everything the company has to give – its entire market value of a half trillion dollars? That's as close as the company can come to infinity. On the other hand, since "no amount of money" is adequate, perhaps it's just as well for the court to award $0. Both of these extremes seem unacceptable. We are left with this question: How can you put a price on something that is priceless? When it comes to tort damages, this is not a rhetorical question.

In addition to serving to make it up to the plaintiff, compensatory damages also serve a deterrence function. Professor Richard A. Epstein writes, "The greatest triumph of the tort is the faceless injuries it prevents, not the major ones it compensates." TORTS, p. 437 (1999). When defendants know that they will have to pay for the negative consequences of their actions, they have the incentive to undertake the care that will prevent the harm in the first place.

Compensatory damages come in two kinds: pecuniary damages and nonpecuniary damages.

B. Pecuniary or Special Damages

Some compensatory damages are natively denominated in dollars. Repair costs, car rental, lost wages, medical bills, prosthetics, etc. These are **pecuniary damages**.

Pecuniary damages go by various names. Sometimes they are called "economic damages," a phrase which uses the word "economic" in a limited, non-technical sense to mean "having to do with money." Another label used for the same thing is "special damages," a common phrasing in the context of defamation. The term "special" is confusing here, because these damages are quite common. If, however, you think of "special" as meaning "specific," then the term makes sense, since special damages are damages that can be assigned a specific amount in dollars and cents as a matter of straightforward bookkeeping.

In a simple case, calculating pecuniary damages is often as easy as referring to a written estimate for repairs. In a more complicated case, you

might need to do some accounting work to reduce medical bills and various income losses to a single number. In a complex business case, calculating pecuniary damages can become extremely complicated and might involve making a number of assumptions.

B.1. Case: *Texaco v. Pennzoil* (Tex. App. 1987)

B.1.a. Advance Notes

This case exemplifies how the assumptions used in calculating pecuniary damages can have an enormous effect on the size of the verdict.

B.1.b. Opinion

Texaco v. Pennzoil

Court of Appeals of Texas, First District
February 12, 1987

729 S.W.2d 768. TEXACO, INC., Appellant, v. PENNZOIL, CO., Appellee. No. 01-86-0216-CV. Before WARREN, JACK SMITH and SAM BASS, JJ.

Justice JAMES F. WARREN:

This is an appeal from a judgment awarding Pennzoil damages for Texaco's tortious interference with a contract between Pennzoil and the "Getty entities" (Getty Oil Company, the Sarah C. Getty Trust, and the J. Paul Getty Museum).

The jury found, among other things, that:

> (1) At the end of a board meeting on January 3, 1984, the Getty entities intended to bind themselves to an agreement providing for the purchase of Getty Oil stock, whereby the Sarah C. Getty Trust would own 4/7 th of the stock and Pennzoil the remaining 3/7 th; and providing for a division of Getty Oil's assets, according to their respective ownership if the Trust and Pennzoil were unable to agree on a restructuring of Getty Oil by December 31, 1984;
>
> (2) Texaco knowingly interfered with the agreement between Pennzoil and the Getty entities;
>
> (3) As a result of Texaco's interference, Pennzoil suffered damages of $7.53 billion;
>
> (4) Texaco's actions were intentional, willful, and in wanton disregard of Pennzoil's rights; and,

(5) Pennzoil was entitled to punitive damages of $3 billion.

~Though many facts are disputed, the parties' main conflicts are over the inferences to be drawn from, and the legal significance of, these facts. There is evidence that for several months in late 1983, Pennzoil had followed with interest the well-publicized dissension between the board of directors of Getty Oil Company and Gordon Getty, who was a director of Getty Oil and also the owner, as trustee, of approximately 40.2% of the outstanding shares of Getty Oil. On December 28, 1983, Pennzoil announced an unsolicited, public tender offer for 16 million shares of Getty Oil at $100 each.

Soon afterwards, Pennzoil contacted both Gordon Getty and a representative of the J. Paul Getty Museum, which held approximately 11.8% of the shares of Getty Oil, to discuss the tender offer and the possible purchase of Getty Oil. In the first two days of January 1984, a "Memorandum of Agreement" was drafted to reflect the terms that had been reached in conversations between representatives of Pennzoil, Gordon Getty, and the Museum.

Under the plan set out in the Memorandum of Agreement, Pennzoil and the Trust (with Gordon Getty as trustee) were to become partners on a 3/7 ths to 4/7 ths basis respectively, in owning and operating Getty Oil. Gordon Getty was to become chairman of the board, and Hugh Liedtke, the chief executive officer of Pennzoil, was to become chief executive officer of the new company.

The Memorandum of Agreement further provided that the Museum was to receive $110 per share for its 11.8% ownership, and that all other outstanding public shares were to be cashed in by the company at $110 per share. Pennzoil was given an option to buy an additional 8 million shares to achieve the desired ownership ratio. The plan also provided that Pennzoil and the Trust were to try in good faith to agree upon a plan to restructure Getty Oil within a year, but if they could not reach an agreement, the assets of Getty Oil were to be divided between them, 3/7 ths to Pennzoil and 4/7 ths to the Trust.

The Memorandum of Agreement stated that it was subject to approval of the board of Getty Oil, and it was to expire by its own terms if not approved at the board meeting that was to begin on January 2. Pennzoil's CEO, Liedtke, and Gordon Getty, for the Trust, signed the Memorandum of Agreement before the Getty Oil board meeting on January 2, and Harold Williams, the president of the Museum, signed it shortly after the board meeting began. Thus, before it was submitted to the Getty Oil board, the Memorandum of Agreement had been executed

by parties who together controlled a majority of the outstanding shares of Getty Oil.

The Memorandum of Agreement was then presented to the Getty Oil board, which had previously held discussions on how the company should respond to Pennzoil's public tender offer. A self-tender by the company to shareholders at $110 per share had been proposed to defeat Pennzoil's tender offer at $100 per share, but no consensus was reached.

The board voted to reject recommending Pennzoil's tender offer to Getty's shareholders, then later also rejected the Memorandum of Agreement price of $110 per share as too low. Before recessing at 3 a.m., the board decided to make a counter-proposal to Pennzoil of $110 per share plus a $10 debenture. Pennzoil's investment banker reacted to this price negatively. In the morning of January 3, Getty Oil's investment banker, Geoffrey Boisi, began calling other companies, seeking a higher bid than Pennzoil's for the Getty Oil shares.

When the board reconvened at 3 p.m. on January 3, a revised Pennzoil proposal was presented, offering $110 per share plus a $3 "stub" that was to be paid after the sale of a Getty Oil subsidiary ("ERC"), from the excess proceeds over $1 billion. Each shareholder was to receive a pro rata share of these excess proceeds, but in any case, a minimum of $3 per share at the end of five years. During the meeting, Boisi briefly informed the board of the status of his inquiries of other companies that might be interested in bidding for the company. He reported some preliminary indications of interest, but no definite bid yet.

The Museum's lawyer told the board that, based on his discussions with Pennzoil, he believed that if the board went back "firm" with an offer of $110 plus a $5 stub, Pennzoil would accept it. After a recess, the Museum's president (also a director of Getty Oil) moved that the Getty board should accept Pennzoil's proposal provided that the stub be raised to $5, and the board voted 15 to 1 to approve this counter-proposal to Pennzoil. The board then voted themselves and Getty's officers and advisors indemnity for any liability arising from the events of the past few months. Additionally, the board authorized its executive compensation committee to give "golden parachutes" (generous termination benefits) to the top executives whose positions "were likely to be affected" by the change in management. There was evidence that during another brief recess of the board meeting, the counter-offer of $110 plus a $5 stub was presented to and accepted by Pennzoil. After Pennzoil's acceptance was conveyed to the Getty board, the meeting

was adjourned, and most board members left town for their respective homes.

That evening, the lawyers and public relations staff of Getty Oil and the Museum drafted a press release describing the transaction between Pennzoil and the Getty entities. The press release, announcing an agreement in principle on the terms of the Memorandum of Agreement but with a price of $110 plus a $5 stub, was issued on Getty Oil letterhead the next morning, January 4, and later that day, Pennzoil issued an identical press release.

On January 4, Boisi continued to contact other companies, looking for a higher price than Pennzoil had offered. After talking briefly with Boisi, Texaco management called several meetings with its in-house financial planning group, which over the course of the day studied and reported to management on the value of Getty Oil, the Pennzoil offer terms, and a feasible price range at which Getty might be acquired. Later in the day, Texaco hired an investment banker, First Boston, to represent it with respect to a possible acquisition of Getty Oil. Meanwhile, also on January 4, Pennzoil's lawyers were working on a draft of a formal "transaction agreement" that described the transaction in more detail than the outline of terms contained in the Memorandum of Agreement and press release.

On January 5, the Wall Street Journal reported on an agreement reached between Pennzoil and the Getty entities, describing essentially the terms contained in the Memorandum of Agreement. The Pennzoil board met to ratify the actions of its officers in negotiating an agreement with the Getty entities, and Pennzoil's attorneys periodically attempted to contact the other parties' advisors and attorneys to continue work on the transaction agreement.

The board of Texaco also met on January 5, authorizing its officers to make an offer for 100% of Getty Oil and to take any necessary action in connection therewith. Texaco first contacted the Museum's lawyer, Lipton, and arranged a meeting to discuss the sale of the Museum's shares of Getty Oil to Texaco. Lipton instructed his associate, on her way to the meeting in progress of the lawyers drafting merger documents for the Pennzoil/Getty transaction, to not attend that meeting, because he needed her at his meeting with Texaco. At the meeting with Texaco, the Museum outlined various issues it wanted resolved in any transaction with Texaco, and then agreed to sell its 11.8% ownership in Getty Oil.

That evening, Texaco met with Gordon Getty to discuss the sale of the Trust's shares. He was informed that the Museum had agreed to sell its shares to Texaco. Gordon Getty's advisors had previously warned him that the Trust shares might be "locked out" in a minority position if Texaco bought, in addition to the Museum's shares, enough of the public shares to achieve over 50% ownership of the company. Gordon Getty accepted Texaco's offer of $125 per share and signed a letter of his intent to sell his stock to Texaco, as soon as a California temporary restraining order against his actions as trustee was lifted.

At noon on January 6, Getty Oil held a telephone board meeting to discuss the Texaco offer. The board voted to withdraw its previous counter-proposal to Pennzoil and unanimously voted to accept Texaco's offer. Texaco immediately issued a press release announcing that Getty Oil and Texaco would merge.

Soon after the Texaco press release appeared, Pennzoil telexed the Getty entities, demanding that they honor their agreement with Pennzoil. Later that day, prompted by the telex, Getty Oil filed a suit in Delaware for declaratory judgment that it was not bound to any contract with Pennzoil. The merger agreement between Texaco and Getty Oil was signed on January 6; the stock purchase agreement with the Museum was signed on January 6; and the stock exchange agreement with the Trust was signed on January 8, 1984.~

DAMAGES

In its 57th through 69th points of error, Texaco claims that the evidence was legally and factually insufficient to support the jury's~ damage awards.

Texaco attacks Pennzoil's use of a replacement cost model to prove its compensatory damages. It urges that:~ the court should have instructed the jury that the correct measure of Pennzoil's compensatory damages was the difference between the market price and contract price of Getty stock at the time of the breach;~ compensatory damages are excessive;~ and prejudgment interest should not have been allowed.

In a cause involving a tortious interference with an existing contract, New York courts allow a plaintiff to recover the full pecuniary loss of the benefits it would have been entitled to under the contract. The plaintiff is not limited to the damages recoverable in a contract action, but instead is entitled to the damages allowable under the more liberal rules recognized in tort actions.

New York courts have cited and relied extensively on the Restatement (Second) of Torts in deciding damages issues~.

Section 774A of the Restatement (Second) of Torts (1977), reads in pertinent part:

> (1) One who is liable to another for interference with a contract ... is liable for damages for
>
> (a) the pecuniary loss of the benefits of the contract ...; [and]
>
> (b) consequential losses for which the interference is a legal cause....~

Pennzoil relied on two witnesses to prove the amount of its damages: Dr. Thomas Barrow and Dr. Ronald Lewis. Dr. Barrow holds a Ph.D. in petroleum engineering from Stanford University, and a bachelor's and master's degree from the University of Texas in geology and petroleum engineering. He has been president of Humble Oil & Refining Company, a senior vice-president of Exxon Corporation, chairman and chief executive officer of Kennecott Corporation, and president of Standard Oil of Ohio. He sits on the board of directors of many major corporations and charitable institutions.

Dr. Lewis is employed by Pennzoil as a vice-president in charge of offshore operations. He holds a bachelor of science degree and a master of science degree in petroleum engineering from Colorado School of Mines, and a Ph.D. with emphasis on petroleum engineering from the University of Texas. He has held responsible positions with the government, Mobil Oil Company, and Pennzoil, and taught petroleum engineering for seven years.

Texaco presented no witnesses to refute the testimony of Dr. Barrow or Dr. Lewis.

Dr. Barrow prepared three damages models, as follows:

(1) a replacement cost model,

(2) a discounted cash flow model, and

(3) a cost acquisition model.

Because the jury based its award of damages on the replacement cost model, the other two models will not be discussed. By Dr. Barrow's testimony, Pennzoil showed that because of Texaco's interference with its Getty contract, it was deprived of its right to acquire 3/7th's of Getty's proven reserves, amounting to 1.008 billion barrels of oil equivalent (B.O.E.), at a cost of $3.40 a barrel. Pennzoil's evidence further showed that its cost to find equivalent reserves (based on its last five years of exploration costs) was $10.87 per barrel. Therefore,

Pennzoil contended that it suffered damages equal to 1.008 billion B.O.E. times $7.47 (the difference between $10.87, the cost of finding equivalent reserves, and $3.40, the cost of acquiring Getty's reserves) or $7.53 billion. The jury agreed.

Texaco first alleges that the trial judge should have instructed the jury that the measure of Pennzoil's damages was the difference between the market value of Getty Oil stock and its contract price at the time of the breach. We reject this contention. The Getty/Pennzoil agreement contemplated something more than a simple buy-sell stock transaction. Pennzoil's cause of action against Texaco was in tort, not in contract, and Pennzoil's measure of damages was the pecuniary loss of the benefits it would have been entitled to under the contract. There was ample evidence that the reason Pennzoil (and later, Texaco) wanted to buy Getty was to acquire control of Getty Oil's reserves, and not for any anticipated profit from the later sale of Getty stock. There was evidence that such fluctuations in market price are primarily of interest to holders of small, minority share positions.

The court in Special Issue No. 3 correctly instructed the jury that the measure of damages was the amount necessary to put Pennzoil in as good a position as it would have been in if its agreement, if any, with the Getty entities had been performed. If the measure of damages suggested by Texaco was correct, then there would have been no necessity to submit an issue at all, because no issue of fact would have existed, there being no dispute about the market value of the stock or the contract price of the stock at the time of the breach.

Texaco next contends that the replacement cost theory is based on the speculative and remote contention that Pennzoil would have gained direct access to Getty's assets. Texaco strongly urges that Pennzoil had a "good faith" obligation under its alleged contract to attempt to reorganize and restructure Getty Oil rather than to divide its assets. We agree. Under New York law, a duty of fair dealing and good faith is implied in every contract. But a duty of good faith and fair dealing does not require that Pennzoil completely subordinate its financial well-being to the proposition of reorganization or restructuring.

The directors of Pennzoil would have had a duty to the company's shareholders to obtain the greatest benefit from the merger assets, by either restructuring, reorganizing, or taking the assets in kind. If taking the assets in kind would be the most advantageous to Pennzoil, its directors would, in the absence of a great detriment to Getty, have a duty to take in kind. So the acquisition of a pro rata share of Getty Oil's

reserves would be more than a mere possibility, unless the restructuring or reorganization of Getty would be just as profitable to Pennzoil as taking the assets in kind.

Next, Texaco urges that the jury's use of the replacement cost model resulted in a gross overstatement of Pennzoil's loss because:

> (a) Pennzoil sought to replace Getty's low value reserves with reserves of a much higher value;
>
> (b) Pennzoil based its replacement cost on its costs to find oil only during the period from 1980 to 1984, rather than over a longer period;
>
> (c) Pennzoil improperly included future development costs in its exploration costs;
>
> (d) Pennzoil used pre-tax rather than post-tax figures; and
>
> (e) Pennzoil failed to make a present value adjustment of its claim for future expenses.

Our problem in reviewing the validity of these Texaco claims is that Pennzoil necessarily used expert testimony to prove its losses by using three damages models. In the highly specialized field of oil and gas, expert testimony that is free of conjecture and speculation is proper and necessary to determine and estimate damages. Texaco presented no expert testimony to refute the claims but relied on its cross-examination of Pennzoil's experts to attempt to show that the damages model used by the jury was flawed. Dr. Barrow testified that each of his three models would constitute an accepted method of proving Pennzoil's damages. It is inevitable that there will be some degree of inexactness when an expert is attempting to make an educated estimate of the damages in a case such as this one. Prices and costs vary, depending on the locale, and the type of crude found. The law recognizes that a plaintiff may not be able to prove its damages to a certainty. But this uncertainty is tolerated when the difficulty in calculating damages is attributable to the defendant's conduct.

In his replacement cost model, Dr. Barrow estimated the cost to replace 1.008 billion barrels of oil equivalent that Pennzoil had lost. Dr. Barrow admitted that some of Getty's reserves consisted of heavy crude, which was less valuable than lighter crude, and that he had made no attempt to determine whether there was an equivalency between the lost Getty barrels and the barrels used to calculate Pennzoil's exploration costs. Dr. Barrow also testified that there was no way to determine what grade of reserves Pennzoil would find in its future exploration; they could be better or worse than the Getty reserves.

Finally Dr. Barrow testified that in spite of his not determining the value equivalency, the replacement cost model was an accepted method of figuring Pennzoil's loss. Dr. Lewis testified that with improved refining technology, the difference in value between light and heavy crude was becoming less significant.

Texaco next urges that Pennzoil should have calculated replacement cost by using a longer time period and industry wide figures rather than using only its own exploration costs, over a five year period. Dr. Lewis admitted that it might have been more accurate to use a longer period of time to estimate exploration costs, but he and Dr. Barrow both testified that exploration costs had been consistently rising each year and that the development cost estimates were conservative. Dr. Barrow testified that in his opinion, Pennzoil would, in the future, have to spend a great deal more than $10.87 a barrel to find crude. Dr. Lewis testified that industry wide exploration costs were higher than Pennzoil's, and those figures would result in a higher cost estimate than the $10.87 per barrel used by Pennzoil.

Next, Texaco claims that Pennzoil inflated its exploration costs by $1.86 per barrel by including "future development cost" in its historical exploration costs. Both Dr. Lewis' and Dr. Barrow's testimony refuted that contention. Texaco neither offered evidence to refute their testimony, nor did its cross-examination reveal that this was an unwarranted cost.

Texaco also claims that Pennzoil should have used post-tax rather than pre-tax figures in figuring its loss calculations. First, it contends that there are large tax incentives for exploration and development that are not applicable to acquisition of reserves. Second, it contends that there was a $2 billion tax penalty attached to the Pennzoil/Getty agreement, and Pennzoil's $900 million share of that penalty would have increased its $3.40 pre-tax acquisition cost by nearly a dollar.

Dr. Barrow testified that the fact that Pennzoil included $997 million as recapture tax in its costs of acquiring the Getty reserves, made the pre-tax comparison between the $3.40 per barrel to acquire Getty reserves and the $10.87 per barrel for Pennzoil to find new oil, "apples and apples"; in other words, the $997 million tax adjustment compensated for the tax benefits reaped when discovering, as compared with purchasing, reserves. Further, there was no conclusive proof that the Internal Revenue Service would have assessed a $2 billion penalty to Getty's purchase of the Museum's shares under the Pennzoil/Getty agreement, as alleged by Texaco. Several witnesses, familiar with tax law, testified that it was unlikely that such a tax would

be imposed; therefore it was for the jury to decide when assessing damages, whether Pennzoil's pro rata share of the speculative tax penalty should reduce the amount of its damages.

Texaco's contention that Pennzoil's cost replacement model should be discounted to present value ignores the fact that Pennzoil's suit is not for future damages but for those already sustained. Pennzoil would have had an interest in the Getty reserves immediately if the agreement had been consummated, and it did not seek damages for reserves to be recovered in the future. The cases cited by Texaco are inapposite here because all involve damages that the plaintiff would incur in the future, such as lost wages or future yearly payments. Also, Texaco requested no jury instruction on a discount or a discount rate; therefore, any complaint of the court's failure to submit the issue or instruction is waived. *See* Tex.R.Civ.P. 279. Nor was Texaco entitled to an omitted finding by the court under rule 279, because the omitted discount and discount rate were not issues "necessarily referable" to the damages issue.

Texaco's Points of Error 57 through 60 are overruled.

In its 69th point of error, Texaco claims that the court erroneously applied New York Law when it allowed prejudgment interest, because most of the damages are to compensate for expenses to be incurred over the next 25 years. We have previously considered and rejected Texaco's contention that Pennzoil's recovery, or any part thereof, was for future damages.

Under New York law, a plaintiff in an action for inducing a breach of contract is entitled as a matter of right to interest on the amount of recovery, measured from the date of the accrual of the cause of action. *De Long Corp. v. Morrison-Knudsen Co.,* 14 N.Y.2d 346, 251 N.Y.S.2d 657, 200 N.E.2d 557 (1964).

Point of Error 69 is overruled.~

B.1.c. Questions to Ponder on *Texaco v. Pennzoil*

A. Consider what $7.53 billion in compensatory damages means. Did you think killing another human being was the worst thing a person could do? Not according to tort law. A DOJ study in 2004 found the median award in wrongful death cases to be $961,000. That's more than 7,500 times smaller than Pennzoil's compensatory award for a business deal gone bad. Is there something wrong with that? Does it counsel some adjustment to

our tort system? Or does it reflect an uncomfortable truth about the value of human life?

B. Why didn't Texaco present its own witnesses on the issue of damages, instead of "[relying] on its cross-examination of Pennzoil's experts to attempt to show that the damages model used by the jury was flawed"? Was that a defensible, calculated risk? Or was that a huge lawyering mistake?

B.1.d. Historical Note on *Texaco v. Pennzoil*

Texaco, whose name is a contraction of "The Texas Company," was America's first nationwide brand of gasoline. In the 1980s, Texaco was the fifth largest corporation in the United States.

The $10.53 billion dollar judgment against Texaco was the biggest in U.S. history. It's a lot of money – even to an enormous oil company. Texaco wanted to appeal the judgment, and in the meantime stay the execution of the judgment. By staying the execution of the judgment, Texaco would not have to fork over the money until the appeal was over. The problem for Texaco was that Texas court rules required a stay of execution of judgment to be supported with a bond. That way, if the appeal failed, the plaintiff would still be assured of getting its money. But bonding companies don't have $10.53 billion in cash on hand any more than huge oil companies do. Texaco appealed to the U.S. Supreme Court, challenging the bonding requirement as unconstitutional, but in a unanimous decision, the Supreme Court rebuffed the oil giant.

In a concurrence, Justice Stevens wrote,

> ˜Texaco makes a sympathetic argument, particularly when it describes the potential adverse impact of this litigation on its employees, its suppliers, and the community at large. But the exceptional magnitude of those consequences is the product of the vast size of Texaco itself — it is described as the fifth largest corporation in the United States — and the immensity of the transaction that gave rise to this unusual litigation. The character of harm that may flow from this litigation is not different from that suffered by other defeated litigants, their families, their employees, and their customers. The price of evenhanded administration of justice is especially high in some cases, but our duty to deal equally with the rich and the poor does not admit of

> a special exemption for multibillion-dollar corporations or transactions.

Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 65 (1987).

Texaco filed for bankruptcy within days of the announcement of the Supreme Court's decision, a move that blocked Pennzoil's collection efforts. (Federal bankruptcy's automatic stay halts all judgment collections.) It was the largest corporate bankruptcy in U.S. history to that point. After about a year, Texaco reached a $3 billion settlement with Pennzoil that allowed it to emerge from Chapter 11 with deep wounds. Eventually, Texaco was purchased by and absorbed into Chevron. Today, Texaco exists as an alternative brand used by Chevron for its retail gasoline sales.

C. Nonpecuniary or General Damages

Where the question of damages becomes particularly difficult is with nonpecuniary damages – damages that are not natively measured in dollars. The leading example of nonpecuniary damages is what's known as "pain and suffering." In addition, courts may award nonpecuniary damages for loss of enjoyment of one's life, which might include an inability to engage in a favored activity, such as playing the piano or cross-country skiing. In a defamation case, nonpecuniary damages might be awarded for the loss of one's good reputation.

Nonpecuniary damages also go by the names "non-economic damages" and "general damages." The latter label is typical in defamation cases, where it is contrasted with special damages. While special damages can be pinpointed with specificity, general damages are "general" in the sense that they are vague and impossible to pin down with precision.

The question of how to assign a specific dollar amount to someone's pain and suffering or lost enjoyment of life is a thorny one. But plaintiffs' attorneys are entitled to argue the point to juries, and juries must do the best they can to assign a fair dollar value.

C.1. Case: *Spell v. McDaniel* (4th Cir. 1987)

C.1.a. Advance Notes

The following case illustrates how nonpecuniary damages can exceed pecuniary damages by orders of magnitude.

C.1.b. Opinion

Spell v. McDaniel

United States Court of Appeals for the Fourth Circuit
July 24, 1987

824 F.2d 1380. Henry Z. SPELL, Appellee, v. Charles D. McDANIEL, Individually and as Patrolman, City of Fayetteville Police Department, and John P. Smith, City Manager, City of Fayetteville, Defendants, and other cases consolidated with this one. Nos. 85-1524, 85-1523, 85-1691, 85-1714 and 85-1757. Before PHILLIPS, CHAPMAN and WILKINSON, Circuit Judges.

Judge JAMES DICKSON PHILLIPS:

This is a 42 U.S.C. § 1983 action in which after two trials Henry Spell was awarded substantial damages against the City of Fayetteville, North Carolina (the City), and Charles McDaniel, a City police officer, as a result of physical injury inflicted on Spell by McDaniel while Spell was in McDaniel's custody following Spell's arrest. McDaniel and the City have appealed~.

We find no reversible error in the trials and therefore affirm the judgment on the merits against McDaniel and the City.~

I

Spell, admittedly inebriated on alcohol and quaaludes, was stopped by Officer McDaniel while driving an automobile in the City of Fayetteville. After talking with Spell and finding a quantity of quaaludes in his automobile, McDaniel arrested him along with a passenger in Spell's automobile, handcuffed the two of them and took them in a patrol car to the police station. There Spell was subjected to various sobriety tests, including a breathalyzer test, and was formally charged with driving while impaired and with the possession of quaaludes. Just after Spell completed the breathalyzer test and was returned, still handcuffed and inebriated, to McDaniel's direct custody, McDaniel, possibly angered by Spell's failure to respond to his questioning, and in any event without any physical provocation, brutally assaulted Spell. When Spell warded off a blow toward his head by raising his arms, McDaniel seized his handcuffed arms, pulled them down and violently kneed Spell in the groin. The blow to Spell's groin ruptured one of his testicles, necessitating its surgical removal. This resulted in irreversible sterility and of course in considerable associated pain and suffering.~

⁻Spell later pled guilty to the possession charge which was contained in a multi-count indictment that also charged two counts of narcotics trafficking for which he was convicted after trial. At the time of trial of this § 1983 action, he was serving a seven year sentence growing out of those convictions, a fact brought out to the jury in Spell's own testimony on direct examination.⁻

⁻[The above facts concerning the traffic stop] are the essential facts necessarily accepted in substance by the jury [in the § 1983 action] in finding McDaniel liable. They were disputed by McDaniel, who denied making any assault on Spell and speculated that the conceded injury resulted from a pre-arrest occurrence. Though acceptance of these facts required outright rejection of McDaniel's testimony and that of another officer circumstantially corroborating McDaniel's, there was more than ample evidence supporting the critical finding. The district court, denying defendant's motion for judgment n.o.v. and alternatively for new trial, expressed flat incredulity at the testimony offered to support McDaniel's denial that he ever physically assaulted Spell.⁻

[T]he City contends that the district court abused its discretion in declining to set aside the second jury's compensatory award of $900,000 as excessive. Here again, of course, the district court's ruling is a discretionary one, and indeed is one that we review with even more than ordinary deference. See *Grunenthal v. Long Island Rail Road Co.*, 393 U.S. 156, 160 (1968) (only to determine if "untoward, inordinate, unreasonable or outrageous"); *Simmons v. Avisco, Local 713, Textile Workers Union,* 350 F.2d 1012, 1020 (4th Cir. 1965) (only to determine whether "not merely excessive but 'monstrous'").

Under this standard we cannot find error in the district court's ruling; indeed it seems to us eminently sound. Although Spell's medical expenses were relatively low ($2,041), his hospital stay short (four days), and his ability to function sexually not permanently impaired, the evidence showed that the assault caused him intense pain, that his damaged testicle enlarged five to seven times its normal size as a result, that it was like "a smashed piece of fruit" with the outer covering torn and the internal contents passing through the tear, that surgical removal of the testicle led to permanent disfigurement and that, on account of an earlier illness, the assault left Spell irreversibly sterile.~

We therefore affirm the judgment against McDaniel and the City on the merits~.

C.1.c. Questions to Ponder About *Spell v. McDaniel*

A. The district court is entrusted with discretion to rule on a defendant's motion to set aside the jury's verdict as excessive, and an appeals court will not easily overturn the decision resulting from that exercise of discretion. As the circuit court says here, the district court's decision is to be treated with "even more than ordinary deference." Why do you suppose that is? Does it make sense?

B. Logically speaking, should it make any difference to the calculation of compensatory damages whether the defendant or plaintiff was sympathetic? Regardless of whether it should, does it in fact make such a difference? Are you surprised that a jury awarded $900,000 to a drug trafficker? Was it in part because of a belief that Officer McDaniel lied about kneeing Mr. Spell? Do you think the verdict would have been different if McDaniel had admitted to the kneeing?

C.2. Caps on Nonpecuniary Damages

For many years, tort reform advocates have looked to change various aspects of the civil tort system in order to rein in perceived abuses that negatively impact businesses. One object of the tort-reform movement has been to place upper limits on nonpecuniary damages. Most states now have some kind of cap on nonpecuniary damages, either for medical malpractice cases or for all tort cases.

The forerunner of this trend was California. In 1975, California passed the Medical Injury Compensation Reform Act. The law placed a $250,000 limit on nonpecuniary damages in medical liability cases. See Cal. Civ. Code § 3333.2. It stayed in place until 2023, when provisions were made to increase caps and provide for ongoing adjustments that would account for inflation.

The enactment of the cap in California helped precipitate a movement to enact similar caps across the country. Some examples: In 1995, North Dakota capped noneconomic damages in medical liability cases to $500,000. See N.D. Cent. Code § 32-42-02. In 2003, West Virginia capped noneconomic damages in medical liability cases to a maximum of $500,000, with a stricter cap of $250,000 applying in some circumstances. The caps are indexed to increase with inflation and in 2021 were $706,752 and $353,376

respectively. See W.V. Code § 55-7B-8. In 2011, Tennessee passed a maximum cap of $1 million, with a lower limit of $750,000 in most cases. The limitation is not applicable where the defendant acted intentionally, was intoxicated, or falsified records. See Tenn. Code § 29-39-102.

California's trendsetting nonpecuniary damages cap is an interesting counterpoint to the role the state has so often played as a pioneer of plaintiff-friendly shifts in doctrine, including strict products liability and market-share liability. Those trailblazing cases, by the way, were *Greenman v. Yuba Power Products,* 59 Cal.2d 57 (Cal. 1963) (strict products liability) and *Sindell v. Abbott Labs,* 26 Cal.3d 588 (Cal. 1980) (market-share liability).

D. Mitigation

Plaintiffs have a **duty to mitigate** their losses. This means that, given the injury they sustained at the hands of a defendant, plaintiffs must do what they reasonably can to prevent their losses from growing larger.

A plaintiff who receives a cut to the leg, for instance, must promptly seek medical care and get stitches. If the plaintiff waits until the wound becomes infected and eventually gangrenous, so that amputation is necessary, the plaintiff is not entitled to damages for a lost limb. Instead, the plaintiff would be entitled to damages measured by the medical expense of getting stitches and the accompanying pain and suffering that would have been associated with the injury treated in that manner.

E. The Collateral Source Rule

The collateral source rule provides that a plaintiff is entitled to recovery from the defendant for tortiously caused damages regardless of whether or not a third party has stepped in to help the plaintiff pay some or all of those costs.

Before the modern era, the collateral source might have been a rich uncle or a religious charity. These days, the collateral source is likely to be an insurer. In fact, an automobile negligence case might involve injuries that are almost entirely covered by insurance – physicians' fees, hospital bills, medicine, physical therapy. None of this can be used to diminish the defendant's responsibility or the plaintiff's recovery.

The fairness of the collateral source rule has been widely questioned. The argument is as follows: If the goal of tort law is to make the plaintiff whole, and if a plaintiff is already made whole by someone other than the defendant, then the plaintiff has no more need for redress. Worse, it may be argued, a successful plaintiff who has also been the beneficiary of a collateral source has received a double recovery.

There are a few responses to this line of criticism. One is to question the assumption that the only goal of compensatory damages in tort law is to return the plaintiff to a pre-injury state. Another goal advanced for compensatory damages is to deter injury-producing behavior by would-be defendants. If businesses are never compelled to pay the costs of the injuries they cause, they might lack the needed incentives to be careful.

Another response is that if someone is going to receive a windfall – either the plaintiff by getting a double recovery, or the defendant by getting off scot-free – then it seems preferable that the plaintiff should receive the windfall, since the plaintiff is the blameless one.

A full debate about the collateral-source rule must also take into account the practical reality of how insurance works. Plaintiffs rarely receive a double recovery because insurance policies generally carry a right of **subrogation**: Once an insurance company pays a claim, it has the right to get reimbursed by the plaintiff if and when the plaintiff gets a tort recovery. Because of this, insurers benefiting from subrogation rights – subrogees – are said to "stand in the shoes" of their subrogor (the plaintiff) in being able to obtain compensation from the tortfeasor who ultimately necessitated the insurance payout.

F. Issues of Time: Past and Future Losses

Meritorious plaintiffs are entitled to one lawsuit and one judgment. This is sometimes called the **single-recovery rule**. The judgment must include all of the plaintiff's damages – past, present, and future. Present damages yield no particular difficulties. But past and future damages necessitate some special handling.

F.1. Pre-judgment Interest

For damages sustained in the past, the plaintiff is entitled to pre-judgment interest. Consider it this way: With past damages, the plaintiff was entitled to compensation at some specific moment in the past, perhaps at the moment of injury. Yet the meritorious plaintiff will not get a check until the end of her or his lawsuit. It's as if the plaintiff lent the tortfeasor money during that intervening time. Pre-judgment interest means that the "loan" advanced to the defendant is not interest-free.

How pre-judgment interest is applied differs among the jurisdictions. In some states, interest runs from the date the complaint is filed. In others, pre-judgment interest begins accumulating at the moment of injury. Interest rates vary as well. Some states set interest rates by law. Some states peg interest rates to one of several rates published by the Federal Reserve or even leave it up to the judge in the lawsuit to determine on a case-by-case basis. Other states do not provide for pre-judgment interest in tort suits at all. Randomly browsing 2024 cases revealed courts applying rates of 4.25%, 7.75%, 8%, 8.5%, 9%, 10%, and 12%, plus one court that varied the rate each pre-judgment year, moving around between 2.25% and 5.5%.

The differences among jurisdictions are important, because pre-judgment interest can add up to real money. In a jurisdiction with an interest rate on the higher end, and if interest begins running at the time of loss, a judgment rendered six years later might be nearly doubled by accumulated interest.

F.2. Figuring Future Losses

Although past losses present their difficulties, future losses create much thornier questions. An injured plaintiff whose long-term medical prognosis will require more treatment and more surgeries will not be able to bring another lawsuit at a later time. This means that juries routinely face the difficult prospect of trying to determine what the plaintiff will need to expend in the future for continuing care. For a plaintiff rendered unable to work, the jury will be called upon to determine the plaintiff's lost wages over the rest of her or his life. This involves considering several questions: How long is the plaintiff likely to live? What were the plaintiff's career prospects? What will medical care and medical monitoring cost? The issue often comes

down to a battle of expert witnesses, each of whom compiles analyses that are presented to the jury.

Regardless of how the jury and court resolve these issues, once the judgment becomes final, it is legally irrelevant what actually happens to the plaintiff. An injured plaintiff whose condition turns out to be much worse – and much more expensive – than anticipated at the time of trial will be out of luck. A plaintiff given a large amount of money in anticipation of expensive long-term care whose fortunes turn around when a new medical breakthrough completely reverses the injury is doubly lucky – that plaintiff has the cure and gets to keep the money.

F.3. Reducing Future Losses to Net Present Value and Accounting for Inflation

Once a court has decided on an appropriate figure for future losses, there remains the problem of figuring how to account for the changing value of money through time.

A dollar today is worth more than a dollar tomorrow – because in the meantime, money in the bank earns interest. If $10,000 of expenses will be incurred 10 years from now, an award of $10,000 today would require the defendant to wildly overpay.

Financial analysts and economists use a concept called "net present value" to compare money in the future to money in the present. Calculating net present value is the reverse of calculating the growth of money over time using compounded interest.

To calculate the net present value of a lump sum of money at some point in the future, you need to assume an interest rate (commonly called the "discount rate").

For an example, let's say we want to find the net present value of $10,000 three years in the future. Let's assume the effective year-over-year rate of interest is 10%. The net present value is $7,513.15.

To see how this is calculated, it is best to first see it done from the other direction, translating $7,513.15 into its value three years from now:

- After one year, $7,513.15 will increase by 10%. We add $7,513.15 to $751.31 (which is 10% of $7,513.15), and get $8,264.46. We

can do this in one step by multiplying $7,513.15 by 1.10 (which is to multiply the number by itself plus 10% of itself).

- After year two, we multiply $8,264.46 by 1.10 to get $9,090.91.
- After year three, we multiply $9,090.91 by 1.10 to get $10,000.

To translate future value into present value, we do the reverse at each step, dividing by 1.10 instead of multiplying:

$$\$10{,}000 \div 1.10 \div 1.10 \div 1.10 = \$7{,}513.15$$

Let's simplify this:

$$\$10{,}000 \div (1.10 \times 1.10 \times 1.10) = \$7{,}513.15$$

And simplify again:

$$\$10{,}000 \div 1.10^3 = \$7{,}513.15$$

Now, replacing the numbers with symbols, we get a formula:

$$V_F \div (1 + r)^t = V_P$$

In the formula, V_F is the future value, r is the effective interest rate (or "discount rate"), t is time in units (such as years) that corresponds to the interest rate, and V_P is present value.

Compare the formula to the example above. If you look back and forth a few times, you should be able to see exactly how the formula works.

If you want to reduce to present value (to "discount" in financial jargon) a cash flow over time – that is, a continuous stream of money – as opposed to a single amount of money at some predetermined point in the future – then the calculation is much more complex, and it helps to use calculus. But we can leave that task to the accountants.

Having an idea of how discounting works, we are left with an important question: What discount rate is appropriate for reducing future losses to net present value? Unfortunately, there is no easy answer. Interest rates change over time, and no one can predict with certainty what will happen to rates in the future. Thus, in the absence of a controlling statute or rule, courts will permit expert testimony from economists about reasonable assumptions for future interest rates and what the net present value of a future loss is based on those assumptions.

Although one might justifiably feel some sense of accomplishment after having carefully discounted future losses to present value, that analysis ignores another looming complication: Inflation.

Over time, inflation causes a dollar to lose purchasing power. Because of this, inflation works in the opposite direction of interest. The number of dollars in a bank account grows over time thanks to interest, but the value of each dollar declines thanks to inflation.

The opposing effects of inflation and interest have tempted some to argue that both inflation and interest can be assumed to net to zero, so that a lump sum for the future can be awarded without any adjustment. But that approach – while perhaps enticing for its simplicity – seems to be unsound policy. Under usual economic conditions, interest steadily outpaces inflation so that money will grow in real terms over time. The Ninth Circuit, for instance, has admonished trial courts not to take the lazy way out:

> By today's holding that the trier of facts in awarding damages may take into consideration estimated changes in the purchasing power of money, we do not mean to imply that the lower court may use our holding as an excuse not to discount an award to its net present value. In other words, the court may not assume that the discount rate and the inflation rate will net to zero. The lower court must first estimate future income and expenses, taking into account estimated changes in the purchasing power of the dollar, and then discount this future net income stream to its present value. Nor do we intend to have our holding of today read as authorizing the court to arbitrarily draw an estimate of inflation out of thin air. [¶] As with any other element of damages, we must require the estimate of future inflation to be supported by competent evidence. The court is to be especially wary of the pitfalls˜ inherent in making predictions about the future of economic conditions. By our holding we allow the trier of fact in awarding damages to take into account only such estimates of future changes in the purchasing power of money as are based on sound and substantial economic evidence, and as can be postulated with some reliability

U.S. v. English, 521 F.2d 63, 75-76 (9th Cir. 1975).

Calculations can be made easier when the discount rate is set such that it already takes into account the effects of anticipated inflation. (And stated discount rates are often inclusive of inflationary effects.) But easing the arithmetic does not address the underlying uncertainty in the calculation.

When you combine the difficulty of estimating future losses with the uncertainty of future interest rates and inflation, you end up with a monetary award that is sagging under the weight of layers of assumptions. What is more, the award can be pricey to deduce, given the expert testimony it requires. In the eyes of the courts, however, this imperfect justice is preferable to the overt injustice of awarding plaintiffs windfalls or of depriving them of recovery altogether.

F.4. Problem: Amelia's Future Medical Care

After a bench trial, the judge determines that Amelia has received a latent injury that is more likely than not going to require extensive surgery in the future. The judge accepts as a model for damages that Amelia is likely to need $1 million in medical care at a point in time 10 years in the future. The judge also accepts expert testimony establishing an annual discount rate inclusive of inflation of 3.9%. What should be Amelia's award today, discounted to present value?

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29. Punitive Damages

"Punishment is justice for the unjust."

— Saint Augustine

A. Lead-in

Punitive damages – frequently called "exemplary damages" – are damages awarded for the purpose of punishing the defendant. This is in contrast to compensatory damages, which are meant to compensate the plaintiff.

The difference between compensatory damages and punitive damages can be conceptualized by imagining which way the jury is looking when awarding them. With compensatory damages, the jury is looking squarely at the plaintiff: How has the plaintiff been injured? What loss has the plaintiff suffered?

By contrast, with punitive damages, the jury's gaze is fixed firmly on the defendant: What did the defendant do that was wrong? What was the defendant thinking? What is the defendant's attitude? How much money does the defendant have? And, how much money would have to be awarded to really get the defendant's attention?

In seeking to punish the defendant, punitive damages serve at least two purposes: deterrence and retribution. These goals may be familiar to you if you have already taken a course in criminal law. The point of deterrence is to have the defendant and other potential defendants choose not to undertake a similar action in the future, since doing so leads to judgments that make the conduct not worth engaging in. The idea of retribution is to serve the plaintiff's thirst for seeing a wrongdoer, after having made the plaintiff

suffer, be caused to endure suffering of its own. In other words: tit for tat, or getting what you have coming. A more subtle account was made by Professor Dan Markel: "To not punish when we reasonably could is to signal that we do not care about the actions of the offender or the rights and interests underlying the rule the offender breached, or the integrity of our democratic decision-making structure." Dan Markel, *Retributive Damages: A Theory of Punitive Damages as Intermediate Sanction,* 94 CORNELL L. REV. 239, 242 (2009).

To be awarded punitive damages, a plaintiff must do much more than prove the elements of the prima facie case and defeat any affirmative defenses. Simply prevailing on a cause of action is not enough to warrant punitive damages. For punitives to be warranted, there must be some special culpability on the part of the defendant – culpability that greatly exceeds simple negligence. Courts have different words they use to express the threshold culpability for punitive damages, including phrases such as "flagrant misconduct," "malice," "in conscious disregard," "willful, wanton, or reckless," and "wantonly reckless or malicious." The formulations vary. But there is an essence they all share of pointing beyond mere blame to reprehensibility.

A.1. Case: *Mathias v. Accor Economy Lodging* (7th Cir. 2003)

A.1.a. Advance Notes

This case presents a contemporary example of a claim for punitive damages in a consumer context.

A.1.b. Opinion

Mathias v. Accor Economy Lodging

United States Court of Appeals for the Seventh Circuit
October 21, 2003

347 F.3d 672. Burl MATHIAS and Desiree Matthias, Plaintiffs-Appellees/Cross-Appellants, v. ACCOR ECONOMY LODGING, INC. and Motel 6 Operating L.P., Defendants-Appellants/Cross-Appellees. Nos. 03-1010, 03-1078. Before POSNER, KANNE, and EVANS, Circuit Judges.

Judge RICHARD A. POSNER:

The plaintiffs brought this diversity suit governed by Illinois law against affiliated entities (which the parties treat as a single entity, as shall we) that own and operate the "Motel 6" chain of hotels and motels. One of these hotels (now a "Red Roof Inn," though still owned by the defendant) is in downtown Chicago. The plaintiffs, a brother and sister, were guests there and were bitten by bedbugs, which are making a comeback in the U.S. as a consequence of more conservative use of pesticides. The plaintiffs claim that in allowing guests to be attacked by bedbugs in a motel that charges upwards of $100 a day for a room and would not like to be mistaken for a flophouse, the defendant was guilty of "willful and wanton conduct" and thus under Illinois law is liable for punitive as well as compensatory damages. The jury agreed and awarded each plaintiff $186,000 in punitive damages though only $5,000 in compensatory damages. The defendant appeals, complaining primarily about the punitive-damages award. It also complains about some of the judge's evidentiary rulings, but these complaints are frivolous and require no discussion. The plaintiffs cross-appeal, complaining about the dismissal of a count of the complaint in which they alleged a violation of an Illinois consumer protection law. But they do not seek any additional damages, and so, provided we sustain the jury's verdict, we need not address the cross-appeal.

The defendant argues that at worst it is guilty of simple negligence, and if this is right the plaintiffs were not entitled by Illinois law to any award of punitive damages. It also complains that the award was excessive-indeed that any award in excess of $20,000 to each plaintiff would deprive the defendant of its property without due process of law. The first complaint has no possible merit, as the evidence of gross negligence, indeed of recklessness in the strong sense of an unjustifiable failure to avoid a known risk, was amply shown. In 1998, EcoLab, the extermination service that the motel used, discovered bedbugs in several rooms in the motel and recommended that it be hired to spray every room, for which it would charge the motel only $500; the motel refused. The next year, bedbugs were again discovered in a room but EcoLab was asked to spray just that room. The motel tried to negotiate "a building sweep [by EcoLab] free of charge," but, not surprisingly, the negotiation failed. By the spring of 2000, the motel's manager "started noticing that there were refunds being given by my desk clerks and reports coming back from the guests that there were ticks in the rooms and bugs in the rooms that were biting." She looked in some of the rooms and discovered bedbugs. The defendant asks us

to disregard her testimony as that of a disgruntled ex-employee, but of course her credibility was for the jury, not the defendant, to determine.

Further incidents of guests being bitten by insects and demanding and receiving refunds led the manager to recommend to her superior in the company that the motel be closed while every room was sprayed, but this was refused. This superior, a district manager, was a management-level employee of the defendant, and his knowledge of the risk and failure to take effective steps either to eliminate it or to warn the motel's guests are imputed to his employer for purposes of determining whether the employer should be liable for punitive damages. The employer's liability for compensatory damages is of course automatic on the basis of the principle of respondeat superior, since the district manager was acting within the scope of his employment.

The infestation continued and began to reach farcical proportions, as when a guest, after complaining of having been bitten repeatedly by insects while asleep in his room in the hotel, was moved to another room only to discover insects there; and within 18 minutes of being moved to a third room he discovered insects in that room as well and had to be moved still again. (Odd that at that point he didn't flee the motel.) By July, the motel's management was acknowledging to EcoLab that there was a "major problem with bed bugs" and that all that was being done about it was "chasing them from room to room." Desk clerks were instructed to call the "bedbugs" "ticks," apparently on the theory that customers would be less alarmed, though in fact ticks are more dangerous than bedbugs because they spread Lyme Disease and Rocky Mountain Spotted Fever. Rooms that the motel had placed on "Do not rent, bugs in room" status nevertheless were rented.

It was in November that the plaintiffs checked into the motel. They were given Room 504, even though the motel had classified the room as "DO NOT RENT UNTIL TREATED," and it had not been treated. Indeed, that night 190 of the hotel's 191 rooms were occupied, even though a number of them had been placed on the same don't-rent status as Room 504. One of the defendant's motions in limine that the judge denied was to exclude evidence concerning all other rooms-a good example of the frivolous character of the motions and of the defendant's pertinacious defense of them on appeal.

Although bedbug bites are not as serious as the bites of some other insects, they are painful and unsightly. Motel 6 could not have rented any rooms at the prices it charged had it informed guests that the risk of being bitten by bedbugs was appreciable. Its failure either to warn

guests or to take effective measures to eliminate the bedbugs amounted to fraud and probably to battery as well, as in the famous case of *Garratt v. Dailey*, 46 Wash.2d 197, (1955), appeal after remand, 49 Wash.2d 499, (1956), which held that the defendant would be guilty of battery if he knew with substantial certainty that when he moved a chair the plaintiff would try to sit down where the chair had been and would land on the floor instead. There was, in short, sufficient evidence of "willful and wanton conduct" within the meaning that the Illinois courts assign to the term to permit an award of punitive damages in this case.

But in what amount? In arguing that $20,000 was the maximum amount of punitive damages that a jury could constitutionally have awarded each plaintiff, the defendant points to the U.S. Supreme Court's recent statement that "few awards [of punitive damages] exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *State Farm Mutual Automobile Ins. Co. v. Campbell*, 538 U.S. 408 (2003). The Court went on to suggest that "four times the amount of compensatory damages might be close to the line of constitutional impropriety." Hence the defendant's proposed ceiling in this case of $20,000, four times the compensatory damages awarded to each plaintiff. The ratio of punitive to compensatory damages determined by the jury was, in contrast, 37.2 to 1.

The Supreme Court did not, however, lay down a 4-to-1 or single-digit-ratio rule – it said merely that "there is a presumption against an award that has a 145-to-1 ratio," – and it would be unreasonable to do so. We must consider why punitive damages are awarded and why the Court has decided that due process requires that such awards be limited. The second question is easier to answer than the first. The term "punitive damages" implies punishment, and a standard principle of penal theory is that "the punishment should fit the crime" in the sense of being proportional to the wrongfulness of the defendant's action, though the principle is modified when the probability of detection is very low (a familiar example is the heavy fines for littering) or the crime is potentially lucrative (as in the case of trafficking in illegal drugs). Hence, with these qualifications, which in fact will figure in our analysis of this case, punitive damages should be proportional to the wrongfulness of the defendant's actions.

Another penal precept is that a defendant should have reasonable notice of the sanction for unlawful acts, so that he can make a rational determination of how to act; and so there have to be reasonably clear

standards for determining the amount of punitive damages for particular wrongs.

And a third precept, the core of the Aristotelian notion of corrective justice, and more broadly of the principle of the rule of law, is that sanctions should be based on the wrong done rather than on the status of the defendant; a person is punished for what he does, not for who he is, even if the who is a huge corporation.

What follows from these principles, however, is that punitive damages should be admeasured by standards or rules rather than in a completely ad hoc manner, and this does not tell us what the maximum ratio of punitive to compensatory damages should be in a particular case. To determine that, we have to consider why punitive damages are awarded in the first place.

England's common law courts first confirmed their authority to award punitive damages in the eighteenth century, at a time when the institutional structure of criminal law enforcement was primitive and it made sense to leave certain minor crimes to be dealt with by the civil law. And still today one function of punitive-damages awards is to relieve the pressures on an overloaded system of criminal justice by providing a civil alternative to criminal prosecution of minor crimes. An example is deliberately spitting in a person's face, a criminal assault but because minor readily deterrable by the levying of what amounts to a civil fine through a suit for damages for the tort of battery. Compensatory damages would not do the trick in such a case, and this for three reasons: because they are difficult to determine in the case of acts that inflict largely dignitary harms; because in the spitting case they would be too slight to give the victim an incentive to sue, and he might decide instead to respond with violence-and an age-old purpose of the law of torts is to provide a substitute for violent retaliation against wrongful injury-and because to limit the plaintiff to compensatory damages would enable the defendant to commit the offensive act with impunity provided that he was willing to pay, and again there would be a danger that his act would incite a breach of the peace by his victim.

When punitive damages are sought for billion-dollar oil spills and other huge economic injuries, the considerations that we have just canvassed fade. As the Court emphasized in Campbell, the fact that the plaintiffs in that case had been awarded very substantial compensatory damages – $1 million for a dispute over insurance coverage-greatly reduced the need for giving them a huge award of punitive damages ($145 million) as well in order to provide an effective remedy. Our case

is closer to the spitting case. The defendant's behavior was outrageous but the compensable harm done was slight and at the same time difficult to quantify because a large element of it was emotional. And the defendant may well have profited from its misconduct because by concealing the infestation it was able to keep renting rooms. Refunds were frequent but may have cost less than the cost of closing the hotel for a thorough fumigation. The hotel's attempt to pass off the bedbugs as ticks, which some guests might ignorantly have thought less unhealthful, may have postponed the instituting of litigation to rectify the hotel's misconduct. The award of punitive damages in this case thus serves the additional purpose of limiting the defendant's ability to profit from its fraud by escaping detection and (private) prosecution. If a tortfeasor is "caught" only half the time he commits torts, then when he is caught he should be punished twice as heavily in order to make up for the times he gets away.

Finally, if the total stakes in the case were capped at $50,000 (2 x [$5,000 + $20,000]), the plaintiffs might well have had difficulty financing this lawsuit. It is here that the defendant's aggregate net worth of $1.6 billion becomes relevant. A defendant's wealth is not a sufficient basis for awarding punitive damages. That would be discriminatory and would violate the rule of law, as we explained earlier, by making punishment depend on status rather than conduct. Where wealth in the sense of resources enters is in enabling the defendant to mount an extremely aggressive defense against suits such as this and by doing so to make litigating against it very costly, which in turn may make it difficult for the plaintiffs to find a lawyer willing to handle their case, involving as it does only modest stakes, for the usual 33-40 percent contingent fee.

In other words, the defendant is investing in developing a reputation intended to deter plaintiffs. It is difficult otherwise to explain the great stubborness with which it has defended this case, making a host of frivolous evidentiary arguments despite the very modest stakes even when the punitive damages awarded by the jury are included.

As a detail (the parties having made nothing of the point), we note that "net worth" is not the correct measure of a corporation's resources. It is an accounting artifact that reflects the allocation of ownership between equity and debt claimants. A firm financed largely by equity investors has a large "net worth" (= the value of the equity claims), while the identical firm financed largely by debt may have only a small net worth because accountants treat debt as a liability.

All things considered, we cannot say that the award of punitive damages was excessive, albeit the precise number chosen by the jury was arbitrary. It is probably not a coincidence that $5,000 + $186,000 = $191,000/191 = $1,000: i.e., $1,000 per room in the hotel. But as there are no punitive-damages guidelines, corresponding to the federal and state sentencing guidelines, it is inevitable that the specific amount of punitive damages awarded whether by a judge or by a jury will be arbitrary. (Which is perhaps why the plaintiffs' lawyer did not suggest a number to the jury.) The judicial function is to police a range, not a point.

But it would have been helpful had the parties presented evidence concerning the regulatory or criminal penalties to which the defendant exposed itself by deliberately exposing its customers to a substantial risk of being bitten by bedbugs. That is an inquiry recommended by the Supreme Court. But we do not think its omission invalidates the award. We can take judicial notice that deliberate exposure of hotel guests to the health risks created by insect infestations exposes the hotel's owner to sanctions under Illinois and Chicago law that in the aggregate are comparable in severity to the punitive damage award in this case.

"A person who causes bodily harm to or endangers the bodily safety of an individual by any means, commits reckless conduct if he performs recklessly the acts which cause the harm or endanger safety, whether they otherwise are lawful or unlawful." 720 ILCS 5/12-5(a). This is a misdemeanor, punishable by up to a year's imprisonment or a fine of $2,500, or both. 720 ILCS 5/12-5(b); 730 ILCS 5/5-8-3(a)(1), 5/5-9-1(a)(2). Of course a corporation cannot be sent to prison, and $2,500 is obviously much less than the $186,000 awarded to each plaintiff in this case as punitive damages. But this is just the beginning. Other guests of the hotel were endangered besides these two plaintiffs. And, what is much more important, a Chicago hotel that permits unsanitary conditions to exist is subject to revocation of its license, without which it cannot operate. Chi. Munic. Code §§ 4-4-280, 4-208-020, 050, 060, 110. We are sure that the defendant would prefer to pay the punitive damages assessed in this case than to lose its license.

AFFIRMED.

B. Arguing for Punitive Damages

Because the point of punitive damages is to punish, that necessarily means giving the defendant pecuniary pain. And the bigger the defendant is, the larger the punitive damage figure may need to be. In other words, a

$100,000 punitive judgment might be a seismic source of financial hurt for you or me. But to a multinational oil company, $100,000 is less than a rounding error on the corporate balance sheet. Because of this, plaintiffs can present evidence on corporate financials to the jury, and they can then use that as a basis for suggesting how much the jury should assess in punitive damages. It is also permissible for the attorney to argue about the significance of the defendant's conduct on society as a whole.

B.1. Case: *Silkwood v. Kerr-McGee* (W.D. Okla. 1979)

B.1.a. Advance Notes

Part of the closing argument of Gerry Spence in *Silkwood v. Kerr-McGee* is reproduced elsewhere, in the materials relating to strict liability. Here is a different part of that closing argument, in which Spence argues the issue of punitive damages to the jury.

B.1.b. Closing Argument

Silkwood v. Kerr-McGee

United States District Court for the Western District of Oklahoma
1979

Bill M. SILKWOOD, Administrator of the Estate of Karen G. Silkwood, deceased, Plaintiff, v. Kerr-McGee CORPORATION et al., Defendants. Civ. A. No. 76-0888-Theis. In the United States District Court for the Western District of Oklahoma. Hon. Judge Frank G. Theis, U.S. District Judge, District of Kansas, sitting by designation.

The FACTS:

In the early 1970s, Karen Silkwood worked at Kerr-McGee Corporation's Cimarron Fuel Fabrication Site, which made plutonium fuel pellets to be used in nuclear reactors. Silkwood was active with her union, and she uncovered serious health and safety violations at the plant, which she reported to government authorities.

Silkwood became contaminated with plutonium under suspicious circumstances: She was found to have traces of plutonium on her hands, even though the gloves she was using inside of a sealed "glove box" work area had no leaks. Later, more plutonium was found on Silkwood, including from swipes of her nostrils, urine samples, and a

fecal sample. No source for the contamination was found until health physicists went with her to her apartment, where substantial plutonium contamination was found in the kitchen and bathroom. Subsequently, Silkwood agreed to meet with a reporter from the New York Times to provide documentation of plant safety violations. On the way to the meeting, she was killed in a strange one-car accident. Many believed Silkwood was murdered.

Gerry L. Spence of Jackson Hole, Wyoming represented the Silkwood estate. William G. Paul of Crowe, Dunlevy, Thweatt, Swinford, Johnson & Burdick of Oklahoma City represented Kerr-McGee.

(A more detailed recitation of the facts can be found with the portion of the case appearing in the Strict Liability chapter, supra.)

GERRY L. SPENCE, Esq., delivered the plaintiff's CLOSING ARGUMENT:

Thank you, Your Honor. Well, here we are. Every good closing argument has to start with "Ladies and gentlemen of the jury," so let me start that way with you.

I actually thought we were going to grow old together. I thought we would just kind of go down to Sun City, and get us a nice complex there and sort of live out our lives. It looked like that was the way it was going to happen. I had an image in my mind with the judge at the head block, and then the six jurors with nice little houses beside each – and I hadn't made up my mind whether I was going to ask Mr. Paul to come down or not – but I didn't think this case was ever going to get over and I know you didn't think so, either. And, as a matter of fact, as Mr. Paul kept calling witnesses and calling witnesses, I sort of got the impression that he's fallen in love with us over here and just didn't want to quit calling witnesses.

Ladies and gentlemen, it was winter in Jackson, Wyoming, when I came here, and there was four feet of snow at Jackson. We've spent a season here together. I haven't been home to Jackson for two and a half months. And, although I'm a full-fledged Oklahoman now, and have been for over a month and a half, nevertheless I'm homesick. And I'm sure you're homesick, too. I'm sure this has been a tough one on you. Well, I know lots of you have had to do extra work, and I know you've had to work at night, and I know you've had to drive long distances. Every morning – now, I'm a jury watcher – you watch me watching you every morning, and I'd look at you to see if my jury was all right, and see if they were feeling okay. Sometimes they weren't feeling too good, but mostly we made it through this matter together, and I'm pretty proud of that.

It's the longest case in Oklahoma history, they tell me. And, before the case is over, you will know, as you probably already know, that this is probably the most important case, as well. Well, ladies and gentlemen, I want you to know that I don't know how – excepting because Bill Silkwood happened to want me – a country lawyer from Wyoming got out to Oklahoma. It sort of seems that if anything good comes out of this trial that it was providence, and it's the most important case of my career. I'm standing here talking to you now about the most important things that I have ever said in my life. And, I have a sense that I have spent a lifetime, 50 years, to be exact, preparing somehow for this moment with you.

And, so, I'm proud to be here with you, and I'm awed, and I'm a little frightened, and I know that's hard for you to believe because I don't look frightened. But, I've been frightened from time to time throughout this trial. I've learned how to cover that up pretty well. And, what I am setting out to do today is frightening to me. I hope I have the intelligence, the insight, and the spirit, and the ability, and just the plain old guts to get to you what I have to get to you. What I need to do is to have you understand what needs to be understood. And, I think I'll get some help from you. My greatest fear in my whole life has been that when I would get to this important case – whatever it was – I would stand here in front of the jury and be called upon to make my final argument and suddenly you know, I'd just open my mouth and nothing would come out. I'd just sort of stand there and maybe just wet my pants, or something. But I feel the juices – they're going, and I'm going to be all right.~

Now, what is this case about? What is the $70 million claim about? I want to talk about it, because my purpose here is to do some changes that has to do with stopping some things. I don't want to see workers in America cheated out of their lives. I'm going to talk to you about that a lot. It hurts me. It hurts me. I don't want to see people deprived of the truth – the cover-ups. It's ugly. I want to stop it, with your help, the exposing of the public to the hidden dangers, and operating grossly, and negligently, and willfully, and recklessly, and callously. Those are words that you have heard from world experts that you respect – that you believe. I want to stop the misrepresentation to the workers, and to the public, and to the government, and I want to stop it to the juries, and I want to stop it having been made to you.

What is the case not about? The case is not about being against the nuclear industry. You will never hear me say that I stand here against the nuclear industry – I do not. But it is about being responsible, about

responsible progress~. And without the truth, the progress that we all need, and want, can't be had. It is that simple. That is what the case is not about.

But it is about the power of truth, that you have to use in this case somehow, because it has been revealed to you now – you know it – and if there is only one thing that can come from this case, I will go home and sleep for two solid weeks, and rest and catch up, and I will feel that I have done my life's work in one case, and I hope that you would, too – and that if this case makes it so expensive to lie, and to cover up, and to cheat, and not to tell the truth, and to play number games, that it makes it so expensive for industry – this industry – to do that, that the biggest bargain in life, the biggest bargain for those companies is the truth.

You know, I was amazed to hear that Kerr-McGee has 11,000 employees. That's more than most of the towns in the state that I live in – that it is in, 35 states. Well, I guarantee that corporation does not speak "South." It doesn't speak "Okie." It doesn't speak "Western." It doesn't speak "New York." And it is in~ five countries. It doesn't speak any foreign language. It speaks one language universally. It speaks the language of money.

That is the only language that it speaks – the only language that it understands – and that is why the case becomes what it is. That's why we have to talk back to that corporation in money.

I want to talk about the design of that plant very quickly. It was designed by Mr. Utnage. He never designed any kind of a plant. He never designed any plant, plutonium or otherwise. And I confronted him with scores of problems – you remember those 574 reports of contaminations – they were that thick – in two volumes – you remember them. They were paraded out in front of you a number of times. Page after page of them are based upon equipment failure, design failure, equipment failure, design failure, equipment failure, equipment went wrong, design went wrong. Look at them yourself. I asked him about a leak detection system. "We do not need a leak detection system," he said. "What do we need a leak detection system for? We can see it. We can see it."

Here is the man who told you that as long as you can't see it, you're safe. And we know that the amount of plutonium, a half a gram of plutonium, will contaminate the whole state of Oklahoma, and you can't see it. They let it flop down into the rooms, and Jim Smith said one time it was in the room a foot thick on the floor. Do you remember the testimony? He said he designed a safe plant. And he believed the

company lie that plutonium doesn't cause cancer. He sat there on that stand under his oath and looked at every one of you under his oath, and he said plutonium has never been known to cause cancer. Well, now either he lied, or he bought the company lie and didn't know. But he was the man who designed the plant.

You wouldn't have to design a very good plant if you didn't think plutonium caused cancer, it wouldn't bother you. You wouldn't work very hard.~ [T]hat is why we are talking about exemplary and punitive damages, to stop those kind of lies, to stop that kind of action.

Right today, sitting out there at that plant are the trailers with the waste in them. They are not covered by any kind of a vault. They are full of radioactivity. All you have to have is a good strong wind to hit one of those trailers that are sitting there today at this moment as my words come out of my mouth, and pollute the whole countryside. I talked about negligent construction of the plant – that is one of our claims. Can you imagine? Do you remember young Apperson sitting there? You remember his open face – I liked him a lot – an open, honest boy – blond, curly hair – you remember him, two and a half months ago? He said, "Thirty percent of the pipes weren't welded when I came, when the plant was opened. Thirty percent of the pipes were welded after the plant was in operation, and I was there and I saw those old welds." And he wasn't a certified welder himself, and he was teaching people in an hour or two to be welders themselves – not a certified welder on the job. "There was things leaking everywhere," he said. You remember how he was describing how he was there welding the pipe and they jerked the oxygen out, and he had to gasp for air – the contamination – to survive the moment? Jim Smith talked about the valves breaking up from the acid. So much for the design of the plant.

What about the attitude of the management that followed? You know, you can have a gun – most of us in my country know about guns – we use guns – we use guns to go hunting, and it's just a tradition in the West. They probably are for many of us folks. Now, a gun is safe in the hands of somebody that believes it is dangerous. If you do not believe it is dangerous, it isn't safe – if you don't understand a gun – if you don't respect it. Now, what about management? The first manager out there said, "Sure, you can breathe in a pollen-size particle of plutonium and it won't even hurt you." You heard the experts say that a pollen-size of plutonium is lethal. Hammock, the highway patrolman, was talking about how they shoveled up the contamination in the dirt, threw it over the fence, and how the rocks and dirt contaminated – how they played with the uranium, threw it around. One person was telling

us about how they took it home and gave it to one of their children. Would $70 million stop that? Is it enough? Is two weeks' pay enough to dock them for that? Plowman [one of the plant managers] said, you could give $500 million if you think that is right.

Plowman said that he resigned his job because of his concern for the plant operations. Here's a quote: "The major factor was that I didn't like the way the plant was running. I felt that the plutonium plant program was going the same way the uranium plant program was going. I just didn't think I could take much more of it. It seems like things were going from one emergency to another. Nothing was right. I hardly knew where to begin. Contamination was everywhere. The equipment leaked. There was no real effort to control it."

No real effort to control it.

Can you hear their witness saying, "Containment is the name of the game. The men were so contaminated on their arms and hands that you couldn't get it off without peeling their hides. They went home like this nearly every night."? And then he stopped them taking the truck to town, because they always washed it in the car wash, and it would contaminate the town, and the sewer system in the town.

Well, I look at Zitting [a Kerr-McGee manager]. He was the man over everybody. He was an adverse, hostile witness – and I called him in my case. Why would anybody do something that silly? Well, I wanted you to see with your own eyes and hear with your own ears what that man knew, who was in charge of this whole lashup. The buck stopped with him. He's like the commander-in-chief, like our president. Now, the president doesn't need to know everything, but when he sends a bomb, he knows it. When he sends the troops, he knows it. When he's involved with the lives of thousands of people, he knows it, because the buck stops with him, and he's the one with all the ultimate responsibility. And so was Mr. Zitting, who didn't know a damn thing about that plant, or what was going on. He said repeatedly, "I don't recall." I showed him 574 worker contamination reports – 574 were marched up and dumped right here on this stand, and I said, "What about those?"

And do you know what he said to me – you remember? "This is the first time I have ever seen those," in this courtroom.

That is the kind of management, that is the kind of caring. I asked him about the truck that was leaking, that they buried parts of. He said he never heard of it before.

Is there any wonder that Mr. Keppler of the AEC [Atomic Energy Commission, a federal regulatory body] – poor Mr. Keppler – I probably pushed him a little further than I should have. I hope you don't hold that against me, but I wanted to shake out the last bit of information I could from him so you could see it. Poor Mr. Keppler said, "I was of the opinion I couldn't find anybody knowledgeable enough in management who knew anything about it, or who cared."

This is the man who said, when I asked him, "Were you ever" – here is an actual question – "Were you ever advised by anybody that employees were of the opinion that any amount of plutonium could be taken out of that plant?" He said, "No, I never heard of it." Was production put over safety? What did they do with a contaminated room? Did they ever stop production? Is there any evidence that they even once stopped production? If they did stop production for a contaminated room, don't you think they would have brought somebody in, in five years? Not once.

They painted it – one hundred gallons of paint, and – "It is chipping off today" – to this very day. Dr. Morgan [plaintiff's expert witness] called that reckless. You know why it is reckless? Because as it chips of, it comes down in a fine powder form and can be breathed into your lungs. "How big a piece do you breathe into your lungs?" "Nobody knows." "Do you know when you breathe it into your lungs?" "No. Nobody knows if you breathe it. It is too late after you breathe it, and once you get it from the air sample, by the time you get it in the air sample, it is 24 hours too late, or longer now." By the time you understand you have been poisoned, the poisoning has already happened.

That is why it is negligence. That is why it is callous. That is why Dr. Morgan said, "It is worse than reckless." Documented doctored X-rays. They were always behind. Always behind. They denied that, but they were always behind. Finally Zitting admitted, when I took him through the monthly reports – you remember that – "Yes, they were behind."

And Hammock said they were shipping defective pins. It just turns my guts. They were shipping defective pins to a breeder reactor knowing they were defective, to Washington where people – the state of Washington – where people are going to somehow be subjected to the first breeder reactor in this country. Here is the actual testimony of Hammock. Now, hear this: He said, "The rods were defective because they had a bad weld, or too large a weld sealing in the plutonium pellets." This is an exact quote: "Even though we rejected them, we would go ahead and ship them because we were too far behind in

production. The workers, on orders from the supervisors, would simply sand down the welds, which weakened them."

Now, I want to tell you something. That evidence is before you. It is uncontradicted. If that wasn't true, they would have brought somebody here to tell differently.

Now, here we are next on training. I talked a good bit about that. I was satisfied, I will admit I was satisfied with my $10 million request – which the judge now says the sky is the limit – I was satisfied with that $10 million request until I heard about the training. I almost didn't come out for the next round after that. I couldn't get over it. I couldn't sleep. I couldn't believe what I had heard.

I don't know how it affected you. Maybe you get so numb after awhile. I guess people just stand and say, "Exposure, exposure, exposure, exposure, exposure, cancer, cancer, cancer, cancer, cancer, cancer, cancer, cancer, cancer, cancer, cancer, cancer, cancer, cancer, cancer, cancer, cancer, cancer," until you don't hear it anymore. Maybe that is what happens to us.

I tell you, if it is throbbing in your breast, if cancer is eating at your guts, or it's eating at your lungs, or it's gnawing away at your gonads, and you're losing your life, and your manhood, and your womanhood, and your child, or your children, it then has meaning. They are not just words. You multiply it by hundreds of workers, and thousands of workers, that is why this case is the most important case, maybe, in the history of man. That is why I'm so proud to be here with you. That's why I'm so glad you're on this jury and that we are apart of this thing together.

It wasn't until I read this document – that came to me almost like it was divinely given – and, you know, I don't know how you feel about things like that, but I reached out my hand, and that man had it, that man right there, Mr. Paul, put it in my hand. This is the '59 data that you saw, that Mr. Valentine [an expert witness for the defense] had in his possession. Now, Dr. Morgan told you there were thousands of articles written, available to people that wanted to read them, about the danger of plutonium. Thousands. This is the one, the only one that their expert, Valentine, could tell us he read, and he had it clutched in his own little hand, and it was this document, from which he had put together this infamous manual, the manual that hides, and is full of gobbledygook so that workers who took that home in their hands and sat down at the table with their children, ladies and gentlemen, as they sat down at the table with their family around, and they said we should read this, and

here it is. [*Indicating the exhibit.*] That infamous piece of junk said nothing about cancer of the lungs, it said nothing about anything excepting once a word about – the fancy word "malignancy" – and with respect to the respiratory problems and of the lungs, it said nothing. And I read it to you, and you heard it, and you will have it in your jury room, and you can read it to yourselves and see if it told you anything. And this is the document that told him about the radium workers clear back in '59 and the uranium workers clear back in the 1800s that were dying like flies from alpha particles and they knew it. That man knew it.

It is the most dastardly crime in the history of man, to cheat workers of their right to live, of their right to make a free choice. How would you like it if somebody wanted your body for $3.50 a lousy hour, and to get it, told you – like those books told you – like the big man told them, "that the nuclear industry is probably the safest industry ever developed."

I wish I could just tell you how bad that makes me feel. I wish I could just express to you how dastardly a trick that is.

It would be one thing, you know, if they said to workers, "Listen, we've known for years that uranium people have died like flies, we know that radium dial people have died from alpha particles just like in the plutonium business. Here is a picture, ladies and gentlemen, my dear workers, people that are going to give your lives to my company – here is a picture of a particle, an alpha particle – millions of those will be in your lungs if you breathe any, and we don't know how much it takes to cause cancer. You have the right to know that is the danger you're exposed to."

If you're working with electricity, nobody goes around and says, you know, "There isn't any danger in electricity if you grab that wire – it won't hurt you." If you're working with a structure where men's lives are involved, you don't tell them it is safe if it is not safe. You tell them the truth.

It was that night, ladies and gentlemen, that I woke up the next morning, after a fitful night's sleep, and decided that I was going to ask you to make this case meaningful, and I increased my request for a prayer from 10 to 70 million – two weeks' wages. I hope it is enough. I leave it to your good judgment.

How does this all tie in with Karen Silkwood? Well the court says that they're liable if the lion got away, even if they used the utmost care. If the lion got away, they have to pay – they have to pay for what

happened to her. If it is willful, wanton, and gross negligence, they have to pay such sum as you feel is correct, even if it is half a billion – even if it is 500 million. The assessment of the damages is left for you.

I want to quote an instruction that you will hear. It is the basis of punitive damages – that's the $70 million to punish. Punitive. To exemplify. Exemplary. So that the rest of the uranium, plutonium, and the nuclear industries in this country will have to tell the truth.

The basis of punitive and exemplary damages rests upon the principle that they are allowed as punishment of the offender for the general benefit of society, both as a restraint upon the transgressor – restraint upon the transgressor – that is against Kerr-McGee, so they won't do it anymore, and a meaningful warning and example – to deter the commission of like offenses in the future. If the defendants are grossly or wantonly negligent – listen to this language in the court's instructions – you may allow exemplary or punitive damages, and you may consider the financial worth. I didn't bring that out to try to have you be prejudiced against a large corporation, I brought it out because what is fair punishment for one isn't for another.

It is fair punishment to take a paper boy who makes five dollars a week~ to take away five dollars from him for not coming home when he was suppose to~. If one of your children lied about something – one of your children lied about something that had to do with the life and health of a brother or sister, and he covered it up, and he lied about it, and he said that the brother and the sister were safe when he knew that he had exposed them to death – I suppose that you might not find it unreasonable to hold him responsible for two weeks, two piddling weeks, allowance in bucks, and leave fifty weeks left for him.

That is what 70 million is to this corporation: Two weeks. Leaving 50 weeks' income.

Maybe it isn't enough, but I was afraid to ask for more. You know why I'm afraid? This case is so important that I'm afraid that if I stand here and ask you what I really think the case is entitled to, you will laugh at me, and I can't have that. I can't have you thinking that I'm silly. I can't have you thinking that I'm ridiculous. Because it is important to me, it is important for what I'm trying to do that you find me credible. And I've tried to retain my credibility with you through this trial.

Now, Dr. Karl Morgan said the plant employees themselves were deceived into entering a lion's cage – it was his language – not even meeting permissible standards. They were sent into a lion's cage – this actually quoting him – being told there were no animals in the cage. He

said they had unqualified people there. He took great exception to the fact they weren't told about cancer, and he said that is willful. "Is it wanton?" "Yes, it is wanton." "Is it reckless?" "Yes, it is reckless." "What would you call it, doctor?" He said: "I would call it callous." He said, and I want to give you a quote from that great man of science – the father of health physics, who has taught the teachers and professors, and he's a fine, old, beautiful man – and if I were a little child wanting to be protected from the great exposures of plutonium I would curl up in his lap and close my eyes and put my hands and my faith in him, and I do. And, he said, "I could not imagine that such a lackadaisical attitude could be developed in an organization toward the health and safety of people. It was callous, willful, and wanton negligence."

I will be back with you after the defendants have concluded their arguments. Thank you.

SPENCE delivered the plaintiff's REBUTTAL CLOSING ARGUMENT:

Thank you, your honor.

Fellow counsel, Mr. Paul,~ ladies and gentlemen:

I, during the recess, wondered about whether there is enough in all of us to do what we have to do.

I'm afraid – I'm afraid of two things.

I'm afraid that you have been worn out, and that there may not be enough left in you to hear, even if you try and I know you will try but I know you are exhausted.

And I've been afraid that there isn't enough left in me, that my mind isn't clear and sharp now, and that I can't say the things quickly that I need to say, and yet it has to be done, and it has to be done well.

I have asked my friends, during the recess – and they are here, I asked my father, my mother, my close friends for strength to do this. I hope that you have been able to do that yourselves, and that you can, with each other, and call upon your own strength and from your own sources, because this is the last time that we, as living, breathing humans, will talk together about this subject. And it is the last time that anybody will speak for Karen Silkwood. And when your verdict comes out, it will be the last time that anybody will have the opportunity that you have, and so it is important that we have the strength and the power to do what we need to do.

You know history has always at crucial times reached down into the masses and picked ordinary people and gave ordinary people

extraordinary power. That is the way it has always been in history and I have no reason to believe that it is any different now.

Ladies and gentlemen, I need to get to the issues – our time is short.~ You know, if all of the leaks, and all of the spills, and the incidents, and all the rest of the 500 things – if all of those violations, some 75 of them – violations – all those weeks, from the testimony of all of those people, wouldn't somehow embarrass them enough, if the fact that they were doctoring – one of the world's great corporations doctoring – now that wouldn't embarrass them enough?

She didn't need to embarrass them. She wasn't trying to embarrass them. She was trying to do something that was important to people. Her words were: "Something has to be done about this."~

I think she was a heroine. I think her name will be one of the names that go down in history along with the great names of women heroines. I think she will be the woman who speaks through you, and may save this industry and this progress and may save, out of that industry hundreds of thousands of lives. But Mr. Paul calls it "despicable."

I think it was the greatest service that was ever conceived. I think she was exactly what the people said she was: "A courageous woman."~

Now, they rest their case on her emotional state. They say – I'm referring to their notes – "This woman was in an emotional state, and therefore because she was in an emotional state she doctored her own urine sample." That is what they said. How did she get in such an emotional state? How was it that she was almost ready to break? How was it that she was nervous and moody? She couldn't find the contamination. How would you like to come home all clean, go to your bed – cleaned up at the plant – go to your own bed, and come back the next day and find you're dirty again, and be cleaned up again, and come back to go to your own bed, and come back the second day and find you're dirty again? How would you like that? Would it upset you? Would it scare you? Would you say to people, "I don't know why they're doing this. Somebody is contaminating me. I don't know where this is coming from. It must be coming out of my body. It is in my nose. It must be coming out of my lungs. I've been cleaned up. It isn't anywhere else. I go home, and I come back the next day. What is going on, Mr. People of the Management, Mr. Morgan Moore? I gave you my samples, they're hot. You're not doing anything about it. It is coming out of my lungs."

And you know what they do? They accuse her.

They accused her then, and they accuse her now, and they continue to accuse her. They said, "You're unstable. You've lost control." And then Mr. Paul says: "Let's be fair."

I heard him say it over and over. "Let's be fair." She thought she was going to die, and they gave her lawyers – "Let's be fair" – not doctors.~ "Let's be fair." And they continued to blame her.~ They are still blaming her today.~

I would have thought a lot more of them if they had come in and said, "Yes, we let it go. Yes, we had a sloppy operation. Yes, we did it. We're sorry. We will pay the damages. We'll pay the fiddler." I don't think I would be nearly so angry as when they try to slander.

You know what Will Rogers said about slander? Will Rogers said, "Slander is the cheapest defense going."

It doesn't cost anything to slander anybody. I can slander you, and if I say it enough, somebody will start believing it. And, it is pretty hard to defend. You remember when you were a kid in high school, and somebody said you did certain things, and you didn't do it, but your mother accused you of something and you couldn't prove you didn't do it, or your daddy said you did something and you couldn't prove it. How about when people slander you like this in the most important case in the world, and base their defense upon it? Now stop and think about what I just said. How about it when the slander is in the most important case of this century – maybe of this nation's history – and all the defense is a slander? What about that – how do you feel? How does it make you feel? How do you feel about the kind of corporation that tells Mr. Paul this is what he has to do?

Now let me ask you this question: When we walk out of here I ain't going to be able to say another word, and you're going to have to make some decisions, and they are going to be made not just about Karen Silkwood, and not just about those people at that plant, but people involved in this industry and the public that is exposed to this industry.

That is a frightening obligation. You need to trust somebody. You need not to get in mud springs. If you get in there, you're lost forever. If you get down in there and start dealing with the number crunches, and this exhibit and that exhibit, and all the other junk, you get into mud springs. But you don't need to. You need to trust somebody. Who are you going to trust? Are you going to trust Kerr-McGee? Are you going to leave your kids to them? Do you feel safe in that? Are you going to leave your children and their futures to those people, the men in gray? Do you feel safe about that? I'm not saying they are bad men – I'm

saying are you going to leave it on those arguments? Do they satisfy you? Can you do it? Is your verdict going to say something about the number-crunching game – that it's got to stop? Is it going to be heard from here around the world? Can you do it? Do you have the power? Are you afraid? If you are, I don't blame you, because I'm afraid, too.

I'm afraid that I haven't the power for you to hear me. I'm afraid that somehow I can't explain my knowledge and my feelings that are in my guts to you. I wish I had the magic to put what I feel in my gut and stomach into the pit of every one of you.

I want to tell you something about me. I have been in courtrooms in Wyoming, little old towns in Wyoming, 5,000 here – I grew up in Riverton, Wyoming – 5,000 people there – Dubois, Rock Springs, I've been all over. I've been the county attorney, and I've prosecuted murderers – eight years I was a prosecutor – and I prosecuted murderers and thieves, and drunk and crazy people, and I've sued careless corporations in my life, and I want to tell you that I have never seen a company who misrepresented to the workers that the workers were cheated out of their lives.

These people that were in charge knew of plutonium. They knew what alpha particles did. They hid the facts, and they confused the facts, and they tried to confuse you, and they tried to cover it, and they tried to get you in the mud springs.

You know and I know what it was all about. It was about a lousy $3.50-an-hour job. And if those people knew they were going to die from cancer 20 or 40 years later, would they have gone to work? The misrepresentations stole their lives. It's sickening, it's willful, it's callous.

Nobody seriously contends Kerr-McGee told these people about cancer. No one said that they heard about cancer.~ They hid it. They hid the fact. It was a trap, surely as deadly as the worst kind of landmines, the worse kind of traps. I tell you, if you were in the army, and your officer said to you to walk down that road, and that it was safe, and they knew it was full of landmines, and the only reason they told you it was safe was because that was the only way they could get you to go down the road, and that they blew you all to hell, what would your feelings be? It's that kind of misconduct that we are talking about in this case, and it is that kind of misconduct relative to the entire training of these people that this case is about. They blame it on something else after it is all over.

Now, I have a vision. It is not a dream – it's a nightmare. It came to me in the middle of the night, and I got up and wrote it down, and I want you to hear it because I wrote it in the middle of the night about a week ago. Twenty years from now – the men are not old, some say they're just in their prime, they're looking forward to some good things. The men that worked at that plant are good men with families who love them. They are good men, but they are dying – not all of them but they are dying like men die in a plague. Cancer they say, probably from the plutonium plant. He worked there as a young man. They didn't know much about it in those days. He isn't suffering much; but it is just a tragedy. They all loved him. Nobody in top management seemed to care. Those were the days when nobody in management in the plutonium plant could be found, even by the AEC, who knew or cared. They worked the men in respirators. The pipes leaked. The paint dropped from the walls. The stuff was everywhere. Nobody cared very much. The place was run by good money men. They were good money men – good managers. The company, well, it covered things up.~ And the information was kept from them, or they wouldn't have worked.~ The training. Well, it was as bad as telling children that the Kool-Aid, laced with poison, is good for them. A hidden danger – they never knew. Some read about plutonium and cancer in the paper for the first time during a trial – the trial called "The Silkwood Case" – but it was too late for them. Karen Silkwood was dead, the company was trying to convince an Oklahoma jury that she contaminated herself. They took two and a half months for trial. The company had an excuse for everything. Blamed it all on the union. Blamed it all on everybody else – on Karen Silkwood, on the workers, on sabotage, on the AEC. It was a sad time in the history of our country. They said the AEC was tough – 75 violations later they hadn't even been fined once. It was worse than the days of slavery. It was a worse time of infamy than the days of slavery because the owners of the slaves cared about their slaves, and many of them loved their slaves. It was a time of infamy, and a time of deceit, corporate dishonesty. A time when men used men like disposable commodities – like so much expendable property. It was a time when corporations fooled the public, were more concerned with the public image than with the truth. It was a time when the government held hands with these giants, and played footsie with their greatest scientists. At the disposal of the corporation, to testify, to strike down the claims of people, and it was too late. It was a sad time, the era between '70 and '79 – they called it the Cimarron Syndrome.

What is this case about? It is about Karen Silkwood, who was a brave, ordinary woman who did care. And she risked her life, and she lost it. And she had something to tell the world, and she tried to tell the world. What was it that Karen Silkwood had to tell the world? That has been left to us to say now. It is for you, the jury to say. It is for you, the jury to say it for her. What was she trying to tell the world? Ladies and gentlemen of the jury I wish Karen Silkwood was standing here by me now and could say what she wanted to say. I think she would say, "Brothers and sisters …" I don't think she would say ladies and gentlemen. I think she would say, "Brothers and sisters, they were just 18- and 19-year-olds. They didn't understand. There wasn't any training. They kept the danger a secret. They covered it with word games and number games." And she would say: "Friends, it has to stop here today, here in Oklahoma City today."

Ladies and gentlemen, I've still got half an hour, and I'm not going to use it. I'm going to close my case with you right now I'm going to tell you a story a simple story about a wise old man – and a smart-aleck young boy who wanted to show up the wise old man for a fool. The boy's plan was this: He found a little bird in the forest and captured the little bird. And he had the idea he would go to the wise old man with the bird in his hand and say, "Wise old man, what have I got in my hand?" And the old man would say, "Well, you have a bird, my son." And he would say, "Wise old man, is the bird alive, or is it dead?" And the old man knew if he said, "It is dead" the little boy would open his hand and the bird would fly away. Or if he said, "It is alive," then the boy would take the bird in his hand and crunch it and crunch it, and crunch the life out of it, and then open his hand and say, "See, it is dead." And so the boy went up to the wise old man and he said, "Wise old man, what do I have in my hand?" "The old man said, "Why it is a bird, my son." He said, "Wise old man, is it alive, or is it dead?" And the wise old man said, "The bird is in your hands, my son."

Thank you very much.

It's been my pleasure, my God-given pleasure, to be a part of your lives. I mean that. Thank you, your honor.

C. Incidence and Magnitude of Punitive Damages

Punitive damages are not typical. A U.S. Department of Justice study found that plaintiffs sought punitive damages in about 12% of civil trials. Success in getting such an award is considerably rarer. Of all cases proceeding

through trial, punitive damages were awarded about 2% of the time. THOMAS H. COHEN & KYLE HARBACEK, PUNITIVE DAMAGE AWARDS IN STATE COURTS, 2005, NCJ 233094 (DOJ Bureau of Justice Statistics, 2011).

Although punitive damages are a permissible remedy for most tort causes of action, they are far more common with certain claims, including intentional torts, defamation, and fraud. The DOJ study found punitive damages were sought in 33% of defamation cases, 32% of fraud cases, and 30% of intentional tort cases (including conversion and other intentional torts). By contrast, in medical malpractice cases, punitives were sought 8% of the time. For auto accidents, the figure was 7%.

The median award of punitive damages was $64,000, and 13% of awards were for amounts of $1 million or more.

D. Caps and Split-Recovery Provisions for Punitive Damages Under State Law

Many states place caps on punitive damages. Most involve hard dollar amounts or maximum multiples of compensatory damages. Others take a hybrid approach, considering both a hard cap and the mathematical relationship between compensatory and punitive damages. Still other states tie caps to the net worth of the defendant.

A very different limit on punitive damages occurs when states rake off a percentage of punitive damages awarded and deposit those funds into the state treasury. The idea behind these laws, called split-recovery statutes, is that since the money awarded is for the purpose of punishing the defendant rather than compensating the plaintiff, the plaintiff has no special claim to it.

A few hops around the map will give you an idea of the variety that's out there.

Among those states with caps, Montana is at the high end. In Montana, punitive damages may be awarded in cases of actual fraud, or when the defendant "deliberately proceeds to act in conscious or intentional disregard of the high probability of injury to the plaintiff," or "deliberately proceeds to act with indifference to the high probability of injury to the plaintiff." Mont. Code § 27-1-221. Punitive damages are capped at $10 million or 3% of the

defendant's net worth, whichever is less. The cap is not applicable to class actions. Mont. Code § 27-1-220.

Indiana is a state at the stricter end of the spectrum. There, punitive damages are generally allowed where the plaintiff can show, by clear and convincing evidence, that the defendant has a quasi-criminal state of mind or engages in willful or wanton misconduct that the defendant knows is likely to cause injury. When permitted, Ind. Code § 34-51-3-3 limits punitive damages to the greater of $50,000 or three times compensatory damages. A defendant paying punitive damages must submit the payment to the clerk of the court, who will remit 25% to the plaintiff and 75% to the state treasury. The jury cannot be advised of the cap on punitive damages, nor can it be told about the state's 75% rake.

In Arkansas, the legislature passed a cap on punitive damages generally limiting them to the greater of $250,000 or three times compensatory damages up to a hard limit of $1 million. Ark. Code § 16-55-208. But in 2011, the Arkansas Supreme Court struck down §16-55-208 as violating the state constitution, providing that except for workers compensation, "no law shall be enacted limiting the amount to be recovered for injuries resulting in death or for injuries to persons or property." Ark. Const. art. 5, § 32. Notably, the Arkansas decision spurred business leaders to finance the election campaigns of state Supreme Court judges – presumably those likely to vote differently on such issues in the future.

New Hampshire stands alone with how its law treats punitive damages. In the Granite State, punitive damages are not allowed at all unless they are specifically authorized by statute. The list of torts that have been given a legislative blessing for punitive damages is eclectic. Willful or wanton misappropriation of trade secrets can merit punitive damages. N.H. Rev. Stat. § 350-B:3. And treble damages are permitted against willful removers of gravel, clay, sand, turf, mold, or loam from another's property. N.H. Rev. Stat. § 539:4. One wonders how often this comes up: Owners of sewer systems and sewage disposal plants can obtain treble damages from persons maliciously or wantonly damaging their facilities. N.H. Rev. Stat. § 149-I:23. One last thing of note – although punitive damages are generally unavailable in New Hampshire, something called "enhanced compensatory damages" are allowed as a general matter in egregious cases.

E. Federal Constitutional Limits on Punitive Damages

While state limits on punitive damages vary, the federal constitution sets an outer bound beyond which punitive damages are not allowed.

The constitutionalization of punitive damages in tort cases is a fairly recent development. The Supreme Court rejected an early attempt to find such an outer boundary in the Excessive Fines Clause of the Eighth Amendment in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.,* 492 U.S. 257 (1989). That case held that the Excessive Fines Clause concerns direct actions by the government to inflict punishment. Since civil trials between private parties fall outside that concern, the Eighth Amendment provides no limit.

Soon thereafter, in *Pacific Mutual Life Ins. Co. v. Haslip,* 499 U.S. 1 (1991), the Supreme Court rebuffed a challenge to a punitive damages award on a theory that it violated the Due Process Clause of the Fourteenth Amendment. But the *Pacific Mutual* court conspicuously left the door open to Due Process challenges of punitive damages awards in future cases. Then, five years later, the Supreme Court held that the Due Process Clause was violated by an award of civil-jury punitive damages in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996). In the *BMW* case, the buyer of a "new" BMW found out that his car had – before he purchased it – suffered some cosmetic damage that was repaired at an auto-body shop. While the repairs made the car look new again, they provably decreased the market value of the car by $4,000. In the trial court, Gore got his compensatory damages. Then, on top of that, the court awarded $4 million in punitive damages. The Supreme Court found this award constitutionally excessive.

The court revisited the issue of punitive damages more systematically in *State Farm v. Campbell,* 538 U.S. 408 (2003), a case which is reproduced below.

Subsequently, in *Philip Morris USA v. Williams,* 549 U.S. 346 (2007), the court held that punitive damages may not be imposed for a defendant's conduct toward persons other than the plaintiff. The court did say, however, that evidence of harming other persons was relevant as evidence of the reprehensibility of the defendant's conduct toward the plaintiff.

E.1. Case: *State Farm v. Campbell* (U.S. 2003)

E.1.a. Advance Notes

This case contains the U.S. Supreme Court's most comprehensive statement of the law with regard to the constitutionality of punitive damage awards.

E.1.b. Opinion

State Farm v. Campbell

Supreme Court of the United States
April 7, 2003

538 U.S. 408. Formally styled as "State Farm Mutual Automobile Insurance Co. v. Campbell." STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Petitioner, v. Inez Preece CAMPBELL and Matthew C. Barneck, special administrator and personal representative of the Estate of Curtis B. Campbell. No. 01-1289. KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and STEVENS, O'CONNOR, SOUTER, and BREYER, JJ., joined. SCALIA, J., THOMAS, J., and GINSBURG, J., post, p. 1527, filed dissenting opinions.

Justice ANTHONY KENNEDY delivered the opinion of the Court:

We address once again the measure of punishment, by means of punitive damages, a State may impose upon a defendant in a civil case. The question is whether, in the circumstances we shall recount, an award of $145 million in punitive damages, where full compensatory damages are $1 million, is excessive and in violation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

I

In 1981, Curtis Campbell (Campbell) was driving with his wife, Inez Preece Campbell, in Cache County, Utah. He decided to pass six vans traveling ahead of them on a two-lane highway. Todd Ospital was driving a small car approaching from the opposite direction. To avoid a head-on collision with Campbell, who by then was driving on the wrong side of the highway and toward oncoming traffic, Ospital swerved onto the shoulder, lost control of his automobile, and collided with a vehicle driven by Robert G. Slusher. Ospital was killed, and Slusher was rendered permanently disabled. The Campbells escaped unscathed.

In the ensuing wrongful death and tort action, Campbell insisted he was not at fault. Early investigations did support differing conclusions

as to who caused the accident, but "a consensus was reached early on by the investigators and witnesses that Mr. Campbell's unsafe pass had indeed caused the crash." 65 P.3d 1134, 1141 (Utah 2001). Campbell's insurance company, petitioner State Farm Mutual Automobile Insurance Company (State Farm), nonetheless decided to contest liability and declined offers by Slusher and Ospital's estate (Ospital) to settle the claims for the policy limit of $50,000 ($25,000 per claimant). State Farm also ignored the advice of one of its own investigators and took the case to trial, assuring the Campbells that "their assets were safe, that they had no liability for the accident, that [State Farm] would represent their interests, and that they did not need to procure separate counsel." To the contrary, a jury determined that Campbell was 100 percent at fault, and a judgment was returned for $185,849, far more than the amount offered in settlement.

At first State Farm refused to cover the $135,849 in excess liability. Its counsel made this clear to the Campbells: " 'You may want to put for sale signs on your property to get things moving.' " Ibid. Nor was State Farm willing to post a supersedeas bond to allow Campbell to appeal the judgment against him. Campbell obtained his own counsel to appeal the verdict. During the pendency of the appeal, in late 1984, Slusher, Ospital, and the Campbells reached an agreement whereby Slusher and Ospital agreed not to seek satisfaction of their claims against the Campbells. In exchange the Campbells agreed to pursue a bad faith action against State Farm and to be represented by Slusher's and Ospital's attorneys. The Campbells also agreed that Slusher and Ospital would have a right to play a part in all major decisions concerning the bad-faith action. No settlement could be concluded without Slusher's and Ospital's approval, and Slusher and Ospital would receive 90 percent of any verdict against State Farm.

In 1989, the Utah Supreme Court denied Campbell's appeal in the wrongful-death and tort actions. *Slusher v. Ospital,* 777 P.2d 437 (Utah 1989). State Farm then paid the entire judgment, including the amounts in excess of the policy limits. The Campbells nonetheless filed a complaint against State Farm alleging bad faith, fraud, and intentional infliction of emotional distress.~ [T] jury determined that State Farm's decision not to settle was unreasonable because there was a substantial likelihood of an excess verdict.

Before the second phase of the action against State Farm we decided *BMW of North America, Inc. v. Gore,* 517 U.S. 559 (1996), and refused to sustain a $2 million punitive damages award which accompanied a verdict of only $4,000 in compensatory damages. Based

on that decision, State Farm again moved for the exclusion of evidence of dissimilar out-of-state conduct. The trial court denied State Farm's motion.

The second phase addressed State Farm's liability for fraud and intentional infliction of emotional distress, as well as compensatory and punitive damages. The Utah Supreme Court aptly characterized this phase of the trial:

> State Farm argued during phase II that its decision to take the case to trial was an 'honest mistake' that did not warrant punitive damages. In contrast, the Campbells introduced evidence that State Farm's decision to take the case to trial was a result of a national scheme to meet corporate fiscal goals by capping payouts on claims company wide. This scheme was referred to as State Farm's 'Performance, Planning and Review,' or PP & R, policy. To prove the existence of this scheme, the trial court allowed the Campbells to introduce extensive expert testimony regarding fraudulent practices by State Farm in its nation-wide operations. Although State Farm moved prior to phase II of the trial for the exclusion of such evidence and continued to object to it at trial, the trial court ruled that such evidence was admissible to determine whether State Farm's conduct in the Campbell case was indeed intentional and sufficiently egregious to warrant punitive damages.

Evidence pertaining to the PP & R policy concerned State Farm's business practices for over 20 years in numerous States. Most of these practices bore no relation to third-party automobile insurance claims, the type of claim underlying the Campbells' complaint against the company. The jury awarded the Campbells $2.6 million in compensatory damages and $145 million in punitive damages, which the trial court reduced to $1 million and $25 million respectively. Both parties appealed.

The Utah Supreme Court sought to apply the three guideposts we identified in *Gore*, and it reinstated the $145 million punitive damages award. Relying in large part on the extensive evidence concerning the PP & R policy, the court concluded State Farm's conduct was reprehensible. The court also relied upon State Farm's "massive wealth" and on testimony indicating that "State Farm's actions, because of their clandestine nature, will be punished at most in one out of every 50,000 cases as a matter of statistical probability," and concluded that the ratio between punitive and compensatory damages was not

unwarranted. Finally, the court noted that the punitive damages award was not excessive when compared to various civil and criminal penalties State Farm could have faced, including $10,000 for each act of fraud, the suspension of its license to conduct business in Utah, the disgorgement of profits, and imprisonment. We granted certiorari.

II

We recognized in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.,* 532 U.S. 424 (2001), that in our judicial system compensatory and punitive damages, although usually awarded at the same time by the same decisionmaker, serve different purposes. Compensatory damages "are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct." By contrast, punitive damages serve a broader function; they are aimed at deterrence and retribution. *Cooper Industries,* supra, at 432; see also *Gore*, supra, at 568 ("Punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition"); *Pacific Mut. Life Ins. Co. v. Haslip,* 499 U.S. 1, 19 (1991) ("[P]unitive damages are imposed for purposes of retribution and deterrence").

While States possess discretion over the imposition of punitive damages, it is well established that there are procedural and substantive constitutional limitations on these awards. The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor.~

Although these awards serve the same purposes as criminal penalties, defendants subjected to punitive damages in civil cases have not been accorded the protections applicable in a criminal proceeding. This increases our concerns over the imprecise manner in which punitive damages systems are administered. We have admonished that "[p]unitive damages pose an acute danger of arbitrary deprivation of property. Jury instructions typically leave the jury with wide discretion in choosing amounts, and the presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences."~ Our concerns are heightened when the decisionmaker is presented, as we shall discuss, with evidence that has little bearing as to the amount of punitive damages that should be awarded. Vague instructions, or those that merely inform the jury to avoid "passion or prejudice," do little to aid the decisionmaker in its

task of assigning appropriate weight to evidence that is relevant and evidence that is tangential or only inflammatory.

In light of these concerns, in *Gore,* we instructed courts reviewing punitive damages to consider three guideposts: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. We reiterated the importance of these three guideposts in *Cooper Industries* and mandated appellate courts to conduct de novo review of a trial court's application of them to the jury's award. Exacting appellate review ensures that an award of punitive damages is based upon an "application of law, rather than a decisionmaker's caprice."

III

Under the principles outlined in *BMW of North America, Inc. v. Gore,* this case is neither close nor difficult. It was error to reinstate the jury's $145 million punitive damages award. We address each guidepost of *Gore* in some detail.

A

"[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect. It should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence.

Applying these factors in the instant case, we must acknowledge that State Farm's handling of the claims against the Campbells merits

no praise. The trial court found that State Farm's employees altered the company's records to make Campbell appear less culpable. State Farm disregarded the overwhelming likelihood of liability and the near-certain probability that, by taking the case to trial, a judgment in excess of the policy limits would be awarded. State Farm amplified the harm by at first assuring the Campbells their assets would be safe from any verdict and by later telling them, postjudgment, to put a for-sale sign on their house. While we do not suggest there was error in awarding punitive damages based upon State Farm's conduct toward the Campbells, a more modest punishment for this reprehensible conduct could have satisfied the State's legitimate objectives, and the Utah courts should have gone no further.

This case, instead, was used as a platform to expose, and punish, the perceived deficiencies of State Farm's operations throughout the country. The Utah Supreme Court's opinion makes explicit that State Farm was being condemned for its nationwide policies rather than for the conduct directed toward the Campbells.~ The courts awarded punitive damages to punish and deter conduct that bore no relation to the Campbells' harm. A defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages. A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business. Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis, but we have no doubt the Utah Supreme Court did that here. Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct; for in the usual case nonparties are not bound by the judgment some other plaintiff obtains.

The same reasons lead us to conclude the Utah Supreme Court's decision cannot be justified on the grounds that State Farm was a recidivist. Although "[o]ur holdings that a recidivist may be punished more severely than a first offender recognize that repeated misconduct is more reprehensible than an individual instance of malfeasance," *Gore* at 577, in the context of civil actions courts must ensure the conduct in question replicates the prior transgressions.

The Campbells have identified scant evidence of repeated misconduct of the sort that injured them. Nor does our review of the Utah courts' decisions convince us that State Farm was only punished for its actions toward the Campbells. Although evidence of other acts

need not be identical to have relevance in the calculation of punitive damages, the Utah court erred here because evidence pertaining to claims that had nothing to do with a third-party lawsuit was introduced at length.~ The reprehensibility guidepost does not permit courts to expand the scope of the case so that a defendant may be punished for any malfeasance, which in this case extended for a 20-year period. In this case, because the Campbells have shown no conduct by State Farm similar to that which harmed them, the conduct that harmed them is the only conduct relevant to the reprehensibility analysis.

B

Turning to the second *Gore* guidepost, we have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award. We decline again to impose a bright-line ratio which a punitive damages award cannot exceed. Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. In *Haslip,* in upholding a punitive damages award, we concluded that an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety. We cited that 4-to-1 ratio again in *Gore.* The Court further referenced a long legislative history, dating back over 700 years and going forward to today, providing for sanctions of double, treble, or quadruple damages to deter and punish. While these ratios are not binding, they are instructive. They demonstrate what should be obvious: Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to 1, or, in this case, of 145 to 1.

Nonetheless, because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where "a particularly egregious act has resulted in only a small amount of economic damages." The converse is also true, however. When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee. The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff.

In sum, courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered. In the context of this case, we have no doubt that there is a presumption against an award that has a 145-to-1 ratio. The compensatory award in this case was substantial; the Campbells were awarded $1 million for a year and a half of emotional distress. This was complete compensation. The harm arose from a transaction in the economic realm, not from some physical assault or trauma; there were no physical injuries; and State Farm paid the excess verdict before the complaint was filed, so the Campbells suffered only minor economic injuries for the 18-month period in which State Farm refused to resolve the claim against them. The compensatory damages for the injury suffered here, moreover, likely were based on a component which was duplicated in the punitive award. Much of the distress was caused by the outrage and humiliation the Campbells suffered at the actions of their insurer; and it is a major role of punitive damages to condemn such conduct. Compensatory damages, however, already contain this punitive element. See Restatement (Second) of Torts § 908, Comment *c,* p. 466 (1977) ("In many cases in which compensatory damages include an amount for emotional distress, such as humiliation or indignation aroused by the defendant's act, there is no clear line of demarcation between punishment and compensation and a verdict for a specified amount frequently includes elements of both").~

C

The third guidepost in *Gore* is the disparity between the punitive damages award and the "civil penalties authorized or imposed in comparable cases." We note that, in the past, we have also looked to criminal penalties that could be imposed. The existence of a criminal penalty does have bearing on the seriousness with which a State views the wrongful action. When used to determine the dollar amount of the award, however, the criminal penalty has less utility. Great care must be taken to avoid use of the civil process to assess criminal penalties that can be imposed only after the heightened protections of a criminal trial have been observed, including, of course, its higher standards of proof. Punitive damages are not a substitute for the criminal process, and the remote possibility of a criminal sanction does not automatically sustain a punitive damages award.

Here, we need not dwell long on this guidepost. The most relevant civil sanction under Utah state law for the wrong done to the Campbells appears to be a $10,000 fine for an act of fraud, an amount dwarfed by

the $145 million punitive damages award. The Supreme Court of Utah speculated about the loss of State Farm's business license, the disgorgement of profits, and possible imprisonment, but here again its references were to the broad fraudulent scheme drawn from evidence of out-of-state and dissimilar conduct. This analysis was insufficient to justify the award.

IV

An application of the *Gore* guideposts to the facts of this case, especially in light of the substantial compensatory damages awarded (a portion of which contained a punitive element), likely would justify a punitive damages award at or near the amount of compensatory damages. The punitive award of $145 million, therefore, was neither reasonable nor proportionate to the wrong committed, and it was an irrational and arbitrary deprivation of the property of the defendant. The proper calculation of punitive damages under the principles we have discussed should be resolved, in the first instance, by the Utah courts.

The judgment of the Utah Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Justice ANTONIN SCALIA, dissenting:

I adhere to the view expressed in my dissenting opinion in *BMW of North America, Inc. v. Gore,* 517 U.S. 559, 598-99 (1996), that the Due Process Clause provides no substantive protections against "excessive" or "'unreasonable'" awards of punitive damages. I am also of the view that the punitive damages jurisprudence which has sprung forth from *BMW v. Gore* is insusceptible of principled application; accordingly, I do not feel justified in giving the case *stare decisis* effect. See id., at 599. I would affirm the judgment of the Utah Supreme Court.

Justice CLARENCE THOMAS, dissenting:

I would affirm the judgment below because "I continue to believe that the Constitution does not constrain the size of punitive damages awards." *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.,* 532 U.S. 424, 443 (2001) (THOMAS, J., concurring) (citing *BMW of North America, Inc. v. Gore,* 517 U.S. 559, 599 (1996) (SCALIA, J., joined by THOMAS, J., dissenting)). Accordingly, I respectfully dissent.

Justice RUTH BADER GINSBURG, dissenting:

~The large size of the award upheld by the Utah Supreme Court in this case indicates why damages-capping legislation may be altogether fitting and proper. Neither the amount of the award nor the trial record, however, justifies this Court's substitution of its judgment for that of Utah's competent decisionmakers. In this regard, I count it significant that, on the key criterion "reprehensibility," there is a good deal more to the story than the Court's abbreviated account tells.

Ample evidence allowed the jury to find that State Farm's treatment of the Campbells typified its "Performance, Planning and Review" (PP & R) program; implemented by top management in 1979, the program had "the explicit objective of using the claims-adjustment process as a profit center." "[T]he Campbells presented considerable evidence," the trial court noted, documenting "that the PP & R program ... has functioned, and continues to function, as an unlawful scheme ... to deny benefits owed consumers by paying out less than fair value in order to meet preset, arbitrary payout targets designed to enhance corporate profits." That policy, the trial court observed, was encompassing in scope; it "applied equally to the handling of both third-party and first-party claims."

Evidence the jury could credit demonstrated that the PP & R program regularly and adversely affected Utah residents. Ray Summers, "the adjuster who handled the Campbell case and who was a State Farm employee in Utah for almost twenty years," described several methods used by State Farm to deny claimants fair benefits, for example, "falsifying or withholding of evidence in claim files." A common tactic, Summers recounted, was to "unjustly attac[k] the character, reputation and credibility of a claimant and mak[e] notations to that effect in the claim file to create prejudice in the event the claim ever came before a jury." State Farm manager Bob Noxon, Summers testified, resorted to a tactic of this order in the Campbell case when he "instruct[ed] Summers to write in the file that Todd Ospital (who was killed in the accident) was speeding because he was on his way to see a pregnant girlfriend." In truth, "[t]here was no pregnant girlfriend." Expert testimony noted by the trial court described these tactics as "completely improper."

The trial court also noted the testimony of two Utah State Farm employees, Felix Jensen and Samantha Bird, both of whom recalled "intolerable" and "recurrent" pressure to reduce payouts below fair value. When Jensen complained to top managers, he was told to "get out of the kitchen" if he could not take the heat; Bird was told she

should be "more of a team player." At times, Bird said, she "was forced to commit dishonest acts and to knowingly underpay claims." Eventually, Bird quit. Utah managers superior to Bird, the evidence indicated, were improperly influenced by the PP & R program to encourage insurance underpayments. For example, several documents evaluating the performance of managers Noxon and Brown "contained explicit preset average payout goals."

Regarding liability for verdicts in excess of policy limits, the trial court referred to a State Farm document titled the "Excess Liability Handbook"; written before the Campbell accident, the handbook instructed adjusters to pad files with "self-serving" documents, and to leave critical items out of files, for example, evaluations of the insured's exposure. Divisional superintendent Bill Brown used the handbook to train Utah employees. While overseeing the Campbell case, Brown ordered adjuster Summers to change the portions of his report indicating that Mr. Campbell was likely at fault and that the settlement cost was correspondingly high. The Campbells' case, according to expert testimony the trial court recited, "was a classic example of State Farm's application of the improper practices taught in the Excess Liability Handbook."

The trial court further determined that the jury could find State Farm's policy "deliberately crafted" to prey on consumers who would be unlikely to defend themselves. In this regard, the trial court noted the testimony of several former State Farm employees affirming that they were trained to target "the weakest of the herd" – "the elderly, the poor, and other consumers who are least knowledgeable about their rights and thus most vulnerable to trickery or deceit, or who have little money and hence have no real alternative but to accept an inadequate offer to settle a claim at much less than fair value."

The Campbells themselves could be placed within the "weakest of the herd" category. The couple appeared economically vulnerable and emotionally fragile. At the time of State Farm's wrongful conduct, "Mr. Campbell had residuary effects from a stroke and Parkinson's disease." *Id.,* at 3360a.

To further insulate itself from liability, trial evidence indicated, State Farm made "systematic" efforts to destroy internal company documents that might reveal its scheme, efforts that directly affected the Campbells. For example, State Farm had "a special historical department that contained a copy of all past manuals on claim-handling practices and the dates on which each section of each manual was changed." *Ibid.* Yet in discovery proceedings, State Farm failed to

produce any claim-handling practice manuals for the years relevant to the Campbells' bad-faith case.

State Farm's inability to produce the manuals, it appeared from the evidence, was not accidental. Documents retained by former State Farm employee Samantha Bird, as well as Bird's testimony, showed that while the Campbells' case was pending, Janet Cammack, "an in-house attorney sent by top State Farm management, conducted a meeting ... in Utah during which she instructed Utah claims management to search their offices and destroy a wide range of material of the sort that had proved damaging in bad-faith litigation in the past-in particular, old claim-handling manuals, memos, claim school notes, procedure guides and other similar documents." "These orders were followed even though at least one meeting participant, Paul Short, was personally aware that these kinds of materials had been requested by the Campbells in this very case."

Consistent with Bird's testimony, State Farm admitted that it destroyed every single copy of claim-handling manuals on file in its historical department as of 1988, even though these documents could have been preserved at minimal expense. *Ibid.* Fortuitously, the Campbells obtained a copy of the 1979 PP & R manual by subpoena from a former employee. Although that manual has been requested in other cases, State Farm has never itself produced the document.

State Farm's "wrongful profit and evasion schemes," the trial court underscored, were directly relevant to the Campbells' case: "The record fully supports the conclusion that the bad-faith claim handling that exposed the Campbells to an excess verdict in 1983, and resulted in severe damages to them, was a product of the unlawful profit scheme that had been put in place by top management at State Farm years earlier.~"

State Farm's "policies and practices," the trial evidence thus bore out, were "responsible for the injuries suffered by the Campbells," and the means used to implement those policies could be found "callous, clandestine, fraudulent, and dishonest." The Utah Supreme Court, relying on the trial court's record-based recitations, understandably characterized State Farm's behavior as "egregious and malicious."~

When the Court first ventured to override state-court punitive damages awards, it did so moderately. The Court recalled that "[i]n our federal system, States necessarily have considerable flexibility in determining the level of punitive damages that they will allow in different classes of cases and in any particular case." *Gore,* 517 U.S., at

568. Today's decision exhibits no such respect and restraint. No longer content to accord state-court judgments "a strong presumption of validity," the Court announces that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process."~

I remain of the view that this Court has no warrant to reform state law governing awards of punitive damages. *Gore,* 517 U.S., at 607 (GINSBURG, J., dissenting). Even if I were prepared to accept the flexible guides prescribed in *Gore,* I would not join the Court's swift conversion of those guides into instructions that begin to resemble marching orders. For the reasons stated, I would leave the judgment of the Utah Supreme Court undisturbed.

E.1.c. Questions to Ponder About *State Farm v. Campbell*

A. The Supreme Court scolded the Utah court for allowing punitive damages to be correlated with reference to nationwide conduct, as opposed to just conduct directed toward the Campbells. How does this square with the idea that punitive damages are meant to deter bad conduct? What would it mean to create a punitive damages figure based solely on reference to the Campbells? Would that be "punitive" at all – or at that point are we just talking about compensatory damages?

B. Criminal sentences are typically longer for prior offenders. Should punitive damages work the same way, made larger for defendants with a track record of abuse?

C. If you agree with the Utah court's reference to nationwide conduct in setting the amount of punitive damages, then what should happen in the next litigation, where another couple brings suit against State Farm for similar conduct. At that point would it be just for State Farm to enter evidence that it had already paid a large punitive damages judgment, under the theory that it had already been "punished enough"? Assuming a trial court thought it proper to admit such evidence, what effect do you imagine that would have on the jury?

D. If pinning punitive damages to nationwide conduct seems too boundless, and if focusing solely on conduct toward the Campbells seems

too limited, then what should be done to give the quantification of punitive damages some mooring? Or is any mooring even necessary?

E. How would *Campbell*'s reasoning apply to Gerry Spence's closing argument in *Silkwood*?

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Special Issues with Parties and Actions

30. Multiple Tortfeasors

"Some day, they'll go down together
They'll bury them side by side
To a few, it'll be grief
To the law, a relief
But it's death for Bonnie and Clyde."

– *Bonnie and Clyde*, 1967

A. Lead-in

We live in a complicated world. That fact is easy to lose track of in a torts course where you get used to thinking in terms of abstract, simplified hypotheticals – a stick-figure world where one solitary defendant walks up and does something tortious to a single plaintiff. But reality is messier. It is seldom the case that there is only one person who bears tortious responsibility for an injury. It's often said that no person is an island. Certainly few tortfeasors are.

This chapter explores various doctrines relating to the existence of multiple tortfeasors within the scope of a single lawsuit. Here's a preview: Doctrines of **vicarious liability** allow plaintiffs to sue parties who stand in the shoes of the primary tortfeasor. Particularly important among them is **respondeat superior**, which allows plaintiffs to sue employers for the torts committed by their employees. Where the actions of more than one tortfeasor combine to injure the plaintiff – such as with a negligent driver operating a defective car – the doctrine of **joint and several liability** allows plaintiffs to satisfy their full claim against any single defendant. The doctrine of **contribution** allows defendants saddled with outsized judgments to get

partially reimbursed by fellow blameworthy parties, and the related doctrine of **indemnification** provides a way for defendants to shift their entire liability burdens on to other parties. Many of these doctrines have been the subject of defendant-friendly modifications passed as part of tort-reform efforts.

B. Vicarious Liability

In general, tort law requires that persons be blameworthy before their actions are considered tortious. The defendant's intent may make the defendant blameworthy, as can the defendant's carelessness. One glaring exception to this idea, as we have seen, is strict liability. Vicarious liability is another. Through the application of vicarious liability, one entity is regarded by the law as if it performed the tortious actions of another – even when it didn't.

B.1. Respondeat Superior

The most important form of vicarious liability is respondeat superior, which causes an employer to be automatically liable for torts committed by employees acting within the scope of their employment. In fact, companies would rarely be liable otherwise. No company can act except through the actions of actual human beings. And because of respondeat superior, when a company is acting through its employees, it is capable of committing torts.

The historical roots of respondeat superior go back at least to Ancient Rome. Even today, some of the terminology in the cases seems antiquated, particularly in its references to "masters" and "servants": Masters are said to be responsible for the torts of their servants. This terminology is potentially confusing. When you think of "masters" and "servants," you are probably more likely to picture a scene from *Downton Abbey* than a regular Tuesday at ExxonMobil. But the basic doctrine is the same whenever people are employed to carry out actions on behalf of others – whether they are carrying soup tureens or steering supertankers.

The flow of liability under respondeat superior works only in one direction: Up. Masters are liable for the torts of their servants. Servants are not liable for the torts of their masters. Because of this, respondeat superior works only to expand, not contract, liability. Where a truck driver negligently

causes a collision, the fact that the truck driver was employed by a trucking company only causes the trucking company to become liable, it does not relieve the employee trucker of liability. If the plaintiff decides to sue both the employer and the employee and is successful in the suit, then both will be on the hook – which is to say they have joint and several liability.

This means that an employer stuck with a judgment premised on respondeat superior would be theoretically able to sue the employee more directly at fault for indemnification. For many reasons – e.g., damage to employee morale, bad trial dynamics, and all-around pointlessness – this is a capability rarely invoked.

B.2. Acting in Concert

Another important occasion for vicarious liability is persons acting in concert. Acting in concert is the same as acting in "conspiracy," to borrow a criminal law word. When two or more people work together in the commission of a tort, each is liable for the other's tortious action. If two burglars break into a house and one starts a fire, the other is liable as well.

It is important to understand that there is no need for an elaborately drawn up joint venture agreement in order for tortfeasors to be considered acting in concert. If one aids or encourages another to commit a tort, then that person will be liable along with the primary tortfeasor. Even if the aid or encouragement was not necessary to bring about the tort – that is to say, even if there is an absence of but-for causation – the act of aiding or encouraging causes the aider/encourager to become jointly and severally liable with the primary tortfeasor.

B.3. Other Situations and Relevant Statutes

It seems intuitive to many people that parents should be vicariously liable for the torts of their minor children. The traditional common-law, however, has no such doctrine. If parents themselves are negligent in supervising their children, they may have first-party liability for negligence. There is, however, no general common-law rule by which parents are liable for torts committed by their children.

In the absence of common-law doctrine, most states have added some form of parental vicarious liability by way of statute. In many jurisdictions, however, this liability is quite limited.

Some states exclude negligence and have hard monetary caps. Alabama, for instance, makes parents liable for up to $1,000 worth of a child's willful, wanton, or intentional property damage. Ala. Code § 6-5-380. Montana's law is similar, but the cap is $6,900. Mont. Stat. § 40-6-237.

Other states are more generous to plaintiffs. Hawaii's statute provides for joint and several liability for all tortious actions committed by minor children, with no cap. One interesting exception – and a reminder that you never know what you will find in a statute until you look – the Hawaii law excludes vicarious liability for minor children who are married. Haw. Rev. Stat. § 577-3.

There are statutes that provide for vicarious liability outside the parent/child context as well. Some jurisdictions make owners of motor vehicles vicariously liable for persons who use their car with their express or implied permission. So, before you let someone borrow your ride in California, you should know that the owner is liable for compensatory damages of up to $15,000 per person injured or killed, subject to a $30,000 maximum, plus up to $5,000 for property damage. Cal. Vehicle Code §§ 17150-17151.

And some states provide for vicarious liability where parenting and driving meet. In Nevada, the adult signing the child's driver's license application takes on unlimited joint and several liability for the minor's torts behind the wheel. Nev. Rev. Stat. § 483.300.

C. Joint and Several Liability – The Traditional Approach

When there are two or more defendants whose tortious actions caused the plaintiff's injury, how is the responsibility for paying a damages award divided among them? The answer, under the traditional common law, is that it is entirely up to the plaintiff.

Under the doctrine of **joint and several liability**, the plaintiff can collect all of the judgment from one defendant, 50% from each, or according to any arbitrary division the plaintiff desires. The plaintiff cannot, however, double collect: Once the plaintiff has collected the full amount of the judgment, the plaintiff is done.

Joint and several liability applies where multiple tortfeasors are all liable to the same plaintiff for the same harm. Remember that an injury can have any number of actual causes, as an injury is often the final point along a line of unfortunate events. It may take a negligently engineered machine that is negligently operated by a person in a negligently secured area to bring about just one injury. Joint and several liability means that the injured plaintiff can go after any one tortfeasor or any combination of the tortfeasors whose negligence was a but-for cause of injury.

The argument for joint and several liability is that as between the plaintiff and the defendants, it is more important to make sure the plaintiff gets compensated than to worry about equity among defendants. If a tort case gets to the point where there is a judgment for the plaintiff, that necessarily means the plaintiff has been injured, and it means that, in the eyes of the law, all defendants against whom judgment is entered are responsible for that injury.

Suppose there are four parties whose negligence caused the plaintiff to suffer a $1 million injury, and suppose the four parties are equally at fault, so that it would be fair to have each pay 25%. Assuming all four are defendants in the lawsuit and that each can pay a quarter of the judgment, then no harm is done to the plaintiff by requiring the plaintiff to collect no more than 25% of the judgment from each. But suppose three defendants lack the assets to pay the judgment: a bankrupt gas station, an unemployed and uninsured motorist, and a floral shop operated as a sole proprietorship. And suppose the fourth defendant is one of the world's largest oil companies. In the view of joint and several liability, it's fair for the oil company to pay the entire judgment. After all, but for the oil company's negligence, the plaintiff would not have suffered an injury. And without the oil company being on the hook, the plaintiff will not be made whole.

Yet even the most ardent defenders of joint and several liability would be hard pressed not to admit that it creates some strange results. An excellent example is the case of *Walt Disney World Co. v. Wood*, 515 So.2d 198 (Fla. 1987). The accident at issue happened on the Grand Prix Raceway attraction in Walt Disney World, where diminutive race cars (essentially go-karts with cosmetic enhancements) were driven by park goers on a winding roadway circuit, with the cars being kept from deviating more than several inches to the left or right by a metal guiderail running down the middle of the road.

(The same attraction, somewhat refurbished, was renamed the Tomorrowland Speedway. Its sister attraction in California is Disneyland's Autopia.) Back in 1971, Plaintiff Aloysia Wood was in one car, while Daniel Wood – her then-fiancé and later husband – was riding in the car behind. Daniel rammed Aloysia's car, and she suffered personal injuries as a result. Aloysia sued Disney, and Disney brought Daniel into the suit as a means of seeking contribution. In a special verdict, the jury assessed total damages at $75,000 and found Daniel 85% at fault, Aloysia 14% at fault, and Disney 1% at fault. Thanks to joint and several liability, the court entered judgment against Disney for all damages save Aloysia's portion. Thus, Disney was liable for $64,500. The judgment was upheld on appeal.

D. The Realities of Shallow-Pocketed Defendants

The doctrine of joint and several liability is of much more help to plaintiffs than merely simplifying the collection of a judgment or preserving marital harmony between a plaintiff-bride and tortfeasor-groom. There are important practical reasons why recovery is not sought from certain defendants.

First, as mentioned, it may be that one or more co-defendants lack the resources to pay the judgment. Many commentators speak in a short-hand way of joint and several liability being useful where one or more defendants is "insolvent." This can be confusing, however, because a defendant does not need to be insolvent to lack the resources to pay the judgment. In fact, for a decent-sized personal injury case, it may well be that most individuals in the United States are not worth suing on account of lacking adequate assets. Take, for example, an automobile collision that puts the plaintiff in the hospital for a week or two and requires a couple of surgeries. The medical bill might be $250,000. Your run-of-the-mill middle class individual certainly doesn't have cash on hand to pay this. But, you might think, can't the plaintiff seize the defendant's house to satisfy the judgment? The answer is probably not, because state judgment-debtor laws shield certain property from confiscation to satisfy judgments. In our hypothetical, what's called a *homestead exemption* may well place the property off-limits.

Debtor exemption laws vary wildly from one state to the next, and homestead exemptions are a good example. Rhode Island, for instance, has an exemption to protect the debtor's primary residence up to $500,000. In

Florida, the homestead exemption is unlimited as to value – subject instead to an acreage limitation of half an acre in urban areas and 160 acres in rural areas. Wyoming homeowners used to face a $20,000 value limit, but in 2023 it was upped to $100,000.

Other exemptions apply to retirement accounts, family jewelry, vehicles, and more. There are also state-law limitations on collection methods such as wage garnishments.

That is not the end of the story, however. Even if the judgment creditor would be satisfied with whatever nonexempt assets a normal middle-class individual would have, when the judgment creditor goes to collect, the debtor may be able to declare bankruptcy. Bankruptcy is possible where all of the debtor's current obligations put together – including those of the plaintiff creditor and everyone else – exceed the ability of the debtor to pay. Once a debtor declares bankruptcy, federal law prohibits all attempts to collect on the debt. This will force the victorious personal-injury plaintiff to go to the bankruptcy court and get in line with all of the debtor's other creditors. At that point, the plaintiff may be lucky to get a few pennies on the dollar.

None of this is to say that bankruptcy is a pleasant option for the defendant debtor. But the fact that bankruptcy is out there as a contingency means that a wide array of tort plaintiffs are discouraged from ever knocking at the door with a summons.

In other words, a tortfeasor does not need to be "insolvent" to be effectively judgment-proof.

E. Other Practical and Strategic Reasons Some Co-Tortfeasors Don't Become Defendants

The lack of depth of a tortfeasor's pockets isn't the only reason a plaintiff may be disinclined to sue.

Some tortfeasors may simply be outside of the court's jurisdiction. With products manufactured overseas, this can be a common occurrence. In such a case, the defendant may be unreachable.

In other cases, personal jurisdiction can be had, but the defendant's distance still presents a barrier for the plaintiff. If an important part of that defendant's operations is located overseas, then it may prove practically

impossible to take full discovery of that defendant. Suppose the defendant has most of its operations in Japan. Japanese courts do not compel expansive American-style discovery. The Japanese company might stipulate to discovery to avoid sanctions in an American court, but Japanese law generally forbids American attorneys from taking depositions on Japanese soil or even entering the country for the purpose of taking a deposition. Pursuant to a treaty, there is a process, but it is difficult. Among the strict requirements, the U.S. attorney must obtain a special deposition visa in advance. Then, the deposition must occur on the grounds of the U.S. embassy or a U.S. consulate and be presided over by a U.S. consular officer. And the waiting list for private parties to use U.S. consular facilities might be many months long.

Thus, in a products liability case, the anticipation of such difficulties may discourage a plaintiff from even trying to sue a distant defendant.

There are also strategic reasons to leave defendants off a complaint – even if they are readily reachable and have non-exempt assets that could satisfy the judgment. This is particularly the case where the potential defendants are individuals. Consider that the individual will likely be a witness at trial. A witness whose name is on the other side of the "v" in a lawsuit is likely to be much less cooperative and forthcoming on the stand. Moreover, the fact that an individual is on the complaint might engender sympathies with the jury that a faceless corporation could never muster. Also, multiple defendants in a litigation will often save money on their defense by cooperating – pooling discovery efforts and taking turns writing briefs that all defendants sign. The more defendants there are to share the costs of the defense, the less likely they will be to settle. All of these are considerations for the plaintiff in deciding whom to sue.

F. Joint and Several Liability – Modifications

Today, the doctrine of joint and several liability is on the decline. Or, at least, it is losing its purity. Fewer than 10 states still follow the doctrine in its original, unmodified form. The trend is toward allocating liability on the front end, so that, at least in some situations, a plaintiff cannot collect from defendants out of proportion to their relative fault.

Several states have moved by statute to a system of **pure several liability**, where any given defendant can only be held liable for the share of the total damages that is proportional to that defendant's fault. Many states that use this system have exceptions for certain kinds of cases, such as hazardous waste or medical-device liability.

Many states have a **hybrid system**, such that where there is a judgment-proof tortfeasor, that tortfeasor's share will be reallocated to other parties in accordance with their share of comparative responsibility. In some states, the reallocation is only to the other defendants; in other states, it is to the plaintiff as well. Some states have a hybrid system that allows joint and several liability for tortfeasors whose share of comparative responsibility exceeds a certain threshold, but several liability for those whose share falls below the threshold. Still other states draw distinctions on the type of damages, such as having joint and several liability for pecuniary (or "economic") damages, but several liability only for nonpecuniary (or "noneconomic") damages.

Among all these modified approaches, the states also differ as to whether fault can be assigned to a non-party tortfeasor, such as a would-be defendant that is outside the court's jurisdiction.

Suffice it to say that these variations, even if seemingly slight as an abstract matter, can easily make or break a particular case.

G. Contribution – Letting the Defendants Fight It Out

The doctrine of contribution helps to ameliorate the seeming injustice of joint and several liability. Losing defendants who feel they have been made to overpay can seek **contribution** from co-defendants or other blameworthy parties.

The most important thing to understand about contribution is that it is generally irrelevant to the plaintiff. Traditional joint and several liability does its job for the plaintiff by making it easy for the plaintiff to recover. Given that, sorting out who ought to reimburse whom on the defendants' side isn't the plaintiff's concern.

How contribution works as a procedural matter is subject to considerable variation among jurisdictions. Contribution might be brought into the trial proceedings – where the defendants begin to resolve the

problems amongst themselves even as they are battling the plaintiff – or contribution might be sought in a separate litigation that begins after the plaintiff's trial has concluded.

The substance of contribution also varies greatly. Some approaches call for defendants to split the burden *pro rata,* with each defendant being ultimately liable for an equal share. Other approaches call for responsibility to be apportioned by relative fault.

H. Indemnification – Shifting the Loss

Indemnification allows one entity to shift the entire burden of loss on to another. There are two kinds of indemnification – one is a doctrine applied by the courts; the other is an obligation arising out of contract.

The doctrine version of indemnification allows a cause of action by a relatively innocent party against a more blameworthy party. Recall that there are many situations in which a relatively blameless party might find itself liable – strict liability and vicarious liability being two leading examples. Assuming the losing defendant can find a party who is "really to blame" for the plaintiff's injury, then the defendant can become an indemnification plaintiff, suing the more blameworthy party to get reimbursed for the judgment. The ability of a defendant to seek indemnification does a great deal of work in making doctrines such as strict liability more intuitively fair. For instance, when it comes to strict products liability, the tort system seems to say: *First, let's make sure the plaintiff gets paid. If you sell a defective product in your store, then you are going to have to stand by to make whole any plaintiff who gets injured. Afterward, of course, you can get reimbursed by the manufacturer who is actually responsible for introducing the defect.*

Some courts characterize the doctrine of indemnification as an equitable doctrine, others describe it as a legal doctrine or common-law doctrine. As a result, this doctrinal indemnification often goes by the name "equitable indemnification" or "common-law indemnification." Either way, it is important to distinguish it from the other kind of indemnification – that which arises by contract.

Contractual indemnification is created by a promise made binding under contract law. It has nothing to do with fairness or blame. One party in a business deal may agree to indemnify the other as part of the overall bargain

of money, services, goods, and promises that are exchanged between the two parties. Insurance, in fact, is a particularized and highly regulated form of indemnity, wherein the insurance company agrees to make payments to a policyholder to offset certain contingent losses. When a hurricane destroys a house, it's not the insurance company's fault, of course. The insurance company indemnifies the homeowner simply because it agreed to do so: The indemnification was part of a mutually beneficial bargain made between the parties.

Sometimes, however, an indemnification clause is not really about a sensible bargain reached between parties; instead it is just a matter of one party having much more bargaining power than the other. In fact, you might be shocked to know how many times you have agreed to indemnify another party in seemingly innocuous agreements you've signed, or clicked-through online.

There is one aspect of contractual indemnification that it is crucial for you to understand for torts purposes: No defendant can escape liability to a plaintiff by way of an indemnification provision with a third party. Many people misapprehend this, so it is important to think through it carefully. If A agrees to indemnify B, that does nothing to stop C from suing B and collecting from B. The agreement between A and B does not and cannot affect C's rights. All the indemnification agreement means is that B can go after A to get reimbursed if B must pay C. This makes sense if you think about it in its most abstract terms: Should a contract between two people be able to deprive a person not a party to the contract of her or his rights? Of course not.

This concept is so important, and so frequently misunderstood, it is worth emphasizing with an example.

> ***Example: The Whirler*** – Suppose that General Amusement Industries wants to sell a ride called The Whirler to a small, family-owned theme park, Wonder Cove. Wonder Cove is worried that operator error could lead to injuries on The Whirler. So, to close the deal, General Amusement Industries agrees to indemnify and hold harmless Wonder Cove for any and all injuries sustained in connection with The Whirler. Plaintiff Gene Gbaj is injured on The Whirler because of operator negligence. Can Gbaj successfully sue Wonder Cove? You bet. The indemnification agreement does not

affect Gbaj's rights. What Wonder Cove can do is demand General Amusement Industries reimburse Wonder Cove, and if General Amusement Industries refuses, Wonder Cove can sue them for breach of contract.

I. Settlements in Circumstances Involving Contribution

The law encourages settlements. Whenever parties can resolve their dispute in a mutually agreeable way without needing a judge and jury to decide the matter, so much the better. Unfortunately for the courts, settlements, when combined with questions of contribution, can themselves create thorny issues that courts may be called upon to resolve.

Suppose there are four defendants who have all tortiously contributed to the plaintiff's injury. What happens if one settles? Suppose they are equally to blame, and one settles before trial for $10,000. Then, the jury returns a verdict against the remaining three defendants for $10 million. Can the losing defendants go after the defendant who ducked out early for contribution on the difference between $2.5 million and $10,000?

Or consider the opposite sort of situation: One defendant in the case settles for $10 million – an amount that fully compensates the plaintiff. The other three successfully evade service of process and therefore are not part of any litigation. Can the settling defendant get contribution from the other three provided they can be tracked down?

How courts treat situations such as these varies greatly from state to state. If you are planning to practice litigation when you graduate, you would be well served to leave a note for your future self to check the laws of the jurisdiction you land in. The finer points of law in this area can have important effects on litigation strategy. It also matters for how best to draft a settlement agreement, since the language used can affect settling defendants' rights vis-à-vis their co-tortfeasors.

I.1. Case: *Great Lakes Dredge & Dock Company v. Tanker Robert Watt Miller* (11th Cir. 1992)

I.1.a. Advance Notes

This case explains different approaches to the problem of partial settlements and contribution. Because this case uses admiralty law – a common-law form of federal law for maritime claims – it provides insightful comparisons among the various approaches used in state tort law of various jurisdictions.

I.1.b. Opinion

Great Lakes Dredge & Dock Company v. Tanker Robert Watt Miller

United States Court of Appeals for the Eleventh Circuit
April 16, 1992

957 F. 2d 1575. GREAT LAKES DREDGE & DOCK COMPANY, Plaintiff-Appellant, v. TANKER ROBERT WATT MILLER, Defendant-Appellee. Complaint of CHEVRON TRANSPORT CORPORATION, as owner of the S/S ROBERT WATT MILLER, in an action for exoneration from or limitation of liability, Plaintiff. GREAT LAKES DREDGE & DOCK CO., a corporation, Plaintiff-Appellant, v. CHEVRON SHIPPING COMPANY and Italia Societe Per Az Di Nav., Defendants-Appellees. No. 90-3466.Before COX and DUBINA, Circuit Judges, and GODBOLD, Senior Circuit Judge.

Judge Emmett Ripley COX:

Great Lakes Dredge & Dock Co. ("Great Lakes") appeals the district court's grant of summary judgment in favor of Chevron Transport Corp. and Chevron Shipping Corp. (collectively referred to as "Chevron"). For the reasons discussed below, we reverse and remand.

I. Facts and Procedural Background

~In February 1975, the *Robert Watt Miller,* a tanker owned by Chevron Transport Corp. and operated by Chevron Shipping Corp., collided with the *Alaska,* a dredge owned by Great Lakes, in the St. Johns River near Jacksonville, Florida. As a result of the collision, eight crewmen of the *Alaska* were injured and two lost their lives.

The injured crewmen and the estates of the deceased filed separate suits against Great Lakes under the Jones Act and general maritime law. Great Lakes in turn filed third-party complaints against Chevron for contribution, indemnity, and damage to the *Alaska.* Meanwhile,

Chevron settled with the injured crewmen and the estates of the deceased crewmen for a total of $707,800.

The district court severed the third-party claims against Chevron and tried before a jury the cases against Great Lakes. After a verdict was returned in favor of Great Lakes, the crewmen and estates appealed to this court. They argued that the district court erred in framing special interrogatories submitted to the jury. Those interrogatories asked the jury to determine the comparative degrees of fault of Great Lakes and Chevron, which was not a party to the suit. We reversed and remanded for a new trial, saying:

> Since the plaintiff is entitled to recover, as stated by the Court, against either of several tortfeasors, without regard to the percentage of fault, it was error for the trial court to distract the juror's attention by requiring it to allocate the degree of fault between the defendant and a non-party. If the jury had found the causation in the negligence which it found against Great Lakes, and Great Lakes considered that the total amount of damages for the injuries received by these plaintiffs was disproportionate for it to bear, it could have obtained contributions against Chevron, as it had already undertaken to do, in a different proceeding. That issue was to be tried at a different time and between two live opponents, and not as part of the suit by the injured workman and representative of a deceased workman against their employer~.

After that decision, Great Lakes settled with all the claimants except the estate of Danny Self for a total of $943,199. The Self claim, brought by his widow Vivian Self, was then heard in conjunction with Great Lakes's claims against Chevron. The district court concluded that Great Lakes was 30% responsible and Chevron was 70% responsible. It also found Self's total damages to be $661,354. Because Self had already settled with Chevron (which was 70% responsible), the district court limited Self's recovery against Great Lakes to 30% of her damages or $198,406.

On appeal, this court rejected the district court's limitation of Self's recovery to the percentage of Great Lakes's fault. We held the district court's~ limitation~ was inconsistent with the principles of joint and several liability~. We held that Self was entitled to recover her entire damages from Great Lakes, regardless of its percentage of fault, with a credit for the dollar amount ($315,000) of the settlement paid by Chevron, not a credit based upon Chevron's percentage of fault. We also

concluded that the district court underestimated the amount of Self's damages through faulty assumptions about her husband's pain and suffering and his future earnings potential. As a result, Self was likely to recover far more than the $198,406 judgment entered by the district court.

Great Lakes subsequently settled with the Self estate for $2,050,000. The sole remaining issue was Great Lakes's claims for contribution from Chevron. Great Lakes maintained that it was forced to pay far more than its proportionate share of all of the personal injury and wrongful death claims. The district court granted Chevron's motion for summary judgment on the contribution claims under the so-called "settlement bar" rule. The settlement bar rule prohibits one joint tortfeasor from seeking contribution from another joint tortfeasor who has settled with the injured party. The district court also held that Great Lakes's claims for contribution were barred because Great Lakes itself had settled with the personal injury and death claimants. Great Lakes appeals.

II. Issues on Appeal

Great Lakes contends that the district court erred in granting Chevron summary judgment on Great Lakes's contribution claims. Resolving this issue requires that we answer two questions:

> 1) Whether a settlement bar rule precludes a joint tortfeasor from seeking contribution from another joint tortfeasor who has settled with the injured party?
>
> 2) Whether, under what may be called a "settler barred" rule, a joint tortfeasor who has settled with the injured party may seek contribution from another joint tortfeasor?

~Discussion

Historical Background

Before addressing the settlement bar question directly, it is necessary to briefly review the historical evolution of the law regarding distribution of liability among joint tortfeasors in maritime actions. At common law, contribution among joint tortfeasors was not recognized. In admiralty, however, a limited right to contribution has been recognized for more than 135 years. *See, e.g., The Schooner Catharine v. Dickinson,* 58 U.S. (17 How.) 170 (1855). Under the admiralty "divided damages" rule, if two vessels were both at fault for a collision, each was held responsible for one-half of the total damage. Although damages for the collision were shared among the joint tortfeasors, liability was not based on the parties' relative degrees of fault.

In 1974, the Supreme Court established the modern right to contribution among joint tortfeasors in maritime personal injury cases. *Cooper Stevedoring Co. v. Fritz Kopke, Inc.,* 417 U.S. 106 (1974). A year later, the Court abandoned the divided damages rule in collision cases and adopted a comparative negligence approach. *United States v. Reliable Transfer Co.,* 421 U.S. 397, (1975). The Court held that liability should be distributed among the parties according to each party's comparative degree of fault. The same proportionate fault rule applies in personal injury cases.

A difficult problem arises in the personal injury context when one of the joint tortfeasors settles with the victim. What effect should that settlement have on the liability of the remaining joint tortfeasors? It is generally agreed that non-settling joint tortfeasors are entitled to have a judgment against them reduced by the amount of any settlement. Otherwise, the injured party would receive a double recovery. There is a split of authority, however, over how to calculate the settlement credit. Some courts use a *pro rata* approach under which the non-settling joint tortfeasor receives a credit based upon the percentage of the settling party's fault. Other courts apply a *pro tanto* approach and give a credit for the actual dollar amount of the settlement. A simple hypothetical will demonstrate the effect of these two methods.

Assume, for example, that the negligence of A and B combine to injure C, who then files a lawsuit against A and B. On the morning of trial A settles with C for $50,000. The jury subsequently finds that A was 75% responsible and B was 25% responsible for the accident and that C's damages totaled $100,000. If neither party had settled, judgment would be entered against A for $75,000 and B for $25,000. But given A's settlement for $50,000, how much should B pay? Under a *pro rata* approach, B would receive a credit for 75% of C's damages ($75,000) because A, the settling joint tortfeasor, was 75% responsible for the accident. Thus, B would owe $25,000 ($100,000-$75,000) to C. Under the *pro tanto* approach, B would only receive a credit for the dollar value of A's settlement ($50,000). Therefore, B would owe $50,000 ($100,000-$50,000) to C. Clearly, the manner in which the settlement credit is calculated has a significant effect.~

In *Edmonds v. Compagnie Generale Transatlantique,* 443 U.S. 256 (1979), a longshoreman was injured in an accident for which the jury determined he was 10% at fault, his employer (via another employee's negligence) was 70% at fault, and the shipowner was 20% at fault. The longshoreman collected benefits from his employer under the Longshoremen's and Harbor Worker's Compensation Act (LHWCA),

which provides statutory benefits in exchange for the loss of the right to sue the employer for negligence. The longshoreman filed suit against the shipowner. The jury found the longshoreman's total damages to be $100,000. The district court entered judgment against the shipowner for $90,000, which represented the $100,000 of damages less a 10% credit ($10,000) for the longshoreman's contributory negligence.

The shipowner argued that it should only be liable for $20,000, which is that portion of the damages attributable to its 20% fault. The Supreme Court, however, held that the Longshoremen's Act did not modify the pre-existing admiralty rule that a longshoreman may recover the full measure of his damages from a shipowner who is partially responsible for an accident. *Id.* at 266. Unfortunately for the shipowner, it was also barred by the exclusive remedy provision of the LHWCA from seeking contribution from the employer who was 70% responsible. The Court sympathized with the shipowner's argument that it was being forced to bear more than its fair share, concluding that "[s]ome inequity appears inevitable in the present statutory scheme, but we find nothing to indicate and should not presume that Congress intended to place the burden of the inequity on the longshoreman whom the Act seeks to protect."

Citing *Edmonds* by analogy, this court [adopted] the *pro tanto* method. *Self v. Great Lakes Dredge & Dock Co.,* 832 F.2d 1540, 1548 (11th Cir.1987).~ The court candidly admitted that the *pro tanto* method may cause a joint tortfeasor to pay more damages than were actually caused by its proportionate share of fault. Nevertheless, "[t]he philosophy governing *Edmonds* is clear: any inequity which results from the implementation of a seaman's damage award should be borne by the tortfeasors rather than the seaman himself." This court concluded that the *Edmond*'s philosophy requires the non-settling joint tortfeasor to bear a disproportionate burden even when the "inequity" was caused by the seaman's own imprudent settlement with another joint tortfeasor for less than its fair share of the damages.

With this background in mind, we now turn to the central issue on this appeal: Whether, given the *pro tanto* method adopted in *Self,* a joint tortfeasor who is forced to bear more than its fair share of an injured party's damages is prohibited by a settlement bar rule from seeking contribution from a settling joint tortfeasor.

The Settlement Bar Rule

The Ninth Circuit accurately summarized the confusion surrounding the maritime settlement bar rule in *Miller v. Christopher,*

887 F.2d 902 (9th Cir.1989). "We sympathize with the district court's difficulties in finding guidance from controlling authority on the settlement bar issue. There is none." *Id.* at 903. The court noted that there are three possible solutions to the question:

> (1) allowing an action for contribution against a settling tortfeasor by any other tortfeasor who has paid more than his equitable share of the plaintiff's claim;
>
> (2) imposing a bar to contribution claims against a settling tortfeasor, perhaps in conjunction with a requirement that the settlement be in "good faith"; and
>
> (3) reducing the claim of the plaintiff by the pro rata share of a settling tortfeasor's liability for damages, which has the effect of eliminating any reason to sue a settling tortfeasor for contribution.

Id. at 905 (citing Restatement (Second) of Torts § 886A cmt. m (1977)). Other circuits have failed to reach a consensus on this issue. *See, e.g., Associated Electric Co-op.,* 931 F.2d at 1266 (8th Cir.1991) (adopting third approach); *In re Oil Spill by the Amoco Cadiz,* 954 F.2d 1279 (7th Cir.1992) (rejecting third approach but not deciding between first and second); *Miller v. Christopher,* 887 F.2d 902 (9th Cir.1989) (rejecting first approach but not deciding between the second and third). Of course, this same issue arises in tort law generally. The Restatement (Second) of Torts refuses to take a position on the issue. Restatement (Second) of Torts § 886A Caveat. The Restatement notes that each approach has drawbacks and that no one is satisfactory. *Id.* § 886A cmt. m.~

Self~ rejected the proportionate distribution of liability. Accordingly, the third approach described above is not available. This court, therefore, must choose between the first and second approaches – permitting an action for contribution or adopting some kind of settlement bar rule. Permitting contribution ensures that liability will be shared by all joint tortfeasors in proportion to their respective degrees of fault. Critics, however, argue that it may discourage settlements because the settling tortfeasor still faces litigation and potential liability to non-settling joint tortfeasors. Adopting a settlement bar rule, on the other hand, generally encourages at least partial settlements. Non-settling tortfeasors, however, may be forced to pay far more than their proportionate share of damages. Given the necessity of deciding between these two approaches, we select the former and reject the adoption of a settlement bar rule.

Permitting contribution is clearly supported by the Supreme Court's decision in *Reliable Transfer*[, which] held that liability among joint tortfeasors in maritime actions should be distributed according to their comparative degree of fault. The public policy underlying this quest for a "just and equitable" allocation of damages is not eroded by the fact that the party from whom contribution is sought has settled with the victim. Requiring each party to bear that portion of the damages caused by its own negligence guarantees an efficient level of deterrence against future negligence. If a negligent party was forced to pay more or less than its fair share, future negligence would be either over- or under-deterred. *See, e.g., Smith & Kelly Co. v. The S/S Concordia Tadj,* 718 F.2d 1022, 1029-30 (11th Cir. 1983) (stating that "[t]he clear trend in maritime cases is to reject all-or-nothing or other arbitrary allotments of liability in favor of a system that divides damages on the basis of the relative degrees of fault" and that such a system "matches the power of its incentives to the ability of each party to prevent injury"); *Reliable Transfer,* 421 U.S. at 405 n. 11 (noting that comparative fault "imposes the strongest deterrent upon the wrongful behavior that is most likely to harm others"). Allowing an action for contribution is also consistent with *Edmonds.* The injured party is assured of full compensation for his damages (less a deduction for any contributory negligence) and is unaffected by any subsequent action among the joint tortfeasors for contribution.

Chevron argues that allowing contribution will discourage settlements because the settling party may still face liability to the non-settling joint tortfeasors for contribution. The deterrent effect on settlements, however, is far from clearly established. Furthermore, the potential negative side effects of the settlement bar rule outweigh its purported advantage.

The *pro tanto* approach may encourage irresponsible settlements by plaintiffs. If we then apply a settlement bar rule, we force non-settling defendants to bear a disproportionate share of liability. When a single tortfeasor causes an injury and the parties settle, both the plaintiff and the defendant accept the certainty of a fixed result in exchange for forgoing the chance of a more favorable outcome at trial. The balancing of risk by both sides of the bargaining table ensures that the result is equitable. This, however, is not the case with multiple tortfeasors under the *pro tanto* approach. The plaintiff is free to accept the certainty of a settlement *without* losing the chance of obtaining more at trial. If it turns out that the plaintiff settled for too little from one defendant, he automatically recovers the shortfall from the non-

settling defendants. The normal balancing of risks by both sides is disrupted. The party who makes the decision relative to settlement is not the party who bears the responsibility for that decision. If we apply a settlement bar rule in this situation, the defendants will be unable to equitably divide liability among themselves. It will be the non-settling defendants, not the plaintiff or the settling defendant, who bear the risk that the plaintiff settled for too little.

Assuming, *arguendo,* that rejecting the settlement bar rule has a slight disincentive effect upon settlements, we nevertheless authorize an action for contribution. The Supreme Court came to a similar conclusion when it adopted the doctrine of comparative fault in *Reliable Transfer.* "[The argument against comparative fault] asks us to continue the operation of an archaic rule because its facile application out of court yields quick, though inequitable, settlements, and relieves the courts of some litigation." *Reliable Transfer,* 421 U.S. at 408.

For the reasons discussed above, therefore, we reject the settlement bar rule in admiralty. We hold that an action for contribution against a settling tortfeasor may be maintained by a non-settling joint tortfeasor that has paid more than its share of the plaintiff's damages based upon the respective degrees of fault.

The "Settler Barred" Rule

~Chevron~ argues that Great Lakes's claims for contribution are prohibited by Great Lakes's own settlement with the injured crewmen and estates under what may be called a "settler barred" rule.

Great Lakes,~ might well have been forced to pay far more than its proportionate share of damages. Accordingly, notwithstanding the fact that Great Lakes itself settled with the claimants, Great Lakes may be entitled to contribution from Chevron.

In Wisconsin Barge Line, Inc. v. The Barge Chem 300, 546 F.2d 1125 (5th Cir. 1977), a seaman sued his employer for injuries subsequently determined to have been caused by a third party. The employer requested that the third party defend the lawsuit, but the third party never responded. The employer then entered into a court approved settlement with the injured seaman for $32,419. In a separate action for indemnity from the third party, the third party claimed that the employer was not entitled to indemnification for its settlement.

The court rejected the third-party's argument that, absent a judgment, the employer was not required to pay the employee's damages. "[I]n the facts of the instant case, appellant's payment to the

claimant could hardly be said to be 'voluntary' in the sense of there being no legal liability, with the result of foreclosing indemnification." The court held that the employer was entitled to indemnity for its settlement payment if the settlement amount was reasonable. We recently reiterated this principle in *Weissman v. Boating Magazine,* 946 F.2d 811 (11th Cir.1991).

> [A] settling indemnitee can recover from an indemnitor upon proof of the indemnitee's potential liability if the settlement terms are reasonable and if the indemnitor has notice of the suit, and has failed to object to those terms even though he has had a reasonable opportunity to approve or disapprove the settlement.

Id. at 813 (quoting *Burke v. Ripp,* 619 F.2d 354, 360 (5th Cir.1980)).~

As discussed above, liability in maritime actions should be distributed according to the parties' comparative degrees of fault. If Great Lakes paid more than its proportionate share, it might well be entitled to contribution from Chevron. We hold that Great Lakes's claims for contribution from Chevron are not barred by the fact that Great Lakes itself settled with the injured crewmen and estates.~

Conclusion

For the reasons discussed above, we reject both the settlement bar and "settler barred" rules in maritime actions for contribution under the *Self pro tanto* approach. The district court's grant of summary judgment in favor of Chevron on Great Lakes's claims for contribution is reversed.~

REVERSED and REMANDED.

I.2. Problem: A Lucky Break for Bad Brakes?

Omar was driving on a divided mountain highway consisting of two lanes of traffic in each direction separated by the familiar 42-inch-high concrete wall that is known as "K-rail" or "Jersey wall." On a downhill section, Omar's brakes failed, and, after travelling for one mile, he finally careened off the road to avoid a jackknifed tractor-trailer (i.e., an "18-wheeler" or semi truck with trailer). Omar's car somersaulted down the mountainside.

At the resulting trial, the jury calculated total damages at $1 million and, using a special verdict form, assigned fault as follows: 60% of the

responsibility to the brake manufacturer; 20% to the operator of the tractor-trailer; 5% to the civil engineering firm that decided no guardrail was needed on the right shoulder; and 15% to Omar, for failing to slow down with lower gears or the hand brake and for choosing to steer the car into the void rather than nudge it into the K-rail.

Omar would like to collect $850,000 from the civil engineering firm. What might be some reasons he would want to do this? And will he be permitted to do so under the law? How could doctrinal differences among jurisdictions affect Omar's ability to collect?

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31. Thresholds of Life

"I liked being a person. I wanted to keep at it."

– John Green, *The Fault in Our Stars*, 2012

A. Lead-in

Like the parent of a preschooler, tort law has displayed great unease when confronted with the topics of sex, pregnancy, and death. Historically, tort law largely refused to deal with these subjects at all.

For instance, under the traditional English common law, death was not considered a compensable injury. Tort causes of action were said to die with the plaintiff. If you have already taken your property course, you might find this surprising. Under the common law, the dead can exercise exquisite control over the ownership of real property. (For example, conveying real property in defeasible fee can limit what the grantees may do with the property into the indefinite future.) By contrast, the common law courts believed that tort law was exclusively for the living.

Today's tort law deals head-on with sex, pregnancy, and death. But the doctrine bears the marks of a legacy of discomfiture. In fact, much of the modern law in this area has been created by statute rather than through evolution of judge-made law.

To deal with tortiously caused death, legislatures everywhere have created post-mortem causes of action known as **wrongful death** and **survival claims**. These can be brought by the decedent's loved ones whether the death was caused negligently, intentionally, or in a situation in which strict liability applies.

When the tortfeasor's victim is still alive but left disabled, loved ones can sue for **loss of consortium**, a way of claiming damages for the loss of an essential part of life that two people once shared – intimacy, companionship, and the like. Again, it can be used where the underlying theory of recovery is based in negligence, intentional torts, or strict liability.

Then there are questions about how negligence and other torts should apply in the context of pregnancy. For instance, can an injury suffered in utero vest as a tort claim upon birth? While advances in medicine have forced courts to confront these sorts of cases increasingly frequently, not all courts have responded in the same way.

As you explore this area, you may notice that none of the jurisprudence in this area is very far from the squirminess that all of us feel – judges included – upon confronting the fragility of our own lives.

B. Wrongful Death

The common law allows no cause of action to an estate where the alleged harm is death. This is astonishing to many people, but it is nonetheless true. If the defendant injures and maims a person, then the defendant might be on the hook for a fortune. But if the defendant goes just a little bit further and actually kills the person? Under the traditional common law, the defendant is off the hook entirely. Zero balance due.

For a brief time in America's early years, some courts experimented with departing from English precedent to hold that fatalities could be tortious. But by the middle 1800s, all American courts had returned to the original rule. The seeming absurdity of the common law on this point eventually led legislatures in all states to pass wrongful death statutes.

This statutory arrangement is reflected in lawsuit pleadings. The complaint in a lawsuit over a fatality will often use the label "wrongful death" to describe the relevant cause of action. And as a technical matter, wrongful death is its own tort. In practice, however, wrongful death functions as an attachment to existing theories of recovery in the common-law. After all, alleging a claim for wrongful death means alleging that the death is "wrongful." That, in turn, usually means pursuing an underlying theory of negligence, strict liability, or intentional tort.

Damages for wrongful death can be measured in a couple of different ways. Under one theory, dependents of the decedent can recover the value of lost pecuniary support in the form of food, shelter, clothing, and the like that the decedent would have provided through earnings. Another theory takes the perspective of the decedent's estate, figuring that the defendant owes the estate whatever the decedent would have earned had she or he stayed alive. Some jurisdictions allow recovery for grief and anguish as well.

B.1. Case: Benally v. Navajo Nation (Navajo 1986)

B.1.a. Advance Notes

This case presents a fascinating look at wrongful death from a fresh perspective – that of a tribal court. Tribal courts in the United States apply their own law, which is separate from the Anglo-American common law. Here, the plaintiff estate is asking for the court to do what the Anglo-American courts have not – recognize a common-law cause of action where the injury is death.

B.1.b. Opinion

Benally v. Navajo Nation

District Court of the Navajo Nation, Judicial District of Window Rock
April 15, 1986

5 Nav. R. 209 (W.R. Dist. Ct. 1986). FERN ANN BENALLY, PERSONAL REPRESENTATIVE OF THE ESTATE OF MONICA LULA BENALLY, PLAINTIFF, v. THE NAVAJO NATION, ET AL., DEFENDANTS.. No. WR-CV-430-84.

Judge ROBERT YAZZIE:

I. Findings Of Fact

This case involves a claim for the wrongful death of a minor child. The allegations are that on May 7, 1984, Defendant Phillip Lee, in the course of employment with the Navajo Nation, while driving a Navajo tribal vehicle, struck and ran over a three year old child, Monica Lula Benally, who was at the time crossing a dirt road (commonly referred to as Bureau of Indian Affairs Route No. 36) located about six miles west of the Nenahnezad Boarding School within the Navajo Reservation. It is further alleged that as a result of this accident, the minor child died about one (1) hour later at the Shiprock Public Health Service Hospital, Shiprock, New Mexico.

ISSUE I: WHAT IS THE NAVAJO LAW FOR WRONGFUL DEATH ACTIONS, INVOLVING THE DEATH OF A MINOR

A wrongful death action is a lawsuit brought by or on behalf of a deceased person's beneficiaries (e.g. spouse, parent, children, etc.), alleging that death was caused by the willful or negligent act of another. See Black's Law Dictionary (5th Ed.). Under Anglo common law, "the death of a human being could not be complained of as an injury." *Baker v. Barton*, 1 Campbell 493, 170 Eng. Reprint 1033 (1808); see also Prosser On Torts, p. 902. This rule was later altered by state statutes. Most states have allowed civil actions for wrongful death and/or survival actions by statute, allowing a decedent's heirs or personal representative to make claims for the loss of the decedent; they also sometimes allow the representative to bring claims that the decedent might have brought. The neighboring states of New Mexico, Arizona, and Utah have enacted wrongful death statutes. Although the Navajo Nation has never formally adopted either a statute to create a cause of action for wrongful death, or a survival statute, a claim for the wrongful death of a tribal member has, however, been long recognized by Navajo common law. See *Estate of Boyd Apachee*, 4 Nav. R. 178, 179-180 (Window Rock D. Ct. 1983) (defining Navajo common law to include custom, case law and matters commonly known or easily verified in recognized works on Navajo common law.).

The Anglo common law, as stated by *Baker v. Barton*, and Prosser, does not allow a wrongful death action, unless enacted by legislation. The Courts of the Navajo Nation are not bound by this rule of Anglo common law.

7 N.T.C. Section 204~ provides that:

> (a) In all civil cases the Court of the Navajo Tribe shall apply any laws of the United States that may be applicable, any authorized regulations of the Interior Department, and any ordinance or customs of the Tribe, not prohibited by such Federal laws.
>
> (b) Where any doubt arises as to the customs and usages of the Tribe, the court may request the advice of counselors familiar with these customs and usages.
>
> (c) Any matters that are not covered by the traditional customs and usages of the Tribe, or by applicable Federal laws and regulations, shall be decided by the Court of the Navajo Tribe according to the laws of the state in which the matter in dispute may lie.

By the clear terms of Section 204(a), if there is an existing custom, then that customary law should be applied, and state law does not have application. Thus, defendant is correct that under 204(a), custom, where it exists, is held to be superior to the common law of the states.

This Court finds that Navajo common law recognizes a wrongful death action. The Navajo experts who testified about the Navajo concepts of tort, especially recovery of damages for wrongful death said that:

When a Navajo dies from the careless conduct of another, the person responsible for the death pays the immediate family livestock and silver jewelry.

Defendant referred to a written source, which explained:

> … [W]hat is expected in all cases of injuries that arise between traditional Navajos is that the person who did the injury will make a symbolic material payment for the loss that he has caused … ." (See "Torts in Tribal Courts" by Barry K. Berkson, Esq., A presentation for the National American Indian Court Judges Association in Reno, Nevada, January 28, 1970).

Plaintiff's complaint in the instant case alleges that the death of her minor child was caused by the negligence of the defendant. Under the current Navajo case law, negligence is defined as the failure to exercise the duty of care owed to the injured party, thereby proximately causing injury. *Mann v. Navajo Tribe*, 4 Nav. R. 83 (1983). Plaintiff has urged that Defendant Phillip Lee was required to meet a higher than ordinary standard of care when operating a vehicle on Navajo roads. *Navajo Tribe of Indians v. Littleman*, 1 Nav. R. 33 (1971). This Court agrees. The Littleman case was a criminal appeal, in which the Court of Appeals took judicial notice of the state of Navajo roads, and the need for extra care while driving, and recommended certain action be taken regarding certain safety measures in places where there are apt to be children near roadways. The defendant, therein, was found guilty for failing to exercise due care while driving a vehicle upon a roadway, after striking and killing a six year old who was crossing the highway immediately in front of defendant's truck at the time. The Court of Appeals acquitted defendant, because of insufficient evidence to sustain a finding of guilt beyond a reasonable doubt.

Considering the traffic, the road condition, and the fact that pedestrians many times walk the Navajo roads without notice, in the

case at hand, Phillip Lee was under a duty to use a higher degree of care while operating the vehicle at the time.

ISSUE II: WHAT IS THE MEASURE OF DAMAGES IN A WRONGFUL DEATH OF A MINOR UNDER NAVAJO COMMON LAW

In the instant case, Plaintiff Fern Ann Benally, in her complaint for the wrongful death of her minor child, is seeking recovery for the following damages against the defendants:

1. General damages for the negligent act of defendant.
2. Special damages for funeral and burial expenses.
3. The monetary worth of the life of the deceased minor (including loss of earnings and financial support).
4. Compensation for the loss of affection, love and companionship of her deceased minor child.
5. Damages for pain and suffering experienced by the deceased minor between the time of her injury and death.

This Court does not agree with the defendant's contention that a wrongful death action is foreign to the custom and tradition of the Navajo people. Compensation for wrongful death of a human being is and always has been recognized at Navajo common law. The Navajo experts in testimony before this Court, on the issue of whether human loss from a wrongful act is compensable, agreed with the following:

When a Navajo dies from the careless conduct of another, the person responsible for the death pays the immediate family livestock and silver jewelry.

If a person dies in a wrongful death situation, the closer relative would be given sheep to relieve that person from loneliness. How many sheep will be given varies depending upon what will fix the victim's mind. One at fault will say, "I will give this for payment."

In other situations, where there is wrongful death, survivors get together and discuss what compensation should be given to make up for the wrongdoing. When a settlement is reached among the survivors and the one at fault, payment may be made by giving sheep, a belt, or even one strand of beads. Sometimes, survivors may object and demand that more should be given.

Whatever property of value is given for the wrong doing, the paying back, nályéél would make the person in sorrow get better, feel better, regain strength, and be able to go forth again in this life.

Finally, the nályééh (a paying back of restitution), seems to be used today mostly in connection with what would be considered civil matters, but in the past this symbolic restitution was usually all that would be required of the person who committed a criminal act, as well. Nalyeeh, traditionally, has the power to correct wrongs of any kind ... The law of the People-Dine 'Bibee Haz'a' nii; Volumes I-IV, Ramah High School, Ramah, New Mexico, 1972, Dan Vicenti, et al.

Regarding the wrongful death of a minor child, the expert testimony added that:

If a child died as a result of wrongful death in a situation where the minor was run over by a car, payment for funeral expenses would be expected by the immediate family.

Children are highly valued by Navajo families. Parents depend upon their children. They are resourceful in terms of future financial support and education. Youth should have full life to gain money, property and good life.

Defendants contend that the principle of Navajo torts does not result in an "intolerable burden upon all human activity" because the damages sought are not a direct monetary repayment for the loss and all of its ramifications, but only token. Human loss cannot be fully compensated for by money. This is certainly not the case in today's Navajo world. The value and expectation of the Navajo people with respect to money have changed. For example, the value of dollars and cents, for pain and suffering of a person disabled by an accident, has become a significant consideration for damage recovery, even to a traditional Navajo person.

To be sure, money cannot replace the life of a child who dies from an accident. The Navajo experts stated what all Navajos know; compensation for loss is part of our way. It is true that the payback nályééh in the past may have been adequate if it was three horses, ten head of sheep, a belt or strand of beads. The value of such compensation may have been high yesterday. Times have changed. More Navajos work for money today. The concepts of payment have changed. The law of Navajo tort has also changed. Yesterday, wrongful death resulting from automobile accidents was unheard of. Today, deaths caused by automobile accidents are not only real, but there are numerous incidents of highway fatalities.

Payment of material goods alone is no longer adequate. In *Bryant v. Bryant*, 3 Nav. R. 194 (Shiprock D. Ct. 1981), the jury had no problem awarding money damages for the losses caused plaintiffs. There was no

talk of sheep or horses in that opinion. Whether or not the award for the death of the two minors was adequate is a question this Court does not address. The Shiprock jury decided on the evidence before it. The jury in the instant case at hand will do the same.

Navajos today look to their own codes and tribal law to seek fair compensation. The Court acknowledges, as defendant pointed out, the following important point:

> The continued importance placed upon the private symbolic renumeration of injured parties as a cornerstone of Navajo justice is a factor that cannot be ignored by judges and law advocates who seriously desire that the legal institutions offer Navajo people a solution to their problems.
>
> The Law of the People-Dine' Bibee Haz' a' nii, Id.

The Navajo Tribal Council has ensured that an injured party be fairly compensated for the loss he or she has suffered; for the injury inflicted as the result of the act of the person at fault. 7 N.T.C. Section 701(6).

The Court finds that the notion of fair compensation today should include compensation that would be normally available anywhere a person might file a wrongful death action. It is the opinion of this court that the purpose of 7 N.T.C. Section 701(6) in light of Navajo common law discussed above, is to compensate plaintiffs in wrongful death actions for the following damages:

> – Special damages, such as funeral and burial expenses, and medical expenses incurred.
>
> – General damages for the negligent act of defendant, including (a) the sorrow, mental anguish, pain and suffering of the plaintiffs; (b) loss of affection, love and companionship of the decedent. – Damages for the pain and suffering of the deceased minor between the time of her injury and death. – Damages for the monetary worth of the life of the deceased minor, including loss of earnings and financial support. *Bryant v. Bryant*, allowed the jury to determine the value of a child's life based upon their own understanding, taking into account the Navajo culture, the economy of the reservation, the usual ages of marriage, and many other things, to value a life in terms of the loss caused others.

Judgment

IT IS THEREFORE ORDERED that, as a choice of law in the instant case, the Navajo common law of tort in a wrongful death action and the measure of damages based upon the notion of fair compensation under 7 N.T.C. Section 701(b), will be applied as explained in the opinion above.

B.1.c. Questions to Ponder About *Benally v. Navajo Nation*

A. On the question of whether death is a compensable harm, who got it right – Anglo-American courts or the Navajo court? Or did they both get it right? Is it cultural, with no one right answer?

B. What do you think of the court's use of precedent – in particular its reliance on custom and cultural norms? Is this in stark contrast to Anglo-American courts? Do Anglo-American courts do the same thing, perhaps less overtly? If we could trace the roots of the English common law back far enough, do you think we would find a more upfront reliance on societal mores? Or would we find unsupported assertions, in lieu of precedent, that only implicitly rely on cultural understandings?

C. Survival Actions

Under the traditional common law, persons' causes of action died with them unless legal action had already been commenced. This led to the strange situation in which a plaintiff who sustained fatal injuries could leave her or his heirs an economically substantial legacy by way of a solid tort action – but only if she or he could make it to the courthouse before succumbing. Survival actions, sometimes called *survivor* actions, make it so would-be plaintiffs who die on the roadway are treated equally with those who might first get to the clerk's office.

As with wrongful death claims, survival actions are another way of suing in tort for fatal injury. But they differ in their essential nature. In a wrongful death action, the gravamen of the complaint is death. With survival actions, the essence of the wrong is the decedent's experience prior to death – including pain, fear, and anguish caused by the awareness of one's own imminent demise. Survival actions can also include any lost wages from the time between the injury and death.

Because of the focus on claims accrued between injury and death, it may well be that a person who dies instantaneously will occasion no survival action. On the other hand, the more horrible the death is, the more valuable the survival claim will be. Notably in some jurisdictions, survival actions are allowed for funeral expenses, punitive damages, and other amounts that do not depend on the post-tort/pre-death interstice.

Note that the terms here are potentially confusing. The word "survival" in this context is ironic – it is, after all, because someone didn't survive that the survival action accrues. The name makes sense, however, if you remember that the survival refers to the *claim*. That is, the claim survives even when the tort-victim does not. But even if we can make sense of the term "survival action," it seems impossible to make sense of the alternate label used by many courts, "survivor action." The *survivors* are not the ones who own the claim. Instead, it is the estate that owns the claim. In fact, a decedent without any survivors could have a valuable "survivor action" that escheats to the state.

Survival statutes also work in a completely different way – they can allow a living tort victim to recover from a dead tortfeasor. Under the traditional common law, just as persons' claims died with them, so did their liabilities. Today, survival statutes allow claims against the deceased tortfeasor's estate for torts accrued during the tortfeasor's lifetime.

D. Loss of Consortium

Loss of consortium is a common-law doctrine that allows recovery in a manner broadly similar to wrongful death, but in cases where the injured person is still alive. Where a person suffers brain damage or serious physical impairments, a measure of damages may be taken based on what family members lose as a result.

One way to think about it is that while wrongful-death actions are based on the loss suffered because of not having a person around any more, loss-of-consortium claims are based on the loss occasioned by no longer having someone around in the same capacity.

The development of the law regarding loss of consortium actually pre-dates the introduction of wrongful-death statutes. Loss of consortium is a common-law doctrine, judicially created. Wrongful death is a statutory cause

of action, legislatively created, that came along afterward. To a large degree, wrongful-death statutes can be characterized as extending common-law loss-of-consortium-type damages to the post-mortem realm.

Among the jurisdictions, the widest acceptance of loss-of-consortium claims is for loss of consortium between spouses. Recovery may be had for "affection, solace, comfort, companionship, society, assistance, and sexual relations." *Whittlesey v. Miller,* 572 S.W.2d 665, 666 (Tex. 1978).

Jurisdictions may also recognize parent/child consortium claims. Children can recover for lost opportunities to receive "counsel" and "advice" from a parent, as well as "loss of affection, comfort, companionship, society, emotional support and love." *Cavnar v. Quality Control Parking, Inc.,* 696 S.W.2d 549, 550-51 (Tex. 1985). Many jurisdictions recognize loss of consortium flowing the other way as well, so that parents can bring a consortium claim for the loss of children. Courts tend to be much more hesitant, however, in recognizing any parent/child claim where the child is an adult. Thus, courts frequently refuse to recognize as a compensable injury a parent's loss of an adult child or an adult child's loss of a parent.

D.1. Problem: Death on Route 12

This problem involves wrongful death, survival actions, and loss of consortium.

At 3 a.m. in a sparsely populated rural area, Melida was driving with her friends Felipe and Antone. Texting on a brightly lit cell phone, Melida's impaired night vision and distraction level caused her to cross the center line and hit an automobile driven by Ronni. Because of the remoteness of the location and its lack of cell coverage, no help arrived at the accident scene for five hours.

The evidence shows that Felipe stayed alive for two hours, immobilized in the twisted wreckage, experiencing intense pain, a fact memorialized in cell phone videos made by Antone. Felipe is survived by his husband and his one-year-old son.

Antone retained consciousness for four hours – as evidenced by his phone logs. He lost consciousness when a carotid embolism severely deprived a large part of his brain of oxygen. He nonetheless stayed alive. At

the hospital, physicians determined that Antone was in a permanent vegetative state. Antone has a wife and an adult child.

Kyle was a hitchhiker riding as a passenger in Ronni's car. Because of the angle of the impact, Kyle received catastrophic head trauma that killed him instantly. Statements by Ronni established that Kyle was sleeping before the accident, and autopsy results showing high levels of opiate pain killers made it more likely than not that he died without any awareness of the accident. Kyle had no family or loved ones who survived him.

As for Ronni, unsent texts on her phone show she was alive for at least 20 minutes, during which she experienced a great deal of pain and fear.

Melida – the tortfeasor at the center of it all – survived long enough to be taken by ambulance to the hospital. She died there several hours later from her injuries. A software engineer with a valuable portfolio of vested stock options, Melida is survived by a husband and two minor children.

What liability will there be for wrongful death, survival actions, and/or loss of consortium?

E. Unborn Plaintiffs

Issues created by the beginning of life can be just as thorny as end-of-life issues, if not more so. Under the traditional common law, an infant injured in utero had no cause of action. The trend now, however, is toward allowing recovery for pre-natal injuries.

E.1. Case: *Dobson v. Dobson* (Can. 1999)

E.1.a. Advance Notes

The next case presents the issue of recovery for pre-natal injuries in a unique circumstance – where the party alleged to have caused the injuries is the mother. Just as *Benally* provided a point of contrast with Anglo-American courts, this case does as well, coming as it does from Canada. Unlike in the United States, where there are more than 50 jurisdictions, each with its own tort law, Canada has a single body of common law, which applies nationally. (Note that Quebec is an exception: In the French legal tradition, Quebec follows a civil code.) As you read *Dobson v. Dobson*, try to spot differences between Canadian jurisprudence and its American counterpart.

E.1.b. Opinion

Dobson v. Dobson

Supreme Court of Canada
July 9, 1999

2 S.C.R. 753, 1999 CanLII 698. Cynthia Dobson, Appellant, v. Ryan Leigh MacLean Dobson by his Litigation Guardian, Gerald M. Price, Respondent. Indexed as: Dobson (Litigation Guardian of) v. Dobson. File No.: 26152. The judgment of Lamer C.J. and L'Heureux-Dubé, Gonthier, Cory, Iacobucci and Binnie JJ. was delivered by CORY J. McLachlin, Major, and Bastarache did not join the opinion.

Justice PETER CORY:

I. Introduction

1¶ Pregnancy speaks of the mystery of birth and life; of the continuation and renewal of the species. The relationship between a pregnant woman and her foetus is unique and innately recognized as one of great and special importance to society. In the vast majority of cases, the expectant woman makes every effort to ensure the good health and welfare of her future child. In addition, the sacrifices made by the mother for her newborn child are considerable. Yet, what if hopes for the future are dashed by an injury caused to the foetus as a result of a prenatal negligent act of the mother-to-be? Should a mother be held liable for the damages occasioned to her born alive child? That is the question to be resolved in this appeal.

II. Facts

2¶ On March 14, 1993, the appellant was in the 27th week of her pregnancy. On that day, she was driving towards Moncton in a snowstorm. She lost control of her vehicle on a patch of slush and struck an oncoming vehicle. It is alleged that the accident was caused by her negligent driving. The infant respondent, Ryan Dobson, was allegedly injured while in utero, and was delivered prematurely by Caesarean section later that same day. He suffers from permanent mental and physical impairment, including cerebral palsy.

3¶ The infant respondent, by his grandfather and litigation guardian, launched a tort claim against, inter alia, the appellant for the damages he sustained. The respondent's father was the owner of the vehicle driven by the appellant. As required by provincial law, he was insured against damages caused by the negligence of drivers of his motor vehicle.

4¶ The issues of liability and quantum of damages were severed by a consent order dated June 25, 1996. Thus, the only question to be determined is whether Ryan Dobson has the legal capacity to bring a tort action against his mother for her allegedly negligent act which occurred while he was in utero. Miller J., on an application for determination of this question of law, found that the infant respondent had the legal capacity to sue for injuries caused by the appellant's prenatal negligence. The Court of Appeal dismissed the appeal from that decision.

III. Judicial History

A. New Brunswick Court of Queen's Bench, (1997), 186 N.B.R. (2d) 81

5¶ Miller J. recognized the difficulty of reconciling competing legal principles regarding the nature and extent of foetal rights. He accepted that legal personality begins at birth and ends at death: *Tremblay v. Daigle*, 1989 CanLII 33 (S.C.C.), [1989] 2 S.C.R. 530. Therefore, at the time of the commission of the tort, the infant respondent did not exist as a person in law.

6¶ Miller J. based his decision on two principles of tort law. First, there is no common law bar to actions in tort by children against their parents: *Deziel v. Deziel*, [1953] 1 D.L.R. 651. The doctrine of parental tort immunity, which exists in certain American jurisdictions, has never been a part of Canadian law. Second, Canadian courts have recognized the juridical personality of the foetus as a fiction which is utilized, at least in certain contexts, to protect future interests. Although a foetus is not a legal person, certain rights accrue and may be asserted by the infant upon being born alive and viable: *Montreal Tramways Co. v. Léveillé,* [1933] S.C.R. 456. In this case, the injury was allegedly suffered by the foetus, but the damages sued for are those sustained by the infant Ryan after his birth. Accordingly, if the damages had been caused by the negligence of some third-party, the infant respondent would be entitled to seek compensation in a tort action.

7¶ Miller J. concluded that "if an action can be sustained by a child against a parent, and if an action can be sustained against a stranger for injuries suffered by a child before birth, then it seems to me a reasonable progression to allow an action by a child against his mother for prenatal injuries caused by her negligence" (p. 88). He therefore held that the infant respondent had the legal capacity to sue his mother for the injuries allegedly caused by her prenatal negligence.

B. New Brunswick Court of Appeal 1997 CanLII 9513 (NB C.A.), (1997), 189 N.B.R. (2d) 208

8¶ Hoyt C.J.N.B. also accepted that, at the time of the accident, the infant respondent did not possess juridical personality. He noted that it was common ground between the parties that a child may sue his or her parents in tort, and that a child may sue a third-party for prenatal negligence. Moreover, he found that there was a real distinction between an action brought by or on behalf of a foetus and one brought by or on behalf of a child. Accordingly, Canadian decisions involving the former – *Tremblay v. Daigle*, supra; *R. v. Sullivan*, 1991 CanLII 85 (S.C.C.), [1991] 1 S.C.R. 489; and *Winnipeg Child and Family Services (Northwest Area) v. G.* (D.F.), 1997 CanLII 336 (S.C.C.), [1997] 3 S.C.R. 925 – had no application to the case before him.

9¶ Hoyt C.J.N.B. further found that different considerations would arise if this case involved damages resulting from lifestyle choices made by a woman during pregnancy, such as smoking, drinking and the taking of or refusal to take medication. Although cases alleging such negligent conduct by a pregnant woman would raise difficult policy decisions, those issues do not arise in this case. Hoyt C.J.N.B. found that the narrow issue to be resolved concerns the allegedly negligent driving of a pregnant woman resulting in injuries to her born alive child, and not injuries occasioned as a result of her lifestyle choices. Hoyt C.J.N.B. found support for this distinction in *Bonte* v. *Bonte*, 616 A.2d 464 (N.H. 1992), *Lynch v. Lynch* (1991), 25 N.S.W.L.R. 411, and J. G. Fleming, The Law of Torts (8th ed. 1992), at p. 168. He observed that, in *Lynch*, supra, Clarke J.A. stated that different policy considerations arise in the context of a claim based on negligent driving as opposed to a case involving a pregnant woman's lifestyle choices.

10¶ Hoyt C.J.N.B. concluded that the duty on the appellant in this case arose from her general duty to drive carefully and could not be characterized as a lifestyle choice which is "peculiar to parenthood" (p. 216). He noted that the same distinction was made in the Congenital Disabilities (Civil Liability) Act 1976 (U.K.), 1976, c. 28. That Act exempts a mother from tort liability for prenatal negligence to her children who are born alive. However, the exemption does not apply to prenatal negligence which occurs when the pregnant woman is in breach of her general duty to drive carefully. Therefore, Hoyt C.J.N.B. held that a pregnant woman has a general duty to drive carefully, in relation to both her subsequently born child and third-party motorists. If, as alleged here, the child suffers injury during his or her lifetime as a result of the mother's negligent driving during pregnancy, the child

should be able to enforce his or her rights. To hold otherwise would create a partial exclusion to a pregnant woman's general duty to drive carefully.

IV. Issue

11¶ This appeal raises but one issue. Should a mother be liable in tort for damages to her child arising from a prenatal negligent act which allegedly injured the foetus in her womb?

V. Analysis

12¶ Perhaps as a prelude to considering the public policy aspects of this appeal, it may be helpful to begin with a review of the case law which allows infants to receive compensation in tort for prenatally inflicted injuries.

A. Tort Liability for Prenatal Negligence

13¶ In *Montreal Tramways*, supra, a child born with club feet two months after an incident of alleged negligence by the tramcar company brought an action for the prenatal injuries which caused the damages. Lamont J., for the majority, held that the child did indeed have the right to sue. He based his conclusion on the following rationale (at p. 464):

> If a child after birth has no right of action for pre-natal injuries, we have a wrong inflicted for which there is no remedy, for, although the father may be entitled to compensation for the loss he has incurred and the mother for what she has suffered, yet there is a residuum of injury for which compensation cannot be had save at the suit of the child. If a right of action be denied to the child it will be compelled, without any fault on its part, to go through life carrying the seal of another's fault and bearing a very heavy burden of infirmity and inconvenience without any compensation therefor. To my mind it is but natural justice that a child, if born alive and viable, should be allowed to maintain an action in the courts for injuries wrongfully committed upon its person while in the womb of its mother. (Emphasis added.)

14¶ The infant respondent argued that the underlined passage provides a born alive child with the right to sue in tort for all prenatally inflicted injuries, including those allegedly caused by the prenatal negligence of his or her mother. It is true that the reasoning of Lamont J., on behalf of the majority of this Court, was based in part on general principles of compensation and natural justice. However, the decision contains no direct reference to the tort liability of a mother for prenatal

negligence. Even if *Montreal Tramways*, supra, could be understood to encompass tortious acts by a pregnant woman that cause injury to her foetus, it must be emphasized that the decision dealt with the negligence of a third-party tortfeasor. Nothing in the decision suggests that the Court directed its attention to the sensitive issue of maternal tort liability for prenatal negligence. Accordingly, the decision in *Montreal Tramways*, while important, should not be taken as determinative of the issue raised in this appeal.

15¶ A different legal analysis was employed to achieve the same result in *Duval v. Seguin*, [1972] 2 O.R. 686 (H.C.), aff'd (1973), 1 O.R. (2d) 482 (C.A.). In that case, a pregnant woman was involved in an automobile accident caused by the negligent acts of another. Three weeks later, her child was born prematurely with cerebral defects. Fraser J. held that once a child is born alive with injuries caused by an incident of prenatal negligence, the cause of action is complete (at pp. 700-701):

> [T]he law has been clear that it is unnecessary that the damages coincide in time or place with the wrongful act or default. In this connection reference is made to *Grant v. Australian Knitting Mills, Ltd.,* [1936] A.C. 85, and to *Dorset Yacht Co. v.* Home Office, [1970] A.C. 1004. In these cases the existence of the plaintiffs was unknown to the defendant. It would have been immaterial to the causes of action if the plaintiffs had been persons born after the negligent acts.
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> ...
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> Procreation is normal and necessary for the preservation of the race. If a driver drives on a highway without due care for other users it is foreseeable that some of the other users of the highway will be pregnant women and that a child en ventre sa mère may be injured. Such a child therefore falls well within the area of potential danger which the driver is required to foresee and take reasonable care to avoid.

16¶ The approach adopted in *Duval* applies the "neighbour principle" articulated in the famous dictum of Lord Atkin in *Donoghue v. Stevenson,* [1932] A.C. 562 (H.L.), at p. 580. Since it is reasonably foreseeable at the time of an accident that negligent driving may cause injury to a pregnant woman, the possibility of injury to the child on birth is, as well, reasonably foreseeable. It is this foreseeability that creates a relationship which is sufficiently proximate to give rise to a duty of care. Once the child is born alive with injuries, the relationship crystallizes and the claim for damages can be made. By contrast, the

holding in *Montreal Tramways*, supra, is based in part on a legal fiction borrowed from the civil law. Once the child is born alive with injuries, it is "deemed to have been born at the time of the accident to the mother" (per Lamont J., at p. 465).

17¶ For the purposes of this appeal, it is not necessary to resolve the differences apparent in the reasoning of *Montreal Tramways* and *Duval*. It is sufficient to observe that when a child sues some third party for prenatal negligence, the interests of the newborn and the mother are perfectly aligned. Neither approach addresses the physical unity of a pregnant woman and her foetus, or the post-natal conflict of interest between mother and child, which are raised in this appeal.

18¶ It must be added that in *City of Kamloops v. Nielsen*, 1984 CanLII 21 (S.C.C.), [1984] 2 S.C.R. 2, it was recognized that even where a duty of care exists, it may not be imposed for reasons of public policy. Although a duty of care to the born alive child may exist, for reasons of public policy, which will be explored later, that duty should not be imposed upon a pregnant woman. Matters of public policy are concerned with sensitive issues that involve far-reaching and unpredictable implications for Canadian society. It follows that the legislature is the more appropriate forum for the consideration of such problems and the implementation of legislative solutions to them.

B. Imposing a Duty of Care in this Situation

19¶ The test set out in *Kamloops*, supra, must be considered and applied in determining whether the appellant mother should be held liable to her child in the present case. This analysis is particularly important in light of the significant policy consequences raised by this appeal. In *Kamloops*, it was held that before imposing a duty of care, the court must be satisfied: (1) that there is a sufficiently close relationship between the parties to give rise to the duty of care; and (2) that there are no public policy considerations which ought to negative or limit the scope of the duty, the class of persons to whom it is owed, or the damages to which a breach of it may give rise.

20¶ The first criterion may be satisfied if it is assumed that a pregnant woman and her foetus can be treated as distinct legal entities. It should be noted that this assumption might be seen as being contrary to the holding of McLachlin J. in *Winnipeg*, supra, at p. 945 that "the law has always treated the mother and unborn child as one". Nonetheless, it is appropriate in the present case to assume, without deciding, that a pregnant woman and her foetus can be treated as separate legal entities. Based on this assumption, a pregnant woman and her foetus

are within the closest possible physical proximity that two "legal persons" could be. With regard to foreseeability, it is clear that almost any careless act or omission by a pregnant woman could be expected to have a detrimental impact on foetal development. Indeed, the very existence of the foetus depends upon the pregnant woman. Thus, on the basis of the assumption of separate legal identities, it is possible to proceed to the more relevant analysis for the purposes of the present appeal, the second stage of the *Kamloops* test.

21¶ However, even if it is assumed that the first stage of the *Kamloops* test is satisfied, the public policy considerations in this case clearly indicate that a legal duty of care should not be imposed upon a pregnant woman towards her foetus or subsequently born child. The second branch of the *Kamloops* test requires a consideration of those public policy consequences which may negate or limit the imposition of such a duty of care upon mothers-to-be. Although increased medical knowledge makes the consequences of certain behaviour more foreseeable, and facilitates the establishment of a causative link in negligence suits, public policy must also be considered. Significant policy concerns militate against the imposition of maternal tort liability for prenatal negligence. These relate primarily to (1) the privacy and autonomy rights of women and (2) the difficulties inherent in articulating a judicial standard of conduct for pregnant women.

22¶ In addition, an intervener submitted that to impose a legal duty of care upon a pregnant woman towards her foetus or subsequently born child would give rise to a gender-based tort, in contravention of s. 15(1) of the Canadian Charter of Rights and Freedoms. That contention may be correct. However, in light of the conclusion reached with respect to the second branch of the *Kamloops* test, this case need not, and should not, be decided on Charter grounds. It cannot be forgotten that the parties did not address the Charter. Indeed, apart from the submissions of one intervener, no argument was put forward on the Charter. In those circumstances, it is inappropriate to resolve that issue in these reasons.

1. Privacy and Autonomy Rights of Women

23¶ First and foremost, for reasons of public policy, the Court should not impose a duty of care upon a pregnant woman towards her foetus or subsequently born child. To do so would result in very extensive and unacceptable intrusions into the bodily integrity, privacy and autonomy rights of women. It is true that Canadian tort law presently allows a child born alive and viable to sue a third-party for injuries which were negligently inflicted while in utero: *Montreal*

Tramways, supra. However, of fundamental importance to the public policy analysis is the particularly unique relationship that exists between a pregnant woman and the foetus she carries.

(a) Overview

24¶ Pregnancy represents not only the hope of future generations but also the continuation of the species. It is difficult to imagine a human condition that is more important to society. From the dawn of history, the pregnant woman has represented fertility and hope. Biology decrees that it is only women who can bear children. Usually, a pregnant woman does all that is possible to protect the health and well-being of her foetus. On occasion, she may sacrifice her own health and well-being for the benefit of the foetus she carries. Yet it should not be forgotten that the pregnant woman – in addition to being the carrier of the foetus within her – is also an individual whose bodily integrity, privacy and autonomy rights must be protected.

25¶ The unique and special relationship between a mother-to-be and her foetus determines the outcome of this appeal. There is no other relationship in the realm of human existence which can serve as a basis for comparison. It is for this reason that there can be no analogy between a child's action for prenatal negligence brought against some third-party tortfeasor, on the one hand, and against his or her mother, on the other. The inseparable unity between an expectant woman and her foetus distinguishes the situation of the mother-to-be from that of a negligent third-party. The biological reality is that a pregnant woman and her foetus are bonded in a union. This was recognized in the majority reasons of McLachlin J. in *Winnipeg*, supra, at pp. 944-45:

> Before birth the mother and unborn child are one in the sense that "[t]he 'life' of the foetus is intimately connected with, and cannot be regarded in isolation from, the life of the pregnant woman": *Paton v. United Kingdom* (1980), 3 E.H.R.R. 408 (Comm.), at p. 415, applied in Re F (in utero), [[1988] 2 All E.R. 193]. It is only after birth that the fetus assumes a separate personality. Accordingly, the law has always treated the mother and unborn child as one. To sue a pregnant woman on behalf of her unborn fetus therefore posits the anomaly of one part of a legal and physical entity suing itself.

26¶ It was recognized in both *Montreal Tramways*, supra, and *Duval*, supra, that the strongest argument for imposing a duty of care upon third parties towards unborn children is that tort law is designed to provide compensation for harm caused by negligence and, to a lesser

extent, to deter tortfeasors. It was submitted that to deny recognition to the type of action at issue in this appeal could leave an infant plaintiff without the protection and compensation provided by tort law, solely because the defendant is his or her mother. Accordingly, it was argued that the compensatory principle should be the basis for the imposition of a similar duty of care upon expectant women.

27¶ Yet, this argument fails to take into account the fundamental difference between a mother-to-be and a third-party defendant. The unique relationship between a pregnant woman and her foetus is so very different from the relationship with third parties. Everything the pregnant woman does or fails to do may have a potentially detrimental impact on her foetus. Everything the pregnant woman eats or drinks, and every physical action she takes, may affect the foetus. Indeed, the foetus is entirely dependent upon its mother-to-be. Although the imposition of tort liability on a third party for prenatal negligence advances the interests of both mother and child, it does not significantly impair the right of third parties to control their own lives. In contrast to the third-party defendant, a pregnant woman's every waking and sleeping moment, in essence, her entire existence, is connected to the foetus she may potentially harm. If a mother were to be held liable for prenatal negligence, this could render the most mundane decision taken in the course of her daily life as a pregnant woman subject to the scrutiny of the courts.

28¶ Is she to be liable in tort for failing to regulate her diet to provide the best nutrients for the foetus? Is she to be required to abstain from smoking and all alcoholic beverages? Should she be found liable for failing to abstain from strenuous exercise or unprotected sexual activity to protect her foetus? Must she undertake frequent safety checks of her premises in order to avoid falling and causing injury to the foetus? There is no rational and principled limit to the types of claims which may be brought if such a tortious duty of care were imposed upon pregnant women.

29¶ Whether it be considered a life-giving miracle or a matter of harsh reality, it is the biology of the human race which decrees that a pregnant woman must stand in a uniquely different situation to her foetus than any third-party. The relationship between a pregnant woman and her foetus is of fundamental importance to the future mother and her born alive child, to their immediate family and to our society. So far as the foetus is concerned, this relationship is one of complete dependence. As to the pregnant woman, in most circumstances, the relationship is marked by her complete dedication

to the well-being of her foetus. This dedication is profound and deep. It affects a pregnant woman physically, psychologically and emotionally. It is a very significant factor in this uniquely important relationship. The consequences of imposing tort liability on mothers for prenatal negligence raise vastly different considerations, and will have fundamentally different results, from the imposition of such liability on third parties.

30¶ In *Winnipeg*, supra, the majority rejected an argument which sought to extend tort principles in order to justify the forced confinement and treatment of a pregnant woman with a glue-sniffing addiction, as a means of protecting her foetus. McLachlin J. observed that difficult legal and social issues arise in examining the policy considerations under the second branch of the *Kamloops* test. First, the recognition of a duty of care owed by a pregnant woman to her foetus has a very real potential to intrude upon that woman's fundamental rights. Any intervention may create a conflict between a pregnant woman as an autonomous decision-maker and the foetus she carries. Second, the judicial definition of an appropriate standard of care is fraught with insoluble problems due to the difficulty of distinguishing tortious and non-tortious behaviour in the daily life of an expectant woman. Third, certain so-called lifestyle "choices" such as alcoholism and drug addiction may be beyond the control of the pregnant woman, and hence the deterrent value of the imposition of a duty of care may be non-existent. Lastly, the imposition of a duty of care upon a pregnant woman towards her foetus could increase, to an unwarranted degree, the level of external scrutiny focussed upon her. In *Winnipeg*, supra, it was held that the lifestyle choices of a pregnant woman should not be regulated because to do so would result in an unacceptably high degree of intrusion into her privacy and autonomy rights. If that is so, then it follows that negligent acts resulting from unreasonable lapses of attention, which may so often occur in the course of a pregnant woman's daily life, should not form the basis for the imposition of tort liability on mothers.~

(b) Position in the United Kingdom

35¶ A similar concern with the privacy and autonomy rights of women led the Parliament of the United Kingdom to fashion a rule of maternal tort immunity for prenatal negligence, with a limited exception for negligent driving. This legislative solution is set out in the Congenital Disabilities (Civil Liability) Act 1976 (U.K.), s. 1(1), and will be discussed in greater detail below. However, it should be noted at this point that, in its memorandum to the U.K. Law Commission, the Bar

Council emphasized the social policy concerns inherent in the issue on appeal:

> We recognise that logic and principle dictate that if a mother's negligent act or omission during or before pregnancy causes injury to a foetus, she should be liable to her child when born for the wrong done. But we have no doubt at all that in any system of law there are areas in which logic and principle ought to yield to social acceptability and natural sentiment and that this particular liability lies in such an area. [Emphasis added.]

(Law Com. No. 60, "Report on Injuries to Unborn Children" Cmnd. 5709 in Law Commission Reports (1979), vol. 5, at para. 55.)

36¶ Although the law of torts has traditionally been the province of the courts, to impose tort liability on mothers for prenatal negligence would have consequences which are impossible for the courts to assess adequately. This development would involve extensive intrusions and frequently unpredictable effects on the rights of bodily integrity, privacy and autonomous decision-making of pregnant women. The resolution of such fundamental policy issues is a matter best left to the legislature. In the United Kingdom, it was Parliament that provided a carefully tailored and minimally intrusive legislative scheme of motor vehicle insurance coverage. It was designed to provide a measure of compensation for a child who sustains prenatal injuries as a result of the negligent driving of his or her mother. Yet, it provides protection for mothers by prohibiting claims against them beyond the limits of their insurance policies.

(c) American Case Law

37¶ The American cases indicate that there is no judicial consensus on the issue of maternal tort liability for prenatal negligence, in the context of motor vehicle accidents or otherwise. However, in *Stallman v. Youngquist*, 531 N.E.2d 355 (1988), the Supreme Court of Illinois declined to recognize a cause of action by a foetus, subsequently born alive, against his or her mother for the unintentional infliction of prenatal injuries caused by her negligent driving. Cunningham J. held that to impose a duty of care in this context would infringe the mother's rights of privacy and bodily integrity. His decision emphasized the policy concerns which militate against imposing tort liability on mothers for prenatal negligence. He articulates his position in this manner (at pp. 359-60):

> It is clear that the recognition of a legal right to begin life with a sound mind and body on the part of a fetus which is

> assertable after birth against its mother would have serious ramifications for all women and their families, and for the way in which society views women and women's reproductive abilities. The recognition of such a right by a fetus would necessitate the recognition of a legal duty on the part of the woman who is the mother; a legal duty, as opposed to a moral duty, to effectuate the best prenatal environment possible.
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> Holding a third person liable for prenatal injuries furthers the interests of both the mother and the subsequently born child and does not interfere with the defendant's right to control his or her own life. Holding a mother liable for the unintentional infliction of prenatal injuries subjects to State scrutiny all the decisions a woman must make in attempting to carry a pregnancy to term, and infringes on her right to privacy and bodily autonomy.
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> The relationship between a pregnant woman and her fetus is unlike the relationship between any other plaintiff and defendant. No other plaintiff depends exclusively on any other defendant for everything necessary for life itself. No other defendant must go through biological changes of the most profound type, possibly at the risk of her own life, in order to bring forth an adversary into the world. It is, after all, the whole life of the pregnant woman which impacts on the development of the fetus. As opposed to the third-party defendant, it is the mother's every waking and sleeping moment which, for better or worse, shapes the prenatal environment which forms the world for the developing fetus. That this is so is not a pregnant woman's fault: it is a fact of life.

38¶ In the case of *Bonte*, supra, a child sued his mother for injuries sustained as a result of her negligent failure to use a designated crosswalk when she was seven months pregnant. The three-to-two split in the Supreme Court of New Hampshire, in favour of allowing the infant's cause of action to proceed, is typical of the division of judicial opinion in the United States. The reasons of Thayer J., for the majority, reflect those of the trial judge in the instant appeal. Thayer J. recognized the infant's cause of action for the following reasons (at p. 466):

> Because our cases hold that a child born alive may maintain a cause of action against another for injuries sustained

> while in utero, and a child may sue his or her mother in tort for the mother's negligence, it follows that a child born alive has a cause of action against his or her mother for the mother's negligence that caused injury to the child when in utero.

39¶ With respect, I believe that the public policy considerations are paramount in this appeal.~

40¶ The willingness of the trial judge and the New Brunswick Court of Appeal to impose tort liability on mothers for prenatal negligence appears to be based in large part on principles of tort law which, to date, have been applied solely to negligent third parties. The infant respondent argues that these general principles, which may result in third-party liability, may equally result in maternal prenatal liability. Yet, I agree with the position put forward by the dissent in *Bonte*, which was expressed as follows: "[W]hether to subject the day-to-day decisions and acts of a woman concerning her pregnancy to judicial scrutiny is not properly a question to be decided by a mechanical application of logic" (p. 467).~

(d) Consequences of Recognizing this Cause of Action

~42¶ There are many circumstances in which the acts or failures to act of a pregnant woman may constitute negligence and result in injury to her foetus. A general social survey indicates that of all the types of accidents in which women were involved, 28 percent occurred in motor vehicles and 21 percent occurred in the home~. If a legal duty of care is imposed upon a pregnant woman towards her foetus or subsequently born child, such accidents, if they occur while the woman is pregnant, could be characterized as prenatal negligence and result in tort liability.

43¶ Moreover, a pregnant woman will very often choose, or be compelled by economic reality, to continue her employment in order to support and maintain, or to assist in the support and maintenance, of her family. It seems clear that imposing a legal duty of care upon a pregnant woman would adversely affect that woman's ability to work during pregnancy.~

44¶ Whether it be in the household, on the roadways, or in the workplace, the imposition of a duty of care upon a pregnant woman towards her foetus or subsequently born child could render that woman liable in tort, even in situations where her conduct could not possibly affect a third-party. A mother could be held liable in tort for negligent acts or defaults, which occurred while she was pregnant and

alone, and which subsequently caused damages to her born alive child. This could include the careless performance of household activities – such as preparing meals, carrying loads of laundry, or shovelling snow – while alone in the home. It could include the negligent operation of any motor vehicle – be it for personal, family or work-related purposes – even if no third-party could possibly be affected. A mother who injured her foetus in a careless fall, or who had an unreasonable lapse of attention in the home, at work or on the roadways, could potentially be held liable in tort for the damages suffered by her born alive child. The imposition of tort liability in those circumstances would significantly undermine the privacy and autonomy rights of women.

45¶ It becomes apparent that many potential acts of negligence are inextricably intertwined with the lifestyle choices, the familial roles and the working lives of pregnant women. Women alone bear the burdens of pregnancy. Our society collectively benefits from the remarkably important role played by pregnant women. The imposition by courts of tort liability on mothers for prenatal negligence would restrict a pregnant woman's activities, reduce her autonomy to make decisions concerning her health, and have a negative impact upon her employment opportunities. It would have a profound effect upon every woman, who is pregnant or merely contemplating pregnancy, and upon Canadian society in general. Any imposition of such tort liability should be undertaken, not by the courts, but by the legislature after careful study and debate.

46¶ Moreover, the imposition of tort liability in this context would carry psychological and emotional repercussions for a mother who is sued in tort by her newborn child. To impose tort liability on a mother for an unreasonable lapse of prenatal care could have devastating consequences for the future relationship between the mother and her born alive child. In essence, the judicial recognition of a cause of action for maternal prenatal negligence is an inappropriate response to the pressing social issue of caring for children with special needs. Putting a mother through the trauma of a public trial to determine whether she was at fault for the injury suffered by her child can only add emotional and psychological trauma to an already tragic situation.

47¶ Such litigation would, in all probability, have detrimental consequences, not only for the relationship between mother and child, but also for the relationship between the child and his or her family. Yet, family harmony will be particularly important for the creation of a caring and nurturing environment for the injured child, who will undoubtedly require much loving attention. It seems clear that the

well-being of such a child cannot be readily severed from the interests of his or her family. In short, neither the best interests of the injured child, nor those of the remainder of the family, would be served by the judicial recognition of the suggested cause of action.

48¶ The primary purposes of tort law are to provide compensation to the injured and deterrence to the tortfeasor. In the ordinary course of events, the imposition of tort liability on a mother for prenatal negligence would provide neither compensation nor deterrence. The pressing societal issue at the heart of this appeal is the lack of financial support currently available for the care of children with special needs. The imposition of a legal duty of care on a pregnant woman towards her foetus or subsequently born child will not solve this problem. If anything, attempting to address this social problem in a litigious setting would merely exacerbate the pain and trauma of a tragic situation. It may well be that carefully considered legislation could create a fund to compensate children with prenatally inflicted injuries. Alternatively, amendments to the motor vehicle insurance laws could achieve the same result in a more limited context. If, as a society, Canadians believe that children who sustain damages as a result of maternal prenatal negligence should be financially compensated, then the solution should be formulated, after careful study and debate, by the legislature.

Justice JOHN C. MAJOR, dissenting:

~92¶ The issue is whether a born alive child has the legal capacity to commence a tort action against his mother for prenatal injuries sustained as a result of her alleged negligent driving.

93¶ The trial judge granted the respondent standing to sue. He reasoned that since a child has a right to sue his parents in tort (*Deziel v. Deziel*, [1953] 1 D.L.R. 651 (Ont. H.C.)), and since a born alive child has a right to sue third parties in tort for injuries sustained in utero (*Montreal Tramways Co. v. Léveillé,* [1933] S.C.R. 456; *Duval v. Seguin*, [1972] 2 O.R. 686 (H.C.), aff'd (1973), 1 O.R. (2d) 482 (C.A.), it follows that a born alive child has a right to sue his mother in tort for injuries sustained in utero.~

130¶ To grant a pregnant woman immunity from the reasonably foreseeable consequences of her acts for her born alive child would create a legal distortion as no other plaintiff carries such a one-sided burden, nor any defendant such an advantage.

131¶ Aside from a pregnant woman's autonomy interests, there may be policy considerations flowing from concerns about the appropriateness of intra-familial litigation that may be sufficient to

negative any child's right to sue its parents in tort. The considerations, however, must apply to all members of the defined family unit. The conclusion that such concerns only bar tort action brought by born alive children who sustained injuries while still in utero is not justified.

132¶ As no policy concerns sufficient to negative the child's right to sue arise on the facts of this case, the born alive respondent has the legal capacity to commence a tort action against his appellant mother for prenatal injuries allegedly sustained as a result of her negligent driving.

133¶ Under the direction given by the majority in *Winnipeg*, supra, it is my opinion that the removal of Ryan Dobson's right to sue in tort for negligent violations of his physical integrity lies within the exclusive purview of the legislature, subject to the limits imposed by the Canadian Charter of Rights and Freedoms.

134¶ I would dismiss this appeal.

E.1.c. Questions to Ponder About *Dobson v. Dobson*

A. What strikes you as different about Canadian jurisprudence? What is the same?

B. Can one side or the other be said to be "judicially activist" in *Dobson*? If so, which one?

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