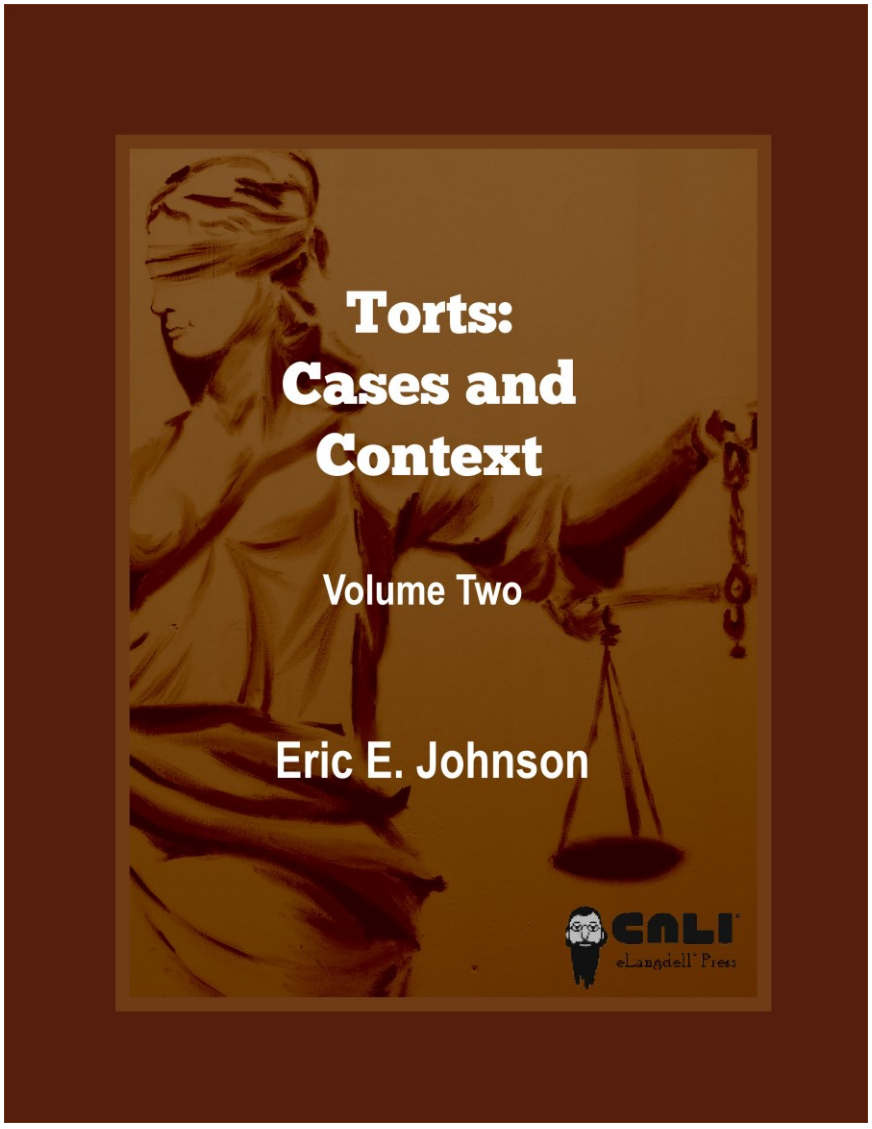
Torts:
Cases and
Context
Volume Two
Eric E. Johnson
CALI
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Torts, Volume Two

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About the Author

Eric E. Johnson is an Associate Professor of Law at the University of North Dakota. He has taught torts, intellectual property, sales, entertainment law, media law, sports law, employment law, and writing courses. He has twice been selected by students as the keynote speaker for UND Law's graduation banquet. His writing on legal pedagogy has appeared in the *Journal of Legal Education*.

With scholarly interests in intellectual property and the intersection of law and science, Eric's publications include the *Northwestern University Law Review*, the *Boston University Law Review*, the *University of Illinois Law Review*, and *New Scientist* magazine. His work was selected for the Yale/Stanford/Harvard Junior Faculty Forum in 2013.

Eric's practice experience includes a wide array of business torts, intellectual property, and contract matters. As a litigation associate at Irell & Manella in Los Angeles, his clients included Paramount, MTV, CBS, Touchstone, and the bankruptcy estate of eToys.com. As in-house counsel at Fox Cable Networks, he drafted and negotiated deals for the Fox Sports cable networks.

Eric received his J.D. *cum laude* from Harvard Law School in 2000, where he was an instructor of the first-year course in legal reasoning and argument. He received his B.A. with Highest and Special Honors from the Plan II program at the University of Texas at Austin.

Outside of his legal career, Eric performed as a stand-up comic and was a top-40 radio disc jockey. Eric archives teaching materials on his website at ericejohnson.com. His online exam archive includes more than a dozen torts essay exams and a bank of multiple-choice questions.

For my mom, Gretchen Johnson

Notices

This is the first edition of this casebook, updated December 2016. Visit http://elangdell.cali.org/ for the latest version and for revision history.

Rights Information

Silkwood v. Kerr-McGee (in Chapter 13, Strict Liability): For the "FACTS," all but the first and last paragraphs of the facts are taken, nearly verbatim, from James F. McInroy, *A True Measure of Exposure: The Karen Silkwood Story,* 23 LOS ALAMOS SCIENCE 252 (1995).

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Preface

(For both volumes)

What Makes this Casebook Different

This book is different from other casebooks in at least three key ways.

First, and most importantly, this casebook is **free**. It is free in both senses of the word. In one sense, it is free in that it does not cost the reader any money. That is, **the price is zero**. You can get an electronic copy for free, or you can buy a printed copy for whatever the paper and ink costs. You can also print it out yourself, if you'd like. The no-money sense of free is great, but this casebook is also free in a deeper sense: It is **unfettered by proprietary legal claims** that would prevent it from being abridged, expanded, repurposed, or adapted. That is to say, this book is "open source." Consistent with the terms of the Creative Commons license that this book is published under, generations of instructors and students will be able to rip and remix this book to suit their needs.

Next, this casebook is different from many traditional casebooks in that it has made **a deliberate effort to explain the law**, rather than just present a series of readings and questions. All casebooks contain some explanatory matter, but few casebooks emphasize it. This is changing. More and more casebooks are built around the idea of actively explaining concepts to the reader rather than relying solely on the judicial opinions' internal exposition. This book embraces that trend.

Finally, this casebook is offered not merely as a one-way communication. Instead, this book **constitutes an invitation to you**. If you are an instructor, please get in touch with me. I'd love to hear how your class is going, and I would be happy to provide you with notes, slides, advice, and anything else I can. If you are a student, I would love to hear your comments about how this casebook is working and how it could be improved. An advantage of in-person speaking over writing is that you can see from the reactions

of students whether you are doing a good job explaining something. Since, in writing this book, I can't see any faces, I am relying on you and other readers to not be shy about telling me what I am doing well and what I could be doing better. You can find me at ericejohnson.com.

Questions and Problems

There are two types of questions in this book, and they are separately labeled as such. In addition, there are problems for you to work.

Questions to Ponder: These questions are intended to be interesting and helpful to think about after reading the preceding material. You should not, however, attempt to figure out "the answer" to these questions. They are not meant to have clearly correct answers. Instead, the idea is to prompt you to think more deeply about one or more facets of the case.

Check-Your-Understanding Questions: These questions are intended to help you see if you absorbed the preceding material. Unlike "Questions to Ponder," the questions labeled as "Check-Your-Understanding Questions" do have clearly correct answers.

Problems: The problems in this casebook are much more involved than the questions. Rather than asking for you to ponder ideas or come up with simple answers, the problems call upon you to do *analysis*. That is, you are expected to apply what you have learned. With the problems, you mirror to some extent the task of the practicing lawyer. As you will learn by working through them, some of the problems in this book have well-defined solutions. Others are more open-ended and invite creativity. But all are meant to get you to utilize doctrine and concepts to generate fresh insights in view of new facts.

Editing of Cases

In editing the cases for inclusion in this book, I have strived primarily for readability and brevity. Thus, I have been quite liberal in cutting down courts' text, and, in some cases, re-arranging it.

I have left a record of my editing either in the cases themselves, in the annotations below, or in the aftermatter at the end of the book. I

realize most casebooks do not provide this level of detail about the editing, but by thoroughly cataloging my edits, I hope to facilitate the revision and adaptation of this book by others.

Footnotes

I have handled footnotes in a slightly unconventional manner. The reason why is that this book is being written to work in multiple formats, including print, the print-like PDF format, and various e-book formats with variable pagination. Achieving compatibility across formats presents a problem with regard to footnotes. Footnotes are no problem in print. But footnotes are often rendered awkwardly in e-book formats.

This is a particular problem for a casebook. Courts love footnotes. Gather together a collection of judicial opinions, and footnotes are everywhere. In truth, footnotes are a wonderful structural tool for writing, since they give the reader choices. Less essential matter is kept out of the text, allowing a time-pressed reader to forge ahead. But if a more probing reader wants to read the footnote material, the eyes do not have to go far to find it. Unfortunately, standards developers have not provided a way of dealing with digital footnotes that preserves all the functionality they exhibit on paper.

One way around the problem posed by continuous pagination in electronic formats would be to convert the footnotes to endnotes. Hyperlinking can then facilitate a reader's movement from the text to the endnotes and back again. But that does not work in this casebook for two reasons. First, even though clicking links back and forth is easier than finding your way through a document with a scroll wheel or slide knob, clicking links is still time consuming. And with a lot of footnotes, the clicking time adds up. Second, this book is intended also to work well in a print distribution, and you can't use hyperlinks to avoid page turning in a physical book.

Because of these concerns, I have adopted a zero-footnote/zero-endnote policy for this book. Nevertheless, there is footnote material in many cases that deserves to be read. So, where I felt footnote material was important, I have incorporated into the inline text.

I have adopted this convention for marking footnote material:

> ⮑ The superscript right-pointing descending arrow indicates the beginning of footnote material.
>
> ⮐ The superscript left-pointing descending arrow indicates the end of a passage of footnote material.

While this system works well, there is one wrinkle: Sometimes courts put footnote references in the middle of a sentence. Where this has happened, I have had to depart from the exact linear order of the text, usually by inserting the footnote material after the end of the sentence.

Editing Marks

Because I think it is good for the reader to be able to get a sense of the relative fidelity of the edited version of a reading compared to the original, I have left editing marks in many places.

Editing a casebook presents a special challenge in indicating what edits you have made. Courts themselves, when writing opinions, include an enormous amount of quoted material. Thus, unedited court opinions are filled with ellipses to show where the quoted version differs from the original. If I used ellipses in editing the opinions themselves, how could the reader of this casebook tell my edits from the court's?

To avoid such ambiguity, I have used a special mark in lieu of an ellipse where the chopping was mine:

> ~ The superscript tilda denotes matter omitted.

The superscript tilda also has the advantage of being less obtrusive than an ellipse.

Insertions are indicated with brackets – and generally they are mine if they are not in a quote.

> [] Brackets indicate an insertion. The insertion may be mine or the court's.

Also, some courts use brackets in and around citations as part of their adopted citation style. Those brackets, which do not indicate an insertion, are the court's, not mine.

Any other editing marks you see are the court's, not mine.

Unmarked Edits

While I have sought to indicate significant edits in the text, as I've just described, I also have made unmarked changes. In such cases, I left them unmarked because marking them in some way would have been unduly distracting. In particular, throughout the cases I have liberally omitted citation matter, including parallel cites, portions of cites, and whole cites. (Note that I didn't remove all citation; in many places I thought it was essential to what the court was trying to say or that it otherwise made a helpful contribution.) Other unmarked edits are cataloged in the aftermatter at the end of this book.

Acknowledgements

(For both volumes)

First and foremost, I want to acknowledge and thank my students, particularly my torts students over the years at the University of North Dakota. They helped me immeasurably to grow as a teacher, and they provided invaluable feedback for the early forms of material that evolved into this casebook. A particular note of thanks is due my 2014-2015 torts students. Many of them went above-and-beyond-the-call in helping me ferret out typos and rework unclear passages. I am truly indebted to them. I also owe thanks to the faculty, staff, and administration at the University of North Dakota School of Law for their considerable support.

Many other people lent me their time and advice to help with this book. In particular, I grateful to Michael L. Corrado, Patti Alleva, Murray Tabb, Paul LeBel, Keith Richotte, James Grijalva, Adam Gutride, Jim Dedman, Brian Schmidt, Devin Rogers, Pete Boll, Susan Carlson, Karen Martin, Jan Stone, and Kit Johnson. I also want to thank the anonymous reviewers who, through the CALI editing process, provided excellent counsel.

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I am also grateful to Justice Raymond D. Austin who suggested *Benally v. Navajo Nation* to me as a good teaching case, as well as Jennifer L. Schulz for making the same suggestion with regard to *Dobson v. Dobson.*

Finally, I want to warmly thank Deb Quentel and everyone at CALI for supporting me in this endeavor. I am grateful to them not only for their work with regard to this particular project, but also more

broadly for their efforts to make legal education more efficient, effective, affordable, and accessible.

Part IV: Dealing with Accidents: Beyond Negligence

13. Strict Liability

" 'Danger! What danger do you foresee?'
Holmes shook his head gravely. 'It would cease to
be danger if we could define it,' said he."
– from "The Copper Beeches," by Arthur Conan Doyle, 1892

Introduction

The dominant form of legal action for compensation following an injury is the action for negligence, which we explored in Volume One. 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.)

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.

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 – which follows immediately after this one. In this chapter, we focus on the first four categories.

Animals

Of the categories for the imposition of an absolute duty of safety, three of the five have to do with 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 some one, 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 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.

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.

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. It's additional qualification as livestock for strict-liability purposes would be redundant.

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, since 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 negligence-per-se doctrine. 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. (See Volume One, Chapter 6 regarding 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.

Case: Isaacs v. Monkeytown U.S.A.

The following case illustrates many of the key points of strict liability for animals.

Isaacs v. Monkeytown, U.S.A.

District Court of Appeal of Florida, Second District

October 4, 1972

267 So.2d 864. Scott ISAACS, a minor, by his father and natural guardian, Howard Isaacs, Appellant, v. Lester M. POWELL and Arlyss R. Powell, doing business as Monkeytown, U.S.A., Appellees.

Judge JOSEPH P. McNULTY:

This is a case of first impression in Florida. The question posed is whether Florida should adopt the general rule that the owner or keeper of a wild animal, in this case a chimpanzee, is liable to one injured by such animal under the strict liability doctrine, i.e., regardless of negligence on his part, or whether his liability should be predicated on his fault or negligence.~

Plaintiff-appellant Scott Isaacs was two years and seven months old at the times material herein. His father had taken him to defendants-appellees' monkey farm where, upon purchasing an admission ticket, and as was usual and encouraged by appellees, he also purchased some food to feed the animals. While Scott was feeding a chimpanzee named Valerie, she grabbed his arm and inflicted serious injury.

The exact details of how Valerie was able to grab Scott's arm are in dispute. Appellees contend that Scott's father lifted the boy above reasonably sufficient protective barriers to within Valerie's reach, while appellants counter that the barriers and other protective measures were insufficient. But in any case, appellants do not now, nor did they below, rely on any fault of appellees. Rather, they rely solely on the aforesaid generally accepted strict or, as it is sometimes called, absolute liability doctrine under which negligence or fault on the part of the owner or keeper of an animal *ferae naturae* is irrelevant. Appellees, on the other hand, suggest that we should adopt the emerging, though yet minority, view that liability should depend upon negligence, i.e., a breach of the duty of care reasonably called for taking into account the nature and specie of the animal involved. We will consider this aspect of the problem first and will hereinafter discuss available defenses under the theory we adopt.

The trial judge apparently agreed with the appellees that fault or negligence on the part of the owners of a wild animal must be shown. He charged the jury on causation as follows:

> The issues for your determination are whether the proximate cause of Scott Isaacs' injuries was the improper protection for paying customers of the defendants in the condition of the cage, and whether the approximate cause of (sic) the placing of Scott by his father, Howard Isaacs, within the barrier placed by the defendants for the protection of customers of the defendant.

In other words the trial judge asked the jury to decide whether Scott was injured through the fault of defendants-appellees and/or through the fault of his father. The jury returned a verdict for the defendants; but obviously, it's impossible for us to determine whether, under the foregoing charge, the jury so found because they were unable to find fault on defendants' part, or whether they so found because they believed the cause of Scott's injury to be the fault of the father. If, of course, we adopt the negligence theory of liability there would be no error in submitting both issues to the jury. But we are of the view that the older and general rule of strict liability, which obviates the issue of the owner's negligence, is more suited to the fast growing, populous and activity-oriented society of Florida. Indeed, our society imposes more than enough risks upon its members now, and we are reluctant to encourage the addition of one more particularly when that one more is increasingly contributed by those who, for profit, would exercise their "right" to harbor wild animals and increase exposure to the dangers thereof by luring advertising. Prosser puts it this way:

> … (Liability) has been thought to rest on the basis of negligence in keeping the animal at all; but this does not coincide with the modern analysis of negligence as conduct which is unreasonable in view of the risk, since it may not be an unreasonable thing to keep a tiger in a zoo. It is rather an instance of the strict responsibility placed upon those who, even with proper care, expose the community to the risk

> of a very dangerous thing. While one or two jurisdictions insist that there is no liability without some negligence in keeping the animal, by far the greater number impose strict liability.

Additionally, we observe that Florida has enacted § 767.04, F.S.A., relating to dogs. ⌙This section provides, in pertinent part:

> The owners of any dog which shall bite any person, while such person is on or in a public place, or lawfully on or in a private place, including the property of the owner of such dogs, shall be liable for such damages as may be suffered by persons bitten, regardless of the former viciousness of such dog or the owners' knowledge of such viciousness …; Provided, however, no owner of any dog shall be liable for any damages to any person or his property when such person shall mischievously or carelessly provoke or aggravate the dog inflicting such damage; nor shall any such owner be so liable if at the time of any such injury he had displayed in a prominent place on his premises a sign easily readable including the words 'Bad Dog.~⌟

[This statute] abrogates the permissive "one bite" rule of the common law. That rule posited that an owner of a dog is liable to one bitten by such dog only if he is chargeable with "scienter," i.e., prior knowledge of the viciousness of the dog. Necessarily, of course, the cause of action therefor was predicated on the negligence of the owner in failing to take proper precautions with knowledge of the dog's vicious propensities. ⌙This indeed was also basis at common law of liability on the part of an owner of any animal domitae naturae.⌟ Our statute, however, has in effect imposed strict liability on a dog owner (from which he can absolve himself only by complying with the warning proviso of the statute). It would result in a curious anomaly, then, if we were to adopt the negligence concept as a basis for liability of an owner or keeper of a tiger, while § 767.04, supra, imposes potential strict liability

upon him if he should trade the tiger for a dog. We are compelled to adopt, therefore, the strict liability rule in these cases.

Concerning, now, available defenses under this rule we share the view, and emphasize, that "strict or absolute liability" does not mean the owner or keeper of a wild animal is an absolute insurer in the sense that he is liable regardless of any fault on the part of the victim. Moreover, we do not think it means he is liable notwithstanding an intervening, efficient independent fault which solely causes the result, as was possibly the case here if fault on the part of Scott's father were the sole efficient cause.

As to the fault of the victim himself, since the owner or keeper of a wild animal is held to a rigorous rule of liability on account of the danger inherent in harboring such animal, it has generally been held that the owner ought not be relieved from such liability by slight negligence or want of ordinary care on the part of the person injured. The latter's acts must be such as would establish that, with knowledge of the danger, he voluntarily brought the calamity upon himself. This general rule supports the Restatement of Torts, § 515, which we now adopt and set forth as follows:

> (1) A plaintiff is not barred from recovery by his failure to exercise reasonable care to observe the propinquity of a wild animal or an abnormally dangerous domestic animal or to avoid harm to his person, land or chattels threatened by it.
>
> (2) A plaintiff is barred from recovery by intentionally and unreasonably subjecting himself to the risk that a wild animal or an abnormally dangerous domestic animal will do harm to his person, land or chattels.~

~This rule is duplicated in § 484, Restatement, Torts 2d, which states that the plaintiff's contributory negligence is not a defense to the strict liability of the possessor of an animal, except where such contributory negligence consists in voluntarily and unreasonably subjecting himself to the risk of harm from the animal.~

> With regard to an intervening fault bringing about the result we have no hesitancy in expanding the foregoing rule to include as a defense the willful or intentional fault of a third party provided such fault is of itself an efficient cause and is the sole cause. If a jury were to decide in this case, therefore, that the sole efficient cause of Scott's injury was the intentional assumption of the apparent risks on the part of the boy's father and his placing of the boy within reach of the danger, it would be a defense available to appellees. Clearly, though, this defense would be related only to causation and is not dependent upon any theory of imputation of the father's fault to the son, which is now irrelevant in view of the extent of strict liability in these cases and the limited defenses available thereunder.
>
> The judgment is reversed and the cause is remanded for a new trial on the theory of strict liability, and the defenses thereto, as enunciated above.
>
> Reversed.
>
> HOBSON, A.C.J., and MANN, J., concur.

Check-Your-Understanding Questions About Strict Liability

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. Can the plaintiff recover against the zoo in strict liability?

Ultrahazardous or Abnormally Dangerous Activities

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 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 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.

What Activities Qualify as Ultrahazardous or Abnormally Dangerous?

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.

Here are some examples of activities have that 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.

Richard A. Epstein writes, "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).

One way 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.

Case: Rylands v. Fletcher

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

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.~

The Economics of Strict Liability

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 social 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.

Case: Indiana Belt Harbor R.R. v. American Cyanamid

In this modern classic, Judge Richard A. Posner, a leading figure in the law-and-economics movement, brings economic analysis to bear on the decision of whether the transportation of toxic chemicals should be subject to strict liability. This case has been praised by some and lambasted by others. Ask yourself whether you find the analysis convincing.

Indiana Belt Harbor R.R. v. American Cyanamid

United States Court of Appeals for the Seventh Circuit
October 18, 1990

916 F.2d 1174. INDIANA HARBOR BELT RAILROAD COMPANY, Plaintiff-Appellee, Cross-Appellant, v. AMERICAN CYANAMID COMPANY, Defendant-Appellant, Cross-Appellee. Nos. 89-3703, 89-3757. United States Court of Appeals, Seventh Circuit. Before POSNER, MANION and KANNE, Circuit Judges.

Circuit Judge RICHARD A. POSNER:

American Cyanamid Company, the defendant in this diversity tort suit governed by Illinois law, is a major manufacturer of chemicals, including acrylonitrile, a chemical used in large quantities in making acrylic fibers, plastics, dyes, pharmaceutical chemicals, and other intermediate and final goods. On January 2, 1979, at its manufacturing plant in Louisiana, Cyanamid loaded 20,000 gallons of liquid acrylonitrile into a railroad tank car that it had leased from the North American Car Corporation. The next day, a train of the Missouri Pacific Railroad picked up the car at Cyanamid's siding. The car's ultimate destination was a Cyanamid plant in New Jersey served by Conrail rather than by Missouri Pacific. The Missouri Pacific train carried the car north to the Blue Island railroad yard of Indiana Harbor Belt Railroad, the plaintiff in this case, a small switching line that has a contract with Conrail to switch cars from other lines to Conrail, in this case for travel east. The Blue Island yard is in the Village of Riverdale, which is just south of Chicago and part of the Chicago metropolitan area.

The car arrived in the Blue Island yard on the morning of January 9, 1979. Several hours after it arrived, employees of the switching line noticed fluid gushing from the bottom outlet of the car. The lid on the outlet was broken. After two hours, the line's supervisor of equipment was able to stop the leak by closing a shut-off valve controlled from the top of the car. No one was sure at the time just how much of the contents of the car had leaked, but it was feared that all 20,000 gallons had, and since acrylonitrile is flammable at a temperature of 30° Fahrenheit or above, highly toxic, and possibly carcinogenic (*Acrylonitrile,* 9 International Toxicity Update, no. 3, May-June 1989, at 2, 4), the local authorities ordered the homes near the

yard evacuated. The evacuation lasted only a few hours, until the car was moved to a remote part of the yard and it was discovered that only about a quarter of the acrylonitrile had leaked. Concerned nevertheless that there had been some contamination of soil and water, the Illinois Department of Environmental Protection ordered the switching line to take decontamination measures that cost the line $981,022.75, which it sought to recover by this suit.

One count of the two-count complaint charges Cyanamid with having maintained the leased tank car negligently. The other count asserts that the transportation of acrylonitrile in bulk through the Chicago metropolitan area is an abnormally dangerous activity, for the consequences of which the shipper (Cyanamid) is strictly liable to the switching line, which bore the financial brunt of those consequences because of the decontamination measures that it was forced to take.~

The question whether the shipper of a hazardous chemical by rail should be strictly liable for the consequences of a spill or other accident to the shipment en route is a novel one in Illinois, despite the switching line's contention that the question has been answered in its favor by two decisions of the Illinois Appellate Court that the district judge cited in granting summary judgment. In both *Fallon v. Indiana Trail School,* 148 Ill.App.3d 931, 934~(1986), and *Continental Building Corp. v. Union Oil Co.,* 152 Ill.App.3d 513, 516~(1987), the Illinois Appellate Court cited the district court's first opinion in this case with approval and described it as having held that the transportation of acrylonitrile in the Chicago metropolitan area is an abnormally dangerous activity, for which the shipper is strictly liable. These discussions are dicta. The cases did not involve acrylonitrile – or for that matter transportation – and in both cases the court held that the defendant was not strictly liable. The discussions were careless dicta, too, because the district court had not in its first opinion, the one they cited, held that acrylonitrile was in fact abnormally dangerous. It merely had declined to grant a motion to dismiss the strict liability count for failure to state a claim. We do not wish to sound too censorious; this court has twice made the same mistake in interpreting the district court's first opinion.

Martin v. Harrington & Richardson, Inc., 743 F.2d 1200, 1203 (7th Cir.1984); *City of Bloomington v. Westinghouse Elec. Corp.,* 891 F.2d 611, 615 (7th Cir.1989). But mistake it is. The dicta in *Fallon* and *Continental* cannot be considered reliable predictors of how the Supreme Court of Illinois would rule if confronted with the issue in this case. We are not required to follow even the *holdings* of intermediate state appellate courts if persuaded that they are not reliable predictors of the view the state's highest court would take. No court is required to follow another court's dicta. Here they are not even considered or well-reasoned dicta, founded as they are on the misreading of an opinion.

The parties agree that the question whether placing acrylonitrile in a rail shipment that will pass through a metropolitan area subjects the shipper to strict liability is, as recommended in Restatement (Second) of Torts § 520, comment *l* (1977), a question of law, so that we owe no particular deference to the conclusion of the district court. They also agree (and for this proposition, at least, there is substantial support in the *Fallon* and *Continental* opinions) that the Supreme Court of Illinois would treat as authoritative the provisions of the Restatement governing abnormally dangerous activities. The key provision is section 520, which sets forth six factors to be considered in deciding whether an activity is abnormally dangerous and the actor therefore strictly liable.

The roots of section 520 are in nineteenth-century cases. The most famous one is *Rylands v. Fletcher,* 1 Ex. 265, aff'd, L.R. 3 H.L. 300 (1868), but a more illuminating one in the present context is *Guille v. Swan,* 19 Johns. (N.Y.) 381 (1822). A man took off in a hot-air balloon and landed, without intending to, in a vegetable garden in New York City. A crowd that had been anxiously watching his involuntary descent trampled the vegetables in their endeavor to rescue him when he landed. The owner of the garden sued the balloonist for the resulting damage, and won. Yet the balloonist had not been careless. In the then state of ballooning it was impossible to make a pinpoint landing.

Guille is a paradigmatic case for strict liability. (a) The risk (probability) of harm was great, and (b) the harm that would ensue if the risk materialized could be, although luckily was not, great (the balloonist could have crashed into the crowd rather than into the vegetables). The confluence of these two factors established the urgency of seeking to prevent such accidents. (c) Yet such accidents could not be prevented by the exercise of due care; the technology of care in ballooning was insufficiently developed. (d) The activity was not a matter of common usage, so there was no presumption that it was a highly valuable activity despite its unavoidable riskiness. (e) The activity was inappropriate to the place in which it took place – densely populated New York City. The risk of serious harm to others (other than the balloonist himself, that is) could have been reduced by shifting the activity to the sparsely inhabited areas that surrounded the city in those days. (f) Reinforcing (d), the value to the community of the activity of recreational ballooning did not appear to be great enough to offset its unavoidable risks.

These are, of course, the six factors in section 520. They are related to each other in that each is a different facet of a common quest for a proper legal regime to govern accidents that negligence liability cannot adequately control. The interrelations might be more perspicuous if the six factors were reordered. One might for example start with (c), inability to eliminate the risk of accident by the exercise of due care. The baseline common law regime of tort liability is negligence. When it is a workable regime, because the hazards of an activity can be avoided by being careful (which is to say, nonnegligent), there is no need to switch to strict liability. Sometimes, however, a particular type of accident cannot be prevented by taking care but can be avoided, or its consequences minimized, by shifting the activity in which the accident occurs to another locale, where the risk or harm of an accident will be less ((e)), or by reducing the scale of the activity in order to minimize the number of accidents caused by it ((f)). *Bethlehem Steel Corp. v. EPA,* 782 F.2d 645, 652 (7th Cir.1986); Shavell, *Strict Liability versus Negligence,* 9 J. Legal Stud. 1 (1980). By making the actor strictly liable – by denying him in other words an excuse based on his inability to

avoid accidents by being more careful – we give him an incentive, missing in a negligence regime, to experiment with methods of preventing accidents that involve not greater exertions of care, assumed to be futile, but instead relocating, changing, or reducing (perhaps to the vanishing point) the activity giving rise to the accident. *Anderson v. Marathon Petroleum Co.,* 801 F.2d 936, 939 (7th Cir.1986). The greater the risk of an accident ((a)) and the costs of an accident if one occurs ((b)), the more we want the actor to consider the possibility of making accident-reducing activity changes; the stronger, therefore, is the case for strict liability. Finally, if an activity is extremely common ((d)), like driving an automobile, it is unlikely either that its hazards are perceived as great or that there is no technology of care available to minimize them; so the case for strict liability is weakened.

The largest class of cases in which strict liability has been imposed under the standard codified in the Second Restatement of Torts involves the use of dynamite and other explosives for demolition in residential or urban areas. Restatement, *supra,* § 519, comment d; *City of Joliet v. Harwood,* 86 Ill. 110 (1877). Explosives are dangerous even when handled carefully, and we therefore want blasters to choose the location of the activity with care and also to explore the feasibility of using safer substitutes (such as a wrecking ball), as well as to be careful in the blasting itself. Blasting is not a commonplace activity like driving a car, or so superior to substitute methods of demolition that the imposition of liability is unlikely to have any effect except to raise the activity's costs.

Against this background we turn to the particulars of acrylonitrile. Acrylonitrile is one of a large number of chemicals that are hazardous in the sense of being flammable, toxic, or both; acrylonitrile is both, as are many others. A table in the record~ contains a list of the 125 hazardous materials that are shipped in highest volume on the nation's railroads. Acrylonitrile is the fifty-third most hazardous on the list. Number 1 is phosphorus (white or yellow), and among the other materials that rank higher than acrylonitrile on the hazard scale are anhydrous ammonia, liquified petroleum gas, vinyl chloride,

gasoline, crude petroleum, motor fuel antiknock compound, methyl and ethyl chloride, sulphuric acid, sodium metal, and chloroform. The plaintiff's lawyer acknowledged at argument that the logic of the district court's opinion dictated strict liability for all 52 materials that rank higher than acrylonitrile on the list, and quite possibly for the 72 that rank lower as well, since all are hazardous if spilled in quantity while being shipped by rail. Every shipper of any of these materials would therefore be strictly liable for the consequences of a spill or other accident that occurred while the material was being shipped through a metropolitan area. The plaintiff's lawyer further acknowledged the irrelevance, on her view of the case, of the fact that Cyanamid had leased and filled the car that spilled the acrylonitrile; all she thought important is that Cyanamid introduced the product into the stream of commerce that happened to pass through the Chicago metropolitan area. Her concession may have been incautious. One might want to distinguish between the shipper who merely places his goods on his loading dock to be picked up by the carrier and the shipper who, as in this case, participates actively in the transportation. But the concession is illustrative of the potential scope of the district court's decision.

No cases recognize so sweeping a liability. Several reject it, though none has facts much like those of the present case.~ With *National Steel Service Center v. Gibbons,* 693 F.2d 817 (8th Cir.1982), which held a railroad strictly liable for transporting propane gas – but under Iowa law, which uses a different standard from that of the Restatement – we may pair *Seaboard Coast Line R.R. v. Mobil Chemical Co.,* 172 Ga.App. 543, 323 S.E.2d 849 (1984), which refused to impose strict liability on facts similar to those in this case, but again on the basis of a standard different from that of the Restatement. *Zero Wholesale Co. v. Stroud,* 264 Ark. 27 (1978), refused to hold that the delivery of propane gas was not an ultrahazardous activity as a matter of law. But the delivery in question was to a gas-storage facility, and the explosion occurred while gas was being pumped from the tank truck into a storage tank. This was a highly, perhaps unavoidably, dangerous activity.

Siegler v. Kuhlman, 81 Wash.2d 448, 502 P.2d 1181 (1972), also imposed strict liability on a transporter of hazardous materials, but the circumstances were again rather special. A gasoline truck blew up, obliterating the plaintiff's decedent and her car. The court emphasized that the explosion had destroyed the evidence necessary to establish whether the accident had been due to negligence; so, unless liability was strict, there would be no liability – and this as the very consequence of the defendant's hazardous activity. 81 Wash.2d at 454-55, 502 P.2d at 1185. But when the Supreme Court of Washington came to decide the *New Meadows* case, *supra,* it did not distinguish *Siegler* on this ground, perhaps realizing that the plaintiff in *Siegler* could have overcome the destruction of the evidence by basing a negligence claim on the doctrine of res ipsa loquitur. Instead it stressed that the transmission of natural gas through underground pipes, the activity in *New Meadows,* is less dangerous than the transportation of gasoline by highway, where the risk of an accident is omnipresent. 102 Wash.2d at 502-03, 687 P.2d at 216-17. We shall see that a further distinction of great importance between the present case and *Siegler* is that the defendant there was the transporter, and here it is the shipper.

Cases such as *McLane v. Northwest Natural Gas Co.,* 255 Or. 324 (1970)~ that impose strict liability for the storage of a dangerous chemical provide a potentially helpful analogy to our case. But they can be distinguished on the ground that the storer (like the transporter, as in *Siegler*) has more control than the shipper.

So we can get little help from precedent, and might as well apply section 520 to the acrylonitrile problem from the ground up. To begin with, we have been given no reason, whether the reason in *Siegler* or any other, for believing that a negligence regime is not perfectly adequate to remedy and deter, at reasonable cost, the accidental spillage of acrylonitrile from rail cars. Cf. *Bagley v. Controlled Environment Corp.,* 127 N.H. 556, 560 (1986). Acrylonitrile could explode and destroy evidence, but of course did not here, making imposition of strict liability on the theory of the *Siegler* decision premature. More important, although acrylonitrile is flammable even at relatively low temperatures, and toxic, it is not so corrosive or otherwise destructive that it

will eat through or otherwise damage or weaken a tank car's valves although they are maintained with due (which essentially means, with average) care. No one suggests, therefore, that the leak in this case was caused by the *inherent* properties of acrylonitrile. It was caused by carelessness – whether that of the North American Car Corporation in failing to maintain or inspect the car properly, or that of Cyanamid in failing to maintain or inspect it, or that of the Missouri Pacific when it had custody of the car, or that of the switching line itself in failing to notice the ruptured lid, or some combination of these possible failures of care. Accidents that are due to a lack of care can be prevented by taking care; and when a lack of care can (unlike *Siegler*) be shown in court, such accidents are adequately deterred by the threat of liability for negligence.

It is true that the district court purported to find as a fact that there is an inevitable risk of derailment or other calamity in transporting "large quantities of anything." 662 F.Supp. at 642. This is not a finding of fact, but a truism: anything can happen. The question is, how likely is this type of accident if the actor uses due care? For all that appears from the record of the case or any other sources of information that we have found, if a tank car is carefully maintained the danger of a spill of acrylonitrile is negligible. If this is right, there is no compelling reason to move to a regime of strict liability, especially one that might embrace all other hazardous materials shipped by rail as well. This also means, however, that the amici curiae who have filed briefs in support of Cyanamid cry wolf in predicting "devastating" effects on the chemical industry if the district court's decision is affirmed. If the vast majority of chemical spills by railroads are preventable by due care, the imposition of strict liability should cause only a slight, not as they argue a substantial, rise in liability insurance rates, because the incremental liability should be slight. The amici have momentarily lost sight of the fact that the feasibility of avoiding accidents simply by being careful is an argument *against* strict liability.

This discussion helps to show why *Siegler* is indeed distinguishable even as interpreted in *New Meadows*. There are so

many highway hazards that the transportation of gasoline by truck is, or at least might plausibly be thought, inherently dangerous in the sense that a serious danger of accident would remain even if the truckdriver used all due care (though *Hawkins* and other cases are *contra*). Which in turn means, contrary to our earlier suggestion, that the plaintiff really might have difficulty invoking res ipsa loquitur, because a gasoline truck might well blow up without negligence on the part of the driver. The plaintiff in this case has not shown that the danger of a comparable disaster to a tank car filled with acrylonitrile is as great and might have similar consequences for proof of negligence. And to repeat a previous point, if the reason for strict liability is fear that an accident might destroy the critical evidence of negligence we should wait to impose such liability until such a case appears.

The district judge and the plaintiff's lawyer make much of the fact that the spill occurred in a densely inhabited metropolitan area. Only 4,000 gallons spilled; what if all 20,000 had done so? Isn't the risk that this might happen even if everybody were careful sufficient to warrant giving the shipper an incentive to explore alternative routes? Strict liability would supply that incentive. But this argument overlooks the fact that, like other transportation networks, the railroad network is a hub-and-spoke system. And the hubs are in metropolitan areas. Chicago is one of the nation's largest railroad hubs. In 1983, the latest year for which we have figures, Chicago's railroad yards handled the third highest volume of hazardous-material shipments in the nation. East St. Louis, which is also in Illinois, handled the second highest volume. Office of Technology Assessment, Transportation of Hazardous Materials 53 (1986). With most hazardous chemicals (by volume of shipments) being at least as hazardous as acrylonitrile, it is unlikely – and certainly not demonstrated by the plaintiff – that they can be rerouted around all the metropolitan areas in the country, except at prohibitive cost. Even if it were feasible to reroute them one would hardly expect shippers, as distinct from carriers, to be the firms best situated to do the rerouting. Granted, the usual view is that common carriers are not subject to strict liability for the carriage

of materials that make the transportation of them abnormally dangerous, because a common carrier cannot refuse service to a shipper of a lawful commodity. Restatement, *supra,* § 521. Two courts, however, have rejected the common carrier exception. *National Steel Service Center, Inc. v. Gibbons,* 319 N.W.2d 269 (Ia. 1982); *Chavez v. Southern Pacific Transportation Co.,* 413 F.Supp. 1203, 1213-14 (E.D.Cal. 1976). If it were rejected in Illinois, this would weaken still further the case for imposing strict liability on shippers whose goods pass through the densely inhabited portions of the state.

The difference between shipper and carrier points to a deep flaw in the plaintiff's case. Unlike *Guille,* and unlike *Siegler,* and unlike the storage cases, beginning with *Rylands* itself, here it is not the actors – that is, the transporters of acrylonitrile and other chemicals – but the manufacturers, who are sought to be held strictly liable. Cf. *City of Bloomington v. Westinghouse Elec. Corp., supra,* 891 F.2d at 615-16. A shipper can in the bill of lading designate the route of his shipment if he likes, 49 U.S.C. § 11710(a)(1), but is it realistic to suppose that shippers will become students of railroading in order to lay out the safest route by which to ship their goods? Anyway, rerouting is no panacea. Often it will increase the length of the journey, or compel the use of poorer track, or both. When this happens, the probability of an accident is increased, even if the consequences of an accident if one occurs are reduced; so the expected accident cost, being the product of the probability of an accident and the harm if the accident occurs, may rise.~ It is easy to see how the accident in this case might have been prevented at reasonable cost by greater care on the part of those who handled the tank car of acrylonitrile. It is difficult to see how it might have been prevented at reasonable cost by a change in the activity of transporting the chemical. This is therefore not an apt case for strict liability.

We said earlier that Cyanamid, because of the role it played in the transportation of the acrylonitrile – leasing, and especially loading, and also it appears undertaking by contract with North American Car Corporation to maintain, the tank car in which the railroad carried Cyanamid's acrylonitrile to Riverdale – might

be viewed as a special type of shipper (call it a "shipper-transporter"), rather than as a passive shipper. But neither the district judge nor the plaintiff's counsel has attempted to distinguish Cyanamid from an ordinary manufacturer of chemicals on this ground, and we consider it waived. Which is not to say that had it not been waived it would have changed the outcome of the case. The very fact that Cyanamid participated actively in the transportation of the acrylonitrile imposed upon it a duty of due care and by doing so brought into play a threat of negligence liability that, for all we know, may provide an adequate regime of accident control in the transportation of this particular chemical.

In emphasizing the flammability and toxicity of acrylonitrile rather than the hazards of transporting it, as in failing to distinguish between the active and the passive shipper, the plaintiff overlooks the fact that ultrahazardousness or abnormal dangerousness is, in the contemplation of the law at least, a property not of substances, but of activities: not of acrylonitrile, but of the transportation of acrylonitrile by rail through populated areas. Natural gas is both flammable and poisonous, but the operation of a natural gas well is not an ultrahazardous activity.~ The plaintiff does not suggest that Cyanamid should switch to making some less hazardous chemical that would substitute for acrylonitrile in the textiles and other goods in which acrylonitrile is used. Were this a feasible method of accident avoidance, there would be an argument for making manufacturers strictly liable for accidents that occur during the shipment of their products (how strong an argument we need not decide). Apparently it is not a feasible method.

The relevant activity is transportation, not manufacturing and shipping. This essential distinction the plaintiff ignores. But even if the plaintiff is treated as a transporter and not merely a shipper, it has not shown that the transportation of acrylonitrile in bulk by rail through populated areas is so hazardous an activity, even when due care is exercised, that the law should seek to create – perhaps quixotically – incentives to relocate the activity to nonpopulated areas, or to reduce the scale of the activity, or to switch to transporting acrylonitrile by road rather

than by rail, perhaps to set the stage for a replay of *Siegler v. Kuhlman*. It is no more realistic to propose to reroute the shipment of all hazardous materials around Chicago than it is to propose the relocation of homes adjacent to the Blue Island switching yard to more distant suburbs. It may be less realistic. Brutal though it may seem to say it, the inappropriate use to which land is being put in the Blue Island yard and neighborhood may be, not the transportation of hazardous chemicals, but residential living. The analogy is to building your home between the runways at O'Hare.

The briefs hew closely to the Restatement, whose approach to the issue of strict liability is mainly *allocative* rather than *distributive*. By this we mean that the emphasis is on picking a liability regime (negligence or strict liability) that will control the particular class of accidents in question most effectively, rather than on finding the deepest pocket and placing liability there. At argument, however, the plaintiff's lawyer invoked distributive considerations by pointing out that Cyanamid is a huge firm and the Indiana Harbor Belt Railroad a fifty-mile-long switching line that almost went broke in the winter of 1979, when the accident occurred. Well, so what? A corporation is not a living person but a set of contracts the terms of which determine who will bear the brunt of liability. Tracing the incidence of a cost is a complex undertaking which the plaintiff sensibly has made no effort to assume, since its legal relevance would be dubious. We add only that however small the plaintiff may be, it has mighty parents: it is a jointly owned subsidiary of Conrail and the Soo line.

The case for strict liability has not been made. Not in this suit in any event. We need not speculate on the possibility of imposing strict liability on shippers of more hazardous materials, such as the bombs carried in *Chavez v. Southern Pacific Transportation Co., supra,* any more than we need differentiate (given how the plaintiff has shaped its case) between active and passive shippers. We noted earlier that acrylonitrile is far from being the most hazardous among hazardous materials shipped by rail in highest volume. Or among materials shipped, period. The Department of Transportation has classified transported

materials into sixteen separate classes by the degree to which transporting them is hazardous. Class number 1 is radioactive material. Class number 2 is poisons. Class 3 is flammable gas and 4 is nonflammable gas. Acrylonitrile is in Class 5. 49 C.F.R. §§ 172.101, Table; 173.2(a).

Ordinarily when summary judgment is denied, the movant's rights are not extinguished; the case is simply set down for trial. If this approach were followed here, it would require remanding the case for a trial on whether Cyanamid should be held strictly liable. Yet that would be a mistake. The parties have agreed that the question whether the transportation of acrylonitrile through densely populated areas is abnormally dangerous is one of law rather than of fact; and trials are to determine facts, not law. More precisely – for there is no sharp line between "law" and "fact" – trials are to determine adjudicative facts rather than legislative facts. The distinction is between facts germane to the specific dispute, which often are best developed through testimony and cross-examination, and facts relevant to shaping a general rule, which, as the discussion in this opinion illustrates, more often are facts reported in books and other documents not prepared specially for litigation or refined in its fires. Again the line should not be viewed as hard and fast. If facts critical to a decision on whether a particular activity should be subjected to a regime of strict liability cannot be determined with reasonable accuracy without an evidentiary hearing, such a hearing can and should be held, though we can find no reported case where this was done. Some courts treat the question whether an activity is abnormally dangerous as one of fact, and then there must be an evidentiary hearing to decide it.~ Here we are concerned with cases in which the question is treated as one of law but in which factual disputes of the sort ordinarily resolved by an evidentiary hearing may be germane to answering the question. An evidentiary hearing would be of no use in the present case, however, because the plaintiff has not indicated any facts that it wants to develop through such a hearing.~

The defendant concedes that if the strict liability count is thrown out, the negligence count must be reinstated, as requested by the cross-appeal.~ It is not over now. But with

damages having been fixed at a relatively modest level by the district court and not challenged by the plaintiff, and a voluminous record having been compiled in the summary judgment proceedings, we trust the parties will find it possible now to settle the case. Even the Trojan War lasted only ten years.

The judgment is reversed (with no award of costs in this court) and the case remanded for further proceedings, consistent with this opinion, on the plaintiff's claim for negligence.

REVERSED AND REMANDED, WITH DIRECTIONS.

Questions to Ponder About *Indiana Belt Harbor*

A. Are you persuaded that economic analysis is the correct basis upon which to decide whether strict liability ought to be applied in a particular context?

B. Speaking more broadly, do you think economic analysis is the right yardstick by which to measure the wisdom of legal doctrines in general? If not, what else could be?

C. Supposing that economic analysis is the correct basis upon which to decide whether strict liability ought to apply, are you persuaded that this case does a good job with the economic analysis? Are some aspects of the economic analysis weak?

D. Again, supposing that economic analysis is the correct basis upon which to decide whether strict liability ought to apply, do you think courts are the appropriate entities to engage in such reasoning? Would legislatures or administrative agencies do better?

Defenses and Limitations on Strict Liability

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. 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.

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

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.

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. 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) (see remarks in Aftermatter at the end of this book).

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 swipe 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.

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 of 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.

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?

14. 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

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 determine who can be held liable.

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. We will not discuss warranty actions at length in this book, but there are two important things you should know about warranty actions before we move on. First, and most importantly, ***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 breach-of-contract action, a warranty action does not require privity. That is, while a person generally must be a party to a contract to sue for breach of contract, there is no such requirement for warranty claims. Also, a warranty, to be enforceable through a legal action, does not require consideration or a mutuality of obligation. You might ask, how come a warranty doesn't need to be a contract to be enforceable? The fact is, various state and federal laws provide 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 their own beast – neither contract, tort, nor property. The second thing 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. 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. Finally, negligence might reach some defendants that strict liability cannot reach.

The dominant theory of liability for injuries caused by products is **strict liability**, often called "strict products liability." The key to proving a case for strict liability is showing the existence of a product ***defect***. If the product can be shown to be defective, then, for eligible defendants, it will not matter whether all due care was taken or not. We will see, later on, that the determination of what counts as a "defect" in many ways is similar to the determination of whether the defendant has breached the duty of care. An important limitation on the doctrine is that only certain defendants can be sued under a strict liability theory for products: manufacturers, distributors, and commercial sellers.

For the remainder of the chapter, we will discuss strict products liability.

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 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.

Sale by a Commercial Manufacturer, Distributor, or Retailer

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 larger 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 the next two cases.

Case: Escola v. Coca-Cola

The following case played a pivotal role in the history of strict products liability by laying out the intellectual foundation of the doctrine – albeit in a concurring opinion.

Escola v. Coca-Cola

Supreme Court of California
July 5, 1944

24 Cal.2d 453. GLADYS ESCOLA, Respondent, v. COCA COLA BOTTLING COMPANY OF FRESNO (a Corporation), Appellant. S. F. No. 16951. Gibson, C.J., wrote the opinion of the court in which Shenk, J., Curtis, J., Carter, J., and Schauer, J. joined. Traynor, J. wrote a separate concurring opinion.

Chief Justice PHIL S. GIBSON:

Plaintiff, a waitress in a restaurant, was injured when a bottle of Coca Cola broke in her hand. She alleged that defendant company, which had bottled and delivered the alleged defective bottle to her employer, was negligent in selling "bottles containing said beverage which on account of excessive pressure of gas or by reason of some defect in the bottle was dangerous ... and likely to explode." This appeal is from a judgment upon a jury verdict in favor of plaintiff.

Defendant's driver delivered several cases of Coca Cola to the restaurant, placing them on the floor, one on top of the other, under and behind the counter, where they remained at least thirty-six hours. Immediately before the accident, plaintiff picked up the top case and set it upon a near-by ice cream cabinet in front of and about three feet from the refrigerator. She then proceeded to take the bottles from the case with her right hand, one at a time, and put them into the refrigerator. Plaintiff testified that after she had placed three bottles in the refrigerator and had moved the fourth bottle about eighteen

inches from the case "it exploded in my hand." The bottle broke into two jagged pieces and inflicted a deep five-inch cut, severing blood vessels, nerves and muscles of the thumb and palm of the hand. Plaintiff further testified that when the bottle exploded, "It made a sound similar to an electric light bulb that would have dropped. It made a loud pop." Plaintiff's employer testified, "I was about twenty feet from where it actually happened and I heard the explosion." A fellow employee, on the opposite side of the counter, testified that plaintiff "had the bottle, I should judge, waist high, and I know that it didn't bang either the case or the door or another bottle ... when it popped. It sounded just like a fruit jar would blow up. ..." The witness further testified that the contents of the bottle "flew all over herself and myself and the walls and one thing and another."

The top portion of the bottle, with the cap, remained in plaintiff's hand, and the lower portion fell to the floor but did not break. The broken bottle was not produced at the trial, the pieces having been thrown away by an employee of the restaurant shortly after the accident. Plaintiff, however, described the broken pieces, and a diagram of the bottle was made showing the location of the "fracture line" where the bottle broke in two.

One of defendant's drivers, called as a witness by plaintiff, testified that he had seen other bottles of Coca Cola in the past explode and had found broken bottles in the warehouse when he took the cases out, but that he did not know what made them blow up.

Plaintiff then rested her case, having announced to the court that being unable to show any specific acts of negligence she relied completely on the doctrine of res ipsa loquitur.~

The judgment is affirmed.

Justice ROGER J. TRAYNOR, concurring:

I concur in the judgment, but I believe the manufacturer's negligence should no longer be singled out as the basis of a plaintiff's right to recover in cases like the present one. In my opinion it should now be recognized that a manufacturer incurs

an absolute liability when an article that he has placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings. *McPherson v. Buick Motor Co.,* 217 N.Y. 382, established the principle, recognized by this court, that irrespective of privity of contract, the manufacturer is responsible for an injury caused by such an article to any person who comes in lawful contact with it. In these cases the source of the manufacturer's liability was his negligence in the manufacturing process or in the inspection of component parts supplied by others. Even if there is no negligence, however, public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market. It is evident that the manufacturer can anticipate some hazards and guard against the recurrence of others, as the public cannot. Those who suffer injury from defective products are unprepared to meet its consequences. The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business. It is to the public interest to discourage the marketing of products having defects that are a menace to the public. If such products nevertheless find their way into the market it is to the public interest to place the responsibility for whatever injury they may cause upon the manufacturer, who, even if he is not negligent in the manufacture of the product, is responsible for its reaching the market. However intermittently such injuries may occur and however haphazardly they may strike, the risk of their occurrence is a constant risk and a general one. Against such a risk there should be general and constant protection and the manufacturer is best situated to afford such protection.

The injury from a defective product does not become a matter of indifference because the defect arises from causes other than the negligence of the manufacturer, such as negligence of a submanufacturer of a component part whose defects could not be revealed by inspection, or unknown causes that even by the device of res ipsa loquitur cannot be classified as negligence of

the manufacturer. The inference of negligence may be dispelled by an affirmative showing of proper care. If the evidence against the fact inferred is "clear, positive, uncontradicted, and of such a nature that it cannot rationally be disbelieved, the court must instruct the jury that the nonexistence of the fact has been established as a matter of law." (*Blank v. Coffin,* 20 Cal.2d 457, 461.) An injured person, however, is not ordinarily in a position to refute such evidence or identify the cause of the defect, for he can hardly be familiar with the manufacturing process as the manufacturer himself is. In leaving it to the jury to decide whether the inference has been dispelled, regardless of the evidence against it, the negligence rule approaches the rule of strict liability. It is needlessly circuitous to make negligence the basis of recovery and impose what is in reality liability without negligence. If public policy demands that a manufacturer of goods be responsible for their quality regardless of negligence there is no reason not to fix that responsibility openly.

In the case of foodstuffs, the public policy of the state is formulated in a criminal statute. Section 26510 of the Health and Safety Code prohibits the manufacturing, preparing, compounding, packing, selling, offering for sale, or keeping for sale, or advertising within the state, of any adulterated food. Section 26470 declares that food is adulterated when "it has been produced, prepared, packed, or held under insanitary conditions whereby it may have been rendered diseased, unwholesome or injurious to health." The statute imposes criminal liability not only if the food is adulterated, but if its container, which may be a bottle (26451), has any deleterious substance (26470 (6)), or renders the product injurious to health. (26470 (4)). The criminal liability under the statute attaches without proof of fault, so that the manufacturer is under the duty of ascertaining whether an article manufactured by him is safe. (People v. Schwartz, 28 Cal.App.2d Supp. 775.) Statutes of this kind result in a strict liability of the manufacturer in tort to the member of the public injured. (See cases cited in Prosser, Torts, p. 693, note 69.)

The statute may well be applicable to a bottle whose defects cause it to explode. In any event it is significant that the statute

imposes criminal liability without fault, reflecting the public policy of protecting the public from dangerous products placed on the market, irrespective of negligence in their manufacture. While the Legislature imposes criminal liability only with regard to food products and their containers, there are many other sources of danger. It is to the public interest to prevent injury to the public from any defective goods by the imposition of civil liability generally.~

As handicrafts have been replaced by mass production with its great markets and transportation facilities, the close relationship between the producer and consumer of a product has been altered. Manufacturing processes, frequently valuable secrets, are ordinarily either inaccessible to or beyond the ken of the general public. The consumer no longer has means or skill enough to investigate for himself the soundness of a product, even when it is not contained in a sealed package, and his erstwhile vigilance has been lulled by the steady efforts of manufacturers to build up confidence by advertising and marketing devices such as trade-marks. Consumers no longer approach products warily but accept them on faith, relying on the reputation of the manufacturer or the trade mark. Manufacturers have sought to justify that faith by increasingly high standards of inspection and a readiness to make good on defective products by way of replacements and refunds. The manufacturer's obligation to the consumer must keep pace with the changing relationship between them; it cannot be escaped because the marketing of a product has become so complicated as to require one or more intermediaries. Certainly there is greater reason to impose liability on the manufacturer than on the retailer who is but a conduit of a product that he is not himself able to test.

The manufacturer's liability should, of course, be defined in terms of the safety of the product in normal and proper use, and should not extend to injuries that cannot be traced to the product as it reached the market.

Case: Greenman v. Yuba Power Products

The *Greenman* case, coming nearly 20 years after *Escola v. Coca-Cola,* gave birth to strict products liability.

Greenman v. Yuba Power Products

Supreme Court of California
January 24, 1963

59 Cal.2d 57. WILLIAM B. GREENMAN, Plaintiff and Appellant, v. YUBA POWER PRODUCTS, INC., Defendant and Appellant; THE HAYSEED, Defendant and Respondent. L. A. No. 26976.

Traynor, J, wrote the opinion of the court, in which Gibson, C. J., Schauer, J., McComb, J., Peters, J., Tobriner, J., and Peek, J., joined.

Justice ROGER J. TRAYNOR:

Plaintiff brought this action for damages against the retailer and the manufacturer of a Shopsmith, a combination power tool that could be used as a saw, drill, and wood lathe. He saw a Shopsmith demonstrated by the retailer and studied a brochure prepared by the manufacturer. He decided he wanted a Shopsmith for his home workshop, and his wife bought and gave him one for Christmas in 1955. In 1957 he bought the necessary attachments to use the Shopsmith as a lathe for turning a large piece of wood he wished to make into a chalice. After he had worked on the piece of wood several times without difficulty, it suddenly flew out of the machine and struck him on the forehead, inflicting serious injuries. About 10 1/2 months later, he gave the retailer and the manufacturer written notice of claimed breaches of warranties and filed a complaint against them alleging such breaches and negligence.

After a trial before a jury, the court ruled that there was no evidence that the retailer was negligent or had breached any express warranty and that the manufacturer was not liable for the breach of any implied warranty. Accordingly, it submitted to the jury only the cause of action alleging breach of implied warranties against the retailer and the causes of action alleging negligence and breach of express warranties against the manufacturer. The jury returned a verdict for the retailer against plaintiff and for plaintiff against the manufacturer in the amount of $65,000. The trial court denied the manufacturer's motion for

a new trial and entered judgment on the verdict. The manufacturer and plaintiff appeal. Plaintiff seeks a reversal of the part of the judgment in favor of the retailer, however, only in the event that the part of the judgment against the manufacturer is reversed.

Plaintiff introduced substantial evidence that his injuries were caused by defective design and construction of the Shopsmith. His expert witnesses testified that inadequate set screws were used to hold parts of the machine together so that normal vibration caused the tailstock of the lathe to move away from the piece of wood being turned permitting it to fly out of the lathe. They also testified that there were other more positive ways of fastening the parts of the machine together, the use of which would have prevented the accident. The jury could therefore reasonably have concluded that the manufacturer negligently constructed the Shopsmith. The jury could also reasonably have concluded that statements in the manufacturer's brochure were untrue, that they constituted express warranties, and that plaintiff's injuries were caused by their breach.[6] In this respect the trial court limited the jury to a consideration of two statements in the manufacturer's brochure. (1) "When Shopsmith Is in Horizontal Position--Rugged construction of frame provides rigid support from end to end. Heavy centerless-ground steel tubing insures perfect alignment of components." (2) "Shopsmith maintains its accuracy because every component has positive locks that hold adjustments through rough or precision work."[7]

The manufacturer contends, however, that plaintiff did not give it notice of breach of warranty within a reasonable time and that therefore his cause of action for breach of warranty is barred by section 1769 of the Civil Code.[8] The notice requirement of section 1769, however, is not an appropriate one for the court to adopt in actions by injured consumers against manufacturers with whom they have not dealt. "As between the immediate parties to the sale [the notice requirement] is a sound commercial rule, designed to protect the seller against unduly delayed claims for damages. As applied to personal injuries, and

notice to a remote seller, it becomes a booby-trap for the unwary. The injured consumer is seldom 'steeped in the business practice which justifies the rule,' and at least until he has had legal advice it will not occur to him to give notice to one with whom he has had no dealings." (Prosser, Strict Liability to the Consumer, 69 Yale L. J. 1099, 1130, footnotes omitted.)~

Moreover, to impose strict liability on the manufacturer under the circumstances of this case, it was not necessary for plaintiff to establish an express warranty as defined in section 1732 of the Civil Code. A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being. Recognized first in the case of unwholesome food products, such liability has now been extended to a variety of other products that create as great or greater hazards if defective.

Although in these cases strict liability has usually been based on the theory of an express or implied warranty running from the manufacturer to the plaintiff, the abandonment of the requirement of a contract between them, the recognition that the liability is not assumed by agreement but imposed by law, and the refusal to permit the manufacturer to define the scope of its own responsibility for defective products make clear that the liability is not one governed by the law of contract warranties but by the law of strict liability in tort. Accordingly, rules defining and governing warranties that were developed to meet the needs of commercial transactions cannot properly be invoked to govern the manufacturer's liability to those injured by its defective products unless those rules also serve the purposes for which such liability is imposed.~

The purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves. Sales warranties serve this purpose fitfully at best. In the present case, for example, plaintiff was able to plead and prove an express warranty only because he read and relied on the

> representations of the Shopsmith's ruggedness contained in the manufacturer's brochure. Implicit in the machine's presence on the market, however, was a representation that it would safely do the jobs for which it was built. Under these circumstances, it should not be controlling whether plaintiff selected the machine because of the statements in the brochure, or because of the machine's own appearance of excellence that belied the defect lurking beneath the surface, or because he merely assumed that it would safely do the jobs it was built to do. It should not be controlling whether the details of the sales from manufacturer to retailer and from retailer to plaintiff's wife were such that one or more of the implied warranties of the sales act arose. "The remedies of injured consumers ought not to be made to depend upon the intricacies of the law of sales." To establish the manufacturer's liability it was sufficient that plaintiff proved that he was injured while using the Shopsmith in a way it was intended to be used as a result of a defect in design and manufacture of which plaintiff was not aware that made the Shopsmith unsafe for its intended use.~
>
> The judgment is affirmed.

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. That's one reason it's helpful to see the roots of that rationale in the *Escola* and *Greenman* cases, above.

What Constitutes a Defect

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.

Courts have helpfully divided the universe of potential product defects into **three categories: manufacturing defects, design**

defects, and warning defects. This typology is useful, because each category has its own unique set of issues that must be considered.

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, which we discussed in Chapter 13. 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 leave 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.

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.

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.

Case: In re Toyota Motor Corp. Unintended Acceleration

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.

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

United States 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.⁵Leave 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.⁵

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

Note 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.

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.

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?

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 by 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.

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.

15. Safety and Health Regulation

"The atmosphere of officialdom would kill anything that breathes the air of human endeavour, would extinguish hope and fear alike in the supremacy of paper and ink."

– Joseph Conrad, *The Shadow-Line*, 1915

"Before OSHA was created 43 years ago, an estimated 14,000 workers were killed on the job every year. … Today, workplaces are much safer and healthier. We've gone from 38 fatal injuries a day to 12. But there is still much work to be done."

– David Michaels, Assistant Secretary of Labor for Occupational Safety and Health, 2014

Introduction

Tort law generally works in an *ex post* manner. The phrase *ex post* is short for *ex post facto,* which is Latin for "after the fact." For the most part, when tort law comes in, the damage has already been done. Thus, tort law is largely about shifting the burden of loss from one party to the other, thus making the best of a bad situation. Nevertheless, because tort law provides a way of shifting the burden of loss after the fact, it undoubtedly has a strong – albeit indirect – effect of preventing harm: The anticipation of being forced to pay after-the-fact damages will incentivize persons to be more careful on the front end.

The courts do have a more direct role to play in the prevention of accidents and injuries. Although rarely invoked, basic principles of equity can be used to get a court to order an injunction prohibiting conduct that is deemed unreasonably risky. In *Harris Stanley Coal & Land Co. v. Chesapeake & Ohio Railway Co.,* 154 F.2d. 450 (6th Cir. 1946), a railroad running on tracks above an underground coal mine

won an injunction to prohibit the mine from conducting an operation called "pulling the pillars," in which columns of coal originally left intact to support the mine's ceiling would be demolished so that the coal could be recovered. The railroad argued that pillar-pulling operations could cause the ground underneath the train to subside, leading to a derailment. The court agreed with the railroad, deciding that when lives were at stake, an *ex post* award of damages would not be adequate to set things right again.

Court orders to halt risky activities are, however, infrequent. By far, the most common way for the law to try to directly prevent accidents and injuries is through ***administrative regulation***. Unlike the relatively few general principles of tort law, government regulations are legion, and their provisions can be extraordinarily specific.

The Code of Federal Regulations, which contains the federal body of regulatory law, fills about 200 volumes when printed in book form. Not all of that concerns safety. Many regulations govern the distribution of various government-granted entitlements – everything from patents to Social Security payments. Another large fraction concerns taxes and tariffs. But notwithstanding these varied subjects, it is fair to say that preventing injuries, accidents, health problems, and other tort-type harms is a major preoccupation of federal regulation. Safety regulations run the gamut from 49 C.F.R. §382.207, which prohibits commercial-vehicle drivers from performing "safety-sensitive functions" within four hours of drinking alcohol, to 21 C.F.R. §556.200, which limits concentrations of the antibiotic dihydrostreptomycin in swine kidney meat to 2.0 parts per million.

Specific regulations of this sort are subordinate to a layer of law that governs the authority of agencies to make and enforce regulations, as well as the ability of citizens to challenge agency actions. This body of law is known as ***administrative law***, and it is the focus of an upper-division elective course at most law schools.

The object of this chapter is not to comprehensively teach you administrative law, nor to teach you the substance of the huge body of regulatory law of the United States. Rather, the aim is to give you a feel for how agencies use regulation to prevent injury and to allow

you to see the regulatory system as counterpoint to the common-law scheme of torts.

History of Administrative Regulation

Through most of the 1800s, there were fewer than a dozen federal agencies. With industrialization, federal agencies began to multiply and take on a greater role in governance and the economy. In this earlier stage of the administrative state, much of the function of agencies was rate regulation. The Interstate Commerce Commission, for instance, established by the Interstate Commerce Act of 1887, regulated the rates charged by common carriers such as railroads and telegraph companies. The aim was to prevent such companies from using their natural monopoly power to engage in rate discrimination that would be unfair to consumers and that could stifle the economic growth.

The blossoming of administrative agencies as a means of *ex ante* prevention of personal harm occurred in the 20th Century. A turning point occurred in 1906, when public disgust with the meat-packing industry was brought on by Upton Sinclair's novel, *The Jungle*. Congress responded with a wave of regulation.

The true boom years of administrative agency creation occurred from the 1930s through the 1970s. In response to the Great Depression, Franklin D. Roosevelt's New Deal programs massively increased the size and scope of the federal administrative state. Then, after World War II, Congress brought organization to the administrative system with the Administrative Procedure Act of 1946. The project of building the government bureaucracy continued through the increasing economic sophistication of industry in the 1950s and 60s, and the environmental movement of the 1970s.

The 1980s saw a growing skepticism of regulation, part of larger movement against "big government." A widely held sentiment of the era is typified by President Ronald Reagan's cynical quip about the role of government: "If it moves, tax it. If it keeps moving, regulate it. And if it stops moving, subsidize it."

If Reagan's presidency marked a new era of distrust of administrative regulation, it did not by any means mark the end of the administrative power. Today the number of federal agencies is probably in the thousands, although, in a boon to critics, the government itself has been unable to pin down an exact figure.

Reading: The Jungle

At the dawn of the 20th Century the work of butchering animals for meat, which had previously been done on a local basis, became centralized in huge meat-packing operations. The biggest concentration of slaughtering and butchering activity was in Chicago's "Packingtown."

With market power concentrated in just four companies, and given a stream of willing immigrant laborers arriving from overseas, the packing industry was able to impose extremely harsh working conditions. When the packing companies broke a meat-worker's strike in 1904, a socialist magazine, *Appeal to Reason*, prodded 26-year-old New York City writer Upton Sinclair to go to Chicago to investigate. Over two months, he conducted interviews and witnessed factory operations firsthand. His product was a serialized novel published in the magazine. Sinclair's subsequent attempts to publish the manuscript as a book met with failure until he paid for the first printing himself in February 1906. The book then caused a sensation, and the political forces it helped unleash changed the face of American law.

The Jungle

a novel by
Upton Sinclair

February 1906

> Jurgis was confident of his ability to get work for himself, unassisted by any one. As we have said before, he was not mistaken in this. He had gone to Brown's and stood there not more than half an hour before one of the bosses noticed his form towering above the rest, and signaled to him. The colloquy which followed was brief and to the point:

"Speak English?"

"No; Lit-uanian." (Jurgis had studied this word carefully.)

"Job?"

"Je." (A nod.)

"Worked here before?"

"No 'stand."

(Signals and gesticulations on the part of the boss. Vigorous shakes of the head by Jurgis.)

"Shovel guts?"

"No 'stand." (More shakes of the head.)

"Zarnos. Pagaiksztis. Szluofa!" (Imitative motions.)

"Je."

"See door. Durys?" (Pointing.)

"Je."

"To-morrow, seven o'clock. Understand? Rytoj! Prieszpietys! Septyni!"

"Dekui, tamistai!" (Thank you, sir.) And that was all. Jurgis turned away, and then in a sudden rush the full realization of his triumph swept over him, and he gave a yell and a jump, and started off on a run. He had a job! He had a job! And he went all the way home as if upon wings, and burst into the house like a cyclone, to the rage of the numerous lodgers who had just turned in for their daily sleep.

For one evening the old man came home in a great state of excitement, with the tale that he had been approached by a man in one of the corridors of the pickle rooms of Durham's, and asked what he would pay to get a job. He had not known what to make of this at first; but the man had gone on with matter-of-fact frankness to say that he could get him a job, provided that he were willing to pay one-third of his wages for it. Was he a

boss? Antanas had asked; to which the man had replied that that was nobody's business, but that he could do what he said.

Jurgis had made some friends by this time, and he sought one of them and asked what this meant. The friend, who was named Tamoszius Kuszleika, was a sharp little man who folded hides on the killing beds, and he listened to what Jurgis had to say without seeming at all surprised. They were common enough, he said, such cases of petty graft. It was simply some boss who proposed to add a little to his income. After Jurgis had been there awhile he would know that the plants were simply honeycombed with rottenness of that sort – the bosses grafted off the men, and they grafted off each other; and some day the superintendent would find out about the boss, and then he would graft off the boss. Warming to the subject, Tamoszius went on to explain the situation. Here was Durham's, for instance, owned by a man who was trying to make as much money out of it as he could, and did not care in the least how he did it; and underneath him, ranged in ranks and grades like an army, were managers and superintendents and foremen, each one driving the man next below him and trying to squeeze out of him as much work as possible. And all the men of the same rank were pitted against each other; the accounts of each were kept separately, and every man lived in terror of losing his job, if another made a better record than he. So from top to bottom the place was simply a seething caldron of jealousies and hatreds; there was no loyalty or decency anywhere about it, there was no place in it where a man counted for anything against a dollar. And worse than there being no decency, there was not even any honesty. The reason for that? Who could say? It must have been old Durham in the beginning; it was a heritage which the self-made merchant had left to his son, along with his millions.

Jurgis would find out these things for himself, if he stayed there long enough; it was the men who had to do all the dirty jobs, and so there was no deceiving them; and they caught the spirit of the place, and did like all the rest. Jurgis had come there, and thought he was going to make himself useful, and rise and become a skilled man; but he would soon find out his error –

for nobody rose in Packingtown by doing good work. You could lay that down for a rule – if you met a man who was rising in Packingtown, you met a knave. That man who had been sent to Jurgis' father by the boss, he would rise; the man who told tales and spied upon his fellows would rise; but the man who minded his own business and did his work – why, they would "speed him up" till they had worn him out, and then they would throw him into the gutter.

Jurgis went home with his head buzzing. Yet he could not bring himself to believe such things – no, it could not be so. Tamoszius was simply another of the grumblers. He was a man who spent all his time fiddling; and he would go to parties at night and not get home till sunrise, and so of course he did not feel like work. Then, too, he was a puny little chap; and so he had been left behind in the race, and that was why he was sore. And yet so many strange things kept coming to Jurgis' notice every day!

He tried to persuade his father to have nothing to do with the offer. But old Antanas had begged until he was worn out, and all his courage was gone; he wanted a job, any sort of a job. So the next day he went and found the man who had spoken to him, and promised to bring him a third of all he earned; and that same day he was put to work in Durham's cellars. It was a "pickle room," where there was never a dry spot to stand upon, and so he had to take nearly the whole of his first week's earnings to buy him a pair of heavy-soled boots. He was a "squeedgie" man; his job was to go about all day with a long-handled mop, swabbing up the floor. Except that it was damp and dark, it was not an unpleasant job, in summer.

Now Antanas Rudkus was the meekest man that God ever put on earth; and so Jurgis found it a striking confirmation of what the men all said, that his father had been at work only two days before he came home as bitter as any of them, and cursing Durham's with all the power of his soul. For they had set him to cleaning out the traps; and the family sat round and listened in wonder while he told them what that meant. It seemed that he was working in the room where the men prepared the beef for

canning, and the beef had lain in vats full of chemicals, and men with great forks speared it out and dumped it into trucks, to be taken to the cooking room. When they had speared out all they could reach, they emptied the vat on the floor, and then with shovels scraped up the balance and dumped it into the truck. This floor was filthy, yet they set Antanas with his mop slopping the "pickle" into a hole that connected with a sink, where it was caught and used over again forever; and if that were not enough, there was a trap in the pipe, where all the scraps of meat and odds and ends of refuse were caught, and every few days it was the old man's task to clean these out, and shovel their contents into one of the trucks with the rest of the meat!

This was the experience of Antanas; and then there came also Jonas and Marija with tales to tell. Marija was working for one of the independent packers, and was quite beside herself and outrageous with triumph over the sums of money she was making as a painter of cans. But one day she walked home with a pale-faced little woman who worked opposite to her, Jadvyga Marcinkus by name, and Jadvyga told her how she, Marija, had chanced to get her job. She had taken the place of an Irishwoman who had been working in that factory ever since any one could remember. For over fifteen years, so she declared. Mary Dennis was her name, and a long time ago she had been seduced, and had a little boy; he was a cripple, and an epileptic, but still he was all that she had in the world to love, and they had lived in a little room alone somewhere back of Halsted Street, where the Irish were. Mary had had consumption, and all day long you might hear her coughing as she worked; of late she had been going all to pieces, and when Marija came, the "forelady" had suddenly decided to turn her off. The forelady had to come up to a certain standard herself, and could not stop for sick people, Jadvyga explained. The fact that Mary had been there so long had not made any difference to her – it was doubtful if she even knew that, for both the forelady and the superintendent were new people, having only been there two or three years themselves. Jadvyga did not know what had become of the poor creature; she would have gone to see her, but had been sick herself. She had pains in her back all the time, Jadvyga

explained, and feared that she had womb trouble. It was not fit work for a woman, handling fourteen-pound cans all day.

It was a striking circumstance that Jonas, too, had gotten his job by the misfortune of some other person. Jonas pushed a truck loaded with hams from the smoke rooms on to an elevator, and thence to the packing rooms. The trucks were all of iron, and heavy, and they put about threescore hams on each of them, a load of more than a quarter of a ton. On the uneven floor it was a task for a man to start one of these trucks, unless he was a giant; and when it was once started he naturally tried his best to keep it going. There was always the boss prowling about, and if there was a second's delay he would fall to cursing; Lithuanians and Slovaks and such, who could not understand what was said to them, the bosses were wont to kick about the place like so many dogs. Therefore these trucks went for the most part on the run; and the predecessor of Jonas had been jammed against the wall by one and crushed in a horrible and nameless manner.

All of these were sinister incidents; but they were trifles compared to what Jurgis saw with his own eyes before long. One curious thing he had noticed, the very first day, in his profession of shoveler of guts; which was the sharp trick of the floor bosses whenever there chanced to come a "slunk" calf. Any man who knows anything about butchering knows that the flesh of a cow that is about to calve, or has just calved, is not fit for food. A good many of these came every day to the packing houses – and, of course, if they had chosen, it would have been an easy matter for the packers to keep them till they were fit for food. But for the saving of time and fodder, it was the law that cows of that sort came along with the others, and whoever noticed it would tell the boss, and the boss would start up a conversation with the government inspector, and the two would stroll away. So in a trice the carcass of the cow would be cleaned out, and entrails would have vanished; it was Jurgis' task to slide them into the trap, calves and all, and on the floor below they took out these "slunk" calves, and butchered them for meat, and used even the skins of them.

One day a man slipped and hurt his leg; and that afternoon, when the last of the cattle had been disposed of, and the men were leaving, Jurgis was ordered to remain and do some special work which this injured man had usually done. It was late, almost dark, and the government inspectors had all gone, and there were only a dozen or two of men on the floor. That day they had killed about four thousand cattle, and these cattle had come in freight trains from far states, and some of them had got hurt. There were some with broken legs, and some with gored sides; there were some that had died, from what cause no one could say; and they were all to be disposed of, here in darkness and silence. "Downers," the men called them; and the packing house had a special elevator upon which they were raised to the killing beds, where the gang proceeded to handle them, with an air of businesslike nonchalance which said plainer than any words that it was a matter of everyday routine. It took a couple of hours to get them out of the way, and in the end Jurgis saw them go into the chilling rooms with the rest of the meat, being carefully scattered here and there so that they could not be identified. When he came home that night he was in a very somber mood, having begun to see at last how those might be right who had laughed at him for his faith in America.

Jurgis heard of these things little by little, in the gossip of those who were obliged to perpetrate them. It seemed as if every time you met a person from a new department, you heard of new swindles and new crimes. There was, for instance, a Lithuanian who was a cattle butcher for the plant where Marija had worked, which killed meat for canning only; and to hear this man describe the animals which came to his place would have been worthwhile for a Dante or a Zola. It seemed that they must have agencies all over the country, to hunt out old and crippled and diseased cattle to be canned. There were cattle which had been fed on "whisky-malt," the refuse of the breweries, and had become what the men called "steerly" – which means covered with boils. It was a nasty job killing these, for when you plunged your knife into them they would burst and splash foul-smelling stuff into your face; and when a man's sleeves were smeared

with blood, and his hands steeped in it, how was he ever to wipe his face, or to clear his eyes so that he could see? It was stuff such as this that made the "embalmed beef" that had killed several times as many United States soldiers as all the bullets of the Spaniards; only the army beef, besides, was not fresh canned, it was old stuff that had been lying for years in the cellars.

Then one Sunday evening, Jurgis sat puffing his pipe by the kitchen stove, and talking with an old fellow whom Jonas had introduced, and who worked in the canning rooms at Durham's; and so Jurgis learned a few things about the great and only Durham canned goods, which had become a national institution. They were regular alchemists at Durham's; they advertised a mushroom-catsup, and the men who made it did not know what a mushroom looked like. They advertised "potted chicken," – and it was like the boardinghouse soup of the comic papers, through which a chicken had walked with rubbers on. Perhaps they had a secret process for making chickens chemically – who knows? said Jurgis' friend; the things that went into the mixture were tripe, and the fat of pork, and beef suet, and hearts of beef, and finally the waste ends of veal, when they had any. They put these up in several grades, and sold them at several prices; but the contents of the cans all came out of the same hopper. And then there was "potted game" and "potted grouse," "potted ham," and "deviled ham" – de-vyled, as the men called it. "De-vyled" ham was made out of the waste ends of smoked beef that were too small to be sliced by the machines; and also tripe, dyed with chemicals so that it would not show white; and trimmings of hams and corned beef; and potatoes, skins and all; and finally the hard cartilaginous gullets of beef, after the tongues had been cut out. All this ingenious mixture was ground up and flavored with spices to make it taste like something. Anybody who could invent a new imitation had been sure of a fortune from old Durham, said Jurgis' informant; but it was hard to think of anything new in a place where so many sharp wits had been at work for so long; where men welcomed tuberculosis in the cattle they were feeding, because it made them fatten more quickly; and where they bought up all

the old rancid butter left over in the grocery stores of a continent, and "oxidized" it by a forced-air process, to take away the odor, rechurned it with skim milk, and sold it in bricks in the cities! Up to a year or two ago it had been the custom to kill horses in the yards – ostensibly for fertilizer; but after long agitation the newspapers had been able to make the public realize that the horses were being canned. Now it was against the law to kill horses in Packingtown, and the law was really complied with – for the present, at any rate. Any day, however, one might see sharp-horned and shaggy-haired creatures running with the sheep and yet what a job you would have to get the public to believe that a good part of what it buys for lamb and mutton is really goat's flesh!

There was another interesting set of statistics that a person might have gathered in Packingtown – those of the various afflictions of the workers. When Jurgis had first inspected the packing plants with Szedvilas, he had marveled while he listened to the tale of all the things that were made out of the carcasses of animals, and of all the lesser industries that were maintained there; now he found that each one of these lesser industries was a separate little inferno, in its way as horrible as the killing beds, the source and fountain of them all. The workers in each of them had their own peculiar diseases. And the wandering visitor might be skeptical about all the swindles, but he could not be skeptical about these, for the worker bore the evidence of them about on his own person – generally he had only to hold out his hand.

There were the men in the pickle rooms, for instance, where old Antanas had gotten his death; scarce a one of these that had not some spot of horror on his person. Let a man so much as scrape his finger pushing a truck in the pickle rooms, and he might have a sore that would put him out of the world; all the joints in his fingers might be eaten by the acid, one by one. Of the butchers and floorsmen, the beef-boners and trimmers, and all those who used knives, you could scarcely find a person who had the use of his thumb; time and time again the base of it had been slashed, till it was a mere lump of flesh against which the man pressed the knife to hold it. The hands of these men would

be criss-crossed with cuts, until you could no longer pretend to count them or to trace them. They would have no nails, – they had worn them off pulling hides; their knuckles were swollen so that their fingers spread out like a fan. There were men who worked in the cooking rooms, in the midst of steam and sickening odors, by artificial light; in these rooms the germs of tuberculosis might live for two years, but the supply was renewed every hour. There were the beef-luggers, who carried two-hundred-pound quarters into the refrigerator-cars; a fearful kind of work, that began at four o'clock in the morning, and that wore out the most powerful men in a few years. There were those who worked in the chilling rooms, and whose special disease was rheumatism; the time limit that a man could work in the chilling rooms was said to be five years. There were the wool-pluckers, whose hands went to pieces even sooner than the hands of the pickle men; for the pelts of the sheep had to be painted with acid to loosen the wool, and then the pluckers had to pull out this wool with their bare hands, till the acid had eaten their fingers off. There were those who made the tins for the canned meat; and their hands, too, were a maze of cuts, and each cut represented a chance for blood poisoning. Some worked at the stamping machines, and it was very seldom that one could work long there at the pace that was set, and not give out and forget himself and have a part of his hand chopped off. There were the "hoisters," as they were called, whose task it was to press the lever which lifted the dead cattle off the floor. They ran along upon a rafter, peering down through the damp and the steam; and as old Durham's architects had not built the killing room for the convenience of the hoisters, at every few feet they would have to stoop under a beam, say four feet above the one they ran on; which got them into the habit of stooping, so that in a few years they would be walking like chimpanzees. Worst of any, however, were the fertilizer men, and those who served in the cooking rooms. These people could not be shown to the visitor, – for the odor of a fertilizer man would scare any ordinary visitor at a hundred yards, and as for the other men, who worked in tank rooms full of steam, and in some of which there were open vats near the level of the floor, their peculiar

> trouble was that they fell into the vats; and when they were fished out, there was never enough of them left to be worth exhibiting, – sometimes they would be overlooked for days, till all but the bones of them had gone out to the world as Durham's Pure Leaf Lard!

Historical Note on *The Jungle*

Sinclair hoped his novel would inspire the public to support the socialist struggle for workers' welfare. The most pronounced effect, however, was to focus the public on questions of food safety. President Theodore Roosevelt conducted his own follow-up factfinding and found conditions even worse than those described in the book. Roosevelt eventually invited Sinclair to the White House to consult on how to improve inspections. Congress was spurred to pass two landmark statutes on June 30, 1906 – the Federal Meat Inspection Act and the Pure Food and Drug Act, the later of which established the modern Food and Drug Administration.

Questions to Ponder About *The Jungle*

A. What does this reading suggest about the relative value of tort law and administrative law in preventing injuries to workers?

B. Would the injured workers have been likely to sue Durham's? Why or why not? To what extent might the relative scarcity of jobs and abundance of applicants play a role in plaintiffs' decisions to sue? What about the power dynamics within the managerial hierarchy? If they sued in tort, what would be their chances of obtaining a recovery? Considering your answers to the foregoing, to what extent do you think Durham's would adjust the working environment and operational practices as a response to prospective tort liability?

C. What does this reading suggest about the relative value of tort law and administrative law in preventing consumers from receiving adulterated foods?

D. Would the consumers who ended up eating human remains have been likely to sue Durham's? Why or why not? To what extent does the economic power of Durham's play a role in the likelihood of consumers suing? Assuming unwitting consumers of human remains

sued Durham's in tort, what causes of action could they use? And what would be the likely outcome?

Administrative Agencies and the Law Governing Them

A myriad of federal agencies produce, enforce, and interpret health and safety regulations. Some of these agencies are devoted primarily to the prevention of injury. Standout examples include the National Highway Traffic Safety Administration ("NHTSA," regulating automobile manufacture), the Occupational Safety & Health Administration ("OSHA," regulating workplace safety), and the U.S. Consumer Product Safety Commission ("the CPSC," regulating toys, tools, and other products that do not come under an agency with more specific jurisdiction). Other agencies have broader regulatory mandates, but safety is a large part of what they do – a good example being the Federal Aviation Administration ("FAA," regulating airlines and airplanes, and providing air traffic control).

Within their spheres of expertise, agencies exercise elements of legislative, judicial, and executive power. Agencies make law by promulgating regulations. They act as units of executive power by conducting investigations and bringing enforcement actions against private parties. And agencies exercise a judicial function through administrative tribunals that are presided over by administrative law judges.

Agencies are one of the most salient aspects of the anatomy of today's federal government. Yet they are not mentioned in the Constitution. Instead, agencies are created by statute, and their authority to act derives from statute. For instance, the Consumer Product Safety Act (15 U.S.C. §§ 2051-2089) established the CPSC. That same act provided the CPSC with the authority it used to ban lawn darts. (Lawn darts are huge, oversized darts that can be sued to play an outdoor game similar to horseshoes. They caused numerous deaths and brain injuries through skull punctures, many of the victims being children.) A different statute, the Federal Hazardous Substances Act of 1960 (15 U.S.C. §§ 1261-1278) gave the CPSC the authority it used to ban lead paint. (Lead is poisonous, and bits of

lead paint, when ingested or inhaled by children, can affect brain development.)

The process that an agency must follow in rulemaking or adjudication comes from statute as well. For many agencies, certain processes are dictated by the statute that first brought the agency into existence – variously called the "enabling act," "enabling legislation," or "organic act." This is the statutory law that established the agency and that, going forward, governs its essential operation. To the extent its enabling act does not specify otherwise, an agency's procedure is governed by the overarching "APA" – the Administrative Procedure Act of 1946 (5 U.S.C. §§ 500, et seq.). Amended several times since its original passage, the APA is the generic default law that applies to administrative agencies across the board.

How Regulations are Made

The APA sets out two possible methods of rulemaking.

The first, **formal rulemaking**, requires the agency to hold a proceeding similar to a courtroom trial, in which evidence is introduced on the record and a decision to promulgate a rule is based on that record. The APA, by itself, does not require this procedure. It is only required if the relevant enabling statute requires it. And few enabling statutes do. Some new regulations of the Food and Drug Administration are required to follow the formal rulemaking procedure, but for the most part, formal rulemaking is a relic of a past era when a primary concern of administrative regulation was rate-setting for railroads and the like.

The second method – and the procedure by which nearly all new regulation is promulgated – is known as **notice-and-comment rulemaking**. This method is the default procedure for rulemaking under the APA, and it applies to all regulation-creation unless a specific provision of enabling statutory law provides otherwise. Today, nearly all regulations are promulgated this way.

An alternative name for notice-and-comment rulemaking is *informal rulemaking* – but it's only "informal" in comparison to old-school formal rulemaking. First, an agency must issue an official notice of

proposed rulemaking in the Federal Register, which is a daily publication of the U.S. government. At the same time as it gives notice, the agency invites comment from interested groups and members of the public.

The comment period usually must be at least 30 days, but agencies frequently allow a longer comment period than the minimum because of a sincere interest in getting informed opinions from people who have a strong interest in the matter – "stakeholders" in agency jargon.

After receiving comments, the agency deliberates. Then, unless it has been persuaded to abandon its efforts, the agency will decide on a final rule. The final rule might be quite different than the proposed rule. In some cases, comments persuade the agency that it needs to go in a different direction than it had been contemplating with its proposed rule. If the newly contemplated rule is different enough from the original proposal, the agency must re-propose the rule in its new incarnation and solicit a new round of comments. For instance, if a proposed rule would have banned the use of a certain chemical in toys, and the new rule would ban it in all industrial and consumer settings, then the notice-and-comment process would need to be started anew to give newly implicated stakeholders a chance to weigh in.

After deciding on a final rule, most agencies in the federal government then face an additional step before officially promulgating the regulation: They must send the rule to the White House's Office of Information and Regulatory Affairs, where the president's staff can squelch the regulation or send it back to the agency with instructions to do revisions or additional research. When a rule is finally adopted, it is codified in the Code of Federal Regulations, where it has the force of law.

Depending on the relevant enabling statute, agencies can sometimes adopt an emergency regulation without providing for notice and comment ahead of time. But ordinarily such a regulation is only valid on a temporary basis. In the meantime, the agency can use the regular means of rulemaking to promulgate a permanent regulation that will be effective after the emergency regulation expires. For example,

OSHA is authorized by § 6(c) of the Occupational Safety and Health Act of 1970 to adopt "emergency temporary standards" in cases where the Secretary of Labor determines that the rule is necessary to protect workers from a "grave danger." The rule is effective as soon as it is published in the Federal Register, and it can last a maximum of six months. During that time, OSHA must use an elaborate procedure under § 6(b) of the OSHA Act involving public review and public hearings if it wants a permanent rule.

Judicial Review of Regulations

Persons opposing regulations can seek to have them overturned by judicial review. But doing so requires finding a legal basis upon which to mount a challenge.

The most powerful source for challenging a regulation may be the agency's enabling act. Agency-specific statutes sometimes provide a way to challenge rules on the merits – such as by arguing that the "problem" addressed by the rule lacks significance. On the other hand, a given enabling act may provide an agency with extra-wide discretion, in which case there may be little foothold for challengers.

As an across-the-board matter, the APA provides generic grounds for courts to set aside regulations. The first ground for overturning a regulation is finding it to be **arbitrary or capricious**. 5 U.S.C. § 706(2)(A). This is a high burden for the challenger to meet. It means that a court cannot set aside a regulation simply because the court disagrees with the agency, or even because the court is convinced the regulation is a ruinously bad idea. Arbitrary-or-capricious review means, in some sense, that the court must find that the agency has lain down on the job. Thus, arbitrary-or-capricious review is quite limited. But it does provide a way for courts to keep agency rulemaking in check at the outer boundaries.

Another key basis upon which to set aside a regulation is **failure to observe required procedure**. 5 U.S.C. § 706(2)(D). Proper procedure is very important under the APA. "Procedure" is, after all, the APA's middle name. But so long as agencies are good at following procedure – and they usually are – they can keep their regulations safe from this sort of challenge.

One sure-fire way of getting a court to overturn a regulation is convincing the court that the agency promulgating the regulation has **exceeded its statutory grant of authority** in doing so. The only thing that allows an agency to issue a regulation with the force of law is that Congress has, by law, provided the agency with the authority to do so. So if an agency exceeds it's authority, the regulation is dead in the water. Yet it is an uphill battle to persuade a court that an agency has exceeded its statutory power because of a doctrine called ***Chevron* deference**. Under this doctrine, named for the Supreme Court's decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), agencies have a great deal of power to interpret their own governing statutes. This is important, because it means agencies are allowed to interpret their enabling legislation broadly, giving themselves the broadest possible regulatory power. Under *Chevron*, if Congressional intent is unclear as to the scope of agency power, then the agency can choose any permissible interpretation, and that interpretation will be deemed the correct one. From *Chevron*:

> The power of an administrative agency to administer a congressionally created program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress. If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

Chevron, 467 U.S. at 834-44 (internal quotes, footnotes, and ellipses omitted).

The bottom line is that agencies wield tremendous quasi-legislative power, and the ability of others to challenge disliked regulations can be quite limited.

Agency Enforcement of Regulations

Administrative agencies are not only given the power to make regulations, but also to enforce them and, through administrative tribunals, to adjudicate those enforcement efforts. By putting rulemaking, enforcement, and adjudication all together in one agency with a large pool of technical expertise, agencies are able to move much faster than legislatures and courts in responding to fast-emerging questions about product safety and other health concerns. Of course, depending on whether you are a safety advocate or a business investor, that may or may not be a good thing.

Case: FDA v. Phusion Products LLC

In 2005, a start-up company in Ohio named Phusion began selling an alcoholic energy beverage called Four Loko. The product was a sugar-sweetened concoction of alcohol, caffeine, and additional "energy" ingredients of taurine and guarana. The idea of a drink that simultaneously relaxes and stimulates the imbiber found broad appeal. Phusion enjoyed strong sales growth. Hip-hop songs sang the drink's praises. Then, in 2010, reports surfaced connecting Four Loko to hospitalizations. Soon, multiple deaths were blamed on the beverage. A media firestorm ensued.

The safety questions caught the attention of federal regulators. In the following letter, the FDA took the position that Four Loko was unlawful because it violated federal statutory law on food safety and its accompanying regulations. The key statute, 21 U.S.C. § 342(a)(2)(C), provides: "A food shall be deemed to be adulterated ... if it is or if it bears or contains (i) any food additive that is unsafe within the meaning of section 348 of this title ... "

FDA v. Phusion Products LLC

Department of Health and Human Services
Public Health Service

Food and Drug Administration
College Park, MD 20740

NOV 17, 2010

WARNING LETTER

OVERNIGHT MAIL via UPS

Mr. Jaisen Freeman
Mr. Chris Hunter
Mr. Jeff Wright
Phusion Projects, LLC (dba Drink Four Brewing Company)
1658 N. Milwaukee Avenue, Suite 424
Chicago, IL 60647

Re: 134051

Dear Messrs. Freeman, Hunter, and Wright

The Food and Drug Administration (FDA) has reviewed the regulatory status of the ingredients declared on the label of your product, "Four Loko" which contains caffeine that has been directly added to an alcoholic beverage and packaged in combined caffeine and alcohol form. As it is used in your product, caffeine is an unsafe food additive, and therefore your product is adulterated under section 402(a)(2)(C) of the Federal Food, Drug, and Cosmetic Act (the Act) [21 U.S.C. § 342(a)(2)(C)]. Regulations on the general provisions for food additives are located in Title 21, Code of Federal Regulations, Part 170 (21 CFR 170). You may find copies of the Act and these regulations through links in FDA's Internet home page at http://www.fda.gov.

As defined in section 201(s) of the Act [21 U.S.C. § 321(s)], the term "food additive" refers to any substance the intended use of which results in its becoming a component of any food, unless the substance is the subject of a prior sanction or is generally recognized as safe (GRAS) among qualified experts under the conditions of its intended use. Under section 409 of the Act [21 U.S.C. § 348], a food additive is unsafe unless a regulation is in effect that prescribes the conditions under which the additive may be safely used, and the additive and its use or intended use are in conformity with that regulation. There is no food additive regulation authorizing the use of caffeine as a direct addition to alcoholic beverages, and we are not aware of any information to establish that caffeine added directly to alcoholic beverages is the subject of a prior sanction. Likewise, we are not aware of any basis to conclude that caffeine is GRAS under these conditions of use.

FDA's regulations in 21 CFR Part 170 describe the eligibility criteria for classification of a substance added to food as GRAS. Under 21 CFR 170.30(a)-(c), general recognition of safety must be based on the views of qualified experts. The basis of such views may be either (1) scientific procedures or (2) in the case of a substance used in food prior to January 1, 1958, through experience based on common use in food. Further, general recognition of safety requires common knowledge about the substance throughout the scientific community knowledgeable about the safety of substances directly added to food.

FDA's regulations in 21 CFR Part 170 define "common use in food" and establish eligibility criteria for classification as GRAS through experience based on common use in food. Under 21 CFR 170.30, common use in food means "a substantial history of consumption of a substance for food use by a significant number of consumers." Under 21 CFR 170.30(c)(1), "[g]eneral recognition of safety through experience based on common use in food prior to January 1, 1958, shall be based solely on food use of the substance prior to January 1, 1958, and shall ordinarily be based upon generally available data and information." Importantly, however, the fact that a substance was added to food before 1958 does not, in itself, demonstrate

that such use is safe, unless the pre-1958 use is sufficient to demonstrate to qualified experts that the substance is safe when added to food. See section 201(s) of the Act [21 U.S.C. § 321(s)]; see also *Fmali Herb, Inc. v. Heckler*, 715 F.2d 1385, 1389-90 (9th Cir. 1983) ("Under the statute, 'common use in food' of an ingredient does not automatically exempt the substance from pretesting requirements. Instead, 'common use in food' merely describes one form of evidence that may be introduced by a proponent for the purpose of meeting the ultimate standard ... ").

Similarly, FDA's regulations in 21 CFR Part 170 define "scientific procedures" and establish eligibility criteria for classification as GRAS through scientific procedures. Under 21 CFR 170.3(h), scientific procedures "include those human, animal, analytical, and other scientific studies, whether published or unpublished, appropriate to establish the safety of a substance." Under 21 CFR 170.30(b), general recognition of safety based upon scientific procedures "shall require the same quantity and quality of scientific evidence as is required to obtain approval of a food additive regulation for the ingredient." Section 170.30(b) further states that general recognition of safety through scientific procedures is ordinarily based upon published studies, which may be corroborated by unpublished studies and other data and information.

FDA's regulations in 21 CFR Part 170 also define "safe" and "safety." Under 21 CFR 170.3(i), "[s]afe or safety means that there is a reasonable certainty in the minds of competent scientists that the substance is not harmful under the intended conditions of use." The regulations identify factors to be considered in determining the safety of a substance added to food. 21 CFR 170.3(i).

By letter dated November 12, 2009, FDA requested that, within 30 days, your company provide evidence of the rationale, along with supporting data and information, for concluding that the use of caffeine in your product is GRAS or prior sanctioned. The letter informed your company that if FDA determined that the use of caffeine in your alcoholic beverage is neither GRAS

nor the subject of a prior sanction, the agency would take appropriate action to ensure that the product is removed from the marketplace. FDA's letter also reiterated that it is the continuing responsibility of your company to ensure that the foods it markets are safe and in compliance with all applicable legal and regulatory requirements.

FDA acknowledges that, in response to the agency's November 12 letter, your firm submitted a letter within the 30 day timeframe requested, indicating that you would submit a GRAS Notice pursuant to proposed 21 CFR 170.36 (62 FR 18938; April 17, 1997) at a later date. The agency received your GRAS Notice (GRN No. 000347) ("GRAS Notice"), dated June 25, 2010, and filed it on June 30, 2010. But, as discussed in more detail below, FDA has reviewed that notice and continues to have safety concerns about your caffeinated alcoholic beverage product. Accordingly, the agency is issuing this warning letter.

To establish that the use of a substance in food is GRAS under its specific conditions of use (for example, the GRAS status of caffeine when directly added to an alcoholic beverage), there must be consensus among qualified experts that the substance is safe under its conditions of use, based on publicly available data and information. FDA is aware that, based on the publicly available literature, a number of qualified experts have concerns about the safety of caffeinated alcoholic beverages. Moreover, the agency is not aware of data or other information to establish the safety of the relevant conditions of use for your product. Therefore, the criteria for GRAS status have not been met for the caffeine in your beverage.

Based upon the publicly available literature, FDA has the following specific concerns about the safety of caffeine when used in the presence of alcohol.[4] As used in the discussion below, the term "energy drink" identifies beverages that contain a significant amount of calories and caffeine as well as other ingredients, such as taurine, herbal extracts, or vitamins (Heckman et al., 2010).[5]

- Reports in the scientific literature have described behavioral effects that may occur in young adults when

energy drinks are consumed along with alcoholic beverages (O'Brien et al., 2008; Thombs et al., 2010; Miller, 2008).

- Studies suggest that the combined ingestion of caffeine and alcohol may lead to hazardous and life-threatening situations because caffeine counteracts some, but not all, of alcohol's adverse effects. In one study, a mixture of an energy drink and alcohol reduced subjects' subjective perception of intoxication but did not improve diminished motor coordination or slower visual reaction times using objective measures (Ferreira et al., 2006). In a dual-task model, subjects co-administered caffeine and alcohol reported reduced perception of intoxication but no reduction of alcohol-induced impairment of task accuracy (Marczinski and Fillmore, 2006).

- Because caffeine alters the perception of alcohol intoxication, the consumption of pre-mixed products containing added caffeine and alcohol may result in higher amounts of alcohol consumed per drinking occasion, a situation that is particularly dangerous for naïve drinkers (Oteri et al., 2007).

GRAS status is not an inherent property of a substance, but must be assessed in the context of the intended conditions of use of the substance (section 201(s) of the Act [21 U.S.C. § 321(s)]). The assessment includes a consideration of the population that will consume the substance (21 CFR 170.30(b); section 409(b) of the Act [21 U.S.C. § 348(b)]). Therefore, the scientific data and information that support a GRAS determination must consider the conditions under which the substance is safe for the use for which it is marketed. Reports in the scientific literature have raised concerns regarding the formulation and packaging of pre-mixed products containing added caffeine and alcohol. For example, these products, presented as fruity soft drinks in colorful single-serving packages, seemingly target the young adult user. Furthermore, the marketing of the caffeinated versions of this class of

alcoholic beverage appears to be specifically directed to young adults (Bonnie and O'Connell, 2004). FDA is concerned that the young adults to whom these pre-mixed, added caffeine and alcohol products are marketed are especially vulnerable to the adverse behavioral effects associated with consuming caffeine added to alcohol, a concern reflected in the publicly available literature (O'Brien et al., 2008; Simon and Mosher, 2007).

It is FDA's view that the caffeine content of your beverage could result in central nervous system effects if a consumer drank one or more containers of your product. Therefore, FDA believes that the consumption of your product, "Four Loko," may result in adverse behavioral outcomes because the caffeine is likely to counteract some, but not all, of the adverse effects of alcohol. The agency is unaware of any data that address the complex, potentially hazardous behaviors that have been identified in the scientific literature as associated with these beverages or that otherwise alleviate our concerns about the effects of consuming these pre-mixed caffeine and alcohol beverages. Moreover, FDA is not aware of any publicly available data to establish affirmatively safe conditions of use for caffeine added directly to alcoholic beverages and packaged in a combined form.

As noted, FDA has reviewed the information in your GRAS Notice as well as other publically available information and continues to have safety concerns about your caffeinated alcoholic beverage product. In considering the totality of the information presented in the GRAS Notice, FDA notes that the GRAS Notice did not cite any scientific literature of which the agency was not already aware.[6] We note that in an e-mail dated August 10, 2010, the Office of Food Additive Safety did request three references cited within your GRAS Notice. We had been aware of these references but due to their age, had not been able to locate them.[7] Furthermore, we wish to comment generally on two lines of argument presented in your GRAS Notice.

First, your GRAS Notice relies primarily upon safety studies of caffeine alone (i.e., not in the presence of alcohol) to support your view that caffeine is safe under the relevant conditions of

use (that is, in combination with alcohol). Importantly, however, the current scientific literature, which we cite above, establishes that significant safety concerns are raised by the co-consumption of caffeine and alcohol. Accordingly, data and information addressing the safety of caffeine alone are not sufficient to establish the safety, and the general recognition of the safety, of beverages that combine caffeine with alcohol.

Second, we note that one section of your GRAS Notice reviews some of the studies that have reported the adverse behavioral effects elicited by the co-consumption of caffeine and alcohol and identifies purported deficiencies in the design and interpretation of these studies. Even if certain studies in the scientific literature have limitations due to their design or the interpretation of their results, the peer-reviewed literature as a whole is sufficient to raise, among qualified experts, safety concerns about alcoholic beverages to which caffeine has been directly added. Similarly, even if the results from no single study are sufficiently comprehensive to characterize fully the potential responses to beverages containing caffeine added to alcohol, these studies are collectively sufficient to raise concerns about consumption of this combination and to support the conclusion that more research is required. Furthermore, FDA is not aware of any reports in the literature that refute the association between the co-consumption of alcohol and caffeine and adverse behavioral results or that otherwise affirmatively establish the safety of these beverages. Indeed, our review of this literature, as well as certain related studies in animals, shows that there are currently no studies or other information that refute the safety concerns or otherwise affirmatively establish the safety of caffeine directly added to alcoholic beverages. Therefore, we are not aware of a sufficient basis to support a conclusion that caffeine, when directly added to alcohol to form a single beverage, is generally recognized as safe.

The agency is aware that your company received a Certification/Exemption of Label/Bottle Approval (COLA) from the Alcohol and Tobacco Tax and Trade Bureau (TTB) and that, as part of your application for the COLA, you informed TTB that your product would contain caffeine. A

COLA does not constitute a food additive petition approval, a statement regarding GRAS status, or a prior sanction, and you are obligated to abide by the provisions of the Federal Food, Drug, and Cosmetic Act.

In light of the safety concerns identified above, the use of added caffeine in the alcoholic beverage product "Four Loko" does not satisfy the criteria for GRAS status outlined above. Further, FDA is aware of no other exemption from the food additive definition that would apply to caffeine when used as an ingredient in an alcoholic beverage product. Therefore, caffeine as used in your product is a food additive under section 201(s) of the Act [21 U.S.C. § 321(s)] and is subject to the provisions of section 409 of the Act [21 U.S.C. § 348]. Under the latter, a food additive is required to be approved by FDA for its proposed conditions of use prior to marketing. Because caffeine is not an approved food additive for its use in your product, "Four Loko," this product is adulterated within the meaning of section 402(a)(2)(C) of the Act [21 U.S.C. § 342 (a)(2)(C)].

You should take prompt action to correct this violation and prevent its recurrence. Failure to do so may result in enforcement action without further notice. The Act authorizes the seizure of illegal products and injunctions and prosecutions against manufacturers and distributors of those products.~

Please advise this office in writing within fifteen (15) days from your receipt of this letter as to the specific steps you have taken to correct the violation identified above and to assure that similar violations do not occur. Your response should include any documentation necessary to show that correction has been achieved. If you cannot complete all corrections within the 15 days, please explain the reason for your delay and the date by which each such item will be corrected and documented.

Please send your reply to Seyra Hammond, Food and Drug Administration, Center for Food Safety and Applied Nutrition, Office of Compliance (HFS-605), 5100 Paint Branch Parkway, College Park, MD 20740.

Sincerely,

/s/

Joann M. Givens
Acting Director
Office of Compliance
Center for Food Safety and Applied Nutrition,

cc: Food and Drug Administration Chicago District Office

Questions to Ponder About *FDA v. Phusion*

A. Before Phusion came along, professional bartenders and amateur partiers alike mixed 80-proof liquor or even 200-proof grain alcohol with energy drinks containing caffeine. And even before energy drinks came on the scene, it was common to mix caffeine and alcohol. The popularity of one particular combination during the World War II era is memorialized in the Andrews Sisters' song, "Rum & Coca-Cola." Should those historical facts matter to the interpretation of 21 CFR 170.3?

B. Should it matter under 21 CFR 170.3 that the alleged harmful effect of a food additive is behaviorally mediated? In other words, does it matter that a food additive is not directly physically dangerous, but instead is risky solely because of its link with behavior and the choices people make?

C. Should it matter that Phusion's products are "presented as fruity soft drinks in colorful single-serving packages" and that they "seemingly target the young adult user"? Do either of these facts bear on whether the drinks are "adulterated"?

D. Based on what you read, how would you characterize Phusion's situation in terms of tort liability? Apparently, at the time the letter was written, the prospect of tort liability had not caused Phusion to stop selling caffeinated alcohol drinks. Why not?

E. Did Phusion's prospective tort liability change as a result of this letter and the fact that Phusion received it? What impact could the letter and its analysis have in a tort lawsuit against Phusion? Put yourself in the position of Phusion's general counsel: After receipt of this letter, would you advise Phusion to stop selling caffeinated

alcoholic beverages? To what extent does tort law play a role in your analysis?

Case: FTC v. Phusion Products LLC

On the same day that the FDA sent its letter, the FTC wrote to Phusion to add its concern that the marketing of Four Loko might constitute a violation of the broad provisions of 15 U.S.C. § 45(a), which provides: "(1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful. (2) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations … from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce."

FTC v. Phusion Products LLC

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Bureau of Consumer Protection
Division of Advertising Practices

November 17, 2010

Via Electronic Mail
Andrew J. Strenio, Jr.
Sidley Austin LLP
1501 K Street, N.W.
Washington, D.C. 20005

RE:NOTICE OF POTENTIALLY ILLEGAL MARKETING
OF CAFFEINATED ALCOHOL PRODUCTS

Dear Mr. Strenio:

Your client, Phusion Products LLC ("Phusion"), markets and sells Four Loko and Four Maxed, alcohol beverages containing caffeine directly added as a separate ingredient. Four Loko, a carbonated malt beverage that comes in several fruity flavors, is sold in 23.5 fluid ounce cans containing 11% to 13% alcohol by volume (depending on the state), plus added caffeine, taurine, and guarana. Thus, one can of this product contains the same alcohol content as four regular or five light beers. Four Maxed, also a carbonated malt beverage with added caffeine that comes in fruity flavors, is sold in 16 fluid ounce cans containing 10% alcohol by volume (equivalent to about three regular beers). These products sell for less than $3.00 a can. This letter serves to advise Phusion that its marketing and sale of Four Loko and Four Maxed may constitute an unfair or deceptive act or practice in violation of the Federal Trade Commission Act, 15 U.S.C. § 45. ⮡The Federal Trade Commission enforces the Federal Trade Commission Act, which, among other things, prohibits unfair or deceptive acts or practices in or affecting commerce, *id.*, and the false advertising of food, drugs, devices, services, or cosmetics, 15 U.S.C. § 52. The Food and Drug Administration is responsible, among other things, for ensuring that any food, drug, device, or cosmetic is not adulterated, misbranded, or otherwise improperly labeled. See generally Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 321 *et seq.*⮢

Consumer safety is among the highest priorities of the Federal Trade Commission ("FTC"). Safety concerns have, in the past, contributed to the Commission's decision to take action against alcohol marketers. We are aware of a number of recent incidents suggesting that alcohol containing added caffeine may present unusual risks to health and safety.⮡Over the past several months, consumers in at least four states have been hospitalized following consumption of caffeinated alcohol.⮢ These incidents suggest that consumers, particularly young adults, may not fully appreciate the potential effects of consuming caffeinated alcohol beverages such as Four Loko and Four Maxed.

We have further been advised that the Food and Drug Administration ("FDA") has warned you that caffeine, as used in your product, Four Loko, is an "unsafe food additive" under the Federal Food, Drug, and Cosmetic Act. As a result, this product is deemed adulterated.

The FDA's warning that caffeine is an "unsafe food additive," as used in Four Loko, is a relevant consideration in the FTC's analysis of whether the marketing of caffeinated alcohol products such as Four Loko and Four Maxed is deceptive or unfair under the Federal Trade Commission Act. In the past, the FTC has accorded significant weight to FDA findings regarding product safety and efficacy.

The FTC staff therefore strongly urges you to take swift and appropriate steps to protect consumers. Even in the absence of express safety claims, the very act of offering goods for sale creates an implied representation that the goods are reasonably fit for their intended uses and free of gross safety hazards. In addition, the non-disclosure of rare but serious safety risks may constitute an unfair practice.

Please notify Janet M. Evans~ and Carolyn L. Hann~ in writing, within 15 days, of the specific actions you have taken to address our concerns. You may contact Ms. Evans and Ms. Hann by email or, alternatively, by mail~.

Very truly yours,

/s/

Mary K. Engle
Associate Director
Division of Advertising Practices

Historical Note on Phusion and Four Loko

As it turns out, Phusion did not fight the FDA. On the same date as the letters, November 17, 2010, Phusion announced that it would voluntarily remove caffeine from its formula for Four Loko.

Just five days later, Kansas's Department of Alcoholic Beverage Control used its administrative power to ban Four Loko within the state. And the next month, special agents of the Virginia Department of Alcoholic Beverage Control conducted a sting operation to arrest a man for selling alcoholic beverages without a license. The man used Craigslist to unwittingly meet an undercover officer to sell eight cans of Four Loko for $80. The Kansas and Virginia experiences illustrate how state administrative agencies often have overlapping regulatory jurisdiction with federal authorities.

Problem: Boogie Woogie Bugle Boy Beverages

Suppose that after Phusion removed the caffeine from Four Loko, a new group of entrepreneurs see an opening in the market. They form Company B LLC and begin marketing a bottled drink called Boogie Woogie Bugle Boy Rum and Cola. To advertise, they produce a videos featuring mash-ups of the Andrew Sisters' recordings of "Boogie Woogie Bugle Boy" and "Rum & Coca-Cola," both originally recorded in the 1940s. The company focus-group tests the videos, the product packaging, and the product itself, exclusively with persons aged 70 or older, and it finds that all elements work well with this demographic. Shortly after the drink hits the market, however, a social media buzz – entirely unorchestrated by Company B – causes sales to skyrocket among persons in the 21- to 24-year-old age range. This demographic soon accounts for 87% of sales. This effect was not unexpected. The entrepreneurs were hoping for a kind of retro-reverse coolness effect to happen, since they were familiar with similar phenomena in recent years concerning brands of clothing and deodorant. Does Company B have anything to worry about in terms of FDA or FTC regulation?

Part V: Intentional Torts

16. Introduction to Intentional Torts

"What did you mean to do? And why was I the only one you didn't do it to?"

– Fiyero Tiggular in *Wicked,* by Winnie Holzman, 2003

The Context of the Intentional Torts Within Tort Law

There are seven traditional intentional torts – battery, assault, false imprisonment, intentional infliction of emotional distress, trespass to land, trespass to chattels, and conversion. These are the subject of the next several chapters.

The intentional torts are the most basic tort causes of action. And most of the doctrine of intentional torts pre-dates the development of negligence. Because of this, many torts courses start with intentional torts.

Whether you are starting to read the book here, or whether you studied the preceding chapters first, it is helpful to take a moment here to compare intentional torts to accidental torts.

The intent/damages trade-off: When it comes to the accidental torts, such as negligence, it is no defense for the defendant to say, "I didn't mean to do it." The law can hold a person responsible for loss even without intent. But the accidental torts require as part of the prima facie case that the plaintiff show an actual injury – physical damage to the plaintiff's person or property.

In contrast, the intentional torts do not require proof of physical injury or damage. So, for example, intentionally spitting on someone qualifies as the tort of battery – even if there is no injury.

At the broadest level, considering both intentional and accidental torts together, there is a sense in which we can think of the defendant's intent as an alternative to the existence of damages. If the defendant intended to invade your legally protected interests in your

body or property, then you may be able to recover regardless of whether actual harm has been suffered. That's intentional torts. On the other hand, if you have actually been hurt, then you may be able to recover regardless of whether the defendant intended any harm or offense.

So when we look at the intentional torts and the accidental torts together, tort law seems to take the stance that unless you've been hurt, or unless the defendant acted with bad intent, you should not bring your grievance to court.

Differences in doctrinal structure: Another point of contrast between the intentional torts and the accidental torts is how the doctrine is structured. For accidents, there is really just one big cause of action – negligence, which takes care of the vast majority of claims arising from accidents. The other causes of action – strict liability, products liability, and informed-consent actions – could be categorized as modifications of negligence that are relevant in limited circumstances. By contrast, in intentional torts, there is no general tort of "intentigence." Instead we have seven specific intentional torts.

Painting with a broad brush, we can make some additional generalizations: While negligence is broad and flexible, the intentional torts tend toward the narrow and rigid. Correspondingly, while the doctrine of negligence is complex and its contours fuzzy, intentional torts doctrine is comparatively simple, with harder, more well-defined edges.

Take, for instance, the cause of action for battery. The elements are: (1) an action, that is (2) intentional, and which results in a (3) harmful or offensive (4) touching of the plaintiff. Those elements are mostly self-explanatory. There are a few clarifications that will have to be made. For instance, does hitting someone with a thrown object count as a "touching"? (It does.) But such questions are relatively straightforward, and they have relatively straightforward answers. By contrast, the first element of the negligence cause of action is that "the defendant owed the plaintiff a duty of due care." That is not

self-explanatory at all. Understanding what it means requires a lot of work.

None of this is to say that there are no difficult cases in intentional torts. There are, of course, hard cases on the margins. And novel facts can pose challenges to established doctrine. But, by and large, the intentional torts are generally about applying well-formed rules, not about balancing factors or making policy choices.

The bottom line is that moving between accidental torts and the intentional torts requires a little bit of a mental adjustment. So if you're starting out with intentional torts, don't expect the same degree of rule-intensiveness when you move to negligence. And if you are arriving here after studying negligence, you can look forward to legal questions that tend more to have a "right answer."

A Quick Overview of the Intentional Torts

Let's take a fast look at the basics of the seven intentional torts.

First up are the four personal intentional torts – battery, assault, false imprisonment, and intentional infliction of emotional distress.

The most basic of these is **battery**. Battery is the intentional touching of the plaintiff in a harmful or offensive way. The concept of "touching" is quite broad. It would include, for instance, poisoning the plaintiff's meal. But in keeping with the theme of the intentional torts, no actual harm need be done. A sturdy plaintiff, for instance, might not be harmed at all by a punch thrown by a weak defendant. Regardless, a punch is "harmful or offensive," even if no harm results, so a punch is an actionable battery.

Next is **assault**. Assault is the intentional creation of an immediate apprehension of a harmful or offensive touching. That is to say, an assault is the apprehension of an oncoming battery. Throwing a punch and missing is an assault.

The third intentional tort is **false imprisonment**, which is the intentional confinement of the plaintiff to a bounded area by force, threat of force, or improper assertion of legal authority. Locking the plaintiff in the cellar would count. So would brandishing a firearm and saying, "Move and I shoot." False imprisonment is a civil cause

of action that is analogous to – though not completely overlapping with – the crime of kidnapping.

The last personal intentional tort is **intentional infliction of emotional distress**, often abbreviated "IIED," and sometimes known by its shorter and pithier name, *outrage*. This tort results when the defendant intentionally engages in outrageous conduct that causes the plaintiff severe mental distress. The key is that the action has to be *truly outrageous*. Telling someone that a close family member is dead – when that's not true – would likely qualify. Teasing or insulting someone, however, is usually not enough. Also, the mental distress the suffered by the plaintiff must be *severe*. Physical effects – such as cardiac problems or tooth-grinding damage – are not necessary, but where they occur, they are helpful in showing the required severity.

It should be said that IIED is something of anomaly among the intentional torts for a couple reasons. First, intent is not strictly required. Recklessness will suffice. Also, IIED is an arguable exception to our general observation that the intentional torts do not require a showing of damages. While there is no need to prove physical injury, property damage, lost wages, or the like, there is the requirement that the plaintiff suffer actual distress. If a plaintiff, perhaps because of a reserve of inner strength, were not caused severe distress despite the plaintiff's intentional and outrageous conduct, then there would be no cause of action.

The remaining three intentional torts are trespass to land, trespass to chattels, and conversion – all of which involve invasions of rights over tangible property.

The tort of **trespass to land** is the intentional tort that applies to invasions of interests in real property, which includes land and things attached to the land, such as trees, buildings, improvements, and fixtures. An action for trespass to land requires an intentional act to invade someone's real property. Traipsing across someone else's land – or even putting a foot on it – satisfies the elements. The invasion can be momentary and does not need to do any damage to be actionable.

The remaining two intentional torts are for invasions of interests in chattels. Chattels are the moveable kind of property, and they include any item of tangible property that is not part of real property. Cars, computers, clothing, and animals are all examples of chattels.

The tort of **trespass to chattels** requires an intentional action that substantially interferes with a plaintiff's chattel. What counts as "interfering" is a little tricky. The law here is stricter than it is with trespass to land. With trespass to land, merely putting a foot on the plaintiff's land creates liability. The analogous is not true for trespass to chattels. Merely running up and touching the plaintiff's chattel does not count. Making a substantial use of the plaintiff's chattels does count as interference, as does depriving the plaintiff of the opportunity to use them. Damage, where it occurs, always counts as interference.

The last intentional tort is **conversion**. An alternative to trespass to chattels, the tort of conversion is an intentional interference with the plaintiff's chattel that is so severe that it warrants a forced sale of the chattel to the defendant. Conversion is essentially trespass to chattels, but with a heightened threshold that triggers a more powerful remedy. Here's an example: A defendant steals the plaintiff's car, puts a cinder block on the gas pedal, and causes it to propel itself off a cliff. That plaintiff has an excellent cause of action for conversion. Thus, the plaintiff can get the market value of the car before it was taken, and the defendant will take title to the smoldering wreck at the bottom of the canyon.

A Preview of Intentional Torts Defenses

Affirmative defenses play a starring role in the world of the intentional torts. The main defenses are consent, self-defense, defense of others, and necessity.

Most importantly, **consent** is a complete defense to the intentional torts. You can't successfully sue your invited party guests for trespass to land because you consented to their entry on your land. Likewise, you can't successfully sue your aunt for giving you a big hug, because you consented – impliedly if not expressly – to her touching you.

And of, course, if someone tries to hurt you, you're entitled to use force in **self-defense**. If someone runs at you with a knife, you can sweep the leg and knock them to the ground without incurring liability for battery. Similarly, **defense of others** allows you to avoid assault liability for aiming a gun at the assailant who is mugging your friend.

Finally, the defense of **necessity** allows you to avoid tort liability when you are acting to prevent a greater harm. For instance, you'll incur no trespass-to-chattels liability for absconding with a bowl of punch if you're using to put out a fire.

The Place of Damages in the Intentional Torts

As already emphasized, it is possible to plead and prove a claim an intentional tort claim without a showing of damages. Nonetheless, the concept of damages does have an important place with the intentional torts.

At the outset, we need to note that there is often little point in bringing a lawsuit unless it is for damages. Therefore, in the real world, intentional tort cases will often include claims for compensatory damages.

Also, for many intentional torts, proving damages may be the quickest path to proving a prima facie case. For a battery claim, proving a physical injury makes it unnecessary to debate the issue as to whether the touching counts as "harmful or offensive." In an action for trespass to chattels, proving that the plaintiff's actions damage the chattel means the "substantial interference" requirement is fulfilled – end of discussion.

But what about situations in which the plaintiff never succeeds in proving compensatory damages? What does the plaintiff get for prevailing in such a lawsuit? In such situations, courts will award **nominal damages**. "Nominal" here means "in name only." Nominal damages are usually one dollar, or a similar amount.

Why would anyone bother to file a lawsuit to get nominal damages of $1? Well, they almost never do. But there are a few reasons that a plaintiff might be motivated to pursue an intentional tort claim

without damages. For one, an award of nominal damages might be useful as a means of establishing a legal right. A judgment in a trespass to land case, even without damages, can be used as the basis for an injunction against future trespasses. Then, further trespassing can be deterred by the threat of contempt sanctions.

Probably the most lucrative function of nominal damages is as a hook upon which to hang an award of punitive damages. Let's go back to the case of a defendant spitting on the plaintiff, but let's embellish it a little: Suppose the defendant is a spoiled A-list movie star who spits on a waiter at a restaurant. On top of nominal damages of $1, the waiter might convince a jury to award punitive damages in an amount sufficient to deter the defendant from such conduct in the future. And such an amount, for a rich celebrity, might be quite a lot of money.

Putting all practicality aside, a victory in court and $1 in nominal damages might, if nothing else, give a wronged plaintiff a feeling of satisfaction. And suing out of a sense of indignity happens more often than you might imagine.

Intent and its Various Iterations

Now that we have a sketch of the intentional torts and understand their relation to negligence and other torts, it is helpful to look a little more closely at the concept of intent itself.

In general, "intent" means that the defendant either acts with the purpose or goal of bringing about a certain consequence, or at least does so with **substantial certainty** that the consequence will occur. The substantial certainty idea expands the concept of intent beyond the defendant's goals.

Suppose a defendant testifies in court, "I didn't really want to shoot the plaintiff. What I *wanted* to do was shoot the jukebox that the plaintiff was standing in front of. So, yeah, I pretty much knew the plaintiff was going to get shot. But that wasn't my goal." Here, the defendant's testimony establishes the requisite intent, since the defendant acted with substantial certainty. It doesn't matter that shooting the plaintiff wasn't the goal.

Beyond the fundamentals, the concept of intent begins to diverge among the various intentional torts. We said that intent means that the plaintiff acted purposely or with substantial certainty of producing *a certain consequence*. What "consequence" must be intended depends on the tort. With battery, for instance, the defendant generally must intend to commit a battery. But for trespass to land, the defendant does not need to intend a trespass at all – the defendant only needs to intend the action that causes the trespass. So, the intent to walk a certain path – even if undertaken in the earnest attempt to stay off the defendant's property – will satisfy the intent requirement of trespass to land. That is, the intent to put one foot in front of another is intent enough, even if it was a genuine mistake to cross the property line. By contrast, the intent to raise your arms is not requisite intent for battery if you didn't think doing so would inflict a harmful or offensive touching on anyone.

Strangely, there is one intentional tort – intentional infliction with emotional distress – that, despite the word "intentional" in its name, requires only proof that the defendant acted with *recklessness*. (This may be one reason many people prefer the name "outrage" for the tort.)

Our discussion of intent is not complete without mention of the plaintiff-friendly doctrine of **transferred intent**. Where it applies, the doctrine of transferred intent allows the intent required by one intentional tort claim to be satisfied by showing the defendant's intent to commit a different intentional tort. Intent is said to be able to "transfer" from tort to tort or from person to person, or even between torts and persons at the same time.

The concept is best explained with an example: If a defendant intends to hit Bart with a baseball, but errantly throws wide left so that the ball whizzes right by Ashanti's head, then the tortious intent to inflict a battery on Bart can be "transferred" to Ashanti for an assault claim. In this case, the intent transfers both from battery to assault and from Bart to Ashanti.

Under the most traditional view of transferred intent, intent can transfer among persons and among any of the torts of battery,

assault, false imprisonment, trespass to land, and trespass to chattels. Thus, acting with the purpose of trespassing on land could count as the requisite intent for a battery. Many courts today, however, apply transferred intent more narrowly, restricting tort-to-tort transfer to assault and battery only.

One last thing to point out is that intent is an issue for the jury. You may have wondered, how can you truly know what another person *intended*? In a metaphysical sense, perhaps there is no way to truly know the subjective mental experience of another person. But a jury's job isn't to engage in metaphysics. A jury decides, based on the preponderance of the evidence, whether the defendant acted with the requisite intent. The defendant might testify under oath that she or he did not intend the tortious action, but the jury can choose to disbelieve the defendant and decide, looking reasonably at the circumstances, that the defendant in fact did act with intent. That might not count as "proof" for a philosopher, but it counts as proof in a courtroom.

That's the general lay of the land with intent. The main takeaway should be that you cannot guess at what intent means based on your common understanding of the word "intent." You will need to carefully apply the specific rules – explained in the following chapters – for each intentional tort.

17. Battery and Assault

"What villain touch'd his body, that did stab, and not for justice?"

Brutus, in *Julius Caesar*, by William Shakespeare, 1599

Introduction

In this chapter we will explore the torts of assault and battery, two claims that are often found together. Each one is almost as ancient as tort law itself.

Battery

Battery may be the most basic tort of all. Battery is intentionally touching someone in a harmful or offensive way.

Along with the torts of trespass to land and trespass to chattels, battery traces its history in English law as far back as tort law goes, to an action called the writ of trespass *vi et armis* ("by force and arms"). As part of a set with trespass to land and trespass to chattels, the tort of battery could just as well be called trespass to the body. That's the essence of the complaint – a physical intrusion by one person on another's flesh – whether accomplished by stabbing, spitting, grabbing, kicking, caressing, shoving, shooting, or any of a million other unwelcome ways.

The Elements of Battery

Here is a blackletter statement of the elements of the tort of battery:

> A plaintiff can establish **a prima facie case for battery** by showing: (1) the defendant undertook an act, (2) with intent, effecting a (3) harmful or offensive (4) touching of the plaintiff.

Let's take the elements in turn.

Battery: The Act

First, there must be an act of the defendant. This is a simple requirement that is almost always very easy to meet. All it requires is that the defendant engage in some volitional action. This requirement will not exclude many cases, but it will exclude a battery claim where the touching of the plaintiff is caused by some motor reflex or unconscious movement on the part of the defendant. So a sleepwalker could escape liability by pointing to the lack of an act, as could a jumpy person whose limbs flailed in reaction to a noise.

The act requirement also excludes cases where the plaintiff's complaint is that the defendant failed to act to prevent a touching. Standing by and watching someone get hit by an object, even when a slight exertion would have deflected it, does not meet the act requirement. But note that persuading someone with words to stand in a certain spot where she or he will suffer a harmful or offensive touching would count as an act for the purpose of battery.

Battery: Intent

Next is intent. As is the case with intentional torts generally (and as discussed in Chapter 16), acting either with purpose or with substantial certainty suffices as intent. Closing your eyes and swinging your arms widely in a tightly packed room – even if solely for the purpose of expressing an overwhelming *joie de vivre* – can suffice as intent for battery, because it's substantially certain that you will hit someone. Keep in mind, of course, that intent is a jury issue, so its determination depends ultimately on what the jury believes.

We still are left with this question: What is it that the defendant must intend? Unless transferred intent applies, the required object of intent is a battery. That is, the defendant must intended to inflict a harmful or offensive touching. This means that merely intending to move one's limbs is not enough to meet the intent requirement. Suppose you intend to pitch a baseball dangerously near an unaware bystander. That does not count as intent for battery. Now, it might be correctly characterized as negligence, and if the bystander is harmed, the thrower might be liable via a negligence claim. But the intent for battery would not satisfied.

Remember, too, that the doctrine of **transferred intent** expands the scope of intent so that a defendant who intends to commit a battery on Arthur, but who misses and commits a battery instead on Beatrice, has acted with requisite intent for a claim by Beatrice.

And in addition to transferring intent among persons, the transferred-intent doctrine permits transfers of intent between assault and battery. And courts adhering to the most traditional view allow transfer among any of the torts of battery, assault, false imprisonment, trespass to land, and trespass to chattels. So, if a defendant intends not to punch the plaintiff, but only to create the immediate apprehension of a punch, and if the defendant misjudges the angles and actually punches the plaintiff, then there is sufficient intent to suffice for a battery claim.

Intent can even transfer simultaneously from person to person and tort to tort. Throwing a hatchet with the aim of making a near-miss of Anne, but missing and grazing Burl, will suffice for intent to commit a battery against Burl.

Battery: Harmfulness or Offensiveness

People get touched by others all the time. One person may tap another on the shoulder to ask for the time. Persons in a crowd will unavoidably bump into one another. What keeps these touches from being actionable as batteries is the requirement of harmfulness or offensiveness. If it weren't for the harmful-or-offensive element, millions of battery claims would arise every second.

A touching that causes actual harm is harmful – and there is no need to take the analysis any further. But a touching need not inflict harm to be considered harmful or offensive. Nor is there a requirement that the plaintiff be "offended" in the sense of being affronted. A touching is "offensive" in the battery sense if it intrudes upon a person's reasonable sense of dignity.

To put it more plainly, people have the right to not be "messed with," and the harmful-or-offensive element tracks this. Any touching of a person in a way that is not socially sanctioned under

the circumstances and that a person would reasonably find objectionable is a battery.

Societal convention plays a large role here. Tapping a stranger on the shoulder to ask the time is not battery because it's generally understood that this is how members of society interact with one another even when they are strangers. But tapping someone repeatedly on the shoulder to ask the time over and over again would be battery because, to sum it up in vernacular, "That's weird."

What counts as harmful or offensive may even differ geographically. In Boston, strangers brush into each other on sidewalks all the time. In Los Angeles – provided they are out of their cars and walking around – pedestrians don't touch. In Manhattan during the lunch hour, people unhesitatingly pack into elevators in such a way that there is substantial touching. But in the rural Midwest, people will wait for the next elevator rather than get cozy. Yet geographical differences only go so far. Even in Manhattan, if the elevator is otherwise empty and you sidle up and stand so that you are touching the next person, you have transcended social convention and likely committed a battery.

Regardless of whether some touchings – like the tap on the shoulder – are socially acceptable as a general matter, once a person has put another on warning, social convention yields to the individual's right to be let alone. Even a friendly hug of a close friend can constitute a battery after the friend bellows, "Don't touch me right now!"

Battery: The Touching

The prototypical case of battery would involve a defendant who punches the plaintiff in the face. That certainly is a touching. But you should think about "touching" broadly.

The touching can, for instance, be indirect. Sneakily removing someone's chair as they go to sit down, thereby causing them to fall to the floor, will count as a "touching." So can putting some foul substance in a person's drink. Laying a trap for someone that doesn't spring until years later would be a touching as well.

Case: Leichtman v. WLW Jacor

The following case confronts the question of what constitutes a touching in the contentious context of talk radio.

Leichtman v. WLW Jacor

Court of Appeals of Ohio, Hamilton County
January 26, 1994

92 Ohio App.3d 232. LEICHTMAN, Appellant, v. WLW JACOR COMMUNICATIONS, INC. et al., Appellees. No. C-920922. DOAN, P.J., and HILDEBRANDT and GORMAN, JJ., concurred.

PER CURIAM:

In his complaint, [Aaron] Leichtman claims to be "a nationally known" antismoking advocate. Leichtman alleges that, on the date of the Great American Smokeout, he was invited to appear on the WLW Bill Cunningham radio talk show to discuss the harmful effects of smoking and breathing secondary smoke. He also alleges that, while he was in the studio, [Andy] Furman, another WLW talk-show host, lit a cigar and repeatedly blew smoke in Leichtman's face "for the purpose of causing physical discomfort, humiliation and distress."~

Leichtman contends that Furman's intentional act constituted a battery. The Restatement of the Law 2d, Torts (1965), states:

> An actor is subject to liability to another for battery if
>
> (a) he acts intending to cause a harmful or offensive contact with the person of the other … , and
>
> (b) a harmful contact with the person of the other directly or indirectly results[; or]
>
> (c) an offensive contact with the person of the other directly or indirectly results.

In determining if a person is liable for a battery, the Supreme Court has adopted the rule that "[c]ontact which is offensive to a reasonable sense of personal dignity is offensive contact." It

has defined "offensive" to mean "disagreeable or nauseating or painful because of outrage to taste and sensibilities or affronting insultingness." Furthermore, tobacco smoke, as "particulate matter," has the physical properties capable of making contact. R.C. 3704.01(B) and 5709.20(A); Ohio Adm. Code 3745-17.

As alleged in Leichtman's complaint, when Furman intentionally blew cigar smoke in Leichtman's face, under Ohio common law, he committed a battery. No matter how trivial the incident, a battery is actionable, even if damages are only one dollar. The rationale is explained by Roscoe Pound in his essay "Liability": "[I]n civilized society men must be able to assume that others will do them no intentional injury – that others will commit no intentioned aggressions upon them."

Other jurisdictions also have concluded that a person can commit a battery by intentionally directing tobacco smoke at another. We do not, however, adopt or lend credence to the theory of a "smoker's battery," which imposes liability if there is substantial certainty that exhaled smoke will predictably contact a nonsmoker. Also, whether the "substantial certainty" prong of intent from the Restatement of Torts translates to liability for secondary smoke via the intentional tort doctrine in employment cases as defined by the Supreme Court~, need not be decided here because Leichtman's claim for battery is based exclusively on Furman's commission of a deliberate act. Finally, because Leichtman alleges that Furman deliberately blew smoke into his face, we find it unnecessary to address offensive contact from passive or secondary smoke~.

Neither Cunningham nor WLW is entitled to judgment on the battery claim under Civ.R. 12(B)(6). Concerning Cunningham, at common law, one who is present and encourages or incites commission of a battery by words can be equally liable as a principal. Leichtman's complaint states, "At Defendant Cunningham's urging, Defendant Furman repeatedly blew cigar smoke in Plaintiff's face."

With regard to WLW, an employer is not legally responsible for the intentional torts of its employees that do not facilitate or promote its business. However, whether an employer is liable

under the doctrine of respondeat superior because its employee is acting within the scope of employment is ordinarily a question of fact. Accordingly, Leichtman's claim for battery with the allegations against the three defendants in the second count of the complaint is sufficient to withstand a motion to dismiss under Civ.R. 12(B)(6).~

Arguably, trivial cases are responsible for an avalanche of lawsuits in the courts. They delay cases that are important to individuals and corporations and that involve important social issues. The result is justice denied to litigants and their counsel who must wait for their day in court. However, absent circumstances that warrant sanctions for frivolous appeals under App.R. 23, we refuse to limit one's right to sue. Section 16, Article I, Ohio Constitution states, "All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay."

This case emphasizes the need for some form of alternative dispute resolution operating totally outside the court system as a means to provide an attentive ear to the parties and a resolution of disputes in a nominal case. Some need a forum in which they can express corrosive contempt for another without dragging their antagonist through the expense inherent in a lawsuit. Until such an alternative forum is created, Leichtman's battery claim, previously knocked out by the trial judge in the first round, now survives round two to advance again through the courts into round three.~

Judgment accordingly.

Questions to Ponder About *Leichtman v. WLW*

A. Do you agree that contact with smoke should qualify as a touching for purposes of battery? If so, how far should this be taken? To perfume? To bad breath? At a fundamental level, even noise involves physical touch – with one molecule in the air transferring kinetic energy to the next as part of the process of propagating soundwaves. Where would you draw the line?

B. Is this a trivial case? Is that the implication when the court says, "Arguably, trivial cases are responsible for an avalanche of lawsuits in the courts."? Is it important that the courts should be available for cases such as this?

C. If there needs to be a place for disputes such as this, do you agree with the court that some alternative dispute resolution forum would be better?

D. If you were arguing that the courts should stay available for cases such as this, what societal interests could be said to be served by judicial resolution of disputes such as these?

Battery: Damages

Battery does not require damages for a prima facie case. A successful claim for battery without any proof of physical harm will entitle the plaintiff to nominal damages. On the other hand, any bodily injury that is sustained will serve to meet the requirement of harmfulness or offensiveness. In this sense, you might say that injury is sufficient but not necessary to round out a case for battery.

It should be kept in mind that although proof of compensatory damages is not required for a prima facie case for battery, a battery action will definitely be more financially enticing if it supports a significant compensatory damages claim. Any bodily injury that is a result of the battery will support a claim for compensatory damages. But plaintiffs can also generally recover compensatory damages that do not have a physical basis, so long as they stem from the battery.

Case: Fisher v. Carrousel Motor Hotel

This case explores the availability of damages for a battery that has no physical-injury component.

Fisher v. Carrousel Motor Hotel, Inc.

Supreme Court of Texas
December 27, 1967

424 S.W.2d 627. Emmit E. FISHER, Petitioner, v. CARROUSEL MOTOR HOTEL, INC., et al., Respondents. No. B-342.

Justice JOE R. GREENHILL:

This is a suit for actual and exemplary damages growing out of an alleged assault and battery. The plaintiff Fisher was a mathematician with the Data Processing Division of the Manned Spacecraft Center, an agency of the National Aeronautics and Space Agency, commonly called NASA, near Houston. The defendants were the Carrousel Motor Hotel, Inc., located in Houston, the Brass Ring Club, which is located in the Carrousel, and Robert W. Flynn, who as an employee of the Carrousel was the manager of the Brass Ring Club. Flynn died before the trial, and the suit proceeded as to the Carrousel and the Brass Ring. Trial was to a jury which found for the plaintiff Fisher. The trial court rendered judgment for the defendants notwithstanding the verdict. The Court of Civil Appeals affirmed. The questions before this Court are whether there was evidence that an actionable battery was committed, and, if so, whether the two corporate defendants must respond in exemplary as well as actual damages for the malicious conduct of Flynn.

The plaintiff Fisher had been invited by Ampex Corporation and Defense Electronics to a one day's meeting regarding telemetry equipment at the Carrousel. The invitation included a luncheon. The guests were asked to reply by telephone whether they could attend the luncheon, and Fisher called in his acceptance. After the morning session, the group of 25 or 30 guests adjourned to the Brass Ring Club for lunch. The luncheon was buffet style, and Fisher stood in line with others and just ahead of a graduate student of Rice University who testified at the trial. As Fisher was about to be served, he was approached by Flynn, who snatched the plate from Fisher's hand and shouted that he, a Negro, could not be served in the club. Fisher testified that he was not actually touched, and did not testify that he suffered fear or apprehension of physical injury; but he did testify that he was highly embarrassed and hurt by Flynn's conduct in the presence of his associates.

The jury found that Flynn "forceably dispossessed plaintiff of his dinner plate" and "shouted in a loud and offensive manner"

that Fisher could not be served there, thus subjecting Fisher to humiliation and indignity. It was stipulated that Flynn was an employee of the Carrousel Hotel and, as such, managed the Brass Ring Club. The jury also found that Flynn acted maliciously and awarded Fisher $400 actual damages for his humiliation and indignity and $500 exemplary damages for Flynn's malicious conduct.

The Court of Civil Appeals held that there was no assault because there was no physical contact and no evidence of fear or apprehension of physical contact. However, it has long been settled that there can be a battery without an assault, and that actual physical contact is not necessary to constitute a battery, so long as there is contact with clothing or an object closely identified with the body. In Prosser, Law of Torts 32 (3d Ed. 1964), it is said:

> "The interest in freedom from intentional and unpermitted contacts with the plaintiff's person is protected by an action for the tort commonly called battery. The protection extends to any part of the body, or to anything which is attached to it and practically identified with it. Thus contact with the plaintiff's clothing, or with a cane, a paper, or any other object held in his hand will be sufficient; * * * The plaintiff's interest in the integrity of his person includes all those things which are in contact or connected with it."

Under the facts of this case, we have no difficulty in holding that the intentional grabbing of plaintiff's plate constituted a battery. The intentional snatching of an object from one's hand is as clearly an offensive invasion of his person as would be an actual contact with the body. "To constitute an assault and battery, it is not necessary to touch the plaintiff's body or even his clothing; knocking or snatching anything from plaintiff's hand or touching anything connected with his person, when done in an offensive manner, is sufficient." *Morgan v. Loyacomo,* 190 Miss. 656 (1941).~

The rationale for holding an offensive contact with such an object to be a battery is explained in 1 Restatement of Torts 2d § 18 (Comment p. 31) as follows:

> "Since the essence of the plaintiff's grievance consists in the offense to the dignity involved in the unpermitted and intentional invasion of the inviolability of his person and not in any physical harm done to his body, it is not necessary that the plaintiff's actual body be disturbed. Unpermitted and intentional contacts with anything so connected with the body as to be customarily regarded as part of the other's person and therefore as partaking of its inviolability is actionable as an offensive contact with his person. There are some things such as clothing or a cane or, indeed, anything directly grasped by the hand which are so intimately connected with one's body as to be universally regarded as part of the person."

We hold, therefore, that the forceful dispossession of plaintiff Fisher's plate in an offensive manner was sufficient to constitute a battery, and the trial court erred in granting judgment notwithstanding the verdict on the issue of actual damages.

In *Harned v. E-Z Finance Co.,* 151 Tex. 641, 254 S.W.2d 81 (1953), this Court refused to adopt the "new tort" of intentional interference with peace of mind which permits recovery for mental suffering in the absence of resulting physical injury or an assault and battery. This cause of action has long been advocated by respectable writers and legal scholars.~ However, it is not necessary to adopt such a cause of action in order to sustain the verdict of the jury in this case. The *Harned* case recognized the well established rule that mental suffering is compensable in suits for willful torts "which are recognized as torts and actionable independently and separately from mental suffering or other injury." Damages for mental suffering are recoverable without the necessity for showing actual physical injury in a case of willful battery because the basis of that action is the unpermitted and intentional invasion of the plaintiff's person and not the actual harm done to the plaintiff's body.

> Personal indignity is the essence of an action for battery; and consequently the defendant is liable not only for contacts which do actual physical harm, but also for those which are offensive and insulting. We hold, therefore, that plaintiff was entitled to actual damages for mental suffering due to the willful battery, even in the absence of any physical injury.~

Questions to Ponder About Fisher v. Carrousel Motor Hotel

A. Compare this case with *Leichtman v. WLW*. How important is it that the courts were available to hear Fisher's complaint? Would an alternative dispute forum have served as well?

B. Consider that the Civil Rights Act of 1964 prohibits race-based discrimination by public accommodations such as hotels. Also note that the statute allows the United States to seek a federal injunction to prohibit what the Carrousel Motor Hotel did in this case. Even where such a legal tool is available, is it still important for a plaintiff to be able to bring a cause of action under tort law in a circumstance such as this?

Case: Bohrmann v. Maine Yankee Atomic Power

This next case confronts questions of what constitutes a touching and the necessity of injury in the context of a nuclear power plant with radioactive emissions.

Bohrmann v. Maine Yankee Atomic Power

United States District Court for the District of Maine
May 1, 1996

> 926 F.Supp. 211. Erich BOHRMANN, Andrew Daniels, Jeffrey Gagnon, Nevena Novkovic, and Eric Ortman, Plaintiffs, v. MAINE YANKEE ATOMIC POWER COMPANY, Defendant. Civil No. 95-359-P-C.

Chief Judge GENE CARTER:

> Plaintiffs, several University of Southern Maine students, have filed the present action against Maine Yankee Atomic Power Company ("Maine Yankee") for injuries they allegedly sustained

after being exposed to radiation when touring Defendant's nuclear power plant in Wiscasset, Maine.~

The facts alleged in the Complaint are as follows. Plaintiffs are five University of Southern Maine students who were among a group of chemistry students invited to tour Defendant's facility. Plaintiffs allege that approximately two weeks before their tour, there was a radioactive gas leak in Defendant's primary auxiliary building (PAB) as a result of design flaws and faulty engineering when Defendant "sluiced the demineralizers in its Chemical and Volume Control System." The students toured Maine Yankee on the morning of October 11, 1994, at which time, Defendant allegedly was in the process of repairing the leakage problem. Plaintiffs claim that "Maine Yankee officials had decided to flush out resin 'hot spots' in the demineralizer" and scheduled the procedure to occur during Plaintiffs' tour. Plaintiffs further allege that the officials were aware that the flushing procedure would release radioactive gases. Plaintiffs claim that they were never apprised of the problems at Defendant's facility.

Plaintiffs allege that each student was given a pocket-sized Self-Reading Dosimeter, which measures only gamma radiation. The students were not provided with Thermo-Luminescent Dosimeters, which also measure beta radiation and which are worn by the employees of Defendant.

Plaintiffs claim that despite his being warned that radioactive gases would be released in the PAB, the lead tour guide led the students into the "hot" side of the plant. Plaintiffs allege that the tour guides knowingly took the students through a plume of unfiltered radioactive gases. While the students were walking through the radioactive gases, the continuous air monitor in the PAB was sounding an alarm. After spending thirty to forty minutes on the "hot" side of the plant, the students returned to the "hot" side's entry point and stepped into portal monitors. Plaintiffs and the tour guides allegedly "alarmed out," indicating that they had all been exposed to excessive radioactive contamination from the tour. In fact, Plaintiffs Bohrmann and Ortman continued to "alarm out" up to twenty minutes after they left the PAB.

Plaintiffs allege that Maine Yankee employees never suggested that the students remove their contaminated clothing or that the students take a shower and wash themselves. Two hours after the exposure to radioactive gases, Defendant told a few students that they needed to go for a "whole body count" to assess their radiation exposure. Plaintiff Gagnon allegedly was told that he had nothing to worry about and was not told to undergo a whole body count. Plaintiffs claim that Maine Yankee employees falsely told them that they had not been subjected to gamma radiation and that only gamma radiation was "bad." Defendant's employees allegedly told Plaintiffs that they had not been exposed to anything that would pose a health risk.

Plaintiffs assert that Defendant did not promptly or accurately determine the radiation dose to which they had been subjected. Although urinalyses were done for the tour guides to determine possible inhalation of Strontium 89, Defendant did not offer to conduct such tests on Plaintiffs. Plaintiffs allege that Defendant belatedly used a whole body counter on a few of the students, but the device was not properly programmed to provide accurate readings. Defendant allegedly failed to calculate accurately the dose exposure for the students because Defendant's readings of exposure amounts were at least thirty to forty percent too low. It is not known how much radioactive gas each student inhaled.

Plaintiffs assert that Defendant deliberately failed to report the contamination of Plaintiffs and the tour guides to the Nuclear Regulatory Commission or the State Nuclear Safety Inspector until after the contamination was reported in the media several days later. Plaintiffs allegedly did not become aware of the extent of their exposure until they read a newspaper report of the incident later that week. Defendant allegedly destroyed the charts showing the level of radioactive gases in the PAB soon after October 11, 1994. Plaintiffs assert that such destruction makes it impossible to quantify the release of radiation to which they had been exposed and allegedly constitutes a violation of federal regulations mandating the retention of the records.

Plaintiff Bohrmann claims to have suffered a significant decrease in his white blood cell count. In addition, Plaintiffs allege that they live with "the significant distress and uncertainty caused by exposure to unreasonably high levels of nuclear radiation." Plaintiffs now seek compensatory and punitive damages.~

As concerns Plaintiffs' claims for damages pursuant to theories of intentional infliction of emotional distress and battery, the Court concludes that such intentional tort claims are not inconsistent with the federal safety standards. To recover on either theory, Plaintiffs must demonstrate that Defendant intentionally exposed Plaintiffs to radiation without their consent, and that such intentional conduct on the part of Defendant caused them damages. *See, e.g., Latremore v. Latremore,* 584 A.2d 626, 631 (Me. 1990) (setting forth elements of intentional infliction of emotional distress); *Pattershall v. Jenness,* 485 A.2d 980, 984 (Me. 1984) (an element of battery is an intentional act). ⌙The Court intimates no opinion as to whether the facts as alleged by Plaintiffs amount to physical contact so as to constitute a battery.⌟

There is no reason apparent to this Court to believe that Congress intended that a defendant be insulated from liability for its intentional acts solely by complying with the federal safety standards. Instead, compliance with the federal regulations merely demonstrates the absence of negligence. See *Coley*, 768 F.Supp. at 629. The federal safety standards have no bearing on a defendant's liability for its intentional acts. While a plaintiff may recover on an intentional tort theory without proving exposure to radiation exceeding the federal safety standards, a plaintiff may not recover without first proving that he sustained damages, and such proof may be difficult to establish in the absence of proving a violation of the federal safety standards. See, e.g., *Laswell v. Brown,* 683 F.2d 261, 269 (8th Cir.1982) (concluding that "lawsuit for personal injuries cannot be based only upon the mere possibility of some future harm"), cert. denied, 459 U.S. 1210, 103 S.Ct. 1205, 75 L.Ed.2d 446 (1983); *Johnston v. United States,* 597 F.Supp. 374, 425-26

(D.Kan.1984); *Bubash v. Philadelphia Elec. Co.,* 717 F.Supp. 297, 300 (M.D.Pa.1989) (concluding that mere exposure to radiation is not an actionable physical injury). Nevertheless, the absence of a violation of the federal standards does not necessarily establish the absence of an actual injury.~

Accordingly, it is ORDERED that~ Defendant's Motion to Dismiss be, and it is hereby, DENIED as to [battery].

Questions to Ponder About *Bohrmann v. Maine Yankee*

A. Should intentional exposure to radioactivity count as battery? Is your position consistent with your position on tobacco smoke? If you would find one to be battery, but not the other, what distinguishes the two?

B. Compare this case to *Fisher v. Carrousel Motor Hotel.* Why do you think the plaintiffs here was not able to recover for mental distress damages?

Assault

An assault happens when the defendant intentionally creates for the plaintiff an immediate apprehension of a battery. That is, you're assaulted when you are made to think you're about to be harmfully or offensively touched.

Assault might seem like a strange tort. Before law school, you probably had an intuitive idea of battery. That is, you could probably guess that you could sue someone over a harmful or offensive touching. But it might come as a surprise that you can sue someone just for giving you the apprehension of such a touching. Nonetheless, assault is a long-established part of the common law's package of rights meant to foster and protect our civilized society. We all have the right to be free from the perception of imminent attack, and we can sue to enforce it. It's a right that has existed in the common law for centuries.

Case: I de S et Ux v. W de S

The following case is credited as the first to recognize the action of assault. Many of the details are lost to history. We don't even know the litigants names, save their initials. yet even though we are

separated from the litigants by many centuries, the hatchet swing in this case still paints a vivid picture.

I de S et Ux v. W de S

At the Assizes
Unknown month and date, 1348

Y.B.Lib Assessonum folio 99, placitum 60

I de S and M, his wife, complain of W de S concerning this that the said W, in the year etc., with force and arms (*vi et armis*) did make an assault upon the said M at S and beat her. And W pleaded not guilty. And it was found by the verdict of the Inquest that the said W came at night to the house of the said I and sought to buy of his wine, but the door of the Tavern was shut and he beat upon the door with a hatchet which he had in his hand, and the wife of the plaintiff put her head out of a window and commanded him to stop, and he saw and he struck (at her) with the hatchet but he did not hit the woman. Whereupon the Inquest said that it seemed to them that there was no trespass since no harm (was) done.

THORPE, C.J. There is harm done and a trespass for which he shall recover damages since he made an assault upon the woman, as has been found, although he did no other harm. Wherefore tax the damages, etc., and they taxed the damages at half a mark. Thorpe awarded that they should recovered their damages etc. and that the other should be taken. And so note that for an assault made a man shall recover damages, etc.

Historical Note on I de S et Ux v. W de S

The recognition of an action for assault in *I de S et Ux v. W de S,* where there was only a mental harm and no physical contact, represented a great step in the evolution of tort law to its modern form. William Prosser's classic torts casebook calls *I de S et Ux* "the great-grandparent of all assault cases." Victor E. Schwartz et al., PROSSER, WADE AND SCHWARTZ'S TORTS 37 (11th ed. 2005). To the extent that is true, and given that assault itself can be credited with sprouting still other torts, *I de S et Ux* has a claim on being be the great-great-grandparent of all actions for negligent infliction of

emotional distress and intentional infliction of emotional distress (discussed in chapters 9 and 19, respectively).

While 1348 was an important year in tort law, English history remembers the year mostly for something else. In June 1348, ships crossing the English Channel first brought bubonic plague to Dorset on the southern edge of England. The ensuing epidemic – the Black Death – moved across England to kill half the country's population before the end of the year.

One wonders how *I de S et Ux* fits into that history. Perhaps the case represents the eve of catastrophe – a moment when English society had a high enough standard of living that it had the luxury of recognizing fundamental rights of people to be left alone even where no physical harm was suffered. Or perhaps *I de S et Ux* came down while the epidemic raged. If that were true, it might be seen as a stand taken against the breakdown of civil order despite mass death and an impending sense of doom.

The Elements of Assault

Here is a blackletter statement of assault doctrine as it exists today:

> A plaintiff can establish **a prima facie case for assault** by showing: (1) the defendant undertook an act, (2) with intent, effecting (3) the immediate apprehension of (4) a harmful or offensive (5) touching of the plaintiff.

Let's take the elements in turn.

Assault: Intent

To meet the requisite intent for assault, the defendant must intend to create the apprehension in the plaintiff that is the essence of the tort. Otherwise, the plaintiff can use the transferred-intent doctrine – transferring intent from person-to-person and from tort-to-tort.

In the assault context, person-to-person transference of intent takes place when the defendant intends to create an immediate apprehension in X, but in fact causes an immediate apprehension in Y. In such a case, Y can show the requisite intent for the prima facie case.

Tort-to-tort transference of intent takes place between battery and assault. Suppose the defendant intends to strike the plaintiff in the back – thus intending to commit a battery but not an assault. This intent suffices for the intent element of an assault claim. So if, for instance, the plaintiff turns around just before the defendant strikes, and thus is able to move out of the way, the plaintiff has a good cause of action for assault.

As explained previously, transferred intent can also work two ways at once. If the defendant intends to commit a battery by throwing a beer bottle at Jill, but throws wide left so that Kai has to duck out of the way, the defendant has exhibited the requisite intent for Kai's claim against the defendant for assault.

Note that under the older, traditional view of transferred intent, transference is allowed among any of the torts of assault, battery, false imprisonment, trespass to land, and trespass to chattels.

Assault: Immediate Apprehension

Assault requires that the plaintiff experience an immediate apprehension of a battery.

Apprehension is **distinguished from fear**. Fear is not required for an assault case. Suppose a small child – cranky and weak from having missed an afternoon nap – swats at a mixed-martial arts champion. No fear results. But there is an actionable assault. It might be a dumb move as far as public image goes, but the MMA champ can sue the child for assault and win.

It is also important to keep in mind that **the apprehension must be immediate**. Threats of harm that might occur in the future – even in the quite near future – will not support an apprehension claim. Having the plaintiff anticipate a battery the next day or even in the next minute or two is not enough. The apprehension must be in the moment.

It does not matter, by the way, if the threatened battery could not come to fruition. Aiming an unloaded gun at a person – so long as the person believes the gun to be loaded – counts as an assault.

Traditionally, there must be some physical act or movement to effect an assault. It might be raising a stick for a swing, or even reaching into a pocket. Sometimes courts say that "words alone cannot constitute an assault." Many courts, however, when pressed, would probably agree that surrounding circumstances could make for a situation in which an assault would lie for words alone. A plaintiff already held at gunpoint by a third party, for instance, would likely have a good claim for assault against the interloping defendant who yells "Fire!"

Authorities acknowledge that words can have the effect of alleviating the potential for an apprehension. Suppose the defendant says, "I don't have any bullets, which is a shame," at which point the defendant pulls out a pistol and says, "because if I did, I would shoot you right now." There is no assault in such a situation.

Assault: Harmful or Offensive Touching

The requirement for a harmful or offensive touching is the same as it is for battery. The apprehended touch could be violent, disgusting, amorous, or all of those things. It might be slight or severe. What matters legally is only that it is harmful or offensive.

Check-Your-Understanding Questions on Assault and Battery

A. Betty and Harvey are two campers at Lake Monaveit Summer Camp. Betty, wanting to get Harvey back for pushing her into the lake during canoe races, sneaks up on Harvey as he is sleeping and spoons peanut butter onto his hair. When Harvey wakes up, Betty is sitting there grinning. Harvey runs his hands through his hair, feels the peanut butter, licks a finger, and breaks out into hearty laughter. Does Harvey have a good claim against Betty for assault? For battery?

B. Stephen is giving Gerald a haircut. Gerald is a working model who does mostly catalog work, although lately he has been struggling. He has asked Stephen for a little off the top – just a trim. As Stephen works, Gerald is absorbed in his cell phone. When he finally looks up in the mirror, he sees that Stephen has changed his entire look,

making his hair much, much shorter. Stephen's intention is to give Gerald's career a boost, and he's convinced that the haircut will get him more work. After Gerald leaves the salon, as he is walking down the street, he runs into Freda, an acquaintance who is the chief marketing officer of a major retailer. As soon as Freda sees Gerald, she begins running her fingers through his hair. She loves the haircut, and based on his new look, she offers him a $1.5 million exclusive contract to be the new face of her company's L'*Homme au Travail* clothing line. Does Gerald have a good claim against Stephen for assault? For battery? Does Gerald have a good claim against Freda for assault? For battery?

18. False Imprisonment

"They shut me up in Prose –
As when a little Girl
They put me in the Closet –
Because they liked me 'still' – "

– Emily Dickinson, 1951

Introduction

The tort of false imprisonment gives plaintiffs a claim to assert when they are held against their will.

It is tempting to think of false imprisonment as an ancient relic, a tort with only very rare applicability. The examples that come most easily to mind might be pirates and highwaymen, working in remote places far from the arm of the law. Yet the tort of false imprisonment is relevant all over the landscape of modern life – as close by as department stores and parking garages.

At the outset it is helpful to note that you should not try to make sense of this tort by its name. "False imprisonment" is a double misnomer. First, there is no requirement that the plaintiff be put in prison. All that is necessary is confinement, which might be accomplished without any walls or physical restraints of any kind. For instance, compelling a plaintiff at knifepoint to not move is sufficient confinement for false imprisonment. Second, in so far as people understand the word "false" to mean "not true," then that is a misnomer as well, because a prima facie case requires true confinement. In the false imprisonment context, think of "false" as meaning wrongful or illegitimate.

The Elements of False Imprisonment

Here is a blackletter statement of false imprisonment:

> A plaintiff can establish **a prima facie case of false imprisonment** by showing the defendant (1) intentionally (2) confined the plaintiff, and

> that the plaintiff (3) was aware of the confinement.

Let's take the elements in turn.

False Imprisonment: Intent

The intent required for false imprisonment is the intent to confine. The defendant need not have bad intentions, nor must the defendant intend that the confinement be illegal, tortious, or even improper. Working with the best of intentions and a conviction of being on the right side of the law is perfectly compatible with the requisite intent to confine.

As with the other intentional torts, false imprisonment observes party-to-party transferred intent. If Amy intends to confine Bella, but winds up confining Constance, then Amy has the requisite intent for Constance's prima facie case against Amy for false imprisonment.

Remember, too, that some courts allow tort-to-tort transferred intent among any of assault, battery, false imprisonment, trespass to land, and trespass to chattels.

False Imprisonment: Meaning of Confinement

To be confined for the purpose of false imprisonment, the plaintiff must be restricted to some **closed, bounded area for some appreciable amount of time**.

Confining a person to a room certainly counts, but so does confining a person to a particular city or state. The area need not be strictly delineated. A subway mugger who orders a plaintiff not to run away on threat of being shot effects an actionable confinement regardless of whether the mugging takes place in an enclosed subway car, on a platform, or in the ticketing area. The plaintiff in such circumstances is confined to the space in which she or he is standing, and thus the confinement is actionable.

Even though the area of confinement can be large or small, it must be complete. Freedom of movement must be bounded in all directions. A mere roadblock will not count. Suppose a plaintiff, out for a walk in the city, meets a gang of thugs who, through threats,

prevent the plaintiff from walking on the public sidewalk on Elm Street between 10th Street and 11th Street. If the plaintiff can freely back up and walk somewhere else, then there is no false imprisonment.

Along these lines, a plaintiff cannot use false imprisonment to sue for being wrongly kept out of some particular place. That is to say, the confinement of false imprisonment does not work in reverse. If a plaintiff is not allowed into a certain restaurant or club, there is no false imprisonment. It will not do to say that the area of confinement is "the rest of the world."

In cases where the confinement is achieved by means of physical barriers, courts often say that there must be **no reasonable means of escape**. Suppose the defendant locks the door to the room the plaintiff is in. We must ask if there some other reasonable way out. If the sliding-glass door to the patio is open, and if the patio opens onto a golf course, then that's a reasonable means of escape, and no false imprisonment claim will lie. But if the only means of escape is to jump from a second-story balcony or to crawl through HVAC ducts, then the means of escape is not reasonable, and the plaintiff has a good claim for false imprisonment.

There is **no minimum amount of time** for a valid confinement. Typically, courts will say that the confinement need only be for an "appreciable time." A confinement of one minute, for example, would be much more than enough.

The duration of the confinement may become a live issue in the context of an affirmative defense of consent. For instance, amusement park patrons have consented to a confinement when the board a dark ride and pull down the lap bar. But a confinement for how long? If the ride stops, must the park release the lap bars immediately and let everyone go? Or can they take some time to re-start the ride before they must release patrons? That question is turns on the scope of the consent, and it could be a close issue that requires a jury to resolve.

False Imprisonment: Method of Confinement

In a false imprisonment case, the confinement can be accomplished by a number of means. The most straightforward is by **physical barriers**, such as with walls or fences. But false imprisonment can also be accomplished by **force or imminent threat of force**. Threatening a plaintiff at gunpoint is an obvious example; however, the threat need not be against the plaintiff. The threat could be directed at a third person. Some authorities say the third person must be a family member or someone who is immediately present, but one imagines, if pressed, courts would permit a false imprisonment cause of action for threats to strangers, so long as they were serious and credible.

One aspect of the doctrine that is crystal clear is that **the threat must be imminent**. Telling a person to stay put – or else suffer injury the next day – would not be considered confinement within the meaning of the tort. The fact that the false imprisonment tort does not allow recovery in such a situation seems to imply that, in the view of the law, a would-be plaintiff should go and seek police involvement before the threat matures.

The barriers, force, or threat need not be directed at persons, but can also be aimed at the plaintiff's property. A plaintiff who is "free" to walk away only by surrendering chattels is not free at all under the eyes of false-imprisonment law. Suppose a drunk and belligerent party host refuses to return the plaintiff's coat when the plaintiff is ready to leave the party. That deprivation of property will count as confinement for false imprisonment.

Another recognized method of confinement is **improper assertion of legal authority**. Flashing a fake police badge and informing a plaintiff that she or he is under arrest is an obvious example. But improper assertion of legal authority could be made by a real peace officer with a real badge. In the real world, suits against individual police officers for false imprisonment are rare. But the reason has nothing to do with the doctrine of false imprisonment itself. Individuals are frequently judgment proof, plaintiffs are often not credible witnesses, and state statutes may shield law enforcement

officers from suit. But as far as common-law tort doctrine goes, a police officer making an invalid arrest is liable for false imprisonment.

A common context for false imprisonment accomplished by improper legal assertions is with security officers in retail stores, who may falsely tell suspected shoplifters that they are under a legal obligation to stay on the premises and answer questions, or that they must wait for the police to arrive. Often, store security has no legal basis upon which to make such a claim (although in any given jurisdiction, store security officers might have an authentic legal right to detain people through a statute or a common law "shopkeeper's privilege").

The confinement does not need to be accomplished by an overt act. An **omission** might do the trick under certain circumstances. If the defendant is under an existing obligation to act, then the omission to release the plaintiff can be false imprisonment. For example, lawfully confined inmates must be released when their sentences are up, and a jailer who omits to unlock the cell when required to do so becomes liable for false imprisonment. Similarly, an amusement park patron pulling down a locking lapbar on a roller coaster has consented to a confinement. But if the ride operator refuses to release the lapbar when the ride is over, there is liability for false imprisonment.

False Imprisonment: Awareness

In addition to intent and confinement, the balance of authority adds the requirement that the plaintiff must be aware of the confinement.

Because of the awareness requirement, an unconscious person locked in a room cannot, upon waking up to an open door, make out a case for false imprisonment. Many have noted that the awareness requirement in the false imprisonment tort is consonant with tort's emphasis on an individual's sense of autonomy.

According to convention, however, there is an exception to the awareness requirement. Authorities commonly state, without elaboration, that if the prisoner is harmed by the confinement, then awareness is not required. This exception creates something of a

puzzle: It's not so easy to imagine a situation in which a plaintiff is harmed by a confinement of which she or he is unaware *and* where the confinement itself is the essence of the harm, as opposed to a battery. Suffice it to say, it must not come up very often.

False Imprisonment: Scope of Privilege or Consent

Privilege or consent is an affirmative defense to false imprisonment. And in many cases, the scope of that privilege or consent is likely to be crucial. Consider some examples: Jailers who confine their inmates have a legal privilege to do so. And riders on common carrier transport have consented to a confinement. But at what point does privilege or consent run out?

Case: Sousanis v. Northwest Airlines

This case presents false imprisonment in a thoroughly modern context: an airplane on the tarmac that's going nowhere.

Sousanis v. Northwest Airlines

United States District Court for the Northern District of California
March 3, 2000

2000 WL 34015861. Marti SOUSANIS, Plaintiff, v. NORTHWEST AIRLINES, INC. et al. Defendants. No. C-99-2994 MHP. Not Reported in F.Supp.2d.

Chief Judge MARILYN HALL PATEL:

On May 11, 1999, plaintiff Marti Sousanis filed suit in California state court against Northwest Airlines and twenty "Doe" defendants alleging various tort and contract claims pertaining to a detained flight. On June 17, 1999, defendant Northwest removed the action to this court on diversity grounds.~ Plaintiff's first amended complaint ("complaint") states the following claims against defendants: (1) breach of contract; (2) breach of the covenant of good faith and fair dealing; (3) intentional infliction of emotional distress; (4) false imprisonment; (5) negligence; (6) disability discrimination in violation of California Civil Code section 54.1 et seq.; (7) civil rights discrimination in violation of the Unruh Act, California Civil Code section 51 et seq.; (8) violation of California's Unfair

Competition statute, Business and Professions Code sections 17200 and 17201; and (9) declaratory and injunctive relief.~

BACKGROUND

Plaintiff, a San Francisco resident, spent her 1998 winter holiday in Detroit. In November 1998, she purchased a $540 round-trip airline ticket from Northwest. Plaintiff departed San Francisco on December 23, 1998 and was scheduled to return on Saturday January 2, 1999.

Detroit experienced a blizzard during the New Year's weekend, and Detroit Metro Airport was blanketed with snow and ice. Plaintiff boarded her homebound flight as scheduled. However, the flight was detained and ultimately canceled due to the inclement weather. The next day, plaintiff obtained a boarding pass for Northwest Flight Number 992. This flight was scheduled to depart in the early afternoon, but worsening weather caused further delays. Plaintiff claims that Northwest made a series of disingenuous announcements about when it expected the flight to leave.

At 6:00 p.m. on January 3, Northwest instructed the passengers of Flight 992 to board the aircraft. Once the passengers were seated, the doors were secured but the plane never took off. For approximately six hours, Flight 992 remained parked at the gate or on the runway due to weather-related and mechanical problems.

During the protracted wait, Northwest flight attendants repeatedly instructed the passengers to remain seated with their seat belts fastened. Plaintiff alleges that she suffers a chronic back condition that worsens if she is forced to sit for too long. She contends that her physical therapist advises that she stand and stretch at least every thirty minutes. In addition, plaintiff purports to have panic and anxiety attacks when she anticipates an impending back spasm. Plaintiff claims that she began to feel her back tighten after some period of remaining in her seat on Flight 992. So, plaintiff stood up in her row to stretch her back. According to plaintiff, a flight attendant ordered her to sit down because the seat belt sign was illuminated. Plaintiff alleges that

she attempted to explain her condition to the flight attendant, but that she would not listen. Instead, she summoned other flight attendants, including the supervising flight attendant.

The supervising flight attendant advised plaintiff that her refusal to comply with flight crew instructions constituted a violation of federal law. Plaintiff alleges that she again tried to explain to the supervising flight attendant her medical need for special accommodation. The supervising flight attendant handed plaintiff a notice advising her that passengers who interfere with the operation of the aircraft are subject to arrest. After her altercation with the supervising flight attendant, plaintiff did not attempt to stand up again. Plaintiff recalls being in tears and in pain for the remainder of the approximately six hour wait.

Plaintiff asserts that during the wait, several passengers occasionally stood up and/or walked to the restroom. She also notes that Northwest crew members were able to move freely about the plane. At around midnight, Northwest canceled Flight 992 and the passengers deplaned. On Monday, January 4, 1999, plaintiff returned to San Francisco on Northwest Flight Number 929.

LEGAL STANDARD

A motion to dismiss for failure to state a claim will be denied unless it appears that the plaintiff can prove no set of facts which would entitle him or her to relief.~

DISCUSSION~

The tort of false imprisonment is defined in California as "the nonconsensual, intentional confinement of a person, without lawful privilege, for an appreciable length of time, however short." *Molko v. Holy Spirit Assn.,* 46 Cal.3d 1092, 1123 (1988). Plaintiff alleges that she was detained against her will in her seat for a period of approximately six hours, while other passengers were occasionally permitted to stand, stretch and use the lavatories as the aircraft sat on the tarmac. She argues that while she did consent to boarding the aircraft initially, she did not consent to being confined to her seat during the long delay. Defendant asserts that plaintiff consented to remaining in her

seat while the seat belt sign was illuminated as a condition of boarding the aircraft, and could not, as a matter of law, withdraw it.

Both plaintiff and defendant rely on *Abourezk v. New York Airline, Inc.*, 705 F.Supp. 656 (D.D.C. 1989) to support their positions. While not exactly on point, it presents the closest factual scenario to the case at bar in an area of sparse precedent. There, the court held that the passenger plaintiff was not falsely imprisoned when he was not allowed off an airplane which was delayed on the ground for three hours because of inclement weather at the destination airport. The delay had caused the plaintiff to miss his appointment, thus rendering his trip moot, so he asked to deplane while the aircraft was waiting in the takeoff line. The pilot refused, and the plane eventually flew on to New York.

Plaintiff does not allege that she asked to deplane, only that she be allowed to stand, stretch and move about. The pilot in this case had full and lawful authority to control the actions of the passengers for their own safety. See 14 C.F.R. § 121.533. Plaintiff states in her complaint that the captain kept the seat belt sign illuminated for virtually the entire delay. Therefore, defendant was acting pursuant to federal law in confining plaintiff to her seat, and plaintiff could not withdraw her consent. The *Abourezk* court explained that the plaintiff's agreement with the airline did not provide that he "could unilaterally determine that he should be deplaned in circumstances such as those presented herein." Similar to *Abourezk,* here plaintiff's agreement with defendant did not allow for her to withdraw her consent to obeying federally mandated safety rules. Defendant was acting lawfully by confining plaintiff to her seat within the aircraft while the seat belt sign was illuminated. The court finds that plaintiffs has failed to plead the elements required to state a false imprisonment claim, and thus dismisses that claim with prejudice.

CONCLUSION

For the foregoing reasons, the court GRANTS defendant's motion to dismiss. Plaintiff's first, second, third, and fourth claims are DISMISSED WITH PREJUDICE. Her fifth through ninth claims are DISMISSED WITH PREJUDICE insofar as they are not cognizable under California law.

IT IS SO ORDERED

Questions to Ponder About *Sousanis v. Northwest Airlines*

A. The court found that the plaintiff "failed to plead the elements required to state a false imprisonment claim." Which element of the prima facie case do you think the court believed was missing?

B. The recitation of the elements of false imprisonment given by the court includes that the confinement be "nonconsensual." What difference would it have made, if any, if the court had followed the traditional formulation of the law that sees consent as an affirmative defense, rather than holding that lack of consent is part of a prima facie case?

C. The court's decision appears to be based in large part on the observation that "[t]he pilot in this case had full and lawful authority to control the actions of the passengers for their own safety." In support of this, the court cites 14 C.F.R. §121.533. Here is the complete text of that regulation:

> §121.533 Responsibility for operational control: Domestic operations.
>
> (a) Each certificate holder conducting domestic operations is responsible for operational control.
>
> (b) The pilot in command and the aircraft dispatcher are jointly responsible for the preflight planning, delay, and dispatch release of a flight in compliance with this chapter and operations specifications.
>
> (c) The aircraft dispatcher is responsible for—
>
> (1) Monitoring the progress of each flight;

> (2) Issuing necessary information for the safety of the flight; and
>
> (3) Cancelling or redispatching a flight if, in his opinion or the opinion of the pilot in command, the flight cannot operate or continue to operate safely as planned or released.
>
> (d) Each pilot in command of an aircraft is, during flight time, in command of the aircraft and crew and is responsible for the safety of the passengers, crewmembers, cargo, and airplane.
>
> (e) Each pilot in command has full control and authority in the operation of the aircraft, without limitation, over other crewmembers and their duties during flight time, whether or not he holds valid certificates authorizing him to perform the duties of those crewmembers.

Does the cited authority support the court's statement?

Case: Montejo v. Martin Memorial

This case presents a different modern context – hospitals privately deporting undocumented immigrant patients who cannot pay their medical bills. An article by Professor Kit Johnson, an immigration scholar, provides some helpful context:

> Federal law requires hospitals to treat patients in need of emergency medical care regardless of whether they are lawfully present in the United States. And hospitals are prohibited from discharging those patients unless and until there is an assurance that their continuing medical needs will be met by another facility. Yet federal law does not dictate what can and should be done with undocumented migrants after their need for emergency care has passed but their need for ongoing medical care lingers. Nor is there federal funding for long-term care of undocumented migrants, unlike the Medicaid system's reimbursements for citizens.
>
> Several hospitals have decided to repatriate undocumented patients needing long-term

> medical care at the hospitals' expense. That is, the hospitals hire transport to return these individuals to the care and custody of their native countries.

Kit Johnson, *Patients Without Borders: Extralegal Deportation by Hospitals,* 78 UNIVERSITY OF CINCINNATI LAW REVIEW 657 (2009).

Montejo v. Martin Memorial

District Court of Appeal of Florida, Fourth District
August 23, 2006

935 So.2d 1266. Montejo Gaspar MONTEJO, as Guardian of the person of Luis Alberto Jimenez, Appellant, v. MARTIN MEMORIAL MEDICAL CENTER, INC., Appellee. No. 4D05-652.

Chief Judge W. MATTHEW STEVENSON:

Montejo Gaspar Montejo, the guardian of Luis Alberto Jimenez, appeals an order dismissing with prejudice his false imprisonment claim against Martin Memorial Medical Center, Inc. Because Martin Memorial was not cloaked with absolute immunity from civil liability when acting pursuant to a void court order, we reverse the judgment of the trial court and remand for further proceedings.

In February 2000, Luis Alberto Jimenez, an undocumented native of Guatemala who was living and working in Florida, sustained brain damage and severe physical injuries as a consequence of a car crash. Jimenez was transported to Martin Memorial Medical Center and remained there until June 2000, when he was transferred to a skilled nursing facility. The injuries suffered by Jimenez rendered him incompetent and a circuit court judge appointed Montejo guardian of Jimenez's person and property.

On January 26, 2001, Jimenez was readmitted to Martin Memorial on an emergency basis and, as of November 2001, was still incapacitated and still receiving medical care at Martin Memorial. Around this time, Montejo filed a guardianship plan, indicating Jimenez would require twenty-four hour care at a

hospital or skilled care facility for the next twelve months. As the costs of Jimenez's medical care were mounting, Jimenez was indigent, and Medicaid had refused to pay because he was an illegal alien, Martin Memorial intervened in the guardianship proceedings. In its petition, Martin Memorial claimed the guardian had failed to ensure Jimenez was in the best facility to meet his medical needs and the hospital was not the appropriate facility to provide the long-term rehabilitative care required. Martin Memorial sought permission to discharge Jimenez and have him transported to Guatemala for further care. Pursuant to federal law, in order to discharge Jimenez, Martin Memorial was required to demonstrate appropriate medical care was available. On June 27, 2003, following a hearing, the circuit court granted Martin Memorial's petition, directing the guardian to refrain from frustrating the hospital's plan to relocate Jimenez to Guatemala and authorizing the hospital to provide, at its own expense, "a suitable escort with the necessary medical support for the Ward's trip back to Guatemala."

Specifically, the court found the guardian had failed to act in Jimenez's best interests "by allowing the Ward to remain in the inappropriate residential setting of an acute care hospital" and thus ordered that the guardian "shall consent to, fully cooperate in and refrain from frustrating the Hospital's discharge plan to relocate the Ward back to Guatemala" and that the hospital "shall, at its own expense, provide a suitable escort with the necessary medical support for the Ward's trip back to Guatemala."

On July 9, 2003, the same day that his motion for rehearing was denied, Montejo filed a notice of appeal directed to the circuit court's order. At the same time that he filed the notice of appeal, Montejo filed a motion to stay the court's June 27, 2003 order. According to Montejo, although the circuit court ordered Martin Memorial to file a response to the motion to stay by 10:00 a.m. the following day, sometime before 7:00 a.m., the hospital took Jimenez to the airport via ambulance and transported him by private plane to Guatemala.

In an opinion issued on May 5, 2004, this court reversed the order that had "authorized" Martin Memorial to transport Jimenez to Guatemala. See *Montejo v. Martin Mem'l Med. Ctr., Inc.,* 874 So.2d 654 (Fla. 4th DCA 2004). In the opinion's final paragraph, the panel wrote that it was reversing not only because there was insufficient evidence that Jimenez could receive adequate care in Guatemala, but also because "the trial court lacked subject matter jurisdiction to authorize the transportation (deportation) of Jimenez to Guatemala."

In September 2004, Montejo filed a lawsuit, alleging Martin Memorial's confining Jimenez in the ambulance and on the airplane amounted to false imprisonment and seeking damages for the same. Martin Memorial filed a motion to dismiss or for judgment on the pleadings, arguing (1) that Montejo lacked standing and (2) that Montejo had not and could not state a cause of action because he had not and could not demonstrate the detention was unreasonable and unwarranted-a necessary element of a claim for false imprisonment. With regard to the latter argument, Martin Memorial insisted the detention could not be unreasonable and unwarranted because its transporting Jimenez to Guatemala was done pursuant to a then-valid court order and, as such, its actions were afforded immunity. Following a hearing, the trial court granted Martin Memorial's motion and dismissed Montejo's false imprisonment suit with prejudice. This appeal arises from that order of dismissal.

Montejo insists the dismissal of his false imprisonment claim cannot be sustained upon either the theory that he lacked standing or that he had not and could not state a cause of action because Martin Memorial's actions were somehow cloaked with immunity. To begin, we find Montejo had standing to bring the false imprisonment claim and reject without further comment Martin Memorial's arguments to the contrary.

This, then, brings us to the matter of whether Martin Memorial's transporting Jimenez to Guatemala could provide the foundation for a false imprisonment claim despite the fact that such actions were taken in reliance upon the circuit court's June 27, 2003 order. The question we must decide is whether a

litigant is entitled to "immunity" from a false imprisonment claim for actions taken in reliance upon an order that is later determined to have been entered in the absence of subject matter jurisdiction. We conclude that, under existing Florida law, the answer is no and that the cause of action in the instant case may proceed.

The elements of a cause of action for false imprisonment have been stated in various ways by Florida courts, but, essentially, all have agreed that the elements include: 1) the unlawful detention and deprivation of liberty of a person 2) against that person's will 3) without legal authority or "color of authority" and 4) which is unreasonable and unwarranted under the circumstances. See *Johnson v. Weiner,* 155 Fla. 169 (1944); *Jackson v. Navarro,* 665 So.2d 340, 341 (Fla. 4th DCA 1995); *Everett v. Fla. Inst. of Tech.,* 503 So.2d 1382, 1383 (Fla. 5th DCA 1987); *Kanner v. First Nat'l Bank of S. Miami,* 287 So.2d 715, 717 (Fla. 3d DCA 1974). In *Johnson*, the Florida Supreme Court stated that the element of legal authority may be demonstrated by irregular or voidable process, but "'[v]oid process will not constitute legal authority within this rule.'" It is equally clear that Florida law holds that an order entered in the absence of subject matter jurisdiction is void. In the prior opinion in this case, this court held that the circuit court judge lacked subject matter jurisdiction to authorize the hospital to transport Jimenez to Guatemala.

Initially, Martin Memorial contends that Montejo cannot state a cause of action for false imprisonment because the alleged confinement in the ambulance and plane was performed in furtherance of a court order and "is protected by the absolute immunity related to judicial proceedings." In support of this argument, Martin Memorial cites *Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. United States Fire Insurance Co.,* 639 So.2d 606 (Fla.1994), and *American National Title & Escrow of Florida, Inc. v. Guarantee Title & Trust Co.,* 748 So.2d 1054 (Fla. 4th DCA 1999). In *Levin*, the insurer represented to the court that one of the firm's attorneys would be called as a witness in the bad faith litigation; as a result, the firm was disqualified from the representation. When the insurer failed to follow through,

the firm filed a claim for tortious interference with a business relationship. The insurer insisted the claim was barred by the litigation privilege. The Florida Supreme Court agreed, writing that "absolute immunity must be afforded to any act occurring during the course of a judicial proceeding ... so long as the act has some relation to the proceeding." 639 So.2d at 608.

In *American National Title & Escrow,* a law firm representing two title insurers obtained a temporary injunction and an order appointing a receiver and was sued for abuse of process related to the court-appointed receiver's entry into the business offices and the president's home to obtain records. This court affirmed the trial court's entry of summary judgment in favor of the law firm because the misconduct alleged was done "pursuant to the receivership" and was therefore protected by the absolute immunity afforded conduct related to judicial proceedings. 748 So.2d at 1056. This court stated:

> Appellants' argument that Levin should be limited to publications or communications during litigation has no merit. Prior to *Levin*, the court had already decided that statements amounting to perjury, libel, slander, and defamation were not actionable. The essence of *Levin* was its extension of absolute immunity to acts taken during the proceeding, not just statements made therein. The acts taken here were all done pursuant to the receivership and the order of authority to the receiver.

In the instant case, we cannot agree that Martin Memorial's alleged misconduct occurred "during the course of the judicial proceedings" such that the litigation privilege discussed in Levin and American National Title & Escrow would apply. In discussing the rationale for the litigation privilege, the court in *Levin* explained:

> In balancing policy considerations, we find that absolute immunity must be afforded to any act occurring during the course of a judicial proceeding, regardless of whether the act involves a defamatory statement or other

> tortious behavior such as the alleged misconduct at issue, so long as the act has some relation to the proceeding. The rationale behind the immunity afforded to defamatory statements is equally applicable to other misconduct occurring during the course of a judicial proceeding. Just as participants in litigation must be free to engage in unhindered communication, so too must those participants be free to use their best judgment in prosecuting or defending a lawsuit without fear of having to defend their actions in a subsequent civil action for misconduct.

Here, Martin Memorial's actions were taken neither during the course of the judicial proceedings nor in an effort to prosecute or defend its lawsuit. Unlike *American National Title & Escrow*, where the court appointed a receiver to take control of the business for the purposes of obtaining records and conserving assets which were the subject of the litigation, the court in the instant case merely allowed Martin Memorial to proceed on its own chosen course of action, which was to be taken after the judicial proceedings were concluded. In our view, to afford Martin Memorial absolute immunity from potential tort liability under the circumstances of this case would be an unwarranted and improper extension of the litigation privilege. Further, we do not believe that the litigation privilege discussed in *Levin* would apply to the instant case where the court entering the order lacked subject matter jurisdiction and the order acted upon was void.

Martin Memorial further suggests that because it acted in reliance on the court order, it should be cloaked with qualified or quasi-judicial immunity to the same extent as that afforded to state agents executing the order of a trial court. We disagree. Those authorities which suggest that the immunity to be afforded those who execute the judge's order should be co-extensive with the immunity afforded the judge~ reason that those who execute court orders are "'integral parts of the judicial process'" and that "[t]he fearless and unhesitating execution of court orders is essential if the court's authority and

ability to function are to remain uncompromised," see *Coverdell v. Dep't of Social & Health Servs.,* Wash., 834 F.2d 758, 765 (9th Cir.1987) (finding child protective services worker who took custody of child pursuant to court order, but without requisite notice to parent or her attorney, was immune from suit) (quoting *Briscoe v. LaHue,* 460 U.S. 325, 335 (1983)), and thus hold that " 'official[s] charged with the duty of executing a facially valid court order enjoy [ ] absolute immunity from liability for damages in a suit challenging conduct prescribed by that order,' " see Turney v. O'Toole, 898 F.2d 1470, 1472 (10th Cir.1990) (quoting *Valdez v. City & County of Denver,* 878 F.2d 1285, 1286 (10th Cir.1989)). See also *Zamora v. City of Belen,* 383 F.Supp.2d 1315, 1326 (D.N.M.2005) ("[I]t is irrelevant to the executing officer's absolute immunity from suit under § 1983 if the court order violates a statute, or is erroneous or even unconstitutional, as long as it is 'facially valid.' ") (quoting Turney, 898 F.2d at 1473). Florida law is consistent with the federal authorities on this issue. See *Willingham v. City of Orlando,* 929 So.2d 43, 49 (Fla. 5th DCA 2006) (citing a number of federal cases, including Valdez, and recognizing that "so long as a warrant is valid on its face, [a state agent] is entitled to an absolute grant of immunity springing from the judicial immunity of the judicial officer who issued the warrant"). In the instant case, Martin Memorial was not an agent of the government executing an order of the court.

In the present case, by procuring and obtaining the order allowing the deportation of Jimenez, Martin Memorial was seeking the vindication or enforcement of a purely private right. Cases in other jurisdictions have held that in instances where the object of the detention (i.e., false imprisonment) of an individual is for the protection or enforcement of a private right, the person procuring the detention has no immunity from a claim for money damages where the court issuing the order has exceeded its jurisdiction. The rationale for this rule was explained in *Hamilton v. Pacific Drug Co.,* 78 Wash. 689 (1914), a case in which the court allowed a false imprisonment suit to proceed where the defendant procured a warrant for the

plaintiff's arrest as an "absconding debtor" and the lower court had no jurisdiction to authorize the arrest:

> It is argued that, since the arrest was upon a warrant authorized by order of the superior court, the appellant is exonerated from liability, even though the law at the present time does not authorize the arrest. In support of this position a number of cases are cited, all but one of which appear to have been where the arrest was made in a criminal proceeding. There, the party complaining and setting the machinery of the law in motion, which results in the arrest of a person, is acting, not on his own account or for his own private benefit, but for the public, enforcing the public's right to have the public law obeyed. A rule of law which would exonerate from liability a person causing an arrest in a criminal proceeding when acting without malice, and with probable cause, even though there be no law justifying the arrest, is not applicable where the arrest is caused for the purpose of enforcing a claim of private right. While there is some confusion in the authorities, and this distinction has not always been recognized, it would seem, nevertheless, that it is supported by reason. Where, in a civil case, a party causes his adversary to be arrested unlawfully, a stricter rule of liability should obtain than where a citizen inspiring the arrest has been actuated by public interest solely. A person who causes the arrest of another in a civil proceeding must answer in damages, even though the arrest was in pursuance of an order of court, when the court issuing the order has exceeded its jurisdiction, or had no authority to do so.

See also *Yahola v. Whipple,* 189 Okla. 583 (1941) (allowing a cause of action for false imprisonment to proceed where the plaintiff's detention was at the instance of a void court order procured by the defendant); *Pomeranz v. Class,* 82 Colo. 173

(1927) (finding a receiver and his attorney liable for false imprisonment damages as a consequence of procuring a void order adjudging the plaintiff guilty of contempt notwithstanding the immunity of the judge and the officer serving the warrant of arrest). The results in the foregoing cases are consistent with Florida law, since a void judgment does not suffice as "legal authority" or "color of authority" within the elements of a cause of action for false imprisonment. See Johnson, 19 So.2d at 700; Jackson, 665 So.2d at 341; see also *Jibory v. City of Jacksonville,* 920 So.2d 666 (Fla. 1st DCA 2005) (holding that a false imprisonment claim would lie against the city where the warrant upon which the plaintiff was arrested was void), review dismissed, 926 So.2d 1269 (Fla.2006).

In conclusion, we note that in order for a plaintiff to recover on a false imprisonment claim, all of the elements must be proven. Here, while the issue of whether Martin Memorial acted with legal authority may be resolved as a matter of law, the trier of fact must determine as a matter of fact whether Martin Memorial's actions were unwarranted and unreasonable under the circumstances. See *Rivers v. Dillards Dep't Store, Inc.,* 698 So.2d 1328 (Fla. 1st DCA 1997) (holding that even where some authority to restrain liberty exists, the reasonableness of the procedures followed may present a question of fact). Accordingly, we reverse the order dismissing Montejo's false imprisonment suit and remand for further proceedings.

Reversed and Remanded.

GUNTHER and TAYLOR, JJ., concur.

Questions to Ponder About *Montejo v. Martin Memorial*

A. Under Florida, confinement is not actionable if a jury determines it to be reasonable or warranted under the circumstances. This is at odds with the traditional formulation, which allows no such escape from liability. Dan B. Dobbs has written that false imprisonment "regresses a dignitary or intangible interest, a species of emotional distress or insult that one feels at the loss of freedom and the subjugation to the will of another." Is Florida's formulation better, providing needed flexibility in the tort? Or does the tort of false

imprisonment lose its moral grounding in autonomy and liberty interests when one person can confine another when reasonable under the circumstances?

B. If it is tortious for hospitals to deport indigent patients, and if no other facilities will take them, what should hospitals do about their indigent patients? If you were the hospital's attorney, what would you advise?

19. Intentional Infliction of Emotional Distress

"If only these treasures were not so fragile as they are precious and beautiful."

– Johann Wolfgang von Goethe, *The Sorrows of Young Werther*, 1774

Introduction

The tort of intentional infliction of emotional distress is the most recent of the intentional torts. First arriving on the scene in the late 1800s, the tort won general acceptance the last half of the 1900s. It often goes by the abbreviation "IIED" and many other names as well, the most concise of which is "outrage." Other, longer names are "intentional infliction of emotional harm," "intentional infliction of mental distress," and "intentional infliction of mental shock."

Happily, in our society, people are largely civil to one another. But even when they are not, their insulting behavior rarely rises to the level required for liability under IIED. As we will see, IIED claims require unusual facts and extreme behavior.

One place where IIED does seem to pop up with some frequency is in the employment context. Sadly, there seems to be all too many people wanting to inflict misery on their co-workers. But IIED comes up in other contexts as well – not the least of which are high school hallways and social media sites.

The Elements of IIED

Here is a blackletter formulation for intentional infliction of emotional distress:

> A plaintiff can establish **a prima facie case for intentional infliction of emotional distress** by showing that the defendant (1) intentionally or recklessly, (2) by extreme and outrageous

conduct (3) inflicted severe emotional distress on the plaintiff.

IIED: Intent

Like many other torts terms, intentional infliction of emotional distress is a misnomer. The intent element of the prima facie case is satisfied when the defendant either intended the plaintiff's severe emotional distress, or acted in deliberate disregard of a high probability of causing the plaintiff to suffer severe emotional distress (*i.e.,* recklessness). Thus, despite its traditional classification as an intentional personal tort, and despite the "intentional" in its name, IIED does not require that the defendant act intentionally. Recklessness will suffice.

When it comes to transferred intent, IIED is a lone wolf: Intent generally does not transfer to the outrage tort. So the intent to cause a battery, by itself, is insufficient intent for IIED. And the intent to cause person X to suffer severe emotional distress will not suffice as intent for a suit brought by Y for emotional distress.

The nonapplicability of transferred intent for IIED notwithstanding, it should be noted that some courts have held that a plaintiff can successfully sue a defendant for IIED where the defendant inflicts intentional bodily harm on the plaintiff's immediate family member in the plaintiff's presence – even if the defendant did not intend any emotional distress by doing so. This sort of fact scenario is probably best thought of not as transferred intent, however, but as an instance of recklessness fulfilling the intent requirement. That is, in such a situation, the defendant is construed to have acted in deliberate disregard of the likelihood that the plaintiff would be made to suffer severe emotional distress.

IIED: Extremeness and Outrageousness

While the intent element may be comparatively easy to meet in an IIED claim, the requirement of extreme and outrageous conduct is a high bar. Being rude or insulting – even startlingly rude and grossly insulting – is not nearly enough to qualify as extreme and outrageous conduct.

A typical statement is that the conduct "must transcend all bounds of decency and be regarded as atrocious and utterly intolerable in a civilized community." *Graham v. Guilderland Central School District*, 256 A.D.2d 863, 863–64 (N.Y. App. Div. 1998).

One vivid example of outrageousness comes from *Nickerson v. Hodges,* 84 So. 37 (La. 1920). The plaintiff, Miss Nickerson, earnestly believed that a pot of gold was buried on her property. Her belief was based on family rumor and bolstered by a fortune teller. The neighbors – aware that Nickerson had a history of mental illness – filled a pot with rocks and dirt, put a lid on it, and buried it where she could find it. Included with the pot were instructions to encourage Nickerson to open the pot for the first time in front of a gathering of people. She did. The court reports that "the results were quite serious indeed, and the mental suffering and humiliation must have been quite unbearable, to say nothing of the disappointment and conviction, which she carried to her grave some two years later, that she had been robbed." Despite the death of the plaintiff before trial, her estate succeeded in winning a claim for intentional infliction of emotional distress.

Other examples of IIED include killing a pet animal in the pet owner's presence (*LaPorte v. Associated Independents, Inc.* 163 So.2d 267 (Fla. 1964)) and burning a cross in the yard of an African-American person (*Johnson v. Smith*, 878 F.Supp. 1150 (N.D. Ill. 1995)).

Notwithstanding these examples, IIED claims do not necessarily have to involve grim spectacle. The can involve quiet, isolated suffering as well. In *Kroger Co. v. Willgruber,* 920 S.W.2d 61 (Ky. 1996), the court recognized an outrage claim where the complaint alleged that an employee, fired for a refusal to violate ethical rules, was then sent to chase an nonexistent job in another state.

While mere insults and incivility are generally not outrageous enough for IIED, there are two situations in which invective alone can be enough to sustain a claim.

First is where there is a continued pattern of insults or demeaning behavior. Given enough time, simple boorishness can eventually accumulate to tortious proportions. Most people won't stand around

and be continuously insulted if they can help it, so actionable patterns of repeated verbal abuse often happen in a context where the plaintiff is economically compelled to stay and endure the mistreatment. Workplaces and schools are frequent examples.

Second, courts have traditionally allowed even single instances of gross insult to be actionable where the defendant is an innkeeper or common carrier. Allowance of such claims harkens to an ancient ethic that demands travellers – far from home and dependent on the assistance of strangers – are to be treated especially well.

To generalize about the extreme-and-outrageous requirement, one can often see a theme of inequality between the plaintiff and defendant. Along these lines, Professor Dan B. Dobbs identifies four markers that tend to support a finding of outrageousness: (1) abusing one's position over or power with respect to the plaintiff, (2) taking advantage of a plaintiff whom the defendant knows to be particularly vulnerable, (3) repeating offensive conduct in a situation where the plaintiff is not, as a practical matter, free to leave, and (4) perpetrating or threatening violence against a person or property in which the plaintiff is known to have a particular interest. *See* DAN B. DOBBS, THE LAW OF TORTS, p. 827 (2000).

Note that because the threshold for what counts as outrageous depends on societal mores. What is outrageous in one era many not be in the next. So, as our culture changes, IIED will change right along with it.

IIED: Severe Emotional Distress

Another high threshold for outrage claims is the requirement that the plaintiff must have suffered severe emotional distress. Suffice it to say that merely being upset or even reduced to tears is not enough. The word "severe" is key.

In an earlier era of IIED, plaintiffs had to prove some physical symptom of the distress – heart problems, stomach ulcers, teeth worn from grinding, or some other corporeal manifestation of torment. In fact, some jurisdictions still require a physical symptom. But the majority of courts today leave it up to the jury to determine

whether or not the distress is truly severe. Medical testimony is optional. Of course, where physical ailments can be proved, the plaintiff's case benefits.

The extremeness and outrageousness of the conduct tends to go hand-in-hand with the severity of the emotional distress. A strong showing of outrageousness aids the showing of severity.

It's helpful to take a moment to contrast IIED's requirement of severe emotional distress with assault's requirement of an apprehension of harmful or offensive contact. A particularly stalwart plaintiff, unfazed by an apparently impending finger poke, can bring an assault claim – unflappability notwithstanding. But an emotionally tough plaintiff, one who lets the defendant's taunts and slings roll of her or his back, *is* barred from claiming IIED. No severe distress, no claim.

Case: Wilson v. Monarch Paper

The following case looks at IIED in the employer/employee context, combined with an allegation of age discrimination. Among other things, the case highlights the level of dependence people have on their jobs – both for money and for a sense of well-being.

Wilson v. Monarch Paper

United States Court of Appeals for the Fifth Circuit
August 16, 1991

939 F.2d 1138. Richard E. WILSON, Plaintiff-Appellee, v. MONARCH PAPER COMPANY, the Unisource Corporation, and Alco Standard Corporation, Defendants-Appellants. No. 89-2293. Before REYNALDO G. GARZA, JOLLY and JONES, Circuit Judges.

Circuit Judge E. GRADY JOLLY:

I~

Because Monarch is challenging the sufficiency of the evidence, the facts are recited in the light most favorable to the jury's verdict. In 1970, at age 48, Richard E. Wilson was hired by Monarch Paper Company. Monarch is an incorporated division

of Unisource Corporation, and Unisource is an incorporated group of Alco Standard Corporation. Wilson served as manager of the Corpus Christi division until November 1, 1977, when he was moved to the corporate staff in Houston to serve as "Corporate Director of Physical Distribution." During that time, he routinely received merit raises and performance bonuses. In 1980, Wilson received the additional title of "Vice President." In 1981, Wilson was given the additional title of "Assistant to John Blankenship," Monarch's President at the time.

While he was Director of Physical Distribution, Wilson received most of his assignments from Blankenship. Blankenship always seemed pleased with Wilson's performance and Wilson was never reprimanded or counseled about his performance. Blankenship provided Wilson with objective performance criteria at the beginning of each year, and Wilson's bonuses at the end of the year were based on his good performance under that objective criteria. In 1981, Wilson was placed in charge of the completion of an office warehouse building in Dallas, the largest construction project Monarch had ever undertaken. Wilson successfully completed that project within budget.

In 1981, Wilson saw a portion of Monarch's long-range plans that indicated that Monarch was presently advancing younger persons in all levels of Monarch management. Tom Davis, who was hired as Employee Relations Manager of Monarch in 1979, testified that from the time he started to work at Monarch, he heard repeated references by the division managers (including Larry Clark, who later became the Executive Vice President of Monarch) to the age of employees on the corporate staff, including Wilson.

In October 1981, Blankenship became Chairman of Monarch and Unisource brought in a new, 42-year-old president from outside the company, Hamilton Bisbee. An announcement was made that Larry Clark would be assuming expanded responsibilities in physical distribution.~ When Bisbee arrived at Monarch in November 1981, Wilson was still deeply involved in the Dallas construction project. Richard Gozon, who was 43

years old and the President of Unisource, outlined Blankenship's new responsibilities as Chairman of the company and requested that Blankenship, Bisbee, Wilson, and John Hartley of Unisource "continue to work very closely together on the completion of the Dallas project." Bisbee, however, refused to speak to Wilson or to "interface" with him. This "silent treatment" was apparently tactical; Bisbee later told another Monarch employee, Bill Shehan, "if I ever stop talking to you, you're dead." Shehan also testified that at a meeting in Philadelphia at about the time Bisbee became President of Monarch, Gozon told Bisbee, "I'm not telling you that you have to fire Dick Wilson. I'm telling you that he cannot make any more money."

As soon as the Dallas building project was completed, Bisbee and Gozon intensified an effort designed to get rid of Wilson.~ During the same time frame, Bisbee was preparing a long-range plan for Monarch, in which he made numerous references to age and expressed his desire to bring in "new blood" and to develop a "young team." This long-range plan was transmitted to Gozon, who expressed no dissatisfaction with the goals Bisbee had set out in the plan. In the meantime, Bisbee and Clark began dismantling Wilson's job by removing his responsibilities and assigning them to other employees. Clark was also seen entering Wilson's office after hours and removing files.

Blankenship was diagnosed with cancer in February 1982. In March 1982, Wilson was hospitalized for orthopedic surgery. Immediately after Blankenship's death in June 1982, Bisbee and Snelgrove gave Wilson three options: (1) he could take a sales job in Corpus Christi at half his pay; (2) he could be terminated with three months' severance pay; or (3) he could accept a job as warehouse supervisor in the Houston warehouse at the same salary but with a reduction in benefits. The benefits included participation in the management bonus plan, and the loss of the use of a company car, a company club membership, and a company expense account.

Wilson accepted the warehouse position. Wilson believed that he was being offered the position of Warehouse Manager, the only vacant position in the Houston warehouse at the time. When Wilson reported for duty at the warehouse on August 16, 1982, however, he was placed instead in the position of an entry level supervisor, a position that required no more than one year's experience in the paper business. Wilson, with his thirty years of experience in the paper business and a college degree, was vastly overqualified and overpaid for that position.

Soon after he went to the warehouse, Wilson was subjected to harassment and verbal abuse by his supervisor, Operations Manager and Acting Warehouse Manager Paul Bradley (who had previously been subordinate to Wilson). Bradley referred to Wilson as "old man" and admitted posting a sign in the warehouse that said "Wilson is old." In Bradley's absence, Wilson was placed under the supervision of a man in his twenties. Finally, Wilson was further demeaned when he was placed in charge of housekeeping but was not given any employees to assist him in the housekeeping duties. Wilson, the former vice-president and assistant to the president, was thus reduced finally to sweeping the floors and cleaning up the employees' cafeteria, duties which occupied 75 percent of his working time.

In the late fall of 1982, Wilson began suffering from respiratory problems caused by the dusty conditions in the warehouse and stress from the unrelenting harassment by his employer. On January 6, 1983, Wilson left work to see a doctor about his respiratory problems. He was advised to stay out of a dusty environment and was later advised that he had a clinically significant allergy to dust. Shortly after January 6, 1983, Wilson consulted a psychiatrist who diagnosed him as suffering from reactive depression, possibly suicidal, because of on-the-job stress. The psychiatrist also advised that Wilson should stay away from work indefinitely.

Wilson filed an age discrimination charge with the EEOC in January 1983. Although he continued being treated by a psychiatrist, his condition deteriorated to the point that in

March 1983, he was involuntarily hospitalized with a psychotic manic episode. Prior to the difficulties with his employer, Wilson had no history of emotional illness.

Wilson's emotional illness was severe and long-lasting. He was diagnosed with manic-depressive illness or bipolar disorder. After his first hospitalization for a manic episode, in which he was locked in a padded cell and heavily sedated, he fell into a deep depression. The depression was unremitting for over two years and necessitated an additional hospital stay in which he was given electroconvulsive therapy (shock treatments). It was not until 1987 that Wilson's illness began remission, thus allowing him to carry on a semblance of a normal life.

II

On February 27, 1984, Wilson filed suit against the defendants, alleging age discrimination and various state law tort and contract claims. The defendants filed a counterclaim, seeking damages in excess of $10,000 for libel and slander, but later dismissed it.~ On November 30 and December 28, 1988, the case was tried before a jury on Wilson's remaining claims that the defendants (1) reassigned him because of his age; (2) intentionally inflicted emotional distress; and (3) terminated his long-term disability benefits in retaliation for filing charges of age discrimination under the Age Discrimination in Employment Act (ADEA).

The district court denied the defendants' motions for directed verdict. The jury returned a special verdict in favor of Wilson on his age discrimination claim, awarding him $156,000 in damages, plus an equal amount in liquidated damages. The jury also found in favor of Wilson on his claim for intentional infliction of emotional distress, awarding him past damages of $622,359.15, future damages of $225,000, and punitive damages of $2,250,000. The jury found in favor of the defendants on Wilson's retaliation claim. The district court entered judgment for $3,409,359.15 plus prejudgment interest. The district court denied the defendants' motions for judgment NOV, new trial, or, alternatively, a remittitur. The defendants appeal.

III~

~To prevail on a claim for intentional infliction of emotional distress, Texas law requires that the following four elements be established:

> (1) that the defendant acted intentionally or recklessly;
>
> (2) that the conduct was 'extreme and outrageous';
>
> (3) that the actions of the defendant caused the plaintiff emotional distress; and
>
> (4) that the emotional distress suffered by the plaintiff was severe.

The sole issue before us is whether Monarch's conduct was "extreme and outrageous."

"Extreme and outrageous conduct" is an amorphous phrase that escapes precise definition. In *Dean v. Ford Motor Credit Co., supra,* however, we stated that

> [l]iability [for outrageous conduct] has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.... Generally, the case is one in which a recitation of the facts to an average member of the community would lead him to exclaim, "Outrageous."

885 F.2d at 306 (citing Restatement (Second) of Torts § 46, Comment d (1965)). The Restatement also provides for some limits on jury verdicts by stating that liability "does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.... There is no occasion for the law to intervene in every case where someone's feelings are hurt." Rest. (Second) of Torts § 46.

The facts of a given claim of outrageous conduct must be analyzed in context, and ours is the employment setting. We are

cognizant that "the work culture in some situations may contemplate a degree of teasing and taunting that in other circumstances might be considered cruel and outrageous." *Keeton, et al., Prosser & Keeton on Torts* (5th ed. 1984 & 1988 Supp.). We further recognize that properly to manage its business, every employer must on occasion review, criticize, demote, transfer, and discipline employees. We also acknowledge that it is not unusual for an employer, instead of directly discharging an employee, to create unpleasant and onerous work conditions designed to force an employee to quit, i.e., "constructively" to discharge the employee. In short, although this sort of conduct often rises to the level of illegality, except in the *most* unusual cases it is not the sort of conduct, as deplorable as it may sometimes be, that constitutes "extreme and outrageous" conduct.~

Wilson contends that Monarch's conduct was equally outrageous as the ~incidents~ in *Dean*. Generally, Wilson argues that an average member of the community would exclaim "Outrageous!" upon hearing that a 60-year-old man, with 30 years of experience in his industry, was subjected to a year-long campaign of harassment and abuse because his company wanted to force him out of his job as part of its expressed written goal of getting rid of older employees and moving younger people into management.~

Most of Monarch's conduct is similar in degree to conduct in *Dean* that failed to reach the level of outrageousness. We hold that all of this conduct, except as explicated below, is within the "realm of an ordinary employment dispute," and, in the context of the employment milieu, is not so extreme and outrageous as to be properly addressed outside of Wilson's ADEA claim.

Wilson argues, however, that what takes this case out of the realm of an ordinary employment dispute is the degrading and humiliating way that he was stripped of his duties and demoted from an executive manager to an entry level warehouse supervisor with menial and demeaning duties. We agree.

Monarch argues that assigning an executive with a college education and thirty years experience to janitorial duties is not

extreme and outrageous conduct. The jury did not agree and neither do we. We find it difficult to conceive a workplace scenario more painful and embarrassing than an executive, indeed a vice-president and the assistant to the president, being subjected before his fellow employees to the most menial janitorial services and duties of cleaning up after entry level employees: the steep downhill push to total humiliation was complete. The evidence, considered as a whole, will fully support the view, which the jury apparently held, that Monarch, unwilling to fire Wilson outright, *intentionally and systematically* set out to humiliate him in the hopes that he would quit. A reasonable jury could have found that this employer conduct was intentional and mean spirited, so severe that it resulted in institutional confinement and treatment for someone with no history of mental problems. Finally, the evidence supports the conclusion that this conduct was, indeed, so outrageous that civilized society should not tolerate it. Accordingly, the judgment of the district court in denying Monarch's motions for directed verdict, JNOV and a new trial on this claim is affirmed.~

In conclusion, we express real concern about the consequences of applying the cause of action of intentional infliction of emotional distress to the workplace. This concern is, however, primarily a concern for the State of Texas, its courts and its legislature. Although the award in this case is astonishingly high, neither the quantum of damages, nor the applicability of punitive damages has been appealed.~

AFFIRMED.

Questions to Ponder About *Wilson v. Monarch Paper*

A. Is this the kind of thing that a would-be plaintiff should just "put up with"? Or is it a good thing that people in Wilson's position can sue?

B. The court expressed "real concern about the consequences of applying [IIED] to the workplace." Are there special dangers to recognizing a cause of action for IIED in the employment context?

Would it be a good idea for a state legislature to bar such claims by statute?

C. The court says that "extreme and outrageous" is amorphous and eludes attempts at precise definition. With favor, the court notes the trope that extreme and outrageous conduct is the kind of conduct that would cause a person to exclaim, "Outrageous." Is this approach to defining the tort circular? And if so, is it therefore, unhelpful? Or does this explanation help to communicate something of the gestalt of IIED?

Case: Dzamko v. Dossantos

The following case looks at IIED in the modern social-media context.

Dzamko v. Dossantos

Superior Court of Connecticut
October 23, 2013

57 Conn. L. Rptr. 30. Joseph Dzamko et al. v. Joseph C. Dossantos. CV136027575

JON C. BLUE, JUDGE.

The Motion To Strike now before the court involves allegations of well-established torts committed in the age of the internet. Although the facts are novel, the applicable law is not. As Holmes, J. once wrote, "I am frightened weekly but always when you walk up to the lion and lay hold the hide comes off and the same old donkey of a question of law is underneath."

The alleged facts (assumed, for present purposes, to be true) arise out of a mistaken identity scenario, worthy of a modern Shakespeare, involving the intersection of Facebook pilferage and an internet sting operation. In 2012, the defendant, Joseph C. Dossantos, initiated sexually explicit conversations in an internet chat room, optimistically labeled "Connecticut Romance." Dossantos mistakenly believed that he was communicating with two fourteen-year-old girls. In fact, as courtwatchers will already surmise, the "fourteen-year-old girls" were, in fact, police detectives. Dossantos, who was forty years

old, wanted his correspondents to believe that he was younger than he was. To bolster his claim, he sent three digital images of "himself" to one of the "girls." Unhappily, the images were not images of Dossantos. They were, rather, images of the plaintiff, Joseph Dzamko ("Joseph"), appropriated by Dossantos from Joseph's Facebook page. The images of Joseph were not themselves compromising. They were perfectly normal photographs. But the context in which Dossantos used them plainly made it appear that the person thus depicted was engaged in sexually predatory behavior.

The detective receiving the transmissions recognized the person so depicted. It was Joseph. By malign fate, Joseph was a police officer in another town and had been a Police Academy classmate of the detective. The detective forwarded the images of Joseph to Internal Affairs. Internal Affairs investigated, and Joseph had to tell his wife, Sarah Dzamko ("Sarah") what had happened. The investigating officers eventually traced Joseph's Facebook images to Dossantos. Dossantos, confronted with the evidence, admitted that he had not only sent Joseph's images to the detective as images of himself but that he had done the same thing with at least twenty other females (or persons who he presumed to be females) on the internet. Forensic review of Dossantos' computer revealed that these transmissions had occurred in the context of sexually explicit conversations. All of this caused Joseph and Sarah great distress.

On April 9, 2013, Joseph and Sarah commenced this action against Dossantos by service of process. Their Revised Complaint consists of ten counts, but four of these counts (the Second, Sixth, Seventh, and Tenth Counts) have been withdrawn. Three additional counts (the First, Third, and Eighth Counts) are not the subject of the motion now before the court and can be ignored for present purposes. That leaves three counts in contention: the Fourth Count (alleging publicity placing Joseph in a false light), the Fifth Count (alleging intentional infliction of emotional distress as to Joseph), and the Ninth Count (alleging intentional infliction of emotional distress as to Sarah).

On July 19, 2013, Dossantos filed the Motion To Strike now before the Court. The Motion seeks to strike the Fourth, Fifth, and Ninth Counts (as well as some counts that have been withdrawn and need not be further discussed). The Motion contends that these counts fail to state claims upon which relief can be granted. The Motion was argued on October 21, 2013. The counts in question will be considered in order.~

Fifth Count—Intentional Infliction of Emotional Distress (Joseph).

The Fifth Count alleges intentional infliction of emotional distress as to Joseph. The elements of this cause of action are "(1) that the actor intended to inflict emotional distress or that he knew or should have known that emotional distress was the likely result of his conduct; (2) that the conduct was extreme and outrageous; (3) that the defendant's conduct was the cause of the plaintiff's distress; and (4) that the emotional distress sustained by the plaintiff was severe." *Perez–Dickson v. City of Bridgeport*, 304 Conn. 483, 526–27 (2012). (Internal quotation marks and citation omitted.) The Fifth Count adequately pleads these elements.

With respect to the first element, the Revised Complaint sufficiently alleges facts from which it could reasonably be inferred that, at a minimum, Dossantos should have known that emotional distress would be the likely result of his conduct. It is very well known that images transmitted on the internet are not likely to remain private for very long. All too often, they are retransmitted to the world. Think of the much-publicized issue of "sexting" images sent by clueless teenagers. These images, once sent to a single, supposedly private source, end up being resent to hundreds, and soon thousands, of other people. Any reasonable person could foretell that eventually someone was going to recognize the person in the images transmitted by Dossantos and draw conclusions that would, in turn, cause that person to suffer emotional distress.

Dossantos denies that his conduct was extreme and outrageous, but he cannot do that with a straight face. The test is whether "the recitation of the facts to an average member of the community would arouse his resentment against the actor and

lead him to exclaim, Outrageous!" *Perez–Dickson,* 304 Conn. at 527. This is such a case.

Dossantos does not dispute the remaining elements of the alleged tort. Special damages are not an element of intentional infliction of emotional distress and have never been thought to be so. See Restatement (Second) of Torts § 46 cmt. k (1965). ("[I]f the enormity of the outrage carries conviction that there has in fact been severe emotional distress, bodily harm is not required.") The emotional distress sustained by the plaintiff must, of course, be severe, but that is sufficiently alleged here.

Ninth Count—Intentional Infliction of Emotional Distress—Sarah.

The Ninth Count alleges intentional infliction of emotional distress as to Sarah. That count alleges that Dossantos's conduct "was carried out with the knowledge that it probably would cause … Sarah … to suffer emotional distress." This is not, as Dossantos argues, an allegation of bystander emotional distress, such as that of a witness to an automobile accident. Dossantos's conduct implied that Joseph was a sexual predator. This would naturally reflect on Joseph's spouse and cause her great personal embarrassment and natural concern for her own personal health quite apart from the distress she may have experienced from observing Joseph's own travail. Under these circumstances, the tort of intentional infliction of emotional distress with respect to Sarah has been adequately pleaded.

The Motion To Strike is denied~.

Questions to Ponder About *Dzamko v. Dossantos*

A. As with the *Wilson* court, the *Dzamko* court also references the exclamation-of-the-average-member-of-the-community idea for explaining extremeness and outrageousness. There are a couple of differences, however. For one, the *Dzamko* court uses an exclamation point ("Outrageous!"). The other difference is that the *Dzamko* court calls it a "test." Is it a good test? And what do you think of the *Dzamko* court's application of the test to the facts of this case? Would the average person exclaim "Outrageous!" upon learning of Dossantos's conduct? Did you?

B. The *Dzamko* court allows an IIED claim not only for Joseph Dzamko, but also for his wife, Sarah, brushing aside concerns that this is "bystander emotional distress." Do you agree that Sarah should have a claim? Supposing the Dzamkos had children, should they be able to bring claims as well? If Joseph's mother and father had been aware of this, should they also have claims?

The First Amendment Defense to IIED

As a final note, it's worth considering that an IIED cause of action can be trumped by the First Amendment – at least where the cause of the emotional distress is speech about a matter of public concern.

In *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988), the U.S. Supreme Court unanimously held that a magazine had a protectable free-speech interest in lampooning a politically active televangelist, Jerry Falwell, by publishing an account of a fictional sexual encounter between Falwell and his mother. More recently, in *Snyder v. Phelps*, 131 S.Ct. 1207 (2011), the father of a Marine killed in the Iraq War sought to uphold an IIED verdict against a group that protested his son's funeral. The protestors used the funeral as a platform to voice anti-gay and anti-Catholic views. Standing on public sidewalks, they held placards with slogans including "You are going to hell" and "Thank God for dead soldiers." The Supreme Court held 8-1 that the father's IIED cause of action was barred by the First Amendment.

20. Trespass to Land

"As I went walking I saw a sign there
And on the sign it said 'No Trespassing.'
But on the other side it didn't say nothing,
That side was made for you and me."

– Woody Guthrie, "This Land is Your Land," 1944

Introduction

Trespass to land is one of the most ancient torts – and one of the most basic. It's also fundamental. It sits at the root of our capitalist economy. While we might be able to imagine a world without the torts of assault or intentional infliction of emotional distress, it is hard to imagine American society without a private right to take others to court for coming and going as they please on your land.

Just because trespass to land is old, and just because respect for private property is thoroughly ingrained in our culture, do not make the mistake of thinking trespass to land has little relevance to modern practice. Unauthorized incursions on land happen all the time. And trespass to land is a powerful tort, working against seemingly blameless defendants in ways that would make negligence doctrine blanch.

Consent is, of course, a defense. Many if not most trespass-to-land cases involve a consent defense and a question of whether the consent was exceeded.

The Elements of Trespass to Land

The pleading requirements for the tort of trespass to land can be summed up as follows:

> A plaintiff can establish **a prima facie case for trespass to land** by showing: the defendant (1) intentionally (2) caused an intrusion, either by entry onto or failure to leave or remove from, (3) plaintiff's real property.

Trespass to Land: Plaintiff's Real Property

Instead of taking the elements in order, as we've done with other torts, it is necessary to talk first about the last element – what constitutes the plaintiff's real property. Understanding this is a pre-requisite to understanding anything else about the tort.

To begin with, it is important to understand that the plaintiff does not need to be the owner of the land in question. The plaintiff needs only be the **possessor of the land**. A couple renting a house can sue for trespass to land, even though they only have a lease and no title. In fact, the landlord of leased property might not have standing to sue for trespass – at least where there is no damage to the landlord's interest.

Moreover, you need to think of the word "land" broadly. What we are talking about here is not soil, but *realty*, or **real property**. Real property is the land and everything affixed to it, including improvements, buildings, and all fixtures. Because real property can be divided vertically as well as horizontally, an individual apartment on an upper story can be "land" for the purposes of trespass to land. As an example, imagine a multi-story warehouse converted into full-floor loft apartments. Suppose Jackie is the tenant-lessee of the third-floor loft, and Dominga is the tenant of the fourth-floor loft. If Jackie ventures up to the fourth-floor loft without Dominga's permission, Jackie has committed a trespass, even though her GPS coordinates have never taken her outside the latitudes and longitudes of her own apartment.

Assuming it's not divided up vertically (as with a multi-story building), the property interest in a plot of land extends down into the subsurface of the Earth and upward into the sky. Thus, an undivided square lot defines a 3-D real property interest having the shape of an inverted four-sided pyramid, with the point at the center of the Earth, and the outward sloping sides extending into the heavens. If some good-hearted kids are playing a game of catch with a baseball, and if they throw the ball over a corner of the lot of a neighbor, they are liable to that neighbor for trespass to land – that is assuming there was no implied license for the to use the neighbor's

airspace in this way. (And further assuming the neighbor is cranky enough to sue.)

Trespass to Land: Intent

You may find that the intent requirement for trespass to land is unintuitive. So you'll have to pay careful attention to the doctrine here.

As with the other intentional torts the intent required is the intent to act with the purpose or with the substantial certainty of bringing about some consequence. But that consequence is quite different from other intentional torts. The intent for trespass to land needs only to be to cause the movement that intrudes on the plaintiff's land. Put another way, there does not need to be an intent to *trespass*, just an intent to effect the action that constitutes the trespass.

Let's consider an example: Suppose the defendant intends to place a small wire-and-plastic marking flag in the defendant's own ground. But, because of the defendant's innocent misunderstanding of property boundaries, the piece of ground into which the defendant plants the flag happens to be on the plaintiff's property. That's a trespass to land. The intent requirement is satisfied. It does not matter that the defendant was mistaken. Further, it does not matter if the defendant is non-negligent in entering the plaintiff's land. In fact, the defendant could have consulted all the documents in the county hall of records and used state-of-the-art GPS to map out a route. All that is required for intent is that the defendant intended to place the object where it was actually placed. If that happens to be a corner of land belonging to the plaintiff, then the defendant has committed trespass to land.

It is helpful to contrast this with the intent required for battery. Unless some doctrine of transferred intent applied, the intent required for battery is the intent to effect a battery. If the defendant intends to kick a box – but does not know a small child is inside, there is no battery. But if the defendant intends to kick a fencepost – not knowing that the fence post is on someone else's land – then the defendant is liable for trespass to land. The defendant does not have

to intend to trespass, just intend the action that constitutes the trespass.

The intent required for trespass to land is a low bar. But it's not non-existent. Even under the doctrine's expansive view of intent, not every entry will actionable. Suppose the defendant is pushed by someone else on to the plaintiff's land. There's no intent for a trespass action. Similarly, suppose the defendant stumbles and falls onto the plaintiff's land. There is no trespass to land here either, since the defendant did not intent the action that constitute the trespass. Or let's try a tweaked version of our hypothetical of kids playing catch with a baseball. Suppose the kids are trying to come as close as possible without invading the defendant's airspace. Unless their aim was bad enough that they were substantially certain they would miss and pierce the invisible plane of the property boundary, then there is no intent sufficient for a trespass-to-land action.

Finally, we need to note the applicability of the transferred intent doctrine. Under the older, more traditional view of transferred intent, trespass to land is eligible for the application of transferred intent doctrine among the torts of battery, assault, false imprisonment, and trespass to chattels.

Trespass to Land: Entry

An actionable entry on land may be made by the defendant personally. Alternatively, the defendant can be liable by inducing a third person to enter or by causing an object to enter.

According to some authorities, entry can be accomplished even by minute particles. In *Martin v. Reynolds Metals Co.*, 342 P.2d 790 (Or. 1959), a farmer sued over an aluminum plant whose fluoride particulate emissions caused his land to be unfit for raising cattle. The court upheld the cause of action, writing:

> If, then, we must look to the character of the instrumentality which is used in making an intrusion upon another's land we prefer to emphasize the object's energy or force rather than its size. Viewed in this way we may define trespass as any intrusion which invades the

> possessor's protected interest in exclusive possession, whether that intrusion is by visible or invisible pieces of matter or by energy which can be measured only by the mathematical language of the physicist.

An "entry" does not need to be a transit of the border of the plaintiff's property. Suppose the defendant is on the plaintiff's property with the plaintiff's permission. There is no trespass to land at this point. However, the defendant could accomplish a trespass by interacting with the land or fixtures in a way that is beyond the scope of that permission. Sneaking into a party host's off-limits bathroom to rummage through the medicine cabinet is an example. Or even in the great room, where the defendant is authorized to be, a trespass could be accomplished by jumping on to a table and swinging from the chandelier.

Trespass to Land: Failure to Leave or Remove

The trespass need not be an affirmative act. It can be an omission as well. A guest who refuses to leave when asked commits a trespass by remaining. And some friends who have parked a boat in your driveway commit a trespass if, once their welcome is worn out, they do not return to drive the boat trailer away.

Trespass to Land: Damages and Scope of Recovery

If the trespasser does no damage, the plaintiff can still recover nominal damages. If the trespasser does cause damage – personal injury, property damage, or even mental distress – the plaintiff can recover compensatory damages on that basis.

The scope of recoverable damages in a trespass to land case can be breathtaking. Any damages caused by the trespasser – even if highly unpredictable and even if the trespasser was exercising due care – can be recovered. This is quite extraordinary when compared to the negligence cause of action. In negligence, the requirement of a breach of the duty of care and the application of proximate causation doctrine would foreclose many damages claims that are perfectly viable in a trespass-to-land case.

Suppose an innocent trespasser – with a reasonable belief she or he is not trespassing – consistently undertakes every reasonable precaution while on the plaintiff's land, but nonetheless causes some damage in an utterly unforeseeable manner. The trespass-to-land tort can be used to make the defendant liable for the full extent of the damage. An example is *Cleveland Park Club v. Perry*, 165 A.2d 485 (D.C. App. 1960), in which a nine-year-old, frolicking in the club's pool, raised a metal drain cover and inserted a tennis ball. When the boy came back to get his ball, it had vanished. It turns out the ball was sucked into the pool's drain, where it lodged in a critical place. The pool had to be closed down for extensive repairs. Club management was not amused, and it sued for the cost of the repairs. Handing a victory to the club, the court noted that under negligence, the child's age would be a mitigating factor, since a minor's age adjusts the standard of care in the child's favor. But no such amelioration was available with the trespass-to-land action: "[S]ince recovery under [trespass to land] is based on force and resultant damage regardless of the intent to injure, a child of the most tender years is absolutely liable to the full extent of the injuries inflicted."

Reading: Trespass by Airplane

As you have probably gathered by now, trespass to land is a doctrine that is both powerful and inflexible. With roots going back many centuries, it anticipated little about our modern world. The following law review article from long ago shows how legal doctrine can be put under pressure by unanticipated new technologies – in this case, the airplane. Published in 1919, this article came out 16 years after the first Wright Brothers flight. It was also in the immediate aftermath of World War I, which spurred colossal advances in aviation technology.

Trespass by Airplane

Harvard Law Review
March 1919

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NOTE:

The rapid approach of the airplane as an instrumentality of commerce presents the occasion for defining more precisely the doctrine of the ownership of the air space, as embodied in Coke's maxim, cujus est solum, ejus usque ad coelum. Examining first the cases which involve interferences with the column of air by encroachments from adjoining lands, we find that not only is the subjacent landowner permitted to cut away as nuisances overhanging shrubbery and projecting cornices, but in some states he may resort to an action in ejectment. That the encroaching landowner is liable also for all foreseeable damage is settled; but whether there is a cause of action for the mere entry into the air space resulting in no real injury is not so clear. In England there are, in addition to conflicting dicta on the exact case of a balloon, irreconcilable statements concerning the encroachment cases.⁽*Fay v. Prentice*, 1 C. B. 828 (1845) (damage presumed); *Smith v. Giddy*, [1904] 2 K. B. 448, 451 (if no damage, the plaintiff's only right is to cut back trees). Cf. *Ellis v. Loftus Iron Co.*, 10 C. P. 10 (1874) (trespass for a horse thrusting his head over a fence); *Clifton v. Bury*, 4 T. L. R. 8 (1887) (firing bullets over land not a technical trespass).⁾ In this country, however, actual damage from the encroachment does not seem to be requisite for a cause of action.⁽~*Smith v. Smith*, 110 Mass. 302 (1872) (projecting eaves are "a wrongful occupation of the plaintiff's land for which he may maintain an action in trespass");~ *Hannabalson v. Sessions*, 116 Iowa, 457, 90 N. W. 93 (1902) (leaning on a fence so that an arm extends over is a trespass); *Butler v. Frontier Telephone Co.*, 186 N. Y. 486, 491, 79 N. E. 716 (1906) ("the law regards the empty space as if it were a solid inseparable from the soil and protects it from hostile occupation accordingly." The owner has "the right to the exclusive possession of that space which is not personal property but a part of the land").~⁾ The air space, at least near the ground, is almost as inviolable as the soil itself.

On the reasoning of these cases, the aviator would be held a wrongdoer and, therefore, would be liable for all foreseeable damage to the land.⁽~Cf. *Guille v. Swan*, 19 Johns. (N. Y.) 381 (1822) (descending balloonist liable for trespasses by a crowd that gathered to aid him)~.⁾ This financial responsibility for all

the natural consequences of the flight over the land, regardless of the care exercised, may prove so great a burden that it will retard considerably the flow of capital into the airplane service and hamper materially its development. Yet states adopting the doctrine of absolute liability in the conduct of dangerous undertakings might impose that burden at any rate on the aviator. Massachusetts, however, has already provided against such a difficulty by enacting that there be liability only for failure to take every reasonable precaution; and the statute is probably constitutional. The consequences of the trespass, other than liability for actual damage, need concern the aviator but little. A litigious owner will find it expensive seeking nominal damages, especially where statutes make costs at law discretionary. Further, he will be an ingenious landowner who can keep the trespassing airplane off without seriously endangering the aviator's life; whatever means he employs will be far from reasonable. Then, too, there will be practically no basis for an injunction to prevent the repeated trespasses, since the sum total of the damage would be nominal and the danger of an easement's arising the slightest, when we consider the difficulty of establishing twenty years' adverse user of a particular lane at a fixed height as well as within a certain width.

If we rigorously apply Coke's maxim, the result is that the law will frown upon the aviator, but unless he causes actual damage it will connive at the formal wrong. This branding of the inoffensive aviator as a tortfeasor, even if only in form, may be an embarrassing annoyance to one who acclaims the elasticity of the common law. Fortunately there are no binding decisions which stamp the aviator a trespasser; and of the cases adopting Coke's maxim unqualifiedly it may be said that the particular situation of a passage by an airplane was not considered. They have, then, only an inferential bearing on our problem, so that the courts may feel free to invoke general principles and practical considerations in balancing the interest of the aviator in the unrestrained development of a beneficial enterprise and that of the landowner in the free use of his superincumbent air space.

During the past decade foresighted lawyers have been discussing the problem, and several have ventured a theory upon which the balance should be struck. It has been suggested that although, according to the maxim, the landowner does own the air space up to the heavens, there is also a right of public passage, as long as the enjoyment of the land-owner is not interrupted; a situation similar to the right of passage over navigable rivers privately owned. The similarity, however, is slightly incomplete, for on rivers it is the navigator who is not to be interfered with by the bed-owner; here, the owner is to be left undisturbed.

Another theory construes Coke's maxim as securing to the landowner only a right of user, and maintains that the aviator is within the circle of law-abiding citizens, until he causes actual damage. This doctrine, however, imposes absolute liability for any interference with the landowner's use.

A third doctrine asserts that "the scope of possible trespass is limited by that of effective possession," just as possession is at the basis of proprietary rights in land, so is it the basis of any proprietary right in the air space. The passage at a high altitude is, then, not a trespass. But there is liability for all interferences with the air effectively possessed.

Although the flight of an airplane will very likely not be held a tort, the common law seems to afford no basis for holding the aviator liable only for negligence. If the burden of absolute liability for injuries to the land tends to check the growth of the airplane industry, we must look to the legislatures for relief. It is to be observed, however, that a duty of due care under the circumstances surrounding travel by airplane is practically as burdensome as absolute liability.

Case: Boring v. Google

Having gotten some historical context with the legal quandaries presented by the new-fangled aeroplane, we now go back to the future, where roaming dot-com camera cars come up against private property rights.

Boring v. Google Inc.

United States Court of Appeals for the Third Circuit
January 25, 2010

AARON C. BORING; CHRISTINE BORING, husband and wife respectively, Appellants, v. GOOGLE INC. No. 09-2350. Before: RENDELL and JORDAN, Circuit Judges, and PADOVA, Senior District Judge. Marked as "NOT PRECEDENTIAL."

Circuit Judge KENT A. JORDAN:

Aaron C. Boring and Christine Boring appeal from an order of the United States District Court for the Western District of Pennsylvania dismissing their complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure. For the reasons that follow, we affirm in part and reverse in part.

On April 2, 2008, the Borings commenced an action in the Court of Common Pleas of Allegheny County, Pennsylvania against Google, Inc., asserting claims for invasion of privacy, trespass, injunctive relief, negligence, and conversion. The Borings sought compensatory, incidental, and consequential damages in excess of $25,000 for each claim, plus punitive damages and attorney's fees.

The Borings' claims arise from Google's "Street View" program, a feature on Google Maps that offers free access on the Internet to panoramic, navigable views of streets in and around major cities across the United States. To create the Street View program, representatives of Google attach panoramic digital cameras to passenger cars and drive around cities photographing the areas along the street. According to Google, "[t]he scope of Street View is public roads." Google allows individuals to report and request the removal of inappropriate images that they find on Street View.

The Borings, who live on a private road in Pittsburgh, discovered that Google had taken "colored imagery of their residence, including the swimming pool, from a vehicle in their residence driveway months earlier without obtaining any privacy

waiver or authorization." They allege that their road is clearly marked with a "Private Road, No Trespassing" sign, and they contend that, in driving up their road to take photographs for Street View and in making those photographs available to the public, Google "disregarded [their] privacy interest."

On May 21, 2008, Google invoked diversity jurisdiction, removed the action to the United States District Court for the Western District of Pennsylvania, and filed a motion to dismiss.~

On February 17, 2009, the District Court granted Google's motion to dismiss as to all of the Borings' claims.~ In dismissing the trespass claim, the Court held that "the Borings have not alleged facts sufficient to establish that they suffered any damages caused by the alleged trespass."~

The Borings filed a timely notice of appeal from both the District Court's order granting the motion to dismiss and the subsequent denial of their motion for reconsideration.~

The District Court dismissed the Borings' trespass claim, holding that trespass was not the proximate cause of any compensatory damages sought in the complaint and that, while nominal damages are generally available in a trespass claim, the Borings did not seek nominal damages in their complaint. While the District Court's evident skepticism about the claim may be understandable, its decision to dismiss it under Rule 12(b)(6) was erroneous.

Trespass is a strict liability tort, "both exceptionally simple and exceptionally rigorous." Prosser on Torts at 63 (West, 4th ed. 1971). Under Pennsylvania law, it is defined as an "unprivileged, intentional intrusion upon land in possession of another." *Graham Oil Co. v. BP Oil Co.*, 885 F. Supp. 716, 725 (W.D. Pa. 1994) (citing *Kopka v. Bell Tel. Co.*, 91 A.2d 232, 235 (Pa. 1952)). Though claiming not to have done so, it appears that the District Court effectively made damages an element of the claim, and that is problematic, since "[o]ne who intentionally enters land in the possession of another is subject to liability to the possessor for a trespass, although his presence on the land

causes no harm to the land, its possessor, or to any thing or person in whose security the possessor has a legally protected interest." RESTATEMENT (SECOND) TORTS § 163.

Here, the Borings have alleged that Google entered upon their property without permission. If proven, that is a trespass, pure and simple. There is no requirement in Pennsylvania law that damages be pled, either nominal or consequential. It was thus improper for the District Court to dismiss the trespass claim for failure to state a claim. Of course, it may well be that, when it comes to proving damages from the alleged trespass, the Borings are left to collect one dollar and whatever sense of vindication that may bring, but that is for another day. For now, it is enough to note that they "bear the burden of proving that the trespass was the legal cause, i.e., a substantial factor in bringing about actual harm or damage" *C&K Coal Co. v. United Mine Workers of Am.*, 537 F. Supp. 480, 511 (W.D. Pa. 1982), if they want more than a dollar.~

We reverse~ with respect to the trespass claim, and remand with instructions that the District Court permit that claim to go forward.

Historical Note About *Boring v. Google*

On remand, Google accepted a consent judgment whereby they agreed to pay $1. As part of the deal, Google admitted that it trespassed. While that might sound like a loss for Google, the company claimed victory. In a statement, Google said, "We are pleased that this lawsuit has finally ended with plaintiffs' acknowledgment that they are entitled to only $1."

The Borings issued their own statement, saying, "This is one sweet dollar of vindication. Google could have just sent us an apology letter in the very beginning, but chose to try to prove they had a legal right to be on our land. We are glad they finally gave up."

Questions to Ponder About *Boring v. Google*

A. Who won? Can either side really call this a win? Can both?

B. Did the strictness of trespass to land and the availability of nominal damages serve their purpose in this case?

C. Do you think Google is likely to change any of their practices because of this litigation and its outcome?

D. New technologies are often fraught with potential legal liabilities. At one time, it was an open question as to whether a search engine like Google would violate copyright by caching copies of websites and linking to them with a snippet of representative text. Instead of seeking permission from relevant parties or lobbying for a change in the law, many technology companies follow an unwritten motto of, "Innovate first, beg for forgiveness later." Did that work here? What do you think would have happened if, prior to launching its Street View service, Google had lobbied Congress for a statute specifically providing for the service's lawfulness? What if Google had sent letters out to municipalities and residents letting them know that the Street View imaging vehicle was coming, and asking them to flag potential issues for them?

E. Do you think the last name of the plaintiffs in this action matters at all? When this case surfaced in the media, poking fun at the name Boring was one of the first things that pundits and bloggers did. Could it have an effect on the margins of how one frames the case mentally before getting into the facts – at least among the news-browsing public, if not the courts?

F. Cases usually become known by the names of the first listed plaintiff and the first listed defendant. Suppose Aaron and Christine Boring had different last names – say one was Davis and the other was Boring. If you were their attorney, whose name would you list first in the caption? Consider the other side of the caption as well: Suppose you were suing Google Inc. and a subsidiary named Map Data Services LLC. Which defendant would you want to list first?

Problem: Champagne Whooshes

Suppose you are an attorney for the Wang family, which owns a spacious ranch in the high desert of the Southwest. Lately, hot-air ballooning has become a major tourist attraction in the area, with

romantic champagne breakfasts being a particular favorite. But they are becoming a major pain for the Wangs.

Hot-air balloons cannot be directly steered in any direction. The only control the pilot has is whether to ascend or descend by firing the propane burner or pulling a cord that lets hot air out the top. The unsteerability of the balloons is a particular problem for the Wangs. The prevailing winds and the happenstance of some hilly topography conspires to lead balloons right over the Wang's ranch house several days a week.

On a typical morning, when the Wangs are still fast asleep, and as the first rays of dawn are gently kissing the high desert sagebrush, a balloon will glide in absolute silence until it comes within 20 or 30 feet of the Wangs' bedroom patio, and RFRFRFRFRFRPPPPHHHHT!! The sudden roar of the propane burner has the Wangs bolting straight up in bed – disoriented with racing hearts. Sometimes the Wangs are lucky and the balloons pass over at a higher altitude – maybe 100 feet. But even at that distance, the whoosh of the burning gas still can wake up the baby and terrorize the two-year-old. On the other hand, some balloons have been even lower – close enough to the ground that a standing person could touch the basket. On one occasion, a balloon touched the ground lightly before bouncing back into the air.

1. What do you recommend the Wangs do about their problem? Do they have a viable lawsuit against anyone?

2. Suppose Air Adventures, Buoyant Breakfasts, and Champagne Celebrations are the three companies that operate balloon charters that frequently end up over the Wangs' house. Imagine that Buoyant Breakfasts offers to stop flying Mondays through Wednesday and to pay the Wangs a token license fee for all other days. What should the Wangs do with the offer?

21. Trespass to Chattels and Conversion

"Okay, here's the situation:
My parents went away on a week's vacation and
They left the keys to the brand new Porsche
Would they mind? Umm, well, of course not
I'll just take it for a little spin
And maybe show it off to a couple of friends … "

– The Fresh Prince (Will Smith), in *Parents Just Don't Understand*, written by Smith, Peter Harris, and Jeffrey Allen Townes, 1988

Introduction

The torts of trespass to chattels and conversion provide ways to sue people who "mess with your stuff."

Both torts concern chattels. The universe of tangible property is divided into two categories: chattels and realty (or real property). The difference between a chattel and realty is whether its moveable or whether its fixed to the Earth.

In some other languages, there's no need to memorize the definitions – they are clear on their face. In French, the words for chattels and realty are, respectively, *mobiliers* and *immobilier*. Mobile things and immobile things. The German language is similarly transparent: Chattels are *Mobilien*, and real property is *Grundstück* – a word which, on its face, looks like "stuck to the ground." (Although in terms of word roots, it's closer to "piece of land.")

Whether or not something can be carted off drives a big legal distinction. While merely touching someone's real property is actionable as trespass to land, merely touching someone's movable property is not actionable. Instead, there's a higher bar.

How high is that bar? It's different between the two torts of trespass to chattels and conversion. Trespass to chattels requires something

that rises to an *interference*. That could be "borrowing" something for a short time or doing some minor damage to it. The more potent tort of conversion requires something more, for instance absconding with a chattel for a lengthy period of time or doing so much damage that it's "totaled."

Corresponding to its higher-threshold requirement of interference, the tort of conversion has a special remedy unavailable for trespass to chattels – the forced sale. A victorious conversion plaintiff can force the defendant to pay the full market value of the chattel before it was taken or destroyed.

We'll have the same warning here as we did with other intentional torts: Don't be fooled by the ancientness of these doctrines. Trespass to chattels and conversion may have grown up in an era of horse thieves and cattle rustlers, but both causes of action are highly relevant to the contemporary world. As we'll see in this chapter, these torts can play a starring role in thoroughly modern lawsuits – including fights over biomedical research and internet communications.

The Elements of Trespass to Chattels

Here is the blackletter formulation of trespass to chattels:

> A plaintiff can establish **a prima facie case for trespass to chattels** by showing: the defendant (1) intentionally (2) interfered with the (3) plaintiff's right of possession in a chattel.

As was the case with trespass to land, it makes sense to take these elements slightly out of order, starting with the last.

Trespass to Chattels: Plaintiff's Right of Possession in Chattel

There is no requirement that the plaintiff be the owner of the chattel – merely that the plaintiff have a current right of possession. This mirrors the requirement of trespass to land. Thus, a defendant who takes a baseball bat to the plaintiff's leased car is not protected from liability by the fact that the plaintiff does not hold the car's title.

Trespass to Chattels: Intent

The intent requirement for trespass to chattels is somewhat analogous to that for trespass to land. Assuming the defendant does not have permission to touch or use the chattel, the defendant need only intend to act upon the chattel. There is no requirement that the defendant intend to invade any legal right of the plaintiff or intend to harm the chattel. Nor is the defendant excused by way of honest mistake. For instance, if the defendants, innocently believing they are using their own mule, mistakenly use the plaintiff's mule to plow their field, then the defendants are liable for trespass to chattels for the value of the plowing. If the mule is injured despite defendants' best efforts to treat it properly, the defendants are on the hook for that damage as well.

It is important here to distinguish situations where the defendant is using the chattel with permission. Suppose Paul gives Dara permission to drive his car to the neighborhood store. While going to the store, Dara accidentally drives off the road and hits a tree. Paul has no cause of action against Dara for trespass to chattels. If he is going to recover, it will have to be through a negligence action. There is no trespass, because Dara was using the chattel with permission.

Now let's tweak the hypothetical: Dara has permission to drive Paul's car to the neighborhood store, but on a lark, she decides to drive the car out of town to see her mother. Leaving the city limits, she accidentally drives off the road into a tree. Dara has committed trespass to chattels, since her taking the car out of town exceeded the scope of her consent. In this situation, Paul will not need to prove negligence to recover – he can use a trespass-to-chattels action to get damages for the cost of repairs to the car, regardless of whether Dara was careless in her driving.

Note that under the traditional doctrine of transferred intent, trespass to chattels is eligible for the application of transferred intent doctrine with the torts of battery, assault, false imprisonment, and trespass to land.

Trespass to Chattels: Interference

It is in the interference element that trespass to chattels differs most starkly from trespass to land.

Merely touching a chattel does not create liability. For liability to arise, the defendant must "interfere" with the plaintiff's possession. Interference can be established by any of the following:

> (1) actual damage to the chattel,
>
> (2) actual dispossession of the chattel,
>
> (3) loss of use of the chattel for some appreciable amount of time, or
>
> (4) harm to the plaintiff, or to something or someone in whom the plaintiff had a legal interest, on account of the defendant's action.

An observation we can make here is that, in contrast to battery, assault, false imprisonment, and trespass to land, it is not possible to get nominal damages for a trespass-to-chattels action that is truly trivial in nature. Suppose a busybody is upset that a motorcycle enthusiast has parked a bike over a crosswalk. Too annoyed to walk away, the busybody moves the motorcycle a few feet away so that it is out of the crosswalk. Actionable? No. There is no trespass to chattels because there is no interference. Look back over the list, and you'll see that nothing fits: The moving of the motorcycle effected no damage, no dispossession, no loss for an appreciable time, nor harm to anything or anyone connected with the plaintiff. Thus, there is no interference.

Let's try a different motorcycle hypothetical to illustrate a case where there is an interference: Suppose the defendant takes a motorcycle, parked in front of a diner, and drives it a couple of miles away to visit a nail salon, returning it a couple of hours later. This counts as a dispossession, so it creates liability for trespass to chattels.

Case: Intel Corp. v. Hamidi

The following case explores trespass to chattels in a 21st Century context.

Intel Corp. v. Hamidi

Supreme Court of California
June 30, 2003

30 Cal.4th 1342. INTEL CORPORATION, Plaintiff and Respondent, v. Kourosh Kenneth HAMIDI, Defendant and Appellant. No. S103781. Opinion by WERDEGAR, in which KENNARD, MORENO and PERREN, JJ. concur. Concurring opinion by KENNARD, J, omitted. Dissenting opinion of BROWN, J. Dissenting opinion by MOSK, J., in which GEORGE, C.J. concurred.

Associate Justice KATHRYN WERDEGAR:

Intel Corporation (Intel) maintains an electronic mail system, connected to the Internet, through which messages between employees and those outside the company can be sent and received, and permits its employees to make reasonable nonbusiness use of this system. On six occasions over almost two years, Kourosh Kenneth Hamidi, a former Intel employee, sent e-mails criticizing Intel's employment practices to numerous current employees on Intel's electronic mail system. Hamidi breached no computer security barriers in order to communicate with Intel employees. He offered to, and did, remove from his mailing list any recipient who so wished. Hamidi's communications to individual Intel employees caused neither physical damage nor functional disruption to the company's computers, nor did they at any time deprive Intel of the use of its computers. The contents of the messages, however, caused discussion among employees and managers.

On these facts, Intel brought suit, claiming that by communicating with its employees over the company's e-mail system Hamidi committed the tort of trespass to chattels. The trial court granted Intel's motion for summary judgment and enjoined Hamidi from any further mailings. A divided Court of Appeal affirmed.

After reviewing the decisions analyzing unauthorized electronic contact with computer systems as potential trespasses to chattels, we conclude that under California law the tort does not

encompass, and should not be extended to encompass, an electronic communication that neither damages the recipient computer system nor impairs its functioning. Such an electronic communication does not constitute an actionable trespass to personal property, i.e., the computer system, because it does not interfere with the possessor's use or possession of, or any other legally protected interest in, the personal property itself. The consequential economic damage Intel claims to have suffered, i.e., loss of productivity caused by employees reading and reacting to Hamidi's messages and company efforts to block the messages, is not an injury to the company's interest in its computers – which worked as intended and were unharmed by the communications – any more than the personal distress caused by reading an unpleasant letter would be an injury to the recipient's mailbox, or the loss of privacy caused by an intrusive telephone call would be an injury to the recipient's telephone equipment.

Our conclusion does not rest on any special immunity for communications by electronic mail; we do not hold that messages transmitted through the Internet are exempt from the ordinary rules of tort liability~, but because the trespass to chattels tort – unlike the causes of action just mentioned – may not, in California, be proved without evidence of an injury to the plaintiffs personal property or legal interest therein.

Nor does our holding affect the legal remedies of Internet service providers (ISP's) against senders of unsolicited commercial bulk e-mail (UCE), also known as "spam." A series of federal district court decisions~ has approved the use of trespass to chattels as a theory of spammers' liability to ISP's, based upon evidence that the vast quantities of mail sent by spammers both overburdened the ISP's own computers and made the entire computer system harder to use for recipients, the ISP's customers. In those cases,~ the underlying complaint was that the extraordinary *quantity* of UCE impaired the computer system's functioning. In the present case, the claimed injury is located in the disruption or distraction caused to recipients by the *contents* of the e-mail messages, an injury

entirely separate from, and not directly affecting, the possession or value of personal property.

FACTUAL AND PROCEDURAL BACKGROUND

We review a grant of summary judgment de novo; we must decide independently whether the facts not subject to triable dispute warrant judgment for the moving party as a matter of law. (*Galanty v. Paul Revere Life Ins. Co.* (2000) 23 Cal.4th 368, 374, 97 Cal.Rptr.2d 67, 1 P.3d 658; *Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 404, 87 Cal.Rptr.2d 453, 981 P.2d 79; Code Civ. Proc, § 437c, subd. (c).) The pertinent undisputed facts are as follows.

Hamidi, a former Intel engineer, together with others, formed an organization named Former and Current Employees of Intel (FACE-Intel) to disseminate information and views critical of Intel's employment and personnel policies and practices. FACE-Intel maintained a Web site (which identified Hamidi as Webmaster and as the organization's spokesperson) containing such material. In addition, over a 21-month period Hamidi, on behalf of FACE-Intel, sent six mass e-mails to employee addresses on Intel's electronic mail system. The messages criticized Intel's employment practices, warned employees of the dangers those practices posed to their careers, suggested employees consider moving to other companies, solicited employees' participation in FACE-Intel, and urged employees to inform themselves further by visiting FACE-Intel's Web site. The messages stated that recipients could, by notifying the sender of their wishes, be removed from FACE-Intel's mailing list; Hamidi did not subsequently send messages to anyone who requested removal.

Each message was sent to thousands of addresses (as many as 35,000 according to FACE-Intel's Web site), though some messages were blocked by Intel before reaching employees. Intel's attempt to block internal transmission of the messages succeeded only in part; Hamidi later admitted he evaded blocking efforts by using different sending computers. When Intel, in March 1998, demanded in writing that Hamidi and FACE-Intel stop sending e-mails to Intel's computer system,

Hamidi asserted the organization had a right to communicate with willing Intel employees; he sent a new mass mailing in September 1998.

The summary judgment record contains no evidence Hamidi breached Intel's computer security in order to obtain the recipient addresses for his messages; indeed, internal Intel memoranda show the company's management concluded no security breach had occurred.[1] Hamidi stated he created the recipient address list using an Intel directory on a floppy disk anonymously sent to him. Nor is there any evidence that the receipt or internal distribution of Hamidi's electronic messages damaged Intel's computer system or slowed or impaired its functioning. Intel did present uncontradicted evidence, however, that many employee recipients asked a company official to stop the messages and that staff time was consumed in attempts to block further messages from FACE-Intel. According to the FAC-Intel Web site, moreover, the messages had prompted discussions between "[e]xcited and nervous managers" and the company's human resources department.

Intel sued Hamidi and FACE-Intel, pleading causes of action for trespass to chattels and nuisance, and seeking both actual damages and an injunction against further e-mail messages. Intel later voluntarily dismissed its nuisance claim and waived its demand for damages. The trial court entered default against FACE-Intel upon that organization's failure to answer. The court then granted Intel's motion for summary judgment, permanently enjoining Hamidi, FACE-Intel, and their agents "from sending unsolicited e-mail to addresses on Intel's computer systems." Hamidi appealed; FACE-Intel did not.[2]

The Court of Appeal, with one justice dissenting, affirmed the grant of injunctive relief. The majority took the view that the use of or intermeddling with another's personal property is actionable as a trespass to chattels without proof of any actual injury to the personal property; even if Intel could not show any damages resulting from Hamidi's sending of messages, "it showed he was disrupting its business by using its property and therefore is entitled to injunctive relief based on a theory of

trespass to chattels." The dissenting justice warned that the majority's application of the trespass to chattels tort to "unsolicited electronic mail that causes no harm to the private computer system that receives it" would "expand the tort of trespass to chattel in untold ways and to unanticipated circumstances."

We granted Hamidi's petition for review.

Discussion

I. Current California Tort Law

Dubbed by Prosser the "little brother of conversion," the tort of trespass to chattels allows recovery for interferences with possession of personal property "not sufficiently important to be classed as conversion, and so to compel the defendant to pay the full value of the thing with which he has interfered." (Prosser & Keeton, Torts (5th ed.1984) § 14, pp. 85-86.)

Though not amounting to conversion, the defendant's interference must, to be actionable, have caused some injury to the chattel or to the plaintiffs rights in it. Under California law, trespass to chattels "lies where an intentional interference with the possession of personal property *has proximately caused injury." (Thrifty-Tel, Inc. v. Bezenek* (1996) 46 Cal. App.4th 1559, 1566, 54 Cal.Rptr.2d 468, italics added.) In cases of interference with possession of personal property not amounting to conversion, "the owner has a cause of action for trespass or case, *and may recover only the actual damages suffered by reason of the impairment of the property or the loss of its use." (Zasloiv v. Kroenert, supra,* 29 Cal.2d at p. 551, 176 P.2d 1, italics added.) In modern American law generally, "[t]respass remains as an occasional remedy for minor interferences, *resulting in some damage,* but not sufficiently serious or sufficiently important to amount to the greater tort" of conversion. (Prosser & Keeton, Torts, *supra,* § 15, p. 90, italics added.)

The Restatement, too, makes clear that some actual injury must have occurred in order for a trespass to chattels to be actionable. Under section 218 of the Restatement Second of Torts, dispossession alone, without further damages, is actionable (see

id., par. (a) & com. d, pp. 420-421), but other forms of interference require some additional harm to the personal property or the possessor's interests in it. (*Id.,* pars, (b)-(d).) "The interest of a possessor of a chattel in its inviolability, unlike the similar interest of a possessor of land, is not given legal protection by an action for nominal damages for harmless intermeddlings with the chattel. In order that an actor who interferes with another's chattel may be liable, his conduct must affect some other and more important interest of the possessor. *Therefore, one who intentionally intermeddles with another's chattel is subject to liability only if his intermeddling is harmful to the possessor's materially valuable interest in the physical condition, quality, or value of the chattel, or if the possessor is deprived of the use of the chattel for a substantial time, or some other legally protected interest of the possessor is affected as stated in Clause (c*). Sufficient legal protection of the possessor's interest in the mere inviolability of his chattel is afforded by his privilege to use reasonable force to protect his possession against even harmless interference." (*Id.,* com. e, pp. 421-422, italics added.)

The Court of Appeal referred to "a number of very early cases [showing that] any unlawful interference, however slight, with the enjoyment by another of his personal property, is a trespass." But while a harmless use or touching of personal property may be a technical trespass, an interference (not amounting to dispossession) is not *actionable,* under modern California and broader American law, without a showing of harm. As already discussed, this is the rule embodied in the Restatement and adopted by California law.

In this respect, as Prosser explains, modern day trespass to chattels differs both from the original English writ and from the action for trespass to land: "Another departure from the original rule of the old writ of trespass concerns the necessity of some actual damage to the chattel before the action can be maintained. Where the defendant merely interferes without doing any harm – as where, for example, he merely lays hands upon the plaintiffs horse, or sits in his car – there has been a division of opinion among the writers, and a surprising dearth of authority. *By analogy to trespass to land there might be a technical tort in*

such a case .... Such scanty authority as there is, however, has considered that the dignitary interest in the inviolability of chattels, unlike that as to land, is not sufficiently important to require any greater defense than the privilege of using reasonable force when necessary to protect them. Accordingly it has been held that nominal damages will not be awarded, and that in the absence of any actual damage the action will not lie." (Prosser & Keeton, Torts, *supra,* § 14, p. 87, italics added, fns. omitted.)

Intel suggests that the requirement of actual harm does not apply here because it sought only injunctive relief, as protection from future injuries. But as Justice Kolkey, dissenting below, observed, "[t]he fact the relief sought is injunctive does not excuse a showing of injury, whether actual or threatened." Indeed, in order to obtain injunctive relief the plaintiff must ordinarily show that the defendant's wrongful acts threaten to cause *irreparable* injuries, ones that cannot be adequately compensated in damages. (5 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 782, p. 239.) Even in an action for trespass to real property, in which damage to the property is not an element of the cause of action, "the extraordinary remedy of injunction" cannot be invoked without showing the likelihood of irreparable harm. A fortiori, to issue an injunction without a showing of likely irreparable injury in an action for trespass to chattels, in which injury to the personal property or the possessor's interest in it *is* an element of the action, would make little legal sense.

The dispositive issue in this case, therefore, is whether the undisputed facts demonstrate Hamidi's actions caused or threatened to cause damage to Intel's computer system, or injury to its rights in that personal property, such as to entitle Intel to judgment as a matter of law. To review, the undisputed evidence revealed no actual or threatened damage to Intel's computer hardware or software and no interference with its ordinary and intended operation. Intel was not dispossessed of its computers, nor did Hamidi's messages prevent Intel from using its computers for any measurable length of time. Intel presented no evidence its system was slowed or otherwise impaired by the burden of delivering Hamidi's electronic messages. Nor was

there any evidence transmission of the messages imposed any marginal cost on the operation of Intel's computers.~

Relying on a line of decisions, most from federal district courts, applying the tort of trespass to chattels to various types of unwanted electronic contact between computers, Intel contends that, while its computers were not damaged by receiving Hamidi's messages, its interest in the "physical condition, quality or value" of the computers was harmed. We disagree. The cited line of decisions does not persuade us that the mere sending of electronic communications that assertedly cause injury only because of their contents constitutes an actionable trespass to a computer system through which the messages are transmitted. Rather, the decisions finding electronic contact to be a trespass to computer systems have generally involved some actual or threatened interference with the computers' functioning.

In *Thrifty-Tel,* the California Court of Appeal held that evidence of automated searching of a telephone carrier's system for authorization codes supported a cause of action for trespass to chattels. The defendant's automated dialing program "overburdened the [plaintiffs] system, denying some subscribers access to phone lines", showing the requisite injury.

Following *Thrifty-Tel,* a series of federal district court decisions held that sending UCE through an ISP's equipment may constitute trespass to the ISP's computer system~. In each of these spamming cases, the plaintiff showed, or was prepared to show, some interference with the efficient functioning of its computer system. In *CompuServe, Inc. v. Cyber Promotions, Inc.,* 962 F.Supp. 1015 (S.D. Ohio 1997), the plaintiff ISP's mail equipment monitor stated that mass UCE mailings, especially from nonexistent addresses such as those used by the defendant, placed "a tremendous burden" on the ISP's equipment, using "disk space and draining] the processing power," making those resources unavailable to serve subscribers. Similarly, in *Hotmail Corp. v. Van$ Money Pie, Inc.,* (N.D. Cal. 1998) 1998 WL 388389, the court found the evidence supported a finding that the defendant's mailings "fill[ed] up Hotmail's computer storage

space and threatened] to damage Hotmail's ability to service its legitimate customers."~

Building on the spamming cases, in particular *CompuServe,* three even more recent district court decisions addressed whether unauthorized robotic data collection from a company's publicly accessible Web site is a trespass on the company's computer system. (*eBay, Inc. v. Bidder's Edge, Inc.,* (N.D. Cal. 2000) 100 F.Supp.2d 1058 (*eBay); Register.com, Inc. v. Verio, Inc.* (S.D.N.Y. 2000) 126 F.Supp.2d 238; *Ticketmaster Corp. v. Tickets.com, Inc.,* (C.D. Cal. 2000) 2000 WL 1887522.) The two district courts that found such automated data collection to constitute a trespass relied, in part, on the deleterious impact this activity could have, especially if replicated by other searchers, on the functioning of a Web site's computer equipment.

In the leading case, *eBay,* the defendant Bidder's Edge (BE), operating an auction aggregation site, accessed the eBay Web site about 100,000 times per day, accounting for between 1 and 2 percent of the information requests received by eBay and a slightly smaller percentage of the data transferred by eBay. The district court rejected eBay's claim that it was entitled to injunctive relief because of the defendant's unauthorized presence alone, or because of the incremental cost the defendant had imposed on operation of the eBay site, but found sufficient proof of *threatened* harm in the potential for others to imitate the defendant's activity: "If BE's activity is allowed to continue unchecked, it would encourage other auction aggregators to engage in similar recursive searching of the eBay system such that eBay would suffer irreparable harm from reduced system performance, system unavailability, or data losses." Again, in addressing the likelihood of eBay's success on its trespass to chattels cause of action, the court held the evidence of injury to eBay's computer system sufficient to support a preliminary injunction: "If the court were to hold otherwise, it would likely encourage other auction aggregators to crawl the eBay site, potentially to the point of denying effective access to eBay's customers. If preliminary injunctive relief were denied, and other aggregators began to crawl the eBay site, there appears to be little doubt that the load on eBay's computer

system would qualify as a substantial impairment of condition or value."

Another district court followed *eBay* on similar facts – a domain name registrar's claim against a Web hosting and development site that robotically searched the registrar's database of newly registered domain names in search of business leads – in *Register.com, Inc. v. Verio, Inc.*. Although the plaintiff was unable to measure the burden the defendant's searching had placed on its system, the district court, quoting the declaration of one of the plaintiffs officers, found sufficient evidence of threatened harm to the system in the possibility the defendant's activities would be copied by others: "'I believe that if Verio's searching of Register.com's WHOIS database were determined to be lawful, then every purveyor of Internet-based services would engage in similar conduct.'" Like eBay, the court observed, Register.com had a legitimate fear "that its servers will be flooded by search robots."

In the third decision discussing robotic data collection as a trespass, *Ticketmaster Corp. v. Tickets.com, Inc.,* the court, distinguishing *eBay,* found *insufficient* evidence of harm to the chattel to constitute an actionable trespass: "A basic element of trespass to chattels must be physical harm to the chattel (not present here) or some obstruction of its basic function (in the court's opinion not sufficiently shown here) .... The comparative use [by the defendant of the plaintiffs computer system] appears very small and there is no showing that the use interferes to any extent with the regular business of [the plaintiff].... *Nor here is the specter of dozens or more parasites joining the fray, the cumulative total of which could affect the operation of [the plaintiffs] business."*

In the decisions so far reviewed, the defendant's use of the plaintiffs computer system was held sufficient to support an action for trespass when it actually did, or threatened to, interfere with the intended functioning of the system, as by significantly reducing its available memory and processing power. In *Ticketmaster,* the one case where no such effect, actual or threatened, had been demonstrated, the court found insufficient evidence of harm to support a trespass action. These

decisions do not persuade us to Intel's position here, for Intel has demonstrated neither any appreciable effect on the operation of its computer system from Hamidi's messages, nor any likelihood that Hamidi's actions will be replicated by others if found not to constitute a trespass.

That Intel does not claim the type of functional impact that spammers and robots have been alleged to cause is not surprising in light of the differences between Hamidi's activities and those of a commercial enterprise that uses sheer quantity of messages as its communications strategy. Though Hamidi sent thousands of copies of the same message on six occasions over 21 months, that number is minuscule compared to the amounts of mail sent by commercial operations. The individual advertisers sued in *America Online, Inc. v. IMS* and *America Online, Inc. v. LCGM, Inc.* were alleged to have sent more than 60 million messages over 10 months and more than 92 million messages over seven months, respectively. Collectively, UCE has reportedly come to constitute about 45 percent of all e-mail. The functional burden on Intel's computers, or the cost in time to individual recipients, of receiving Hamidi's occasional advocacy messages cannot be compared to the burdens and costs caused ISP's and their customers by the ever-rising deluge of commercial e-mail.

Intel relies on language in the *eBay* decision suggesting that unauthorized use of another's chattel is actionable even without any showing of injury: "Even if, as [defendant] BE argues, its searches use only a small amount of eBay's computer system capacity, BE has nonetheless deprived eBay of the ability to use that portion of its personal property for its own purposes. The law recognizes no such right to use another's personal property." But as the *eBay* court went on immediately to find that the defendant's conduct, if widely replicated, *would* likely impair the functioning of the plaintiffs system, we do not read the quoted remarks as expressing the court's complete view of the issue. In isolation, moreover, they would not be a correct statement of California or general American law on this point. While one may have no *right* temporarily to use another's personal property, such use is actionable as a trespass only if it

"has proximately caused injury." (*Thrifty-Tel, supra,* 46 Cal.App.4th at p. 1566, 54 Cal.Rptr.2d 468.) "[I]n the absence of any actual damage the action will not lie." (Prosser & Keeton, Torts, *supra,* § 14, p. 87.) Short of dispossession, personal injury, or physical damage (not present here), intermeddling is actionable only if "the chattel is impaired as to its condition, quality, or value, or [¶] ... the possessor is deprived of the use of the chattel for a substantial time." (Rest.2d Torts, § 218, pars, (b), (c).) In particular, an actionable deprivation of use "must be for a time so substantial that it is possible to estimate the loss caused thereby. A mere momentary or theoretical deprivation of use is not sufficient unless there is a dispossession...." (*Id.,* com. i, p. 423.) That Hamidi's messages temporarily used some portion of the Intel computers' processors or storage is, therefore, not enough; Intel must, but does not, demonstrate some measurable loss from the use of its computer system.~

Whether the economic injuries identified in *CompuServe* were properly considered injuries to the ISP's possessory interest in its personal property, the type of property interest the tort is primarily intended to protect (see Rest.2d Torts, § 218 & com. e, pp. 421-22; Prosser & Keeton, Torts, *supra,* § 14, p. 87), has been questioned.[6] "[T]he court broke the chain between the trespass and the harm, allowing indirect harms to CompuServe's business interests – reputation, customer goodwill, and employee time – to count as harms to the chattel (the server)." (Quilter, *The Continuing Expansion of Cyberspace Trespass to Chattels, supra,* 17 Berkeley Tech. L.J. at pp. 429-430.) "[T]his move cuts trespass to chattels free from its moorings of dispossession or the equivalent, allowing the court free reign *[sic]* to hunt for 'impairment.'" (Burk, *The Trouble with Trespass* (2000) 4 J. Small & Emerging Bus.L. 27, 35.) But even if the loss of goodwill identified in *CompuServe* were the type of injury that would give rise to a trespass to chattels claim under California law, Intel's position would not follow, for Intel's claimed injury has even less connection to its personal property than did CompuServe's.

CompuServe's customers were annoyed because the system was inundated with unsolicited commercial messages, making its use for personal communication more difficult and costly. Their

complaint, which allegedly led some to cancel their CompuServe service, was about *the functioning of CompuServe's electronic mail service*. Intel's workers, in contrast, were allegedly distracted from their work not because of the frequency or quantity of Hamidi's messages, but because of assertions and opinions the messages conveyed. Intel's complaint is thus about *the contents of the messages* rather than the functioning of the company's e-mail system. Even accepting *CompuServe's* economic injury rationale, therefore, Intel's position represents a further extension of the trespass to chattels tort, fictionally recharacterizing the allegedly injurious effect of a communication's *contents* on recipients as an impairment to the device which transmitted the message.~

Nor may Intel appropriately assert a *property* interest in its employees' time.~ Whatever interest Intel may have in preventing its employees from receiving disruptive communications, it is not an interest in personal property, and trespass to chattels is therefore not an action that will lie to protect it. Nor, finally, can the fact Intel staff spent time attempting to block Hamidi's messages be bootstrapped into an injury to Intel's possessory interest in its computers. To quote, again, from the dissenting opinion in the Court of Appeal: "[I]t is circular to premise the damage element of a tort solely upon the steps taken to prevent the damage. Injury can only be established by the completed tort's consequences, not by the cost of the steps taken to avoid the injury and prevent the tort; otherwise, we can create injury for every supposed tort."

Intel connected its e-mail system to the Internet and permitted its employees to make use of this connection both for business and, to a reasonable extent, for their own purposes. In doing so, the company necessarily contemplated the employees' receipt of unsolicited as well as solicited communications from other companies and individuals. That some communications would, because of their contents, be unwelcome to Intel management was virtually inevitable. Hamidi did nothing but use the e-mail system for its intended purpose – to communicate with employees. The system worked as designed, delivering the messages without any physical or functional harm or disruption. These occasional transmissions cannot reasonably be viewed as

impairing the quality or value of Intel's computer system. We conclude, therefore, that Intel has not presented undisputed facts demonstrating an injury to its personal property, or to its legal interest in that property, that support, under California tort law, an action for trespass to chattels.

II. Proposed Extension of California Tort Law

We next consider whether California common law should be *extended* to cover, as a trespass to chattels, an otherwise harmless electronic communication whose contents are objectionable. We decline to so expand California law. Intel, of course, was not the recipient of Hamidi's messages, but rather the owner and possessor of computer servers used to relay the messages, and it bases this tort action on that ownership and possession. The property rule proposed is a rigid one, under which the sender of an electronic message would be strictly liable to the owner of equipment through which the communication passes – here, Intel – for any consequential injury flowing from the *contents* of the communication. The arguments of amici curiae and academic writers on this topic, discussed below, leave us highly doubtful whether creation of such a rigid property rule would be wise.

Writing on behalf of several industry groups appearing as amici curiae, Professor Richard A. Epstein of the University of Chicago urges us to excuse the required showing of injury to personal property in cases of unauthorized electronic contact between computers, "extending the rules of trespass to real property to all interactive Web sites and servers." The court is thus urged to recognize, for owners of a particular species of personal property, computer servers, the same interest in inviolability as is generally accorded a possessor of land. In effect, Professor Epstein suggests that a company's server should be its castle, upon which any unauthorized intrusion, however harmless, is a trespass.

Epstein's argument derives, in part, from the familiar metaphor of the Internet as a physical space, reflected in much of the language that has been used to describe it: "cyberspace," "the information superhighway," e-mail "addresses," and the like. Of

course, the Internet is also frequently called simply the "Net," a term, Hamidi points out, "evoking a fisherman's chattel." A major component of the Internet is the World Wide "Web," a descriptive term suggesting neither personal nor real property, and "cyberspace" itself has come to be known by the oxymoronic phrase "virtual reality," which would suggest that any real property "located" in "cyberspace" must be "virtually real" property. Metaphor is a two-edged sword.

Indeed, the metaphorical application of real property rules would not, by itself, transform a physically harmless electronic intrusion on a computer server into a trespass. That is because, under California law, intangible intrusions on land, including electromagnetic transmissions, are not actionable as trespasses (though they may be as nuisances) unless they cause physical damage to the real property. (*San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 936-937, 55 Cal.Rptr.2d 724, 920 P.2d 669.) Since Intel does not claim Hamidi's electronically transmitted messages physically damaged its servers, it could not prove a trespass to land even were we to treat the computers as a type of real property. Some further extension of the conceit would be required, under which the electronic signals Hamidi sent would be recast as tangible intruders, perhaps as tiny messengers rushing through the "hallways" of Intel's computers and bursting out of employees' computers to read them Hamidi's missives. But such fictions promise more confusion than clarity in the law. (See *eBay, supra,* 100 F.Supp.2d at pp. 1065-1066 (rejecting eBay's argument that the defendant's automated data searches "should be thought of as equivalent to sending in an army of 100,000 robots a day to check the prices in a competitor's store"].)

The plain fact is that computers, even those making up the Internet, are – like such older communications equipment as telephones and fax machines – personal property, not realty. Professor Epstein observes that "[a]though servers may be moved in real space, they cannot be moved in cyberspace," because an Internet server must, to be useful, be accessible at a known address. But the same is true of the telephone: to be useful for incoming communication, the telephone must remain

constantly linked to the same number (or, when the number is changed, the system must include some forwarding or notification capability, a qualification that also applies to computer addresses). Does this suggest that an unwelcome message delivered through a telephone or fax machine should be viewed as a trespass to a type of real property? We think not: As already discussed, the contents of a telephone communication may cause a variety of injuries and may be the basis for a variety of tort actions (e.g., defamation, intentional infliction of emotional distress, invasion of privacy), but the injuries are not to an interest in property, much less real property, and the appropriate tort is not trespass.[7]

More substantively, Professor Epstein argues that a rule of computer server inviolability will, through the formation or extension of a market in computer-to-computer access, create "the right social result." In most circumstances, he predicts, companies with computers on the Internet will continue to authorize transmission of information through e-mail, Web site searching, and page linking because they benefit by that open access. When a Web site owner does deny access to a particular sending, searching, or linking computer, a system of "simple one-on-one negotiations" will arise to provide the necessary individual licenses.

Other scholars are less optimistic about such a complete propertization of the Internet. Professor Mark Lemley of the University of California, Berkeley, writing on behalf of an amici curiae group of professors of intellectual property and computer law, observes that under a property rule of server inviolability, "each of the hundreds of millions of [Internet] users must get permission in advance from anyone with whom they want to communicate and anyone who owns a server through which their message may travel." The consequence for e-mail could be a substantial reduction in the freedom of electronic communication, as the owner of each computer through which an electronic message passes could impose its own limitations on message content or source. As Professor Dan Hunter of the University of Pennsylvania asks rhetorically: "Does this mean that one must read the 'Terms of Acceptable Email Usage' of

every email system that one emails in the course of an ordinary day? If the University of Pennsylvania had a policy that sending a joke by email would be an unauthorized use of their system, then under the logic of [the lower court decision in this case], you commit 'trespass' if you emailed me a ... cartoon." (Hunter, *Cyberspace as Place, and the Tragedy of the Digital Anticommons* (2003) 91 Cal. L.Rev. 439, 508-509.)

Web site linking, Professor Lemley further observes, "would exist at the sufferance of the linked-to party, because a Web user who followed a 'disapproved' link would be trespassing on the plaintiffs server, just as sending an e-mail is trespass under the [lower] court's theory." Another writer warns that "[c]yber-trespass theory will curtail the free flow of price and product information on the Internet by allowing website owners to tightly control who and what may enter and make use of the information housed on its Internet site." (Chang, *Bidding on Trespass: eBay, Inc. v. Bidder's Edge, Inc. and the Abuse of Trespass Theory in Cyberspace Law* (2001) 29 AIPLA Q.J. 445, 459.) A leading scholar of Internet law and policy, Professor Lawrence Lessig of Stanford University, has criticized Professor Epstein's theory of the computer server as quasi-real property, previously put forward in the *eBay* case (*eBay, supra,* 100 F.Supp.2d 1058), on the ground that it ignores the costs to society in the loss of network benefits: "eBay benefits greatly from a network that is open and where access is free. It is this general feature of the Net that makes the Net so valuable to users and a source of great innovation. And to the extent that individual sites begin to impose their own rules of exclusion, the value of the network as a network declines. If machines must negotiate before entering any individual site, then the costs of using the network climb." (Lessig, The Future of Ideas: The Fate of the Commons in a Connected World (2001) p. 171; see also Hunter, *Cyberspace as Place, and the Tragedy of the Digital Anticommons, supra,* 91 Cal. L.Rev. at p. 512 ("If we continue to mark out anticommons claims in cyberspace, not only will we preclude better, more innovative uses of cyberspace resources, but we will lose sight of what might be possible"].)

We discuss this debate among the amici curiae and academic writers only to note its existence and contours, not to attempt its resolution. Creating an absolute property right to exclude undesired communications from one's e-mail and Web servers might help force spammers to internalize the costs they impose on ISP's and their customers. But such a property rule might also create substantial new costs, to e-mail and e-commerce users and to society generally, in lost ease and openness of communication and in lost network benefits. In light of the unresolved controversy, we would be acting rashly to adopt a rule treating computer servers as real property for purposes of trespass law.

[W]e are not persuaded that these perceived problems call at present for judicial creation of a rigid property rule of computer server inviolability.~

DISPOSITION

The judgment of the Court of Appeal is reversed.

Justice JANICE ROGERS BROWN, dissenting:

Candidate A finds the vehicles that candidate B has provided for his campaign workers, and A spray paints the water soluble message, "Fight corruption, vote for A" on the bumpers. The majority's reasoning would find that notwithstanding the time it takes the workers to remove the paint and the expense they incur in altering the bumpers to prevent further unwanted messages, candidate B does not deserve an injunction unless the paint is so heavy that it reduces the cars' gas mileage or otherwise depreciates the cars' market value. Furthermore, candidate B has an obligation to permit the paint's display, because the cars are driven by workers and not B personally, because B allows his workers to use the cars to pick up their lunch or retrieve their children from school, or because the bumpers display B's own slogans. I disagree.

Intel has invested millions of dollars to develop and maintain a computer system. It did this not to act as a public forum but to enhance the productivity of its employees. Kourosh Kenneth Hamidi sent as many as 200,000 e-mail messages to Intel

employees. The time required to review and delete Hamidi's messages diverted employees from productive tasks and undermined the utility of the computer system. "There may ... be situations in which the value to the owner of a particular type of chattel may be impaired by dealing with it in a manner that does not affect its physical condition." (Rest.2d Torts, § 218, com. h, p. 422.) This is such a case.

The majority repeatedly asserts that Intel objected to the hundreds of thousands of messages solely due to their content, and proposes that Intel seek relief by pleading content-based speech torts. This proposal misses the point that Intel's objection is directed not toward Hamidi's message but his use of Intel's property to display his message. Intel has not sought to prevent Hamidi from expressing his ideas on his Web site, through private mail (paper or electronic) to employees' homes, or through any other means like picketing or billboards. But as counsel for Intel explained during oral argument, the company objects to Hamidi's using Intel's property to advance his message.

Of course, Intel deserves an injunction even if its objections are based entirely on the e-mail's content. Intel is entitled, for example, to allow employees use of the Internet to check stock market tables or weather forecasts without incurring any concomitant obligation to allow access to pornographic Web sites. (*Loving v. Boren* (W.D.Okla.1997) 956 F.Supp. 953, 955.) A private property owner may choose to exclude unwanted mail for any reason, including its content. (*Rowan v. U.S. Post Office Dept.* (1970) 397 U.S. 728, 738, 90 S.Ct. 1484, 25 L.Ed.2d 736 (*Rowan); Tillman v. Distribution Systems of America Inc.* (1996) 224 A.D.2d 79, 648 N.Y.S.2d 630, 635 (*Tillman*).)

The majority refuses to protect Intel's interest in maintaining the integrity of its own system, contending that (1) Hamidi's mailings did not physically injure the system; (2) Intel receives many unwanted messages, of which Hamidi's are but a small fraction; (3) Intel must have contemplated that it would receive some unwanted messages; and (4) Hamidi used the email system for its intended purpose, to communicate with employees.

Other courts have found a protectible interest under very similar circumstances. In *Thrifty-Tel v. Bezenek* (1996) 46 Cal. App.4th 1559, 54 Cal.Rptr.2d 468 (*Thrifty-Tel*), the Court of Appeal found a trespass to chattels where the defendants used another party's access code to search for an authorization code with which they could make free calls. The defendants' calls did not damage the company's system in any way; they were a minuscule fraction of the overall communication conducted by the phone network; and the company could have reasonably expected that some individuals would attempt to obtain codes with which to make free calls (just as stores expect shoplifters). Moreover, had the defendants succeeded in making free calls, they would have been using the telephone system as intended. (*Id,* at p. 1563, 54 Cal.Rptr.2d 468.)

Because I do not share the majority's antipathy toward property rights and believe the proper balance between expressive activity and property protection can be achieved without distorting the law of trespass, I respectfully dissent.~

Those who have contempt for grubby commerce and reverence for the rarified heights of intellectual discourse may applaud today's decision, but even the flow of ideas will be curtailed if the right to exclude is denied. As the Napster controversy revealed, creative individuals will be less inclined to develop intellectual property if they cannot limit the terms of its transmission. Similarly, if online newspapers cannot charge for access, they will be unable to pay the journalists and editorialists who generate ideas for public consumption.

This connection between the property right to objects and the property right to ideas and speech is not novel. James Madison observed, "a man's land, or merchandize, or money is called his property." (Madison, *Property,* Nat. Gazette (Mar. 27, 1792), quoted in McGinnis, *The Once and Future Property-Based Vision of the First Amendment* (1996) 63 U.Chi. L.Rev. 49, 65.) Likewise, "a man has a property in his opinions and the free communication of them." (*Ibid.*) Accordingly, "freedom of speech and property rights were seen simply as different aspects of an indivisible concept of liberty." (*Id.* at p. 63.)

The principles of both personal liberty and social utility should counsel us to usher the common law of property into the digital age.

Justice STANLEY MOSK, dissenting:

The majority hold that the California tort of trespass to chattels does not encompass the use of expressly unwanted electronic mail that causes no physical damage or impairment to the recipient's computer system. They also conclude that because a computer system is not like real property, the rules of trespass to real property are also inapplicable to the circumstances in this case. Finally, they suggest that an injunction to preclude mass, noncommercial, unwelcome e-mails may offend the interests of free communication.

I respectfully disagree and would affirm the trial court's decision. In my view, the repeated transmission of bulk e-mails by appellant Kourosh Kenneth Hamidi (Hamidi) to the employees of Intel Corporation (Intel) on its proprietary confidential email lists, despite Intel's demand that he cease such activities, constituted an actionable trespass to chattels. The majority fail to distinguish open communication in the public "commons" of the Internet from unauthorized intermeddling on a private, proprietary intranet. Hamidi is not communicating in the equivalent of a town square or of an unsolicited "junk" mailing through the United States Postal Service. His action, in crossing from the public Internet into a private intranet, is more like intruding into a private office mailroom, commandeering the mail cart, and dropping off unwanted broadsides on 30,000 desks. Because Intel's security measures have been circumvented by Hamidi, the majority leave Intel, which has exercised all reasonable self-help efforts, with no recourse unless he causes a malfunction or systems "crash." Hamidi's repeated intrusions did more than merely "prompt[ ] discussions between '[e]xcited and nervous managers' and the company's human resource department" (maj. opn., *ante,* 1 Cal. Rptr.3d at p. 38, 71 P.3d at p. 301); they also constituted a misappropriation of Intel's private computer system contrary to its intended use and against Intel's wishes.

The law of trespass to chattels has not universally been limited to physical damage. I believe it is entirely consistent to apply that legal theory to these circumstances – that is, when a proprietary computer system is being used contrary to its owner's purposes and expressed desires, and self-help has been ineffective. Intel correctly expects protection from an intruder who misuses its proprietary system, its nonpublic directories, and its supposedly controlled connection to the Internet to achieve his bulk mailing objectives – incidentally, without even having to pay postage.~

The trial court granted an injunction to prevent threatened injury to Intel. That is the purpose of an injunction. Intel should not be helpless in the face of repeated and threatened abuse and contamination of its private computer system. The undisputed facts, in my view, rendered Hamidi's conduct legally actionable. Thus, the trial court's decision to grant a permanent injunction was not "a clear abuse of discretion" that may be "disturbed on appeal."

The injunction issued by the trial court simply required Hamidi to refrain from further trespassory conduct, drawing no distinction based on the content of his emails. Hamidi remains free to communicate with Intel employees and others outside the walls – both physical and electronic – of the company.

For these reasons, I respectfully dissent.

Questions to Ponder About *Intel v. Hamidi*

A. What do you think of the decision in *eBay v. Bidder's Edge*, discussed by the court? Should trespass to chattels lie for automated information-inquiries of a website by a another company, such as a competitor?

B. What do you think of Professor Richard A. Epstein's idea, discussed in the case, of applying property rights to the internet similar to how they are applied to land? What effect would that have? Would it be positive, negative, or neutral?

C. Do you think Justice Brown's analogy to water-soluble spray paint is an apt one? Why or why not?

D. In the text prior to the case, a prima facie trespass to chattels was said to require showing that the defendant (1) intentionally (2) interfered with the (3) plaintiff's right of possession in a chattel. Interference, we said, could include any of the following:

> (1) actual damage to the chattel, (2) actual dispossession of the chattel, (3) loss of use of the chattel for some appreciable amount of time, (4) harm to the plaintiff, or harm to something or someone in whom the plaintiff had a legal interest, on account of the defendant's action.

Does the majority in Intel reject this conception of the blackletter law? In other words, in the view of *Intel*, is that an accurate description of the law in California? What differences are there, if any?

The Elements of Conversion

Trespass to chattels has a big sibling – the tort of conversion. Here's a blackletter formulation of the conversion tort:

> A plaintiff can establish **a prima facie case for conversion** by showing: the defendant (1) intentionally (2) interfered with (3) the plaintiff's right of possession in a chattel (4) in so substantial a manner as to warrant the remedy of a forced sale.

Conversion: Intent

The intent requirement for conversion works like that for trespass to chattels. Conversion requires only that the defendant intend the actions that constitute conversion. There is no requirement of bad motive, nor is there a requirement that the defendant intend to effect a conversion.

An example that is used in the Restatement concerns an auctioneer who takes a fine-art painting from a third party, honestly and reasonably believing that the third party is the true owner of the painting. If the auctioneer sells the painting, as instructed by the third party (the intended act), the auctioneer is liable for conversion to the painting's actual owner.

As loose as the intent element may be, it is still there. If a person does not intentionally exercise unpermitted dominion over the property, then there is no conversion. Suppose a museum is given artifacts on loan, and the museum negligently loses them. There may be a good negligence case here, but there is no conversion, because the intent element is unsatisfied.

Conversion: Interference and Substantiality to Warrant Remedy

For an interference with a chattel to qualify as a conversion, the defendant must exercise dominion over the chattel in a way that is so substantial that it warrants the remedy of the forced sale. There is no way to precisely delineate the threshold – it's a matter of degree.

Let's extend the example of the borrowed motorcycle that we used to illustrate trespass to chattels: The defendant borrows a motorcycle for a couple of hours to go to a nail salon a couple of miles away and then returns the bike to where it was originally parked. That is a trespass to chattels, since it constitutes a dispossession. Yet it is not conversion. Why not? The defendant has not exercised dominion over the chattel so seriously as to force the defendant to purchase the motorcycle. Now, if we change the hypothetical so that, instead of going to the nearby nail salon, the defendant drives the motorcycle from Milwaukee to South Dakota, then the dispossession unquestionably qualifies as a conversion.

Conversion: The Remedy of Forced Sale (or Forced Purchase)

The sine qua non of the conversion action is the availability of the forced-sale remedy, in which the defendant is ordered to pay full value for the converted chattel. So if someone takes a joyride in your car and drives it into a lake, you can get the court to order the joyrider to pay the full fair market value of the car at the time it was taken, with the joyrider then taking title to the waterlogged car.

Pursuing the tort of conversion is a choice. No plaintiff can be required to sue for conversion rather than trespass to chattels. Because of this, conversion cannot be used to require an unwilling

plaintiff to sell her or his goods. For this reason, the terminology of "forced sale" is confusing. In this sense, it is more accurate to call the remedy a **forced purchase**. In fact, some commentators use this term. The doctrine of conversion doesn't force anyone to sell anything. Instead, it can be used to force the defendant to buy something.

An example will help make this clear. Suppose you want your roommate's signed first edition of *Harry Potter and the Sorcerer's Stone*, but your roommate won't sell it. It is not possible to game the conversion tort so that you wind up getting what you want. If you take the book and your roommate wants it back, your roommate can choose to sue for trespass to chattels. (Also, using something called a writ of replevin, your roommate can get a court order, even before trial, compelling you to return the book.) Alternatively, your roommate can chose to sue for conversion, yet elect the trespass-to-chattels remedy of compensatory damages for the dispossession. The remedy of the forced sale (or forced purchase) is something plaintiffs seek when they no longer want the chattels at issue.

Conversion: Intangibles and Capturing Increased Value

Beyond the forced-sale remedy, conversion has some other superpowers that the tort of trespass to chattels lacks. For one, conversion can be used with many intangible assets that are tied to tangible artifacts, such as stock certificates. And conversion can be used by the plaintiff to capture the benefit of increased market values.

Suppose the defendant steals certificates for 100 shares of stock on Monday, when they are worth $100,000. On Tuesday, the price of the stock skyrockets, and the shares are worth $200,000. At that point, the plaintiff can use conversion to get a judgment of $200,000. Now suppose the plaintiff waits to sue, and on Wednesday morning, the value of the stock plummets to $50,000, at which point the defendant sells the shares for a loss. The plaintiff can still use conversion to get a judgment of $200,000. In this way, conversion can be used like a

ratchet to capture increases in value without a possibility of slippage to a lower value.

Case: Moore v. U.C. Regents

This case explores the outer bounds of conversion doctrine. In the quarter century since it was handed down, the *Moore* case has become a modern classic.

Moore v. Regents of University of California

Supreme Court of California
July 9, 1990

51 Cal.3d 120. JOHN MOORE, Plaintiff and Appellant, v. THE REGENTS OF THE UNIVERSITY OF CALIFORNIA et al., Defendants and Repondents No. S006987.

Justice EDWARD A. PANELLI:

I. Introduction

We granted review in this case to determine whether plaintiff has stated a cause of action against his physician and other defendants for using his cells in potentially lucrative medical research without his permission. Plaintiff alleges that his physician failed to disclose preexisting research and economic interests in the cells before obtaining consent to the medical procedures by which they were extracted. The superior court sustained all defendants' demurrers to the third amended complaint, and the Court of Appeal reversed. We hold that the complaint states a cause of action for breach of the physician's disclosure obligations, but not for conversion.

II. Facts

~The plaintiff is John Moore, who underwent treatment for hairy-cell leukemia at the Medical Center of the University of California at Los Angeles (UCLA Medical Center). The five defendants are: (1) Dr. David W. Golde, a physician who attended Moore at UCLA Medical Center; (2) the Regents of the University of California (Regents), who own and operate the university; (3) Shirley G. Quan, a researcher employed by the Regents; (4) Genetics Institute, Inc.; and (5) Sandoz

Pharmaceuticals Corporation and related entities (collectively Sandoz).

Moore first visited UCLA Medical Center on October 5, 1976, shortly after he learned that he had hairy-cell leukemia. After hospitalizing Moore and "withdr[awing] extensive amounts of blood, bone marrow aspirate, and other bodily substances," Golde~ confirmed that diagnosis. At this time all defendants, including Golde, were aware that "certain blood products and blood components were of great value in a number of commercial and scientific efforts" and that access to a patient whose blood contained these substances would provide "competitive, commercial, and scientific advantages."

On October 8, 1976, Golde recommended that Moore's spleen be removed. Golde informed Moore "that he had reason to fear for his life, and that the proposed splenectomy operation ... was necessary to slow down the progress of his disease." Based upon Golde's representations, Moore signed a written consent form authorizing the splenectomy.

Before the operation, Golde and Quan "formed the intent and made arrangements to obtain portions of [Moore's] spleen following its removal" and to take them to a separate research unit. Golde gave written instructions to this effect on October 18 and 19, 1976. These research activities "were not intended to have ... any relation to [Moore's] medical ... care." However, neither Golde nor Quan informed Moore of their plans to conduct this research or requested his permission. Surgeons at UCLA Medical Center, whom the complaint does not name as defendants, removed Moore's spleen on October 20, 1976.

Moore returned to the UCLA Medical Center several times between November 1976 and September 1983. He did so at Golde's direction and based upon representations "that such visits were necessary and required for his health and well-being, and based upon the trust inherent in and by virtue of the physician-patient relationship ...." On each of these visits Golde withdrew additional samples of "blood, blood serum, skin, bone marrow aspirate, and sperm." On each occasion Moore travelled to the UCLA Medical Center from his home in Seattle because

he had been told that the procedures were to be performed only there and only under Golde's direction.

"In fact, [however,]throughout the period of time that [Moore] was under [Golde's] care and treatment, ... the defendants were actively involved in a number of activities which they concealed from [Moore] ...." Specifically, defendants were conducting research on Moore's cells and planned to "benefit financially and competitively ... [by exploiting the cells] and [their] exclusive access to [the cells] by virtue of [Golde's] ongoing physician-patient relationship ...."

Sometime before August 1979, Golde established a cell line from Moore's T-lymphocytes.

A T-lymphocyte is a type of white blood cell. T-lymphocytes produce lymphokines, or proteins that regulate the immune system. Some lymphokines have potential therapeutic value. If the genetic material responsible for producing a particular lymphokine can be identified, it can sometimes be used to manufacture large quantities of the lymphokine through the techniques of recombinant DNA. (See generally U.S. Congress, Office of Technology Assessment, New Developments in Biotechnology: Ownership of Human Tissues and Cells (1987) at pp. 31-46)

While the genetic code for lymphokines does not vary from individual to individual, it can nevertheless be quite difficult to locate the gene responsible for a particular lymphokine. Because T-lymphocytes produce many different lymphokines, the relevant gene is often like a needle in a haystack. Moore's T-lymphocytes were interesting to the defendants because they overproduced certain lymphokines, thus making the corresponding genetic material easier to identify.~

Cells taken directly from the body (primary cells) are not very useful for these purposes. Primary cells typically reproduce a few times and then die. One can, however, sometimes continue to use cells for an extended period of time by developing them into a "cell line," a culture capable of reproducing indefinitely. This is not, however, always an easy task. "Longterm growth of human

cells and tissues is difficult, often an art," and the probability of succeeding with any given cell sample is low, except for a few types of cells not involved in this case.

On January 30, 1981, the Regents applied for a patent on the cell line, listing Golde and Quan as inventors. "[B]y virtue of an established policy ..., [the] Regents, Golde, and Quan would share in any royalties or profits ... arising out of [the] patent." The patent issued on March 20, 1984, naming Golde and Quan as the inventors of the cell line and the Regents as the assignee of the patent. (U.S. Patent No. 4,438,032 (Mar. 20, 1984).)

The Regent's patent also covers various methods for using the cell line to produce lymphokines.~ Moore admits in his complaint that "the true clinical potential of each of the lymphokines ... [is] difficult to predict, [but] ... competing commercial firms in these relevant fields have published reports in biotechnology industry periodicals predicting a potential market of approximately $3.01 Billion Dollars by the year 1990 for a whole range of [such lymphokines] ...."

With the Regents' assistance, Golde negotiated agreements for commercial development of the cell line and products to be derived from it. Under an agreement with Genetics Institute, Golde "became a paid consultant" and "acquired the rights to 75,000 shares of common stock." Genetics Institute also agreed to pay Golde and the Regents "at least $330,000 over three years, including a pro-rata share of [Golde's] salary and fringe benefits, in exchange for ... exclusive access to the materials and research performed" on the cell line and products derived from it. On June 4, 1982, Sandoz "was added to the agreement," and compensation payable to Golde and the Regents was increased by $110,000. "[T]hroughout this period, ... Quan spent as much as 70 [percent] of her time working for [the] Regents on research" related to the cell line.

Based upon these allegations, Moore attempted to state 13 causes of action: (1) "Conversion"; (2) "lack of informed consent"; (3) "breach of fiduciary duty"; (4) "fraud and deceit"; (5) "unjust enrichment"; (6) "quasi-contract"; (7) "bad faith breach of the implied covenant of good faith and fair dealing";

(8) "intentional infliction of emotional distress"; (9) "negligent misrepresentation"; (10) "intentional interference with prospective advantageous economic relationships"; (11) "slander of title"; (12) "accounting"; and (13) "declaratory relief."

Each defendant demurred to each purported cause of action. The superior court, however, expressly considered the validity of only the first cause of action, conversion.~ Reasoning that the remaining causes of action incorporated the earlier, defective allegations, the superior court sustained a general demurrer to the entire complaint~.

With one justice dissenting, the Court of Appeal reversed, holding that the complaint did state a cause of action for conversion. The Court of Appeal agreed with the superior court that the allegations against Genetics Institute and Sandoz were insufficient, but directed the superior court to give Moore leave to amend. The Court of Appeal also directed the superior court to decide "the remaining causes of action, which [had] never been expressly ruled upon."

III. Discussion

A. *Breach of Fiduciary Duty and Lack of Informed Consent*

{The court discussed Moore's claims for breach of fiduciary duty and lack of informed consent. The court remanded to the Court of Appeal, ordering it to: direct the trial court to overrule the physician's demurrers to these causes of action and sustain, with leave to amend, the demurrers of the four other defendants to the purported causes of action for breach of fiduciary duty and lack of informed consent. The court held that a physician who is seeking a patient's consent for a medical procedure must, in order to satisfy his fiduciary duty and to obtain the patient's informed consent, disclose personal interests unrelated to the patient's health, whether research or economic, that may affect his medical judgment. – *Ed. (compiled from clerk's case summary)*}

B. *Conversion*

Moore also attempts to characterize the invasion of his rights as a conversion – a tort that protects against interference with possessory and ownership interests in personal property. He

theorizes that he continued to own his cells following their removal from his body, at least for the purpose of directing their use, and that he never consented to their use in potentially lucrative medical research. Thus, to complete Moore's argument, defendants' unauthorized use of his cells constitutes a conversion. As a result of the alleged conversion, Moore claims a proprietary interest in each of the products that any of the defendants might ever create from his cells or the patented cell line.

No court, however, has ever in a reported decision imposed conversion liability for the use of human cells in medical research. While that fact does not end our inquiry, it raises a flag of caution. In effect, what Moore is asking us to do is to impose a tort duty on scientists to investigate the consensual pedigree of each human cell sample used in research. To impose such a duty, which would affect medical research of importance to all of society, implicates policy concerns far removed from the traditional, two-party ownership disputes in which the law of conversion arose.

Conversion arose out of the common law action of trover. "We probably do not have the earliest examples of its use, but they were almost certainly cases in which the finder of lost goods did not return them, but used them himself, or disposed of them to someone else. ... By then allegations of the complaint had become more or less standardized: that the plaintiff was possessed of certain goods, that he casually lost them, that the defendant found them, and that the defendant did not return them, but instead 'converted them to his own use.' From that phrase in the pleading came the name of the tort." (Prosser & Keeton, Torts (5th ed. 1984) § 15, p. 89.)

Invoking a tort theory originally used to determine whether the loser or the finder of a horse had the better title, Moore claims ownership of the results of socially important medical research, including the genetic code for chemicals that regulate the functions of every human being's immune system. Moore alleges, for example, that "genetic sequences ... are his tangible personal property ...." We are not, however, bound by that

conclusion of law. Moreover, as already mentioned, the genetic code for lymphokines does not vary from individual to individual.

We have recognized that, when the proposed application of a very general theory of liability in a new context raises important policy concerns, it is especially important to face those concerns and address them openly. Moreover, we should be hesitant to "impose [new tort duties] when to do so would involve complex policy decisions", especially when such decisions are more appropriately the subject of legislative deliberation and resolution. This certainly is not to say that the applicability of common law torts is limited to the historical or factual contexts of existing cases. But on occasions when we have opened or sanctioned new areas of tort liability, we "have noted that the 'wrongs and injuries involved were both comprehensible and assessable within the existing judicial framework."

Accordingly, we first consider whether the tort of conversion clearly gives Moore a cause of action under existing law. We do not believe it does. Because of the novelty of Moore's claim to own the biological materials at issue, to apply the theory of conversion in this context would frankly have to be recognized as an extension of the theory. Therefore, we consider next whether it is advisable to extend the tort to this context.

1. *Moore's Claim Under Existing Law*

"To establish a conversion, plaintiff must establish an actual interference with his *ownership* or *right of possession*. ... Where plaintiff neither has title to the property alleged to have been converted, nor possession thereof, he cannot maintain an action for conversion." Since Moore clearly did not expect to retain possession of his cells following their removal, to sue for their conversion he must have retained an ownership interest in them. But there are several reasons to doubt that he did retain any such interest. First, no reported judicial decision supports Moore's claim, either directly or by close analogy. Second, California statutory law drastically limits any continuing interest of a patient in excised cells. Third, the subject matters of the

Regents' patent – the patented cell line and the products derived from it – cannot be Moore's property.

Neither the Court of Appeal's opinion, the parties' briefs, nor our research discloses a case holding that a person retains a sufficient interest in excised cells to support a cause of action for conversion. We do not find this surprising, since the laws governing such things as human tissues, transplantable organs, blood, fetuses, pituitary glands, corneal tissue, and dead bodies deal with human biological materials as objects sui generis, regulating their disposition to achieve policy goals rather than abandoning them to the general law of personal property.

[*The court provided footnotes for the foregoing list as follows:*]

> human tissues – [*No footnote.*]
>
> transplantable organs – ⌙See the Uniform Anatomical Gift Act, Health and Safety Code section 7150 et seq. The act permits a competent adult to "give all or part of [his] body" for certain designated purposes, including "transplantation, therapy, medical or dental education, research, or advancement of medical or dental science." (Health & Saf. Code, §§ 7151 , 7153.) The act does not, however, permit the donor to receive "valuable consideration" for the transfer. (Health & Saf. Code, § 7155.)⌟
>
> blood – ⌙See Health and Safety Code section 1601 et seq., which regulates the procurement, processing, and distribution of human blood. Health and Safety Code section 1606 declares that "[t]he procurement, processing, distribution, or use of whole blood, plasma, blood products, and blood derivatives for the purpose of injecting or transfusing the same ... is declared to be, for all purposes whatsoever, the rendition of a service ... and shall not be construed to be, and is declared not to be, a sale ... for any purpose or purposes whatsoever."⌟
>
> fetuses – ⌙See Health and Safety Code section 7054.3 : "Notwithstanding any other provision

> of law, a recognizable dead human fetus of less than 20 weeks uterogestation not disposed of by interment shall be disposed of by incineration."

> pituitary glands – See Government Code section 27491.46 : "The coroner [following an autopsy] shall have the right to retain pituitary glands solely for transmission to a university, for use in research or the advancement of medical science" (id., subd. (a)) or "for use in manufacturing a hormone necessary for the physical growth of persons who are, or may become, hypopituitary dwarfs ..." (id. , subd. (b)).

> corneal tissue – See Government Code section 27491.47 : "The coroner may, in the course of an autopsy [and subject to specified conditions], remove ... corneal eye tissue from a body ..." (id. , subd. (a)) for "transplant, therapeutic, or scientific purposes" (id. , subd. (a)(5)).

> dead bodies – See Health and Safety Code section 7000 et seq. While the code does not purport to grant property rights in dead bodies, it does give the surviving spouse, or other relatives, "[t]he right to control the disposition of the remains of a deceased person, unless other directions have been given by the decedent ...." (Health & Saf. Code, § 7100.)

It is these specialized statutes, not the law of conversion, to which courts ordinarily should and do look for guidance on the disposition of human biological materials.

Lacking direct authority for importing the law of conversion into this context, Moore relies, as did the Court of Appeal, primarily on decisions addressing privacy rights.~ One line of cases involves unwanted publicity. (*Lugosi* v. *Universal Pictures* (1979) 25 Cal.3d 813; *Motschenbacher* v. *R. J. Reynolds Tobacco Company* (9th Cir. 1974) 498 F.2d 821.) These opinions hold that every person has a proprietary interest in his own likeness and

that unauthorized, business use of a likeness is redressible as a tort. But in neither opinion did the authoring court expressly base its holding on property law. Each court stated, following Prosser, that it was "pointless" to debate the proper characterization of the proprietary interest in a likeness. For purposes of determining whether the tort of conversion lies, however, the characterization of the right in question is far from pointless. Only property can be converted.

No party has cited a decision supporting Moore's argument that excised cells are "a species of tangible personal property capable of being converted." On this point the Court of Appeal cited only *Venner v. State* (1976) 30 Md.App. 599, which dealt with the seizure of a criminal defendant's feces from a hospital bedpan by police officers searching for narcotics. The court held that the defendant had abandoned his excrement for purposes of the Fourth Amendment.

In dictum, the *Venner* court observed that "[i]t is not unknown for a person to assert a continuing right of ownership, dominion, or control, for good reason or for no reason, over such things as excrement, fluid waste, secretions, hair, fingernails, toenails, blood, and organs or other parts of the body ...." This slender reed, alone, supported the Court of Appeal's conclusion in the case before us that "it cannot be said that a person has no property right in materials which were once part of his body." However, because *Venner* involved a criminal-procedure dispute over the suppression of evidence, and not a civil dispute over who was entitled to the economic benefit of property, the opinion is grounded in markedly different polices and has little relevance to the case before us.

Not only are the wrongful-publicity cases irrelevant to the issue of conversion, but the analogy to them seriously misconceives the nature of the genetic materials and research involved in this case. Moore, adopting the analogy originally advanced by the Court of Appeal, argues that "[i]f the courts have found a sufficient proprietary interest in one's persona, how could one not have a right in one's own genetic material, something far more profoundly the essence of one's human uniqueness than a

name or a face?" However, as the defendants' patent makes clear – and the complaint, too, if read with an understanding of the scientific terms which it has borrowed from the patent – the goal and result of defendants' efforts has been to manufacture lymphokines.

Inside the cell, a gene produces a lymphokine~ by attracting protein molecules, which bond to form a strand of "messenger RNA" (mRNA) in the mirror image of the gene. The mRNA strand then detaches from the gene and attracts other protein molecules, which bond to form the lymphokine that the original gene encoded. (OTA Rep., *supra* , at pp. 38-44.)

In the laboratory, scientists sometimes use genes to manufacture lymphokines by cutting a gene from the chromosome and grafting it onto the chromosome of a bacterium. The resulting chromosome is an example of "recombinant DNA," or DNA composed of genetic material from more than one individual or species. As the bacterium lives and reproduces, the engrafted gene continues to produce the lymphokine that the gene encodes.

It can be extremely difficult to identify the gene that carries the code for a particular lymphokine. "Since the amount of DNA in a human cell is enormous compared to the amount present in an individual gene, the search for any single gene within a cell is like searching for needle in a haystack." As the Regents' patent application explains, the significance of a cell that overproduces mRNA is to make the difficult search for a particular gene unnecessary. (U.S. Patent No. 4,438,032 (Mar. 20, 1984) at col. 2.) If one has an adequate source of mRNA – the gene's mirror image – it can be used to make a copy, or clone, of the original gene. The cloned gene can then be used in recombinant DNA, as already described, for large-scale production of lymphokines.

Lymphokines, unlike a name or a face, have the same molecular structure in every human being and the same, important functions in every human being's immune system. Moreover, the particular genetic material which is responsible for the natural production of lymphokines, and which defendants use to manufacture lymphokines in the laboratory, is also the same in

every person; it is no more unique to Moore than the number of vertebrae in the spine or the chemical formula of hemoglobin.

By definition, a gene responsible for producing a protein found in more than one individual will be the same in each. It is precisely because everyone needs the same basic proteins that proteins produced by one person's cells may have therapeutic value for another person.~ Thus, the proteins that defendants hope to manufacture – lymphokines such as interferon – are in no way a "likeness" of Moore.~

The next consideration that makes Moore's claim of ownership problematic is California statutory law, which drastically limits a patient's control over excised cells. Pursuant to Health and Safety Code section 7054.4 , "[n]otwithstanding any other provision of law, recognizable anatomical parts, human tissues, anatomical human remains, or infectious waste following conclusion of scientific use shall be disposed of by interment, incineration, or any other method determined by the state department [of health services] to protect the public health and safety." Clearly the Legislature did not specifically intend this statute to resolve the question of whether a patient is entitled to compensation for the nonconsensual use of excised cells. A primary object of the statute is to ensure the safe handling of potentially hazardous biological waste materials. Yet one cannot escape the conclusion that the statute's practical effect is to limit, drastically, a patient's control over excised cells. By restricting how excised cells may be used and requiring their eventual destruction, the statute eliminates so many of the rights ordinarily attached to property that one cannot simply assume that what is left amounts to "property" or "ownership" for purposes of conversion law.

It may be that some limited right to control the use of excised cells does survive the operation of this statute. There is, for example, no need to read the statute to permit "scientific use" contrary to the patient's expressed wish. A fully informed patient may always withhold consent to treatment by a physician whose research plans the patient does not approve. That right,

however, as already discussed, is protected by the fiduciary-duty and informed-consent theories.

Finally, the subject matter of the Regents' patent – the patented cell line and the products derived from it – cannot be Moore's property. This is because the patented cell line is both factually and legally distinct from the cells taken from Moore's body. Federal law permits the patenting of organisms that represent the product of "human ingenuity," but not naturally occurring organisms. Human cell lines are patentable because "[l]ong-term adaptation and growth of human tissues and cells in culture is difficult – often considered an art ... ," and the probability of success is low. (OTA Rep., *supra* , at p. 33~.) It is this *inventive effort* that patent law rewards, not the discovery of naturally occurring raw materials. Thus, Moore's allegations that he owns the cell line and the products derived from it are inconsistent with the patent, which constitutes an authoritative determination that the cell line is the product of invention.

The distinction between primary cells (cells taken directly from the body) and patented cell lines is not purely a legal one. Cells change while being developed into a cell line and continue to change over time. "[I]t is clear that most established cell lines ... are not completely normal. Besides [an] enhanced growth potential relative to primary cells, they frequently have highly abnormal chromosome numbers ...." (2 Watson et al., Molecular Biology of the Gene (4th ed. 1987) p. 967.)

The cell line in this case, for example, after many replications began to generate defective and rearranged forms of the HTLV-II virus. A published research paper to which defendants contributed suggests that "the defective forms of virus were probably generated during the passage [or replication] of the cells rather than being present in the original tumour cells of the patient." Possibly because of these changes in the virus, the cell line has developed new abilities to grow in different media. (Chen, McLaughlin, Gasson, Clark & Golde, *Molecular Characterization of Genome of a Novel Human T-cell Leukaemia Virus* , Nature (Oct. 6, 1983) vol. 305, p. 505.)

We find it interesting that Justice Mosk, in his dissent, would object to our "summar[y] of the salient conclusions" (*People v. Guerra* (1984) 37 Cal.3d 385, 412 [opn. by Mosk, J.]) of relevant scientific literature in setting forth the technological background of this case. (Dis. opn. of Mosk, J., post , at p. 182.) This court has previously cited scientific literature to show, for example, that reports of hypnotic recall "form[ed] a scientifically inadequate basis for drawing conclusions about the memory processes of the large majority of the population" (*People v. Shirley* (1982) 31 Cal.3d 18, 59 [opn. by Mosk, J.]), and that eyewitness testimony can be unreliable (*People v. McDonald* (1984) 37 Cal.3d 351, 365-367 [opn. by Mosk, J.]).

2. *Should Conversion Liability Be Extended?*

As we have discussed, Moore's novel claim to own the biological materials at issue in this case is problematic, at best. Accordingly, his attempt to apply the theory of conversion within this context must frankly be recognized as a request to extend that theory. While we do not purport to hold that excised cells can never be property for any purpose whatsoever, the novelty of Moore's claim demands express consideration of the policies to be served by extending liability rather than blind deference to a complaint alleging as a legal conclusion the existence of a cause of action.

There are three reasons why it is inappropriate to impose liability for conversion based upon the allegations of Moore's complaint. First, a fair balancing of the relevant policy considerations counsels against extending the tort. Second, problems in this area are better suited to legislative resolution. Third, the tort of conversion is not necessary to protect patients' rights. For these reasons, we conclude that the use of excised human cells in medical research does not amount to a conversion.

Of the relevant policy considerations, two are of overriding importance. The first is protection of a competent patient's right to make autonomous medical decisions. That right, as already discussed, is grounded in well-recognized and long-standing principles of fiduciary duty and informed consent. This policy

weighs in favor of providing a remedy to patients when physicians act with undisclosed motives that may affect their professional judgment. The second important policy consideration is that we not threaten with disabling civil liability innocent parties who are engaged in socially useful activities, such as researchers who have no reason to believe that their use of a particular cell sample is, or may be, against a donor's wishes.

To reach an appropriate balance of these policy considerations is extremely important. In its report to Congress, the Office of Technology Assessment emphasized that "[u]ncertainty about how courts will resolve disputes between specimen sources and specimen users could be detrimental to both academic researchers and the infant biotechnology industry, particularly when the rights are asserted long after the specimen was obtained. The assertion of rights by sources would affect not only. the researcher who obtained the original specimen, but perhaps other researchers as well.

"Biological materials are routinely distributed to other researchers for experimental purposes, and scientists who obtain cell lines or other specimen-derived products, such as gene clones, from the original researcher could also be sued under certain legal theories [such as conversion]. Furthermore, the uncertainty could affect product developments as well as research. Since inventions containing human tissues and cells may be patented and licensed for commercial use, companies are unlikely to invest heavily in developing, manufacturing, or marketing a product when uncertainty about clear title exists."

Indeed, so significant is the potential obstacle to research stemming from uncertainty about legal title to biological materials that the Office of Technology Assessment reached this striking conclusion: "[R]egardless of the merit of claims by the different interested parties, resolving the current uncertainty may be more important to the future of biotechnology than resolving it in any particular way." (OTA Rep., supra , at p. 27 .)

We need not, however, make an arbitrary choice between liability and nonliability. Instead, an examination of the relevant

policy considerations suggests an appropriate balance: Liability based upon existing disclosure obligations, rather than an unprecedented extension of the conversion theory, protects patients' rights of privacy and autonomy without unnecessarily hindering research.

To be sure, the threat of liability for conversion might help to enforce patients' rights indirectly. This is because physicians might be able to avoid liability by obtaining patients' consent, in the broadest possible terms, to any conceivable subsequent research use of excised cells. Unfortunately, to extend the conversion theory would utterly sacrifice the other goal of protecting innocent parties. Since conversion is a strict liability tort, it would impose liability on all those into whose hands the cells come, whether or not the particular defendant participated in, or knew of, the inadequate disclosures that violated the patient's right to make an informed decision.

"'The foundation for the action for conversion rests neither in the knowledge nor the intent of the defendant. ... [Instead,] "the tort consists in the breach of what may be called an absolute duty; the act itself ... is unlawful and redressible as a tort.'" "Conversion is a species of strict liability in which questions of good faith, lack of knowledge and motive are ordinarily immaterial."

In contrast to the conversion theory, the fiduciary-duty and informed-consent theories protect the patient directly, without punishing innocent parties or creating disincentives to the conduct of socially beneficial research.~

The extension of conversion law into this area will hinder research by restricting access to the necessary raw materials. Thousands of human cell lines already exist in tissue repositories, such as the American Type Culture Collection and those operated by the National Institutes of Health and the American Cancer Society. These repositories respond to tens of thousands of requests for samples annually. Since the patent office requires the holders of patents on cell lines to make samples available to anyone, many patent holders place their cell lines in repositories to avoid the administrative burden of

responding to requests. At present, human cell lines are routinely copied and distributed to other researchers for experimental purposes, usually free of charge. This exchange of scientific materials, which still is relatively free and efficient, will surely be compromised if each cell sample becomes the potential subject matter of a lawsuit.~

Justice ALLEN BROUSSARD, concurring and dissenting:

~When it turns to the conversion cause of action,~ the majority opinion fails to maintain its focus on the specific allegations before us. Concerned that the imposition of liability for conversion will impede medical research by innocent scientists who use the resources of existing cell repositories – a factual setting not presented here – the majority opinion rests its holding, that a conversion action cannot be maintained, largely on the proposition that a patient generally possesses no right in a body part that has already been removed from his body. Here, however, plaintiff has alleged that defendants interfered with his legal rights before his body part was removed. Although a patient may not retain any legal interest in a body part after its removal when he has properly consented to its removal and use for scientific purposes, it is clear under California law that before a body part is removed it is the patient, rather than his doctor or hospital, who possesses the right to determine the use to which the body part will be put after removal. If, as alleged in this case, plaintiff's doctor improperly interfered with plaintiff's right to control the use of a body part by wrongfully withholding material information from him before its removal, under traditional common law principles plaintiff may maintain a conversion action to recover the economic value of the right to control the use of his body part. Accordingly, I dissent from the majority opinion insofar as it rejects plaintiff's conversion cause of action.~

Justice STANLEY MOSK, dissenting:

I dissent.~

The majority~ cite several statutes regulating aspects of the commerce in or disposition of certain parts of the human body,

and conclude in effect that in the present case we should also "look for guidance" to the Legislature rather than to the law of conversion.~ Surely this argument is out of place in an opinion of the highest court of this state. As the majority acknowledge, the law of conversion is a creature of the common law. ""The inherent capacity of the common law for growth and change is its most significant feature. Its development has been determined by the social needs of the community which it serves. It is constantly expanding and developing in keeping with advancing civilization and the new conditions and progress of society, and adapting itself to the gradual change of trade, commerce, arts, inventions, and the needs of the country.'~ In short, as the United States Supreme Court has aptly said, 'This flexibility and capacity for growth and adaptation is the peculiar boast and excellence of the common law.'~ ... Although the Legislature may of course speak to the subject, in the common law system the primary instruments of this evolution are the courts, adjudicating on a regular basis the rich variety of individual cases brought before them." (*Rodriguez v. Bethlehem Steel Corp.* (1974) 12 Cal.3d 382, 394.)

Especially is this true in the field of torts. I need not review the many instances in which this court has broken fresh ground by announcing new rules of tort law: time and again when a new rule was needed we did not stay our hand merely because the matter was one of first impression. For example, in *Sindell v. Abbott Laboratories* (1980) 26 Cal.3d 588, we adopted a "market share" theory of liability for injury resulting from administration of a prescription drug and suffered by a plaintiff who without fault cannot trace the particular manufacturer of the drug that caused the harm. Like the opinion in the case at bar, the dissent in *Sindell* objected that market share liability was "a wholly new theory" and an "unprecedented extension of liability", and urged that in view of the economic, social, and medical effects of this new rule the decision to adopt it should rest with the Legislature. We nevertheless declared the new rule for sound policy reasons~.

Even if we assume that section 7054.4 limited the use and disposition of his excised tissue in the manner claimed by the

majority, Moore nevertheless retained valuable rights in that tissue. Above all, at the time of its excision he at least had *the right to do with his own tissue whatever the defendants did with it*: i.e., he could have contracted with researchers and pharmaceutical companies to develop and exploit the vast commercial potential of his tissue and its products. Defendants certainly believe that their right to do the foregoing is not barred by section 7054.4 and is a significant property right, as they have demonstrated by their deliberate concealment from Moore of the true value of his tissue, their efforts to obtain a patent on the Mo cell line, their contractual agreements to exploit this material, their exclusion of Moore from any participation in the profits, and their vigorous defense of this lawsuit. The Court of Appeal summed up the point by observing that "Defendants' position that plaintiff cannot own his tissue, but that they can, is fraught with irony." It is also legally untenable.~

My respect for this court as an institution compels me to make one last point: I dissociate myself completely from the amateur biology lecture that the majority impose on us throughout their opinion. For several reasons, the inclusion of most of that material in an opinion of this court is improper.

First, with the exception of defendants' patent none of the material in question is part of the record on appeal as defined by the California Rules of Court. Because this appeal is taken from a judgment of dismissal entered after the sustaining of general and special demurrers, there is virtually no record other than the pleadings. The case has never been tried, and hence there is no evidence whatever on the obscure medical topics on which the majority presume to instruct us. Instead, all the documents that the majority rely on for their medical explanations appear in an appendix to defendant Golde's opening brief on the merits. Such an appendix, however, is no more a part of the *record* than the brief itself, because the record comprises only. the materials before the trial court when it made its ruling. Nor could Golde have moved to augment the record to include any of these documents, because none was "part of the original superior court file," a prerequisite to such augmentation. "As a general

rule, documents not before the trial court cannot be included as a part of the record on appeal."

Second, most of these documents bear solely or primarily on the majority's discussion of whether Moore's "genetic material" was or was not "unique", but that entire discussion is legally irrelevant to the present appeal. As Justice Broussard correctly observes in his separate opinion, "the question of uniqueness has no proper bearing on plaintiff's basic right to maintain a conversion action; ordinary property, as well as unique property, is, of course, protected against conversion."

Third, this nonissue is also a noncontention. The majority claim that "Moore relies ... primarily" on an analogy to certain right-of-privacy decisions, but this is not accurate. Under our rules, as in appellate practice generally, the parties to an appeal are confined to the contentions raised in their briefs (see Cal. Rules of Court, rule 29.3). In his brief on the merits in this court Moore does not even cite, less still "rely primarily," on the right-of-privacy decisions discussed by the majority, nor does he draw any analogy to the rule of those decisions. It is true that in the course of oral argument before this court, counsel for Moore briefly paraphrased the analogy argument that the majority now attribute to him; but a party may not, of course, raise a new contention for the first time in oral argument.~

I would affirm the decision of the Court of Appeal to direct the trial court to overrule the demurrers to the cause of action for conversion.

Questions to Ponder About *UC Regents v. Moore*

A. The court disapproves of John Moore's "claims ownership of the results of socially important medical research," yet the court looks approvingly on the patent that UCLA obtained on Moore's cell line. The court appears to make this differentiation on the basis that culturing a cell line is "often considered an art" and is a "product of 'human ingenuity.'" Are you persuaded by this distinction? Should Moore be incapable of owning his excised cells while UCLA can commercially exploit them?

B. The court says there is no support for Moore's claim that excised cells can be considered a kind of tangible property for purposes of conversion. Does that mean that no one could convert the cells from UCLA? Suppose researchers from a rival lab at USC managed to surreptitiously take the excised cells from UCLA's lab, and USC subsequently patented them, selling them for billions of dollars. Would UCLA have a claim for conversion against USC?

C. Do you find the court's listing of California statutes as persuasive on the point that human biological materials are not to be "abandon[ed] to the general law of personal property"?

D. The court wrote that "a fully informed patient may always withhold consent to treatment by a physician whose research plans the patient does not approve. That right, however,˜ is protected by the fiduciary-duty and informed-consent theories." Do you agree with the court that these non-conversion claims sufficiently protect such a right? Note that Dr. David W. Golde personally received millions of dollars from providing Moore's cell line to Genetics Institute, and UCLA may have received much more, with the overall worth being perhaps $3 billion. Suppose you were a lawyer for UCLA and Golde as they contemplated how to deal with Moore, and suppose you could accurately predict how this case would come out. Would you advise your clients to fully inform Moore about the intended research? Or would you advise them to proceed exactly as they did?

22. Defenses to Intentional Torts

"There's only one basic principle of self-defense: You must apply the most effective weapon, as soon as possible, to the most vulnerable target."

– Bruce Lee

Introduction

The elements of the causes of action for the intentional torts are only half the story. The intentional torts would be incomprehensible without their accompanying defenses – consent, self-defense, defense of others, and necessity. All of these are crucial to understanding the full landscape of intentional tort liability.

Consent

Consent is the most important defense to intentional torts, and it is ubiquitous. Without it, every shutting of elevator doors would be actionable false imprisonment, every kiss of newlyweds would be actionable battery, and every haunted house at Halloween would generate an avalanche of actionable assaults.

What is seemingly strange about consent is that, at least in the traditional common-law formulation, it is a defense. That means that it is the defendant's burden of proof to show consent. So, technically, a person who sends out party invitations could sue everyone who came to the party for trespass and make out a prima facie case against each one. In court, the burden would fall on the party guests to prove that they were on the plaintiff's land with the plaintiff's consent. This may seem absurd way to structure the doctrine. Yet asking the plaintiff to prove lack of consent as a prima facie element would mean asking the plaintiff to prove a negative. That is something most courts are unwilling to do – at least in this context.

Let's take a slightly more realistic example than the vexatiously litigious party host. Suppose that a contractor demolishes the attached garage of someone's house. Because consent is a defense, it is not the homeowner's burden to prove that the contractor did not have permission. Instead, the contractor will need to offer proof that there was consent. In this case, it seems intuitively fair to ask that the contractor be able to produce a preponderance of evidence of consent – such as a document signed by the homeowner.

Notwithstanding the problems of proving a negative, the courts in many states hold that lack of consent is a prima facie element for the intentional torts other than trespass to land. The plaintiff may accomplish this as an initial matter by testifying that there was no consent. Then it is up to the defendant to impeach or rebut that testimony. Yet putting the burden on the plaintiff for lack of consent is not without effect. In a close case, where the factfinder perceives the evidence to be a toss- up, the tie will go in favor of the party without the burden of proof. So, in an jurisdiction where a battery claim requires proof of a lack of consent, a tie on the consent issue means that the defendant wins. The fact that trespass to land is the one tort for which courts seem unwilling to shift the burden on the consent issue to the plaintiff shows once again the abiding importance with which the law treats private ownership of land.

To delve further into the issue of consent, it is helpful to break it up into chunks. Courts have categorized consent as coming in two forms – express and implied.

Express Consent

Express consent is consent that is *expressed* by the plaintiff. This doesn't require anything formal. Express consent can be communicated orally, in writing, or even in gestures. Legally, any of these is just as good as the other. In terms of trespass to land, waving someone into a room is just as valid a consent as delivering a signed written document that gives someone permission to enter.

You might wonder, if gestures or spoken words are legally valid to express consent, then why would anyone ever insist on a signed document indicating consent? The reason is that parties might later

disagree about what happened. In that case, a signed writing will be very credible evidence at trial.

We should acknowledge that what is credible to a jury may depend on the circumstances. If a neighbor is sued for walking into a backyard, a jury will probably readily believe testimony that there was a "come on over" gesture. But a jury would be rightfully skeptical of a demolition firm claiming it was given consent through gestures to bulldoze a garage.

What this all means is that the doctrine of express consent is perfectly at home in the real world. Neighbors can stay neighborly and informal. But demolition firms are well advised to get signed, written permission before they bite into the first bucketload of sheetrock.

Implied Consent

Implied consent is consent that, instead of being expressed, is implied. Circumstances, custom, context, and culture can all create implications of consent.

The validity of implied consent to intentional torts is crucial to how our society works. A restaurant patron takes a paper napkin out of a dispenser and uses it. This is a prima facie case of trespass to chattels. But it's not a winning case, because there is implied consent for restaurant patrons to take napkins. Of course if a restaurant patron empties all the dispensers, making off with hundreds of napkins, then the scope of the implied consent has been exceeded, and the restaurant has a good trespass-to-chattels case.

Implied consent works on an **objective standard**. The question is whether the objectively reasonable person, standing in the shoes of the defendant, would have reasonably believed that the plaintiff consented.

Implied consent can arise out of the particular circumstances. Climb into a boxing ring and hold up gloved hands, and you have impliedly consented to getting punched by the boxer waiting in the ring.

Implied consent can also arise by community custom. When neighborhood kids walk up to a house and ring the doorbell to sell

cookies for a fundraiser, consent to come on the land is implied by community custom. If homeowners want to avoid the implication of consent, then they can post no-soliciting signs.

The objective standard for implied consent leaves us with an important corollary: Consent can be valid even if the plaintiff never intended to consent. This is because the issue is not what the plaintiff was secretly thinking, but rather what the objectively reasonable defendant would comprehend.

The implied consent defense and its objective standard is often taught through the classic case of *O'Brien v. Cunard Steam-Ship Co.*, 28 N.E. 266 (Mass. 1891). Mary O'Brien – a young Irish immigrant on her way to Boston – sued the operator of an ocean liner for battery on account of having been given a vaccination for smallpox. The steamship line was in the practice of giving vaccinations at the time because of American immigration procedures. The evidence, according to the Massachusetts Supreme Judicial Court, showed that O'Brien stood in a line of people about to receive vaccinations and that, when her time came, she held up her arm and said nothing to the physician about a wish to not be vaccinated. According to the court:

> [T]he surgeon's conduct must be considered in connection with the surrounding circumstances. If the plaintiff's behavior was such as to indicate consent on her part, he was justified in his act, whatever her unexpressed feelings may have been.

28 N.E. at 266. The appellate opinion leaves it a mystery why O'Brien sued over being vaccinated – making it seem as though she had nothing of substance to complain about. Professor Ann C. Shalleck, however, looked into lower-court records in the case to find a richer version of the facts: The vaccine left O'Brien covered with blisters and sores, and the court dismissed evidence of O'Brien's desire not to be vaccinated, including her statement that she had already been vaccinated. Professor Shalleck observes that the court made assumptions about the circumstances on the ship that allowed them to "disregard or obliterate Mary O'Brien's own story." See Ann

C. Shalleck, *Feminist Legal Theory and the Reading of* O'Brien v. Cunard, 57 MO. L. REV. 371 (1992).

Indeed, it is the oft-cited aim of the cause of action of battery to give people a way – by being heard in court – to vindicate and validate their interest in bodily integrity. (How else does one explain the law's provision for symbolic awards of $1 in nominal damages?) One way of looking at the *O'Brien* case, then, is that in washing away the plaintiff's story, the court undermined a central aim of the tort of battery and a main tenet of the legal system: to give an aggrieved person the right to be heard and to have her or his personal autonomy upheld.

Professor Shalleck points to the *O'Brien* case as an example of the importance of discovering women's stories. Doing so, she points out, can allow us to see how the official version of a case's facts are shaped and misrepresented. And she explains that doing so can also allow us to critique a judge's understanding of a case. In explaining why a feminist perspective is important generally in learning the law, Shalleck observes, "Feminist theory does not add ideology to the curriculum. It reveals the ideology that is already there."

Case: Florida Publishing Co. v. Fletcher

To further explore the consent defense, here we have the first of two cases pitting the news media against the private property owners. Both cases share the same fundamental tension: The media wants to get the story, and the property owners want to be left alone.

In this first case, the issue is whether camera-wielding journalists have implied consent to enter private property after a disaster in order to capture vivid images of fresh tragedy.

Florida Publishing Co. v. Fletcher

Supreme Court of Florida
October 7, 1976

340 So. 2d 914. FLORIDA Publishing Company, a Florida Corporation, Petitioner (Defendant), v. Klenna Ann Fletcher,

Etc., Respondent (Plaintiffs). No. 48372. Opinion by ROBERTS, J., with which OVERTON, C.J., and ADKINS, BOYD and HATCHETT, JJ., concur. SUNDBERG, J., dissented with an opinion omitted here. ENGLAND, J., did not participate.

Justice B.K. ROBERTS:

~Respondent, Mrs. Fletcher, left Jacksonville for New York on September 15, 1972, to visit a friend. She left in Jacksonville her three young daughters, including seventeen-year-old Cindy. A "baby sitter" was to spend the nights with the children, but there was no one with them in the home during the daytime except a young man who had a room in the house and whom Mrs. Fletcher described as Cindy's "boy friend." On the afternoon of September 15, 1972, while Cindy was alone in the house, a fire of undetermined origin did large damage to the home, and Cindy died.

The fire and police departments were called by a neighbor who discovered the fire, but too late to save the child. A large group of firemen, news media representatives, and onlookers gathered at the scene and on Mrs. Fletcher's property.

When the Fire Marshal and Police Sergeant Short entered the house to make their official investigation, they invited the news media to accompany them, as they deposed was their standard practice. The media representatives entered through the open door; there was no objection to their entry; they entered quietly and peaceably; they did no damage to the property; and their entry was for the purpose of their news coverage of this fire and death.

The Fire Marshal desired a clear picture of the "silhouette" left on the floor after the removal of Cindy's body. He and Sergeant Short in their depositions explained that the picture was important for their respective investigations to show that the body was already on the floor *before* the heat of the fire did any damage in the room. The Fire Marshal took one polaroid picture of the silhouette, but it was not too clear, he had no further film, and he requested photographer Cranford to take

the "silhouette" picture which was made a part of the official investigation file of both the Fire and Police.

This picture was not only a part of the investigation but News Photographer Cranford turned it and his other pictures over to the defendant newspaper. It and several other pictures appeared in the news story of The Florida Times-Union on September 16, 1972.

Respondent first learned of the facts surrounding the death of her daughter by reading the newspaper story and viewing the published photographs.

Respondent filed an amended complaint against petitioner alleging (1) trespass and invasion of privacy, (2) invasion of privacy, (3) wrong intentional infliction of emotional distress – seeking punitive damages.

The trial court dismissed Count II and granted final summary judgment for petitioner as to Counts I and III. Relative to the granting of summary judgment for Petitioner as to Count I, the trial judge cogently explicated:

> "As to Count I, the question raised by the motion for summary judgment is one of law as there is no genuine issue of material fact. The question raised is whether the trespass alleged in Count I of the complaint was consented to by the doctrine of common custom and usage.
>
> "The law is well settled in Florida and elsewhere that there is no unlawful trespass when peaceable entry is made, without objection, under common custom and usage.~
>
> "In *Martin v. Struthers* (1943) 319 U.S. 141, 149, the Court struck down an unconstitutional and 'invalid in conflict with the freedom of speech and press' a city ordinance which made it unlawful trespass to knock on doors and ring doorbells to distribute literature. In so doing, it made the far reaching pronouncement followed by the Florida Supreme Court in *Prior v. White* (Fla. 1938) 132 Fla. 1:

"'Traditionally the American law punishes persons who enter onto the property of another after having been warned by the owner to keep off. * * We know of no state which, as does the Struthers ordinance in effect, makes a person a criminal trespasser if he enters the property of another for an innocent purpose without an explicit command from the owners to stay away.'

"In *McKee v. Gratz* (1922) 262 [260] U.S. 127, the Supreme Court recognized the rule that it was not trespass when under the 'habits of the country' entry was commonly made.

* * * * * *

"Not only did the Fire Marshal and Detective Sergeant Short testify it was common custom and usage to permit the news media to enter under the circumstances here, and of the great number of times they had permitted it in private homes, but many affidavits were filed to the same effect, including those of Duval County Sheriff Carson and Florida Attorney General Shevin.

"Similar affidavits have been filed from the Chicago Tribune; the ABC-TV News, New York; the Tallahassee Democrat; the Pensacola Journal; the Associated Press; the President of the American Newspaper Publishers Association; the President of the Radio Television News Directors Association; the Miami Herald; United Press International; The Florida Times-Union and Jacksonville Journal; The Washington Post; TV-12 at Jacksonville; TV-10 at Miami; TV-4 at Jacksonville; the New York Daily News; the Milwaukee Journal; the Birmingham Post-Herald; the Memphis Commercial Appeal; the Macon Telegraph; and the Tampa Tribune; all attesting that it is common usage, custom and practice for news

media to enter private premises and homes under circumstances like those here.

"Plaintiff filed no affidavits except her own; she makes no attempt to qualify as an expert; and she simply states her personal belief generally, without going into the situation involving coverage of a news story of public interest. She shows no qualifications to make an affidavit on the custom and usage in such matters.

"In Mrs. Fletcher's deposition, she stated she was in New York at the time of the fire; there was no one at the scene who objected to the entry; and she makes it clear she does not contend there was any force used for entry, or any physical damage done to the premises.

"Plaintiff likewise concedes that it was perfectly proper for the Fire and Police to enter without permission. The Fire and Police used the picture as part of their official investigation and actually requested that such picture be taken and would have made such request even had the Plaintiff been there and objected. There is no evidence that any restriction was placed upon the Defendant's photographer in the use of the photographs he took at the request of the Police and Fire Marshal.

"Numerous affidavits, as above set forth, have been filed by the Defendant in support of its motion for summary judgments. All these affidavits attest to the fact that it is common usage, custom and practice for news media to enter private premises and homes to report on matters of public interest or a public event. The court therefore finds that there is no genuine issue of material fact and that as a matter of law an entry, that may otherwise be an actionable trespass, becomes lawful and non-actionable when it is done under common usage, custom and practice. The court further finds that the entry complained of in Count I of the Plaintiff's

> complaint was one permitted by common usage, custom and practice, and that the Defendant is entitled to a summary judgment as a matter of law as to matters alleged in Count I of the Plaintiff's complaint."

On appeal, the District Court of Appeal reversed as to the granting of summary judgment on Count I, stating:

> "We do not here hold that a trespass or 'intrusion' did in fact occur sub judice: We simply find that such is alleged in Count I of the amended complaint and that the proofs before the learned trial judge are insufficient to resolve the point by summary judgment."

Although recognizing that consent is an absolute defense to an action for trespass and that the defense of custom and usage is but another way of expressing consent by implication – that is consent may be implied from custom, usage or conduct – the District Court commented that the emergency of the fire was over and that there was no contention that petitioner's employees entered the premises to render assistance, explained that respondent did not either impliedly or expressly invite petitioner's employees into her home, and concluded that the proofs before the court were not sufficient to show that there was no genuine issue of material fact as to whether implied consent by custom and usage authorized entry into the premises without invitation by appellant.~

The District Court erred in reversing summary judgment for petitioners as to Count I. The trial court properly determined from the record before it that there was no genuine issue of material fact insofar as the entry into respondent's home by petitioner's employees became lawful and non-actionable pursuant to the doctrine of common custom, usage, and practice and since it had been shown that it was common usage, custom and practice for news media to enter private premises and homes *under the circumstances present here.*

Judge McCord in his dissenting opinion could not agree with the majority that the news photographer who entered the burned

out home was a trespasser or that the photograph published by petitioner and the news story resulting from the entry were an actionable invasion of privacy. We agree with and approve the following well-reasoned explication by Judge McCord in his dissenting opinion:

> "The only photographs taken and published were of fire damage – none were of deceased or injured persons. There, is no contention that the particular photograph complained of (the silhouette picture) and the news story were in any way false or inaccurate. There could, therefore, be no recovery under the 'false-light' doctrine of invasion of privacy. See Cantrell v. Forest City Publishing Company, 419 U.S. 245 (1974). Thus, there could be no recovery from the publication if the same photograph had come from a source other than from the news photographer's entry upon the premises. Any recovery in this case must necessarily be based upon trespass, and, therefore, the only question is whether or not there was a trespass by the news photographer. The majority opinion discusses the implied consent doctrine under which a person, who does not have express consent from the owner or possessor of premises, may legally enter under circumstances which infer or imply consent (common usage, custom and practice). It is my view that the entry in this case was by implied consent.
>
> "It is not questioned that this tragic fire and death were being investigated by the fire department and the sheriff's office and that arson was suspected. The fire was a disaster of great public interest and it is clear that the photographer and other members of the news media entered the burned home at the invitation of the investigating officers. (Numerous members of the general public also went through the burned house.) Many affidavits of news editors throughout Florida and the nation and affidavits of Florida law enforcement

officials were filed in support of appellee's motion for summary judgment. These affidavits were to the general effect that it has been a long-standing custom and practice throughout the country for representatives of the news media to enter upon private property where disaster of great public interest has occurred – entering in a peaceful manner, without causing any physical damage, and at the invitation of the officers who are investigating the calamity. The affidavits of law enforcement officers indicate that the presence of the news media at such investigations is often helpful to the investigations in developing leads, etc.

"The affidavits as to custom and practice do not delineate between various kinds of property where a tragedy occurs. They apply to any such place. If an entry is or is not a trespass, its character would not change depending upon whether or not the place of the tragedy is a burned out home (as here), an office or other building or place. An analysis of the cases on implied consent by custom and usage, indicates that they do not rest upon the previous nonobjection to entry by the particular owner of the property in question but rest upon custom and practice generally. Implied consent would, of course, vanish if one were informed not to enter at that time by the owner or possessor or by their direction. But here there was not only no objection to the entry, but there was an invitation to enter by the officers investigating the fire. The question of implied consent to news media personnel to enter premises in a circumstance such as this appears to be one of first impression not only in this jurisdiction but elsewhere. This, in itself, tends to indicate that the practice has been accepted by the general public since it is a widespread practice of long-standing. Due to such widespread and long-standing custom, reason and logic support the application of implied consent to enter the

> premises in the case before us. It, therefore, was not a trespass, and I would affirm the trial court." (emphasis supplied)

Accordingly, that portion of the decision of the District Court of Appeal, First District, reversing summary judgment for petitioner as to Count I is quashed~.

It is so ordered.

Note on the Intermediate Appeals Court in *Florida Publishing*

The intermediate appeals court, which the Florida Supreme Court in the above opinion overturned, took a starkly different view. Judge Tyrie A. Boyer wrote:

> [N]o case has been cited to us by counsel, nor has independent research revealed any, in which consent by custom and usage was held to have authorized entry into the private dwelling of another.
>
> The law is so well established as to render citations superfluous that "every man's home is his castle".~ Sub judice, it is clear that appellant did not either impliedly or expressly invite appellee's employees into her home; nor is there anything in the record to indicate that appellant (nor others like situated) had theretofore acquiesced in other persons coming into her home: Therefore there was no basis for the establishing of an implied consent by custom and usage. Though it is conceded by appellant that the fire marshal and police rightfully entered the premises for the purpose of discharging their official duties, there is nothing to indicate that those officials had, in the absence of an emergency, authority to invite others to do so. The fire had been extinguished prior to the entry complained of. The emergency was over. There is no contention that appellee's employee went into the premises for the purpose of rendering assistance to the

> occupants nor to the officials.~ Under the authorities above cited, in the light of the affidavits filed by appellee in support of its motion for summary judgment, custom and usage implied consent to go onto the yard of appellant's home and up to the front door: However, the proofs before the trial court were not sufficient to show that there was no genuine issue as to the very material fact as to whether implied consent by custom and usage authorized entry into the premises, without invitation by appellant or someone authorized by her.

Fletcher v. Florida Publishing Co., 319 So. 2d 100, 108-09 (Fla. App. 1975).

Questions to Ponder About *Florida Publishing*

A. Whose reasoning do you find more persuasive? That of the Florida Court of Appeals or that of the Florida Supreme Court?

B. Where permission to enter land is implied by custom, there is generally a way to opt out. While custom may imply consent for sales people to walk up a driveway to ring a door bell, a no-soliciting sign will dispel the implication. A no-trespassing sign on a gate will dispel the implied custom for anyone – sales person, neighbor, or anyone else – to be able to walk up to the door. Was there a valid opt-out in *Florida Publishing*? That is, is there a way for the possessor of land to dispel the implied permission for the media to enter after a disaster? As a practical matter, how could a resident dispel the implied consent for the media to enter after a fire, hurricane, or tornado?

Note on Media Trespass and Implied Consent

Implied consent for media entry on land has had not had broad acceptance in other courts.

In *Anderson v. WROC-TV*, 109 Misc.2d 904 (N.Y. App. 1981.), an animal welfare official used a search warrant to enter a house where there was suspected animal mistreatment. The official called up multiple television stations, inviting them to come along on the search. The owner, who was at the house, objected to the entry of the

news crews, but they entered with the official regardless, filming the house's interior. The footage was then used on air.

Not persuaded by *Florida Publishing*'s implied consent theory, Justice David O. Boehm's opinion in *Anderson v. WROC-TV* held:

> The gathering of news and the means by which it is obtained does not authorize, whether under the First Amendment or otherwise, the right to enter into a private home by an implied invitation arising out of a self-created custom and practice.

Id. at 907. In view of the media defendant's urgings that the First Amendment should protect them, the judge noted an irony, citing *People v. Segal*, 78 Misc.2d 944 (N.Y. City Crim. Ct. 1974), where the CBS television network used legal process to oust unwelcome protestors:

> In a case where the factual circumstances were ironically reversed, it appears the First Amendment suffered a strange sea-change. The defendants there, without permission, entered into a studio of the Columbia Broadcasting System in an attempt to exercise their right of free speech by publicizing what they claimed was unfair and unequal treatment of homosexuals in television news broadcasts. CBS was not deterred by the First Amendment from bringing charges against them of criminal trespass and they were duly convicted.

Id. at 908.

Another case, *Berger v. Hanlon,* 129 F.3d 505 (9th Cir. 1997), also parted ways with *Florida Publishing*. In *Berger*, federal agents from the U.S. Fish and Wildlife Service entered into a written contract with CNN and Turner Broadcasting for cooperation in the production of television shows *Earth Matters* and *Network Earth*. According to the court, the network crews wanted footage of the Berger ranch, and federal officials wanted publicity for their enforcement efforts.

Rancher Paul Berger was under suspicion for poisoning eagles that were a threat to his livestock. Agents obtained a search warrant and entered the property. The agents made no disclosure to Berger or his wife that the lead agent was wearing a microphone, nor did they disclose that the cameras brought on to the property were owned by the media.

The raid was successful – at least from a television-production perspective. Crews was able to shoot eight hours of footage, and both the footage and the audio recordings were used on television. From a law enforcement standpoint, however, the bust was a bust. The search yielded only a misdemeanor conviction against Berger for violation of 7 U.S.C. § 136j(a)(2)(G) – using a pesticide in a manner inconsistent with its labeling.

In the subsequent civil suit brought by the Bergers, the Ninth Circuit held that the Bergers had stated a claim of trespass against the broadcasters. And interestingly, the court found the media so entwined with the federal government that the court upheld a constitutional tort claim against the media defendants as well as the agents.

Consent Implied By Law

In addition to being implied *in fact* – that is, by circumstances or custom – consent can also be implied by law. When unconscious patients arrive in the emergency room, they have not consented to medical treatment. (How could they, being unconscious?) Consent in such a situation is implied by law for public policy reasons.

In some jurisdictions, during hunting season, consent for hunters to enter private property is implied by law. To defeat the implication, the onus is on property owners to post no trespassing signs.

The distinction between consent implied by law and consent implied in fact can get a little blurry. One might say that the fire-ravaged home of *Florida Publishing* is analogous to the unconscious ER patient, with neither situation providing any basis for factual consent. At least on a theoretical level, the difference between implied-in-fact and implied-by-law consent is that implied-in-fact consent is manifested,

if not by the plaintiff, at least by people within the plaintiff's community. The court, through implied-in-fact consent doctrine, merely recognizes that existing implication. By contrast, implied-by-law consent doesn't exist "out there" in the real world. Instead, the court construes it – that is, acts as if it exists – because the court has decided that doing so is for the best.

Consent Obtained By Invalid Means

If consent is obtained by fraud, duress, or a mistake induced by the defendant, then the consent will not be valid.

Case: Food Lion v. Capital Cities / ABC

This case explores consent obtained by deception. Like *Florida Publishing v. Fletcher,* it concerns the news media's desire to enter private property for journalistic purposes.

Food Lion v. Capital Cities /ABC

United States Court of Appeals for the Fourth Circuit
October 20, 1999

194 F. 3d 505. FOOD LION, INCORPORATED, Plaintiff-Appellee, v. CAPITAL CITIES/ABC, INC.; Lynne Litt, a/k/a Lynne Neufes; ABC Holding Company; American Broadcasting Companies, Incorporated; Richard N. Kaplan; Ira Rosen; Susan Barnett, Defendants-Appellants, Nos. 97-2492, 97-2564. Before NIEMEYER, MICHAEL, and MOTZ, Circuit Judges.

Circuit Judge M. BLANE MICHAEL:

Two ABC television reporters, after using false resumes to get jobs at Food Lion, Inc. supermarkets, secretly videotaped what appeared to be unwholesome food handling practices. Some of the video footage was used by ABC in a *PrimeTime Live* broadcast that was sharply critical of Food Lion. The grocery chain sued Capital Cities/ABC, Inc., American Broadcasting Companies, Inc., Richard Kaplan and Ira Rosen, producers of *PrimeTime Live*, and Lynne Dale and Susan Barnett, two reporters for the program (collectively, "ABC" or the "ABC defendants"). Food Lion did not sue for defamation, but

focused on how ABC gathered its information through claims for fraud, breach of duty of loyalty, trespass, and unfair trade practices. Food Lion won at trial, and judgment for compensatory damages of $1,402 was entered on the various claims. Following a substantial (over $5 million) remittitur, the judgment provided for $315,000 in punitive damages. The ABC defendants appeal the district court's denial of their motion for judgment as a matter of law, and Food Lion appeals the court's ruling that prevented it from proving publication damages. Having considered the case, we (1) reverse the judgment that the ABC defendants committed fraud and unfair trade practices, (2) affirm the judgment that Dale and Barnett breached their duty of loyalty and committed a trespass, and (3) affirm, on First Amendment grounds, the district court's refusal to allow Food Lion to prove publication damages.

I.

In early 1992 producers of ABC's *PrimeTime Live* program received a report alleging that Food Lion stores were engaging in unsanitary meat-handling practices. The allegations were that Food Lion employees ground out-of-date beef together with new beef, bleached rank meat to remove its odor, and re-dated (and offered for sale) products not sold before their printed expiration date. The producers recognized that these allegations presented the potential for a powerful news story, and they decided to conduct an undercover investigation of Food Lion. ABC reporters Lynne Dale (Lynne Litt at the time) and Susan Barnett concluded that they would have a better chance of investigating the allegations if they could become Food Lion employees. With the approval of their superiors, they proceeded to apply for jobs with the grocery chain, submitting applications with false identities and references and fictitious local addresses. Notably, the applications failed to mention the reporters' concurrent employment with ABC and otherwise misrepresented their educational and employment experiences. Based on these applications, a South Carolina Food Lion store hired Barnett as a deli clerk in April 1992, and a North Carolina Food Lion store hired Dale as a meat wrapper trainee in May 1992.

Barnett worked for Food Lion for two weeks, and Dale for only one week. As they went about their assigned tasks for Food Lion, Dale and Barnett used tiny cameras ("lipstick" cameras, for example) and microphones concealed on their bodies to secretly record Food Lion employees treating, wrapping and labeling meat, cleaning machinery, and discussing the practices of the meat department. They gathered footage from the meat cutting room, the deli counter, the employee break room, and a manager's office. All told, in their three collective weeks as Food Lion employees, Dale and Barnett recorded approximately 45 hours of concealed camera footage.

Some of the videotape was eventually used in a November 5, 1992, broadcast of *PrimeTime Live*. ABC contends the footage confirmed many of the allegations initially leveled against Food Lion. The broadcast included, for example, videotape that appeared to show Food Lion employees repackaging and redating fish that had passed the expiration date, grinding expired beef with fresh beef, and applying barbeque sauce to chicken past its expiration date in order to mask the smell and sell it as fresh in the gourmet food section. The program included statements by former Food Lion employees alleging even more serious mishandling of meat at Food Lion stores across several states. The truth of the *PrimeTime Live* broadcast was not an issue in the litigation we now describe.

Food Lion sued ABC and the *PrimeTime Live* producers and reporters. Food Lion's suit focused not on the broadcast, as a defamation suit would, but on the methods ABC used to obtain the video footage. The grocery chain asserted claims of fraud, breach of the duty of loyalty, trespass, and unfair trade practices, seeking millions in compensatory damages. Specifically, Food Lion sought to recover (1) administrative costs and wages paid in connection with the employment of Dale and Barnett and (2) broadcast (publication) damages for matters such as loss of good will, lost sales and profits, and diminished stock value. Punitive damages were also requested by Food Lion.~

II.

A.~

ABC argues that it was error to allow the jury to hold Dale and Barnett liable for trespass on either of the independent grounds (1) that Food Lion's consent to their presence as employees was void because it was based on misrepresentations or (2) that Food Lion's consent was vitiated when Dale and Barnett breached the duty of loyalty. The jury found Dale and Barnett liable on both of these grounds and awarded Food Lion $1.00 in nominal damages, which is all that was sought in the circumstances.

In North and South Carolina, as elsewhere, it is a trespass to enter upon another's land without consent. Accordingly, consent is a defense to a claim of trespass. Even consent gained by misrepresentation is sometimes sufficient. See *Desnick v. American Broad. Cos.,* 44 F.3d 1345, 1351-52 (7th Cir.1995) (Posner, C.J.). The consent to enter is canceled out, however, "if a wrongful act is done in excess of and in abuse of authorized entry."~

We turn first to whether Dale and Barnett's consent to be in non-public areas of Food Lion property was void from the outset because of the resume misrepresentations. "[C]onsent to an entry is often given legal effect" even though it was obtained by misrepresentation or concealed intentions. *Desnick*, 44 F.3d at 1351. Without this result,

> a restaurant critic could not conceal his identity when he ordered a meal, or a browser pretend to be interested in merchandise that he could not afford to buy. Dinner guests would be trespassers if they were false friends who never would have been invited had the host known their true character, and a consumer who in an effort to bargain down an automobile dealer falsely claimed to be able to buy the same car elsewhere at a lower price would be a trespasser in a dealer's showroom.

Id.~

We like *Desnick*'s thoughtful analysis about when a consent to enter that is based on misrepresentation may be given effect. In

Desnick ABC sent persons posing as patients needing eye care to the plaintiffs' eye clinics, and the test patients secretly recorded their examinations. Some of the recordings were used in a *PrimeTime Live* segment that alleged intentional misdiagnosis and unnecessary cataract surgery. *Desnick* held that although the test patients misrepresented their purpose, their consent to enter was still valid because they did not invade "any of the specific interests [relating to peaceable possession of land] the tort of trespass seeks to protect:" the test patients entered offices "open to anyone expressing a desire for ophthalmic services" and videotaped doctors engaged in professional discussions with strangers, the testers; the testers did not disrupt the offices or invade anyone's private space; and the testers did not reveal the "intimate details of anybody's life." 44 F.3d at 1352-53. *Desnick* supported its conclusion with the following comparison:

> "Testers" who pose as prospective home buyers in order to gather evidence of housing discrimination are not trespassers even if they are private persons not acting under color of law. The situation of [ABC's] "testers" is analogous. Like testers seeking evidence of violation of anti-discrimination laws, [ABC's] test patients gained entry into the plaintiffs' premises by misrepresenting their purposes (more precisely by a misleading omission to disclose those purposes). But the entry was not invasive in the sense of infringing the kind of interest of the plaintiffs that the law of trespass protects; it was not an interference with the ownership or possession of land.

Id. at 1353 (citation omitted).~

The jury~ found that the reporters committed trespass by breaching their duty of loyalty to Food Lion "as a result of pursuing [their] investigation for ABC." We affirm the finding of trespass on this ground because the breach of duty of loyalty – triggered by the filming in non-public areas, which was adverse to Food Lion – was a wrongful act in excess of Dale

and Barnett's authority to enter Food Lion's premises as employees.~

The Court of Appeals of North Carolina has indicated that secretly installing a video camera in someone's private home can be a wrongful act in excess of consent given to enter.~

It is consistent with that principle to hold that consent to enter is vitiated by a wrongful act that exceeds and abuses the privilege of entry.~

B.

ABC argues that even if state tort law covers some of Dale and Barnett's conduct, the district court erred in refusing to subject Food Lion's claims to any level of First Amendment scrutiny. ABC makes this argument because Dale and Barnett were engaged in newsgathering for *PrimeTime Live*. It is true that there are "First Amendment interests in newsgathering." In re Shain, 978 F.2d 850, 855 (4th Cir.1992) (Wilkinson J., concurring). See also *Branzburg v. Hayes,* 408 U.S. 665, 681 (1972) ("without some protection for seeking out the news, freedom of the press could be eviscerated."). However, the Supreme Court has said in no uncertain terms that "generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news." *Cohen v. Cowles Media Co.,* 501 U.S. 663, 669 (1991); see also *Desnick*, 44 F.3d at 1355 ("the media have no general immunity from tort or contract liability").~

We are convinced that the media can do its important job effectively without resort to the commission of run-of-the-mill torts.~

C.

For the foregoing reasons, we affirm the judgment that Dale and Barnett~ committed trespass. We likewise affirm the damages award against them for these torts in the amount of $2.00.

Notes on *Food Lion*

Although the grocery store won its case against ABC, it was a pyrrhic victory. The court struck down the multi-million punitive damages verdict because it was based entirely on the fraud claim, which the court found lacking. The court also struck down the compensatory damages claim based on the reputational harm that occurred from ABC's broadcast of the *PrimeTime Live* program about Food Lion. Those damages were unavailable, the court held, because "it was [Food Lion's] food handling practices themselves – not the method by which they were recorded or published – which caused the loss of consumer confidence." (internal quotes omitted).

Thus, in the end, Food Lion won only $2. It was a technical win for the strict application of trespass law, but it was widely hailed as a victory for the news media.

Exceeding the Scope of Consent

Often there is no question that there is consent. Instead, the issue is the scope of that consent. Playing a game of tag means consenting to being touched. But does it mean consent to a powerful shove? How about consent to being hit with a ball – or a rock? If the scope of the consent is exceeded, then it will not work as a defense. As you might imagine, scope-of-consent issues force courts into difficult line-drawing problems.

Case: Koffman v. Garnett

This case looks the scope-of-consent issue in the context of contact sports.

Koffman v. Garnett

Supreme Court of Virginia
January 10, 2003

265 Va. 12. Andrew W. KOFFMAN, an Infant by his Father and Next Friend, Richard Koffman, et al., v. James GARNETT. Record No. 020439.

Justice ELIZABETH B. LACY:

In this case we consider whether the trial court properly dismissed the plaintiffs' second amended motion for judgment for failure to state causes of action for gross negligence, assault, and battery.

Because this case was decided on demurrer, we take as true all material facts properly pleaded in the motion for judgment and all inferences properly drawn from those facts. *Burns v. Board of Supvrs.,* 218 Va. 625, 627 (1977).

In the fall of 2000, Andrew W. Koffman, a 13-year old middle school student at a public school in Botetourt County, began participating on the school's football team. It was Andy's first season playing organized football, and he was positioned as a third-string defensive player. James Garnett was employed by the Botetourt County School Board as an assistant coach for the football team and was responsible for the supervision, training, and instruction of the team's defensive players.

The team lost its first game of the season. Garnett was upset by the defensive players' inadequate tackling in that game and became further displeased by what he perceived as inadequate tackling during the first practice following the loss.

Garnett ordered Andy to hold a football and "stand upright and motionless" so that Garnett could explain the proper tackling technique to the defensive players. Then Garnett, without further warning, thrust his arms around Andy's body, lifted him "off his feet by two feet or more," and "slamm[ed]" him to the ground. Andy weighed 144 pounds, while Garnett weighed approximately 260 pounds. The force of the tackle broke the humerus bone in Andy's left arm. During prior practices, no coach had used physical force to instruct players on rules or techniques of playing football.

In his second amended motion for judgment, Andy, by his father and next friend, Richard Koffman, and Andy's parents, Richard and Rebecca Koffman, individually, (collectively "the Koffmans") alleged that Andy was injured as a result of Garnett's simple and gross negligence and intentional acts of assault and battery. Garnett filed a demurrer~, asserting that the

second amended motion for judgment did not allege sufficient facts to support a lack of consent to the tackling demonstration and, therefore, did not plead causes of action for either gross negligence, assault, or battery. The trial court dismissed the action, finding that~ the facts alleged were insufficient to state causes of action for gross negligence, assault, or battery because the instruction and playing of football are "inherently dangerous and always potentially violent."

In this appeal, the Koffmans~ assert that they pled sufficient facts in their second amended motion for judgment to sustain their claims of~ assault~ and battery.~

The second amended motion for judgment is sufficient~ to establish a cause of action for the tort of battery. The Koffmans pled that Andy consented to physical contact with players "of like age and experience" and that neither Andy nor his parents expected or consented to his "participation in aggressive contact tackling by the adult coaches." Further, the Koffmans pled that, in the past, coaches had not tackled players as a method of instruction. Garnett asserts that, by consenting to play football, Andy consented to be tackled, by either other football players or by the coaches.

Whether Andy consented to be tackled by Garnett in the manner alleged was a matter of fact. Based on the allegations in the Koffmans' second amended motion for judgment, reasonable persons could disagree on whether Andy gave such consent. Thus, we find that the trial court erred in holding that the Koffmans' second amended motion for judgment was insufficient as a matter of law to establish a claim for battery.~

Reversed and remanded.

Justice CYNTHIA DINAH KINSER, concurring in part and dissenting in part:

~In my view, the second amended motion for judgment filed by the plaintiffs, Andrew W. Koffman, by his father and next friend, and Richard Koffman and Rebecca Koffman, individually, was insufficient as a matter of law to state a claim for battery.

Absent fraud, consent is generally a defense to an alleged battery. In the context of this case, "[t]aking part in a game manifests a willingness to submit to such bodily contacts or restrictions of liberty as are permitted by its rules or usages." However, participating in a particular sport "does not manifest consent to contacts which are prohibited by rules or usages of the game if such rules or usages are designed to protect the participants and not merely to secure the better playing of the game as a test of skill."

The thrust of the plaintiffs' allegations is that they did not consent to "Andy's participation in aggressive contact tackling by the adult coaches" but that they consented only to Andy's engaging "in a contact sport with other children of like age and experience." They further alleged that the coaches had not previously tackled the players when instructing them about the rules and techniques of football.

It is notable, in my opinion, that the plaintiffs admitted in their pleading that Andy's coach was "responsible ... for the supervision, training and instruction of the defensive players." It cannot be disputed that one responsibility of a football coach is to minimize the possibility that players will sustain "something more than slight injury" while playing the sport. A football coach cannot be expected "to extract from the game the body clashes that cause bruises, jolts and hard falls." Instead, a coach should ensure that players are able to "withstand the shocks, blows and other rough treatment with which they would meet in actual play" by making certain that players are in "sound physical condition," are issued proper protective equipment, and are "taught and shown how to handle [themselves] while in play." The instruction on how to handle themselves during a game should include demonstrations of proper tackling techniques. By voluntarily participating in football, Andy and his parents necessarily consented to instruction by the coach on such techniques. The alleged battery occurred during that instruction.

The plaintiffs alleged that they were not aware that Andy's coach would use physical force to instruct on the rules and

techniques of football since neither he nor the other coaches had done so in the past. Surely, the plaintiffs are not claiming that the scope of their consent changed from day to day depending on the coaches' instruction methods during prior practices. Moreover, they did not allege that they were told that the coaches would not use physical demonstrations to instruct the players.

Additionally, the plaintiffs did not allege that the tackle itself violated any rule or usage of the sport of football. Nor did they plead that Andy could not have been tackled by a larger, physically stronger, and more experienced player either during a game or practice. Tackling and instruction on proper tackling techniques are aspects of the sport of football to which a player consents when making a decision to participate in the sport.

In sum, I conclude that the plaintiffs did not sufficiently plead a claim for battery. We must remember that acts that might give rise to a battery on a city street will not do so in the context of the sport of football. We must also not blur the lines between gross negligence and battery because the latter is an intentional tort. I agree fully that the plaintiffs alleged sufficient facts to proceed with their claim for gross negligence.

For these reasons, I respectfully concur, in part, and dissent, in part, and would affirm the judgment of the circuit court sustaining the demurrer with regard to the claim for battery.

Questions to Ponder About *Koffman v. Garnett*

A. Based on what you know of the facts, along with your common experience, where do you think the outer boundary of consent was in this case? Was Coach Garnett's tackle within it? Would it have been within the scope of consent for Garnett to have done the same thing in slow motion, such that Koffman was not hurt? What if the tackle were exactly the same as in the case, but it was carried out by another student, instead of by Coach Garnett?

B. Where do you think the line is drawn with student touches in a game context? Are only legal tackles within the scope of consent? How about a late hit (a tackle after the whistle is blown and the play

is over)? A late hit is outside the rules, but is it outside the scope of legal consent and therefore actionable as a battery? How about tackling a player full force after that player has signaled for a fair catch? (A fair catch is when, during a kickoff or punt, the receiving player waives the ability to advance the ball in exchange for not being tackled. It is typically used when the receiving player must be looking into the sky to catch the ball and will not see an oncoming opposing player.) What about illegal spearing (an illegal tackle that has frequently caused catastrophic injury)? What about an illegal spearing late hit after a fair catch?

Self-Defense, Defense of Others, Defense of Property

Tort law guarantees citizens a civil way of settling disputes and getting justice. As such, tort law expects that people will not resort to the use of force against one another, infringements on their rights notwithstanding.

Yet the law does recognize that there are some circumstances under which people cannot be expected to wait to try to vindicate their rights in court. Under these limited circumstances, people can commit prima facie intentional torts and then later escape liability, if sued, by asserting defenses of self-defense, defense of others, or defense of property.

Self-defense entitles a person to use reasonable force, as apparently necessary, to prevent an imminent and unconsented-to touching that is harmful or offensive, or a confinement. In other words, you can defend yourself with reasonable force where there is an immediate threat of battery or false imprisonment.

The law puts stringent limits on self-defense. Notice that the threat must be *imminent*. In other words, self-defense privilege arises where the defendant has an immediate choice of self-defense or suffering the battery or false imprisonment. If there is time to call the police, or if the threat has not fully materialized, then imminence is lacking, and self-defense will not shield the defendant from tort liability.

Another key limitation is that only *reasonable force* is permissible. That is, the degree of force must not be more than the force that appears

necessary to thwart the threat. Deadly force may only be used where the defendant is faced with an extremely serious threat – such as death, rape, sodomy, loss of limb, loss of sight, etc. – and where nothing short of deadly force will stop the imminent attack.

Jurisdictions differ on whether the defendant has a *duty to retreat*. Many jurisdictions will not allow self-defense to negate tort liability where the defendant could have safely retreated to avoid the threat. Some jurisdictions, by contrast, allow a defendant to stand her or his ground and use force. In general, jurisdictions apply the same rule in torts as they do for criminal cases.

Defense of others – that is, defense of a third party – works nearly identically to self-defense, with one important exception. The exception comes up where the defendant makes a reasonable mistake about whether there really is a threat to the third party. In most jurisdictions, if the defendant mistakenly believes that the third party is threatened, when that person is not actually threatened, then the defendant cannot use defense of others to avoid tort liability.

Let's take an example: Suppose three friends are filming a video on a public street, shooting a scene of a mugging. In the scene, a man pushes down and savagely "beats" an actress appearing to be elderly woman. Unaware that it's staged scene, a passer-by stops his car, jumps out, and grabs the actor playing the thug, and pushes him away from the woman. In most jurisdictions, the passer-by – no matter how reasonable his subjective belief that a battery was occurring – would be liable to the actor he pushed for battery.

Funny enough, this example is not a hypothetical. These are the exact facts of what happened when actor Andy Samberg – before being hired on *Saturday Night Live* – was filming a mugging scene with his friends on Olympic Boulevard in Los Angeles. The passer-by who stopped to intervene was none other than actor Kiefer Sutherland. Famous for his role as tough-guy-who-doesn't-play-by-the-rules counterterrorism agent Jack Bauer on *24*, Sutherland leapt to the woman's defense. Luckily, Samberg and his friends were able to quickly explain to Sutherland that they were making a movie.

In most jurisdictions, Sutherland would be liable for battery. In a minority of jurisdictions, Sutherland's reasonable mistake would not have prevented his ability to use defense of others as a complete defense to a suit for battery. Of course, in all jurisdictions, struggling comedic actors are well advised to milk such a situation for publicity value rather than filing a lawsuit.

Defense of property allows the reasonable use of force to defend both land and chattels against trespass. Generally, property owners must make a verbal demand on the trespasser to stop. After that, however, property owners may use as much force as is necessary to prevent the trespass, short of deadly force.

Whether deadly force may be used for the protection of property is a controversial issue. Most jurisdictions do not allow deadly force to be used against a trespasser merely on account of defending a property interest. (Although if there is additionally a threat to a person, then deadly force may be permissible as self-defense or defense of others.) If the property is a dwelling, and the trespasser is engaging in a breaking-and-entering felony, then many or most courts would allow deadly force if necessary – that is, if the intruder could not be evicted more safely.

Case: Katko v. Brinney

This next case is the classic exploration of the use of deadly force to defend property.

Katko v. Briney

Supreme Court of Iowa
February 9, 1971

183 N.W.2d 657. Marvin KATKO, Appellee, v. Edward BRINEY and Bertha L. Briney, Appellants. No. 54169.

Chief Justice C. EDWIN MOORE:

The primary issue presented here is whether an owner may protect personal property in an unoccupied boarded-up farm house against trespassers and thieves by a spring gun capable of inflicting death or serious injury.

We are not here concerned with a man's right to protect his home and members of his family. Defendants' home was several miles from the scene of the incident to which we refer infra.

Plaintiff's action is for damages resulting from serious injury caused by a shot from a 20-gauge spring shotgun set by defendants in a bedroom of an old farm house which had been uninhabited for several years. Plaintiff and his companion, Marvin McDonough, had broken and entered the house to find and steal old bottles and dated fruit jars which they considered antiques.

At defendants' request plaintiff's action was tried to a jury consisting of residents of the community where defendants' property was located. The jury returned a verdict for plaintiff and against defendants for $20,000 actual and $10,000 punitive damages.~

Most of the facts are not disputed. In 1957 defendant Bertha L. Briney inherited her parents' farm land in Mahaska and Monroe Counties. Included was an 80-acre tract in southwest Mahaska County where her grandparents and parents had lived. No one occupied the house thereafter. Her husband, Edward, attempted to care for the land. He kept no farm machinery thereon. The outbuildings became dilapidated.

For about 10 years, 1957 to 1967, there occurred a series of trespassing and housebreaking events with loss of some household items, the breaking of windows and 'messing up of the property in general'. The latest occurred June 8, 1967, prior to the event on July 16, 1967 herein involved.

Defendants through the years boarded up the windows and doors in an attempt to stop the intrusions. They had posted 'no trespass' signs on the land several years before 1967. The nearest one was 35 feet from the house. On June 11, 1967 defendants set 'a shotgun trap' in the north bedroom. After Mr. Briney cleaned and oiled his 20-gauge shotgun, the power of which he was well aware, defendants took it to the old house where they secured it to an iron bed with the barrel pointed at the bedroom door. It was rigged with wire from the doorknob to the gun's

trigger so it would fire when the door was opened. Briney first pointed the gun so an intruder would be hit in the stomach but at Mrs Briney's suggestion it was lowered to hit the legs. He admitted he did so 'because I was mad and tired of being tormented' but 'he did not intend to injure anyone'. He gave to explanation of why he used a loaded shell and set it to hit a person already in the house. Tin was nailed over the bedroom window. The spring gun could not be seen from the outside. No warning of its presence was posted.

Plaintiff lived with his wife and worked regularly as a gasoline station attendant in Eddyville, seven miles from the old house. He had observed it for several years while hunting in the area and considered it as being abandoned. He knew it had long been uninhabited. In 1967 the area around the house was covered with high weeds. Prior to July 16, 1967 plaintiff and McDonough had been to the premises and found several old bottles and fruit jars which they took and added to their collection of antiques. On the latter date about 9:30 p.m. they made a second trip to the Briney property. They entered the old house by removing a board from a porch window which was without glass. While McDonough was looking around the kitchen area plaintiff went to another part of the house. As he started to open the north bedroom door the shotgun went off striking him in the right leg above the ankle bone. Much of his leg, including part of the tibia, was blown away. Only by McDonough's assistance was plaintiff able to get out of the house and after crawling some distance was put in his vehicle and rushed to a doctor and then to a hospital. He remained in the hospital 40 days.

Plaintiff's doctor testified he seriously considered amputation but eventually the healing process was successful. Some weeks after his release from the hospital plaintiff returned to work on crutches. He was required to keep the injured leg in a cast for approximately a year and wear a special brace for another year. He continued to suffer pain during this period.

There was undenied medical testimony plaintiff had a permanent deformity, a loss of tissue, and a shortening of the leg.

The record discloses plaintiff to trial time had incurred $710 medical expense, $2056.85 for hospital service, $61.80 for orthopedic service and $750 as loss of earnings. In addition thereto the trial court submitted to the jury the question of damages for pain and suffering and for future disability.

Plaintiff testified he knew he had no right to break and enter the house with intent to steal bottles and fruit jars therefrom. He further testified he had entered a plea of guilty to larceny in the nighttime of property of less than $20 value from a private building. He stated he had been fined $50 and costs and paroled during good behavior from a 60-day jail sentence. Other than minor traffic charges this was plaintiff's first brush with the law. On this civil case appeal it is not our prerogative to review the disposition made of the criminal charge against him.

The main thrust of defendants' defense in the trial court and on this appeal is that 'the law permits use of a spring gun in a dwelling or warehouse for the purpose of preventing the unlawful entry of a burglar or thief'.~

In the statement of issues the trial court stated plaintiff and his companion committed a felony when they broke and entered defendants' house. In instruction 2 the court referred to the early case history of the use of spring guns and stated under the law their use was prohibited except to prevent the commission of felonies of violence and where human life is in danger. The instruction included a statement breaking and entering is not a felony of violence.

Instruction 5 stated: 'You are hereby instructed that one may use reasonable force in the protection of his property, but such right is subject to the qualification that one may not use such means of force as will take human life or inflict great bodily injury. Such is the rule even though the injured party is a trespasser and is in violation of the law himself.'

Instruction 6 stated: 'An owner of premises is prohibited from willfully or intentionally injuring a trespasser by means of force that either takes life or inflicts great bodily injury; and therefore a person owning a premise is prohibited from setting out 'spring guns' and like dangerous devices which will likely take life or inflict great bodily injury, for the purpose of harming trespassers. The fact that the trespasser may be acting in violation of the law does not change the rule. The only time when such conduct of setting a 'spring gun' or a like dangerous device is justified would be when the trespasser was committing a felony of violence or a felony punishable by death, or where the trespasser was endangering human life by his act.'

Instruction 7, to which defendants made no objection or exception, stated: 'To entitle the plaintiff to recover for compensatory damages, the burden of proof is upon him to establish by a preponderance of the evidence each and all of the following propositions:

> 1. That defendants erected a shotgun trap in a vacant house on land owned by defendant, Bertha L. Briney, on or about June 11, 1967, which fact was known only by them, to protect household goods from trespassers and thieves.
>
> 2. That the force used by defendants was in excess of that force reasonably necessary and which persons are entitled to use in the protection of their property.
>
> 3. That plaintiff was injured and damaged and the amount thereof.
>
> 4. That plaintiff's injuries and damages resulted directly from the discharge of the shotgun trap which was set and used by defendants.'

The overwhelming weight of authority, both textbook and case law, supports the trial court's statement of the applicable principles of law.

Prosser on Torts, Third Edition, pages 116-118, states:

> ... the law has always placed a higher value upon human safety than upon mere rights in property, it is the accepted rule that there is no privilege to use any force calculated to cause death or serious bodily injury to repel the threat to land or chattels, unless there is also such a threat to the defendant's personal safety as to justify a self-defense. … spring guns and other mankilling devices are not justifiable against a mere trespasser, or even a petty thief. They are privileged only against those upon whom the landowner, if he were present in person would be free to inflict injury of the same kind.

~In *Hooker v. Miller,* 37 Iowa 613, we held defendant vineyard owner liable for damages resulting from a spring gun shot although plaintiff was a trespasser and there to steal grapes. At pages 614, 615, this statement is made: "This court has held that a mere trespass against property other than a dwelling is not a sufficient justification to authorize the use of a deadly weapon by the owner in its defense; and that if death results in such a case it will be murder, though the killing be actually necessary to prevent the trespass." At page 617 this court said: "[T]respassers and other inconsiderable violators of the law are not to be visited by barbarous punishments or prevented by inhuman inflictions of bodily injuries."

The facts in *Allison v. Fiscus*, 156 Ohio 120, decided in 1951, are very similar to the case at bar. There plaintiff's right to damages was recognized for injuries received when he feloniously broke a door latch and started to enter defendant's warehouse with intent to steal. As he entered a trap of two sticks of dynamite buried under the doorway by defendant owner was set off and plaintiff seriously injured. The court held the question whether a particular trap was justified as a use of reasonable and necessary force against a trespasser engaged in the commission of a felony should have been submitted to the jury. The Ohio Supreme Court recognized plaintiff's right to recover punitive or exemplary damages in addition to compensatory damages.~

The legal principles stated by the trial court in instructions 2, 5 and 6 are well established and supported by the authorities~. There is no merit in defendants' objections and exceptions thereto. Defendants' various motions based on the same reasons stated in exceptions to instructions were properly overruled.

Plaintiff's claim and the jury's allowance of punitive damages, under the trial court's instructions relating thereto, were not at any time or in any manner challenged by defendants in the trial court as not allowable. We therefore are not presented with the problem of whether the $10,000 award should be allowed to stand.

We express no opinion as to whether punitive damages are allowable in this type of case. If defendants' attorneys wanted that issue decided it was their duty to raise it in the trial court.~

Study and careful consideration of defendants' contentions on appeal reveal no reversible error.

Affirmed.

Questions to Ponder on *Katko v. Briney*

A. Are you surprised by the verdict? Do you think such a verdict is more or less likely in Iowa farm country than it would be in Manhattan?

B. The court notes, "We are not here concerned with a man's right to protect his home and members of his family. Defendants' home was several miles from the scene of the incident … ." Do you think the result would have been different if the spring gun was set up in the house the Brineys' were living in? Would it make a difference if the gun set to fire on intruders only when the Brineys were inside, as opposed to when they were gone on errands or on vacation?

C. What if Mr. Briney had surrounded his property with warning signs that said "NO TRESPASSING – DEATH OR SERIOUS INJURY MAY RESULT – AUTOMATIC SHOTGUN IN USE." Would that make a difference to the outcome of the case? Why or why not?

Necessity

The defense of necessity allows a defendant, in emergency circumstances, to escape tort liability for committing an intentional tort against an innocent person. The defense of necessity is similar to self-defense or defense of others, except that it does not require the plaintiff to have been an aggressor.

As a practical matter, necessity is a defense that applies only to torts against property – that is, trespass to land, trespass to chattels, and conversion. Theoretically, necessity could apply to the personal torts. A battery effected by shoving an uncooperative person out of the way in order to trip a fire alarm, one imagines, would be justified on account of a necessity defense. But such cases, to the extent they come up at all, are no doubt rare.

There are two brands of necessity – public necessity and private necessity.

Public necessity is when the tort is committed in order to protect the public as a whole from some danger. The defense of public necessity is a total defense, voiding all liability.

Private necessity is when the tort is committed to help one or a few people. Private necessity works the same as public necessity, except that private necessity is only a partial defense: The defendant who successfully interposes a defense of private necessity is still liable for compensatory damage for any actual harm suffered. So if a person commits a trespass to chattels by absconding with someone's cell phone to call for emergency help, then the phone snatcher is liable to the phone's owner for damage to the phone. If the phone owner has not suffered any actual loss, however, there is no claim.

So, what good is the defense of private necessity if the trespasser is still liable for the cost of any damage done? For one thing, it means that the trespasser cannot be held liable for punitive damages. But it also means that the property-owner does not have the right to self-help measures that would defeat the trespasser.

Cases: Vincent v. Lake Erie and Ploof v. Putnam

Here we have not one but two classic cases on private necessity. The first is *Vincent v. Lake Erie*. The second is the case-within-a-case, *Ploof v. Putnam*.

Vincent v. Lake Erie Transportation Co.

Supreme Court of Minnesota
January 14, 1910

109 Minn. 456. VINCENT et al. v. LAKE ERIE TRANSP. CO.

Justice THOMAS D. O'BRIEN:

The steamship Reynolds, owned by the defendant, was for the purpose of discharging her cargo on November 27, 1905, moored to plaintiff's dock in Duluth. While the unloading of the boat was taking place a storm from the northeast developed, which at about 10 o'clock p. m., when the unloading was completed, had so grown in violence that the wind was then moving at 50 miles per hour and continued to increase during the night. There is some evidence that one, and perhaps two, boats were able to enter the harbor that night, but it is plain that navigation was practically suspended from the hour mentioned until the morning of the 29th, when the storm abated, and during that time no master would have been justified in attempting to navigate his vessel, if he could avoid doing so. After the discharge of the cargo the Reynolds signaled for a tug to tow her from the dock, but none could be obtained because of the severity of the storm. If the lines holding the ship to the dock had been cast off, she would doubtless have drifted away; but, instead, the lines were kept fast, and as soon as one parted or chafed it was replaced, sometimes with a larger one. The vessel lay upon the outside of the dock, her bow to the east, the wind and waves striking her starboard quarter with such force that she was constantly being lifted and thrown against the dock, resulting in its damage, as found by the jury, to the amount of $500.

We are satisfied that the character of the storm was such that it would have been highly imprudent for the master of the Reynolds to have attempted to leave the dock or to have permitted his vessel to drift a way from it. One witness testified upon the trial that the vessel could have been warped into a slip, and that, if the attempt to bring the ship into the slip had failed, the worst that could have happened would be that the vessel would have been blown ashore upon a soft and muddy bank. The witness was not present in Duluth at the time of the storm, and, while he may have been right in his conclusions, those in charge of the dock and the vessel at the time of the storm were not required to use the highest human intelligence, nor were they required to resort to every possible experiment which could be suggested for the preservation of their property. Nothing more was demanded of them than ordinary prudence and care, and the record in this case fully sustains the contention of the appellant that, in holding the vessel fast to the dock, those in charge of her exercised good judgment and prudent seamanship.

It is claimed by the respondent that it was negligence to moor the boat at an exposed part of the wharf, and to continue in that position after it became apparent that the storm was to be more than usually severe. We do not agree with this position. The part of the wharf where the vessel was moored appears to have been commonly used for that purpose. It was situated within the harbor at Duluth, and must, we think, be considered a proper and safe place, and would undoubtedly have been such during what would be considered a very severe storm. The storm which made it unsafe was one which surpassed in violence any which might have reasonably been anticipated.

The appellant contends by ample assignments of error that, because its conduct during the storm was rendered necessary by prudence and good seamanship under conditions over which it had no control, it cannot be held liable for any injury resulting to the property of others, and claims that the jury should have been so instructed. An analysis of the charge given by the trial court is not necessary, as in our opinion the only question for the jury was the amount of damages which the plaintiffs were entitled to recover, and no complaint is made upon that score.

The situation was one in which the ordinary rules regulating properly rights were suspended by forces beyond human control, and if, without the direct intervention of some act by the one sought to be held liable, the property of another was injured, such injury must be attributed to the act of God, and not to the wrongful act of the person sought to be charged. If during the storm the Reynolds had entered the harbor, and while there had become disabled and been thrown against the plaintiffs' dock, the plaintiffs could not have recovered. Again, if which attempting to hold fast to the dock the lines had parted, without any negligence, and the vessel carried against some other boat or dock in the harbor, there would be no liability upon her owner. But here those in charge of the vessel deliberately and by their direct efforts held her in such a position that the damage to the dock resulted, and, having thus preserved the ship at the expense of the dock, it seems to us that her owners are responsible to the dock owners to the extent of the injury inflicted.

In *Depue v. Flatau,* 100 Minn. 299, this court held that where the plaintiff, while lawfully in the defendants' house, became so ill that he was incapable of traveling with safety, the defendants were responsible to him in damages for compelling him to leave the premises. If, however, the owner of the premises had furnished the traveler with proper accommodations and medical attendance, would he have been able to defeat an action brought against him for their reasonable worth?

In *Ploof v. Putnam,* 71 Atl. 188, the Supreme Court of Vermont held that where, under stress of weather, a vessel was without permission moored to a private dock at an island in Lake Champlain owned by the defendant, the plaintiff was not guilty of trespass, and that the defendant was responsible in damages because his representative upon the island unmoored the vessel, permitting it to drift upon the shore, with resultant injuries to it. If, in that case, the vessel had been permitted to remain, and the dock had suffered an injury, we believe the shipowner would have been held liable for the injury done.

Theologians hold that a starving man may, without moral guilt, take what is necessary to sustain life; but it could hardly be said that the obligation would not be upon such person to pay the value of the property so taken when he became able to do so. And so public necessity, in times of war or peace, may require the taking of private property for public purposes; but under our system of jurisprudence compensation must be made.

Let us imagine in this case that for the better mooring of the vessel those in charge of her had appropriated a valuable cable lying upon the dock. No matter how justifiable such appropriation might have been, it would not be claimed that, because of the overwhelming necessity of the situation, the owner of the cable could not recover its value.

This is not a case where life or property was menaced by any object or thing belonging to the plaintiff, the destruction of which became necessary to prevent the threatened disaster. Nor is it a case where, because of the act of God, or unavoidable accident, the infliction of the injury was beyond the control of the defendant, but is one where the defendant prudently and advisedly availed itself of the plaintiffs' property for the purpose of preserving its own more valuable property, and the plaintiffs are entitled to compensation for the injury done.

Order affirmed.

Justice CHARLES L. LEWIS, dissenting:

I dissent. It was assumed on the trial before the lower court that appellant's liability depended on whether the master of the ship might, in the exercise of reasonable care, have sought a place of safety before the storm made it impossible to leave the dock. The majority opinion assumes that the evidence is conclusive that appellant moored its boat at respondent's dock pursuant to contract, and that the vessel was lawfully in position at the time the additional cables were fastened to the dock, and the reasoning of the opinion is that, because appellant made use of the stronger cables to hold the boat in position, it became liable under the rule that it had voluntarily made use of the property of another for the purpose of saving its own.

In my judgment, if the boat was lawfully in position at the time the storm broke, and the master could not, in the exercise of due care, have left that position without subjecting his vessel to the hazards of the storm, then the damage to the dock, caused by the pounding of the boat, was the result of an inevitable accident. If the master was in the exercise of due care, he was not at fault. The reasoning of the opinion admits that if the ropes, or cables, first attached to the dock had not parted, or if, in the first instance, the master had used the stronger cables, there would be no liability. If the master could not, in the exercise of reasonable care, have anticipated the severity of the storm and sought a place of safety before it became impossible, why should he be required to anticipate the severity of the storm, and, in the first instance, use the stronger cables?

I am of the opinion that one who constructs a dock to the navigable line of waters, and enters into contractual relations with the owner of a vessel to moor at the same, takes the risk of damage to his dock by a boat caught there by a storm, which event could not have been avoided in the exercise of due care, and further, that the legal status of the parties in such a case is not changed by renewal of cables to keep the boat from being cast adrift at the mercy of the tempest.

JAGGARD, J., concurs herein.

Questions to Ponder on *Vincent, Ploof,* and Economic Analysis

A. The cases of *Vincent* and *Ploof* are favorites of law-and-economics scholars. They ask whether it makes a difference what the rule is. Suppose that a dock owner and boat owner have a chance to negotiate before the boat is tied up. A storm is raging, and the boat has no place else to go. The boat owner and dock owner begin negotiating over permission to moor – shouting to each other over the howling wind and spray. What will be the outcome of their negotiations? Will the outcome change depending on the legal rule regarding private necessity? Is one version of the rule more economically efficient than another?

B. Economists use the label "transaction costs" to refer to the time, effort, expense, and overall inconvenience that must be endured to conclude a transaction. How does the concept of transaction costs apply to the analysis of whether one rule is more economically efficient than another?

C. Economic efficiency isn't the only way to think about whether a legal rule is a good one. One might also think along the lines of intuitive notions of justice and fairness. Do those notions lead to a different conclusion than the economic analysis in the cases of *Vincent* and *Ploof*?

Case: Surocco. v. Geary

The following is the classic case on public necessity. The facts occurred in during San Francisco's Great Fire in 1849, at the height of the Gold Rush.

Surocco v. Geary

Supreme Court of California
January 1853

3 Cal. 69. PASCAL SUROCCO et al. v. JOHN W. GEARY. Supreme Court of California. MURRAY, Chief Justice, delivered the opinion of the Court. HEYDENFELDT, Justice, concurred.

FACTS:

This was an action brought in the Superior Court of the City of San Francisco, by the plaintiffs, against the defendant, for the recovery of damages for the blowing up with gunpowder, and destroying their house and store, with the goods therein, on the 24th December, 1849. Damages laid at $65,000.

The defendant answered, that the said building was, at the time of the entry upon the same and of the destruction thereof, certain to be consumed by a public conflagration then raging in the city of San Francisco, and to communicate the said conflagration to other adjacent buildings in the said city. That defendant was at the time First Alcalde of the said city, and did, by the advice and command of divers members of the then

Ayuntamiento, enter into and destroy the said building, as for the cause stated he lawfully might do, the same being then and there a public nuisance, and denies the damage, and asks to be dismissed, with costs, &c.

There was a good deal of testimony given as to the value of the buildings and goods contained in it, and as to the necessity for its destruction at the time. The proof was, however, that the fire in a very few minutes reached the site of the building, and extended beyond it, and that its destruction would have been certain if it had not been blown up.

On the 25th October, 1850, the court in banc, sitting as a jury, on a reargument of the case, found for the plaintiffs in the sum of $7500, and ordered judgment accordingly.

Chief Justice HUGH MURRAY:

This was an action, commenced in the court below, to recover damages for blowing up and destroying the plaintiffs' house and property, during the fire of the 24th of December, 1849.

Geary, at that time Alcalde of San Francisco, justified, on the ground that he had the authority, by virtue of his office, to destroy said building, and also that it had been blown up by him to stop the progress of the conflagration then raging.

It was in proof, that the fire passed over and burned beyond the building of the plaintiffs', and that at the time said building was destroyed, they were engaged in removing their property, and could, had they not been prevented, have succeeded in removing more, if not all of their goods.

The cause was tried by the court sitting as a jury, and a verdict rendered for the plaintiffs, from which the defendant prosecutes this appeal under the Practice Act of 1850.

The only question for our consideration is, whether the person who tears down or destroys the house of another, in good faith, and under apparent necessity, during the time of a conflagration, for the purpose of saving the buildings adjacent, and stopping its progress, can be held personally liable in an action by the owner of the property destroyed.

This point has been so well settled in the courts of New York and New Jersey, that a reference to those authorities is all that is necessary to determine the present case.

The right to destroy property, to prevent the spread of a conflagration, has been traced to the highest law of necessity, and the natural rights of man, independent of society or civil government. "It is referred by moralists and jurists to the same great principle which justifies the exclusive appropriation of a plank in a shipwreck, though the life of another be sacrificed; with the throwing overboard goods in a tempest, for the safety of a vessel; with the trespassing upon the lands of another, to escape death by an enemy. It rests upon the maxim, Necessitas inducit privilegium quod jura privata."

The common law adopts the principles of the natural law, and places the justification of an act otherwise tortious precisely on the same ground of necessity. (See *American Print Works v. Lawrence*, 1 Zab. 258, 264, and the cases there cited.)

This principle has been familiarly recognized by the books from the time of the saltpetre case, and the instances of tearing down houses to prevent a conflagration, or to raise bulwarks for the defence of a city, are made use of as illustrations, rather than as abstract cases, in which its exercise is permitted. At such times, the individual rights of property give way to the higher laws of impending necessity.

A house on fire, or those in its immediate vicinity, which serve to communicate the flames, becomes a nuisance, which it is lawful to abate, and the private rights of the individual yield to the considerations of general convenience, and the interests of society. Were it otherwise, one stubborn person might involve a whole city in ruin, by refusing to allow the destruction of a building which would cut off the flames and check the progress of the fire, and that, too, when it was perfectly evident that his building must be consumed.

The respondent has invoked the aid of the constitutional provision which prohibits the taking of private property for public use, without just compensation being made therefor. This

is not "a taking of private property for public use," within the meaning of the Constitution.

The right of taking individual property for public purposes belongs to the State, by virtue of her right of eminent domain, and is said to be justified on the ground of state necessity; but this is not a taking or a destruction for a public purpose, but a destruction for the benefit of the individual or the city, but not properly of the State.

The counsel for the respondent has asked, who is to judge of the necessity of the destruction of property?

This must, in some instances, be a difficult matter to determine. The necessity of blowing up a house may not exist, or be as apparent to the owner, whose judgment is clouded by interest, and the hope of saving his property, as to others. In all such cases the conduct of the individual must be regulated by his own judgment as to the exigencies of the case. If a building should be torn down without apparent or actual necessity, the parties concerned would undoubtedly be liable in an action of trespass. But in every case the necessity must be clearly shown. It is true, many cases of hardship may grow out of this rule, and property may often in such cases be destroyed, without necessity, by irresponsible persons, but this difficulty would not be obviated by making the parties responsible in every case, whether the necessity existed or not.

The legislature of the State possess the power to regulate this subject by providing the manner in which buildings may be destroyed, and the mode in which compensation shall be made; and it is to be hoped that something will be done to obviate the difficulty, and prevent the happening of such events as those supposed by the respondent's counsel.

In the absence of any legislation on the subject, we are compelled to fall back upon the rules of the common law.

The evidence in this case clearly establishes the fact, that the blowing up of the house was necessary, as it would have been consumed had it been left standing. The plaintiffs cannot recover for the value of the goods which they might have saved;

they were as much subject to the necessities of the occasion as the house in which they were situate; and if in such cases a party was held liable, it would too frequently happen, that the delay caused by the removal of the goods would render the destruction of the house useless.

The court below clearly erred as to the law applicable to the facts of this case. The testimony will not warrant a verdict against the defendant.

Judgment reversed.

Historical Note on *Surocco v. Geary*

The Great Fire started around 6 a.m. on Christmas Eve in Dennison's Exchange – a gambling parlor located on Kearny Street across from Portsmouth Square. (The site is about a block west of the present-day Transamerica Pyramid skyscraper.) The fire rapidly grew into an inferno, feeding on homes made of wooden frames covered with painted- or papered-over cotton cloth. John W. Geary, the head municipal official – who, in the Spanish tradition, was called the "alcalde" – created a firebreak by demolishing buildings in the way of the fire.

The city responded to the disaster the next month by organizing a volunteer fire department, the forerunner of today's S.F.F.D. But building standards remained the same. And because of the economic pressure of the Gold Rush, new buildings were hastily erected on burned-out lots within days. These poorly constructed new buildings were no less flammable than those they replaced. Another fire soon followed, marking the first of multiple burn-build-burn cycles that continued through 1851.

Alcalde Geary went on to become San Francisco's first mayor, territorial governor of Kansas, a colonel in the Union Army during the Civil War, and eventually a two-term governor of Pennsylvania. Today, Geary Boulevard, a major east-west thoroughfare in San Francisco, is named after him.

Questions to Ponder on *Surocco* and Economic Analysis

A. How would you analyze the case of *Surocco v. Geary* in economic terms? Is it economically efficient for Surocco to shoulder the entire loss? Why not have the public treasury reimburse Surocco?

B. Suppose in this situation Surocco tried to enter into a negotiation with Geary over the subject of blowing up Surocco's building. What would be the outcome? Would the outcome change if the legal rule were different? What legal rule would be more economically efficient, or does the legal rule make any difference?

C. Where do your intuitive notions of justice and fairness lie in a case like this? Do those notions lead to a different conclusion than the economic analysis? Does your intuitive sense of justice lead you perceive that a different rule should be applicable in cases like *Surocco* as opposed to *Vincent* and *Ploof*?

Part VI: Remedies

23. 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

Introduction

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.

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.

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**, the subject of Chapter 25, 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.

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 slight 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 to 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.

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. This 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 can 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 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.

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.

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 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 a $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.

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 of 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.

The federal courts and some state courts also explicitly require a showing that the injunction is in the public interest, or at least not contrary to it. *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. To get a preliminary injunction, a plaintiff must establish a likelihood of suffering irreparable harm unless preliminary relief is ordered as well as a likelihood of eventually succeeding on the merits of the after the process of discovery and trial has been run to its conclusion. In addition, the balance of equities must tip in the plaintiff's favor and, where the courts require it, there must be a showing that the public interest is served by the injunction.

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 the due process concerns, a TRO lasts only a very short time, 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.

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?

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** allows the plaintiff a fast-track procedure to throw a trespassing defendant off of the plaintiff's land.

The equitable restitutionary remedy of an **equitable lien** enables a court to use its equity power to impose a lien on property of the defendant that is traceable to money or property misappropriated from the plaintiff. An equitable lien can be very advantageous for the plaintiff if the defendant is near insolvent, because lien holders have a preferred position in bankruptcy, putting them ahead of other creditors in the queue seeking to get debts satisfied.

A similar equitable remedy is the **constructive trust**, where the defendant is treated 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, and, like an equitable lien, it also puts the plaintiff in a preferred position if the defendant declares bankruptcy.

24. 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

The Idea of Compensatory Damages

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.

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.

Case: Texaco v. Pennzoil

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

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.~

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 for 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?

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.

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.

Case: Spell v. McDaniel

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

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.

Circuit 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. ~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.⁴ 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. ⁵These are the essential facts necessarily accepted in substance by the jury 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.⁶

Spell then brought this § 1983 action naming as defendants McDaniel, the City of Fayetteville, the City Manager, the City Chief of Police, the Director of the police department's Internal Affairs Division and two police department command sergeants. He structured the action as one against McDaniel in his individual and official capacities; against the City Manager, Smith, the Police Chief, Dixon, the Internal Affairs Division Director, Johnson, and the two command sergeants, Dalton and Holman, in their several official capacities; and against the City as a suable municipal corporation.⁷

> [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~.

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

the Officer McDaniel lied about kneeing Mr. Spell? Do you think the verdict would have been different if McDaniel had admitted to the kneeing?

Caps on Nonpecuniary Damages

For many years, tort reform advocates have looked to change various aspects of the civil tort system in order to reign 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 – perhaps surprising considering the state's liberal reputation. In 1975, California passed the Medical Injury Compensation Reform Act. The law places a $250,000 limit on nonpecuniary damages in medical liability cases. Cal. Civ. Code § 333.2.

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. 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. 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.

California's cap remains among the nation's lowest, and it has not been adjusted for inflation since its enactment. Because of inflationary effects, the cap has shrunk in real terms by a factor of four. (An award of $250,000 in 1975 dollars would have been equivalent to $1.1 million in 2014.) The Golden State's trendsetting and nation-leading 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. See *Greenman v. Yuba Power Products,* 59 Cal.2d 57. (Cal. 1963) (strict products liability; in Chapter 14) and

Sindell v. Abbott Labs, 26 Cal. 3d 588 (Cal. 1980) (market-share liability; in Chapter 7).

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.

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.

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.

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, interest begins accumulating at the moment of injury. Interest rates vary as well. In Arkansas, the interest rate is set by the state constitution at 6%, and it begins running at the time of loss. Ark. Const. art. 19, § 13. In New Mexico, the rate for actions based on "tortious conduct" is 15%, beginning on the date the complaint is served. N.M. Stat. § 56-8-4. Other 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.

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.

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 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.

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 a 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 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 discounted 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.

Problem on Discounting Future Losses to Net Present Value

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?

25. Punitive Damages

"Punishment is justice for the unjust."

– Saint Augustine

The Basics of Punitive Damages

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.

Case: Mathias v. Accor Economy Lodging

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

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.

Circuit 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.

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.

Case: Silkwood v. Kerr-McGee

We encountered part of the closing argument of Gerry Spence in *Silkwood v. Kerr-McGee* in the materials relating to strict liability. Here is more of that closing argument, in which Spence argues the issue of punitive damages to the jury.

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, 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.

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.

Caps and Rakes for Punitive Damages Under State Law

About half the 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 such rakes 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 general cap on punitive damages of 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, which provides 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 for another's property. N.H. Rev. Stat. § 167:61. 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. § 167:61. One last thing of note – although punitive damages are generally unavailable in New Hampshire, something called "liberal compensatory damages" are allowed as a general matter in egregious cases.

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, two 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*, 509 U.S. 443 (1993). 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 *Phillip 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.

Case: State Farm v. Campbell

This case contains the U.S. Supreme Court's most comprehensive statement of the law with regard to the constitutionality of punitive damage awards.

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.

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*?

26. 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

Introduction

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.

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.

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.

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 negligently causes 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.

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 $2,500. 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.

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. (Today the same attraction, somewhat refurbished, is the Tommorowland 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.

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 $300,000. 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. But watch out Wyoming homeowners – the exemption limit there is just $20,000.

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 – exceeds 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.

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 are 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 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, an attorney can obtain a special deposition visa to enter Japan so as to take a deposition of a Japanese national at the U.S. embassy or a U.S. consulate in that country. The waiting list for private parties to use these consular facilities, however, can 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 unexempt 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.

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.

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.

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.

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 tortuously 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 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 evaded service of process and therefore were not part of the trial. Can the settling defendant get

contribution from the other three provided they can be tracked down – even though they had no chance to defend against the suit?

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 to how a settlement agreement is drafted, since the language can affect settling defendants' rights vis-à-vis their co-tortfeasors.

Case: Great Lakes Dredge Dock Company v. Tanker Robert Watt Miller

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.

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.

Circuit 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.

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 "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. 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 under the law? How could doctrinal differences among jurisdictions affect Omar's ability to collect?

Part VII: Special Issues with Parties and Actions

27. Immunities and Tort Liability of the Government

"That's the good thing about being president, I can do whatever I want."

– Barack Obama, in an offhand remark while visiting Monticello, 2014

Introduction

The basic idea of tort law is that if you are responsible for someone else's injuries, then you are responsible for making them whole. Plaintiffs bring claims, and defendants are judged by the care they took, the knowledge they had, and the intent or indifference they manifested. If they are blameworthy, then they've got to pay up.

But sometimes the law allows blameworthy defendants to escape all legal responsibility. They are not let go because of anything they did or didn't do. Instead, they are let go because of *who they are*. This is how immunity works. It makes certain defendants legally untouchable. Whatever destruction they wreak, they can dust off their hands and walk away.

Immunities can be asserted by family members, charities, sovereign governments, and government officials. Some immunities depend on the circumstances. Others are absolute in character. In terms of historical trends, immunity doctrines are in a state of flux. Some are on the wane; others are waxing larger.

When they apply, immunities can bring an absolute halt to litigation, regardless of whether the defendant's conduct was egregious and even if it leaves the plaintiff with no remedy at all.

Family Immunities

Historically, American law recognized two forms of immunity within the family – spousal immunity and parent-child immunity. The national trend is toward the abrogation of both.

Spousal immunity prohibited one spouse from suing the other. The historical rationale was that, once married, a husband and wife were one person. More accurately, a man and his wife became just the man, with the wife losing her legal personhood upon marriage. Spousal immunity follows from the idea that it doesn't make sense to allow a man to sue himself.

In keeping with the general arc of American history, the lessening of discrimination against women has been a slow historical process for the common law. In the late 1800s, legal reforms began allowing married women to have distinct legal personality and to own property in their own name. On account of these changes, the theoretical basis for spousal immunity eroded: A wife suing the husband was no longer equivalent to a man suing himself.

Confronted with this logic, some courts offered up a separate rationale for spousal immunity – that preventing spouses from suing one another assisted in the cause of marital harmony. The counterargument, of course, is that once things have gotten to the point that spouses want to sue each other, there isn't a lot of marital harmony left to preserve.

There is a more subtle counter-argument: There may be non-hostile reasons for one spouse to sue another – for instance, to establish negligence in an automobile accident so as to trigger the obligation of an insurance company to pay for personal injuries. These days, a majority of jurisdictions have abolished spousal immunity entirely. Others have weakened and limited it.

Parent-child immunity precludes minor children from suing their parents. This immunity, never recognized in England, was an invention of American law. Like spousal immunity, parent-child immunity seems to have rested largely on outdated ideas of the family being a single legal unit represented by the man of the house. A large number of jurisdictions have eliminated the immunity, and where it is still recognized, it is often limited or weakened.

In case you are wondering, there is no immunity for any other family relationship – such as between siblings or between grandparents and their grandchildren.

Charitable Immunity

American law also long recognized immunity for charitable organizations, including hospitals, educational institutions, and religious entities. Charitable immunity was justified largely on two theories. First, the *trust fund theory* held that donors who funded these entities gave their money in trust to fund the provision of services – not to pay judgments. Second, the *implied waiver theory* held that beneficiaries of a charity's munificence had impliedly waived their right to sue for injury.

Charitable immunity may have felt justified in a bygone era, when hospitals, perhaps staffed by nuns, gave free care to the indigent. Today, however, non-profit hospitals are run like giant corporations. They expect full payment for their services, and patients who lack the resources to pay are turned away. Increasingly, universities and even museums are operating as corporate entities, jockeying for "market share," looking to "monetize assets," and extend the reach of their "brand." Such entities frequently assert intellectual property entitlements so as to extract maximum licensing revenues from inventions, artistic works, and recognizable elements of their corporate identity.

Given our present-day reality, it's no wonder that charitable immunity is on the decline. More than 30 states have abolished it all together. Others have repealed it for non-profit hospitals.

Government Immunities

The doctrine of **sovereign immunity** precludes suit against a sovereign entity. In the United States, that means the federal government and each of the states.

While immunities for charities, spouses, and parents are on the ebb, the doctrine of sovereign immunity remains very strong. Individuals are generally powerless to sue the state or federal government unless the government decides, of its own volition, to allow itself to be sued.

Notably, over the course of the 20th Century, sovereign governments increasingly decided to allow themselves to be sued, at least under certain circumstances.

The Federal Tort Claims Act (discussed more below), and similar statutes in the states, permit citizens to sue their government to get tort recovery in many of the same circumstances where tort recovery would be possible against a private entity. Yet since sovereign immunity remains solid as judicial doctrine, legislatures have complete discretion to pick and choose what they will and will not be liable for. And they can give themselves a variety of procedural advantages in the process.

The doctrine of sovereign immunity in American law was inherited from the English courts. In England, sovereign immunity rested on the theory of the divine right of kings and the idea that, in the eyes of the law, the king could do no wrong. Commentators have pointed out that, since the American Revolution was premised on the idea of rejecting the divine right of kings, it seems odd to retain the doctrine of sovereign immunity. Yet whether or not the doctrine of sovereign immunity is theoretically well-grounded, its continuing vitality has not come under serious attack.

It is important to keep in mind what sovereign immunity is and is not. It offers immunity only for the sovereign itself – that means the federal government, the state governments, and the various departments and agencies of the federal and state governments. State universities, the military, and state and federal administrative agencies are generally embraced by the doctrine. But local governments, since they have historically not been considered arms of the states, are not protected by sovereign immunity. In the absence of a statute to the contrary, cities and towns can generally be sued like anyone else – but jurisdictions vary.

Sovereign immunity also does not apply to government employees – at least not as a general matter. It is the government itself that is immune from suit. This conception is not universal, however. In Virginia, a middle school football coach, as a school board employee, was able to invoke what the court called "sovereign immunity" to shield himself from personal liability for acts of simple negligence. Yet the court said he remained liable for any damages arising out of gross negligence. See *Koffman v. Garnett,* 265 Va. 12, 15 (Va. 2003).

Despite the general unavailability of sovereign immunity for public employees, there are other, related immunity doctrines that public employees can assert.

Immunities for Individuals in the Government Context

Immunity for public officials is distinct from sovereign immunity. Where sovereign immunity has monolithic simplicity and unchecked vigor, immunities for public employees exist in a patchwork of statutes and common-law rules.

To understand immunity for public employees, it helps to start with the traditional default rule, which is that unless an exception applies, a public official has *no immunity*. That being said, exceptions have accumulated to the point that it is often impossible to sue a public employee for on-the-job conduct – even in egregious cases. Moreover, the trend is toward erecting more barriers to holding public employees liable in their personal capacity.

Probably the most longstanding form of immunity provided to individuals involved in the business of the government is immunity for individuals who are involved in judicial and legislative functions. Such immunities, often labeled "absolute," are quite powerful: Judges cannot be sued for any judicial function; prosecutors cannot be sued for any prosecutorial function; legislators cannot be sued for any legislative function. The absolute nature of these immunities means that if, for instance, a judge renders a decision from the bench that is in bad faith, contrary to law, and motivated more by greed or personal animus than anything else, the judge is still completely and totally immune. This immunity extends as well to individuals who are not public employees, but who are carrying out the business of the courts. In this way, immunity protects lawyers, witnesses, and jurors for civil liability for anything they say or do within the confines of judicial business. So a lawyer cannot be sued for defamation after telling the most heinous lies about a witness – so long as she or he does so in the course of a hearing, trial, or other official court matter. (Note that lawyer would, however, could face court sanctions and bar disciplinary action.) Similarly, legislators cannot be sued in tort for

proposing and voting on a new law, even if the law will result in, say, false imprisonment of private citizens, or even if the law is motivated by personal or racial animus.

Consonant with the immunities of judges and legislators, the President of the United States is immune from suit over any official acts.

Rank-and-file employees of government agencies present a more complicated set of issues. Traditionally, employees within the executive branch of government had no immunity at all. The trend, however, has been toward greater and greater recognition of immunity for public employees. A widely recognized doctrine gives public employees "qualified immunity" for acts done within the course and scope of employment so long as the acts were of a *discretionary* rather than a *ministerial* character. (This distinction is discussed below in context of the Federal Tort Claims Act and *Kohl v. United States*.)

Governments also protect their employees through statutes that provide indemnities or immunities. Some statutes require or allow the state to defend public employees who are sued for actions undertaken while on the job – whether or not those actions were discretionary or ministerial in nature. And such statutes may require the government to indemnify the employee for any judgment. This an be beneficial for both the defendant employee and the plaintiff: The plaintiff has a guaranteed source of payment, and the government employee will not be on the hook.

Other statutory schemes provide immunity to government employees for actions within the scope of their employment. "Scope of employment" is often interpreted very broadly. If you are a state trooper, is it really part of your job to taser a nonthreatening suspect? Most would say it's not. But for purposes of immunity and indemnity, it can be considered within the scope of employment.

Since 1988, federal employees have received the benefit of a sweeping form of immunity provided by the Federal Employees Liability Reform and Tort Compensation Act, 28 U.S.C. §§ 2671, 2679(b)(1), better known as the **Westfall Act**. The statute immunizes

federal employees from personal liability for torts committed while on the job – whether classifiable as ministerial or not. The Westfall Act substitutes the United States into the action as a defendant, then permits liability only to the extent it is consistent with the Federal Tort Claims Act (discussed below). This means that in cases where the Federal Tort Claims Act disallows recovery, there may be no way for a tort victim to recover. In the case of *United States v. Smith,* 499 U.S. 160 (1991), the spouse of military service member stationed in Italy sought to sue armed forces physicians for negligence in the delivery of her baby, who suffered massive brain damage. The court held that the Westfall Act shielded the physicians from personal liability, and since the Federal Tort Claims Act did not allow tort liability for actions arising in a foreign country, Smith was left without any remedy.

States have various statutes that protect police officers from suit to different extents. But even these statutes do nothing to protect police from lawsuits brought under 42 U.S.C. § 1983 (discussed later in the Constitutional Torts chapter). The federal claim under § 1983 trumps all contrary state laws.

The Federal Tort Claims Act and Limited Waivers of Sovereign Immunity

Over the course of American history, the role of government has expanded radically. Instead of merely *governing*, governments have moved to providing more and more services of the kind that were previously provided by private entities. The earliest example was probably the Post Office in the late 18th Century. A movement to establish state universities took hold in the 19th Century. In the 20th Century, the federal government began providing recreation facilities under the auspices of the National Park Service, and it got into the business of generating electric power through the Tennessee Valley Authority.

In recognition of the changing role of government , Congress passed the Federal Tort Claims Act of 1946 ("FTCA"). The FTCA waives sovereign immunity in a carefully controlled and limited way to allow persons to sue the federal government for damages resulting from

the government's negligence during the course of non-governing activities. Its provisions are both substantive and procedural, creating a comprehensive system for tort suits against the federal government.

When it comes to suing the federal government in tort, the FTCA is the only game in town. If a plaintiff does not comply with the FTCA, the plaintiff will not be able to recover anything.

Procedurally, the FTCA requires that a plaintiff must first file an administrative claim with whatever governmental unit is alleged to be at fault – anything from the U.S. Air Force to the Smithsonian – and the plaintiff must specify a particular amount of compensatory damages. The agency then has six months to decide whether to pay the claim or deny it. If the claim is denied, the plaintiff can sue in federal district court. Suits in state court are not permitted.

Substantively, the tort liability of the federal government is determined with reference to the tort law of the state whose law would apply if the suit were against a private actor: That means that if, under the circumstances, a private actor would have been liable, then the federal government will be liable too. This is true even if the activity the government was engaging in is of a kind that would be incredibly unusual for a private person to undertake – such as hostage negotiations or munitions testing.

There are a number of important exclusions from liability.

First, there is an important exclusion based on remedies. Only compensatory damages are recoverable from the federal government. No punitive damages are allowed.

Another set of exclusions has to do with the cause of action: The federal government does not allow itself to be sued for battery, assault, false imprisonment, false arrest, fraud, interference with contract rights, defamation, malicious prosecution, or abuse of process. Also, no theory of strict liability can be used. That means the would-be strict liability plaintiff has to prove negligence – no matter how ultrahazardous the activity might have been. (From nuclear weapons testing to experiments with smallpox, the federal government engages in an impressive array of ultrahazardous

activities.) For the most part, that leaves negligence as the lone cause of action that can be used to sue the United States.

The FTCA also has very important exemptions based on the nature of the conduct: No claim can be brought for any combatant actions of the military in wartime. 28 U.S.C. § 2680(j). No claim can be brought for any action taking place in a foreign country. 28 U.S.C. § 2680(k). Most importantly, no claim can be brought for any "discretionary function." 28 U.S.C. § 2680(a).

The **discretionary function exception** requires elaboration. Government actions are divided into two categories: ministerial functions and discretionary functions. Ministerial actions can incur negligence liability for the government, discretionary functions cannot. The term **ministerial function** denotes government action that implements some policy-making decision. The term **discretionary function** denotes the policy-making decision itself. In essence, to exercise a discretionary function is to engage in an act of *governing*. And the idea is that you can't sue the government for governing. It is as if the doctrine is saying that democracy and elections are the intended mode of redress for bad government – not lawsuits.

Thus, if a postal truck runs a red light and hits your car, you can sue. But if a new health insurance mandate has caused you to lose money, you can write a letter to member of Congress. As a matter of theory, the distinction is clear. In practice, however, the dividing line between discretionary functions and ministerial functions is not always easy to discern.

Case: Kohl v. United States

The case tackles the question of how to differentiate a discretionary function from a ministerial function.

Kohl v. United States

United States Court of Appeals for the Sixth Circuit
November 16, 2012

699 F.3d 935. Debra R. KOHL, Plaintiff–Appellant, v. the UNITED STATES OF AMERICA, Defendant–Appellee. No.

11–6213. MOORE, J., delivered the opinion of the court in which McKEAGUE, J., joined. MERRITT, J., delivered a separate dissenting opinion.

Circuit Judge KAREN NELSON MOORE:

This case arises out of the execution of a field experiment aimed at improving the government's technical capacity to respond to Improvised Explosive Devices (IEDs). Plaintiff–Appellant Debra R. Kohl ("Kohl") seeks recovery for injuries allegedly sustained due to negligence of a federal employee operating a winch while collecting debris generated by the planned detonation of explosives during this government-funded research experiment. Kohl appeals the district court's determination that her claims were barred by the discretionary-function exception to the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671 *et seq.,* and that the court thus lacked subject-matter jurisdiction. Because we conclude that the government's decisions about how to extract evidence from the site of the explosions, and what types of equipment to use to do so, are shielded from liability by the discretionary-function exception, we AFFIRM the judgment of the district court.

I. BACKGROUND

On December 4, 2007, Kohl, a certified bomb technician with the Hazardous Devices Unit of the Metropolitan Nashville Police Department ("MNPD"), participated in a research experiment funded by the U.S. Department of Defense at the Tennessee State Fire Academy in Bell Buckle, Bedford County, Tennessee. The experiment involved constructing and detonating explosive devices in vehicles and then collecting post-blast debris for laboratory analysis as forensic evidence. This experiment was part of a larger research project conducted by scientists working at Oak Ridge National Laboratory, managed by the University of Tennessee–Battelle for the Department of Energy. Explosives Enforcement Officers of the federal Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF"), Jason Harrell and Alex Guerrero, assisted and participated in the experiment.

Following the detonation of the explosives, and after an "all-clear" was given, participants in the project, including Kohl, entered the explosives range to inspect the vehicles. Kohl and Officer Todd Mask, another MNPD bomb technician participating in the project, proceeded to investigate one of the vehicles, a minivan. Kohl searched the passenger's side of the minivan for evidence, while Mask attempted to search the driver's side of the vehicle. However, the driver's side door of the minivan had "buckled," and as a result, it would not open. The investigation team decided to try to access the inside of the van by using a winch on the driver's side door. After a first failed attempt to winch the door, a second attempt was made. While other team members were preparing to winch the door a second time, Kohl testified that she returned to the passenger's side door of the van and continued searching for evidence. During this time, Kohl was "leaning into the passenger side of the vehicle."

Then, although the record is not clear about exactly how Kohl came into contact with the vehicle, Kohl testified that she remembers feeling "pain in the top of [her] head" and that she "saw stars." The complaint alleges that "[d]ue to the winching, the door came loose and the door frame of the vehicle crashed into Ms. Kohl's head." After seeking medical care the following day, Kohl was referred to a neurologist, who diagnosed her with "post-concussive syndrome with persistent headaches and cognitive changes." Since the incident, Kohl has not been employed.

Kohl filed this action on December 16, 2009 in the U.S. District Court for the Middle District of Tennessee under the FTCA, seeking damages. The complaint alleges that federal employees were negligent in "operat[ing] the winch in an unsafe manner," "fail[ing] to warn Plaintiff of dangers regarding the winch," "conduct[ing] the operation, including winching of the vehicle, without proper safety protocols," and by "fail[ing] to use reasonable and due care to prevent injury to Plaintiff." Defendant United States filed a motion to dismiss or, alternatively, for summary judgment on January 7, 2011, in part on the basis that the district court lacked subject-matter

jurisdiction. Finding that the conduct at issue in this case falls within the discretionary-function exception to the FTCA, the district court dismissed Kohl's claims for lack of subject-matter jurisdiction.

II. ANALYSIS

A. Discretionary–Function Exception: Legal Framework

At issue is whether the district court erred in finding that it lacked subject-matter jurisdiction over Kohl's claims. We review de novo a district court's dismissal based on the application of the discretionary-function exception to the FTCA.

Sovereign immunity generally bars claims against the United States without its consent. Congress, through the FTCA, waived this governmental immunity for claims brought for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. The FTCA's waiver of immunity is limited, and contains a series of exceptions. One of these exceptions—known as the discretionary-function exception—states that the FTCA's waiver does not apply to "[a]ny claim ... based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a). If a claim falls within this exception, then federal courts lack subject-matter jurisdiction, and the claim must be dismissed. This appeal concerns whether the conduct at issue in Kohl's claims falls within the discretionary-function exception.

Determining whether a claim falls within the discretionary-function exception involves a two-step test. The first step "requires a determination of whether the challenged act or omission violated a mandatory regulation or policy that allowed no judgment or choice." *Rosebush v. United States,* 119 F.3d 438,

441 (6th Cir.1997). If there was such a violation of a mandatory regulation or policy, then the discretionary-function exception will not apply, because "there was no element of judgment or choice," *id.,* and thus "the employee has no rightful option but to adhere to the directive."*Berkovitz v. United States,* 486 U.S. 531, 536 (1988).

If, on the other hand, there was room for judgment or choice in the decision made, then the challenged conduct was discretionary. In such a case, the second step of the test requires a court to evaluate "whether the conduct is 'of the kind that the discretionary function exception was designed to shield'" from liability. *Rosebush,* 119 F.3d at 441. The discretionary-function exception is meant "to prevent judicial 'second-guessing' of ... administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines),* 467 U.S. 797, 814 (1984).

The discretionary-function exception's scope extends beyond high-level policymakers, and includes government employees at any rank exercising discretion. *Id.* at 813 ("[I]t is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case."). "A discretionary act is one that involves choice or judgment; there is nothing in that description that refers exclusively to policymaking or planning functions." *Gaubert,* 499 U.S. at 325. Even where government action is taken on the day-to-day operational level, and implements broader governmental objectives, if that action involves choice or judgment that is "susceptible to policy analysis," then it falls within the discretionary-function exception. *Id.* "We also consider the fact that '[w]hen established governmental policy, as expressed or implied by statute, regulation, or agency guidelines, allows a Government agent to exercise discretion, it must be presumed that the agent's acts are grounded in policy when exercising that discretion.' " *Sharp ex rel. Estate of Sharp v. United States,* 401 F.3d 440, 443 (6th Cir.2005).

B. Application to Kohl's Case

In determining whether Kohl's claims fall within the discretionary-function exception, "the crucial first step is to determine exactly what conduct is at issue." *Rosebush,* 119 F.3d at 441. Theparties disagree about how to characterize appropriately the conduct. Kohl argues that the relevant conduct is "use of a winch on a large minivan while people are working in and around the minivan, and whether the Government employee sufficiently alerted those people before doing so." Kohl's theory is that the context of the use of the winch is irrelevant to the analysis of the discretionary-function exception. Using this narrow characterization of the conduct at issue, Kohl goes on to argue that the ministerial act of using a winch does not involve policy-related judgments, and thus is not shielded from liability by the discretionary-function exception. The Government, on the other hand, emphasizes the context in which the alleged injury occurred: a field experiment which recreated a bomb scene and required trained bomb technicians to recover evidence from the scene. Using this broad characterization, the Government argues that the decisions related to how best to conduct the experiment did involve policy-related judgments and thus are shielded from liability. The Government's theory appears to be tantamount to a contention that every decision, "[a]t every level," in the context of the post-blast investigation would be shielded from liability. Each of these views is too extreme.

Kohl's narrow characterization must be rejected, because it "collapses the discretionary function inquiry into a question of whether the [government] was negligent." *Rosebush,* 119 F.3d at 442. "Negligence, however, is irrelevant to our inquiry at this point." *Id.* We rejected a similarly narrow approach in *Rosebush,* which involved a child who was severely burned when she fell into a fire pit on a campground site maintained by the United States Forest Service. Plaintiff argued that the Forest Service was negligent in "fail[ing] to make the fire pit safe for unsupervised toddlers, and to warn of the dangers of the fire pit." *Id.* at 441. The *Rosebush* court held that this characterization was too narrow, and that instead, the conduct at issue was the maintenance of the Forest Service's campsites and fire

pits. Similarly, in *Bell v. United States,* 238 F.3d 419 (6th Cir. Nov. 6, 2000) a panel of this court in an unpublished opinion rejected a narrow characterization of the conduct at issue for purposes of analysis under the discretionary-function exception. *Bell* involved a slip and fall due to a wet floor of a lobby of a post office building, which was open to the public even during hours when the Post Office itself was closed and unstaffed. Suing the United States under the FTCA to recover for her injuries, the plaintiff argued that the relevant conduct was the "Post Office's lack of efforts to maintain the premises in a reasonably safe manner." Again, we concluded that this formulation was too narrow, instead holding that "the conduct at issue here is the˜ postmaster's conduct in deciding under what circumstances to allow the lobby area to remain open to the public at times when the service windows were closed." *Id.*; *see also Merando v. United States,* 517 F.3d 160, 168 (3d Cir.2008) (rejecting a narrow framing of the conduct at issue as whether the government had discretion "not to find and remove the hazardous tree," instead concluding that the "relevant issue" was whether the government "had discretion in formulating and executing [the hazardous tree management] plan"); *Autery v. United States,* 992 F.2d 1523, 1527–28 (11th Cir.1993) (rejecting plaintiff's contention that the relevant conduct was the allegedly negligent manner in which the park's employees carried out a plan to remove hazardous trees, instead concluding that the relevant issue was "[w]hether park personnel had discretion in executing that plan").

Kohl's formulation of the conduct at issue is inappropriate for the same reason: by framing the question as whether the ATF employee operated the winch in a safe manner, Kohl "begs the question." To characterize the issue as whether the ATF employees had discretion to operate the winch in an unsafe manner is to ask whether the employees had discretion to be negligent. As we stated in *Rosebush,* negligence is irrelevant at this stage of the inquiry. The issues of whether the ATF employee who operated the winch was negligent, and whether the safety precautions taken were reasonable, are separate inquiries from the analysis of the discretionary-function exception. "It is the

governing administrative policy," rather than the negligence of a particular employee, "that determines whether certain conduct is mandatory for purposes of the discretionary function exception." *Autery,* 992 F.2d at 1528. Thus, the conduct at issue must be framed in terms of the scope of administrative authority to use discretion in executing the research experiment. More properly formulated, the conduct at issue is "the recovery of forensic evidence and the necessary actions taken to facilitate that recovery, including actions taken to dislodge the door of the minivan so that evidence could be recovered." *Kohl,* 2011 WL 4537969, at *7. Our analysis thus focuses on whether ATF's actions in collecting the forensic evidence from the field test, including decisions about what equipment to use, are protected by the discretionary-function exception.

Regarding the first step of the discretionary-function-exception test, neither party in this case argues that there was a mandatory policy or regulation at issue. Because there was no specific regulation or policy governing the post-blast investigation, the challenged government conduct involved discretion. ⁵Kohl appears to argue in her brief that *because* there was no formal or written policy addressing the conduct at issue, the discretionary-function exception cannot apply. This argument makes little sense. The governing precedents do not imply that government conduct can be discretionary only if it is taken pursuant to a written directive of some sort. Rather, the existence of such a formal statute, regulation, or policy prescribing a course of action means that the discretionary-function exception will not apply. Indeed, it is more likely that government agents are exercising discretion if they are conducting an experiment that is not governed by a written manual or regulation, because such decisions will involve "an element of judgment or choice." *Berkovitz,* 486 U.S. at 536.⁵

Thus, the district court properly concluded that the "relevant inquiry" is at the second step of the two-part discretionary-function-exception test.

The second step of the test requires a determination of whether the conduct is " 'of the kind that the discretionary function

exception was designed to shield' " from governmental liability. *Gaubert,* 499 U.S. at 322–23. It is important to note that framing the conduct more broadly, as we have done, does not imply that every action taken in connection with a government program will be brought under the umbrella of the broader policy-related judgments involved in the program. Although difficult to draw, there is a line between conduct "of the kind that the discretionary function exception was designed to shield," *Berkovitz,* 486 U.S. at 536, and the sorts of run-of-the-mill torts, which, while tangentially related to some government program, are not sufficiently "grounded in regulatory policy" so as to be shielded from liability. *Gaubert,* 499 U.S. at 325 n. 7; *see also Totten v. United States,* 806 F.2d 698, 700 (6th Cir.1986) (explaining that Congress, in the discretionary-function exception, "was drawing a distinction between torts committed in the course of such routine activities as the operation of a motor vehicle and those associated with activities of a more obviously governmental nature"). Where an act "cannot be said to be based on the purposes that the regulatory regime seeks to accomplish," the discretionary-function exception will not apply. *Gaubert,* 499 U.S. at 325 n. 7. The *Gaubert* Court used negligent driving by a government actor on government business as an example of conduct that would not be shielded by the discretionary-function exception. Driving a car, while it "requires the constant exercise of discretion," is not sufficiently connected to regulatory policy to fall within the discretionary-function exception.

The key question in this appeal is whether the conduct at issue here was sufficiently based on the purposes that the regulatory regime – here the research experiment – sought to accomplish. Although this is a close case, we conclude that the answer to this question is yes. The decision to use a winch was part of the decisionmaking involved in deciding how best to conduct the post-blast investigation. *Cf. Konizeski v. Livermore Labs (In re Consol. U.S. Atmospheric Testing Litig.),* 820 F.2d 982, 993–95 (9th Cir. 1987) (finding that claims of negligence for failure to maintain sufficient safety precautions during "inherently dangerous" field testing of nuclear weapons were

barred by the discretionary-function exception); *Creek Nation Indian Hous. v. United States,* 677 F.Supp. 1120, 1124–26 (E.D.Okla.1988) (finding, in a case involving an explosion of bombs being transported by a commercial carrier, that the discretionary-function exception barred negligence claims against the United States for alleged failure to take adequate safety precautions regarding transportation of explosives).

The planning and execution of the research experiment is susceptible to policy analysis, including judgments about how to respond to hazards, what level of safety precautions to take, and how best to execute the experiment in a way that balanced the safety needs of the personnel and the need to gather evidence from the vehicles. *See Rosebush,* 119 F.3d at 444(explaining that even if there is no indication "that policy concerns were the basis of a challenged decision, the discretionary function exception applies if the decision is susceptible to policy analysis") (citing *Myslakowski v. United States,* 806 F.2d 94, 97 (6th Cir.1986)). Decisions about how to execute the experiment include judgments as to what kinds of equipment to use to extract the evidence for forensic laboratory analysis. These equipment-related decisions were "intimately related" to the execution of the field experiment—in other words, judgments as to how to extract the evidence from the vehicles after the bombs were detonated, including what equipment to use, were necessary to the execution of the project. Thus, a challenge to the use of a particular piece of equipment, i.e., the winch, would amount to a challenge as to the overall execution of the research project. The conduct at issue is thus unlike the *Gaubert* Court's example of driving a car in connection with a government mission; the ATF employee's use of the winch was sufficiently related to the purposes that the post-blast investigation sought to accomplish to fall within the discretionary-function exception.~

Further, Kohl's contention that the conduct falls outside the exception because it involved "machine operator error" is of no avail. The Supreme Court's discretionary-function-exception cases have made clear that the fact that the

decisionmaking involved occurred on an operational level does not affect the analysis. The discretionary-function exception protects both high-level policymakers and the employees who implement broader governmental objectives. In *Varig Airlines*, the Court held that the discretionary-function exception shielded not only the federal government's broad decision to implement a "spot-check" system for ensuring compliance of airplanes with FAA regulations, but also "the acts of FAA employees in executing" the program.

III. CONCLUSION

For the foregoing reasons, we AFFIRM the judgment of the district court dismissing Kohl's claims for lack of subject-matter jurisdiction.

Circuit Judge GILBERT S. MERRITT, dissenting:

It seems to me that a private person acting as agent of a company, who is trying to open the door of a car with a regular winch with a strong spring, would normally be subject to standard tort principles in case of injury. Instead, my colleagues simply say there can be no such liability, despite the statutory language, if the conduct "involves choice or judgment" because—for some unstated reason—liability for such a choice "amount[s] to a challenge as to the overall execution of the research project." Why? The problem with formulating a standard or principle this way is that almost every act by government or private agent in the scope of employment would "challenge a policy" if it is for the purpose of carrying out some government or private interest, policy or plan.~

The court's theory is incoherent and directly contrary to the early case of *Indian Towing Co. v. United States,* 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed. 48 (1955), decided not long after the Federal Tort Claims Act was enacted. In the *Indian Towing* case the Court concluded that once the government makes a protected policy, every implementing step like conducting an experiment or repairing damaged equipment must proceed with "due care" in carrying out its decision. In *Indian Towing* the

government set up a lighthouse service. The government agent did not "repair" the light properly:

> The Coast Guard need not undertake the lighthouse service. But once it exercised its discretion to operate a light on Chandeleur Island and engendered reliance on the guidance afforded by the light, *it was obligated to use due care* to make certain that the light was kept in working order ... and to repair the light or give warning that it was not functioning.

350 U.S. at 69 (Emphasis added). Likewise, once the government decided to carry out the hazardous IED experiment "it was obligated to use due care." The firearms agent using the winch did not have to ponder the nature of a policy. No considerations of social policy would come to mind in getting the door opened. The question should be the regular tort question for "private" persons in the economy: did the agent use due care?

Otherwise, there are severe distributional consequences for the entire society. The costs of torts by government agents are distributed only to private individuals. Here the plaintiff is permanently disabled by alleged government error. The government distributes income to the private companies that manufacture the IED's, the car and the winch. But the plaintiff's injuries somehow become a "challenge to government policy" and cannot be compensated.~

The nature of the conduct here is perfectly clear: a federal agent attempted to remove a door from a minivan with a winch in order to obtain evidence from within.~ Having defined the conduct, its context becomes relevant to the legal standard we must apply: Whether the government agent's decision was "grounded in social, economic, [or] political policy." *United States v. Gaubert,* 499 U.S. 315, 323 (1991). To make this determination, we typically must discern the legal authority for an agent's action. Even where there is no explicit constraint on an agent's action – and here there is not – discretion is guided by some sort of governmental pronouncement. An agent acquires

immunity for the government not simply by making a choice – she acquires it by making a choice that substantively constitutes the policy behind a statute, regulation, or agency guidance. *See id.* at 325 (holding that the discretionary function exception only protects actions "grounded in the policy of the regulatory regime").

In this case, the Government has been quite sketchy about the authority or purpose of the IED experiment at issue. Without an adequate explanation of the authority for the experiment—which appears not to have been disclosed before the district court granted the motion to dismiss—it is clear that the agent's decision was not grounded in any policy that the government or my colleagues can articulate. Even if we assume some sort of agency guidance and interpret the exercise in the way most favorable to the Government – as a training mission to recover evidence – I fail to see how the decision to winch the door off the van required any sort of policy judgment.

At root, policy judgment requires a balancing of interests. *See Myers v. United States,* 17 F.3d 890, 898 (6th Cir.1994) ("Th[e] *balancing* of interests ... characterizes the type of discretion that the discretionary function exception was intended to protect."). Of course, balancing is a necessary element of discretion. The majority believes that the agent's decision to use a winch was susceptible to policy analysis because it required him to "execute the experiment in a way that balanced the safety needs of the personnel and the need to gather evidence from the vehicles." This sort of balancing is a meaningless way to identify policy analysis. Had the agent crashed his car while speeding to the scene of the exploded van, he would have tacitly been balancing the safety of his passengers against the need to reach the subject of the experiment. Yet crashing a car is not behavior from which the government can claim immunity. The relevant question is not whether the government actor engaged in some sort of balancing, but whether judicial interference with the actor's balancing would "seriously handicap efficient government operations." *United States v. Varig Airlines,* 467 U.S. 797, 814 (1984).~

> Complex balancing pursuant to stated regulatory authority has characterized the situations in which courts apply the discretionary function exception.~ By contrast, no complex balancing was required in this case. The challenge facing the agent was how to get the door off the van to recover evidence. The Government points to no statute, regulation, or agency guidance granting the agent discretion to choose among a number of methods to achieve this task. Assuming that the agent had authority to remove the door, the ultimate decision to use the winch required no calculus as to the best use of government resources or the cost of proceeding otherwise. Indeed, there is no evidence that the agent had any tool but the winch available, or that he did anything other than grab the instrument nearest at hand. The decisional process the agent employed is not the sort of judgment characteristic of social, economic, or political policy.~
>
> Because the agent's decision to use a winch required no policy judgment, and because the plaintiff's suit would in no way interfere with government operations, I respectfully dissent.

Questions to Ponder About *Kohl v. United States*

A. Under the *Kohl* court's conception of the discretionary function test, is there *anything* that a government employee could do, other than crash a car, which would fall outside of the discretionary function exception?

B. What do we make of the policy question at the heart of the discretionary function exemption? Would the government's ability to govern be hamstrung if liability were permitted in a case such as this?

C. The majority writes, "The discretionary-function exception protects both high-level policymakers and the employees who implement broader governmental objectives." What do you think the court means when it says the exception "protects … employees"? Literally, the exception shields the federal government from liability – not the employees. (The employees are already fully immune because of the Westfall Act, discussed above.) So why does the court phrase it this way? Is there any sense to it, or is it just a relaxed style of writing?

Different Views of Discretionary Function

In *Downs v. United States,* 522 F.2d 990 (6th Cir. 1975), hijackers seized a small plane in Nashville, Tennessee and then forced it to fly to Jacksonville, Florida for a fuel stop. The FBI was alleged to have botched the rescue attempt by refusing to refuel the plane in Florida and instead attempting to shoot out the aircraft's engines and tires. In response to being fired on, one of the hijackers shot and killed two hostages.

Emphasizing the "sweeping language" of the FTCA's waiver of sovereign immunity, the *Downs* court held that decisions of the FBI agent in charge of the hijacking response were not protected as being within a discretionary function:

> We recognize that the agent was called upon to use judgment in dealing with the hijacking. Judgment is exercised in almost every human endeavor. It is not the mere exercise of judgment, however, which immunizes the United States from liability for the torts of its employees.~ We believe that the basic question concerning the exception is whether the judgments of a Government employee are of "the nature and quality" which Congress intended to put beyond judicial review. Congress intended "discretionary functions" to encompass those activities which entail the formulation of governmental policy, whatever the rank of those so engaged. We agree with a commentator's analysis of the provision: It would seem that the justifications for the exception do not necessitate a broader application than to those decisions which are arrived at through an administrator's exercise of a quasi-legislative or quasi-judicial function. In this case, the FBI agents were not involved in formulating governmental policy. Rather, the chief agent was engaged in directing the actions of other Government agents in the handling of a particular situation. FBI hijacking policy was not being set as an ad hoc or exemplary matter

> since it had been formulated before this hijacking.~
>
> The prospect of governmental liability for the actions of law enforcement officers should not cause those officers less vigorously to enforce the law. The need for compensation to citizens injured by the torts of government employees outweighs whatever slight effect vicarious government liability might have on law enforcement efforts.

Downs, 522 F.2d at 995-98. Judge Merritt's dissenting opinion in *Kohl* – in a portion not reproduced above – cited *Downs* as a laudable example of discretionary-function jurisprudence. That was in contrast to the majority's work in *Kohl*, which he called "muddled."

It seems difficult to reconcile *Downs* with *Kohl*. While *Downs* is still good law, it may reflect the predilections of a different era, when there was more skepticism of government action. Implying a trend, Judge Merritt wrote, "We now seem inclined to redistribute the costs of accidents created by government to private individuals who are much less capable of shouldering the burden."

Indeed, the cover of discretionary function seems to have grown to be very expansive.

In *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797 (1984), the Supreme Court held that the discretionary-function exception reaches far enough to shield the acts of FAA employees carrying out "spot check" inspections of maintenance records:

> The FAA employees who conducted compliance reviews of the aircraft involved in this case were specifically empowered to make policy judgments regarding the degree of confidence that might reasonably be placed in a given manufacturer, the need to maximize compliance with FAA regulations, and the efficient allocation of agency resources. In administering the "spot-check" program, these FAA engineers and inspectors necessarily took

> certain calculated risks, but those risks were encountered for the advancement of a governmental purpose and pursuant to the specific grant of authority in the regulations and operating manuals. Under such circumstances, the FAA's alleged negligence in failing to check certain specific items in the course of certificating a particular aircraft falls squarely within the discretionary function exception of § 2680(a).

Varig Airlines, 467 U.S. at 820.

The discretionary function has also been upheld in numerous cases alleging negligent maintenance of facilities. In *Rosebush v. United States*, 119 F.3d 438 (6th Cir. 1997), the plaintiff's 16-month old daughter fell into a fire pit at a campsite and was badly burned by smoldering coals. The parents argued that the U.S. Forest Service was negligent in not placing a grating over the pit or a protective railing around it. The court held that the discretionary-function exception applied, since fire-pit maintenance involved "balancing the needs of the campground users, the effectiveness of various types of warnings, aesthetic concerns, financial considerations, and the impact on the environment, as well as other considerations."

Diplomatic Immunity and Immunities for International Organizations

As an extension of the principles of sovereign immunity, and also for practical concerns of keeping the machinery of international relations running smoothly, diplomats from foreign countries are immune from court process in the country where they are stationed. Technically, diplomats are subject to *the laws* of the United States while they are here, it is just that they are immune from *the courts*. For most practical purposes, this ends up being a distinction without a difference.

A historical outgrowth of diplomatic immunity is immunity for many international organizations. Immunity for these organizations is provided – if at all – by a treaty to which the United States is a signatory. Since international organizations increasingly engage in

highly complex, large-scale operations that are not merely diplomatic in character, this form of immunity is arguably of increasing importance. The United Nations, for instance, was recently sued for negligence over its disaster relief operations in Haiti. Following the 2010 earthquake in the country, the U.N. allegedly caused sewage to be dumped into a river, precipitating an outbreak of cholera that raged through 2013, killing roughly 9,000 people and sickening about 700,000. Sued in New York, the U.N. asserted its immunity to avoid liability.

The Firefighter's Rule

A final topic for us to consider along with various forms of immunities is a doctrine called the **firefighter's rule**. This doctrine prohibits firefighters from suing for injuries sustained because of a negligently set fire.

Suppose a homeowner carelessly starts a fire. A small child is trapped inside. A firefighter, in the course of rescuing the child, suffers smoke inhalation injuries. Anyone else in this situation – coming to the rescue of someone in danger – could sue the careless homeowner in negligence. But the firefighter cannot, because of the firefighter rule.

The firefighter rule can be characterized as a "reverse immunity," because instead of precluding suit against a particular class of defendants, the firefighter rule precludes a particular class of plaintiffs from suing.

The firefighter rule does not apply only to firefighters. It also may also apply to police officers and to other professional emergency responders. It has even been extended to the case of a veterinarian who sued after being bit by a dog brought for in for care.

One justification for the firefighter rule is assumption of the risk. By voluntarily taking on their job, professional emergency responders, or others in analogous situations, have assumed the risk of injury – or so goes the theory. The problem with assumption of the risk as the theoretical underpinning for the firefighter rule is that when bystanders come to the rescue – that is, nonprofessional emergency responders – they are considered foreseeable plaintiffs under

negligence doctrine, and assumption of risk does not bar their recovery.

The firefighter rule does have some flexibility to prevent certain instances of rank unfairness. Courts have held, for instance, that arsonists – those who intentionally start fires – are not protected by the firefighter rule.

Problem: Museum Gala

The Museum of Municipal Accomplishment, jointly owned and operated by the City of Metropolis and the non-profit Metropolis Museum Trust, has opened a new exhibition: *70 Years of Safety*. During the opening gala, a large steel structure – holding up various examples of "safe" scaffolding – collapses. Gala invitee Carl Cinitez is injured and trapped by the wreckage. It turns out that museum staff negligently failed to install several bolts, causing the collapse. The Metropolis Fire Department responds, and firefighter Fiona Freeman attempts to lift part of the structure up to free Carl, but when she does, she slips on a patch of cooking oil negligently left there by the Fiona's husband, Harold Heltenmayer, who happened to be serving as the caterer for the event. As a result, the structure collapses further, which further injures Carl and causes Fiona to suffer a compound leg fracture.

After Carl is finally freed, he and Fiona are whisked away by ambulance to the hospital via the closest route, which goes through the Metropolis Battlefield National Historic Park. Unfortunately for Carl and Fiona, the National Park Service has been undertaking a maintenance project that has involved removing key structural supports from a small bridge. The Superintendent Stu Strinden of NPS lost the order form for a new sign and figured it wasn't that important anyway. Thus, the NPS neglected to place any posted warning of the bridge's compromised condition. When the ambulance carrying Carl and Fiona goes over the bridge, the weight of the vehicle causes the structure to collapse, resulting in additional injuries for Carl and Fiona.

Who among the following defendants, on the basis of immunity or a related doctrine, can escape liability in a lawsuit brought by Carl for

personal injuries? And, separately, who among the following can assert immunity or some related doctrine to block a personal injury suit brought by Fiona?

A. The City of Metropolis

B. The Metropolis Museum Trust

C. Fiona Freeman

D. Harold Heltenmayer

E. The National Park Service

F. Superintendent Stu Strinden

28. Constitutional Torts

"Don't taze me, bro!"

– Andrew Meyer, University of Florida student, 2007

Introduction

If one of your fellow citizens invades your home, that's trespass to land. If the neighbors lock you in their basement, that's false imprisonment. But what if the government does these things to you?

As discussed in the last chapter, tort law does not apply to the government unless it waives its sovereign immunity. And, as we saw, the federal government has not waived its sovereign immunity with respect to intentional torts. The result is that people are often left with no common-law tort cause of action to use when the government undertakes abusive actions that would otherwise be tortious.

It might occur to you that the Constitution offers protection. Entering your home without probable cause and a warrant is generally a violation of the Fourth Amendment. Locking you in a basement without due process of law would be a violation of the Fifth Amendment. But so what? If the government violates the Constitution, what are *you* going to do about it? Patiently explaining your constitutional rights to a group of armed agents in blue windbreakers is unlikely to help you. Theoretically, you could go to court to ask for an injunction, but as a practical matter, how will that help you while agents are in your house?

After the dust settles and the dark-tinted Chevy Suburbans drive off, you could file a lawsuit. The problem, however, is finding a cause of action. The Constitution says nothing about the ability of citizens to sue the government for damages arising from violations of its provisions.

The solution is to use a "constitutional tort" as the basis for your suit.

The cause of action you can use depends on whether your rights were violated by state officials or federal officials. A claim under **§ 1983** allows a cause of action against state officials, and a ***Bivens* action** allows a claim against federal officials.

Section 1983

The federal statute known as § 1983 is the great workhorse of the civil-rights plaintiffs' bar. It provides a cause of action to use against any state or local authorities who violate someone's federally guaranteed rights. In other words, it's a basis for suing non-federal defendants alleged to have violated federal rights.

When someone says "Section 1983," they mean 42 U.S.C. § 1983. The statute is so well known, however, you rarely see the "42 U.S.C."

Appreciating the history of § 1983 is helpful in understand its essential function. During the reconstruction era after the Civil War, the United States added the Reconstruction Amendments to the Constitution – the 13th, 14th, and 15th. Those amendments abolished slavery and guaranteed essential rights to all citizens, including freed slaves. Yet it became clear that local police and courts in the South could simply decline to enforce these rights. In fact, § 1983 was originally part of a set of legal provisions designed to combat the Ku Klux Klan, a secret vigilante network dedicated to white supremacy.

Thus, § 1983 provides a private right of action for plaintiffs to sue state and local officials in federal court for violations of their rights. Here is the text:

> 42 U.S.C. § 1983. Civil action for deprivation of rights
>
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the

> party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

After its passage, a string of cases gave § 1983 a restrictive interpretation. The modern power of § 1983 blossomed in 1961, when the U.S Supreme Court established the statute's vitality in the landmark case of *Monroe v. Pape,* 365 U.S. 167 (1961).

Today, § 1983 lawsuits routinely involve claims by arrestees against police officers for using excessive force and claims by inmates against corrections officers for various constitutional violations. But § 1983 has much broader applicability, and it can be used entirely outside of the law enforcement context. For instance, a public school teacher denied free speech rights could use § 1983 to get vindication.

The Elements of a § 1983 Action

Here is the blackletter formulation of a cause of action under § 1983:

> A plaintiff can establish **a prima facie case under § 1983** by showing the defendant was (1) a person (2) who acted under color of state law to (3) deprive the plaintiff of a right protected by the Constitution or a federal statute.

Person

There are many issues as to who qualifies as a "person" under § 1983. A natural person definitely qualifies as a "person," and therefore § 1983 lawsuits are commonly filed against state or local officials in their personal capacity.

A state government, however, does not qualify as a "person," and a § 1983 suit cannot be brought against a state. Nor can state officials be sued "in their official capacity," as doing so is the same thing as

suing the state. Arms of the state – such the Department of Corrections – are generally considered the same as the state, so § 1983 suits cannot name them as defendants either.

Largely for historical reasons, a local government is *not* considered an arm of the state. Thus, municipalities, counties, and municipal agencies can each qualify as a "person" and be a § 1983 defendant.

Suing a local government entity is tricky, however, because the principle of vicarious liability (including respondeat superior) does not apply to § 1983. A local government entity is not liable merely because one of its employees committed a deprivation of constitutional rights against the plaintiff. Because of this, a § 1983 plaintiff wishing to sue a local government must show that the government entity itself is to blame for the constitutional violation. This can be accomplished by showing that there is a law, policy, or well-established custom within municipal government that gave rise to the constitutional violation. A municipality can also be held liable for a failure to adequately train officials. For instance, a local police department that fails to provide adequate training to police officers on the use of nonlethal force could be liable on that basis for the overzealous tazing of suspects.

Acting Under Color of State Law

To have a cause of action under § 1983, the defendant must act "under color" of some "statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia." The concept is referred to in shorthand as "acting under color of state law."

Defendants act under color of state law when they have "exercised power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *West v. Atkins,* 487 U.S. 42, 49 (1988) (internal quotes omitted). This includes authority of a local or municipal character.

To put it simply, local and state government employees act "under color of law" when they are on the job, and maybe when they are off

the job too, if they are flashing a badge or otherwise undertaking conduct pursuant to their governmental powers and duties.

The cases are clear that the phrase "under color" does not require that defendants act "in accordance" with state law. *Monroe v. Pape* established that even when a state or local official acts contrary to state law, she or he can act "under color" of state law within the meaning of § 1983. For example, a parks-and-recreation employee who denies a rally permit to an organization the employee finds personally distasteful might well be violating state law, municipal ordinances, and departmental policy by doing so. But because the employee is acting as a parks-and-rec official at the time, § 1983 applies.

Private persons usually cannot be sued under § 1983, since they are not exercising state power. An exception applies when a private person conspires with state or local officials to deprive others of their constitutional rights. In such a situation, the private person can be liable.

While "under color of state law" embraces state and local authority, it most certainly does not include federal authority. If a federal official is alleged to have violated constitutional rights, a § 1983 action will not work. Instead, the plaintiff must look to a *Bivens* action (discussed below).

Depriving a Person of a Right

Any of the rights guaranteed by the U.S. Constitution are eligible for § 1983 actions. In addition, rights guaranteed by federal statute may be enforced through § 1983 – at least if Congress has not provided otherwise. The question of whether a federal statute creates a guaranteed right, however, can be a complex one.

As already mentioned, any right created by state statute or state constitution is outside § 1983's ambit.

Case: Scott v. Harris

The following case is a recent example of § 1983 in action.

Scott v. Harris

Supreme Court of the United States
April 30, 2007

550 U.S. 372. TIMOTHY SCOTT, PETITIONER v. VICTOR HARRIS. CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT. No. 05–1631. SCALIA, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, SOUTER, THOMAS, GINSBURG, BREYER, and ALITO, JJ., joined. GINSBURG, J., and BREYER, J., filed concurring opinions, omitted here. STEVENS, J., filed a dissenting opinion, also omitted.

Justice ANTONIN SCALIA delivered the opinion of the Court:

We consider whether a law enforcement official can, consistent with the Fourth Amendment, attempt to stop a fleeing motorist from continuing his public-endangering flight by ramming the motorist's car from behind. Put another way: Can an officer take actions that place a fleeing motorist at risk of serious injury or death in order to stop the motorist's flight from endangering the lives of innocent bystanders?

I

In March 2001, a Georgia county deputy clocked respondent's vehicle traveling at 73 miles per hour on a road with a 55-mile-per-hour speed limit. The deputy activated his blue flashing lights indicating that respondent should pull over. Instead, respondent sped away, initiating a chase down what is in most portions a two-lane road, at speeds exceeding 85 miles per hour. The deputy radioed his dispatch to report that he was pursuing a fleeing vehicle, and broadcast its license plate number. Petitioner, Deputy Timothy Scott, heard the radio communication and joined the pursuit along with other officers. In the midst of the chase, respondent pulled into the parking lot of a shopping center and was nearly boxed in by the various police vehicles. Respondent evaded the trap by making a sharp

turn, colliding with Scott's police car, exiting the parking lot, and speeding off once again down a two-lane highway.

Following respondent's shopping center maneuvering, which resulted in slight damage to Scott's police car, Scott took over as the lead pursuit vehicle. Six minutes and nearly 10 miles after the chase had begun, Scott decided to attempt to terminate the episode by employing a "Precision Intervention Technique ('PIT') maneuver, which causes the fleeing vehicle to spin to a stop." Brief for Petitioner 4. Having radioed his supervisor for permission, Scott was told to " '[g]o ahead and take him out.' " *Harris* v. *Coweta County*, 433 F.3d 807, 811 (CA11 2005). Instead, Scott applied his push bumper to the rear of respondent's vehicle. As a result, respondent lost control of his vehicle, which left the roadway, ran down an embankment, overturned, and crashed. Respondent was badly injured and was rendered a quadriplegic.

Respondent filed suit against Deputy Scott and others under Rev. Stat. § 1979, 42 U.S.C. § 1983, alleging, *inter alia*, a violation of his federal constitutional rights, viz. use of excessive force resulting in an unreasonable seizure under the Fourth Amendment. In response, Scott filed a motion for summary judgment based on an assertion of qualified immunity. The District Court denied the motion, finding that "there are material issues of fact on which the issue of qualified immunity turns which present sufficient disagreement to require submission to a jury." *Harris* v. *Coweta County*, No. 3:01-CV-148-WBH (ND Ga., Sept. 23, 2003), App. to Pet. for Cert. 41a-42a. On interlocutory appeal, the United States Court of Appeals for the Eleventh Circuit affirmed the District Court's decision to allow respondent's Fourth Amendment claim against Scott to proceed to trial. Taking respondent's view of the facts as given, the Court of Appeals concluded that Scott's actions could constitute "deadly force" under *Tennessee* v. *Garner*, 471 U.S. 1 (1985), and that the use of such force in this context "would violate [respondent's] constitutional right to be free from excessive force during a seizure. Accordingly, a reasonable jury could find that Scott violated [respondent's] Fourth Amendment rights." 433 F.3d, at 816. The Court of Appeals

further concluded that "the law as it existed [at the time of the incident], was sufficiently clear to give reasonable law enforcement officers 'fair notice' that ramming a vehicle under these circumstances was unlawful." *Id.* at 817. The Court of Appeals thus concluded that Scott was not entitled to qualified immunity. We granted certiorari and now reverse.

II

In resolving questions of qualified immunity, courts are required to resolve a "threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right? This must be the initial inquiry." *Saucier v. Katz*, 533 U.S. 194, 201 (2001). If, and only if, the court finds a violation of a constitutional right, "the next, sequential step is to ask whether the right was clearly established ... in light of the specific context of the case." *Ibid.* Although this ordering contradicts "[o]ur policy of avoiding unnecessary adjudication of constitutional issues," *United States* v. *Treasury Employees*, 513 U.S. 454, 478 (1995) (citing *Ashwander* v. *TVA*, 297 U.S. 288, 346-347 (1936) (Brandeis, J., concurring)), we have said that such a departure from practice is "necessary to set forth principles which will become the basis for a [future] holding that a right is clearly established." *Saucier*, *supra*, at 201. We therefore turn to the threshold inquiry: whether Deputy Scott's actions violated the Fourth Amendment.

III

The first step in assessing the constitutionality of Scott's actions is to determine the relevant facts. As this case was decided on summary judgment, there have not yet been factual findings by a judge or jury, and respondent's version of events (unsurprisingly) differs substantially from Scott's version. When things are in such a posture, courts are required to view the facts and draw reasonable inferences "in the light most favorable to the party opposing the [summary judgment] motion." *United States* v. *Diebold, Inc.*, 369 U.S. 654, 655 (1962) *(per curiam); Saucier*, *supra*, at 201. In qualified immunity cases, this usually means

adopting (as the Court of Appeals did here) the plaintiff's version of the facts.

There is, however, an added wrinkle in this case: existence in the record of a videotape capturing the events in question. There are no allegations or indications that this videotape was doctored or altered in any way, nor any contention that what it depicts differs from what actually happened. The videotape quite clearly contradicts the version of the story told by respondent and adopted by the Court of Appeals. For example, the Court of Appeals adopted respondent's assertions that, during the chase, "there was little, if any, actual threat to pedestrians or other motorists, as the roads were mostly empty and [respondent] remained in control of his vehicle." 433 F.3d at 815. Indeed, reading the lower court's opinion, one gets the impression that respondent, rather than fleeing from police, was attempting to pass his driving test:

> [T]aking the facts from the non-movant's viewpoint, [respondent] remained in control of his vehicle, slowed for turns and intersections, and typically used his indicators for turns. He did not run any motorists off the road. Nor was he a threat to pedestrians in the shopping center parking lot, which was free from pedestrian and vehicular traffic as the center was closed. Significantly, by the time the parties were back on the highway and Scott rammed [respondent], the motorway had been cleared of motorists and pedestrians allegedly because of police blockades of the nearby intersections." *Id.* at 815-816 (citations omitted).

The videotape tells quite a different story. There we see respondent's vehicle racing down narrow, two-lane roads in the dead of night at speeds that are shockingly fast. We see it swerve around more than a dozen other cars, cross the double-yellow line, and force cars traveling in both directions to their respective shoulders to avoid being hit. We see it run multiple red lights and travel for considerable periods of time in the occasional center left-turn-only lane, chased by numerous police

cars forced to engage in the same hazardous maneuvers just to keep up. Far from being the cautious and controlled driver the lower court depicts, what we see on the video more closely resembles a Hollywood-style car chase of the most frightening sort, placing police officers and innocent bystanders alike at great risk of serious injury.

At the summary judgment stage, facts must be viewed in the light most favorable to the nonmoving party only if there is a "genuine" dispute as to those facts. Fed. Rule Civ. Proc. 56(c). As we have emphasized, "[w]hen the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts... . Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.' " *Matsushita Elec. Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 586-587 (1986) (footnote omitted). "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 247-248 (1986). When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.

That was the case here with regard to the factual issue whether respondent was driving in such fashion as to endanger human life. Respondent's version of events is so utterly discredited by the record that no reasonable jury could have believed him. The Court of Appeals should not have relied on such visible fiction; it should have viewed the facts in the light depicted by the videotape.

Judging the matter on that basis, we think it is quite clear that Deputy Scott did not violate the Fourth Amendment.~

The car chase that respondent initiated in this case posed a substantial and immediate risk of serious physical injury to others; no reasonable jury could conclude otherwise. Scott's

attempt to terminate the chase by forcing respondent off the road was reasonable, and Scott is entitled to summary judgment. The Court of Appeals' decision to the contrary is reversed.

Bivens Actions

A *Bivens* action is the federal counterpart to § 1983 – that is, a *Bivens* action allows you to sue federal officials for violating rights guaranteed by the federal Constitution. The name comes from the case of *Bivens v. Six Unknown Agents*, 403 U.S. 388 (1971), in which the court first approved a cause of action for damages for unconstitutional search and seizure under the Fourth Amendment.

Since then, the *Bivens* action has been extended beyond the Fourth Amendment to a range of constitutional rights, and, as a result, it is largely analogous to § 1983. Yet the cause of action under *Bivens* lacks the sprawling vigor of § 1983 – especially so because of a line of recent Supreme Court decisions expressing skepticism about the need for and wisdom behind *Bivens*.

Compared to § 1983, the *Bivens* plaintiff faces additional hurdles to maintaining a successful claim. First, the plaintiff must show there is no viable alternative federal or state remedy or process that would provide adequate protection for the plaintiff's rights. Then, the court must look for special factors that would counsel hesitation before allowing the kind of claim at issue in the case to go forward.

Case: Bivens v. Six Unknown Agents

Here is the case that started it all – the eponym of all *Bivens* actions to come afterward.

Bivens v. Six Unknown Agents

Supreme Court of the United States
June 21, 1971

403 U.S. 388. Webster BIVENS, Petitioner, v. SIX UNKNOWN NAMED AGENTS OF FEDERAL BUREAU OF NARCOTICS. No. 301. Mr. Justice Harlan concurred in the judgment and filed opinion, Mr. Chief Justice Burger, Mr. Justice Black and Mr. Justice Blackmun filed dissenting

opinions. Stephen A. Grant, for petitioner. Jerome Feit, Washington, D.C., for respondents.

Justice WILLIAM J. BRENNAN, JR. delivered the opinion of the Court:

The Fourth Amendment provides that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. …

In *Bell v. Hood,* 327 U.S. 678 (1946), we reserved the question whether violation of that command by a federal agent acting under color of his authority gives rise to a cause of action for damages consequent upon his unconstitutional conduct. Today we hold that it does.

This case has its origin in an arrest and search carried out on the morning of November 26, 1965. Petitioner's complaint alleged that on that day respondents, agents of the Federal Bureau of Narcotics acting under claim of federal authority, entered his apartment and arrested him for alleged narcotics violations. The agents manacled petitioner in front of his wife and children, and threatened to arrest the entire family. They searched the apartment from stem to stern. Thereafter, petitioner was taken to the federal courthouse in Brooklyn, where he was interrogated, booked, and subjected to a visual strip search.

On July 7, 1967, petitioner brought suit in Federal District Court. In addition to the allegations above, his complaint asserted that the arrest and search were effected without a warrant, and that unreasonable force was employed in making the arrest; fairly read, it alleges as well that the arrest was made without probable cause.~ Petitioner claimed to have suffered great humiliation, embarrassment, and mental suffering as a result of the agents' unlawful conduct, and sought $15,000 damages from each of them. The District Court, on respondents' motion, dismissed the complaint on the ground, inter alia, that it failed to state a cause of action.~ The Court of

Appeals, one judge concurring specially,~ affirmed on that basis. We granted certiorari. We reverse.

Respondents do not argue that petitioner should be entirely without remedy for an unconstitutional invasion of his rights by federal agents. In respondents' view, however, the rights that petitioner asserts – primarily rights of privacy – are creations of state and not of federal law. Accordingly, they argue, petitioner may obtain money damages to redress invasion of these rights only by an action in tort, under state law, in the state courts. In this scheme the Fourth Amendment would serve merely to limit the extent to which the agents could defend the state law tort suit by asserting that their actions were a valid exercise of federal power: if the agents were shown to have violated the Fourth Amendment, such a defense would be lost to them and they would stand before the state law merely as private individuals. Candidly admitting that it is the policy of the Department of Justice to remove all such suits from the state to the federal courts for decision, respondents nevertheless urge that we uphold dismissal of petitioner's complaint in federal court, and remit him to filing an action in the state courts in order that the case may properly be removed to the federal court for decision on the basis of state law. ¬'(S)ince it is the present policy of the Department of Justice to remove to the federal courts all suits in state courts against federal officers for trespass or false imprisonment, a claim for relief, whether based on state common law or directly on the Fourth Amendment will ultimately be heard in a federal court.' Brief for Respondents 13 (citations omitted); see 28 U.S.C. s 1442(a); Willingham v. Morgan, 395 U.S. 402 (1969). In light of this, it is difficult to understand our Brother BLACKMUN's complaint that our holding today 'opens the door for another avalanche of new federal cases.' Post, at 2021. In estimating the magnitude of any such 'avalanche,' it is worth noting that a survey of comparable actions against state officers under 42 U.S.C. s 1983 found only 53 reported cases in 17 years (1951-1967) that survived a motion to dismiss. Ginger & Bell, Police Misconduct Litigation-Plaintiff's Remedies, 15 Am.Jur. Trials 555, 580-590 (1968). Increasing this figure by 900% to allow for increases in rate and

unreported cases, every federal district judge could expect to try one such case every 13 years.[7]

We think that respondents' thesis rests upon an unduly restrictive view of the Fourth Amendment's protection against unreasonable searches and seizures by federal agents, a view that has consistently been rejected by this Court. Respondents seek to treat the relationship between a citizen and a federal agent unconstitutionally exercising his authority as no different from the relationship between two private citizens. In so doing, they ignore the fact that power, once granted, does not disappear like a magic gift when it is wrongfully used. An agent acting – albeit unconstitutionally – in the name of the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own. Accordingly, as our cases make clear, the Fourth Amendment operates as a limitation upon the exercise of federal power regardless of whether the State in whose jurisdiction that power is exercised would prohibit or penalize the identical act if engaged in by a private citizen. It guarantees to citizens of the United States the absolute right to be free from unreasonable searches and seizures carried out by virtue of federal authority. And "where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." *Bell v. Hood,* 327 U.S., at 684.

First. Our cases have long since rejected the notion that the Fourth Amendment proscribes only such conduct as would, if engaged in by private persons, be condemned by state law. Thus in *Gambino v. United States,* 275 U.S. 310 (1927), petitioners were convicted of conspiracy to violate the National Prohibition Act on the basis of evidence seized by state police officers incident to petitioners' arrest by those officers solely for the purpose of enforcing federal law. Notwithstanding the lack of probable cause for the arrest, it would have been permissible under state law if effected by private individuals.[8] It appears, moreover, that the officers were under direction from the Governor to aid in the enforcement of federal law. Accordingly, if the Fourth

Amendment reached only to conduct impermissible under the law of the State, the Amendment would have had no application to the case. Yet this Court held the Fourth Amendment applicable and reversed petitioners' convictions as having been based upon evidence obtained through an unconstitutional search and seizure. Similarly, in *Byars v. United States,* 273 U.S. 28 (1927), the petitioner was convicted on the basis of evidence seized under a warrant issued, without probable cause under the Fourth Amendment, by a state court judge for a state law offense. At the invitation of state law enforcement officers, a federal prohibition agent participated in the search. This Court explicitly refused to inquire whether the warrant was "good under the state law … since in no event could it constitute the basis for a federal search and seizure." Id., at 29.~ And our recent decisions regarding electronic surveillance have made it clear beyond peradventure that the Fourth Amendment is not tied to the niceties of local trespass laws. In light of these cases, respondents' argument that the Fourth Amendment serves only as a limitation on federal defenses to a state law claim, and not as an independent limitation upon the exercise of federal power, must be rejected.

Second. The interests protected by state laws regulating trespass and the invasion of privacy, and those protected by the Fourth Amendment's guarantee against unreasonable searches and seizures, may be inconsistent or even hostile. Thus, we may bar the door against an unwelcome private intruder, or call the police if he persists in seeking entrance. The availability of such alternative means for the protection of privacy may lead the State to restrict imposition of liability for any consequent trespass. A private citizen, asserting no authority other than his own, will not normally be liable in trespass if he demands, and is granted, admission to another's house. But one who demands admission under a claim of federal authority stands in a far different position. The mere invocation of federal power by a federal law enforcement official will normally render futile any attempt to resist an unlawful entry or arrest by resort to the local police; and a claim of authority to enter is likely to unlock the door as well.~ "In such cases there is no safety for the citizen,

except in the protection of the judicial tribunals, for rights which have been invaded by the officers of the government, professing to act in its name. There remains to him but the alternative of resistance, which may amount to crime." *United States v. Lee,* 106 U.S. 196, 219 (1882).~ Nor is it adequate to answer that state law may take into account the different status of one clothed with the authority of the Federal Government. For just as state law may not authorize federal agents to violate the Fourth Amendment, neither may state law undertake to limit the extent to which federal authority can be exercised. The inevitable consequence of this dual limitation on state power is that the federal question becomes not merely a possible defense to the state law action, but an independent claim both necessary and sufficient to make out the plaintiff's cause of action.

Third. That damages may be obtained for injuries consequent upon a violation of the Fourth Amendment by federal officials should hardly seem a surprising proposition. Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty. Of course, the Fourth Amendment does not in so many words provide for its enforcement by an award of money damages for the consequences of its violation. But "it is … well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." *Bell v. Hood,* 327 U.S., at 684. The present case involves no special factors counseling hesitation in the absence of affirmative action by Congress.~ Finally, we cannot accept respondents' formulation of the question as whether the availability of money damages is necessary to enforce the Fourth Amendment. For we have here no explicit congressional declaration that persons injured by a federal officer's violation of the Fourth Amendment may not recover money damages from the agents, but must instead be remitted to another remedy, equally effective in the view of Congress. The question is merely whether petitioner, if he can demonstrate an injury consequent upon the violation by federal agents of his Fourth Amendment rights, is entitled to redress his injury through a particular

> remedial mechanism normally available in the federal courts. "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury v. Madison,* 1 Cranch 137 (1803). Having concluded that petitioner's complaint states a cause of action under the Fourth Amendment, we hold that petitioner is entitled to recover money damages for any injuries he has suffered as a result of the agents' violation of the Amendment.~
>
> Judgment reversed and case remanded.

Bivens Since Bivens

The U.S. Supreme Court has approved *Bivens* actions two times since *Bivens* itself.

In *Davis v. Passman*, 442 U.S. 228 (1979), the Supreme Court held that damages were available under the equal protection guarantee of the Fifth Amendment where a female federal employee was allegedly fired because of her gender. In that case, there was no adequate alternative remedy because the employee worked as a staffer for a member of Congress. Congress had chosen to exempt its own employees from coverage of the Civil Rights Act of 1964, which otherwise would have allowed a cause of action.

In *Carlson v. Green*, 446 U.S. 14 (1980), the Supreme Court allowed a damages suit against federal prison officials for violations of the Eighth Amendment's prohibition on cruel and unusual punishments. While the plaintiff could have sued under the Federal Tort Claims Act, the court said such a remedy was not adequate for several reasons: First, the FTCA was, in the court's judgment, insufficient to deter individuals from violating constitutional rights; second, the FTCA does not allow jury trials; and third, the FTCA would not lead to uniform standards since it borrows state law in any given jurisdiction to determine what is and what is not actionable.

Carlson was the high-water mark for *Bivens* cases. Since then, a grant of cert on *Bivens* case has been a kiss of death for plaintiffs, with the U.S. Supreme Court rebuffing each case before it. In the process, the high court has signaled that it strongly disfavors the prospect of further extending the list of circumstances under which *Bivens* will apply.

Case: Minneci v. Pollard

The following is the court's recent pronouncement on *Bivens* actions.

Minneci v. Pollard

Supreme Court of the United States
January 10, 2012

565 U.S. ___; 132 S.Ct. 617. Margaret MINNECI, et al., Petitioners, v. Richard Lee POLLARD, et al. No. 10-1104. Justice Clarence THOMAS joined the concurrence of Justice SCALIA.

Justice STEPHEN BREYER delivered the opinion of the Court:

The question is whether we can imply the existence of an Eighth Amendment-based damages action (a *Bivens* action) against employees of a privately operated federal prison. See generally *Bivens v. Six Unknown Fed. Narcotics Agents,* 403 U.S. 388, 389 (1971) ("[V]iolation of [the Fourth Amendment] by a federal agent ... gives rise to a cause of action for damages" against a Federal Government employee). Because we believe that in the circumstances present here state tort law authorizes adequate alternative damages actions – actions that provide both significant deterrence and compensation – we cannot do so. See *Wilkie v. Robbins,* 551 U.S. 537, 550 (2007) (no *Bivens* action where "alternative, existing" processes provide adequate protection).

I

Richard Lee Pollard was a prisoner at a federal facility operated by a private company, the Wackenhut Corrections Corporation. In 2002 he filed a *pro se* complaint in federal court against several Wackenhut employees, who (now) include a security officer, a food-services supervisor, and several members of the medical staff. As the Federal Magistrate Judge interpreted Pollard's complaint, he claimed that these employees had deprived him of adequate medical care, had thereby violated the Eighth Amendment's prohibition against "cruel and unusual" punishment, and had caused him injury. He sought damages.

Pollard said that a year earlier he had slipped on a cart left in the doorway of the prison's butcher shop. The prison medical staff took x rays, thought he might have fractured both elbows, brought him to an outside clinic for further orthopedic evaluation, and subsequently arranged for surgery. In particular, Pollard claimed:

> (1) Despite his having told a prison guard that he could not extend his arm, the guard forced him to put on a jumpsuit (to travel to the outside clinic), causing him "the most excruciating pain,";
>
> (2) During several visits to the outside clinic, prison guards made Pollard wear arm restraints that were connected in a way that caused him continued pain;
>
> (3) Prison medical (and other) personnel failed to follow the outside clinic's instructions to put Pollard's left elbow in a posterior splint, failed to provide necessary physical therapy, and failed to conduct necessary studies, including nerve conduction studies;
>
> (4) At times when Pollard's arms were in casts or similarly disabled, prison officials failed to make alternative arrangements for him to receive meals, with the result that (to avoid "being humiliated" in the general food service area) Pollard had to auction off personal items to obtain funds to buy food at the commissary;
>
> (5) Prison officials deprived him of basic hygienic care to the point where he could not bathe for two weeks;
>
> (6) Prison medical staff provided him with insufficient medicine, to the point where he was in pain and could not sleep; and
>
> (7) Prison officials forced him to return to work before his injuries had healed.

After concluding that the Eighth Amendment did not provide for a *Bivens* action against a privately managed prison's

personnel, the Magistrate Judge recommended that the District Court dismiss Pollard's complaint. The District Court did so. But on appeal the Ninth Circuit found that the Eighth Amendment provided Pollard with a *Bivens* action.~

The defendants sought certiorari. And, in light of a split among the Courts of Appeals, we granted the petition.

II

Recently, in *Wilkie v. Robbins, supra,* we rejected a claim that the Fifth Amendment impliedly authorized a *Bivens* action that would permit landowners to obtain damages from government officials who unconstitutionally interfere with their exercise of property rights. After reviewing the Court's earlier *Bivens* cases, the Court stated:

> "[T]he decision whether to recognize a *Bivens* remedy may require two steps. In the first place, there is the question whether any alternative, existing process for protecting the [constitutionally recognized] interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages... . But even in the absence of an alternative, a *Bivens* remedy is a subject of judgment: 'the federal courts must make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special factors counselling hesitation before authorizing a new kind of federal litigation.'" 551 U.S., at 550, (quoting *Bush v. Lucas,* 462 U.S. 367, 378 (1983)).

These standards seek to reflect and to reconcile the Court's reasoning set forth in earlier cases.~ Since *Carlson v. Green,* 446 U.S. 14 (1980), the Court has had to decide in several different instances whether to imply a *Bivens* action. And in each instance it has decided against the existence of such an action. These instances include:

(1) A federal employee's claim that his federal employer dismissed him in violation of the First Amendment, *Bush, supra,* at 386-388, 103 S.Ct. 2404 (congressionally created federal civil service procedures provide meaningful redress);

(2) A claim by military personnel that military superiors violated various constitutional provisions, *Chappell v. Wallace,* 462 U.S. 296, 298-300 (1983) (special factors related to the military counsel against implying a *Bivens* action), see also *United States v. Stanley,* 483 U.S. 669, 683-684 (1987) (similar);

(3) A claim by recipients of Social Security disability benefits that benefits had been denied in violation of the Fifth Amendment, *Schweiker v. Chilicky,* 487 U.S. 412, 414, 425 (1988) (elaborate administrative scheme provides meaningful alternative remedy);

(4) A former bank employee's suit against a federal banking agency, claiming that he lost his job due to agency action that violated the Fifth Amendment's Due Process Clause, *FDIC v. Meyer,* 510 U.S. 471, 484-486 (1994) (no *Bivens* actions against government agencies rather than particular individuals who act unconstitutionally);

(5) A prisoner's Eighth Amendment-based suit against a private corporation that managed a federal prison, *Correctional Services Corporation v. Malesko,* 534 U.S. 61, 70-73 (2001) (to permit suit against the employer-corporation would risk skewing relevant incentives; at the same time, the ability of a prisoner to bring state tort law damages action against *private* individual defendants means that the prisoner does not "lack effective remedies."

Although the Court, in reaching its decisions, has not always similarly emphasized the same aspects of the cases, *Wilkie* fairly summarizes the basic considerations that underlie those

decisions. We consequently apply its approach here. And we conclude that Pollard cannot assert a *Bivens* claim.

That is primarily because Pollard's Eighth Amendment claim focuses upon a kind of conduct that typically falls within the scope of traditional state tort law. And in the case of a privately employed defendant, state tort law provides an "alternative, existing process" capable of protecting the constitutional interests at stake. The existence of that alternative here constitutes a "convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages." Our reasoning is best understood if we set forth and explain why we reject Pollard's arguments to the contrary.

III

Pollard (together with supporting *amici*) asks us to imply a *Bivens* action for four basic reasons – none of which we find convincing. First, Pollard argues that this Court has already decided in *Carlson* that a federal prisoner may bring an Eighth Amendment-based *Bivens* action against prison personnel; and we need do no more than simply apply *Carlson*'s holding here. *Carlson,* however, was a case in which a federal prisoner sought damages from personnel employed by the *government,* not personnel employed by a *private* firm. 446 U.S., at 25, 100 S.Ct. 1468. And for present purposes that fact – of employment status – makes a critical difference.

[T]he potential existence of an adequate "alternative, existing process" differs dramatically in the two sets of cases. Prisoners ordinarily *cannot* bring state-law tort actions against employees of the Federal Government. See 28 U.S.C. §§ 2671, 2679(b)(1) (Westfall Act).~ But prisoners ordinarily *can* bring state-law tort actions against employees of a private firm.~

Second, Pollard argues that, because of the "vagaries" of state tort law, *Carlson,* 446 U.S., at 23, 100 S.Ct. 1468, we should consider only whether *federal* law provides adequate alternative remedies. This argument flounders, however, on the fact that the Court rejected it in *Malesko*. State tort law, after all, can help to deter constitutional violations as well as to provide

compensation to a violation's victim. And it is consequently unsurprising that several cases have considered the adequacy or inadequacy of state-law remedies when determining whether to imply a *Bivens* remedy. See, *e.g., Bivens,* 403 U.S., at 394, 91 S.Ct. 1999 (state tort law "inconsistent or even hostile" to Fourth Amendment); *Davis,* 442 U.S., at 245, n. 23, 99 S.Ct. 2264 (noting no state-law remedy available); cf. *Malesko, supra,* at 70, 122 S.Ct. 515 (noting that the Court has implied *Bivens* action only where any alternative remedy against individual officers was "nonexistent" or where plaintiff "lacked *any alternative remedy*" at all).

Third, Pollard argues that state tort law does not provide remedies *adequate* to protect the constitutional interests at issue here. Pollard's claim, however, is a claim for physical or related emotional harm suffered as a result of aggravated instances of the kind of conduct that state tort law typically forbids. That claim arose in California, where state tort law provides for ordinary negligence actions, for actions based upon "want of ordinary care or skill," for actions for "negligent failure to diagnose or treat," and for actions based upon the failure of one with a custodial duty to care for another to protect that other from "'unreasonable risk of physical harm.'" See Cal. Civ.Code Ann. §§ 1714(a), 1714.8(a). California courts have specifically applied this law to jailers, including private operators of prisons.

Moreover, California's tort law basically reflects general principles of tort law present, as far as we can tell, in the law of every State. We have found specific authority indicating that state law imposes general tort duties of reasonable care (including medical care) on prison employees in every one of the eight States where privately managed secure federal facilities are currently located.

We note, as Pollard points out, that state tort law may sometimes prove less generous than would a *Bivens* action, say, by capping damages, or by forbidding recovery for emotional suffering unconnected with physical harm, or by imposing procedural obstacles, say, initially requiring the use of expert administrative panels in medical malpractice cases. But we

cannot find in this fact sufficient basis to determine state law inadequate.

State-law remedies and a potential *Bivens* remedy need not be perfectly congruent. See *Bush, supra,* at 388 (administrative remedies adequate even though they "do not provide complete relief"). Indeed, federal law as well as state law contains limitations. Prisoners bringing federal lawsuits, for example, ordinarily may not seek damages for mental or emotional injury unconnected with physical injury. And *Bivens* actions, even if more generous to plaintiffs in some respects, may be less generous in others. For example, to show an Eighth Amendment violation a prisoner must typically show that a defendant acted, not just negligently, but with "deliberate indifference."~

Rather, in principle, the question is whether, in general, state tort law remedies provide roughly similar incentives for potential defendants to comply with the Eighth Amendment while also providing roughly similar compensation to victims of violations. The features of the two kinds of actions just mentioned suggest that, in practice, the answer to this question is "yes." And we have found nothing here to convince us to the contrary.

Fourth, Pollard argues that there "may" be similar kinds of Eighth Amendment claims that state tort law does not cover. But Pollard does not convincingly show that there are such cases.~

Regardless, we concede that we cannot prove a negative or be totally certain that the features of state tort law relevant here will universally prove to be, or remain, as we have described them. Nonetheless, we are certain enough about the shape of present law as applied to the kind of case before us to leave different cases and different state laws to another day. That is to say, we can decide whether to imply a *Bivens* action in a case where an Eighth Amendment claim or state law differs significantly from those at issue here when and if such a case arises. The possibility of such a different future case does not provide sufficient grounds for reaching a different conclusion here.

For these reasons, where, as here, a federal prisoner seeks damages from privately employed personnel working at a privately operated federal prison, where the conduct allegedly amounts to a violation of the Eighth Amendment, and where that conduct is of a kind that typically falls within the scope of traditional state tort law (such as the conduct involving improper medical care at issue here), the prisoner must seek a remedy under state tort law. We cannot imply a *Bivens* remedy in such a case.~

So ordered.

Justice ANTONIN SCALIA, concurring:

I join the opinion of the Court because I agree that a narrow interpretation of the rationale of *Bivens v. Six Unknown Fed. Narcotics Agents,* 403 U.S. 388 (1971), would not cause the holding of that case to apply to the circumstances of this case. Even if the narrowest rationale of *Bivens* did apply here, however, I would decline to extend its holding. *Bivens* is "a relic of the heady days in which this Court assumed common-law powers to create causes of action" by constitutional implication. *Correctional Services Corp. v. Malesko,* 534 U.S. 61, 75 (2001) (SCALIA, J., concurring); see also *Wilkie v. Robbins,* 551 U.S. 537, 568 (2007) (THOMAS, J., concurring). We have abandoned that power in the statutory field, see *Alexander v. Sandoval,* 532 U.S. 275, 287 (2001), and we should do the same in the constitutional field, where (presumably) an imagined "implication" cannot even be repudiated by Congress. As I have previously stated, see *Malesko,* I would limit *Bivens* and its two follow-on cases (*Davis v. Passman* and *Carlson v. Green*) to the precise circumstances that they involved.

Justice RUTH BADER GINSBURG, dissenting:

Were Pollard incarcerated in a federal-or state-operated facility, he would have a federal remedy for the Eighth Amendment violations he alleges. See *Carlson v. Green,* 446 U.S. 14 (1980) (*Bivens* action); *Estelle v. Gamble,* 429 U.S. 97, (1976) (42 U.S.C. § 1983 action). For the reasons stated in the dissenting opinion I joined in *Correctional Services Corp. v. Malesko,* 534 U.S. 61, 75-83

(2001) (opinion of Stevens, J.), I would not deny the same character of relief to Pollard, a prisoner placed by federal contract in a privately operated prison. Pollard may have suffered "aggravated instances" of conduct state tort law forbids, but that same aggravated conduct, when it is engaged in by official actors, also offends the Federal Constitution. Rather than remitting Pollard to the "vagaries" of state tort law, I would hold his injuries, sustained while serving a federal sentence, "compensable according to uniform rules of federal law," *Bivens v. Six Unknown Fed. Narcotics Agents,* 403 U.S. 388, 409 (1971) (Harlan, J., concurring in judgment).

Indeed, there is stronger cause for providing a federal remedy in this case than there was in *Malesko.* There, the question presented was whether a *Bivens* action lies against a private corporation that manages a facility housing federal prisoners. Suing a corporate employer, the majority observed in *Malesko,* would not serve to deter individual officers from conduct transgressing constitutional limitations on their authority. Individual deterrence, the Court reminded, was the consideration central to the *Bivens* decision. Noting the availability of state tort remedies, the majority in *Malesko* declined to "exten[d] *Bivens* beyond [that decision's] core premise," *i.e.,* deterring individual officers. Pollard's case, in contrast, involves *Bivens*' core concern: His suit seeking damages directly from individual officers would have precisely the deterrent effect the Court found absent in *Malesko.*

For the reasons stated, I would hold that relief potentially available under state tort law does not block Pollard's recourse to a federal remedy for the affront to the Constitution he suffered.~

Questions to Ponder About *Minneci v. Pollard*

A. Justice Scalia calls *Bivens* actions "a relic of the heady days in which this Court assumed common-law powers to create causes of action" under the Constitution. Is it unfortunate that those heady days are now past? Did the heady days serve a purpose, but one that is now obsolete? Or were the heady days a mistake at the time?

B. Justice Scalia would not overturn *Bivens,* instead he would limit *Bivens* actions to the circumstances specifically approved in the U.S. Supreme Court's three cases of *Bivens, Davis,* and *Carlson.* Why do you think Justice Scalia and Justice Thomas do not favor overturning *Bivens* altogether? Given their articulated position, what is good about keeping it around?

C. Justice Ginsberg references *Bivens*'s stated purpose of deterrence. Is the deterrence issue one that allows drawing a helpful distinction with the past? Do federal officials today have checks on their conduct such that there is less of a need for deterring violations of constitutional rights now than there was in the later 20th Century?

D. How do *Bivens* actions fit with the gestalt of common-law torts, given the deterrence rationale? Is it fair to say that the common law of torts emphasizes compensation and treats deterrence as a welcome side effect? Or is deterrence more central to the common law than that?

E. How would you characterize Justice Breyer's majority opinion? Does it seem to focus more on compensation, deterrence, both, or neither?

29. Thresholds of Life

"I liked being a person. I wanted to keep at it."

— John Green, *The Fault in Our Stars,* 2012

Introduction

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 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.

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 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 pursing 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.

Case: Benally v. Navajo Nation

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.

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 nályéél (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 nályéél 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.

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?

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" is 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.

Loss of Consortium

Loss of consortium claims seek damages that come from not having a person around any more – or at least not around in the same

capacity. In addition to their post-mortem usage, loss of consortium claims can arise for non-fatal injuries. 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.

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 commonly refuse to recognize as a compensable injury a parent's loss of an adult child or an adult child's loss of a parent.

Problem: Death on Route 12

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?

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.

Case: Dobson v. Dobson

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.

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.

31¶ On behalf of the infant respondent, it was argued that the reasoning in *Winnipeg* is not determinative because it dealt with the standing of the foetus to sue while still in utero. In *Winnipeg*, the foetus which sought the detention of its mother-to-be was not a legal person and possessed no legal rights. By contrast, the present action is brought on behalf of an infant born alive whose legal rights and interests vested at the moment of birth. In other words, the sole issue in this appeal is whether a child born alive - as opposed to a foetus - should be able to recover damages for prenatal negligence from every person except his or her mother. Despite the important legal distinction between a foetus and a child born alive, as a matter of social policy and pragmatic reality, both situations involve the imposition of a duty of care upon a pregnant woman towards either her foetus or her subsequently born child. To impose either duty of care would require judicial scrutiny into every aspect of that woman's behaviour during pregnancy. Irrespective of whether the duty of care is imposed upon a pregnant woman towards her foetus or her subsequently born child, both would involve severe intrusions into the bodily integrity, privacy and autonomous decision-making of that woman. Accordingly, the policy concerns raised by McLachlin J. in *Winnipeg* are equally pertinent to this appeal.

32¶ I am strengthened in this conclusion by the final report of the Royal Commission on New Reproductive Technologies, Proceed with Care (1993), vol. 2, which rejected judicial interventions in pregnancy and birth. The Commission expressed its concern with these same policy issues, and recognized the need to ensure support for pregnant women and their foetuses without interfering with the privacy interests and physical autonomy of those women. It articulated its position in the following way (at pp. 955-56):

> Permitting judicial intervention therefore has serious implications for the autonomy of individual women and for the status of women collectively in our society. All individuals have the right to make personal decisions, to control their bodily integrity, and to refuse unwanted

> medical treatment. These are not mere legal technicalities; they represent some of the most deeply held values in society and form the basis for fundamental and constitutional human rights.
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> …
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> A woman has the right to make her own choices, whether they are good or bad, because it is the woman whose body and health are affected, the woman who must live with her decision, and the woman who must bear the consequences of that decision for the rest of her life.

33¶ Thus, it was the far-reaching implications for the privacy and autonomy rights of pregnant women which caused the Commission to recommend specifically that "civil liability never be imposed upon a woman for harm done to her fetus during pregnancy" (p. 964).

34¶ At trial, Miller J. observed that the existing jurisprudence permits recovery from third parties, and permits a child to sue his or her parents for postnatal negligence. He held that to permit an action by a child against his mother for prenatal negligence is a "reasonable progression" in tort jurisprudence. With respect, I believe that the imposition of a duty of care upon pregnant women in these circumstances cannot be characterized as a reasonable progression. Rather, in my view, it constitutes a severe intrusion into the lives of pregnant women, with attendant and potentially damaging effects on the family unit. This case raises social policy concerns of a very real significance. Indeed, they are of such magnitude that they are more properly the subject of study, debate and action by the legislature.

(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).

41¶ Rather, it is the policy concerns, so central to this issue, which should determine whether tort liability should be imposed on mothers for prenatal negligence. With the greatest respect, I am of the view that the judgments below failed to appreciate fully the extensive intrusion into the privacy and autonomy rights of women that would be required by the imposition of tort liability on mothers for prenatal negligence. Such a rule of law would have profound implications and consequences for all Canadian women who are or may become pregnant.

(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: Statistics Canada, Catalogue No. 82-003, Health Reports (1995), vol. 7, No. 2, at p. 12. In addition, for hospital admissions due to unintentional falls, the place of occurrence is the home for 47 percent of the females who reported injuries: Canadian Institute for Health Information, National Trauma Registry Report – Hospital Injury Admissions, 1995/96 (1998), at p. 57. 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. Indeed, all of the

legal problems inherent in maternal tort liability for prenatal negligence, in the context of household and highway accidents, are equally apparent in the workplace setting. Statistical data indicates that, of all the accidents in which women were injured, 14 percent occurred in the course of employment: Health Reports, supra, at p. 12.

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:

91¶ ~On March 14, 1993, the appellant Cynthia Dobson was driving a motor vehicle towards Moncton, New Brunswick, on Route 126. There were patches of drifted snow and slush on the road and the weather was unsettled. At approximately 12:30 p.m., her vehicle collided with that of John Carter. Cynthia Dobson was 27 weeks pregnant. The respondent Ryan Dobson was born by Caesarean section later the same day. He suffered injuries in the collision resulting in permanent mental and physical impairment, including cerebral palsy, and alleges that the collision was caused by his mother's negligent driving.

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.

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?

Part VIII: Oblique Torts

30. Transactional Torts

"In business, sir, one has no friends, only correspondents."

– Alexandre Dumas

Introduction

In this chapter we look at torts that arise in the context of business transactions. These are often called "business torts," although businesses deal with *all* torts, from negligence to defamation. What makes these torts unique is that they are tied to deals and transactions – the *business of business*, if you like. We will see buyers suing sellers, lawyers suing accountants, and sports agents suing sports agents. As opposed to the personal injury torts we have been exploring, the primary harm here is economic. But that is not to say things don't get personal. Transactional-tort cases frequently involve a surprising amount of spite and pique – something you will see in the cases below.

There are a variety of causes of action that could fall under the umbrella of transactional torts, but this chapter covers a few particularly important ones: intentional economic interference, fraud, and breach of fiduciary duty. They are all torts that pick up where contract law leaves off in defining the legal landscape for conducting commerce.

For all transactional torts, it is important to keep in mind the overarching default rule: Where the gravamen of the plaintiff's complaint is that a contract has been breached, then the plaintiff's only remedy is breach of contract. Tort law is not supposed to interfere in the contractual context – at least not unless the rationale is highly compelling. But that is not to say that these torts are infrequently alleged. For plaintiffs in business disputes, tort law has great allure. Tort law's concepts of compensatory damages are more expansive than those under contract law. Plus, for real bad apples, there is the possibility of punitive damages. And business disputes often turn up bad apples. Also, plaintiffs going to trial on a tort may

benefit from a strategic advantage. In a regular contract dispute, evidence that makes the defendant look bad is likely to be irrelevant, and therefore inadmissible. But if a tort is alleged, the plaintiff's lawyers may be able to put before the jury all sorts of disparaging evidence because it is relevant to showing tortious intent.

Because of these advantages, plaintiffs are always looking for ways to tortify contract disputes. And that means courts are always looking for ways to keep this drive toward tortification from getting out of hand. In fact, one theme that runs through the doctrines of intentional economic interference, fraud, and breach of fiduciary duty, is the existence of safeguards put into the doctrine that are meant to prevent workaday contract disputes from morphing into mudslinging tort litigation.

Intentional Economic Interference

The idea behind the cause of action for **intentional economic interference** is that a person should be free to seek economic opportunities without being impeded by intermeddling ne'er-do-wells.

Suppose I manage to get a contract with my neighbors to mow their lawn – something that will give me enough cash to go to the movies and buy a few new video games. Yet you – just because you want to see me fail – work to destroy my nascent lawn mowing business, and you manage to cause my neighbors to terminate my services.

At this point, I can sue you for intentional economic interference. But we should stop to wonder why I would need such a cause of action to sue you. Most of the things you could do to sabotage me are already tortious. For instance, you could tell lies about me that would cause my neighbor to fire me. You could steal my lawn mower. Or you could put sugar in the mower's gas tank. If you do all that to me, I can sue you for intentional economic interference, but I can also sue you for defamation, trespass to chattels, and conversion. So the question is, why does tort law need an independent cause of action for intentional economic interference?

The true value of the intentional economic interference tort shows its worth when something particularly sneaky is afoot. Say you convince your little brother and sister to go over to play with the neighbors' kids and convince them to host an elaborate tea party on the lawn during what you know to be the only hours I have free to get the mowing done. Let's say you do this two weeks in a row, at which point the neighbors terminate my services because I'm not getting the job done. In such a situation, I would have no claim for trespass, conversion, or defamation, but my claim for intentional economic interference will let me in the courthouse doors.

Instead of having a single tort of "intentional economic interference," many jurisdictions have two causes of action: the tort of **intentional interference with contract** and the separate tort of **intentional interference with prospective economic advantage**. Both torts are essentially the same, except that with the former, there is a contract between the plaintiff and a third party. With the later, there would have been a contract but for the defendant's actions.

Here is a statement of the blackletter rule for intentional economic interference:

> A plaintiff can establish **a prima facie case for intentional economic interference** by showing: (1) there is a valid contract or non-speculative economic expectancy between the plaintiff and a third party; (2) the defendant had knowledge of this economic interest; (3) the defendant intended to interfere with this economic interest; (4) but for the interference, the plaintiff would have received the benefit of the economic interest; and (5) the plaintiff thereby accrued damages.

These elements are mostly self-explanatory, but a few observations should be made.

First, it bears emphasis that the economic interest (the contract or prospective economic advantage) must arise between the plaintiff and a *third party* – that is, someone who is not the defendant. If the defendant backs out of a contract, the remedy is breach of contract.

Tort law will not enter the mix. Another way of putting this is that a defendant cannot interfere with its own contract – it can merely breach it.

Although it may not be apparent at first glance, the blackletter formulation of intentional economic interference is very expansive. The fact is that competitors try to deny each other economic interests all the time. Check the elements above, and you'll see, for instance, that a car dealer undercutting a competitor's price could be actionable. But that's the essence of our free-market economy, and we don't want it to be deemed tortious. Another vast category of conduct that could be swept up into the scope of the prima facie case for intentional economic interference is what attorneys do: Give advice. Suppose a client asks you for a mixture of business and legal judgment about whether she or he should back out of a deal. Taking account of the legal liabilities and the business ramifications, you advise your client to do just that, and your client follows your advice. Check the elements above: That qualifies as a prima facie case. And yet we don't want attorney advice to be considered tortious.

Because of the overinclusive scope of the prima facie case for intentional economic interference, much of the doctrinal work is done in the form of affirmative defenses, in particular the nebulous and wide-ranging concepts of "privileges" and "justifications." Bona-fide competition, for instance, is considered a justification. Bona-fide business or legal advice is also considered a justification – although under some formulations, the advice must be asked for. Other justifications include having a financial interest in the matter or being in a position of responsibility for the welfare of the third party. Courts generally have wide latitude in determining whether to find conduct privileged or justified, and courts are expected to take public policy concerns into account in making that determination.

The fact that ill-defined defenses are so heavily relied upon to give shape to the doctrine of intentional economic interference means that even a losing claim can have legs in litigation. Since justifications are fact-intensive affirmative defenses, it follows that they generally cannot be used at the pleadings stage. This means that even a losing claim for intentional economic interference can have considerable

strategic value in litigation. Until it can be knocked out on summary judgment, it can permit discovery into otherwise irrelevant matters, drive up expense, and give defendants an extra incentive to settle.

Case: Calbom v. Knudtzon

This intentional economic interference case pits accountants against a lawyer.

Calbom v. Knudtzon

Supreme Court of Washington
October 29, 1964

65 Wn.2d 157. HARRY B. CALBOM, JR., Respondent, v. HALVOR KNUDTZON, SR. et al., Appellants. No. 37076.

Justice ORRIS L. HAMILTON:

Plaintiff (respondent) instituted this action seeking recovery of damages upon the grounds that defendants (appellants) had interferred with and induced a breach of an attorney-client relationship. Defendants appeal from an adverse judgment.

On May 1, 1958, K.T. Henderson, sole proprietor of a successful general contracting business, unexpectedly died of a heart attack. His death created pressing problems pertaining to the continuing operations of his business. Mrs. Jessie Bridges, Mr. Henderson's office manager, immediately contacted plaintiff, who was personally acquainted with the Hendersons and who, as a practicing attorney, had served them occasionally. Plaintiff, in substance, advised Mrs. Bridges that before he could intelligently give counsel he would have to know whether Mr. Henderson left a will and, if so, who was named as executor or executrix therein, and the provisions thereof. Mrs. Bridges then contacted Mrs. Henderson and a meeting was arranged between plaintiff, Mrs. Henderson, and Mrs. Bridges. At this meeting, it was disclosed that Mr. Henderson had left a will naming Mrs. Henderson his executrix, and that she desired to continue the business. She requested that plaintiff make arrangements to carry out her wishes.

Plaintiff prepared the necessary papers and at 4 p.m. on May 1, 1958, appeared with Mrs. Henderson and Mrs. Bridges before the Superior Court of Cowlitz County, at which time the will was offered for probate, Mrs. Henderson designated as executrix, and an order authorizing continuance of the business was entered. The following day, Mrs. Henderson was fully qualified as executrix and, with plaintiff's assistance, accounts at the bank were adjusted whereby business obligations, including the payroll of the business then due, were met, and a letter relating to and confirming an outstanding bid to a local school district for school construction dispatched. Plaintiff prepared to perfect and continue probate of the estate.

On May 6th, it was necessary for plaintiff to go to California. Before leaving, he checked with Mrs. Bridges to ascertain any immediate needs, and was informed there was none. Between May 6th and May 8th, Halvor Knudtzon, Sr., the senior member of the firm of Knudtzon and Associates, certified public accountants, returned from a trip. On May 8th, he was consulted by Mrs. Henderson relative to performing the tax work in connection with the estate. At this meeting, Mr. Knudtzon inquired of Mrs. Henderson if she had selected an attorney, to which she replied "Yes, I suppose Harry Calbom." Whereupon, Mr. Knudtzon shook his head and indicated, by inference at least, that plaintiff was unsatisfactory. Mr. Knudtzon thereupon recommended a list of attorneys from which one was selected.

On May 9th, plaintiff returned and was advised by Mrs. Bridges that another attorney was handling the probate matter. Thereupon, he contacted Mr. Knudtzon, Sr., and requested a meeting, which was arranged for that morning. Mr. Knudtzon, who was at home when contacted by plaintiff, telephoned his son at the office and advised him that plaintiff was coming in to confer with them, and that they would give him "a line of hot air." When confronted by plaintiff at their office, plaintiff was advised by Mr. Knudtzon, Sr., that they, as accountants, hired and fired attorneys for their clients and made reference to a former probate matter in which they had been instrumental in discharging the attorney.

Subsequently, an effort was made to pay plaintiff for services he had performed and secure his signature upon a notice of substitution of attorneys. Plaintiff refused to submit a bill for his services up to the time of his termination, refused to agree to a substitution of attorneys, and instituted the present action against the defendants alleging intentional interference with plaintiff's employment contract.

Trial of the action consumed several days, at the conclusion of which the trial court rendered an oral decision in favor of plaintiff and thereafter entered findings of fact, conclusions of law, and judgment. The essence of the trial court's findings were: (a) Plaintiff was an ethical, reputable, and competent attorney; (b) plaintiff had a contract with the surviving widow to probate the estate of K.T. Henderson, pursuant to which plaintiff undertook performance of the probate proceedings; (c) defendants, with knowledge of plaintiff's contract of employment, intentionally, maliciously, and without justification induced the surviving widow to discharge plaintiff as attorney for the estate, and (d) plaintiff suffered damage in the amount of the reasonable attorney's fee he would have earned had he continued to the conclusion of the probate.~

Intentional and unjustified third-party interference with valid contractual relations or business expectancies constitutes a tort, with its taproot embedded in early decisions of the courts of England~.

The fundamental premise of the tort – that a person has a right to pursue his valid contractual and business expectancies unmolested by the wrongful and officious intermeddling of a third party – has been crystallized and defined in Restatement, Torts § 766, as follows:

> Except as stated in Section 698 [betrothal promises], one who, without a privilege to do so, induces or otherwise purposely causes a third person not to
>
> (a) perform a contract with another, or

(b) enter into or continue a business relation with another

is liable to the other for the harm caused thereby.

Clause (a) relates to those cases in which the purposeful interference of a third party induces or causes a breach of an existing and valid contract relationship. Clause (b) embraces two types of situations. One is that in which the interferor purposely induces or causes a party not to enter into a business relationship with another. The second is where a business relationship, terminable at the will of the parties thereto, exists, and the intermeddler purposely induces or causes a termination of such relationship. The distinction between the situations propounded by clauses (a) and (b) lies not so much in the nature of the wrong, as in the existence or nonexistence, and availability as a defense, of privilege or justification for the interference. Restatement, Torts § 766, Comment c.

The basic elements going into a prima facie establishment of the tort are (1) the existence of a valid contractual relationship or business expectancy; (2) knowledge of the relationship or expectancy on the part of the interferor; (3) intentional interference inducing or causing a breach or termination of the relationship or expectancy; and (4) resultant damage to the party whose relationship or expectancy has been disrupted. Ill will, spite, defamation, fraud, force, or coercion, on the part of the interferor, are not essential ingredients, although such may be shown for such bearing as they may have upon the defense of privilege.

The burden of showing privilege for interference with the expectancy involved rests upon the interferor. The basic issue raised by the assertion of the defense is whether, under the circumstances of the particular case, the interferor's conduct is justifiable, bearing in mind such factors as the nature of the interferor's conduct, the character of the expectancy with which the conduct interferes, the relationship between the various parties, the interest sought to be advanced by the interferor, and the social desirability of protecting the expectancy or the

interferor's freedom of action. Some of the privileges and their limitations, which have been recognized, depending upon the circumstances and the factors involved, are legitimate business competition, financial interest, responsibility for the welfare of another, directing business policy, and the giving of requested advice.

Against the backdrop of the foregoing, we turn to defendants' contentions.

Defendants first assert that the evidence does not support the trial court's finding concerning the existence of an attorney-client relationship between plaintiff and Mrs. Henderson whereby plaintiff would undertake the "long term" probate of the estate. This assertion is predicated upon the argument that the testimony of Mrs. Henderson and Mrs. Bridges, coupled with the surrounding circumstances, indicate that Mrs. Henderson only intended to engage plaintiff's services for the limited purpose of admitting the will to probate and securing an order authorizing continuation of the business.

We agree that the evidence presented by defendants upon this point is susceptible of the interpretation defendants would place upon it. However, such is not the only interpretation finding support in the evidence as a whole. The evidence reveals that at the meeting on May 1, 1958, after plaintiff had explained the necessity for probate proceedings, Mrs. Henderson stated to plaintiff she wanted him to "handle this thing for me." Plaintiff thereupon prepared all papers incidental to the admission of the will to probate; arranged for the testimony of the witnesses to the will; appeared in court and presented the testimony of Mrs. Henderson, Mrs. Bridges, and the witnesses to the will; provided for, counseled, and participated in arrangements to meet pending business obligations; and, to all intents and purposes, became the attorney in fact and of record for the estate. Although the relationship thus established was terminable at the will of the parties, we are convinced the evidence and the reasonable inferences therefrom amply support the trial court's finding of an existing attorney-client relationship which plaintiff

had every right to anticipate would continue, and which would have continued but for the intervention of defendants.~

Defendants next assert that the evidence does not support the trial court's finding that they had knowledge of the existence of the attorney-client relationship in issue. Here again, the evidence and the inferences therefrom produce a conflict. On the one hand, defendants claim they were advised by Mrs. Bridges that plaintiff's employment was limited. On the other hand, plaintiff's evidence indicates that defendants were not only aware of plaintiff's position as attorney in fact and of record for the estate, but in fact boasted of their ability to terminate that relationship. Additional evidence supportive of plaintiff's version is the admission of defendants that they determined to give plaintiff a "line of hot air" when he called upon them, rather than rely upon what they now assert was their knowledge of his status in the estate.

Although knowledge of the existence of the business relationship in issue is an essential element in establishing liability for interference therewith, it is sufficient if the evidence reveals that the alleged interferor had knowledge of facts giving rise to the existence of the relationship. It is not necessary that the interferor understand the legal significance of such facts.

We are satisfied that the evidence presented supports the trial court's finding of the requisite knowledge of the circumstances on the part of defendants.~

Defendants next contention is that plaintiff's employment as attorney for the estate created a conflict of interest with his duties as a member of the local school board, and was, therefore, contrary to public policy and invalid. This is predicated upon the fact that the Henderson Construction Company had pending before the school board a bid for school construction at the time plaintiff initiated the probate proceedings.

We find no merit in this contention because (a) plaintiff stepped down from the school board at the time it considered the bid; (b) the board did not consider the bid until May 12, 1958, at

which time plaintiff's services with the estate had been terminated; (c) the board, upon advice of the prosecuting attorney, rejected the bid; and (d) neither plaintiff nor his successor represented the estate before the school board. It is possible that had plaintiff continued as counsel for the estate he would have been confronted with a choice between his position upon the school board and as attorney for the estate. The fact is, however, that he was not afforded this opportunity, and speculation that he might have made a wrong choice cannot now form the basis of a declaration that his continued employment as attorney for the estate would have been invalid. Particularly is this so in the face of the unchallenged finding by the trial court that plaintiff acted "at all times herein material … with the highest degree of integrity consistent with the professional ethics of an attorney at law."

Defendants next contend that their interference with plaintiff's relationship to the estate was privileged. Defendants predicate this assertion upon the claim that they occupied a confidential relationship with Mrs. Henderson by virtue of their long time service to the Hendersons as tax consultants. In essence, defendants rely upon the privileges capsulized in Restatement, Torts §§ 770 and 772, or a combination thereof.

> ⌙"One who is charged with responsibility for the welfare of another is privileged purposely to cause him not to perform a contract, or enter into or continue a business relation, with a third person if the actor '(a) does not employ improper means and '(b) acts to protect the welfare of the other.' Restatement, Torts § 770.2⌟

> ⌙"One is privileged purposely to cause another not to perform a contract, or enter into or continue a business relation, with a third person by giving honest advice to the other within the scope of a request for advice made by him, except that, if the actor is under a special duty to the third person with reference to the accuracy

> of the advice, he is subject to liability for breach of that duty.' Restatement, Torts § 772.[7]
>
> The basic reason supporting both of the mentioned privileges is the protection of public and private interests in freedom of communication, decent conduct, and professional as well as lay counsel. Such privileges, however, do not justify officious, self-serving, or presumptious assumption of responsibility and interference with the rights of others. The burden of establishing the existence of such a privilege or privileges rests, as heretofore indicated, upon the one asserting justification thereby.
>
> We are satisfied, from our examination of the record, that defendants have not sustained their burden of proof. Suffice it to say the evidence supports the trial court's finding that defendants' interference was malicious, intentional and without justification.

Questions to Ponder About *Calbom v. Kundtzon*

A. Are you surprised by the result here – that an accountant's shaking his head and suggesting other attorneys caused him to incur liability for intentional economic interference?

B. Of what significance is it that the Knudtzons decided to give Calbom "a line of hot air" and that they bragged about hiring and firing attorneys?

C. Issues of privilege or justification are supposed to take into account "the social desirability of protecting the expectancy or the interferor's freedom of action." Which way does that cut here?

D. Was Knudtzon disadvantaged by the fact that he was an accountant while Calbom was a lawyer? After all, judges decide cases, and judges are lawyers. Suppose this case had been decided by a board of accountants reviewing Knudtzon on professional ethics charges? And suppose the rule he was alleged to have violated was the same in substance as the cause of action for intentional economic interference. Do you think Knudtzon would be vindicated or disciplined?

E. Could Knudtzon have done anything to protect himself with regard to tort liability while still giving his advice to Mrs. Henderson?

Case: Speakers of Sport v. ProServ

The next case presents an example of a claim for intentional economic interference in the sports-agency context.

Speakers of Sport v. ProServ

United States Court of Appeals for the Seventh Circuit
May 13, 1999

178 F.3d 862. SPEAKERS OF SPORT, INC., Plaintiff-Appellant, v. PROSERV, INC., Defendant-Appellee. No. 98-3113. Before POSNER, Chief Judge, and FLAUM and MANION, Circuit Judges.

Chief Judge RICHARD A. POSNER:

The plaintiff, Speakers of Sport, appeals from the grant of summary judgment to the defendant, ProServ, in a diversity suit in which one sports agency has charged another with tortious interference with a business relationship and related violations of Illinois law. The essential facts, construed as favorably to the plaintiff as the record will permit, are as follows. Ivan Rodriguez, a highly successful catcher with the Texas Rangers baseball team, in 1991 signed the first of several one-year contracts making Speakers his agent. ProServ wanted to expand its representation of baseball players and to this end invited Rodriguez to its office in Washington and there promised that it would get him between $2 and $4 million in endorsements if he signed with ProServ – which he did, terminating his contract (which was terminable at will) with Speakers. This was in 1995. ProServ failed to obtain significant endorsement for Rodriguez and after just one year he switched to another agent who the following year landed him a five-year $42 million contract with the Rangers. Speakers brought this suit a few months later, charging that the promise of endorsements that ProServ had made to Rodriguez was fraudulent and had induced him to terminate his contract with Speakers.

The parties agree that the substantive issues in this diversity suit are governed by Illinois law, and we do not look behind such agreements so long as they are reasonable~.

Speakers could not sue Rodriguez for breach of contract, because he had not broken their contract, which was, as we said, terminable at will. Nor, therefore, could it accuse ProServ of inducing a breach of contract, as in *J.D. Edwards & Co. v. Podany,* 168 F.3d 1020, 1022 (7th Cir.1999). But Speakers did have a contract with Rodriguez, and inducing the termination of a contract, even when the termination is not a breach because the contract is terminable at will, can still be actionable under the tort law of Illinois, either as an interference with prospective economic advantage, or as an interference with the contract at will itself. Nothing turns on the difference in characterization.

There is in general nothing wrong with one sports agent trying to take a client from another if this can be done without precipitating a breach of contract. That is the process known as competition, which though painful, fierce, frequently ruthless, sometimes Darwinian in its pitilessness, is the cornerstone of our highly successful economic system. Competition is not a tort, but on the contrary provides a defense (the "competitor's privilege") to the tort of improper interference. It does not privilege inducing a breach of contract, – conduct usefully regarded as a separate tort from interfering with a business relationship without precipitating an actual breach of contract – but it does privilege inducing the lawful termination of a contract that is terminable at will. Sellers (including agents, who are sellers of services) do not "own" their customers, at least not without a contract with them that is not terminable at will.

There would be few more effective inhibitors of the competitive process than making it a tort for an agent to promise the client of another agent to do better by him, – which is pretty much what this case comes down to. It is true that Speakers argues only that the competitor may not make a promise that he knows he cannot fulfill, may not, that is, compete by fraud. Because the competitor's privilege does not include a right to get business from a competitor by means of fraud, it is hard to quarrel with

this position in the abstract, but the practicalities are different. If the argument were accepted and the new agent made a promise that was not fulfilled, the old agent would have a shot at convincing a jury that the new agent had known from the start that he couldn't deliver on the promise. Once a case gets to the jury, all bets are off. The practical consequence of Speakers' approach, therefore, would be that a sports agent who lured away the client of another agent with a promise to do better by him would be running a grave legal risk.

This threat to the competitive process is blocked by the principle of Illinois law that promissory fraud is not actionable unless it is part of a scheme to defraud, that is, unless it is one element of a pattern of fraudulent acts. By requiring that the plaintiff show a pattern, by thus not letting him rest on proving a single promise, the law reduces the likelihood of a spurious suit; for a series of unfulfilled promises is better (though of course not conclusive) evidence of fraud than a single unfulfilled promise.

Criticized for vagueness, and rejected in most states, the Illinois rule yet makes sense in a case like this, if only as a filter against efforts to use the legal process to stifle competition. Consider in this connection the characterization by Speakers' own chairman of ProServ's promise to Rodriguez as "pure fantasy and gross exaggeration" – in other words, as puffing. Puffing in the usual sense signifies meaningless superlatives that no reasonable person would take seriously, and so it is not actionable as fraud. Rodriguez thus could not have sued ProServ (and has not attempted to) in respect of the promise of $2–$4 million in endorsements. If Rodriguez thus was not wronged, we do not understand on what theory Speakers can complain that ProServ competed with it unfairly.

The promise of endorsements was puffing not in the most common sense of a cascade of extravagant adjectives but in the equally valid sense of a sales pitch that is intended, and that a reasonable person in the position of the "promisee" would understand, to be aspirational rather than enforceable – an expression of hope rather than a commitment. It is not as if

ProServ proposed to employ Rodriguez and pay him $2 million a year. That would be the kind of promise that could found an enforceable obligation. ProServ proposed merely to get him endorsements of at least that amount. They would of course be paid by the companies whose products Rodriguez endorsed, rather than by ProServ. ProServ could not force them to pay Rodriguez, and it is not contended that he understood ProServ to be warranting a minimum level of endorsements in the sense that if they were not forthcoming ProServ would be legally obligated to make up the difference to him.

It is possible to make a binding promise of something over which one has no control; such a promise is called a warranty. But it is not plausible that this is what ProServ was doing – that it was guaranteeing Rodriguez a minimum of $2 million a year in outside earnings if he signed with it. The only reasonable meaning to attach to ProServ's so-called promise is that ProServ would try to get as many endorsements as possible for Rodriguez and that it was optimistic that it could get him at least $2 million worth of them. So understood, the "promise" was not a promise at all. But even if it was a promise (or a warranty), it cannot be the basis for a finding of fraud because it was not part of a scheme to defraud evidenced by more than the allegedly fraudulent promise itself.

It can be argued, however, that competition can be tortious even if it does not involve an actionable fraud (which in Illinois would not include a fraudulent promise) or other independently tortious act, such as defamation, or trademark or patent infringement, or a theft of a trade secret; that competitors should not be allowed to use "unfair" tactics; and that a promise known by the promisor when made to be unfulfillable is such a tactic, especially when used on a relatively unsophisticated, albeit very well to do, baseball player. Considerable support for this view can be found in the case law. The doctrine's conception of wrongful competition is vague – "wrongful by reason of ... an established standard of a trade or profession," or "a violation of recognized ethical rules or established customs or practices in the business community," or "improper because they [the challenged competitive tactics] violate an established standard of

a trade or profession, or involve unethical conduct, ... sharp dealing[, or] overreaching." Worse, the established standards of a trade or profession in regard to competition, and its ideas of unethical competitive conduct, are likely to reflect a desire to limit competition for reasons related to the self-interest of the trade or profession rather than to the welfare of its customers or clients. We agree with Professor Perlman that the tort of interference with business relationships should be confined to cases in which the defendant employed unlawful means to stiff a competitor, Harvey S. Perlman, "Interference With Contract and Other Economic Expectancies: A Clash of Tort and Contract Doctrine," 49 *U. Chi. L.Rev.* 61 (1982), and we are reassured by the conclusion of his careful analysis that the case law is generally consistent with this position as a matter of outcomes as distinct from articulation.

Invoking the concept of "wrongful by reason of ... an established standard of a trade or profession," Speakers points to a rule of major league baseball forbidding players' agents to compete by means of misrepresentations. The rule is designed to protect the players, rather than their agents, so that even if it established a norm enforceable by law Speakers would not be entitled to invoke it; it is not a rule designed for Speakers' protection. In any event its violation would not be the kind of "wrongful" conduct that should trigger the tort of intentional interference; it would not be a violation of law.~

We add that even if Speakers could establish liability under either the common law of torts or the deceptive practices act, its suit would fail because it cannot possibly establish, as it seeks to do, a damages entitlement (the only relief it seeks) to the agent's fee on Rodriguez's $42 million contract. That contract was negotiated years after he left Speakers, and by another agent. Since Rodriguez had only a year-to-year contract with Speakers – terminable at will, moreover – and since obviously he was dissatisfied with Speakers at least to the extent of switching to ProServ and then when he became disillusioned with ProServ of *not* returning to Speakers' fold, the likelihood that Speakers would have retained him had ProServ not lured him away is too slight to ground an award of such damages. Such an award

would be the best example yet of puffing in the pie-in the-sky sense.

AFFIRMED.

Questions to Ponder About Speakers of Sport v. ProServ

A. Judge Posner writes in this decision, "Once a case gets to the jury, all bets are off." Is he showing shockingly little faith in the jury system – especially considering his position as a judge? Or is he just being realistic?

B. Do you agree that a promise of obtaining $2 million to $4 million in endorsements is "pure fantasy and gross exaggeration" and "meaningless superlatives that no reasonable person would take seriously"? Do you think Rodriguez took it seriously?

C. Does the existence of tort doctrine in this area stifle competition by creating a cloud of possible liability when competitors fight for clients? Or does it aid competition by forcing business interests to provide information that is more accurate, thus leading to more efficient outcomes in the marketplace?

Fraud

The most hallowed way to turn a contract dispute into a tort lawsuit is through a charge of fraud. The cause of action for fraud, which is sometimes called "deceit" or "intentional misrepresentation," provides a cause of action where the defendant knowingly misrepresents facts for the purpose of inducing the plaintiff to do something, and the plaintiff actually, justifiably, and detrimentally relies on the misrepresentation.

Here is the blackletter formulation:

> A plaintiff can establish a **prima facie case for fraud** by showing: (1) A material misrepresentation by defendant, (2) scienter (defendant's knowledge of falsity), (3) the defendant's intent to induce reliance on the part of the plaintiff, (4) the plaintiff's (a) actual and (b) justifiable reliance on the misrepresentation,

> and (5) the plaintiff's accrual of actual damages as a result.

Several of these elements bear elaboration.

First, the there must be a **misrepresentation**. The misrepresentation is usually an affirmative statement of fact that turns out to not be true. There are as many examples of misrepresentations as there are con-artists: saying that land is owned free and clear by the defendant (when it's not), saying that certain computer equipment can process a certain amount of data per hour (when it can't), or saying that a certain motor oil meets certain industry standards (when it doesn't). Any of these sorts of statements, if false, can be the basis for a fraud claim.

Yet a misrepresentation does not need to be an affirmative statement of fact to be the basis of a fraud claim. Actively concealing facts can count as a misrepresentation as well, as can nondisclosure when there is a duty to disclose. Suppose a real estate agent installs a fake circuit-breaker panel to make a home inspector think that a house's wiring is up to code. That concealment counts as a fraudulent misrepresentation.

Even a promise can constitute a misrepresentation – that is, if the defendant has no intention of keeping it. Taking an advance payment from your neighbor for mowing the lawn next weekend – when you already have airplane tickets to abscond overseas – counts as a fraudulent misrepresentation. Where a promise is the basis of a fraud claim, the cause of action is sometimes called "promissory fraud."

It is often said that the misrepresentation must be **material**. In law, to say something is material is to say "it matters." Suppose a sales associate at a used car lot lies by telling you the car you are thinking about buying was inspected on Tuesday, when, in fact, it was inspected on Monday. This misrepresentation is immaterial, and therefore it could not be used as the basis for a fraud claim. However, suppose the sales associate tells you the car has never been involved in an accident – when, in fact, it once skidded off the road into a lake where it sat for three days before being pulled out. That is

definitely a material misrepresentation. So it could form the basis for a fraud claim.

Second is the requirement of **scienter**. The word scienter ("sigh-EN-tur," among other pronunciations) is a legal term that often comes up in economic contexts. It is from the Latin for "to know," the same root word underlying "science." In fraud, the scienter requirement is the requirement that the plaintiff either knew that the representation was false or else acted recklessly as to the truth in making the statement.

Third, is the **intent** requirement – the defendant had to intend for the plaintiff to rely on the statement at issue. Typically, the defendant's intent to have the plaintiff rely on the misrepresentation is for the ultimate purpose of monetary gain.

While the first three elements focus on the defendant, the final two directly concern the plaintiff.

The fourth element is **reliance** – that the plaintiff actually and justifiably relied on the misrepresentation. Courts usually present this as one element, but it is useful to break it down into two sub-elements: (a) actual reliance, and (b) justifiable reliance.

The requirement of **actual reliance** is an actual causation requirement, and it can be measured by the but-for test. Would the plaintiff have avoided undertaking the detrimental action but for the defendant's misrepresentation? That is, but for the misrepresentation, would the plaintiff have suffered the complained of loss? Actual reliance is subjective – it has to do with what the plaintiff actually believed.

The requirement of **justifiable reliance**, on the other hand, is objective: It must have been reasonable for the plaintiff to have been fooled by the misrepresentation.

Working together, the requirements of actual and justifiable reliance greatly cut down on the possible universe of fraud cases that can be brought. Actual and justifiable reliance call for a plaintiff who threads the needle: If the plaintiff is savvy enough to avoid actually being swindled, then the plaintiff has no case. If the plaintiff *should have been*

savvy enough to avoid being swindled, then the plaintiff has no case. Thus, fraud requires a goldilocks plaintiff: One unaware enough to have been actually duped, but not so gullible as to be objectively unreasonable.

Finally, fraud requires actual damages, an insistence captured in the requirement that the plaintiff relied on the misrepresentation to the plaintiff's **detriment**.

Case: Berger v. Wade

The following case illustrates how the requirement of justifiable reliance can screen out cases the law deems unworthy of compensation. It also reveals another aspect of fraud doctrine – its use as a defense to enforcement of contractual obligations.

Berger v. Wade

Court of Appeals of Ohio, First District
March 28, 2014

Alfred J. BERGER, Jr., Plaintiff–Appellant, v. Martin WADE, Defendant–Appellee/Third–Party Plaintiff, and Christopher Rose, Third–Party Defendant. No. C–120863.

PER CURIAM:

[Alleged fraud victim Martin Wade signed a guaranty for a short-term business loan of $100,000 evidenced by a promissory note. When Wade was called upon for payment, he claimed to be the victim of fraud.]

~Alfred J. Berger, Jr., appeals from the trial court's judgment in favor of defendant-appellee/third-party plaintiff Martin Wade, on Berger's claim that Wade had failed to repay a business loan that he had personally guaranteed. Berger contends that the trial court erred when it found that he had fraudulently induced Wade into executing the guaranty agreement. We agree and reverse.

In 2006, third-party defendant Christopher Rose, a local developer, approached Wade about investing in The Rookwood Corporation, doing business as The Rookwood Pottery Company ("Rookwood"). By 2009, Wade had invested over $1

million in the corporation and was its largest shareholder. Though he was not involved in the day-to-day operations of the company, Wade had access to the corporation's books, records, and financial information.

In 2009, Rose obtained a loan commitment for Rookwood from the Ohio Department of Development. Because the proceeds of the Ohio loan took longer than expected to reach the company, funding difficulties imperiled the development. To cover the shortfall, Rose sought temporary financing. He approached Berger about the possibility of making a short-term loan to the company. After negotiations between Rose and Berger, Berger agreed to lend Rookwood $100,000 to fund operations until the proceeds of the Ohio loan were delivered.

Berger was given the opportunity to examine the books of Rookwood. Given Rookwood's poor financial condition, Berger was unwilling to lend the company the funds without additional security. Therefore, as a condition of making the loan, Berger insisted that Rose and Wade co-sign the promissory note, and that Rose and Wade personally guarantee the debt.

The debt was to be evidenced by a promissory note which Berger had drafted. Berger ultimately admitted that he had copied documents originally prepared by a Cincinnati law firm for another transaction that also involved a promissory note and guaranty. Though not a lawyer, Berger "changed [the documents] to fit the circumstances" of the Rookwood deal. The changes took less than ten minutes. The documents provided that Berger would loan the corporation $100,000 in August 2009. The corporation, Rose, and Wade promised to repay the loan in one month with $10,000 in interest also due at that time. In a separate guaranty agreement, Rose and Wade personally guaranteed the loan repayment.

Rose presented Berger's note and guaranty to Wade. Despite examining the note for less than three minutes, and the guaranty for less than five, Wade signed the documents. He had not met with or spoken to Berger before signing the documents.

The promissory note provided, on its first page, that:

> This Note is secured by a first-priority security interest in the Assets of The Rookwood Corporation pursuant to the terms of a Security Agreement dated of even date herewith between The Rookwood Corporation and [Berger] (the "Security Agreement").

As it turned out, however, there was no security agreement and, therefore, no security interest existed.~

The requirement of justifiable reliance is best understood as testing the credibility of the claim that fraud induced a party to act. The necessity that the reliance is justified screens out pretextual claims or defenses put forward after adverse facts on the ground have rendered a party's promise unprofitable.

The question of justifiable reliance is one of fact, and the court must inquire into the nature of the transaction, the representation, and the relationship of the parties.

Wade testified that he would "probably not" have signed the note and guaranty if he had known that the first-priority security agreement identified in the note did not exist. He stated that he assumed that Berger would enforce the security interest to pay the debt rather than proceed against him.

Yet, the overwhelming weight of the evidence in the record reflects that Wade's assumption and his reliance on the fictitious representation were not justified. Wade was a principal investor in Rookwood. Before signing the note and guaranty, he had examined the corporation's financial statements. Although Berger's note stated that it was secured by a first-priority security interest, Wade knew that Rookwood had already given security interests in its assets and real property to another investor and to the Ohio development agency. Wade admitted that he had already personally guaranteed the payment of some of those loans.

Before signing Berger's note and guaranty, Wade, an experienced certified public accountant and former attorney, reviewed the documents, albeit very briefly. He admitted that under the guaranty's express terms, whether Berger's security

> agreement existed or not, Berger could proceed against Wade personally if the note was not repaid. Wade acknowledged that he had waived the right to require Berger to proceed first against "any other person or any security." In light of these facts, Wade's assumption that Berger would not elect to proceed against him for the funds, and his reliance on that assumption, was simply not sustainable.
>
> We hold that Wade's belief that the fictitious security agreement would protect him from having to satisfy the amount due on the note was not justified under the circumstances. Accordingly, we conclude that the judgment as to the fraudulent-inducement defense was against the manifest weight of the evidence. The third assignment of error is sustained.~

Fraud: Pleading Requirements

Fraud has a procedural component that plays a strong role in shaping the tort in practice. Unlike most tort claims, a claim for fraud must be pled with "specificity." This longstanding requirement is entirely independent of the recent "Twiqbal" doctrine – which you may have learned about in your civil procedure class – that has ratcheted up pleading requirements in federal courts. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

Fraud's pleading requirement means that plaintiffs alleging fraud must come right out at the beginning of the lawsuit and explain how they were suckered by the defendant. The standard justification for this requirement is that without it, plaintiffs could go on "fishing expeditions," filing lawsuits on speculation and then using the powerful mechanisms of civil discovery to churn up evidence to see if there is anything upon which to base a claim.

The pleading requirement reflects a congenital difficulty for fraud doctrine. Its substantive foundation is an allegation of the plaintiff's ignorance. That seems to invite plaintiffs to use alleged ignorance as a shield at the pleading stage, thus creating fertile ground for strategic behavior aimed at garnering low-value settlements from defendants simply wanting to avoid litigation expense. On the other hand, fraud,

in fact, is meant to address situations where a plaintiff suffers losses on account of a defendant intentionally denying to the plaintiff the full facts, so it seems unjust to require the plaintiff to know everything in detail before filing suit. Thus, courts trying to strike the right balance are put in a difficult position.

Case: Committee on Children's Television v. General Foods

The following case shows the cause of action for fraud used in a novel way for consumer "impact litigation" – that is, litigation intended to have society-wide effect. The case also shows how the pleading requirement works to shape the substance of the fraud tort.

Committee on Children's Television v. General Foods

Supreme Court of California
December 22, 1983

Cal.3d 197. Committee on Children's Television, Inc., et al., Plaintiffs and Appellants, v. General Foods Corporation et al., Defendants and Respondents. L.A. No. 31603. Named plaintiffs included five organizations (The Committee on Children's Television, Inc.; the California Society of Dentistry for Children; the American G.I. Forum of California; the Mexican-American Political Association; the League of United Latin American Citizens), as well as individual adults, and individual children. Opinion by Broussard, J., with Mosk, Richardson, Kaus, Reynoso and Grodin JJ., concurring. Separate concurring and dissenting opinion by Bird, C. J, not reproduced here.

Justice ALLEN E. BROUSSARD:

Plaintiffs appeal from a judgment of dismissal following a trial court order sustaining demurrers without leave to amend to their fourth amended complaint. The complaint essentially charges defendants – General Foods Corporation, Safeway Stores, and two advertising agencies – with fraudulent, misleading and deceptive advertising in the marketing of sugared breakfast cereals. The trial court found its allegations insufficient because they fail to state with specificity the advertisements

containing the alleged misrepresentations. We review the allegations of the complaint and conclude that the trial court erred in sustaining demurrers without leave to amend to plaintiffs' causes of action charging fraud and violation of laws against unfair competition and deceptive advertising.~

Plaintiffs filed their original complaint on June 30, 1977, as a class action on behalf of "California residents who have been misled or deceived, or are threatened with the likelihood of being deceived or misled," by defendants in connection with the marketing of sugared cereals.

The principal defendant is General Foods Corporation, the manufacturer of five "sugared cereals" – Alpha Bits, Honeycomb, Fruity Pebbles, Sugar Crisp, and Cocoa Pebbles – which contain from 38 to 50 percent sugar by weight. The other corporate defendants are two advertising agencies – Benton and Bowles, Inc., and Ogilvy & Mather International, Inc. – which handled advertising of these cereals, and Safeway Stores, which sold the products to plaintiffs. Finally, the complaint includes as defendants numerous officers and employees of the corporate defendants.~

Paragraph 34 alleges that defendants "engaged in a sophisticated advertising and marketing program which is designed to capitalize on the unique susceptibilities of children and preschoolers in order to induce them to consume products which, although promoted and labelled as 'cereals,' are in fact more accurately described as sugar products, or candies." The complaint thereafter refers to sugared cereals as "candy breakfasts."

Paragraph 35 lists some 19 representations allegedly made in television commercials aimed at children. Most of these representations are not explicit but, according to plaintiffs, implicit in the advertising. Paragraph 35 of the complaint reads as follows:

> The advertising scheme routinely and repeatedly employs and utilizes, in commercials aimed at children, each of the following representations which are conveyed both visually and verbally:

(a) Children and young children who regularly eat candy breakfasts are bigger, stronger, more energetic, happier, more invulnerable, and braver than they would have been if they did not eat candy breakfasts. (b) Eating candy breakfasts is a 'fun' thing for children to do, and is invariably equated with entertainment and adventure. (c) The sweet taste of a product ensures or correlates with nutritional merit. (d) Eating candy breakfasts will make children happy. (e) Bright colors in foods ensure or correlate with nutritional merit. (f) Candy breakfasts are grain products. (g) Candy breakfasts are more healthful and nutritious for a child than most other kinds and types of cereals. (h) Adding small amounts of vitamins and minerals to a product automatically makes it 'nutritious.' (i) Candy breakfasts inherently possess and/or impart to those ingesting them magical powers, such as the capacity to cause apes and fantastic creatures to appear or disappear. (j) Candy breakfasts contain adequate amounts of the essential elements of a growing child's diet, including protein. (k) The 'premiums' (small toys packaged in with the candy breakfast as an inducement to the child) are very valuable and are offered free as a prize in each box of candy breakfast. (l) Candy breakfasts are the most important part of a 'well-balanced breakfast' and are at least as nutritious as milk, toast and juice. (m) Candy breakfasts calm a child's fears and dispel a child's anxiety. ... (n) Candy breakfasts have visual characteristics which they do not in fact possess, such as vivid colors and the capacity to glitter or to enlarge from their actual size to a larger size.

"In addition to the foregoing representations specified in Paragraph 35 (a) through (n), in each of the commercials for each of the products specified below the advertising scheme repeatedly, uniformly and consistently utilizes

> and relies upon the following representations with respect to particular products: (o) Cocoa Pebbles are good for a child to eat whenever he or she is hungry, and it is a sound nutritional practice to eat chocolatey tasting foods, such as Cocoa Pebbles, for breakfast. (p) Honeycomb (i) contains honey and (ii) consists of pieces which are each at least two (2) inches in diameter and (iii) will make a child big and strong. (q) Alpha-Bits (i) will enable a child to conquer his or her enemies, (ii) can be used by a child easily to spell words in his or her spoon, (iii) are an effective cure for the child's anxieties, and (iv) have magical powers and can impart magical powers to a child. ... (r) Fruity Pebbles (i) contain fruit and (ii) emit auras, rainbows or mesmerizing colors. (s) Super Sugar Crisp (i) should be eaten as a snack food without danger to dental health, (ii) should be eaten as a nutritious snack whenever a child is hungry, (iii) makes a child smart and (iv) is coated with golden sugar and such sugar is very valuable."

Plaintiffs allege that commercials containing these representations are broadcast daily. Although the commercials changed every 60 days, "they retain consistent themes and each convey ... the representations as set forth." Defendants, but not plaintiffs, know the exact times, dates, and places of broadcasts. Plaintiffs further allege that the same representations appear in other media, and on the cereal packages themselves. Paragraph 42 asserts that defendants concealed material facts:

> In the advertising scheme planned and participated in by each and every Defendant, none of the following facts are ever disclosed: (a) The percentage of sugar and chemicals together in the products advertised ranges from 38% to 50% of the total weight of the product; (b) There is no honey in Honeycomb, no fruit in Fruity Pebbles, and the premiums packed into the boxes of Alpha Bits and Super Sugar Crisp cost no more than a few pennies at most;

> (c) Eating candy breakfasts may contribute to tooth decay in children and adults; (d) Eating candy breakfasts as a snack will cause tooth decay; (e) Children should brush their teeth soon after eating sugary foods; (f) For many children, excessive sugar consumption will have serious and detrimental health consequences, including obesity, heart disease, and other adverse health consequences; (g) For children with already existing health problems, especially diabetes, consuming candy breakfasts may have serious and detrimental health consequences; (h) There is a serious controversy over the adverse effects of sugar on the health of children; (i) Candy breakfasts are not the most important part of a balanced breakfast; (j) If eaten at all, candy breakfasts should not be consumed in large quantities and whenever a child is hungry; (k) Candy breakfasts cost more per serving than non-pre-sweetened breakfast cereals or hot cereals and more than other foods of better nutritional value than candy breakfasts; (l) A child's welfare is best served by accepting nutritional advice from his or her parents when such advice conflicts with advice given in television commercials; (m) The happy, adventure-filled fantasy portrayal of eating candy breakfasts is unrealistic and cannot be duplicated by any child.

Such concealment, plaintiffs allege, when joined with the affirmative misrepresentations listed in paragraph 35, render the advertisements misleading and deceptive.

The complaint asserts at length the special susceptibility of children to defendants' "advertising scheme," and explains how defendants take advantage of this vulnerability. It further asserts that, as defendants know, the desires and beliefs of children influence and often determine the decision of adults to buy certain breakfast foods.~

The third through sixth causes of action set out various aspects of the tort of fraud.~ Each of these causes of action~ claims

compensatory damages of $10 million; those counts asserting intentional misrepresentation include a prayer for punitive damages. The prayer for relief is extensive, and includes some novel requests. In addition to seeking damages, restitution, and injunctive relief, plaintiffs seek warning labels in stores and on packages, creation of funds for research on the health effects of sugar consumption by young children, public interest representatives on defendants' boards of directors, and public access to defendants' research on the health effects of their products. ⌙We discuss plaintiffs' right to seek damages, restitution, and injunctive relief in this opinion, but take no position on the suitability of the other remedies requested.⌟

Defendants demurred to the fourth amended complaint for failure to state a cause of action and for uncertainty. The trial court sustained the demurrers without leave to amend. The trial judge explained the basis for his ruling: "[I]n order to state a cause of action for fraud or for breach of warranty, there must be alleged with specificity the basis for the cause and that is, if there are advertisements which contain fraudulent matters, those advertisements must be set out. [–] In paragraph 35, which is the heart of the allegations concerning the conveying of the representations, we have just a series of very general allegations to which there is no reference of an advertisement actually made. ... [–] Paragraph 38 which makes the allegations concerning media dissemination set out no television stations, no other media, except for the fact that these ads were run on television stations every day in Southern California for a four-year period. [–] This gives the defendant practically no kind of information concerning that which the defendant must answer, and it doesn't give the court a sufficient factual basis for its administration of the case."~

Plaintiffs base their third, fourth, fifth and sixth causes of action on the tort of fraud. Civil Code section 1710 defines that tort:

> A deceit [fraud] ... is either: 1. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true; 2. The assertion, as a fact, of that which is not true, by one who

> has no reasonable ground for believing it to be true; 3. The suppression of a fact, by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact ....~

[Witkin explains the pleading requirement of specificity:]

> Fraud actions ... are subject to strict requirements of particularity in pleading. The idea seems to be that allegations of fraud involve a serious attack on character, and fairness to the defendant demands that he should receive the fullest possible details of the charge in order to prepare his defense. Accordingly the rule is everywhere followed that fraud must be specifically pleaded. The effect of this rule is twofold: (a) General pleading of the legal conclusion of 'fraud' is insufficient; the facts constituting the fraud must be alleged. (b) Every element of the cause of action for fraud must be alleged in the proper manner (i.e., factually and specifically), and the policy of liberal construction of the pleadings ... will not ordinarily be invoked to sustain a pleading defective in any material respect. (3 Witkin, Cal. Procedure (2d ed. 1971) Pleading, § 574)

Witkin adds, however, that:

> In reading the cases one gains the impression that entirely too much emphasis has been laid upon the requirement of specific pleading. The characterization of some actions as 'disfavored' has little to recommend it ... and actions based on fraud are so numerous and commonplace that the implications of immoral conduct are seldom considered more serious than those involved in other intentional torts. Hence, while it seems sound to require specific pleading of the facts of fraud rather than general conclusions, the courts should not look askance at the complaint, and seek to absolve the defendant from liability on highly technical

> requirements of form in pleading. Pleading facts in ordinary and concise language is as permissible in fraud cases as in any others, and liberal construction of the pleading is as much a duty of the court in these as in other cases. (3 Witkin, op. cit. supra, Pleading, § 575, quoted in Lacy v. Laurentide Finance Corp. (1972) 28 Cal.App.3d 251, 258, fn. 2.)

The specificity requirement serves two purposes. The first is notice to the defendant, to "furnish the defendant with certain definite charges which can be intelligently met." The pleading of fraud, however, is also the last remaining habitat of the common law notion that a complaint should be sufficiently specific that the court can weed out nonmeritorious actions on the basis of the pleadings. Thus the pleading should be sufficient "'to enable the court to determine whether, on the facts pleaded, there is any foundation, prima facie at least, for the charge of fraud.'"

We observe, however, certain exceptions which mitigate the rigor of the rule requiring specific pleading of fraud. Less specificity is required when "it appears from the nature of the allegations that the defendant must necessarily possess full information concerning the facts of the controversy,"; "[e]ven under the strict rules of common law pleading, one of the canons was that less particularity is required when the facts lie more in the knowledge of the opposite party ... ."

Additionally, in a case such as the present one, considerations of practicality enter in. A complaint should be kept to reasonable length, and plaintiffs' fourth amended complaint, 64 pages long, strains at that limit.~ A complaint which set out each advertisement verbatim, and specified the time, place, and medium, might seem to represent perfect compliance with the specificity requirement, but as a practical matter, it would provide less effective notice and be less useful in framing the issues than would a shorter, more generalized version.

Defendants object to the allegations of misrepresentation on the ground that the complaint fails to state the time and place of each misrepresentation, to identify the speaker and listener, and

to set out the representation verbatim or in close paraphrase. The place and time of the television advertisements, however, is fully known to defendant General Foods, but became available to plaintiffs only through discovery. That defendant equally knows the distribution of cereal box advertisements. A lengthy list of the dates and times of cereal ads on California television stations would add nothing of value to the complaint; the same is true for a list of California grocers marketing General Foods cereals. The language of the complaint – all ads for sugared cereals within a given four-year period – is sufficient to define the subject of the complaint and provide notice to defendants.

General Foods also knows the content of each questioned advertisement. Plaintiffs initially lacked such detailed knowledge, and although they have now obtained copies of the television storyboards through discovery, quotation or attachment of such copies to the complaint would consume thousands of pages. Attachment of the storyboards, moreover, would not redress defendants' grievance, which is, as we understand it, not that they lacked knowledge of the content of the commercials but that they do not understand what it is in the images and words that gives rise to the alleged misrepresentations.

For plaintiffs to provide an explanation for every advertisement would be obviously impractical. We believe, however, that the trial court could reasonably require plaintiffs to set out or attach a representative selection of advertisements, to state the misrepresentations made by those advertisements, and to indicate the language or images upon which any implied misrepresentations are based. This is a method of pleading which has been endorsed in other cases involving numerous misrepresentations. It represents a reasonable accommodation between defendants' right to a pleading sufficiently specific "that the court can ascertain for itself if the representations ... were in fact material, and of an actionable nature", and the importance of avoiding pleading requirements so burdensome as to preclude relief in cases involving multiple misrepresentations.~

Defendants also object that the complaint does not indicate that any particular child relied upon or even saw any particular television advertisement. They point out that although the complaint does assert that each of the adult plaintiffs purchased General Foods' products at a Safeway Store, it does not state which advertisements they, or their children, saw and relied upon.

A specific statement of the advertisements seen and relied upon by the individual plaintiffs would serve to demonstrate both that they possess a valid cause of action in their individual capacity and that they are proper representatives for the class plaintiffs. The realistic setting of the case, however, may make such specific pleading impossible. A long-term advertising campaign may seek to persuade by cumulative impact, not by a particular representation on a particular date. Children in particular are unlikely to recall the specific advertisements which led them to desire a product, but even adults buying a product in a store will not often remember the date and exact message of the advertisements which induced them to make that purchase. Plaintiffs should be able to base their cause of action upon an allegation that they acted in response to an advertising campaign even if they cannot recall the specific advertisements.~

Although the parties argue primarily the sufficiency and specificity of the pleadings, the underlying controversy is of much greater dimension. Defendants engaged in a nationwide, long-term advertising campaign designed to persuade children to influence their parents to buy sugared cereals. Adapted to its audience, the campaign sought to persuade less by direct representation than by imagery and example. While maintaining a constant theme, the particular advertisements changed frequently. Plaintiffs now contend that these advertisements were deceptive and misleading, and while we do not know the actual truth of those charges, we must assume them true for the purpose of this appeal. Yet, if we apply strict requirements of specificity in pleading as defendants argue, the result would be to eliminate the private lawsuit as a practical remedy to redress such past deception or prevent further deception. By directing their advertisements to children, and changing them frequently,

> defendants would have obtained practical immunity from statutory and common law remedies designed to protect consumers from misleading advertising.
>
> It can be argued that administrative investigation and rule making would be a better method of regulating advertising of this scope and character. The California Legislature, however, has not established the necessary administrative structure. It has enacted consumer protection statutes and codified common law remedies which in principle apply to all deceptive advertising, regardless of complexity and scale, and, we believe, regardless of whether the advertisement seeks to influence the consumer directly or through his children. Established rules of pleading should not be applied so inflexibly that they bar use of such remedies.~
>
> Plaintiffs should be permitted to amend their complaint on behalf of the parent and child plaintiffs under the causes of action for fraud.~

Questions to Ponder About Committee on Children's Television v. General Foods

A. Does the court strike the right balance with the specificity requirement? That is, does the holding take due account of the need to prevent strategic gamesmanship, give defendants the capacity to fairly defend themselves, and yet allow meritorious claims to move forward?

B. Do you find it problematic that this case is in court? Should litigation be used in this way to challenge industry-wide practices? Or would this better be left to regulation – such as through the U.S. Food and Drug Administration? Or is there any problem with allowing regulation and this kind of litigation to co-exist?

Other Misrepresentation Torts

In addition to liability for fraud – which is premised on an intentional misrepresentation – the law sometimes allows causes of action for misrepresentations even where there is no intent to deceive. These include actions for negligently made misrepresentations and even innocently made misrepresentations (what you could call strict-

liability misrepresentation). Some courts even categorize these theories of recovery as particular species of fraud. Here's a brief look at the relevant concepts:

The cause of action known as **negligent misrepresentation** allows a claim where the misrepresentation was made as a result of negligent error. This cause of action is broader than fraud in one sense, since it reaches beyond situations involving an intentional falsehood. But in other important ways, the cause of action for negligent misrepresentation is narrower, as courts are willing to recognize it only in a limited range of situations. Yet before we can understand negligent misrepresentation and its place in the law, we need first to back up and provide some context vis-à-vis negligence law.

If a negligently made misrepresentation causes property damage or personal injury, then there is a cause of action in negligence – that is, the everyday garden-variety cause of action for negligence, which is covered in Part II of this book. In such a case, there's no need for a tort of negligent misrepresentation to enable recovery. Professor Kenneth S. Abraham gives the example of one person asking another if a ladder is safe to stand on. Suppose I say, "I've inspected the ladder, and it's safe." And further suppose I did, in fact, inspect the ladder, but I did so negligently – that is, not up to the standards of the reasonable person. (For instance, perhaps I just looked the ladder over from a distance and didn't notice the conspicuously absent bolts on the seventh step.) If you break your leg in a fall from the ladder as the result of relying on my advice, I am liable for your injuries in negligence – just plain-old negligence. Sure, I made what could be described as a "negligent misrepresentation," but the misrepresentation was merely the mode by which I breached my duty of care. (Breach of the duty of care for the negligence cause of action is discussed in Chapter 6 of Volume One.)

The need for a particular cause of action known as negligent misrepresentation comes up when there is no injury to person or property, but where the injury is instead purely economic. Frequently the situation is an investment gone wrong: Money is lost, but no blood is spilled and nothing tangible has been damaged. In such a case, a regular-old negligence cause of action will not work because

of negligence's prima facie requirement of an injury to person or property. The concept that negligence cases cannot proceed on pure economic loss alone is often called the "economic loss rule." (The relevant doctrine is discussed in Chapter 9 of Volume One.)

Bearing this in mind, you can see that the cause of action for negligent misrepresentation can either be looked at as an evolution of fraud (that is, an offshoot of fraud that lacks the scienter requirement) or as a special form of negligence (that is, one that incorporates an exception to the economic loss rule). Either way, the tort of negligent misrepresentation tends to be narrow, applying only in certain situations. And while the tort varies in its scope among jurisdictions – in some states it looms larger than in others – it is everywhere more limited in scope than either fraud or negligence. Now that you have that context, you can understand where negligent misrepresentation comes in.

Negligent misrepresentation's native habitat, as a tort, is the investment-gone-wrong scenario. For example, an investor in a land-development deal or a small- to medium-sized company has lost a very large amount of money and is looking for someone to blame. In this scenario, the archetypal negligent misrepresentation claim is the client of an accountant or attorney suing that accountant or attorney for an incorrect representation that the client relied upon to her or his detriment in making the investment.

Here is a realistic scenario: Suppose an accountant is hired by a would-be investor to review a company's books, and suppose the accountant departs from the standard practice for professional accountants in doing this work and thus negligently fails to uncover massive accounting irregularities and balance-sheet problems that would flag the company as a bad investment. The investor (i.e., the client of the accountant) who loses her or his investment because of relying on the negligent accounting work has a good cause of action against the accountant for negligent misrepresentation.

This core example of negligent misrepresentation is probably actionable in just about all jurisdictions. Once we start to move away

from this core example, however, the jurisdictional differences begin to accumulate.

Beyond accountants and attorneys, causes of action for negligent misrepresentation might also be had against other professional suppliers of information, such as surveyors, public weighers, or real estate agents. And outside of these professional contexts, a court might recognize a cause of action for negligent misrepresentation in situations where there is a special relationship of trust between the plaintiff and defendant.

Another way in which many cases expand outward from the core client-vs-accountant-or-attorney example is in allowing non-clients to sue. That is, sometimes a third party to client-professional relationship will be able to pursue a claim. Suppose a company hires an accounting firm to audits its books. The report of the audit might be detrimentally relied upon by third parties: If the audit report is shown to a would-be investor, that person might rely on the accounting firm's work in deciding whether or not to invest.

Courts take different approaches in determining whether a third party – that is, one not in contractual privity with the defendant – may sue for negligent misrepresentation. Courts often allow a cause of action where the defendant had actual knowledge that the third party was relying on the defendant's statements. Some courts, however, go further and allow a cause of action so long as the third party's reliance was foreseeable.

As a whole, the law of negligent misrepresentation is often less than clear, and it is subject to considerable variation among jurisdictions.

A different cause of action, one recognized by some courts, is that of **innocent misrepresentation**. This tort applies where a party made a misrepresentation (even absent intent or negligence), the plaintiff detrimentally relied on the misrepresentation, and the defendant benefited thereby. Alternatively, this can be called an action for "strict liability misrepresentation."

Suppose sellers of a house represent that their home is free of termites, and suppose they make this representation innocently and

non-negligently, yet the house in fact has termites. If the sale goes through, the sellers have benefitted from this innocent misrepresentation because they sold their house for a higher price than they would have had the termite infestation been known. Under these facts, some courts would allow a cause of action for innocent misrepresentation, permitting the buyers to recover the costs of repairs and remediation from the sellers. This has the effect of giving the buyers the expected benefit of their bargain.

Breach of Fiduciary Duty

There are many sorts of "duties" under the law. In negligence, a person owes a *duty of due care* to all foreseeable plaintiffs to use appropriate cautions to avoid injury. When two parties conclude a contract, one party will owe a *contractual duty* to the other. Another kind of duty under the law is *fiduciary duty*.

The word "fiduciary" comes from the Latin *fiducia,* "to trust," and it appears related to *fidelis,* meaning "faithful." A fiduciary duty is a very high duty – much higher than a contractual duty and much, much higher than the duty of due care. In a fiduciary relationship, one party is assumed to be looking out for the other and protecting the others' interests – thus, "fiduciary duty."

While a contractual duty arises out of a contract, and while a duty of due care arises out of being within injury-range of another person, a fiduciary duty only arises in a relationship where "special confidence and trust is reposed in the integrity and fidelity of another and there is a resulting position of superiority or influence, acquired by virtue of this special trust." *Groob v. KeyBank*, 108 Ohio St.3d 348, 351 (Ohio 2006) (internal quotes omitted).

When one person owes a fiduciary duty to another, that person is "bound to act in good faith and with due regard to the interests of the one reposing confidence." *Steelvest, Inc. v. Scansteel Service Center, Inc.,* 807 S.W.2d 476, 485 (Ky. 1991) (internal quotes omitted). If the fiduciary – the person owing the fiduciary duty – does not act in good faith and with due regard to the interests of the person to whom the duty is owed and thereby causes damages to that person, the fiduciary is liable for the tort of breach of fiduciary duty.

Here is a blackletter formulation for the tort:

> A plaintiff can establish a **prima facie case for breach of fiduciary duty** by showing: (1) the existence of a fiduciary duty owed by the defendant to the plaintiff, (2) misconduct by the defendant in contravention of the fiduciary duty, (3) damages suffered by the plaintiff resulting from the misconduct.

The key is knowing which relationships count as fiduciary relationships. Fiduciary duties are owed by trustees to their beneficiaries, by attorneys to their clients, and by agents to their principals. In these fiduciary relationships, the fiduciary duty is one-way: Attorneys owe a fiduciary duty to clients, but clients do not owe a fiduciary duty to their attorneys. To put it more plainly: Clients can screw over their attorneys. But attorneys are not allowed to screw over their clients.

Other fiduciary duties are bilateral. In a business partnership, partners owe each other a fiduciary duty. And in a business joint venture, joint venturers owe one another a fiduciary duty.

It's important to understand that in the overall scheme of commercial enterprise and human interaction, fiduciary duties are the exception, not the default. Most business transactions do not give rise to a fiduciary duty. In a regular "arms-length" transaction, it is assumed that each party is looking out for itself. Thus, there is no need to recognize a fiduciary duty.

But where there is a fiduciary duty, breach of it is, under the eyes of the law, a much graver offense than breaching a mere contractual duty. Breaching a contract is breaking one's word. But breaching a fiduciary duty is an act of *faithlessness*. Correspondingly, breach of contract is just breach of contract. But breach of fiduciary duty is a tort, and, as such, it is subject to tort remedies, including, where warranted, punitive damages – something that is off the table for a breach of contract cause of action.

Case: April Enterprises v. KTTV

The following case entertains a claim for breach of fiduciary duty in a unique context: a production/distribution deal for children's television.

April Enterprises v. KTTV

Court of Appeals of California, Second Appellate District, Division Seven
October 5, 1983

147 Cal. App. 3d 805. APRIL ENTERPRISES, INC., Plaintiff and Appellant, v. KTTV et al., Defendants and Respondents. Civ. No. 66885. Opinion by Johnson, J., with Schauer, P. J., and Thompson, J., concurring.

Justice EARL JOHNSON, JR.:

The plaintiff, April Enterprises, (April) appeals from a judgment dismissing its complaint without leave to amend.~

Factual and Procedural Background

⌙Since this appeal is based on judgments on the pleadings and of nonsuit on the opening statement, the allegations of the complaint and opening statement are assumed to be true. Consequently, many of the "facts" recited in this opinion will be subject to proof in later proceedings.⌟

In 1965 April entered into a written contract with respondents, KTTV and Metromedia, Inc., (Metromedia/KTTV) for production of the "Winchell-Mahoney Time" television show (hereinafter referred to as the show.) The contract set forth the rights of the parties with respect to the show's production and syndication. Under section 4 of the agreement respondents owned all of the videotapes of the show. Section 17, dealing with future syndication, provided that both parties had the right to initiate syndication of the show with third parties and that each party was to receive 50 percent of the net profits from any resulting syndication. Subsection C of section 17 provided respondents could erase the videotape of each show six months after its original broadcast.

In 1968 respondents sent April a new contract which, if accepted, would implement the syndication clause of the 1965 contract by conferring upon respondents the exclusive right to initiate syndication for a limited period of time. April signed the contract and returned it to respondents.

The new 1968 contract altered the rights of the parties in several respects. With respect to respondents, they no longer had the right to erase the videotapes of the show. They had the exclusive right to initiate syndication but that exclusivity was limited to the time in which the contract remained in effect. It follows that under the new agreement April could not initiate syndication at all.[4] As we explain later, however, once the 1968 contract expired April's rights to initiate syndication were reinstated.[5] Also, April's compensation was changed: the 1968 contract provided that April would be paid 20 percent of the syndication revenue, rather than the 50 percent compensation April was to receive under the earlier agreement.

The 1968 contract provided for automatic termination in five years, or earlier if the shows were not broadcast for a certain period of time.

April alleges that some time in 1969 it attempted to negotiate syndication agreements with various third parties and in that connection offered to purchase the videotapes of the show from respondents. We assume these negotiations were entered even though April had no right to initiate syndication while the 1968 contract remained in effect.

Between November of 1969 and March of 1970, presumably in response to April's efforts to purchase the tapes, respondents wrote two letters to April offering to buy the exclusive rights to broadcast and license the show for another two years on terms different from those in the 1968 contract. In the second of the two letters, dated March 31, 1970, respondents also warned April the videotapes would be erased unless April accepted respondents' new terms. There is no record of any response by April to these letters.

April alleges that in 1976 it discovered the video tapes had actually been erased at some unknown date. Shortly after this discovery, April filed suit.~

April Has~ Stated a Cause of Action for Breach of Fiduciary Duty by a Joint Venturer.

A. *Judgment on the Pleadings.*

In its complaint April alleged that the negotiations leading to creation of the 1965 contract created a joint venture. In the opening statement counsel also referred to the 1968 contract. April's position apparently is that both the 1965 and 1968 contracts merely implemented an over-arching oral joint venture arrangement between the parties.

Respondents contend neither contract, nor any oral agreement, created a joint venture; they proffer two arguments in support of this contention. First, the clause in the 1965 contract labelling April as an independent contractor coupled with the contract's integration clause negates the existence of a joint venture. And, second, the contract taken as a whole details the rights and duties of the parties in such a fashion that it negates every element necessary to the creation of a joint venture. We disagree.

"A joint venture ... is an undertaking by two or more persons jointly to carry out a single business enterprise for profit." The elements necessary for its creation are: (1) joint interest in a common business; (2) with an understanding to share profits and losses; and (3) a right to joint control. "Such a venture or undertaking may be formed by parol agreement [citations], or it may be assumed as a reasonable deduction from the acts and declarations of the parties~." Whether a joint venture actually exists depends on the intention of the parties.

Here, it cannot be determined as a matter of law that the complaint fails to allege facts supporting creation of a joint venture. April argues that the common enterprise to seek syndication of the show after it was produced and originally telecast was a joint venture and we find that the first amended complaint sufficiently alleges such a relationship. The requisite

joint interest in a common business is supplied by the allegations that the parties planned to coproduce the shows in order to exploit the market for its syndication and that each contributed its own unique talents in furtherance of this objective. The requisite joint control is supplied by the allegation that each party agreed to have equal rights to initiate syndication of the show.

We also disagree with respondents' assertion that the requirement of sharing profits and losses is not met in the instant case. The 1965 contract provides that April and Metromedia each receive 50 percent of the profit derived from any syndication of the show. April alleges in its complaint that the parties also intended to share losses in the same proportion. Since the intention to share losses may be inferred from a contract provision to share profits, the joint venture action is not defeated by the 1965 contract's failure to specifically provide for the unlikely eventuality that syndication of the show would be a losing proposition. Moreover, where a joint venture involves the contribution of capital by one party and services by the other, neither party is required to reimburse the other for losses sustained. In the event of loss, the party contributing capital loses his capital and the one contributing labor loses the value of his efforts. Consequently, if the evidence at trial establishes that in practical effect the parties intended to share losses even though April's losses would be in the form of loss of its labor and Metromedia's would be in the form of lost capital, the difference in the type of loss sustained would not defeat a finding of joint venture.

Respondents next argument, that the contract's labelling of April as an independent contractor forecloses a finding of joint venture, fails since the conduct of the parties may create a joint venture despite an express declaration to the contrary.

We note that where evidence is in dispute the existence or nonexistence of a joint venture is a question of fact to be determined by the jury. Consequently, whether a joint venture was actually created in the instant case is a question of fact to be decided at trial. For purposes of this appeal, however, we hold

the complaint alleged facts sufficient to support a cause of action for breach of fiduciary duty of a joint venturer.

B. *Judgment of Nonsuit.*

Respondents nevertheless contend that any joint venture that may have been created by the 1965 contract was negated in 1968 because the agreement entered into that year gave Metromedia the exclusive right to license and syndicate, thereby removing the requisite control from April.[4] According to the terms of the 1968 contract, however, Metromedia's exclusive rights to initiate syndication were time limited. Metromedia had exclusive rights only until the 1968 contract expired. Once that happened Metromedia's exclusive syndication rights were exhausted and April was left with the remaining rights to initiate syndication of the show.[5] It also provided that April would be paid on the basis of gross receipts, and, according to respondents, if the parties intended to share losses as well as profits April would have been paid on the basis of net receipts. We address these arguments as they relate to the order granting respondents' motion for nonsuit.

As we noted earlier, our view of the 1968 contract is that it merely implemented the earlier joint venture during the period in which it remained in effect. Moreover, the 1968 contract strengthens April's assertion of an oral agreement of joint venture if it is construed as representing a written implementation of decision to "take turns" syndicating the show, i.e., respondents had exclusive rights to syndicate until the 1968 agreement terminated, at which time exclusive rights to initiate syndication vested in April.

A joint venture continues until the purpose for which it was formed has been accomplished or it is expressly extinguished. And a subsequent agreement between joint venturers which merely provides for a different distribution of profits does not change the relationship unless it also expressly extinguishes the earlier agreement.

There is no evidence before this court that one of the purposes of the joint venture-to exploit the market for syndication of the

> television show-has been accomplished. Indeed, the 1968 agreement evidences the parties intended to "take turns" initiating syndication, with April's turn coming after the 1968 contract terminated. Neither is there evidence of express extinguishment. Thus, the 1968 agreement, absent evidence that may be introduced at trial to the contrary, does not defeat the cause of action based on joint venture and granting the judgment of nonsuit was also error.~
>
> *Conclusion*
>
> This case cries out for a full development of the facts through a trial of the action.~ The judgment is reversed and remanded for further proceedings consistent with the views expressed in this opinion.

Questions to Ponder About *April v,. KTTV*

A. Do you agree that the relationship between April Enterprises and KTTV should be construed as a joint venture? Do you think the parties intended it, in substance, to be that?

B. The court says a joint venture requires an understanding to share both profits and losses. The contract clearly provided for a sharing of profits in the event the show entered syndication. As for losses, the court says this requirement can be satisfied for April through the "loss of its labor" contributed to the project. Is this reasoning correct? Does this holding mean that virtually all profit-sharing agreements are joint venture agreements? If so, would that be a good thing? If not, what distinguishes the April/KTTV deal as a joint venture as opposed to other deals involving profit sharing?

C. This about what lessons can be learned for the transactional attorney: What could KTTV have done differently in putting this deal together to avoid the possibility of this kind of tort liability?

Historical Note on *April v. KTTV*

On remand, April Enterprises won a $17.8-million jury verdict.

The person behind April Enterprises was ventriloquist Paul Winchell, who was perhaps best known as the voice of Disney's Tigger the Tiger. He did *Winchell-Mahoney Time* in an era when locally produced

programming was common, including locally produced children's shows. Winchell's show was beloved by many viewers growing up in the Bay Area at that time, who fondly recall a puppet named Knucklehead Smiff.

In the years following the live production and broadcast of *Winchell-Mahoney Time*, Winchell worked to secure a syndication deal. In the meantime, KTTV erased the tapes. Back then, videotape was expensive, and since it was re-usable, recording over old shows was commonplace. An enormous wealth of television ephemera from the 1960s and 1970s was lost in this way.

One of the most famous examples of videotape-erasing is the BBC's destruction of many early episodes of the television show *Doctor Who,* which debuted 1963. Today, *Doctor Who* is one of the world's most valuable media franchises. According to a 2013 report on franchise licensing, the BBC, largely because of Doctor Who, was ranked ahead of the owners of franchises such as Pokémon and Sesame Street.

The BBC, which can be quite strict in asserting intellectual property rights, has, in an ironic twist, benefitted greatly from fans who made unauthorized recordings of the show in its early days. Bootleg tapes, traded for years amongst devoted fans called "Whovians," gave the BBC a second chance to exploit the episodes that it had intended to abandon and destroy.

As for *Winchell-Mahoney Time*, efforts were made for years to spread the word in search of fans who might have retained tapes of the show. Some have been recovered. Several clips can be found at http://www.paulwinchell.net/media.html.

Paul Winchell's daughter, April, followed her father into show business. April Winchell is currently a voice actor and stand-up comic. She previously hosted a talk-radio show in Los Angeles. Paul Winchell died in 2005 at age 82.

Problem Based on *April v. KTTV*

Suppose you were representing a media company negotiating with talent over a deal similar to the one in *April v. KTTV* – where talent develops a show using your client's facilities and staff, for initial

distribution by your client, with the idea that if the show is eventually syndicated, the profits will be split between your client and talent. Would you want the deal to be a joint venture or not? What could you do in terms of drafting to settle the issue one way or another?

31. Defamation

"Words are, in my not-so-humble opinion, our most inexhaustible source of magic. Capable of both inflicting injury, and remedying it."

– Albus Dumbledore, *Harry Potter and the Deathly Hallows,* by J.K. Rowling, 2007

Introduction

Defamation is all about reputation and falsehoods. As a cause of action, it applies when a defendant makes false statements that are harmful to a plaintiff's reputation.

At first blush, defamation may seem to be something of an island, unconnected to the rest of the doctrinal landscape of torts. But at an instinctual level, it has something in common with the intentional torts of battery, assault, false imprisonment and intentional infliction of emotional distress. All these torts might be thought of as a suite of doctrines protecting a person's right to not be "messed with." While the tort of battery protects a person's sense of bodily integrity, defamation and the various privacy torts (covered in the next chapter) protect a person's non-corporeal integrity. Defamation recognizes that we are more than our bodies. Our existence is also defined by our relationships with others. Thus, our protectable personal interests run to the web of interconnected impressions about us held in the imagination of others.

Although simple in concept, American defamation is complex as a matter of legal doctrine. There are two parts to the analysis. First is the common law, which itself is labyrinthine. Second is the First Amendment analysis imposed by the U.S. Supreme Court, which changes the requirements for defamation cases where important free-speech values are at play.

The Basic, Unconstitutionalized Doctrine of Defamation

To begin to explore the tort of defamation, we will start with a basic, blackletter formulation of the tort in its unconstitutionalized form (where the First Amendment does not come into play):

> A plaintiff can establish **a prima facie case for defamation** by showing: (1) A defamatory statement (2) regarding a matter of fact (3) that was of and concerning the plaintiff (4) was published by the defendant, and (5) an extra condition is satisfied, being either that (a) the statement constitutes libel per se, (b) the statement constitutes libel per quod, (c) the statement constitutes slander per se, or (d) special damages are proven.

One thing you should notice about the prima facie case for defamation is that proving the falsity of the statement is not required. At its heart, defamation is about falsehoods, but the prima facie case – in its unconstitutionalized form – only requires that the plaintiff show the reputation-harming aspect of the defendant's statement. The issue of falsity is not the plaintiff's to prove. Instead, common-law defamation sees truth as an affirmative defense.

Defamatory Statement

The essence of a defamatory statement is that it is reputation-harming. "A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." *Nuyen v. Slater,* 372 Mich. 654 (Mich. 1964).

The reference point for "reputation" is the whole community or, at least, some substantial and morally respectable group. Calling someone a murderer clearly qualifies as reputation-harming, for instance, because pretty much everyone considers committing murder to reflect poorly on someone's character. But what about something that is only reputation-harming in certain circles? That's where the substantial-and-morally-respectable-group requirement comes in. Suppose someone is falsely said to be Jewish. That's not

defamatory – notwithstanding that such a statement might tend to harm one's reputation among the neo-Nazis. The neo-Nazis are not a morally respectable group. So the fact that a statement harms one's reputation among them can't make it defamatory.

The Per Se Categories

Under traditional defamation law, certain kinds of statements are considered **per se** defamatory. (The Latin "per se" means "in itself" and can be translated as "as such.") In other words, there is no need to debate the issue or ask a jury to determine whether these statements are reputation-harming. Statements from the per se categories are reputation-harming *as such*. End of discussion.

There are four categories of per se defamation: (1) making a statement that is adverse to one's profession or business, (2) saying that a person has a loathsome disease, (3) imputing guilt of a crime of moral turpitude, (4) imputing to a person a lack of chastity.

Let's take these in turn.

The first per se category is a statement **adverse to one's profession**. An example would be calling a lawyer a liar. Since honesty is essential in the legal profession, saying that a lawyer is dishonest is to harm the lawyer's professional reputation. Whether a statement is adverse to one's profession clearly depends on the profession. Saying that an accountant is "bad with numbers" is to make a statement adverse to that person's profession. But saying that an actor or poet is bad with numbers would not have the same effect.

The second per se category is **loathsome disease**. Leprosy and sexually transmitted diseases are leading examples. (The persistence of leprosy as a leading example – even though leprosy these days is easily treatable – highlights the ancientness of this legal doctrine.) There is no list of other diseases that qualify as "loathsome," but presumably any disease that would generally cause others to shun the sufferer could qualify.

The third per se category is imputing **guilt of a crime of moral turpitude**. Categorizing certain crimes as morally turpitudinous is not just a defamation concept – it comes up under multiple areas of law.

In U.S. immigration law, for instance, a conviction for a crime of moral turpitude can make a non-citizen deportable. And in legal ethics, a conviction for a crime of moral turpitude can be cause for disbarment or denial of admission to the bar. Despite its cross-category significance, however, the boundaries of what constitutes a crime of moral turpitude are fuzzy. One court hearing a defamation case has said that "moral turpitude involves an act of inherent baseness, vileness or depravity in the private and social duties which man does to his fellow man or to society in general, contrary to the accepted rule of right and duty between man and law." *Lega Siciliana Social Club, Inc. v. St. Germaine,* 77 Conn. App. 846 (Conn. App. 2003) (internal quotes omitted). Recently, in the immigration context, a crime involving moral turpitude has been described as "conduct that shocks the public conscience as being inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general." *Da Silva Neto v. Holder,* 680 F.3d 25, (1st Cir. 2012). As to what crimes are in or out, it can be said with a certainty that murder, rape, and mayhem (assaults causing permanent injury, such as disfigurement or dismemberment) are crimes of moral turpitude. Crimes that involve lying, such a perjury and forgery, are also moral-turpitude crimes. Theft crimes, however, are more of a toss up – some being turpitudinous, others not. Larceny under false pretenses has been held morally turpitudinous. But simple shoplifting might not be.

The fourth category is imputing a **lack of chastity**. Chastity is abstaining from sex altogether, or, for married persons, abstaining from sex outside of the marriage. Originally, this doctrine only applied for female plaintiffs, but modern courts have extended it to cover male plaintiffs as well. And the category has also been used to cover statements short of alleging sexual intercourse, such as saying that a person has made sexual advances or evinced a willingness to engage in sexual intercourse. Different, but within the same sphere of subject matter, some courts have concluded that an allegation of impotence is per se defamatory.

Beyond the Per Se Categories

To be defamatory, a statement need not be per se defamatory. Any statement that tends to be reputation-harming can be held defamatory. Statements that have been held to be defamatory outside the per se categories include imputing that someone is mentally ill, abuses drugs, is bankrupt or financially irresponsible, or is dishonest.

Courts "take the world as it is" when deciding what is defamatory, even if doing so seems to give credence to wrong-headed thinking. For instance, while there is nothing wrongful about being a victim of rape, some courts have held that making a statement that someone is a rape victim is defamatory. And as of a few years ago, most courts held imputing that someone is of lesbian, gay, or bisexual orientation was defamatory. The current trend, however, is toward holding that such imputations are not defamatory.

Other changes in what is considered reputation-harming reflect great arcs of American history. Calling someone a Communist was generally not considered defamatory before World War II. But during the Cold War, it was.

Regarding a Matter of Fact

To count as defamation, the statement at issue must be regarding a matter of fact. Opinion is off-limits for defamation plaintiffs.

The difference between what counts as a factual assertion and what is non-actionable opinion can often be a close issue, but the court will consider the context in which the statement is made, the medium, the intended audience, and whether the statement is theoretically provable.

In the case of *Obsidian Finance Group v. Cox*, 2011 WL 2745849 (D. Or. 2011), blogger Crystal Cox used a blog called obsidianfinancesucks.com to make a variety of withering comments about Obsidian Finance Group and bankruptcy trustee Kevin Padrick. Judge Marco A. Hernández held her blogging to be non-actionable opinion:

> [T]he statements are not sufficiently factual to be susceptible of being proved true or false.

> Cox repeatedly poses her statements as questions or asserts that she will prove her accusations. For example, she asserts that "a Whole Lot" of the "Truth" is "Coming Soon," that she "intend[s] to Expose every Dirty Deed," that Padrick "WILL BE EXPOSED," that "YOU [meaning Padrick] will BE Indicted SOME TIME, someday," and that she "WILL PROVE IT ALL." She tells the reader to "STAY TUNED," and she asks "Kevin Padrick, Guilty of Tax Fraud?" She also states that Padrick is a "cold hearted evil asshole" and is a "Cruel, Evil Discriminating Liar."~
>
> Defendant's use of question marks and her references to proof that will allegedly occur in the future negate any tendency for her statements to be understood as provable assertions of fact. Her statements contain so little actual content that they do not assert, or imply, verifiable assertions of fact. They are, instead, statements of exaggerated subjective belief such that they cannot be proven true or false.
>
> Considering all of the statements in the record under the totality of circumstances, the statements at issue are not actionable assertions of fact, but are constitutionally protected expressions of opinion. Plaintiffs' motion for summary judgment on the liability of the defamation claim is denied.

The *Cox* case points up the fact that the more wild and outlandish the language and medium, the less likely the content will be taken as factual. Outsized invective and wanton use of capital letters or bold type seem to move the needle toward the safe zone of protected opinion. On the other hand, sobriety of language and prestige of the forum make it easier to push toward the red line of actionable assertions of fact.

Of and Concerning the Plaintiff

The requirement that the statement be of and concerning the plaintiff means that the statement must somehow identify the plaintiff. This is easy in cases where the defendant calls out the plaintiff by name. But identification need not be express. It can be implied.

Suppose the defendant never uses the plaintiff's name, but says, instead, "You all know who I'm talking about." Has the plaintiff been identified? That will be an issue of fact. A jury will have to decide whether the audience would have understood that the defendant was referring to the plaintiff.

As with defamatory meaning, identification of the plaintiff can arise by accident. This sometimes happens in media that juxtaposes images and words, such as television shows or magazines.

Suppose a magazine runs a story about pathological liars next to a file photo of lawyers exiting a courthouse. If readers tend to think that the lawyers pictured are examples of the pathological liars the story is talking about, then the of-and-concerning-the-plaintiff element of the tort is met.

Published by the Defendant

Defamation requires communication, and communication cannot happen without at least two people – a sender and a receiver. Thus, to be actionable, a defamatory statement must be "published" to at least one person, not including the plaintiff.

The word "published" here is a term of art. A statement is published in the defamation sense if it is uttered to a person who hears it. The requirement has nothing to do with publication in a formal sense, such as by a respected newspaper or book publisher. Uttering something aloud or writing it on a post-it note will count as publication as long as at least one other person hears or reads the message.

Note that you can not defame a person by communicating only to that person. Defamation is about reputational harm, not insult. So unless someone other than the plaintiff and the defendant perceives

the statement, there can be no effect on the plaintiff's reputation, and thus there's no cause of action.

The Necessity of an "Extra Condition"

On top of the above elements, defamation needs something more. We have marked this out as the fifth element of the defamation case. There are four different ways to satisfy the extra condition:

> **The "extra condition" can be satisfied** by any one of the following:
>
> (a) the statement constitutes libel per se
>
> (b) the statement constitutes libel per quod
>
> (c) the statement constitutes slander per se
>
> (d) special damages are proven

Here we encounter **the distinction between libel and slander**.

The word **libel** refers to defamation that comes in writing or in some other permanent, non-ephemeral form. By contrast **slander** refers to defamation that is uttered as speech or is otherwise ephemeral. Because a written falsehood is presumed to be capable of more damage than a falsehood uttered into the air, the barriers to suing over libel are lower than they are to suing over slander.

You may wonder whether defamation by radio or television broadcast counts as libel or slander. That's a good question. The jurisdictions are split. It's libel in some, slander in others. The courts in Georgia found the question troubling enough to put defamation by broadcast under the heading of a newly minted tort, which they call "defamacast." *See, e.g., Jaillett v. Georgia TV Co.,* 520 S.E.2d 721, 724 (Ga. App. 1999).

Given the disarray over broadcasting, you will not be surprised to hear that whether defamation over the internet should be categorized as libel or slander remains a largely unresolved question. At least some jurisdictions, however, have categorized internet defamation as libel.

Now that we have some understanding of "libel" and "slander," we can talk about what counts as "slander per se," "libel per quod," and

"libel per se." Although jurisdictions vary, the following are helpful generalizations:

A statement is **slander per se** if it is slander (meaning it doesn't rise to the level of qualifying as libel), and if it fits within one of the per se categories discussed above. To review, those per se categories are adverse to one's profession, having a loathsome disease, guilt of a crime of moral turpitude, and having a lack of chastity. If it fits within one of those categories, then it qualifies as slander per se, and the final requirement of the defamation case is satisfied.

A statement is **libel per quod** if it is libel (as opposed to slander), if some external information is needed to understand its defamatory nature, and if it fits within one of the per se categories. The Latin "per quod" means "meaning whereby" – it refers to the necessity of having some external information to understand the meaning. In other words, a statement that is libel per quod is not defamatory on its face, but it is defamatory once context is taken into account.

Here's an example of a libel per quod issue. Imagine that a newspaper prints a notice that "Doris Orband Sydney of Throgs Bay and Basil Keane Arbuckle of West Orange Hill are deeply in love and engaged to be married, with a ceremony to be held next Saturday." Nothing about this engagement notice is defamatory on its face. But taking into account external factors, it might be. Suppose newspaper readers know that Ms. Sydney and Mr. Arbuckle are both married to other people. In that case, the extrinsic facts of their existing marriages makes the engagement notice defamatory because it imputes a lack of chastity to the alleged couple. (Botched engagement notices have, in fact, been a recurrent source of libel per quod cases.)

A statement is **libel per se** if it is libel and if no external information is necessary to understand its defamatory meaning. So long as the communication counts as libel and its defamatory meaning is clear on its face, then it fulfills the fifth element's extra condition and is actionable. This means that *libel per se qualifies as actionable regardless of whether its content fits within any of the per se categories*. If that sounds confusing, you heard it correctly: Despite having "per se" in its name, libel per se does not need to fit within one of the per se categories.

The per se categories are, instead, used for slander per se and libel per quod. (Clearly, no one designed these terms for ease of learning.)

For an example of libel per se, suppose this is printed in the newspaper: "Ozella Grantham Clifton of Upper Larnwick, a noted methamphetamine addict, is a bankrupt spendthrift." This is libel per se because it is libel (as opposed to slander), it is reputation-harming, and no external information is needed to understand its defamatory meaning. Thus, it won't matter that the facts attributed to Ozella Grantham Clifton don't fall into any of the per se categories. This statement will be actionable as libel per se.

Now, if a statement is defamatory, but it doesn't qualify as slander per se, libel per quod, or libel per se, it can still be actionable if the plaintiff can prove **special damages**. In this case, "special" means *specific* (as opposed to unique). Special damages are those damages that are provably quantifiable in dollars lost. For instance, if the plaintiff is paid on a commission basis and loses sales because of a reputation-harming statement, there are special damages. Getting fired or not being hired would count as well. What will not count as special damages is a *general* lowering of one's esteem in the community.

Check-Your-Understanding Questions About the Extra Condition

Do the following satisfy the extra condition required for a prima facie defamation case? If so, on what grounds?

A. A statement uttered in spoken conversation that accuses the plaintiff of being a terrorist sympathizer.

B. A written statement that, given extrinsic facts known to most in the community, clearly insinuates that the plaintiff committed perjury.

C. A written statement clearly accusing the plaintiff by name of being a heroin addict.

D. An oral statement that the plaintiff frequently daydreams of ways of inflicting physical injury on her or his boss, along with evidence

showing that this statement caused the plaintiff's dismissal from employment.

E. A whispered statement that the plaintiff is sick with a weaponized form of smallpox, readily communicable through the air.

Defamation and the First Amendment

In the landmark case of *New York Times v. Sullivan,* 376 U.S. 254 (1964), the Supreme Court held that the First Amendment guarantee of free speech alters and restricts common-law defamation. Thus, through *New York Times v. Sullivan* and subsequent cases, the court has constitutionalized the law of defamation.

To perform the constitutional analysis, you must first begin with this question: Is the plaintiff a public official or public figure, or does the statement involve a matter of public concern? If the answer is yes, then the First Amendment comes into play. If the answer is no, then First Amendment has nothing to say about the case, and the original common-law analysis under state law will control.

What the First Amendment does – if it comes into play – is change around the elements and defenses of the common-law analysis. What changes and how depends on whether the plaintiff is considered a public official or public figure, or, alternatively, a private person.

If the plaintiff is a public official or public figure, then, in addition to the common-law elements of defamation, the plaintiff takes on the burden of having to prove two additional elements. That is, on top of the five common-law elements of the prima facie case for defamation, the public-official-or-public-figure plaintiff must add two more elements to have a prima face case.

Under the first added constitutional element, the public-official/public-figure plaintiff must prove that the allegedly defamatory statement is **false**. Note that under the traditional common law, falsity is not a prima facie element. Instead, truth is an affirmative defense. The constitutionalized form of defamation, however, shifts the burden on the truth/falsity issue, making it the plaintiff's job to prove up front.

Second, the public figure or public official plaintiff must prove that the defendant acted with **actual malice** in making the statement. "Actual malice" is a term of art. It does not mean that the plaintiff was somehow "malicious." Instead, the actual malice requirement speaks to the level of care used by the defendant, and it signifies a standard above that of negligence. Actual malice means that the defendant either knew the statement was false, or else acted with reckless disregard for whether the statement was true or not.

If the plaintiff is a private person, but the statement was on a matter of public concern, then the plaintiff is given a little extra flexibility as compared with public figures or public officials. The private-person plaintiff in a constitutionalized defamation case must still prove the falsity of the statement, but as to the other added element, the private-person plaintiff has a choice. The private-person plaintiff can either (1) prove actual malice or (2) prove negligence plus actual injury suffered by the plaintiff.

We can sum this up as blackletter law in this way:

> A plaintiff who is **a public official or public figure must, as part of a prima facie case for defamation,** additionally prove: (6) that the statement was false, and (7) that the defendant acted with actual malice.
>
> A plaintiff who is **a private person suing over a statement made regarding a matter of legitimate public concern must, as part of a prima facie case for defamation,** additionally prove: (6) that the statement was false, and (7) either (a) the defendant acted with actual malice, or (b) the defendant was negligent and the plaintiff suffered an actual injury.

The bottom line is that it is very hard to win a lawsuit for defamation if you are a public official or public figure, or if the subject is one of legitimate public concern. And it's hard because the First Amendment wants it that way.

Here is an example that will show you how these elements work with a set of facts:

Example: Geopolis Gazette – The Geopolis Gazette publishes a story about police corruption that, owing to hasty layout and photo editing, inadvertently implies that Pablo is one of the people discussed in the story who has bribed police officers. Pablo is a dental assistant who has never held public office or been publicly well-known. He has never bribed or attempted to bribe anyone. Because of the newspaper story, Pablo is put on a two-week unpaid suspension at work.

Can Pablo prevail in a defamation case against the Geopolis Gazette? Probably yes.

First let's look at the constitutional analysis. Pablo is not a public figure or public official, but police corruption is clearly a matter of legitimate public concern. Therefore, the First Amendment comes into play. Pablo will be required to prove the falsity of the statement, but he can do this simply by taking the stand and being credible in front of a jury. Next, we look at the actual-malice/negligence issue. The description of the editing as "hasty" suggests the newspaper acted with negligence. Proving actual malice would be more difficult, but happily for Pablo, he will not need to show actual malice. Negligence is enough since Pablo can show actual injury: his unpaid suspension. Thus, Pablo's case survives First Amendment scrutiny.

Now let's look at the remaining common law analysis. Implying that someone has bribed police officers would certainly tend to lower that person's reputation in the community, so it's a defamatory statement. Bribing police officers is a matter of fact, not opinion. And the statement was of and concerning Pablo because the photo in the context of the layout implied that Pablo was one of the bribers. And the statement was published by Geopolis Gazette in its own pages. All that remains is the "extra element." This is satisfied three different ways. The communication counts as libel per se, since it was communicated in written form. But, for argument's sake,

even if it were not, the extra requirement would still likely be satisfied because bribery would likely be considered a crime of moral turpitude. And even if we put that aside, Pablo can allege and prove special damages, since he was given an unpaid two-week suspension from work. So, on these facts, Pablo has a strong defamation claim.

The blackletter law of defamation is, admittedly, quite complex. But, as you can see, if you work through it systematically, it's quite manageable.

Case: Bindrim v. Mitchell

This case points up the hazards of ripped-from-the-headlines fiction writing. If you find it surprising, you wouldn't be alone. When the court issued this decision it sent shockwaves through the book-publishing and novel-writing worlds.

Bindrim v. Mitchell

Court of Appeals of California, Second Appellate District, Division Four
April 18, 1979

92 Cal.App.3d 61. PAUL BINDRIM, Plaintiff and Appellant, v. GWEN DAVIS MITCHELL et al., Defendants and Appellants. Civ. No. 52133. Judge Bernard Jefferson wrote a concurrence, not reproduced here.

Justice ROBERT KINGSLEY:

This is an appeal taken by Doubleday and Gwen Davis Mitchell from a judgment for damages in favor of plaintiff-respondent Paul Bindrim, Ph.D. The jury returned verdicts on the libel counts against Doubleday and Mitchell~. Plaintiff is a licensed clinical psychologist and defendant is an author. Plaintiff used the so-called "Nude Marathon" in group therapy as a means of helping people to shed their psychological inhibitions with the removal of their clothes.

Defendant Mitchell had written a successful best seller in 1969 and had set out to write a novel about women of the leisure class. Mitchell attempted to register in plaintiff's nude therapy

but he told her he would not permit her to do so if she was going to write about it in a novel. Plaintiff said she was attending the marathon solely for therapeutic reasons and had no intention of writing about the nude marathon. Plaintiff brought to Mitchell's attention paragraph B of the written contract which reads as follows: "The participant agrees that he will not take photographs, write articles, or in any manner disclose who has attended the workshop or what has transpired. If he fails to do so he releases all parties from this contract, but remains legally liable for damages sustained by the leaders and participants."

Mitchell reassured plaintiff again she would not write about the session, she paid her money and the next day she executed the agreement and attended the nude marathon.

Mitchell entered into a contract with Doubleday two months later and was to receive $150,000 advance royalties for her novel.

Mitchell met Eleanor Hoover for lunch and said she was worried because she had signed a contract and painted a devastating portrait of Bindrim.

Mitchell told Doubleday executive McCormick that she had attended a marathon session and it was quite a psychological jolt. The novel was published under the name "Touching" and it depicted a nude encounter session in Southern California led by "Dr. Simon Herford."

Plaintiff first saw the book after its publication and his attorneys sent letters to Doubleday and Mitchell. Nine months later the New American Library published the book in paperback.

The parallel between the actual nude marathon sessions and the sessions in the book "Touching" was shown to the jury by means of the tape recordings Bindrim had taken of the actual sessions.~

Plaintiff asserts that he was libeled by the suggestion that he used obscene language which he did not in fact use. Plaintiff also alleges various other libels due to Mitchell's inaccurate portrayal of what actually happened at the marathon. Plaintiff

alleges that he was injured in his profession and expert testimony was introduced showing that Mitchell's portrayal of plaintiff was injurious and that plaintiff was identified by certain colleagues as the character in the book, Simon Herford.

I

Defendants first allege that they were entitled to judgment on the ground that there was no showing of "actual malice" by defendants. As a public figure, plaintiff is precluded from recovering damages for a defamatory falsehood relating to him, unless he proved that the statement was made with "actual malice," that is, that it was made with knowledge that it is false or with reckless disregard of whether it was false or not. (*New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 279-280.) The cases are clear that reckless conduct is not measured by whether a reasonably prudent man would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Thus, what constitutes actual malice focuses on defendants' attitude toward the truth or falsity of the material published and reckless disregard of the truth or falsity cannot be fully encompassed by one infallible definition but its outer limits must be marked by a case-by-case adjudication.

Evidence establishing a reckless disregard for the truth must be clear and convincing evidence, and proof by a preponderance of evidence is insufficient. (*New York Times Co. v. Sullivan* (1964) supra., 376 U.S. 254, at pp. 285-286.) Whether or not there was such malice is a question of fact to be determined by the trier of fact.. However, the reviewing court is required to review the evidence in a libel action by a public figure, to be sure that the principles were constitutionally applied. The court has the duty to examine the record to determine whether it could constitutionally support a judgment in favor of plaintiff, but this does not involve a de novo review of the proceedings below wherein the jury's verdict is entitled to no weight.

There is clear and convincing evidence to support the jury's finding that defendant Mitchell entertained actual malice, and

that defendant Doubleday had actual malice when it permitted the paperback printing of "Touching," although there was no actual malice on the part of Doubleday in its original printing of the hardback edition.

Mitchell's reckless disregard for the truth was apparent from her knowledge of the truth of what transpired at the encounter, and the literary portrayals of that encounter.[4] The fact that "Touching" was a novel does not necessarily insulate Mitchell from liability for libel, if all the elements of libel are otherwise present.[5] Since she attended sessions, there can be no suggestion that she did not know the true facts. [6] There is no suggestion that Mitchell was being malicious in the fabrication; her intent may have been to be colorful or dramatic.[7] [Yet because] "actual malice" concentrates solely on defendants' attitude toward the truth or falsity of the material published, and not on malicious motives, certainly defendant Mitchell was in a position to know the truth or falsity of her own material, and the jury was entitled to find that her publication was in reckless disregard of that truth or with actual knowledge of falsity.[8]

II

[T]he award for punitive damages against Doubleday may stand. A public figure in a defamation case may be awarded punitive damages when there is "actual malice,"[9] and, as we have said above, actual malice was established for Doubleday.[10]

III

Appellants claim that, even if there are untrue statements, there is no showing that plaintiff was identified as the character, Simon Herford, in the novel "Touching."

Appellants allege that plaintiff failed to show he was identifiable as Simon Herford, relying on the fact that the character in "Touching" was described in the book as a "fat Santa Claus type with long white hair, white sideburns, a cherubic rosy face and rosy forearms" and that Bindrim was clean shaven and had short hair.[11] In the case at bar, the only differences between plaintiff and the Herford character in "Touching" were physical appearance and that Herford was a psychiatrist rather than

psychologist. Otherwise, the character Simon Herford was very similar to the actual plaintiff. We cannot say~ that no one who knew plaintiff Bindrim could reasonably identify him with the fictional character. Plaintiff was identified as Herford by several witnesses and plaintiff's own tape recordings of the marathon sessions show that the novel was based substantially on plaintiff's conduct in the nude marathon.

Defendant also relies on *Middlebrooks v. Curtis Publishing Co.* (4th Cir. 1969) 413 F.2d 141, where the marked dissimilarities between the fictional character and the plaintiff supported the court's finding against the reasonableness of identification. In Middlebrooks, there was a difference in age, an absence from the locale at the time of the episode, and a difference in employment of the fictional character and plaintiff; nor did the story parallel the plaintiff's life in any significant manner. In the case at bar, apart from some of those episodes allegedly constituting the libelous matter itself, and apart from the physical difference and the fact that plaintiff had a Ph.D., and not an M.D., the similarities between Herford and Bindrim are clear, and the transcripts of the actual encounter weekend show a close parallel between the narrative of plaintiff's novel and the actual real life events. Here, there were many similarities between the character, Herford, and the plaintiff Bindrim and those few differences do not bring the case under the rule of Middlebrooks. There is overwhelming evidence that plaintiff and "Herford" were one.

IV

However, even though there was clear and convincing evidence to support the finding of "actual malice," and even though there was support for finding that plaintiff is identified as the character in Mitchell's novel, there still can be no recovery by plaintiff if the statements in "Touching" were not libelous. There can be no libel predicated on an opinion. The publication must contain a false statement of fact.

Plaintiff alleges that the book as a whole was libelous and that the book contained several false statements of fact.~ ⁋We find it unnecessary to discuss each alleged libel separately, since if any

of the alleged libels fulfill all the requirements of libel, that is sufficient to support the judgment.[4]

Our inquiry then, is directed to whether or not any of these incidents can be considered false statements of fact. It is clear from the transcript of the actual encounter weekend proceeding that some of the incidents portrayed by Mitchell are false: i.e., substantially inaccurate description of what actually happened. It is also clear that some of these portrayals cast plaintiff in a disparaging light since they portray his language and conduct as crude, aggressive, and unprofessional.[5]

Defendants contend that the fact that the book was labeled as being a "novel" bars any claim that the writer or publisher could be found to have implied that the characters in the book were factual representations not of the fictional characters but of an actual nonfictional person. That contention, thus broadly stated, is unsupported by the cases. The test is whether a reasonable person, reading the book, would understand that the fictional character therein pictured was, in actual fact, the plaintiff acting as described. (*Middlebrooks v. Curtis Publishing Co.* (4th Cir. 1969) supra., 413 F.2d 141, 143.) Each case must stand on its own facts. In some cases, such as *Greenbelt Pub. Assn. v. Bresler* (1970) supra., 398 U.S. 6, an appellate court can, on examination of the entire work, find that no reasonable person would have regarded the episodes in the book as being other than the fictional imaginings of the author about how the character he had created would have acted. Similarly, in *Hicks v. Casablanca Records* (S.D.N.Y. 1978) 464 F.Supp. 426, a trier of fact was able to find that, considering the work as a whole, no reasonable reader would regard an episode, in a book purporting to be a biography of an actual person, to have been anything more than the author's imaginative explanation of an episode in that person's life about which no actual facts were known. We cannot make any similar determination here. Whether a reader, identifying plaintiff with the "Dr. Herford" of the book, would regard the passages herein complained of as mere fictional embroidering or as reporting actual language and conduct, was for the jury. Its

verdict adverse to the defendants cannot be overturned by this court.

V

Defendants raise the question of whether there is "publication" for libel where the communication is to only one person or a small group of persons rather than to the public at large. Publication for purposes of defamation is sufficient when the publication is to only one person other than the person defamed. Therefore, it is irrelevant whether all readers realized plaintiff and Herford were identical.

VI

Appellant Doubleday alleges several charges to the jury were erroneous, and that the court improperly refused to give certain proffered instructions by them. Doubleday objects that the court erred when it rejected its instruction that Bindrim must prove by clear and convincing evidence that defendants intentionally identified Bindrim. Firstly, the "clear and convincing evidence" standard applies to the proving that the act was done with "actual malice" and an instruction to that effect was given by the court. Secondly, defendants' instructions that the jury must find that a substantial segment of the public did, in fact, believe that Dr. Simon Herford was, in fact, Paul Bindrim, was properly refused. For the tort of defamation, publication to one other person is sufficient, ante.~

Presiding Justice GORDON L. FILES, dissenting:

This novel, which is presented to its readers as a work of fiction, contains a portrayal of nude encounter therapy, and its tragic effect upon an apparently happy and well-adjusted woman who subjected herself to it. Plaintiff is a practitioner of this kind of therapy. His grievance, as described in his testimony and in his briefs on appeal, is provoked by that institutional criticism.~The record demonstrates the essential truth of the author's thesis. A tape recording of an actual encounter session conducted by plaintiff contains this admonition to the departing patients: "... Now, to top that off, you're turned on, that is you're about as turned on as if you've had 50 or 75 gammas of LSD. That's the

estimate of the degree of the turn-on is. And it doesn't feel that way, because you're [sic] been getting higher a little bit at a time. So don't wait to find out, take may word for it, and drive like you've had three or four martinis. Drive cautiously."[7] Plaintiff's "concession" that he is a public figure appears to be a tactic to enhance his argument that any unflattering portrayal of this kind of therapy defames him.

The decision of the majority upholding a substantial award of damages against the author and publisher poses a grave threat to any future work of fiction which explores the effect of techniques claimed to have curative value.

The majority opinion rests upon a number of misconceptions of the record and the law of libel. I mention a few of them.

Defamation.

Libel is a false and unprivileged publication which exposes any person to hatred, contempt, ridicule or obloquy, or which causes him to be shunned or avoided or which has a tendency to injure him in his occupation. (Civ. Code, § 45.) A libel which is defamatory without the necessity of explanatory matter is said to be a libel on its face. Language not libelous on its face is not actionable unless the plaintiff alleges and proves that he has suffered special damage as a result thereof. (Civ. Code, § 45a.)

Whether or not matter is on its face reasonably susceptible of a libelous meaning is a question of law.

The complaint in this action quotes verbatim the portions of the defendant's novel which are alleged to be libelous. No explanatory matter or special damages are alleged. The only arguably defamatory matter I can find in that complaint is in the passages which portray the fictional therapist using coarse, vulgar and insulting language in addressing his patients. Some of the therapeutic techniques described in the quoted passages may seem bizarre, but a court cannot assume that such conduct is so inappropriate that a reputable therapist would be defamed if that technique were imputed to him. The alleged defamation therefore is limited to the imputation of vulgar speech and insulting manners.

The defendants asked the trial court to give an instruction to the jury identifying the matter which it could consider as defamatory. The trial court refused. Instead, the court sent the case to the jury without distinction between actionable defamation and constitutionally protected criticism. In addition, the trial court's instructions authorized the jury to award special damages for loss of income which could have resulted from the lawful expression of opinion.

Identification.

Whether or not an allegedly defamatory communication was made "of and concerning the plaintiff" is an issue involving constitutional rights. (*New York Times v. Sullivan* (1964) 376 U.S. 254, 288; see Rest. 2d Torts, § 580A com. (g).) Criticism of an institution, profession or technique is protected by the First Amendment; and such criticism may not be suppressed merely because it may reflect adversely upon someone who cherishes the institution or is a part of it.

Defendants' novel describes a fictitious therapist who is conspicuously different from plaintiff in name, physical appearance, age, personality and profession.

Indeed the fictitious Dr. Herford has [none] of the characteristics of plaintiff except that Dr. Herford practices nude encounter therapy. Only three witnesses, other than plaintiff himself, testified that they "recognized" plaintiff as the fictitious Dr. Herford. All three of those witnesses had participated in or observed one of plaintiff's nude marathons. The only characteristic mentioned by any of the three witnesses as identifying plaintiff was the therapy practiced.

Plaintiff was cross-examined in detail about what he saw that identified him in the novel. Every answer he gave on this subject referred to how the fictitious Dr. Herford dealt with his patients.

Plaintiff has no monopoly upon the encounter therapy which he calls "nude marathon." Witnesses testified without contradiction that other professionals use something of this kind. There does not appear to be any reason why anyone could not conduct a

"marathon" using the style if not the full substance of plaintiff's practices.

Plaintiff's brief discusses the therapeutic practices of the fictitious Dr. Herford in two categories: Those practices which are similar to plaintiff's technique are classified as identifying. Those which are unlike plaintiff's are called libelous because they are false. Plaintiff has thus resurrected the spurious logic which Professor Kalven found in the position of the plaintiff in New York Times v. Sullivan, supra., 376 U.S. 254. Kalven wrote: "There is revealed here a new technique by which defamation might be endlessly manufactured. First, it is argued that, contrary to all appearances, a statement referred to the plaintiff; then, that it falsely ascribed to the plaintiff something that he did not do, which should be rather easy to prove about a statement that did not refer to plaintiff in the first place. ..." Kalven, The New York Times Case : A Note on "The Central Meaning of the First Amendment," 1964 Sup. Ct. Rev. 191, 199.

Even if we accept the plaintiff's thesis that criticism of nude encounter therapy may be interpreted as libel of one practitioner, the evidence does not support a finding in favor of plaintiff.

Whether or not a publication to the general public is defamatory is "whether in the mind of the average reader the publication, considered as a whole, could reasonably be considered as defamatory." (Patton v. Royal Industries, Inc. (1968) 263 Cal.App.2d 760, 765.

The majority opinion contains this juxtaposition of ideas: "Secondly, defendants' [proposed] instructions that the jury must find that a substantial segment of the public did, in fact, believe that Dr. Simon Herford was, in fact, Paul Bindrim was properly refused. For the tort of defamation, publication to one other person is sufficient, ante."

The first sentence refers to the question whether the publication was defamatory of plaintiff. The second refers to whether the defamatory matter was published. The former is an issue in this case. The latter is not. Of course, a publication to one person

may constitute actionable libel. But this has no bearing on the principle that the allegedly libelous effect of a publication to the public generally is to be tested by the impression made on the average reader.

The jury instruction on identification.

The only instruction given the jury on the issue of identification stated that plaintiff had the burden of proving "That a third person read the statement and reasonably understood the defamatory meaning and that the statement applied to plaintiff."

That instruction was erroneous and prejudicial in that it only required proof that one "third person" understood the defamatory meaning.

The word "applied" was most unfortunate in the context of this instruction. The novel was about nude encounter therapy. Plaintiff practiced nude encounter therapy. Of course the novel "applied to plaintiff," particularly insofar as it exposed what may result from such therapy. This instruction invited the jury to find that plaintiff was libeled by criticism of the kind of therapy he practiced. The effect is to mulct the defendants for the exercise of their First Amendment right to comment on the nude marathon.

Malice.

The majority opinion adopts the position that actual malice may be inferred from the fact that the book was "false." That inference is permissible against a defendant who has purported to state the truth. But when the publication purports to be fiction, it is absurd to infer malice because the fiction is false.

As the majority agrees, a public figure may not recover damages for libel unless "actual malice" is shown. Sufficiency of the evidence on this issue is another constitutional issue. (St. Amant v. Thompson (1968) 390 U.S. 727, 730.) Actual malice is a state of mind, even though it often can be proven only by circumstantial evidence. The only apparent purpose of the defendants was to write and publish a novel. There is not the slightest evidence of any intent on the part of either to harm

plaintiff. No purpose for wanting to harm him has been suggested.

The majority opinion seems to say malice is proved by Doubleday's continuing to publish the novel after receiving a letter from an attorney (not plaintiff's present attorney) which demanded that Doubleday discontinue publication "for the reasons stated in" a letter addressed to Gwen Davis. An examination of the latter demonstrates the fallacy of that inference.

The letter to Davis [Mitchell] asserted that the book violated a confidential relationship, invaded plaintiff's privacy, libelled him and violated a "common law copyright" by "using the unpublished words" of plaintiff. It added "From your said [television] appearances, as well as from the book, it is unmistakable that the 'Simon Herford' mentioned in your book refers to my client."

The letters did not assert that any statement of purported fact in the book was false. The only allegation of falsity was this: "In these [television] appearances you stated, directly or indirectly, that nude encounter workshops, similar to the one you attended, are harmful. The truth is that those attending my client's workshops derive substantial benefit from their attendance at such workshops."

These letters gave Doubleday no factual information which would indicate that the book libelled plaintiff.

The letters did not put Doubleday on notice of anything except that plaintiff was distressed by the expression of an opinion unfavorable to nude encounter therapy-an expression protected by the First Amendment. (See *Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 339.)

From an analytical standpoint, the chief vice of the majority opinion is that it brands a novel as libelous because it is "false," i.e., fiction; and infers "actual malice" from the fact that the author and publisher knew it was not a true representation of plaintiff. From a constitutional standpoint the vice is the chilling effect upon the publisher of any novel critical of any

occupational practice, inviting litigation on the theory "when you criticize my occupation, you libel me."

I would reverse the judgment.

Questions to Ponder About *Bindrim v. Mitchell*

A. Do you agree with the dissent that this decision was bound to have a chilling effect on writers and publishers? Do you think defamation doctrine as applied here impinges on free speech?

B. What could Mitchell have done to avoid defamation liability? Could she have written essentially the same book, with just minor changes? Or would she have had to write a substantially different book?

C. What did Bindrim do that helped him put together a successful case?

D. What have you seen in books, movies, television shows, or other media that appears to have been shaped by concerns about defamation liability?

Case: Masson v. New Yorker Magazine

In the following case the U.S. Supreme Court confronts how much poetic license a writer has with quotes for a magazine story about a real person. Reading it will give you a more nuanced feel for how the First Amendment frustrates defamation actions in order to give the press plenty of breathing room.

Masson v. New Yorker Magazine

Supreme Court of the United States
June 20, 1991

501 U.S. 496. MASSON v. NEW YORKER MAGAZINE, INC., ET AL. No. 89-1799.

Justice ANTHONY KENNEDY delivered the opinion of the Court:

In this libel case, a public figure claims he was defamed by an author who, with full knowledge of the inaccuracy, used quotation marks to attribute to him comments he had not made.

The First Amendment protects authors and journalists who write about public figures by requiring a plaintiff to prove that the defamatory statements were made with what we have called "actual malice," a term of art denoting deliberate or reckless falsification. We consider in this opinion whether the attributed quotations had the degree of falsity required to prove this state of mind, so that the public figure can defeat a motion for summary judgment and proceed to a trial on the merits of the defamation claim.

I

Petitioner Jeffrey Masson trained at Harvard University as a Sanskrit scholar, and in 1970 became a professor of Sanskrit & Indian Studies at the University of Toronto. He spent eight years in psychoanalytic training, and qualified as an analyst in 1978. Through his professional activities, he came to know Dr. Kurt Eissler, head of the Sigmund Freud Archives, and Dr. Anna Freud, daughter of Sigmund Freud and a major psychoanalyst in her own right. The Sigmund Freud Archives, located at Maresfield Gardens outside of London, serves as a repository for materials about Freud, including his own writings, letters, and personal library. The materials, and the right of access to them, are of immense value to those who study Freud and his theories, life, and work.

In 1980, Eissler and Anna Freud hired petitioner as projects director of the archives. After assuming his post, petitioner became disillusioned with Freudian psychology. In a 1981 lecture before the Western New England Psychoanalytical Society in New Haven, Connecticut, he advanced his theories of Freud. Soon after, the board of the archives terminated petitioner as projects director.

Respondent Janet Malcolm is an author and a contributor to respondent The New Yorker, a weekly magazine. She contacted petitioner in 1982 regarding the possibility of an article on his relationship with the archives. He agreed, and the two met in person and spoke by telephone in a series of interviews. Based on the interviews and other sources, Malcolm wrote a lengthy article. One of Malcolm's narrative devices consists of enclosing

lengthy passages in quotation marks, reporting statements of Masson, Eissler, and her other subjects.

During the editorial process, Nancy Franklin, a member of the fact-checking department at The New Yorker, called petitioner to confirm some of the facts underlying the article. According to petitioner, he expressed alarm at the number of errors in the few passages Franklin discussed with him. Petitioner contends that he asked permission to review those portions of the article which attributed quotations or information to him, but was brushed off with a never-fulfilled promise to "get back to [him]." Franklin disputes petitioner's version of their conversation.

The New Yorker published Malcolm's piece in December 1983, as a two-part series. In 1984, with knowledge of at least petitioner's general allegation that the article contained defamatory material, respondent Alfred A. Knopf, Inc., published the entire work as a book, entitled In the Freud Archives.

Malcolm's work received complimentary reviews. But this gave little joy to Masson, for the book portrays him in a most unflattering light. According to one reviewer:

> "Masson the promising psychoanalytic scholar emerges gradually, as a grandiose egotist – mean-spirited, self-serving, full of braggadocio, impossibly arrogant and, in the end, a self-destructive fool. But it is not Janet Malcolm who calls him such: his own words reveal this psychological profile – a self-portrait offered to us through the efforts of an observer and listener who is, surely, as wise as any in the psychoanalytic profession." Coles, Freudianism Confronts Its Malcontents, Boston Globe, May 27, 1984, pp. 58, 60.

Petitioner wrote a letter to the New York Times Book Review calling the book "distorted." In response, Malcolm stated:

> "Many of [the] things Mr. Masson told me (on tape) were discreditable to him, and I felt it best

> not to include them. Everything I do quote Mr. Masson as saying was said by him, almost word for word. (The 'almost' refers to changes made for the sake of correct syntax.) I would be glad to play the tapes of my conversation with Mr. Masson to the editors of The Book Review whenever they have 40 or 50 short hours to spare."

Petitioner brought an action for libel under California law in the United States District Court for the Northern District of California. During extensive discovery and repeated amendments to the complaint, petitioner concentrated on various passages alleged to be defamatory, dropping some and adding others. The tape recordings of the interviews demonstrated that petitioner had, in fact, made statements substantially identical to a number of the passages, and those passages are no longer in the case. We discuss only the passages relied on by petitioner in his briefs to this Court.

Each passage before us purports to quote a statement made by petitioner during the interviews. Yet in each instance no identical statement appears in the more than 40 hours of taped interviews. Petitioner complains that Malcolm fabricated all but one passage; with respect to that passage, he claims Malcolm omitted a crucial portion, rendering the remainder misleading.

(a) *"Intellectual Gigolo."* Malcolm quoted a description by petitioner of his relationship with Eissler and Anna Freud as follows:

> ""Then I met a rather attractive older graduate student and I had an affair with her. One day, she took me to some art event, and she was sorry afterward. She said, "Well, it is very nice sleeping with you in your room, but you're the kind of person who should never leave the room – you're just a social embarrassment anywhere else, though you do fine in your own room." And you know, in their way, if not in so many words, Eissler and Anna Freud told me the same thing. They like me well enough "in

> my own room." They loved to hear from me what creeps and dolts analysts are. I was like an intellectual gigolo – you get your pleasure from him, but you don't take him out in public ... ."' *In the Freud Archives* 38.

The tape recordings contain the substance of petitioner's reference to his graduate student friend, but no suggestion that Eissler or Anna Freud considered him, or that he considered himself, an "'intellectual gigolo.'" Instead, petitioner said:

> "They felt, in a sense, I was a private asset but a public liability... . They liked me when I was alone in their living room, and I could talk and chat and tell them the truth about things and they would tell me. But that I was, in a sense, much too junior within the hierarchy of analysis, for these important training analysts to be caught dead with me."

(b) *"Sex, Women, Fun."* Malcolm quoted petitioner as describing his plans for Maresfield Gardens, which he had hoped to occupy after Anna Freud's death:

> "'It was a beautiful house, but it was dark and sombre and dead. Nothing ever went on there. I was the only person who ever came. I would have renovated it, opened it up, brought it to life. Maresfield Gardens would have been a center of scholarship, but it would also have been a place of sex, women, fun. It would have been like the change in *The Wizard of Oz,* from black-and-white into color.'" *In the Freud Archives* 33.

The tape recordings contain a similar statement, but in place of the references to "sex, women, fun" and The Wizard of Oz, petitioner commented:

> "[I]t is an incredible storehouse. I mean, the library, Freud's library alone is priceless in terms of what it contains: all his books with his annotations in them; the Schreber case annotated, that kind of thing. It's fascinating."

Petitioner did talk, earlier in the interview, of his meeting with a London analyst:

> "I like him. So, and we got on very well. That was the first time we ever met and you know, it was buddy-buddy, and we were to stay with each other and [laughs] we were going to pass women on to each other, and we were going to have a great time together when I lived in the Freud house. We'd have great parties there and we were [laughs] –
>
> "... going to really, we were going to live it up."

(c) *"It Sounded Better."* Petitioner spoke with Malcolm about the history of his family, including the reasons his grandfather changed the family name from Moussaieff to Masson, and why petitioner adopted the abandoned family name as his middle name. The article contains the passage:

> "'My father is a gem merchant who doesn't like to stay in any one place too long. His father was a gem merchant, too – a Bessarabian gem merchant, named Moussaieff, who went to Paris in the twenties and adopted the name Masson. My parents named me Jeffrey Lloyd Masson, but in 1975 I decided to change my middle name to Moussaieff – it sounded better.'" *In the Freud Archives* 36.

In the most similar tape-recorded statement, Masson explained at considerable length that his grandfather had changed the family name from Moussaieff to Masson when living in France, "[j]ust to hide his Jewishness." Petitioner had changed his last name back to Moussaieff, but his then-wife Terry objected that "nobody could pronounce it and nobody knew how to spell it, and it wasn't the name that she knew me by." Petitioner had changed his name to Moussaieff because he "just liked it." "[I]t was sort of part of analysis: a return to the roots, and your family tradition and so on." In the end, he had agreed with Terry that "it wasn't her name after all," and used Moussaieff as a middle instead of a last name.

(d) "I Don't Know Why I Put It In." The article recounts part of a conversation between Malcolm and petitioner about the paper petitioner presented at his 1981 New Haven lecture:

> "[I] asked him what had happened between the time of the lecture and the present to change him from a Freudian psychoanalyst with somewhat outré views into the bitter and belligerent anti-Freudian he had become.
>
> "Masson sidestepped my question. 'You're right, there was nothing disrespectful of analysis in that paper,' he said. 'That remark about the sterility of psychoanalysis was something I tacked on at the last minute, and it was totally gratuitous. I don't know why I put it in.'" *In the Freud Archives* 53.

The tape recordings instead contain the following discussion of the New Haven lecture:

> Masson: "So they really couldn't judge the material. And, in fact, until the last sentence I think they were quite fascinated. I think the last sentence was an in, [sic] possibly, gratuitously offensive way to end a paper to a group of analysts. Uh, – "
>
> Malcolm: "What were the circumstances under which you put it [in]? ..."
>
> Masson: "That it was, was true.
>
> . . . . .
>
> ". . . I really believe it. I didn't believe anybody would agree with me.
>
> . . . . .
>
> ". . . But I felt I should say something because the paper's still well within the analytic tradition in a sense. . . .
>
> . . . . .
>
> ". . . It's really not a deep criticism of Freud. It contains all the material that would allow one to

> criticize Freud but I didn't really do it. And then I thought, I really must say one thing that I really believe, that's not going to appeal to anybody and that was the very last sentence. Because I really do believe psychoanalysis is entirely sterile . . . ."

(e) *"Greatest Analyst Who Ever Lived."* The article contains the following self-explanatory passage:

> "A few days after my return to New York, Masson, in a state of elation, telephoned me to say that Farrar, Straus & Giroux has taken *The Assault on Truth* [Masson's book]. 'Wait till it reaches the best-seller list, and watch how the analysts will crawl,' he crowed. 'They move whichever way the wind blows. They will want me back, they will say that Masson is a great scholar, a major analyst – after Freud, he's the greatest analyst who ever lived. Suddenly they'll be calling, begging, cajoling: "Please take back what you've said about our profession; our patients are quitting." They'll try a short smear campaign, then they'll try to buy me, and ultimately they'll have to shut up. Judgment will be passed by history. There is no possible refutation of this book. It's going to cause a revolution in psychoanalysis. Analysis stands or falls with me now.'" *In the Freud Archives* 162.

This material does not appear in the tape recordings. Petitioner did make the following statements on related topics in one of the taped interviews with Malcolm:

> ". . . I assure you when that book comes out, which I honestly believe is an honest book, there is nothing, you know, mean-minded about it. It's the honest fruit of research and intellectual toil. And there is not an analyst in the country who will say a single word in favor of it."
>
> "Talk to enough analysts and get them right down to these concrete issues and you watch

> how different it is from my position. It's utterly the opposite and that's finally what I realized, that I hold a position that no other analyst holds, including, alas, Freud. At first I thought: Okay, it's me and Freud against the rest of the analytic world, or me and Freud and Anna Freud and Kur[t] Eissler and Vic Calef and Brian Bird and Sam Lipton against the rest of the world. Not so, it's me. it's me alone."

The tape of this interview also contains the following exchange between petitioner and Malcolm:

> Masson: ". . . analysis stands or falls with me now."
>
> Malcolm: "Well that's a very grandiose thing to say."
>
> Masson: "Yeah, but it's got nothing to do with me. It's got to do with the things I discovered."

(f) *"He Had The Wrong Man."* In discussing the archives' board meeting at which petitioner's employment was terminated, Malcolm quotes petitioner as giving the following explanation of Eissler's attempt to extract a promise of confidentiality:

> "'[Eissler] was always putting moral pressure on me. "Do you want to poison Anna Freud's last days? Have you no heart? You're going to kill the poor old woman." I said to him, "What have I done? *You're* doing it. *You're* firing me. What am I supposed to do – be grateful to you?" "You could be silent about it. You could swallow it. I know it is painful for you. But you could just live with it in silence." "Why should I do that?" "Because it is the honorable thing to do." Well, he had the wrong man.'" *In the Freud Archives* 67.

From the tape recordings, on the other hand, it appears that Malcolm deleted part of petitioner's explanation (italicized below), and petitioner argues that the "wrong man" sentence relates to something quite different from Eissler's entreaty that

silence was "the honorable thing." In the tape recording, petitioner states:

> "But it was wrong of Eissler to do that, you know. He was constantly putting various kinds of moral pressure on me and, 'Do you want to poison Anna Freud's last days? Have you no heart?' He called me: 'Have you no heart? You're going to kill the poor old woman. Have you no heart? Think of what she's done for you and you are now willing to do this to her.' I said, 'What have I, what have I done? You did it. You fired me. What am I supposed to do: thank you? be grateful to you?' He said, 'Well you could never talk about it. You could be silent about it. You could swallow it. I know it's painful for you but just live with it in silence.' 'Fuck you,' I said, 'Why should I do that? Why? You know, why should one do that?' 'Because it's the honorable thing to do *and you will save face. And who knows? If you never speak about it and you quietly and humbly accept our judgment, who knows that in a few years if we don't bring you back?'* Well, he had the wrong man."

Malcolm submitted to the District Court that not all of her discussions with petitioner were recorded on tape, in particular conversations that occurred while the two of them walked together or traveled by car, while petitioner stayed at Malcolm's home in New York, or while her tape recorder was inoperable. She claimed to have taken notes of these unrecorded sessions, which she later typed, then discarding the handwritten originals. Petitioner denied that any discussion relating to the substance of the article occurred during his stay at Malcolm's home in New York, that Malcolm took notes during any of their conversations, or that Malcolm gave any indication that her tape recorder was broken.

Respondents moved for summary judgment. The parties agreed that petitioner was a public figure and so could escape summary judgment only if the evidence in the record would permit a reasonable finder of fact, by clear and convincing evidence, to

conclude that respondents published a defamatory statement with actual malice as defined by our cases. The District Court analyzed each of the passages and held that the alleged inaccuracies did not raise a jury question. The court found that the allegedly fabricated quotations were either substantially true, or were "'one of a number of possible rational interpretations' of a conversation or event that 'bristled with ambiguities,'" and thus were entitled to constitutional protection. The court also ruled that the "he had the wrong man" passage involved an exercise of editorial judgment upon which the courts could not intrude.

The Court of Appeals affirmed, with one judge dissenting. The court assumed for much of its opinion that Malcolm had deliberately altered each quotation not found on the tape recordings, but nevertheless held that petitioner failed to raise a jury question of actual malice, in large part for the reasons stated by the District Court. In its examination of the "intellectual gigolo" passage, the court agreed with the District Court that petitioner could not demonstrate actual malice because Malcolm had not altered the substantive content of petitioner's self-description.

The dissent argued that any intentional or reckless alteration would prove actual malice, so long as a passage within quotation marks purports to be a verbatim rendition of what was said, contains material inaccuracies, and is defamatory. We granted certiorari, and now reverse.

II

A

~The First Amendment limits California's libel law in various respects. When, as here, the plaintiff is a public figure, he cannot recover unless he proves by clear and convincing evidence that the defendant published the defamatory statement with actual malice, *i.e.,* with "knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 279-280 (1964). Mere negligence does not suffice. Rather, the plaintiff must demonstrate that the author

"in fact entertained serious doubts as to the truth of his publication," or acted with a "high degree of awareness of . . . probable falsity[.]"

Actual malice under the *New York Times* standard should not be confused with the concept of malice as an evil intent or a motive arising from spite or ill will. We have used the term actual malice as a shorthand to describe the First Amendment protections for speech injurious to reputation, and we continue to do so here. But the term can confuse as well as enlighten. In this respect, the phrase may be an unfortunate one. In place of the term actual malice, it is better practice that jury instructions refer to publication of a statement with knowledge of falsity or reckless disregard as to truth or falsity. This definitional principle must be remembered in the case before us.

B

In general, quotation marks around a passage indicate to the reader that the passage reproduces the speaker's words verbatim. They inform the reader that he or she is reading the statement of the speaker, not a paraphrase or other indirect interpretation by an author. By providing this information, quotations add authority to the statement and credibility to the author's work. Quotations allow the reader to form his or her own conclusions and to assess the conclusions of the author, instead of relying entirely upon the author's characterization of her subject.

A fabricated quotation may injure reputation in at least two senses, either giving rise to a conceivable claim of defamation. First, the quotation might injure because it attributes an untrue factual assertion to the speaker. An example would be a fabricated quotation of a public official admitting he had been convicted of a serious crime when in fact he had not.

Second, regardless of the truth or falsity of the factual matters asserted within the quoted statement, the attribution may result in injury to reputation because the manner of expression or even the fact that the statement was made indicates a negative personal trait or an attitude the speaker does not hold. John

Lennon once was quoted as saying of the Beatles, "We're more popular than Jesus Christ now." *Time*, Aug. 12, 1966, p. 38. Supposing the quotation had been a fabrication, it appears California law could permit recovery for defamation because, even without regard to the truth of the underlying assertion, false attribution of the statement could have injured his reputation. Here, in like manner, one need not determine whether petitioner is or is not the greatest analyst who ever lived in order to determine that it might have injured his reputation to be reported as having so proclaimed.

A self-condemnatory quotation may carry more force than criticism by another. It is against self-interest to admit one's own criminal liability, arrogance, or lack of integrity, and so all the more easy to credit when it happens. This principle underlies the elemental rule of evidence which permits the introduction of statements against interest, despite their hearsay character, because we assume "that persons do not make statements which are damaging to themselves unless satisfied for good reason that they are true."

Of course, quotations do not always convey that the speaker actually said or wrote the quoted material. "Punctuation marks, like words, have many uses. Writers often use quotation marks, yet no reasonable reader would assume that such punctuation automatically implies the truth of the quoted material." *Baker* v. *Los Angeles Herald Examiner,* 42 Cal. 3d 254 (Cal. 1986). In *Baker,* a television reviewer printed a hypothetical conversation between a station vice president and writer/producer, and the court found that no reasonable reader would conclude the plaintiff in fact had made the statement attributed to him. Writers often use quotations as in *Baker,* and a reader will not reasonably understand the quotations to indicate reproduction of a conversation that took place. In other instances, an acknowledgment that the work is so-called docudrama or historical fiction, or that it recreates conversations from memory, not from recordings, might indicate that the quotations should not be interpreted as the actual statements of the speaker to whom they are attributed.

The work at issue here, however, as with much journalistic writing, provides the reader no clue that the quotations are being used as a rhetorical device or to paraphrase the speaker's actual statements. To the contrary, the work purports to be nonfiction, the result of numerous interviews. At least a trier of fact could so conclude. The work contains lengthy quotations attributed to petitioner, and neither Malcolm nor her publishers indicate to the reader that the quotations are anything but the reproduction of actual conversations. Further, the work was published in The New Yorker, a magazine which at the relevant time seemed to enjoy a reputation for scrupulous factual accuracy. These factors would, or at least could, lead a reader to take the quotations at face value. A defendant may be able to argue to the jury that quotations should be viewed by the reader as nonliteral or reconstructions, but we conclude that a trier of fact in this case could find that the reasonable reader would understand the quotations to be nearly verbatim reports of statements made by the subject.

C

The constitutional question we must consider here is whether, in the framework of a summary judgment motion, the evidence suffices to show that respondents acted with the requisite knowledge of falsity or reckless disregard as to truth or falsity. This inquiry in turn requires us to consider the concept of falsity; for we cannot discuss the standards for knowledge or reckless disregard without some understanding of the acts required for liability. We must consider whether the requisite falsity inheres in the attribution of words to the petitioner which he did not speak.

In some sense, any alteration of a verbatim quotation is false. But writers and reporters by necessity alter what people say, at the very least to eliminate grammatical and syntactical infelicities. If every alteration constituted the falsity required to prove actual malice, the practice of journalism, which the First Amendment standard is designed to protect, would require a radical change, one inconsistent with our precedents and First Amendment principles. Petitioner concedes that this absolute

definition of falsity in the quotation context is too stringent, and acknowledges that "minor changes to correct for grammar or syntax" do not amount to falsity for purposes of proving actual malice. We agree, and must determine what, in addition to this technical falsity, proves falsity for purposes of the actual malice inquiry.

Petitioner argues that, excepting correction of grammar or syntax, publication of a quotation with knowledge that it does not contain the words the public figure used demonstrates actual malice. The author will have published the quotation with knowledge of falsity, and no more need be shown. Petitioner suggests that by invoking more forgiving standards the Court of Appeals would permit and encourage the publication of falsehoods. Petitioner believes that the intentional manufacture of quotations does not "represen[t] the sort of inaccuracy that is commonplace in the forum of robust debate to which the *New York Times* rule applies," and that protection of deliberate falsehoods would hinder the First Amendment values of robust and well-informed public debate by reducing the reliability of information available to the public.

We reject the idea that any alteration beyond correction of grammar or syntax by itself proves falsity in the sense relevant to determining actual malice under the First Amendment. An interviewer who writes from notes often will engage in the task of attempting a reconstruction of the speaker's statement. That author would, we may assume, act with knowledge that at times she has attributed to her subject words other than those actually used. Under petitioner's proposed standard, an author in this situation would lack First Amendment protection if she reported as quotations the substance of a subject's derogatory statements about himself.

Even if a journalist has tape-recorded the spoken statement of a public figure, the full and exact statement will be reported in only rare circumstances. The existence of both a speaker and a reporter; the translation between two media, speech and the printed word; the addition of punctuation; and the practical necessity to edit and make intelligible a speaker's perhaps

rambling comments, all make it misleading to suggest that a quotation will be reconstructed with complete accuracy. The use or absence of punctuation may distort a speaker's meaning, for example, where that meaning turns upon a speaker's emphasis of a particular word. In other cases, if a speaker makes an obvious misstatement, for example by unconscious substitution of one name for another, a journalist might alter the speaker's words but preserve his intended meaning. And conversely, an exact quotation out of context can distort meaning, although the speaker did use each reported word.

In all events, technical distinctions between correcting grammar and syntax and some greater level of alteration do not appear workable, for we can think of no method by which courts or juries would draw the line between cleaning up and other changes, except by reference to the meaning a statement conveys to a reasonable reader. To attempt narrow distinctions of this type would be an unnecessary departure from First Amendment principles of general applicability, and, just as important, a departure from the underlying purposes of the tort of libel as understood since the latter half of the 16th century. From then until now, the tort action for defamation has existed to redress injury to the plaintiff's reputation by a statement that is defamatory and false. As we have recognized, "[t]he legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood." If an author alters a speaker's words but effects no material change in meaning, including any meaning conveyed by the manner or fact of expression, the speaker suffers no injury to reputation that is compensable as a defamation.

These essential principles of defamation law accommodate the special case of inaccurate quotations without the necessity for a discrete body of jurisprudence directed to this subject alone. [W]e reject any special test of falsity for quotations, including one which would draw the line at correction of grammar or syntax. We conclude, rather, that the exceptions suggested by petitioner for grammatical or syntactical corrections serve to illuminate a broader principle.~

[T]he statement is not considered false unless it "would have a different effect on the mind of the reader from that which the pleaded truth would have produced." Our definition of actual malice relies upon this historical understanding.

We conclude that a deliberate alteration of the words uttered by a plaintiff does not equate with knowledge of falsity for purposes of *New York Times Co.* v. *Sullivan* and *Gertz* v. *Robert Welch, Inc.* unless the alteration results in a material change in the meaning conveyed by the statement. The use of quotations to attribute words not in fact spoken bears in a most important way on that inquiry, but it is not dispositive in every case.

Deliberate or reckless falsification that comprises actual malice turns upon words and punctuation only because words and punctuation express meaning. Meaning is the life of language. And, for the reasons we have given, quotations may be a devastating instrument for conveying false meaning. In the case under consideration, readers of In the Freud Archives may have found Malcolm's portrait of petitioner especially damning because so much of it appeared to be a self-portrait, told by petitioner in his own words. And if the alterations of petitioner's words gave a different meaning to the statements, bearing upon their defamatory character, then the device of quotations might well be critical in finding the words actionable.

D

The Court of Appeals applied a test of substantial truth which, in exposition if not in application, comports with much of the above discussion. The Court of Appeals, however, went one step beyond protection of quotations that convey the meaning of a speaker's statement with substantial accuracy and concluded that an altered quotation is protected so long as it is a "rational interpretation" of an actual statement. [W]e cannot accept the reasoning of the Court of Appeals on this point.

In *Bose Corp. v. Consumers Union of United States, Inc.,* 466 U.S. 485 (1984), a Consumer Reports reviewer had attempted to describe in words the experience of listening to music through a pair of loudspeakers, and we concluded that the result was not an

assessment of events that speak for themselves, but "'one of a number of possible rational interpretations' of an event 'that bristled with ambiguities' and descriptive challenges for the writer." ~ We refused to permit recovery for choice of language which, though perhaps reflecting a misconception, represented "the sort of inaccuracy that is commonplace in the forum of robust debate to which the *New York Times* rule applies."~

The protection for rational interpretation serves First Amendment principles by allowing an author the interpretive license that is necessary when relying upon ambiguous sources. Where, however, a writer uses a quotation, and where a reasonable reader would conclude that the quotation purports to be a verbatim repetition of a statement by the speaker, the quotation marks indicate that the author is not involved in an interpretation of the speaker's ambiguous statement, but attempting to convey what the speaker said. This orthodox use of a quotation is the quintessential "direct account of events that speak for themselves."~ More accurately, the quotation allows the subject to speak for himself.

The significance of the quotations at issue, absent any qualification, is to inform us that we are reading the statement of petitioner, not Malcolm's rational interpretation of what petitioner has said or thought. Were we to assess quotations under a rational interpretation standard, we would give journalists the freedom to place statements in their subjects' mouths without fear of liability. By eliminating any method of distinguishing between the statements of the subject and the interpretation of the author, we would diminish to a great degree the trustworthiness of the printed word and eliminate the real meaning of quotations. Not only public figures but the press doubtless would suffer under such a rule. Newsworthy figures might become more wary of journalists, knowing that any comment could be transmuted and attributed to the subject, so long as some bounds of rational interpretation were not exceeded. We would ill serve the values of the First Amendment if we were to grant near absolute, constitutional protection for such a practice. We doubt the suggestion that as a general rule readers will assume that direct quotations are but a rational

interpretation of the speaker's words, and we decline to adopt any such presumption in determining the permissible interpretations of the quotations in question here.

III

A

We apply these principles to the case before us. On summary judgment, we must draw all justifiable inferences in favor of the nonmoving party, including questions of credibility and of the weight to be accorded particular evidence. So we must assume, except where otherwise evidenced by the transcripts of the tape recordings, that petitioner is correct in denying that he made the statements attributed to him by Malcolm, and that Malcolm reported with knowledge or reckless disregard of the differences between what petitioner said and what was quoted.~

B

We must determine whether the published passages differ materially in meaning from the tape-recorded statements so as to create an issue of fact for a jury as to falsity.

(a) *"Intellectual Gigolo."* We agree with the dissenting opinion in the Court of Appeals that "[f]airly read, intellectual gigolo suggests someone who forsakes intellectual integrity in exchange for pecuniary or other gain." 895 F. 2d, at 1551. A reasonable jury could find a material difference between the meaning of this passage and petitioner's tape-recorded statement that he was considered "much too junior within the hierarchy of analysis, for these important training analysts to be caught dead with [him]."

The Court of Appeals majority found it difficult to perceive how the "intellectual gigolo" quotation was defamatory, a determination supported not by any citation to California law, but only by the argument that the passage appears to be a report of Eissler's and Anna Freud's opinions of petitioner. *Id.,* at 1541. We agree with the Court of Appeals that the most natural interpretation of this quotation is not an admission that petitioner considers himself an intellectual gigolo but a statement that Eissler and Anna Freud considered him so. It

does not follow, though, that the statement is harmless. Petitioner is entitled to argue that the passage should be analyzed as if Malcolm had reported falsely that *Eissler* had given this assessment (with the added level of complexity that the quotation purports to represent petitioner's understanding of Eissler's view). An admission that two well-respected senior colleagues considered one an "intellectual gigolo" could be as, or more, damaging than a similar self-appraisal. In all events, whether the "intellectual gigolo" quotation is defamatory is a question of California law. To the extent that the Court of Appeals based its conclusion in the First Amendment, it was mistaken.

The Court of Appeals relied upon the "incremental harm" doctrine as an alternative basis for its decision. As the court explained it: "This doctrine measures the incremental reputational harm inflicted by the challenged statements beyond the harm imposed by the nonactionable remainder of the publication." The court ruled, as a matter of law, that "[g]iven the. . . many provocative, bombastic statements indisputably made by Masson and quoted by Malcolm, the additional harm caused by the 'intellectual gigolo' quote was nominal or nonexistent, rendering the defamation claim as to this quote nonactionable."

This reasoning requires a court to conclude that, in fact, a plaintiff made the other quoted statements, and then to undertake a factual inquiry into the reputational damage caused by the remainder of the publication. As noted by the dissent in the Court of Appeals, the most "provocative, bombastic statements" quoted by Malcolm are those complained of by petitioner, and so this would not seem an appropriate application of the incremental harm doctrine.

Furthermore, the Court of Appeals provided no indication whether it considered the incremental harm doctrine to be grounded in California law or the First Amendment. Here, we reject any suggestion that the incremental harm doctrine is compelled as a matter of First Amendment protection for speech. The question of incremental harm does not bear upon

whether a defendant has published a statement with knowledge of falsity or reckless disregard of whether it was false or not. As a question of state law, on the other hand, we are given no indication that California accepts this doctrine, though it remains free to do so. Of course, state tort law doctrines of injury, causation, and damages calculation might allow a defendant to press the argument that the statements did not result in any incremental harm to a plaintiff's reputation.

(b) *"Sex, Women, Fun."* This passage presents a closer question. The "sex, women, fun" quotation offers a very different picture of petitioner's plans for Maresfield Gardens than his remark that "Freud's library alone is priceless." Petitioner's other tape-recorded remarks did indicate that he and another analyst planned to have great parties at the Freud house and, in a context that may not even refer to Freud house activities, to "pass women on to each other." We cannot conclude as a matter of law that these remarks bear the same substantial meaning as the quoted passage's suggestion that petitioner would make the Freud house a place of "sex, women, fun."

(c) *"It Sounded Better."* We agree with the District Court and the Court of Appeals that any difference between petitioner's tape-recorded statement that he "just liked" the name Moussaieff, and the quotation that "it sounded better" is, in context, immaterial. Although Malcolm did not include all of petitioner's lengthy explanation of his name change, she did convey the gist of that explanation: Petitioner took his abandoned family name as his middle name. We agree with the Court of Appeals that the words attributed to petitioner did not materially alter the meaning of his statement.

(d) *"I Don't Know Why I Put It In."* Malcolm quotes petitioner as saying that he "tacked on at the last minute" a "totally gratuitous" remark about the "sterility of psychoanalysis" in an academic paper, and that he did so for no particular reason. In the tape recordings, petitioner does admit that the remark was "possibly [a] gratuitously offensive way to end a paper to a group of analysts," but when asked why he included the remark, he answered "[because] it was true . . . I really believe it."

Malcolm's version contains material differences from petitioner's statement, and it is conceivable that the alteration results in a statement that could injure a scholar's reputation.

(e) *"Greatest Analyst Who Ever Lived."* While petitioner did, on numerous occasions, predict that his theories would do irreparable damage to the practice of psychoanalysis, and did suggest that no other analyst shared his views, no tape-recorded statement appears to contain the substance or the arrogant and unprofessional tone apparent in this quotation. A material difference exists between the quotation and the tape-recorded statements, and a jury could find that the difference exposed petitioner to contempt, ridicule, or obloquy.

(f) *"He Had The Wrong Man."* The quoted version makes it appear as if petitioner rejected a plea to remain in stoic silence and do "the honorable thing." The tape-recorded version indicates that petitioner rejected a plea supported by far more varied motives: Eissler told petitioner that not only would silence be "the honorable thing," but petitioner would "save face," and might be rewarded for that silence with eventual reinstatement. Petitioner described himself as willing to undergo a scandal in order to shine the light of publicity upon the actions of the Freud Archives, while Malcolm would have petitioner describe himself as a person who was "the wrong man" to do "the honorable thing." This difference is material, a jury might find it defamatory, and, for the reasons we have given, there is evidence to support a finding of deliberate or reckless falsification.

C

Because of the Court of Appeals' disposition with respect to Malcolm, it did not have occasion to address petitioner's argument that the District Court erred in granting summary judgment to The New Yorker Magazine, Inc., and Alfred A. Knopf, Inc., on the basis of their respective relations with Malcolm or the lack of any independent actual malice. These questions are best addressed in the first instance on remand.

> The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.
>
> *It is so ordered.*

Historical Note About *Masson v. New Yorker*

After remand, a jury found that two quotations were false and one was defamatory. But the jury also found actual malice to be lacking, resulting in a victory for the defense.

Janet Malcolm continued writing for *The New Yorker*. She is a controversial figure. Some journalists were critical of Malcolm's handling of her story about Masson. Others lauded her. Craig Seligman, a Malcolm supporter, wrote this for *Salon*:

> The public pillorying of Janet Malcolm is one of the scandals of American letters. The world of journalism teems with hacks who will go to their graves never having written one sparkling or honest or incisive sentence; why is it Malcolm, a virtuoso stylist and a subtle, exciting thinker, who drives critics into a rage? What journalist of her caliber is as widely disliked or as often accused of bad faith? And why did so few of her colleagues stand up for her during the circus of a libel trial that scarred her career? … Dryden famously noted the "vast difference betwixt the slovenly butchering of a man, and the fineness of a stroke that separates the head from the body, and leaves it standing in its place." Malcolm's blade gleams with a razor edge. Her critics tend to go after her with broken bottles.

In 1989, as the *Masson* case was working its way through the courts, Malcolm wrote about journalistic ethics in *The Journalist and the Murderer,* published as a two-part series in *The New Yorker* and later as a book. In the work, Malcolm indicted all journalists as being "morally indefensible," writing:

> [The journalist] is a kind of confidence man, preying on people's vanity, ignorance or loneliness, gaining their trust and betraying

> them without remorse. Like the credulous widow who wakes up one day to find the charming young man and all her savings gone, so the consenting subject of a piece of nonfiction learns – when the article or book appears – *his* hard lesson.

Questions to Ponder About *Masson v. New Yorker*

A. How would you characterize Malcolm's conduct? Was she "reworking" quotes or "making them up"?

B. How would you characterize Malcolm? Is she a hero, a villain, neither, or both?

C. Does this case change your view of journalism – magazine journalism or *The New Yorker* in particular? Would you have thought quotes in a magazine like *The New Yorker* were verbatim? Or have you have assumed that writers take some latitude in the wording?

D. Should persons quoted by journalists have a cause of action for being deliberately and substantially misquoted – even if this is not done in a reputation-harming way?

E. Besides potential defamation liability, are there are other constraints on journalist behavior with regard to material in quotes? If so, what would they be?

Defamation Privileges

As difficult as it is for a plaintiff to win a prima facie case for defamation, particularly in its constitutionalized form, there are still more hurdles to successfully obtaining a judgment. Defamation defendants have powerful array of affirmative defenses to use.

First, there are **absolute privileges**. An absolute privilege protects anything said in official meetings of the legislature. That includes the floor of Congress or the state assembly chamber, as well as what happens in committee hearings.

Absolute privilege also applies to statements made in the course of court proceedings and in court documents. This makes civil and criminal litigation a huge safe harbor for defamation. This applies to lawyers, judges, jurors, and witnesses. For instance, an attorney could

tell the most malicious lies to the judge or jury, and absolutely no defamation liability would result. Of course, such behavior could get a lawyer disbarred. But that is a matter of rules of court and canons of legal ethics – tort law will not enter the fray. Yet once a lawyer steps outside and meets the press on the courthouse steps, the shields are down and defamation liability can attach to whatever is said.

In addition to matters of absolute privilege, there are affirmative defenses that the courts have categorized as **qualified privileges**. The most prominent is probably the "fair reporting privilege," a common-law doctrine pre-dating *New York Times v. Sullivan* that allows for accurate reporting of defamatory statements made in public records, in the courtroom, or in similar official contexts. The privilege is "qualified" because malice or unfairness on the part of the defendant can cause the privilege to be exceeded. Courts have recognized other qualified privileges as well, including a limited privilege for employers providing references for their former employees.

32. Privacy Torts

"I never said, 'I want to be alone.' I only said 'I want to be *let* alone!' There is all the difference."

– Greta Garbo, c. 1955

Introduction

The value people place on their privacy is famously reflected in the Constitution. But it is also reflected in tort law.

Back in 1890, in one of the most cited law review articles of all time, future U.S. Supreme Court Justice Louis D. Brandeis and his friend Samuel D. Warren argued that there existed a common-law right of privacy: Samuel D. Warren & Louis D. Brandeis, *The Right of Privacy,* 4 HARV. L. REV. 193 (1890). Courts followed that lead in construing tort law to protect the right of privacy. Then, around the middle of the 20th Century, a few writers began to break up the right of privacy into separate torts. Chief among them was William L. Prosser, who identified four separate torts within "right of privacy." See William L. Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960).

In this chapter, we will discuss three of the four privacy torts that Prosser identified: (1) false light, (2) intrusion upon seclusion, and (3) public disclosure of embarrassing facts.

The fourth tort that Prosser identified, appropriation of name or likeness (or "the right of publicity"), concerns the right of people – often celebrities – to exclusively control the use of their name and image on merchandise, in advertising, and in other means of commercial exploitation. The right-of-publicity cause of action has evolved to go beyond notions of privacy and has been increasingly discussed in terms of analogies drawn to intellectual property. It is not covered in this chapter.

The three torts of false light, intrusion, and public disclosure all protect various aspects of what you might informally call a person's right "not to be messed with" or "to be let alone."

The tort of false light is very similar to defamation, except that it is harnessed to ideas of privacy and dignity rather than reputation. It allows a cause of action where a defendant spreads a highly offensive, false statement to the public.

The tort of intrusion upon seclusion provides a cause of action against the most stereotypical invasions of privacy, such as when someone spies or peeps on someone.

The tort of public disclosure allows suit against defendants who spread to the public embarrassing facts about the plaintiff that, while true, are none of anyone's business.

Taken together, defamation and the privacy torts seek to protect a person's non-corporeal integrity – that part of ourselves that is reflected in what people thinks about us. Like defamation, the privacy torts routinely implicate First Amendment values, and they are often brought against media defendants. Because of this, a rich constitutional jurisprudence has developed to constantly patrol the perimeters of these torts.

False Light

Here is the blackletter statement for a claim for false light:

> A **prima face case for false light** is established where the defendant makes (1) a public statement (2) with actual malice (3) placing the plaintiff in a (4) false light (5) that is highly offensive to the reasonable person.

As you can see, false light is very similar to defamation. Both concern falsehoods told about the plaintiff. In fact, some jurisdictions have rejected the false light cause of action as being needlessly duplicative of defamation. Yet there are some key differences between the doctrines. And because of those differences, there are some situations in which there will be liability for defamation but not for false light, and vice versa.

The most important difference is that false light does not require reputational harm. For false light, a plaintiff can sue over a false statement even if it is reputation-enhancing rather than being

reputation-harming. Saying that someone is a war hero, for instance, when the person actually never served in the military, would be an example of a falsehood that is not reputation-harming but nonetheless could be considered highly offensive.

Notice also that false light requires that the statement be made to the public – a much higher threshold than defamation's requirement of only one other person receiving the communication.

First Amendment values are just as much implicated by the tort of false light as they are with defamation, and because of this, all the First Amendment limits to defamation apply to false light. But note that the common-law structure of the false light tort, as it is typically set forth by the courts, has built-in First Amendment compliance: Falsity and actual malice must be proved as part of the prima facie case.

Intrusion Upon Seclusion and Public Disclosure

Intrusion upon seclusion and public disclosure are quite different from false light. To sum them up as concisely as possible, you can think of intrusion upon seclusion as the tort of *peeping or creeping*, and public disclosure as the tort of *blabbing*.

Here is the blackletter for each:

> A **prima facie case for intrusion upon seclusion** is established where the defendant effects (1) an intrusion, physical or otherwise, (2) into a zone where the plaintiff has a reasonable expectation of privacy, which is (3) highly offensive to the reasonable person.
>
> A **prima facie case for public disclosure** is established where the defendant effects (1) a public disclosure of (2) private facts, which is (3) highly offensive to the reasonable person.

The public disclosure tort, in particular, is limited by a newsworthiness privilege, and it necessarily engages First Amendment concerns which courts will apply along the lines of the teachings of *New York Times v. Sullivan* and its progeny.

Case: Shulman v. Group W

This case looks at both intrusion and disclosure as they come up in the course of producing and broadcasting a ride-along reality show.

Shulman v. Group W

Supreme Court of California
June 1, 1998

18 Cal.4th 200. RUTH SHULMAN et al., Plaintiffs and Appellants, v. GROUP W PRODUCTIONS, INC., et al., Defendants and Respondents. No. S058629.

Justice KATHRYN M. WERDEGAR:

On June 24, 1990, plaintiffs Ruth and Wayne Shulman, mother and son, were injured when the car in which they and two other family members were riding on interstate 10 in Riverside County flew off the highway and tumbled down an embankment into a drainage ditch on state-owned property, coming to rest upside down. Ruth, the most seriously injured of the two, was pinned under the car. Ruth and Wayne both had to be cut free from the vehicle by the device known as "the jaws of life."

A rescue helicopter operated by Mercy Air was dispatched to the scene. The flight nurse, who would perform the medical care at the scene and on the way to the hospital, was Laura Carnahan. Also on board were the pilot, a medic and Joel Cooke, a video camera operator employed by defendants Group W Productions, Inc., and 4MN Productions. Cooke was recording the rescue operation for later broadcast.

Cooke roamed the accident scene, videotaping the rescue. Nurse Carnahan wore a wireless microphone that picked up her conversations with both Ruth and the other rescue personnel. Cooke's tape was edited into a piece approximately nine minutes long, which, with the addition of narrative voice-over, was broadcast on September 29, 1990, as a segment of *On Scene: Emergency Response.*

The segment begins with the Mercy Air helicopter shown on its way to the accident site. The narrator's voice is heard in the

background, setting the scene and describing in general terms what has happened. The pilot can be heard speaking with rescue workers on the ground in order to prepare for his landing. As the helicopter touches down, the narrator says: "[F]our of the patients are leaving by ground ambulance. Two are still trapped inside." (The first part of this statement was wrong, since only four persons were in the car to start.) After Carnahan steps from the helicopter, she can be seen and heard speaking about the situation with various rescue workers. A firefighter assures her they will hose down the area to prevent any fire from the wrecked car.

The videotape shows only a glimpse of Wayne, and his voice is never heard. Ruth is shown several times, either by brief shots of a limb or her torso, or with her features blocked by others or obscured by an oxygen mask. She is also heard speaking several times. Carnahan calls her "Ruth," and her last name is not mentioned on the broadcast.

While Ruth is still trapped under the car, Carnahan asks Ruth's age. Ruth responds, "I'm old." On further questioning, Ruth reveals she is 47, and Carnahan observes that "it's all relative. You're not that old." During her extrication from the car, Ruth asks at least twice if she is dreaming. At one point she asks Carnahan, who has told her she will be taken to the hospital in a helicopter: "Are you teasing?" At another point she says: "This is terrible. Am I dreaming?" She also asks what happened and where the rest of her family is, repeating the questions even after being told she was in an accident and the other family members are being cared for. While being loaded into the helicopter on a stretcher, Ruth says: "I just want to die." Carnahan reassures her that she is "going to do real well," but Ruth repeats: "I just want to die. I don't want to go through this."

Ruth and Wayne are placed in the helicopter, and its door is closed. The narrator states: "Once airborne, Laura and [the flight medic] will update their patients' vital signs and establish communications with the waiting trauma teams at Loma Linda." Carnahan, speaking into what appears to be a radio microphone, transmits some of Ruth's vital signs and states that Ruth cannot

move her feet and has no sensation. The video footage during the helicopter ride includes a few seconds of Ruth's face, covered by an oxygen mask. Wayne is neither shown nor heard.

The helicopter lands on the hospital roof. With the door open, Ruth states while being taken out: "My upper back hurts." Carnahan replies: "Your upper back hurts. That's what you were saying up there." Ruth states: "I don't feel that great." Carnahan responds: "You probably don't."

Finally, Ruth is shown being moved from the helicopter into the hospital. The narrator concludes by stating: "Once inside both patients will be further evaluated and moved into emergency surgery if need be. Thanks to the efforts of the crew of Mercy Air, the firefighters, medics and police who responded, patients' lives were saved." As the segment ends, a brief, written epilogue appears on the screen, stating: "Laura's patient spent months in the hospital. She suffered severe back injuries. The others were all released much sooner."

The accident left Ruth a paraplegic. When the segment was broadcast, Wayne phoned Ruth in her hospital room and told her to turn on the television because "Channel 4 is showing our accident now." Shortly afterward, several hospital workers came into the room to mention that a videotaped segment of her accident was being shown. Ruth was "shocked, so to speak, that this would be run and I would be exploited, have my privacy invaded, which is what I felt had happened." She did not know her rescue had been recorded in this manner and had never consented to the recording or broadcast. Ruth had the impression from the broadcast "that I was kind of talking nonstop, and I remember hearing some of the things I said, which were not very pleasant." Asked at deposition what part of the broadcast material she considered private, Ruth explained: "I think the whole scene was pretty private. It was pretty gruesome, the parts that I saw, my knee sticking out of the car. I certainly did not look my best, and I don't feel it's for the public to see. I was not at my best in what I was thinking and what I was saying and what was being shown, and it's not for the public to see this trauma that I was going through."

Ruth and Wayne sued the producers of *On Scene: Emergency Response*, as well as others.~ The first amended complaint included two causes of action for invasion of privacy, one based on defendants' unlawful intrusion by videotaping the rescue in the first instance and the other based on the public disclosure of private facts, i.e., the broadcast.~

We conclude summary judgment was proper as to plaintiffs' cause of action for publication of private facts, but not as to their cause of action for intrusion.~

Discussion

Influenced by Dean Prosser's analysis of the tort actions for invasion of privacy (Prosser, *Privacy* (1960) 48 Cal.L.Rev. 381) and the exposition of a similar analysis in the Restatement Second of Torts sections 652A-652E~ , California courts have recognized both of the privacy causes of action pleaded by plaintiffs here: (1) public disclosure of private facts, and (2) intrusion into private places, conversations or other matters.~

We shall review the elements of each privacy tort, as well as the common law and constitutional privilege of the press as to each, and shall apply in succession this law to the facts pertinent to each cause of action.

I. *Publication of Private Facts*

The claim that a publication has given unwanted publicity to allegedly private aspects of a person's life is one of the more commonly litigated and well-defined areas of privacy law. In *Diaz* v. *Oakland Tribune, Inc.* (1983) 139 Cal.App.3d 118, 126, the appellate court accurately discerned the following elements of the public disclosure tort: "(1) public disclosure (2) of a private fact (3) which would be offensive and objectionable to the reasonable person and (4) which is not of legitimate public concern." That formulation does not differ significantly from the Restatement's, which provides that "[o]ne who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that [¶] (a) would be highly

offensive to a reasonable person, and [¶] (b) is not of legitimate concern to the public."

The element critical to this case is the presence or absence of legitimate public interest, i.e., newsworthiness, in the facts disclosed.~ We conclude, inter alia, that lack of newsworthiness is an element of the "private facts" tort, making newsworthiness a complete bar to common law liability. We further conclude that the analysis of newsworthiness inevitably involves accommodating conflicting interests in personal privacy and in press freedom as guaranteed by the First Amendment to the United States Constitution, and that in the circumstances of this case-where the facts disclosed about a private person involuntarily caught up in events of public interest bear a logical relationship to the newsworthy subject of the broadcast and are not intrusive in great disproportion to their relevance-the broadcast was of legitimate public concern, barring liability under the private facts tort.

The *Diaz* formulation, like the Restatement's, includes as a tort element that the matter published is not of legitimate public concern. *Diaz* thus expressly makes the *lack* of newsworthiness part of the plaintiff's case in a private facts action.~ The *Diaz* approach is consistent with the tort's historical development, in which defining an actionable invasion of privacy has generally been understood to require balancing privacy interests against the press's right to report, and the community's interest in receiving, news and information.

We therefore agree with defendants that under California common law the dissemination of truthful, newsworthy material is not actionable as a publication of private facts. If the contents of a broadcast or publication are of legitimate public concern, the plaintiff cannot establish a necessary element of the tort action, the lack of newsworthiness.~

Newsworthiness – constitutional or common law – is also difficult to define because it may be used as either a descriptive or a normative term. "Is the term 'newsworthy' a descriptive predicate, intended to refer to the fact there is widespread public interest? Or is it a value predicate, intended to indicate that the

publication is a meritorious contribution and that the public's interest is praiseworthy?" (Comment, *The Right of Privacy: Normative-Descriptive Confusion in the Defense of Newsworthiness* (1963) 30 U. Chi. L.Rev. 722, 725.) A position at either extreme has unpalatable consequences. If "newsworthiness" is completely descriptive-if all coverage that sells papers or boosts ratings is deemed newsworthy-it would seem to swallow the publication of private facts tort, for "it would be difficult to suppose that publishers were in the habit of reporting occurrences of little interest." (*Id.* at p. 734.) At the other extreme, if newsworthiness is viewed as a purely normative concept, the courts could become to an unacceptable degree editors of the news and self-appointed guardians of public taste.

The difficulty of finding a workable standard in the middle ground between the extremes of normative and descriptive analysis, and the variety of factual circumstances in which the issue has been presented, have led to considerable variation in judicial descriptions of the newsworthiness concept. As one commentator has noted, the newsworthiness test "bears an enormous social pressure, and it is not surprising to find that the common law is deeply confused and ambivalent about its application." (Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort* (1989) 77 Cal.L.Rev. 957, 1007.) Without attempting an exhaustive survey, and with particular focus on California decisions, we review some of these attempts below.~

Our prior decisions have not explicitly addressed the type of privacy invasion alleged in this case: the broadcast of embarrassing pictures and speech of a person who, while generally not a public figure, has become involuntarily involved in an event or activity of legitimate public concern. We nonetheless draw guidance from those decisions, in that they articulate the competing interests to be balanced. First, the analysis of newsworthiness does involve courts to some degree in a normative assessment of the "social value" of a publication. All material that might attract readers or viewers is not, simply by virtue of its attractiveness, of *legitimate* public interest. Second, the evaluation of newsworthiness depends on the degree of

intrusion and the extent to which the plaintiff played an important role in public events (*ibid.*), and thus on a comparison between the information revealed and the nature of the activity or event that brought the plaintiff to public attention. "Some reasonable proportion is ... to be maintained between the events or activity that makes the individual a public figure and the private facts to which publicity is given. Revelations that may properly be made concerning a murderer or the President of the United States would not be privileged if they were to be made concerning one who is merely injured in an automobile accident." (Rest.2d Torts, § 652D, com. h, p. 391.)~

Courts balancing these interests in cases similar to this have recognized that, when a person is involuntarily involved in a newsworthy incident, not all aspects of the person's life, and not everything the person says or does, is thereby rendered newsworthy. "Most persons are connected with some activity, vocational or avocational, as to which the public can be said as a matter of law to have a legitimate interest or curiosity. To hold as a matter of law that private facts as to such persons are also within the area of legitimate public interest could indirectly expose everyone's private life to public view." This principle is illustrated in the decisions holding that, while a particular event was newsworthy, identification of the plaintiff as the person involved, or use of the plaintiff's identifiable image, added nothing of significance to the story and was therefore an unnecessary invasion of privacy. (See~ *Gill* v. *Curtis*, 38 Cal.2d at p. 279 (use of plaintiffs' photograph to illustrate article on love); *Melvin* v. *Reid*, 112 Cal.App. at pp. 291-292 (identification of plaintiff as former prostitute); *Barber* v. *Time, Inc.*, 348 Mo. at pp. 1207-1208 (use of plaintiff's name and photograph in article about her unusual medical condition); *Vassiliades* v. *Garfinckel's Brooks Bros.*, 492 A.2d at pp. 589-590 (use of plaintiff's photograph to illustrate presentations on cosmetic surgery).) For the same reason, a college student's candidacy for president of the student body did not render newsworthy a newspaper's revelation that the student was a transsexual, where the court could find "little if any connection between the information disclosed and [the student's] fitness for office." (*Diaz*, 139

Cal.App.3d at p. 134.) Similarly, a mother's private words over the body of her slain son as it lay in a hospital room were held nonnewsworthy despite undisputed legitimate public interest in the subjects of gang violence and murder. (*Green* v. *Chicago Tribune Co.* (1996) 286 Ill.App.3d 1).)

Consistent with the above, courts have generally protected the privacy of otherwise private individuals involved in events of public interest "by requiring that a logical nexus exist between the complaining individual and the matter of legitimate public interest." The contents of the publication or broadcast are protected only if they have "some substantial relevance to a matter of legitimate public interest."~ This approach accords with our own prior decisions, in that it balances the public's right to know against the plaintiff's privacy interest by drawing a protective line at the point the material revealed ceases to have any substantial connection to the subject matter of the newsworthy report.~ This approach also echoes the Restatement commentators' widely quoted and cited view that legitimate public interest does not include "a morbid and sensational prying into private lives *for its own sake* ...."

An analysis measuring newsworthiness of facts about an otherwise private person involuntarily involved in an event of public interest by their relevance to a newsworthy subject matter incorporates considerable deference to reporters and editors, avoiding the likelihood of unconstitutional interference with the freedom of the press to report truthfully on matters of legitimate public interest. In general, it is not for a court or jury to say how a particular story is best covered. The constitutional privilege to publish truthful material "ceases to operate only when an editor abuses his broad discretion to publish matters that are of legitimate public interest."~ Our analysis thus does not purport to distinguish among the various legitimate purposes that may be served by truthful publications and broadcasts. As we said in *Gill* v. *Hearst*, "the constitutional guarantees of freedom of expression apply with equal force to the publication whether it be a news report or an entertainment feature ...." Thus, newsworthiness is not limited to "news" in the narrow sense of reports of current events. "It extends also to

the use of names, likenesses or facts in giving information to the public for purposes of education, amusement or enlightenment, when the public may reasonably be expected to have a legitimate interest in what is published."~

Finally, an analysis focusing on relevance allows courts and juries to decide most cases involving persons involuntarily involved in events of public interest without "balanc[ing] interests in ad hoc fashion in each case". The articulation of standards that do not require "*ad hoc* resolution of the competing interest in each ... case" (*Gertz* v. *Robert Welch*,*Inc.* (1974) 418 U.S. 323) is favored in areas affecting First Amendment rights, because the relative predictability of results reached under such standards minimizes the inadvertent chilling of protected speech, and because standards that can be applied objectively provide a stronger shield against the unconstitutional punishment of unpopular speech.

On the other hand, no mode of analyzing newsworthiness can be applied mechanically or without consideration of its proper boundaries. To observe that the newsworthiness of private facts about a person involuntarily thrust into the public eye depends, in the ordinary case, on the existence of a logical nexus between the newsworthy event or activity and the facts revealed is not to deny that the balance of free press and privacy interests may require a different conclusion when the intrusiveness of the revelation is greatly disproportionate to its relevance. Intensely personal or intimate revelations might not, in a given case, be considered newsworthy, especially where they bear only slight relevance to a topic of legitimate public concern. (See *Kapellas*, 1 Cal.3d at pp. 37-38 (public interest in free flow of information will outweigh interest in individual privacy "[i]f the publication does not proceed widely beyond the bounds of propriety and reason in disclosing facts about those closely related to an aspirant for public office ...")~.)~

Turning now to the case at bar, we consider whether the possibly private facts complained of here-broadly speaking, Ruth's appearance and words during the rescue and evacuation-

were of legitimate public interest. If so, summary judgment was properly entered.~

We agree at the outset with defendants that the subject matter of the broadcast as a whole was of legitimate public concern. Automobile accidents are by their nature of interest to that great portion of the public that travels frequently by automobile. The rescue and medical treatment of accident victims is also of legitimate concern to much of the public, involving as it does a critical service that any member of the public may someday need. The story of Ruth's difficult extrication from the crushed car, the medical attention given her at the scene, and her evacuation by helicopter was of particular interest because it highlighted some of the challenges facing emergency workers dealing with serious accidents.

The more difficult question is whether Ruth's appearance and words as she was extricated from the overturned car, placed in the helicopter and transported to the hospital were of legitimate public concern. Pursuant to the analysis outlined earlier, we conclude the disputed material was newsworthy as a matter of law. One of the dramatic and interesting aspects of the story as a whole is its focus on flight nurse Carnahan, who appears to be in charge of communications with other emergency workers, the hospital base and Ruth, and who leads the medical assistance to Ruth at the scene. Her work is portrayed as demanding and important and as involving a measure of personal risk (e.g., in crawling under the car to aid Ruth despite warnings that gasoline may be dripping from the car).[10] The broadcast segment makes apparent that this type of emergency care requires not only medical knowledge, concentration and courage, but an ability to talk and listen to severely traumatized patients. One of the challenges Carnahan faces in assisting Ruth is the confusion, pain and fear that Ruth understandably feels in the aftermath of the accident. For that reason the broadcast video depicting Ruth's injured physical state (which was not luridly shown) and audio showing her disorientation and despair were substantially relevant to the segment's newsworthy subject matter.

Plaintiffs argue that showing Ruth's "intimate private, medical facts and her suffering was not *necessary* to enable the public to understand the significance of the accident or the rescue as a public event." The standard, however, is not necessity. That the broadcast *could* have been edited to exclude some of Ruth's words and images and still excite a minimum degree of viewer interest is not determinative. Nor is the possibility that the members of this or another court, or a jury, might find a differently edited broadcast more to their taste or even more interesting. The courts do not, and constitutionally could not, sit as superior editors of the press.

The challenged material was thus substantially relevant to the newsworthy subject matter of the broadcast and did not constitute a "morbid and sensational prying into private lives *for its own sake*." (Rest.2d Torts, § 652D, com. h, p. 391, italics added.) Nor can we say the broadcast material was so lurid and sensational in emotional tone, or so intensely personal in content, as to make its intrusiveness disproportionate to its relevance. Under these circumstances, the material was, as a matter of law, of legitimate public concern. Summary judgment was therefore properly entered against Ruth on her cause of action for publication of private facts.~

One might argue that, while the contents of the broadcast were of legitimate interest in that they reflected on the nature and quality of emergency rescue services, the images and sounds that potentially allowed identification of Ruth as the accident victim were irrelevant and of no legitimate public interest in a broadcast that aired some months after the accident and had little or no value as "hot" news. (See *Briscoe*, 4 Cal.3d at p. 537 (While reports of the facts of "long past" crimes are newsworthy, identification of the actor in such crimes "usually serves little independent public purpose.").) We do not take that view. It is difficult to see how the subject broadcast could have been edited to avoid completely any possible identification without severely undercutting its legitimate descriptive and narrative impact. As broadcast, the segment included neither Ruth's full name nor direct display of her face. She was nonetheless arguably identifiable by her first name (used in

recorded dialogue), her voice, her general appearance and the recounted circumstances of the accident (which, as noted, had previously been published, with Ruth's full name and city of residence, in a newspaper).~ In a video documentary of this type, however, the use of that degree of truthful detail would seem not only relevant, but essential to the narrative.

II. *Intrusion*

Of the four privacy torts identified by Prosser, the tort of intrusion into private places, conversations or matter is perhaps the one that best captures the common understanding of an "invasion of privacy." It encompasses unconsented-to physical intrusion into the home, hospital room or other place the privacy of which is legally recognized, as well as unwarranted sensory intrusions such as eavesdropping, wiretapping, and visual or photographic spying. It is in the intrusion cases that invasion of privacy is most clearly seen as an affront to individual dignity. "[A] measure of personal isolation and personal control over the conditions of its abandonment is of the very essence of personal freedom and dignity, is part of what our culture means by these concepts. A man whose home may be entered at the will of another, whose conversations may be overheard at the will of another, whose marital and familial intimacies may be overseen at the will of another, is less of a man, has less human dignity, on that account. He who may intrude upon another at will is the master of the other and, in fact, intrusion is a primary weapon of the tyrant." (Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser* (1964) 39 N.Y.U. L.Rev. 962, 973-974, fn. omitted.)~

~The action for intrusion has two elements: (1) intrusion into a private place, conversation or matter, (2) in a manner highly offensive to a reasonable person. We consider the elements in that order.

We ask first whether defendants "intentionally intrude[d], physically or otherwise, upon the solitude or seclusion of another," that is, into a place or conversation private to Wayne or Ruth. "[T]here is no liability for the examination of a public record concerning the plaintiff, ... [or] for observing him or even

taking his photograph while he is walking on the public highway ...."~ To prove actionable intrusion, the plaintiff must show the defendant penetrated some zone of physical or sensory privacy surrounding, or obtained unwanted access to data about, the plaintiff. The tort is proven only if the plaintiff had an objectively reasonable expectation of seclusion or solitude in the place, conversation or data source.

Cameraman Cooke's mere presence at the accident scene and filming of the events occurring there cannot be deemed either a physical or sensory intrusion on plaintiffs' seclusion. Plaintiffs had no right of ownership or possession of the property where the rescue took place, nor any actual control of the premises. Nor could they have had a reasonable expectation that members of the media would be excluded or prevented from photographing the scene; for journalists to attend and record the scenes of accidents and rescues is in no way unusual or unexpected.~

Two aspects of defendants' conduct, however, raise triable issues of intrusion on seclusion. First, a triable issue exists as to whether both plaintiffs had an objectively reasonable expectation of privacy in the interior of the rescue helicopter, which served as an ambulance. Although the attendance of reporters and photographers at the scene of an accident is to be expected, we are aware of no law or custom permitting the press to ride in ambulances or enter hospital rooms during treatment without the patient's consent. Other than the two patients and Cooke, only three people were present in the helicopter, all Mercy Air staff. As the Court of Appeal observed, "[i]t is neither the custom nor the habit of our society that any member of the public at large or its media representatives may hitch a ride in an ambulance and ogle as paramedics care for an injured stranger."

Second, Ruth was entitled to a degree of privacy in her conversations with Carnahan and other medical rescuers at the accident scene, and in Carnahan's conversations conveying medical information regarding Ruth to the hospital base. Cooke, perhaps, did not intrude into that zone of privacy merely by being present at a place where he could hear such conversations

with unaided ears. But by placing a microphone on Carnahan's person, amplifying and recording what she said and heard, defendants may have listened in on conversations the parties could reasonably have expected to be private.~

Whether Ruth expected her conversations with Nurse Carnahan or the other rescuers to remain private and whether any such expectation was reasonable are, on the state of the record before us, questions for the jury. We note, however, that several existing legal protections for communications could support the conclusion that Ruth possessed a reasonable expectation of privacy in her conversations with Nurse Carnahan and the other rescuers. A patient's conversation with a provider of medical care in the course of treatment, including emergency treatment, carries a traditional and legally well-established expectation of privacy.~

We turn to the second element of the intrusion tort, offensiveness of the intrusion. In a widely followed passage, the *Miller* court explained that determining offensiveness requires consideration of all the circumstances of the intrusion, including its degree and setting and the intruder's "motives and objectives." (*Miller*, 187 Cal.App.3d at pp. 1483-1484; cited, e.g., in *Hill*, 7 Cal.4th at p. 26. The *Miller* court concluded that reasonable people could regard the camera crew's conduct in filming a man's emergency medical treatment in his home, without seeking or obtaining his or his wife's consent, as showing "a cavalier disregard for ordinary citizens' rights of privacy" and, hence, as highly offensive. (*Miller*, 187 Cal.App.3d at p. 1484.)

We agree with the *Miller* court that all the circumstances of an intrusion, including the motives or justification of the intruder, are pertinent to the offensiveness element. Motivation or justification becomes particularly important when the intrusion is by a member of the print or broadcast press in the pursuit of news material.[17] Although, as will be discussed more fully later, the First Amendment does not immunize the press from liability for torts or crimes committed in an effort to gather news, the constitutional protection of the press does reflect the strong

societal interest in effective and complete reporting of events, an interest that may-as a matter of tort law-justify an intrusion that would otherwise be considered offensive. While refusing to recognize a broad privilege in newsgathering against application of generally applicable laws, the United States Supreme Court has also observed that "without some protection for seeking out the news, freedom of the press could be eviscerated." (*Branzburg* v. *Hayes* (1972) 408 U.S. 665, 681.~)

In deciding, therefore, whether a reporter's alleged intrusion into private matters (i.e., physical space, conversation or data) is "offensive" and hence actionable as an invasion of privacy, courts must consider the extent to which the intrusion was, under the circumstances, justified by the legitimate motive of gathering the news. Information-collecting techniques that may be highly offensive when done for socially unprotected reasons-for purposes of harassment, blackmail or prurient curiosity, for example-may not be offensive to a reasonable person when employed by journalists in pursuit of a socially or politically important story. Thus, for example, "a continuous surveillance which is tortious when practiced by a creditor upon a debtor may not be tortious when practiced by media representatives in a situation where there is significant public interest [in discovery of the information sought]." (Hill, *Defamation and Privacy Under the First Amendment* (1976) 76 Colum. L.Rev. 1205, 1284, fn. omitted.)

The mere fact the intruder was in pursuit of a "story" does not, however, generally justify an otherwise offensive intrusion; offensiveness depends as well on the particular method of investigation used. At one extreme, " 'routine ... reporting techniques,' " such as asking questions of people with information ("including those with confidential or restricted information") could rarely, if ever, be deemed an actionable intrusion. At the other extreme, violation of well-established legal areas of physical or sensory privacy-trespass into a home or tapping a personal telephone line, for example-could rarely, if ever, be justified by a reporter's need to get the story. Such acts would be deemed highly offensive even if the information sought was of weighty public concern; they would also be

outside any protection the Constitution provides to newsgathering.

Between these extremes lie difficult cases, many involving the use of photographic and electronic recording equipment. Equipment such as hidden cameras and miniature cordless and directional microphones are powerful investigative tools for newsgathering, but may also be used in ways that severely threaten personal privacy. California tort law provides no bright line on this question; each case must be taken on its facts.

On this summary judgment record, we believe a jury could find defendants' recording of Ruth's communications to Carnahan and other rescuers, and filming in the air ambulance, to be " 'highly offensive to a reasonable person.' "With regard to the depth of the intrusion, a reasonable jury could find highly offensive the placement of a microphone on a medical rescuer in order to intercept what would otherwise be private conversations with an injured patient. In that setting, as defendants could and should have foreseen, the patient would not know her words were being recorded and would not have occasion to ask about, and object or consent to, recording. Defendants, it could reasonably be said, took calculated advantage of the patient's "vulnerability and confusion." Arguably, the last thing an injured accident victim should have to worry about while being pried from her wrecked car is that a television producer may be recording everything she says to medical personnel for the possible edification and entertainment of casual television viewers.

For much the same reason, a jury could reasonably regard entering and riding in an ambulance-whether on the ground or in the air-with two seriously injured patients to be an egregious intrusion on a place of expected seclusion. Again, the patients, at least in this case, were hardly in a position to keep careful watch on who was riding with them, or to inquire as to everyone's business and consent or object to their presence. A jury could reasonably believe that fundamental respect for human dignity requires the patients' anxious journey be taken only with those

whose care is solely for them and out of sight of the prying eyes (or cameras) of others.

Nor can we say as a matter of law that defendants' motive-to gather usable material for a potentially newsworthy story-necessarily privileged their intrusive conduct as a matter of common law tort liability. A reasonable jury could conclude the producers' desire to get footage that would convey the "feel" of the event-the real sights and sounds of a difficult rescue-did not justify either placing a microphone on Nurse Carnahan or filming inside the rescue helicopter. Although defendants' purposes could scarcely be regarded as evil or malicious (in the colloquial sense), their behavior could, even in light of their motives, be thought to show a highly offensive lack of sensitivity and respect for plaintiffs' privacy. A reasonable jury could find that defendants, in placing a microphone on an emergency treatment nurse and recording her conversation with a distressed, disoriented and severely injured patient, without the patient's knowledge or consent, acted with highly offensive disrespect for the patient's personal privacy comparable to, if not quite as extreme as, the disrespect and insensitivity demonstrated in *Miller*.

Turning to the question of constitutional protection for newsgathering, one finds the decisional law reflects a general rule of *nonprotection*: the press in its newsgathering activities enjoys no immunity or exemption from generally applicable laws.~

"It is clear that the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil and criminal statutes of general applicability. Under prior cases, otherwise valid laws serving substantial public interests may be enforced against the press as against others, despite the possible burden that may be imposed." California's intrusion tort~ appl[ies] to all private investigative activity, whatever its purpose and whoever the investigator, and impose no greater restrictions on the media than on anyone else. (If anything, the media enjoy some degree of *favorable* treatment under the California intrusion tort, as a

reporter's motive to discover socially important information may reduce the offensiveness of the intrusion.) These laws serve the undisputedly substantial public interest in allowing each person to maintain an area of physical and sensory privacy in which to live. Thus, defendants enjoyed no constitutional privilege, merely by virtue of their status as members of the news media, to eavesdrop in violation of section 632 or otherwise to intrude tortiously on private places, conversations or information.

Courts have impliedly recognized that a generally applicable law might, under some circumstances, impose an "impermissible burden" on newsgathering; such a burden might be found in a law that, as applied to the press, would result in "a significant constriction of the flow of news to the public" and thus "eviscerate[]" the freedom of the press. No basis exists, however, for concluding that either section 632 or the intrusion tort places such a burden on the press, either in general or under the circumstances of this case. The conduct of journalism does not depend, as a general matter, on the use of secret devices to record private conversations.~ More specifically, nothing in the record or briefing here suggests that reporting on automobile accidents and medical rescue activities depends on secretly recording accident victims' conversations with rescue personnel or on filming inside an occupied ambulance. Thus, if any exception exists to the general rule that "the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally", such exception is inapplicable here.[18]

As should be apparent from the above discussion, the constitutional protection accorded newsgathering, if any, is far narrower than the protection surrounding the publication of truthful material; consequently, the fact that a reporter may be seeking "newsworthy" material does not in itself privilege the investigatory activity. The reason for the difference is simple: The intrusion tort, unlike that for publication of private facts, does not subject the press to liability for the contents of its publications.~

As to constitutional policy, we repeat that the threat of infringement on the liberties of the press from intrusion liability is minor compared with the threat from liability for publication of private facts. Indeed, the distinction led one influential commentator to assert flatly that "[i]ntrusion does not raise first amendment difficulties since its perpetration does not involve speech or other expression." (Nimmer, 56 Cal.L.Rev. at p. 957.) Such a broad statement is probably not warranted; a liability rule, for example, that punished as intrusive a reporter's merely asking questions about matters an organization or person did not choose to publicize would likely be deemed an impermissible restriction on press freedom. But no constitutional precedent or principle of which we are aware gives a reporter general license to intrude in an objectively offensive manner into private places, conversations or matters merely because the reporter thinks he or she may thereby find something that will warrant publication or broadcast.~

George, C. J., and Kennard, J., concurred.

Justice JOYCE L. KENNARD, concurring:

Applying existing California tort law, the plurality opinion holds that to establish a cause of action for invasion of privacy by publication of private facts the plaintiff must show that a private fact was publicly disclosed, that the disclosure would be offensive and objectionable to a reasonable person, and that the private fact was not newsworthy. I agree that here summary judgment was properly entered against plaintiffs on that cause of action. There is, however, a tension between the plurality opinion's rule of liability for publication of private facts and some aspects of the United States Supreme Court's current First Amendment jurisprudence. In my view, the potential clash in this area of law between personal privacy interests and the First Amendment's guarantee of freedom of speech and of the press warrants a more detailed examination than the plurality opinion has undertaken.~

I leave open the possibility that the plurality opinion's "newsworthiness" rule may require further adjustment and revision in the future when we are presented with a case in

which its application, unlike the situation here, would affirm liability for the publication of truthful private facts.

Mosk, J., concurred.

Justice MING W. CHIN, concurring and dissenting:

I concur in part I of the plurality opinion. The newsworthy nature of the disclosure absolutely precludes plaintiffs' recovery under this theory, and summary judgment for defendants on this cause of action was therefore proper.

I dissent, however, from the plurality's holding that plaintiffs' "intrusion" cause of action should be remanded for trial. The critical question is whether defendants' privacy intrusion was " '*highly* offensive to a reasonable person.' " (Plur. opn., *ante*, at p. 231, italics added.) As the plurality explains, "the constitutional protection of the press does reflect the strong societal interest in effective and complete reporting of events, an interest that may-as a matter of law-justify an intrusion that *would otherwise be considered offensive*." (*Id.* at p. 236, italics added.) I also agree with the plurality that "Information-collecting techniques that *may be highly offensive* when done for socially unprotected reasons-for purposes of harassment, blackmail or prurient curiosity, for example-*may not be offensive to a reasonable person* when employed by journalists in pursuit of a socially or politically important story." (*Id.* at p. 237, italics added.)

Although I agree with the plurality's premises, I disagree with the conclusion it draws from those premises.~ Ruth's expectations notwithstanding, I do not believe that a reasonable trier of fact could find that defendants' conduct in this case was "highly offensive to a reasonable person," the test adopted by the plurality. Plaintiffs do not allege that defendants, though present at the accident rescue scene and in the helicopter, interfered with either the rescue or medical efforts, elicited embarrassing or offensive information from plaintiffs, or even tried to interrogate or interview them. Defendants' news team evidently merely recorded newsworthy events "of legitimate public concern" (plur. opn., *ante,* at p. 228) as they transpired. Defendants' apparent motive in undertaking the supposed

privacy invasion was a reasonable and nonmalicious one: to obtain an accurate depiction of the rescue efforts from start to finish. The event was newsworthy, and the ultimate broadcast was both dramatic and educational, rather than tawdry or embarrassing.

No illegal trespass on private property occurred, and any technical illegality arising from defendants' recording Ruth's conversations with medical personnel was not so "highly offensive" as to justify liability. Recording the innocuous, inoffensive conversations that occurred between Ruth and the nurse assisting her (see plur. opn., *ante*, at p. 211) and filming the seemingly routine, though certainly newsworthy, helicopter ride (*id.* at pp. 211-212) may have technically invaded plaintiffs' private "space," but in my view no "highly offensive" invasion of their privacy occurred.

We should bear in mind we are not dealing here with a true "interception"-e.g., a surreptitious wiretap by a third party-of words spoken in a truly private place-e.g., in a psychiatrist's examining room, an attorney's office, or a priest's confessional. Rather, here the broadcast showed Ruth speaking in settings where others could hear her, and the fact that she did not realize she was being recorded does not ipso facto transform defendants' newsgathering procedures into *highly* offensive conduct within the meaning of the law of intrusion.

In short, to turn a jury loose on the defendants in this case is itself "highly offensive" to me. I would reverse the judgment of the Court of Appeal with directions to affirm the summary judgment for defendants on all causes of action.

Mosk, J., concurred.

Justice JANICE ROGERS BROWN, concurring and dissenting:

I concur in the plurality's conclusion that summary judgment should not have been granted as to the cause of action for intrusion, and I generally concur in its analysis of that cause of action. I respectfully dissent, however, from the conclusion that summary judgment was proper as to plaintiff Ruth Shulman's

cause of action for publication of private facts. For the reasons discussed below, I would hold that there are triable issues of material fact as to that cause of action as well.~

In this case, a straightforward application of the *Kapellas* newsworthiness test leads to one inescapable conclusion-that, at the very least, there are triable issues of material fact on the question of newsworthiness. The private facts broadcast had little, if any, social value. (*Kapellas*, 1 Cal.3d at p. 36.) The public has no legitimate interest in witnessing Ruth's disorientation and despair. Nor does it have any legitimate interest in knowing Ruth's personal and innermost thoughts immediately after sustaining injuries that rendered her a paraplegic and left her hospitalized for months-"I just want to die. I don't want to go through this." The depth of the broadcast's intrusion into ostensibly private affairs was substantial. (*Ibid.*) As the plurality later acknowledges in analyzing "the depth of the intrusion" for purposes of Ruth's intrusion cause of action, "[a]rguably, the last thing an injured accident victim should have to worry about while being pried from her wrecked car is that a television producer may be recording everything she says to medical personnel for the possible edification and entertainment of casual television viewers. [¶] For much the same reason, a jury could reasonably regard entering and riding in an ambulance-whether on the ground or in the air-with two seriously injured patients to be an egregious intrusion on a place of expected seclusion.... A jury could reasonably believe that fundamental respect for human dignity requires the patients' anxious journey be taken only with those whose care is solely for them and out of sight of the prying eyes (or cameras) of others." (Plur. opn., *ante*, at p. 238.) There was nothing voluntary about Ruth's position of public notoriety. (*Kapellas*, 1 Cal.3d at p. 36.) She was "involuntarily caught up in events of public interest" (plur. opn., *ante*, at p. 215), all the more so because defendants appear to have surreptitiously and unlawfully recorded her private conversations with Nurse Laura Carnahan. (See *id.* at pp. 233-235.)~

In short, I see no reason to abandon our traditional newsworthiness test, which has produced consistent and

predictable results over the course of nearly three decades. As I have explained, a straightforward application of that test demonstrates there are triable issues of material fact on the question of newsworthiness and, hence, that summary judgment should not have been granted on Ruth's cause of action for publication of private facts.

For the reasons discussed above, I would affirm the judgment of the Court of Appeal in its entirety.

Baxter, J., concurred.

Questions to Ponder About *Shulman v. Group W*

A. How should we regard the potential privacy interest a person has in a moment of tragedy? How does it compare, in terms of privacy interests, to private-moment archetypes such as a penitent's confession or a couple's honeymoon night? If we should regard it as highly private, what is it about having a near-death experience and making the transition to life with paraplegia that makes it highly private?

B. Do you agree with the court's characterization of the footage as newsworthy because of the legitimate public interest in emergency rescue services?

C. If the public interest in the functioning of emergency rescue services makes particular instances of individuals' interactions with those services newsworthy, then what else would be newsworthy by that definition? Is there a public interest in the efficacy of services rendered in a county hospital? If so, does that make newsworthy the reporting of patient's diagnoses and treatments? How about the function of the public schools – is there a public interest in that? And if so, would the reporting of students' grades be justified? If not, what justifies a distinction, and where should the line be drawn?

Aftermatter

Unmarked Edits Generally

(For both volumes)

Various edits are not marked in the text. They have been left unmarked because to mark them would have made the text substantially less readable.

In general, whole citations and portions of citations have been liberally removed from the readings. Parallel citations have been removed generally. Spaces have been added or deleted in cases where the observed style was unconventional and jarring. In cases where case names were printed in roman type, case names have generally been italicized. Where quotation marks occurred around a blockquote, they have generally been removed. Lengthy portions of quoted material have sometimes been re-set as blockquotes. Dashes and ellipses have 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. Footnote references and footnotes have been removed without notation.

The author attributions at the beginning of case material, in general, are not attributable to the original source. Formatting of citations has been changed here and there to conform to conventions and norms. For example, in various places the spelled-out word "section" has been replaced with the § symbol, including in *Rowland v. Christian, Beswick v. CareStat,* the text discussing California Civil Code § 847, and *Issacs v. Monkeytown, U.S.A.* Typesetting for citations may have been changed, such as from lower-case to small-caps for titles of journals, for example in *Tarasoff v. UC Regents* and *Weirum v. RKO. Harris v. Scott,* at least as the opinion was reproduced in the reporter volume, had unconventional punctuation and spacing in citations; thus, those were changed to be more conventional.

Case citations have generally 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. In some cases, punctuation was changed to accommodate cites that were eliminated without notation.

Idiosyncratic Unmarked Edits in this Volume

Idiosyncratic unmarked edits were made as follows:

Isaacs v. Monkeytown, U.S.A: Some of what appear to be typos have been corrected, including missing punctuation and oddly capitalized words, which have been corrected to lower case. Officially cited as "Isaacs v. Powell." Supplied italicization in a blockquote was removed and reset in roman text, with the note about the italicization removed.

Silkwood v. Kerr-McGee (in Chapter 13, Strict Liability): In the transcript of Spence's argument, the paragraphing is my own. Some of the punctuation has been changed to enhance readability, and some capitalization may be different as well. See the "Rights Information" section in the front matter of this book for information about the "FACTS" section.

DOJ Press Release on Toyota Unintended Acceleration: The original press release referred to Toyota as "TOYOTA" in all capital letters. The all-caps style was replaced with regular capitalization to enhance readability.

FDA v. Phusion Products LLC: A list of references was omitted without notation.

Leichtman v. WLW Jacor: Spaces added into citation.

Sousanis v. Northwest Airlines: The word "the" was changed to "she" to reverse what appears to be a transcription error possibly attributable to the reporter rather than the court. The original passage appearing in the reporter volume is "a chronic back condition that worsens if the is forced to sit for too long." The changed version is "a chronic back condition that worsens if she is forced to sit for too long."

Boring v. Google: Section heading removed without notation.

Intel Corp. v. Hamidi: Brackets were changed to parentheses; paragraph breaks were removed without notation.

Kirby v. Sega: The citation format of the statute cite was altered.

Silkwood v. Kerr-McGee (in Chapter 25, Punitive Damages): In the transcript of Spence's argument, the paragraphing is my own. Some of the punctuation has been changed to enhance readability, and some capitalization may be different as well.

Great Lakes Dredge Dock Company v. Tanker Robert Watt Miller: Headings within the case originally were lettered or numbered. These letters and numbers have been removed without notation.

Kohl v. United States: Paragraphing and cite formats were changed without annotation. Cites were truncated to omit portions of cites referencing omitted portions from quotes.

Dobson v. Dobson: Brackets were changed to parentheses to avoid the appearance that insertions were the casebook's and not the court's.

Calbom v. Knudtzon: The character "s" was replaced with "ʃ" in multiple places.

Committee on Children's Television v. General Foods: Material from footnotes was worked into the text without annotation, and the text was changed to accommodate this.

Obsidian Finance Group v. Cox: Citations omitted without notation.

Masson v. New Yorker: Citations reformatted.