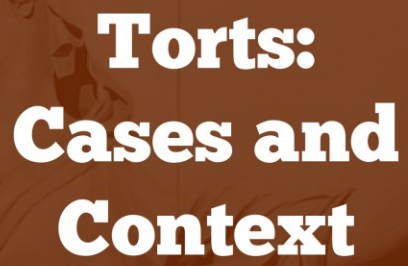

Volume One

ERIC E. JOHNSON

Torts: Cases and Context Volume One

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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 science and risk, and in intellectual property, Eric's publications include 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.

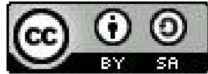
Eric received his J.D. *cum laude* from Harvard Law School in 2000, where he was an instructor of the first-year course in legal reasoning and argument. He received his B.A. with Highest and Special Honors from the Plan II program at the University of Texas at Austin.

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 Joe and Zane

Notices

This is the first edition of this casebook, updated December 2015. Visit http://elangdell.cali.org/ for the latest version and for revision history.



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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.

<u>First</u>, this book departs from the traditional style of most casebooks. Rather than just presenting a series of readings, notes, and questions, **this book makes a deliberate and systematic effort to explain the law**. It's an implementation of an approach I argued for in an article, *A Populist Manifesto for Learning the Law,* 60 JOURNAL OF LEGAL EDUCATION 41 (2010). In keeping with that approach, this book aims to be **easy to read** and to make it **easy for students to learn difficult concepts**.

There's something to be said for challenging students to figure out things for themselves. But, in my view, traditional casebooks err too much on the side of providing students with opportunities to get befuddled. This casebook strives for a balance. There are many formidable primary sources in these pages, but they are presented within a treatise-like narrative that will, I hope, help students get more of a return from their investment in reading.

Key to the explanatory mission of this book is **an emphasis on context**. I want students to understand why they are learning what they are learning, and where it fits into the bigger picture of tort law and the legal system as a whole. You will find evidence of that commitment in the first sentence of the first chapter, and it carries through to the end. This book also aims for **real-world context**, putting doctrine in the context of litigation strategy and trial tactics.

<u>Second</u>, 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.

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** so that **you have the freedom to abridge, expand, repurpose, or adapt it as you wish**. 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.

The license – which is simple to deal with – is CC BY-SA 4.0. It lets you change up and redistribute the book so long as you share it forward – that is, so long as you make it available to others under the same license. The CC license is, in essence, a legal trick to keep downstream users from locking the book up with their own proprietary copyright claims.

The open-source nature of the book provides considerable advantages. For one, it means **instructors can create their own customized version of this book at no cost**. Cut out the parts you don't want, and fill-in anything you think is missing.

The CC license also means **instructors will never be compelled to use newer editions**, since older versions will stay available, and anyone can always keep re-distributing any version.

It's helpful for learners, too. The open-source licensing means **students can cut-and-paste from this book to create their own study materials**.

CALI's eLangdell Press, by the way, has a whole fleet of casebooks with open-source/share-it-forward licensing arrangements.

Third, 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 would be happy to provide you with notes, slides, advice, and anything else I can offer. And as the semester moves forward, I'd very much like to hear how your class is going. If you are a student, I would love to hear your comments about how this casebook is working and how it could be improved. One the things I like best about teaching live in a classroom is that I can see from the reactions of students whether

I'm doing a good job of 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.

Let me go on to explain a little about the format of the book.

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" are intended to have right 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. Yet 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.

Yet there is nonetheless footnote material in many cases that deserves to be read. So, where I felt footnote material was important, I have incorporated it 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 ellipsis where the chopping was mine:

> ˜ The superscript tilda denotes matter omitted.

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

About brackets:

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

The insertion is generally mine if the brackets are not in a quote, although you'll notice that some courts use brackets in and around citations as part of their adopted citation style.

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 I felt marking them would have been unduly distracting. In particular, I have liberally omitted citation matter from cases, including parallel cites, portions of cites, and whole cites. (Note that I didn't remove all citation; in many places I thought it was helpful or even essential.) 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 and 2015-2016 torts students. Many of them went above-and-beyond-the-call in helping me ferret out typos and rework unclear passages. Since they are current students, I won't list names, but 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, Murray Tabb, Patti Alleva, Paul LeBel, Keith Richotte, Adam Gutride, Jim Dedman, Brian Schmidt, Devin Rogers, Pete Boll, Susan Carlson, Karen Martin, Jan Stone, and, especially, my wife, Kit Johnson. I also want to thank the anonymous reviewers who, through the CALI editing process, provided excellent counsel.

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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 I: Preliminaries

1. Basic Concepts

To start, it's helpful to get some context for what you will be studying: what torts is, where it comes from, and how it fits into the general scheme of law and the law-school curriculum.

What is Torts?

Torts is traditionally one of the core, basic, required courses in law school. The subject of torts is civil lawsuits in which one person alleges that another person perpetrated some harm. Personal injury, medical malpractice, and defamation are all subjects of torts.

The subject matter of torts is broad and fundamental. If you wrote out a list of 10 things someone could sue over, most of them would probably be torts. Breach of contract is a matter for your contracts course. Questions of who owns what are questions for your property course. And many modern claims, such as copyright infringement or antitrust violation, are based in specific federal statutes. But otherwise, most of the traditional, frequently invoked claims that can serve as a basis for a lawsuit can be categorized as torts. Someone punches you? That's a tort – it's called *battery*. A careless driver loses control and drives over your lovingly hewn shrubbery? That's a tort – it's called *negligence*. An enraged neighbor intentionally drives over your shrubbery? That's the tort of *trespass to land*. The neighbor does it over and over? Well, depending on how lovingly hewn the shrubbery was, that could be the tort of *intentional infliction of emotional distress*. Other torts include *slander*, *invasion of privacy, products liability,* and *fraud*.

The word "tort" dates back to Middle English, where it meant *a wrong* or *an injury*. The word, with its meaning, came to Middle English, by way of Old French, from the medieval Latin "tortum." That word was produced as the past participle of "torquere," which means *to*

twist. Etymologically, the word "tort" is related to "torque," "tortuous," and "torture."

How Torts Fits In

Let's take a look at law school as a whole and see where torts fits in. Typically, law schools have at least these six courses in the first year: Torts, Contracts, Property, Civil Procedure, Criminal Law, and a course in basic lawyering skills, which goes by different names at different schools.

Torts is a doctrinal course teaching substantive private law. Explaining what that means will help you see how Torts relates to and is distinguished from your other courses.

Doctrine vs. Skills

Roughly speaking, there are two sets of subject matter taught in law school – skills and doctrine. Sometimes both are taught in the same course, but often a course tends to be either a skills course or a doctrinal course. Generally, 1Ls will have one introductory course to teach you how to do the things a lawyer does. This may be called "Legal Methods," "Lawyering Skills," "Legal Reasoning and Argument," or something similar. You are taught how to do legal research, how to write a brief, and maybe how to present an oral argument in court. Advanced skills coursework may include trial techniques, negotiation techniques, drafting for business transactions, estate planning, and more. In contrast with skills courses, courses that teach the law itself are called doctrinal courses. Torts is a doctrinal course. Although a torts course might include some relevant skills training, the primary mission is to teach you what tort law is.

Substantive vs. Procedural

Doctrinal subject matter can be divided into two camps: procedural and substantive. Procedural law is law that governs the function of legal institutions. Most first-year law students take a course called Civil Procedure in which they learn the law that governs civil lawsuits. This includes how to start a lawsuit by serving a summons and a copy of the complaint on the defendant, which court to file the lawsuit in, and other essentials. Other procedural courses include

Evidence, which largely concerns when you can say "Objection!" at trial, and Federal Courts, which covers some fascinating questions about the power of the federal courts in relation to Congress, the president, and the states. Substantive law, by contrast, directly governs what people can and cannot do, or to whom they will be liable if they do certain things. In many schools, a course called "Criminal Law" is about half procedural law (such as what constitutes probable cause) and half substantive law (such as the difference between murder and manslaughter). Torts is a body of substantive law. Contracts and Property are substantive courses as well.

Private Law vs. Public Law

Law can also be divided into "private law" and "public law."

"Public law" refers to direct regulation by the government of individual conduct. If you run afoul of public law, then you are in trouble with the government. Substantive criminal law fits within this category, as does constitutional law, immigration law, environmental regulation, zoning ordinances, and the motor vehicle code.

"Private law," on the other hand, refers to substantive law that gives one private party a claim on which to sue another private party. Torts is this kind of law. If you commit a tort, you are not in trouble with the government, but you might get sued by some private person. Another way to refer to private law is "the law of obligations," meaning that it is the law that recognizes obligations between private parties that are enforceable in court.

It is of course possible for the same action to create liability under both private and public law. Many actions that constitute a tort will also constitute a crime. If you intentionally kill someone, that's actionable in tort as wrongful death, and it is prosecutable under criminal law as murder.

Technically speaking, the government could – if they really wanted to – sue you as a private party in tort. But that almost never happens. If the government comes after you, they have more potent means in the public law than they have under private law. If you break into a secret Air Force installation, for instance, the federal government is not

going to noodle around with a tort suit for trespass. The U.S. Attorney will go to a grand jury and cook up an indictment with some heavy federal criminal statutes. Getting sued would seem dreamy by comparison.

The Elemental Concepts of Private Law

In most law schools there are three foundational first-year doctrinal courses that each revolve around an elemental concept in private law. Those courses are Torts, Contracts, and Property. Each of these represents an essential idea that can give one person a claim against another person in court. If one person injures another, that's actionable under **tort** law. If one person breaches a binding promise to another, that's actionable under **contract** law. If two people both claim to own the same thing, a court can resolve the dispute using **property** law.

These concepts are not just important as themes for first-year courses. They are fundamental ideas that that animate law as a whole, and thus the concepts from them will reappear over and over again throughout law school.

Take misappropriation of trade secrets, for instance. If an employee takes a secret recipe from a baker and sells it to a competitor, that is actionable under trade secret law. Trade secret law is usually thought of as a separate body of law, not as a species of torts, contracts, or property. But at a fundamental conceptual level, when we ask why we have trade secret law, we find ourselves using the basic theories of tort, contract, and property to explain it. For instance, you could say trade secret misappropriation should be actionable because it constitutes a harm suffered by the originator of the secret. That's a *tort* way of thinking about it. Or, you could say the misappropriation should be actionable because it represents a broken promise made by the misappropriator to safeguard the secret. That's a *contract* way of thinking about it. Or you could say that the misappropriation is wrong because the trade secret was owned by the originating party and thus the misappropriator had no right to transfer or dispose of it. That's a *property* way of thinking about it.

You can think of torts, contracts, and property as the great common-law triumvirate in the first-year curriculum.

There is a fourth elemental concept, although it does not get its own course in the core curriculum. That fourth concept can be called **unjust enrichment**. The same concept also goes by labels such as "quantum meruit," and "restitution." The idea here is that a court should transfer some wealth from one person to another because the other person deserves it more. This is a very broad idea, but it usually is only applied in rare situations where no other theory would reach a just result. For instance, when an unconscious person – incapable of assenting to a contract – receives emergency treatment in a hospital, a theory of unjust enrichment gives the hospital a legal right to get paid. You might cover this doctrine in your contracts course.

So, that's about it – four fundamental theories of the common law: tort, contract, property, and unjust enrichment. Most of the private law is built out of these four elements. So keep in mind that torts has a conceptual importance well beyond this single course. You can expect tort theories to come up in courses concerning constitutional law, intellectual property, civil rights, federal courts, securities regulation, and many others.

Where Tort Law Comes From

States vs. the Federal Government

In the United States, for reasons having to do with federalism and the dictates of the U.S. Constitution, tort law is almost entirely a creature of state law. Contracts, property, and unjust enrichment are, similarly, matters of state law.

This has a very important implication for this course: You are going to learn a generalized conception of tort law, not the law of any particular state. There are many different versions of tort law in the United States – including each state, plus the District of Columbia and various territories. Happily, tort law is mostly the same everywhere. But, unfortunately, you never know for sure what a particular doctrine of tort law is in any given jurisdiction until you

check it out. And what may be a minor difference in the grand scheme of things could make all the difference in a particular lawsuit.

For you, as a law student, this is both annoying and liberating. It is annoying for obvious reasons: You could learn tort law extremely well, but yet not be able to answer any particularized question about it with certainty. It is liberating for the same reason – you are off the hook from knowing with certainty how the law will apply to any given situation. (This can make it a lot easier to dodge legal questions posed to you by members of your extended family when you are home for the holidays.)

By the way, when it is time for you to take the bar exam, you will find that most state bars require you to know the generalized conception of tort law, rather than your state's particular law. When it comes to torts, you could even get a multiple-choice question on the bar exam marked wrong by answering it accurately based on your state's idiosyncratic law.

Every once in a while, federal law has a say in a torts lawsuit, but such circumstances are rare. One example, covered in the part of this book on healthcare liability, is how the federal Employee Retirement Income Security Act – better known as "ERISA" – preempts tort lawsuits against health insurers. Two other examples, subjects for Volume Two, concern the Federal Tort Claims Act and constitutional due-process limitations on punitive damages.

Common Law vs. Civil Law

In American elementary schools, maybe even in middle schools and high schools, it is common to teach that the three branches of government – the legislative, the executive, and the judicial – each have three separate, distinct jobs: The legislative branch makes the law; the executive branch enforces the law; and the judicial branch interprets the law. Unfortunately, this is wrong. It is not just slightly inaccurate – it is fundamentally wrong. Most of the private, substantive law that is on the books in the United States has been created by the courts, not legislatures. This kind of court-created law is called the "common law."

For the most part, what you will study in torts, contracts, and property are doctrines of common law. In creating, fine-tuning, and revising these doctrines, the courts are not being "judicially activist." Under the common-law system, it is the job of the courts to do this. This is the way it has been for centuries.

The tort of battery, for instance, allows one person to sue another for a harmful or offensive touching. If someone kicks you, that's a battery. Battery is actionable as a tort not because a legislature passed a statute, but because long ago, a court said it was. And later courts followed that court. If you want to find the "law of battery," you will have to look in the reported opinions of the courts – not in the enactments of the legislature. This makes looking up the law complicated. And this is a large part of what people pay lawyers for: Reading through lots of cases to figure out what the law is on any given matter.

You could criticize the common-law method as abstruse, wasteful, arcane, and undemocratic. And these criticisms would not be groundless. Regardless, as a general matter, this is how the law works in the "common-law countries," a group which includes the United States, the United Kingdom, Canada, Jamaica, Ireland, Tanzania, Australia, and New Zealand, among others. Looking at this list of common-law countries, you probably will not be surprised to learn that the common-law way of doing things derives ultimately from England.

There is another way of creating a system of private law that is much closer to the government/law model you may have learned in elementary school – that is, where the legislature makes the law and the courts interpret the law. In this other way of doing things, the legislature passes statutes that govern private legal causes of action. This method is sometimes called a "code system," since the essential doctrines are arranged in the form of a written code – an organized set of laws. This system is also called a "civil-law system." Countries that follow such a system are often referred to as "civil-law countries." Examples include France, Mexico, Germany, Japan, Guatemala, Switzerland, Thailand, China, Brazil, and many others. The phrase "civil law" can be confusing, because in the United States,

the word "civil" is often used in contradistinction to "criminal." For instance your "Civil Procedure" course will cover the procedural law of "civil" lawsuits – meaning litigation that is not criminal litigation. In this sense, a tort lawsuit is a civil lawsuit, even though torts is a common-law subject. But to say that a country is a civil-law jurisdiction is to say that it follows a code system, in which the legislature creates the law of private obligations.

France is an archetypal civil-law jurisdiction. In France, the law that allows one person to sue another comes from the Napoleonic Code. The French civil-law heritage actually gives rise to two important exceptions to the common-law nature of torts in the United States and Canada. One state and one province have a code-based "law of obligations" rather than a common-law of torts. Those two jurisdictions are, naturally, Louisiana and Quebec. Owing to their French colonial history, each has a legal system that is a descendant of the Napoleonic Code.

While the code system has advantages, many of which are immediately apparent – including organization and accessibility – you will find that the common law has a wealth of subtly attractive features. In fact, both the common-law and civil-law systems have much to admire, which is perhaps why many countries – including Botswana, South Korea, Cameroon, Kuwait, and Norway – have adopted a mix of the two.

The Place of Statutes

Even in a common-law jurisdiction, the legislature has a role to play in shaping tort law. While, for the most part, legislatures do not create tort law, they can if they want to. And when a legislature passes a statute on a point of tort law, it trumps any contrary judge-made common law.

For instance, the courts decided long ago that killing another person is not actionable as a tort. If this sounds ridiculous to you, you are in good company. Legislatures have found it ridiculous too. That's why state legislatures everywhere have passed statutes that create a "wrongful death" cause of action and allow "survivorship" claims.

So, some aspects of tort law are statutory in origin. Nonetheless, tort law is, overwhelmingly, a body of judge-made common law. This means that most of what you will study in a course on torts are cases in which judges have announced and sharpened common-law doctrines.

The Structure of a Tort Case

To proceed methodically through tort law, we will follow what you might call the internal structure of a tort. Understanding this structure requires separating out the roles of the plaintiff and defendant, and then distilling causes of action, elements, and affirmative defenses.

The Parties

A **plaintiff** is someone who sues. A **defendant** is a person whom the plaintiff sues. In the torts context, this typically means that the plaintiff got hurt and the defendant is the one who is alleged to be responsible.

Causes of Action, Elements, Affirmative Defenses, and Burdens of Proof

A **cause of action**, also called a "claim," is a basis upon which a plaintiff can sue. Torts has several causes of action. Some examples are battery, negligence, false imprisonment, fraud, and assault. In order to have a meritorious lawsuit, a plaintiff will need to properly allege at least one cause of action. Plaintiffs can, and frequently do, sue on multiple causes of action in the same lawsuit.

Each cause of action can be broken down into a number of **elements**. For instance, the cause of action for battery can be divided into the following four elements: (1) an action, that is (2) intentional, and which results in a (3) harmful or offensive (4) touching of the plaintiff. It is the plaintiff's **burden of proof** to establish each of these elements. The plaintiff must establish all of the elements of the cause of action in order to win. It is not enough for the plaintiff to establish one or even most of the elements. The plaintiff must establish every single one in order to win.

If the plaintiff establishes each of these elements, then the plaintiff is said to have made out a **prima facie case**. “Prima facie” is Latin for “first face.” If a plaintiff has established a prima facie case, then the plaintiff has presumptively won.

You can understand the requirement that a plaintiff establish every single element just by thinking about it. Suppose you tap a stranger on the shoulder and ask her what time it is – after which she promptly sues you for battery. She can prove you undertook an (1) action, which was (2) intentional, and which resulted in (4) a touching. But the lawsuit must fail because there is nothing *harmful or offensive* about tapping someone on the shoulder. Because that element has not been established, the prima facie case for battery has not been made out. If you change the facts to replace the tap on the shoulder with a shove, then you have something harmful or offensive. And in that case there would then be a prima facie case for battery.

What does the defendant need to do to win a tort lawsuit? Absolutely nothing. At trial, the defendant can just sit back and see how things go, and if the plaintiff comes up short, failing to establish every element, then the defendant will win.

Now, even if the plaintiff establishes all the elements, and therefore has a prima facie case, the defendant still has two more ways to win. First, the defendant can undermine the plaintiff’s prima facie case by putting on additional evidence to refute the proof offered by the plaintiff on at least one of the elements of the cause of action. This is called a **rebuttal defense**. If the defendant can disprove just one element, the defendant wins on that cause of action.

There is a second way for the defendant to win as well: an **affirmative defense**. If the defendant can establish an affirmative defense, then the defendant can actually stipulate to the plaintiff’s entire case and yet still win. An affirmative defense defeats the entirety of the plaintiff’s successful prima facie case.

Different tort causes of action have different defenses. For the tort of battery, two principle defenses are consent and self-defense. Let’s say you punch someone in the face. That’s a battery. But suppose you

punch the person in the face in the context of a boxing match. In that case, you can establish the affirmative defense of consent. Consent is a complete defense to battery. Alternatively, if the punch in the face was in the context of defending yourself against someone physically attacking you, then you can establish the affirmative defense of self-defense.

It's a little strange how this works: If you punch someone in the context of a boxing match, you have committed a battery. That means that a prima facie case can be established against you. It does not mean the plaintiff will win when all is said and done, but it does mean the burden is on you, as the defendant, to establish that the punch was consented to in order to avoid liability. That's not to say that this will be difficult: Just provide credible testimony that the plaintiff stepped into a boxing ring and took a fighting stance while wearing boxing gloves – that will suffice to show implied consent.

The general standard of proof in a torts lawsuit is **preponderance of the evidence**. This means that it counts as "proof" to show that something is more likely than not. If a jury, after hearing conflicting evidence, determines it was 50.000000000000001% likely that a defendant acted with consent when punching someone, then that counts as proof. The preponderance standard works for whomever has the burden of proof in a torts case on a given issue. That is, the preponderance standard is the standard by which plaintiff must prove every element of a cause of action, and it is the standard applied to defendants seeking to establish an affirmative defense.

One way of thinking about the burden of proof and the preponderance standard together is that it constitutes a tie-breaker. If the question is whether a prima facie case has been established for a given cause of action, then the burden is on the plaintiff – that means that any tie will go to the defendant. If the issue is whether an affirmative defense is established, the burden is the defendant's – so a tie on that issue will go the plaintiff. (Just remember, a defendant is not required to prove an affirmative defense to win. If the plaintiff fails to prove any element of a given cause of action, then the defendant wins without doing anything.)

The preponderance standard can be compared to the well-known standard for criminal prosecutions: proof beyond a reasonable doubt. The reasonable-doubt standard in criminal law is a high bar. By comparison, the preponderance of the evidence standard in a tort suit is easy to meet. Suppose, after a trial, a jury collectively thought, "We aren't very sure about it, but we think it's slightly more likely than not that the defendant intentionally killed the victim." That's enough for a wrongful-death verdict, but it would lead to an acquittal for a murder charge.

One more note about causes of actions and affirmative defenses: Remember that it is possible for a plaintiff to allege more than one cause of action in a lawsuit. In fact, it's typical. Similarly, a defendant may raise multiple affirmative defenses. A single altercation between two people could give rise to claims for battery, negligence, false imprisonment, fraud, defamation, and more. Each of those claims could give rise to multiple affirmative defenses, and all would ordinarily be dealt with in the same lawsuit.

Why allege more than one cause of action? Well, some causes of action entitle a plaintiff to more in monetary damages than others. Some are easier to prove than others. Bottom line, however, to get some relief, a plaintiff needs only to prevail with one cause of action. Similarly, for any given cause of action, a defendant can raise multiple affirmative defenses. But the defendant needs only to prove one affirmative defense to prevail with regard to any given cause of action.

2. An Overview of Tort Law

Now that you understand the fundamentals of causes of action, elements, and affirmative defenses, we can start to sketch an overview of the subject of tort law.

Before delving into the details of particular tort causes of action, it is extremely helpful to take the time to learn the broad outlines of the entire subject matter. Why? Having a framework of any subject makes it easier for you understand and absorb details. Moreover, when it comes to torts, you will find that there are many points of connection among disparate aspects of the subject matter. For instance, an aspect of negligence doctrine – called res ipsa loquitor – is similar in important ways to the cause of action for strict liability. If you take the time at the outset to study the overview, you will be able to understand these linkages much more readily when they come up later on.

As a common-law subject, torts has no official organization scheme. It exists as a disconnected mass of judicial opinions spanning a multitude of jurisdictions. The opinions are put into reporter volumes in chronological order – not grouped by topic. In fact, you would have a hard time grouping cases by topic if you tried, because any given case often deals with multiple topics.

Yet to tackle the subject of torts methodically, it is necessary to adopt some organizational scheme. There is some unavoidable artificiality in doing this, but imposing some form of order is needed to make the subject comprehensible to the uninitiated.

The most straightforward way to organize the study of torts seems to be to group together causes of action, and then explore one cause of action at a time, running through the elements and relevant defenses for each. That is how this book is organized. Unfortunately, some topics do not fit into this structure, since they are relevant to all or many tort causes of action. Such topics include immunities, remedies, special issues regarding who can sue, and generically applicable

affirmative defenses. Such topics will be treated separately (and they will appear in Volume Two).

To take a first cut at dividing up all the tort causes of action for study, we'll separate them into two large piles, to which we will give the labels "lineal" and "oblique."

The Lineal Torts – Direct Harm to Persons or Physical Property

What we are calling the lineal torts are the ones that involve some kind of direct injury to a person's body or physical property. (And rarely, the harm can be to a person's mental well-being.) In this category of lineal torts, the harm to person or property is a direct one. Bar brawls, car crashes, and exploding soda-pop bottles are all examples.

Lineal-tort causes of action can be divided into two categories: those that will accrue from accidents, and those that only apply to intentional actions.

Causes of Action for Accidents

Negligence

The most general cause of action that is available for accidents is negligence. Motor-vehicle accidents, slip-and-falls, and most kinds of medical malpractice are negligence cases. There are five elements to the cause of action for negligence.

> **(In plain English:)**
>
> A plaintiff can win a negligence case by showing that (1) the defendant had an obligation to be careful, (2) the defendant wasn't careful, and that carelessness was (3) an actual cause and (4) a not-too-indirect and not-too-far-fetched cause of (5) a bodily injury or damage to physical property.

Those are the elements of negligence. But those are not the words courts actually use to talk about negligence. We will have to translate our plain English into legal terms of art – "legalese," if you want to call it that.

(Restated in legal terms of art:)

> 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.

The **duty of care** concept simply means that, under the circumstances, the defendant had an obligation to be careful. A defendant is said to owe a duty of care (i.e., have an obligation to be careful) with regard to all "foreseeable" plaintiffs. This means that if you should have known you could hurt someone by being careless, then you had an obligation to be careful.

The **breach** element is established if the defendant was not, in fact, being careful.

The element of **actual causation** means that there is a logical cause-and-effect relationship between the defendant's carelessness and the plaintiff's injury. That is to say, if the defendant had actually been careful, then the plaintiff never would have gotten hurt. Generally speaking, if the plaintiff would have gotten hurt anyway, then the element of actual causation is not met.

The element of **proximate causation** means that the cause-and-effect relationship between the defendant's conduct and the plaintiff's injury cannot be too bizarre. If newlyweds driving back from their wedding reception are paying more attention to one another than the road, and because of this, their car rear-ends yours, you can sue the driver, and maybe the distracting passenger, but you cannot sue the matchmaker who got the two lovebirds together. Why not? A court would say that the matchmaker's actions were not a "proximate cause" of the collision.

The **injury** element requires that the plaintiff actually got hurt. You cannot sue someone in negligence just because you are mad at them for *almost* getting you killed. If you come away without a scratch, then there is no negligence case.

There are three affirmative defenses that are particularly relevant to negligence. The first two are **comparative negligence** and **contributory negligence**. These are really two different versions of the same idea – relieving the defendant from liability when the plaintiff's own negligence contributed to the plaintiff's injury. This kind of defense may either be complete, absolving the defendant of all liability, or partial, allowing the defendant to pay no more than some percentage of the total damages. An additional affirmative defense is **assumption of the risk**, based on the idea that where the plaintiff knowingly and voluntarily assumed the risk of something bad happening, the defendant should not be liable.

Strict Liability

The cause of action for strict liability, like negligence, is also available for a plaintiff who has suffered a bodily injury or property damage because of an accident. But while negligence is available broadly for just about any kind of accident, strict liability is available only in a few limited circumstances in which the law imposes an **absolute responsibility for safety**. Those circumstances are:

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

The elements for strict liability are the same as those for negligence with one powerful exception: The duty-of-care and breach-of-duty elements are removed. This means that if the cause of an injury falls into one of the five categories for strict liability, then it doesn't matter how careful a defendant was being.

> A plaintiff can establish **a prima facie case for strict liability** by showing: (1) the defendant's conduct falls into one of the categories for which there is an absolute responsibility for safety, and the defendant's conduct was the (2)

> actual cause and (3) proximate cause of (4) an injury to the plaintiff's person or physical property.

The key question in strict liability is when it may be invoked; that is: How do we define the categories giving rise to absolute responsibility for safety?

Ultrahazardous activities trigger the absolute responsibility for safety. That much is clear. But there is considerable room for argument as to what qualifies as ultrahazardous. Some examples of activities the courts have said qualify as ultrahazardous are fireworks, blasting, crop dusting, fumigation, oil drilling, and just about anything nuclear. On the other hand, jurisdictions are split on whether transporting gasoline by tanker truck qualifies.

With regard to defective products liability, the key question is what counts as a defect. The law recognizes three kinds of defects: a **manufacturing defect**, whereby some product failed to be made to specification; a **design defect**, where the product was designed in such a way that it was unreasonably dangerous; and a **warning defect**, in which the lack of a clear warning causes an otherwise safe product to be dangerous. An interesting aspect of strict products liability is that anyone in the distribution chain can be held liable, from the retailer, to the distributor, to the manufacturer.

We will save elaborations, complications, and exceptions for later, but for now it may give some readers peace of mind to know that selling items at a garage sale does not make you a retailer for purposes of strict products liability.

Intentional Torts

The next broad category is that of intentional torts. You will see that where the defendant acted with intent in harming the plaintiff, the law allows many more options for recovery.

There are seven traditional intentional torts. Four are personal, three are property-related. The intentional personal torts are battery, assault, false imprisonment, and outrage (also known as intentional infliction of emotional distress, or "IIED"). The intentional property

torts are trespass to land, trespass to chattels, and conversion. For these torts, we will sum up each in a sentence, saving a formal breakdown into elements for later.

Battery

The tort of battery requires an intentional infliction of a harmful or offensive touching of a person.

The touching does not need to be direct. Touching someone's clothing, or even an object the person is holding, can qualify. Setting in motion some process that eventually results in a touching qualifies as well. Setting up a bucket of water to pour on someone's head when they walk into a room weeks later will count as a touching. The touching also does not need to be on the outside of the body. Giving someone a beverage adulterated with a disgusting substance or a narcotic would count as a touching.

The intent requirement is more relaxed than you might think, as well. Knowing with substantial certainty that a person would be harmfully or offensively touched, for instance, suffices for the purposes of battery. Intent is also satisfied where the defendant intended only a near miss.

The most important aspect of battery, when compared to negligence and strict liability, is that there is no injury requirement. Spitting on someone, for instance, rarely causes an injury. But it will constitute a battery. In a case without an injury, it might not be possible to win any appreciable monetary award, but a claim can nonetheless be made and vindicated. And since some harmless touchings are quite reprehensible (e.g., spitting), a large award of punitive damages might well be justified.

Battery covers an enormous range of conduct, from the inappropriate to the catastrophic. Pulling hair is a battery. So is a bombing.

The affirmative defense of consent is extremely important to battery. Consent can be expressed in words or implied by the circumstances or a past course of interaction. The defense of consent is what keeps contact sports out of the courtroom.

Assault

The tort of assault is similar to battery, but it does not require a touching. Assault is defined as **the intentional creation of an immediate apprehension of a harmful or offensive touching**. In other words, making someone think they are about be the recipient of a battery constitutes an assault. Like battery, assault does not require an injury as part of the prima facie case.

Also like battery, the intent requirement is nonspecific. Intending to hit someone, but actually missing, qualifies as intent for the purpose of establishing battery.

False Imprisonment

The tort of false imprisonment is established by proof of **intentional confinement – experienced or harmful – of a person to a bounded area**. Kidnapping counts as false imprisonment. But a very brief period of locking someone in a room is false imprisonment as well. An actionable confinement can be accomplished by physical force, threat of physical force, or improper claim of legal authority. For instance, overzealous store security guards can accrue liability for false imprisonment by making improper assertions of legal authority in detaining persons suspected of shoplifting.

No harm needs to be done, nor any injury inflicted, for a claim of false imprisonment.

A key affirmative defense is **consent**, which, for instance, keeps airlines from incurring liability for making passengers wait for the ding before getting out of their seats. Another key affirmative defense is the **lawful arrest privilege**, which allows the police and sometimes citizens to effect the arrest of a criminal suspect.

Outrage (or Intentional Inflection of Emotional Distress)

The tort of outrage is commonly called intentional infliction of emotional distress, a name unwieldy enough that it is usually shortened to "IIED." Liability for the tort is triggered by **the intentional or reckless infliction, by extreme and outrageous conduct, of severe emotional distress**.

The key to remember with outrage is that merely insulting or treating someone badly will not suffice. The conduct has to be *extreme and outrageous*. Teasing and name-calling does not qualify. Falsely telling someone that a loved one is dead, however, certainly would. Sometimes an outrage claim can be successfully pursued in employment situations where a worker's boss engaged in a prolonged campaign of harassment.

Also important, the emotional distress experienced by the plaintiff must be *severe*. Making someone cry is not enough. Reducing someone to uncontrolled screaming or prolonged hysterical sobbing, however, would likely qualify as severe. Over the longer term, severity could be established by proving recurring night sweats, heart palpitations, panic attacks, or the wearing down of teeth through chronic grinding.

Trespass to Land

The intentional tort of trespass to land requires **an intentional physical invasion of a person's real property**. Real property is land along with anything built on or affixed to the land, as well as the subsurface below and the airspace above to a reasonable distance.

Failing to remove something from the plaintiff's land that the defendant is obligated to remove also counts as trespass to land.

To have a valid claim for trespass to land, no injury is necessary. Touching a physical portion of the land is not even necessary. A disgruntled homeowner could theoretically sue neighborhood kids for playing a game of catch in which a ball is thrown over a corner of the homeowner's lot. Of course, in such a case, no compensatory damages would be awarded, since there is no harm needing compensation. Punitive damages would be unavailable as well, since the kids' behavior would not warrant it. In such a case a court would likely award only nominal damages of $1. So, such a case would, as a practical matter, be pointless to pursue. But the fact that bringing such a claim is possible serves to illustrate the incredible sweep of the tort of trespass to land.

Also important for trespass to land is how the intent requirement is construed. The defendant does not need to have the specific intent to trespass. If the defendant intends only to walk upon a public right-of-way, but nonetheless strays onto private property, the intent of putting one foot in front the other is sufficient intent to establish the cause of action.

Of course, consent is a defense, as it is to intentional torts generally. So when the neighborhood kids come trick-or-treating, they will have a defense of implied consent.

Trespass to Chattels

Chattels are items of tangible property that do not qualify as real property. Motor vehicles, paper clips, jewelry, horses, and helium balloons are all chattels. An action for trespass to chattels will lie when there is **an intentional interference with plaintiff's chattel by use, intermeddling, or dispossession**.

The requirement for trespass to chattels is stricter than for trespass to land. Merely touching or waving a limb over real property counts as trespass to land. But for trespass to chattels, a mere touch will not qualify, nor will merely picking the item up. There has to be something more – not damage, but something that amounts to an interference with the plaintiff's rights in the chattel. Stealing the item, damaging it, or destroying it would be more than enough.

Conversion

The intentional tort of conversion is an alternative cause of action for chattels. A conversion is effected by **an intentional exercise of dominion or control over a chattel that so substantially interferes with the plaintiff's rights as to require the defendant to be forced to purchase it**.

If the plaintiff wants to pursue conversion, the plaintiff will need to make a heighted showing compared to trespass to chattels, proving that the defendant so substantially interfered with the chattel that a forced sale is warranted.

The main difference between trespass to chattels and conversion is the remedy. For conversion, the court will order the defendant to pay

the plaintiff for the value of the chattel before the defendant interfered with it. It is an example of what is called a "forced sale." Afterwards, the plaintiff must deliver the chattel to the defendant – or whatever is left of it.

If the plaintiff wants to keep the chattel, regardless of its condition, then the plaintiff should pursue an action for trespass to chattels. The monetary recovery might be lower, but the plaintiff does not have to part company with the object.

The Oblique Torts – Economic or Dignitary Harm

The other major group of tort causes of action applies where the harm is not a direct one to person or property. The harm may by financial, or it may be to one's sense of dignity or reputation. We will only discuss these very briefly, just enough to demonstrate the range of situations in which tort law provides a mode of redress for oblique harms.

Many oblique torts concern a purely financial loss.

The tort of **fraud** allows a cause of action in certain circumstances we would call, in the ordinary vernacular, "getting ripped off." A fraud claim requires that the defendant made a misrepresentation to the plaintiff, that the plaintiff relied on it, and that this ended up making the plaintiff worse off. A typical situation is where the defendant lies in order to get the plaintiff to purchase worthless goods or put money into a shady investment.

The tort of **intentional economic interference** allows a plaintiff to sue when someone does something to prevent the plaintiff from closing a business deal or getting the benefits of a valid contract. In the prototypical case, the defendant is an intermeddler, who for some reason, possibly out of spite, wants to make someone flounder in their career or line of business. The most important thing to understand about the intentional economic interference tort is that it cannot be brought against a party to a contract for failing to live up to the terms of a deal. The action available in such a situation is one for breach of contract. The intentional economic interference tort

can only be brought against third parties who have no business involving themselves in the matter.

Other oblique torts are more concerned the plaintiff's sense of dignity and integrity.

The tort of **defamation** can be brought against a person who communicates false, reputation-harming statements about the plaintiff. Defamation in writing is called **libel**, while the defamation that is spoken is **slander**. Libel is easier to allege. For slander, a plaintiff will only be able to make out a prima facie case under certain circumstances, such as if the false statement is about certain sensitive topics or if the plaintiff can prove a direct financial loss resulting from the statement. The largest limitation on defamation comes in the form of the **First Amendment**, which can make it nearly impossible for public officials and public figures to sue their critics in most circumstances.

There are multiple torts that fit under the banner of **invasion of privacy**. One, **false light**, is similar to defamation in that it allows a cause of action for certain false statements, but it does not require the kind of harm to reputation that defamation requires. The tort of **intrusion upon seclusion** allows lawsuits against peeping toms and others engaged in eavesdropping, surveillance, or various other sorts of creepiness. Meanwhile, the cause of action for **public disclosure** allows suits against people who communicate embarrassing, private information about the plaintiff to the public at large. And finally, the tort cause of action called the **right of publicity** creates liability for certain commercial uses of a person name, voice, or likeness. It is principally useful to celebrities suing makers of unauthorized merchandise – like t-shirts, stickers, and coffee mugs – as well as for anyone whose name is unwittingly used in an advertisement. Consent is a defense – one, in fact, that you will find buried in the terms of service for Facebook and Google.

There yet more common-law tort causes of action, some of them quite exotic. Examples are some relics of a different age that allow lawsuits to be brought by cuckolds and jilted bridegrooms. These may be more interesting for their historical value than anything else.

Other torts – many with considerable present-day relevance – are statutory in origin. These include claims against government officials for civil rights violations.

The Whole Torts Landscape Considered Together

As you can see, there are a variety of torts, each with its own tangle of convoluted doctrine prescribing when persons are entitled to redress. Ultimately, the range of tort claims and defenses reflects society's ideas about what counts as hurtful and wrong and what we owe to one another as citizens of the same complicated, crowded society. Our views on these subjects, of course, are complicated, so it is probably inevitable that tort law is complex as well. But as a student, take heart, because as complicated as it might be, tort law takes its current form from having been hammered over the lumps and bumps of human concern – and that is a subject that you, just by living on this planet, have already become intimately familiar with.

Part II: Negligence

3. Introduction to Negligence

Introduction

The center-stage cause of action in torts is negligence. In terms of its economic impact and social importance, negligence predominates.

In its briefest form, the doctrine of negligence holds that if you are to blame, through your carelessness, for an injury to the person or property of another, you will be liable for the damage.

Attorneys who practice "personal injury law" are, for the most part, working with the negligence cause of action. Bus-stop ads and billboards offering legal representation for "ACCIDENTS" are mostly aimed at negligence claims. On the other side of the coin, defending against negligence suits is a major preoccupation of insurance companies.

The Central Idea: Shifting the Burden of Loss

Negligence is all about who should bear the burden of the loss that results from an injury-producing incident. It takes as a given that something bad has happened. Often it is something tragic. Negligence tries to make the best out of a bad situation by allowing the burden of the loss to be shifted from one party to another where appropriate.

Fundamentally, the negligence cause of action is about compensation. It is not about punishment. It is possible to get punitive damages as an added remedy in a negligence lawsuit, but doing so requires proving more than negligence. In particular a punitives damages award requires showing that the defendant's conduct was reckless, wanton or willful. But at its most basic level, the cause of action for negligence is about trying to allow a less blameworthy party to shift the burden of misfortune on to a more blameworthy party.

There are many stories of runaway jury verdicts in negligence cases that give plaintiffs a huge windfall of cash. Some of these stories are apocryphal. Most omit important context that would make the verdict seem less shocking. Jackpot verdicts happen, but they are outliers, and even those are usually cut down to size on a post-trial motion or appeal.

Real-life jury verdicts that run to the millions of dollars often include large punitive damage components, meaning more than negligence was at work. If a huge verdict is handed down merely on the basis of negligence alone, and thus comprises only what are called "compensatory damages," then it is usually because the plaintiff will suffer lifelong chronic pain, has permanent injuries that will make normal life impossible, or will be unable to pursue what had been a very lucrative career. Or it might be a combination of these factors. For example, a multi-million-dollar verdict consisting of only compensatory damages could well be possible – and might even be expected – for a young Wall Street financial whiz whose brilliant career was cut short by a massive brain injury that has left her in constant, severe pain and unable to eat, drink, or use the toilet without assistance. In other words, a person with a huge compensatory damages verdict is probably someone you wouldn't want to switch places with.

The Elements and Defenses for Negligence

The law of negligence is both complicated and simple. Negligence is simple in terms of its central idea. That idea is that a party injured in an accident should be able to recover the loss from whoever is at fault for causing the accident. The core notion is one of *responsibility*.

A good way to think about the law of negligence is that it is a formalized system for assigning blame. The elements of the prima facie case for negligence, and the defenses that are allowed, form a highly structured way for the courts to "think" about issues of responsibility and blame, and thereby hold a party accountable. This is where negligence law gets complicated. Exactly what does it mean to say that someone is "to blame" for an injury?

Try to imagine that you are shipwrecked on a remote island with a large group of castaways. None are lawyers or judges. There are no books and no internet. You are appointed as a judge in this cleaved-off society. A dispute comes before you, and you are asked to determine whether someone is to blame for an accident. "Blame" is a broad and vague word. How could you subdivide the question for analysis? In other words, what things would have to be true for you to confidently say that a given person to be "to blame" for the injuries of another? Essentially, these were questions that have been put to the common law over the past centuries. And the answer the common law has come up with is the modern cause of action for negligence. The prime facie elements and affirmative defenses of negligence reflect a way of dividing up the blame question into many subsidiary issues.

Here are the elements of a **prima facie case for negligence**:

> (1) The defendant owed a **duty of care** to the plaintiff. (That is, the defendant had a reason to be careful.)
>
> (2) The defendant's conduct constituted a **breach** of that duty of care. (In other words, the defendant was *not* careful.)
>
> (3) The defendant's conduct was an **actual cause** of the plaintiff's injury. (Without the defendant's conduct, there would not have been an injury.)
>
> (4) The defendant's conduct was a **proximate cause** of the plaintiff's injury. (This concept is complicated, but it means something like the plaintiff's injury isn't so indirectly connected to the defendant's actions that it isn't fair to hold the defendant responsible.)
>
> (5) There was an **injury** to the plaintiff's person or property. (An injury "to the person" here generally means the person's body, and "property" means something tangible.)

This way of dividing up the question of blame in the case of accidents is not a logical necessity. Other people could have come up with other systems. In fact, it's not hard to argue that other systems would be better. Regardless, this is the system we have.

In talking about a different body of American law, legal scholar Sarah Burstein said, "It's a weedy garden, but it's out garden." The exact same sentiment could be expressed about American negligence law.

This is a good point at which to pause and note that some other people writing about torts – such as lawyers, commentators, or judges – might tell you that the negligence cause of action only has four elements. Others might say the number is six. Accountings of the elements vary. But if you look closely at the content of what other sources say, you will find that it is, in essence, the same as the five elements laid out above.

Plausibly, a court could say that the negligence cause of action consists of just *two* elements: (1) a breach of a duty of care owed to the plaintiff, (2) an injury that was caused thereby. While this formulation looks different – since it is two elements instead of five – look closely and you will see that it is actually the same thing, just with various parts lumped together.

You may be tempted to ask about the "official" list of elements of the cause of action for negligence. Well, there is no official list. As a common-law subject, negligence is the product of many, many different courts, all reading each other's work, but with no one really in charge. Add to that the fact that the doctrine evolves over time. The bottom line is that in learning torts, you will have to pay attention to concepts more than labels.

Now, going back to the list of the five elements above, you might think, right off the bat, that the concept of "duty of care" seems strange and unnecessary. Once we get into it, however, you will see that this element helps to filter out a lot of cases where it would seem unfair for the plaintiff to be able to recover.

In particular, the duty-of-care concept helps filter out many cases where the plaintiff's injury seems too indirectly connected with the defendant's conduct. That the duty-of-care element would do this is strange, since the proximate-cause element also helps filter out cases where there is an indirect connection between the plaintiff's injury and the defendant's conduct.

The fact is, the elements of negligence contain considerable room for overlap. In fact, the conceptual overlap between the duty of care element and the proximate causation element is at the heart of what is likely the most famous torts case of all time: *Palsgraf v. Long Island Railroad*. We will get to that in a later chapter.

An alternative to the prima facie elements would be for every case to be decided on its own, with a judge listening to both sides and simply determining what is fair. And that is a very plausible way things could be done. But it's an anathema to the common law. The project of the common law is to build a body of doctrine that helps to ensure that like cases will be decide alike, no matter who the judge is and who the parties are. By setting out a formal system, rather than depending on intuition and a rough sense of justice, then the courts can avoid arbitrary decisions, achieving a "rule of law" rather than a "rule of persons." That's the idea, anyway. Throughout your study of torts, you can constantly ask yourself whether negligence law, through its structure of elements, is achieving that goal. At times you may find that the determination with regard to any individual element in any given case seems to be decided arbitrarily – not according to any system, but just according to the judge's "rough sense of justice." In fact, one way of defining the proximate causation element, as we will see in the *Palsgraf* case, is that it is a placeholder for "a rough sense of justice."

At the end of the day, the use of individual elements within the prima facie case for negligence reflects the common law's incomplete project of striving to avoid arbitrariness. The elements give us a helpful structure to organize our thinking about negligence.

Alongside the prima facie elements of the negligence case are the principle defenses to negligence, which include:

> **Comparative negligence** – With the defense of comparative negligence, if the plaintiff's injury is at least partly attributable to the plaintiff's own negligence, then the defendant will not be liable to the plaintiff for the full amount of the plaintiff's damages. If the plaintiff's relative fault is very large in comparison to the defendant, then, depending on the

jurisdiction, the plaintiff may be barred from any recovery whatsoever.

Contributory negligence – The defense of contributory negligence is a more defendant-friendly version of comparative negligence. It is used in a minority of jurisdictions in lieu of comparative negligence. Under contributory negligence, if the plaintiff's own negligence contributed even slightly to the injuries sued upon, the plaintiff is completely barred from any recovery.

Assumption of the risk – Despite the existence of a prima facie case for negligence, the plaintiff will not be able to recover if the plaintiff willingly assumed the potential burden that something bad might happen. Such an assumption of the risk can implied by the circumstances or expressed in words, written or oral.

In addition to these defenses, there are generic defenses available – defenses that are available in all torts cases. These include the statute of limitations, which causes you to lose your claim if you wait too long to file. There are also some unique defenses that are only applicable to certain kinds of defendants, such as charities and governmental entities. But we will wait to study those until after we have explored the elements of negligence and the general defenses.

Check-Your-Understanding Questions About Elements and Defenses

A. A plaintiff is able to establish a preponderance of the elements, including duty of care, actual causation, and injury. Based on this showing, will the plaintiff be able to prevail?

B. A defendant's negligence played a large part in the plaintiff's injury, but the plaintiff's own negligence played a role, too. Because of the law applicable in this jurisdiction, the plaintiff will entitled to only a partial recovery. Why?

C. If a defendant undertook the utmost care in trying to prevent the plaintiff's injury, but the plaintiff was injured anyway, which element of the prima facie case will fail?

D. Must a plaintiff prove reckless, wanton, or willful conduct on the part of the defendant to establish a prima facie case for negligence?

4. An Example of a Negligence Case

In the following case, you will be able to see how tort law works within a structure made of causes of action, elements, and affirmative defenses. The case does a great job, as well, of showing the different roles of the judge and the jury. It also shows the common-law method at work – past decisions being applied as precedent to help decide a new case presenting different facts.

Georgetown v. Wheeler

District of Columbia Court of Appeals
September 19, 2013

__ A.3d __, 2013 WL 5271567. PRESIDENT and DIRECTORS OF GEORGETOWN COLLEGE, et al., Appellants, v. Crystal WHEELER, Appellee. Nos. 12–CV–671, 12–CV–672. Before WASHINGTON, Chief Judge, BLACKBURNE–RISGBY, Associate Judge, and BELSON, Senior Judge.

Senior Judge JAMES BELSON:

This is an appeal by a hospital and a physician from a large judgment against them in a medical malpractice case. Appellee Crystal Wheeler suffered various medical complications as the result of a Rathke's cleft cyst behind her left eye, which went undetected for nearly ten years despite its appearance on a 1996 MRI report. Wheeler brought a medical-malpractice suit against the appellants, Marilyn McPherson-Corder, M.D., and the President and Directors of Georgetown College ("Georgetown"), claiming that their negligence caused the cyst to go undiscovered. Following a lengthy trial in Superior Court, a jury awarded Wheeler more than $2.5 million in damages. Dr. McPherson-Corder and Georgetown now appeal, making four arguments: (1) the jury's verdict was irreconcilably inconsistent, in that it found that the appellants' negligent failure to detect the cyst was a proximate cause of Wheeler's injuries, but also found

that Wheeler's own failure to follow up on the 1996 MRI report, while negligent, was not a proximate cause; (2) the trial court erred by admitting Wheeler's proffered expert testimony, as her experts' conclusion that her cyst caused certain gastrointestinal problems has not been generally accepted in the medical scientific community; (3) Wheeler's counsel made improper and prejudicial statements during her closing argument; and (4) the jury's verdict was against the weight of the evidence.

We reject the appellants' first argument because they waived their objection to any alleged inconsistency by failing to raise the issue before the jury's dismissal. We find their second argument lacking, as it misstates our standard for the admission of expert testimony. We likewise find their third argument unpersuasive, as we see no impropriety in Wheeler's counsel's remarks. We do, however, find merit in one aspect of appellant's argument on the weight of the evidence, i.e., insofar as it relates to the jury's award of greater future medical costs than the evidence established. Because the jury awarded $19,450 more than the record supports, we remand with instructions that the trial court amend its order to reduce the award in that amount. In all other respects, we affirm.

I.

Wheeler has long suffered from a litany of health problems, including serious gastrointestinal difficulties. At several times in her youth, she was hospitalized due to extreme nausea and vomiting. These problems persisted throughout her adolescence, and have lasted well into her adult life.

In 1996, Wheeler began attending college in southern Virginia. When she returned home to Washington, D.C., the following summer, she complained of severe headaches to her then-pediatrician, Dr. Marilyn McPherson-Corder. Accordingly, Dr. McPherson-Corder referred her to a Georgetown University Hospital pediatric neurologist, Dr. Yuval Shafrir.

Dr. Shafrir saw Wheeler twice that summer, once on July 8, and again on August 5. During the first visit, Wheeler was also experiencing leg and ear pain. Because of these other maladies,

Dr. Shafrir was unable to fully diagnose her headaches. He prescribed medication for her ear pain, which he concluded was the result of an ear infection, and asked her to come back in a few weeks when her symptoms cleared. When she returned, Dr. Shafrir diagnosed her headaches as migraines. Accordingly, he instructed her on migraine management, prescribed medication, and asked her to keep a headache diary. He also noticed "a new complete blurring of [Wheeler's] right optic disk," which prompted him to give her a prescription and tell her to arrange an EKG and an MRI through her primary-care physician.

The parties dispute exactly what Dr. Shafrir told Wheeler about these tests. At trial, Wheeler testified that Dr. Shafrir told her that both procedures were merely "precautionary," and that he would contact her if there were "any concerns with the MRI." Dr. Shafrir, however, testified that while he does not have any independent memory of Wheeler's visits, he "always" told patients to contact him within three days of having an MRI if they did not hear from him. He also testified that whenever he ordered an MRI he would instruct the patient to come back for a follow-up visit. He said that this system, which placed the onus on the patient to follow up on test results, had "never" failed him. He testified that it would be "impossible" for him to track down every result independently, in light of the system he used for having patients get an MRI.

After Wheeler's second visit, Dr. Shafrir wrote to Dr. McPherson-Corder, informing her that he asked Wheeler to undergo an MRI and EKG. Although he indicated that he had already received the EKG results, which came back "normal," he did not mention any MRI results. He also wrote that he would "like to see [Wheeler] again in my office during her next college vacation."

Wheeler obtained a referral for the MRI from Dr. McPherson-Corder's office. She then had the MRI performed at Georgetown Hospital on August 16. This MRI revealed a 3–5 mm supersellar cyst behind her left eye – likely a Rathke's pouch cyst. At the time, the cyst was not pressuring her pituitary gland, hypothalamus, or her optic chiasm. Neither Dr. McPherson-

Corder nor Dr. Shafrir ever saw the results of this MRI during the time relevant to this proceeding.

Wheeler's gastrointestinal issues troubled her throughout college. She continued to struggle with nausea, vomiting, and low appetite. After her graduation in 2000, her symptoms only worsened. She began losing weight, required at least four gastric-emptying procedures, and on several occasions had to be hospitalized. Eventually, her condition deteriorated to the point that her doctors were forced to insert a feeding tube. In 2003, she was diagnosed with gastroparesis: a condition that makes it more difficult for the stomach to empty properly.

Wheeler's physical decline correlated with her deteriorating mental health. In 2002, she reported increasing depression and stress, which she attributed to her physical maladies. In 2003, her depression worsened, and she began to suffer from panic attacks. She was diagnosed with depressive disorder in 2004 and major depression in 2005. She was also diagnosed with a mood disorder.

Her medical problems came to a head when, in December 2005, she checked into George Washington University Hospital ("GWU") complaining of vertigo and double vision. At that time, GWU doctors ordered an MRI. Like the 1996 MRI, this new test showed a cyst-like mass behind Wheeler's left eye. The cyst had visibly grown, now measuring approximately 11 x 8.5 x 10 mm, and was causing "mass effects" on Wheeler's optic chiasm. Also at this time, GWU doctors diagnosed Wheeler with thyroid and adrenal deficiencies, as well as abnormally low levels of human growth hormone.

After her discharge from GWU Hospital, Wheeler saw Dr. Walter Jean, a neurosurgeon at Georgetown University Hospital. Dr. Jean asked Wheeler to undergo another MRI. While examining the results of this MRI in March 2006, Dr. Jean discovered the 1996 MRI. Comparing the two MRIs, he noted that Wheeler's cyst had "progress[ed]" during the intervening decade, becoming "bigger." Dr. Jean then performed surgery to remove the cyst, without complication.

Wheeler brought suit against Georgetown and Dr. McPherson-Corder on November 24, 2008. Over the course of a thirteen-day trial, both sides called several competing medical experts. Through her experts, Wheeler sought to establish that the cyst caused or contributed to her hormone deficiencies, gastroparesis, and mental-health issues. Her experts testified that, had the cyst been detected and removed earlier, she would have avoided these problems. The appellants' experts vigorously disputed any such causal connection. The appellants also disputed Wheeler's claim that Drs. McPherson-Corder and Shafrir breached their respective duties of care, argued that the doctors' actions did not cause Wheeler's injuries, and contested the extent of her damages. In addition, they maintained that, because Wheeler failed to follow up on the MRI results herself, she was contributorily negligent.

The jury ultimately returned a verdict in Wheeler's favor. It found that the doctors breached their respective standards of care and that their breaches proximately caused Wheeler's injuries. It also found that Wheeler was "contributorily negligent" for not "following Dr. Shafrir's instructions to follow up with him after obtaining the MRI." However, it concluded that her negligence was not a proximate cause of her injuries. It awarded her $505,450.37 in past medical expenses, $800,000 in future medical expenses, and $1,200,000 in noneconomic damages, for a total of $2,505,450.37.

The verdict form's first three questions, and the jury's answers to them, read:

> ***VERDICT FORM***
>
> 1(a). Did Yuval Shafrir, M.D., as agent and employee of Georgetown University Hospital, breach the standard of care in his care and treatment of Crystal Wheeler? Yes *x;* No____.
>
> 1(b). Did Marilyn McPherson-Corder, M.D. breach the standard of care in her care and treatment of Crystal Wheeler? Yes *x;* No____.
>
> **If you answered "NO" to *BOTH* Questions # 1(a) and # 1(b), *STOP ANSWERING***

> ***QUESTIONS HERE.* THE FOREPERSON SHOULD SIGN AND DATE THIS FORM, AND NOTIFY THE JUDGE.**
>
> **If you answered "YES" to Question # 1(a), please answer Question # 2(a).**
>
> **If you answered "YES" to Question # 1(b), please answer Question # 2(b).**
>
> 2(a). Was the breach of the standard of care by Yuval Shafrir, M.D., as agent and employee of defendant Georgetown University Hospital, a proximate cause of injuries and damages to Crystal Wheeler? Yes *x;* No____.
>
> 2(b). Was the breach of the standard of care by Marilyn McPherson-Corder, M.D. a proximate cause of injuries and damages to Crystal Wheeler? Yes *x;* No____.
>
> **If you answered "NO" to Questions # 2(a) and # 2(b), *STOP ANSWERING QUESTIONS HERE.* THE FOREPERSON SHOULD SIGN AND DATE THIS FORM, AND NOTIFY THE JUDGE.**
>
> **If you answered "YES" to Question # 2(a) or # 2(b), please proceed to Question # 3.**
>
> 3(a). Was Crystal Wheeler contributorily negligent in not following Dr. Shafrir's instructions to follow up with him after obtaining the MRI? Yes *x;* No____.
>
> * * * *
>
> 3(b). Was Crystal Wheeler's negligence a proximate cause of her injuries and damages? Yes____; No *x*.

Following trial, Georgetown and Dr. McPherson-Corder moved jointly for judgment notwithstanding the verdict, or in the alternative for a new trial. In support of this motion, they

presented four arguments. First, they claimed that the jury could not rationally have concluded that the negligence of each of the physicians was a proximate cause of Wheeler's injuries, but that her own negligent failure to follow up with Dr. Shafrir was not. Therefore, they argued, the jury's verdict was irreconcilably inconsistent. Second, they asserted that there was no general acceptance in the medical scientific community of a causal connection between Rathke's cleft cysts and gastroparesis. Accordingly, Wheeler's expert testimony on that point had been inadmissible under *Dyas v. United States,* 376 A.2d 827 (D.C.1977), and *Frye v. United States,* 54 App.D.C. 46, 293 F. 1013 (1923). Third, they claimed that the jury's verdict was against the weight of the evidence. Fourth and finally, they argued that Wheelers' attorney improperly appealed to the jury's passions during her closing argument.

The trial court denied their motion on April 27, 2012. This appeal followed.

II.

On appeal, Georgetown and Dr. McPherson-Corder reiterate the arguments they presented in their post-trial motion. We address these arguments in turn, beginning with their claim that the verdict was irreconcilably inconsistent.

(a)

Georgetown and Dr. McPherson-Corder's first argument on appeal is essentially the same one they made to the trial court: that the jury could not rationally have concluded that their negligent conduct was a proximate cause of Wheeler's injuries, but that the contributory negligence it found Wheeler had committed was not a proximate cause. The trial court rejected this argument, finding that the verdict was not irreconcilable. We now affirm, but on alternate grounds. We do not reach the question of whether the verdict was irreconcilably inconsistent. Rather, we conclude that the appellants waived their objection by failing to raise the issue before the jury's discharge.

In general, a civil jury will return one of three types of verdicts. In many cases, this will be a standard general verdict. A general

verdict is "'[a] verdict by which the jury finds in favor of one party or the other, as opposed to resolving specific fact questions.'" *Wilbur v. Corr. Servs. Corp.,* 393 F.3d 1192, 1201 (11th Cir.2004) (quoting *Mason v. Ford Motor Co.,* 307 F.3d 1271, 1274 (11th Cir.2002)); *accord* BLACK'S LAW DICTIONARY 1696 (9th ed. 2009). The jury will also set damages, where appropriate. *See Mason, supra,* 307 F.3d at 1273. When the jury returns such a verdict, the basis for its decision is usually not stated explicitly; the jury simply announces a decision for one side or the other. *See Robinson v. Washington Internal Med. Assocs., P.C.,* 647 A.2d 1140, 1144 (D.C.1994) ("Because the jury returned a general verdict in favor of the defendants, we do not know whether the jury found that the defendants were not negligent (or that proximate causation was not proven) or that the plaintiff was contributorily negligent."); *see also Sinai v. Polinger Co.,* 498 A.2d 520, 523 n. 1 (D.C.1985).

In addition, Superior Court Civil Rule 49 authorizes trial courts to use two alternate verdict types. First, subsection (a) permits the trial court to submit to the jury "a special verdict in the form of a special written finding upon each issue of fact." When returning such a "special verdict," the jury answers only the specific factual questions posed by the court. *Trull v. Volkswagen of Am., Inc.,* 320 F.3d 1, 4 (1st Cir.2002) (describing special verdicts under the corresponding Fed.R.Civ.P. 49(a) as setting forth "written finding[s] upon each issue of fact"); *Portage II v. Bryant Petroleum Corp.,* 899 F.2d 1514, 1519 (6th Cir.1990) ("A special verdict is one in which the jury finds *all* the facts and then refers the case to the court for a decision on those facts." (citation omitted)). Indeed, "[w]ith a special verdict, the jury's sole function is to determine the facts; the jury needs no instruction on the law because the court applies the law to the facts as found by the jury." *Mason, supra,* 307 F.3d at 1274.

Second, subsection (b) authorizes the court to "submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon [one] or more issues of fact the decision of which is necessary to a verdict." Verdicts submitted under this section are "hybrid[s]" between standard general verdicts and special verdicts. *Mason, supra,* 307 F.3d at 1274; *see*

also Portage II, supra, 899 F.2d at 1520 ("The general verdict with interrogatories may be viewed as a middle ground between the special verdict and the general verdict...."). They "permit[ ] a jury to make written findings of fact and to enter a general verdict," *Lavoie v. Pacific Press & Shear Co.,* 975 F.2d 48, 53 (2d Cir.1992), and are useful when it is necessary to determine "specifically what the jury found." *Sinai, supra,* 498 A.2d at 533 (Nebeker, J., concurring).

The distinction between these verdict types is crucial in this case, because a party waives its objection to any alleged inconsistency in a general verdict, with or without interrogatories, if it fails to object before the jury's discharge. *See District of Columbia Hous. Auth., v. Pinkney,* 970 A.2d 854, 868 (D.C.2009) ("DCHA did not raise an objection based on inconsistent verdicts before the jury was excused, [after returning general verdict with special interrogatory,] and it therefore has waived this argument."); *Estate of Underwood v. Nat'l Credit Union Admin.,* 665 A.2d 621, 645 (D.C.1995) (explaining that Rule 49, "particularly section (b), countenances a waiver of objections to inconsistencies in the verdict that are not pointed out before the jury is discharged"). That rule, however, may not apply to special verdicts. *See Mason, supra,* 307 F.3d at 1274 ("[I]f the jury rendered inconsistent general verdicts, failure to object timely waives that inconsistency as a basis for seeking retrial; inconsistent special verdicts, on the other hand, may support a motion for a new trial even if no objection was made before the jury was discharged.").

In this case, the verdict form itself did not specify the type of verdict to be rendered. That form, labeled simply "Verdict," first directed the jurors to determine whether Dr. Shafrir or Dr. McPherson-Corder breached the applicable standards of care in his or her care of and treatment of Wheeler. If the jurors answered either question with a "yes," the form instructed them to determine whether the breach by either or both doctors was a proximate cause of injuries and damages to Wheeler. If the jurors answered "yes" again, the form instructed them to then determine whether Wheeler was "contributorily negligent in not following Dr. Shafrir's instructions to follow up with him after

obtaining the MRI." Then, if the jurors found that she was, the form required them to determine whether Wheeler's "negligence [was] a proximate cause of her injuries and damages."

The appellants do not argue that the verdict form was facially inconsistent because it allowed the jury to reach different conclusions as to Wheeler's "contributory negligence," a concept which ordinarily encompasses negligence and proximate cause. Indeed, it is not clear they could do so, given that appellants' counsel took primary responsibility for drafting the verdict form. *See Preacher v. United States,* 934 A.2d 363, 368 (D.C.2007) ("Generally, the invited error doctrine precludes a party from asserting as error on appeal a course that he or she has induced the trial court to take.").

Appellants could have avoided any potential confusion on this point by simply phrasing the verdict form to ask only whether Wheeler had been negligent by failing to follow Dr. Shafrir's instructions (as opposed to *contributorily* negligent), and whether her negligence was a proximate cause of her injuries. Such phrasing would have tracked the language of the applicable Standardized Instructions. *See* Standardized Civil Jury Instructions for the District of Columbia, No. 5–15 (2013 rev. ed.) ("The defendant alleges that the plaintiff was negligent. The defendant is not liable for the plaintiff's injuries if the plaintiff's own negligence is a proximate cause of [his] [her] injuries.").

The form also called on the jurors to consider the appellants' assumption-of-the-risk defense. Finally, if the jurors ultimately found in Wheeler's favor, the form required them to award damages.

The verdict form used in this case did not call for a general verdict of the most basic type. In the past, however, we have at times referred to similar verdicts as general. *See Nimetz v. Cappadona,* 596 A.2d 603, 606 (D.C.1991) (describing as "general" a verdict form that "require[ed] the jury to make separate findings only on negligence, proximate cause, and the award of damages for each plaintiff"). *Accord Portage II, supra,* 899 F.2d at 1518, 1522 (construing as "general" a verdict form that asked the jury whether the defendant was negligent and whether

the plaintiff was contributorily negligent); *Pinkney, supra,* 970 A.2d at 868–69 (holding that appellant waived its objection to inconsistency in remarkably similar verdict by failing to raise it before jury's discharge). Nevertheless, this verdict does not comfortably fit the accepted definition of a "general" verdict, because it required the jurors to expressly resolve at least one discrete factual issue: whether Wheeler "follow[ed] Dr. Shafrir's instructions to follow up with him after obtaining the MRI." *See, e.g., Wilbur, supra,* 393 F.3d at 1201. Thus, although this verdict form was similar to others we have called "general," it was not a general verdict in its most basic form.

But it is likewise unclear that the form called for a Rule 49(b) general verdict with interrogatories. True, one portion of the form suggests such a verdict, because, as noted above, the jury answered at least one question regarding a discrete factual issue (i.e., whether Wheeler failed to follow Dr. Shafrir's instructions), while still deciding the ultimate issue of liability. *See Portage II, supra,* 899 F.2d at 1521 (holding that verdict form that asked jury several factual questions, but also required it to determine ultimate liability, called for a general verdict with interrogatories). But the trial court here did not indicate that it was exercising its authority under Rule 49(b). Rather, it used a form simply labeled "Verdict." And that form did not pose any purely factual questions. Instead, each question required the jury to resolve both factual questions and legal issues. *But cf. Lavoie, supra,* 975 F.2d at 54 (finding verdict form was a general verdict with interrogatories despite the "unusual nature" of the form used).

The issues before us, however, do not require us to choose between labeling this verdict a general verdict or a Rule 49(b) general verdict with interrogatories, because we can clearly determine that it was not a special verdict – the only type of verdict to which a party might be permitted to raise an inconsistency objection after the jury's discharge. Special verdicts do not require the jury to determine ultimate liability, or indeed reach any legal conclusions whatsoever. *Mason, supra,* 307 F.3d at 1274 ("[A] Rule 49(a) special verdict is a verdict by which the jury finds the facts particularly, and then submits to

the court the questions of law arising on them." (internal quotation marks omitted)). Indeed, when a trial court uses a special-verdict form, it generally will not instruct the jury on the law at all, because the jury will not be called upon to apply the law. *See Bills v. Aseltine,* 52 F.3d 596, 605 (6th Cir.1995) (holding that verdict was general where the jury instructions "discussed legal matters in detail"); *Portage II, supra,* 899 F.2d at 1521. In other words, when rendering a special verdict, the jury *only* finds specific facts. BLACK'S LAW DICTIONARY 1697 (9th ed. 2009) (defining "special verdict" as "[a] verdict in which the jury makes findings *only* on factual issues submitted to them by the judge" (emphasis added)).

But here, the jury did much more. Not only did the jury determine ultimate liability, it explicitly resolved several mixed legal and factual issues along the way, including negligence, proximate cause, and assumption of the risk. *Cf. Jarvis v. Ford Motor Co.,* 283 F.3d 33, 56 (2d Cir.2002) (holding that Federal Rule 49(a), governing special verdicts, does not apply when "the jury is required to make determinations not only of issues of fact but of ultimate liability"). Recognizing that the jury would be applying law to facts, the trial court thoroughly instructed it on the applicable legal principles. *Cf. Portage II, supra,* 899 F.2d at 1521 ("If the written questions submitted to the jury were truly special verdicts, no instruction on the law, and certainly not one as detailed would have been given to the jury."). With these facts in mind, we can comfortably conclude that, whatever type of verdict this was, it was not a special verdict.

Accordingly, because the verdict was not special, it was either a standard general verdict or a Rule 49(b) general verdict with interrogatories. To preserve an objection to an alleged inconsistency in either of these types, a party must raise the argument before the jury is discharged. Here, appellants failed to do so. Accordingly, they waived their objection to any inconsistency in the verdict. *See, e.g., Underwood, supra,* 665 A.2d at 645; *Pinkney, supra,* 970 A.2d at 868.

III.

The appellants next argue that the trial court erred by permitting Wheeler's expert witnesses to testify that there was a causal link between her Rathke's cleft cyst and her gastroparesis. They assert that Wheeler failed to demonstrate that such a causal relationship is generally accepted in the medical scientific community.

In general, "[t]he trial court has broad discretion to admit or exclude expert testimony." *Russell v. United States,* 17 A.3d 581, 585 (D.C.2011). But this discretion is not unlimited. Before permitting expert testimony, the trial court must determine that the proffered testimony meets three threshold requirements:

> (1) the subject matter must be so distinctively related to some science, profession, business or occupation as to be beyond the ken of the average layman; (2) the witness must have sufficient skill, knowledge, or experience in that field or calling as to make it appear that his opinion or inference will probably aid the trier in his search for truth; and (3) expert testimony is inadmissible if the state of the pertinent art or scientific knowledge does not permit a reasonable opinion to be asserted even by an expert.

Id. at 586 (quoting *Dyas v. United States,* 376 A.2d 827, 832 (D.C.1977)) (original emphasis omitted) (internal quotation marks omitted). Here, appellants acknowledge that Wheeler's experts satisfied the first two requirements. They argue only that the experts' testimony failed to meet the third requirement: that the "state of the pertinent art or scientific knowledge" permits the expert to state "a reasonable opinion." Specifically, they claim that "Wheeler's experts were required to demonstrate that the medical community recognizes and supports their conclusion that there is a causal link between a Rathke's cleft cyst and gastroparesis or hormonal insufficiency and gastroparesis."

This argument misstates our admissibility standard. The third *Dyas* requirement focuses not on "'the acceptance of a particular ... conclusion derived from [the] methodology,'" but rather on

"the acceptance of the methodology itself." *Minor v. United States,* 57 A.3d 406, 420–21 (D.C.2012) (quoting *United States v. Jenkins,* 887 A.2d 1013, 1022 (D.C.2005)). In other words, "satisfaction of the third *Dyas* criterion begins – and ends – with a determination of whether there is general acceptance of a particular scientific methodology, not an acceptance, beyond that, of particular study results based on that methodology." *Burgess v. United States,* 953 A.2d 1055, 1063 n. 12 (D.C.2008) (quoting *Ibn–Tamas v. United States,* 407 A.2d 626, 638 (D.C.1979)).

Here, the appellants challenge Wheeler's experts' "conclusion[s]," not their methodology. This challenge fails, because it "focuse[s] on the wrong question." *Minor, supra,* 57 A.3d at 420. At trial, Wheeler's experts testified that they based their conclusions on case studies and medical literature, which listed endocrine conditions like hypothyroidism as a cause of gastroparesis. The appellants contested these conclusions during trial, and do so again on appeal. But they have offered no argument that reliance on relevant medical literature, which according to at least one expert dates back to the 1970s, as well as case studies appearing in that literature, is not a "generally accepted" method for forming an opinion regarding medical causation. Accordingly, we find the appellants' challenge unpersuasive.

IV.

Next, the appellants argue that the trial court should have ordered a new trial based on certain comments Wheeler's counsel made during closing arguments. Specifically, they point to counsel's statements regarding the applicable standard of care, which they characterize as an improper send-a-message argument:

> You know, the jury system in our country exists to protect the community. And in this medical malpractice case, you will decide what standards doctors must meet in the community when they provide care and treatment to patients. You will decide what standards doctors must meet to

> protect patient health and safety.... Remember, the standards ... in the medical community exist for a reason. They have been developed by doctors for doctors. They exist to promote patient safety. They exist to protect patient health. They're to provide a medical care system that above all prevents harm that's avoidable. And what these standards are in this community is what you will be deciding when you go back to the jury room.

This court will reverse on the basis of improper comments by counsel only when it is likely that the comments left "'the jurors with wrong or erroneous impressions, which were likely to mislead, improperly influence, or prejudice them to the disadvantage of the [defendant].'" *Psychiatric Inst. of Wash. v. Allen,* 509 A.2d 619, 629 (D.C.1986) (quoting *Simpson v. Stein,* 52 App.D.C. 137, 139, 284 F. 731, 733 (1922)). Because it has the advantage of observing the arguments as they occurred, the trial court is in a better position than this court to determine whether counsel's statements were prejudicial. *Scott v. Crestar Fin. Corp.,* 928 A.2d 680, 690 (D.C.2007). Accordingly, we afford the trial court's conclusions on that count broad deference, and will sustain its ruling so long as it is "rational." *Id.*

Here, the trial court concluded that counsel's statements "related to the determination the jury was being asked to make regarding the standard of care," and found "no impropriety in the closing argument." Based on our own reading of counsel's comments, we conclude that the trial court's conclusion was "rational." *Id.* Counsel merely explained the jury's role in determining the applicable standard of care. She did not urge the jury to penalize the appellants based on irrelevant considerations or to return a verdict that would "send a message." Accordingly, we will defer to the trial court's judgment.

V.

Finally, the appellants argue that the verdict was against the weight of the evidence. Although their argument is multi-faceted,[*] we focus in particular on their claim that the evidence did not support the jury's award of $800,000 in future medical

costs. Specifically, the appellants argue that the jury awarded $19,450 more than Wheeler's damages expert testified was necessary, and that this additional award was based on pure speculation. We agree.

> * The appellants also make a broader weight-of-the-evidence argument, contending that the jury could not rationally have credited Wheeler's experts over their own. We do not think it necessary to restate the particulars of that argument here. We note only that it would not be proper for this court to usurp the jury's factfinding role by reweighing the evidence in a manner more to the appellants' liking. "When the case turns on disputed factual issues and credibility determinations, the case is for the jury to decide." *Durphy v. Kaiser Found. Health Plan of Mid–Atlantic States, Inc.,* 698 A.2d 459, 465 (D.C.1997); *see also Burke v. Scaggs,* 867 A.2d 213, 217 (D.C.2005) (holding that judgment as a matter of law is permissible "only if it is clear that the plaintiff has not established a *prima facie* case" (quoting *Haynesworth v. D.H. Stevens Co.,* 645 A.2d 1095, 1097 (D.C.1994))).

In general, we do not require plaintiffs to prove their damages "'precisely'" or "'with mathematical certainty.'" *District of Columbia v. Howell,* 607 A.2d 501, 506 (D.C.1992) (quoting *Garcia v. Llerena,* 599 A.2d 1138, 1142 (D.C.1991)). Nevertheless, plaintiffs must provide "'some reasonable basis upon which to estimate damages.'" *Id.* The jury may not award damages based solely on speculation. *Zoerb v. Barton Protective Servs.,* 851 A.2d 465, 470 (D.C.2004). Specifically in the context of future-medical-expenses awards, we have held that where there is "no basis upon which the jury could have reasonably calculated or inferred the cost of [the plaintiff's] future medical expenses," the trial court may not "allow the jury to speculate in this area of damages." *Romer v. District of Columbia,* 449 A.2d 1097, 1100 (D.C.1982).

Here, Wheeler's damages expert, economist Dr. Richard Lurito, testified that a lump-sum payment of $780,550 would fully

compensate Wheeler for her future medical costs. He reached this figure by looking at historical trends, projected treatment costs, and estimated inflation in the general economy. He testified that he used a 3.75% after-tax discount rate, which he described as "reasonable and conservative." He adopted this rate based on current market conditions, accounting for current returns on short-and long-term government bonds, and adjusting for relatively low present interest rates. Then, during closing arguments, Wheeler's counsel urged the jury to award Wheeler $780,550 – the full amount Dr. Lurito recommended. But the jury was ultimately more generous, rounding Dr. Lurito's figure up and awarding Wheeler $800,000 for future medical expenses – a sum $19,450 in excess of the amount Dr. Lurito indicated was necessary.

Wheeler points us to no record evidence upon which the jury could have reasonably awarded this additional $19,450, nor can we discern any. Wheeler argues that the jury could have inferred that a larger sum would be necessary based on Dr. Lurito's description of his estimate as "conservative." But there was no basis in the evidence for the jury to make such an inference. Although Dr. Lurito described in detail the factors he considered in his calculations, he did not testify what a more pessimistic forecast would have entailed, nor did he indicate how much additional money would be necessary under less-favorable circumstances. Accordingly, the jury could only speculate that Wheeler might require an extra $19,450 to cover her medical costs. *Cf. Zoerb, supra,* 851 A.2d at 471 ("[E]ven if we were to conclude – which we do not – that generalizations such as 'the sooner the better,' without evidence as to how much sooner was how much better, were sufficient to preclude the direction of a verdict as to liability, the jury would face an impossible task in attempting to make a rational award of damages.").

The jury is not permitted to award damages based on such speculation. *See Romer, supra,* 449 A.2d at 1100. Because the award of an additional $19,450 was not supported by the evidence, the trial court should have granted a remittitur in that amount. *See Duff v. Werner Enters., Inc.,* 489 F.3d 727, 730–31 (5th

Cir.2007) (ordering trial court to grant remittitur where future-medical-costs award exceeded "the 'maximum amount calculable from the evidence'" (quoting *Carlton v. H.C. Price Co.,* 640 F.2d 573, 578 (5th Cir.1981))). Accordingly, we remand with instructions for the trial court to amend its order, reducing the future-medical-expenses award by $19,450 to accord with the evidence.

So ordered.

Check-Your-Understanding Questions About *Georgetown v. Wheeler*

A. What is the difference between the verdict and the judgment?

B. What is the procedural posture of the case?

C. The trial court's rulings on what motions are being reviewed?

D. What is an example of a common-law doctrine that is applied?

E. What is an example of a rule of procedure that is applied?

F. What is an example of a standard of review that is applied?

5. When and to Whom is a Duty of Care Owed

"A danger foreseen is half-avoided."
– Cheyenne Proverb

Introduction

The first element that must be established by a plaintiff in proving a negligence case is that the defendant owed the plaintiff a duty of care. If the defendant did not owe the plaintiff a duty of care, then even if the defendant was careless and caused injury to the plaintiff, there will be no recovery in negligence.

Suppose someone asks you for one of your kidneys, explaining that otherwise they will die. In terms of negligence doctrine, you do not owe this person a duty to hand over a kidney. And even if the person dies as a result of not getting one of your kidneys, there is no prima facie case against you for negligence. You can probably intuit that there is not a good cause of action here, but it is instructive to consider the explicit reason. Check off the elements: There is an injury. There is causation. Those are not lacking. What *is* lacking is the duty of care.

Now, suppose you are carelessly operating a rocket-powered tricycle and, thanks to your lack of care, you careen out of control, hitting and injuring a pedestrian who was walking on a sidewalk. You owed the pedestrian a duty of care, and you breached that duty. And that breach caused an injury. Thus, the pedestrian will be able to establish a prima facie case for negligence. All the elements are in place.

In this chapter, the key question is when and to whom is a duty of care owed. In other words: Is there a duty? The question of what is required by a duty of care – in other words, just how careful do you have to be – is a question for the next chapter, in which we will talk about *breach of duty*.

Whether or not there is a duty of care is generally considered a *question of law*, meaning it is a matter for the judge to decide. Thus, the doctrine of duty of care can be used to prevent a jury from hearing a case that might otherwise result in a substantial award of damages.

The Essential Concept: Foreseeability

The essential concept in defining the duty of care in negligence is *foreseeability*. A defendant is said to owe a duty of care to all foreseeable plaintiffs for all foreseeable harm.

Case: Weirum v. RKO

In this case there is carelessness, injury, actual and proximate causation. The only open question is whether a duty of care is owed.

Weirum v. RKO General, Inc.

Supreme Court of California
August 21, 1975

15 Cal.3d 40. RONALD A. WEIRUM et al., Plaintiffs and Appellants, v. RKO GENERAL, INC., Defendant and Appellant; MARSHA L. BAIME, Defendant and Respondent. L.A. No. 30452. In Bank. Opinion by Mosk, J., expressing the unanimous view of the court. Wright, C. J., McComb, J., Tobriner, J., Sullivan, J., Clark, J., and Richardson, J., concurred.

Justice STANLEY MOSK:

A rock radio station with an extensive teenage audience conducted a contest which rewarded the first contestant to locate a peripatetic disc jockey. Two minors driving in separate automobiles attempted to follow the disc jockey's automobile to its next stop. In the course of their pursuit, one of the minors negligently forced a car off the highway, killing its sole occupant. In a suit filed by the surviving wife and children of the decedent, the jury rendered a verdict against the radio station. We now must determine whether the station owed decedent a duty of due care.

The facts are not disputed. Radio station KHJ is a successful Los Angeles broadcaster with a large teenage following. At the time of the accident, KHJ commanded a 48 percent plurality of

the teenage audience in the Los Angeles area. In contrast, its nearest rival during the same period was able to capture only 13 percent of the teenage listeners. In order to attract an even larger portion of the available audience and thus increase advertising revenue, KHJ inaugurated in July of 1970 a promotion entitled "The Super Summer Spectacular." The "spectacular," with a budget of approximately $40,000 for the month, was specifically designed to make the radio station "more exciting." Among the programs included in the "spectacular" was a contest broadcast on July 16, 1970, the date of the accident.

On that day, Donald Steele Revert, known professionally as "The Real Don Steele," a KHJ disc jockey and television personality, traveled in a conspicuous red automobile to a number of locations in the Los Angeles metropolitan area. Periodically, he apprised KHJ of his whereabouts and his intended destination, and the station broadcast the information to its listeners. The first person to physically locate Steele and fulfill a specified condition received a cash prize. The conditions varied from the giving of a correct response to a question to the possession of particular items of clothing. In addition, the winning contestant participated in a brief interview on the air with "The Real Don Steele." The following excerpts from the July 16 broadcast illustrate the tenor of the contest announcements:

> 9:30 and The Real Don Steele is back on his feet again with some money and he is headed for the Valley. Thought I would give you a warning so that you can get your kids out of the street.
>
> The Real Don Steele is out driving on – could be in your neighborhood at any time and he's got bread to spread, so be on the lookout for him.
>
> The Real Don Steele is moving into Canoga Park – so be on the lookout for him. I'll tell you what will happen if you get to The Real Don Steele. He's got twenty-five dollars to give away

> if you can get it ... and baby, all signed and sealed and delivered and wrapped up.
>
> 10:54 – The Real Don Steele is in the Valley near the intersection of Topanga and Roscoe Boulevard, right by the Loew's Holiday Theater – you know where that is at, and he's standing there with a little money he would like to give away to the first person to arrive and tell him what type car I helped Robert W. Morgan give away yesterday morning at KHJ. What was the make of the car. If you know that, split. Intersection of Topanga and Roscoe Boulevard – right nearby the Loew's Holiday Theater – you will find The Real Don Steele. Tell him and pick up the bread.

In Van Nuys, 17-year-old Robert Sentner was listening to KHJ in his car while searching for "The Real Don Steele." Upon hearing that "The Real Don Steele" was proceeding to Canoga Park, he immediately drove to that vicinity. Meanwhile, in Northridge, 19-year-old Marsha Baime heard and responded to the same information. Both of them arrived at the Holiday Theater in Canoga Park to find that someone had already claimed the prize. Without knowledge of the other, each decided to follow the Steele vehicle to its next stop and thus be the first to arrive when the next contest question or condition was announced.

For the next few miles the Sentner and Baime cars jockeyed for position closest to the Steele vehicle, reaching speeds up to 80 miles an hour. It is not contended that the Steele vehicle at any time exceeded the speed limit. About a mile and a half from the Westlake offramp the two teenagers heard the following broadcast: "11:13 – The Real Don Steele with bread is heading for Thousand Oaks to give it away. Keep listening to KHJ .... The Real Don Steele out on the highway – with bread to give away – be on the lookout, he may stop in Thousand Oaks and may stop along the way .... Looks like it may be a good stop Steele – drop some bread to those folks."

The Steele vehicle left the freeway at the Westlake offramp. Either Baime or Sentner, in attempting to follow, forced decedent's car onto the center divider, where it overturned. Baime stopped to report the accident. Sentner, after pausing momentarily to relate the tragedy to a passing peace officer, continued to pursue Steele, successfully located him and collected a cash prize.

Decedent's wife and children brought an action for wrongful death against Sentner, Baime, RKO General, Inc. as owner of KHJ, and the maker of decedent's car. Sentner settled prior to the commencement of trial for the limits of his insurance policy. The jury returned a verdict against Baime and KHJ in the amount of $300,000 and found in favor of the manufacturer of decedent's car. KHJ appeals from the ensuing judgment and from an order denying its motion for judgment notwithstanding the verdict. Baime did not appeal.

The primary question for our determination is whether defendant owed a duty to decedent arising out of its broadcast of the giveaway contest. The determination of duty is primarily a question of law. It is the court's "expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection." (Prosser, *Law of Torts* (4th ed. 1971) pp. 325-326.) Any number of considerations may justify the imposition of duty in particular circumstances, including the guidance of history, our continually refined concepts of morals and justice, the convenience of the rule, and social judgment as to where the loss should fall. (Prosser, *Palsgraf Revisited* (1953) 52 MICH. L. REV. 1, 15.) While the question whether one owes a duty to another must be decided on a case-by-case basis, every case is governed by the rule of general application that all persons are required to use ordinary care to prevent others from being injured as the result of their conduct. However, foreseeability of the risk is a primary consideration in establishing the element of duty. Defendant asserts that the record here does not support a conclusion that a risk of harm to decedent was foreseeable.

While duty is a question of law, foreseeability is a question of fact for the jury. The verdict in plaintiffs' favor here necessarily embraced a finding that decedent was exposed to a foreseeable risk of harm. It is elementary that our review of this finding is limited to the determination whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury.

We conclude that the record amply supports the finding of foreseeability. These tragic events unfolded in the middle of a Los Angeles summer, a time when young people were free from the constraints of school and responsive to relief from vacation tedium. Seeking to attract new listeners, KHJ devised an "exciting" promotion. Money and a small measure of momentary notoriety awaited the swiftest response. It was foreseeable that defendant's youthful listeners, finding the prize had eluded them at one location, would race to arrive first at the next site and in their haste would disregard the demands of highway safety.

Indeed, "The Real Don Steele" testified that he had in the past noticed vehicles following him from location to location. He was further aware that the same contestants sometimes appeared at consecutive stops. This knowledge is not rendered irrelevant, as defendant suggests, by the absence of any prior injury. Such an argument confuses foreseeability with hindsight, and amounts to a contention that the injuries of the first victim are not compensable. "The mere fact that a particular kind of an accident has not happened before does not ... show that such accident is one which might not reasonably have been anticipated." (*Ridley v. Grifall Trucking Co.* (1955) 136 Cal.App.2d 682, 686.) Thus, the fortuitous absence of prior injury does not justify relieving defendant from responsibility for the foreseeable consequences of its acts.

It is of no consequence that the harm to decedent was inflicted by third parties acting negligently. Defendant invokes the maxim that an actor is entitled to assume that others will not act negligently. This concept is valid, however, only to the extent the intervening conduct was not to be anticipated. If the

likelihood that a third person may react in a particular manner is a hazard which makes the actor negligent, such reaction whether innocent or negligent does not prevent the actor from being liable for the harm caused thereby. Here, reckless conduct by youthful contestants, stimulated by defendant's broadcast, constituted the hazard to which decedent was exposed.

It is true, of course, that virtually every act involves some conceivable danger. Liability is imposed only if the risk of harm resulting from the act is deemed unreasonable – i.e., if the gravity and likelihood of the danger outweigh the utility of the conduct involved.

We need not belabor the grave danger inherent in the contest broadcast by defendant. The risk of a high speed automobile chase is the risk of death or serious injury. Obviously, neither the entertainment afforded by the contest nor its commercial rewards can justify the creation of such a grave risk. Defendant could have accomplished its objectives of entertaining its listeners and increasing advertising revenues by adopting a contest format which would have avoided danger to the motoring public.

Defendant's contention that the giveaway contest must be afforded the deference due society's interest in the First Amendment is clearly without merit. The issue here is civil accountability for the foreseeable results of a broadcast which created an undue risk of harm to decedent. The First Amendment does not sanction the infliction of physical injury merely because achieved by word, rather than act.

We are not persuaded that the imposition of a duty here will lead to unwarranted extensions of liability. Defendant is fearful that entrepreneurs will henceforth be burdened with an avalanche of obligations: an athletic department will owe a duty to an ardent sports fan injured while hastening to purchase one of a limited number of tickets; a department store will be liable for injuries incurred in response to a "while-they-last" sale. This argument, however, suffers from a myopic view of the facts presented here. The giveaway contest was no commonplace invitation to an attraction available on a limited basis. It was a

> competitive scramble in which the thrill of the chase to be the one and only victor was intensified by the live broadcasts which accompanied the pursuit. In the assertedly analogous situations described by defendant, any haste involved in the purchase of the commodity is an incidental and unavoidable result of the scarcity of the commodity itself. In such situations there is no attempt, as here, to generate a competitive pursuit on public streets, accelerated by repeated importuning by radio to be the very first to arrive at a particular destination. Manifestly the "spectacular" bears little resemblance to daily commercial activities.~
>
> The judgment and the orders appealed from are affirmed.~

Questions to Ponder About *Weirum v. RKO*

A. Does the duty-of-care concept work well to provide an outer boundary for what is recoverable in negligence? What might you replace it with?

B. The court held that the accident was foreseeable. If it was foreseeable, why do you think the radio station personnel staged the contest? Were they greedy? Were they ignorant? Were they in denial? Or does "foreseeable" mean something different for the court than it does for an individual? If so, should it?

C. How could KHJ have changed the contest to avoid liability?

Some Historical Notes About *Weirum v. RKO*

A. Mosk's legacy: Justice Mosk is the namesake of the Stanley M. Mosk Courthouse, the main courthouse of the Los Angeles County Superior Court for civil litigation. (The Clara Shortridge Foltz courthouse, site of many famous celebrity criminal trials, is a couple of blocks to the east.)

B. Boss radio: KHJ was a legendary AM radio station of the Top-40 format. Most notably, KHJ was the progenitor of the "Boss Radio" style that spread throughout the nation in the early 1970s. The Everclear song "AM Radio," released in 2000, pays homage to KHJ and even includes a KHJ jingle at the beginning. KHJ was a

launching pad for many present-day personalities, including Rick Dees, Shadoe Stevens, and Charlie Tuna.

Don Steele was one of the most important personalities behind the boss sound, and he is considered to have been one of the greatest personalities in the history of L.A. radio. To really understand Steele's boss-jock style, you need to listen to tapes of his radio shows from the early 70s. To say that he was extremely energetic is putting it mildly. His patter commonly included rapid-fire nonsensical rhymes and frequent outbursts of "Yeah, baby!" Steele died in 1997 at age 61 of lung cancer.

Doctrinal Wiggle Room

One way to think about the elements of a negligence case is that they are the law's way of providing an analytical structure that will pare down the universe of possible negligence matters into a subset of cases where awarding compensation is in tune with our basic intuitions of fairness. But when you try to construct simply stated rules that will both correspond with a sense of justice and work in any context, you run into the inevitable need for wiggle room. In tort law, the elements of duty of care and proximate causation do the most to provide that wiggle room, with duty of care being primarily the domain of judge, and proximate causation being generally the province of the jury.

The duty of care can be defined as an obligation for people to exercise reasonable care to avoid foreseeable harm to others. It is a frustratingly fuzzy definition. So, if you feel like you are having a hard time understanding the concept of duty, do not worry. It probably just means that you are reading closely and thinking deeply. The duty-of-care standard is vague out of necessity.

The definition of the duty of care is probably less important than the way it is employed by courts. Justice Mosk describes the role of the duty of care with considerable candor when he says, "It is the court's 'expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection.'"

Duty of Care in Entertainment Industry Cases

Weirum v. RKO is frequently cited in negligence cases where the entertainment media is blamed for death or injury. In other cases, however, plaintiffs have not tended to fare as well as the Weirum family. For example, in *McCollum v. CBS, Inc.,* 202 Cal.App.3d 989 (1988), a 19-year-old killed himself with a gun after listening to the Ozzy Osbourne song, "Suicide Solution." The song includes the lyrics "Suicide is the only way out" and "Get the gun and try it. Shoot, shoot, shoot … " The California Court of Appeals rejected the plaintiffs' attempt to use *Weirum v. RKO* to show a duty of care. While acknowledging *Weirum*'s broad language, the court found the case to be of limited applicability, concluding that while the accident in *Weirum* was foreseeable, the Osbourne fan's suicide was not.

The court also noted the separation in time involved in recorded music versus live radio: "Osbourne's music and lyrics had been recorded and produced years before. There was not a 'real time' urging of listeners to act in a particular manner. There was no dynamic interaction with, or live importuning of, particular listeners." Emphasizing the policy implications of their decision, the court added, "[I]t is simply not acceptable to a free and democratic society to impose a duty upon performing artists to limit and restrict their creativity in order to avoid the dissemination of ideas in artistic speech which may adversely affect emotionally troubled individuals. Such a burden would quickly have the effect of reducing and limiting artistic expression to only the broadest standard of taste and acceptance and the lowest level of offense, provocation and controversy."

Problem: WZX Cash Patrol

Suppose you are an attorney for radio station WZX. The station is considering staging a "Cash Patrol" contest in which a disc jockey will drive around the city in an unmarked vehicle looking for cars with a WZX bumper sticker. When the disc jockey has found such a car, the disc jockey will go on the air via a remote hookup, describe the car she or he is following, and ask that car to pull over to receive a $1,000 cash prize. How would you advise WZX on its liability risk?

Should they do the contest or pull the plug? Does it matter that WZX's sister station in another city tried the promotion and it resulted in a ratings spike that substantially increased station revenues?

Case: Kubert v. Colonna

This case explores the duty of care in the context of texting while driving, a leading-edge area in negligence law.

Kubert v. Colonna

Superior Court of New Jersey, Appellate Division
August 27, 2013

__ A.3d __, 2013 WL 4512313 Linda KUBERT and David Kubert, Plaintiffs–Appellants, v. Kyle BEST, Susan R. Best, Executrix of the Estate of Nickolas J. Best, Deceased, Defendants, and Shannon Colonna, Defendant–Respondent. Before Judges ASHRAFI, ESPINOSA and GUADAGNO. Espinosa, J.A.D., filed a concurring opinion, not reproduced here.

Judge VICTOR ASHRAFI:

Plaintiffs Linda and David Kubert were grievously injured by an eighteen-year-old driver who was texting while driving and crossed the center-line of the road. Their claims for compensation from the young driver have been settled and are no longer part of this lawsuit. Plaintiffs appeal the trial court's dismissal of their claims against the driver's seventeen-year-old friend who was texting the driver much of the day and sent a text message to him immediately before the accident.~

We must determine as a matter of civil common law whether one who is texting from a location remote from the driver of a motor vehicle can be liable to persons injured because the driver was distracted by the text. We hold that the sender of a text message can potentially be liable if an accident is caused by texting, but only if the sender knew or had special reason to know that the recipient would view the text while driving and thus be distracted.

In this appeal, we must also decide whether plaintiffs have shown sufficient evidence to defeat summary judgment in favor of the remote texter. We conclude they have not. We affirm the trial court's order dismissing plaintiffs' complaint against the sender of the text messages, but we do not adopt the trial court's reasoning that a remote texter does not have a legal duty to avoid sending text messages to one who is driving.

I.

The Kuberts' claims against defendant Shannon Colonna, the teenage sender of the texts, were never heard by a jury. Since this appeal comes to us from summary judgment in favor of Colonna, we view all the evidence and reasonable inferences that can be drawn from the evidence favorably to plaintiffs, the Kuberts.

On the afternoon of September 21, 2009, David Kubert was riding his motorcycle, with his wife, Linda Kubert, riding as a passenger. As they came south around a curve on Hurd Street in Mine Hill Township, a pick-up truck being driven north by eighteen-year-old Kyle Best crossed the double center line of the roadway into their lane of travel. David Kubert attempted to evade the pick-up truck but could not. The front driver's side of the truck struck the Kuberts and their motorcycle. The collision severed, or nearly severed, David's left leg. It shattered Linda's left leg, leaving her fractured thighbone protruding out of the skin as she lay injured in the road.

Best stopped his truck, saw the severity of the injuries, and called 911. The time of the 911 call was 17:49:15, that is, fifteen seconds after 5:49 p.m. Best, a volunteer fireman, aided the Kuberts to the best of his ability until the police and emergency medical responders arrived. Medical treatment could not save either victim's leg. Both lost their left legs as a result of the accident.

After the Kuberts filed this lawsuit, their attorney developed evidence to prove Best's activities on the day of the accident. In September 2009, Best and Colonna were seeing each other socially but not exclusively; they were not boyfriend and

girlfriend. Nevertheless, they texted each other many times each day. Best's cell phone record showed that he and Colonna texted each other sixty-two times on the day of the accident, about an equal number of texts originating from each. They averaged almost fourteen texts per hour for the four-and-a-half-hour, non-consecutive time-span they were in telephone contact on the day of the accident.

The telephone record also showed that, in a period of less than twelve hours on that day, Best had sent or received 180 text messages. In her deposition, Colonna acknowledged that it was her habit also to text more than 100 times per day. She said: "I'm a young teenager. That's what we do." She also testified that she generally did not pay attention to whether the recipient of her texts was driving a car at the time or not. She thought it was "weird" that plaintiffs' attorney was trying to pin her down on whether she knew that Best was driving when she texted him.

During the day of the accident, a Monday, Best and Colonna exchanged many text messages in the morning, had lunch together at his house, and watched television until he had to go to his part-time job at a YMCA in Randolph Township. ↳Our record does not indicate why Colonna was not in school that day. Best was a student at a community college and also worked part-time.↵ The time record from the YMCA showed that Best punched in on a time clock at 3:35 p.m. At 3:49 p.m., Colonna texted him, but he did not respond at that time. He punched out of work at 5:41. A minute later, at 5:42, Best sent a text to Colonna. He then exchanged three text messages with his father, testifying at his deposition that he did so while in the parking lot of the YMCA and that the purpose was to notify his parents he was coming home to eat dinner with them.

The accident occurred about four or five minutes after Best began driving home from the YMCA. At his deposition, Best testified that he did not text while driving—meaning that it was not his habit to text when he was driving. He testified falsely at first that he did not text when he began his drive home from the YMCA on the day of the accident. But he was soon confronted

with the telephone records, which he had seen earlier, and then he admitted that he and Colonna exchanged text messages within minutes of his beginning to drive.

The sequence of texts between Best and Colonna in the minutes before and after the accident is shown on the following chart.~

Sent	Sender	Received	Recipient
5:42:03	Best	5:42:12	Colonna
5:47:49	Best	5:47:56	Colonna
5:48:14	Colonna	5:48:23	Best
5:48:58	Best	5:49:07	Colonna
(5:49:15	911 Call)		
5:49:20	Colonna	5:55:30	Best
5:54:08	Colonna	5:55:33	Best

This sequence indicates the precise time of the accident – within seconds of 5:48:58. Seventeen seconds elapsed from Best's sending a text to Colonna and the time of the 911 call after the accident. Those seconds had to include Best's stopping his vehicle, observing the injuries to the Kuberts, and dialing 911. It appears, therefore, that Best collided with the Kuberts' motorcycle immediately after sending a text at 5:48:58. It can be inferred that he sent that text in response to Colonna's text to him that he received twenty-five seconds earlier. Finally, it appears that Best initiated the texting with Colonna as he was about to and after he began to drive home.

Missing from the evidence is the content of the text messages. Plaintiffs were not able to obtain the messages Best and Colonna actually exchanged, and Best and Colonna did not provide that information in their depositions. The excerpts of Best's deposition that have been provided to us for this appeal do not include questions and answers about the content of his text messages with Colonna late that afternoon. When Colonna's deposition was taken sixteen months after the accident, she testified she did not remember her texts that day. Despite the fact that Best did not respond to her last two texts

at 5:55 p.m., and despite her learning on the same evening that he had been involved in a serious accident minutes before he failed to respond to her, Colonna testified that she had "no idea" what the contents of her text messages with Best were that afternoon.

After plaintiffs learned of Colonna's involvement and added her to their lawsuit, she moved for summary judgment. Her attorney argued to the trial court that Colonna had no liability for the accident because she was not present at the scene, had no legal duty to avoid sending a text to Best when he was driving, and further, that she did not know he was driving. The trial judge reviewed the evidence and the arguments of the attorneys, conducted independent research on the law, and ultimately concluded that Colonna did not have a legal duty to avoid sending a text message to Best, even if she knew he was driving. The judge dismissed plaintiffs' claims against Colonna.

II.

On appeal before us, plaintiffs argue that Colonna is potentially liable to them if a jury finds that her texting was a proximate cause of the accident. They argue that she can be found liable because she aided and abetted Best's unlawful texting while he was driving, and also because she had an independent duty to avoid texting to a person who was driving a motor vehicle. They claim that a jury can infer from the evidence that Colonna knew Best was driving home from his YMCA job when she texted him at 5:48:14, less than a minute before the accident.

We are not persuaded by plaintiffs' arguments as stated, but we also reject defendant's argument that a sender of text messages never has a duty to avoid texting to a person driving a vehicle. We conclude that a person sending text messages has a duty not to text someone who is driving if the texter knows, or has special reason to know, the recipient will view the text while driving. But we also conclude that plaintiffs have not presented sufficient evidence to prove that Colonna had such knowledge when she texted Best immediately before the accident.~

We first address generally the nature of a duty imposed by the common law.

In a lawsuit alleging that a defendant is liable to a plaintiff because of the defendant's negligent conduct, the plaintiff must prove four things: (1) that the defendant owed a duty of care to the plaintiff, (2) that the defendant breached that duty, (3) that the breach was a proximate cause of the plaintiff's injuries, and (4) that the plaintiff suffered actual compensable injuries as a result. The plaintiff bears the burden of proving each of these four "core elements" of a negligence claim.

Because plaintiffs in this case sued Best and eventually settled their claims against him, it is important to note that the law recognizes that more than one defendant can be the proximate cause of and therefore liable for causing injury. Whether a duty exists to prevent harm is not controlled by whether another person also has a duty, even a greater duty, to prevent the same harm.~

"A duty is an obligation imposed by law requiring one party 'to conform to a particular standard of conduct toward another.'"

Acuna v. Turkish, 192 *N.J.* 399, 413 (2007) (quoting *Prosser & Keeton on Torts: Lawyer's Edition* § 53, at 356 (5th ed.1984)); *see also Restatement (Second) of Torts* § 4 (1965) ("The word 'duty' ... denote[s] the fact that the actor is required to conduct himself in a particular manner at the risk that if he does not do so he becomes subject to liability to another to whom the duty is owed for any injury sustained by such other, of which that actor's conduct is a legal cause.").

Whether a duty of care exists "is generally a matter for a court to decide," not a jury. The "fundamental question [is] whether the plaintiff's interests are entitled to legal protection against the defendant's conduct." *J.S. v. R.T.H.,* 155 *N.J.* 330, 338 (1998).

The New Jersey Supreme Court recently analyzed the common law process by which a court decides whether a legal duty of care exists to prevent injury to another. *Estate of Desir ex. rel. Estiverne v. Vertus,* —— *N.J.* —— (2013). The Court reviewed precedents developed over the years in our courts and restated

the "most cogent explanation of the principles that guide [the courts] in determining whether to recognize the existence of a duty of care":

> "[w]hether a person owes a duty of reasonable care toward another turns on whether the imposition of such a duty satisfies an abiding sense of basic fairness under all of the circumstances in light of considerations of public policy. That inquiry involves identifying, weighing, and balancing several factors—the relationship of the parties, the nature of the attendant risk, the opportunity and ability to exercise care, and the public interest in the proposed solution.... The analysis is both very fact-specific and principled; it must lead to solutions that properly and fairly resolve the specific case and generate intelligible and sensible rules to govern future conduct."

The Court emphasized that the law must take into account "generally applicable rules to govern societal behaviors," not just an "outcome that reaches only the particular circumstances and parties before the Court today[.]" The Court described all of these considerations as "a full duty analysis" to determine whether the law recognizes a duty of care in the particular circumstances of a negligence case.~

Plaintiffs argue~ that Colonna independently had a duty not to send texts to a person who she knew was driving a vehicle. They have not cited a case in New Jersey or any other jurisdiction that so holds, and we have not found one in our own research.

The trial court cited one case that involved distraction of the driver by text messages, *Durkee v. C.H. Robinson Worldwide, Inc.,* 765 *F.Supp.*2d 742 (W.D.N.C.2011). In *Durkee,* the plaintiffs were injured when a tractor-trailer rear-ended their car. In addition to the truck driver and other defendants, they sued the manufacturer of a text-messaging device that was installed in the tractor-trailer. They claimed the device was designed defectively because it could be viewed while the truck driver was driving and it distracted the driver immediately before the accident that

injured them. The federal court dismissed the plaintiffs' claims against the manufacturer of the device, holding that it was the driver's duty to avoid distraction. Since other normal devices in a motor vehicle could distract the driver, such as a radio or GPS device, attributing a design defect to the product would have too far-reaching an effect. It would allow product liability lawsuits against manufacturers of ordinary devices found in many motor vehicles and hold them liable for a driver's careless use of the product.

Similarly, at least two state courts have declined to hold manufacturers of cell phones liable for failing to design their products to prevent harm caused when drivers are distracted by use of the phones.

We view *Durkee* and these state cases as appropriately leading to the conclusion that one should not be held liable for sending a wireless transmission simply because some recipient might use his cell phone unlawfully and become distracted while driving. Whether by text, email, Twitter, or other means, the mere sending of a wireless transmission that unidentified drivers may receive and view is not enough to impose liability.

Having considered the competing arguments of the parties, we also conclude that liability is not established by showing only that the sender directed the message to a specific identified recipient, even if the sender knew the recipient was then driving. We conclude that additional proofs are necessary to establish the sender's liability, namely, that the sender also knew or had special reason to know that the driver would read the message while driving and would thus be distracted from attending to the road and the operation of the vehicle. We reach these conclusions by examining the law in analogous circumstances and applying "a full duty analysis" as discussed in *Desir, supra,* slip op. at 24.

A section of the *Restatement* that the parties have not referenced provides:

> An act is negligent if the actor intends it to affect, or realizes or should realize that it is likely to affect, the conduct of another, a third

> person, or an animal in such a manner as to create an unreasonable risk of harm to the other.

[Restatement § 303.]

To illustrate this concept, the Restatement provides the following hypothetical example:

> A is driving through heavy traffic. B, a passenger in the back seat, suddenly and unnecessarily calls out to A, diverting his attention, thus causing him to run into the car of C. B is negligent toward C.

[*Restatement* § 303, comment d, illustration 3.]

We have recognized that a passenger who distracts a driver can be held liable for the passenger's own negligence in causing an accident. In other words, a passenger in a motor vehicle has a duty "not to interfere with the driver's operations."

One form of interference with a driver might be obstructing his view or otherwise diverting his attention from the tasks of driving. It would be reasonable to hold a passenger liable for causing an accident if the passenger obstructed the driver's view of the road, for example, by suddenly holding a piece of paper in front of the driver's face and urging the driver to look at what is written or depicted on the paper. The same can be said if a passenger were to hold a cell phone with a text message or a picture in front of the driver's eyes. Such distracting conduct would be direct, independent negligence of the passenger~. Here, of course, Colonna did not hold Best's cell phone in front of his eyes and physically distract his view of the road.

The more relevant question is whether a passenger can be liable not for actually obstructing the driver's view but only for urging the driver to take his eyes off the road and to look at a distracting object. We think the answer is yes, but only if the passenger's conduct is unreasonably risky because the passenger knows, or has special reason to know, that the driver will in fact be distracted and drive negligently as a result of the passenger's actions.

It is the primary responsibility of the driver to obey the law and to avoid distractions. Imposing a duty on a passenger to avoid any conduct that might theoretically distract the driver would open too broad a swath of potential liability in ordinary and innocent circumstances. As the Supreme Court stated in *Desir,* courts must be careful not to "create a broadly worded duty and ... run the risk of unintentionally imposing liability in situations far beyond the parameters we now face." "The scope of a duty is determined under 'the totality of the circumstances,' and must be 'reasonable' under those circumstances." *J.S.,* 155 *N.J.* at 339.

"Foreseeability of the risk of harm is the foundational element in the determination of whether a duty exists." *Id.* at 337. "Foreseeability, in turn, is based on the defendant's knowledge of the risk of injury."

It is foreseeable that a driver who is actually distracted by a text message might cause an accident and serious injuries or death, but it is not generally foreseeable that every recipient of a text message who is driving will neglect his obligation to obey the law and will be distracted by the text. Like a call to voicemail or an answering machine, the sending of a text message by itself does not demand that the recipient take any action. The sender should be able to assume that the recipient will read a text message only when it is safe and legal to do so, that is, when not operating a vehicle. However, if the sender knows that the recipient is both driving and will read the text immediately, then the sender has taken a foreseeable risk in sending a text at that time. The sender has knowingly engaged in distracting conduct, and it is not unfair also to hold the sender responsible for the distraction.

"When the risk of harm is that posed by third persons, a plaintiff may be required to prove that defendant was in a position to 'know or have reason to know, from past experience, that there [was] a likelihood of conduct on the part of [a] third person[]' that was 'likely to endanger the safety' of another." *J.S.,* 155 *N.J.* at 338. In *J.S.,* the Court used the phrase "special reason to know" in reference to a personal relationship or prior experience that put a defendant "in a position" to

"discover the risk of harm." Consequently, when the sender "has actual knowledge or special reason to know," from prior texting experience or otherwise, that the recipient will view the text while driving, the sender has breached a duty of care to the public by distracting the driver.~

When the sender knows that the text will reach the driver while operating a vehicle, the sender has a relationship to the public who use the roadways similar to that of a passenger physically present in the vehicle. As we have stated, a passenger must avoid distracting the driver. The remote sender of a text who knows the recipient is then driving must do the same.

When the sender texts a person who is then driving, knowing that the driver will immediately view the text, the sender has disregarded the attendant and foreseeable risk of harm to the public. The risk is substantial, as evidenced by the dire consequences in this and similar cases where texting drivers have caused severe injuries or death.

With respect to the sender's opportunity to exercise care, "[a] corresponding consideration is the practicality of preventing [the risk]." We must take into account "how establishing this duty will work in practice." In imposing an independent duty of the passengers in *Podias,* we noted the "relative ease" with which they could have used their cell phones to summon help for the injured motorcyclist. It is just as easy for the sender of a text message to avoid texting to a driver who the sender knows will immediately view the text and thus be distracted from driving safely. "When the defendant's actions are 'relatively easily corrected' and the harm sought to be presented is 'serious,' it is fair to impose a duty.".

At the same time, "[c]onsiderations of fairness implicate the scope as well as the existence of a duty.". Limiting the duty to persons who have such knowledge will not require that the sender of a text predict in every instance how a recipient will act. It will not interfere with use of text messaging to a driver that one expects will obey the law. The limited duty we impose will not hold texters liable for the unlawful conduct of others, but it will hold them liable for their own negligence when they have

knowingly disregarded a foreseeable risk of serious injury to others.

Finally, the public interest requires fair measures to deter dangerous texting while driving. Just as the public has learned the dangers of drinking and driving through a sustained campaign and enhanced criminal penalties and civil liability, the hazards of texting when on the road, or to someone who is on the road, may become part of the public consciousness when the liability of those involved matches the seriousness of the harm.~

To summarize our conclusions, we do not hold that someone who texts to a person driving is liable for that person's negligent actions; the driver bears responsibility for obeying the law and maintaining safe control of the vehicle. We hold that, when a texter knows or has special reason to know that the intended recipient is driving and is likely to read the text message while driving, the texter has a duty to users of the public roads to refrain from sending the driver a text at that time.~

In this case, plaintiffs developed evidence pertaining to the habits of Best and Colonna in texting each other repeatedly. They also established that the day of the accident was not an unusual texting day for the two. But they failed to develop evidence tending to prove that Colonna not only knew that Best was driving when she texted him at 5:48:14 p.m. but that she knew he would violate the law and immediately view and respond to her text.

As our recitation of the facts shows, Colonna sent only one text while Best was driving. The contents of that text are unknown. No testimony established that she was aware Best would violate the law and read her text as he was driving, or that he would respond immediately. The evidence of multiple texting at other times when Best was not driving did not prove that Colonna breached the limited duty we have described.

Because the necessary evidence to prove breach of the remote texter's duty is absent on this record, summary judgment was properly granted dismissing plaintiffs' claims against Colonna.

Affirmed.

The Duty of Care and Criminal Acts

One thorny question regarding the duty of care is whether a duty of care will be present in the circumstance in which a person is pressured to accede to the demands of a criminal in order to prevent harm to an innocent person. Few courts have considered this question, but a majority have concluded that there is no duty.

Case: Boyd v. Racine Currency Exchange

The following case considers whether there is a duty to accede to criminal demands. While you read, ask yourself whether you find the court's use of precedent persuasive.

Boyd v. Racine Currency Exchange, Inc.

Supreme Court of Illinois
November 30, 1973

56 Ill.2d 95. Piney BOYD, Appellee, v. RACINE CURRENCY EXCHANGE, INC., et al., Appellants. No. 45557.

Justice HOWARD C. RYAN:

The plaintiff's husband, John Boyd, was present in the Racine Currency Exchange on April 27, 1970, for the purpose of transacting business. While he was there, an armed robber entered and placed a pistol to his head and told Blanche Murphy, the teller, to give him the money or open the door or he would kill Boyd. Blanche Murphy was at that time located behind a bulletproof glass window and partition. She did not comply with the demand but instead fell to the floor. The robber then shot Boyd in the head and killed him.

This is a wrongful death action against Racine Currency Exchange and Blanche Murphy to recover damages for the death of plaintiff's decedent~. Plaintiff's complaint was dismissed on motion of the defendants by the circuit court of Cook County for failure to state a cause of action. The appellate court reversed and remanded the cause to the circuit court.~

Plaintiff alleges several acts of negligence by the Racine Currency Exchange and Blanche Murphy. Count I alleges that the defendants owed Boyd, a business invitee, the duty to exercise reasonable care for his safety and that they breached this duty when they refused to accede to the robber's demands. Count I also alleges that defendants acted negligently in adopting a policy, knowledge of which was deliberately withheld from their customers, according to which their money was to be protected at all costs, including the safety and the lives of the customers.

In count II the plaintiff alleges that the Currency Exchange was negligent in failing to instruct its employees regarding the course of conduct which would be necessary under the circumstances of this case to prevent exposing customers to unreasonable risks of harm. Count II further alleges that the Currency Exchange was negligent in employing a person who was incompetent to fulfill the responsibilities of her position. Negligence is also alleged in the failure to furnish guidelines of how to act in case of armed robbery, and alternatively that it was negligent in failing to disclose to its customers its policy of preserving its monies at all costs.

It is fundamental that there can be no recovery in tort for negligence unless the defendant has breached a duty owed to the plaintiff. The plaintiff contends that a business proprietor has a duty to his invitees to honor criminal demands when failure to do so would subject the invitees to an unreasonable risk. It is claimed that this duty arises from the relationship between a landowner and a business invitee.

It is the general rule in Illinois and other jurisdictions that a person has no duty to anticipate the criminal acts of third parties. An exception to this rule exists, however, when criminal acts should reasonably have been foreseen. (*Neering v. Illinois Central R.R. Co.*, 383 Ill. 366.) *Neering*, and many of the other cases cited by the parties, involved the question of whether facts existed which should have alerted the defendant to a risk of harm to his invitees by criminals. These cases are of little help here since our case presents a question of whether the defendant

who is faced with an imminent criminal demand incurs liability by resisting, not whether he is negligent in failing to take precautions against a possible future crime.

Also of little assistance in *Sinn v. Farmers Deposit Savings Bank*, 300 Pa. 85, 150 A. 163. In that case recovery for the plaintiff, who was injured when a bank robber detonated dynamite within the bank, was upheld. The plaintiff alleged that had the bank warned him that a bank robbery was in progress, as they had the opportunity to do, he could have escaped unharmed. The plaintiff's intestate in our case, however, was obviously on notice that a robbery was in progress, and plaintiff does not predicate her claim on the absence of warning.

The Restatement of Torts does not consider the specific issue before us. The Restatement does set forth the principle that a person defending himself or his property may be liable for harm to third persons if his acts create an unreasonable risk of harm to such persons. (*Restatement (Second) of Torts,* secs. 75 and 83.) However, these sections refer to situations in which the harm is caused directly by a person resisting, not by the criminal such as where a shot fired at a criminal hits a third person.

We are aware of only two cases which have discussed issues similar to the one with which we are faced here – whether a person injured during the resistance to a crime is entitled to recover from the person who offered the resistance. In *Genovay v. Fox*, 50 N.J.Super. 538, a plaintiff who was shot and wounded during the robbery of a bowling alley bar claimed that the proprietor was liable because instead of complying with the criminal demand he stalled the robber and induced resistance by those patrons present. The plaintiff was shot when several patrons attempted to disarm the bandit. The court there balanced the interest of the proprietor in resisting the robbery against the interest of the patrons in not being exposed to bodily harm and held that the complaint stated a cause of action. The court stated: 'The value of human life and of the interest of the individual in freedom from serious bodily injury weigh sufficiently heavily in the judicial scales to preclude a determination as a matter of law that they may be disregarded