Ch. 3.  Damages

B.  Related Parties:  Who Is Entitled to Compensation?

2.  "Wrongful Birth" and "Wrongful Life"

Where a defendant's negligence results in the birth of a child, courts have divided on whether to permit a recovery to parents of a healthy child.  Some have permitted only the costs associated with the birth itself, while others have permitted the award of all costs associated with the child, less the "imputed benefit" derived from the child.  In the case of a "defective" child, most courts permit a recovery to the parents under the imputed benefit theory, and some permit an award to the child himself (a "wrongful life" claim) for the costs of his defective condition beyond those already awarded to the parents.

3.  Loss of Consortium

Where an injured party's relatives also suffer emotional injury, courts have divided on when an award is justified.  Some limit recovery to those who are in "the zone of danger"; others extend it to those at the accident scene.  Most courts permit the spouse of the injured party to recover "loss of consortium"; and some permit recovery by the parents or children of the injured party where the injury is severe.

C.  The Size of Damage Awards

1.  How Much is Too Much (or Too Little)?  In response to large personal injury awards, some states have adopted limitations on pain and suffering awards.  Most such statutes have survived constitutional challenge as a rational response to "crises."  Others have been successfully challenged as a denial of the right to trial by jury.

2.  Collateral Source Benefits.  When a plaintiff receives compensation from a source other than one of the defendants, the court must decide whether to deduct this amount from the compensation owed by the defendants or to allow the plaintiff a "windfall."  Actually, most such payments are subject to "subrogation"—repayment pursuant to statutory right (e.g., worker's compensation) or contractual obligation (e.g., health insurance).  The "collateral source rule"
disallowed evidence of collateral source recoveries, but some tort reform statutes have permitted the introduction of such evidence, even if there is an obligation to repay the amounts.

3. The Scope of Acceptable Argument. In asking a jury to award a large amount of damages, plaintiffs' attorneys like to use arguments that either focus on the amount of the pain suffered (e.g., the per diem argument) or on the need to "send a message" to discourage the conduct giving rise to the injury. Most jurisdictions place limits on the use of such arguments to avoid runaway verdicts.

PART II. DEFENSES TO A PERSONAL INJURY CASE

Ch. 4. Immunity

Although the plaintiff may have a perfectly good case against the defendant in terms of his traditional burden of proof, he may be stymied by the fact that the defendant is entitled to some form of immunity. The most important form of immunity is that enjoyed by governments. Courts have recognized that a sovereign is immune from tort liability unless it permits suits against it. Congress passed the Federal Tort Claims Act in 1946 to waive its immunity from certain kinds of suits, while retaining immunity for others. The overall goal of the statute was to provide for liability of the government "in the same manner and to the same extent" as would apply to a private party "under like circumstances." The tricky question, of course, is whether the government is analogous to a private party in particular cases. For example, a government vehicle that strikes a plaintiff in a crosswalk will generally result in liability against the government. But other activities of the government (e.g., repair of a weather buoy) may take place in the context of a larger function of government that is not analogous to what private parties do. An important retention of governmental immunity is where government engages in a discretionary function; government is not held liable for harms arising from allegedly poor decisionmaking; to do so would allow the judiciary to intrude into the separate powers of the executive or legislative branch.

Family immunity is another point at which the plaintiff's proof of negligence may not suffice to create liability. Although most states permit suits by a child against his parent for example for an automobile accident, most states still make the parent immune for suits alleging negligent discharge of the parental function; again, to make parents liable for letting Johnny play in a dangerous place would intrude upon the parental discretion permitted in our pluralistic society.

Finally, worker's compensation systems have generally replaced tort liability as a means of addressing workplace injuries. An employer is immune from ordinary tort claims unless the injury is intentionally inflicted on the worker.
Ch. 5. Contributory Fault

Plaintiffs are unable to recover the full extent of their damages if they have also contributed to causing the injury. The common law rule was that a plaintiff’s contributory negligence barred any recovery; modern statutes and decisions, however, permit a recovery so long as the plaintiff pays for his "share" of fault. *Li v. Yellow Cab* is a good statement of the modern view that liability should follow fault. Some jurisdictions limit the comparative fault principle to situations where the plaintiff is less negligent than the defendant; this is called "modified comparative negligence" (as opposed to a "pure" comparative negligence system). Also at common law, assumption of risk was a complete bar to recovery. Although assumption of risk was originally a kind of contract doctrine (a "voluntary assumption of a known risk"), in which the plaintiff has presumably "agreed" to the risk in order to induce the defendant to engage in the relationship, it eventually was muddled with concepts of unreasonable conduct and fault. Modern comparative fault treats one form of assumption of risk (often called "secondary" assumption of risk) as a version of comparative negligence (and thus reduces the plaintiff's recovery only where the plaintiff is in fact acting unreasonably). Another form of assumption of risk (often called "primary" assumption of risk)—where plaintiff wants the defendant to leave a danger in place (e.g. unscreened baseball seats or a steep ski slope)—is not so much a defense to negligence as it is a redefinition of what reasonable care is in such circumstances. A final form of assumption of risk has been recognized in some jurisdictions—*reasonable* assumption of risk as a damage-reducing factor. For example, as in the *Kirk* case the court may reject an all-or-nothing approach to plaintiffs injured by inherent dangers as well as the defendant's negligence.

Ch. 6. Joint Tortfeasors

Plaintiffs frequently sue more than one defendant for the same injury. Even if they don't, one defendant may name another party as a third-party defendant. Two defendants are joint tortfeasors if their negligence (or other "fault," such as a strict liability theory) combines to cause an indivisible injury to the plaintiff. At common law, the doctrine of joint and several liability (J&SL) made joint tortfeasors liable for all of the plaintiff's damages; since negligent plaintiffs recovered nothing, the theory was that it was better for a slightly negligent defendant to pay more than his share than for an innocent plaintiff to be unable to collect his judgment because one tortfeasor was (relatively) insolvent. Modern comparative fault, under which negligent plaintiffs are permitted to recover, required rethinking this position. Some jurisdictions retained J&SL in its entirety (*American Motorcycle*); some abolished it wherever the plaintiff was at fault (Washington statute; Oklahoma); and some provide for proportionate sharing of a defendant's insolvency (UCFA).

A defendant usually seeks to minimize his net payout by including as many potential payors in the system as possible. He may need to file a third-party claim to bring them in, or they may already be defendants, so that he can simply cross-claim for contribution. At common law,

1. An indivisible injury is one which is a single injury caused by two separate sources, as opposed to two different injuries caused by two different people.
defendants were sometimes permitted to obtain *indemnity* (a complete payment of the loss) from other defendants, on various bases. Today, the availability of *contribution* in virtually all jurisdictions makes it a flexible procedure rather than an all-or-nothing award. Each defendant theoretically pays in proportion to his fault. However, where one defendant is insolvent, the problems mentioned above must be resolved according to the rules of the jurisdiction. Another problem arises from partial settlements. If one defendant settles with the plaintiff, but another is found liable at trial, by how much is the plaintiff's claim reduced? Again, there are three alternatives: one is to reduce the recovery only by the amount that the plaintiff has received (the "dollar method"); this is most favorable to plaintiffs; least favorable to non-settling defendants. Another approach is to reduce the plaintiff's recovery by an arbitrary "equal share" representing the number of defendants (one-half for two defendants; one-third for three defendants, etc.); a third method is to reduce the claim by the percentage share of the settling defendant.

**Ch. 7. Statutes of Limitation**

Statutes of limitation require a plaintiff to file a claim within a reasonable period of time. In order to determine whether the statute of limitations has run, three questions must be asked: (1) what is the proper limitation period? That is determined by the kind of claim being asserted (e.g., medical malpractice, assault, general personal injury, breach of warranty, etc.). Where there is more than one theory to recover damages, courts will sometimes employ a test that determines what the *gravamen* of the claim is (e.g., was it basically a contract action or basically a tort action?) and then follow the limitation period that applies to that type of claim. (2) The *accrual* date must be identified. Originally this was tied to the date of the accident. But modern cases have recognized a *discovery rule* that ties the accrual date to the point when the plaintiff has enough information that would put a reasonable person on notice that a claim should be filed, or at least investigation should be pursued. Some statutes (e.g. construction or product liability) also contain a *statute of repose* that requires the claim to accrue within a set period of time. That way, a defendant can't be sued twenty years after the work is done. (Some courts have held such statutes an unconstitutional bar to open access to the courts.) (3) Even if the statute would ordinarily have run, it may have been *tolled* by conduct on the part of the defendant that would make it inequitable to bar the claim. For example, if a foreign object is left by a doctor, or if the defendant has fraudulently concealed the negligent act from the plaintiff, the statute will be tolled, i.e., the "clock" will stop running for so long as the plaintiff was put at an unfair disadvantage. Earlier statutes tolled the statute for infants or incompetents, but modern statutes have sometimes changed this to require parents or guardians to act on their behalf or else the claim will be lost.

**PART III. MODIFYING THE DEFENDANT'S DUTY BY CONTRACT**

Many cases of tort liability arise out of situations where the defendant and the plaintiff have entered into some kind of contractual arrangement. Surprisingly, courts rarely look to the specific agreement reached by the parties in a particular case to determine the duty of care. However, in each area that we look at in this chapter the defendant's duty is determined by what plaintiffs might reasonably expect generally from such arrangements.
Ch. 8. Owners and Occupiers: Premises Liability

The owner (or occupier)’s duty to prevent harm to his visitors arising from a condition of the premises usually depends upon the status of the visitor. (A minority of jurisdictions have purported to replace the traditional status categories with a duty of reasonable care under "all the circumstances." In practice this usually produces similar results.) Business and public invitees are owed the duty of reasonable care, which includes inspection of the property for potentially dangerous conditions, and reasonable efforts to repair conditions that create hazards. "Bare" licensees (including social guests), on the other hand, are only owed the duty to be warned of hidden dangers of which the owner is aware. As to trespassers—those who have no permission to be on the owner's premises—the owner need only refrain from willful or wanton injury.

Determining the plaintiff's status can be tricky; it can change depending upon the purpose for which the plaintiff happens to be using them. Business invitees are those who come upon the premises for a purpose connected with the owner's business; money need not change hands on the particular occasion, but there must be some benefit to the owner in the plaintiff's presence. Public invitees are those who are invited by a nonprofit entity for the advancement of the owner's interests (e.g. a museum or library), where the public expects the same care to be exercised as if they had paid to enter. An owner's invitation or permission may extend to only some parts of the premises, and thus a visitor's status may change mid-visit.

As to child trespassers, the courts have recognized the doctrine of "attractive nuisance." The RESTATEMENT sets out criteria for determining when an artificial condition will create liability for the owner. Essentially the criteria provide that there must be a serious, known risk to unsuspecting children, and the owner failed to undertake a cheap fix.

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2. An occupier, such as a tenant, usually acquires the same rights and obligations as the owner, and where the tenant's visitor is injured the tenant "stands in the shoes" of the owner for purposes of determining what duty is owed.

3. Bear in mind that premises liability arises from ownership of the premises, and is governed by special rules; where the plaintiff's claim against the defendant is not based upon ownership of the premises, but rather arises from the defendant's negligent conduct of an activity unrelated to his ownership, then the plaintiff may claim a duty of ordinary care. For example, the golfer who shows his guest how to swing a golf club and negligently hits him in the jaw is held to the same standard whether he is on his own property or at the golf course. Premises liability law does not come into play in such a case because the claim is not based upon ownership of the land where the injury took place.
Ch. 9. Product Liability

Product liability was initially limited by contract law, which was very picky about establishing privity between consumer and defendant; frequently manufacturers were separated from victims by an intermediate seller, which defeated plaintiff's claim. Eventually the privity requirements were scrapped, and tort law came to dominate. In addition to traditional negligence remedies, courts moved to a form of no-fault recovery wherever the product was defective, such that the product became unreasonably dangerous. Defects come in three varieties: (1) manufacturing defects, e.g. a toaster with a short circuit or a tire with a separated tread (product is "out of spec"); (2) design defects, such as a can of Drano that doesn't have a childproof cap ("bad spec"); and (3) warning defects, e.g., a can of hairspray that doesn't warn that the spray is flammable. In cases of alleged manufacturing defects, strict liability is applied; that is, the court asks whether the reasonably prudent manufacturer would have put the product in the stream of commerce given the knowledge we now have about the product's dangers. In the case of alleged design defects courts may use a strict liability test (i.e., taking advantage of knowledge of risk acquired since the time of design) or may use a true negligence test (i.e., given what was known or should have been known at the time, would a reasonably prudent person have put the product on the market). As to warning defects, some jurisdictions impose strict liability (just as with design defects), but many courts use a simple negligence test: was the manufacturer negligent in failing to warn about the danger? Warning cases are often successful for plaintiffs because the cost to warn is arguably nothing, compared with even a remote risk that the lack of warning will result in injury.

Modern product liability reform statutes tend to provide for "statutes of repose," limiting the length of time a product is expected to perform safely; they also tend to consolidate the different theories of product liability into a unified theory of "defect." Most also permit contributory negligence as a defense to a claim based on a defective product.

Ch. 10. Medical Malpractice

Medical malpractice law is based on ordinary negligence principles, with two major variations: First, in determining the standard of reasonable care, expert testimony is required as to what the reasonably prudent physician in those circumstances would have done. The circumstances include the physician's degree of specialization and the resources available in the community. However, differences of opinion about alternative therapies (e.g., Sabin vaccine v. Salk vaccine) do not allow the jury to find that one therapy is "correct" and the other is negligent. The second variation concerns "informed consent." A patient has a right to choose whether or not to undergo a medical procedure, even if a reasonably prudent person would have chosen it, and even though the physician acts with reasonable care in performing it. Although originally considered part of the law of battery (since it is an "unconsented" touching), modern approaches to informed consent consider failure to provide informed consent as a form of negligence. The standard is whether the patient was informed of all material facts connected with the treatment, including the risks and benefits of alternative approaches.
Ch. 11. Rescuers, Justifiable Reliance, and Special Relationships

In some cases courts have a difficult time determining whether the defendant owes a duty to exercise reasonable care toward the plaintiff. Although most cases start with the presumption that everyone owes a duty to use reasonable care, it is not necessarily the case. A defendant doesn't owe a duty to use reasonable care if his conduct can be characterized as a simple failure to act (nonfeasance). A defendant is required to use reasonable care in two kinds of cases: first, if the defendant's conduct increases the risk that an injury will occur. For example, driving a car or putting a product out on the market creates the risk that an injury will occur. The defendant then has a duty to use reasonable care to prevent such injuries. Second, a defendant must use reasonable care if he has induced justifiable reliance that care will be used to avoid an injury. For example, if an ambulance service is called and indicates they will respond to a call for medical assistance, they have acquired a duty to use reasonable care to perform. Finally, courts may decide that there is a "special relationship" between the defendant and the plaintiff that requires the defendant to use care for the plaintiff's safety. For example, a doctor who knows of a child's abuse by its parents may be under a statutory duty to act for the child's benefit.

PART IV. INTENTIONAL TORTS

Intentional torts were among the first causes of action recognized at common law (and earlier legal systems) as ones requiring the defendant to pay compensation. However, they have receded in importance as a result of the prominence of insurance as the compensating mechanism. Most insurance policies exclude coverage for injuries caused intentionally; the typical insurance contract language provides coverage only for an "occurrence," which is usually defined as some kind of accidental harm. However, many cases still arise, frequently in the context of an employer whose employee oversteps his bounds (in law enforcement, debt collection, or the like).

Ch. 12. The Prima Facie Case

The elements for each cause of action are specified in the RESTATEMENT OF TORTS, and there is no substantial departure in any jurisdiction from the elements of the torts of battery, assault, or false imprisonment. The essence of battery is a touching—either harmful or offensive. In both cases the defendant must act intending to cause either the touching or the apprehension of such a touching, although under the doctrine of "transferred intent" it is possible for the plaintiff to show intent by proving that the contact was intended for a third party. The essence of assault is causing fear—imminent apprehension of a harmful or offensive contact by the defendant. The same rules about transferred intent apply. As to false imprisonment, the key issues are whether the defendant intended to confine the plaintiff, and whether the confinement is complete. Finally, the tort of outrage (RESTATEMENT § 46, Intentional Infliction of Emotional Distress) allows a recovery for cases where (1) the distress is inflicted intentionally (in some jurisdictions, or recklessly); (2) the conduct is extreme and outrageous; and (3) severe emotional distress results.
Ch. 13. Defenses to Intentional Tort Claims

Defenses to intentional torts are sometimes referred to as "privileges." That is, even if the defendant acted with the requisite state of mind, he may claim that he had a right to do so. In some cases the plaintiff consented to such contact by the defendant; but in other cases the plaintiff's consent is held ineffective because a plaintiff cannot consent to engage in criminal conduct (although the cases on this point are ambiguous). The most important privileges for battery come out of the defense of person or property. The general rule is that deadly force can only be used for defense of person; even there, such force can only be used where the defendant reasonably believes that death or serious bodily harm will be inflicted unless he uses such force. The standard is whether or not the defendant reasonably believed such injury was threatened—even if it actually wasn't. In defense of property, only reasonable force is permissible. Where there is a legal dispute over ownership (e.g., the C.I.T. case) a court's determination should be first obtained; a person can't retake possession if it will lead to a breach of the peace. Finally, many states provide a privilege for storeowners to detain suspected shoplifters, but they must exercise reasonable care in doing so.