**432** C H A PTE R XI

### baseball programs . Where the assumption of risk is implied, consent is manifested by the plaintiff s continued presence after he or she has become aware of the danger involved. The plaintiff impli­ edly consents to take his or her chances concern­ in g the defendant's negligence. For example, baseball fa ns who sit in unscreened sea ts a t the ballpark know that balls and even bats may strike them; they implicitly agree to take a chance of being injured in this manner.

**•@Miiiill**

North Carolina is one of the six states that continue to follow the contributory negligence-assumption of risk approach . Readers can find *Carolyn Alford v. Wanda E. Lowery,* a North Carolina case that illustrates how con­ tributory negligence works, on the textbook's website.

## Comparative Negligence

### In states that allow the *contributory-neglige nce* defense, the entire loss is placed on the plaintiff even when both the plaintiff and the defendant are contributo­ rily negligent. For this reason , most states now determine the a mount of damage by compa1ing the negligence of the plaintiff with that of the defendant . Under this doctrine of **comparative negligence,** a negligent plaintiff may be able to recover a portion of the cost of an injury.

In negligence cases, compa rative negligence divides the damages between the parties by reduc­ ing the plaintiff s damages in proportion to the extent of tha t person's contributory fa ult. The trier of fact in a case assigns a percen tage of the total fa ult to the plaintiff, a nd the plaintiff s total damages are usually reduced by that percentage. For example, a plaintiff who was considered to be 40 percent a t fault by the trier of fact would recover $1,200 if the total damages were deter­ mined to be $2,000 .

**Introduction to *Baker v. East Coast Properties, Inc.***

### Plaintiff Alfred Baker is legally blind a nd is aillicted with many medical issues, including diabetes a nd Pa rkinson's disease . He has difficulty walking and frequently falls. At the time he sustained the injmy that was the subject of this lawsuit, Baker rented an apartment that was specifically designed for people with medical problems like his. He sue1 his landlord for injuries he allegedly received when agents of the la ndlord entered his apartment and triggered an alarn1, startling the sleeping Baker. Baker alleged that he was injured when he fell t1y­ ing to get to the door. The landlord's defense was that its entry was not the proximate cause of Baker's injuries, and it moved for summary jud gment. What follows is the nial court's ruling on the sum­ ma1y judgment motion.

##### Alfred L. Baker v. East Coast Properties, Inc.

###### *C.A. No. N09C-11-144 MMJ Superior Court of Delaware*

*November 15, 2011*

**Johnston, J .**

Plaintiff Alfred Baker ("Baker") rented an apartment in Greenwood Acres Apartments ("Greenwood Acres") from Defendant East Coast Properties, Inc. ("East Coast"). Baker brought suit, claiming that he sustained injuries as a result of negligence on the part of East Coast. Baker contends that East Coast's unannounced and unauthorized entry into his apartment triggered an audible self-installed alarm attached to his front door. Accord ing to Baker, the sound of the alar m

startled him awake, causing him to get out of bed and subsequently fall as he attempted to get to the front door .

East Coast moves for summary judgment against Baker, arguing that it was not reasonably foreseeable that East Coast's entry into Baker's apartment would result in Baker falling and sustaining injuries. East Coast further argues that even if its actions were neg­ ligent, Baker's installation of the alarms constitutes an intervening and superseding cause ....

THE L A W OF TO R TS **433**

*Factual Background*

The following facts are set forth in the light most favorable to Baker, as the non-moving party. Baker rented an apartment in Greenwood Acres from East Coast, owner and landlord of the apartment complex . Greenwood Acres provides housing spe­ cifica lly for the elderly and those with ambulatory difficulties. Baker, himself, is legally blind and suf­ fers from numerous health problems, including COPD, diabetes ... , prostate cancer, and low back pain. Baker has also been diagnosed with Parkin­ son's disease. As a result of his Parkinson's disease, Baker exhibits ambulatory dysfunction which causes him to fall down frequently because his knees buckle.

Since moving to Greenwood Acres in 2000, Baker c laimed that maintenance personnel employed by East Coast repeatedly had entered his apartment without permission. During one of these unauthorized visits, Baker claimed that his cable box had been stolen. As a result of the numerous unauthorized entries into his apartment, Baker purchased and installed an audible motion-sensitive alarm to hang on the interior front doorknob . When activated, the alarm would sound only if the door was opened .... Therefore, according to Baker, he would only set the alarm if he was home so that he could be alerted when someone entered his apartment.

On March 13, 2009, at approximately 9:00 a.m., Louis Desposito ("Desposito"), East Coast 's mainte­ nance man, arrived outside Baker's apartment .

Desposito, who was accompanied by a fire technician from Simplex Grinnell, planned to conduct mainte­ nance and inspections of the complex's fire suppres­ sion system, including equipment in Baker's unit.

Baker contends that he never received oral or written notice that maintenance personnel would need to access his unit.

The parties dispute whether Desposito knocked on the door or rang the door bell before using the master key to enter Baker's unit. Viewing the facts in the light most favorable to Baker, however, the Court will assume that Desposito's entry in Baker's apartment was unannounced and unauthorized. As Desposito unlocked Baker's front door and opened it, the alarms immediately sounded .... According to Baker, he was startled awake by the sound of the alarm and jumped out of bed to see who was in his apartment . Baker took about three steps and fell to the ground when his legs gave way. As a result of the fa ll, Baker claimed to have sustained head and neck injuries. Baker managed to get back on his feet and proceeded to the front door to see who was attempting to enter his apartment ....

*Discussion*

*Common-Law Negligence*

In order to establish a prima facie case of negligence, the plaintiff must show that the defendant's negligent act or omission breached a duty of care owed to plaintiff in a way that proximately caused plaintiff injury.... "Sum­ mary judgment can be appropriate in a negligence action if [the] [p]laintiff[] fail[s] to establish the elements of negligence by a preponderance of the evidence." ...

Here, in determining whether summary judgment is appropr iate, the Court's inquiry must focus on two issues: (1) whether East Coast breached any duty it owed to Baker; and (2) if so, whether its breach was the proximate cause of Baker's injuries.

*Duty and Breach*

Under Delaware law, one's "duty of care" is measured in terms of reasonableness .... One has a duty to act as a reasonably prudent person would act .... In defining the parameters of one's duty, the Court has incorporated the principle of foreseeability .... The duty encompasses protecting against reasonably foreseeable events ....

Here, the relevant inquiry is whether it was rea­ sonably foreseeable that East Coast's conduct-that is, East Coast's allegedly unauthorized and unannounced entry into Baker's apartment-would result in Baker's injuries. Absent a finding that such a result was rea­ sonably foreseeable, East Coast cannot be said to have breached any duty to Baker under the circumstances.

East Coast argues that it was not reasonably fore­ seeable that Desposito's "knocking on the door and ring­ ing [Baker's] doorbell for several minutes and opening his door yelling 'maintenance', would result in Baker's self­ installed alarms going off, start ling him awake, resulting in his attempt to wa lk when he was not physically capable to do so." Therefore, East Coast contends that it owed no duty to Baker under these circumstances.

Baker disputes East Coast's account of events, cla iming that Desposito neither knocked on the door

nor rang the doorbell. Instead, Baker claims that with­ out authorizat ion or announcement , Desposito entered Baker's apartment, triggered the alarm and caused injury by startling Baker. According to Baker, because East Coast was aware of his ambulatory diffi­ culties as well as his prior complaints regarding unau­ thorized intrusions into his apartment, it was reasonably foreseeable that Baker may be inj ured due to East Coast's unannounced entry.

*Intervening and Superseding Causation*

Although a question of fact exists as to the manner of East Coast's entry into Baker's apartment, the Court need not resolve this factual dispute. Even if the Court

**434** C H A P TER XI

were to find that East Coast's entry was unauthorized and unannounced, Baker has failed to establish that the injuries he sustained were proximately caused by East Coast's conduct.

Delaware applies the traditional "but for" defini­ tion of proximate cause .... Proximate cause is that which "brings about or produces, or helps to bring about or produce the injury and damage, and but for which the injury would not have occurred." . . . In other words, proximate cause exists if "a natural and contin­ uous sequence, unbroken by any efficient intervening cause, produces the injury and without which the result would not have occurred." ...

The mere occurrence of an intervening cause, however, does not automatically relieve the original tortfeasor of liability .... In determining whether the chain of causation stemming from the original tortious conduct is broken, the relevant inquiry is whether the intervening act was reasonably foreseen or reasonably anticipated by the original tortfeasor .... If the inter­ vening act was not reasonably foreseeable, then the act constitutes a superseding cause and the initial tortfeasor is relieved of liability....

East Coast argues that Baker's actions constitute an intervening cause that supersedes any alleged neg­ ligent conduct by East Coast. According to East Coast, Baker's installation of the alarm on his front door was neither anticipated nor reasonably foreseeable by East Coast. Baker's own conduct, East Coast contends, was the sole proximate cause of Baker's injuries.

In response, Baker claims that East Coast's negligence-that is, East Coast's unauthorized and unannounced entry into his apartment-was the proximate cause of his injuries.

At his deposition, Baker acknowledged that the sole reason he fell was because he was startled out of bed by the sound of the alarm. The alarm operated precisely as Baker intended. When the door opened, the alarm sounded. According to Baker, when the alarm sounded, "it woke [him] up and startled [him]." In response to the sound of the alarm, Baker test ified that he "jumped out of bed, made about three steps and fell" because his "legs gave way."

The Court finds that Baker's act of installing the alarm on the front door was neither reasonably fore­ seeable nor reasonably anticipated by East Coast. Baker testified that he saw no reason to inform East Coast that he had installed the alarm on the front door.

Viewing the facts in the light most favorable to Baker, the Court finds that the sounding of the alarm constitutes an intervening cause which relieves East Coast of liability. While it is undisputed that the alarm would not have sounded but for East Coast's entry into the apartment , it was the audible sound emitted from

the alarm that directly caused Baker's injuries. It was not reasonably foreseeable that Baker would install a device that would cause him to panic to such an extent that he would forget that he was unable to walk without assistance. Therefore, the causal chain of lia­ bility stemming from any negligence on behalf of East Coast was effectively broken by Baker's intervening and superseding act.

*Comparative Negligence*

Even absent the intervening and superseding cause, the Court finds that Baker's own contributory negligence bars his recovery. Under Delaware's comparative negli­ gence law, a plaintiff cannot recover if he acted more negligently than the defendant.... In other words, "if the plaintiff's contributory negligence is 51 % or greater, it is an absolute bar to recovery according to the Delaware statute." ... However, "if the plaintiff's contributory negligence is 50% or less, the plaintiff is permitted to recover, although the recovery is reduced proportionally." ... Summary judgment may be granted in favor [of] the defendant if the trial judge determines that "no reasonable juror could find that the plaintiff's negligence did not exceed the defendant's."...

At his deposition, Baker acknowledged that his ambulatory dysfunction, a side effect of his Parkinson's disease, posed significant problems with his ability to stand and walk. According to Baker, he would fall fre­ quently as a result of his condition. Baker was keenly aware of the physical limitations caused by his Parkinson's.

The Court finds, as a matter of law based on un­ disputed facts, that Baker's contributory negligence­ installing the alarm without notice to East Coast, which caused him to jump up out of bed and take "three steps" despite the fact that he suffered from physical limitations which prevented him from walking without assistance- is greater than any negligence allegedly committed by East Coast.

*Conclusion*

Baker has failed to establish a prima facie case of negli­ gence on the part of East Coast. Having considered the facts in the light most favorable to the non-moving party, the Court finds that the alarm, installed by Baker, constitutes an intervening and superseding cause which relieves East Coast of liability. The Court is cognizant of the fact that but for East Coast's entry into the apart­ ment, the alarm would not have been triggered. How­ ever, the Court finds, as Baker conceded, that the sound emitted from the self-installed alarm (of which East Coast had no notice) directly caused Baker's injuries.

Additionally, the Court finds as a matter of law based on undisputed facts, that Baker's contributory negligence

-installing the alarm and attempting to walk without

TH E L A W O F TOR T S **435**

assistance despite his physical limitations-exceeds any negligence of East Coast. Therefore, pursuant to Delaware's comparative negligence statute, Baker is barred from recovery.

THEREFORE, East Coast's Motion for Summary J udgment is hereby GRANTED ....

IT IS SO ORDERED.

The Honorable Mary M. Johnston

Case Questions

1. Do you agree with the court with respect to proximate causation in this case?
2. Why did the court rule in favor of the defendant?
3. Based on what you have read, do you agree with the court that no reasonable juror could find that the defendant was more negligent than the plaintiff?

## Negligence and Product Liability

### Plaintiffs can recover in negligence by proving that a manufacturer's conduct violated the reasonable person standard and proximately caused injury. The manufacturer's all egedly tortious conduct could relate to any aspect of product design, manufactur­ ing, quality control, packaging, or warnings.

In product liability suits, it is often difficult to

,Jrove the defendant's act or omission that ca used the plaintiff's injury. Thus, in the interests of ju stice, courts developed the doctrine of **res ipsa loquitur** ("the thing speaks for itself '). This doctrine perm.its plaintiffs to prove negligence circumstantially if the following facts are proved: (1) the defenda nt had exclusive control over the allegedly defective prod­ uct du1ing manufacture; (2) under nonnal circum­ stances, the plaintiff would not have been injured by the product if the defendant had exercised ordina1y care; and (3) the plaintiff's conduct did not contrib­ ute significantly to the accident. From the proved facts, the law permits the jurors to infer a fact for which there is no direct, explicit proof-the defen­ dant's negligent act or omission. The ttial judge will

instruct the jurors that the law permits them to con­ sider the inferred fact as wel1 as the proved facts in deciding whether the defendan t was negligent.

**Duty to Warn**

The following case illustrates typical probl ems asso­ ciated with law suits in which the plaintiff alleges a negligent failure to warn. A ma nufacturer's duty to warn consumers depends on the nature of the prod­ u ct. Warnings are unnecessa1y for products that are obviously dangerous to everyone (knives, saws, and firearms) . However, for products that may contain hazards that are not obvious, ma nufacturers have a duty to warn if th e average person would not have known about a safety hazard. If the plaintiff is knowledgeable about the hazard that the warning would have addressed, the ma nufacturer's negligent failure to warn would not have proxima tely caused the plaintiff s injuries. Thus in such cases the extent of the plaintiff' s actual knowledge of and familia1ity with the hazard and the product are relevant to the issue of ca usation.

Laaperi v. Sears Roebuck & Co., Inc.

*787 F.2d 726*

*U.S. Court of Appeals, First Circuit March 31, 1986*

Campbell, Chief Judge .

This is an appeal from jury verdicts totaling $1.8 million entered in a product liability suit against defendants Sears, Roebuck & Co. and Pittway Corporat ion. The

actions were brought by Albin Laaperi as administrator of the estates of his three sons, a ll of whom were killed in a fire in their home in December 1976, and as father and next friend of his daughter, Janet, who was injured

### ..

**436** CH A P TER XI

in the fire. Plaintiff's theory of recovery was that de­ fendants had a duty to warn plaintiff that a smoke detector powered by house current, manufactured by Pittway, and sold to Laaperi by Sears might not operate in the event of an electrical fire caused by a short circuit. Defendants contend on appeal that the district court erred in denying their motions for directed verdict and judgment notwithstanding the verdict; that the admis­ sion into evidence of purportedly undisclosed expert testimony violated Fed. R. Civ. P. 26(e); and that the award of $750,000 for inj uries to Janet Laaper i was excessive and improper . We affirm the j udgments in favor of plaintiff in his capacity as administrator of the estates of his three sons, but vacate the judgment in favor of Janet Laaperi, and remand for a new tr ial lim­ ited to the issue of her damages.

In March 1976, plaintiff Albin Laaperi purchased a smoke detector from Sears. The detector, manufac­ tured by the Pittway Corporation, was designed to be powered by AC (electrical) current. Laaperi installed the detector himself in one of the two upstairs bed­ rooms in his home.

Early in the morning of December 27, 1976, a fire broke out in the Laaperi home. The three boys in one of the upstairs bedrooms were killed in the blaze. Laaperi's 13-year-old daughter, Janet, who was sleeping in the other upstairs bedroom, received burns over 12 percent of her body and was hospitalized for three weeks .

The uncontroverted testimony at trial was that the smoke detector did not sound an alarm on the night of the f ire. The cause of the fire was later found to be a short circuit in an electrical cord that was located in a cedar closet in the boys' bedroom. The Laaperi home had two separate electrical circuits in the upstairs bedrooms: one that provided electricity to the outlets and one that powered the lighting fixtures. The smoke detector had been connected to the outlet circuit, which was the cir­ cuit that shorted and cut off. Because the circuit was shorted, the AC-operated smoke detector received no power on the night of the fire. Therefore, although the detector itself was in no sense defective (indeed, after the fire the charred detector was tested and found to be operable), no alarm sounded.

Laaperi brought this diversity action against de­ fendants Sears and Pittway, asserting negligent design, negligent manufacture, breach of warra nty, and neg­ ligent failure to warn of inherent dangers. The parties agreed that the applicable law is that of Massachu­ setts. Before the cla ims went to the j ury, verdicts were directed in favor of the defendants on a ll theories of liability other than failure to warn .

Laaperi's claim under the failure to warn theory was that he was unaware of the danger that the very short circuit which might ignite a f ire in his home

could, at the same time, incapacitate the smoke detector. He contended that had he been warned of this danger, he would have purchased a battery­ powered smoke detector as a backup or taken some other precaution, such as wiring the detector to a cir­ cuit of its own, in order better to protect his family in the event of an electrical fire.

The jury returned verdicts in favor of Laaperi in all four actions on the failure to warn claim. The jury as­ sessed damages in the amount of $350,000 in each of the three actions brought on behalf of the deceased sons, and $750,000 in the action brought on behalf of Janet Laaperi. The defendants ' motions for directed verdict and judgment notwithstanding the verdict were denied and defendants appealed.

Defendants contend that the district court erred in denying their motions for directed verdict and

j udgment n.o.v . First, they cla im that they had no duty to warn that the smoke detector might not work in the event of some electrical fires. Second, they maintain that even if they had such a duty, there was insuffi­ cient evidence on the record to show that the failure to warn proximately caused plaintiff's damages. We address these arguments in turn.

*A. Duty to Warn*

We must look, of course, to Massachusetts law. While we have found no cases with similar facts in Massa­ chusetts (or elsewhere), we conclude that on this record a jury would be entitled to find that defendants had a duty to warn. In Massachusetts, a manufacturer · can be found liable to a user of the product if the user is injured due to the failure of the manufacturer to exercise reasonable care in warning potential users of hazards associated with use of the product.. ..

The manufacturer can be held liable even if the product does exactly what it is supposed to do, if it does not warn of the potential dangers inherent in the way a product is designed. It is not necessary that the product be negligently designed or manufactured;

the failure to warn of hazards associated with fore­ seeable uses of a product is itself negligence, and if that negligence proximately results in a plaintiff's injuries, the plaintiff may recover ....

\*Defendants make no argument that the duty of Sears is any different from that of Pittway, the actual manufacturer. In the present case, Sears advertised the smoke detector as a "Sears Early One Fire Alarm." Pittway Corp. was not mentioned any­ where in these advertisements or in the 12- page owner's man­ ual packaged with the detector. Where a seller puts out a product manufactured by another as its own, the seller is sub­ ject to the same liability as though it were the manufacturer ....

TH E L A W OF TOR TS **437**

The sole purpose of a smoke detector is to alert occupants of a building to the presence of fire. The failure to warn of inherent nonobvious limitations of a smoke detector, or of non-obvious circumstances in which a detector will not function, can, we believe, "create an unreasonable risk of harm in that the inha­ bitants of a structure may be lulled into an unjustified sense of safety and fail to be forewarned of the exis­ tence of a fire." ... In the present case, the defendants failed to warn purchasers that a short circuit which causes an electrical fire may also render the smoke detector useless in the very situation in which it is ex­ pected to provide protection: in the early stages of a fire. We believe that whether such a failure to warn was negligent was a question for the jury .

To be sure, it was the fire, not the smoke detector per se, that actually killed and injured plaintiff's chil­ dren. But as the Second Circuit recently held, the manufacturer of a smoke detector may be liable when, due to its negligence, the device fails to work:

Although a defect must be a substantial factor in causing a plaintiff's injuries, it is clear that a "manu­ facturer's liability for injuries proximately caused by these defects should not be limited to [situations] in which the defect causes the accident, but should ex­ tend to situations in which the defect caused injuries over and above that which would have occurred from the accident, but for the defective design."

It is true that, unlike the above, there was no defect of design or manufacture in this case. But there was evi­ dence from which it could be inferred that the absence of a warning enhanced the harm resulting from the fire. Plaintiff testified that if he had realized that a short cir­ cuit that caused an electrical fire might at the same time disable the smoke detector, he would have purchased a back-up battery-powered detector or wired the detector in question into an isolated circuit, thus minimizing the danger that a fire-causing short circuit would render the detector inoperative. We find, therefore, a sufficient connection between the children's deaths and injury and the absence of any warning.

Defendants contend that the district court never­ theless erred in denying their motions because, they claim, the danger that an electrical fire will incapacitate an electric-powered smoke detector is obvious. They point out that anyone purchasing a device powered by house electrica l current will necessarily realize that if the current goes off for any reason, the device will not work.

In Massachusetts, as elsewhere, a failure to warn amounts to negligence only where the supplier of

the good known to be dangerous for its intended use "has no reason to believe that those for whose use the

chattel is supplied will realize its dangerous condition." ...

Where the risks of the product are discerriible by casual inspection, such as the danger that a knife can cut, or a stove burn, the consumer is in just as good a position as the manufacturer to gauge the dangers associated with the product, and nothing is gained by shifting to the manufacturer the duty to warn. Thus, a manufacturer is not required to warn that placing one's hand into the blades of a potato chopper will cause injury, ... that permitting a three-year-old child to ride on the running board of a moving tractor risks injury to the child, ... or that firing a BB gun at another at close range can injure or kill.... If a manufacturer had to warn consumers against every such obvious danger inherent in a product, "[t]he list of obvious practices warned against would be so long, it would fill a volume." ...

Defendants ask us to declare that the risk that an electrical fire could incapacitate an AC-powered smoke detector is so obvious that the average consumer would not benefit from a warning. This is not a trivial argument; in earlier-some might say sounder-days, we might have accepted it....

Our sense of the current state of the tort law in Massachusetts and most other jurisdictions, however, leads us to conclude that, today, the matter before us poses a jury question; that "obviousness" in a situation such as this would be treated by the Massachusetts courts as presenting a question of fact, not of law. To be sure, it would be obvious to anyone that an electrical outage would cause this smoke detector to fail. But the average purchaser might not comprehend the specific danger that a fire-causing electrical problem can simul­ taneously knock out the circuit into which a smoke detector is wired, causing the detector to fail at the very moment it is needed. Thus, while the failure of a detector to function as the result of an electrical mal­ function due, say, to a broken power line or a neigh­ borhood power outage would, we think, be obvious as a matter of law, the failure that occurred here, being associated with the very risk-fire-for which the device was purchased, was not, or so a jury could f ind.

... We think that the issue of obviousness to the average consumer of the danger of a fire-related power outage was one for the jury, not the court, to determine. In the present case, the jury was specifically instructed that if it found this danger to be obvious it should hold for the defendants. It failed to do so.

*B. Causation*

While, as just discussed, the danger the detector would fail in these circumstances was not so obvious as to eliminate, as a matter of law, any need to warn,

we must also consider whether Laaperi's specialized

**438** C H A PTER XI

electrical knowledge constituted a bar to his own recovery .... [Pllaintiff's specialized knowledge is immaterial to whether defendants had a duty to warn, since that duty is defined by the knowledge of the average purchaser. But plaintiff's expertise *is* relevant to whether defendants' failure to warn caused plain­ tiff's damages. Even though defendants may have been required to provide a warning, plaintiff may not recover if it can be shown that because of his above­ average knowledge, he already appreciated the very danger the warning would have described. In such event there would be no connection between the negligent failure to warn and plaintiff's damages.

Defendants here presented considerable evidence suggesting that Laaperi, who was something of an electrical handyman, knew of the danger and still took no precautions. Laaperi, however, offered evidence that he did not know of the danger, and that he would have guarded against it had he been warned ....

Self-serving as this testimony was, the jury was free to credit it. In reviewing the denial of a motion for directed verdict or judgment n.o.v., we are obliged to view the evidence in the light most favorable to the verdict winner .... In light of this standard, we cannot

say that the district court erred in denying defendants' motions for directed verdict and judgment n.o.v., for the jury could have believed Laaperi's testimony in the colloquy quoted above, among other evidence, and concluded that had he been properly warned, Laaperi would have instituted different fire detection methods in his home to protect his family against the danger that his smoke detector would be rendered useless in the event of a fire-related power outage.

*IV.*

... Considering Janet's injuries alone, apart from the horrible nature of her brothers' deaths, we find the award of $750,000 was so grossly disproportionate to the injuries of Janet Laaperi as to be unconscionable. It is therefore vacated.

The judgments in favor of Albin Laaperi in his capacity as administrator of the estates of his three sons are affirmed. In the action on behalf of Janet Laaperi, the verdict of the jury is set aside, the judg­ ment of the district court vacated, and the cause re­ manded to that court for a new trial limited to the issue of damages.

So ordered.

**Case Questions**

1. What warning should the defendants arguably have given the plaintiffs under the facts of this case?
2. Would the outcome in this case have been different if Albin Laaperi were a licensed electrician? What would utilitarians think of the doctrine of res ipsa loquitur?



**Imputed Negligence**

Although people are always responsible for their own acts, one may be held liable for the negligence of another by reason of some relationship existing between two parties. This is termed **imputed negligence,** or vica1ious liability.

Imputed negligence results when one person (the agent) acts for or represents another (the p1in­ cipal) by the latter's authority and to accomplish the latter's ends. A common example is the liability of employers for the torts that employees conm1-it in the scope of their employment.

One should take a liberal view of the scope­ of-employment concept, because the basis for

vicariou s liability is the desire to include in opera­ tional costs the inevitable losses to third persons incident to carrying on an enterptise, and thus dist1ibute the burden among those benefited by the enterp1ise. Generally, an employee would not be within the scope of employment (1) if the employee is en route to or from home, (2) if the employee is on an undertaking of his own,

1. if the act is prohibited by the employer, or
2. if the act is an u na uthorized delegation by the employer (in which case the employer would be directly liable) .

One generally is not vicariously liable for the negligent act of an independent contractor. **Independent contractors** are those who contract

THE L A W OF TO RTS **439**

### to do work according to their own method s and are not subject to the control of employers, except with respect to the results. The right of control over the manner in which the work is done is the main consideration in determining whether one employed is a n independent contractor or an agent. However, there are certain exceptions to this 11011- liability; for example, an employer who is negligent in hiring a contractor or who assigns a nondelegable duty may be directly liable.

**Modified No-Fault Liability Statutes**

As readers saw in Figure 11.1, automobile collision suits account for most of the t01t claims filed in the United States. Responding to widespread dissatisfac­ tion with the delay and expense in litigation of traffic accident cases, some states have enacted **modified no-fault liability statutes** in an attempt to conect the injustices and inadequacies of the fault system in a utomobile accident cases. Under a modified no­ 'mlt liability statute, an injured person nom1ally has no right to file suit to recover money damages for personal injuries and lost wages below a statutorily specified threshold. Instead, the injured pa1ty is com­ pensated by his or her own insurance company. The amount of compensation paid is determined by dol­ lar ceilings specified in the injured person's insurance policy. All "no-fault" states, however, pennit law­ su its for damages where the injured person has been seriously injured. States differ as to how they detemune when this threshold is crossed. The goal of the statutes is to reduce the cost of automobile insurance by saving litigation costs, including attor­ neys' fees, and by allowing little or no recovery for the pain and suffering and emotional stress for a no­ fault automobile accident.

**ST R I CT LI A B I LI T Y**

In addition to intentional torts a nd negligence, there is a third type of to1t called strict liability or absolute liability. This imposes liability on defendants without requiring any proof of lack of due care. Under the early common law, people were held strictly liable

for trespass and trespass on the case without regard to their intentions and whether they exercised reason­ able care. Although the breadth of strict liability diminished with the emergence of negligence and intentional torts, **strict liability in tort** :is applied in cases involving what the common law recognized as abno1mally dangerous activities and, more recently, :in certain product liability cases.

**Abnormally Dangerous Activities**

One who is involved in abnormally dangerous activities is legally responsible for hanrrful conse­ quences that are proximately caused. The possessor of a dangerous instrumentality is an insurer of the safety of others who are foreseeably within the dan­ ger zone. Because of juri sdictional differences, it is impossible to fomrnla te a general definition or complete listing of all dangerous instru mentalities. However, poisons, toxic chemicals, explosives, and vicious animals are examples of items that have been found to fall into this category.

**iiiOMiild**

Readers can see an example involving strict liability and a dangerous animal in the case of *Westberry v.*

*Blackwell,* which can be found with the Chapter XI materials on the textbook's website .

**Strict Liability and Product Liability**

A purchaser of ta ngible persona.I property may have a right to recover from the manufacturer for inju ries caused by product defects. Product defects include defects in design, manufactming defects, and warn­ ing defects. A person who has been injured by a product defect may be able to recover based on strict liability, as well as on breach of wananty (see discussion in Chapter X) a nd negligence (see earlier discussion in this chapter).

The application of strict liability in product liability cases occmTed because of dissatisfaction with the negligence and wananty remedies. It was very difficult for average consumers to detennine whether

**440** C H A P TE R XI

§ **402A.Special Liability of Seller of Product for Physical Harm to User or Consumer**

1. One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
   1. the seller is engaged in the business of selling such a product, and
   2. it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
2. The rule stated in Subsection (1) applies although
   1. the seller has exercised all possible care in the preparation and sale of his product, and
   2. the user or consumer has not bought the product from or entered into

any contractual relation with the seller.

**F I G U R E 11.2** Section 402A of the Restatement (Second) of Torts

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### manufacturers, wholesalers, or retailers of defective goods were responsible for their irjuries. Also, the tra­ ditional requirement of privity limited the manufac­ turer's liability in tmt and wa1nnty actions to the person who purchased the defective product, often the wholesaler or retailer. Refonners argued that too often consumers assumed the full cost of the losses. They believed that it would be more just and econom­ ically wise to shift the cost of injuries to manufacturers, since manufacturers could purchase insurance and could distribute the costs of the pren1iums among those who purchased their products.

In contrast to breach of warranty and negli­ gence remedies, which focus on the manufactu rer's conduct, modern strict liability focuses on the prod­ uct itself. A plaintiff who relies on strict liability has to prove th a t the product was unreasonably danger­ ous and defective and that the defect proximately caused the injury (although the unreasonably dan­ gerous requirement is disregarded by some courts).

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*Leichtamer v. Amer ican Motors Corporation* is a strict liability case involving a Jeep CJ-7 that pitched over while being driven, killing two people and injuring two others. The plaintiffs brought suit, claiming a design de­ fect was responsible for their injuries. The Ohio Supreme Court refers to Section 402A of the Restatement of Torts

(see Figure 11.2) in this case and adopts it as part of Ohio law. You can read this case on the textbook's website.

## T O R T LA W -A DD ITIO NA L CO NS IDER A T IO NS

**Tort Reform**

### The hotly contested battle over tort reform con­ tinues to rage on, with "reformers" seeking to limit plaintiffs' venue choices; increase the immunities available to physicians, pharmacists, and physician assistants; reduce the liability of pharmaceutical manufacturers in product liability cases; and cap noneconomic and punitive damages. Many advo­ cates of reform in sist that trial-a ttorney greed is at the core of the problem. Others maintain that with­ out tort reform it will be impossibl e to reduce the seemingly unstoppable increases in health costs.

Reform opponents point to reports that thou­ sands of people die annually in the United States because of medical errors. 12 They argue that reforms ultimat ely seek to arbitrarily deny injured people the

just recovery they are entitled to because of the cir­ cumstances and the nature and extent of their inju­ ries. They point out that the dan1age awards are large

T H E L A W OF T OR TS **441**

### only in cases in which the injuries are horrific and the tortfea sor's liability is great. They also argue that cor­ poration s must be held fully accou ntable for their tortiou s acts, or they will not have any economic incentive to act in the pu blic' s interest.

A judgment against one of several joint wrongdoers shall not bar the prosecution of an action against any or all the others, but the injured party may bring separate actions against the wrongdoers and proceed to judgment in each, or, if sued jointly, he

may proceed to judgment against them successively until judgment has been rendered against, or the cause has been otherwise disposed of as to, all of the defendants, and no bar shall arise as to any of them by reason of a judgment against another, or others, until the judgment has been satisfied. If there be a judgment against one or more joint wrongdoers , the full satisfaction of such judgment

accepted as such by the plaintiff shall be a discharge of all joint wrongdoers , except as to the costs; provided, however, this section shall have no effect on the right of contribution between joint wrongdoers

as set out in § 8.01-34.

The battle has played ou t a t the state level: thirty-five states ha ve enacted laws intended to

lessen recoveries, especially in medical malpractice cases. 13 Reform proposals typica lly eliminate joint

a nd several liability, limit a pl aintiff s choice of ve­ nues, cap noneconomic damages, shorten sta tute of limitations periods, and cap pu nitive da mages.

**Joint and Several Liability**

Under the common law, if Sarah, Jose, and Soyinni cornmit a tort at the same time and are a t fault, liability for the entire hann is imposed on each of the tortfea sors jointly and individually. This is te1rned joint **and sev­ eral liability.** This means that the judgment creditors could recover one-third from eachjudgment debtor or 1e entire judgment from one defendant, at the option of thejudgment creditor. This common law approach favors plaintiffs. It allows a judgment creditor to collect the entire judgment from the t01tfeasor that has the "deepest pockets." This unfo1tunate person then has to go to comt and seek "cont1ibution" from the other

t01tfeasors (assum.ing they a re neither bankrupt nor othe1wise judgment-proot). 1 4 Reformers favor mod­

**F I G U R E 11.3** Va. Code Ann. §8.01-443. Joint Wrong­ doers; Effect of Judgment Against One

**Limitations on Venue Choice**

Reformers a llege tha t plaintiffs' lawyers are taking adva ntage of jurisdictions tha t permit forum shop­ ping. In recent years, certain counties in some states have developed a reputation for consistently award­ i ng large verdicts and have been designated "tort

1 5

### ifying the rule so that a judgment debtor who has been

hellholes" by reform advocates .

Reformers sug­

found to be only 10 percent liable is not required to pay for 100 percent of thejudgment. Virginia is one of the states that still follow the common law rule. The Virginia statute establishing joint and several liability can be seen in Figure 11.3. Most states, however , have made modifications to the common law approach.

**iiiOMiild**

Minnesota is one of the states that have modified the common law rule regarding joint and several liability. Readers will find Minnesota's apportionment of damages statute included with the Chapter XI materials on the textbook's website. Readers are encouraged to look at both the Virginia statute (Figure 11.3) and the Minnesota statute, and notice how they differ .

gest that plaintiffs be lin1ited to filing suit in the

cou nty of the state in which the tort occu rred.

**Caps on Noneconomic Damages**

Many states have t1ied to lower jmy awards by statu­ t01ily establishing ceilings on recove1ies for noneco­ nomic damages such as pain and suffering, loss of cons01tium, and loss of ertjoyment of life **(hedonic damages).** Proponents of "t01t reforn1" often urge lawmakers to establish financial "caps" on the amount of damages a successful t01t plaintiff can receive. The rationale generally given is that doctors cannot afford to pay the cost of malpractice insurance premiums, and establish.ing ceilings on damage awards will reduce the overall cost of medical care.

**442** C H A P TER XI

**Introduction to *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt***

### The following case from Georgia illu stra tes how this very controversial issu e can generate

institutional conflict between state legislatures and sta te supreme courts.

##### Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt

###### *691 S.E.2d 218*

*Supreme Court of Georgia March 22, 2010*

Hunstein, Chief Justice.

This case requires us to assess the constitutionality of OCGA §51- 13-1, which limits awards of noneconomic damages in medical malpractice cases to a predeter­ mined amount. The trial court held that the statute violates the Georgia Constitution by encroaching on the right to a jury trial. ... In January 2006, Harvey P. Cole, M.D., of Atlanta Oculoplastic Surgery, d/b/a Ocu­ lus, performed ... laser resurfacing and a full facelift on appellee Betty Nestlehutt. In the weeks after the sur­ gery, complications arose, resulting in Nestlehutt's permanent disfigurement. Nestlehutt, along with her husband, sued Oculus for medical malpractice. The case proceeded to trial, ending in a mistrial. On retrial, the jury returned a verdict of $1,265,000, comprised of

$115,000 for past and future medical expenses;

$900,000 in noneconomic damages for Ms. Nestlehutt's pain and suffering; and $250,000 for Mr. Nestlehutt's loss of consortium. Appel lees then moved to have OCGA §51-13-1, which would have reduced the jury's noneconomic damages award by $800,000 to the stat­ utory limit of $350,000, declared unconstitutional. The trial court granted the motion and thereupon entered judgment for appellees in the full amount awarded by the jury. Oculus moved for a new trial, which was denied, and this appeal ensued.

1. In relevant part, OCGA §51-13-1 provides:

In any verdict returned or judgment entered in a medical malpractice action, including an action for wrongful death, against one or more health care providers, the total amount recoverable by a claimant for noneconomic damages in such action shall be limited to an amount not to exceed

$350,000 .00, regardless of the number of defen­ dant health care providers against whom the claim is asserted or the number of separate causes of action on which the claim is based.

... "Noneconomic damages" is defined as

damages for physical and emotional pain, dis­ comfort, anxiety, hardship, distress, suffering,

inconvenience, physical impairment, mental anguish, disfigurement, loss of enjoyment of life, loss of society and companionship, loss of consor­ tium, injury to reputation, and all other nonpe­ cuniary losses of any kind or nature.

... In addition to capping noneconomic damages against health care providers ... the statute also limits noneconomic damages awards against a single medical facility to $350,000; limits such awards to $700,000 for actions against more than one medical facility; and limits such awards to $1,050,000 for actions against multiple health care providers and medical facilities ....

Enacted as part of a broad legislative package known as the Tort Reform Act of 2005, the damages caps were intended to help address what the General Assembly determined to be a "crisis affecting the pro­ vision and quality of health care services in this

state." ... Specifically, the Legislature found that health care providers and facilities were being negatively affected by diminishing access to and increasing costs of procuring liability insurance, and that these prob­ lems in the liability insurance market bore the poten­ tial to reduce Georgia citizens' access to health care services, thus degrading their health and well-being .... The provisions of the Tort Reform Act were therefore intended by the Legislature to "promote predictability and improvement in the provision of quality health care services and the resolution of health care liability claims and ... thereby assist in promoting the provision of health care liability insurance by insurance providers." ...

1. We examine first the trial court's holding that the noneconomic damages cap violates our state Con­ stitution's guarantee of the right to trial by jury.

Duly enacted statutes enjoy a presumption of constitutionality. A trial court must uphold a statute unless the party seeking to nullify it shows that it "manifestly infringes upon a constitutional provision or violates the rights of the people." The constitution­ ality of a statute presents a question of law. Accord­ ingly, we review a trial court's holding regarding the constitutionality of a statute de novo....

TH E L A W OF T OR TS **443**

The Georgia Constitution states plainly that "[t]he right to trial by jury shall remain inviolate." ... It is well established that Article I, Section I, Paragraph XI (a) "guarantees the right to a jury trial only with respect to cases as to which there existed a right to jury trial at common law or by statute at the time of the adoption of the Georgia Constitution in 1798.... Prior to adop­ tion of the 1798 Constitution, the General Assembly had adopted the common law of England and all sta­ tutes in force as of 1776 as the law of Georgia .... Thus, the initial step in our analysis must necessarily be an examination of the right to jury trial under late eigh­ teenth century English common law.... See *Rouse v.*

*State* ... (1848) (referring to Blackstone, "whose com­

mentaries constituted the law of this State, before and since the Revolution," as authoritative on jury trial right as of 1798)....

* 1. The antecedents of the modern medical mal­ practice action trace back to the 14th century.

The first recorded case in England on the civil [liability] of a physician was an action brought before the Kings Bench in 1374 against a surgeon by the name of J. Mort involving the treatment of a wounded hand. The physician was held not liable because of a legal technicality, but the court clearly enunciated the rule that if negligence is proved in such a case the law will provide a remedy.

... By the mid-18th century, the concept of "mala praxis" [malpractice] was sufficiently established in legal theory as to constitute one of five classes of "private wrongs" described by Sir William Blackstone in his Commentaries .... The concept took root in early American common law, the earliest reported medical negligence case in America dating to 1794.... Given the clear existence of medical negligence claims as of the adoption of the Georgia Constitution of 1798, we have no difficulty concluding that such claims are encom­ passed within the right to jury trial ... under Art. I, Sec. I, Par. XI (a). This conclusion is bolstered by the fact that medical negligence claims appear in Georgia's earliest systematically reported case law ... , and the fact that the tort of medical malpractice was included in Georgia's earliest Code. See Code of 1861, §2915 (effective Jan. 1, 1863)....

As with all torts, the determination of damages rests "peculiarly within the province of the jury." ... Because the amount of damages sustained by a plain­ tiff is ordinarily an issue of fact, this has been the rule from the beginning of trial by jury .... Hence, "[t]he right to a jury trial includes the right to have a ju ry determine the amount of ... damages, if any, awarded to the [plaintiff]."...

Noneconomic damages have long been recog­ nized as an element of total damages in tort cases,

including those involving medical negligence.... Based on the foregoing, we conclude that at the time of the adoption of our Constitution of 1798, there did exist the common-law right to a jury trial for claims involv­ ing the negligence of a health care provider, with an attendant right to the award of the full measure of damages, including noneconomic damages, as deter­ mined by the jury .

* 1. We next examine whether the noneconomic damages caps in OCGA §51-12-1 unconstitutionally infringe on this right. By requiring the court to reduce a noneconomic damages award determined by a jury that exceeds the statutory limit, OCGA §51- 13-1 clearly nullifies the jury's findings of fact regarding damages and thereby undermines the jury's basic function .... Consequently, we are compelled to conclude that the caps infringe on a party's constitutional right, as embodied in Article I, Section I, Paragraph XI (a), to a jury determination as to noneconomic damages .... The fact that OCGA §51-13-1 permits full recovery of non­ economic damages up to the significant amount of

$350,000 cannot save the statute from constitutional attack . "[l]f the legislature may constitutionally cap recovery at [$350,000], there is no discernible reason why it could not cap the recovery at some other figure, perhaps $50,000, or $1,000, or even $1."... The very existence of the caps, in any amount, is violative of the right to trial by jury ....

Though we agree with the general principle ... that the Legislature has author ity to modify or abro­ gate the common law, we do not agree with the notion that this general authority empowers the Leg­ islature to abrogate constitutional rights that may inhere in common-law causes of action.... Likewise, while we have held that the Legislature generally has the authority to define, limit, and modify available legal remedies ... the exercise of such authority simply cannot stand when the resulting legislation violates the constitutional right to jury trial.

Nor does ... the existence of statutes authorizing double or treble damages attest to the validity of the caps on noneconomic damages. While it is question­ able whether any cause of action involving an award thereof would constitute an analogue to a 1798 common-law cause of action so as to trigger the right to jury trial in the first place ... to the extent the right to jury tria l did attach, treble damages do not in any way nullify the jury's damages award but rather merely operate upon and thus affirm the integrity of that award ....

In sum, based on the foregoing, we conclude that the noneconomic damages caps in OCGA §51-13-1 violate the right to a jury trial as guaranteed under the Georgia Constitut ion....

**444** C H A P TE R XI

1. "The general rule is that an unconstitutional statute is wholly void and of no force and effect from the date it was enacted. " ...

In this case, we do not find that the ... factors mil­ itate in favor of deviation from the general rule of retroactivity....

1. We find no abuse of the trial court's discretion in granting appellees' motion to exclude certain evi­ dence, because that ruling was necessitated by the trial court's earlier grant of appellant's motion in

limine.... As to appellant's claim that the evidence was relevant to establishing the bias of appellee's expert witness, the record establishes that the trial court's ruling in no manner precluded appellant from attempting to show the witnes[s]' bias through cross­ examination or other means. Accordingly , this enu­ meration lacks merit.

For the foregoing reasons, we affirm the judg­ ment of the trial court.

Judgment affirmed....

**Case Questions**

1. Why did the Georgia Supreme Court feel it necessary to examine English legal precedents going back as far as 1374 in order to decide a case before it for decision in 2010?
2. Why did the Georgia Supreme Court conclude that the statute was unconstitutional?

## Statutes of Limitations

### Legisl atures often attempt to limit a potential defen­ da nt's exposure to tort liability by shortening the statute of limita tion s. Although this proposal is in tended to benefit defen dants, it does so at the expense of injured pla intifE, who will be denied the opportu nity for th eir day in court if they fail to file their suits in a timely ma n ner.

**Caps on Punitive Damages**

Ma ny states have abolished pun itive damages unl ess such awards are specifically permitted by

statute. Increasingly, states require that punitive damages be proven clearly and convincingly rather than by a prepond erance of the evidence, and others require bifurcated trials for pu nitive da­ mages. Reformers urge legislatures to impose do· Jar ceilings on punitiv e damage awards in medical malpractice and prod u ct liability cases. According to U.S. Bureau of Justice Statistics data, only 3 percent of tort pla intiffs were awarded pu nitive

damages in 2005. 16

**C H A P T E R S U M M A R Y**

The chapter began with brief discussions of the his­ tmical development of th e modem tmt action and the fu nctions of t01t law in contempora1y Ame1ica. This was followed with an overview of intentional tmts in general and discussions and cases focusing on such intentional to1ts as assault, batte1y, conversion, trespass to l and, malicious prosecution , false imp1isonment , defamation, inte1ference with contract relations, in­ fliction of mental distress, and invasion of p1ivacy . The focus then shifted to negligence. The elements

of a negligence claim. were discussed , with an empha­ sis on the "duty of care" and "proximate cause" requirements. The workings of the comparative neg­ ligence approach , which involves an app01tio1m1ent of fault betv.reen the plaintiff and defendant, was ex­ plained and illustrated in accompanying cases. The third type of tort, st1ict liability for abnonnally dangerous activities and product defects, was then ad­ dressed. The chapter concluded with a brief overview of tort refo1111.

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TH E L A W OF T OR TS **445**

## C HA PT E R Q UE S T IO NS

### 1. Jack McM ahon and his wife, Angelina, decided to take a break from d1iving a nd stopped at a Mobil minimart for a take-out coffee. Angelina took the pla stic lid off the Styrofoam cup as Jack resum ed d1iving. She spilled coffee on her lap while t1ying to pour some of the coffee in to another cup, a nd suffered second- a nd third­ degree burns. Angelina experienced consider­ able pain for severa l mon ths, and sustained scarring on one of her thighs and on her abdomen. Th e McMahon s settled their claims against the ma nufacturers of the cup a nd lid , but brought suit against the manufacturer of the coffee-making machin e, the Bunn-0-Matic Corporation . The plaintiffs alleged tha t th e machine was defective beca use it brewed the coffee at too high a temperature, 179 degrees Fahrenheit (the industiy average is between

1 75 and 185), and that the h eat caused the cup to deteriorate. They also claimed that Bunn was negligent in failing to warn customers about the magnitude of the irjurie s (second- and third­ degree bums) that could result from spilled coffee at this temperatu re. Did Bun n, in your opinion, have a legal duty to give plaintiffs the requested warnings?

*J\lrMa/,011* "· *8111111-0-J\latir Co,p., 150 F ]d 651 (7t/, Cir.*

*/ 998)*

1. Patrick Reddell and Derek Johnson, both eighteen years of age, wanted to take pa 1t in a BB gun war "game." They agreed not to fire their weapons above the waist a nd that their BB guns would be pumped no more than three times, thereby limitin g the force of the Bl3s' impact when st1iking the other person. They also promised each other only to fire a BB gun when the other person was "in the open." While participating in this activity, Johnson shot Reddell in the eye, causing seriou sly impaired vision. Reddell su ed Johnson for gross negli­ gence and for recklessly aim.in g his weapon above the waist. Johnson answered by denying liability a nd asserting the defenses of assumption of risk a nd conttibutoiy negligence. Both patties

then filed motions for summa1y judgm ent. How should the t1ial judge rule on the motions'

*Reddell 11. J o/111 so11, 942 P.2d 200 ( 1 997)*

1. Shan non Jackson was injured while driving her car on a farn1-to-market road when her vehicl e hit and killed a horse named Tiny that was

standing in the road. The force of the collision severely damaged her vehicle. Jackson brought a negligence suit against Tiny's owner, Naomi Gibbs, for failin g to prevent Tiny from wan­ dering onto the road. Gibbs defended by sayin g she owed Jackson no duty on a farm-to-market road that was within a "free-range" area. The t1ial court rejected the defense, a nd a jmy

foun d the defendant negligent and liabl e for damages of $7,000. The state intern1ediate ap­ peals court affirmed the tri al court, ruling that a lthough there was no statu tory duty to keep Tiny off the road , the court recognized a common law duty "to keep domestic livestock from roa ming a t large on public roads." This was a case of first impression before the state supreme court. Texas courts prior to this case had rejected the English common-law rule imposing a duty on the own er of a domestic

a nimal to prevent it from trespassing on a neighbor's property. English common law imposed no corresponding duty to keep an a nimal from wa ndering onto a pu blic road

u n less the animal had "vicious propensities." I n light of the above , Texas law generally per­ mitted healthy , nonviciou s a nima l s to roam freely, a condition associated with "free-range" jurisdictions . An exception to the free-ra nge

law was statutorily recognized where a "local stock law" was enacted to keep animals off of a state highway . What argumen ts might be made supporting an d opposing the new common­

law rule recognized by the intermediate court of appeals?

*Gibbs 11. J ackso11, 97-096 1, S11prelll e Co11rt of Texas ( / 998)*

1. The plain tiff became ill in the defendant's store. The defendan t u ndertook to render medical aid

**446** CH A P TER XI

### to the plaintiff, keeping the plaintiff in an infir­ mary for six hours without medical care. It was deternlined that when the plaintiff finally received proper medical care, the extended lapse of time had seriously aggravated the plaintiff s illness. Discuss what action, if any, the plaintiff has.

*Zelenka ,,. Gi111bel Bros., Ju e., 287 N . Y.S. ·134 ( 1935)*

1. Plaintiff came into defendant's grocery store and purchased some ciga rettes. He then asked if the store had a ny empty boxes he could use. The defenda nt instructed the plaintiff that he could find some in the back room a nd told the plaintiff to help himself. Plaintiff entered the room, which was dark. While searching for a light switch, the plaintiff fell into a n open stairwell a nd was injured. What is the status of the plaintiff (invitee, licensee, tres­ passer)? How will the status affect the plain­ ti ff s ability to recover from the defendant, if at all? Do you think the fact that the defen­ dant is opera ting a business should affect his duty?

*Hl/1ela11 v. Van Narr a Grocer)', 382 S. W.2d 205 (K)'· 1964)*

1. Plaintiff s decedent was killed when the roof of the defenda nt's foundry fell in on him. Plaintiff alleges that the defendant failed to make proper repairs to the roof, and tha t such neglect of the defendant caused the roof to collapse. The defendant claims, however, that the roof collapsed during a violent storm, a n d that, even though the roof was in disrepa i r, the high winds caused the roof to fall. Wha t issue is raised, and how would you resolve i t?

*Ki111bl e v. Macki11tosh H e111phill Co., 59 A.2d 68 (1948)*

1. The plaintiff s decedent, who had been drink­ ing, was crossing Broadway when he was negligently struck by one of defendant's cabs. As a result of the accident , the plaintiff s dece­ dent, the victim, was thrown about twenty

feet, his thigh was broken, and his knee was injured . He immediately becam e unconscious and was rushed to a hospital, where he died of delirium trernens (a disease characterized by violent shaking, often induced by excessive alcohol consumption). Defendant argued that the deceased's alcoholism might have caused delirium tremens and death at a later date, even if defendant had not injured him. What is the main issue presen ted here? Who should prevail a nd why?

*/\lcCahi/1 v. 1'\i. Y. Trm1sportatio11 Co., 9-1 N.E. 616 ( 19 1 1)*

1. Plaintiff, while a spectator at a professional hockey game, is struck in the face by a puck. The defendant shot the puck attempting to score a goal, but shot too high , ca using the puck to go into the spectator area. Plaintiff brings suit, and defendant claim s assumption of risk. Who prevails? Suppose the defendant had been angry at crowd reaction a nd intentionally shot the puck into the crowd . Would the outcome change?
2. Clay Fruit, a life insurance salesma n, was required to attend a business convention conducted by his employer. The convention included social as well as business events, and Fruit was encou raged to mix freely with out­ of-state agents in order to learn as much as possible about sales techniques. One evening, after all scheduled business a nd social events had concluded, Fruit drove to a nearby bar

a nd resta u rant, looking for some out-of-state colleagues. Finding none, he drove back toward his hotel. On the journey back, he negligen tly struck the au tomobile of the plaintiff, causing serious inju ries to plaintiff s legs. Was Fruit in the course and scope of his employment a t the time of the accident?

From whom will the plaintiff be able to recover?

*Fm it v. Schrei11er, 502 P.2d 133 (Alaska 1972)*

T HE L A W OF T OR TS **447**

1 . T. F. F. f'l uck nett, *A Co11cise History of the*

## NOTE S

trespass. *Exxon i\1.obi/ Corporat ion* I'.

C,1m111011 *LJll ll* (Boston : little. Brown and Co..

#### 1 956) , p. 37'2.

* 1. A. K. R. Kiralfy, *Pott er's Histori c,,! fntrod11 crio11 to E11glisl, L1w,* 4th ed. (London: Sweet a nd Maxwell Ltd., 1962), pp. 376-177.
  2. R. Walsh, *A History* (!/ *A n.glo-A111eriwn Law*

#### (Indianapolis: Bobbs-Merrill Co.. 1932),

p. 323.

4. Kiralfy, pp. 305-307; Walsh, p. 344.

#### :::>. Maryland plaintiffs sued El\'Xon Mobil after an estimated 2(1,00 gallons of gasoline leaked out of u ndergrou nd storage containers and alleg­ edly contaminated the water suppl y. Some of the plainrifE, who were u nable :it tha t time to detect any presently existing contamination (the "non-detect" Appellces) , clairned that Exxon had committed a tresp:iss. They argued that their property had been inju red to a n u n­ known exent by the leak and this had created the "potenti:il for future detected

contam ination." Maryla nd 's Court of Appeals (the state's highest court) rejected the claim. The court said:

An action for trespass may lie "[w]hen a defendant interferes with a plaintiff s in­ terest in the exclusive possession of the land by entering or causing something to enter the land.". . . Thus, recovery for trespass requires that the defenda n t must

have entered or ca used something ham1ful or noxious to enter onto the plaintiff s land .... Here, the non-detect Appellees fail ed to demonstrate any physical intru­ sion of th eir land. General contamination of an aquifer that may or may not reach a given Appcll ee's property at an undeter­ mined point in the future is not sufficient to prove in vasion of property. Thus, the non -detect A ppellees could not recover, a t the time of trial, damages for dim.in u tion in val u e of property based on a theory of

*A lbri,(! ht ,* No. 15 (Md. fil ed l eb. 26, 2013) .

#### 6. More discussion abou t the diffrrcnt typl S of d:1111:i gcs can be found in Chapter VII.

1. Nt>f r.' : M ost sta tes a lso recognize the tort of *11('.(!i(l!e,u* iufliction of emotional distress, thou gh proof of damages rnay be more stringent.
2. . *Exxrn M obil C01poratio11 11. A lbrig ht,* No. 15

#### (Md. filed Feb. 26, 2013).

1. Rental tenant5 and other authorized occupa nts of property (i n legal ese,, *la11f11l ocaipiers)* also

have about the same protection against liability to trespa ssers as property owners.

1. *Mckinnoll 11. ivash. Fed. Sa11.* & *Loan Ass'n,* 68 Wash. 2d 644 (1 966) .

#### As was explained in Chapter VIII the element of *causatio11* also m ust be proved in some, but not all, criminal cases and in some strict liability cases in tort, as well as in tort negligence cases.

1. "A Tragic Error," *Newsweek* (March 3, 2001),

p. 22.

#### "Ohio's Tort Refom1 Law Hasn't Lowered Health-Care Costs," *T111! Plain Dealer* (March 20, 2010), [http://v..rvvw.cleveland.com](http://v.rvvw.cleveland.com/) / open/index. ssf/2010/03/ ohios\_tort\_refom1\_law\_hasnt\_lo

.html

l4. As a practical matter, lawsuits seeking money damages generally are not brought against in­ dividuals who have no bank accounts, real property, insuran ce poli cies, or jobs. It doesn't make sense for plaintiffa to invest money in litigating a claim against a defendant who does not have the assets to satisfy a judgment -such a defendan t is said to be "judgmen t-proof "

1. "Tort Reform Advances in Mississippi (for Starters) ," *National La111 Journal* Al , AlO-A l 1 (Febrnary 3, 2003).
2. U.S. Departm ent of Justice, *B11rea 11 of ]ustice Statistics B11lletl11 , N C]* 228129 (November 2009), p. 6.