

**JUDGES AND LEGISLATURES
IN 21ST CENTURY TORTS:
INTEGRATING CASES AND STATUTES**

**David W. [Jake] Barnes
Distinguished Research Professor of Law
Seton Hall University School of Law**

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David W. [Jake] Barnes
Seton Hall University School of Law
barnesda@shu.edu

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1. INTENTIONAL TORTS

CONSENTING TO BATTERY

Statute: Disturbing the Peace

Louisiana Revised Statutes 14: 103A (2002)

A. Disturbing the peace is the doing of any of the following in such manner as would foreseeably disturb or alarm the public:

- (1) Engaging in a fistic encounter; or
- (2) Addressing any offensive, derisive, or annoying words to any other person who is lawfully in any street, or other public place; or call him by any offensive or derisive name, or make any noise or exclamation in his presence and hearing with the intent to deride, offend, or annoy him, or to prevent him from pursuing his lawful business, occupation, or duty; or
- (3) Appearing in an intoxicated condition; or
- (4) Engaging in any act in a violent and tumultuous manner by any
- (5) Holding of an unlawful assembly; or
- (6) Interruption of any lawful assembly of people.

Notes to Statute

1. *Defining Disturbing the Peace.* Consent to illegal acts may be ineffective. Many statutes have statutes defining what constitutes disturbing the peace. These statute may distinguish between when consent to a harmful contact is a defense and when it is not. The statute reproduced above applies in Louisiana, where the fight [in the principle case] occurred. Did that fight fit within this statute's definition of disturbing the peace?

SELF DEFENSE

Statute: Affirmative Defense

Texas Civil Practice and Remedies Code § 83.001 (2001)

It is an affirmative defense to a civil action for damages for personal injury or death that the defendant, at the time the cause of action arose, was justified in using deadly force under Section 9.32 , Penal Code, against a person who at the time of the use of force was committing an offense of unlawful entry in the habitation of the defendant.

Statute: Deadly Force in Defense of Person

Texas Penal Code § 9.32 (2001)

- (a) A person is justified in using deadly force against another;
 - (1) if he would be justified in using force against the other under Section 9.31;
 - (2) if a reasonable person in the actor's situation would not have retreated; and
 - (3) when and to the degree he reasonably believes the deadly force is immediately necessary:
 - (A) to protect himself against the other's use or attempted use of unlawful deadly force; or
 - (B) to prevent the other's imminent commission of aggravated kidnaping, murder, sexual assault, aggravated sexual assault, robbery, or aggravated robbery.
- (b) The requirement imposed by Subsection (a)(2) does not apply to an actor who uses force against a person who is at the time of the use of force committing an offense of unlawful entry in the habitation of the actor.

Statute: Self-Defense

Texas Penal Code § 9.31 (a),(b)

- (a) Except as provided in Subsection (b), a person is justified in using force against another when and to the degree he reasonably believes the force is immediately necessary to protect himself against the other's use or attempted use of unlawful force.
- (b) The use of force against another is not justified:
 - (1) in response to verbal provocation alone;
 - (2) to resist an arrest or search that the actor knows is being made by a peace officer . . . ;
 - (3) if the actor consented to the exact force used or attempted by the other;
 - (4) if the actor provoked the other's use or attempted use of unlawful force, unless:
 - (A) the actor abandons the encounter, or clearly communicates to the other his intent to do so reasonably believing he cannot safely abandon the encounter; and
 - (B) the other nevertheless continues or attempts to use unlawful force against the actor; or
 - (5) if the actor sought an explanation from or discussion with the other person concerning the actor's differences with the other person while the actor was:
 - (A) carrying a weapon in violation of Section 46.02 [making it an offense to knowingly carry a handgun, illegal knife, or club]; or
 - (B) possessing or transporting a weapon in violation of Section 46.05 [prohibiting possession, manufacture, transport, repair or sale of specified weapons such as brass knuckles and armor piercing ammunition].

Notes to Statutes:

1. *The "Make My Day!" Myth.* Contemporary mythology holds that, in some states, a homeowner is entitled to shoot to kill anyone who enters the house. Many state statutes make special mention of people's right to be secure in their dwellings. See the Texas Penal Code provision in § 9.32(b). Another such statute declares "The general assembly hereby recognizes that the citizens of Colorado have a right to expect **absolute safety** within their own homes." Colorado Revised Statutes 18-1-704.5 (2002)(emphasis added.). The Texas Civil Practice and Remedies Code sounds like it provides an affirmative defense for killing someone who unlawfully enters their house, but a close reading of the Penal Code makes it clear that the privilege to inflict serious bodily harm is subject to substantial limitations.

2. *The Obligation to Retreat.* Jurisdictions differ with respect to the obligation of a person to retreat. The court in [the principle case] considers the possibility of retreat as merely one factor to be considered in determining the amount of force one is privileged to use. The Restatement (Second) § 65 denies the privilege to use deadly force in self-defense to one who "correctly or reasonably believes that he can safely avoid the necessity of so defending himself by . . . retreating" unless he is attacked in a dwelling place. On the other hand, the Restatement (Second) § 63 allows one to use "reasonable force, not intended or likely to cause death or serious bodily harm" without "retreating or otherwise giving up a right." What approach does the Texas statute take to the obligation to retreat?

Statute: Force in Defense of Property

Utah Statutes § 76-2-406 (2002)

A person is justified in using force, other than deadly force, against another when and to the extent he reasonably believes that force is necessary to prevent or terminate criminal interference with real property or personal property: (1) lawfully in his possession, (2) lawfully in the possession of a member of his immediate family, or (3) belonging to a person whose property he has a legal duty to protect.

Statute: Use of Force in Defense of Premises and Property

North Dakota Statutes 12.1-05-06 (2001)

Force is justified if it is used to prevent or terminate an unlawful entry or other trespass in or upon premises, or to prevent an unlawful carrying away or damaging of property, if the person using such force first requests the person against whom such force is to be used to desist from his interference with the premises or property, except that a request is not necessary if it would be useless or dangerous to make the request or substantial damage would be done the property sought to be protected before the request could effectively be made.

Statute: Use of Force in Defense of Premises or Personal Property

New Jersey Statutes 2C:3-6(b)(3)(2002)

Use of deadly force. The use of deadly force is not justifiable [in defense of premises] unless the actor reasonably believes that:

- (a) The person against whom the force is used is attempting to dispossess him of his dwelling otherwise than under a claim of right to its possession; or
- (b) The person against whom the force is used is attempting to commit or consummate arson, burglary, robbery or other criminal theft or property destruction; except that
- ©) Deadly force does not become justifiable . . . unless the actor reasonably believes that:
 - (I) The person against whom it is employed has employed or threatened deadly force against or in the presence of the actor; or
 - (ii) The use of force other than deadly force to terminate or prevent the commission or the consummation of the crime would expose the actor or another in his presence to substantial danger of bodily harm. An actor within a dwelling shall be presumed to have a reasonable belief in the existence of the danger. . . .

Notes on Statutes:

1. *Limitations on the Use of Reasonable Force.* While some statutes privilege the use of reasonable force to protect property, as Utah’s statute illustrates, others qualify the privilege. Requiring a request to desist is a common limitation, though a request is required only when it is reasonable, as the North Dakota statute indicates. Other statutes explicitly deny the privileged use of force when the actor knows that exclusion of the trespasser will expose the trespasser to a “substantial risk of serious bodily harm.” See, e.g., New Jersey Statutes 2C:3-6b(2).

2. *Limitations on the Use of Deadly Force.* While some states privilege use of deadly force to prevent serious crimes, others qualify the privilege. New Jersey’s statute lists a number of crimes that justify the use of deadly force, but qualifies the privilege by requiring that there also be threat of bodily harm to a person.

2. NEGLIGENCE: THE STANDARD OF CARE

CHILDREN ENGAGED IN ADULT ACTIVITIES

Statute: Liability of parent or guardian for willful destruction of property by infant under 18

New Jersey Statutes Annotated § 2A:53A-15(2000)

A parent, guardian or other person having legal custody of an infant under 18 years of age who fails or neglects to exercise reasonable supervision and control of the conduct of such infant, shall be liable in a civil action for any willful, malicious or unlawful injury or destruction by such infant of the real or personal property of another.

Statute: Parental liability for willful, malicious or criminal acts of children
West Virginia Code § 55-7A-2 (2002)

The custodial parent or parents of any minor child shall be personally liable in an amount not to exceed five thousand dollars for damages which are the proximate result of any one or a combination of the following acts of the minor child:

- (a) The malicious and willful injury to the person of another; or
- (b) The malicious and willful injury or damage to the property of another, whether the property be real, personal or mixed; or
- (c) The malicious and willful setting fire to a forest or wooded area belonging to another; or
- (d) The willful taking, stealing and carrying away of the property of another, with the intent to permanently deprive the owner of possession.

For purposes of this section, "custodial parent or parents" shall mean the parent or parents with whom the minor child is living, or a divorced or separated parent who does not have legal custody but who is exercising supervisory control over the minor child at the time of the minor child's act.

Recovery hereunder shall be limited to the actual damages based upon direct out-of-pocket loss, taxable court costs, and interest from date of judgment. The right of action and remedy granted herein shall be in addition to and not exclusive of any rights of action and remedies therefor against a parent or parents for the tortious acts of his or their children heretofore existing under the provisions of any law, statutory or otherwise, or now so existing independently of the provisions of this article.

Statute: Natural guardian; liability for torts of child
Hawaii Rev. Stat. Ann. § 577-3 (2001)

... The father and mother of unmarried minor children shall jointly and severally be liable in damages for tortious acts committed by their children, and shall be jointly and severally entitled to prosecute and defend all actions in which the children or their individual property may be concerned.

Notes on Statutes

1. *Comparing Parental Liability Statutes.* These statutes show three legislative approaches to the problem of financial responsibility for children's tortious conduct. The New Jersey and West Virginia statutes represent the majority view among states that have adopted statutes on this topic. Note the differences in detail between these two statutes. The Hawaii statute represents a minority position. If a young child rode a bicycle less carefully than a typical child of that age would usually ride and injured a pedestrian, under which of these three statutes could the child's parent be financially responsible for the injury?

2. *Alternative Statutory Approaches.* Under which of these statutes would a parent be responsible for the damage caused by his or her child's setting fire to a wooded area belonging to someone else? What does the West Virginia statute accomplish by including an explicit reference to that conduct?

3. PROOF OF BREACH

VIOLATION OF STATUTE

Statute: Breach of Duty – Evidence of Negligence

– Negligence Per Se

Revised Code of Washington 5.40.050

A breach of a duty imposed by statute, ordinance, or administrative rule shall not be considered negligence per se, but may be considered by the trier of fact as evidence of negligence; however, any breach of duty as provided by statute, ordinance, or administrative rule relating to electrical fire safety, the use of smoke alarms, or driving while under the influence of intoxicating liquor or any drug, shall be considered negligence per se.

Statute: Presumptions Affecting the Burden of Proof
Cal. Evid. Code § 669 (2002)

Failure to exercise due care

- (a) The failure of a person to exercise due care is presumed if:
- (1) He violated a statute, ordinance, or regulation of a public entity;
 - (2) The violation proximately caused death or injury to person or property;
 - (3) The death or injury resulted from an occurrence of the nature which the statute, ordinance, or regulation was designed to prevent; and
 - (4) The person suffering the death or the injury to his person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted.
- (b) This presumption may be rebutted by proof that:
- (1) The person violating the statute, ordinance, or regulation did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law; or
 - (2) The person violating the statute, ordinance, or regulation was a child and exercised the degree of care ordinarily exercised by persons of his maturity, intelligence, and capacity under similar circumstances, but the presumption may not be rebutted by such proof if the violation occurred in the course of an activity normally engaged in only by adults and requiring adult qualifications.

Notes for Statutes.

1. The Washington state statute treats some violations of statutes, ordinances, and regulations as some evidence of negligence and others as negligence per se. It does not explicitly say that no excuses will be offered for violations of rules relating to electrical fire safety, the use of smoke alarms, or driving while intoxicated, but what rationale would support that treatment? Are those likely to be enactments that prescribe standards of conduct in rigid terms?

2. The California evidence statute offers a typical definition of the elements necessary to make statutory violation relevant in a torts case. With regard to the power given to proof of violation, it requires a finding of negligence unless the violator establishes ordinary prudence, under the usual rules defining reasonable care for adults and children.

4. CAUSE IN FACT

MODIFIED ALTERNATIVE LIABILITY

Statute: Infancy, Insanity

New York Civil Practice Law and Rules 208 (2002)

If a person entitled to commence an action is under a disability because of infancy or insanity at the time the cause of action accrues, and the time otherwise limited for commencing the action is three years or more and expires no later than three years after the disability ceases, or the person under the disability dies, the time within which the action must be commenced shall be extended to three years after the disability ceases or the person under the disability dies, whichever event first occurs; if the time otherwise limited is less than three years, the time shall be extended by the period of disability. . . .

Statute: Actions to Be Commenced within Three Years . . .

New York Civil Practice Law and Rules 214 (4), (5) (2002)

The following actions must be commenced within three years: . . .

5. an action to recover damages for a personal injury

Statute: Certain Action to Be Commenced within Three Years of Discovery

New York Civil Practice Law and Rules 214-c (1), (2), (6) (2002).

1. In this section: "exposure" means direct or indirect exposure by absorption, contact, ingestion, inhalation, implantation or injection.

2. Notwithstanding the provisions of section 214, the three year period within which an action to recover damages for personal injury or injury to property caused by the latent effects of exposure to any substance or combination of substances, in any form, upon or within the body or upon or within property must be commenced shall be computed from the date of discovery of the injury by the plaintiff or from the date when through the exercise of reasonable diligence such injury should have been discovered by the plaintiff, whichever is earlier.

6. This section shall be applicable to acts, omissions or failures occurring prior to, on or after July first, nineteen hundred eighty-six, except that this section shall not be applicable to any act, omission or failure:

(a) which occurred prior to July first, nineteen hundred eighty-six, and

(b) which caused or contributed to an injury that either was discovered or through the exercise of reasonable diligence should have been discovered prior to such date, and

©) an action for which was or would have been barred because the applicable period of limitation had expired prior to such date.

Notes for Statutes:

1. *Statute of Limitations in Hymowitz* [the principle case]. The defendants offered two defenses in Hymowitz. The first was that the plaintiff could not identify which defendant had caused the harm. This issue was resolved by adoption of the modified alternative liability rule and market share liability. The second defense was that the statute of limitation had run. According to the New York Statute of Limitations, NY CPLR 214, personal injury actions must be brought within three years of the time when “the cause of action accrues.” In New York, the action generally accrues when the defendant breaches a duty to the plaintiff causing harm to the plaintiff. NY CPLR 208 modified that rule for children, allowing them to bring actions up to three years from the time when they reach the age of 21.

Mindy Hymowitz was born on December 11, 1954 and reached the age of 21 in 1975. She alleged that she developed cancer as a result of prenatal exposure to DES taken by her mother in 1954. Mindy Hymowitz’s cancer symptoms first appeared in 1979. Mindy Hymowitz had been damaged by here mother’s exposure to DES, but the symptoms did not appear until Ms. Hymowitz was 24 or 25.. Under the rules in NY CPLR 214 and 208, Mindy Hymowitz could not sue after she reached the age of 24. Since she did not discover the injury in time to sue, she was barred from recovery.

In 1986, the New York Legislature passed specific “revival” legislation extending the statute of limitations for plaintiff who had injuries resulting from exposures to DES, asbestos, tungsten-carbide, chlordane, and polyvinyl chloride and whose right to sue had expired because of the general statute of limitations. Mindy Hymowitz sued immediately after this revival statute was passed.

2. *Statutes of Limitations Based on Discovery*. Many states’ statutes of limitations start the time clock after the time of discovery of the injury by the plaintiff rather than the time the injury occurs. When the New York Legislature adopted the revival statute allowing Mindy Hymowitz to sue, it also adopted a “discovery rule” for some types of injuries that was codified in 214-c, above. Why does this New York statute not apply to Mindy Hymowitz’s claim?

4. LIMITATION ON LIABILITY: DUTY AND PROXIMATE CAUSE

PROXIMATE CAUSE

Statute: Occupational Diseases; Proximate Causation

New Mexico Statutes 52-3-32 (2002)

The occupational diseases defined in Section 52-3-33 NMSA 1978 shall be deemed to arise out of the employment only if there is a direct causal connection between the conditions under which the work is performed and the occupational disease and which can be seen to have followed as a natural incident of the work as a result of the exposure occasioned by the nature of the employment and which can be fairly traced to the employment as the proximate cause. The disease must be incidental to the character of the business and not independent of the relation of employer and employee. The disease need not have been foreseen or expected but after its contraction must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a natural consequence. In all cases where the defendant denies that an alleged occupational disease is the material and direct result of the conditions under which work was performed, the worker must establish that causal connection as

a medical probability by medical expert testimony. No award of compensation benefits shall be based on speculation or on expert testimony that as a medical possibility the causal connection exists.

Notes for Statute:

1. *Special Rules for Special Circumstances.* States sometimes adopt different cause rules for different purposes. New Mexico has adopted the following rule for proximate cause in routine cases “[A]ny harm which is in itself foreseeable, as to which the actor has created or increased the recognizable risk, is always “proximate,” no matter how it is brought about.” *Torres v. El Paso Electric Co.*, 987 P.2d 386, 396 (1999). Like many other states, New Mexico has adopted a different rule for workers compensation cases, cases involving injuries arising out of employment. How is the New Mexico proximate cause rule for workers compensation cases different from its proximate cause rule for routine cases?

New Jersey Jury Instructions
7.10 Proximate Cause
GENERAL CHARGE TO BE GIVEN IN ALL CASES (5/98)

If you find that the [party] was negligent, you must find that the party’s negligence was a proximate cause of the accident/incident/event before you can find that the [the party] was responsible for the claimed injury/loss/harm. It is the duty of the [plaintiff] to establish, by the preponderance of the evidence, that the negligence of [the defendant] was a proximate cause of the accident/incident/event and of the injury/loss/harm allegedly to have resulted from [the defendant’s] negligence.

The basic question for you to resolve is whether [the plaintiff’s] injury/loss/harm is so connected with the negligent actions or inactions of [the defendant] that you decide it is reasonable, in accordance with the instructions I will now give you, that [the defendant] should be held responsible for the injury/loss/harm.

7.11 Proximate Cause
ROUTINE TORT CASE WHERE NO ISSUES OF
CONCURRENT OR INTERVENING CAUSES,
OR FORESEEABILITY OF INJURY OR HARM (8/99)

By proximate cause, I refer to a cause that in a natural and continuous sequence produces the accident/incident/event/ and resulting injury/loss/harm and without which the resulting accident/incident/event or injury/loss/harm would not have occurred. A person who is negligent is held responsible for any accident/incident/event or injury/loss/harm that results in the ordinary course of events from his/her/its negligence. This means that you must first find that the resulting accident/incident/event or injury/loss/harm to [the plaintiff] would not have occurred but for the negligent conduct of the defendant. Second, you must find that the defendant’s negligent conduct was a substantial factor in bringing about the resulting accident or injury/loss/harm. By substantial, I mean that the cause is not remote, trivial or inconsequential.

If you find that the [defendant’s] negligence was a cause of the accident/incident/event and that such negligence was a substantial factor in bringing about the injury/loss/harm, then you should find that the defendant was a proximate cause of the plaintiff’s injury/loss/harm.

7.13 PROXIMATE CAUSE WHERE THERE IS A CLAIM
THAT CONCURRENT CAUSES OF HARM ARE PRESENT AND CLAIM THAT SPECIFIC HARM WAS NOT
FORESEEABLE (5/98)

[Steps 1 and 2 are the same as above.]

Third, you must find that some injury/loss/harm to [the plaintiff] must have been foreseeable. For the injury/loss/harm to be foreseeable, it is not necessary that the precise injury/loss/harm that occurred here was foreseeable by [the defendant]. Rather, a reasonable person should have anticipated the risk that [the defendant’s] conduct could cause some injury/loss/harm suffered by [the plaintiff]. In other words, if some injury/loss/harm from [the defendant’s] negligence was within the realm of reasonable foreseeability, then

the injury/loss/harm is considered foreseeable. On the other hand, if the risk of injury/loss/harm was so remote as to not be in the realm of reasonable foreseeability, you must find no proximate cause.

In sum, in order to find proximate cause, you must find that the negligence of [the defendant] was a substantial factor in bringing about the injury/loss/harm that occurred and that some harm to [the plaintiff] was foreseeable from [the defendant's] negligence.

Statute: Legislative Findings; Proximate Cause

Tennessee Statutes § 57-10-101 (2002)

The general assembly hereby finds and declares that the consumption of any alcoholic beverage or beer rather than the furnishing of any alcoholic beverage or beer is the proximate cause of injuries inflicted upon another by an intoxicated person.

Statute: Proximate Cause; Standard of Proof

Tennessee Statutes § 57-10-102 (2002)

Notwithstanding the provisions of § 57-10-101, no judge or jury may pronounce a judgment awarding damages to or on behalf of any party who has suffered personal injury or death against any person who has sold any alcoholic beverage or beer, unless such jury of twelve (12) persons has first ascertained beyond a reasonable doubt that the sale by such person of the alcoholic beverage or beer was the proximate cause of the personal injury or death sustained and that such person:

- (1) Sold the alcoholic beverage or beer to a person known to be under the age of twenty-one (21) years and such person caused the personal injury or death as the direct result of the consumption of the alcoholic beverage or beer so sold; or
- (2) Sold the alcoholic beverage or beer to an obviously intoxicated person and such person caused the personal injury or death as the direct result of the consumption of the alcoholic beverage or beer so sold.

Notes for Statutes.

1. *Rules of Policy Limiting Liability.* The Tennessee Supreme Court has outlined a three-prong test for proximate cause:

- (1) the tortfeasor's conduct must have been a "substantial factor" in bringing about the harm being complained of; and (2) there is no rule or policy that should relieve the wrongdoer from liability because of the manner in which the negligence has resulted in the harm; and (3) the harm giving rise to the action could have reasonably been foreseen or anticipated by a person of ordinary intelligence and prudence.

Haynes v. Hamilton County, 883 SW2d 606, 612 (Tenn 1994).

What is the test for proximate cause in Tennessee applied to a person who has sold beer to a person over 21 years old? Under 21 years old?

2. *Burden of Proof on Proximate Cause.* Whatever the test for proximate cause, the party obliged to prove that the other was a proximate cause must ordinarily do so by a preponderance of the evidence. Legislature may change this burden of proof for policy reasons, as the Tennessee legislature did. How does the burden of proof of proximate cause differ in cases involving suits against persons who have sold alcoholic beverages to people under 21 years old?

SUPERSEDING CAUSE

Statute: Proximate Cause

Colorado Statutes § 13-21-504(2) and (3) (2002)

(2) The manufacturer's, importers, or distributor's placement of a firearm or ammunition in the stream of commerce, even if such placement is found to be foreseeable, shall not be conduct sufficient to constitute the proximate cause of injury, damage, or death resulting from a third party's use of the product.

(3) In a product liability action concerning the accidental discharge of a firearm, the manufacturer's importer's, or distributor's placement of the product in the stream of commerce shall not be conduct deemed sufficient to constitute proximate cause, even if accidental discharge is found to be foreseeable.

Notes to Statute:

1. *Legislation Directed at Recurring Issues.* The statute related to firearms and ammunition may be viewed as a legislative response to a recurring problem facing courts or as special interest legislation. Does the statute appear to resolve the issue of proximate cause or of superseding cause? Does it help to know that Colorado applies the substantial factor test for proximate cause?

Statute: Effect upon Chain of Proximate Cause

Indiana Statutes 16-36-5-26 (2002)

The act of withholding or withdrawing CPR, when done under:

- (1) an out of hospital DNR [Do Not Resuscitate] declaration and order issued under this chapter;
- (2) a court order or decision of a court appointed guardian; or
- (3) a good faith medical decision by the attending physician that the patient has a terminal illness;

is not an intervening force and does not affect the chain of proximate cause between the conduct of a person that placed the patient in a terminal condition and the patient's death.

Statute: Intervening Forces; Proximate Causation

Indiana Statutes 16-36-4-20 (2002)

The act of withholding or withdrawing life prolonging procedures, when done under: (1) a living will declaration made under this chapter;

- (2) a court order or decision of a court appointed guardian; or
- (3) a good faith medical decision by the attending physician that the patient has a terminal condition;

is not an intervening force and does not affect the chain of proximate cause between the conduct of any person that placed the patient in a terminal condition and the patient's death.

Notes for Statutes:

1. *Statutory Modifications of Proximate Cause Rules.* States occasionally modify legal cause rules for policy reasons. Indiana courts have adopted the following rule for proximate cause:

“We point out that as an element of a negligence cause of action, the test for proximate cause is whether the injury is a natural and probable consequence which, in light of the circumstances, should reasonably have been foreseen or anticipated. “

Reynolds v. Strauss Veal, Inc. (1988), Ind.App., 519 N.E.2d 226, 229,trans. denied. What policy reasons support the legislative action reflected in the Indiana statutes?

2. *Statutory Modifications of Superseding Cause Rules.* The Indiana statute describe the effect on legal cause of withholding or withdrawing CPR or life prolonging procedures. How does this statute affect the proximate cause determination in Indiana? Can either of these acts be a superseding cause that would relieve an actor who negligently put the patient’s life in danger from liability?

6. DEFENSES

COMPARATIVE FAULT

Statute: Comparative Fault

Florida Statutes § 768.81 (2002).

(2) Effect of contributory fault. -- In an action to which this section applies, any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as economic and noneconomic damages for an injury attributable to the claimant's contributory fault, but does not bar recovery.

Statute: Comparative Fault; Effect

Minnesota Statutes § 604.01(2002)

Subdivision 1. Scope of application. Contributory fault does not bar recovery in an action by any person or the person's legal representative to recover damages for fault resulting in death, in injury to person or property, or in economic loss, if the contributory fault was not greater than the fault of the person against whom recovery is sought, but any damages allowed must be diminished in proportion to the amount of fault attributable to the person recovering. The court may, and when requested by any party shall, direct the jury to find separate special verdicts determining the amount of damages and the percentage of fault attributable to each party and the court shall then reduce the amount of damages in proportion to the amount of fault attributable to the person recovering.

**Statute: Negligence Cases – Comparative Negligence
as a Measure of Damages**

Colorado Revised Statutes § 13-21-111 (2002)

(1) Contributory negligence shall not bar recovery in any action by any person or his legal representative to recover damages for negligence resulting in death or in injury to person or property, if such negligence was not as great as the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in proportion to the amount of negligence attributable to the person for whose injury, damage, or death recovery is made.

Notes to Statutes:

1. *Comparative Negligence:* Many states statutes establish systems of comparative negligence. In analyzing the preceding examples of these statutes, identify the form of comparative negligence (or comparative fault) adopted by each one. Determine how each statute would treat a two-party case in which the shares of responsibility were the following:

- | | | |
|----|---------------|---------------|
| a) | plaintiff 75% | defendant 25% |
| b) | plaintiff 51% | defendant 49% |
| c) | plaintiff 50% | defendant 50% |
| d) | plaintiff 49% | defendant 51% |
| e) | plaintiff 25% | defendant 75% |

Statute: Limitation on recovery in tort actions; fault.

Codified as Illinois Statutes Ch. 735 § 5/2-1116

(held unconstitutional in *Best v. Taylor Machine Works*, 689 NE2d 1057 (Ill. 1997))

(a) The purpose of this Section is to allocate the responsibility of bearing or paying damages in actions brought on account of death, bodily injury, or physical damage to property according to the proportionate fault of the persons who proximately caused the damage.(b) As used in this Section:"Fault" means any act or omission that (I) is negligent, willful and wanton, or reckless, is a breach of an express or implied warranty, gives rise to strict liability in tort, or gives rise to liability under the provisions of any State statute, rule, or local ordinance and (ii) is a proximate cause of death, bodily injury to person, or physical damage to property for which recovery is sought."Contributory fault" means any fault on the part of the plaintiff (including but not limited to negligence, assumption of the risk, or willful and wanton misconduct) which is a proximate cause of the death, bodily injury to person, or physical damage to property for which recovery is sought.

Statute: Effect of Contributory Fault; Definition

Alaska Statutes §§ 09.17.060; 09.17.900 (2001).

09.17.060. In an action based on fault seeking to recover damages for injury or death to a person or harm to property, contributory fault chargeable to the claimant diminishes proportionately the amount awarded as compensatory damages for the injury attributable to the claimant's contributory fault, but does not bar recovery.Sec. 09.17.900 Definition. In this chapter, "fault" includes acts or omissions that are in any measure negligent, reckless, or intentional toward the person or property of the actor or others, or that subject a person to strict tort liability. The term also includes breach of warranty, unreasonable assumption of risk not constituting an enforceable express consent, misuse of a product for which the defendant otherwise would be liable, and unreasonable failure to avoid an injury or to mitigate damages.

Statute: Joint Tortfeasors, Liability

Mississippi Statutes § 85-5-7(1) (2002).

(1) As used in this section "fault" means an act or omission of a person which is a proximate cause of injury or death to another person or persons, damages to property, tangible or intangible, or economic injury, including but not limited to negligence, malpractice, strict liability, absolute liability or failure to warn. "Fault" shall not include any tort which results from an act or omission committed with a specific wrongful intent.

Notes for Statutes:

1. *Downing and the Illinois Statute.* **Downing v. United Auto Racing** [the principle case] discussed two options for handling a defense of contributory negligence where plaintiffs claim that the defendant was reckless: contributory negligence not applicable and balance relative degrees of fault. Four years after **Downing v. United Auto Racing Association** was decided, the Illinois Supreme Court reaffirmed that apportioning fault was appropriate between a negligent plaintiff and a reckless defendant but not between a negligent plaintiff and a

defendant who had committed an intentional tort. See *Poole v. City of Rolling Meadows*, 656 N.E.2d 768 (Ill. 1995). After the accident in **Downing v. United Auto Racing Association**, the Illinois legislature adopted the Civil Justice Reform Amendments of 1995, Public Act 89-7, which contained language defining fault. The entire Act was later declared unconstitutional for reasons unrelated to the issue in **Downing**, in *Best v. Taylor Machine Works*, 689 NE2d 1057 (Ill. 1997). Would the language of the Act have produced the same balancing of reckless and negligent conduct as the holding in **Downing**? What policy arguments for and against this balancing does the **Downing** court identify?

2. *Alternative Approaches*: How do the Alaska and Mississippi statute resolve the issue raised in **Downing**?

ASSUMPTION OF RISK

Statute: Express Assumption of Risk

Ohio Statutes § 4171.09 (2002)

The general assembly recognizes that roller skating as a recreational sport can be hazardous to roller skaters regardless of all feasible safety measures that can be taken. Therefore, roller skaters are deemed to have knowledge of and to expressly assume the risks of and legal responsibility for any losses, damages, or injuries that result from contact with other roller skaters or spectators, injuries that result from falls caused by loss of balance, and injuries that involve objects or artificial structures properly within the intended path of travel of the roller skater, which are not otherwise attributable to an operator's breach of his duties pursuant to sections 4171.06 and 4171.07 of the Revised Code [describing safety measures the operator is obliged to take].

Statute: Waiver of Liability

Hawaii Statutes § 663-10.95 (a)(2001)

(a) Any waiver and release, waiver of liability, or indemnity agreement in favor of an owner, lessor, lessee, operator, or promoter of a motorsports facility, which releases or waives any claim by a participant or anyone claiming on behalf of the participant which is signed by the participant in any motor sports or sports event involving motorsports in the State, shall be valid and enforceable against any negligence claim for personal injury of the participant or anyone claiming on behalf of and for the participant against the motorsports facility, or the owner, operator, or promoter of a motorsports facility. The waiver and release shall be valid notwithstanding any claim that the participant did not read, understand, or comprehend the waiver and release, waiver of liability, or indemnity agreement if the waiver or release is signed by both the participant and a witness; provided that a waiver and release, waiver of liability, or indemnity agreement executed pursuant to this section shall not be enforceable against the rights of any minor or the minor's representative.

Notes on Statutes:

1. *Legislative Solutions to Judicial Invalidation of Waivers*. Legislatures have responded in various ways to claims by operators of public facilities that they could not reasonably operate their facilities without enforceable waivers of liability. How does the Ohio approach to protecting operators of roller skating arenas differ from Hawaii's approach to protecting operators of motorsports facilities? Which provides greater protection?

2. *Judicial Enforceability of Waivers*. Would a waiver signed under the conditions described in the Hawaii statute be enforceable under the rules described in [the principle cases]?

MITIGATION DEFENSES

Statute: Fault

Indiana Code 34-6-2-45 (2002)

(a) "Fault", for purposes of IC 34-20 [referring to injuries caused by products], means an act or omission that is negligent, willful, wanton, reckless, or intentional toward the person or property of others. The term includes the following: (1) Unreasonable failure to avoid an injury or to mitigate damages. . . .

(b) "Fault", for purposes of IC 34-51-2 [referring to comparative negligence], includes any act or omission that is negligent, willful, wanton, reckless, or intentional toward the person or property of others. The term also includes unreasonable assumption of risk not constituting an enforceable express consent, incurred risk, and unreasonable failure to avoid an injury or to mitigate damages. (Emphasis added.)

Statute: Failure to comply; fault; liability of insurer;

mitigation of damages

Indiana Code 9-19-10-7 (2002)

(a) Failure to comply with section 1, 2, 3, or 4 [requiring front seat occupants of passenger motor vehicles to wear safety belts] of this chapter does not constitute fault under IC 34-51-2 and does not limit the liability of an insurer.(b) Except as provided in subsection ©), evidence of the failure to comply with section 1, 2, 3, or 4 of this chapter may not be admitted in a civil action to mitigate damages.©) Evidence of a failure to comply with this chapter may be admitted in a civil action as to mitigation of damages in a product liability action involving a motor vehicle restraint or supplemental restraint system. The defendant in such an action has the burden of proving noncompliance with this chapter and that compliance with this chapter would have reduced injuries, and the extent of the reduction.

Notes to Statutes.

1. *Mitigation and Fault:* The statutory option illustrate by the Indiana Code is to consider that failure to wear a seatbelt is not fault, and can be used as evidence of mitigation in a products liability action only. What is the implication for the plaintiff of allowing failure to use a seatbelt as evidence of mitigation but not fault?

2. *Statutes and Judicial Interpretation.* Indiana courts have applied its seatbelt and mitigation statutes very narrowly. In *Morgen v. Ford Motor Co.*, 762 N.E.2d 137 (Ind.App. 2002), the court held that it was not misuse of a vehicle not to wear seatbelts because there is no statutory or common law duty to wear a seatbelt in the backseat of a vehicle. In *Hopper v. Carey*, 716 N.E.2d 566 (Ind. App. 1999), the court held that there was no common law or statutory duty to wear a seatbelt in a fire truck and, while there is a statutory duty to wear a seatbelt in a passenger vehicle, a failure to do so cannot be used as evidence of fault.

SOVEREIGN IMMUNITY DEFENSES

Statute: United States as a Defendant

28 USC 1346(b)(1) (2002)

Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Statute: Liability of the United States

28 USC § 2674 (2002).The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

Statute: Exceptions

28 USC § 2680 (2002).

The provisions of this chapter and section 1346(b) of this title shall not apply to--(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.©) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer . . .

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.[(g) Repealed. Sept. 26, 1950, c. 1049, § 13(5), 64 Stat. 1043.](h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: Provided, That, with

regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.(I) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.(k) Any claim arising in a foreign country.(l) Any claim arising from the activities of the Tennessee Valley Authority.(m) Any claim arising from the activities of the Panama Canal Company.(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.

Notes on Statutes.

1. *Negligent or Wrongful Acts.* Because Section 1346 waives sovereign immunity only for a "negligent or wrongful act or omission," the United States government cannot be held liable under strict liability theories, theories that do not require proof of fault. For this reason, the Supreme Court in *Laird v. Nelms*, 406 U.S. 797 (1972), held that a property owners could not sue on a theory of strict liability for ultrahazardous activities for damage allegedly caused by sonic booms caused by military planes flying over North Carolina on a training mission.

2. *Discretionary Function Exemption.* The Supreme Court found, in Section 2680, an alternative basis for denying recovery on a strict liability theory in *Laird v. Nelms*. Section 2680(a) exempts the United States government from liability for acts based on the performance of a discretionary function. While the manner in which an activity is carried out may subject the government to liability, the decision to engage in an activity may not, even if the activity is ultrahazardous.

STATUTE OF LIMITATIONS AND REPOSE DEFENSES

Statute: Effect of Disability

Texas Civil Practice and Remedies Code §16.001 (2002).

(a) For the purposes of this subchapter, a person is under a legal disability if the person is:

- (1) younger than 18 years of age, regardless of whether the person is married; or
- (2) of unsound mind.

(b) If a person entitled to bring a personal action is under a legal disability when the cause of action accrues, the time of the disability is not included in a limitations period.

©) A person may not tack one legal disability to another to extend a limitations period.

(d) A disability that arises after a limitations period starts does not suspend the running of the period.

Statute: Claim by minor against provider of health care; limitations

Massachusetts Statutes 231 Section 60D (2000).

Notwithstanding the provisions of section seven of chapter two hundred and sixty, any claim by a minor against a health care provider stemming from professional services or health care rendered, whether in contract or tort, based on an alleged act, omission or neglect shall be commenced within three years from the date the cause of action accrues, except that a minor under the full age of six years shall have until his ninth birthday in which the action may be commenced, but in no event shall any such action be commenced more than seven years after occurrence of the act or omission which is the alleged cause of the injury upon which such action is based except where the action is based upon the leaving of a foreign object in the body.

Statute: Ten years; developer, contractor, architect, etc.

California Code of Civil Procedure § 337.15 (2002).

(a) No action may be brought to recover damages from any person, or the surety of a person, who develops real property or performs or furnishes the design, specifications, surveying, planning, supervision, testing, or observation of construction or construction of an improvement to real property more than 10 years after the substantial completion of the development or improvement for any of the following:

- (1) Any latent deficiency in the design, specification, surveying, planning, supervision, or observation of construction or construction of an improvement to, or survey of, real property.
- (2) Injury to property, real or personal, arising out of any such latent deficiency.

Statute: Limitation of Actions

Tennessee Statutes § 29-28-103 (2002).

(a) Any action against a manufacturer or seller of a product for injury to person or property caused by its defective or unreasonably dangerous condition must be brought within the period fixed by [statutes of limitations in other sections] but notwithstanding any exceptions to these provisions, it must be brought within six (6) years of the date of injury, in any event, the action must be brought within ten (10) years from the date on which the product was first purchased for use or consumption, or within one (1) year after the expiration of the anticipated life of the product, whichever is the shorter, except in the case of injury to minors whose action must be brought within a period of one (1) year after attaining the age of majority, whichever occurs sooner.

Statute: Attorneys

Illinois Compiled Statutes Ch. 735 5/13-214.3(b)(c) (2002).

(b) An action for damages based on tort, contract, or otherwise (i) against an attorney arising out of an act or omission in the performance of professional services or (ii) against a non-attorney employee arising out of an act or omission in the course of his or her employment by an attorney to assist the attorney in performing professional services must be commenced with 2 years from the time the person bringing the action knew or reasonably should have known of the injury for which damages are sought.

©) An action described in Subsection (b) may not be commenced in any event more than 6 years after the date on which the act or omission occurred.

Notes for Statutes:

1. *Tolling of Statute of Limitation for Children and Certain Disabled People:* Another circumstance suspends the running of the statute of limitations to protect children and others who are not able to care for their own property or protect their own rights. A disability exception insures that those individuals' rights to bring suit will not be precluded by the running of the statute of limitations. An example of a statutory provision that tolls the statute until a child reaches the age of majority appears in Section 16.001(b) of the Texas Civil Practice and Remedies Code.

2. *Combining Statutes of Repose and Limitation:* A lawyer must be alert to the combined effect of statutes of limitation and statutes of repose. Statutes of repose may limit the application of the **discovery rule**, barring recovery even though the plaintiff had insufficient time to discover that he or she had a claim. State differ about whether **fraudulent concealment** tolls statutes of repose. Statutes of repose may also reduce the effect of the disability exception, as the Massachusetts statute does. Even though the disability exception to the statute of limitations may generally toll the statute of limitations until a child reaches his or her majority, the statute of repose for health care providers in Massachusetts creates a maximum time from the occurrence of the tortious act.

3. *Other Contexts for Statutes of Repose:* In addition to activity related to "improvements to land," illustrated in [the principle case], statutes of repose are important in medical and legal malpractice and products liability cases. Note how limitation periods and repose periods are combined in the California, Tennessee, and Illinois statutes.

7. APPORTIONMENT OF LIABILITY

JOINT AND SEVERAL LIABILITY AND ITS ABROGATION

Statute: Limitation of Joint and Several Liability

Miss. Stat Ann. § 85-5-7 (2000)

(1) As used in this section "fault" means an act or omission of a person which is a proximate cause of injury or death to another person or persons, damages to property, tangible or intangible, or economic injury, including but not limited to negligence, malpractice, strict liability, absolute liability or failure to warn. "Fault" shall not include any tort which results from an act or omission committed with a specific wrongful intent.

(2) Except as may be otherwise provided in Subsection (6) of this section, in any civil action based on fault, the liability for damages caused by two (2) or more persons shall be joint and several only to the extent necessary for the person suffering injury, death or loss to recover fifty percent (50%) of his recoverable damages.

Statute: Abolition of joint and several liability; exceptions.

Joint and several liability for joint tortfeasors as defined in section 663-11 is abolished except in the following circumstances:

- (1) For the recovery of economic damages against joint tortfeasors in actions involving injury or death to persons;
- (2) For the recovery of economic and noneconomic damages against joint tortfeasors in actions involving:
 - (A) Intentional torts;
 - (B) Torts relating to environmental pollution;
 - (C) Toxic and asbestos-related torts;
 - (D) Torts relating to aircraft accidents;
 - (E) Strict and products liability torts; ...

Note to Statutes

1. *Damage Threshold Several Liability.* In contrast to using types of damages to determine whether joint and several liability will apply, another technique uses the amount of damages as a criterion. The Mississippi statute illustrates this approach. What amount of damages would the plaintiff in [the principle case] be entitled to collect from each defendant under the Mississippi statute?

2. *Harm-based Retention of Joint and Several Liability.* The Hawaii statute illustrates a second approach taken by state legislatures when switching from joint to several liability.

INSOLVENCY IN MULTIPLE TORTFEASOR CASES

Statute: Liability of Multiple Tortfeasors for Damages

Connecticut General Statutes Annotated § 52-572h(g)(3) (2001)

The court shall order that the portion of such uncollectible amount which represents recoverable economic damages be reallocated among the other defendants. The court shall reallocate to any such other defendant an amount equal to such uncollectible amount of . . . economic damages multiplied by a fraction in which the numerator is such defendant's percentage of negligence and the denominator is the total of the percentages of negligence of all defendants, excluding any defendant whose liability is being reallocated.

Statute: Apportionment of Damages

Minnesota Statutes Annotated § 604.02 (2001)

Subd. 2. Upon motion made not later than one year after judgment is entered, the court shall determine whether all or part of a party's equitable share of the obligation is uncollectible from that party and shall reallocate any uncollectible amount among the other parties, including a claimant at fault, according to their respective percentages of fault. A party whose liability is reallocated is nonetheless subject to contribution and to any continuing liability to the claimant on the judgment.

Subd. 3. In the case of a claim arising from the manufacture, sale, use or consumption of a product, an amount uncollectible from any person in the chain of manufacture and distribution shall be reallocated among all other persons in the chain of manufacture and distribution but not among the claimant or others at fault who are not in the chain of manufacture or distribution of the product. Provided, however, that a person whose fault is less than that of a claimant is liable to the claimant only for that portion of the judgment which represents the percentage of fault attributable to the person whose fault is less.

Notes to Statutes

1. Suppose that a plaintiff has suffered economic damages of \$70,000 arising from the sale of a negligently manufactured power saw. The plaintiff was negligent for failing to wear protective eyewear. The manufacturer was negligent for failing to secure the saw's safety guard during manufacture. A retailer was negligent for failing to provide written or oral safety instructions to the plaintiff. A jury allocated the following shares of responsibility for the plaintiff's injuries:

Plaintiff	(30 % responsible)
Defendant Manufacturer	(60% responsible)
Defendant Retailer	(10% responsible)

In a jurisdiction that applies comparative fault principles and several liability, Plaintiff would receive a judgment for \$42,000 against the manufacturer and a judgment for \$7,000 against the retailer. If the manufacturer was insolvent, how would the Connecticut and Minnesota statutes treat the \$42,000 judgment that the manufacturer would otherwise have paid? If the retailer was insolvent, how would these statutes treat the \$7,000 the retailer would otherwise have paid? Which statute is more favorable to plaintiffs?

8. LIABILITY OF PROFESSIONALS

MEDICAL MALPRACTICE STANDARDS OF CARE

Statute: Standard of Acceptable Professional Practice

Mich. Comp. Laws 600.2912a (2002)

Action alleging malpractice; burden of proof, standard of acceptable professional practice and standard of care

Sec. 2912a. (1) Subject to subsection (2), in an action alleging malpractice, the plaintiff has the burden of proving that in light of the state of the art existing at the time of the alleged malpractice:

(a) The defendant, if a general practitioner, failed to provide the plaintiff the recognized standard of acceptable professional practice or care in the community in which the defendant practices or in a similar community, and that as a proximate result of the defendant failing to provide that standard, the plaintiff suffered an injury.

(b) The defendant, if a specialist, failed to provide the recognized standard of practice or care within that specialty as reasonably applied in light of the facilities available in the community or other facilities reasonably available under the circumstances, and as a proximate result of the defendant failing to provide that standard, the plaintiff suffered an injury.

Statute: Community Standard

Idaho Code § 6-1012 (2002)

Proof of community standard of health care practice in malpractice case

In any case, claim or action for damages due to injury to or death of any person, brought against any physician and surgeon or other provider of health care, including, without limitation, any dentist, physicians' assistant, nurse practitioner, registered nurse, licensed practical nurse, nurse anesthetist, medical technologist, physical therapist, hospital or nursing home, or any person vicariously liable for the negligence of them or any of them, on account of the provision of or failure to provide health care or on account of any matter incidental or related thereto, such claimant or plaintiff must, as an essential part of his or her case in chief, affirmatively prove by direct expert testimony and by a preponderance of all the competent evidence, that such defendant then and there negligently failed to meet the applicable standard of health care practice of the community in which such care allegedly was or should have been provided, as such standard existed at the time and place of the alleged negligence of such physician and surgeon, hospital or other such health care provider and as such standard then and there existed with respect to the class of health care provider that such defendant then and there belonged to and in which capacity he, she or it was functioning. Such individual providers of health care shall be judged in such cases in comparison with similarly trained and qualified providers of the same class in the same community, taking into account his or her training, experience, and fields of medical specialization, if any. If there be no other like provider in the community and the standard of practice is therefore indeterminable, evidence of such standard in similar Idaho communities at said time may be considered. As used in this act, the term "community" refers to that geographical area ordinarily served by the licensed general hospital at or nearest to which such care was or allegedly should have been provided.

Notes on Statutes

1. *Universe of Available Witnesses.* The choice between a strict locality rule, a similar locality rule, and a national standard affects the ability of parties to find physicians to provide expert testimony. How do the requirements of the Michigan and Idaho statutes affect the number of expert witnesses who might be available for plaintiffs or defendants?

NECESSITY OF EXPERT TESTIMONY

Statute: Presumption of Negligence

Nev. Rev. Stat. § 41A.100 (2002)

Expert testimony required; exceptions; rebuttable presumption of negligence.

1. Liability for personal injury or death is not imposed upon any provider of medical care based on alleged negligence in the performance of that care unless evidence consisting of expert medical testimony, material from recognized medical texts or treatises or the regulations of the licensed medical facility wherein the alleged negligence occurred is presented to demonstrate the alleged deviation from the accepted standard of care in the specific circumstances of the case and to prove causation of the alleged personal injury or death, except that such evidence is not required and a rebuttable presumption that the personal injury or death was caused by negligence arises where evidence is presented that the personal injury or death occurred in any one or more of the following circumstances:

- (a) A foreign substance other than medication or a prosthetic device was unintentionally left within the body of a patient following surgery;
- (b) An explosion or fire originating in a substance used in treatment occurred in the course of treatment;
- (c) An unintended burn caused by heat, radiation or chemicals was suffered in the course of medical care;
- (d) An injury was suffered during the course of treatment to a part of the body not directly involved in the treatment or proximate thereto; or
- (e) A surgical procedure was performed on the wrong patient or the wrong organ, limb or part of a patient's body.

2. As used in this section, "provider of medical care" means a physician, registered nurse or a licensed hospital as the employer of any such person.

Notes on Statute

1. *Effect of Detailed Provisions.* This statute provides a list of detailed provisions. What is the consequence of that approach for a case involving something not specified, such as the dropping of a patient in *McGraw*?

2. *Problem: Application of Statute to Administration of Hospital.* Would this statute require expert medical testimony in a suit against a hospital based on the following claims?

A. A patient recovering from stomach surgery suffered food poisoning caused by improperly cooked meat served to the patient for dinner.

B. A patient recovering from hand surgery suffered an electric shock and consequential burn from a defective push button on a device provided to call for nursing assistance.

INFORMED CONSENT

Statute: Burden of Proof for Informed Consent Claims

Arkansas Code § 16-114-206 (2002)

- (a) In any action for medical injury, the plaintiff shall have the burden of proving:
 - (1) The degree of skill and learning ordinarily possessed and used by members of the profession of the medical care provider in good standing, engaged in the same type of practice or specialty in the locality in which he practices or in a similar locality;
 - (2) That the medical care provider failed to act in accordance with that standard; and
 - (3) That as a proximate result thereof, the injured person suffered injuries which would not otherwise have occurred.

(b)(1) Without limiting the applicability of subsection (a) of this section, where the plaintiff claims that a medical care provider failed to supply adequate information to obtain the informed consent of the injured person, the plaintiff shall have the burden of proving that the treatment, procedure, or surgery was performed in other than an emergency situation and that the medical care provider did not supply that type of information regarding the

treatment, procedure, or surgery as would customarily have been given to a patient in the position of the injured person or other persons authorized to give consent for such a patient by other medical care providers with similar training and experience at the time of the treatment, procedure, or surgery in the locality in which the medical care provider practices or in a similar locality.

(2) In determining whether the plaintiff has satisfied the requirements of subdivision (b)(1) of this section, the following matters shall also be considered as material issues:

(A) Whether a person of ordinary intelligence and awareness in a position similar to that of the injured person or persons giving consent on his behalf could reasonably be expected to know of the risks or hazards inherent in such treatment, procedure, or surgery;

(B) Whether the injured party or the person giving consent on his behalf knew of the risks or hazards inherent in such treatment, procedure, or surgery;

(C) Whether the injured party would have undergone the treatment, procedure, or surgery regardless of the risk involved or whether he did not wish to be informed thereof;

(D) Whether it was reasonable for the medical care provider to limit disclosure of information because such disclosure could be expected to adversely and substantially affect the injured person's condition.

Notes on Statute

1. *Description of Standard.* Does this statute apply a professional standard of care to informed consent cases?

2. *Problem: Silence for Patient's Own Good.* Assume that a doctor believed that a particular medical procedure would benefit a patient, and also believed that the patient would have rejected the procedure if the patient had known its risks. If the doctor performed the procedure without giving the patient information about the risks, should the doctor be treated as having failed to obtain informed consent under this statute?

7. OWNERS AND OCCUPIERS OF LAND

LIABILITY OF LANDOWNERS

Statute: Liability of Owners or Occupiers of Land for Injury to Guests or Trespassers

Delaware Statutes Title 25 § 1501 (2001)

No person who enters onto private residential or farm premises owned or occupied by another person, either as a guest without payment or as a trespasser, shall have a cause of action against the owner or occupier of such premises for any injuries or damages sustained by such person while on the premises unless such accident was intentional on the part of the owner or occupier or was caused by the wilful or wanton disregard of the rights of others.

Note on Statute.

Statute: Actions Against Landowners Colo. Rev. Stat. § 13-21-115 (2002)

(2) In any civil action brought against a landowner by a person who alleges injury occurring while on the real property of another and by reason of the condition of such property, or activities conducted or circumstances existing on such property, the landowner shall be liable only as provided in subsection (3) of this section. ...

(3) ... (b) A licensee may recover only for damages caused:

(I) By the landowner's unreasonable failure to exercise reasonable care with respect to dangers created by the landowner of which the landowner actually knew; or

(II) By the landowner's unreasonable failure to warn of dangers not created by the landowner which are not ordinarily present on property of the type involved and of which the landowner actually knew. ...

(5) As used in this section:...

(b) "Licensee" means a person who enters or remains on the land of another for the licensee's own convenience or to advance his own interests, pursuant to the landowner's permission or consent. "Licensee" includes a social guest. ...

Statute: Duty of Owner of Premises to Licensee

Official Code Georgia § 51-3-2 (2002)

- (a) A licensee is a person who:
- (1) Is neither a customer, a servant, nor a trespasser;
 - (2) Does not stand in any contractual relation with the owner of the premises; and
 - (3) Is permitted, expressly or impliedly, to go on the premises merely for his own interests, convenience, or gratification.
- (b) The owner of the premises is liable to a licensee only for willful or wanton injury.

Statute: Standard of Care Owed Social Invitee

Connecticut Statutes § 52-557a (2002)

The standard of care owed to a social invitee shall be the same as the standard of care owed to a business invitee.

Notes for Statutes.

1. *Alternative Definitions.* The Colorado and Georgia statutes take different approaches to defining the term licensee. Would the entrants specifically excluded in the Georgia statute fit within the Colorado statute's definition? How do these two definitions promote resolution of difficult cases, such as churchgoers or participants in social club meetings?

2. *Classifying Social Guests.* As indicated in [the principle case], social guests usually are categorized as licensees. In a few states, however, modern decisions have either defined social guests as invitees or continued to classify them as licensees but held that they are entitled to the same care as an invitee. See, e.g., *Burrell v. Meads*, 569 N.E.2d 637 (Indiana 1991) (treating social guests as invitees) and *Wood v. Camp*, 284 So.2d 691 (Florida 1973) (calling social guests "licensees by invitation" and applying a duty to use reasonable care). The Connecticut statute is an example of this approach.

ABOLITION OF COMMON LAW CATEGORIES

Statute: Common law distinction abolished, Trespasser

§ 740 Illinois Compiled Statutes 130/2, 130/3 (2002)

Sec. 2. The distinction under the common law between invitees and licensees as to the duty owed by an owner or occupier of any premises to such entrants is abolished.

The duty owed to such entrants is that of reasonable care under the circumstances regarding the state of the premises or acts done or omitted on them. The duty of reasonable care under the circumstances which an owner or occupier of land owes to such entrants does not include any of the following: a duty to warn of or otherwise take reasonable steps to protect such entrants from conditions on the premises that are known to the entrant, are open and obvious, or can reasonably be expected to be discovered by the entrant; a duty to warn of latent defects or dangers or defects or dangers unknown to the owner or occupier of the premises; a duty to warn such entrants of any dangers resulting from misuse by the entrants of the premises or anything affixed to or located on the premises; or a duty to protect such entrants from their own misuse of the premises or anything affixed to or located on the premises.

Sec. 3. Nothing herein affects the law as regards the trespassing child entrant. An owner or occupier of land owes no duty of care to an adult trespasser other than to refrain from willful and wanton conduct that would endanger the safety of a known trespasser on the property from a condition of the property or an activity conducted by the owner or occupier on the property.

Notes to Statute.

1. *Description of Reasonable Care.* The statute defines reasonable care as not including measures that would protect an entrant from a hazard known to the entrant. In the absence of that limitation, could there be circumstances in which a reasonable landowner would seek to protect an entrant from a condition that the entrant knew about?

2. *Comparing Statutory and Common Law.* The [principle case] is an instance of judicial abrogation of the distinction between invitees and licensees. How does the result in that case compare with the result established in the Illinois statute?

10. SPECIAL DUTY RULES

OBLIGATIONS OF RESCUERS

Statute: Good Samaritans

(Alabama Code § 6-5-332)

(a) When any doctor of medicine or dentistry, nurse, member of any organized rescue squad, member of any police or fire department, member of any organized volunteer fire department, Alabama-licensed emergency medical technician, intern or resident practicing in an Alabama hospital with training programs approved by the American Medical Association, Alabama state trooper, medical aidman functioning as a part of the military assistance to safety and traffic program, chiropractor, or public education employee gratuitously and in good faith, renders first aid or emergency care at the scene of an accident, casualty, or disaster to a person injured therein, he or she shall not be liable for any civil damages as a result of his or her acts or omissions in rendering first aid or emergency care, nor shall he or she be liable for any civil damages as a result of any act or failure to act to provide or arrange for further medical treatment or care for the injured person.

Statute: Liability of physician, dentist, nurse, or emergency medical technician for rendering emergency care.

(Mississippi Code 1972 Annotated § 73-25-37).

No duly licensed, practicing physician, dentist, registered nurse, licensed practical nurse, certified registered emergency medical technician, or any other person who, in good faith and in the exercise of reasonable care, renders emergency care to any injured person at the scene of an emergency, or in transporting said injured person to a point where medical assistance can be reasonably expected, shall be liable for any civil damages to said injured person as a result of any acts committed in good faith and in the exercise of reasonable care or omissions in good faith and in the exercise of reasonable care by such persons in rendering the emergency care to said injured person.

Notes to Good Samaritan Statutes.

1. *Purpose.* Statutes of this type are designed to encourage individuals to offer assistance to others in emergencies. What aspects of these two statutes would accomplish that goal?

2. *Persons Protected.* These statutes differ in how they identify those whom their provisions will protect. How does the phrase “or any other person” in the Mississippi statute affect its coverage, in comparison with the coverage provided in the Alabama statute?

3. *Standard of Care Imposed.* Statutes meant to encourage first aid may strike a balance between protecting defendants and assuring injured people that efforts to help them will be done with some care. Which of these two statutes provides greater protection for rescuers?

4. *Prior Duty.* The statute described in [the principle case] withdraws immunity if the duty allegedly breached by the volunteer existed prior to the voluntary activity. What would justify that limitation? Do the Alabama and Mississippi statutes incorporate it?

DUTY TO RESCUE

Statute: Emergency Medical Care

Vt. Stat. Ann. Tit. 12 §519(a) (West. 2002)

A person who knows that another is exposed to grave physical harm shall, to the extent that the same can be rendered without danger or peril to himself or without interference with important duties owed to others, give reasonable assistance to the exposed person unless that assistance or care is being provided by others.

Statute: Good Samaritan Law Duty to Assist

Mn St § 604A.01 Sub. 1 (West 2002)

A person at the scene of an emergency who knows that another person is exposed to or has suffered grave physical harm shall, to the extent that the person can do so without danger or peril to self or others, give reasonable assistance to the exposed person. Reasonable assistance may include obtaining or attempting to obtain aid from law enforcement or medical personnel. A person who violates this subdivision is guilty of a petty misdemeanor.

Statute: Duty to Render Assistance
RI St § 11-56-1 (West 2001)

Any person at the scene of an emergency who knows that another person is exposed to, or has suffered, grave physical harm shall, to the extent that he or she can do so without danger or peril to himself or herself or to others, give reasonable assistance to the exposed person. Any person violating the provisions of this section is guilty of a petty misdemeanor and shall be subject to imprisonment for not more than six (6) months or by a fine of not more than five hundred dollars (\$500), or both.

Statute: Duty to Aid Victim or Report Crime
WI S 940.34(2)(a) and (d)1 (West 2002)

(a) Any person who knows that a crime is being committed and that a victim is exposed to bodily harm shall summon law enforcement officers or other assistance or shall provide assistance to the victim.

(d) A person need not comply with this subsection if any of the following apply:

1. Compliance would place him or her in danger.

Notes to Duty to Aid Statutes.

1. *Statutory Duty to Rescue.* These statutes are from the only states that appear to recognize a duty to rescue (though there are additional statutes requiring the reporting of crimes). They create immunity from liability similar to the immunity described in the Good Samaritan laws. While England does not have a general duty to rescue, all civil law countries (except Sweden) apparently do, as well as all eastern European countries and most Latin American countries. See Edward Tomlinson, *The French Experience with Duty to Rescue: A Dubious Case for Criminal Enforcement*, 20 *New York Law School J. of Intn'l and Comp. Law* 451 (2000) (comparing treatment of failure to rescue under American and French statutes).

2. *Differences among Statutes.* While the Vermont and Minnesota statutes impose fines of \$100 and \$200, respectively, Wisconsin and Rhode Island fines up to \$500 and also authorize jail terms of up to thirty days and six months, respectively. On whom is the duty imposed under the different statutes? What is a person on whom a duty is imposed obliged to do under the different statutes?

SUITS BY RESCUERS

Statute: Professional Rescuers' Cause of Action
New Jersey Statutes § 2A:62A-21 (2000)

In addition to any other right of action or recovery otherwise available under law, whenever any law enforcement officer, firefighter, or member of a duly incorporated first aid, emergency, ambulance or rescue squad association suffers any injury, disease or death while in the lawful discharge of his official duties and that injury, disease or death is directly or indirectly the result of the neglect, willful omission, or willful or culpable conduct of any person or entity, other than that law enforcement officer, firefighter or first aid, emergency, ambulance or rescue squad member's employer or co-employee, the law enforcement officer, firefighter, or first aid, emergency, ambulance or rescue squad member suffering that injury or disease, or, in the case of death, a representative of that law enforcement officer, firefighter or first aid, emergency, ambulance or rescue squad member's estate, may seek recovery and damages from the person or entity whose neglect, willful omission, or willful or culpable conduct resulted in that injury, disease or death.

Notes to Statute

1. *Statutory Purpose.* Does this statute abrogate the firefighter's rule partially or completely?

2. *Problem: Effect of Statute.* In a New Jersey case that predates this statute, a police officer slipped on powdered sugar that had spilled on the floor of a donut shop. The officer was barred from recovery against the shop, because he was carrying an injured person out of the shop when he was hurt, even though he would have been entitled to a cause of action if he had been in the shop as a customer. See *Rosa v. Dunkin' Donuts*, 583 A.2d 1129 (N.J. 1991). Would the statute have affected that result?

WRONGFUL BIRTH AND LIFE

Statute: Wrongful Birth Claims, Wrongful Life

Michigan ST 600.2971 (2002)

(1) A person shall not bring a civil action on a wrongful birth claim that, but for an act or omission of the defendant, a child or children would not or should not have been born.

(2) A person shall not bring a civil action for damages on a wrongful life claim that, but for the negligent act or omission of the defendant, the person bringing the action would not or should not have been born.

(3) A person shall not bring a civil action for damages for daily living, medical, educational, or other expenses necessary to raise a child to the age of majority, on a wrongful pregnancy or wrongful conception claim that, but for an act or omission of the defendant, the child would not or should not have been conceived.

(4) The prohibition stated in subsection (1), (2), or (3) applies regardless of whether the child is born healthy or with a birth defect or other adverse medical condition. The prohibition stated in subsection (1), (2), or (3) does not apply to a civil action for damages for an intentional or grossly negligent act or omission, including, but not limited to, an act or omission that violates the Michigan penal code.

Statute Wrongful Birth; Wrongful Life

24 Maine R.S.A. § 2931 (2001)

1. Intent. It is the intent of the Legislature that the birth of a normal, healthy child does not constitute a legally recognizable injury and that it is contrary to public policy to award damages for the birth or rearing of a healthy child. 2. Birth of healthy child; claim for damages prohibited. No person may maintain a claim for relief or receive an award for damages based on the claim that the birth and rearing of a healthy child resulted in damages to him. A person may maintain a claim for relief based on a failed sterilization procedure resulting in the birth of a healthy child and receive an award of damages for the hospital and medical expenses incurred for the sterilization procedures and pregnancy, the pain and suffering connected with the pregnancy and the loss of earnings by the mother during pregnancy. 3. Birth of unhealthy child; damages limited. Damages for the birth of an unhealthy child born as the result of professional negligence shall be limited to damages associated with the disease, defect or handicap suffered by the child.

Notes for Statutes.

1. *Statutory Approaches.* State statutes dealing with recovery for wrongful birth, life, and pregnancy take different approaches to the standard of care applicable and to whether recovery is permitted at all. The damages for which compensation may be obtained also differ.

2. *Problem: Wrongful Pregnancy, Life, and Birth.* For personal and socio-economic reasons, Mr. and Mrs. Coleman arranged for Mrs. Coleman to receive a sterilization procedure called a bilateral tubal ligation after giving birth to their fourth child. Subsequent to the operation, Mrs. Coleman became pregnant and gave birth to a fifth child. The Colemans sued the doctors claiming negligence in performing the procedure and claiming as damages: (1) pain, suffering, and discomfort of Mrs. Coleman as a result of the last pregnancy, (2) the cost of the tubal ligation, (3) the loss to Mr. Coleman of the comfort, companionship, services, and consortium of Mrs. Coleman, (4) the deprivation to the other four children of the care and support they would have received had the fifth child not been born, (5) medical expenses incurred by the Coleman's as a result of the fifth pregnancy, and (6) care and maintenance for the fifth child. Under the two statutes above, which of these claims would be allowed? If the child had been born with birth defects, would the additional costs of raising a child with those defects have been recoverable? See *Coleman v. Garrison*, 327 A.2d 757 (Del.Super. 1974).

PRIMARY ASSUMPTION OF RISK

Statute: Acceptance of Inherent Risks

12 Vermont Statutes §§ 1037, 1038(4)(b) (2001).

§ 1037. Notwithstanding the provisions of section 1036 of this title [referring to comparative negligence as a defense], a person who takes part in any sport accepts as a matter of law the dangers that inhere therein insofar as they are obvious and necessary.

Statute: Skiers' and Tramway Passenger's Responsibilities

Maine Stat. tit. 32 § 15217(A)(2002)

A. "Inherent risks of skiing" means those dangers or conditions that are an integral part of the sport of skiing, including, but not limited to: existing and changing weather conditions; existing and changing snow conditions, such as ice, hardpack, powder, packed powder, slush and granular, corn, crust, cut-up and machine-made snow; surface or subsurface conditions, such as dirt, grass, bare spots, forest growth, rocks, stumps, trees and other natural objects and collisions with or falls resulting from such natural objects; lift towers, lights, signs, posts, fences, mazes or enclosures, hydrants, water or air pipes, snowmaking and snow-grooming equipment, marked or lit trail maintenance vehicles and snowmobiles, and other man-made structures or objects and their components, and collisions with or falls resulting from such man-made objects; variations in steepness or terrain, whether natural or as a result of slope design; snowmaking or snow-grooming operations, including, but not limited to, ski jumps, roads and catwalks or other terrain modifications; the presence of and collisions with other skiers; and the failure of skiers to ski safely, in control or within their own abilities.

Statute: Duties and Responsibilities of Each Skier

Georgia Statutes 43-43A-7(1) (2002).

Any other provision of law to the contrary notwithstanding: (1) Each individual skier has the responsibility for knowing the range of his or her own ability to negotiate any ski slope or trail or any portion thereof and must ski within the limits of his or her ability. Each skier expressly accepts and assumes the risk of any injury or death or damage to property resulting from any of the inherent dangers and risks of skiing, as set forth in this chapter; provided, however, that injuries sustained in a collision with another skier are not an inherent risk of the sport for purposes of this Code section.

Statute Legislative Purpose

Idaho Stat. § 6-1101 (2002)

The legislature finds that the sport of skiing is practiced by a large number of citizens of this state and also attracts a large number of nonresidents, significantly contributing to the economy of Idaho. Since it is recognized that there are inherent risks in the sport of skiing which should be understood by each skier and which are essentially impossible to eliminate by the ski area operation, it is the purpose of this chapter to define those areas of responsibility and affirmative acts for which ski area operators shall be liable for loss, damage or injury, and to define those risks which the skier expressly assumes and for which there can be no recovery.

Statute Sport Shooting Participants, Acceptance of Obvious and Inherent Risks.

Michigan Stat. 691.1544(4)

Each person who participates in sport shooting at a sport shooting range that conforms to generally accepted operation practices accepts the risks associated with the sport to the extent the risks are obvious and inherent. Those risks include, but are not limited to, injuries that may result from noise, discharge of a projectile or shot, malfunction of sport shooting equipment not owned by the shooting range, natural variations in terrain, surface or subsurface snow or ice conditions, bare spots, rocks, trees, and other forms of natural growth or debris.

Notes to Statutes.

1. *Objective Test for Obvious and Necessary.* These primary assumption of risk statutes illustrate different approaches to defining inherent risks. All are consistent with the common law in treating the test for the obviousness of a risk is an objective test. Rather than referring to the specific knowledge of the plaintiff, the skiing

statutes either describe the risks in great detail (see the Maine statute), hold the plaintiff responsible for the risks the plaintiffs “should” understand (see the Idaho statute), or simply state that plaintiffs accept obvious and necessary risks as a matter of law (see the Vermont statute).

2. *Inherent risks.* Where inherent risks are enumerated, there are differences among the states. Observe that Maine’s treatment of collisions between skiers differs from Utah’s common law interpretation in [the principle case] and Georgia’s statutory enumeration. States have similar statutes for a few other sports (see, for instance, Michigan’s shooting statute). Do the statutorily enumerated risks all fit within the common law test for whether the risk is obvious and necessary?

Statute: Colorado Baseball Spectator Safety Act
(C.R.S. 13-21-120)

(1) This section shall be known and may be cited as the "Colorado Baseball Spectator Safety Act of 1993".

(2) The general assembly recognizes that persons who attend professional baseball games may incur injuries as a result of the risks involved in being a spectator at such baseball games. However, the general assembly also finds that attendance at such professional baseball games provides a wholesome and healthy family activity which should be encouraged. The general assembly further finds that the state will derive economic benefit from spectators attending professional baseball games. It is therefore the intent of the general assembly to encourage attendance at professional baseball games. Limiting the civil liability of those who own professional baseball teams and those who own stadiums where professional baseball games are played will help contain costs, keeping ticket prices more affordable.

...

(4) (a) Spectators of professional baseball games are presumed to have knowledge of and to assume the inherent risks of observing professional baseball games, insofar as those risks are obvious and necessary. These risks include, but are not limited to, injuries which result from being struck by a baseball or a baseball bat.

(b) Except as provided in subsection (5) of this section, the assumption of risk set forth in this subsection (4) shall be a complete bar to suit and shall serve as a complete defense to a suit against an owner by a spectator for injuries resulting from the assumed risks, notwithstanding the provisions of sections 13-21-111 and 13-21-111.5. Except as provided in subsection (5) of this section, an owner shall not be liable for an injury to a spectator resulting from the inherent risks of attending a professional baseball game, and, except as provided in subsection (5) of this section, no spectator nor spectator’s representative shall make any claim against, maintain an action against, or recover from an owner for injury, loss, or damage to the spectator resulting from any of the inherent risks of attending a professional baseball game.

©) Nothing in this section shall preclude a spectator from suing another spectator for any injury to person or property resulting from such other spectator's acts or omissions.

(5) Nothing in subsection (4) of this section shall prevent or limit the liability of an owner who:

(a) Fails to make a reasonable and prudent effort to design, alter, and maintain the premises of the stadium in reasonably safe condition relative to the nature of the game of baseball; [or]

(b) Intentionally injures a spectator. . . .

Statute: Limited Liability for Baseball Facilities
(Ariz. Rev. Stat. § 12-554)

A. An owner is not liable for injuries to spectators who are struck by baseballs, baseball bats or other equipment used by players during a baseball game unless the owner either:

1. Does not provide protective seating that is reasonably sufficient to satisfy expected requests.

2. Intentionally injures a spectator.

B. This section does not prevent or limit the liability of an owner who fails to maintain the premises of the baseball stadium in a reasonably safe condition.

Notes to Statutes.

1. *Limitations on Coverage.* Although the Colorado statute states that a spectator is barred from recovering damages suffered by being hit by a bat or a ball, it also states that this prohibition is subject to the owner's obligation to make a reasonable effort to maintain the premises in reasonably safe condition. Do those reasonableness obligations weaken the protections the statute offers to owners? How would it apply to the facts of *Jones v. Three Rivers Management Company*?

2. *Limitations on Liability.* The Colorado statute includes among its purposes "limiting the civil liability of those who own professional baseball teams" with the aim of "keeping ticket prices more affordable." The other policy justifications in that same section may support the idea of injured patrons subsidizing ticket purchasers and team owners, but does the statute provide more protection than the common law doctrine of primary assumption of risk would do? Given that the existence of a duty is a question of law for the judge, does the statute keep more cases from the jury than the common law doctrine does?

2 *Problem:* Suppose a plaintiff was injured by a batted ball at a baseball field. Suppose also that the plaintiff claimed that the operator of the field had been negligent because, even though there was screening behind home plate, many people had previously been hit by batted balls in an area that was not protected and the operator had not taken any measures to protect additional areas. How would this claim be affected by the Colorado and Arizona statutes?

11. DAMAGES

APPELLATE TREATMENT OF DAMAGE VERDICTS

Statute: Remittitur or Additur as Alternative to New Trial; Reformation of Verdict.

Louisiana Revised Statutes 38: 383 (2002)

If the trial court is of the opinion that the verdict is so excessive or inadequate that a new trial should be granted for that reason only, it may indicate to the party or his attorney within what time he may enter a remittitur or additur. This remittitur or additur is to be entered only with the consent of the plaintiff or the defendant as the case may be, as an alternative to a new trial, and is to be entered only if the issue of quantum is clearly and fairly separable from other issues in the case. If a remittitur or additur is entered, then the court shall reform the jury verdict or judgment in accordance therewith.

Notes to Statute:

1. *Reformation of Verdicts by Appellate and Trial Courts.* The Louisiana statute applies to trial courts. In Louisiana, the jurisdiction in which [the principle case] was decided, appellate courts may also review the award to determine whether the jury has acted unreasonably in its award of damages:

The trier of fact is given much discretion in awarding damages. The appellate court in reviewing an award to determine if there has been an abuse of this "much discretion" must look first to the facts and circumstances surrounding the particular case. If it is determined that the award is either excessive or inadequate, the court may then use prior awards to aid it in fixing an appropriate award. The reviewing court may then amend the award such that it is lowered to the highest or raised to the lowest point which is reasonable within the discretion afforded the trier of fact.

See *Prevost v. Cowan*, 431 So.2d 1063, 1067 (Ct.App. La. 1983).

WRONGFUL DEATH AND SURVIVAL STATUTES

Statute: Wrongful Death; Damages

Tennessee Code § 20-5-113 (2002)

Where a person's death is caused by the wrongful act, fault, or omission of another, and suit is brought for damages [by a surviving spouse or child or personal representative], the party suing shall, if entitled to damages, have the right to recover for the mental and physical suffering, loss of time, and necessary expenses resulting to the deceased from the personal injuries, and also the damages resulting to the parties for whose use and benefit the right of action survives from the death consequent upon the injuries received.

Statute: Survival of Actions; Death of Party

Tennessee Code § 20-5-102 (2002).

No civil action commenced, whether founded on wrongs or contracts, except actions for wrongs affecting the character of the plaintiff, shall abate by the death of either party, but may be revived; nor shall any right of action arising hereafter based on the wrongful act or omission of another, except actions for wrongs affecting the character, be abated by the death of the party wronged; but the right of action shall pass in like manner as the right of action described in §20-5-106.

Statute: Action for Wrongful Death
Alaska Statutes § 09.55.580 (a)-(c) (2001)

(a) Except as provided under (f) of this section, when the death of a person is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action, had the person lived, against the latter for an injury done by the same act or omission. . . .

(b) The damages recoverable under this section shall be limited to those which are the natural and proximate consequence of the negligent or wrongful act or omission of another.

(c) In fixing the amount of damages to be awarded under this section, the court or jury shall consider all the facts and circumstances and from them fix the award at a sum which will fairly compensate for the injury resulting from the death. In determining the amount of the award, the court or jury shall consider but is not limited to the following:

- (1) deprivation of the expectation of pecuniary benefits to the beneficiary or beneficiaries, without regard to age thereof, that would have resulted from the continued life of the deceased and without regard to probable accumulations or what the deceased may have saved during the lifetime of the deceased;
- (2) loss of contributions for support;
- (3) loss of assistance or services irrespective of age or relationship of decedent to the beneficiary or beneficiaries;
- (4) loss of consortium;
- (5) loss of prospective training and education;
- (6) medical and funeral expenses.

Notes for Statutes:

1. *Wrongful Death and Survival Statutes Compared.* The court in [the principle case] refers to Tennessee Code § 20-5-113, reproduced above. How does the language in this paragraph include both wrongful death and survival rights? Tennessee Statutes § 20-5-102 describes the nature of the survival rights.

2. *Damages Recoverable for Wrongful Death.* A comparison of the Tennessee and Alaska wrongful death statutes illustrates the varying degrees of specificity with which recoverable damages are described and why the court in [the principle case] found the Tennessee statute silent on the recoverability of consortium damages. Are the types of damages enumerated in the Alaska statute losses suffered by the deceased or losses suffered by the family of the deceased?

COLLATERAL SOURCE RULE
Statute: Modified Collateral Source Rule
Colorado Revised Statutes § 13-21-111.6

In any action by any person or his legal representative to recover damages for a tort resulting in death or injury to person or property, the court, after the finder of fact has returned its verdict stating the amount of damages to be awarded, shall reduce the amount of the verdict by the amount by which such person, his estate, or his personal representative has been or will be wholly or partially indemnified or compensated for his loss by any other person, corporation, insurance company, or fund in relation to the injury, damage, or death sustained; except that the verdict shall not be reduced by the amount by which such person, his estate, or his personal representative has been or will be wholly or partially indemnified or compensated by a benefit paid as a result of a contract entered into and paid for by or on behalf of such person. The court shall enter judgment on such reduced amount.

Note to Statute.

1. How does this provision differ from the traditional collateral source rule and from the statute analyzed in [the principle case]? Who benefits and who is harmed under the Colorado statute?

12. TRADITIONAL STRICT LIABILITY

DOMESTICATED ANIMALS

Statute: Harboring a Dog

South Dakota Consolidated Laws § 40-34-2

Any person owning, keeping, or harboring a dog that chases, worries, injures or kills any poultry or domestic animal is guilty of a Class 2 misdemeanor and is liable for damages to the owner thereof for any injury caused by the dog to any such poultry or animal. ...

Note to Statute

1. *Statutory Recognition of Particular Harms.* This statute provides a specific definition of the harms it seeks to remedy. If a defendant's dog entered a farmyard and bit both a farmer and a chicken, what effect would the statute have on potential recovery for harms caused by those bites?

Statute: Trespass on cultivated land

Nev. Rev. Stat. Ann. § 569.450 (2002)

No person is entitled to collect damages, and no court in this state may award damages, for any trespass of livestock on cultivated land in this state if the land, at the time of the trespass was not enclosed by a legal fence.

Statute: Recovery for damage to unfenced lands; exception

Ariz. Rev. Stat. § 3-1427 (2001)

An owner or occupant of land is not entitled to recover for damage resulting from the trespass of animals unless the land is enclosed within a lawful fence, but this section shall not apply to owners or occupants of land in no-fence districts.

Statute: [No-Fence District] Formation

Ariz. Rev. Stat. § 3-1421 (2001)

A. A majority of all taxpayers [of localities meeting certain definitions] may petition the board of supervisors of the county in which such district or land is situated that a no-fence district be formed and that no fence be required around the land in the no-fence district designated in the petition.

B. Upon filing the petition, the board shall immediately enter the contents upon its records and order that the no-fence district be formed.

Note to Statutes

1. The common law favors those who cultivate land over those who raise cattle, by requiring keepers of animals to fence them in or be liable for their trespasses. This tension between farmers and ranchers has been resolved in some states in favor of ranchers, with statutes that prohibit a strict liability action unless the plaintiff had attempted to protect his or her land (and crops) with a fence. The Nevada statute is an example of a "fencing out" statute. The Arizona statutes offer options to be selected by local areas.

HAZARDOUS ACTIVITIES

Statute: Strict Liability for [Oil] Containment, Cleanup and Removal Costs

N.H. R.S.A. 146-A:3-a (2002)

I. Any person who, without regard to fault, directly or indirectly causes or suffers the discharge of oil into or onto any surface water or groundwater of this state, or in a land area where oil will ultimately seep into any surface water or groundwater of the state in violation of this chapter, or rules adopted under this chapter, shall be strictly liable for costs directly or indirectly resulting from the violation relating to:

- (a) Containment of the discharged oil;
- (b) Cleanup and restoration of the site and surrounding environment, and corrective measures as defined under RSA 146-A:11-a, III(a) and (b); and
- ©) Removal of the oil.

Notes to Statute.

1. *Coverage.* Numerous state statutes, similar to New Hampshire's impose strict liability for a variety of environmental harms. This statute covers pollution of both surface water and ground water and covers direct and indirect costs for containment and restoration.

2. *Federal Provisions.* A complex body of federal statutes treats environmental harms. See 42 U.S.C. § 9607 (2002) for treatment of pollutants other than petroleum-related pollutants, and 33 U.S.C. § 2702 (2002) for treatment of petroleum-related pollutants.

13. Products Liability

WHO MAY SUE FOR WHAT?

§ 2-318. Third Party Beneficiaries of Warranties Express and Implied.

Alternative A: A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.

Alternative B: A seller's warranty whether express or implied extends to any natural person who may reasonably be expected to use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.

Alternative C: A seller's warranty whether express or implied extends to any person who may reasonably be expected to use, consume or be affected by the goods and who is injured by breach of the warranty. A seller may not exclude or limit the operation of this section with respect to injury to the person of an individual to whom the warranty extends.

Statute: Definition of Consumer

(Indiana Statutes § 34-6-2-29)

Consumer for the purposes of IC 34-20, means;

- (1) a purchaser,
- (2) any individual who uses or consumes the product;
- (3) any person who, while acting for or on behalf of the injured part, was in possession and control of the product in question; or
- (4) any bystander injured by the product who would reasonably be expected to be in the vicinity of the product during its reasonably expected use.

Notes to Statute.

1. Observe that the range of people to whom the warranty extends increases in the UCC provisions with the smallest range in Alternative A to the largest range in Alternative C. How does the Indiana statute relate to the three UCC choices?

THE RESTATEMENTS SECOND AND THIRD

§ 402 A. 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
 - (a) the seller is engaged in the business of selling such a product, and
 - (b) 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 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.

Restatement (Third) of Torts: Products Liability (1998)

§ 1. LIABILITY OF COMMERCIAL SELLER OR DISTRIBUTOR FOR HARM CAUSED BY DEFECTIVE PRODUCTS

One engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property caused by the defect.

§ 2. CATEGORIES OF PRODUCT DEFECTS

For purposes of determining liability under § 1:

A product is defective when, at the time of sale or distribution, it contains a manufacturing defect, is defective in design, or is defective because of inadequate instructions or warnings. A product:

- (1) contains a manufacturing defect when the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product;
- (2) is defective in design when the foreseeable risks of harm posed by the product could have been reduced by the adoption of a reasonable alternative design by the seller or a predecessor in the commercial chain of distribution and the omission of the alternative design renders the product not reasonably safe;
- (3) is defective because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced by the provision of reasonable instructions or warnings by the seller or a predecessor in the commercial chain of distribution and the omission of the instructions or warnings renders the product not reasonably safe.

Notes to Restatements

1. *Coverage.* The two Restatements and the UCC apply only to commercial sales transactions. Leases and sales by individuals not in business may be outside their

coverage. The most notable difference between the two Restatements is the definition of types of product defects. What types of product defects does each Restatement define?

2. *Multiple Entities*. If a number of entities are involved in the production and sale of an item, such as a manufacturer, distributor, and retailer, do the Restatement provisions expose each of those entities to potential liability?

Statute: Definition of Product Seller

(N.J. Stat. § 2A:58C-8)

"Product seller" means any person who, in the course of a business conducted for that purpose: sells; distributes; leases; installs; prepares or assembles a manufacturer's product according to the manufacturer's plan, intention, design, specifications or formulations; blends; packages; labels; markets; repairs; maintains or otherwise is involved in placing a product in the line of commerce. The term "product seller" does not include:

- (1) A seller of real property; or
- (2) A provider of professional services in any case in which the sale or use of a product is incidental to the transaction and the essence of the transaction is the furnishing of judgment, skill or services; or
- (3) Any person who acts in only a financial capacity with respect to the sale of a product.

Note to Statute

1. *Products Associated with Services*. Numerous cases consider whether strict liability applies to sales of products in conjunction with services. Examples would be popcorn at a movie theater or shampoo at a beauty salon. How would they be treated under the New Jersey statute, or under the Restatements?

14. TRESPASS AND NUISANCE

NUISANCE

Statute: Nuisance Defined; Action for Abatement and Damages; Exceptions.

Nevada Revised Statutes 40-140 (2002)

1. Except as otherwise provided in this section, anything which is injurious to health, or indecent and offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, including, without limitation, a building or place used for the purpose of unlawfully selling, serving, storing, keeping, manufacturing, using or giving away a controlled substance, . . . is a nuisance, and the subject of an action. The action may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened by the nuisance, and by the judgment the nuisance may be enjoined or abated, as well as damages recovered.

2. It is presumed:

(a) That an agricultural activity conducted on farmland, consistent with good agricultural practice and established before surrounding nonagricultural activities is reasonable. Such activity does not constitute a nuisance unless the activity has a substantial adverse effect on the public health or safety.(b) That an agricultural activity which does not violate a federal, state or local law, ordinance or regulation constitutes good agricultural practice.

3. A shooting range does not constitute a nuisance with respect to any noise attributable to the shooting range if the shooting range is in compliance with the provisions of all applicable statutes, ordinances and regulations concerning noise . . .

Statute: Prostitution Houses Deemed Public Nuisances

Missouri Statutes 567.080 (2002)

Any room, building or other structure regularly used for sexual contact for play as defined in section 567.010 or any unlawful prostitution activity prohibited by this chapter is a public nuisance.

Statute: Smoking Prohibited in Certain Public Areas

Rhode Island Statutes § 23-20.6-2(a) (2001)

Smoking tobacco in any form is a public nuisance and dangerous to public health and shall not be permitted in any of the following places used by or open to the public: the state house, elevators, indoor movie theaters, libraries, art galleries, museums, concert halls, auditoriums, buses, primary, secondary or post secondary school buildings, colleges and universities (including dormitories), and public hallways in court buildings, hallways of elderly housing complexes, supermarkets, medical offices, public laundries as defined in chapter 16 of title 5 and hospitals and other health care and assisted living facilities.

Notes for Statute.

1. *Public Policy and Private Nuisance.* Statutory definitions of nuisance reflect states' particular public policy concerns. Many states accord special statutory protection to those who use agricultural activities, as the Nevada statute illustrates. Perhaps more surprising is the large number of states providing some exemption for shooting ranges. Observe, however, there are limits to the immunity from nuisance suits.

2. *Nuisance per se:* In many cases, proving that conduct is a public nuisance is simplified by a statute, which defines the conduct as a nuisance *per se*, distinguishing them from nuisances in fact, which required a more detailed balancing to determine unreasonableness. The New Mexico and Rhode Island statutes are illustrative of the many activities and uses of land defined as nuisances *per se*. Others include "engaging in debt management service" without a valid license (Illinois Compiled Statutes 205 § 665/17 (2002)); gambling houses (Louisiana Revised Statutes 13:4721 (2001)); rooms, building, structures used by criminal street gangs (Missouri Statutes 578.430 (2002)); and owning a vicious dog (South Dakota Statutes § 40-34-13).

15. DEFAMATION

PUBLICATION REQUIREMENT

Statute: Libel and Slander–Self-Publication

Colorado Statutes § 13-25-125.5 (2002)

No action for libel or slander may be brought or maintained unless the party charged with such defamation has published, either orally or in writing the defamatory statement to a person other than the person making the allegation of libel or slander. Self-publication, either orally or in writing, of the defamatory statement to a third person by the person making such allegation shall not give rise to a claim for libel or slander against the person who originally communicated the defamatory statement.

Statute: One Cause of Action; Recovery

California Civil Code § 3425.3 (2002)

No person shall have more than one cause of action for damages for libel or slander or invasion of privacy or any other tort founded upon any single publication or exhibition or utterance, such as any one issue of a newspaper or book or magazine or any one presentation to an audience or any one broadcast over radio or television or any one exhibition of a motion picture. Recovery in any action shall include all damages for any such tort suffered by the plaintiff in any jurisdiction.

Notes on Statutes:

1. *Self-Publication.* A plaintiff who spreads the harm of a defamation by repeating it to others is prohibited from basing a claim on that retelling of the defamation. The Colorado statute codifies this rule. Does this discourage a defamed person from repeating the defamation to an attorney in the course of seeking advice? Does it discourage someone who has been defamed from discussing the defamation with a friend?

2. *Single Publication Rule.* Many states have adopted the single publication rule described in the California statute. It avoids multiple lawsuits over a single defamatory publication, even if that publication reaches many people. This protects both courts and potential defendants. Only one suit may arise from a single broadcast of publication of an edition of a book or newspaper, or a single exhibition of a movie. This rule also helps the plaintiff by allowing recovery of all damages suffered in all jurisdictions in one action. It helps the defendant by barring any defamation action between the parties for damages based on that publication in all other jurisdictions. See Restatement (Second) of Torts § 577A. A new suit arises from the defendant's repetition of the defamation, however, in a new edition of the book or newspaper (in the paperback or evening edition, for instance, designed to reach a new audience) or a second showing of a movie. What incentives does this create for those who publish defamatory speech?

SLANDER AND LIBEL: PER SE AND PER QUOD

Statute: Libel

California Civil Code § 45 (2002).

Libel is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has tendency to injure him in his occupation.

Statute: Slander, False and Unprivileged Publications Which Constitute

California Civil Code § 46 (2002)

Slander is a false and unprivileged publication, orally uttered, and also communications by radio or any mechanical or other means which:

1. Charges any person with crime, or with having been indicted, convicted, or punished for crime;
2. Imputes in him the present existence of an infectious, contagious, or loathsome disease;
3. Tends directly to injure him in respect to his office, profession, trade or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to his office, profession, trade, or business that has a natural tendency to lessen its profits;
4. Imputes to him impotence or want of chastity; or
5. Which, by natural consequence, causes actual damages.

Statute: Libel on Its Face; Other Actionable Defamatory Language

California Civil Code § 45(a) (2002)

A libel which is defamatory of the plaintiff without the necessity of explanatory matter, such as an inducement, innuendo or other extrinsic fact, is said to be a libel on its face. Defamatory language not libelous on its face is not actionable unless the plaintiff alleges and proves that he has suffered special damage as a proximate result thereof. Special damage is defined in Section 48a of this code.

Notes to Statutes:

1. *Per se and Per Quod Defamation.* The preceding opinions in **Gifford** and **Agriss** outlined the differences among jurisdictions in the treatment of libel and slander. The California statutes do not mention the phrases “per se” or “per quod,” but the three sections suggest different treatment of the two types of defamation in that state. According to these statutes, what distinguishes a *per se* libel from a *per quod* libel in that state? What distinguishes a *per se* slander from a *per quod* slander? What different elements must a plaintiff prove to recover damages for *per se* and *per quod* defamations according to the statutes?

2. *Libels and Slanders Compared.* The statutes distinguish between statements classified as libels and those classified as slanders. What justifies different proof requirements for statements a person hears and statements a person sees?

ABSOLUTE AND QUALIFIED PRIVILEGES

Statute: Employer Immunity from Liability;

Disclosure of Information Regarding Former or Current Employees.

Florida Statutes 768.095 (2002)

An employer who discloses information about a former or current employee to a prospective employer of the former or current employee upon request of the prospective employer or of the former or current employee is immune from civil liability for such disclosure or its consequences unless it is shown **by clear and convincing evidence** that the information disclosed by the former or current employer was **knowingly false** or violated any civil right of the former or current employee protected under chapter 760. (Emphasis added.)

Statute: Libel in Newspaper; Slander by Radio Broadcast

California Civil Code § 48a (d) (2002)

“Actual malice” is that state of mind arising from hatred or ill will toward the plaintiff; provided, however, that such a state of mind occasioned by a good faith belief on the part of the defendant in the truth of the libelous publication or broadcast at the time it is published or broadcast shall not constitute actual malice.

Statute: Qualified Privilege

Louisiana Revised Statutes 14:49 (2002)

A qualified privilege exists and actual malice must be proved, regardless of whether the publication is true or false, in the following situations:

- (1) Where the publication or expression is a fair and true report of any judicial, legislative, or other public or official proceeding, or of any statement, speech, argument, or debate in the course of the same.
- (2) Where the publication or expression is made in the reasonable belief of its truth, upon, (a) The conduct of a person in respect to public affairs; or (b) A thing which the proprietor thereof offers or explains to the public.
- (3) Where the publication or expression is made to a person interested in the communication, by one who is also interested or who stands in such a relation to the former as to afford a reasonable ground for supposing his motive innocent.
- (4) Where the publication or expression is made by an attorney or party in a judicial proceeding.

Statute: Absolute Privilege

Louisiana Revised Statutes § 50 (2002)

There shall be no prosecution for defamation in the following situations:

- (1) When a statement is made by a legislator or judge in the course of his official duties.
- (2) When a statement is made by a witness in a judicial proceeding, or in any other legal proceeding where testimony may be required by law, and such statement is reasonably believed by the witness to be relevant to the matter in controversy.
- (3) Against the owner, licensee or other operator of a visual or sound broadcasting station or network of stations by one other than such owner, licensee, operator, agents or employees.

Notes to Statutes:

1. *The Meaning of "Actual Malice."* The California definition of actual malice" starts off with a phrase that sounds very much like common law express malice – "that state of mind arising from hatred or ill will." This language refers to the defendant's attitudes toward the plaintiff. But the remainder of the definition refers to the defendant's attitude toward the truth of the statement – "a good faith belief on the part of the defendant in the truth of the libelous publication." If the defendant has the proper attitude toward the truth, his attitude toward the plaintiff does not matter. This definition reflects modern Constitutional law developments in defamation law.

2. *Moving from Express to Actual Malice.* Constitutional law developments have shifted some states away from requiring proof of **express malice**, a hostile attitude toward the plaintiff, for defeating qualified privileges to requiring proof of **actual malice**, a disregard of the truth. [The principle case], decided by the Federal District Court in Florida in 1993, referred to "express malice." As the Florida statute illustrates, the Florida legislature has since changed the nature of the qualified privilege given to employers, referring instead to whether the defendant knew the statement was false.

3. *Qualified and Absolute Privileges.* As the Louisiana statutes illustrate, proof of actual malice is required to defeat a qualified privilege. For actions brought as a result of speech covered by an absolute privilege, it appears that no action may be brought. Observe, however, how each absolute privilege is hedged with some condition. The judge's speech must, for instance, occur "in the course of his official duties." The Louisiana statutes are from the Louisiana Criminal Code, but the Reporter's Comment (1997 Main Volume) cites examples of each of these privileges in Louisiana civil torts cases. Compare the difference in treatment of attorneys and parties to litigation on one hand and judges and witnesses on the other. What might justify this difference?

CONSTITUTIONAL LIMITS ON DEFAMATION CLAIMS

Statute: Libel or Slander

Michigan Statutes 600.2911 (2)(b), (6), and (7)(2002)

(2)(b) Exemplary and punitive damages shall not be recovered in actions for libel unless the plaintiff, before instituting his or her action, gives notice to the

defendant to publish a retraction and allows a reasonable time to do so, and proof of the publication or correction shall be admissible in evidence under a denial on the question of the good faith of the defendant, and in mitigation and reduction of exemplary or punitive damages. For libel based on a radio or television broadcast, the retraction shall be made in the same manner and at the same time of the day as the original libel; for libel based on a publication, the retraction shall be published in the same size type, in the same editions and as far as practical, in substantially the same position as the original libel; and for other libel, the retraction shall be published or communicated in substantially the same manner as the original libel.

(6) An action for libel or slander shall not be brought based upon a communication involving public officials or public figures unless the claim is sustained by clear and convincing proof that the defamatory falsehood was published with knowledge that it was false or with reckless disregard of whether or not it was false.

(7) An action for libel or slander shall not be brought based upon a communication involving a private individual unless the defamatory falsehood concerns the private individual and was published negligently. Recovery under this provision shall be limited to economic damages including attorney fees.

**Statute: Prerequisites to Recovery of Vindictive or
Punitive Damages in Action for Libel.**

Alabama Code § 6-5-186 (2002)

Vindictive or punitive damages shall not be recovered in any action for libel on account of any publication unless (1) it shall be proved that the publication was made by the defendant with knowledge that the matter published was false, or with reckless disregard of whether it was false or not, and (2) it shall be proved that five days before the commencement of the action the plaintiff shall have made written demand upon the defendant for a public retraction of the charge or matter published; and the defendant shall have failed or refused to publish within five days, in as prominent and public a place or manner as the charge or matter published occupied, a full and fair retraction of such charge or matter.

Notes to Statutes.

1. *Statutory Treatment of Public and Private Figures.* The Michigan statute reflects the Supreme Court's classification scheme that first identifies the type of person (public or private) and, if private, the type of matter or concern (public or private). Are the fault requirements in the Michigan statute sufficient to meet the requirements of the United States Constitution? Are they more rigorous than required?

2. *Statutory Treatment of Punitive Damages.* Some statutory limitations on punitive damages may be more stringent than required by the United States Supreme Court's interpretation of the First Amendment. Which barriers to recovery of punitive damages by a private plaintiff in a matter of private concern created by the Michigan and Alabama statutes are mandated by the First Amendment?

16. ALTERNATIVES TO LITIGATION

WORKERS COMPENSATION

Statute: Schedule in case of disability

N.Y. C.L.S. Workers' Compensation Law §15 (2002)

The following schedule of compensation is hereby established:

1. Permanent total disability. In case of total disability adjudged to be permanent sixty-six and two-thirds per centum of the average weekly wages shall be paid to the employee during the continuance of such total disability. Loss of both hands, or both arms, or both feet, or both legs, or both eyes, or of any two thereof shall, in the absence of conclusive proof to the contrary, constitute permanent total disability....

2. Temporary total disability. In case of temporary total disability, sixty-six and two-thirds per centum of the average weekly wages shall be paid to the employee during the continuance thereof, except as otherwise provided in this chapter.

3. Permanent partial disability. In case of disability partial in character but permanent in quality the compensation shall be sixty-six and two-thirds per centum of the average weekly wages and shall be paid to the employee for the period named in this subdivision, as follows: _

Member lost	Number of weeks' compensation
a. Arm	312
b. Leg	288
c. Hand	244
d. Foot	205
e. Eye	160
f. Thumb	75
g. First finger	46
h. Great toe	38
i. Second finger	30
j. Third finger	25
k. Toe other than great toe	16
l. Fourth finger	15

Notes to Statute.

1. *Amounts of Awards.* These awards are set by the legislature, keyed to the injured workers' average weekly wages. Using the example of a worker whose annual wages were \$30,000, the compensation payment for loss of a leg would be 288 multiplied by two-thirds of that worker's average weekly wages. The payment would be about \$111,000. Does that seem like the right amount of compensation for loss of a leg? Does it seem to be an amount that might be awarded by a jury in a case that was treated in the ordinary litigation system rather than in the administrative workers' compensation system?

2. *Standardization of Awards.* Injuries have different effects on different people, but the Workers' Compensation system ignores those variations. For example, loss of a leg might change the life of an individual who enjoyed playing sports and participating in outdoor recreation more than it would change the life of a typically sedentary person.

The award structure ignores the age of the victim, so that benefits do not vary even though a young claimant might experience fifty years of hardship due to loss of a limb while an older claimant might suffer that disability only for five or ten years.

Relating the size of award to the worker's wages simplifies the administration of the system. Does it seem sensible to treat injuries as worth more or less because of the earning power of the injured individual?

SPECIAL LEGISLATIVE COMPENSATION
September 11th Victim Compensation Fund of 2001
Public Law 107-42 (September 22, 2001)

Sec. 403. Purpose.

It is the purpose of this title to provide compensation to any individual (or relatives of a deceased individual) who was physically injured or killed as a result of the terrorist-related aircraft crashes of September 11, 2001.

Sec. 404. Administration.

(a) In general.--The Attorney General, acting through a Special Master appointed by the Attorney General, shall--

(1) administer the compensation program established under this title[.]

Sec. 405. Determination of eligibility for compensation.

(a) Filing of claim.--

(1) In general.--A claimant may file a claim for compensation under this title with the Special Master. The claim shall be on the form developed under paragraph (2) and shall state the factual basis for eligibility for compensation and the amount of compensation sought.

(b) Review and Determination

(1) Review.--The Special Master shall review a claim submitted under subsection (a) and determine--

(A) whether the claimant is an eligible individual under subsection ©);

(B) With respect to a claimant determined to be an eligible individual--

(I) the extent of the harm to the claimant, including any economic and noneconomic losses; and

(ii) the amount of compensation to which the claimant is entitled based on the harm to the claimant, the facts of the claim, and the individual circumstances of the claimant.

(2) Negligence.--With respect to a claimant, the Special Master shall not consider negligence or any other theory of liability.

©) Eligibility.--

(1) In general.--A claimant shall be determined to be an eligible individual for purposes of this subsection if the Special Master determines that such claimant--

(A) is an individual described in paragraph (2); and

(B) meets the requirements of paragraph (3).

(2) Individuals.--A claimant is an individual described in this paragraph if the claimant is--

(A) An individual who--

(I) was present at the World Trade Center, (New York, New York), the Pentagon (Arlington, Virginia), or the site of the aircraft crash at Shanksville, Pennsylvania at the time, or in the immediate aftermath, of the terrorist-related aircraft crashes of September 11, 2001; and

(ii) suffered physical harm or death as a result of such an air crash;

(B) an individual who was a member of the flight crew or a passenger on American Airlines flight 11 or 77 or United Airlines flight 93 or 175, except that an individual identified by the Attorney General to have been a participant or conspirator in the terrorist-related aircraft crashes of September 11, 2001, or a representative of such individual shall not be eligible to receive compensation under this title; or

©) in the case of a decedent who is an individual described in subparagraph (A) or (B), the personal representative of the decedent who files a claim on behalf of the decedent.

...

(3) Requirements.--

(A) Single claim.--Not more than one claim may be submitted under this title by an individual or on behalf of a deceased individual.

(B) Limitation on civil action.--

(I) In general.--Upon the submission of a claim under this title, the claimant waives the right to file a civil action (or to be a party to an action) in any Federal or State court for damages sustained as a result of the terrorist-related aircraft crashes of September 11, 2001. The preceding sentence does not apply to a civil action to recover collateral source obligations, or to a civil action against any person who is a knowing participant in any conspiracy to hijack any aircraft or commit any terrorist act.

(ii) Pending actions.--In the case of an individual who is a party to a civil action described in clause (I), such individual may not submit a claim under this title unless such individual withdraws from such action by the date that is 90 days after the date on which regulations are promulgated under section 407.

Notes to September 11th Victim Compensation Fund Statute

1. *Elements of Compensation Fund Statutes.* Compensation Fund statutes define those eligible for compensation, typically require recipients to forego compensation that might otherwise have been available, and establish procedures for making awards. How does the September 11th Victim Compensation Fund Statute treat each of these elements?

2. *Findings of Fact.* The statute requires determinations of 1) whether an individual was injured in one of the terrorist-related air crashes and 2) what economic and non-economic losses that injury caused. The first of these determinations is likely to be straightforward. What complications might be related to the second determination?