If the motion for a nonsuit is denied or not made at all, the defendant's lawyer then presents the defendant's case and tries to disprove the plaintiff's evidence or substantiate the defendant's arguments. Witnesses and exhibits are presented, following the same procedure as the plaintiff's direct examination followed by cross-examination. After the defendant rests his or her case, the plaintiff then may produce evidence to rebut the defendant's evidence.

At the end of the presentation of evidence, but before the issues are submitted to the jury, either or both parties may make a motion for a **directed verdict**. The motion is granted for the party making the motion if the judge decides that the case is perfectly clear and that reasonable people could not disagree on the result. If the motion is granted, the moving party wins the dispute without the jury deciding the case. If no motion for a directed verdict is made, or if one is made and denied, the case is submitted to the jury.

Jury Verdict and Posttrial Motions

Both parties' attorneys have an opportunity to make oral arguments to the jury summarizing their cases. The judge then instructs the members of the jury as to how they should proceed. Although jury deliberations are secret, certain restrictions must be observed to avoid possible grounds for setting aside the verdict. These include prohibitions on juror misconduct, such as drunkenness; the use of unauthorized evidence, such as secretly visiting the scene of an accident; or disregarding the judge's instructions, such as discussing the merits of the case over lunch with a friend.

After the verdict has been rendered, a party not satisfied with it may move for judgment notwithstanding the verdict, a new trial, or relief from judgment. A **motion for judgment notwithstanding the verdict (JNOV)** is granted when the judge decides that reasonable people could not have reached the verdict that the jury has reached. A **motion for a new trial** before another jury may be granted by a judge for a variety of reasons, including excessive or grossly inadequate damages, newly discovered evidence, a questionable jury verdict, errors in the production of evidence, or simply the interest of justice. A **motion for relief from judgment** is granted if the judge finds a clerical error in the judgment, newly discovered evidence, or fraud that induced the judgment.

The appellant in the following case made a motion for a directed verdict at the close of all the evidence. She also made postverdict motions for JNOV and a new trial. She appealed from the court's denial of all three motions.

Cody v. Atkins
658 P.2d 59
Supreme Court of Wyoming
February 4, 1983

Raper, Justice

This appeal arose from a negligence action brought by Lois M. Cody (appellant) against Alfred Atkins (appellee) for injuries she allegedly sustained in an automobile collision between her car and appellee's pickup. Appellant appeals from the judgment on a jury verdict entered by the district court in favor of appellee....

At about 7:00 o'clock A.M. on the morning of November 13, 1980, appellant's car was struck from behind by a pickup driven by appellee. At the time of the accident appellant was stopped for a red light in the right-hand, west-bound lane of 16th Street at the intersection of 16th Street and Snyder Avenue in Cheyenne, Wyoming. The right front corner of appellee's vehicle struck the left rear corner of appellant's car. In the words of a police officer who investigated the accident, the lane of traffic in which the accident occurred was ice covered and "very slick." It was overcast and snowing lightly at the time the accident occurred but visibility was not impaired. Neither party complained of injuries when questioned by the investigating officer at the accident scene; however, later that day appellant complained of injuries and was taken to the emergency room at Memorial Hospital where she was examined and released. Appellant was subsequently hospitalized and treated for numerous

physical complaints that she alleged resulted from the accident.

Appellant brought suit June 5, 1981, complaining that appellee's negligent operation of his vehicle had caused harm to her. On March 1, 1982, appellant filed an amended complaint against appellee. Appellee answered the complaints by admitting that his pickup collided with appellant's car but denying appellant's remaining allegations of negligence, etc.; there were no counterclaims made nor affirmative defenses asserted by appellee. The matter was tried before a six-person jury May 10 and 11, 1982, in the district court in Cheyenne. At the close of appellee's case, appellant made a motion for directed verdict.... The district court denied the motion. The jury then, after receiving its instructions and deliberating on the matter, returned a verdict in favor of appellee. Following the trial, appellant made timely motions for a new trial... and for a judgment notwithstanding the verdict.... The district court denied both motions; this appeal followed.

I

The first issue appellant raises for our consideration is the propriety of the district court's denial of his motion for a directed verdict.... We ... have held that since a directed verdict deprives the parties of a determination of the facts by a jury, such motion should be cautiously and sparingly granted....

In the majority of our decisions in which directed verdicts are at issue, we have dealt with directed verdicts sought by the defendant; here we are faced with the opposite situation of a plaintiff seeking a directed verdict. In general, the standard in directing a verdict for a plaintiff is similar to the standard used to direct one against him.... It is proper to direct a verdict for the plaintiff in those rare cases where there are no genuine issues of fact to be submitted to a jury.... In a negligence action a verdict may be directed for the plaintiff when there is no evidence that would justify a jury verdict for the defendant.... A directed verdict for the plaintiff is proper when there is no dispute as to a material fact, and when reasonable jurors cannot draw any other inferences from the facts than that propounded by the plaintiff.... In a negligence action, then, we need only determine that there was sufficient evidence to permit a reasonable jury to find that the defendant acted without negligence to hold that appellant's motion was properly denied. We so hold.

In this case appellee presented evidence that the roadway he was traveling on was slippery due to snow and ice; that he had been attempting to slow down and to stop to avoid a collision for some 400 feet prior to impact; that he had slowed from 20 m.p.h. to 5 m.p.h. in the 400 feet prior to impact; that he had attempted to drive to the left and avoid the collision; that his ability to stop was further complicated because he was traveling downhill; and that he was in control of his vehicle at all times prior to the collision. Although we were unable to find where appellee had testified in so many words that he had not been negligent, the jury could have properly inferred as much from the evidence we have outlined. Although appellant contends otherwise, the concept of an automobile accident occurring without a finding of negligence is not novel in our jurisprudence.... The district court could not have, in the face of appellee's evidence showing an absence of negligence, directed a verdict for appellant. Therefore, we hold the district court properly denied appellant's motion for directed verdict.

II

Appellant next argues that the district court erred in denying her motion for a judgment notwithstanding the verdict (J.N.O.V.).... As previously noted, appellant had sought and had been denied a directed verdict at the close of the evidence; therefore, we reach this issue. Before deciding the issue, however, we first set out the standard of review we shall employ....

J.N.O.V. can only be granted where there is an absence of any substantial evidence to support the verdict entered.... The test then for granting a J.N.O.V. is virtually the same as that employed in determining whether a motion for directed verdict should be granted or denied....

The logic behind similar standards of review is that it allows the district court another opportunity to determine the legal question of sufficiency of the evidence raised by the motion after the jury has reached a verdict.... In close cases the J.N.O.V. procedure promotes judicial economy. When a J.N.O.V. is reversed, for example, an appellate court can remand for reinstatement of the original verdict, where a new trial is generally required when a directed verdict is reversed....

In the case before us, we have, in ruling on the directed verdict question, already held that there was sufficient evidence presented to create a question of fact for the jury to determine on the issue of appellee's negligence. For those same reasons we must also hold that the district court correctly denied appellant's motion for a J.N.O.V.

III

We next reach appellant's final argument that the district court erred in denying her motion for a new

trial.... Appellant's motion set forth the following grounds for obtaining a new trial:

> "1. That the Verdict is not Sustained by sufficient Evidence and is Contrary to Law.
> 2. That Errors of Law were Committed at the Trial."

Appellant then centers her argument around the first ground. The position appellant takes is that she was entitled to a new trial because the jury's verdict was not consistent with the evidence. We disagree....

A court's exercise of the power to grant a new trial is not a derogation of the right of a jury trial but is one of that right's historic safeguards.... The power to grant a new trial gives the trial court the power to prevent a miscarriage of justice.... Trial courts should grant new trials whenever, in their judgment, the jury's verdict fails to administer substantial justice to the parties....

> "The right of trial by jury includes the right to have the jury pass upon questions of fact by determining the credibility of witnesses and the weight of conflicting evidence. The findings of fact, however, are subject to review by the trial judge who, like the jury, has had the benefit of observing the demeanor and deportment of the witnesses. If he concludes that the evidence is insufficient to support the verdict, he should grant a new trial...."

This court has acknowledged that when a court could have properly granted a J.N.O.V. for insufficient evidence, it was not error to grant a motion for a new trial.... That does not mean, however, that the same standards apply for granting a new trial and a J.N.O.V.; the standard must be more lenient for exercising the power to grant new trials to preserve that power's historic role as a safety valve in our system of justice....

> "When the evidence is wholly insufficient to support a verdict, it is the duty of the trial court to direct a verdict or enter a judgment n.o.v., and the court has no discretion in that respect. But, the granting of a new trial involves an element of discretion which goes further than the mere sufficiency of the evidence. It embraces all the reasons which inhere in the integrity of the jury system itself...."

It is well settled in Wyoming that trial courts are vested with broad discretion when ruling on a motion for new trial, and that on review we will not overturn the trial court's decision except for an abuse of that discretion....

In this case, appellant argues there was not sufficient evidence before the jury to entitle them to find in favor of appellee. As we pointed out in our discussion of appellant's first issue, appellee presented sufficient evidence to permit the jury to reach the issue of negligence. Also, as we said earlier, the mere fact that the collision occurred does not in itself indicate negligence. Therefore, after hearing the testimony of the witnesses and observing their demeanor, the district court exercised its discretion and denied appellant's motion for a new trial. The district court thereby indicated its belief that under the circumstances of the case no substantial injustice would occur in upholding the jury's verdict. Appellant has presented no convincing argument that would persuade us that the district court abused its discretion. Therefore, we hold that the district court did not err when it denied appellant's motion for a new trial.

Affirmed.

Case Questions

1. Does granting a new trial because the jury awarded excessive damages infringe on the plaintiff's constitutional right to a jury trial?
2. Does a reduction of the amount of damages by the court as a condition for denying a new trial invade the province of the jury?
3. When is it proper for a judge to grant a directed verdict motion?
4. What is the purpose of the motion for judgment notwithstanding the verdict (JNOV)?

Additur and Remittitur

On occasion, juries award money damages that are, in the view of the trial or appellate courts, inadequate as a matter of law.

When a jury's award is grossly insufficient, a prevailing party in state court is often entitled to ask the trial court to award the plaintiff an additional sum of money (called **additur**). If the trial court agrees, it will specify an additional amount for the defendant to pay the plaintiff. In that event, the defendant can agree to pay the additur; refuse to pay, in which case the trial court will order a new trial on damages; or appeal to a higher court. Federal judges cannot award additur because of the Seventh Amendment, which provides that "no fact tried by a jury shall be otherwise reexamined… than according to the rules of the common law." This means that no federal judge can award money damages in an amount above the sum awarded by the jury.

Although the jury in the next case found the defendant negligent, it failed to award the plaintiff any money damages. The plaintiff filed a motion in the trial court asking the court to order additur.

Shirley Junginger v. Rebecca Betts
No. 05C-10-202-JOH.
Superior Court of Delaware, New Castle County.
April 9, 2008.

MEMORANDUM OPINION

Herlihy, Judge.
Plaintiff Shirley Junginger has moved for a new trial complaining that the jury's verdict finding [that] defendant Rebecca Betts negligently caused the accident yet awarding … [plaintiff] no damages is against the great weight of the evidence. Basically … [plaintiff's] contention is that there were objective signs of injury and a zero damage award is inconsistent with that uncontroverted evidence…..

An examination of the record does indicate a few, objective signs of injury. The Court, however, does not find there is a need to retry the case, but will instead award additur in the amount of $13,500.00.

Factual Background
Junginger was backing out of a parking space in the Community Plaza Shopping Center when Betts, driving a van perpendicular to her, struck Junginger's car. The accident was on September 4, 2004. Junginger described the impact as "incredible," and said she was "tossed" to her left side. Her head, she said, hit the passenger window. At the scene, she testified she could not straighten her neck and head. She was taken to Christiana Hospital. There she described the impact as "mild" (according to the hospital records).

Betts was never quite sure she even hit Junginger's car. She testified she did not hear anything. There was, she said further, no jolting or jarring, but since Junginger did not move her car, she assumed something happened. Betts' daughter who was riding with her sensed her mother braking but nothing else.

Photos of the two vehicles showed no damage to Betts' van but several dents to Junginger's car. One long dent higher up, however, does not correspond to anything on Betts' van.

Junginger had mild pain symptoms at Christiana and was released. She began treatment for her symptoms on September 7, 2004 with Dr. George Buhatiuk. He had treated her in 1998–2000 for a prior accident wherein she had similar problems in some of the same areas: neck and back. Junginger testified these problems resolved, however, prior to the 2004 accident.

Junginger treated with Dr. Buhatiuk from September 7th through May 2005. She had a treatment visit in August that year but did not see him again until a month before the trial. On her first visit, the doctor noted positive foreman's compression and Spurling's tests. These, he testified, are objective findings. But starting with her visit later in September 2004, she had no such positive tests until her visit in 2008. There were times in March, April, and May that he reported she was "guarded" in turning and looking over left shoulder.

Dr. Buhatiuk reported that Junginger told him she had trouble sleeping and that at times when she had slept on her left side, she would wake up with her arm feeling numb or tingly. He also testified she was 90% improved as of February 2005 and many of her symptoms had resolved within two to four weeks of the accident. The only lingering problem, according to the doctor, was mild upper back pain. Since this was present in 2008, he opined it was permanent. Junginger had

exhausted her $15,000 PIP [personal injury protection insurance] coverage and owed Dr. Buhatiuk $6,780.

Dr. Buhatiuk has prescribed some therapy for her among other treatment modalities. She was restricted to lifting no more than twenty to twenty-five pounds. Her job at Joy Cleaners, however, meant she had to pick clothes off an overhead rack. At trial, she said she has upper back pain under the left shoulder blade and neck pain. She takes Advil for flare-ups in her pain. She favors her left side. But she was unable to say other activities had been impaired by the accident.

A significant part of this two-day trial involved whether an impact had occurred, who was at fault or whether both parties were at fault. The jury determined that: (1) Betts was negligent, (2) her negligence proximately caused the accident, and (3) her negligence proximately caused injury to Junginger. It did not award damages to Junginger, however, even though it was instructed to award her damages.

Applicable Standard

When considering a motion for new trial which attacks a jury's verdict, there are several key principles the Court must follow. Enormous deference is given to jury verdicts.... A jury's verdict is assumed to be correct.... To be set aside, a jury's verdict must be against the great weight of the evidence.... The Court will not set aside a verdict unless it is clear the jury disregarded the evidence or the rules of law....

Discussion

Junginger appropriately cites *Amalfitano v. Baker* ... in support of her argument that where there are uncontroverted objective findings of injury, a jury must award damages. In this case there is a mixture of a lot of subjective complaints with occasional objective and uncontroverted medical tests. Those tests are foreman's compression and Spurling's. There is mention in March–May 2005, of guarding, which is a report of pain when Junginger turned her head to the left to look over her shoulder. But there is no concurrent physician report of spasm. And when this guarding was noted, the two tests just mentioned either were not done, or they were negative. They were negative, in fact, from September 9, 2004 until next reported positive in February 2008. It is less than clear, therefore, whether, the "guarding" which Dr. Buhatiuk noted is an "objective" finding in this case.

Many of Junginger's complaints and those reported to her doctor were subjective. This is key for several reasons. The doctor based his opinions about her injuries on subjective complaints, most of which, resolved in late September or early October 2004—just a few weeks after the accident. Respectfully, Junginger was not the most convincing plaintiff. Counsel handling personal injury litigation and judges know how much personal injury cases can rise and fall on the plaintiff's credibility. Further, a jury is entitled to reject a physician's testimony if it is based on a patient's subjective complaints and that patient's credibility is suspect....

There is a strong hint here that the jury's zero damages award reflects its problem with Junginger's credibility; perhaps exaggerating the impact, the pain, its pervasiveness in so many areas of the body and its degree.... This is speculative, of course, but it is a likely explanation considering the brief period many of her injuries lasted and negative results on two objective tests starting September 9, 2004.

The difficulty remains that there were "positive" results on two objective medical tests and uncontroverted medical records from Christiana on September 4th and Dr. Buhatiuk that Junginger suffered injury. This Court has the authority to award additur ... and even do so where there has been zero damages awarded.... In the Court's opinion the amount of that additur must account for three factors: pain and suffering, medical bills above PIP, and the minimal nature of Junginger's injuries (a conclusion supported by the jury's zero damage award). Dr. Buhatiuk testified that all of his treatment was reasonable and necessary and he believed he was appropriately treating what he found and/or was reported to him. Accounting for all of these factors, therefore, the Court will enter an additur award of $13,500.

Accordingly, a new trial on damages will be ordered unless Betts by written filing accepts additur of $13,500 within ten (10) days from the date of this opinion. If no action is taken by Betts, Junginger's motion for a new trial on the issues of damages only will be granted. If Betts accepts the additur, judgment for her will be set aside and a judgment will be entered in favor of Junginger in the amount of $13,500.

IT IS SO ORDERED

Case Questions

1. What is the purpose of additur?
2. If you were Betts' attorney, what would you need to think about as part of the process of determining whether to accept the additur?

Both state and federal judges, with the consent of the plaintiff, can reduce unreasonably high jury verdicts. When a jury finds for the plaintiff and the money damage award is grossly excessive, the defendant is entitled to ask the trial and appellate courts to reduce the size of the award by ordering a **remittitur**. If the trial court awards a remittitur, the plaintiff is given three choices. The plaintiff can accept the reduced sum that was determined by the court, refuse to remit any of the jury's award, in which case the trial court will order a new trial on damages, or appeal to a higher court.

INTERNET TIP

Students wishing to read another additur case, *Ruben Dilone v. Anchor Glass Container Corporation*, or a remittitur case, *Bunch v. King County Department of Youth Services*, can find these cases on the textbook's website.

Judgment and Execution

The trial process concludes with the award of a **judgment**. The judgment determines the rights of the disputing parties and decides what relief is awarded (if any). A judgment is awarded after the trial court has ruled on posttrial motions. Appeals are made from the court's entry of judgment. Either party (or both) may appeal from a trial court's judgment to an appellate court.

A person who wins a judgment is called a **judgment creditor**, and the person who is ordered to pay is called a **judgment debtor**. Many times the judgment debtor will comply with the terms of the judgment and deliver property or pay a specified sum of money to the judgment creditor. If necessary, however, the judgment creditor can enforce the judgment by obtaining a **writ of execution** from the clerk of court where the judgment is filed. The writ will be directed to the sheriff who can then seize the judgment creditor's nonexempt personal property and sell it to satisfy the judgment. An example of a statute exempting specified property from seizure can be seen in Figure 5.6. The statute authorizing judicial sale includes safeguards to prevent abuse of the defendant's rights.

Alternatively, the plaintiff may have a **lien** placed against the judgment debtor's real property.

Vermont Statutes Annotated §§ 2740.
GOODS AND CHATTELS; EXEMPTIONS FROM

The goods or chattels of a debtor may be taken and sold on execution, except the following articles, which shall be exempt from attachment and execution, unless turned out to the officer to be taken on the attachment or execution, by the debtor:

(1) the debtor's interest, not to exceed $2,500.00 in aggregate value, in a motor vehicle or motor vehicles;
(2) the debtor's interest, not to exceed $5,000.00 in aggregate value, in professional or trade books or tools of the profession or trade of the debtor or a dependent of the debtor;
(3) a wedding ring;
(4) the debtor's interest, not to exceed $500.00 in aggregate value, in other jewelry held primarily for the personal, family or household use of the debtor or a dependent of the debtor;
(5) the debtor's interest, not to exceed $2,500.00 in aggregate value, in household furnishings, goods or appliances, books, wearing apparel, animals, crops or musical instruments that are held primarily for the personal, family or household use of the debtor or a dependent of the debtor;
(6) growing crops, not to exceed $5,000.00 in aggregate value;
(7) the debtor's aggregate interest in any property, not to exceed $400.00 in value, plus up to $7,000.00 of any unused amount of the exemptions provided under subdivisions (1), (2), (4), (5) and (6) of this section;

(*continued*)

FIGURE 5.6 Vermont Statute Exempting Goods and Chattels from Execution

(8) one cooking stove, appliances needed for heating, one refrigerator, one freezer, one water heater, sewing machines;

(9) ten cords of firewood, five tons of coals or 500 gallons of oil;

(10) 500 gallons of bottled gas;

(11) one cow, two goats, 10 sheep, 10 chickens, and feed sufficient to keep the cow, goats, sheep or chickens through one winter;

(12) three swarms of bees and their hives with their produce in honey;

(13) one yoke of oxen or steers or two horses kept and used for team work;

(14) two harnesses, two halters, two chains, one plow, and one ox yoke;

(15) the debtor's interest, not to exceed $700.00 in value, in bank deposits or deposit accounts of the debtor;

(16) the debtor's interest in self-directed retirement accounts of the debtor, including all pensions, all proceeds of and payments under annuity policies or plans, all individual retirement accounts, all Keogh plans, all simplified employee pension plans, and all other plans qualified under sections 401, 403, 408, 408A or 457 of the Internal Revenue Code. However, an individual retirement account, Keogh plan, simplified employee pension plan, or other qualified plan, except a Roth IRA, is only exempt to the extent that contributions thereto were deductible or excludable from federal income taxation at the time of contribution, plus interest, dividends or other earnings that have accrued on those contributions, plus any growth in value of the assets held in the plan or account and acquired with those contributions. A Roth IRA is exempt to the extent that contributions thereto did not exceed the contribution limits set forth in section 408A of the Internal Revenue Code, plus interest, dividends or other earnings on the Roth IRA from such contributions, plus any growth in value of the assets held in the Roth IRA acquired with those contributions. No contribution to a self-directed plan or account shall be exempt if made less than one calendar year from the date of filing for bankruptcy, whether voluntarily or involuntarily. Exemptions under this subdivision shall not exceed $5,000.00 for the purpose of attachment of assets by the office of child support pursuant to 15 V.S.A. §§ 799;

(17) professionally prescribed health aids for the debtor or a dependent of the debtor;

(18) any unmatured life insurance contract owned by the debtor, other than a credit life insurance contract;

(19) property traceable to or the debtor's right to receive, to the extent reasonably necessary for the support of the debtor and any dependents of the debtor:

- (A) Social Security benefits;
- (B) veteran's benefits;
- (C) disability or illness benefits;
- (D) alimony, support or separate maintenance;
- (E) compensation awarded under a crime victim's reparation law;
- (F) compensation for personal bodily injury, pain and suffering or actual pecuniary loss of the debtor or an individual on whom the debtor is dependent;
- (G) compensation for the wrongful death of an individual on whom the debtor was dependent;
- (H) payment under a life insurance contract that insured the life of an individual on whom the debtor was dependent on the date of that individual's death;
- (I) compensation for loss of future earnings of the debtor or an individual on whom the debtor was or is dependent;
- (J) payments under a pension, annuity, profit-sharing, stock bonus, or similar plan or contract on account of death, disability, illness, or retirement from or termination of employment.

It is created when the clerk of courts records the judgment (officially informing interested persons of the existence of the lien). The judgment debtor's property cannot be transferred until the lien is satisfied. This often means that when the judgment debtor's property is sold, part of the sale proceeds is paid to the judgment creditor to satisfy the lien.

Garnishment is another remedy for judgment creditors. It is a process that results in the debtor's employer being ordered to deduct a percentage of the debtor's earnings from each paycheck. These payments are first credited against the debt and then forwarded to the judgment creditor.

CHAPTER SUMMARY

Chapter V introduced readers to the importance of procedure in our civil legal system. Although civil procedure varies somewhat within the fifty-two court systems in this country (federal, state, and District of Columbia), all jurisdictions have adopted rules of civil procedure which serve as the road map for civil litigation. These rules tell attorneys how to move successfully through each stage of the litigation process. Fair procedures are essential to achieving just outcomes.

The basic steps of the litigation process were discussed. The chapter began with a discussion of what lawyers do after being retained by a client contemplating litigation. This was followed by a discussion about the role of the pleadings. Here readers learned about the complaint, answer, and reply. The requirements for serving the summons and consequences of defective service were also discussed.

The use of the pretrial motion to dismiss (for lack of subject matter jurisdiction or *in personam* jurisdiction, improper or inadequate service of the summons and/or complaint, or failure to state a claim upon which relief can be granted) and the motion for summary judgment (which is used to dispose of cases not needing to be tried—such as where no genuine issues of material fact exist) were explained.

Readers will also recall how modern discovery provides attorneys with various tools to identify the relevant facts in the case, especially those in the possession of the opposing party.

The procedural steps in the conduct of a trial, starting with the selection of a jury, the opening statements of the attorneys, the presentation of evidence, the rules of evidence, legal privileges, trial motions (such as the motion for nonsuit and directed verdict), and the closing arguments of the attorneys, were also discussed.

The chapter concluded with explanations of the jury verdict, the award of a judgment, posttrial motions (for JNOV and a new trial), and how a judgment can be enforced.

CHAPTER QUESTIONS

1. Richmond was convicted of sexually assaulting Krell, a woman with whom, according to the court, he had been in an "intimate relationship." In the aftermath of the alleged criminal act, Richmond had contacted a priest, Father Dick Osing, who was also a "part-time unlicensed marriage and family counselor." Richmond and Osing had conversed privately at an Episcopal church at which Osing was a priest. Father Osing testified at trial for the prosecution and disclosed the contents of the private discussion between Richmond and himself. Richmond appealed his conviction for sexual assault in the second degree on the grounds that Father Osing's testimony should have been excluded at the trial because of the

communications with clergy privilege. The facts showed that Richmond had contacted Father Osing for "advice on his relationship with Krell."

John M. Richmond v. State of Iowa, 97-954 Supreme Court of Iowa (1999)

2. The Stars' Desert Inn Hotel filed suit against Richard Hwang, a citizen of Taiwan, to collect on a $1,885,000 gambling debt. The parties were unable to cooperate in scheduling a date for taking defendant Hwang's deposition. The court, aware of the scheduling problem, entered an order requiring that the deposition be taken no later than November 29, 1994. Stars requested that Hwang provide at least two dates prior to the deadline when he would be available to be deposed. When Hwang failed to respond to this request, Stars set the date for November 23. Hwang's lawyers responded on November 21 with a proposal that Hwang be deposed in Taiwan prior to November 29. Stars rejected this proposal and filed a motion asking the court to strike Hwang's answer and enter a default judgment in favor of the plaintiff. Hwang's attorneys explained that their client was not cooperating with them and that he refused to be deposed in Nevada. The court imposed a $2,100 fine against Hwang and ordered him to either be deposed in Nevada or to prepay the plaintiff's expenses (estimated by the plaintiff to be between $20,000 and $40,000), for taking the deposition in Taiwan, no later than February 10, 1995. Hwang failed to pay the fine, asserted that the plaintiff's estimate of the costs of taking the deposition in Taiwan were excessive, and refused to comply with either option contained in the court's order. The plaintiff again requested that the court impose the sanctions. Should the court strike the answer and award a default judgment to the plaintiff in the amount of $1,885,000 (plus interest, costs, attorney's fees, and post-judgment interest)? Are there any less drastic steps that should be taken before imposing such a drastic sanction?

Stars' Desert Inn Hotel & Country Club v. Hwang, 105 F.3d 521 (9th Cir. 1997)

3. Colin Cody, a Connecticut resident, invested $200,000 in the common stock of Phillips Company, a firm that installs video gambling machines in Louisiana casinos. Cody brought suit against the defendant, Kevin Ward, a resident of California, alleging that Ward had used an Internet website called "Money Talk" to perpetrate a fraud on potential investors. The gist of Cody's complaint was that Ward had engaged in false and fraudulent misrepresentations about the Phillips company's impending financial prospects. Cody claimed to have made decisions about whether to buy and hold Phillips stock in partial reliance on Ward's misrepresentations on the Internet and on telephone calls made by Ward that encouraged Cody to buy and hold Phillips stock. Cody further claimed that the Phillips stock was essentially worthless. Ward sought to dismiss the complaint, alleging that he could not be sued in Connecticut because there were insufficient grounds for personal jurisdiction. Cody maintains that a defendant who orally or in writing causes information to enter Connecticut by wire is committing a tortious act within Connecticut and is subject to suit pursuant to the Connecticut long-arm statute. Do you believe that Ward has committed a tortious act within the forum state that would satisfy the requirements of the long-arm statute? Do you believe that there is a constitutional basis for Connecticut to exercise *in personam* jurisdiction over Ward?

Cody v. Ward, 954 F.Supp 43 (D. Conn. 1997)

4. The Stars' Desert Inn Hotel filed suit against Richard Hwang, a citizen of Taiwan, to collect on a $1,885,000 gambling debt. Stars unsuccessfully tried to serve Hwang on six occasions at a guarded and gated housing complex in Beverly Hills. The process server, after verifying with the guard that Hwang was inside, left the summons and complaint with the gate

attendant. Hwang moved to quash the service. Was Hwang properly served?

Stars' Desert Inn Hotel & Country Club v. Hwang, 105 F.3d 521 (9th Cir. 1997)

5. Colm Nolan and others brought suit against two City of Yonkers police officers and the City of Yonkers, New York, for alleged brutality and false arrest. The plaintiff's process server alleged that he had served both defendants at police headquarters (rather than at their place of residence), and also mailed copies of the summons and complaint to each officer at police headquarters. New York law provides that a summons can be delivered to "the actual place of business of the person to be served and by mailing a copy to the person to be served at his actual place of business." One defendant admitted receiving a copy of the summons and complaint at his police mailbox; the second officer denied ever receiving either document at police headquarters. Neither officer suffered any prejudice because both defendants did receive the summons and complaint and both filed answers in a timely manner. Rule 4 of the Federal Rules of Civil Procedure permits service "pursuant to the law of the state in which the district court is located." The two police officers asked the court to dismiss the complaint for lack of personal jurisdiction. Was the service at police headquarters sufficient to confer *in personam* jurisdiction over these defendants?

Nolan v. City of Yonkers, 168 F.R.D. 140 (S.D.N.Y. 1996)

6. A car driven by James Murphy struck a boy and injured him. Immediately after the accident, according to the boy's mother, Murphy told her "that he was sorry, that he hoped her son wasn't hurt. He said he had to call on a customer and was in a bit of a hurry to get home." At trial, Murphy denied telling the boy's mother that he was involved in his employment at the time of the accident. It was shown, however, that part of his normal duties for his employer, Ace Auto Parts Company, included making calls on customers in his car. Can the mother have the statement admitted in court as a spontaneous exclamation?

7. Carolyn McSwain was driving a vehicle owned by John Denham in New York City on November 5, 1994. In the vehicle with McSwain were John Denham's mother Ollie Denham and John's child, Raesine. All the people in this vehicle were residents of Covington County, Mississippi. This vehicle was in a collision with a commuter van owned by Rockaway Commuter Line and driven by Sylvan Collard. Rockaway was a New York corporation with no significant contacts with Mississippi. As a result of this collision, McSwain and Raesine were injured, and Ollie Denham died. On November 4, 1997, John Denham sued McSwain, Rockaway, and Collard in Smith County, Mississippi for wrongfully causing the death of Ollie and for causing Raesine's injuries. Denham sent process to Rockaway by certified mail in November of 1997. Rockaway waited almost twenty-one months before filing an answer to Rockaway's complaint on August 27, 1999. The answer raised as a defense the lack of personal jurisdiction, improper service of process, and a motion for change of venue from Smith County to New York City. Rockaway's motion to dismiss was denied by the trial court, but Rockaway's petition for interlocutory appeal was granted by the Mississippi Supreme Court. Did Smith County have personal jurisdiction over Rockaway? Did Smith County waive its lack of personal jurisdiction defense by not filing its answer in a timely manner?

Rockaway Commuter Line, Inc. v. Denham, 897 So. 2d 156 (2004)

8. James Duke filed a suit against Pacific Telephone & Telegraph Company (PT&T) and two of its employees for invasion of privacy through unauthorized wiretapping. Duke claimed that defendant's employees installed an interception device on his telephone line without his knowledge or consent for the sole

purpose of eavesdropping. Through the use of the bugging devices, defendants acquired information that they communicated to the police department, resulting in his arrest. Although the charges were dismissed, he was discharged from his job. As part of the plaintiff's discovery, oral depositions were taken of the employees. The defendants refused to answer (1) questions relating to the procedure used in making unauthorized tapes of phone conversations (training of personnel, equipment, authority among employees), (2) questions relating to the deponent's knowledge of the illegality of unauthorized monitoring, (3) questions relating to a possible working relationship between the police and PT&T, and (4) questions relating to the monitoring of telephone conversations of subscribers other than the plaintiff. The defendants claimed that these questions were irrelevant to the litigation and therefore not proper matters for discovery. Do you agree?

Pacific Telephone & Telegraph Co. v. Superior Court, 2 Cal.3d 161, 465 P.2d 854, 84 Cal. Rptr. 718 (1970)

9. W. R. Reeves filed suit under the Federal Employers Liability Act against his employer, Central of Georgia Railway Company, seeking damages he allegedly suffered when the train on which he was working derailed near Griffin, Georgia. The liability of the defendant railroad was established at trial, and the issue of damages remained to be fixed. Several physicians testified regarding the injuries received by Reeves. Reeves also testified. On the witness stand, he said that an examining physician had told him that he would be unable to work because of a weakness in his right arm, a dead place on his arm, stiffness in his neck, and nerve trouble in his back. Why did admission of this testimony into evidence constitute reversible error?

Central of Georgia Ry. Co. v. Reeves, 257 So.2d 839 (Ga. 1972)

10. On December 10, 1962, Rosch obtained a judgment against Kelly from the superior court of Orange County, California. The California Code permits execution of a judgment only within ten years after entry of a judgment. If this is not done, the judgment may be enforced only by leave of court, after notice to the judgment debtors, accompanied by an affidavit setting forth the reasons for the failure to proceed earlier. The plaintiff made no attempt to enforce the judgment in California before Kelly moved to Texas in 1970. On February 15, 1974, the plaintiff attempted to execute on the California judgment in Texas. Does the Texas court have to allow execution under the full faith and credit clause?

Rosch v. Kelly, 527 F.2d 871 (5th Cir. 1976)

NOTES

1. T. F. F. Plucknett, *A Concise History of the Common Law*, 5th ed. (Boston: Little, Brown and Co., 1956), p. 408.
2. Ibid., pp. 408–409.
3. Ibid., p. 400.
4. The Federal Rules of Civil Procedure have significantly altered the service requirement in federal court. Rule 4(d) requires plaintiffs to send a copy of the complaint and a request for waiver of service to the defendant. A defendant who signs the waiver of service is allowed sixty days from the date of the notice to file an answer. A defendant who fails to sign the waiver and cannot prove good cause for this refusal can be required to pay the plaintiffs costs and attorney fees associated with going to court to obtain enforcement.
5. Jurors are generally selected from rosters containing lists of taxpayers, licensed drivers, and/or registered voters.

VI

Limitations in Obtaining Relief

CHAPTER OBJECTIVES

1. *Understand how constitutions, statutes, and judicial doctrines play a role in deciding which cases can be decided in the public courts.*
2. *Explain the case or controversy requirement.*
3. *Summarize what can make a case nonjusticiable.*
4. *Describe how statues of limitations and the equitable doctrine of laches limit plaintiffs.*
5. *Explain the conditions that must be met for a claim to be barred by the res judicata/claim preclusion doctrine.*
6. *Understand why immunities exist and how they work.*

People with grievances have a variety of options for obtaining relief. Nonjudicial alternatives such as mediation and arbitration, for example, are discussed in Chapter XIV. Access to the public courts, however, is not available to every litigant who would like to have a dispute decided there. We have already seen in Chapter IV, for example, that jurisdictional requirements prevent or limit courts from deciding many cases. In this chapter we learn about other constitutional, statutory, and common law limitations that have been created to determine if suits should be litigated in the public courts.

In some lawsuits courts are asked to provide legal answers to theoretical questions. These suits will generally be dismissed for failure to state a "case or controversy." Cases can also be dismissed for inappropriateness. This occurs, for example, when a plaintiff sues prematurely, takes "too long" to initiate litigation,

or tries to relitigate a matter that had been previously decided in a prior suit. Similarly, courts don't want to waste time on cases that are not truly adversarial (such as where **collusion** exists and one party is financing and controlling both sides of the litigation) or where the person bringing the suit has no personal stake in the litigation (such as where the plaintiff is suing on behalf of a friend who is reluctant to sue).

Later in the chapter we will learn that, in some circumstances, the public interest requires that certain defendants receive **immunity** (preferential protection) from lawsuits. Immunities have historically been granted to governments and certain public officials. In some jurisdictions immunities also limit lawsuits between family members.

CASE OR CONTROVERSY REQUIREMENT

To be within the federal judicial power, a matter must be a "case" or "controversy" as required by Article III, Section 2, of the U.S. Constitution. The parties to a lawsuit filed in federal court must truly be adversaries. The U.S. Supreme Court has always construed the **case or controversy** requirement as precluding the federal courts from advising the other branches of the government or anyone else.

Assume that a police chief has devised a new search and seizure strategy for identifying and apprehending terrorists. Assume further that the chief, wishing to know whether this strategy, if implemented, would violate the Fourth Amendment's "reasonableness clause" regarding searches and seizures, sends a letter posing the question to the U.S. Supreme Court. Will the court answer the question? No, it will not. The police chief is asking for a legal opinion. The question posed is based on a set of assumed facts. The facts are limited and entirely "hypothetical," and there are no true adversaries here. The entire matter is premature. The case or controversy requirement would be satisfied, however, if the police chief were to implement the strategy, seize evidence, and make an arrest that resulted in a criminal prosecution.

Many state constitutions follow the federal approach and do not permit state courts to render advisory opinions. Their executive and legislative branches may only seek advice from the state attorney general. However, the constitutions of some states specifically permit the state supreme court to issue advisory opinions to government officials concerning certain matters of law. In this capacity, the court acts only as an adviser; its opinion does not have the effect of a judicial decision.

JUSTICIABILITY—A MATTER OF STANDING, RIPENESS, AND *RES JUDICATA*

Only cases that are **justiciable** can be decided by courts on their merits. To be justiciable, a case must be well suited for judicial determination. Courts use judicial doctrines (policies) such as standing, ripeness, and *res judicata* to weed out cases that lack justiciability. One of the cornerstones of our judicial system is the notion that the parties to a lawsuit must be true adversaries. The underlying assumption is that the best way to determine the truth and do justice in a lawsuit is to require disputing parties to use their full faculties against each other in court. Their interests must collide, and they must be seeking different relief. The ripeness and standing doctrines help courts preserve this essential aspect of the litigation process.

The concepts of ripeness and standing, although distinguishable, are similar and can overlap. A **ripeness** inquiry focuses on whether a case has developed sufficiently to be before a court for adjudication. A challenge to a party's **standing** differs in that it focuses on whether the plaintiff who filed the lawsuit is the right person or entity to be bringing this particular claim before the court.

A lawsuit is not ripe for adjudication, and is therefore nonjusticiable, if it has been filed prematurely. The adversary system works best when the litigants' positions are definite, distinct, and unambiguously adverse. In such a situation, the consequences of ruling for or against each party are more apparent. Where the full facts of a case are unknown

or obscured, making a decision becomes much more difficult because the decision maker in such situations has to make too many assumptions in order to reach a well-reasoned conclusion. A just outcome is more likely if more certainty is required.

To have **standing**, a plaintiff must have a legally sufficient personal interest in the dispute and must be adversely affected by the defendant's conduct (i.e., injured in fact). With a few notable exceptions (such as for parents of minor children and guardians of incompetents), one person cannot sue to recover on behalf of another person who has been legally injured. Most people actually refuse to bring lawsuits against individuals they have a legal right to sue. They choose not to take legal action because the persons who have caused them harm are their friends, relatives, neighbors, or acquaintances. The standing requirement ensures that the injured person is in control of the decision to sue, prevents undesired and unnecessary suits, and prevents people who have marginal or derivative interests from filing multiple suits.

The following case, from the state of North Carolina, discusses standing in a case brought by two soldiers who sought to prevent their deployment to Iraq or Afghanistan.

Sullivan v. State
612 S.E.2d 397
Court of Appeals of North Carolina
May 17, 2005

Hunter, Judge.

Lt. Col. Donald Sullivan and Specialist Jeffery S. Sullivan (collectively "plaintiffs") appeal from a dismissal of their claim for injunctive relief entered 1 March 2004....

Plaintiffs are former members of the United States Armed Services. Specialist Sullivan is a current member of the North Carolina National Guard and was deployed in August 2003 to the current United States military operation ongoing in Afghanistan.

On 3 October 2003, plaintiffs sought a temporary restraining order and preliminary injunction against the State of North Carolina, Governor Michael F. Easley, and Major General William E. Ingram, Adjutant General of the North Carolina National Guard (collectively "defendants"), to: (1) rescind orders of deployment for members of the military forces of North Carolina engaged in actions in Iraq and Afghanistan, (2) recall those troops already deployed, and (3) estop defendants from further deployment. Plaintiffs contend such actions violate the state and federal Constitutions.

Defendants moved to dismiss the action, contending that the claim was not justiciable and failed to state a claim on which relief could be granted. The trial court granted defendants' motion to dismiss ... finding plaintiffs lacked standing ... and that the complaint presented political questions not justiciable by the court. Plaintiffs contend the trial court erred in dismissing their claims on these grounds. We disagree.

> Standing is among the "justiciability doctrines" developed by federal courts to give meaning to the United States Constitution's "case or controversy" requirement. U.S. Const. Art. 3, § 2. The term refers to whether a party has a sufficient stake in an otherwise justiciable controversy so as to properly seek adjudication of the matter....

"Standing is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction." ...

In order to establish standing to bring a justiciable claim before the court, a plaintiff must show an:

> "'(1) "injury in fact"—an invasion of a legally protected interest that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision'."...

Plaintiffs' requested relief in this action is an injunction to rescind orders of deployment for United States military forces, withdrawal of currently deployed troops, and estoppel of future deployments. Such relief is not within the power of the North Carolina state courts to grant.... A member of a state national guard is simultaneously a member of the Army National Guard of the United States.... Further, a guard member ordered to active duty is relieved from duty in the National Guard of his State.... Plaintiffs' remedy of withdrawal of federal troops and estoppel of further deployment is not within the power of the

State of North Carolina to provide, as such deployments of federal troops are entirely within the control of the federal government … art 1, § 8, cl. 16 (stating Congress shall govern the militia when employed in the service of the United States), U.S. Const. art 2, § 2, cl. 1 (stating President is commander in chief of the militia of the several states), U.S. Const. art. 6, § 2 (stating the Constitution is the supreme law of the land and binding on the judges of every state). Therefore the trial court properly found plaintiffs lacked standing to proceed with their claim.

As both plaintiffs have failed to establish standing, the trial court properly dismissed the action for lack of jurisdiction. We therefore decline to address plaintiffs' additional assignments of error.

Affirmed.

Case Questions

1. What must a plaintiff demonstrate in order to establish standing?
2. Why do Federal courts have a special concern about standing?

INTERNET TIP

Students wishing to read a federal case focusing on both standing and ripeness can read *Thomas v. Anchorage Equal Rights Commission,* 220 F.3d 1134, on the textbook's website.

MOOTNESS

Moot cases are outside the judicial power because there is no case or controversy. Mootness is an aspect of ripeness, in that there is no reason to try a case unless there has been some direct adverse effect on some party. Deciding when a case is moot is sometimes difficult. An actual controversy must not only exist at the date the action was filed, but it also must exist at the appellate stage. Courts recognize an exception to the mootness rule when an issue is capable of repetition. If a defendant is "free to return to his or her old ways," the public interest in determining the legality of the practices will prevent mootness. In the following case, members of the U.S. Supreme Court debated the "mootness" question within the context of a petition for certiorari brought by Jose Padilla, an American citizen President George W. Bush declared to be an enemy combatant.

Jose Padilla v. C. T. Hanft, U.S. Navy Commander, Consolidated Naval Brig
547 U.S. 1062
Supreme Court of the United States
April 3, 2006

Opinion: The petition for a writ of certiorari is denied. Justice Souter and Justice Breyer would grant the petition for a writ of certiorari.

Concur: Justice Kennedy, with whom the Chief Justice and Justice Stevens join, concurring in the denial of certiorari.

The Court's decision to deny the petition for writ of certiorari is, in my view, a proper exercise of its discretion in light of the circumstances of the case. The history of petitioner Jose Padilla's detention, however, does require this brief explanatory statement.

Padilla is a United States citizen. Acting pursuant to a material witness warrant issued by the United States District Court for the Southern District of New York, federal agents apprehended Padilla at Chicago's O'Hare International Airport on May 8, 2002. He was transported to New York, and on May 22 he moved to vacate the warrant. On June 9, while that motion was pending, the President issued an order to the Secretary of Defense designating Padilla an enemy combatant and ordering his military detention. The District Court, notified of this action by the Government's ex parte motion, vacated the material witness warrant.

Padilla was taken to the Consolidated Naval Brig in Charleston, South Carolina. On June 11, Padilla's counsel filed a habeas corpus petition in the Southern

District of New York challenging the military detention. The District Court denied the petition, but the Court of Appeals for the Second Circuit reversed and ordered the issuance of a writ directing Padilla's release. This Court granted certiorari and ordered dismissal of the habeas corpus petition without prejudice, holding that the District Court for the Southern District of New York was not the appropriate court to consider it.…

The present case arises from Padilla's subsequent habeas corpus petition, filed in the United States District Court for the District of South Carolina on July 2, 2004. Padilla requested that he be released immediately or else charged with a crime. The District Court granted the petition on February 28, 2005, but the Court of Appeals for the Fourth Circuit reversed that judgment on September 9, 2005. Padilla then filed the instant petition for writ of certiorari.

After Padilla sought certiorari in this Court, the Government obtained an indictment charging him with various federal crimes. The President ordered that Padilla be released from military custody and transferred to the control of the Attorney General to face criminal charges. The Government filed a motion for approval of Padilla's transfer in the Court of Appeals for the Fourth Circuit. The Court of Appeals denied the motion, but this Court granted the Government's subsequent application respecting the transfer…The Government also filed a brief in opposition to certiorari, arguing, among other things, that Padilla's petition should be denied as moot.

The Government's mootness argument is based on the premise that Padilla, now having been charged with crimes and released from military custody, has received the principal relief he sought. Padilla responds that his case was not mooted by the Government's voluntary actions because there remains a possibility that he will be redesignated and redetained as an enemy combatant.

Whatever the ultimate merits of the parties' mootness arguments, there are strong prudential considerations disfavoring the exercise of the Court's certiorari power. Even if the Court were to rule in Padilla's favor, his present custody status would be unaffected. Padilla is scheduled to be tried on criminal charges. Any consideration of what rights he might be able to assert if he were returned to military custody would be hypothetical, and to no effect, at this stage of the proceedings.

In light of the previous changes in his custody status and the fact that nearly four years have passed since he first was detained, Padilla, it must be acknowledged, has a continuing concern that his status might be altered again. That concern, however, can be addressed if the necessity arises. Padilla is now being held pursuant to the control and supervision of the United States District Court for the Southern District of Florida, pending trial of the criminal case. In the course of its supervision over Padilla's custody and trial the District Court will be obliged to afford him the protection, including the right to a speedy trial, guaranteed to all federal criminal defendants.…Were the Government to seek to change the status or conditions of Padilla's custody, that court would be in a position to rule quickly on any responsive filings submitted by Padilla. In such an event, the District Court, as well as other courts of competent jurisdiction, should act promptly to ensure that the office and purposes of the writ of habeas corpus are not compromised. Padilla, moreover, retains the option of seeking a writ of habeas corpus in this Court.…

That Padilla's claims raise fundamental issues respecting the separation of powers, including consideration of the role and function of the courts, also counsels against addressing those claims when the course of legal proceedings has made them, at least for now, hypothetical. This is especially true given that Padilla's current custody is part of the relief he sought, and that its lawfulness is uncontested.

These are the reasons for my vote to deny certiorari.

Justice Ginsburg, dissenting from the denial of certiorari.

This case, here for the second time, raises a question "of profound importance to the Nation." …Does the President have authority to imprison indefinitely a United States citizen arrested on United States soil distant from a zone of combat, based on an Executive declaration that the citizen was, at the time of his arrest, an "enemy combatant"? It is a question the Court heard, and should have decided, two years ago.… Nothing the Government has yet done purports to retract the assertion of Executive power Padilla protests.

Although the Government has recently lodged charges against Padilla in a civilian court, nothing prevents the Executive from returning to the road it earlier constructed and defended. A party's voluntary cessation does not make a case less capable of repetition or less evasive of review.… Satisfied that this case is not moot, I would grant the petition for certiorari.

Case Questions

1. Why did Chief Justice Roberts and Justices Stevens and Kennedy believe that this certiorari petition should not be granted?
2. Why did Justice Ginsburg believe that the petition for certiorari should have been granted?

POLITICAL QUESTIONS

Because of the constitutional separation of powers, the Supreme Court has long recognized a **political question doctrine**. It provides that the judicial branch is not entitled to decide questions that more properly should be decided by the executive and legislative branches of the federal government. U.S. Supreme Court Justice Scalia explained this doctrine in his plurality opinion in *Richard Vieth v. Robert C. Jubelirer*, 541 U.S. 267 (2004):

> As Chief Justice Marshall proclaimed two centuries ago, "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison* … (1803). Sometimes, however, the law is that the judicial department has no business entertaining the claim of unlawfulness—because the question is entrusted to one of the political branches or involves no judicially enforceable rights…See, e.g., *Nixon v. United States*, (1993) (challenge to procedures used in Senate impeachment proceedings); *Pacific States Telephone & Telegraph Co. v. Oregon*, … (1912) (claims arising under the Guaranty Clause of Article IV, § 4). Such questions are said to be "nonjusticiable," or "political questions."

The federal constitution allocates separate governmental power to the legislative, executive, and judicial branches. As members of the judicial branch of government, the courts exercise judicial powers. As the political departments, the executive and legislative branches are entrusted with certain functions, such as conducting foreign relations, making treaties, or submitting our country to the jurisdiction of international courts. Such issues fall outside the jurisdiction of the courts. Courts classify an issue as justiciable or as a nonjusticiable political question on a case-by-case basis.

INTERNET TIP

Students wishing to read an interesting case in which the political question doctrine is thoroughly discussed will find *Schneider v. Kissinger* on the textbook's website. The plaintiffs in *Schneider* sought to sue former Secretary of State Henry Kissinger and other prominent governmental officials over the U.S. government's actions in Chile during the Nixon administration. This case was decided in 2005 by the U.S. Court of Appeals for the District of Columbia and certiorari was denied by the U.S. Supreme Court in 2006.

THE ACT OF STATE DOCTRINE

The judicially created **Act of State Doctrine** provides that American courts should not determine the validity of public acts committed by a foreign sovereign within its own territory. This doctrine's roots go back to England in 1674. The doctrine is pragmatic: It prevents our courts from making pronouncements about matters over which they have no power. Judicial rulings about such matters could significantly interfere with the conduct of foreign policy—a matter that the Constitution assigns to the political branches of government. The Constitution does not require the Act of State doctrine; it is based on the relationships among the three branches of the federal government.

Assume, for example, that a foreign dictator confiscates a warehouse containing merchandise belonging to an American corporation. The

American corporation subsequently files suit in an American court to challenge the foreign nation's laws and procedures, alleging that the dictator did not have a valid right to confiscate the merchandise. The American court can apply the Act of State doctrine and refuse to make any pronouncements about the foreign nation's laws or procedures. The law presumes the public acts of a foreign sovereign within its own territory to be valid.

STATUTE OF LIMITATIONS

There is a time period, established by the legislature, within which an action must be brought upon claims or rights to be enforced. This law is known as the **statute of limitations** (see Figure 6.1). The statute of limitations compels the exercise of a right of action within a reasonable time, so that the opposing party has a fair opportunity to defend

	Contract				Tort											
					Negligence			Intentional Torts								
	Breach of Sales Contract	Breach of Warranty	Oral	Written	Personal Injury	Wrongful Death	Medical Malpractice	Assault and Battery	Fraud and Deceit	Libel	Slander	Trespass	Damage to Personal Property	Conversion	False Imprisonment	Malicious Prosecution
Alabama	4	4	6	6	1	2	2	6	2	1	1	6	1	6	6	1
Alaska	4	4	6	6	2	2	2	2	2	2	2	6	6	6	2	2
Arizona	4	4	3	6	2	2	2	2	3	1	1	2	2	2	1	1
Arkansas	4	4	3	5	3	3	2	1	5	3	1	3	3	3	1	5
California	4	4	2	4	1	1	3	1	3	1	1	3	3	3	1	1
Colorado	4	4	3	3	2	2	2	1	1	1	1	2	2	3	1	2
Connecticut	4	4	3	6	2	2	2	3	3	2	2	3	3	3	3	3
Delaware	4	4	3	3	2	2	2	2	3	2	2	3	2	3	2	2
District of Columbia	4	4	3	3	3	1	3	1	3	1	1	3	3	3	1	1
Florida	4	4	4	5	4	2	2	4	4	2	2	4	4	4	4	4
Georgia	4	4	4	6	2	2	2	2	4	1	1	4	4	4	2	2
Hawaii	4	4	6	6	2	2	2	2	6	2	2	2	2	6	6	6
Idaho	4	4	4	5	2	2	2	2	3	2	2	3	3	3	2	4
Illinois	4	4	5	10	2	2	2	2	5	1	1	5	5	5	2	2
Indiana	4	4	6	10	2	2	2	2	6	2	2	6	2	6	2	2
Iowa	5	5	5	10	2	2	2	2	5	2	2	5	5	5	2	2
Kansas	4	4	3	5	2	2	2	1	2	1	1	2	2	2	1	1
Kentucky	4	4	5	15	1	1	1	1	5	1	1	5	2	2	1	1
Louisiana	10	1	10	10	1	1	1	1	1	1	1	1	1	1	1	1

FIGURE 6.1 Statutes of Limitations for Civil Actions (in Years)

	Contract				Tort											
					Negligence			Intentional Torts								
	Breach of Sales Contract	Breach of Warranty	Oral	Written	Personal Injury	Wrongful Death	Medical Malpractice	Assault and Battery	Fraud and Deceit	Libel	Slander	Trespass	Damage to Personal Property	Conversion	False Imprisonment	Malicious Prosecution
Maine	4	4	6	6	6	2	2	2	6	2	2	6	6	6	2	6
Maryland	4	4	3	3	3	3	3	1	3	1	1	3	3	3	3	3
Massachusetts	4	4	6	6	3	3	3	3	3	3	3	3	3	3	3	3
Michigan	4	4	6	6	3	3	2	2	6	1	1	3	3	3	2	2
Minnesota	4	4	6	6	6	3	2	2	6	2	2	6	6	6	2	2
Mississippi	6	6	3	6	6	2	2	1	6	1	1	6	6	6	1	1
Missouri	4	4	5	10	5	3	2	2	5	2	2	5	5	5	2	5
Montana	4	4	5	8	3	3	3	2	2	2	2	2	2	2	2	5
Nebraska	4	4	4	5	4	2	2	1	4	1	1	4	4	4	1	1
Nevada	4	4	4	6	2	2	2	2	3	2	2	3	3	3	2	2
New Hampshire	4	4	3	3	3	3	2	3	3	3	3	3	3	3	3	3
New Jersey	4	4	6	6	2	2	2	2	6	1	1	6	6	6	2	2
New Mexico	4	4	4	6	3	3	3	3	4	3	3	4	4	4	3	3
New York	4	4	6	6	3	2	2½	1	6	1	1	3	3	3	1	1
North Carolina	4	4	3	3	3	2	3	1	3	1	1	3	3	3	1	3
North Dakota	4	4	6	6	6	2	2	2	6	2	2	6	6	6	2	6
Ohio	4	4	6	15	2	2	1	1	4	1	1	4	2	4	1	1
Oklahoma	5	5	3	5	2	2	2	1	2	1	1	2	2	2	1	1
Oregon	4	4	6	6	2	3	2	2	2	1	1	6	6	6	2	2
Pennsylvania	4	4	4	4	2	2	2	2	2	1	1	2	2	2	2	2
Rhode Island	4	4	10	10	3	2	3	10	10	10	1	10	10	10	3	10
South Carolina	6	6	6	6	6	6	3	2	6	2	2	6	6	6	2	6
South Dakota	4	4	6	6	3	3	2	2	6	2	2	6	6	6	2	6
Tennessee	4	4	6	6	1	1	1	1	3	1	½	3	3	3	1	1
Texas	4	4	2	4	2	2	2	2	2	1	1	2	2	2	2	1
Utah	4	4	4	6	4	2	2	1	3	1	1	3	3	3	1	1
Vermont	4	4	6	6	3	2	3	3	6	3	3	6	3	6	3	3
Virginia	4	4	3	5	2	2	2	2	1	1	1	5	5	5	2	1
Washington	4	4	3	6	3	3	3	2	3	2	2	3	3	3	2	3
West Virginia	4	4	5	10	2	2	2	2	2	1	1	2	2	2	1	1
Wisconsin	6	6	6	6	3	3	3	2	6	2	2	6	6	6	2	6
Wyoming	4	4	8	10	4	2	2	1	4	1	1	4	4	4	1	1

FIGURE 6.1 Statutes of Limitations for Civil Actions (in Years) *(Continued)*

and will not be surprised by the assertion of a stale claim after evidence has been lost or destroyed. With the lapse of time, memories fade and witnesses may die or move. The prospects for impartial and comprehensive fact-finding diminish.

The statutory time period begins to run immediately on the accrual of the cause of action, that is, when the plaintiff's right to institute a suit arises. If the plaintiff brings the suit after the statutory period has run, the defendant may plead the statute of limitations as a defense. Although jurisdictions have differing definitions, a cause of action can be generally said to exist when the defendant breaches some legally recognized duty owed to the plaintiff and thereby causes some type of legally recognized injury to the plaintiff.

Generally, once the statute of limitations begins to run, it continues to run until the time period is exhausted. However, many statutes of limitation contain a "saving clause" listing conditions and events that "toll" (suspend) the running of the statute. The occurrence of one of these conditions may also extend the limitations period for a prescribed period of time. In personal injury cases, for example, the statute may start to run from the date of the injury or from the date when the injury is discoverable, depending on the jurisdiction. Conditions that may serve to toll the running of the statute or extend the time period include infancy, insanity, imprisonment, court orders, war, and fraudulent concealment of a cause of action by a trustee or other fiduciary. The statute of limitations often starts to run in medical malpractice cases on the day that the doctor or patient stops the prescribed treatment or on the day that the patient becomes aware (or should have become aware) of the malpractice and subsequent injury. The commencement of an action almost universally tolls the running of the statute of limitations. Thus, once an action is commenced on a claim within the statutory time period, it does not matter if judgment is ultimately rendered after the period of limitations has expired.

In the following case the interests of consumers were pitted against the economic welfare of an important industry (and a major regional employer) within the state. The state legislature used the statute of limitations and a ninety-day notification requirement to further the economic interests of the state's ski industry at the expense of consumers.

Marybeth Atkins v. Jiminy Peak, Inc.
514 N.E.2d 850
Massachusetts Supreme Judicial Court
November 5, 1987

O'Connor, Justice

This case presents the question whether an action by an injured skier against a ski area operator is governed by the one-year limitation of actions provision of G.L.c. 143, § 71P, where the plaintiff's theories of recovery are negligence and breach of warranty, as well as breach of contract, in the renting of defective ski equipment.

In her original complaint, filed on December 5, 1984, the plaintiff alleged that on March 20, 1982, she sustained serious injuries while skiing at the defendant's ski resort, and that those injuries were caused by defective ski equipment she had rented from the rental facility on the premises. She further alleged that the defendant had not inspected or adjusted the equipment, and this failure amounted to negligence and breach of contract. In an amended complaint filed on February 14, 1986, the plaintiff added counts alleging that the defendant had breached warranties of merchantability and fitness for a particular purpose.

The defendant moved for summary judgment on the ground that the plaintiff's action was barred by the statute of limitations. A judge of the Superior Court granted the motion, and the plaintiff appealed. We transferred the case to this court on our own motion, and now affirm.

The statute we must interpret, G.L.c. 143, § 71P, imposes a one-year limitation on actions "against a ski area operator for injury to a skier." There is no contention that the defendant is not a "ski area operator," or that this action is not "for injury to a skier." The text of the statute, then, seems fully to support

the decision of the Superior Court judge. The plaintiff argues, however, that the statute should be construed as governing only actions based on a defendant ski area operator's violation of those duties prescribed by G.L.c.143, § 71N. Section 71N requires that ski areas be maintained and operated in a reasonably safe manner, and prescribes methods by which skiers must be warned about the presence of equipment and vehicles on slopes and trails. The plaintiff thus contends that the statute does not bar her lawsuit because her action does not assert a violation of § 71N but rather was brought against the defendant solely in its capacity as a lessor of ski equipment. We do not interpret the statute in this limited way. Rather, we conclude that the one-year limitation in § 71P applies to all personal injury actions brought by skiers against ski area operators arising out of skiing injuries.

If the Legislature had intended that the one-year limitation apply only to actions alleging breach of a ski area operator's duties under § 71N, it easily could have employed language to that effect instead of the sweeping terms contained in the statute. Nothing in § 71P suggests that its reach is so limited.

The plaintiff contends that there is no sound basis for applying the one-year limitation to her action, because if she "had rented skis from an independently operated ski rental shop which leased space in the Defendant's base lodge, such an independent rental shop could not defend against the Plaintiff's action by relying upon Section 71P." Hence, she argues, it makes no sense to afford special protection to lessors of ski equipment who happen also to be ski operators. We assume for purposes of this case that the plaintiff's assertion that § 71P would not apply to an independent ski rental shop is correct. But we cannot say that, in enacting § 71P, the Legislature could not reasonably have decided that ski area operators require more protection than do other sectors of the ski industry. "Personal injury claims by skiers …may be myriad in number, run a whole range of harm, and constitute a constant drain on the ski industry." …The Legislature appears to have concluded that, in view of this perceived threat to the economic stability of owners and operators of ski areas, not shared by those who simply rent ski equipment, a short period for the commencement of skiers' personal injury actions against ski operators, regardless of the fault alleged, is in the public interest.…

Because § 71P applies to the plaintiff's action, the Superior Court judge correctly concluded that the plaintiff's action was time barred.

Judgment affirmed.

Liacos, J. (dissenting, with whom Wilkins and Abrams, JJ., join)

I respectfully dissent. The court's interpretation of G.L.c. 143, § 71P (1986 ed.), is too broad. The general purpose of G.L.c. 143, § § 71H–71S (1986 ed.), is to set the terms of responsibility for ski area operators and skiers in a sport which has inherent risks of injury or even death. This legislative intent to protect ski area operators was designed, as the court indicates, not only to decrease the economic threat to the ski industry, but also to enhance the safety of skiers.

An examination of the whole statutory scheme reveals, however, that the Legislature did not intend to protect the ski area operators from claims for all harm which occurs in connection with skiing accidents, regardless of where the negligence that caused the harm takes place. Indeed, this court decided not long ago that G.L.c. 143, § 71P, on which it relies to rule adversely on this plaintiff's claim, did not apply to wrongful death actions arising from injuries on the ski slope. *Grass v. Catamount Dev. Corp*., 390 Mass. 551 (1983) (O'Connor, J.). The court now ignores the wisdom of its own words in *Grass*, supra at 553: "Had the Legislature intended that G.L.c. 143, § 71P, should apply to claims for wrongful death as well as to claims for injuries not resulting in death, we believe it would have done so expressly." …Here, however, the court extends the protective provisions of § 71P to ordinary commercial activity simply because it occurred at the base of a ski area and was conducted by the operator of the ski slope. No such intent can be perceived in this statute. To the contrary, the statute clearly manifests an intent to promote safety on ski slopes by regulating, through the creation of a recreational tramway board and otherwise, the operation of tramways, chair lifts, "J bars," "T bars," and the like (§ § 71H–71M). The statute defines the duties both of ski area operators and skiers (§ § 71K–71O).

In § 71O, liability of ski area operators for ski slope accidents is sharply limited: "A skier skiing down hill shall have the duty to avoid any collision with any other skier, person or object on the hill below him, and, except as otherwise provided in this chapter, the responsibility for collisions by any skier with any other skier or person shall be solely that of the skier or person involved and not that of the operator, and the responsibility for the collision with an obstruction, man-made or otherwise, shall be solely that of the skier and not that of the operator, provided that such obstruction is properly marked pursuant to the regulations promulgated by the board" (emphasis supplied). Clearly, then, the statutory scheme is designed

not only to enhance the safety of skiers, but also to limit the liability of a ski area operator for his negligent activities which cause injuries (but not deaths, see *Grass*, supra) on the ski slopes. It is in this context that the court ought to consider the additional protection of a ninety-day notice requirement, as well as the short statute of limitations of one year found in § 71P.

General Laws c. 143, § 71P, imposes a ninety-day notice requirement and a one-year statute of limitations on a party who brings suit against a ski area operator. The imposition in § 71P of the ninety-day notice requirement as a condition precedent to recovery confirms, I think, my view that this statute is designed only to protect the ski area operator as to claims arising from conditions on the ski slope. But there is an even stronger argument against the court's position—that is in the very language of the statute. A "[s]ki area operator" is defined in G.L.c. 143, § 71I(6), as "the owner or operator of a ski area." In the same subsection, a "[s]ki area" is defined as: "[A]ll of the slopes and trails under the control of the ski area operator, including cross-country ski areas, slopes and trails, and any recreational tramway in operation on any such slopes or trails administered or operated as a single enterprise but shall not include base lodges, motor vehicle parking lots and other portions of ski areas used by skiers when not actually engaged in the sport of skiing" (emphasis supplied).

The alleged negligence and breach of warranty that occurred in this case happened in the rental shop in the base lodge area. It was there that the defendant rented allegedly defective equipment to the plaintiff and failed to check and to adjust that equipment. The injury was not due to ungroomed snow or exposed rocks or any condition on the slopes or trails under the control of the ski area operator. Rather, the injury allegedly was the result of a transaction in the rental shop, not of a defect on the slope. The rental shop is an area excluded from the purview of G.L.c. 143, § 71P, and thus the ninety-day notice requirement and the one-year statute of limitations do not apply.

The Legislature intended to separate the many functions of a ski area operator so as to focus on the business of operating ski slopes and trails. The statute does not apply where the alleged negligent behavior occurs when the ski area operator is acting as a restaurateur, barkeeper, parking lot owner, souvenir vendor, or, as is the case here, rental agent. For this reason, I would reverse the judgment of the Superior Court.

Case Questions

1. Marybeth Atkins severely broke her leg while using skis and ski bindings rented from a shop at a ski resort. The shop was owned and operated by the owners of the resort. What argument did Atkins make to the court in an effort to avoid the one-year statute of limitations?
2. Do you agree with the dissenters, who feel that the negligent action that caused the harm occurred in the rental shop (an area not covered by the statute), or with the majority, who feel that the accident occurred on the slopes (an area covered by the statute)?

The state supreme court stated in its opinion that "The Legislature appears to have concluded that … a short period for the commencement of skiers' personal injury actions against ski operators … was in the public interest." It denied recovery to a plaintiff who alleged that she was seriously injured as a result of the defendant's negligence in fitting her with defective ski equipment at its on-premises rental facility. Do you see any utilitarian aspects in the making of public policy in this instance?

EQUITABLE DOCTRINE OF LACHES

You may recall Chapter I's discussion of the emergence in England, and subsequently in this country, of courts of equity, and that although a few states continue to maintain separate equitable courts, most states have merged these courts into a single judicial system. In these merged systems, judges are often authorized to exercise the powers of a common law judge as well as the powers of a chancellor in equity. Which "hat" the judge wears is determined by the remedy sought by the plaintiff. Readers

will learn about both legal and equitable remedies in Chapter VII, which is entirely devoted to that topic. But for now it is sufficient to know that when a plaintiff requests the court to award an equitable remedy, such as an injunction (a court order mandating or prohibiting specified conduct), the court may resort to equitable doctrines in reaching a decision.

One of the traditional equitable doctrines is called **laches**. This doctrine can be used in some circumstances to deny a plaintiff an equitable remedy. Consider the following hypothetical case: Assume that a plaintiff has brought a tort action against a defendant and is seeking money damages. Assume further that in her complaint this plaintiff, in addition to the money damages, has asked for equitable remedies, such as a declaratory judgment and an injunction. Also assume that the statute of limitations gives the plaintiff ten years within which to file her suit and that she waits eight years before serving the defendant with the summons and complaint. Under these circumstances, the defendant might argue that the plaintiff should be denied equitable relief because of laches. The defendant could support this argument with proof that he suffered legal harm because of the plaintiff's unreasonable delay in bringing suit and for this reason should be limited to her common law remedies.

INTERNET TIP

Students wishing to read a 2005 Indiana Supreme Court decision that illustrates the doctrine of laches can read *SMDFUND, Inc. v. Fort Wayne-Allen County Airport Authority* on the textbook's website.

CLAIM PRECLUSION/*RES JUDICATA*

Many jurisdictions now use the term "claim preclusion" when referring to the judicial doctrine traditionally known as *res judicata*. This doctrine, by either name, provides that a final decision by a competent court on a lawsuit's merits concludes the litigation of the parties and constitutes a bar (puts an end) to a new suit. When a plaintiff wins his or her lawsuit, the claims that he or she made (and could have made, but didn't) merge into the judgment and are extinguished. Thus no subsequent suit can be maintained against the same defendant based on the same claim. This is known as the principle of **bar and merger**. Once a claim has been judicially decided, it is finally decided. The loser may not bring a new suit against the winner for the same claim in any court. The loser's remedy is to appeal the decision of the lower court to a higher court.

The doctrine reduces litigation and prevents harassment of or hardship on an individual who otherwise could be sued twice for the same cause of action. In addition, once the parties realize that they have only one chance to win, they will make their best effort.

For claim preclusion/*res judicata* to apply, two conditions must be met. First, there must be an identity of parties. Identity means that parties to a successive lawsuit are the same as, or in **privity** with, the parties to the original suit. Privity exists, for example, when there is a relationship between two people that allows one not directly involved in the case to take the place of the one who is a party. Thus if a person dies during litigation, the executor of the estate may take the deceased person's place in the lawsuit. Privity exists between the person who dies and the executor, so that as far as this litigation is concerned, they are the same person.

Second, there must be an identity of claims. In other words, for claim preclusion/*res judicata* to bar the suit, the claim—or cause of action—in the first case must be essentially the same the second time the litigation is attempted. For instance, if A sues B for breach of contract and loses, *res judicata* prohibits any further action on that same contract by A and B (except for appeal). A could, however, sue B for the breach of a different contract, because that would be a different cause of action.

In 1982, adjacent neighbors Donald Czyzewski and Paul Harvey went to court over a land dispute. Although both parties were mutually mistaken about the true location of the boundary line that separated their two properties, Donald filed suit against Paul because Paul had dug a ditch along

what they believed to be the property line. Donald claimed that the ditch had caused erosion on his land and had damaged his fence. After Paul agreed to plant grass seed to prevent erosion and to pay Donald $1,500, this lawsuit was dismissed. Donald subsequently sold his property to Lawrence Kruckenberg. Lawrence was unaware of the 1982 lawsuit. In 2000 Lawrence had his land surveyed and discovered that the presumed boundary line was incorrect. The survey indicated that Lawrence actually owned a sixteen-foot strip that both he and Paul believed to be part of Paul's parcel. Lawrence filed suit against Paul after Paul cut down some trees in the disputed strip, contrary to Lawrence's wishes. Lawrence thereafter sued for trespass and a judicial determination of his rights to the sixteen-foot strip. The trial and intermediate appellate courts ruled in favor of Paul, and Lawrence appealed to the Wisconsin Supreme Court.

When reading this opinion, you will find that the state supreme court refers to Czyzewski as "plaintiff's predecessor in title." This refers to the fact that Lawrence purchased the parcel of land from Donald and was deeded all of Donald's rights to that parcel. Because their interests in the land were identical, there existed between the two what is called a "privity of estate."

The problem confronting the Wisconsin Supreme Court was that the facts appeared to support the application of the claim preclusion doctrine. Donald, back in 1982, could have and probably should have included in his complaint a request for a judicial determination of the boundary line between the two parcels. He didn't, the trial court dismissed the case, and the boundary line was left where it was, incorrect though it might be, favoring Paul. Donald's omission, because of privity, was thus transferred with the deed to Lawrence. Because a mechanical application of the claim preclusion doctrine would have lead to an unfair result, the Wisconsin Supreme Court refused to apply this doctrine in that manner. The chief justice of that court explains why not in the following opinion.

Lawrence A. Kruckenberg v. Paul S. Harvey
685 N.W.2d 844
Supreme Court of Wisconsin
April 14, 2005

Shirley S. Abrahamson, Chief Justice.
This is a review of a published decision of the court of appeals affirming a judgment and order of the Circuit Court for Green Lake County.…

The issue presented is whether the doctrine of claim preclusion bars the plaintiff's action. The prior action brought by the plaintiff's predecessor in title against the defendant was for failing to provide lateral support; the defendant had dug a ditch. The prior action ended in a judgment of dismissal on the merits. The plaintiff's present action against the defendant is for trespass and conversion (the cutting and taking of trees) and for a declaratory judgment regarding the location of the boundary line between the plaintiff's and defendant's land.…

For purposes of deciding how to apply the doctrine of claim preclusion to the present case, we set forth the following facts derived from the record on the motion for summary judgment.

The question of claim preclusion in the present case arises from a lawsuit brought by Donald A. Czyzewski, the plaintiff's predecessor in title, against the defendant in 1982. According to the 1982 complaint, the defendant dug a ditch along the northern boundary of his property, altering the topography and natural watershed, causing Czyzewski's soils and trees to collapse, causing the line fence to collapse … and causing the water level of Czyzewski's pond to subside.

Czyzewski's 1982 complaint alleged that the defendant breached a duty of lateral support and a duty to maintain a line fence and that his conduct was contrary to Wisconsin Statutes … §§ 844.01-.21, relating to physical injury to or interference with real property; § 101.111 relating to protection of adjoining property and buildings during excavation; and chapter 90 relating to fences. For the alleged violations, Czyzewski requested: (1) restoration of the line fence, (2) restoration of the eroded portion of his property, (3) restoration of the water level, and (4) $10,000.

The defendant's answer to the 1982 complaint admitted that the defendant and Czyzewski owned adjoining parcels and that the defendant had dug the

ditch along the northern boundary of his property. The defendant denied all other allegations of the complaint.

On April 6, 1983, on stipulation of the parties, the circuit court entered an order dismissing the Czyzewski suit on its merits. The defendant agreed to pay Czyzewski $1,500 and plant rye grass along the drainage ditch to prevent erosion.

Czyzewski's sale of his parcel to the plaintiff was completed after the 1982 lawsuit was dismissed, and the plaintiff claims he did not know about the lawsuit.

The plaintiff had his land surveyed in 2000 and learned that the "line fence" was not on the boundary line; the fence was 16 feet north of his property's southern boundary. In other words, the survey showed that the plaintiff's property included a strip of about 16 feet wide that was previously thought to belong to the defendant and on which the defendant had dug a ditch.

Peace between the parties was disturbed in "late winter and early spring of 2001" when the defendant decided to harvest some trees on the south side of the fence; according to the 2000 survey, the trees were on the plaintiff's property. The plaintiff asked the defendant not to cut the trees.

After the defendant removed the trees, the plaintiff, armed with his new survey, sued the defendant for trespass and conversion (cutting and taking the trees), failure to provide lateral support (failing to plant rye grass continually to prevent erosion), and a declaratory judgment regarding the location of the boundary line between their properties. The defendant denied many of the allegations of the complaint.…

The circuit court granted summary judgment in the defendant's favor and dismissed the action. The circuit court ruled that the plaintiff could not challenge the location of the line fence as not being the boundary line because of the doctrine of claim preclusion. The circuit court found that the line fence was an issue in the 1982 lawsuit and in effect placed the boundary line at the line fence. The circuit court also ruled that the issue of lateral support was litigated in 1982 and that the doctrine of issue preclusion therefore barred this count.…

A divided court of appeals affirmed the circuit court's judgment of dismissal, also on the ground that the lawsuit was barred by the doctrine of claim preclusion.…

This court reviews a grant of summary judgment using the same methodology as the circuit court…A motion for summary judgment will be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." … In the present case no genuine issue of material fact exists.

The only question presented is one of law, namely whether the defendant is entitled to judgment on the ground of claim preclusion. This court determines this question of law independently of the circuit court and court of appeals, benefitting from their analyses…To decide this case we must determine the application of the doctrine of claim preclusion…

The doctrine of claim preclusion provides that a final judgment on the merits in one action bars parties from relitigating any claim that arises out of the same relevant facts, transactions, or occurrences…When the doctrine of claim preclusion is applied, a final judgment on the merits will ordinarily bar all matters "'which were litigated or which might have been litigated in the former proceedings.'"…

Claim preclusion thus provides an effective and useful means to establish and fix the rights of individuals, to relieve parties of the cost and vexation of multiple lawsuits, to conserve judicial resources, to prevent inconsistent decisions, and to encourage reliance on adjudication.… The doctrine of claim preclusion recognizes that "endless litigation leads to chaos; that certainty in legal relations must be maintained; that after a party has had his day in court, justice, expediency, and the preservation of the public tranquillity requires that the matter be at an end."…

In Wisconsin, the doctrine of claim preclusion has three elements:

> "(1) identity between the parties or their privies in the prior and present suits;
> (2) prior litigation resulted in a final judgment on the merits by a court with jurisdiction; and
> (3) identity of the causes of action in the two suits…"
>
> In effect, the doctrine of claim preclusion determines whether matters undecided in a prior lawsuit fall within the bounds of that prior judgment.…

The parties do not dispute, and we agree, that the first two elements of claim preclusion have been satisfied in the case at bar. The identities of the parties or their privies are the same in the present and the prior suits. The plaintiff was the successor in interest to the property owned by Czyzewski, and the two are in privity for the purposes of claim preclusion.… The 1982 litigation resulted in a final judgment on the merits by

a court with jurisdiction, satisfying the second element of claim preclusion.…

The parties' disagreement focuses on the third element of the doctrine of claim preclusion, namely, the requirement that there be an identity of the causes of action or claims in the two suits.

Wisconsin has adopted the "transactional approach" set forth in the Restatement (Second) of Judgments to determine whether there is an identity of the claims between two suits.… Under the doctrine of claim preclusion, a valid and final judgment in an action extinguishes all rights to remedies against a defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.… The transactional approach is not capable of a "mathematically precise definition," …and determining what factual grouping constitutes a "transaction" is not always easy. The Restatement (Second) of Judgments § 24 (2) (1982) explains that the transactional approach makes the determination pragmatically, considering such factors as whether the facts are related in time, space, origin, or motivation. Section 24 (2) provides as follows:

> (2) What factual grouping constitutes a "transaction", and what groupings constitute a "series", are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.

The goal in the transactional approach is to see a claim in factual terms and to make a claim coterminous with the transaction, regardless of the claimant's substantive theories or forms of relief, regardless of the primary rights invaded, and regardless of the evidence needed to support the theories or rights.…Under the transactional approach, the legal theories, remedies sought, and evidence used may be different between the first and second actions.… The concept of a transaction connotes a common nucleus of operative facts.…

The transactional approach to claim preclusion reflects "the expectation that parties who are given the capacity to present their 'entire controversies' shall in fact do so." …One text states that the pragmatic approach that seems most consistent with modern procedural philosophy "looks to see if the claim asserted in the second action should have been presented for decision in the earlier action, taking into account practical considerations relating mainly to trial convenience and fairness."…

At first blush the events giving rise to the two actions (1982 and 2001) do not appear part of the same transaction, as they are separated by time, space, origin, and motivation. The 1982 suit was prompted when the defendant dug a ditch and allegedly caused Czyzewski to claim erosion to his property and damage to the line fence. The 2001 suit was prompted when the defendant cut trees; this time the plaintiff claimed trespass on his property and sought a declaratory judgment concerning the location of the boundary line between the properties.

Because the trees were not cut until 2001, obviously neither Czyzewski nor the plaintiff could have brought a claim for tree cutting and taking (trespass and conversion) in 1982. The plaintiff reasons that the 2001 claim is therefore not part of the same transaction as the 1982 claim, and he should not be barred by the doctrine of claim preclusion.

The plaintiff makes a good point, but he overlooks that the aggregate operative facts in both the 1982 and 2001 claims are the same, namely the defendant's conduct in relation to the location of the boundary line. The facts necessary to establish the location of the boundary line between the plaintiff's and defendant's properties were in existence in 1982.

Czyzewski's 1982 claims and judgment depended on who owned the property south of the line fence upon which the ditch had been dug. Czyzewski's 1982 claim was that the defendant dug a ditch on the defendant's property, injuring Czyzewski's property by removing lateral support.… In 1982, both parties were mistaken about the location of the boundary line and the ownership of the property upon which the defendant had acted when he dug the ditch.

Similarly, the plaintiff's 2001 claims depend on who owned the property south of the line fence upon which the defendant cut trees. The plaintiff's 2001 claim is that the defendant cut trees on the plaintiff's property, an action that constitutes trespass and conversion.

Even though the 1982 litigation did not determine the boundary line, the two lawsuits have such a measure of identity of claims that a judgment in the second in favor of the plaintiff would appear to impair the rights or interests established in the first judgment.

The plaintiff's 2001 action might well be precluded under the well-settled claim preclusion analysis. We need not decide that difficult question, however, because even if claim preclusion were to apply here, we conclude that the plaintiff's 2001 lawsuit should proceed under a narrow exception to the doctrine of claim preclusion.

The parties' current dispute over the common boundary line illustrates that claim preclusion in the present case presents the "classic struggle between the need for clear, simple, and rigid law and the desire for its sensitive application." …Claim preclusion is a harsh doctrine; it necessarily results in preclusion of some claims that should go forward and it may fail to preclude some claims that should not continue.…

Judicial formulation of the doctrine of claim preclusion should seek to minimize the over-inclusion of the doctrine through exceptions that are narrow in scope…This court has previously stated that "[e]xceptions to the doctrine of claim preclusion, confined within proper limits, are 'central to the fair administration of the doctrine.'"

Exceptions to the doctrine of claim preclusion are rare, but in certain types of cases "the policy reasons for allowing an exception override the policy reasons for applying the general rule." …

Recognizing these truths, the Restatement (Second) of Judgments describes exceptions to the doctrine of claim preclusion. The present case falls within the "special circumstances" exception set forth in § 26(1)(f),…which reads as follows:

> When any of the following circumstances exists, the general rule of § 24 does not apply to extinguish the claim, and part or all of the claim subsists as a possible basis for a second action by the plaintiff against the defendant:…
> (f) It is clearly and convincingly shown that the policies favoring preclusion of a second action are overcome for an extraordinary reason, such as the apparent invalidity of a continuing restraint or condition having a vital relation to personal liberty or the failure of the prior litigation to yield a coherent disposition of the controversy.

We apply Restatement (Second) of Judgments § 26(1)(f) in the present case. We conclude that in the present case the policies favoring preclusion are overcome for an "extraordinary reason," namely, "the failure of the prior litigation to yield a coherent disposition of the controversy."…

The exception we adopt is as follows: When an action between parties or their privies does not explicitly determine the location of a boundary line, the doctrine of claim preclusion will not bar a future declaratory judgment action to determine the proper location of the boundary line.

The narrowly drawn exception we adopt today serves important policy considerations.

First, strict application of the doctrine of claim preclusion in the present case may result in overlitigation in cases involving real property disputes.… Faced with the prospect that they will forever be foreclosed from having boundary lines judicially determined in the future if they fail to litigate the issue in even the most simple lawsuit involving real property, parties will litigate the issue, even when it is apparently not in dispute.

There is no shortage of everyday situations that may implicate the location of a boundary line. The plaintiff's counsel mentioned just a few at oral argument: a pet strays onto a neighbor's property; a child throws his or her ball into the neighbor's flowerbed; trees overhang the neighbor's shed; guests at a party wander onto the neighbor's property. If any of these situations results in a final judgment on the merits without a determination of the boundary line, the parties (and their privies) would, under the defendant's theory of the present case, forever be precluded from determining the location of the boundary line.…

Second, strict application of the doctrine of claim preclusion in the present case may discourage individuals from promptly settling lawsuits relating to real property. Parties may fear that without adequate discovery, any stipulated dismissal on the merits could terminate rights or claims they had yet to even discover were potentially implicated.

Lastly, strict application of the doctrine of claim preclusion in the present case places process over truth. The boundary line is important to the parties in the present litigation and future owners of the properties and should be decided on the merits once and for all. Allowing litigation about the boundary line will produce a final judgment that definitively settles the issue and can be recorded to put the public on notice. The legal system should, in the present case, be more concerned with deciding the location of the boundary line than with strictly applying the doctrine of claim preclusion.

The parties in the 1982 action believed the boundary line was at the line fence. A survey in 2000 showed the line fence was not on the boundary line. Neither the parties to the present litigation, nor their predecessors in title, have ever litigated the location of the boundary line. The boundary line can be determined in the present case, without repeating prior litigation.

Claim preclusion is grounded on a desire to maintain reliable and predictable legal relationships. Public policy seeks to ensure that real estate titles are secure

and marketable, and therefore the doctrine of claim preclusion ordinarily will apply in property cases. But the strict application of the doctrine of claim preclusion in the present case creates uncertainty. The policies favoring preclusion of the 2001 action are overcome, because the 1982 action, in the words of Restatement (Second) of Judgments, "failed to yield a coherent disposition of the controversy" ... and "has left the parties not in a state of repose but in an unstable and intolerable condition."...

We hold that barring the declaratory judgment action (and the trespass and conversion action) to determine the location of the boundary line, when that line has not been previously litigated, undermines the policies that are at the foundation of the doctrine of claim preclusion. The unique nature of a claim to identify the location of a boundary line warrants this narrow exception.

We therefore conclude that important policy concerns exist that favor creation of a narrowly drawn exception in the present case, namely that when a prior action between the parties or their privies does not explicitly determine the location of a boundary line between the properties, the doctrine of claim preclusion will not bar a later declaratory judgment action to determine the location of the boundary line....

Accordingly, we reverse the decision of the court of appeals and remand the cause to the circuit court for proceedings not inconsistent with this decision.

By the Court. The decision of the court of appeals is reversed and the cause remanded.

Case Questions

1. What must a defendant prove in order to establish a claim preclusion/*res judicata* defense?
2. How did the Wisconsin Supreme Court avoid applying the claim preclusion/*res judicata* doctrine in a mechanical way to the facts of this case?
3. What rationale was given by the Wisconsin Supreme Court for its decision in this case?

IMMUNITY FROM LEGAL ACTION

The law provides immunity from tort liability when to do so is thought to be in the best interest of the public. Immunities are an exception to the general rule that a remedy must be provided for every wrong, and they are not favored by courts. They make the right of the individual to redress a private wrong subservient to what the law recognizes as a greater public good. Immunity does not mean that the conduct is not tortuous in character, but only that for policy reasons the law denies liability resulting from the tort. Today, many courts are willing to abolish or limit an immunity when it becomes apparent that the public is not actually deriving any benefit from its existence.

Sovereign Immunity

It is a basic principle of common law that no sovereign may be sued without its express consent. When a person sues the government, the person is actually suing the taxpayers and him- or herself, because any judgment is paid for out of public revenues. The payment of judgments would require the expenditure of funds raised to provide services to the public.

The doctrine of governmental immunity from liability originated in the English notion that "the monarch can do no wrong." (Ironically, although most U.S. jurisdictions have retained the doctrine, England has repudiated it.) Congress consented to be sued in contract cases in the 1887 Tucker Act. In 1946 the federal government passed the Federal Tort Claims Act, in which the U.S. government waived its immunity from tort liability. It permitted suits against the federal government in federal courts for negligent or wrongful acts committed by its employees within the scope of their employment. Liability is based on the applicable local tort law. Thus the government may be sued in its capacity as a landlord and as a possessor of land, as

well as for negligent acts and omissions (concepts explained in Chapter XI). Immunity was not waived for all acts of federal employees, however. Acts within the discretionary function of a federal employee or acts of military and naval forces in time of war are examples of situations in which immunity has not been waived. In addition, members of the armed forces who have suffered a service-related injury due to governmental negligence are denied the right to sue. Permitting such suits has been thought to undermine military discipline. State governments also enjoy **sovereign immunity**.

Courts have made a distinction between governmental and proprietary functions. When a public entity is involved in a governmental function, it is generally immune from tort liability. When the government engages in activity that is usually carried out by private individuals or that is commercial in character, it is involved in a proprietary function, and the cloak of immunity is lost. For example, a state is not immune when it provides a service that a corporation may perform, such as providing electricity.

Courts currently favor limiting or abolishing sovereign immunity. Their rationale is the availability of liability insurance and the perceived inequity of denying relief to a deserving claimant. Many jurisdictions have replaced blanket sovereign immunity with tort claims acts that limit governmental liability. For example, they can reduce exposure to suit by restricting recoveries to the limits of insurance policies or by establishing ceilings on maximum recoveries (often ranging from $25,000 to $100,000). Many states continue to immunize discretionary functions and acts.

Immunity of Governmental Officials

As described in the previous section, executive, legislative, and judicial officers are afforded immunity when the act is within the scope of their authority and in the discharge of their official duties. Immunity increases the likelihood that government officials will act impartially and fearlessly in carrying out their public duties. Thus, it is in the public interest to shield responsible government officers from harassment or ill-founded damage suits based on acts they committed in the exercise of their official responsibilities. Prosecutors, for example, enjoy immunity when they decide for the public who should be criminally prosecuted. Public defenders, however, are not immunized, because their clients are private citizens and not the general public.

This immunity applies only when public officers are performing discretionary acts in conjunction with official functions. Officials are not immune from liability for tortuous conduct when they transcend their lawful authority and invade the constitutional rights of others. They are legally responsible for their personal torts.

Some argue that granting immunity to officials does not protect individual citizens from harm resulting from oppressive or malicious conduct on the part of public officers. A governmental official may in some jurisdictions lose this protection by acting maliciously or for an improper purpose, rather than honestly or in good faith.

High-level executive, legislative, and judicial officials with discretionary functions enjoy more immunity than do lower-level officials. Judges, for example, are afforded absolute immunity when they exercise judicial powers, regardless of their motives or good faith. But judges are not entitled to absolute immunity from civil suit for their nonjudicial acts.

Police officers, however, are only entitled to qualified immunity from suit because of the discretionary nature of police work and the difficulty of expecting officers to make instant determinations as to how the constitution should be interpreted. As we will see in the next case, the qualified immunity defense is unavailable if the illegality of the officer's constitutionally impermissible conduct has been previously well established and would be clearly understood as such by a properly trained officer.

Solomon v. Auburn Hills Police Department

389 F.3d 167
U. S. Court of Appeals for the Sixth Circuit
August 13, 2004

Damon J. Keith, Circuit Judge.

Defendant Officer David Miller appeals the district court's order denying his motion for summary judgment based on qualified immunity....

1. Background
a. Procedural

This lawsuit arises out of the arrest of Plaintiff Francine Solomon ("Solomon"). After she was arrested, Solomon filed a complaint against the Auburn Hills Police Department ("AHPD") and Officer David Miller ("Officer Miller") alleging violations of 42 U.S.C. § 1983, as well as state law claims for assault and battery and gross negligence. Solomon then filed a motion to amend her complaint, and both defendants moved for summary judgment....

[T]he district court denied Officer Miller's motion for summary judgment after finding that he was not entitled to qualified immunity as to the Fourth Amendment claims because a jury question existed as to whether his conduct was objectively reasonable under the circumstances. The district court also left standing the state claims against Officer Miller for assault and battery and gross negligence.

Officer Miller timely filed an appeal with this court as to the issue of qualified immunity. Our opinion today addresses whether the district court erred when it determined that Officer Miller was not entitled to qualified immunity and consequently denied his motion for summary judgment....

1. Factual

On Saturday, March 24, 2001, Solomon took her six children and several of their friends to see a movie at the Star Theatre at Great Lakes Crossing ("Theatre") in Auburn Hills, Michigan. Because the children ranged in age from three to eighteen, Solomon planned to accompany the younger children to a G-rated movie and Solomon's eighteen-year-old son and his girlfriend planned to accompany the older children to an R-rated movie. Solomon explained this to the ticket seller when she purchased the tickets for the two movies. When her adult son attempted to enter the R-rated movie theater with the other children, the usher informed him that the children would not be allowed into the theater without a parent. Solomon then approached the usher and explained that she was the mother of several of the children and that they had permission to be in the R-rated movie, but she would be watching the G-rated movie with her younger children. The usher referred Solomon to customer relations.

Solomon then explained her situation to the Theatre manager, who responded that Theatre policy required a parent or guardian to accompany minor children into an R-rated movie. Solomon left customer relations and walked with her younger children toward the movie theater showing the G-rated movie. Before she reached the theater entrance, another Theatre employee informed Solomon that the older children could not see the R-rated movie without her accompanying them. Even though Solomon did not want to take her young children to see an R-rated movie, she went into the R-rated movie theater as instructed by Theatre management.

After Solomon was seated in the R-rated movie theater, the Theatre security guards entered and informed Solomon that she had to leave because she had not purchased tickets for that particular movie. Solomon refused to leave because she was following the manager's instructions. Shortly thereafter, AHPD officers Miller and Raskin—both of whom were between 230 and 250 pounds and at least five-feet-eight-inches tall—arrived. The officers entered the theater, found Solomon sitting with her three young children, and instructed Solomon to leave. Solomon informed the police officers that she had purchased tickets and attempted to explain the situation, but the officers insisted that she leave. After Solomon refused, Officer Miller told her that she was under arrest for trespassing. Officer Miller grabbed her arm to make her leave, and Solomon, pushing her foot against the seat in front of her, backed away from the officer. Officer Miller then informed her that she was under arrest for assaulting a police officer.... At that point, Officer Raskin asked Solomon to speak with the police officers in the lobby and Solomon agreed. Solomon's children and their friends followed Solomon out of the R-rated movie theater.

When Solomon entered the hallway, she handed her toddler to her son's girlfriend, and Solomon explained to her children that she was going to talk with the officers. In the lobby, Officer Raskin motioned for Solomon to walk toward him. As Solomon was walking toward Officer Raskin, Officer Miller came up behind her, grabbed her arm, and attempted to leg

sweep her. Solomon tripped but did not fall; when she regained her balance, she folded her arms across her chest. In response to Officer Miller's action, Solomon yelled, "Why are you doing this [?] I did not do anything."

At this point, Officer Miller grabbed her left arm and Officer Raskin grabbed her right arm. The officers threw Solomon up against a wall and knocked her face into a display case. Solomon did not attempt to pull away from them and the Officers gave no directives to Solomon. Officer Raskin then handcuffed Solomon's right arm behind her back. Officer Miller pushed up against Solomon with his entire body weight, shoving his arm against her back and his leg in between hers. Solomon was pinned against the wall and could not move; her right arm was already handcuffed and her left arm was straight along her side. Without uttering any instruction to Solomon, Officer Miller forcibly bent her left arm behind her and "heard a popping sound and her left arm [went] limp."…

Solomon was subsequently taken to Pontiac Osteopathic Hospital, where she was diagnosed with a comminuted fracture of her left elbow; she also had several bruises from being thrown against the wall. Solomon was hospitalized for six days for surgical treatment of the fracture and underwent a second operation at a later date. She also underwent extensive physical therapy and endures continual complications.

Solomon was later charged with resisting arrest, assault on a police officer, and trespass. As part of a plea bargain, Solomon pleaded guilty to trespass and attempted resisting arrest.

II. Discussion
A. Standard of Review…
B. Analysis

Through the use of qualified immunity, the law shields "government officials performing discretionary functions … from civil damages liability as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated." … The United States Supreme Court has constructed a two-part test to determine whether an officer-defendant should be granted qualified immunity… First, a court must consider whether the facts, viewed in the light most favorable to the plaintiff, "show the officer's conduct violated a constitutional right."…If the answer is yes, the court must then decide "whether the right was clearly established." … "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation that he confronted."…

In the case before us, the district court reached the correct decision in denying Officer Miller summary judgment, but its rationale intertwined the standard for determining qualified immunity and the standard for granting summary judgment. The district court failed to completely evaluate … whether or not Officer Miller acted objectively reasonably under the circumstances, the district court merely found that a jury question exists on that issue.…Because we are to review the district court's decision *de novo*, the district court's confusion of the standard does not require reversal. Set forth below is the proper analysis for determining whether qualified immunity should result in summary judgment for a defendant—in this case, Officer Miller.

1. Violation of Constitutional Right

As instructed by the [U.S. Supreme] Court …this court must "concentrate at the outset on the definition of the constitutional right and [then] determine whether, on the facts alleged, a constitutional violation could be found."…Here, Solomon brought forth a claim that Officer Miller used excessive force when he arrested her, thereby giving rise to a violation of her constitutional protection against unreasonable seizures under the Fourth Amendment. This court has recognized a person's constitutional "right to be free from excessive force during an arrest."…

After the constitutional right has been defined, we still must inquire whether a violation of Solomon's right to be free from excessive force could be found. Solomon walked out of the movie theater into the hallway as instructed by the officers. Once in the hallway, Officer Miller attempted to knock her onto the ground by kicking her legs even though she was not a flight risk and, in fact, was following Officer Raskin's order. Then, Officer Miller, along with Officer Raskin, shoved her into a display case. Even though Officer Raskin had Solomon's right arm handcuffed and even though Solomon was not actively resisting arrest, Officer Miller pushed his entire weight against Solomon's body, shoving his hand into her back and his leg into her legs. Officer Miller then grabbed Solomon's arm and twisted it behind her with such force that he fractured it in several places. Under the circumstances "taken in the light most favorable to the party asserting the injury." …Officer Miller's overly aggressive actions could have violated Solomon's Fourth Amendment right to be free from excessive force during an arrest.

2. Constitutional Right Clearly Established

Once a potential violation of a plaintiff's constitutional right has been established, we next decide whether

that right was clearly established. In so deciding, we must ask "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation confronted." … "'The reasonableness' inquiry in an excessive force case is an objective one: the question is whether the officers' actions are objectively reasonable in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." … Discerning reasonableness "requires a careful balancing of …the individual's Fourth Amendment interests' against the countervailing governmental interests at stake." … We must remember to consider the reasonableness of the officer at the scene, … and keep in mind that officers must often make split-second judgments because they are involved in "circumstances that are tense, uncertain, and rapidly evolving." … "It is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts." … If an officer, therefore, makes a mistake as to how much force is required, he will still be entitled to qualified immunity so long as that mistake was reasonable.… Thus, to find Officer Miller shielded from his actions and therefore entitled to qualified immunity, we must find that Officer Miller's use of force under the circumstances was objectively reasonable.

In determining objective reasonableness of an officer accused of using excessive force, we will consider several factors. We "should pay particular attention to the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." … In addition, we have also found that "the definition of reasonable force is partially dependent on the demeanor of the suspect." … In applying these considerations to the facts at hand, it would be clear to a reasonable officer that the amount of force used against Solomon by Officer Miller was unlawful.

First, Solomon was being arrested for trespassing. Therefore, "the reasonableness of the Officer's actions must be weighed against this backdrop." … The crime at issue here was a minor offense and certainly not a severe crime that would justify the amount of force used by Officer Miller.

Moreover, Solomon posed no immediate threat to the safety of the officers or others. She was surrounded by her children, including toddlers. Solomon bore no weapon, and she made no verbal threats against the officers. We must also consider the size and stature of the parties involved. Here, each of the officers stood at least five-feet-eight-inches tall and weighed between 230 and 250 pounds. By stark contrast, Solomon stood five-feet-five-inches tall and weighed approximately 120 pounds. Under these facts, Solomon posed no immediate threat to the officers' safety.

Finally, it is undisputed that Solomon did not attempt to flee. Solomon cooperated with the officers by leaving the movie theater and accompanying them out into the lobby. She also complied with the request of Officer Raskin, who motioned for her to walk toward him. In taking the facts as Solomon alleges, she did not resist arrest. After she exited the movie theater, she was never told that she was under arrest. The mere fact that she crossed her arms after Officer Miller tried to leg sweep her does not create a presumption of actively resisting arrest that would justify Officer Miller's actions.

Qualified immunity will often operate "to protect officers from the sometimes hazy border between excessive and acceptable force." … An officer should be entitled to qualified immunity if he made an objectively reasonable mistake as to the amount of force that was necessary under the circumstances with which he was faced.… The facts here, however, do not present one of those hazy cases. The dissent ignores that the officers here were not faced with a tense and uncertain situation where they feared for their safety and the safety of bystanders. In fact, Solomon cooperated with the officers by leaving the movie theater. It was at that point that Officer Miller began to act with unnecessary, unjustifiable, and unreasonable force. He first attempted to leg sweep her when she was walking, as instructed, toward Officer Raskin. Officer Miller then shoved her into the display case, putting his entire weight—nearly twice the amount of her own weight—against her. Finally, without directing Solomon to act, he yanked her arm behind her with such force that it fractured. Officer Miller's actions, in total, were excessive and resulted in Solomon suffering from bruising and a fractured arm. In viewing the facts in favor of Solomon, we conclude that no reasonable officer would find that the circumstances surrounding the arrest of Solomon required the extreme use of force that was used here. Officer Miller is no exception. Because Officer Miller's conduct was unlawful under the circumstances, he is not able to escape liability through qualified immunity.

III. Conclusion

For the foregoing reasons, Officer Miller is not shielded from his actions by qualified immunity and the district court's denial of his motion for summary judgment is AFFIRMED.

Rogers, Circuit Judge, dissenting

At worst, Officer Miller made an objectively reasonable mistake as to the amount of force necessary to handcuff Ms. Solomon. Because Officer Miller is therefore entitled to qualified immunity, I respectfully dissent....

Case Questions

1. Why do police officers receive any form of immunity from civil suit?
2. Why did the U.S. Court of Appeals conclude that Officer Miller should not receive qualified immunity?

INTERNET TIP

The U.S. Supreme Court ruled in *Forrester v. White*, 484 U.S. 219 (1988) that an Illinois Circuit Court judge was not entitled to absolute immunity from a lawsuit filed against him alleging employment discrimination, brought by a discharged court employee. Students can search for this case on the Internet by typing in the case citation.

Immunity among Family Members

American courts have traditionally recognized two types of immunities among family members: interspousal and parental immunities.

Under the common law doctrine of **interspousal immunity**, husbands and wives were immune from liability for negligence and intentional torts perpetrated against their spouses. In part this policy was a byproduct of the old fashioned common law notion that husbands and wives were legally one and the same. But adherents also argued that interspousal immunity was necessary because tort actions between spouses would be harmful to marriages and would disrupt the peace and harmony of the home. They claimed that allowing husbands and wives to sue one another would lead to collusion and fraud. During the twentieth century, reformers successfully argued that married persons and unmarried persons should have equivalent legal rights and remedies. Today, only Georgia and Louisiana continue to adhere in whole or in part to the common law approach. In Georgia, for example, the immunity is limited to personal injury claims, and the immunity will not be recognized if the marital relationship has deteriorated to the point that the spouses are "married" in name only or where it is likely that the spouses are perpetrating a fraud or engaging in collusion.

Author's Commentary

In the late 1920s the author's great-grandfather, August Schubert, while negligently driving one of his company's cars on company business, struck a vehicle in which his wife Jessie, the author's great-grandmother, was a passenger. Jessie was injured as a result of this collision. Prior to 1937, New York recognized interspousal immunity in tort cases. Thus Jessie was not permitted to sue her husband in tort for the damages she sustained resulting from his bad driving. But Jessie (and her lawyers), decided to sue August's company and compel it to pay for her damages. Jessie claimed that the company was financially responsible for the tortious conduct of its employee—her husband, August. Although the company had not directly caused the harm to Jessie, her lawyers argued that the business was still financially responsible for her injury because of a legal doctrine known as *respondeat superior*. Before readers learn about the case it is necessary to explain briefly in general terms the doctrine Jessie relied upon in her suit.

Respondeat Superior

Respondeat superior is an ancient doctrine. The famous American U.S. Supreme Court Justice Oliver Wendell Holmes traced its origin back to the reign of Edward I of England (1272–1307).[1] This

doctrine evolved over the centuries. It essentially permits an injured plaintiff, under certain conditions, to hold a company financially responsible for an employee's negligence and intentional torts. Basically, the plaintiff has to prove that the person whose conduct caused the plaintiff's injury was an employee of the company to be sued and not an independent contractor. Secondly, the plaintiff has to prove that the tortious conduct occurred while the employee was acting within the scope of his or her employment. For example if an employee drives a company car for a personal, nonbusiness reason, say to the grocery store, and commits a tort in the parking lot, the employee's personal errand would have amounted to unauthorized travel. An employer is not vicariously liable for an employee's torts that involve unauthorized travel or other nonbusiness–related conduct.

There are three primary arguments by those who favor this doctrine. The first is that the companies are to some extent responsible. They recruit, select, train, and supervise each employee and therefore have the ability to affect how carefully and safely an employee performs his/her job.

The second argument is that the doctrine makes sense as good public policy. Somebody has to pay for the injured person's damages. Of the three alternatives—the injured victim, the employee, or the employer—making employers pay, it is argued, is the best option. Employers are more likely than their employees to have the ability to pay. Companies can purchase liability insurance and pass this expense on to their customers as one of the costs of operating a business.

Thirdly, placing the burden on employers also creates an incentive for them to promote safe conduct by their employees.

Respondeat superior applies at both the state and federal levels of government. As previously mentioned in the discussion of sovereign immunity, the Federal Tort Claims Act provides that the federal government can be sued for tortious conduct committed by federal employees who were acting within the scope of their employment.

Back to the Lawsuit—*Jessie Schubert v. August Schubert Wagon Company*, 164 N.E. 42 (1928)

The company unsuccessfully argued to the trial court that because spousal immunity barred Jessie from suing her husband directly in tort, it made no sense to allow her to do the same thing by suing his company. The company then appealed to New York's highest court, the Court of Appeals. The Court of Appeals agreed with the trial court that Jessie's respondeat superior claim had nothing to do with the spousal immunity relationship. The trial court had properly applied the law to the facts and ruled in her favor. The Court of Appeals opinion was written by Chief Judge Benjamin Cardozo, who ten years later, in 1938, was sworn in by President Hoover as an associate justice of the U.S. Supreme Court. Cardozo's opinion in the *Schubert* case was widely quoted in similar cases throughout the country and played a role in convincing other states to adopt similar policies. It also helped to undermine the continued vitality of spousal immunity in the state of New York. Jessie and August Schubert lived out their lives as husband and wife.

INTERNET TIP

Interested readers can read Judge Cardozo's opinion in *Jessie Schubert v. August Schubert Wagon Company*, 164 N.E. 42 (1928) along with other materials associated with Chapter VI on the textbook's website.

Parental immunity was created to prohibit unemancipated minor children from suing their parents for negligence or intentional torts. This immunity was first recognized in 1891 by the Mississippi Supreme Court in the case of *Hewllette v. George*.[2] The New Hampshire Supreme Court explained in a 1930 case that the "disability of a child to sue the parent for any injury negligently inflicted by the latter upon the former while a minor is not absolute, but is imposed for the protection of family control and harmony, and exists

only where the suit, or the prospect of a suit might disturb the family relations."[3].

Courts in many states were reluctant to intrude into the parental right and obligation to determine how their children are raised. They also thought it in society's interest to prohibit unemancipated minor children from maintaining actions for negligence or intentional torts against their parents. At common law, children remained minors until they reached the age of twenty-one. Today, legislation has reduced this age to eighteen. A child is unemancipated until the parents surrender the right of care, custody, and earnings of such child and renounce their parental duties. Many courts believed that subjecting the parent to suit by the child might interfere with domestic harmony, deplete family funds at the expense of the other family members, encourage fraud or collusion, and interfere with the discipline and control of children.

The plaintiff in the next case, Lamoni K. Riordan, was a five-year-old boy who accompanied his father to land owned by the Church of Jesus Christ of Latter-Day Saints. The church had instructed Lamoni's father, Ken, a church employee, to cut the grass at this location. Ken, while carrying out this assignment, accidently backed a riding lawnmower over Lamoni's foot. The damage resulted in the partial amputation of Lamoni's foot.

Lamoni filed suit against the church that employed his father. At the time of the accident, Missouri still recognized parental immunity, thereby making it impossible for the child to sue his father in tort. He claimed that because of the doctrine of respondeat superior the church was legally responsible for the injury to his foot.

Lamoni K. Riordan v. Presiding Bishop, Latter-Day Saints
416 F.3d 825
United States Court of Appeals, Eighth Circuit
August 5, 2005

Riley, Circuit Judge

A jury awarded Lamoni Riordan (Lamoni) over $1.18 million in damages on his claims against the Corporation of the Presiding Bishop of The Church of Jesus Christ of Latter-Day Saints (CPB) for injuries Lamoni sustained when his father, Ken Riordan (Ken), a CPB employee, was operating a riding lawnmower in reverse and backed over Lamoni's foot. CPB appeals, arguing Ken's parental immunity shielded CPB from liability, and the district court… erroneously submitted both a *respondeat superior* and a direct negligence claim to the jury…. We affirm *in toto.*

I. Background

On April 13, 1985, five-year-old Lamoni was injured in an accident involving a riding lawnmower operated by Ken while Ken was mowing at a CPB-owned facility. Because of the accident, Lamoni's foot was partially amputated. Lamoni filed suit against CPB on February 15, 2002, in Missouri state court, claiming … CPB was liable for Ken's negligence under the doctrine of *respondeat superior,*…and … CPB negligently failed to train and supervise its employees properly. CPB removed the case to the federal district court.

The district court denied CPB's motion for summary judgment … [and] concluded Lamoni could bring both the *respondeat superior* and direct negligence claims at trial….

CPB appeals….

II. Discussion

Exercising diversity jurisdiction, we interpret Missouri law…. We review the district court's interpretation of Missouri law … attempting to forecast how the Missouri Supreme Court would decide the issues presented….

A. Respondeat Superior Claim

… CPB claims the district court erred in submitting Lamoni's *respondeat superior* claim to the jury. CPB also contends applying parental immunity to bar Lamoni's claims is necessary to prevent collusion between Lamoni and Ken.

Although the Missouri Supreme Court has… [abolished] parental immunity, the doctrine still applies to causes of action accrued before December 19, 1991…. The parties stipulated "[p]arental immunity applies to this case and, therefore, Plaintiff's parents,

Kenneth and Pearl Riordan, cannot be joined as parties to this action." We find no reason to disagree. Thus, we examine whether Ken's parental immunity shields CPB from liability.

The Missouri Supreme Court has recognized the close and analogous connection between parental immunity and spousal immunity…. Missouri adopted parental immunity on "the belief that allowing children to sue their parents would disturb the unity and harmony of the family." … Spousal immunity also had underpinnings in notions of family unity and harmony…. In the absence of authority on the applicability of parental immunity in situations like that presented here, it is appropriate for us to consider Missouri courts' rulings on spousal immunity.

In *Mullally v. Langenberg Brothers Grain Co.…* (1936), the defendant contended, because a wife could not maintain an action against her husband for damages arising from injuries caused by the husband's negligence, the husband's employer enjoyed … immunity against the wife's *respondeat superior* claim against the employer. After noting two lines of authority on this question, the Missouri Supreme Court concluded "legal principle and public policy [dictate] the wife has a right of action against the husband's employer." … The court quoted extensively from the reasoning in [*Jessie] Schubert v. August Schubert Wagon Co...*: "The disability of wife or husband to maintain an action against the other for injuries to the person is not a disability to maintain a like action against the other's principal or master…." (quoting *Schubert*) "The statement sometimes made that it is derivative and secondary …means this, and nothing more: That at times the fault of the actor will fix the quality of the act. Illegality established, liability ensues." …. (quoting *Schubert*) …The court reasoned, "A trespass, negligent or willful, upon the person of a wife, does not cease to be an unlawful act, though the law exempts the husband from liability for the damage. Others may not hide behind the skirts of his immunity." *Id.* (quoting *Schubert*).

According to the Restatement (Second) of Agency, in an action against a principal based on an agent's conduct during the course of the agent's employment, "[t]he principal has no defense because of the fact that …the agent had an immunity from civil liability as to the act." Restatement (Second) of Agency § 217 (1958). These immunities include those "resulting from the relation of parent and child and of husband and wife"…. Moreover, "[s]ince the Restatement,…the trend has been strongly to enforce the liability of the [employer]"….

We believe the Missouri Supreme Court, if confronted with this appeal, would conclude parental immunity does not bar Lamoni's *respondeat superior* claim against CPB. We forecast the Missouri Supreme Court would adopt the majority view, i.e., "the holding that the immunity of a parent is a personal immunity, and it does not, therefore, protect a third party who is liable for the tort." …Accordingly, the district court did not err in so holding.

CPB also argues application of the parental immunity doctrine is necessary to protect it from collusion between Ken and Lamoni….

…[O]ur review of the record does not convince us collusion occurred. …. Witnesses testified at trial Ken blamed himself for the accident from the moment it occurred, admitted the injury was his fault, and stated he did not realize Lamoni was behind him as he mowed. In his deposition, Ken acknowledged mowing in reverse was more dangerous. During trial, Ken recounted the events surrounding the accident. Although Ken did not state he blamed himself, his testimony clearly demonstrates he accepted the blame for the accident, again acknowledging the danger involved in mowing in reverse…. [W]hatever collusion CPB claims occurred certainly was insufficient to warrant application of the now-abrogated parental immunity doctrine to bar Lamoni's *respondeat superior* claim against CPB.

B. Direct Negligence Claim

CPB argues the court erred in submitting to the jury Lamoni's direct negligence claim based on negligent supervision. CPB contends this claim is inextricably intertwined with the *respondeat superior* claim and is barred by parental immunity, and CPB claims Ken's own negligence was an intervening cause of the injury….

In this case, Ken's negligence resulted from CPB's negligent failure to train or supervise him properly. CPB's failure to train and supervise Ken properly caused Ken to operate the mower negligently…. The jury verdict establishes not only the negligence and causation, but the foreseeability of the failure to train and supervise leading directly to the injury…. The district court did not err in submitting both claims to the jury….

III. Conclusion

We affirm in all respects.

Case Questions

1. What was the traditional rationale for recognizing parental immunity?
2. Why did the U.S. Court of Appeals look to a New York case on spousal immunity to help it decide a Missouri case involving parental immunity?

Author Commentary

The parental immunity doctrine has been significantly eroded in the United States.

According to one source "at least twenty-four states now have either abrogated the doctrine of parental immunity altogether or have held that as a general rule, a parent may be liable to a child for injuries caused by the parent's negligence."[4] It should be emphasized that all states permit the criminal prosecution of parents for child abuse and neglect. Moreover, states that still immunize parents in tort create one or more exceptions for special situations such as where a parent has sexually abused his or her child.

INTERNET TIP

Students wishing to read a case in which the state supreme court creates an exception to the doctrine of parental immunity so that children can sue their parents for sexual abuse can read *Hurst v. Capitell* on the textbook's website.

Immunity through Contract

In addition to the immunities imposed by law, parties can create their own immunities by agreeing not to sue. Because public policy favors freedom of contract, such agreements may be legally enforceable. However, courts are often reluctant to do so. An immunity provision in a contract is construed against the party asserting the contract and is held invalid if the contract is against public policy or is a result of unfair negotiations. Factors that the court considers in determining whether to enforce the agreement are the subject matter involved, the clause itself, the relation of the parties, and the relative bargaining power of the parties.

A basic tenet of freedom of contract is that both parties are free to negotiate the terms of the contract. As a result, the contract should reflect a real and voluntary meeting of the minds. Therefore the equality of bargaining power is an important consideration for courts in determining unfair negotiations. Different courts may accord different degrees of importance to such elements as superior bargaining power, a lack of meaningful choice by one party, take-it-or-leave-it propositions, or exploitation by one party of another's known weaknesses.

In the following case, thieves successfully stole jewels valued at over $1 million from three safe deposit boxes rented by jewelers from a branch of the Firstar Bank. Two of the jewelers had purchased insurance to protect themselves from incidents such as this and collected as provided in their policies from Jewelers Mutual Insurance Company. The insurance company, in turn sought to recover from Firstar Bank. The Bank, although admitting negligence, claimed that it was contractually immune under the circumstances of this case and refused to pay. The question was tried and appealed and ultimately was decided by the Illinois Supreme Court.

Jewelers Mutual Insurance. Co. v. Firstar Bank Ill.
820 N.E.2d 411
Supreme Court of Illinois
November 18, 2004

Justice Thomas delivered the opinion of the court:
At issue is whether the exculpatory clause in defendant Firstar Bank's safety deposit box rental agreement is enforceable under the facts of this case…

Background
More than $1 million worth of loose diamonds and jewelry was stolen from three safety deposit boxes that defendant leased to jewel dealers at one of its Chicago branches. The safety deposit box lease …agreement contained the following paragraph:

> "1. It is understood that said bank has no possession or custody of, nor control over, the contents of said safe and that the lessee assumes all risks in connection with the depositing of such contents, that the sum mentioned is for the rental of said safe alone, and that there shall be no liability on the part of said bank, for loss of, or injury to, the contents of said box from any cause whatever unless lessee and said bank enter into a special agreement in writing to that effect, in which case such additional charges shall be made by said bank as the value of contents of said safe, and the liability assumed on account thereof may justify. The liability of said bank is limited to the exercise of ordinary care to prevent the opening of said safe by any person not authorized and such opening by any person not authorized shall not be inferable from loss of any of its contents."

None of the dealers had entered into the "special agreement" referenced in the first sentence of this paragraph (hereinafter, the exculpatory clause). Two of the dealers, Annaco Corporation and Irving M. Ringel, Inc., had the contents of their boxes insured by plaintiff Jewelers Mutual Insurance Company. The third dealer, Bachu Vaidya, was uninsured. Jewelers Mutual paid losses totaling $887,400.37 to Annaco and Ringel and then brought [suit] …against defendant. The complaint alleged breach of contract and negligence. Vaidya also separately sued defendant and sought recovery under the same theories. In its answer in both cases, defendant admitted that it had to some extent been negligent and had breached the agreement as alleged by plaintiff.

Relying on the exculpatory clause, defendant moved for and was granted summary judgment in both cases.…Plaintiffs appealed, and the two cases were consolidated on appeal.

The appellate court affirmed the dismissal of the negligence count in Vaidya's case.… However, the court reversed the summary judgment in favor of defendant in both cases on the breach of contract counts, holding that the exculpatory clause was unenforceable. The court gave two reasons for finding the clause unenforceable. First, that the contract was ambiguous because the first sentence of paragraph one provided that "there shall be no liability," while the second sentence said that the "liability of said bank is limited to the exercise of ordinary care." …The court held that the ambiguity had to be resolved against defendant because it drafted the contract… The court stated that defendant had admitted that it allowed unauthorized access to the safety deposit boxes in both cases, and therefore the court granted in part Jewelers Mutual's motion for summary judgment and directed the entry of partial summary judgment for Vaidya. The court remanded for proof of damages…

Presiding Justice McBride dissented from the reversal of summary judgment for defendant. She disagreed with the majority's conclusion that the contract was ambiguous. She believed that the two sentences in paragraph one could be reconciled by reading the second sentence as referring to the "special agreement" mentioned in the first sentence…In other words, the paragraph means that defendant has no liability for any loss whatsoever, unless the parties enter into the special agreement referenced in the first sentence. If they do, then defendant's liability is limited to the exercise of ordinary care to prevent unauthorized access to the box…Finally, she did not believe that the exculpatory clause was void as against public policy because safety deposit companies are not generally insurers of the safety of the box contents…We allowed defendant's petition for leave to appeal…

Analysis
Summary judgment is proper where the pleadings, affidavits, depositions, admissions, and exhibits on file, when viewed in the light most favorable to the nonmoving, reveal that there is no issue as to any material fact and that the movant is entitled to judgment as a matter of law…

We review summary judgment orders *de novo*…

Defendant first argues that the court erred in finding paragraph one ambiguous. According to defendant, although this provision could have been drafted better, its meaning is clear. Defendant contends that the word "liability" is used two different ways in the first and second sentences. In the first sentence, it refers to the amount of damages for which defendant can be held responsible. In the second sentence, the word "liability" addresses the standard of care. Thus, the second sentence means that defendant has a duty to exercise ordinary care to prevent the unauthorized opening of the box, but the first sentence limits the amount of damages that can be collected for a breach of that duty. At oral argument, defendant clarified that its position was that the only damages that a customer could recover if defendant breaches its duty of care would be a return of the rental fee. Defendant argues that this interpretation takes into account the commercial setting in which the parties contracted and also fairly allocates the liability to the party who elected to bear the risk of loss. Here, none of the parties entered into the special agreement referenced in the first sentence to insure the contents of the box. Defendant argues that Annaco Corporation and Irving M. Ringel, Inc., insured the contents of the boxes with Jewelers Mutual and thus elected that Jewelers Mutual would bear the risk of loss. Vaidya did not purchase insurance and thus chose to bear the risk of loss himself.

We disagree with defendant's argument. First, the first sentence of paragraph one is simply not a limitation of damages clause. That sentence provides that the customer assumes all risks of depositing the contents of the box with defendant and that there "shall be no liability on the part of said bank, for loss of, or injury to, the contents of said box from any cause whatever." The clause does not say that, in the event of a breach, the plaintiff's damages are limited to a return of the rental fee. Rather, it is a general exculpatory clause purporting to exculpate defendant from all liability for loss of or damage to the contents of the box. In the very next sentence, however, defendant assumes one particular liability: it must exercise ordinary care to prevent the unauthorized opening of the box. We do not believe that the clauses can be reconciled in the manner suggested by defendant.

Further, defendant's invocation of insurance law "risk of loss" concepts is a red herring. The issue in this case is not a dispute between insurance companies over who bore the risk of loss. The issues are whether defendant breached the contract it entered into with plaintiffs and whether defendant can exculpate itself from all liability for breach of an express obligation assumed in the contract.

The construction placed on paragraph one by the dissenting justice in the appellate court must also be rejected. The dissent argued that the second sentence referred to defendant's liability in the event that the parties entered into the "special agreement" listed in clause one. This obviously cannot be the case because the first sentence provides, in part, that there is "no liability on the part of said bank, for loss of, or injury to, the contents of said box from any cause whatever unless lessee and said bank enter into a special agreement in writing to that effect." …In other words, there is no liability for loss of or injury to the contents of the box from any cause whatsoever unless the parties enter into an agreement that there will be liability on the part of the bank for loss of, or injury to, the contents of the box from any cause whatsoever. If the parties entered into such an agreement, defendant's liability would not be limited to a failure to exercise ordinary care to keep unauthorized persons out of the box. Rather, defendant would become a general insurer of the contents of the box. Thus, the two sentences cannot be reconciled in the manner suggested by the appellate court dissent.

We believe that paragraph one of the lease agreement is ambiguous and that its two sentences are conflicting. In the first sentence, defendant disclaims liability for any loss whatsoever. In the second sentence, defendant assumes one particular liability. It must exercise ordinary care to prevent unauthorized persons from accessing the box. Defendant argues that, if we find this paragraph ambiguous, then the resolution of its meaning is a question of fact and the case cannot be decided on a motion for summary judgment…Defendant thus contends that, if we find an ambiguity, we must remand the case to the fact finder to resolve the ambiguity.

We disagree.

Whatever the meaning of the exculpatory clause, it clearly cannot be applied to a situation in which defendant is alleged to have breached its duty to exercise ordinary care to prevent unauthorized persons from opening the box. This is a specific duty that defendant assumed in the contract, and it formed the heart of the parties' agreement. A party cannot promise to act in a certain manner in one portion of a contract and then exculpate itself from liability for breach of that very promise in another part of the contract… Here, plaintiffs have received nothing in return for their rental fee if they cannot hold defendant to its

contractual obligation to exercise ordinary care to prevent unauthorized persons from accessing their safety deposit boxes.

This same conclusion was reached by the Florida District Court of Appeal in *Sniffen v. Century National Bank of Broward*,… (Fla. App. 1979). In that case, the safety deposit box rental agreement was similar to the one here in that it contained two conflicting provisions. One was a general, broad exculpatory clause denying liability for any loss: "It is expressly understood…that in making this lease the Bank…shall not be liable for loss or damage to, the contents of said box, caused by burglary, fire or any cause whatsoever, but that the entire risk of such of loss or damage is assumed by the lessee." …In the second provision, the bank assumed a duty to prevent unauthorized access: "No person other than the renter or approved deputy named in the books of Bank …shall have access to the safe." …The plaintiff alleged that the bank breached this agreement when it allowed an authorized person, his ex-wife, to access his safety deposit box. She removed over $250,000 worth of bearer bonds and other valuables. The trial judge dismissed the complaint on the ground that the exculpatory clause barred plaintiff's action…

The Florida District Court of Appeal reversed, holding that, "whatever the possible effect of the exculpatory clause in other situations …it is clear that it cannot be employed, as it was below, to negate the specific contractual undertaking to restrict access to the vault." …The *Sniffen* court further elaborated on how this principle applies to safety deposit box rental agreements:

> "It should be emphasized that …an acceptance of the bank's position in this case would render the agreement between the parties entirely nugatory. If a safety deposit customer cannot enforce the bank's undertaking to preclude unauthorized persons from entry to his box which is the very heart of the relationship and the only real reason that such a facility is used at all,…it is obvious that he will have received nothing whatever in return for his rental fee. The authorities are unanimous in indicating that no such drastic effect may properly be attributed to contractual provisions such as those involved here.…"

We agree with the *Sniffen* court's analysis. In this contract, in exchange for plaintiff's rental fee, defendant assumed the obligation to exercise ordinary care to prevent unauthorized access to the safety deposit box. Having assumed this duty, defendant cannot exculpate itself from liability for a breach of that duty. Accepting defendant's argument would mean that, if defendant routinely breached these safety deposit box rental agreements by handing the keys to anyone who came in off the street and asked for them, it would have no liability to its customers except to give them their rental fee back. It is safe to assume that, if defendant explained the agreement this way in the contract, defendant would not have many safety deposit box customers.

Defendant's response to *Sniffen* is two-fold. First, defendant argues that it is distinguishable because it involved an exculpatory clause that conflicted with another provision of the contract, while the contract in the case before us contains no such conflict. This is clearly incorrect. The contract here contains the same conflict as the contract in *Sniffen*: a general exculpatory clause absolving the bank for all liability from any loss whatsoever, and an express obligation to prevent unauthorized opening of the box…Second, defendant argues that *Sniffen* was distinguished in Federal Deposit Insurance Corp…Defendant is correct, but that does not help defendant…

We hold that the exculpatory provision is not applicable to an allegation that defendant breached its duty to exercise ordinary care to prevent unauthorized access to the box…

We affirm the appellate court's judgment reversing the summary judgment for defendant, entering summary judgment for plaintiffs, and remanding for proof of damages.

Affirmed.

Case Questions

1. What was the bank attempting to do in its contract with its safety box customers?
2. Why did the Illinois Supreme Court conclude that this exculpatory clause was unenforceable?

INTERNET TIP

Students may be interested in reading the case of *Gimple v. Host Enterprises, Inc.* in the retired cases section of the textbook's website. The *Gimple* case debuted in this textbook in the fourth edition in 1989. It is a case in which an exculpatory clause contained in a bicycle rental agreement was enforced, despite the fact that the rental bike had bad brakes.

CHAPTER SUMMARY

Chapter VI began with a discussion of the "case or controversy" requirement. This requirement, which is based in the federal constitution, prevents federal courts from advising the legislative and executive branches. The chapter then discussed the umbrella concept known as "justiciability." The court will only decide cases that are well suited to be decided by means of the judicial process. Various judicial doctrines have been developed that are used to exclude disputes that do not lend themselves to judicial determination. Examples included the "standing," "ripeness," "mootness," "political questions," and "act of state" judicial doctrines. Readers also learned about statutes of limitations, which are legislatively created time limits within which plaintiffs must exercise their right to sue. A plaintiff who fails to bring an action within the specified period of time forfeits the right to sue and, in some circumstances, that time period can be extended. The chapter also included a discussion of the equitable doctrine of laches. If a plaintiff is suing for an equitable remedy and the defendant sustains legal injury due to the plaintiff's unreasonable delay in bringing the action, the court may refuse to award the plaintiff any equitable relief because of the doctrine of laches. Next, the chapter addressed the judicial doctrine traditionally known as *res judicata* and, more recently, as claim preclusion. This doctrine prevents the same parties from relitigating the same claims in a second lawsuit. If a judgment has been awarded, generally any claims that were decided or could and should have been litigated in that first action are included in the judgment. Last, the chapter examined some of the more common types of legal immunities from tort liability. Most legal immunities exist to protect some important public interest. This principle is explained in the subsequent discussions of sovereign immunity, the immunities granted to governmental officials, and intrafamily immunities. The chapter concluded with a discussion of immunities that are created by contract and when courts will and will not enforce exculpatory clauses.

CHAPTER QUESTIONS

1. The city of Jacksonville, Florida, sought to increase the percentage of municipal contracts awarded to minority business enterprises (MBEs) and enacted an ordinance containing a 10 percent set aside. Members of the Association of General Contractors brought suit against the city because they thought the set-aside program impermissibly favored one race over another. Such a race-based classification system in the awarding of municipal construction contracts, they contended, violated the Equal Protection Clause of the Fourteenth Amendment. The trial court granted summary judgment in favor of the contractors' association; however, the U.S. Court of Appeals for the Eleventh Circuit vacated the judgment on the grounds that the contractors lacked standing to sue. The appeals court concluded that the contractors' association had "not demonstrated that, but for the

program, any member would have bid successfully for any of the contracts." After the U.S. Supreme Court granted the contractors' association's petition for a writ of certiorari, the city repealed its MBE ordinance and enacted a second ordinance that was very similar in that it provided for contractual set-asides favoring women and black contractors. Is this case moot, inasmuch as the ordinance complained about has been repealed?

Association of General Contractors v. City of Jacksonville, 508 U.S. 656 (1993)

2. Assume the same facts as in question 1. Assume further that the city argued in the Supreme Court that the contractors' association lacked standing in that no member of the association alleged that he or she would have been awarded a city contract but for the set-aside ordinance. Did the contractors' association have standing to sue? Why? Why not?

   Association of General Contractors v. City of Jacksonville, 508 U.S. 656 (1993)

3. Paula Piper was a public defender assigned to defend William Aramy. Prior to William's trial, Paula told the judges she thought William was crazy. Bail was set and William was placed in a mental institution. Paula failed to tell William how he could arrange bail. Claiming that his prolonged stay in the mental institution was caused by Paula's negligence, William sued Paula for malpractice. Paula claims that her position as an officer of the court gives her the defense of judicial immunity. Who wins? Why?
4. On February 1, 1999, John Smith bought a car for $10,000. He paid $1,000 down and signed a promissory note for $9,000, due in three years. Assume that the note was never paid and that the applicable statute of limitations is five years. The plaintiff could wait until what date to bring a civil suit for nonpayment of the note?
5. The Endangered Species Act of 1973 authorizes citizens to bring suits against the government to protect threatened wildlife and plant life. When the U.S. Fish and Wildlife Service decided to restrict the amount of water released from an irrigation project along the Oregon–Washington border, Oregon ranchers brought suit against the federal government. The ranchers maintained that their businesses would be severely damaged as a result of this decision. They also alleged that the government had not used the "best scientific and commercial data available," as required by the federal statute. The U.S. Court of Appeals for the Ninth Circuit ruled that the ranchers did not have standing because the statute only provided for citizen suits brought on behalf of endangered species. Should citizens who believe that the government has been overly pro-environment and insufficiently sensitive to the economic consequences of environmental protection have standing to sue the government?

   Bennett v. Spear, 520 U.S. 154 (1997)

6. In 1942, Congress amended the Nationality Act of 1940 to make it easier for noncitizens who had fought in World War II and who had been honorably discharged from the U.S. Armed Services to become American citizens. The 1942 act specifically provided that the noncitizen servicemen could complete the naturalization before a designated immigration and naturalization officer and while outside the borders of the United States. This procedure was in lieu of requiring the applicant to come to the United States and appear before a U.S. district court judge. In August 1945, the U.S. vice consul in Manila was designated by the Immigration and Naturalization Service (INS) to perform this responsibility. The government of the Philippines, concerned that too many of its nationals would take advantage of this law, soon prevailed on the United States to restrict this opportunity. The U.S. attorney general responded by revoking the vice consul's authority to process citizenship applications from October 1945 until October 1946. Congress also proceeded to limit the window

of opportunity to those who filed petitions by December 1946. Filipino war veterans brought suit, contending that they were entitled to become citizens under the amended Nationality Act. The INS responded by asserting that the plaintiffs' claims were nonjusticiable because they were political questions. Should the political questions doctrine apply in cases such as this?

Pangilinan v. Immigration and Naturalization Service, 796 F.2d 1091, U.S. Court of Appeals (9th Circuit 1986).

7. Judge Stump, a judge of a circuit court in Indiana (a court of general jurisdiction), approved a mother's petition to have her "somewhat retarded" fifteen-year-old daughter sterilized. The judge approved the mother's petition the same day, without a hearing and without notice to the daughter or appointment of a *guardian ad litem*. The operation was performed on Linda Sparkman, but she was told that she was having her appendix removed. A few years later, after Sparkman married and discovered that she had been sterilized, she and her husband brought suit against Judge Stump. Should Judge Stump be immune under the circumstances?

Stump v. Sparkman, 435 U.S. 349 (1978)

NOTES

1. *Hewllette v. George*, 9 So. 885 (1891).
2. *Lloyd Dunlap v. Dunlap*, 150 A. 905 (1930).
3. R. N. Heath, "The Parental Immunity Doctrine: Is Insurer Bad Faith an Exception or Should the Doctrine Be Abolished," 83 *The Florida Bar Journal* 9, 58 (October 2009).
4. Oliver Wendell Holmes, Harold Joseph Laski, *Collected Legal Papers* (New York: Harcourt, Brace and Howe, 1920), pp. 65–69.

VII

Judicial Remedies

CHAPTER OBJECTIVES

1. *Explain the important differences between equitable and common law relief.*
2. *Describe the function of each remedy.*
3. *Understand what an equitable maxim is and how it is used.*
4. *Identify and explain the three classes of injunctions.*
5. *Explain how compensatory, punitive, nominal, and liquidated damages differ.*

Before addressing the power of the court to award various types of relief, we should establish that courts do not have a monopoly on resolving private disputes. Many disputes within families, for example, are settled without resort to the judiciary by grandparents, parents, or an older sibling. Other peacemakers include religious leaders, coaches, teachers, and other respected persons. Arbitrators, mediators, and private courts also offer disputants alternative procedures for resolving disagreements without involving the public court systems.

Some readers would better understand remedies if they took a few minutes to review the material in Chapter I regarding the development of the English common law and equitable courts. If readers also take another look at Article III, Section 2, of the U.S. Constitution and the Seventh Amendment, they will see that notions of law and equity are specifically mentioned within the text of our Constitution. Lastly, reviewing this historical material will remind readers of the reasons for the traditional rule that a plaintiff who has an adequate legal remedy is not entitled to equitable relief.

We now turn to a discussion of judicial remedies. Once a person has established a substantive right through judicial procedures, the court will award relief.

Judicial relief can assume many different forms, called remedies (see Figure 7.1). The most common remedy is awarding money damages in the form of compensatory damages and, where permissible, punitive damages. Additional remedies include injunctive relief (requiring someone to do or refrain from doing something), restitution (restoring a person to a previous position to prevent unjust enrichment), declaratory judgment (a judicial determination of the parties' rights), and reformation (judicially rewriting a written instrument to reflect the real agreement of the parties).

COMMON LAW REMEDIES

Common law remedies are generally limited to the court's determination of some legal right and the award of money damages. There are some exceptions. For example, when parties want the court's opinion concerning their legal rights but are not seeking damages or injunctive relief, they seek a declaratory judgment. In addition, the common law remedies of ejectment and replevin both seek restitution. An **ejectment** occurs when a trespasser secures full possession of the land and the owner brings an action to regain possession, as well as damages for the unlawful detention of possession. Usually this process involves a title dispute between plaintiff and defendant, and the ejectment action settles this dispute. **Replevin** is an action used to recover possession of personal property wrongfully taken. Once the action is brought, the goods are seized from the defendant after proper notice has been given and held until title has been determined.

Usually, however, a common law court grants relief in the form of damages, a sum of money awarded as compensation for an injury sustained as the consequence of either a tortious act or a breach of a legal obligation. Damages are classified as compensatory, punitive, nominal, and liquidated.

Compensatory Damages

Compensatory damages are awarded to compensate the plaintiff for pecuniary losses that have resulted from the defendant's tortious conduct or breach of contract. Although the permissible damage elements vary by jurisdiction, they typically include awards for loss of time or money, bodily pain and suffering, permanent disabilities or disfigurement, injury to reputation, and mental anguish. Future losses are also recoverable; however, compensation is not allowed for consequences that are remote, indirect, or uncertain (i.e., where speculative).

Damages are usually limited to those reasonably foreseeable by the defendant as a result of the breach. Assume that two plaintiffs have a contract to buy some equipment needed to open their new business, and a defendant breaches by nondelivery. If the plaintiffs sue for lost profits from the delay in opening because they have to procure alternative goods, they would probably not recover, because the defendant could not have foreseen this without knowing that the opening depended on the delivery. Also, future profits are very difficult to measure with any degree of certainty.

In awarding compensatory damages, the court's objective is to put the plaintiff in the same financial position as existed before the commission of the tort or, in a contract case, in the financial position that would have resulted had the promise been fulfilled. In the absence of circumstances giving rise to an allowance of punitive damages, the law will not put the injured party in a better position than the person would have been in had the wrong not been done.

A person who is injured must use whatever means are reasonable to avoid or minimize damages. This rule is called by most the **rule of mitigation** (and by others the avoidable harm doctrine). It prevents recovery for damages that could have been foreseen and avoided by reasonable effort without undue risk, expense, or humiliation. For example, P sues to recover the loss of a crop, because D removed some rails from P's fence, and as a result, cattle escaped and destroyed the crop. Since P, knowing the rails were missing, did not repair the fence, only the cost of repairing the fence is recoverable, because the loss of the crop could have been avoided.

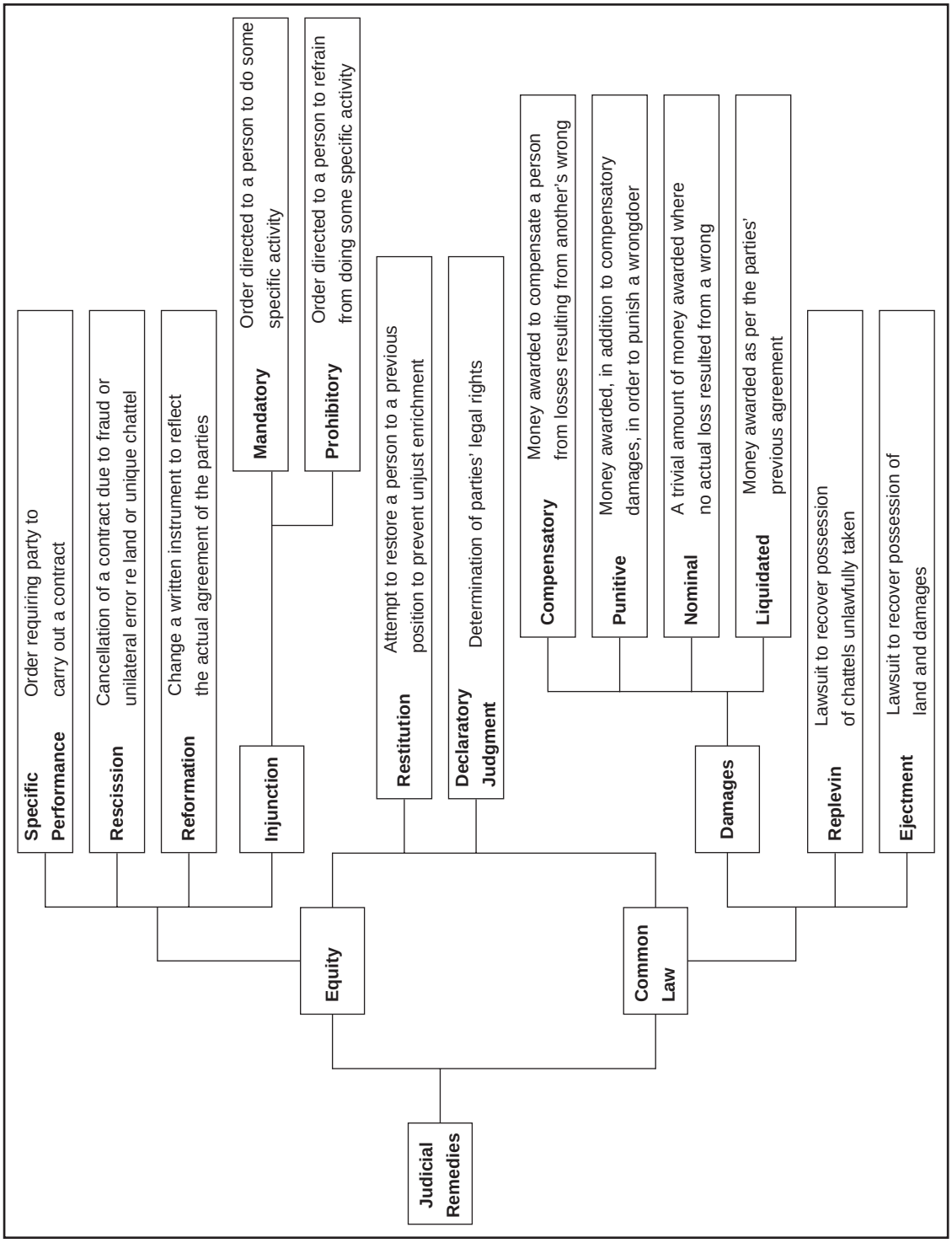

FIGURE 7.1 Judicial Remedies

When the defendant's misconduct causes damages but also operates directly to confer some benefit on the plaintiff, then the plaintiff's damage claim may be diminished by the amount of the benefit conferred. This policy is called the **benefit rule**. For example, a trespasser digs on plaintiff's land, but the digging works to drain swampy areas and improves the value. The plaintiff may recover for the trespass and any damage it caused, but the defendant gets a credit for the value of the benefit conferred. However, this credit exists only for clear benefits and not for those that are remote and uncertain. Problems arise in deciding what constitutes a benefit and what standard to measure it by.

Compensatory damages may be categorized as either general or special. This distinction is very important to lawyers because general damages do not have to be specifically pleaded, whereas special damages must be listed in the pleadings. **General damages** are those that are the natural and necessary result of the wrongful act or omission, and thus can normally be expected to accompany the injury. Pain and suffering, mental anguish, and the loss of enjoyment of life are damages that occur so frequently in the tort of battery that they do not have to be specifically pleaded. **Special damages** are awarded for injuries that arise from special circumstances of the wrong. A plaintiff in a battery case, for example, would have to plead specifically such special damages as medical and hospital expenses, loss of earnings, and a diminished ability to work.

Putting a dollar value on the plaintiff's loss for the purpose of compensation often becomes a difficult task. Because the amount of damages is a factual question and decisions on factual issues do not create precedent, previous case decisions are not binding. The amount of damages is decided by a jury, unless a jury trial has been waived.

The next case involves a plaintiff who seeks to recover a variety of damages for medical malpractice. The court rules that the state's public policy prohibits her from recovering for all that she claims. The concurrence contains a discussion of the benefits rule and the rule requiring the mitigation of damages.

Macomber v. Dillman
505 A.2d 810
Supreme Judicial Court of Maine
February 27, 1986

Glassman, Justice

In April of 1984, the plaintiffs, Roxanne and Steven Macomber, filed a complaint against the defendants, Carter F. Dillman and the Webber Hospital Association. The complaint alleged, *inter alia*, that as a proximate result of the defendants' negligent and careless failure to comply with the standard of care of medical practice in the performance of a tubal ligation on Roxanne for the purpose of permanent sterilization, Roxanne was not permanently sterilized and had conceived and given birth to a child, Maize. Although the plaintiffs did not allege in their complaint that Maize is a healthy, normal child, they did not allege otherwise, and the parties have agreed to these facts. Plaintiffs sought damages from defendants "including, but not limited to, the cost of raising and educating Maize May Macomber, the medical and other expenses of the pregnancy and childbirth, the medical and other expenses of a subsequent hysterectomy for purposes of sterilization, lost wages, loss of consortium, the medical and other expenses of the unsuccessful tubal ligation, permanent physical impairment to Roxanne Macomber resulting from bearing Maize May, her sixth child, and physical and mental pain and suffering resulting [therefrom]."

Defendants filed motions for dismissal or summary judgment on the grounds that the plaintiffs by their complaint failed to state a claim for which relief could be granted and could not recover damages for the cost of rearing and educating a healthy, normal child. After hearing, the Superior Court entered its order denying the defendants' motions and adopting the analysis that should the plaintiffs prevail they would be entitled to recover "all reasonable, foreseeable, and proximately caused damages, including the expenses of child rearing." The court refused to rule on whether damages so recoverable by plaintiffs "should be offset by benefits" of parenthood.

On a joint motion of the parties, the Superior Court reported the case to this court thereby posing the following questions of law: (1) Did the Superior Court by its order properly deny the defendants' motion to dismiss the plaintiff's complaint for failure to state a claim against the defendants for which relief can be granted? (2) Did the Superior Court by its order properly set forth the damages that the plaintiffs could recover should they prevail in their action against the defendants?

We first address the question of whether the plaintiffs have by their complaint stated a claim against the defendants. Contrary to the defendants' contention, the plaintiffs' action does not represent a new cause of action in the state of Maine. "Since the early days of the common law a cause of action in tort has been recognized to exist when the negligence of one person is the proximate cause of damage to another person." … When a plaintiff claims he has suffered a personal injury as the result of medical mistreatment, his remedy lies in a complaint for negligence…. The necessary elements of a cause of action for negligence are a duty owed, a breach of that duty proximately causing the plaintiff's injuries and resulting damages…. Applying these principles to the allegations in the plaintiffs' complaint, it is clear that the necessary elements of a cause of action in negligence have been set forth against the defendants.

We next consider whether the Superior Court correctly established the scope of recoverable damages. We are aware that the courts which have considered this type of case have not reached a consensus as to damages, if any, that may be recoverable….

We hold for reasons of public policy that a parent cannot be said to have been damaged or injured by the birth and rearing of a healthy, normal child. Accordingly, we limit the recovery of damages, where applicable, to 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 that time. Our ruling today is limited to the facts of this case, involving a failed sterilization procedure resulting in the birth of a healthy, normal child.

We also must address whether the plaintiff, Steven Macomber, may recover for loss of consortium of his wife, Roxanne. For centuries courts have recognized a husband's right to recover damages for the loss of consortium when a tortious injury to his wife detrimentally affects the spousal relationship…. Because his wife's cause of action is for negligence, Steven Macomber may recover proven damages for loss of consortium.

The entry is:

The order of the Superior Court is modified to limit the scope of recoverable damages, and as so modified, affirmed. Remanded to the Superior Court for further proceedings consistent with the opinion herein.

McKusik, Nichols, and Roberts, J.J., concurring.
Scolnik, Justice, concurring in part and dissenting in part

Although I concur that a cause of action exists for medical malpractice in the performance of a tubal ligation, I am unable to agree with the Court's judicially imposed limitation on the damages that are recoverable. The Court reasons that in no circumstances can a parent be said to have been damaged by the birth and rearing of a healthy, normal child. This rationale, however, is not only plainly inconsistent with the Court's recognition of a cause of action but also totally ignores the fact that many individuals undergo sterilization for the very purpose of avoiding such a birth. Moreover, the Court's opinion is an unwarranted departure from the fundamental principle of tort law that once a breach of duty has been established, the tortfeasor is liable for all foreseeable damages that proximately result from his acts. I dissent because, in my view, the jury should be permitted to consider awarding damages for child rearing costs.

By finding that a parent is not harmed by the birth of a healthy child, the Court's opinion is logically inconsistent. In the first part of its opinion, the Court applies traditional tort principles to recognize a cause of action for negligence resulting in an unwanted conception and subsequent birth of a normal, healthy child. Although the opinion is noticeably silent as to what the required harm is to support the cause of action … the Court has in effect concluded that the birth of a normal child is recognized as an injury that is directly attributable to the health-care provider's negligence. In the second part of its opinion, however, the Court states that based on unarticulated reasons of public policy, the birth of a normal, healthy child cannot be said to constitute an injury to the parents. As a result, the Court limits the damages that a parent can recover to the hospital and medical expenses incurred for the sterilization procedure and the pregnancy, the pain and suffering connected with the pregnancy and the loss of earnings sustained by the mother during that time. If, however, the birth of a child does not constitute an injury, no basis exists for any award of damages. Damages for "pain and suffering" and medical expenses incidental to childbirth cannot be recoverable if the birth itself is not an injury. Similarly, if the parent is to be compensated for the loss of earnings

that result from the pregnancy, should she not equally be compensated for the identical loss following the birth of the child? The Court's opinion fails to reconcile these obvious inconsistencies.

Not only is the Court's opinion internally inconsistent, but its stated rationale to support an artificial limitation on the scope of recoverable damages ignores reality. To hold that a parent cannot be said to have been damaged or injured by the birth and rearing of a normal, healthy child is plainly to overlook the fact that many married couples, such as the plaintiffs, engage in contraceptive practices and undergo sterilization operations for the very purpose of avoiding the birth of [a] child. Many of these couples resort to such conception avoidance measures because, in their particular circumstances, the physical or financial hardships in raising another child are too burdensome. Far from supporting the view that the birth of a child is in all situations a benefit, the social reality is that, for many, an unplanned and unwanted child can be a clear detriment.... "[W]hen a couple has chosen not to have children, or not to have any more children, the suggestion arises that for them, at least, the birth of a child would not be a net benefit." ... This is not to say that there are not many benefits associated with the raising of a child. The point is that it is unrealistic universally to proclaim that the joy and the companionship a parent receives from a healthy child always outweigh the costs and difficulties of rearing that child. As one judge explained:

> "A couple privileged to be bringing home the combined income of a dual professional household may well be able to sustain and cherish an unexpected child. But I am not sure the child's smile would be the most memorable characteristic to an indigent couple, where the husband underwent a vasectomy or the wife underwent a sterilization procedure, not because they did not desire a child, but rather because they faced the stark realization that they could not afford to feed an additional person, much less clothe, educate and support a child when that couple had trouble supporting one another. The choice is not always giving up personal amenities in order to buy a gift for the baby; the choice may only be to stretch necessities beyond the breaking point to provide for a child that the couple had purposely set out to avoid having."...

I know of no instance where we have strayed from the common law principle that a tortfeasor is liable for every foreseeable injury proximately caused by his negligent act and we should avoid doing so here. The Court states that public policy dictates the result it reaches without explaining the source from which it was derived or the foundation on which it rests. This is not a case where change is required in the common law, without legislative help, because of a conflict between an outdated judicially crafted policy and contemporary legal philosophy.... In fact, I am sure that the Court realizes that substantial disagreement exists among the courts as to whether a parent is harmed by the birth of an unexpected child. This fact coupled with the empirical reality that many individuals choose to forego parenthood for economic or other reasons demonstrates that the Court's unexplicated judicial declaration of public policy is unwarranted....

In my view, it is the duty of this Court to follow public policy, not to formulate it, absent a clear expression of public opinion. Moreover, it has always been the public policy of this State to provide relief to those injured by tortfeasors and to allow for compensation for damages caused by their acts. To deprive the plaintiffs in this case of the opportunity to recover compensation for all their damages contravenes this basic policy. Any limitation on the scope of recoverable damages in such cases is best left to the Legislature where the opportunity for wide ranging debate and public participation is far greater than in the Law Court....

Rather than to rely on unstated notions of public policy, the better approach to determine what damages may be recoverable is to apply traditional common-law rules. It is certainly foreseeable that a medical health professional's failure properly to perform a tubal ligation will result in the birth of an unplanned child. As a result of the tortfeasor's act, the parents, who had chosen not to have a child, find themselves unexpectedly burdened both physically and financially. They seek damages not because they do not love and desire to keep the child, but because the direct and foreseeable consequences of the health-care provider's negligence has [sic] forced burdens on them that they sought and had a right to avoid.

In assessing damages for child rearing costs, I would follow those jurisdictions that have adopted the "benefit rule" of the Restatement (Second) of Torts § 920 (1979).... The benefit rule recognizes that various tangible and intangible benefits accrue to the parents of the unplanned child and therefore to prevent unjust enrichment, their benefits should be weighed by the factfinder in determining damages associated with the raising of the unexpected child. The rule provides that "[w]hen the defendant's tortious conduct has caused harm to the plaintiff or to his property and in so doing has conferred a special benefit to the interest of the plaintiff that was harmed, the value of the benefit

conferred is considered in mitigation of damages, to the extent that this is equitable." … The assessment of damages, if any, should focus on the specific interests of the parents that were actually impaired by the physician's negligence. An important factor in making that determination would be the reason that sterilization was sought, whether it was economic, genetic, therapeutic or otherwise…. The advantages of this approach were succinctly stated by the Arizona Supreme Court.

> "By allowing the jury to consider the future costs, both pecuniary and non-pecuniary, of rearing and educating the child, we permit it to consider all the elements of damage on which the parents may present evidence. By permitting the jury to consider the reason for the procedure and to assess and offset the pecuniary and non-pecuniary benefits which will inure to the parents by reason of their relationship to the child, we allow the jury to discount those damages, thus reducing speculation and permitting the verdict to be based upon the facts as they actually exist in each of the unforeseeable variety of situations which may come before the court. We think this by far the better rule. The blindfold on the figure of justice is a shield from partiality, not from reality."…

Although the benefit rule approach requires the jury to mitigate primarily economic damages by weighing them against primarily noneconomic factors, I reject the view that such a process is "an exercise in prophecy, an undertaking not within the specialty of our factfinders." … The calculation of the benefits a parent could expect to receive from the child is no more difficult than similar computations of damages in wrongful death actions, for extended loss of consortium or for pain and suffering….

As a final note, the parents should not be forced to mitigate their damages by resorting to abortion or to adoption. A doctrine of mitigation of damages known as the avoidable consequences rule requires only that reasonable measures be taken…. Most courts that have considered the matter have held, as a matter of law, neither course of action would be reasonable…. I agree. The tortfeasor takes the injured party as he finds him and has no right to insist that the victims of his negligence have the emotional and mental make-up of a woman who is willing to undergo an abortion or offer her child for adoption. Moreover, the parents should not be precluded from recovering damages because they select the most desirable alternative and raise the child. Accordingly, the avoidable consequences rule is not relevant to the issue of the recovery of child rearing expenses.

Damages recoverable under the cause of action recognized today by this Court should not be limited by unstated notions of public policy so as arbitrarily to limit recovery of proximately caused and foreseeable damages. I recognize that this is an extremely difficult case but I find no public policy declaring that physicians should be partially immunized from the consequences of a negligently performed sterilization operation nor declaring that the birth of a healthy child is in all circumstances a blessing to the parents. Accordingly, I see no justification for supporting a departure from the traditional rules that apply to tort damages.

I would affirm, without modification, the order of the Superior Court and permit the recovery of the potential costs of rearing the child.

Case Questions

1. Why does the court majority hold that the parents could recover damages for hospital and medical expenses, pain, and suffering connected with the unwanted pregnancy, the loss of earnings by the mother during the pregnancy, and loss of consortium, but denies a recovery for the cost of rearing and educating a healthy, normal child?
2. The dissenting justice argues that the majority opinion is inconsistent. Explain the inconsistencies.
3. After carefully reading the majority and dissenting opinions, how would you rule?

Do you agree with the Court that "a parent cannot be said to have been damaged or injured by the birth and rearing of a healthy, normal child"?