Mulford v. Borg-Warner Acceptance Corp.

495 N.Y.S.2d 493
Supreme Court of New York
Appellate Division
November 21, 1985

Harvey, Justice

Appeal from an order and judgment of the Supreme Court at Special Term (Murphy, J.), entered April 19, 1985 in Madison County, which granted defendant's motion for summary judgment dismissing the complaint.

This is an action involving a written lease for certain office space in the Village of Canastota, Madison County, for a period of two years. The lease was never subscribed by anyone on behalf of defendant. Prior to the lease in issue, there were three written leases between these parties involving space in the same office building owned by plaintiff. Each lease expired on March 31, 1983. Prior to the expiration date, plaintiff proposed a new lease for a three-year period involving the same accommodations. Defendant informed plaintiff that it would not lease one of the office suites previously occupied by it and that, as to the remaining space, it would only be interested in a two-year lease. Thereafter, and on the expiration date of the original lease, plaintiff prepared a written two-year lease, subscribed it and delivered it to defendant. Although defendant retained possession of the property described in the document and paid rent at a rate in accordance with the provisions contained therein, it never signed the new lease. On August 2, 1983, defendant notified plaintiff that it was quitting the premises as of August 31, 1983, and paid the rent for that month.

Plaintiff commenced this action alleging that the unexecuted lease was a valid lease and demanded unpaid rent and other expenses alleged to have resulted from defendant's default. After issue was joined, defendant moved…for summary judgment dismissing the complaint, relying upon General Obligations Law § 5-703(2) as an absolute defense. Special Term granted the motion and this appeal ensued.

General Obligations Law § 5-703(2) provides:

> "A contract for the leasing for a longer period than one year, or for the sale, of any real property, or an interest therein, is void unless the contract or some note or memorandum, is in writing, subscribed by the party to be charged, or by his lawful agent thereunto authorized by writing."

Although plaintiff freely admits that the proposed lease was never subscribed by defendant, he contends that signed checks delivered to plaintiff for monthly rentals in the amounts as would have been required by the proposed lease constitute sufficient memoranda to satisfy the Statute of Frauds. We disagree. The law requires that the memoranda embody all the essential and material parts of the lease contemplated with such clarity and certainty as to show that the parties have agreed on all the material parts of the lease contemplated…. The only material factors which could be established by the checks were the fact of possession and the amount of monthly rental. Nothing contained in the checks or any memoranda attached thereto gave any clue as to the term of the lease. The notation on the memo portion of the first check stating "additional rent due for April (new lease)" is consistent with a month-to-month tenancy. This notation is insufficient to establish a tenancy involving all the provisions, including the term, of the proposed written but unsigned lease. We conclude, therefore, that defendant's occupancy of the premises from April 1, 1983 to August 31, 1983 was on the basis of a month-to-month tenancy….

Order and judgment modified, on the law and the facts, without costs, by granting plaintiff judgment for one month's rent for September 1983…and, as so modified, affirmed.

Case Questions

1. What is the rationale behind requiring that contracts for longer than one year satisfy the statute of frauds?
2. The plaintiff argued that the monthly rental checks paid by the defendant to the plaintiff should be held to satisfy the statute of frauds. Why does the appellate court disagree?

Sale of Goods

Generally, a contract for the sale of goods for the price of $500 or more is not enforceable unless there is some writing to serve as evidence that a contract has been entered into. An informal or incomplete writing will be sufficient to satisfy the UCC statute of frauds, providing that it (1) indicates that a contract between the parties was entered into, (2) is signed by the party against whom enforcement is sought, and (3) contains a statement of the quantity of goods sold. The price, time and place of delivery, quality of the goods, and warranties may be omitted without invalidating the writing, as the UCC permits these terms to be shown by outside evidence, custom and usage, and prior dealings between the parties. Thus, the provisions that must be included in a writing that will conform with the UCC statute of frauds are substantially less than those necessary in a writing that evidences one of the other types of contracts governed by the statute of frauds. Under the UCC, the contract will be enforced only as to the quantity of goods shown in the writing (UCC 2-201 [1]).

Parol Evidence Rule

After contracting parties have successfully negotiated a contract, they often sign a written document that contains what they intend to be a definitive and complete statement of the agreed-upon terms (in legalese this means that all terms are "fully integrated"). Courts will usually presume that a fully integrated writing is accurate. Therefore, under the **parol evidence rule**, evidence of alleged prior oral or written agreements or terms not contained in the written document will be inadmissible if offered to change the terms of the document.

There are several exceptions to the parol evidence rule. The parol evidence rule, for example, would not apply where the contracting parties have prepared only a partial memorandum or other incomplete writing. (In legalese the terms of an incomplete agreement are only "partially integrated.") An agreement that is only partially integrated is only intended to be a final and complete statement with respect to the terms actually addressed in the memorandum. Unaddressed terms, in this circumstance, can often be proven extrinsically. Other recognized exceptions exist where parol evidence is used to prove fraud or the absence of consideration in the formation of a contract, and where it helps to explain the meaning of ambiguous words.

Sometimes whether the parol evidence rule applies is a close call. In the next case, the three-judge panel splits 2-1 as to whether the parol evidence rule applies to the particular facts of that case.

Mark Hinkel v. Sataria Distribution & Packaging, Inc.
No. 49A04-0908-CV-473
Court of Appeals of Indiana
February 1, 2010.

Vaidik, Judge

Case Summary

The appellant, Mark Hinkel, was hired to work for the appellee, Sataria Distribution and Packaging, Inc. ("Sataria"). Hinkel was allegedly promised a year's worth of salary and insurance coverage if he were ever terminated involuntarily, but his written employment contract did not provide for severance pay or post-employment benefits. Hinkel was soon terminated, and he did not receive the severance package he says he was promised. Hinkel sued for breach of contract and/or promissory estoppel. The trial court entered summary judgment in favor of Sataria….

Facts and Procedural History

Hinkel was employed by Refractory Engineers, Inc. and Ceramic Technology, Inc. John Jacobs was the owner of Sataria. In late August or September 2005, Hinkel and Jacobs met to discuss working together. Jacobs offered Hinkel a job at Sataria. Hinkel had reservations. Jacobs told him, "Mark, are you worried that I'll f*** you? If so, and things don't work, I'll pay you one (1) year's salary and cover your insurance for the one (1) year as well. But let me make it clear, should you decide this is not for you, and you terminate your own employment, then the agreement is off."… Jacobs later sent Hinkel the following written job offer:

Dear Mark,
This is written as an offer of employment. The terms are as described below:

1. Annual Compensation: $120,000
2. Work Location: Belmont Facility
3. Initial Position: Supervisor Receiving Team
4. Start Date: 08/19/2005
5. Paid Vacation: To be determined
6. Health Insurance: Coverage begins 09/01/2005 pending proper enrollment submission

Please sign and return.

…Hinkel signed the offer and resigned from his other employers. He began working at Sataria in September 2005. According to Hinkel, Jacobs reiterated the severance promise again in November 2005 and December 2005.

Sataria terminated Hinkel's employment involuntarily on January 23, 2006. Sataria paid Hinkel six weeks of severance thereafter. Hinkel brought this action for breach of contract and/or promissory estoppel against Sataria. He claimed that Sataria owed him the severance package that Jacobs promised. Sataria moved for summary judgment. The trial court granted Sataria's motion. Hinkel now appeals….

I. Breach of Contract Claim

According to Hinkel, Jacobs orally promised him a year's salary and insurance coverage if he were ever involuntarily terminated. Sataria argues that any alleged oral promises are barred from consideration by the parol evidence rule.

The parol evidence rule provides that "[w]hen two parties have made a contract and have expressed it in a writing to which they have both assented as the complete and accurate integration of that contract, evidence … of antecedent understandings and negotiations will not be admitted for the purpose of varying or contradicting the writing." *Dicen v. New Sesco, Inc.*, 839 N.E.2d 684, 688 (Ind. 2005) (quoting 6 Arthur Linton Corbin, *Corbin on Contracts* § 573 (2002 reprint))…. This rule "effectuates a presumption that a subsequent written contract is of a higher nature than earlier statements, negotiations, or oral agreements by deeming those earlier expressions to be merged in to or superseded by the written document."….

The first step when applying the parol evidence rule is determining whether the parties' written contract represents a complete or partial integration of their agreement. See *Restatement* (Second) of Contracts §§ 209, 210 (1981). If the contract is completely integrated, constituting a final and complete expression of all the parties' agreements, then evidence of prior or contemporaneous written or oral statements and negotiations cannot operate to either add to or contradict the written contract…. The preliminary question of integration, either complete or partial, requires the court to hear all relevant evidence, parol or written…. "Whether a writing has been adopted as an integrated agreement is a question of fact to be determined in accordance with all relevant evidence."…

In addition,

> The test of [parol evidence] admissibility is much affected by the inherent likelihood that parties who contract under the circumstances in question would simultaneously make both the agreement in writing which is before the court, and also the alleged parol agreement. The point is not merely whether the court is convinced that the parties before it did in fact do this, but whether reasonable parties so situated naturally would or might obviously or normally do so…. The vast majority of courts assessing the admissibility of parol evidence at common law apply this test. This test is commonly known by the adverbs used by the courts which apply it, and might be variously called the "naturally" test, the "naturally and normally" test, the "ordinarily" test, or any of a host of words used by the courts to indicate that parties similarly situated might reasonably have believed it appropriate to keep the two agreements separate. Moreover the test can be stated in the affirmative or the negative; either way the key question is the same. Thus, one way to ask the question is whether the nature of the collateral agreement was such that, if the parties had agreed to it, they would naturally have included it in their writing. Asked in this way, if the answer is that they would have, and they did not, they engaged in "unnatural" behavior, and evidence of the alleged agreement is inadmissible.
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> 11 *Williston on Contracts* § 33:25 (footnotes omitted); …

Here, Jacobs and Hinkel negotiated the terms of Hinkel's employment before completing their written contract. Jacobs allegedly promised Hinkel that he would receive one year of salary and benefits if he were ever terminated involuntarily. The parties then executed their written agreement. The written employment offer specified Hinkel's compensation, work location, title, start date, and the date on which his insurance coverage would begin. It did not provide that Hinkel would receive severance pay or benefits

following termination. Hinkel signed the letter and began working at Sataria. In light of all the relevant evidence, we find as a matter of law that Hinkel's contract represented a complete integration of the parties' employment agreement. Jacobs allegedly promised Hinkel a severance package, but the written contract enumerates both compensation and insurance coverage while saying nothing of post-employment salary and/or benefits. The offer leaves one term to be decided—paid vacation—but the contract imports on its face to be a complete expression with respect to salary and insurance. And since a lucrative severance provision would "naturally and normally" be included in an employment contract, its glaring omission here further supports the conclusion that Hinkel's written contract superseded any alleged prior oral promises. We hold that the written contract constituted a final representation of the parties' agreement, and any contemporaneous oral agreements that the parties made as to severance are not subject to interpretation.

To the extent Jacobs may have promised Hinkel a severance package after their written contract was executed, an additional question is whether Jacobs's promise could have constituted a valid contract modification. "The modification of a contract, since it is also a contract, requires all the requisite elements of a contract." *Hamlin v. Steward*, 622 N.E.2d 535, 539 (Ind. Ct. App. 1993). "A written agreement may be changed by a subsequent one orally made, upon a sufficient consideration." … Consideration consists of either a benefit to the promisor or a detriment to the promisee…. In other words, consideration requires a bargained-for exchange. … A promise is also valuable consideration, and an exchange of mutual promises is consideration which supports modification of a contract….

Here, if Jacobs promised Hinkel a severance package after the written employment contract was executed, there is no evidence that Hinkel provided additional consideration in exchange for the promise. Hinkel argues that he had to agree "to continue working for Sataria" and "to not voluntarily resign his employment."…. But Hinkel had assumed those duties and employment obligations as consideration for the original agreement…. Any subsequent promise by Jacobs respecting severance was not supported by an independent, bargained-for exchange. Accordingly, Jacobs's alleged oral promises could not have constituted valid modifications of Hinkel's employment contract.

For the foregoing reasons, Hinkel has failed to raise a genuine issue of material fact on his breach of contract claim, and the trial court properly granted summary judgment in favor of Sataria.

Affirmed.

Crone, Judge, dissenting

I respectfully dissent because I disagree with the majority's conclusion that Jacobs's oral promise to Hinkel regarding a severance package is "barred from consideration by the parol evidence rule." … I do so for two reasons.

First, I believe that a genuine issue of material fact exists regarding whether the parties intended for Jacobs's written job offer to Hinkel to be completely integrated, i.e., a "final and complete expression of all the parties' agreements[.]" … Although not conclusive, the offer—a one-page document with six bullet points for a position paying $120,000 per year—does not contain an integration clause. More persuasive is its statement that Hinkel's vacation terms were yet to be determined, which indicates to me that the parties had not yet reached agreement on that issue. Based on the foregoing, a factfinder reasonably could conclude that the offer is more akin to a memorandum of understanding and represents only a partial integration of the parties' agreements, and that therefore the parol evidence rule would not apply to bar consideration of Jacobs's oral promise regarding the severance package.

Second, the terms of the severance package do not vary from or contradict the terms of the written offer, but merely cover that which was not covered in the offer…. As such, even assuming that the offer is completely integrated, the terms of the severance package would not be barred by the parol evidence rule. … ("[P]arol evidence may be admitted to supply an omission in the terms of the contract…. Using parol evidence to supply an omission will not modify the written agreement, but merely adds to it."). Therefore, I would reverse the trial court's grant of summary judgment in favor of Sataria and remand for further proceedings.

Case Questions

1. Why did two of the judges conclude that contractual terms were completely integrated?
2. Why did the third judge dissent in this case?
3. Which opinion did you find more persuasive?

ASPECTS OF CONTRACT PERFORMANCE

When parties enter into a contract, they generally expect that each side will fully perform in the manner called for in the agreement. Often, however, problems arise and full performance does not occur, as in the following examples.

Accord and Satisfaction

One party may agree to take something less than full performance to satisfy the agreement. For example, suppose that A asks B to pay a debt for services rendered and B states that he is too poor to pay the full amount. A may agree to accept payment for only half of the debt. In this situation, the parties have worked out an accord and satisfaction. An **accord** is the offer of something different from what was due under the original contract. The **satisfaction** is the agreement to take it. Since the law favors a compromise, courts try to uphold any good-faith modification agreement.

Anticipatory Repudiation

Suppose that A, who is one party to a contract, clearly manifests that she will not perform at the scheduled time. The other party, B, has a choice at common law. B may either sue immediately or ignore A's repudiation and wait for the day of performance. If B waits, A may change her mind and still perform according to the original contract. Under UCC section 2-610, the injured party may not wait until the day of performance. B may wait for a change of mind only for a commercially reasonable period of time after repudiation before taking action.

Warranties

A **warranty** is a contractual obligation that sets a standard by which performance of the contract is measured. If the warranties are created by the parties to the contract, they are *express*. Under UCC section 2-313, express warranties exist whenever a seller affirms facts or describes goods, makes a promise about the goods, or displays a sample model.

If warranties are imposed by law, they are implied. There are two types of **implied warranties** under UCC section 2-314 and section 2-315. (1) When a merchant sells goods that are reputed to be fit for the ordinary purpose for which they are intended and are of average quality and properly labeled and packaged, the merchant is bound by an **implied warranty of merchantability**. (2) When the seller has reason to know some particular (nonordinary) purpose for which the buyer has relied on the seller's skill or judgment in making a selection, the seller is bound by an **implied warranty of fitness** for a particular purpose.

Implied warranties may be disclaimed by a conspicuous disclaimer statement that the goods are being sold "as is." Once an express warranty is created, however, it cannot be disclaimed, and any attempt to do so is void. The Magnuson–Moss Federal Warranty Act is an act requiring that written warranties for consumer products be categorized as "full" or "limited" so that consumers know what type of warranty protection they are getting. In addition, under this act, a consumer may sue under both the federal and state warranties to recover actual damages.

Originally, a warranty was enforceable only by purchasers, but the trend has been to extend the warranty to nonbuyers (such as recipients of gifts) who have been injured by the defective product.

Discharge, Rescission, and Novation

A **discharge** from a duty to perform occurs because of objective impossibility, by operation of law, or by agreement. To illustrate, one party may die or become physically incapable of performing, a statute may be passed that prevents a party from performing, or a duty to perform may be discharged in bankruptcy. Parties can also agree to end their contractual relationship through a rescission. In a *rescission* each party gives up its right to performance from the other; this constitutes sufficient

consideration for the discharge. A *novation* occurs when a promisee agrees to release the original promisor from a duty and enters into a new agreement with another party.

Transfers of Duties and Rights

Sometimes one of the original parties to a contract decides to transfer its rights or duties to some third person who was not originally a party to the agreement. The transfer of rights is called an **assignment**, and the transfer of duties is called a **delegation**. An assignor assigns his or her rights to an assignee. For example, a creditor (the **assignor**) may decide to transfer her right to collect money owed by a debtor to a finance company (the **assignee**).

In another example, Smith may contract with a builder to construct a garage next to her house using the turnkey method of construction (this means that the developer finances and builds the garage and receives payment when it is completed). The builder would negotiate a bank loan to finance the project, and the bank probably would negotiate a requirement that the contractor transfer his rights to payment to the bank as security for the loan. A right is not assignable if it significantly affects the corresponding duty associated with that right. Thus, Smith probably would not be permitted to assign her right (to have the builder construct a garage) to her sister who lives twenty miles away, since the added distance would be a significant detriment to the building contractor.

A person contractually obligated to perform a duty may often delegate that duty to a third person. If Smith contracts with a painter to paint her new garage, the painter could delegate that duty to other painters. A party cannot delegate a duty if there is a personal component involved such that the duty can only be performed by the party to the original agreement. For example, the personal component exists when a person contracts with a famous photographer to take her portrait. The photographer in this situation would not be permitted to delegate the duty to just any other photographer.

An assignee is legally responsible for any claims that were originally available against the assignor. Thus, the debtor would be entitled to raise the same defenses (such as capacity, duress, illegality, or mistake) against the finance agency that were available against the creditor. The rules are similarly strict vis-à-vis the delegation of a duty. Smith's painter would be responsible if the painter to whom he delegated the painting duty (painter #2) performed inadequately. If Smith agrees to a novation, however, the original contracting painter could be relieved of his duty to perform and painter #2 could be substituted.

Statutory provisions generally require that some assignments be in writing. Statutes also prohibit contractual restrictions on most assignments of rights. The following case illustrates what happens when one original contracting party assigns rights and delegates duties over the objection of the other contracting party.

Macke Company v. Pizza of Gaithersburg, Inc.
270 A.2d 645
Court of Appeals of Maryland
November 10, 1970

Singley, Judge
The appellees and defendants below, Pizza of Gaithersburg, Inc.; Pizzeria, Inc.; The Pizza Pie Corp., Inc. and Pizza Oven, Inc., four corporations under the common ownership of Sidney Ansell, Thomas S. Sherwood and Eugene Early and the same individuals as partners or proprietors (the Pizza Shops) operated at six locations in Montgomery and Prince George's Counties. The appellees had arranged to have installed in each of their locations cold drink vending machines owned by Virginia Coffee Service, Inc., and on 30 December 1966, this arrangement was formalized at five of the locations, by contracts for terms of one year, automatically renewable for a like term in the

absence of 30 days' written notice. A similar contract for the sixth location, operated by Pizza of Gaithersburg, Inc., was entered into on 25 July 1967.

On 30 December 1967, Virginia's assets were purchased by The Macke Company (Macke) and the six contracts were assigned to Macke by Virginia. In January, 1968, the Pizza Shops attempted to terminate the five contracts having the December anniversary date, and in February, the contract which had the July anniversary date.

Macke brought suit in the Circuit Court for Montgomery County against each of the Pizza Shops for damages for breach of contract. From judgments for the defendants, Macke has appealed.

The lower court based the result which it reached on two grounds: first, that the Pizza Shops, when they contracted with Virginia, relied on its skill, judgment and reputation, which made impossible a delegation of Virginia's duties to Macke; and second, that the damages claimed could not be shown with reasonable certainty. These conclusions are challenged by Macke.

In the absence of a contrary provision—and there was none here—rights and duties under an executory bilateral contract may be assigned and delegated, subject to the exception that duties under a contract to provide personal services may never be delegated, nor rights be assigned under a contract where *delectus personae** was an ingredient of the bargain….

The six machines were placed on the appellees' premises under a printed "Agreement-Contract" which identified the "customer," gave its place of business, described the vending machine, and then provided:

"TERMS

1. The Company will install on the Customer's premises the above listed equipment in good operating order and stocked with merchandise.
2. The location of this equipment will be such as to permit accessibility to persons desiring use of same. This equipment shall remain the property of the Company and shall not be moved from the location at which installed, except by the Company.
3. For equipment requiring electricity and water, the Customer is responsible for electrical receptacle and water outlet within ten (10) feet of the equipment location. The Customer is also responsible to supply the Electrical Power and Water needed.
4. The Customer will exercise every effort to protect this equipment from abuse or damage.
5. The Company will be responsible for all licenses and taxes on the equipment and sale of products.
6. This Agreement–Contract is for a term of one (1) year from the date indicated herein and will be automatically renewed for a like period, unless thirty (30) day written notice is given by either party to terminate service.
7. Commission on monthly sales will be paid by the Company to the Customer at the following rate: …"

The rate provided in each of the agreements was "30 percent of Gross Receipts to $300.00 monthly[,] 35 percent over [$]300.00," except for the agreement with Pizza of Gaithersburg, Inc., which called for "40 percent of Gross Receipts."

… We cannot regard the agreements as contracts for personal services. They were either a license or concession granted Virginia by the appellees, or a lease of a portion of the appellees' premises, with Virginia agreeing to pay a percentage of gross sales as a license or concession fee or as rent, … and were assignable by Virginia unless they imposed on Virginia duties of a personal or unique character which could not be delegated…. [T]he agreements with Virginia were silent as to the details of the working arrangements and contained only a provision requiring Virginia to "install … the above listed equipment and…maintain the equipment in good operating order and stocked with merchandise."… Moreover, the difference between the service the Pizza Shops happened to be getting from Virginia and what they expected to get from Macke did not mount up to such a material change in the performance of obligations under the agreements as would justify the appellees' refusal to recognize the assignment…. Modern authorities…hold that, absent provision to the contrary, a duty may be delegated, as distinguished from a right which can be assigned, and that the promisee cannot rescind, if the quality of the performance remains materially the same.

Restatement, Contracts § 160(3) (1932) reads, in part:

> "Performance or offer of performance by a person delegated has the same legal effect as performance or offer of performance by the person named in the contract, unless, "(a) performance by the person delegated varies or would vary

*Delectus personae means choice of person.—Ed.

materially from performance by the person named in the contract as the one to perform, and there has been no...assent to the delegation."...

In cases involving the sale of goods, the Restatement rule respecting delegation of duties has been amplified by Uniform Commercial Code § 2-210(5), Maryland Code (1957, 1964 Repl. Vol.) Art 95B § 2-210(5), which permits a promisee to demand assurances from the party to whom duties have been delegated....

As we see it, the delegation of duty by Virginia to Macke was entirely permissible under the terms of the agreements....

Judgment reversed as to liability; judgment entered for appellant for costs, on appeal and below; case remanded for a new trial on the question of damages.

Case Questions

1. When the Virginia Coffee Service sold its assets to the Macke Company, what rights did it assign?
2. What duties were delegated?

Contracts for the Benefit of Third Parties

In some situations, the parties contract with a clear understanding that the agreement is intended to benefit some other, noncontracting person. For example, a son and daughter might contract with a carpenter to repair the back stairs at their elderly mother's house. In another case, a woman might have accidentally damaged a neighbor's fence and agreed to have the fence repaired. The woman might want to discharge this obligation by contracting with a carpenter to repair the damage.

The third person in the first example (the mother) is classified as a **donee beneficiary**, and the third person in the second example (the neighbor) is classified as a **creditor beneficiary**. American law generally permits donee beneficiaries and creditor beneficiaries to sue for breach of contract. The third party's right to sue, however, only exists if that party's rights have "vested," that is, have matured to the point of being legally enforceable. Jurisdictions generally choose one of the following three rules to decide when rights vest: (1) rights vest when the contract is formed, (2) rights vest when the beneficiary acquires knowledge about the contract, or (3) rights vest when the beneficiary relies on the contract and changes his or her position.

INTERNET TIP

Readers can read a New York appellate court opinion in a case in which the deceased plaintiff's estate claimed that she was an intended third-party beneficiary in a contract between her landlord and a contractor. *Castorino v. Unifast Building Products* can be found on the textbook's website.

The Duty to Perform and Breach of Contract

Many agreements include conditions precedent and conditions subsequent that may affect a party's duty to perform. A **condition precedent** exists when some specified event must occur before a duty to perform becomes operative (i.e., obtain a mortgage at a specified rate of interest). A **condition subsequent** exists when a specified event occurs that discharges the parties from their duties.

A breach of contract occurs when a party fails to perform a duty, or inadequately performs what he or she has promised. A breach of contract is a material breach if the nonperforming party totally or substantially fails to perform. Thus, a material breach has occurred if a homeowner contracts with a painter to paint a house with two coats of primer and one finish coat, and the painter quits after painting one coat of primer. The homeowner has not received the substantial benefit of his or her bargain.

In the next case, an exterminating company is found to have breached its contract with a homeowner through inadequate performance of its duty.

Clarkson v. Orkin Exterminating Co., Inc.

761 F.2d 189
U.S. Court of Appeals, Fourth Circuit
May 9, 1985

Haynsworth, Senior Circuit Judge

A jury awarded the plaintiff damages on three separate claims. She claimed breach of a contract to inspect for termites and to treat again if necessary. There was a claim of fraud and of a violation of South Carolina's Unfair Trade Practices Act. § 39–0(a), Code of Laws of South Carolina, 1976.

There was adequate proof that Orkin broke its contract, though an improper measure of damages was applied. There is no evidence in the record, however, to support the finding of fraud or a violation of the Unfair Trade Practices Act. Hence, we reverse in part and affirm in part, but remand the contract claim for an appropriate assessment of damages.

I

In 1976 Mrs. Clarkson purchased a house. Orkin had contracted with her predecessor in title to retreat the house in the event that a termite problem developed. Orkin also promised, for a fee, to inspect the house yearly and, if necessary, retreat it for termites before certifying that the house remained free of termites.

In early 1983, Mrs. Clarkson offered her home for sale. When prospective purchasers noticed evidence of termite infestation, Mrs. Clarkson called Orkin and requested that they inspect the house. Orkin complied with her request and issued a report that the house was free of termites. The report also mentioned the presence of a moisture problem, which had been reported to Mrs. Clarkson on several earlier occasions but which remained uncorrected. For the moisture problem, Orkin had unsuccessfully attempted to sell a protective chemical treatment to Mrs. Clarkson.

The day after Orkin's 1983 inspection, Mrs. Clarkson had the house inspected by the representative of another exterminating company. He found two termite tunnels and damage from water. He attributed the water damage to a drainage problem and expressed the opinion that the water damage would progress unless there were alterations to a porch to prevent drainage of water into the basement.

After a contractor had made the necessary repairs and the recommended alterations, Mrs. Clarkson sought to have Orkin reimburse her for her entire cost of the reconstruction work. She also asked that Orkin reinspect the house and certify that the house was free of termite infestation. Orkin refused both requests.

A jury awarded Mrs. Clarkson $613.47 on the breach of contract claim, $551 on the Unfair Trade Practices Act Claim and $1,148 actual damages and $5,000 punitive damages on the fraud claim. The district judge concluded that the Unfair Trade Practices Act claim was a willful one and tripled the award on that claim and ordered Orkin to pay the plaintiff's attorneys' fees.

II

As proof of a violation of the South Carolina Unfair Trade Practices Act, Mrs. Clarkson points (1) to the fact that Orkin certified in 1983 that the house was free of termites when significant infestation was visible, and (2) the fact that Orkin on several occasions had attempted, though unsuccessfully, to sell to Mrs. Clarkson a "moisture problem treatment package" that would not have been an adequate corrective of an improper drainage problem.

It is abundantly clear that in its 1983 inspection Orkin's representative failed to discover termite infestation which was present and visible. This, however, does not establish a violation of the South Carolina Unfair Trade Practices Act. It shows no more than that Orkin's representative was negligent or incompetent. Mrs. Clarkson had not directed his attention to the area where the infestation was present, though she did direct the attention of the other exterminator to that area....

III

There is enough to support a finding of contract violation. Orkin failed to retreat the house when a termite infestation was present, and it refused Mrs. Clarkson's subsequent request that it reinspect and spray the house after the repairs had been made.

There is no claim that Mrs. Clarkson lost an opportunity to sell the house because of the termite problem. What she claimed was the cost of repairs and alterations. On the breach of contract claim, the jury assessed the damaged at $613.47, which was precisely

the cost to Mrs. Clarkson of replacing the wood damaged by the termites. In effect, the jury converted Orkin's retreatment contract into a repair contract.

Orkin offers its customers alternatives. It will promise and guarantee to provide retreatment if there is a later termite infestation. For a higher fee, it will promise and guarantee to effect necessary repairs after a termite infestation has occurred. Mrs. Clarkson's predecessor in title, and she, elected to take the lower option. In Orkin's guarantee to Mrs. Clarkson, there is an express recital of her waiver and release of Orkin from any liability for damage to the structure occasioned by termites. Mrs. Clarkson cannot now claim the benefits of a repair guarantee she chose not to purchase.

Mrs. Clarkson was entitled to a proper performance by Orkin of its contract, which was to inspect and treat again if an infestation was found. That promise was not properly performed, and Mrs. Clarkson is entitled to any damage she suffered by reason of that non-performance. Since she knew of the termite infestation one day after Orkin failed to detect it, her damage would apparently be limited to the cost of inspection by the other exterminator plus the cost of any retreatment she may have procured.

While we agree that the evidence supports a finding of a breach of contract, we remand that claim for further proceedings on damages as may be consistent with this opinion. Judgment in the plaintiff's favor on the unfair trade practice and fraud claims is reversed.

Reversed in part; Affirmed in part, and remanded.

Case Questions

1. In what way did Orkin breach its duty?
2. Why did the court remand the breach of contract claim for further proceedings?

REMEDIES FOR BREACH OF CONTRACT

An injured party who has established a breach of contract is entitled to turn to a court for legal or equitable relief, as discussed in Chapter VII.

Common Law Remedies

In most cases of breach, the injured party is awarded money damages, which can be compensatory, nominal, or liquidated.

The following case involves breach of contract claims between homeowners and a building contractor. The homeowners discharged the contractor because of defective work. The contractor filed suit against the homeowners to recover the damages. The Maine Supreme Court vacated the trial court's judgment on the counterclaim because of errors in the jury instructions regarding damages.

Anuszewski v. Jurevic
566 A.2d 742
Supreme Judicial Court of Maine
November 28, 1989

Clifford, Justice

Defendants and counterclaim plaintiffs Richard and Judy Jurevic appeal from a judgment entered after a jury trial in Superior Court.... Because we conclude that the court improperly limited the jury's consideration of damages claimed by the Jurevics, we vacate the judgment on the counterclaim.

In early 1987, the Jurevics contracted with the plaintiff, Robert E. Anuszewski, a contractor doing business as Pine Tree Post & Beam, for Anuszewski to construct a home for the Jurevics in Kennebunkport.

The home was to be completed by June 1, 1987, at a cost of $134,000, and the contract called for the Jurevics to make periodic progress payments. The home was only about fifty percent complete on June 1, 1987. In January, 1988, the Jurevics discharged Anuszewski. In March, 1988, Anuszewski brought an action against the Jurevics to recover $39,590.* The Jurevics filed a counterclaim.

At trial, the Jurevics presented evidence that the construction work was defective and testimony in the form of an expert opinion as to the total cost to correct the defects and to complete the house. The testimony indicated that this cost would include a general contractor markup of fifty percent added to the actual cost of the work to be done for overhead and profit, and that this was a usual and customary practice of the industry. The Jurevics also claimed damages for rental and other incidental expenses caused by Anuszewski's delay in completing the house. The court, however, prohibited the Jurevics from presenting evidence of delay damages beyond January 5, 1988, the date the Jurevics terminated the contract with Anuszewski.

At the conclusion of the evidence, the court, in its jury instructions, precluded the jury from considering the general contractor's markup as follows:

> "[I]f you find that the Jurevics are entitled to recover damages from Mr. Anuszewski for completion of the work not done or for repairing work not performed in a workmanlike manner, any amount of damages that you award must be the cost of doing that work by the various workmen without any markup to a general contractor, such as was testified to by [the Jurevics' expert witness]."

The jury returned a verdict awarding Anuszewski damages of $25,000 on his complaint and awarding $22,000 to the Jurevics on their counterclaim. This appeal by the Jurevics followed the denial of their motions for a mistrial, or in the alternative, for a new trial, and for additur.

We find merit in the Jurevics' contention that the court impermissibly restricted the jury's consideration of the full amount of damages that they were entitled to recover. The purpose of contract damages is to place the injured parties in the position they would have been in but for the breach, by awarding the value of the promised performance.... Those damages for breach of a construction contract are measured by either the difference in value between the performance promised and the performance rendered, or the amount reasonably required to remedy the defect.... The amount reasonably required to remedy the defect may be measured by the actual cost of necessary repairs.... Those costs may be proven by the presentation of expert testimony, as the Jurevics did here....

The court correctly instructed the jury that the Jurevics' measure of recovery for incomplete or defective work was "the amount reasonably required to remedy the defect" as specifically measured by the actual cost of repair.... The court went on, however, to instruct the jury that the cost of repair was to be considered "without any markup to a general contractor." This instruction was given despite testimony from an expert witness that the actual cost to remedy the incomplete and defective construction work of Anuszewski would include a general contractor markup for overhead and profit, and that such a markup was customary and usual in the construction business. Although Anuszewski defends the court's instruction, he did not argue at trial, nor does he now, that the Jurevics were not entitled to have the jury consider their claim that it was reasonable for them to hire a general contractor to supervise the repairs and completion of the house. If the jury concluded that it would be reasonable for the Jurevics to hire a substitute general contractor to supervise the repairs and completion, but was precluded by the court's instruction from considering the award of damages for the reasonable cost of the substitute contractor's overhead, for which the evidence suggests they would be charged as a matter of routine, then the Jurevics could be deprived of full recovery in their breach of contract claim. They would not be placed in the same position they would have been had Anuszewski performed the contract....

In breach of contract cases we have upheld repair or replacement damage awards of the amount required to bring a home into compliance with the contract.... In addition, we have affirmed the computation of indebtedness owed a builder by a homeowner that included a contractor's overhead and profit.... We see no reason to exclude reasonable and customary profit and overhead of a contractor from the cost of repairs to remedy defects in a breach of contract case.

The entry is:

Judgment on the complaint affirmed. Judgment on the counterclaim vacated.

Remanded to the Superior Court for further proceedings consistent with the opinion herein.

*The $39,500 represented, alternatively, the unpaid part of the contract price, or the value of the labor and materials provided by Anuszewski for which he had not been paid.

Case Questions

1. According to the Jurevics, what error was committed by the trial judge?
2. What is a counterclaim?

Equitable Remedies

If money damages are deemed to be an inadequate remedy, the court may be persuaded to grant equitable relief. The discussion in Chapter VII addresses the most common forms of equitable relief in breach of contract cases (injunctions, restitution after the court has granted rescission, and specific performance).

UCC Remedies for Breach of Contract for the Sale of Goods

The Uniform Commercial Code provides special rules for breaches of contracts involving the sale of goods. For example, if a seller breaches his or her contract to deliver goods, the buyer is entitled to (1) rescind the contract, (2) sue for damages, and (3) obtain restitution for any payments made. If the goods are unique such as rare artwork, or custom-made, a court may order specific performance. Replevin also is permitted in some situations. If a buyer breaches a sales contract by not accepting delivery of goods, or wrongfully revokes a prior acceptance, the injured seller is entitled to (1) cancel the contract, (2) stop delivery of goods, and (3) recover money damages from the buyer.

CHAPTER SUMMARY

The contracts chapter began with a historical review of the common law antecedents of modern contract law. Included in this overview were the writs of debt, detinue, covenant, trespass, trespass on the case, and assumpsit, as well as the eventual replacement of the writ system with modern code pleading and the development of uniform legislation, such as the Uniform Commercial Code (UCC). Readers then learned that contracts are classified in terms of validity (valid, void, voidable), enforceability, and whether they are bilateral or unilateral. The discussion then turned to an examination of each of the essential requirements of an enforceable contract: (1) an agreement (2) between competent parties (3) based on genuine assent of the parties, (4) supported by consideration, (5) that does not contravene principles of law and (6) that must be in writing in certain circumstances. Attention was also given to several aspects of contract performance, such as accord and satisfaction, anticipatory repudiation, warranties, discharge, recession, and novation, and the transfers of rights and duties to other persons who were not parties to the original agreement. The chapter concluded with a brief return visit to the topic of remedies, which was earlier addressed in Chapter VII.

CHAPTER QUESTIONS

1. Paul Searle, a former basketball player at St. Joseph's College, brought suit against the college, the basketball coach, and the trainer for breach of contract and negligence. Searle alleged that he had sustained basketball-related injuries to his knees and that St. Joseph's had orally contracted to reimburse him for his basketball-related medical costs. Searle asserted

in his complaint that the college had promised to pay his medical expenses if he continued to play for the team. His proof was a statement that the coach had approached Searle's parents after a game and expressed a willingness to pay for all of the medical bills. Given the above factual record, does Searle have a contract with St. Joseph's College?

Searle v. Trustees of St. Joseph's College, 695 A.2d 1206 (1997)

2. S. Allen Schreiber, having tired of receiving unsolicited phone calls from telemarketers in general, received such a call on November 29, 1989, from Olan Mills, a national family portrait chain. Schreiber promptly sent a "Dear Telemarketer" letter to the defendant.

"Dear Telemarketer:

Today, you called us attempting to sell us a product or a service. We have no interest in the product or service that you are selling. Please don't call us again. Please remove us from your telemarketing list and notify the provider of the list to also remove our name and number since we do not appreciate receiving telemarketing phone calls.

We rely on the availability of our phone lines, which have been installed for our convenience and not for the convenience of telemarketers. We pay for these phone lines and instruments. You do not. Please don't tie up our phone lines.

Should we receive any more calls from you or from anyone connected with your firm of a telemarketing nature, we will consider that you have entered into a contract with us for our listening services and that you have made those calls to us and expect us to listen to your message on a "for hire" basis.

If we receive any additional telemarketing phone calls from you, you will be invoiced in accordance with our rates, which are $100.00 per hour or fraction thereof with a minimum charge. Payment will be due on a net seven (7) day basis.

Late payment charge of 1½ percent per month or fraction thereof on the unpaid balance subject to a minimum late charge of $ 9.00 per invoice per month or fraction thereof will be billed if payment is not made as outlined above. This is an annual percentage rate of 18 percent. In addition, should it become necessary for us to institute collection activities, all costs in connection therewith including, but not limited to, attorney fees will also be due and collectible.

Olan Mill representatives made two additional calls, which resulted in the instant breach of contract suit. Did Olan Mills enter into an enforceable contract with Schreiber?

Schreiber v. Olan Mills, 627 A.2d 806 (1993)

3. George and Mary Jane Graham were driving in a car insured by State Farm when they were forced off the road by an unidentified motorist. The Grahams' vehicle struck a telephone pole and both occupants were injured. When the Grahams were unable to reach an agreement with their insurer, State Farm, regarding the amount they should be paid pursuant to the uninsured motorist provisions of their automobile insurance policy, they filed suit against State Farm. State Farm responded with a motion for summary judgment on the grounds that the policy called for binding arbitration in lieu of litigation in the event of such a dispute. The Grahams did not know about the arbitration clause at the time they paid the first premium. State Farm pointed out that the Grahams, after receiving a copy of the policy, never complained about the arbitration clause at any time during the following two years. The Grahams responded that this was a "take it or leave it" situation, under which they actually had no opportunity to "leave it" because they were denied the information necessary to make a decision at the time they enrolled with State Farm. The court, they contended, should not compel them to arbitrate their claim. They pointed out that this contract was drafted by the insurance company's lawyers and that the terms were written in a one-sided manner, permitting the powerful insurance company to

take advantage of weaker insureds such as the Grahams. Delaware public policy favors the use of arbitration to resolve disputes in situations such as this. Should the court enforce the arbitration clause?

Graham v. State Farm Mutual Co., 565 A.2d 908 (1989)

4. Mr. Lucy and Mr. Zehmer were talking at a restaurant. After a couple of drinks, Lucy asked Zehmer if he had sold the Ferguson farm. Zehmer replied that he had not and did not want to sell it. Lucy said, "I bet you wouldn't take $50,000 cash for that farm," and Zehmer replied, "You haven't got $50,000 cash." Lucy said, "I can get it." Zehmer said he might form a company and get it, "but you haven't got $50,000 to pay me tonight." Lucy asked him if he would put it in writing that he would sell him this farm. Zehmer then wrote on the back of a pad, "I agree to sell the Ferguson Place to W. O. Lucy for $50,000 cash." Lucy said, "All right, get your wife to sign it." Zehmer subsequently went to his wife and said, "You want to put your name to this?" She said no, but he said in an undertone, "It is nothing but a joke," and she signed it. At that time, Zehmer was not too drunk to make a valid contract. The Zehmers refused to convey legal title to the property, and Lucy sued for specific performance. What defense would the Zehmers use in the suit? Who should win the suit?

Lucy v. Zehmer, 196 Va. 493, 84 S.E.2d 516 (1954)

5. National Beverages, Inc., offered to the public prizes to be awarded in a contest known as "Pepsi-Cola Streator-Chevrolet Sweepstakes." The first prize was a Chevrolet Corvair. No order of drawing was announced prior to the close of the contest. After the close of the contest, just prior to the drawing, a sign was displayed stating the order of drawing. The first tickets drawn would receive twelve cases of Pepsi-Cola, and the last ticket drawn would receive the automobile. Walters's ticket was the first ticket to be drawn from the barrel. She claims that her number, being the first qualified number drawn, entitles her to the first prize, the Chevrolet Corvair. She bases her claim on the wording of the offer, which listed the automobile as the first prize. She accepted the offer by entering the contest. Is Walters entitled to the automobile?

Walters v. National Beverages, Inc., 18 Utah 2d 301, 422 P.2d 524 (1967)

6. Green signed a roofing contract with Clay Tile, agent for Ever-Tite Roofing Company, to have a new roof put on his house. The agreement stated that this contract was subject to Ever-Tite's approval and that the agreement would become binding upon written notice of acceptance or commencement of work. Nine days later, Clay Tile loaded up his truck and drove to Green's house, only to find that someone else was already doing the job. Ever-Tite wishes to sue on the contract for damages. Was Green's offer to Ever-Tite accepted before the offer was revoked?

Ever-Tite Roofing Corporation v. Green, 83 So.2d 449 (La. App. 1955)

7. Workers agreed to work aboard a canning ship during the salmon canning season. The contract, signed individually by each worker, was to last for the length of time it took to sail from San Francisco, California, to Pyramid Harbor, Alaska, and back. Each worker was to receive a stated compensation. They arrived in Alaska at the height of the fishing and canning season. Knowing that every day's delay would be financially disastrous and that it would be impossible to find workers to replace them, the workers refused to work unless they were given substantial wage increases. The owner of the canning ship acceded to their demands. When the ship returned to San Francisco, the owner paid them in accordance with the original agreement. The workers now bring suit to recover the additional amounts due under the second agreement. Will the contract be upheld?

Alaska Packers Association v. Domenico, 117 F.99 (9th Cir. 1902)

8. A little girl found a pretty stone about the size of a canary bird's egg. She had no idea what it was, so she took it to a jeweler, who eventually bought it from her for a dollar, although he too did not know what it was. The stone turned out to be an uncut diamond worth $10,000. The girl tendered back the $1 purchase price and sued to have the sale voided on the basis of mutual mistake. Should mutual mistake be a basis for recovery?

   Wood v. Boynton, 64 Wis. 265, 25 N.W. 42 (1885)

9. William E. Story agreed orally with his nephew that if he would refrain from drinking liquor, using tobacco, swearing, and playing cards or billiards for money until he became twenty-one years old, then he, Story, would pay his nephew $5,000 when the nephew reached age twenty-one. The nephew fully performed his part of the agreement. But when the nephew reached age twenty-one, his uncle stated that he had earned the $5,000 and that he would keep it at interest for his nephew. Twelve years later, Story died, and his nephew brought an action to recover the $5,000 plus interest. Was there sufficient consideration to create a contract?

   Hamer v. Sidway, 124 N.Y. 538, 27 N.E. 256 (1891)

NOTES

1. W. Walsh, *A History of Anglo-American Law* (Indianapolis: Bobbs-Merrill Company, 1932), p. 339; A. W. B. Simpson, *A History of the Common Law of Contract* (Oxford: Clarendon Press, 1975), pp. 12, 53; A. K. R. Kiralfy, *Potter's Historical Introduction to English Law* (London: Sweet and Maxwell Ltd., 1962), pp. 452–457.
2. Kiralfy, p. 456.
3. Ibid., pp. 456–457.
4. Ibid., pp. 305–307; Walsh, p. 344.
5. Walsh, p. 342.
6. Simpson, p. 199; Walsh, p. 344.
7. Simpson, p. 210; Kiralfy, p. 461; Walsh, p. 341.
8. Walsh, p. 340; Simpson, p. 224; T. F. F. Plucknett, *A Concise History of the Common Law* (Boston: Little, Brown, 1956) p. 639.
9. Walsh, pp. 345, 351; Simpson, p. 406; Plucknett, pp. 649–656.
10. Kiralfy, p. 626.
11. B. Schwartz, *The Law in America* (New York: McGraw-Hill, 1974), pp. 59–62; W. E. Nelson, *Americanization of the Common Law* (Cambridge, MA: Harvard University Press, 1975), p. 86.
12. M. Horwitz, *The Transformation of American Law, 1780–1860* (Cambridge, MA: Harvard University Press, 1977), pp. 164–180; Nelson, p. 154.
13. Horwitz, pp. 167, 173.
14. Schwartz, p. 72; Nelson, p. 86.
15. Horwitz, p. 185.

XI

The Law of Torts

CHAPTER OBJECTIVES

1. *Understand the historical origins of the modern tort action.*
2. *Identify the three types of civil wrongs that comprise modern tort law.*
3. *Explain the essential functions of tort law.*
4. *Understand how the named intentional torts differ.*
5. *Understand the elements that a plaintiff must prove to establish negligence.*
6. *Explain how comparative negligence states determine the payment of damages.*
7. *Understand and explain the concept of strict liability in tort.*

A tort is a civil wrong, other than a breach of contract, for which courts provide a remedy in the form of an action for damages. Tort law seeks to provide reimbursement to members of society who suffer losses because of the dangerous or unreasonable conduct of others. Each of the fifty states determines its own tort law, which is divided into the following three categories: intentional torts, negligence, and strict liability.

You may recall from Figure 1.2 and the accompanying discussion in Chapter I that there are important differences between criminal law and tort law. It was there emphasized that criminal prosecutions are brought by the government to convict and then punish offenders who have committed crimes and thereby harmed society as a whole. You should also remember that the Constitution provides defendants in criminal cases with procedural protections that are unavailable in civil litigation. Nevertheless, it is possible for criminal defendants to be sued civilly irrespective of the criminal trial's outcome.

HISTORICAL EVOLUTION OF AMERICAN TORT LAW

The word **tort** (meaning "wrong") is one of many Norman words that became a part of the English and American legal lexicon. American tort law evolved from the writs of trespass[1] and trespass on the case.[2] Trespass covered a variety of acts, which included trespass to land, assaults, batteries, the taking of goods, and false imprisonment. Each of the acts involved a **tortfeasor** directly causing injury to a victim. By the end of Henry III's reign, it was commonplace for plaintiffs to use trespass to recover money damages for personal injuries.[3] In 1285, Parliament enacted the Statute of Westminster,[4] which authorized the chancery to create new writs to address wrongs that fell outside the boundaries of trespass. Because the new writs were designed to remedy the factual circumstances of a particular case, they were called trespass actions on the case (also called "actions on the case"). From trespass on the case came our contemporary concept of negligence.

One of the major drawbacks of the writ system was that it lacked any comprehensive underlying theoretical base. In the 1800s, as the writ system was being replaced with more modern forms of pleading, American law professors and judges began to develop a basic theory for tort law based on fault.

FUNCTIONS OF TORT LAW

Tort law establishes standards of conduct for all members of society. It defines as civil wrongs these antisocial behaviors: the failure to exercise reasonable care (negligence); intentional interference with one's person, reputation, or property (intentional torts); and in some circumstances, liability without fault (strict liability). Tort law deters people from engaging in behavior patterns that the law does not condone and compensates victims for their civil injuries. It is thus a vehicle by which an injured person can attempt to shift the costs of harm to another person. Tort law is not static; courts can create new causes of action to remedy an injustice. Thus, the argument that a claim is novel does not prevent a court from granting relief when it becomes clear that the law should protect the plaintiff's rights.

Because the plaintiffs in tort cases are usually seeking money damages, tort actions that are not settled prior to trial are generally tried to juries. See Table 11.1.

INTENTIONAL TORTS

Intentional torts are based on willful misconduct or intentional wrongs. A tortfeasor who intentionally invades a protected interest of another, under circumstances for which there is no lawful justification or excuse, is legally and morally "at fault." The intent is not necessarily a hostile intent or even a desire to do serious harm. A person acts intentionally if he or she has a conscious desire to produce consequences the law recognizes as tortious. A person who has no conscious desire to cause the consequences, but is aware that the consequences are highly likely to follow, can also be found to have acted intentionally.

Assault

Assault is an intentional tort because as a general proposition, every person should have the right to live his or her life without being placed in reasonable fear of an intentional, imminent, unconsented, harmful, or offensive touching by another person. Assaults occur where the targeted person's anxiety is the product of the actor's threatening conduct, such as stalking. The law also recognizes that an assault has occurred where a targeted person's fear is the product of the actor's unsuccessful attempt to hit the target with a punch or a thrown object. Mere words alone, however, usually will not constitute an assault, no matter how threatening or abusive they may be. Once an actor has committed an

TABLE 11.1 Tort Cases Disposed of by Bench or Jury Trial in State Courts, by Case Type, 2005

Case type	Number of tort trials	Percentage disposed of by	
		Jury Trial	Bench Trial
All tort trials	6,397	90.0	10.0
Medical malpractice	2,449	98.7	1.3
Professional malpractice	150	60.0	40.0
Asbestos product liability	87	95.4	4.6
Premises liability	1,863	93.8	6.2
Other product liability	268	92.5	7.5
Automobile accident	9,431	92.2	7.8
Animal attack	138	80.6	19.4
Intentional tort	725	78.2	21.8
Other/unknown tort	664	71.5	28.5
Slander/libel	187	64.2	35.8
False arrest/imprisonment	58	63.8	36.2
Conversion	378	46.3	53.7

Source: U.S. Department of Justice, Bureau of Justice Statistics, Bulletin, November 2009, NCJ 228129. Table 1.

assault, the tort has been committed. An actor cannot, through the abandonment of further assaultive conduct, avoid civil liability for assaultive conduct already committed against a target.

Battery

In the intentional tort called battery, the *tortfeasor* has violated the target's right to be free from harmful or offensive touchings by another. A **battery** is defined as an unpermitted, unprivileged, intentional contact with another's person. This tort includes contact that is actually harmful, as well as conduct that is merely offensive. The standard used to determine offensiveness is not whether a particular plaintiff is offended, but whether an ordinary person who is not unusually sensitive in the matter of dignity would be offended. It is not essential that the plaintiff be conscious of the contact at the time it occurs.

Assault or battery may occur without the other, but usually both result from the same occurrence. As a result of an assault and battery—as well as other intentional torts—the injured party may bring a civil suit for damages and, as has been previously discussed, seek a criminal prosecution for the same act.

The following case illustrates the intentional torts of assault, battery, and invasion of privacy.

Estate of Berthiaume v. Pratt, M.D.

365 A.2d 792
Supreme Judicial Court of Maine
November 10, 1976

Pomeroy, Justice

The appellant, as administratrix, based her claim of right to damages on an alleged invasion of her late husband's "right to privacy" and on an alleged assault and battery of him. At the close of the evidence produced at trial, a justice of the Superior Court granted defendant's motion for a directed verdict. Appellant's seasonable appeal brings the case to this court.

The appellee is a physician and surgeon practicing in Waterville, Maine. It was established at trial without contradiction that the deceased, Henry Berthiaume, was suffering from a cancer of his larynx. Appellee, an otolaryngologist, had treated him twice surgically. A laryngectomy was performed; and later, because of a tumor which had appeared in his neck, a radical neck dissection on one side was done. No complaint is made with respect to the surgical interventions.

During the period appellee was serving Mr. Berthiaume as a surgeon, many photographs of Berthiaume had been taken by appellee or under his direction. The jury was told that the sole use to which these photographs were to be put was to make the medical record for the appellee's use….

Although at no time did the appellee receive any written consent for taking of photographs from Berthiaume or any members of his family, it was appellee's testimony that Berthiaume had always consented to having such photographs made.

At all times material hereto, Mr. Berthiaume was a patient of a physician other than the appellee. Such other physician had referred the patient to appellee for surgery. On September 2, 1970, appellee saw the patient for the last time for the purpose of treatment or diagnosis. The incident which gave rise to this lawsuit occurred on September 23, 1970. It was also on that day Mr. Berthiaume died.

Although appellee disputed the evidence appellant produced at trial in many material respects, the jury could have concluded from the evidence that shortly before Mr. Berthiaume died on the 23rd, the appellee and a nurse appeared in his hospital room. In the presence of Mrs. Berthiaume and a visitor of the patient in the next bed, either Dr. Pratt or the nurse, at his direction, raised the dying Mr. Berthiaume's head and placed some blue operating room toweling under his head and beside him on the bed. The appellee testified that this blue toweling was placed there for the purpose of obtaining a color contrast for the photographs which he proposed to take. He then proceeded to take several photographs of Mr. Berthiaume.

The jury could have concluded from the testimony that Mr. Berthiaume protested the taking of pictures by raising a clenched fist and moving his head in an attempt to remove his head from the camera's range. The appellee himself testified that before taking the pictures he had been told by Mrs. Berthiaume when he talked with her in the corridor before entering the room that she "didn't think that Henry wanted his picture taken."

It is the raising of the deceased's head in order to put the operating room towels under and around him that appellant claims was an assault and battery. It is the taking of the pictures of the dying Mr. Berthiaume that appellant claims constituted the actionable invasion of Mr. Berthiaume's right to privacy….

The law of privacy addresses the invasion of four distinct interests of the individual. Each of the four different interests, taken as a whole, represent an individual's right "to be let alone." These four kinds of invasion are (1) intrusion upon the plaintiff's physical and mental solitude or seclusion; (2) public disclosure of private facts; (3) publicity which places the plaintiff in a false light in the public eye; [and] (4) appropriation for the defendant's benefit or advantage of the plaintiff's name or likeness….

> "As it has appeared in the cases thus far decided, it is not one tort, but a complex of four. To date the law of privacy comprises four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff 'to be let alone.' …
>
> "Taking them in order—intrusion, disclosure, false light, and appropriation—the first and second require the invasion of something secret, secluded or private pertaining to the plaintiff; the third and fourth do not. The second and third depend upon publicity, while the first does not, nor does the fourth, although it usually involves it. The third requires falsity or fiction; the other three do not. The fourth involves a use for the defendant's advantage, which is not true of the rest."…

All cases so far decided on the point agree that the plaintiff need not plead or prove special damages. Punitive damages can be awarded on the same basis as in other torts where a wrongful motive or state of mind appears ... but not in cases where the defendant has acted innocently as, for example, in the mistaken but good faith belief that the plaintiff has given his consent....

In this case we are concerned only with a claimed intrusion upon the plaintiff's intestate's physical and mental solitude or seclusion. The jury had a right to conclude from the evidence that plaintiff's intestate was dying. It could have concluded he desired not to be photographed in his hospital bed in such condition and that he manifested such desire by his physical motions. The jury should have been instructed, if it found these facts, that the taking of pictures without decedent's consent or over his objection was an invasion of his legally protected right to privacy, which invasion was an actionable tort for which money damages could be recovered.

Instead, a directed verdict for the defendant was entered, obviously premised on the presiding justice's announced incorrect conclusion that the taking of pictures without consent did not constitute an invasion of privacy and the further erroneous conclusion that no tort was committed in the absence of "proof they [the photographs] were published."

Another claimed basis for appellant's assertion that a right to recover damages was demonstrated by the evidence is the allegations in her complaint sounding in the tort of assault and battery. The presiding justice announced as his conclusion that consent to a battery is implied from the existence of a physician-patient relationship....

There is nothing to suggest that the appellee's visit to plaintiff's intestate's room on the day of the alleged invasion of privacy was for any purpose relating to the *treatment* of the patient. Appellee acknowledges that his sole purpose in going to the Berthiaume hospital room and the taking of pictures was to conclude the making of a photographic record to complete appellee's record of the case. From the evidence, then, it is apparent that the jury had a right to conclude that the physician-patient relationship once existing between Dr. Pratt and Henry Berthiaume, the deceased, had terminated.

As to the claimed assault and battery, on the state of the evidence, the jury should have been permitted to consider the evidence and return a verdict in accordance with its fact-finding. It should have been instructed that consent to a touching of the body of a patient may be implied from the patient's consent to enter into a physician-patient relationship whenever such touching is reasonably necessary for the diagnosis and treatment of the patient's ailments while the physician--patient relationship continues. Quite obviously also, there would be no actionable assault and battery if the touching was expressly consented to. Absent express consent by the patient or one authorized to give consent on the patient's behalf, or absent consent implied from the circumstances, including the physician-patient relationship, the touching of the patient in the manner described by the evidence in this case would constitute assault and battery if it was part of an undertaking which, in legal effect, was an invasion of the plaintiff's intestate's "right to be let alone." ...

We recognize the benefit to the science of medicine which comes from the making of photographs of the treatment and of medical abnormalities found in patients....

> "The court [also] recognizes that an individual has the right to decide whether that which is his shall be given to the public and not only to restrict and limit but also to withhold absolutely his talents, property, or other subjects of the right of privacy from all dissemination."...

Because there were unresolved, disputed questions of fact, which, if decided by the fact finder in favor of the plaintiff, would have justified a verdict for the plaintiff, it was reversible error to have directed a verdict for the defendant.... New trial ordered.

Case Questions

1. Battery is unpermitted, unprivileged, intentional contact with another's person. In a physician-patient relationship, how does a physician receive consent to touch the body of a patient?
2. Could there have been a battery if Dr. Pratt had used rubber gloves in handling Mr. Berthiaume's head in preparation for the pictures? Could there have been a battery if Dr. Pratt had raised Mr. Berthiaume's head by cranking the hospital bed?

3. Could there have been an assault if Mr. Berthiaume was unconscious at the time Dr. Pratt raised his head and placed the blue operating towel under his head?
4. Are plaintiffs able to recover anything in suits for battery if they are unable to prove any actual physical injury?

Does Dr. Pratt have a moral duty to comply with his patient's request? Does acting morally benefit Dr. Pratt?

Conversion

Conversion is an intentional tort which allows owners of tangible personal property (concepts discussed in Chapter XII) to regain possession of their property from other persons who have dispossessed them. Any unauthorized act that deprives an owner of possession of his or her tangible personal property is conversion. There may be liability for the intentional tort of conversion even when the defendant acted innocently. For example, D, an auctioneer, receives a valuable painting from X, reasonably believing that X owns it. D sells the painting for X, but it turns out that P owns the painting. D is liable to P for conversion, even though the mistake is honest and reasonable.

Conversion may be accomplished in a number of ways—for example, if a defendant refuses to return goods to the owner or destroys or alters the goods. Even the use of the chattel may suffice. If you lend your car to a dealer to sell and the dealer drives the car once on business for a few miles, it would probably not be conversion. However, conversion would result if the dealer drives it for 2,000 miles.

Because conversion is considered a forced sale, the defendant must pay the full value, not merely the amount of the actual harm. However, courts consider several factors in determining whether defendant's interference with plaintiff's property is sufficient to require defendant to pay its entire value. These include dominion, good faith, harm, and inconvenience.

The plaintiff in the next case, Consuelo Mickens, claimed that a pawnshop employee committed conversion and breach of contract in transferring possession of her diamond ring to Jesse Colwell, an individual not listed on the pawn ticket.

Consuelo Mickens v. The Pawn Store
723 N.W.2d 450
Court of Appeals of Iowa
July 26, 2006

Vogel, P. J.
Consuelo Mickens appeals from the district court's order following a bench trial denying judgment on her breach of contract and conversion claims against The Pawn Store, Inc. Because we find no error, we affirm the district court.

Mickens and the father of her three children, Jesse Colwell, were regular customers at the Pawn Store (the Store), so much so that the employees were on a first name basis with the couple. Mickens and Colwell held themselves out to be husband and wife to the employees of the Store. Mickens had previously pawned numerous items at the Store, including the diamond ring at question in this case. The Store employees recalled Colwell reclaiming items Mickens had pawned in the past.

On September 25, 2002, Mickens took a pear-shaped, one and a quarter carat diamond ring to pawn at the Store. She received $225 in exchange for the ring. The pawn ticket that was signed by Mickens gave "the grantee" the option to reclaim the ring at a certain price within thirty days. Prior to the expiration of the thirty-day period, Mickens claims Colwell took the pawn ticket without her knowledge or consent and reclaimed the ring from the Store. After Colwell told Mickens he obtained the ring, Mickens attempted to alert the Store employees that Colwell should not be allowed to reclaim the ring. Employee Matt DePhillips informed Mickens that Colwell had already reclaimed the ring, using the pawn ticket. DePhillips thought this was not unusual, as Colwell had regularly picked up items at the Store for Mickens. Mickens quarreled with

the Store employees and owner, Jeff Pocock, over the ring in two more visits to the Store. She did not alert the police of Colwell's actions or assert restitution from Colwell for the ring.

Mickens filed suit against the Store in February 2004, with claims for breach of contract [, and] conversion…. After a bench trial, the district court entered judgment in favor of the Store on all claims, finding that Mickens failed to prove breach of contract or conversion due to her implied consent to allow Colwell to reclaim items she had pawned at the Store. Mickens appeals on the breach of contract and conversion claims….

Mickens asserts on appeal that the district court erred by concluding she failed to prove her breach of contract and conversion claims. She argues that the court's finding that Mickens gave implicit permission to the Store for Colwell to redeem her property was not supported by substantial evidence. Mickens's claim for conversion rests on the allegation that the Store's breach of contract amounted to a conversion of the ring when employees turned it over to Colwell. In deciding whether there is an enforceable contract, we consider not only the language used but also the surrounding circumstances and the conduct of the parties…. Contractual obligations may arise from implication as well as from express writing….

Mickens denied that she had allowed Colwell to retrieve pawned items at the Store for her in the past. The district court found testimony by the Store's employees more credible than Mickens' testimony. Substantial evidence on the record supports the district court's findings that Mickens had previously consented to having Colwell reclaim her various pawned items from the Store. The evidence further supports this arrangement as the couple held themselves out to be husband and wife to the Store's owner and employees. Although the pawn ticket in question was signed by Mickens alone, the parties' repeated past conduct provides substantial evidence that Colwell, having possession of the pawn ticket, was authorized to reclaim the ring pawned by Mickens…. As the district court concluded, "there is nothing in the law or the terms stated on the ticket which would preclude Mickens from giving someone else the right to redeem the ring." We agree and note that Mickens may assign her interest in the pawned item by delivering the pawn ticket to another and transferring the right of redemption…. While Mickens alleges that Colwell took the ticket for the ring without her permission, there is nothing in the record to suggest the Store was aware of this allegation. Rather, the record supports Mickens's and Colwell's past course of dealing with the Store which allowed Colwell to have possession of the ticket and redeem the ring. We conclude the district court did not err by finding no breach of contract or conversion by the Pawn Store and affirm.

Case Questions

1. What facts, according to Mickens, supported her claim that The Pawn Store had committed conversion?
2. Why did Mickens appeal the trial court's judgment to the Court of Appeals?
3. Why did the appellate court reject Mickens's argument and affirm the trial court?

Trespass to Land

Trespass is an intentional tort that protects a lawful owner/occupier's rights to exclusive possession of his or her real property. It occurs when someone makes an unauthorized entry on the land of another. Trespasses to land can occur through either a direct or an indirect entry. A direct entry would occur when one person walks on another person's land without permission. An in-direct entry would occur when one person throws an object on another's land or causes it to flood with water.

The law's protection of the exclusive possession of land is not limited to the surface of real property. It extends below the surface as well as above it. Thus, a public utility that runs a pipe below the surface of a landowner's property without obtaining an easement or consent can commit a trespass. Similarly, overhanging structures, telephone wires, and even shooting across land have been held to be

violations of owners' right to the airspace above their land. Although the extent of such rights is still in the process of determination, the legal trend is for landowners to have rights to as much of the airspace that is immediately above their property as they can effectively occupy or use. Trespass may also occur to personal property, but most interference with the possession of personal property would be considered conversion rather than trespass.

The plaintiff in the following case brought suit in trespass after sustaining serious injury when an overhanging limb fell from the defendant's maple tree onto the plaintiff's driveway and struck the plaintiff.

Ivancic v. Olmstead
488 N.E.2d 72
Court of Appeals of New York
November 26, 1985

Jasen, Judge

At issue on this appeal is whether plaintiff, who seeks to recover for injuries sustained when an overhanging limb from a neighbor's maple tree fell and struck him, established a prima facie case of negligence and whether Trial Term erred, as a matter of law, in refusing to submit to the jury the cause of action sounding in common-law trespass.

Plaintiff was working on his truck in the driveway of his parents' home located in the Village of Fultonville, New York. Since 1970, defendant has owned and lived on the property adjoining to the west. A large maple tree stood on defendant's land near the border with plaintiff's parents' property. Branches from the tree had extended over the adjoining property. During a heavy windstorm on September 26, 1980, an overhanging limb from the tree fell and struck plaintiff, causing him serious injuries. As a result, plaintiff commenced this action, interposing causes of action in negligence and common-law trespass.

At trial, the court declined to charge the jury on the common-law trespass cause of action or on the doctrine of *res ipsa loquitur*, submitting the case solely on the theory of negligence. The jury rendered a verdict in favor of the plaintiff in the sum of $3,500. Both parties moved to set aside the verdict, the plaintiff upon the ground of inadequacy, and the defendant upon the ground that the verdict was against the weight of the evidence. The court ultimately… ordered a new trial on the issues of both liability and damages.

Upon cross appeals, the Appellate Division reversed, on the law, and dismissed the complaint. The court reasoned that no competent evidence was presented upon which it could properly be concluded that defendant had constructive notice of the alleged defective condition of the tree. The Appellate Division did not address the correctness of the trial court's ruling in declining to charge the jury on the common-law trespass cause of action….

Considering first the negligence cause of action, it is established that no liability attaches to a landowner whose tree falls outside of his premises and injures another unless there exists actual or constructive knowledge of the defective condition of the tree….

Inasmuch as plaintiff makes no claim that defendant had actual knowledge of the defective nature of the tree, it is necessary to consider whether there was sufficient competent evidence for a jury to conclude that defendant had constructive notice. We conclude, as did the Appellate Division, that plaintiff offered no competent evidence from which it could be properly found that defendant had constructive notice of the alleged defective condition of the tree. Not one of the witnesses who had observed the tree prior to the fall of the limb testified as to observing so much as a withering or dead leaf, barren branch, discoloration, or any of the indicia of disease which would alert an observer to the possibility that the tree or one of its branches was decayed or defective.

At least as to adjoining landowners, the concept of constructive notice with respect to liability for falling trees is that there is no duty to consistently and constantly check all trees for nonvisible decay. Rather, the manifestation of said decay must be readily observable in order to require a landowner to take reasonable steps to prevent harm…. The testimony of plaintiff's expert provides no evidence from which the jury could conclude that defendant should reasonably have realized that a potentially dangerous condition existed. Plaintiff's expert never saw the tree until the morning of the trial when all that remained of the tree was an eight-foot stump. He surmised from this observation and from some photographs of the tree that water had invaded the tree through a "limb hole" in the tree, thus causing decay and a crack occurring

below. However, the expert did indicate that the limb hole was about eight feet high and located in the crotch of the tree which would have made it difficult, if not impossible, to see upon reasonable inspection. Although there may have been evidence that would have alerted an expert, upon close observation, that the tree was diseased, there is no evidence that would put a reasonable landowner on notice of any defective condition of the tree. Thus, the fact that defendant landowner testified that she did not inspect the tree for over 10 years is irrelevant. On the evidence presented, even if she were to have inspected the tree, there were no indicia of decay or disease to put her on notice of a defective condition so as to trigger her duty as a landowner to take reasonable steps to prevent the potential harm.

Since the evidence adduced at trial failed to set forth any reasonable basis upon which notice of the tree's defective condition could be imputed to defendant ... we agree with the view of the Appellate Division that plaintiff failed to establish a prima facie case of negligence.

Turning to plaintiff's claim of error by the trial court in declining to submit to the jury the cause of action sounding in common-law trespass, we conclude that there was no error. The scope of the common-law tort has been delineated in *Phillips v. Sun Oil Co.*, ... 121 N.E.2d 249, wherein this court held: "while the trespasser, to be liable, need not intend or expect the damaging consequences of his intrusion, he must intend the act which amounts to or produces the unlawful invasion, and the intrusion must at least be the immediate or inevitable consequence of what he willfully does, or which he does so negligently as to amount to willfulness." In this case, there is evidence that defendant did not plant the tree, and the mere fact that defendant allowed what appeared to be a healthy tree to grow naturally and cross over into plaintiff's parents' property airspace, cannot be viewed as an intentional act so as to constitute trespass. ...

Accordingly, the order of the Appellate Division should be affirmed, with costs.

Case Questions

1. The trial court and the appellate court concluded that the plaintiff was not entitled to an instruction with respect to common law trespass. Why was the instruction refused?
2. Why was the plaintiff's negligence claim rejected?
3. Why should a plaintiff be entitled to recover for a trespass under circumstances where no actual harm has been shown?

Malicious Prosecution

Malicious prosecution is an intentional tort that provides targeted individuals with civil remedies against persons who have filed groundless complaints against the target that result in the target's criminal prosecution. Many states have extended the definition of this tort to permit such suits against individuals who initiate groundless civil actions. The plaintiff in a malicious prosecution case must prove that the defendant maliciously and without probable cause instituted a criminal or civil complaint against the target which resulted in a prosecution or lawsuit, which then resulted in a decision favorable to the target. The target must also establish that he or she suffered legal injury as a result of the groundless charges. Merely threatening to bring a lawsuit against the target is not enough to result in civil liability for malicious prosecution.

In a criminal case, the prosecutor is absolutely immune from malicious prosecution suits. In addition, plea bargaining does not suffice to meet the favorable decision criterion.

False Imprisonment

False imprisonment is an intentional tort that provides targeted individuals with civil remedies against those who unlawfully deprive them of their freedom of movement. Plaintiffs must prove that they were intentionally and unlawfully detained against their will for an unreasonable period of time. The detention need not be in a

jail. It may also take place in a mental institution, hospital, restaurant, hotel, store, car, etc. Most courts have held that plaintiffs must be aware of their confinement while suffering it, or if not, then they must suffer some type of actual harm.

The plaintiffs in the following case claimed that they were the victims of false imprisonment by Wal-Mart security personnel.

Kim Gallegly Wesson v. Wal-Mart Stores East, L.P.
No. 2080959.
Court of Civil Appeals of Alabama.
December 4, 2009.

Thomas, Judge

On July 13, 2004, at about 9:30 a.m., Kim Gallegly Wesson and her four children went to the Pell City Wal-Mart discount department store, operated by Wal-Mart Stores East, L.P. ("Wal-Mart"), to have the tires on Wesson's automobile rotated and balanced. Wesson left her automobile at the tire and lube express department ("TLE department") for the service to be performed. Wesson had assumed that the service would take 20–30 minutes, so she and her children walked around the Wal-Mart store awaiting the completion of the service to her automobile. When the automobile was not ready in about 30 minutes, Wesson decided to take her children, who were hungry and requesting breakfast, to the McDonald's fast-food restaurant located inside the store. After finishing breakfast, Wesson checked again to see if her automobile service had been completed; it had not. Wesson and her children proceeded to the pharmacy department of the store, where Wilson dropped off one of her two prescriptions for refilling at the pharmacy counter. Wesson and the children then went to the electronics department of the store, where Wesson purchased additional minutes for her prepaid cellular telephone. When a third check on the status of her automobile yielded further waiting, Wesson dropped off her second prescription at the pharmacy counter for refilling. Wesson then decided to shop for groceries for the family's trip to Florida.

Once Wesson had completed her grocery shopping, she returned to the pharmacy department to retrieve her prescriptions. By this time, the pharmacy associate, Jennifer Vincent, had notified Kyle Jack, the in-store loss prevention associate, that Wesson would be picking up prescriptions from the pharmacy. Because Wal-Mart's policy allows customers to pay for most prescriptions at any check-out counter, the store has a computer system that keeps track of the time and place of the payment to ensure that all prescriptions picked up from the pharmacy department are ultimately paid for. Wesson's name had appeared on a list of persons who had not paid for prescriptions picked up from the pharmacy department on at least two other occasions, resulting in her placement on a "watch list" of sorts.

Once Wesson arrived at the pharmacy department to retrieve her prescriptions, Wesson said that an announcement came over the loudspeaker to inform her that her automobile service was completed. Wesson informed the pharmacy associate that she would pay for her prescriptions when she checked out her groceries and paid for her car service. Vincent gave Wesson both of her prescriptions; Wesson owed money on both prescriptions. Wesson and her children left the pharmacy department and returned to the TLE department; they were followed by Jack. Once she reached the check-out counter at the TLE department, Wesson proceeded to place her grocery items on the counter and to check out. Wesson did not, however, place her prescriptions on the counter to check out. Once she had paid for her groceries and car service, Wesson and her children left the store.

Tara Swain, the associate who checked out Wesson's groceries at the TLE department, testified that she had asked Wesson whether she wanted to pay for her prescriptions. Swain said that Wesson indicated that she had paid for the prescriptions already. Jack testified that he had seen Swain motion toward the child-seat portion of the cart, in which the prescriptions, Wesson's purse, and some of the children's dolls or toys sat, as she completed checking out Wesson's grocery items. Although he said that he did not hear Swain's exact question or Wesson's first answer to that question, Jack said that he moved closer to Wesson and heard her refer to the items in the child-seat portion of the cart as being her personal items. Jack said that he saw Wesson leave the store without paying for the prescriptions, so he followed her outside to apprehend her.

Once she reached the parking lot, Wesson and her children began to place her purchases into the automobile. Jack and another associate, Nathan Nichols, approached Wesson while she unloaded her groceries. Jack addressed Wesson by name and, according to Wesson, said: "Excuse me, but I don't think you paid for those prescriptions." Wesson said that she admitted that she had not, in fact, paid for the prescriptions.

According to Wesson, Jack told her that she needed to come back inside to fill out some forms and that she would be allowed to pay for the prescriptions. Wesson and her children returned to the store with Jack and the other associate. Once inside the store, Jack led Wesson and her children to the loss-prevention office in the front of the store, where, according to Wesson, Jack locked the door to the office. Wesson said that Jack asked for her driver's license and Social Security number and that he gave her several papers to sign. Wesson admitted that she did not read the papers that Jack gave her to sign other than to notice that the Wal-Mart logo appeared on them. Wesson said that, at that time, she still believed that she was simply going to have to pay for her prescriptions.

However, according to Wesson, once Jack secured her signature on the forms, he raised his voice and told her that she would be trespassing if she ever came back into a Wal-Mart store. She said that Jack accused her of stealing from the store "all the time" and told her, in front of her children, that she would be going to jail. Wesson said that Jack informed her that he had notified the police. Wesson said that she tried to reason with Jack, telling him that she had simply forgotten to pay and that she just wanted to settle the matter by paying for her prescriptions. Wesson further testified that Jack had told her that it did not matter to him whether she was guilty of theft under the law but that his job was loss prevention and that her leaving without paying for the items was a loss to Wal-Mart. Three Pell City police officers responded to Jack's earlier telephone call; they took Wesson into custody when they arrived.

Jack secured a warrant for theft of property in the third degree against Wesson. Wal-Mart then prosecuted Wesson in the municipal court. After a trial, the action was "dismissed by agreement," according to a notation on the case-action-summary sheet of the municipal-court criminal case. That document also indicates that Wesson paid court costs.

Wesson sued Wal-Mart and Jack, asserting claims of malicious prosecution and false imprisonment arising from the events of July 13, 2004, and the resulting criminal prosecution. Wal-Mart and Jack moved for a summary judgment, which Wesson opposed. As exhibits to their motion for a summary judgment, Wal-Mart and Jack submitted Wesson's deposition, Jack's deposition, the trial transcript of the criminal prosecution of Wesson, and the case-action-summary sheet of the municipal-court criminal action. Wal-Mart and Jack argued in their summary-judgment motion that Wesson could not establish the elements of a malicious-prosecution claim or a false-imprisonment claim. The trial court entered a summary judgment in favor of Wal-Mart and Jack. After her postjudgment motion was denied, Wesson appealed to the Alabama Supreme Court, which transferred the appeal to this court, pursuant to Ala. Code 1975, § 12-2-7(6).

On appeal, Wesson challenges the summary judgment in favor of Wal-Mart and Jack because, she says, genuine issues of material fact preclude the entry of a summary judgment. She specifically argues that she can establish the elements of her … false-imprisonment claim. We disagree….

Turning now to the false-imprisonment claim, we note that…. [p]ursuant to Ala. Code 1975, § 15-10-14(a) and (c), both a merchant and its employee are immune from claims of false imprisonment instituted by a person detained on the suspicion of shoplifting, provided that the merchant or its employee had probable cause for believing that the person detained was attempting to shoplift. Those sections provide:

> "(a) A peace officer, a merchant or a merchant's employee who has probable cause for believing that goods held for sale by the merchant have been unlawfully taken by a person and that he can recover them by taking the person into custody may, for the purpose of attempting to effect such recovery, take the person into custody and detain him in a reasonable manner for a reasonable length of time. Such taking into custody and detention by a peace officer, merchant or merchant's employee shall not render such police officer, merchant or merchant's employee criminally or civilly liable for false arrest, false imprisonment or unlawful detention."…
>
> "(c) A merchant or a merchant's employee who causes such arrest as provided for in subsection (a) of this section of a person for larceny of goods held for sale shall not be criminally or civilly liable for false arrest or false imprisonment where the merchant or merchant's employee has probable cause for believing that the person arrested committed larceny of goods held for sale."…

… Jack had probable cause to suspect Wesson had purposefully failed to pay for her prescriptions based

on the information he had available to him at the time of Wesson's detention. Wesson admits that she left the Wal-Mart store without paying for her prescriptions. Jack had information compiled by Wal-Mart indicating that Wesson had left the store without paying for her prescriptions on at least two other occasions, and Jack observed Wesson leaving the store on July 13, 2004, after having two opportunities to pay for her prescriptions. Because there existed probable cause to detain Wesson, Wal-Mart and Jack are immune from Wesson's false-imprisonment claim.

Because we have determined that Wesson failed to establish that Wal-Mart and Jack did not have probable cause to institute criminal proceedings against Wesson for theft of the prescriptions, we affirm the summary judgment in Wal-Mart's and Jack's favor on the malicious-prosecution claim. Likewise, because of the existence of probable cause for Wesson's detention, we affirm the summary judgment in favor of Wal-Mart and Jack on the false-imprisonment claim because, under § 15-10-14 (a) and (c), they are immune from that claim.

AFFIRMED.

Case Questions

1. Explain your position as to whether you believe that Wal-Mart employees had probable cause to detain Wesson for shoplifting given that the criminal case against her was dismissed.
2. Although the immunity statute protects merchants from shoplifters, does it make any allowance for the detention of customers? Should forgetful elders, or shoppers who are absent minded or confused, parents preoccupied with keeping track of their children, or people who for other reasons are not adequately focused on the legalities of their conduct be subject to detention by store security to the same extent as professional shoplifters ?

Defamation

Defamation is an intentional tort that is based on the policy that people should be able to enjoy their good names. This tort provides targeted individuals with remedies against persons who intentionally make malicious statements that injure the target's character, fame, or reputation. A publication is defamatory if it tends to lower a person in others' esteem. Language that is merely annoying cannot be defamatory. Generally, the truth of the statement is a complete defense in a suit for defamation because true statements are not considered to be malicious.

Libel and slander are both forms of defamation. **Libel** is defamation expressed by print, writing, signs, pictures, and in the absence of statutory provisions to the contrary, radio and television broadcasts. **Slander** involves spoken words that have been heard by someone other than the target.

The law treats some defamatory expressions as slanderous per se. Examples of **slander per se** include falsely accusing another of committing a crime of moral turpitude (rape, murder, or selling narcotics); false accusations that another person has contracted a morally offensive communicative disease (such as leprosy, syphilis, gonorrhea, or AIDS), or defamatory expressions that interfere with another person's trade, business, or profession (saying that a banker is dishonest or that a doctor is a "quack"). In defamation cases, the law requires that special damages such as loss of job, loss of customers, or loss of credit be proven before the plaintiff can recover general damages, such as loss of reputation.[5] However, a plaintiff who proves slander per se is not required to prove special damages because such expressions are almost certain to harm the plaintiff's reputation and produce economic loss. Not having to prove special damages is very helpful to the plaintiff because they are difficult to prove. The defendant can usually lessen the amount of damages awarded by publishing a retraction.

Riddle v. Golden Isles Broadcasting, LLC

666 S.E.2d 75
Court of Appeals of Georgia
July 2, 2008

Ellington, Judge

A Glynn County jury found Golden Isles Broadcasting, LLC, liable to Travis S. Riddle for defamatory statements made in a radio broadcast and awarded him $100,000 in damages. Following the grant of a new trial as to damages only, a second jury awarded Riddle $25,000. Riddle appeals….

Riddle contends the trial court abused its discretion in finding that the first jury's award of $100,000 for slander per se was contrary to the preponderance of the evidence adduced in that trial and, therefore, erred in granting a new trial on the issue of damages….

The record reveals that, following a hearing on Golden Isles's motion for new trial, the trial court stated that "I feel like the amount [of the verdict] is excessive, so I am going to—unless [Riddle] agrees to reduce it to sixty thousand dollars, I'm going to grant a new trial." The judge did not explain his basis for concluding that the award was excessive, noting only that he had "never seen or heard about a slander case in any of the jurisdictions where [he] was the trial judge." Riddle did not agree to remit $40,000 of the damages awarded; consequently, the court issued an order finding the award of damages "excessive in that it was inconsistent with the preponderance of the evidence," and granted a new trial "as to the issue of damages."…

As the Supreme Court of Georgia has explained, "an excessive or inadequate verdict is a mistake of fact rather than of law and addresses itself to the discretion of the trial judge who, like the jury, saw the witnesses and heard the testimony."… Consequently, this Court is ordinarily loath to interfere and "[t]he trial court's decision on a motion for a new trial [pursuant to this Code section] will be upheld on appeal unless it was an abuse of discretion."…

In the first trial, the jury found Golden Isles Broadcasting liable to Riddle, a private person, for slander … and awarded him $100,000 in damages. Riddle produced six witnesses who testified to having heard a Brunswick, Georgia … WSEG 104.1 radio personality report that Riddle had either killed the mother of his child, that the police were looking for him, or that he had been charged with murder. Jodi Howard, the woman Riddle was alleged to have murdered, was in fact alive and testified at both trials.

Two of Riddle's witnesses testified that while they personally did not believe the broadcast, Riddle's good reputation in the community suffered as a consequence. Riddle, a Brunswick-area rap musician, testified that he had established a positive image in the Brunswick community and with his growing fan base, and that his music did not condone materialism, violence, drug abuse, or the disparaging of women. In fact, in his hit song "Daddy's Little Boy," which WSEG 104.1 played as often as 42 times per week, Riddle presented himself as a positive role model for fathers. Witnesses testified that after the broadcast, radio stations (including Brunswick, Hinesville, and Savannah stations) stopped playing Riddle's music. The evidence showed that Riddle had invested heavily in his nascent music career, and he was beginning to reap the rewards—he had filled local clubs, had successfully promoted his first CD, had appeared on MTV, had launched two commercials on cable television, had moved to Atlanta to join the larger music scene, had begun building a regional fan base, and had been offered a $300,000 distribution deal by a recruiter with Universal Records—but after the Golden Isles broadcast, Riddle's career foundered, the rewards disappeared, and he had to "start over from scratch."

Golden Isles presented the testimony of radio personality Antonio Warrick, who denied making the slanderous statements, and of Golden Isles's business manager, who established the dates and times Warrick was on the air. Golden Isles, through the cross-examination of Riddle's witnesses, attempted to show that he had earned very little as a musician, that he had no written documentation to support his lost income claims, and that he made his living primarily as a part-time banquet server. Golden Isles attempted to demonstrate that Riddle's reputation did not suffer at all, and that Riddle's career suffered not as a consequence of its slander but because Riddle moved away from his Brunswick area fan base and because his one hit song had run its course.

Based on this evidence, the jury found Golden Isles liable for Warrick's slanderous remarks pursuant to OCGA § 51-5-10(a), pertaining to liability for defamatory statements in visual or sound broadcasts. Under this "defamacast" statute, when a slanderous statement is uttered "in or as a part of a visual or sound broadcast, the complaining party shall be

allowed only such actual, consequential, or punitive damages as have been alleged and proved."… But as we have explained, "[t]he expression 'actual damages' is not necessarily limited to pecuniary loss, or loss of ability to earn money. Wounding a man's feelings is as much actual damage as breaking his limbs."… "Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering." … "Those were the damages sought by [Riddle] and they were n[ot] … forbidden by … Georgia law."…

And where, as here, the words uttered constituted slander per se by imputing the commission of a crime to another, the law infers an injury to the reputation without proof of special damages…. Such an injury falls within the category of general damages, "those which the law presumes to flow from any tortious act; they may be recovered without proof of any amount."… Therefore, in this case, the "measure or criterion of the general damages which the law infers as flowing from a slanderous statement which is actionable per se is the enlightened consciences of an impartial jury."… The court charged the jury on this law.

We have reviewed the transcript of the first trial, and we cannot say that the jury's award of $100,000 in general damages for slander per se was clearly so excessive as to be inconsistent with the preponderance of the evidence presented, as required by OCGA § 51-12-12(a) and (b). The record does not support an inference that Riddle had a bad reputation such that the imputation that he was a murderer would be less damaging to him than to any other citizen. In fact, that he was building a musical career based on his reputation as a positive role model is some evidence that the slander was especially damaging to his reputation. And although Golden Isles presented some evidence that Riddle's career may have suffered as a result of his own choices or the vagaries of the music industry rather than as a result of the slander broadcast to the heart of his fan base, we cannot say that Golden Isles's damages evidence outweighed that presented by Riddle. Therefore we must conclude that, under these circumstances, the trial court was not authorized to interfere with the jury's verdict and erred in granting a new trial as to damages under OCGA § 51-12-12(a) and (b)….

Judgment reversed.

Case Questions

1. Why were the radio personality's on-air comments about Riddle slanderous per se?
2. According to the appellate court, what types of injury can be considered to be "actual damages" in a slander case?

INTERNET TIP

Readers should consider reading the thought-provoking 2009 slander case of *Williams v. Tharp* on the textbook's website. The case's two plaintiffs were on their way back after an uneventful trip to a neighborhood pizza shop, where they had purchased a carryout pizza. They were utterly unprepared for what was about to transpire. Upon arriving at their intended destination, the home of one plaintiff, the two were apprehended at gunpoint by police officers. With their neighbors and family members looking on, the plaintiffs were ordered to get down on their knees, handcuffed, and detained for a prolonged period of time. They were utterly unaware of what was going on and why. It turned out that one of the pizza store employees, a delivery driver, who had been present when the pizza was purchased, thought that he had seen one of the plaintiffs with a handgun in the shop. This information was relayed to police and ultimately was the reason the police intervened and apprehended the plaintiffs. It turned out that the pizza delivery driver had been mistaken about the handgun. The plaintiffs sued the pizza shop and delivery driver for false imprisonment and defamation (slander per se). The case was ultimately decided by the state supreme court, which ruled 3–2 against the plaintiffs. Both of the judges who voted in favor of the plaintiffs wrote very interesting dissenting opinions in this case. Excerpts from the majority opinion and both dissents are included with the online materials for chapter XI on the textbook's website.

Interference with Contract Relations

The underlying policy reason behind the intentional tort called **interference with contract relations** is the desire to strengthen our economy by promoting the stability of contracts. Strengthening the economy is important to the welfare of Americans both collectively and individually.

The intentional tort of interference with contractual relations takes place when a noncontracting party or third person wrongfully interferes with the contract relations between two or more contracting parties. (See Chapter X for a discussion of contracts.) The tort of interference includes all intentional invasions of contract relations, including any act injuring a person or destroying property that interferes with the performance of a contract. For example, this tort occurs when someone wrongfully prevents an employee from working for an employer or prevents a tenant from paying rent to the landlord.

In order to maintain an action against a third person for interference, the plaintiff must prove that the defendant maliciously and substantially interfered with the performance of a valid and enforceable contract. The motive or purpose of the interfering party is an important factor in determining liability.

Infliction of Mental Distress

The intentional tort called **infliction of mental distress** evolved out of the need to recognize that every person has a right to not be subjected intentionally and recklessly to severe emotional distress caused by some other person's outrageous conduct. A person has a cause of action for infliction of mental distress when the conduct of the defendant is serious in nature and causes anguish in the plaintiff's mind. Because it is difficult to prove mental anguish and to place a dollar amount on that injury, early cases allowed recovery for mental distress only when it was accompanied by some other tort, such as assault, battery, or false imprisonment. Today, the infliction of mental distress is generally considered to be a stand-alone intentional tort.

Recovery for mental distress is allowed only in situations involving extreme misconduct, for example, telling a wife the made-up story that her husband shot himself in the head. Mental worry, distress, grief, and mortification are elements of mental suffering from which an injured person can recover. Recovery is not available for mere annoyance, disappointment, or hurt feelings. For example, the mere disappointment of a grandfather because his grandchildren were prevented from visiting him on account of delay in the transmission of a fax message would not amount to mental distress.

Invasion of Privacy

The law recognizes one's right to be free from unwarranted publicity and, in general, one's right to be left alone. If one person invades the right of another to withhold self and property from public scrutiny, the invading party can be held liable in tort for invasion of the right of privacy. A suit for **invasion of privacy** may involve unwarranted publicity that places the plaintiff in a false light, intrudes into the plaintiff's private life, discloses embarrassing private facts, or uses the plaintiff's name or likeness for the defendant's gain. Generally, the motives of the defendant are unimportant.

The standard used to measure any type of invasion of privacy is that the effect must be highly offensive to a reasonable person. For example, if a frustrated creditor puts up a notice in a store window stating that a named debtor owes money, this is an invasion of the debtor's privacy.

Technological developments in information storage and communications have subjected the intimacies of everyone's private lives to exploitation. The law protects individuals against this type of encroachment. A person who has become a public figure has less protection, however, because society has a right to information of legitimate public interest.

Although invasion of privacy and defamation are similar, they are distinct intentional torts, and both may be included in a plaintiff's complaint. The difference between a right of privacy and a right to freedom from defamation is that the former is concerned with one's peace of mind, whereas the latter is concerned with one's reputation or

character. Truth is generally not a defense for invasion of privacy.

INTERNET TIP

Readers can read on the textbook's website the case of *Elli Lake v. Wal-Mart Stores, Inc.* 582 N.W.2d 231. This is a 1998 case in which the Minnesota Supreme Court explains why it decided to recognize only three of the four types of activities that commonly are included in the tort of invasion of privacy.

NEGLIGENCE

The law recognizes a duty or obligation to conform to a certain standard of conduct for the protection of others against unreasonable risk of harm. If the person fails to conform to the required standard, and that failure causes damage or loss, the injured party has a cause of action for **negligence**. Negligence is the unintentional failure to live up to the community's ideal of reasonable care; it is not based on moral fault. The fact that defendants may have suffered losses of their own through their negligent acts does not render them any less liable for plaintiffs' injuries.

An infinite variety of possible situations makes the determination of an exact set of rules for negligent conduct impossible. Conduct that might be considered prudent in one situation may be deemed negligent in another, depending on such factors as the person's physical attributes, age, and knowledge, the person to whom the duty was owed, and the situation at the time. If the defendant could not reasonably foresee any injury as the result of a certain conduct, there is no negligence and no liability.

The elements necessary for a cause of action for the tort of negligence are (1) a duty or standard of care recognized by law, (2) a breach of the duty or failure to exercise the requisite care, and (3) the occurrence of harm proximately caused by the breach of duty. No cause of action in negligence is recognized if any of these elements are absent from the proof.

The plaintiff has the burden of proving, through the presentation of evidence, that the defendant was negligent. Unless the evidence is such that it can reasonably lead to but one conclusion, negligence is primarily a question of fact for the jury. A jury must decide whether the defendant acted as a reasonably prudent person would have under the circumstances—that is, a person having the same information, experience, physique, and professional skill. This standard makes no allowance for a person less intelligent than average.

Children are not held to the same standard as adults. A child must conform merely to the conduct of a reasonable person of like age, intelligence, and experience under like circumstances. This standard is subjective and holds a less intelligent child to what a similar child would do.

Malpractice

The term **malpractice** is a nonlegal term for negligence. Professional negligence takes different forms in different fields. Attorney negligence would include drafting a will but failing to see that it is properly attested; failing to file an answer in a timely manner on behalf of a client, with the result that the plaintiff wins by default; and failing to file suit prior to the running of the statute of limitation, thus barring the client's claim. Accountant negligence would occur if a client paid for an audit but the accountant failed to discover that the client's employees were engaging in embezzlement, exposing the client to postaudit losses that could have been prevented. The case of *Macomber v. Dillman* (Chapter VII) is an example of medical malpractice. In that case, a surgeon improperly performed a tubal ligation and the plaintiff subsequently gave birth to a child.

Plaintiffs in malpractice cases allege that the professional specifically breached a contractual duty (if the suit is in contract) or that the professional breached a duty of care imposed by law (if the suit is in tort). Professionals have a higher degree of knowledge, skills, or experience than a reasonable person and are required to use that capacity. They are generally required to act as would a reasonably skilled, prudent, competent, and experienced member of the profession in good standing within that state. Negligence in this

area usually may be shown only by the use of expert testimony.

Duty of Care

There can be no actionable negligence when there is no legal duty. Common law duty is found by courts when the kind of relationship that exists between the parties to a dispute requires the legal recognition of a duty of care. Legislative acts may also prescribe standards of conduct required of a reasonable person. It may be argued that a reasonable person would obey statutes such as traffic laws, ordinances, and regulations of administrative bodies.

In the case of legislative acts, plaintiffs must establish that they are within the limited class of individuals intended to be protected by the statute. In addition, the harm suffered must be of the kind that the statute was intended to prevent. Often the class of people intended to be protected may be very broad. For example, regulations requiring the labeling of certain poisons are for the protection of anyone who may come in contact with the bottle. Many traffic laws are meant to protect other people on the highway. Once it is decided that a statute is applicable, most courts hold that an unexcused violation is conclusive as to the issue of negligence. In other words, it is **negligence per se**, and the issue of negligence does not go to the jury. However, some courts hold that the violation of such a statute is only evidence of negligence, which the jury may accept or reject as it sees fit.

Common law provides that one should guard against that which a reasonably prudent person would anticipate as likely to injure another. Damages for an injury are not recoverable if it was not foreseen or could not have been foreseen or anticipated. It is not necessary that one anticipate the precise injury sustained, however.

Courts do not ignore the common practices of society in determining the duty or whether due care was exercised in a particular situation. The scope of the duty of care that a person owes depends on the relationship of the parties. For example, those who lack mental capacity, the young, and the inexperienced are entitled to a degree of care proportionate to their incapacity to care for themselves.

As a general rule, the law does not impose the duty to aid or protect another. However, a duty *is* imposed where there is a special relationship between the parties—for example, parents must go to the aid of their children, and employers must render protection to their employees. In addition, if one puts another in peril, that person must render aid. A person can also assume a duty through contract where the duty would not otherwise exist. Although persons seeing another in distress have no obligation to be Good Samaritans, if they choose to do so, they incur the duty of exercising ordinary care. Some states have changed this common law duty by passing Good Samaritan statutes that state that those administering emergency care are liable only if the acts performed constitute willful or wanton misconduct.

In the next case, a patient in a state psychiatric hospital successfully sued the hospital for negligence. The patient claimed that the hospital should have prevented her from injuring herself as a result of falling from a third floor window at the hospital.

Mississippi Department of Mental Health v. Julia R. Hall
2004-CA-01522-SCT
Supreme Court of Mississippi
August 24, 2006

Waller, Presiding Justice, for the Court
Julia Renee Hall filed a complaint against the East Mississippi State Hospital ... alleging that, while she was a patient at East Mississippi, she sustained serious injuries after falling from a third-story window. After conducting a bench trial pursuant to the Mississippi Tort Claims Act ... the Lauderdale County Circuit Court entered a judgment against East Mississippi in the amount of $250,000....

Facts

Julia Renee Hall, who was 25 years old at the time of the accident, has been institutionalized at different mental health facilities since she was 13 years old. Her latest admitting diagnosis was schizophrenia, disorganized type, borderline; and borderline personality disorder. Her discharge diagnosis from her last stay at East Mississippi … was Axis One: schizoaffective disorder, bipolar type; alcohol dependency, in remission; amphetamine abuse, in remission; cannabis abuse, in remission; Axis Two: borderline personality disorder. She has been civilly committed to East Mississippi on four different occasions.

On June 4, 2001, Hall became convinced that she would be transferred to the "back building," a facility for chronically ill patients. Hall and other patients believed that the back building was an area where violence and abuse run rampant among the patients and where there was little to no hope for recovery…. Angela Eason, a staff member, filed the following report about what occurred the afternoon of June 4:

> Pam Johnson and I took the patients out for a smoke break at 5:00 o'clock, 1700…. When these patients finished smoking, we returned to the unit on the elevator where the patients started talking about the back building and asking why would a patient get sent to those buildings. I explained it's usually they can't be stabilized on medications or patients that just keep on cycling through the system time and time again.
>
> Julia Hall then laughed and said, You mean like me? I then said, I haven't heard your name come up about going to the back building, but you do keep moving up and down between second (a less restrictive ward) and third and you need to get it together. You are too young to be institutionalized all your life.

When they returned to the third-floor ward, Hall was "hysterical" and "crying" because she thought that the staff was going to transfer her to the back building. Patients Amanda Neal and Regina O'Bryant told Hall that they had a plan in place to escape and coaxed Hall to join them. Neal and O'Bryant's plan was to escape through a third-story window in the all-purpose conference room which adjoined the nurses' station. The door to the room was not locked, and there was no security screen on the window. The window was inoperable, but the women somehow removed a window pane. The group took sheets from a linen closet on the floor which was also unlocked. They entered and exited the conference room several times before Hall actually went out the window and began climbing down a "rope" created by tying the sheets together. Hall lost her footing and fell to the ground. She suffered multiple fractures of the right leg, necessitating eight surgeries so far. Her right foot and heel have become infected several times due to soft tissue damage. She has undergone bone and skin grafts. At the time of the hearing, her right foot and lower leg were swollen and appeared to be deformed, and she noticeably limped. The circuit judge found that Hall would "never be able to hold gainful employment of any consequence for the rest of her life," and that "she has a future of probable repeated and long-term mental health treatment in institutions."…

The circuit judge found that $1,000,000 for actual and compensatory damages … was appropriate. He allocated fault as follows: East Mississippi, 50%; Hall, 25%; Neal, 12-1/2%; and O'Bryant, 12-1/2%. Then, applying the cap on compensatory damages as set out in Miss. Code Ann. § 11-46-15 … the circuit judge entered a judgment against East Mississippi in the amount of $250,000. East Mississippi appealed.

Discussion

"A circuit court judge sitting without a jury is accorded the same deference with regard to his findings as a chancellor, and his findings are safe on appeal where they are supported by substantial, credible, and reasonable evidence." …

WHETHER EAST MISSISSIPPI HAD A DUTY TO PREVENT HALL FROM HARMING HERSELF BY ATTEMPTING TO ESCAPE THROUGH THE THIRD STORY WINDOW.

To prevail on a negligence claim, a plaintiff must establish by a preponderance of the evidence each of the elements of negligence: duty, breach, causation and injury…. The cause of Hall's injuries was her fall from the third-story window, and the parties stipulate to Hall's injuries. Therefore, at issue is whether East Mississippi had a duty to prevent Hall from harming herself by attempting to escape through the third-story window and whether that duty was breached.

Standard of Care for Patients with Mental Impairments

A state facility providing mental health care is statutorily mandated to provide "proper care and treatment, best adapted, according to contemporary professional standards." … Neither the Legislature nor Mississippi courts have defined "contemporary professional standards," but, in dicta, this Court, speaking through the learned Presiding Justice Banks, commented, "[p]ersons deemed incapable of making rational

judgments, such that they must be committed, are not to be protected by a lesser standard than reasonable care under the circumstances." … In Texas, "[a] hospital is under a duty to exercise reasonable care to safeguard the patient from any known or reasonably apprehensible danger from herself and to exercise such reasonable care for her safety as her mental and physical condition, if known, may require."…

The Texas standard of care for the duty a hospital owes to a patient is similar to what we enunciated in *Carrington*. It is flexible in that the duty owed to patients may increase depending on the physical or mental condition of the patient. It can therefore be applied to different fact situations. We therefore adopt the Texas standard of care.

Duties Owed to Hall

Wood Hiatt, M.D., a board-certified psychiatrist … testified that East Mississippi had the duty to protect patients from the consequences of their own dangerous behavior, to lock doors to rooms where a patient could be present without supervision, and to put safety screens on windows in rooms where a patient could be present without supervision. Dr. Hiatt also testified that East Mississippi staff was required to know the location of each patient and the actions in which each patient was engaged. Hall had attempted suicide in March of 2001, and she should have been under "special observation." The May 15, 2001, progress notes concerning Hall state that Hall was a "danger to herself and others." Hall became argumentative with a staff member on May 31 and was placed on the third-floor ward, which was a locked unit.

Dr. Hiatt further testified that East Mississippi breached the above-referenced duties by allowing third-floor ward patients to freely enter and leave an unlocked room without supervision, to have access to the linen closet, and to be without supervision long enough to take sheets out of the linen closet, make a rope out of the sheets, pry the window open in the conference room, take off their pajamas and put on regular clothes, attach the rope to a table in the conference room, and climb out the window. What astounds the Court is that the three women were coming in and out of the supposedly off-limits conference room which was right next to the nurse's station. Also, each patient was to be checked every thirty minutes. Whoever staffed the nurse's station or monitored the patients during these events should have become suspicious about the women's activities. Someone should have noticed that the three women had pajamas on and then they changed into regular clothes. Hall testified that most of the nurse's aides were "watching television."

We find, as the circuit court did, based on Dr. Hiatt's testimony, East Mississippi breached the duties of care owed to Hall.

Foreseeability

East Mississippi contends that it committed no negligent acts because Hall's injury was unforeseeable….

In response, Hall points out that … the fact that an injury rarely occurs, or has never happened, is insufficient to protect the actor from a finding of negligence.

The evidence adduced at trial supports the circuit judge's finding that Hall's escape attempt and injuries were foreseeable. Patricia Dudley, M.D., an East Mississippi staff psychiatrist, testified that it is common knowledge that patients will try to climb out windows; a staff nurse testified that any rooms where patients could be present without supervision should have security screens on the windows (all of the patients' rooms had security screens); and another staff psychiatrist testified that the staff was aware that patients would try to leave the third floor ward. Finally, Dr. Hiatt testified that mental hospital staff should know that psychiatric patients will attempt to escape.

The circuit court found that East Mississippi had a duty to keep unsupervised rooms locked, to place safety screens on windows in unsupervised areas, and to monitor patients' activities, that East Mississippi breached these duties on the night in question, and that the injuries suffered by Hall were reasonably foreseeable. We find that the circuit court's findings were supported by substantial and credible evidence….

Conclusion

For these reasons, we affirm the circuit court's judgment in favor of Julia Renee Hall.

AFFIRMED…

Case Questions

1. Why did the Mississippi Supreme Court "adopt" the Texas duty of care for use in Mississippi?
2. Why did Mississippi's highest court determine that Hall's injury was foreseeable?

3. Why did the hospital, which was found by the trial court to be 50 percent responsible for Hall's injuries, end up only having to pay $250,000?

This case involves an alleged violation of the rule of general application in misfeasance cases that one has a legal duty to exercise ordinary care to prevent others from being injured as a result of one's conduct. How would Immanuel Kant probably react to this legal duty of ordinary care?

Liability Rules for Specialized Activities

The ordinary principles of negligence do not govern occupiers' liability to those entering their premises. For example, the duty the land occupier or possessor owes to a trespasser is less than the duty the possessor owes to the general public under the ordinary principles of negligence. The special rules regarding liability of the possessor of land stem from the English tradition of high regard for land and from the dominance and prestige of the English landowning class. In the eighteenth and nineteenth centuries, owners of land were considered sovereigns within their own boundaries and were privileged to do what they pleased within their domains. The unrestricted use of land was favored over human welfare. Visitors were classified as **invitees, licensees,** or **trespassers**. Although English law has since rejected these distinctions, they remain part of the U.S. common law.

An invitee is either a **public invitee** or a **business visitor**. A public invitee is a member of the public who enters land for the purpose for which the land is held open to the public, for example, a customer who enters a store. A business visitor enters land for a purpose directly or indirectly connected with business dealings with the possessor of the land. Thus, plumbers, electricians, trash collectors, and letter carriers are classified as business invites. Invites are given the greatest protection by the courts. A landowner owes the invitee a duty to exercise ordinary care under the usual principles of negligence liability, and must exercise reasonable care to make the premises safe. This preferred status applies only to the area of invitation.

One who enters or remains on land by virtue of the possessor's implied or express consent is a licensee, for example, door-to-door salespeople or social guests. In addition, police officers and firefighters are usually classified as licensees because they often come on premises unexpectedly and it would not be fair to hold possessors to the standard of care applicable to invites. Licensees must ordinarily accept the premises as they find them and look out for their own welfare. This is based on the principle that land occupiers cannot be expected to exercise a higher degree of care for licensees than they would for themselves. A possessor of land generally owes the licensee only the duty to refrain from willful or wanton misconduct; however, the courts have developed some exceptions to this rule. With respect to active operations, for example, the possessor of land is subject to liability to licensees for injury caused by failure to exercise reasonable care for their safety. What might constitute activities dangerous to licensees depends on the court's interpretation, and knowledge of the nature of the activities normally precludes recovery by the licensee. Generally, the possessor of land is under a duty to give warning of known dangers.

A **trespasser** is one who enters and remains on the land of another without the possessor's expressed or implied consent. Licensees or invades may become trespassers when they venture into an area where they are not invited or expected to venture, or if they remain on the premises for longer than necessary. Generally, possessors of land are not liable to trespassers for physical harm caused by their failure either to exercise reasonable care to make their land safe for their reception or to carry on their activities so as not to endanger them. The only duty that is owed to a trespasser by an occupier of land is to refrain from willful or wanton misconduct. However, a duty of reasonable care is owed to an adult trespasser whose presence has been discovered or who habitually intrudes on a limited area.

Reasonable care is also owed to the child trespasser whose presence is foreseeable.

Many have questioned the legal and moral justification of a rule that determines the legal protection of a person's life and limb according to this classification scheme. Although courts have been reluctant to abandon the land occupier's preferred position set forth by history and precedent, some courts have replaced the common law distinction with ordinary principles of negligence to govern occupiers' liability to those entering their premises.

The following case is from North Dakota, a state that has abandoned the common law distinctions. The defendants in *Schmidt v. Gateway Community Fellowship* were sponsors of an outdoor automotive show that was being held in a shopping mall parking lot. The defendants persuaded the trial court that they were immune from suit under the state's recreational use immunity law and the court granted them summary judgment. The plaintiff, who had injured her ankle while attending the show appealed to the state supreme court. She maintained that the trial court's conclusion was erroneous in that these defendants were not entitled to protection under the recreational immunity statute.

Schmidt v. Gateway Community Fellowship
2010 ND 69
Supreme Court of North Dakota.
April 8, 2010

Kapsner, Justice

Jacqueline and Randall Schmidt appeal from a summary judgment dismissing their personal injury action against Gateway Community Fellowship and North Bismarck Associates II after the district court decided Gateway Community Fellowship and North Bismarck Associates II were entitled to recreational use immunity because Jacqueline Schmidt entered a parking lot at a shopping mall for recreational purposes and she was not charged to enter the premises. The Schmidts argue there are factual issues about whether Jacqueline Schmidt entered the premises for recreational purposes and whether there was a charge for her entry to the premises....

I

The Schmidts alleged Jacqueline Schmidt injured her right ankle on September 14, 2002, when she stepped in a hole in a paved parking lot on the north side of Gateway Mall shopping center in Bismarck while attending an outdoor automotive show and skateboarding exhibition sponsored by Gateway Community Fellowship, a non-profit church affiliated with the Church of God. At the time, Gateway Community Fellowship leased space for church services inside Gateway Mall from North Bismarck Associates II, the mall owner.

On September 14, 2002, Gateway Community Fellowship sponsored an outdoor automotive show and skateboarding exhibition, the "Impact Auto Explosion," on a paved lot on the north side of Gateway Mall from 10 a.m. to 4 p.m., which was during the mall's regular Saturday business hours ... The public was not charged an admission fee for entry to the exhibition, but Gateway Community Fellowship procured exhibition sponsors to defray costs. Additionally, the automotive show included several contests, and Gateway Community Fellowship charged car owners a registration fee to enter the contests.... The ... mall manager for North Bismarck Associates II directed Gateway Community Fellowship to hold the exhibition ... parking lot on the north side of Gateway Mall to increase visibility from Century Avenue in Bismarck. North Bismarck Associates II did not separately charge Gateway Community Fellowship for use of the parking lot.... The parking lot on the north side of Gateway Mall had been part of a lumberyard of a previous mall tenant, and the area had holes and depressions in the concrete from the removal of posts that had formed part of an enclosure around the lumberyard. According to North Bismarck Associates II, the area of the parking lot used for the 2002 exhibition usually was roped off to be less accessible by the public.

On September 14, 2002, Jacqueline Schmidt and her son were driving by ... when they saw activity in the parking lot north of ... Gateway Mall, and they stopped at the exhibition. According to Jacqueline Schmidt, they decided "it would be fun. They had skateboarders, and they had music, and it was a nice day out.... We were enjoying ourselves. We were watching the skateboarders. We were looking around, looking at the vehicles. It was a pleasant day out. It was very nice out, and we were just enjoying spending time together, looking at the activities."

Jacqueline Schmidt and her son were not charged an admission fee for entry to the property or to the exhibition. According to her, she severely injured her right ankle as she walked across the parking lot and stepped in a posthole from the prior tenant's lumberyard.

The Schmidts sued Gateway Community Fellowship and North Bismarck Associates II, alleging they negligently and carelessly failed to eliminate the holes in the parking lot or to warn exhibition attendees about the holes and were liable for the hazardous condition on the premises. Gateway Community Fellowship and North Bismarck Associates II separately answered, denying they were negligent and claiming the Schmidts' action was barred by recreational use immunity under N.D.C.C. ch. 53-08. Gateway Community Fellowship and North Bismarck Associates II separately moved for summary judgment, arguing they were entitled to recreational use immunity … because the premises were used for recreational purposes and Jacqueline Schmidt was not charged to enter the premises.

The district court granted summary judgment, concluding Gateway Community Fellowship and North Bismarck Associates II were entitled to recreational use immunity, because Jacqueline Schmidt entered the land for the recreational purpose of enjoying the exhibition with her son and she was not charged to enter the premises. The court also decided the statutory provisions for recreational use immunity were not unconstitutional as applied to the Schmidts' action.

II

Summary judgment is a procedural device for promptly resolving a controversy on the merits without a trial if there are no genuine issues of material fact or inferences that reasonably can be drawn from undisputed facts, or if the only issues to be resolved are questions of law….

III

Under North Dakota law for premises liability, general negligence principles govern a landowner's duty of care to persons who are not trespassers on the premises …. See *O'Leary v. Coenen*, … (N.D. 1977) (abandoning common law categories of licensee and invitee for premises liability and retaining standard that owner owes no duty to trespasser except to refrain from harming trespasser in willful and wanton manner). Thus, a landowner or occupier of premises generally owes a duty to lawful entrants to exercise reasonable care to maintain the property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to another, the seriousness of injury, and the burden of avoiding the risk….

Under that formulation, an owner or possessor of commercial property owes a duty to lawful entrants to exercise reasonable care to maintain the property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to another, the seriousness of injury, and the burden of avoiding the risk… 1 Premises Liability Law and Practice, at § 4.01[2][a] (explaining owner or possessor of commercial property must warn entrants of all known dangers, must inspect premises to discover hidden dangers, and must provide proper warning of known dangers); 62 Am. Jur. 2d Premises Liability, §§ 435, 439 (2005) (discussing commercial property owner's duty to customers and potential customers in shopping centers and malls). Similarly, a church or religious institution generally owes the same duty of care to lawful entrants on its premises….

In 1965, the Legislature enacted recreational use immunity statutes to encourage landowners to open their land for recreational purposes by giving them immunity from suit under certain circumstances.'"

Under N.D.C.C. § 53-08-02, "an owner of land owes no duty of care to keep the premises safe for entry or use by others for recreational purposes, or to give any warning of a dangerous condition, use, structure, or activity on such premises to persons entering for such purposes." Section 53-08-03, N.D.C.C., also provides:

Subject to the provisions of section 53-08-05, an owner of land who either directly or indirectly invites or permits without charge any person to use such property for recreational purposes does not thereby:

1. Extend any assurance that the premises are safe for any purpose;
2. Confer upon such persons the legal status of an invitee or licensee to whom a duty of care is owed; or
3. Assume responsibility for or incur liability for any injury to person or property caused by an act or omission of such persons….

… In 1995 … the Legislature amended the definition of "recreational purposes" to its present form to cover "all recreational activities."…

IV

The Schmidts argue the district court did not view the evidence in the light most favorable to them and erred in finding, as a matter of law, that Jacqueline Schmidt's use of the land was recreational in character and that there was no charge for her to enter the land. They

argue the court erred in failing to weigh the business purposes of Gateway Community Fellowship and North Bismarck Associates II in having the exhibition on the dangerous parking lot. They claim Gateway Community Fellowship's purpose was to increase membership, including tithing, and North Bismarck Associate's purpose was to increase foot traffic for its Gateway Mall tenants.... The Schmidts ... also assert a factual issue exists in this case because, although Gateway Community Fellowship did not directly charge Jacqueline Schmidt to enter the exhibition, it procured sponsors for the exhibition and charged contestants a registration fee to enter the contests in the automotive show....

A common thread under our case law interpreting the recreational use immunity statutes is that the intent of both the owner and the user are relevant to the analysis and that the location and nature of the injured person's conduct when the injury occurs are also relevant.... Other jurisdictions have acknowledged that cases involving claims of recreational use immunity involve fact-driven inquiries in which nonrecreational uses or purposes may be mixed with recreational uses or purposes....

In *Auman v. School Distr. of Stanley-Boyd*, 2001 WI 125, ..., the Wisconsin Supreme Court said the line between recreational and nonrecreational purposes was an intensely fact-driven inquiry and reiterated the test for resolving the issue:

Although the injured person's subjective assessment of the activity is pertinent, it is not controlling. A court must consider the nature of the property, the nature of the owner's activity, and the reason the injured person is on the property. A court should consider the totality of circumstances surrounding the activity, including the intrinsic nature, purpose, and consequences of the activity. A court should apply a reasonable person standard to determine whether the person entered the property to engage in a recreational activity.

Under N.D.C.C. ch. 53-08 and our caselaw interpreting those provisions, we decline to construe our recreational use statutes to necessarily provide a commercial landowner immunity where there is a recreational and commercial component to the landowner's operation. We conclude the rationale and balancing test ... provide persuasive authority for construing our statutes and assessing mixed use cases. We hold that [the Auman] balancing test applies to our recreational use immunity statutes in mixed use cases and that inquiry generally involves resolution of factual issues unless the facts are such that reasonable minds could not differ.

... We conclude the facts in this case are not such that reasonable persons could reach one conclusion and there are disputed factual issues about whether North Bismarck Associates II and Gateway Community Fellowship are entitled to recreational use immunity. We therefore conclude resolution of the issue by summary judgment was inappropriate and a remand is necessary for the trier of fact to apply the balancing test to this mixed use case....

We reverse the summary judgment and remand for proceedings consistent with this opinion.

Case Questions

1. What would it mean to these parties if ultimately the North Dakota courts concluded that the trial court was correct and that the plaintiff was engaging in a recreational activity when attending the auto show in the mall parking lot?
2. The North Dakota Supreme Court felt that the record was insufficient to permit the trial court to decide this case by summary judgment. Assume that the facts revealed upon remand indicate that the auto show contained some elements that were essentially recreational and other elements that were commercial. Which party do you think should ultimately win the lawsuit? Why?

INTERNET TIP

Readers will find *Benejam v. Detroit Tigers, Inc.*, a case in which a state intermediate appellate court concluded that the Tigers had a limited duty to make their stadium reasonably safe for fans, on the textbook's website.

Proximate Cause

For the plaintiff to support a negligence action, there must be a reasonable connection between the negligent act of the defendant and the damage suffered by the plaintiff. For tort liability, however,

proof of factual causation is not enough. Tort liability is predicated on the existence of **proximate cause.** Proximate cause means legal cause and consists of two elements: (1) **causation in fact,** and (2) **foreseeability.** A plaintiff must prove that his or her injuries were the actual or factual result of the defendant's actions. Causation in fact may be established directly or indirectly. Courts usually use a "but for" test to establish causation in fact: but for the defendant's negligence, the plaintiff's injuries would not have occurred. This test is an extremely broad one and could have far-reaching results.

Every event has many contributing causes, even though some may be very remote. The defendant is not relieved from liability merely because other causes have contributed to the result. In many situations, application of the "but-for" test will identify several persons who could be placed on a causation continuum. The question before the court in a negligence case is whether the conduct has been so significant and important a cause that the defendant should be legally responsible. For example, in a nighttime automobile accident, the fact that one of the drivers worked late at the office would be a factual cause of the collision. If she hadn't worked late, she wouldn't have been at the location of the accident. But this cause should not be recognized as a legal cause of the collision. Because cause demands that some boundary be set for the consequences of an act, proximate cause, rather than causation in fact, is used to determine liability.

An individual is only responsible for those consequences that are reasonably foreseeable, and will be relieved of liability for injuries that are not reasonably related to the negligent conduct. To illustrate, a driver drives his car carelessly and collides with another car, causing it to explode. Four blocks away, a nurse carrying a baby is startled by the explosion and drops the infant. It is doubtful if any court would hold the driver liable to the infant, even though the driver was negligent and was the factual cause of the infant's injury. The baby's injury is so far removed from the driver that it would be unfair to hold the driver liable. The driver could not reasonably have foreseen the injury sustained by the infant. In other words, the driving would not be the proximate cause of the injury.

If there is more than one cause for a single injury, liability is possible if each alone would have been sufficient to cause the harm without the other. If there are joint tortfeasors of a single injury, each possible tortfeasor's actions must be examined to see if the acts were so closely related to the damage to have proximately caused the plaintiff's injury.

The plaintiffs in the following case, West and Richardson, were injured when their car was involved in a head-on collision with another vehicle operated by an intoxicated driver named Tarver. Tarver had been driving the wrong way at the time of the collision and had just left defendant's nearby gas station, where a store employee assisted him with pumping gas into his vehicle.

Gary L. West v. East Tennessee Pioneer Oil Co.
172 S.W.3d 545
Supreme Court of Tennessee
August 18, 2005

William M. Barker, J.

… The defendant East Tennessee Pioneer Oil Company operates an Exxon convenience store on U.S. Highway 11W, also known as Rutledge Pike, in Knox County, Tennessee. The store consists of three connected portions—a convenience market and gas station, an ice cream counter, and a "Huddle House" restaurant—each owned and operated by the defendant.

On July 22, 2000, Brian Tarver ("Tarver") entered the convenience store. Tarver had been drinking alcohol, and the plaintiffs allege that upon entering the store he was obviously intoxicated. There was [sic] a large number of customers in the store at the time, with a long line of people waiting at the check-out counter. Tarver pushed his way to the front of the line and asked the clerk if she would "go get [him] some

beer." The clerk, Dorothy Thomas ("Thomas"), stated in her deposition that Tarver smelled of beer and staggered as he walked. Thomas refused to sell him beer because, in her opinion, Tarver was intoxicated. After being denied beer, Tarver began cursing loudly, talking to Thomas in a threatening manner, and generally causing a disturbance inside the store. Tarver then managed to pull three crumpled one-dollar bills out of his pocket and laid them on the counter. He told Thomas, "we need gas" and then turned to leave. A customer opened the door for Tarver, who staggered out of the store and back toward the gas pump where his car was parked.

A few moments later an alarm began "beeping" inside the store, alerting Thomas that someone was attempting to activate the gasoline pumps outside. After the "beeping" continued, Thomas concluded that a customer was having difficulty with the pump. Although the evidence conflicts on this point, Thomas testified that she could not see the pump … so she asked the other employees in the store if someone would "go see who doesn't know what they're doing at the gas pump." Two off-duty employees were at the store: Candice Drinnon ("Drinnon"), who worked at both the Huddle House restaurant and the ice cream counter, and Roy Armani ("Armani") … who worked in the Huddle House portion of the defendant's store. The accounts also differ as to how the events next unfolded. Thomas testified that both Drinnon and Armani were inside the store during this episode, and they went to assist the customer at the pumps at Thomas's request. Drinnon, on the other hand, testified that she and Armani were standing outside on the parking lot when they first saw Tarver and noticed he was having difficulty operating the pump. According to Drinnon, she and Armani walked over to assist Tarver without being asked to do so by Thomas or anyone else.

In any event, Drinnon and Armani came to the aid of the intoxicated Tarver, who could not push the correct button to activate the pump. Drinnon testified that upon approaching Tarver she could tell he had been drinking because she "could smell it on him." Drinnon also states, however, that she and Armani were not fully aware of the degree of Tarver's intoxication until after activating the pump. According to Drinnon, Tarver spoke normally, but, "when we seen him walk away, [we] could tell he was drunk." Drinnon pushed the correct button on the pump and then Thomas, the clerk behind the counter, activated the pump from inside the store which allowed the pump to operate. Tarver then apparently proceeded to operate the nozzle himself, obtaining the gasoline without any further assistance.

Tarver pumped three dollars' worth of gasoline, got back into his vehicle, and prepared to leave. Drinnon and Armani watched as Tarver, without turning on his vehicle's headlights, drove off the parking lot and into the wrong lane of traffic on Rutledge Pike, traveling southbound in the northbound lane. Drinnon then went back into the store and informed Thomas, the clerk, that Tarver had gotten three dollars' worth of gasoline and then driven away on the wrong side of the road. Thomas stated that this was her first indication that Tarver was driving; prior to this point she believed Tarver had been accompanied by another person and was not driving a vehicle himself.

At about the same time as Tarver was traveling south with no headlights on and in the wrong lane of traffic, the plaintiffs' vehicle was traveling north on Rutledge Pike, several miles in front of Tarver. One of the plaintiffs, Gary West, was driving while the other plaintiff, Michell Richardson, was a passenger. Tarver managed to travel 2.8 miles from the convenience store before striking the plaintiffs' vehicle head-on. Both of the plaintiffs sustained serious injuries in the accident….

During their ensuing investigation, the plaintiffs requested Dr. Jeffrey H. Hodgson, a mechanical engineering professor at the University of Tennessee, to examine the fuel tank of Tarver's vehicle. Based upon the results of his examination, Dr. Hodgson determined that at the time Tarver stopped at the defendant's store his vehicle contained only enough fuel to travel another 1.82 miles. Therefore, without the three dollars' worth of gas he obtained at the store, Tarver would have "run out" of gasoline approximately one mile before reaching the accident scene.

On June 1, 2001, the plaintiffs filed suit alleging that the defendant's employees were negligent in selling gasoline to the visibly intoxicated Tarver and assisting him in pumping it into his vehicle. The plaintiffs contended it was reasonably foreseeable that these actions would result in an automobile accident….

The defendant filed a motion for summary judgment…. Specifically, the defendant contended that it owed no duty of care to the plaintiffs while furnishing gasoline to Tarver and that its employees' actions were not a proximate cause of the accident….

Following a hearing on the motion, the trial court entered an order granting summary judgment in favor of the defendant…. Upon appeal, the Court of Appeals … reversed the trial court on the negligence claim. The intermediate court held, inter alia, that "the affirmative acts of Defendant's employees in both selling gasoline to and in helping a visibly intoxicated Tarver

pump the gasoline into his vehicle created a duty to act with due care."

We granted review.

Standard of Review

Summary judgment is appropriate when the moving party establishes that there is no genuine issue as to any material fact and that a judgment may be rendered as a matter of law….

Analysis I. Negligence Principles

A negligence claim requires proof of the following elements: (1) a duty of care owed by the defendant to the plaintiff; (2) conduct by the defendant falling below the standard of care amounting to a breach of that duty; (3) an injury or loss; (4) cause in fact; and (5) proximate or legal cause….

While we will discuss each of these elements in turn, our primary focus is on the first element: duty of care.

I. Duty

Although not a part of the early English common law, the concept of duty has become an essential element in all negligence claims…. The duty owed to the plaintiffs by the defendant is in all cases that of reasonable care under all of the circumstances…. Whether the defendant owed the plaintiffs a duty of care is a question of law to be determined by the court….

If a defendant fails to exercise reasonable care under the circumstances, then he or she has breached his or her duty to the plaintiffs. The term reasonable care must be given meaning in relation to the circumstances…. Reasonable care is to be determined by the risk entailed through probable dangers attending the particular situation and is to be commensurate with the risk of injury…. Thus, legal duty has been defined as the legal obligation owed by a defendant to a plaintiff to conform to a reasonable person standard of care for the protection against unreasonable risks of harm….

The risk involved must be one which is foreseeable; "a risk is foreseeable if a reasonable person could foresee the probability of its occurrence or if the person was on notice that the likelihood of danger to the party to whom is owed a duty is probable." … "The plaintiff must show that the injury was a reasonably foreseeable probability, not just a remote possibility, and that some action within the [defendant's] power more probably than not would have prevented the injury."…

We employ a balancing approach to assess whether the risk to the plaintiff is unreasonable and thus gives rise to a duty to act with due care…. This Court has held that a risk is unreasonable, "'if the foreseeable probability and gravity of harm posed by defendant's conduct outweigh the burden upon defendant to engage in alternative conduct that would have prevented the harm.'"…

The defendant argues that it owed no duty of care to the plaintiffs because the intoxicated driver was merely a customer at the defendant's convenience store; thus there was no "special relationship" giving rise to a duty on the part of the defendant to control the actions of the customer…. In our view, the defendant misconstrues the plaintiffs' claims as being based upon a "special relationship" arising from the sale of gasoline to Mr. Tarver (the intoxicated driver). The plaintiffs' allegations do not revolve around any duty of the defendant to control the conduct of a customer. Instead, the claims are predicated on the defendant's employees' affirmative acts in contributing to the creation of a foreseeable and unreasonable risk of harm, i.e., providing mobility to a drunk driver which he otherwise would not have had, thus creating a risk to persons on the roadways. Viewed in this light, the balancing test set out above is appropriate to determine whether the defendant owed the plaintiffs a duty.

Simply stated, the defendant convenience store owed a duty to act with reasonable care under all the circumstances. Under the facts of this case, we conclude that the acts of the defendant in selling gasoline to an obviously intoxicated driver and/or assisting an obviously intoxicated driver in pumping gasoline into his vehicle created a foreseeable risk to persons on the roadways, including the plaintiffs. It is common knowledge that drunk driving directly results in accidents, injuries, and deaths….

We next examine the feasibility of alternative, safer conduct and the burdens associated with such alternative conduct. A safer alternative was readily available and easily feasible—simply refusing to sell gasoline to an obviously intoxicated driver. The clerk at the defendant's store had already refused to sell beer to Mr. Tarver. In fact, both state law … and store policy required her to refuse to sell alcohol to intoxicated persons. It was also the clerk's understanding that she was never required to allow a customer to purchase any item, including gasoline. The relative usefulness and safety of this alternative conduct is obvious. All reasonable persons recognize that refraining from selling gasoline to or assisting intoxicated persons in pumping it into their vehicles will lead to safer roadways.

Based upon the foregoing analysis, we conclude that a convenience store employee owes a duty of reasonable care to persons on the roadways, including the plaintiffs, not to sell gasoline to a person whom the employee knows (or reasonably ought to know) to be intoxicated and to be the driver of the motor vehicle. Similarly, a convenience store employee also owes a duty of reasonable care not to assist in providing gasoline (in this case pumping the gasoline) to a person whom the employee knows (or reasonably ought to know) to be intoxicated and to be the driver of the motor vehicle. We stress that because "Foreseeability is the test of negligence,"… the convenience store employee must know that the individual is intoxicated and that the individual is the driver of the vehicle before a duty arises. It is a question of fact for a jury as to what the employee knew with respect to the individual's intoxication and status as driver. We also hasten to point out, as did the Court of Appeals, that by our decision today we do not hold that convenience store employees have a duty to physically restrain or otherwise prevent intoxicated persons from driving.

II. Breach of Duty, Injury or Loss, Cause in Fact, and Proximate Cause

Our conclusion that the defendant owed a duty to the plaintiffs does not completely resolve this case. The plaintiffs at trial still bear the burden of proving the remaining elements of negligence: breach of duty, injury or loss, cause in fact, and proximate cause. Although we have viewed the facts in the light most favorable to the plaintiffs for purposes of resolving this appeal, the record reflects genuine issues of material fact concerning each of these elements which the jury must resolve.

For instance, the jury must determine whether, in consideration of all the facts and circumstances presented, the employees failed to exercise due care resulting in a breach of their duty of care…. Another question of fact for the jury is whether the employees' actions can be attributed to the defendant, thus making the defendant vicariously liable for the employees' alleged negligence…. Furthermore, the plaintiffs must show that the defendant's employees' acts were the cause in fact of their injuries. While the affidavit from Dr. Hodgson provides probative evidence on this point, the credibility of the witness, the weight given to his testimony and whether this evidence establishes cause in fact are all issues for the jury.

The final element the plaintiffs must prove is proximate cause. While cause in fact establishes that the plaintiff's injury would not have occurred "but for" the defendant's conduct, proximate cause focuses on whether the law will extend responsibility for that conduct…. This Court has previously set out a three-prong test for proximate cause:

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

The defendant argues that its employees' actions were not the proximate cause of the plaintiffs' injuries; rather, the injuries were caused solely by the actions of Mr. Tarver. The defendant asserts that its connection to the accident is so tenuous that proximate cause simply does not apply. We note however, "there is no requirement that a cause, to be regarded as the proximate cause of an injury, be the sole cause, the last act, or the one nearest to the injury, provided it is a substantial factor in producing the end result."… Viewing the evidence in the light most favorable to the plaintiffs, we conclude that a reasonable jury could find the acts of the convenience store employees were a substantial factor in bringing about the plaintiffs' accident and that this result was foreseeable. We further conclude there is no rule of law or policy that should relieve the defendant from liability. Accordingly, whether the defendant's employees' acts proximately caused the plaintiffs' injuries is a question for the jury….

Conclusion

In summary, we hold that the convenience store employees owed a duty of reasonable care to persons on the roadways, including the plaintiffs, when selling gasoline to an obviously intoxicated driver and/or assisting an obviously intoxicated driver in pumping the gasoline into his vehicle…. We offer no opinion concerning the ultimate resolution of this case, as the plaintiffs still bear the burden at trial of proving the other elements of negligence. Based upon the foregoing analysis, we conclude that the trial court erred in granting summary judgment in favor of the defendants…. Consequently, the judgment of the Court of Appeals is affirmed … and the case is remanded for further proceedings consistent with this opinion.

Case Questions

1. What kind of test did the Tennessee Supreme Court say it would use in determining whether the gas station/convenience store operator owed a duty of care to the plaintiff in this case?
2. The defendant gas station/convenience store operator maintained that it owed no duty of care. What was the essence of the defendant's position on this issue?
3. What did the Tennessee Supreme Court conclude with respect to this issue?

INTERNET TIP

Readers visiting the textbook's website will find there the 2002 Texas case of *McClure v. Roch*, a case that discusses the distinction between invitees and licensees, proximate cause, and foreseeability.

Contributory Negligence and Assumption-of-Risk Defenses

Even after a plaintiff has proved that a defendant was negligent and that the negligence was the proximate cause of his or her injury, some states permit the defendant to counter by proving a defense. Contributory negligence and assumption of risk are two such defenses.

Contributory negligence is a defense that exists when the injured persons proximately contributed to their injuries by their own negligence. This defense is based on the theory that the plaintiff is held to the same standard of care as the defendant: that is, that of a reasonable person under like circumstances. When proven, contributory negligence will usually bar any recovery by the plaintiff.

To illustrate, D-1 is driving his car and P is his passenger. Both are injured in a collision with D-2's car. If both cars were driven negligently, D-1 could not recover from D-2 because his own negligence contributed to his own injuries. Yet P could recover from both D-1 and D-2, because they were both joint tortfeasors in causing P's injuries. The burden of proving contributory negligence is on the defendant. The defense of **assumption of risk** exists when the plaintiffs had knowledge of the risk and made the free choice of exposing themselves to it. Assumption of risk may be express or implied. In an express assumption of risk, the plaintiff expressly agrees in advance that the defendant has no duty to care for him or her and is not liable for what would otherwise be negligent conduct. For example, parents often expressly assume the risk of personal injury to their children in conjunction with youth soccer, basketball, and baseball programs. Where the assumption of risk is implied, consent is manifested by the plaintiff's continued presence after he or she has become aware of the danger involved. The plaintiffs impliedly consent to take their chances concerning the defendant's negligence. For example, baseball fans who sit in unscreened seats at the ballpark know that balls and even bats may strike them; they implicitly agree to take a chance of being injured in this manner.

INTERNET TIP

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

Comparative Negligence

When the defense of contributory negligence is used in a non–comparative-negligence jurisdiction, the entire loss is placed on one party even when both are negligent. For this reason, most states now determine the amount of damage by comparing the negligence of the plaintiff with that of the defendant. Under this doctrine of **comparative negligence,** a negligent plaintiff may be able to recover a portion of the cost of an injury.

In negligence cases, comparative negligence divides the damages between the parties by reducing the plaintiff's damages in proportion to the extent of that person's contributory fault. The trier of fact in a case assigns a percentage of the total fault to the plaintiff, and the plaintiff's total damages are usually reduced by that percentage. For example, a plaintiff who was considered to be 40 percent at fault by the trier of fact would recover $1,200 if the total damages were determined to be $2,000.

The trial court in the following case improperly granted additur to the plaintiff in the next case in spite of the fact that the trial jury found the plaintiff to be 66.75 percent responsible for the collision that caused serious injuries to the plaintiff's eight-year-old son.

Anne Hockema v. J. S.
832 N.E.2d 537
Court of Appeals of Indiana, Second District
August 8, 2005

Vaidik, Judge

Case Summary

Seventeen-year-old Anne Hockema and her father Stanley Hockema appeal the trial court's grant of additur after the jury found Jacob Secrest to be 66.75% at fault and awarded $0 damages....

Facts and Procedural History

In September 2001, Anne was driving along Hanawalt Road in White County, Indiana. As she was driving, eight-year-old Jacob Secrest darted out into the road and collided with Hockema's vehicle. Jacob's nine-year-old sister, Erica Secrest, witnessed the collision, and Jacob's mother, Merri Secrest, came running out of her parents' house to assist Jacob immediately after the collision. Jacob's father, Eric Secrest, was not present at the scene of the accident. Jacob was transported to the hospital by ambulance with his mother accompanying him. As a result of the impact, Jacob broke his right elbow and collarbone, which required him to undergo surgery and attend physical therapy.

The Secrests filed a complaint for damages against Anne and Stanley ... (collectively, "the Hockemas"), which sought recovery for medical expenses; permanent injuries; emotional distress; loss of services; and pain and suffering. A jury trial ensued during which the parties stipulated that Jacob's medical expenses totaled $38,708.44....

The jury returned a defense verdict. In particular, the jury found Jacob to be 66.75% at fault, Anne to be 33.25% at fault, and awarded the Secrests $0 in damages.

The Secrests filed a motion to correct errors seeking additur or a new trial, in which it claimed that the jury erred by not awarding Jacob's parents damages for a percentage of the stipulated medical expenses. The Hockemas responded by asserting that the Secrests "failed to take into account the expenses and damage claims made by the family members were derivative to Jacob's primary cause of action,"... and consequently, "the 'parent' plaintiffs cannot prevail if a jury decides against the 'child's' claim."... Following a hearing on the motion, the trial court entered judgment in favor of the Secrests for $12,780.56, which is 33.25% of the stipulated amount of medical expenses. In its Order ... the trial court stated:

> The Court instructed the Jury that there was a stipulation as to the medical expenses incurred by the parents in the sum of Thirty-eight Thousand Seven Hundred Eight Dollars Forty-four Cents ($38,708.44), and that the Jury in this matter found that the Defendant, Anne Hockema, was thirty-three point two-five percent (33.25%) negligent in the action.
>
> The Court had previously instructed the Jury that the parent's right of recovery for their medical expenses was not contingent on the child's right of recovery for his injuries.
>
> Therefore, the Court finds that the parents should be entitled to their stipulated expenses of thirty-three point two-five percent (33.25%) of Thirty-eight Thousand Seven Hundred Eight Dollars Forty-four Cents ($38,708.44).
>
> The Court directs that the jury verdict be modified in this matter that the Court now orders a judgment entered against the Defendant, Anne Hockema, in the sum of Twelve Thousand Eight Hundred Seventy Dollars Fifty-six Cents ($12,870.56).

... The Hockemas now appeal.

Discussion and Decision

The Hockemas argue that the trial court erred by granting the Secrests' request for additur following the jury's award of $0 damages to the Secrests….

The Hockemas claim that the trial court abused its discretion when it granted the Secrests' motion to correct error pursuant to Indiana Trial Rule 59(J)(5) and awarded $12,870.56 to the Secrests notwithstanding the jury's verdict of $0. Trial Rule 59(J)(5) provides:

> The court, if it determines that prejudicial or harmful error has been committed, shall take such action as will cure the error, including without limitation the following with respect to all or some of the parties and all or some of the errors: … (5) In the case of excessive or inadequate damages, enter final judgment on the evidence for the amount of the proper damages, grant a new trial, or grant a new trial subject to additur or remittitur.

… This remedy is only available when the evidence is insufficient to support the verdict as a matter of law….

Trial courts must afford juries great latitude in making damage award determinations…. A verdict must be upheld if the award determination falls within the bounds of the evidence….

Curiously, the issue with which we are faced today—namely, whether a parent is precluded from recovering necessary medical expenses paid by them on behalf of an injured child whose comparative negligence exceeds the negligence of the tortfeasor—is an issue of first impression in Indiana. The Comparative Fault Act, now codified at Indiana Code 34-51-2, was adopted in Indiana in 1983 and went into effect in 1985… By adopting the Comparative Fault Act, the General Assembly rejected the common law doctrine of contributory negligence as a complete bar to recovery in negligence cases, … thereby bringing this state in line with the vast majority of states that adhere to some form of a comparative fault law….

There are two basic forms of comparative fault laws, which are designated as "pure" or "modified." Under the "pure" form, a plaintiff may recover a percentage of his damages even though his fault exceeds that of the defendant…. Under "modified" comparative fault statutes, a plaintiff normally may recover a reduced amount of his damages so long as his negligence either does not equal ("modified forty-nine percent") or exceed that of the defendant ("modified fifty percent")…. The Indiana statute is a type of modified fifty percent comparative fault law that requires, in some cases, consideration of the degree of fault of non-parties to the action as well as the fault of the parties…. Thus, if a claimant is deemed to be more than fifty percent at fault, then the claimant is barred from recovery….

The jury found Jacob Secrest to be 66.75% at fault for the accident. Thus, under Indiana's comparative fault scheme, Jacob is barred from recovering any damages from Hockema. Nonetheless, Eric and Merri Secrest argue that they should be able to recover a percentage of the stipulated medical expenses, and therefore the trial court did not err by granting their request for additur. We disagree.

Eric and Merri Secrest, as the parents of Jacob, are responsible for the costs of the medical attention furnished to Jacob by the various providers…. ("The parent also is liable because of his common law and, in some instances, statutory duty to support and maintain his child…. This parental duty includes the provision of necessary medical care."). The obligation to pay medical expenses is not a damage inflicted directly on the parents; rather, the parents' debt arises only because, as parents, they are obligated to contract for necessary medical care for their minor child. If the child was not a minor, the medical expenses would be his own, and the parents would not be obligated to pay them. The right of the parents to recover the child's medical expenses, hence, rests upon the child's right to recover and therefore may be appropriately categorized as a derivative right…. Accordingly, when a child is injured, the parent has a cause of action against the tortfeasor to recover compensation for the necessary medical treatment arising from the tortious conduct…. Because of the derivative nature of this right, however, the right is not absolute. Instead, the right to recover medical expenses may be barred by the child's comparative negligence if it exceeds the negligence of the tortfeasor….

Thus, although Indiana has abandoned contributory negligence in cases such as the one with which we are faced today, the concept of imputation is still viable under our comparative fault scheme. This means that if a child's comparative fault is less than fifty percent, then a parent may recover the appropriate percentage of the medical expenses paid on behalf of the child from the tortfeasors. If, however, the child's comparative fault exceeds fifty percent, the parents are barred from recovering medical expenses.

As mentioned above, the jury determined that Jacob was 66.75% at fault and that Anne was 33.25% at fault. By seeking to recover a percentage of the stipulated medical expenses in spite of Jacob's negligence exceeding that of Anne's, the Secrests essentially are requesting that we abandon the concept of modified comparative fault in favor of a pure comparative fault scheme with regard to medical expenses. The

Indiana General Assembly has chosen to adopt a modified comparative fault system. It is not our province to override the legislature's clear intent of barring recovery when a claimant is more than fifty percent at fault. Consequently, the trial court erred by granting additur, and we reverse and remand with instructions that the jury verdict be reinstated....

Reversed and remanded.

Case Questions

1. What are the advantages and disadvantages of comparative negligence in comparison to contributory negligence?
2. Under what circumstances will a court disturb a jury's allocation of the percentages of fault?
3. Which of the two basic forms of comparative fault laws do you think to be fairer? Explain your rationale.

Negligence and Product Liability

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

In product liability suits, it is often difficult to prove the defendant's act or omission that caused the plaintiff's injury. Thus, in the interests of justice, courts developed the doctrine of ***res ipsa loquitur*** ("the thing speaks for itself"). This doctrine permits plaintiffs to circumstantially prove negligence if the following facts are proved: (1) the defendant had exclusive control over the allegedly defective product during manufacture, (2) under normal circumstances, the plaintiff would not have been injured by the product if the defendant had exercised ordinary care, and (3) the plaintiff's conduct did not contribute significantly to the accident. From the proved facts, the law permits the jurors to infer a fact for which there is no direct, explicit proof—the defendant's negligent act or omission. The trial judge will instruct the jurors that the law permits them to consider the inferred fact as well as the proved facts in deciding whether the defendant was negligent.

The following case illustrates typical problems associated with a case involving negligent failure to warn. A manufacturer's duty to warn consumers depends on the nature of the product. Warnings are unnecessary for products that are obviously dangerous to everyone (knives, saws, and firearms). However, for products that may contain hazards that are not obvious, manufacturers have a duty to warn if the average person would not have known about a safety hazard. If the plaintiff is knowledgeable about the hazard that the warning would have addressed, the manufacturer's negligent failure to warn would not have proximately caused the plaintiff's injuries. Thus in such cases the extent of the plaintiff's actual knowledge and familiarity with the hazard and the product are relevant to the issue of causation.

Laaperi v. Sears Roebuck & Co., Inc.
787 F.2d 726
U.S. Court of Appeals, First Circuit
March 31, 1986

Campbell, Chief Judge

This is an appeal from jury verdicts totaling $1.8 million entered in a product liability suit against defendants Sears, Roebuck & Co. and Pittway Corporation. The actions were brought by Albin Laaperi as administrator of the estates of his three sons, all of whom were killed in a fire in their home in December 1976, and as father and next friend of his daughter, Janet, who was injured in the fire. Plaintiff's theory of recovery was that defendants had a duty to warn plaintiff that a

smoke detector powered by house current, manufactured by Pittway, and sold to Laaperi by Sears might not operate in the event of an electrical fire caused by a short circuit. Defendants contend on appeal that the district court erred in denying their motions for directed verdict and judgment notwithstanding the verdict; that the admission into evidence of purportedly undisclosed expert testimony violated Fed. R. Civ. P. 26(e); and that the award of $750,000 for injuries to Janet Laaperi was excessive and improper. We affirm the judgments in favor of plaintiff in his capacity as administrator of the estates of his three sons, but vacate the judgment in favor of Janet Laaperi, and remand for a new trial limited to the issue of her damages.

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

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

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

Laaperi brought this diversity action against defendants Sears and Pittway, asserting negligent design, negligent manufacture, breach of warranty, and negligent failure to warn of inherent dangers. The parties agreed that the applicable law is that of Massachusetts. Before the claims went to the jury, verdicts were directed in favor of the defendants on all theories of liability other than failure to warn.

Laaperi's claim under the failure to warn theory was that he was unaware of the danger that the very short circuit which might ignite a fire in his home could, at the same time, incapacitate the smoke detector. He contended that had he been warned of this danger, he would have purchased a battery-powered smoke detector as a backup or taken some other precaution, such as wiring the detector to a circuit of its own, in order better to protect his family in the event of an electrical fire.

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

Defendants contend that the district court erred in denying their motions for directed verdict and judgment n.o.v. First, they claim that they had no duty to warn that the smoke detector might not work in the event of some electrical fires. Second, they maintain that even if they had such a duty, there was insufficient evidence on the record to show that the failure to warn proximately caused plaintiff's damages. We address these arguments in turn.

A. Duty to Warn

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

The manufacturer can be held liable even if the product does exactly what it is supposed to do, if it does not warn of the potential dangers inherent in the way a product is designed. It is not necessary that the product be negligently designed or manufactured; the failure to warn of hazards associated with foreseeable uses of a product is itself negligence, and if that negligence proximately results in a plaintiff's injuries, the plaintiff may recover….

The sole purpose of a smoke detector is to alert occupants of a building to the presence of fire. The failure to warn of inherent non–obvious limitations of

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

a smoke detector, or of non-obvious circumstances in which a detector will not function, can, we believe, "create an unreasonable risk of harm in that the inhabitants of a structure may be lulled into an unjustified sense of safety and fail to be forewarned of the existence of a fire."… In the present case, the defendants failed to warn purchasers that a short circuit which causes an electrical fire may also render the smoke detector useless in the very situation in which it is expected to provide protection: in the early stages of a fire. We believe that whether such a failure to warn was negligent was a question for the jury.

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

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

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

Defendants contend that the district court nevertheless erred in denying their motions because, they claim, the danger that an electrical fire will incapacitate an electric-powered smoke detector is obvious. They point out that anyone purchasing a device powered by house electrical current will necessarily realize that if the current goes off for any reason, the device will not work.

In Massachusetts, as elsewhere, a failure to warn amounts to negligence only where the supplier of the good known to be dangerous for its intended use "has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition."…

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

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

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

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

B. Causation

While, as just discussed, the danger the detector would fail in these circumstances was not so obvious as to eliminate, as a matter of law, any need to warn, we must also consider whether Laaperi's specialized electrical knowledge constituted a bar to his own recovery…. [P]laintiff's specialized knowledge is immaterial

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

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

Self-serving as this testimony was, the jury was free to credit it. In reviewing the denial of a motion for directed verdict or judgment n.o.v., we are obliged to view the evidence in the light most favorable to the verdict winner…. In light of this standard, we cannot say that the district court erred in denying defendants' motions for directed verdict and judgment n.o.v., for the jury could have believed Laaperi's testimony in the colloquy quoted above, among other evidence, and concluded that had he been properly warned, Laaperi would have instituted different fire detection methods in his home to protect his family against the danger that his smoke detector would be rendered useless in the event of a fire-related power outage.

IV

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

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

So ordered.

Case Questions

1. What warning should the defendants arguably have given the plaintiffs under the facts of this case?
2. Would the outcome in this case have been different if Albin Laaperi were a licensed electrician?
3. Why didn't the plaintiff base the claim on strict liability?

What would utilitarians think of the doctrine of res ipsa loquitur?

Imputed Negligence

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

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

One should take a liberal view of the scope-of-employment concept, because the basis for vicarious liability is the desire to include in operational costs the inevitable losses to third persons incident to carrying on an enterprise, and thus distribute the burden among those benefited by the enterprise. Generally, an employee would not be within the scope of employment (1) if the employee is en route to or from home, (2) if the employee is on an undertaking of his own, (3) if the acts are prohibited by the employer, or (4) if the act is an unauthorized delegation by the employer.

One is not accountable for the negligent act of an independent contractor. **Independent contractors** are those who contract to do work

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

Modified No-Fault Liability Statutes

As readers saw in Table 11.1, automobile collision suits account for most of the tort claims filed in the United States. Responding to widespread dissatisfaction with the delay and expense in the litigation of traffic accident cases, some states have enacted **modified no-fault liability statutes** in an attempt to correct the injustices and inadequacies of the fault system in automobile accident cases. Under a modified no-fault liability statute, an injured person normally has no right to file suit to recover money damages for personal injuries and lost wages below a statutorily specified threshold. Instead, the injured party is compensated by his/her own insurance company. The amount of compensation paid is determined by dollar ceilings specified in the injured person's insurance policy. All "no-fault "states, however, permit lawsuits for damages where the injured person has been seriously injured. States differ as to how they determine when this threshold is crossed. The goal of the statutes is to reduce the cost of automobile insurance by saving litigation costs, including attorneys' fees, and by allowing little or no recovery for the pain and suffering and emotional stress that accompany an automobile accident.

STRICT LIABILITY

In addition to intentional torts and negligence, there is a third type of tort called strict liability or absolute liability. This imposes liability on defendants without requiring any proof of lack of due care. Under the early common law, people were held strictly liable for trespass and trespass on the case without regard to their intentions and whether they exercised reasonable care. Although the breadth of strict liability diminished with the emergence of negligence and intentional torts, **strict liability in tort** is applied in cases involving what the common law recognized as abnormally dangerous activities and, more recently, in product liability cases.

Abnormally Dangerous Activities

One who is involved in abnormally dangerous activities is legally responsible for harmful consequences that are proximately caused. The possessor of a dangerous instrumentality is an insurer of the safety of others who are foreseeably within the danger zone. Because of jurisdictional differences, it is impossible to formulate a general definition or complete listing of all dangerous instrumentalities. However, poisons, toxic chemicals, explosives, and vicious animals are examples of items that have been found to fall into this category.

INTERNET TIP

Interested readers can see an example involving strict liability and a dangerous animal in the case of *Westberry v. Blackwell,* which can be found with the Chapter XI materials on the textbook's website.

Strict Liability and Product Liability

A purchaser of tangible, personal property may have a right to recover from the manufacturer for injuries caused by product defects. Product defects include defects in design, manufacturing defects, and warning defects. A person who has been injured by a product defect may be able to recover based on strict liability, as well as on breach of warranty (see discussion in Chapter X) and negligence (see earlier discussion in this chapter).

The use of strict liability in product liability cases occurred because of dissatisfaction with the negligence and warranty remedies. It was very difficult for average consumers to determine whether