

## Update Materials

Franklin, Rabin & Green, "Tort Law and Alternatives" (8th ed. 2006)

### Chapter I

**Page 28 after note 3 (new note).** Some courts, however, do not require reliance on the physician's being an employee, but instead demand only that the patient rely on the hospital to provide competent medical care. See *York v. Rush-Presbyterian-St. Luke's Medical Center*, 854 N.E.2d 635 (Ill. 2006). For a discussion of the range of approaches employed by courts on the issue of apparent agency of hospital physicians and whether reliance is required, see John D. Ingram, *Vicarious Liability of the Employer of an Apparent Servant*, 41 *Tort Trial & Ins. Prac. L.J.* 1 (2005).

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### Chapter III

#### Section B. Affirmative Obligations to Act.

**Page 144 after note 2 (new note).** Recognizing an arguably new special relationship is *Bjerke v. Johnson*, 742 N.W.2d 660 (Minn. 2007). Defendant owned a stable and had minor-plaintiff reside there for significant periods of time with approval of her parents. Defendant told the parents she would look after their child. The minor, during a period when she was 14-18 years old, had a sexual relationship with the defendant's live-in boyfriend and sues defendant claiming she had a duty to protect her. The court finds a special relationship based on the surrogate parent/custodial role that defendant undertook when she invited plaintiff to live with her. (This is the same court that decided *Harper*.)

**Page 145 note 7.** A variation on the pre-employment physical occurred in *Draper v. Westerfield*, 181 S.W.3d 283 (Tenn. 2005). The defendant-radiologist was hired by the state department of social services to review scans taken of the infant child because of suspected child abuse. The child was subsequently killed by her father. The doctor did not report that the tests revealed strong evidence of abuse, likely by the parents. The physician claimed that he had no duty to the decedent with whom he did not have a doctor-patient relationship. The court concluded otherwise, finding the basis for a duty in the physician's undertaking to review the medical records and report the results to state investigators.

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**Page 182 note 9.** *Olivo v. Owens-Illinois, Inc.*, 895 A.2d 1143 (N.J. 2006). By contrast with the New York Court of Appeals in *New York City Asbestos Litigation*, the New Jersey Supreme Court had little difficulty finding that a refinery owed a duty to the spouse of a welder who was exposed to asbestos at the defendant's refinery and brought home clothes laden with asbestos.

The spouse's exposure when cleaning the clothes caused her to contract mesothelioma. Relying on the foreseeability of harm to the spouse of a worker, the court brushed aside the "limitless liability" concern that weighed heavily with the New York court. Courts continue to confront and resolve this issue. The latest are *In re Certified Question from Fourteenth Dist. Court of Appeals of Texas*, 740 N.W.2d 206 (Mich. 2007) (no duty over a vigorous dissent); *Chaisson v. Avondale Industries, Inc.*, 947 So. 2d 171 (La. Ct. App. 2006) (employer owed a duty to spouse of employee); *Rochon v. Saberhagen Holdings, Inc.*, 140 Wash. App. 1008 (Ct. App. 2007) (holding the ordinary duty of care is applicable to employer whose affirmative conduct resulted in employee bringing home asbestos fibres, but that status as employer and land possessor did not impose affirmative duty on defendant); see also *In re Asbestos Litigation*, 2007 WL 4571196 (Del. Super. Ct. 2007) (trial court holding employer owed no duty to spouse).

**Page 187 after note 5 (new note).** Does a person who agrees to act as a designated driver have a duty to third persons? Yes, qualifiedly, says the court in *White v. Sabatino*, 415 F. Supp. 2d 1163 (D. Haw. 2006). The qualification is that a duty arising from the undertaking exists only if performance begins. Thus, a broken promise to serve as a designated driver cannot be the basis for a duty. (The issue of whether a bare promise, without any further action, is sufficient for an undertaking has long been a matter of controversy, although it appears the modern view is that it can be. See Restatement (Third) of Torts: Liability for Physical Harm § 42, Comment *e* (Proposed Final Draft No. 1, 2005).)

**Page 187 note 6, last &.** The judgment in the Giants Stadium case was overturned on appeal. *Verni v. Harry M. Stevens, Inc.*, 903 A.2d 475 (N.J. Super. Ct. App. Div. 2006). The court explained:

[The beer vendors] argue that the trial judge erred in admitting evidence of a "culture of intoxication" at the stadium. They urge that such evidence is irrelevant to the central issue in a claim against a licensed beverage server and that admission of such evidence caused undue prejudice to [the vendors]. We agree . . . and thus, a new trial is required.

The court observed that under the dram shop act the issue is whether the driver was visibly intoxicated when he was served. Whether others were similarly served, or a generally rowdy culture existed, or violations of defendant's own service policies occurred, were irrelevant to the central question in the case.

After remand, the case was settled for what appears to be a substantial amount, but which was not made public. Mary Jo Patterson, *7 Years Later, a Child's Life Can Begin Again: Settlement Reached in Giants Fan's DWI*, *The Star-Ledger* (Newark, NJ), Nov. 7, 2007, at 16.

**Page 195 new section entitled "A Reprise on Duty."** Instructors may want to include the following case either at the conclusion of Section C, Policy Bases for Invoking No Duty or at the conclusion of Section D, The Duties of Landowners and Occupiers. We envision using this case to play off many of the themes in the prior sections, including the ordinary duty of reasonable care, the use of factors to decide if a duty exists and especially the role of foreseeability in that inquiry, whether statutes can be the source of (affirmative) duties in tort, the relationship between an implied private right of action and a statute providing a basis for an affirmative tort

duty, and the role of relationships as a basis for the ordinary duty of care as well as affirmative duties. This case would be fine at the conclusion of Section C, but since it does refer to duties imposed on landowners, suggesting that they are a remaining bastion in which duty arises from a relationship (rather than landowner duties being partial dispensations from the ordinary duty of reasonable care), and because the case is a good foil for *Posecai*, some instructors may want to defer coverage until after completing Section D.

**Gipson v. Kasey**  
Supreme Court of Arizona, 2007  
214 Ariz. 141,150 P.3d 228.

BALES, JUSTICE.

The issue presented is whether persons who are prescribed drugs owe a duty of care, making them potentially liable for negligence, when they improperly give their drugs to others. We conclude that such a duty is owed.

**FACTS AND PROCEDURAL BACKGROUND**

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Kasey attended an employee holiday party hosted by the restaurant where he worked. Also present were his co-worker, Nathan Followill, and Followill's girlfriend, Sandy Watters. The restaurant provided beer for the guests. Kasey brought whiskey to the party and he gave shots to others present, including Followill, who was twenty-one years old. Kasey also brought pain pills containing oxycodone, a narcotic drug, which he had been prescribed for back pain. On prior occasions, Kasey had given pain pills to other co-workers for their recreational use.

During the party, Watters asked Kasey for one of his pain pills. Kasey gave Watters eight pills, noting that they were of two different strengths, but not identifying them by name. Although Kasey knew that combining the pills with alcohol or taking more than the prescribed dosage could have dangerous side effects, including death, he did not tell Watters this information.

When Kasey gave the pills to Watters, he knew that she was dating Followill. Kasey also knew that Followill was interested in taking prescription drugs for recreational purposes because Followill had on prior occasions asked Kasey for some of his pills, but Kasey had refused because he thought Followill was "too stupid and immature to take drugs like that."

Shortly after she obtained the pills from Kasey, Watters told Followill she had them, and Followill took the pills from her. As the night progressed, Followill became increasingly intoxicated. Around 1:00 am., Watters and Followill left the party. The next morning, Watters awoke to find that Followill had died in his sleep. The cause of death was the combined toxicity of alcohol and oxycodone.

Gipson, Followill's mother, filed a wrongful death action against Kasey. The superior

court granted summary judgment for Kasey, finding that he owed Followill no duty of care. . . .

The court of appeals reversed, holding that Kasey did owe Followill a duty of care . . . .

## DISCUSSION

To establish a claim for negligence, a plaintiff must prove four elements: (1) a duty requiring the defendant to conform to a certain standard of care; (2) a breach by the defendant of that standard; (3) a causal connection between the defendant's conduct and the resulting injury; and (4) actual damages. [ ]The first element, whether a duty exists, is a matter of law for the court to decide. [ ]The other elements, including breach and causation, are factual issues usually decided by the jury. [ ]

The existence of a duty of care is a distinct issue from whether the standard of care has been met in a particular case. As a legal matter, the issue of duty involves generalizations about categories of cases. Duty is defined as an "obligation, recognized by law, which requires the defendant to conform to a particular standard of conduct in order to protect others against unreasonable risks of harm." . . . Whether the defendant has met the standard of care--that is, whether there has been a breach of duty--is an issue of fact that turns on the specifics of the individual case.

Whether the defendant owes the plaintiff a duty of care is a threshold issue; absent some duty, an action for negligence cannot be maintained. [ ]Thus, a conclusion that no duty exists is equivalent to a rule that, for certain categories of cases, defendants may not be held accountable for damages they carelessly cause, no matter how unreasonable their conduct. [ ]

In this case, the court of appeals held that Kasey owed Followill a duty of care, based on the totality of the circumstances as reflected in the following factors: (1) the relationship that existed between Kasey and Followill, (2) the foreseeability of harm to a foreseeable victim as a result of Kasey giving eight pills to Watters, and (3) the presence of statutes making it unlawful to furnish one's prescription drugs to another person not covered by the prescription.

Kasey argues that none of these factors support a finding that he owed a duty of care to Followill. Although we disagree with aspects of the analysis of the court of appeals, that court correctly concluded that Kasey owed a duty of care.

### A. Foreseeability

Kasey argues that the court of appeals erred by relying on foreseeability of harm because this Court held in *Martinez v. Woodmar IV Condominiums Homeowners Ass'n, Inc.* [941 P.2d 218, 223 (1997)] that foreseeability should no longer be a factor in determining whether a duty exists. [ ] Gipson, on the other hand, argues that our prior cases have relied on foreseeability in determining whether a duty is owed. See, e.g., *Donnelly Constr. Co. v. Oberg/Hunt/Gilleland*, 139 Ariz. 184, 187 (1984) ("Duty and liability are only imposed where both the plaintiff and the risk are foreseeable to a reasonable person.").

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Whether an injury to a particular plaintiff was foreseeable by a particular defendant necessarily involves an inquiry into the specific facts of an individual case. See W. Jonathan Cardi, *Purging Foreseeability: The New Version of Duty and Judicial Power in the Proposed Restatement (Third) of Torts*, 58 Vand. L. Rev. 739, 801 (2005). Moreover, foreseeability often determines whether a defendant acted reasonably under the circumstances or proximately caused injury to a particular plaintiff. Such factual inquiries are reserved for the jury. The jury's fact-finding role could be undermined if courts assess foreseeability in determining the existence of duty as a threshold legal issue. [ ] Reliance by courts on notions of "foreseeability" also may obscure the factors that actually guide courts in recognizing duties for purposes of negligence liability. [ ]

Foreseeability, as this Court noted in *Martinez*, is more properly applied to the factual determinations of breach and causation than to the legal determination of duty. 189 Ariz. at 211 ("[F]oreseeable danger [does] not dictate the existence of duty but only the nature and extent of the conduct necessary to fulfill the duty."); [ ]. We believe that such an approach desirably recognizes the jury's role as factfinder and requires courts to articulate clearly the reasons, other than foreseeability, that might support duty or no-duty determinations. See Restatement (Third) of Torts: Liability for Physical Harm §7 cmt. j (Proposed Final Draft No. 1, 2005) ("Third Restatement") (rejecting foreseeability as a factor in determining duty).

### **B. Relationship Between the Parties**

Kasey also argues that he did not owe Followill a duty of care because they had no "direct" or "special" relationship. Duties of care may arise from special relationships based on contract, family relations, or conduct undertaken by the defendant. [ ] A special or direct relationship, however, is not essential in order for there to be a duty of care.<sup>1</sup>

Under Arizona common law, various categorical relationships can give rise to a duty. These include, but are not limited to, the landowner-invitee relationship, [ ], the tavern owner-patron relationship, [ ], and those "special relationships" recognized by §315 of the Restatement (Second) of Torts (1965) that create a duty to control the actions of another, [ ]. None of these relationships existed between Followill and Kasey.

Although a duty of care may result from the nature of the relationship between the parties, we decline to recognize such a duty here based on the particular facts (some of which are disputed) of the relationship between Kasey and Followill. In identifying this relationship as a

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<sup>1</sup>That particular "relationships" may provide the basis for a duty of care reflects the historical evolution of the common law, which before the nineteenth century recognized fault-based liability in "actions on the Case" between parties having relationships to each other by contract or status. 1 Dan B. Dobbs, *The Law of Torts* § 111, at 259-63 (2001). As the common law evolved during the nineteenth century, courts extended the scope of negligence actions by recognizing a more general duty of care applicable to suits among strangers, like those involved in railway crossing accidents. *Id.* § 112, at 265-66. Relationships, however, have continued to provide a basis for identifying and defining duties of care. *Id.* § 113, at 266.

factor supporting a finding of duty, the court of appeals noted that “[t]hey were co-workers and friends; they had socialized previously; [and] Followill had asked Kasey for pills in the past.” [ ]

A fact-specific analysis of the relationship between the parties is a problematic basis for determining if a duty of care exists. The issue of duty is not a factual matter; it is a legal matter to be determined *before* the case-specific facts are considered. [ ]; see 1 Dan B. Dobbs, *The Law of Torts* § 226, at 577 (2001) (“The most coherent way of using the term duty states a rule of law rather than an analysis of the facts of particular cases.”). Accordingly, this Court has cautioned against narrowly defining duties of care in terms of the parties’ actions in particular cases. “[A]n attempt to equate the concept of ‘duty’ with such specific details of conduct is unwise,” because a fact-specific discussion of duty conflates the issue with the concepts of breach and causation. . .

A finding of duty, however, does not necessarily depend on a preexisting or direct relationship between the parties. As we explained in *Stanley*, “[t]he requirement of a formalized relationship between the parties has been quietly eroding . . . and, when public policy has supported the existence of a legal obligation, courts have imposed duties for the protection of persons with whom no preexisting ‘relationship’ existed.” 208 Ariz. at 221 -22 ¶1 8 (internal citations omitted).

### C. Public Policy

Having rejected foreseeability as a factor in the duty analysis and declining to recognize a duty based on the particular relationship between the parties, we turn to public policy considerations. Public policy may support the recognition of a duty of care. [ ]

Kasey argues that recognizing a duty here would imply that all people owe a duty of care to all others at all times, a proposition he contends was rejected in *Wertheim v. Pima County*, 211 Ariz. 422, 426 & 17 (App.2005) (“We do not understand the law to be that one owes a duty of reasonable care at all times to all people under all circumstances.” [ ]). It is not necessary, however, to frame the issue this broadly to recognize a duty on the part of Kasey. Instead, in this case, Arizona statutes themselves provide a sufficient basis for a duty of care.<sup>2</sup>

It is well settled that “[t]he existence of a statute criminalizing conduct is one aspect of Arizona law supporting the recognition of [a] duty.” [ ] Not all criminal statutes, however, create duties in tort. A criminal statute will “establish a tort duty [only] if the statute is ‘designed to protect the class of persons, in which the plaintiff is included, against the risk of the type of harm which has in fact occurred as a result of its violation . . . . [ ]

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<sup>2</sup>This Court has, however, previously noted that “every person is under a duty to avoid creating situations which pose an unreasonable risk of harm to others.” [ ] Similarly, § 7 of the proposed Third Restatement recognizes that “[a]n actor ordinarily has a duty to exercise reasonable care when the actor’s conduct creates a risk of physical harm.” Based on such statements, one could conclude that people generally “owe a duty to exercise reasonable care to avoid causing physical harm” to others, subject to exceptions that eliminate or modify this duty for reasons of policy, such as the social host rule. See *id.* § 7 & cmt. a; accord Dobbs, *supra*, § 227, at 578. Because we find a duty based on Arizona statutes, we need not decide if a duty would exist independently as a matter of common law. . . .

Several Arizona statutes prohibit the distribution of prescription drugs to persons lacking a valid prescription. [ ] As the court of appeals recognized, “[t]hese statutes are designed to avoid injury or death to people who have not been prescribed prescription drugs, who may have no medical need for them and may in fact be endangered by them, and who have not been properly instructed on their usage, potency, and possible dangers.” [ ] Because Followill is within the class of persons to be protected by the statute and the harm that occurred here is the risk that the statute sought to protect against, these statutes create a tort duty.

Kasey argues that because the legislature did not create a civil duty for a violation of these criminal statutes, a duty does not exist, But this notion was rejected in *Ontiveros*: “[A] duty of care and the attendant standard of conduct may be found in a statute silent on the issue of civil liability.” 136 Ariz. at 510 (internal citations omitted).

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Alternatively, Kasey argues that this Court should adopt a no-duty rule precluding recovery on the grounds that a person who voluntarily becomes intoxicated and thereby sustains an injury should not be able to recover from the person supplying the intoxicants. We reject this reasoning. Followill’s own actions may reduce recovery under comparative fault principles or preclude recovery if deemed a superseding cause of the harm, but those are determinations to be made by the factfinder. For the reasons stated, neither our case law nor considerations of policy justify a blanket no-duty rule that would insulate persons who improperly distribute prescription drugs from tort liability.

## CONCLUSION

We hold that Kasey did owe a duty of care based on Arizona’s statutes prohibiting the distribution of prescription drugs to persons not covered by the prescription. Accordingly, we vacate the part of the opinion of the court of appeals that addresses the issue of duty and remand to the superior court for further proceedings consistent with this opinion.

HURWITZ, JUSTICE, CONCURRING.

[While agreeing with the majority on the current state of Arizona law, Justice Hurwitz, following up on the suggestion in footnote 2, ruminated on whether the court should adopt a framework recognizing a duty of reasonable care as a default, as proposed by the Third Restatement. Then, in exceptional cases, the court might rule that public policy requires an exemption from liability, which would be accomplished by developing a no-duty rule broad enough to cover cases falling within the policy thought to require exemption. Thus, rather than looking for a criminal statute in this case, since the defendant’s actions were implicated in causing the harm (i.e., this was not a case in which the basis for an affirmative duty was required), the court should only have considered whether the defendant provided some good ground why the ordinary duty of reasonable care should be negated. This might “simplify our analytical task in future cases and remove some understandable confusion among the bar and lower courts on the duty issue.” Nevertheless, such a change had not been proposed by the parties or briefed, counseling deference to another case and day.]

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## Section F. Governmental Entities.

**Page 234 new note (before note 1).** In 2007, a DVD version of *Crazy Love*, a documentary about the relationship between Burton Pugach and Linda Riss, was released. The movie covers their courtship and the lye incident, as well as their subsequent marriage after he was released from jail and Riss's support for her husband when he was criminally charged in the 1990s with harassing another woman.

The New York Times reviewed the movie twice and it generated two more articles in the Times about the couple. The Riss-Pugach relationship has fascinated New Yorkers for decades. The two reviews are Manohla Dargis, *Tragedy, Too, Is in the Eye of the Beholder*, N.Y. Times, June 1, 2007, at B1 and Allison H. Weiner, *For Worse and for Better: Documenting an Obsession*, N.Y. Times, Jan. 23, 2007, at E1. The articles are Ruth La Ferla, *What's Love Got to Do With It?*, N.Y. Times, May 27, 2007, at § 9, p.1 and Jim Dwyer, *A Policewoman Looks Back On the Craziest of Love Duets*, N.Y. Times, May 23, 2007, at B1.

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## Chapter V

### Section A. Cause in Fact

**Page 356 new note (after note 1).** Recall the use of expert testimony to prove the standard of care in medical malpractice cases, at p. 111. Does *Daubert* apply to an expert testifying to the standard of care? Not ordinarily, says the court in *Palandjian v. Foster*, 842 N.E.2d 916 (Mass. 2006), because the issue is one of fact: How do other physicians practice in like circumstances? But, says the court, when an expert's testimony on standard of care is interwoven with scientific knowledge (whether a family history of gastric cancer was relevant to whether the defendant should have tested decedent for such disease), *Daubert* is applicable.

**Page 358 note 7.** In *Williams v. Utica College of Syracuse University*, 453 F.3d 112 (2d Cir. 2006), plaintiff, a college student, was sexually assaulted in her dorm room. She sued the college, alleging it should have had better security to keep intruders from entering the building. The issue is whether better security would have prevented the attack. The difficulty is that the individual who committed the assault could have been either an outsider or someone who lived within the dormitory. Thus, the question becomes whether the lack of security is a factual cause of the plaintiff's harm. One might have thought that the "increasing the risk" language of *Zuchowicz* would save the day for the plaintiff who had no evidence about the assaulter. But that's not the case, the court, per Calabresi, J., holds. Summary judgment was properly granted against the plaintiff based on her inability to prove causation. The court retreats from the burden shifting in *Zuchowicz* and distinguishes this case from *Martin v. Herzog* and *Zuchowicz*. Three factors bear on whether a plaintiff can satisfy the burden of proof on causation based only on the negligent act and inference: 1) circumstantial evidence; 2) the relative ability of the parties to obtain evidence about what happened; and 3) whether the case is one in which there is reason to

have different concerns about errors favoring plaintiffs as opposed to defendants. This case seems to drive a significant wedge in the presumption rule adopted in *Zuchowicz*.

**Page 369 new note (after note 7).** *Medved v. Glenn*, 125 P.3d 913 (Utah 2005) provides an occasion to rehearse the single judgment rule, statutes of limitation, the need to determine damages for future anticipated harm (all of which are introduced briefly at p. 15), and lost chance. In *Medved*, defendant was negligent in diagnosing the plaintiff's cancer, requiring plaintiff to undergo more extensive treatment. That constituted physical injury and the basis for recovery of damages. But, pursuant to the single judgment rule, plaintiff can -- indeed must -- recover for anticipated future harm -- her likelihood of having a recurrence due to the delay. (The court does not confront whether a less than 50% chance of recurrence can be recovered.) For statute of limitations purposes, the court distinguishes another line of cases in which it held that a risk of future harm alone is inadequate to start the statute running, so that plaintiff here must recover for the risk of future harm in conjunction with the suit for injury from the delayed diagnosis, thereby tying together the statute of limitations, single judgment rule, and a lost chance to avoid future harm.

**Page 372 in connection with the changes to joint and several liability.** Among states that have legislatively modified joint and several liability, some of those statutes do not address whether the doctrine is retained when multiple tortfeasors engage in concerted action. The Iowa Supreme Court confronted this situation in *Reilly v. Anderson*, 727 N.W.2d 102 (Iowa 2006). The Iowa comparative fault act has no explicit provision for joint and several liability of concerted actors. Nevertheless, the court held that a driver and his front-seat passenger who caused an accident when the passenger attempted to steer the automobile while the driver took a hit from a marijuana bong were jointly and severally liable to the plaintiff.

**Page 378 note 7.** Presenting a different question from *Loui* and *Gross* is the situation in which some of the plaintiff's injury was caused non-tortiously but, as in those cases, causal apportionment is difficult. In *Rowe v. Munye*, 702 N.W.2d 729 (Minn. 2005), the plaintiff's pre-existing condition was not tortiously caused. Thus, the court concluded that the burden-shifting employed by some courts and the Second Restatement when two defendants each cause an indeterminate amount of damage is inapplicable. As a consequence, plaintiff bears the burden of proof in demonstrating the harm caused by the defendant above and beyond the pre-existing condition.

**Page 387 notes and questions.** Instructors who are interested in the story behind Vioxx--the New Drug Application process, Merck's marketing and aspirations for the drug, the VIGOR study and the concerns it raised internal to Merck, Merck's spin on the heart effects found in that study, and the difficulties of the FDA in effectively regulating drugs in the post-approval period--may want to take a look at *McDarby v. Merck & Co., Inc.*, --- A.2d ---, 2008 WL 2199871 (N.J. Super. Ct. App. Div. 2008). The court, in the course of affirming a compensatory damages award on behalf of plaintiff, tells the story in considerable detail. The primary development in Vioxx litigation, a global settlement between Merck and claimants, is explained in Melissa Maleske, *Merck's Vioxx Settlement Highlights a Winning Legal Strategy*, Inside Counsel, Jan. 2008, at 16

**Page 391 note 9.** Some instructors may want to use this case in connection with Chapter VI for more extensive consideration of statutes of limitations. In *Grisham v. Philip Morris USA, Inc.*, 151 P.3d 1151 (Cal. 2007), the court provided guidance on when and how a plaintiff could invoke the discovery rule for a claim that would otherwise be time-barred. Plaintiffs brought suit alleging that their addiction to smoking caused them economic loss -- the cost of buying cigarettes -- as well as for physical injuries suffered later. Rejecting defendant's claim that by 1988 everyone knew that cigarettes were addictive and therefore the statute had to begin running no later than that date, the court held that plaintiffs invoking the discovery rule must plead when and how they discovered the factual basis for their claim and why it was reasonable for them not to have been aware earlier of those facts. Moreover, the statute of limitations for the economic loss claim did not affect claims for later-occurring diseases nor did the single-judgment rule require that claims for economic loss and for physical injury be pursued in the same suit.

**Page 395 note 2.** In *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006), the lower court had certified a class of smokers and tried the case with the jury awarding \$145 billion in punitive damages and compensatory damages to three named plaintiffs. The court affirmed two of the compensatory awards but decertified the class, holding that favorable determinations on common issues could be used by members of the class in future proceedings, in which they would have to prove only issues that were not common, such as that their injury was caused by smoking. In a splintered decision, the court also struck down the punitive damages award because a predicate for such an award -- proof of liability on all issues -- was not established for the class.

## **Section B. Proximate Cause**

**Page 403 note 1.** *Rowe v. Munye*, 702 N.W.2d 729 (Minn. 2005), excerpted previously in this Update Letter in connection with the burden of proof on the extent of injury, p. 378. The plaintiff had a pre-existing condition that was aggravated in some indeterminate amount by defendant. The dissent claimed that the eggshell plaintiff rule would permit plaintiff to recover for all of his harm, not just the enhanced harm. The court explained why the rule is inapplicable -- the eggshell plaintiff rule is not about the amount of harm caused by the defendant but whether the harm that is caused is recoverable -- when a plaintiff has a predisposition that results in greater than anticipated harm. Indeed, the court explains that the need for proof of enhancement and the eggshell rule may coexist in a case.

**Page 424 note 7.** *Soto v. New York City Transit Authority*, 846 N.E.2d 1211 (N.Y. 2006). Plaintiff, a teenager who had consumed alcohol, was on a catwalk that ran parallel to an elevated track in an effort to get to the next station to catch a train. He was struck by a train and sued claiming that the train operator was negligent in keeping a lookout and failing to stop the train in time to avoid the accident. Over the defendant's claim that plaintiff's reckless conduct was a superseding cause of his injuries, the court held that although plaintiff was reckless and his conduct substantially contributed to the accident, that conduct should reduce his recovery based on comparative fault and not absolve the defendant from liability.

## Chapter VI

### Section A. The Plaintiff's Fault.

**Page 441 insert new paragraph (Just before *Statutes* paragraph).** Another lack of symmetry occurred in *Dodson v. South Dakota Dept. of Human Services*, 703 N.W.2d 353 (S.D. 2005). Plaintiff's decedent, who was being treated for bipolar disorder, committed suicide after being discharged by defendant physicians. The court held that the decedent's conduct should be evaluated by using a subjective standard that reflected her mental capacity rather than employing the traditional objective standard used for defendants with mental deficiencies.

**Page 452 note 4, end of 1st ¶.** *Nash v. Port Authority of New York & New Jersey*, 856 N.Y.S.2d 583 (App. Div. 2008), reflects a contrasting approach (the court never confronts the evident tension between its decision and that of the Court of Appeals in *Chianese*). This case arises out of the first World Trade Center terrorist attack in 1993 when terrorists exploded a bomb in the parking garage. The case tells a chilling tale of how the WTC was recognized as a target for a terrorist attack as early as the 1980s by the Port Authority. The jury assigned the defendant 68% of the comparative fault, more than it assigned to the terrorists. The court declines to upset that ruling, even though it means that under New York law the defendant will be subject to joint and several liability. The court relies on the "jury's exercise of its unique capacity to arrive at a more nuanced understanding of the nature and quality of the culpable conduct and its role in causing the plaintiffs harm" to justify this result. "[A]s this case so vividly illustrates, the blameworthiness of negligence may actually be increased by the heinousness of the wrongdoing it directly and foreseeably facilitates." The impetus for such relative assignments of comparative fault to negligent and intentional tortfeasors, which has occurred in other cases in which the negligent tortfeasor was at fault because of a failure to protect the plaintiff from the intentional tortfeasor, is reflected in Restatement (Third) of Torts: Apportionment of Liability § 14. That section makes such a negligent tortfeasor liable for both its fault and any fault assigned to the intentional tortfeasor, regardless of the status of joint and several liability generally under the jurisdiction's rules.

**Page 453 new note (after note 4).** *Plaintiff no-duty rules.* In the same way that courts adopted no-duty rules to exempt defendants from liability as reflected in Chapter III, might there be no-duty rules (however awkward it is to speak to of a plaintiff's duty to him or herself) for plaintiffs? In other words, are there certain arenas in which a plaintiff's conduct, even if negligent, will not be considered in a tort suit? The issue arises in cases involving minors having (arguably consensual) sex with adults. In *Christensen v. Royal School Dist. No. 160*, 124 P.3d 283 (Wash. 2005), a 13-year-old student sued the school and principal as a result of a sexual relationship the student had with a teacher. Defendants claimed that her voluntary participation constituted contributory negligence. The court held that her consent could not constitute contributory fault. It cited two policy reasons: the same concerns for protection of minors that mandate statutory rape as a crime, regardless of consent, and the "solemn duty" of a school district to protect its minor students.

**Page 454 note 8.** *J & J Timber Co. v. Broome*, 932 So. 2d I (Miss. 2006), constitutes a modern trap for the unwary that harks back to the days when a settlement with a jointly-liable tortfeasor

released the plaintiff's claims against all tortfeasors. In this narrower context, in which one party is vicariously liable for the other's negligence, the court holds that a settlement with an employee releases the employer from its vicarious liability, regardless of what the settlement agreement provides. There are several reasons for this, the most significant being that releasing the employee and maintaining a claim against the employer creates conflicts with the employer's right to seek indemnification from the employee. The Third Restatement provides for similar treatment of partial settlements with vicariously liable parties. See Restatement (Third) of Torts: Apportionment of Liability § 16, Comment d.

**Page 454 note 9.** In re Eighth Judicial Dist. Asbestos Litigation, 872 N.E.2d 232 (N.Y. 2007), reveals the variations that can occur in settlements but a common principle: when a settlement may affect a settling defendant's incentives and the defendant remains in the case, the agreement must be disclosed. In this multi-defendant case, one entered into a high-low agreement with the plaintiff that was based on the jury's award against that defendant. The court orders a new trial because the agreement was not disclosed to the non-settling defendants. The principle here is the same as exists in jurisdictions requiring disclosure of Mary Carter agreements.

### **Section B. Assumption of Risk.**

**Page 472, new note (after note 7).** In a trilogy of decisions, the Connecticut Supreme Court imposed substantial restrictions on the use of contractual waivers of liability. The first, *Hanks v. Powder Ridge Restaurant Corp.*, 885 A.2d 734 (Conn. 2005), addressed a waiver required of snowtubers. In a 4-3 decision with a vigorous dissent, the court paid homage to the *Tunkl* factors, while largely ignoring them in holding the waiver violated public policy. The court focused on the facility's control of the risks involved in snowtubing and that the waiver was an adhesion contract. The dissent argued that the majority was out of step with contemporary decisions (if not *Dalury*), especially in its reliance on the waivers being adhesion contracts. *Hanks* was followed by *Reardon v. Windswept Farm, LLC*, 905 A.2d 1156 (Conn. 2006), which extended the public policy proscription to a waiver obtained by a horseback riding stable. The final case, *Brown v. Soh*, 909 A.2d 43 (Conn. 2006), involved a professional car racer employed as an instructor at a car racing school. The instructor was injured when a student driver, while engaging in an instructional exercise, struck him. The instructor signed a waiver that released the school and others. (The court does not explain why workers' compensation is inapplicable here, although subsequently all claims against the school were dismissed, so the issue is the effectiveness of the waiver against a student and others but not the employer.) In one sense this is a less compelling case for striking the waiver, as the employee was well aware of the risks he was confronting. Nevertheless, based on disparities in bargaining power and the waiver being a contract of adhesion, the court strikes it, ruling broadly: "When we apply the factors that guide us, we conclude that exculpatory agreements in the employment context violate Connecticut public policy."

In contrast to Connecticut (and *Dalury*) are two decisions by the Utah Supreme Court. In the first, comparable to *Brown v. Soh*, above, the court adopted *Tunkl* as the governing framework and concluded that a pre-injury release by a ski racer was enforceable in a suit against the ski area where the racer was injured. *Berry v. Greater Park City Co.*, 171 P.3d 442

(Utah 2007). The court then addressed enforcement of a waiver in a purely recreational context in *Pearce v. Utah Athletic Foundation*, 179 P.3d 760 (Utah 2008). The court concluded that, in light of the *Tunkl* factors, waivers for recreational activities (here, a modified bobsled run open to the public) are enforceable and do not violate public policy: “We now join other states [if not Vermont and Connecticut] in declaring, as a general rule, that recreational activities do not constitute a public interest and that, therefore, preinjury releases for recreational activities cannot be invalidated under the public interest exception.”

**Page 480 note 6.** Instructors who want to employ a contrasting hypothetical might find the situation with maple baseball bats useful. Those bats splinter at a considerably higher rate than bats made of other woods. The maple bat problem is explored in Bruce Jenkins, *Maple Bats Are Risky Business*, S. F. Chron., June 9, 2008, at C1, which details a case in which a fan in Dodger stadium had her jaw broken by a broken bat. Query who the target defendants might be, the theories against them, and the extent to which they would be protected by primary assumption of risk.

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## Chapter X

### Section A. Damages.

**Page 706 note 1.** *Madeira v. Affordable Housing Foundation, Inc.*, 469 F.3d 219 (2d Cir. 2006), reveals yet another facet of the contemporary immigration debate. When an undocumented alien recovers lost wages in a tort suit, in which labor market should those lost wages be valued? Defendants relied on a Supreme Court case, *Hoffman Plastic*, 535 U.S. 137 (2002), that held that the Immigration Reform and Control Act of 1986 (“IRCA”) barred the NLRB from awarding backpay to an illegal alien. Defendants claimed that IRCA preempted state tort law that would provide damages based on what the plaintiff would earn in the United States and that if any damages for lost wages were awarded it should be based on earnings capacity in the plaintiff’s home country. The court rejected defendant’s claim, relying heavily on an earlier New York Court of Appeals decision, *Balbuena v. IDR Realty LLC*, 845 N.E.2d 1246 (N.Y. 2006):

The Court specifically noted that, in *Balbuena*, as opposed to *Hoffman Plastic*, the undocumented aliens had not themselves violated federal immigration law in procuring employment. [] Further, the Court of Appeals noted that New York law for compensating personal injury specifically sought to avoid any conflict with federal immigration law by instructing juries to consider the fact of a plaintiff’s removability in determining what, if any, lost United States earnings should be compensated. []

*Madeira* also noted the varying results in about a half dozen other cases confronting the same issue.

**Page 714 note 9, 2d full ¶.** Continuing the theme sounded in *Jutzi-Johnson*, Judge Posner in *Arpin v. U.S.*, 521 F.3d 769 (7th Cir. 2008), required the trial judge, as finder of fact, to explain the basis for a \$7 million award to a widow and adult children for loss of consortium. Even

though Illinois law does not favor consideration of comparable awards, this is a procedural matter and therefore governed by federal law. The court also suggested that the consideration of similar cases might begin by determining the ratio of compensatory to consortium damages in other cases and then deciding whether an adjustment from that overall ratio is appropriate based on the facts of the instant case.

**Page 714 note 9, 3d full ¶.** In Arpin, *supra*, Judge Posner explained how tradeoffs of risk and safety as revealed in behavior could provide a basis for determining damages for intangible losses:

It used to be thought that noneconomic losses were arbitrary because incommensurable with any dollar valuation. That is not true. People are constantly trading off hazards to life and limb against money; consider combat pay and re-enlistment bonuses in the army. Even when the tradeoff is between two nonmonetary values, such as danger and convenience (as when one crosses a street against the lights because one is in a hurry, or drives in excess of the speed limit), it may be possible to express the tradeoff in monetary terms, for example by estimating, on the basis of hourly wage rates, the value of the time saving. And if we know both the probability of a fatal accident and the benefit that a person would demand to bear it we can estimate a value of life and use that value to calculate damages in wrongful death cases. See W. Kip Viscusi and Joseph E. Aldy, “The Value of a Statistical Life: A Critical Review of Market Estimates Throughout the World,” 27 *J. Risk & Uncertainty* 5 (2003); Paul Lanoie, Carmen Pedro & Robert Latour, “The Value of a Statistical Life: A Comparison of Two Approaches,” 10 *J. Risk & Uncertainty* 235 (1995); W. Kip Viscusi, “The Value of Risks to Life and Health,” 31 *J. Econ. Lit.* 1912 (1992). Suppose a person would demand \$7 to assume a one in one million chance of being killed. Then we would estimate the value of his life at \$7 million. Not that he would sell his life for that (or for any) amount of money, but that if the risk could be eliminated at any cost under \$7 he would be better off. Suppose it could be eliminated by the potential injurer at a cost of only \$5. Then we would want him to do so and the prospect of a \$7 million judgment if he failed to would give him the proper incentive.

Id. at 775-76.

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**Page 738 note 5.** *Robinson v. Bates*, 857 N.E.2d 1195 (Ohio 2006) (citing cases on both sides). Contra to *Acuar*, this court stated that the collateral source rule is not implicated by the “write down” amount on the formal ground that the write down is not a benefit because it wasn’t actually “paid.” The court went on to say that the jury should decide the appropriate amount to award based on the standard of the reasonable value of medical services provided. Thus, the jury might award the amount billed, the amount paid, or something in between. The court concluded on this issue:

It may well be that the collateral-source rule itself is out of sync with today’s economic

realities of managed care and insurance reimbursement for medical expenses. However, whether plaintiffs should be allowed to seek recovery for medical expenses as they are originally billed or only for the amount negotiated and paid by insurance is for the General Assembly to determine.

Additional cases continue to confront this issue. See *Papke v. Harbert*, 738 N.W.2d 510 (S.D. 2007) (holding that jury should decide what is reasonable value of hospital services).

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**Pages 937 and 942 notes and questions.** Adam Liptak, *15 States Expand Right to Shoot in Self Defense*, N.Y. Times, Aug 7, 2006, at A1, details legislation providing expanded self-defense rights permitting individuals to “stand their ground” and not requiring that they retreat. Some also permit the use of deadly force in protection of home or vehicle and do not require fear for one’s safety as a condition for the use of such force.