July 2022

To: Torts Colleagues

Re: Franklin, Rabin, Green, Geistfeld & Engstrom Update Materials, 2022

TORT LAW AND ALTERNATIVES, Eleventh Edition (2021)

Dear Colleague:

Many, many years ago, we decided to prepare an annual set of update materials each summer, reflecting recent torts developments that might serve as a supplement to classroom use of our casebook between editions. In that tradition, we have now prepared this 2022 set of update materials, which is cumulative and contains developments since publication of the Eleventh Edition in 2021. In past years, we have occasionally added one or two edited cases to these update materials that instructors may want to use in their class. This year there are no new cases, but we have continued to add notes on recent developments of particular interest, keyed to the casebook. In addition, we have identified several interesting cases as potentials for hypotheticals to be used by instructors in their class. We intend to continue this practice in future versions of these update materials.

We continue our effort to re-think how best to offer course coverage that is pedagogically interesting and challenging. As always, we would be pleased to share ideas with you on this update. We encourage you to share your thoughts with us and please forward any cases that you think deserve consideration as we think ahead to next summer's update materials, as well as our future preparation of the Twelfth Edition.

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Chapter 1

Page 20, add to the end of the second full paragraph. In May 2021, the American Law Institute voted to approve the last piece of the Intentional Torts to Persons project. That Restatement will be published sometime soon. For discussion, see ALI Press Release, Restatement Third of Torts: Intentional Torts to Persons Is Approved, May 18, 2021. Work continues on the Remedies, Defamation and Privacy, and Concluding Provisions projects.

Chapter 2

Page 57, add to first paragraph in place of penultimate sentence of note 1. As in *Bethel*, other state courts "have abandoned the distinction between degrees of negligence or at least suggested that they should no longer be recognized," and the "Restatements and some legal commentators agree." But "most states still follow the common-law rule" and apply a heightened standard of care to common carriers—those "in the business of transporting people or goods." VIA Metro. Transit v. Meck, 620 S.W.3d 356, 362–66 (Tex. 2020); see also Maison v. New Jersey Transit Corp., 245 A.3d 536, 551 (N.J. 2021) (stating that only "some jurisdictions . . . do not impose the heightened common-carrier standard on either privately or publicly owned carriers").

Page 58, new note following note 1.

1A. *Related doctrines*. Other doctrines also alter the duty of care to accommodate certain circumstances. For example:

> The sudden emergency doctrine . . . is available as a defense to a party who suddenly and unexpectedly finds him or herself confronted with a perilous situation which permits little or no opportunity to apprehend the situation and act accordingly. The sudden emergency doctrine is frequently employed in motor vehicle accident cases wherein a driver was confronted with a perilous situation requiring a quick response in order to avoid a collision. The rule provides generally, that an individual will not be held to the "usual degree of care" or be required to exercise his or her "best judgment" when confronted with a sudden and unexpected position of peril created in whole or in part by someone other than the person claiming protection under the doctrine. The rule recognizes that a driver who, although driving in a prudent manner, is confronted with a sudden or unexpected event which leaves little or no time to apprehend a situation and act accordingly should not be subject

> to liability simply because another perhaps more prudent cause of action was available. Rather, under such circumstances, a person is required to exhibit only an honest exercise of judgment.

Graham v. Check, 243 A.3d 153, 159–60 (Pa. 2020). Based on the reasoning of the *Bethel* court, does the ordinary standard of reasonable care adequately account for a "sudden emergency"?

Page 68, add the following new paragraph at end of note 1.

Rather than being formulated as either an inflexible rule or a wholly flexible standard, legal rules can be modified in other ways that straddle between these two extremes. For example, many jurisdictions presume that a driver who rear-ends another vehicle engaged in negligent behavior, in which case the driver must provide evidence overcoming the presumption of negligence. See, e.g., Hester v. Walker, 320 So. 3d 362, 3687 (La. 2021) (granting summary judgment against driver who rear-ended a tractor trailer and "failed to produce factual support sufficient" to rebut the presumption of negligence). By shifting the burden of proof onto the defendant, such a presumption can function like a rule of negligence liability that is subject to exceptions—those cases in which the defendant rebuts the presumption based on the particular circumstances of the crash. Can *Goodman* and *Pokora* be adequately reconciled by treating a violation of *Goodman*'s "stop, look, and listen" rule as a presumption of negligence that the other party can rebut by showing that the particular circumstances justified a departure from that rule, as in *Pokora*?

Page 73, add the following new paragraph at end of note 4. Uber, Lyft and other commercial ride-sharing services are in the business of providing the general public with transportation services, subjecting them to the heightened duty of care imposed on common carriers. Murray v. Uber Techs., Inc., 486 F. Supp. 3d 468, 475 (D. Mass. 2020) (holding that "plaintiff has stated a plausible claim that Uber should be held to the common carrier standard of liability because it operates in substantially the same manner as taxi cab companies"). Would the heightened duty obligate commercial ride-sharing services to adopt the safest possible driving technologies, which at some point might involve replacing human drivers with autonomous vehicles?

Pages 92–93, insert new paragraph at the end of note 5. What criteria should courts rely on when considering whether to extend this rule beyond self-service areas of retail establishments? Consider Jeter v. Sam's Club, 271 A.3d 317, 319–20 (N.J. 2022) ("We agree with the trial and appellate courts that the mode of operation rule does not apply to the sale of grapes in closed clamshell containers. Selling grapes in

this manner does not create a reasonably foreseeable risk that grapes will fall to the ground in the process of ordinary customer handling."). Is the relevant concept one of reasonable foreseeability, or whether the risk of a slip-and-fall is sufficiently large to justify eliminating the plaintiff's burden of proving that the defendant had constructive notice of a temporary dangerous condition?

Page 108, new note following note 2.

2A. *The relevance of plaintiff's conduct.* The third factor in Prosser's formulation, which forecloses application of res ipsa loquitur when the plaintiff's voluntary action or conduct caused the injury, is overly broad. For example, the plaintiff in *Ybarra* made a voluntary choice to undergo the treatment; had he not done so, the injury would not have occurred. Properly applied, this factor implements the early common law rule that barred a contributorily negligent plaintiff from recovery altogether, explaining why it was not relevant in *Ybarra*. For reasons discussed more extensively in Chapter 7, contributory negligence no longer bars recovery under the regime of comparative fault. Consequently, "the advent of comparative fault should logically eliminate this [third factor based on plaintiff's conduct] from the doctrine, unless the plaintiff's negligence would appear to be the sole proximate cause of the event." W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 39 (5th ed. 1984).

This formulation is adopted by the Third Restatement, which usefully illustrates its application:

> [C]onsider the motorist who parks a car at the top of an incline; a minute later, the car rolls down the incline and runs into a pedestrian, who at the time is carelessly not paying attention. . . . [T]he plaintiff's carelessness—even though it has contributed to the accident—in no way diminishes the res ipsa loquitur idea that the car probably rolled because of the motorist's negligence. Hence res ipsa applies, despite the plaintiff's contribution.

Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 17 cmt. h. Despite the logic of this approach, some courts continue to bar application of res ipsa loquitur when the plaintiff's voluntary conduct contributed to the injury. See, e.g., Pannucci v. Edgewood Park Senior Hous.—Phase 1, LLC, 243 A.3d 948, 955 (N.J. Super. App. Div. 2020).

Page 118, add the following to the end of note 10. In light of the difficulties that plaintiffs face in trying to recover tort damages, coupled with the considerable

expense of retaining medical experts, two attorneys who represent plaintiffs in these suits conclude that "[o]nly med mal cases with clear liability and serious injuries can be pursued. . . . Our experience has been that we reject 90% or more of potential medical malpractice cases. . . ." Thomas E. Albro & Thomas M. Hendell, What Practitioners can Teach Academics About Tort Litigation—The Plaintiff's Perspective in Medical Malpractice Litigation, 13 J. Tort L. 273, 275 (2020).

Chapter 3

Page 136, note 4. Replace cite to Cooper with: Zachary D. Kaufman, Police Policing Police, 91 Geo. Wash. L. Rev. (forthcoming 2023).

Page 151, add after the first sentence of note 2. The California Supreme Court clarified that both a special relationship and a positive assessment of the *Rowland* factors are required for an affirmative duty to exist. Brown v. USA Taekwondo, 483 P.3d 159 (Cal. 2021).

Page 161, note 8, add to the discussion of *Brown*. On appeal, the California Supreme Court, after the obligatory bow—"Generally speaking, all persons have a duty to take reasonable care in their activities to avoid causing injury, though particular policy considerations may weigh in favor of limiting that duty in certain circumstances."—addressed the framework for determining when a person owes an affirmative duty to protect the plaintiff from attack by another. Rejecting plaintiffs' claim that the *Rowland* factors alone can be sufficient for an affirmative duty to protect, the court said that, before a duty to protect can arise, two inquires must be made: 1) Is there a special relationship?; 2) If yes, do the *Rowland* factors support imposing a duty? Thus, the court clarifies that both are necessary, . "The multifactor test set forth in *Rowland* was not designed as a freestanding means of establishing duty, but instead as a means for deciding whether to limit a duty derived from other sources." Brown v. USA Taekwondo, 483 P.3d 159, 166 (Cal. 2021).

In the course of its opinion, the court explained when a special relationship exists: "A special relationship between the defendant and the victim is one that gives the victim a right to expect protection from the defendant, while a special relationship between the defendant and the dangerous third party is one that entails an ability to control [the third party's] conduct." Id. at 166 (internal quotation marks omitted).

By contrast with affirmative duties, *Rowland* serves to inform when there are reasons to create an exception to the ordinary duty of reasonable care. Id. at 167. The court affirms the lower court: USAT had a special relationship with the coach, because, based on the organizational realm, it controlled him; USOC had no such relationship with the coach or plaintiffs. *Rowland* factors supported imposing a duty on USAT.

Pages 167–68, add to the end of note 4. See also Weisenberger v. Ameritas Mut. Holding Co., 2022 WL 1078211, at *7 (D. Neb. 2022) (concluding that, although data security statute did not create a private right of action, that is a distinct and separate matter "from whether a statute creates a common law duty in tort which can be enforced in a negligence action").

Page 188, add to the end of note 5.

Can a gas station that merely sells gasoline to an intoxicated patron be held liable to a victim of the patron's drunk driving? Yes, answers the court in Morris v. Giant Four Corners, Inc., 498 P.3d 238 (N.M. 2021), provided that the station knows or has reason to know the patron is intoxicated. Public policy in combatting the toll of drunk driving is the rationale for the court's holding. Doctrinally, this is a negligent entrustment case that is the subject of the next section, but the thrust of the case is concern about reducing the carnage caused by drunk driving.

Page 189, add at the end of note 8. In early 2022, the plaintiffs settled the lawsuit against the manufacturer of the AR-15-style rifle used in the massacre for $73 million, "in what is believed to be the largest payout by a gun manufacturer in a mass shooting case." Rick Rojas et al., Sandy Hook Families Settle with Gunmaker for $73 million Over Massacre, N.Y. Times, Feb. 15, 2022.

Page 194, add before the last paragraph of note 7.

A child attending a party drowns in the pool. Should the case be analyzed as one involving a condition of the property or an activity on the property? In Bramlett v. Ryan, 635 S.W.3d 831 (Ky. 2021), the court characterized the case as one involving the activity of holding a party rather than the condition of a swimming pool, ameliorating the harshness of the treatment of social guests as licensees.

Pages 236–37, add before the last paragraph of note 7.

By contrast with *Hoyem*, the court in Dinsmoor v. City of Phoenix, 492 P.3d 313 (Ariz. 2021), found no duty to students who are injured off campus. The case involved a high school romantic situation involving one male and two females. The two females who, at different times, had a relationship with the male became

convinced he planned to hurt one of them. They reported the situation to the Vice Principal, who, after consulting with the school safety officer, developed and implemented a plan to protect the female who was thought to be at risk of an attack. Later the male shot the other female at a friend's house after school. The victim's mother sued the city, school district and school officials who were involved. (Parenthetically, it is a little hard to find that any of the defendants acted unreasonably.) The court of appeals held that the school owed a duty to the student based on the special relationship between school and student. The Arizona Supreme Court reversed, holding the only bases for a school's affirmative duty to its students is in a custodial, land possessor or quasi-parental role; once a student has left school grounds, the school's duty ends.

Page 243, add new note after note 7.

8, *Medical examiner error.* Apparently, the medical examiner's error in *Lauer* was not as unusual as one might assume. The New York Times reports on a number of individual instances of medical examiner error that resulted in wrongful prosecutions and incarcerations, with one prominent medical examiner's comment that "egregious failures of the system have led to tragic consequences for innocent defendants." See Shaila Dewan, Failed Autopsies, False Arrests: A Risk of Bias in Death Examinations, N.Y. Times, June 21, 2022, at A1. The article also discusses a controversial and methodologically challenged study that found cognitive biases were driving many of these errors. Did the *Lauer* court fail to appreciate the role that tort law might play in combatting medical examiner error?

Chapter 4

Page 290, add to note 3. Suggested hypothetical. Consider the following: Parents take their two older children to a youth basketball tournament while a caregiver babysits plaintiffs' two-year-old child at their home. At the tournament, in order to keep tabs on the caregiver, the parents periodically check a "nanny cam" app on their smartphone, which livestreams audio and video from their home in real time. To their horror, the livestream shows the caregiver physically assaulting their two-year-old. Under *Dillon v. Legg* and its progeny, does the situation give rise to a claim for bystander emotional distress?

This hypothetical is drawn from Ko v. Maxim Healthcare Services, Inc., 58 Cal. App. 5th 1144 (Cal. Ct. App. 2020). There, the trial court dismissed the plaintiffs' complaint, reasoning that the parents "were not physically present when Landon was abused." Id. at 1146. Reversing, the appellate court held that, even though the parents were some distance from their home at the time of the attack, they

were "virtually present at the scene . . . sufficient for them to have a contemporaneous sensory awareness of the event." Id. at 1159.

Page 292, add after *Dunphy* block quote. Similarly, in Greene v. Esplanade Venture Partnership, 168 N.E.3d 827 (N.Y. 2021), the court held a grandchild counted as "immediate family." Unsatisfied with that expansion, a concurring justice criticized the court for having "missed the moment" in not scrapping the "immediate family" requirement altogether and in continuing to adhere "to a legal framework that is arbitrary to the point of being contrary to public policy and blatantly unjust." Id. at 835–36 (Rivera, J., concurring).

Page 293, add to note 9. Indiana also allows parents to recover for their emotional distress as a result of learning that their child has been sexually abused—even if the parents do not satisfy typical "bystander" requirements. In K.G. by Next Friend Ruch v. Smith, 178 N.E.3d 300 (Ind. 2021), the mother of a child with severe physical and mental disabilities sued a school instructional assistant who had sexually abused her child. Even though the mother did not learn about the abuse until more than two years after it ceased, when she did learn of it, the mother's mental health perceptibly declined. In light of these "extraordinary" facts, the Indiana Supreme Court crafted a new "narrow" bright-line rule:

> [W]hen a caretaker assumes responsibility for a child, and when that caretaker owes a duty of care to the child's parent or guardian, a claim against the caretaker for the negligent infliction of emotional distress may proceed when the parent or guardian later discovers, with irrefutable certainty, that the caretaker sexually abused that child and when that abuse severely impacted the parent or guardian's emotional health.

Id. at 311.

Page 294, new note after note 10.

10A. *Reasonable woman standard?* Advances in neuroscience technology have identified certain brain differences between men and women, prompting some scholars to consider whether gender-neutral tests suffice. Assessing this literature, Professor Betsy J. Grey advocates for a reasonable woman standard in certain limited settings, including claims for "pure" emotional harm. She observes that, in these cases, "courts often require that the inflicted harm be such that it would cause severe emotional distress in an ordinarily sensitive person"—a requirement that "reflect[s] the normative view that we cannot and should not compensate for every

stress and emotional hardship inflicted by others that individuals suffer throughout life." Betsy J. Grey, Sex-Based Brain Differences and Emotional Harm, 70 Duke L.J. Online 29, 60–63 (2020). A problem arises, however, because some research suggests that women and men view certain situations differently—and "the 'truth' of the encounter may sometimes depend on the sex of the [victim]." Id. at 64.

If neuroscience does ultimately "prove" that women experience particular emotional harms differently (and more acutely) than men experience them, how, if at all, should the law respond? What is the problem with keeping the law gender-neutral? What might be a problem with applying particularized standards to NIED claims, based on the victim's gender?

Page 319, add to middle of note 7, after *Community Bank of Trenton*. But see Dittman v. UPMC, 196 A.3d 1036 (Pa. 2018) (holding that the economic loss rule did not bar employees' negligence claims, where employees alleged that their employer failed to exercise reasonable care when storing their personal and financial information on its computer system—and that, as a consequence of employer's breach, their confidential information was disclosed, and they "incurred damages relating to fraudulently filed tax returns" and were "at an increased and imminent risk of becoming victims of identity theft crimes, fraud and abuse").

Page 319, add to end of note 7. Scholars and policymakers continue to debate how data breaches ought to be addressed. See, e.g., Jay P. Kesan & Carol M. Hayes, Liability for Data Injuries, 2019 U. Ill. L. Rev. 295 (2019); Nicolas N. LaBranche, Note, The Economic Loss Doctrine & Data Breach Litigation: Applying the "Venerable Chestnut of Tort Law" in the Age of the Internet, 62 B.C. L. Rev. 1665 (2021). For more on liability for data breaches, see infra Chapter 15, Note 10, p. 1167.

Page 331, add before *Emerson*. Suggested hypothetical.
Revvo Corp., a sperm bank, claims to carefully vet donors for personal health, educational attainment, and family medical history. During the vetting process, Dan Dishonest lied and did not disclose his substantial criminal history, including previous arrests for burglary, DUI, and disorderly conduct. He also did not disclose his medical history, which included multiple hospitalizations for schizophrenia and grandiose delusions. While filling out a questionnaire, Dan was told by a Revvo employee that donors with the highest IQs and most extensive educations received the highest compensation. That employee even encouraged him to exaggerate his background. On his screening questionnaire, Dan claimed he had an IQ of 160 and later forged a PhD diploma. In fact, he did not have any higher education degrees.

Revvo did not ask him to verify his answers or to supply his medical records. After being told that only a small fraction of candidates made it past Revvo's careful vetting process, Sally, a Revvo customer, was impregnated with Dan's sperm. She then gave birth to Drew, who was later diagnosed with severe attention deficit hyperactivity disorder and a rare inheritable blood disorder. Like his biological father, Drew suffers from psychiatric episodes that require hospitalization. Can Sally bring a wrongful conception, wrongful birth, or wrongful life claim against Revvo Corp.?

In Norman v. Xytex Corp., 848 S.E.2d 835 (Ga. 2020), a case with nearly identical facts, the court held that plaintiffs cannot bring a claim alleging they would not have purchased donor sperm had Xytex revealed the truth about the donor, since such a claim arises "from the very existence of the child" and Georgia law bars plaintiffs from allowing damages in tort "that necessarily presume that life itself can ever be an injury." Id. at 837. However, plaintiffs can pursue other claims, including to recover damages for the difference in price between the cost of the sperm they received and its true fair market value. Plaintiffs may also be able to recover under consumer protection laws. For further discussion, see generally Yaniv Heled et al., A Wrong Without a Remedy: Leaving Parents and Children with a Hollow Victory in Lawsuits Against Unscrupulous Sperm Banks, 96 Chi-Kent L. Rev. 115 (2021).

Page 339, new note after note 7.

7A. *Wrongful prolongation of life*. In 2017, a Montana man sued the doctor who saved his life on a theory of "wrongful prolongation of life." Rodney Knoepfle, a 67-year-old with an extensive history of disease and physical ailments, nearly died of cardiac arrest in a hospital bathroom before doctors revived him. Upon regaining consciousness, Knoepfle was not pleased: He had signed a Do Not Resuscitate order so he could die "in peace." Following the hospital resuscitation, he lived for two more years, "suffering from substantial pain and physical debilitation." A jury ultimately awarded his estate $409,000. Mark Arsenault, Hospital Staff Revived a Man's Stopped Heart—and He Sued, Bos. Globe, Dec. 26, 2020. For further discussion, see Paula Span, Filing Suit for 'Wrongful Life,' N.Y. Times, Jan. 22, 2021, at D7; Plaintiff's Trial Brief in Knoepfle v. Harrison, available at https://www.thaddeuspope.com/images/ODonnell_v_Harrison_Mont_2019_PL_TRIAL_BRIEF.pdf. For another case, similar to Knoepfle's, see Doctors Hospital of Augusta, LLC v. Alicea, 788 S.E.2d 392 (Ga. 2016) (concluding that defendant hospital was not entitled to summary judgment where the hospital failed to comply with the 91-year-old patient's advance directive and, contrary to the patient's express wishes, intubated her and put her on a mechanical ventilator).

Chapter 5

Page 350, add to paragraph beginning "A significant number of states . . ." Cf. Benoit v. Saint-Gobain Performance Plastics Corp., 959 F.3d 491, 501 (2d Cir. 2020) (interpreting *Caronia* to hold that, under New York law, a plaintiff may be entitled to medical monitoring if the plaintiff has "the physical manifestation of or clinically demonstrable presence of toxins" in his or her body).

Page 362, add to note 5. Adopting the position of the Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 26 cmt j, Massachusetts recently rejected the "substantial factor" test because it proved too "confusing" and, among other deficiencies, "invite[d] jurors to skip the causation inquiry altogether." Doull v. Foster, 163 N.E.3d 976, 988, 991 (Mass. 2021).

Page 375, add note 7. Also adopting a skeptical stance, in Parkes v. Hermann, 852 S.E.2d 322, 325 (N.C. 2020), the court declined to recognize a cause of action for lost chance, reasoning that the adoption of "[s]uch a policy . . . is better suited for the legislative branch of government."

Page 392, add to note 7. Plaintiffs were also able to satisfy the fungibility requirement in a lead-paint case only with respect to the manufacturers of the lead carbonate *pigment* used in these paint products; the fungibility did not extend to the paint products themselves, and so paint manufacturers were not subject to liability. Burton v. E.I. du Pont de Nemours and Co., Inc., 994 F.3d 791, 812–14 (7th Cir. 2021).

Chapter 6

Page 408, add at the end of note 4. Reflecting the trend described by Professor Long is Wickersham v. Ford Motor Co., 853 S.E.2d 329, 331 (S.C. 2020), (responding to a certified question from the Fourth Circuit):

> South Carolina does not recognize a general rule that suicide is an intervening act which breaks the chain of causation and categorically precludes recovery in wrongful death actions. Rather, our courts have applied traditional principles of proximate cause to individual factual situations when considering whether a personal representative has a valid claim for wrongful death from suicide.

Page 419, end of Subsection B. Suggested hypothetical. A truck was inspected at a state-designated, privately owned inspection station where it passed inspection. Several months later, the truck is being repaired and, while on the repairer's lift, it breaks apart, falls, and injures the mechanic working on the truck. The mechanic sues the inspection station alleging negligence in inspecting the truck. Assuming there was negligence in inspecting the truck, is that negligence within the station's scope of liability?

This hypothetical is drawn from Newton v. Preseau, 236 A.3d 1270 (Vt. 2020). There, the court concluded that the point of the inspection is to determine compliance with state truck rules and roadworthiness, not the condition of the vehicle. An instructor might play this out further by asking whether the inspection station could be held liable if it failed to identify a condition of the truck that led to it being damaged. This question harks back to whether independent medical examiners have a duty to the patient when performing an employment physical, although this situation is a bit different with the plaintiff, rather than the employer, being the one who arranged and paid for the inspection.

Chapter 7

Pages 465-66, add at the end of note 6. Glassman v. Friedel, 265 A.3d 84 (N.J. 2021). Decedent is injured at a restaurant and dies as a result of subsequent medical malpractice by physicians. P settles with restaurant, and the medical care defendants seek a declaration of their credit, based on the settlement with the restaurant, against any judgment. Court rejects pro tanto and pro rata under state comparative fault statute and adopts comparative share credit. Then it attends to the fact that restaurant settlement was for more than just the enhanced harm for which the malpractice defendants are liable because it resolved the claim for decedent's initial harm for which the medical care defendants were not liable. Invoking § 26 of the Apportionment of Liability Restatement, the court affords the medical care defendants an opportunity to attempt to apportion by causation for the initial and subsequent harms—they're only liable for enhanced harm. The court's analysis is fine as far it goes, but it stops short of addressing how much credit the non-settling medical-care defendants should receive for the settlement with the restaurant. That would require having the factfinder determine the restaurant's comparative fault in causing the enhanced injury, a step the court seems not to appreciate. Even more difficulties would exist if the court employed a pro tanto credit, which would have required determining how much of the settlement with the restaurant was attributable to the enhanced harm suffered after the malpractice.

Page 510, add a new note after note 8.

8A. *A tort claim based on failure to comply with FDA adverse event reporting requirements?* Plaintiff had a medical device implanted that she alleged contained inadequate warnings. But, that warning claim was preempted by *Riegel*. So, plaintiff asserted a state law claim based on the manufacturer's failure to comply with FDA adverse event reporting. One might have thought that *Buckman* would preempt such claims, but the Second Circuit concluded that a "narrow gap" existed for such a claim: "The plaintiff must be suing for conduct that violates the FDCA (or else his claim is expressly preempted by § 360k(a)), but the plaintiff must not be suing because the conduct violates the FDCA (such a claim would be impliedly preempted under *Buckman*)." Glover v. Bausch & Lomb Inc., 6 F.4th 229, 237 (2d Cir. 2021) (quoting Riley v. Cordis Corp., 625 F. Supp. 2d 769, 777 (D. Minn. 2009)). It is a bit difficult to understand that narrow gap—it relies on a difference between fraud perpetrated on the FDA during the pre-marketing process for drug approval (*Buckman*) and at least negligent misrepresentation (and maybe fraud) on the FDA post approval of a medical device. To date, no case has clearly articulated why the narrow gap exists or its diameter.

The Second Circuit certified to the Connecticut Supreme Court the question of whether that state's products liability law recognized a claim for failing to comply with FDA adverse event reporting requirements. The Connecticut Supreme Court responded affirmatively, thereby leaving the plaintiffs free of preemption obstacles to pursue their claim. Glover v. Bausch & Lomb, Inc., 2022 WL 2035805 at *10 (Conn. 2022) ("We agree with the plaintiff that the defendants had a duty under the CPLA to comply with federal laws requiring them to report adverse events associated with the Trulign Lens to the FDA in order to prevent harm to users such as the plaintiff.").

Chapter 8

Page 541, add at the end of note 2. Gonzalez v. O & G Indus., Inc., 267 A.3d 766, 783 (Conn. 2021) (largely relying on the actor's ability to reduce risk through the exercise of reasonable care to deny claim of strict liability for an explosion at a natural gas plant and observing that "[o]ur emphasis of this factor is consistent with other courts' application of the six factor balancing test" in the Second Restatement).

Chapter 9

Page 584, add to the second paragraph of note 6.c. Two recent decisions have concluded that Amazon is not a "seller" or other type of commercial product distributor subject to strict products liability. In Amazon.com, Inc. v. McMillan, 625 S.W.3d 101, 109 (Tex. 2021), the court concluded that the Texas product liability statute "does not expand the pool of potentially liable non-manufacturing sellers beyond those recognized at common law; it reduces that pool." The court continued:

> Given that [the statute] is more restrictive than the common law, we see no indication that the Legislature intended for "distributing or otherwise placing" to include commercial behavior beyond ordinary sales and previously qualifying non-sale commercial transactions [such as bailment transactions or commercial delivery of an advertising sample].

Id. at 109 (quoting the Texas product liability statute).

In an unpublished opinion, a federal appellate court affirmed the district court's ruling that Amazon is not subject to strict products liability under Arizona law:

> The district court accurately summarized the law when it stated that Arizona weighs a number of factors when determining if entities participate significantly in the stream of commerce and are therefore subject to strict liability, including whether they: (1) provide a warranty for the product's quality; (2) are responsible for the product during transit; (3) exercise enough control over the product to inspect or examine it; (4) take title or ownership over the product; (5) derive an economic benefit from the transaction; (6) have the capacity to influence a product's design and manufacture; or (7) foster consumer reliance through their involvement.
>
> The court's decision to enumerate the existing factors was neither a novel approach to the law nor overly rigid. Rather, the court's articulation of the various strict liability factors was entirely consistent with existing Arizona case law.
>
> In applying these factors, the district court found that the majority of factors weighed in favor of Amazon. We agree.

State Farm Fire & Cas. Co. v. Amazon.com, Inc., 835 Fed. App'x 213, 215–16 (9th Cir. 2020). A dissenting opinion argued that the court should have certified the question to the Arizona Supreme Court given that other courts have relied on similar analyses in finding that Amazon is subject to strict products liability and because "Amazon's responsibility for the transaction before us is not, in my view, clearly covered by prior Arizona cases. The role played by Amazon here was not contemplated in those decisions." Id. at 217 (Clifton J., dissenting).

Page 613, add to the end of the first paragraph of note 2. But see Crawford v. ITW Food Equip. Grp., LLC, 977 F.3d 1331, 1344 (11th Cir. 2020) (holding that the patent danger of unguarded blade of a commercial meat saw was defectively designed under the consumer expectations test because "the plaintiffs introduced significant evidence through both of their experts that there will inevitably be accidental injuries caused by the saw operator's inability to maintain one hundred percent focus one hundred percent of the time," and that, while these lapses are "in the long run, inescapable, they are by no means obvious to the typical user of meat saws").

Pages 642–43, insert at end of paragraph running across these two pages. In Maynard v. Snapchat, Inc., 870 S.E.2d 739, 743 (Ga. 2022), the plaintiff was rear-ended by a third party driving over 100 miles per hour who "was using a 'Speed Filter' feature within Snapchat, a mobile phone application, to record her real-life speed on a photo or video that she could then share with other Snapchat users." The court concluded that plaintiff and his wife stated a valid claim that Snap had negligently designed Snapchat's Speed Filter based on their allegations. In particular, plaintiffs alleged "that Snap could reasonably foresee that its product design created this risk of harm based on, among other things, the fact that Snap knew that other drivers were using the Speed Filter while speeding at 100 miles per hour or more as part of 'a game,' purposefully designed its products to encourage such behavior, knew of at least one other instance in which a driver who was using Snapchat while speeding caused a car crash, and warned users not to use the product while driving."

Page 675, add to note 3. Courts continue to hold that pharmacists and health-care providers predominantly sell "services" and not "products" subject to strict products liability, influenced by prior decisions such as *Murphy*. See, e.g., Carrozza v. CVS Pharm., Inc., 992 F.3d 44, 60 (1st Cir. 2021) (adopting this rule as a matter of first impression in part because "other courts have consistently concluded that pharmacists primarily provide a service when dispensing prescriptions"); Normandy v. Am. Med. Sys., Inc., 262 A.3d 698, 103 (Conn. 2021) (adopting this rule as a

matter of first impression in part because a "review of sister state decisions demonstrates that hospitals are predominantly held to be service providers rather than product sellers for purposes of strict liability because the essence of the transaction between a hospital and a patient is for medical services rather than the sale of goods").

Chapter 10

Page 715, add at the end of note 8. The history of the opioid litigation and a thorough analysis of its similarities and important differences with the tobacco litigation is provided in Nora Freeman Engstrom & Robert L. Rabin, Pursuing Public Health Through Litigation: Lessons from Tobacco and Opioids, 73 Stan. L. Rev. 285 (2021).

Numerous actions brought by governmental entities alleging public nuisance claims against opioid manufacturers and distributors have resulted in massive settlements, with the associated liabilities driving Purdue Pharma L.P. into bankruptcy. According to a recent report:

> Eight opioid trials have commenced in state and federal courts—mostly during the past year—but only four of those have concluded and produced verdicts. The trials are largely intended to help resolve thorny legal disputes and pave the way for national settlements, and with so few verdicts thus far, and with many defendants still balking at settlements, each trial has far-reaching implications.

Jeff Overley, Bellwether by the Bay: Key Details as SF Opioid Trial Looms, Law360 (Apr. 21, 2022).

Relying on the reasoning in *Lead Industries Association,* the Oklahoma Supreme Court overturned the trial court's $465 million judgment for the state of Oklahoma against a manufacturer for creating a public nuisance in the manufacturing, marketing, and selling of prescription opioids. The court reasoned: "The damages the State seeks are not for a communal injury but are instead more in line with a private tort action for individual injuries sustained from use of a lawful product and in providing medical treatment or preventive treatment to certain, though numerous, individuals." State ex rel. Hunter v. Johnson & Johnson, 499 P.3d 719, 727 (Okla. 2021).

Similarly, a trial court in California issued a preliminary ruling rejecting governmental entities' public nuisance claims against the manufacturers and distributors of prescription opioids, concluding that plaintiffs "failed to prove the element of 'unreasonable' interference" and also "failed to prove that any such alleged interference was more than 'negligible or theoretical.'" People v. Purdue Pharma L.P., 2021 WL 7186146 (Cal. Super. Ct. 2021). Arguing that these cases reflect a "national trend against the use of public nuisance law to support opioid claims," one of the defendants in the Ohio MDL moved for a reconsideration of the MDL court's ruling that plaintiffs had stated viable claims based on this theory of liability. The MDL court denied the motion on the ground that the Oklahoma case has no necessary general implications—it is based on the court's "legal interpretation of Oklahoma's nuisance statutes"—and the California case only involves a failure of proof and "did *not* conclude public nuisance is an inappropriate cause of action for the vindication of opioid claims." In re Nat'l Prescription Opiate Litig., 2022 WL 228150, at *4 (N.D. Ohio 2022).

Chapter 11

Pages 728-29, note 4. Note to Instructors: In Teaching at the Intersection of Torts, Race and Gender (available on SSRN, posted 2022), Professor Alberto Bernabe addresses how an instructor might prepare for, and proceed with, a nuanced classroom conversation probing courts' reliance on race- and gender-based actuarial tables. See particularly pages 13–18. For other excellent ideas, see Jennifer Wriggins, How to Include Issues of Race and Racism in the 1-L Torts Course: A Call for Reform, __ Rutgers Race & L. __, manuscript at 23–26 (forthcoming 2022).

Page 729, add new note after note 5.

5A. Even apart from race- and gender- based tables, there is evidence that the tort system devalues certain individuals' injuries. Professor Jennifer Wriggins, for example, recently analyzed all the published wrongful death decisions in Louisiana from 1900-1950 where the amount of damages was discussed. Her searches yielded a dataset of 152 cases. Out of those, the average and median awards to African-American survivors were less than half of damages awarded to whites. Professor Wriggins underscores the pernicious nature of these disparities:

> When damages are unequal by race, when African-Americans are compensated for less than whites for comparable injuries, that is race discrimination and a violation of the basic principle that like cases

> should be treated alike. It has ripple effects to the future, disadvantaging people of color and advantaging whites.

Wriggins manuscript, supra at 22–23.

Page 734, add to note 13. On May 23, 2022, California Governor Gavin Newsom signed compromise legislation, sponsored by consumer advocates and supported by medical groups, to increase MICRA's caps to account for inflation. In 2023, caps for noneconomic damages will be $350,000 for non-death cases and $500,000 when the malpractice causes death. From there, the cap will climb steadily, to $750,000 in non-death cases and $1 million in death cases over the next ten years. Then, starting in 2033, the cap will creep upward 2% per year to account for inflation. See Bob Egelko, Malpractice Damage Limit to Rise, S.F. Chron., May 23, 2022, at C2.

Page 747, add new paragraph following *Herron*.

More recently, courts have continued to grapple with how much to award for a decedent's loss of life. E.g., Rack v. Schwartz, 2021 WL 6619275, at *7 (E.D. Ark. 2021) (awarding $1 million for the 52-year-old decedent's loss-of-life and observing: "When considering the value Ms. Rack would have placed on her own life, it is important to note that she was a singer—who when she sang in church 'everybody felt the Holy Ghost,' a baby sister who brought joy to her Family, and her mother's caretaker.").

Page 755, add to the end of note 2. But see Benjamin Minhao Chen, The Expressiveness of Regulatory Trade-offs, 55 Ga. L. Rev. 1029 (2021) (summarizing results from empirical studies suggesting that "people normally do not perceive regulatory trade-offs [of money and lives] as symbolic affronts that call for an expressive defense of the value of life").

Page 755–56, add to note 3. Consider Zander v. Morsette, 959 N.W.2d 838 (N.D. 2021). There, a driver with a blood-alcohol level of 0.295—more than three-and-a-half times the legal limit—seriously injured one person and killed two others while driving on the wrong side of the Bismarck Expressway. A jury awarded each plaintiff $295 million in punitive damages. Evaluating whether the driver acted with malice (as required under North Dakota law), the North Dakota Supreme Court concluded that the driver's conduct was grossly "negligent or extremely reckless," but the driver did not act "with ill will or wrongful motive"; nor did he "intend[] to injure" anyone. Id. at 847. Accordingly, the court ruled that the trial court "abused its discretion" in awarding punitive damages. Id.

Does the court's holding neglect the deterrence rationale of punitive damages? How would the case come out, applying the definition of "malice" as supplied by California Civil Code § 3294(1), reprinted on pp. 755-56.

Pages 756-57, modify the end of note 4. Strike the second paragraph. Instead substitute: Meanwhile, a majority of states permit a decedent's estate to recover punitive damages after the victim's death; a strong minority of states, however, bar such recoveries."

Page 758, add to note 9. See also Louisville SW Hotel, LLC v. Lindsey, 636 S.W.3d 508, 521 (Ky. 2021) (adopting this majority view while explaining that divergent treatment is warranted because "comparative fault regimes and punitive damages advance different aims").

Page 773, add to note 5. Even after BMW v. Gore and *Campbell*, courts will sometimes (like *Mathias*) bless awards above the single-digit ratio. In Adeli v. Silverstar Automobile, Inc., 960 F.3d 452 (8th Cir. 2020), for instance, an Arkansas car dealership sold a used 2007 Ferrari to Adeli for $90,000, assuring him that the car was "turnkey" and "ready to go." The dealer, however, knew that the car had faulty exhaust headers (devices that keep dangerous gas created by the engine from entering the car's passenger compartment). After Adeli discovered the defect, and the dealer refused to rescind the sale, Adeli sued.

At trial, the jury found for Adeli and awarded him $20,201 in compensatory and $5.8 million in punitive damages—a ratio of 1:287. The district court subsequently slashed the punitives to $500,000, a ratio of roughly 1:25. Applying the Supreme Court's factors from BMW v. Gore, the appellate court affirmed, finding the dealer's conduct reprehensible enough to justify the nearly 1:25 ratio. In defending its deviation from a single-digit multiplier, the court explained that compliance would undermine deterrence. "To rigidly apply the instructive single-digit ratio principle as if it were a mathematical formula for due process," held the court, "risks turning [defendant's] fraudulent conduct into a calculable business decision." Id. at 464. In a concurring opinion, Judge David Stras complained that modern punitive damages jurisprudence amounts to "judicial alchemy," or an exercise in "anti-due process." Id. at 464–65 (Stras, J., concurring).

Page 806. For a discussion of the non-insurability of intentional torts—and also an argument that the default rule should be changed to permit insurability, see generally Christopher C. French, Insuring Intentional Torts, 83 Ohio St. L.J. __ (forthcoming 2022).

Chapter 12

Page 820, third full paragraph. According to the National Center for State Courts, in 2020, tort cases comprised roughly 7% of the incoming civil cases in state courts. This figure represents a slight rebound from prior years. See https://www.courtstatistics.org/csp-stat-nav-cards-first-row/csp-stat-civil. That change might be explained by the fact that, in 2020, there was a sharp (pandemic-fueled) decline in civil case filings (which were down 26%) and particularly traffic filings, especially moving violations and parking tickets (which were down 45%). See generally National Center for State Courts, 2020 Incoming Caseload Composition—Civil (Jan. 6, 2022), available at https://www.courtstatistics.org/csp-stat-nav-cards-first-row/csp-stat-civil.

Page 822, first full paragraph. Shari Seidman Diamond & Jessica M. Salerno, Reasons for the Disappearing Jury Trial: Perspectives From Attorneys and Judges, 81 La. L. Rev. 119 (2020), offers the results of a national survey of 1,460 attorneys and judges, which compiled respondents' views of why the trial is vanishing. The authors found that perceived risk, costs, and delay deter litigants from opting for trial. In respondents' opinion, trials are also affected by tort reform initiatives, as these mechanisms "have reduced the ability of litigants and their attorneys to recover substantial awards."

Page 824, first full paragraph. As noted above, on May 23, 2022, California increased MICRA's caps. In 2023, caps for noneconomic damages will be $350,000 for non-death cases and $500,000 when the malpractice causes death. From there, the cap will tick upward, to $750,000 in non-death cases and $1 million in death cases in 2033. Then, starting in 2033, the cap will increase 2% per year to account for inflation. See Bob Egelko, Malpractice Damage Limit to Rise, S.F. Chron., May 23, 2022, at C2.

Page 826, first full paragraph. The year 2020 saw significant tort reform activity in both Louisiana and Missouri. For discussion of these enactments, as well as a comprehensive compilation of state activity, see ATRA, Tort Reform Record (2020), available at https://www.atra.org/reform_record/2020-tort-reform-records/.

Page 826, first full paragraph. In the past two-and-a-half years, states have added another item to the tort reform menu: New shields protecting certain businesses from liability from claims for injury caused by exposure to Covid-19. For a discussion of these enactments, see Betsy Grey & Samantha Orwoll, Tort Immunity in the

Pandemic, 96 Ind. L.J. Supp. 1 (2020); Josh Czaczkes, Tom Baker & John Fabian Witt, Why We Don't Need COVID-19 Immunity Legislation, Balkinization, Sept. 26, 2020, https://balkin.blogspot.com/2020/09/why-we-dont-need-covid-19-immunity.html. For an interactive 50-state compilation of state activity, see Husch Blackwell, 50-State Update on COVID-19 Business Liability Protections (last updated Mar. 18, 2021), https://www.huschblackwell.com/newsandinsights/50-state-update-on-covid-19-business-liability-protections#:~:text=House%20Bill%206030%2C%20titled%20%22COVID,in%20compliance%20with%20COVID%2D19%2D.

Page 829, second full paragraph. Busch v. McInnis Waste Sys., Inc., 468 P.3d 419 (Or. 2020) (invalidating the state's $500,000 cap on noneconomic damages because the restriction unjustly deprived plaintiffs of their state constitutional right to a remedy).

Page 829, third full paragraph. Siebert v. Okun, 485 P.3d 1265, 1267 (N.M. 2021) (upholding the state's law that provides: "Except for punitive damages and medical care and related benefits, the aggregate dollar amount recoverable by all persons for or arising from any injury or death to a patient as a result of malpractice shall not exceed six hundred thousand dollars ($600,000) per occurrence.").

Page 846, add to note 5. According to a report published in January 2022 by the National Conference of State Legislatures:

> States are taking action to extend workers' compensation coverage to include first responders and health care workers impacted by COVID-19. A common approach is to amend state policy so that COVID-19 infections in certain workers are presumed to be work-related and covered under workers' compensation. This presumption places the burden on the employer and insurer to prove that the infection was not work-related making it easier for those workers to file successful claims. Some employers and insurers have raised concerns that these presumption policies will increase insurance costs for employers at a time when businesses are already facing significant financial challenges.
>
> In total, 28 states and Puerto Rico have taken action to extend workers compensation coverage to include COVID-19 as a work-related illness. Eleven states have enacted legislation creating a presumption of coverage for various types of workers. Utah and Wisconsin limit the

> coverage to first responders and health care workers. Illinois, New Jersey and Vermont cover all essential workers while California and Wyoming cover all workers. States have also used executive branch authority to implement presumption policies for first responders and health care workers as a part of their COVID-19 emergency responses. However, many of those executive orders have expired following the end of the state of emergency in certain states.

Josh Cunningham, National Conference of State Legislatures, Covid-19: Workers' Compensation, Jan. 24, 2022. For more on how the workers' compensation system has addressed Covid-19, see generally Michael Dworsky & Bethany Saunders-Medina, RAND, Covid-19 and Workers' Compensation (2022); Dylan Moore, Comment, Striking a New Grand Bargain: Workers' Compensation as a Pandemic Social Safety Net, 2021 U. Chi. Legal F. 499 (2021).

Pages 847-50, add to note 6. See also Michael C. Duff, Fifty More Years of Ineffable Quo? Workers' Compensation and the Right to Personal Security, __ Ky. L.J. __ (forthcoming 2022) (charting and interrogating workers' compensation's evolution from a "reasonable substitute for tort" to something feebler and less adequate).

Page 888, add to note 4. According to the Health Research & Services Administration:

> As of May 1, 2022, the CICP has not compensated any COVID-19 countermeasures claims. Thirteen COVID-19 countermeasure claims have been denied compensation because the standard of proof for causation was not met and/or a covered injury was not sustained. One COVID-19 countermeasure claim, a COVID-19 vaccine claim due to an anaphylactic reaction, has been determined eligible for compensation and is pending a review of eligible expenses [but has not yet been paid].

HRSA, Countermeasures Injury Compensation Program (CICP) Data (last visited May 24, 2022). For a discussion of the CICP, see Congressional Research Service, Compensation Program for Potential COVID-19 Vaccine Injuries (Oct. 20, 2021), available at https://crsreports.congress.gov/product/pdf/LSB/LSB10584. A bill (the Vaccine Access Improvement Act) has been introduced in the House. If enacted, it would move injury payments out of the CICP and into the VICP.

Chapter 13

Page 907, insert after second sentence in first paragraph of note 6. See, e.g., McKenzie v. Sevier, 854 S.E.2d 236 (W. Va. 2020) (holding that jury award of zero damages was legally inadequate in light of verdict finding that defendant committed a physical battery).

Pages 911, insert at the end of note 4. Compare Zander v. Morsette, 959 N.W.2d 838, 847 (N.D. 2021) (applying rule that "[i]ntentional or willful conduct is not synonymous with oppressive, fraudulent or malicious conduct" required to recover punitive damages).

Page 920, add to the end of the first paragraph in note 2. Compare Archer v. City of Winter Haven, 846 Fed. App'x 759, 765 (11th Cir. 2021) (holding that employee of Wal-Mart store did not falsely imprison plaintiff by asking for receipt to prove purchase of a television because plaintiff "could have left the store and escaped any confinement by either showing . . . his receipt or leaving the store without his television, which he eventually did").

Page 954, add the following new paragraph at end of note 1. Consider, for example, whether conversion would apply to the claim that one party misappropriated another's trademark or trade name. In Edible IP, LLC v. Google, LLC, 869 S.E.2d 481 (Ga. 2022), plaintiff claimed that its "Edible Arrangements" trademark and trade name had been converted by defendant's internet search engine, which used the name in its "keyword advertising program" without plaintiff's permission. The governing law permits claims of conversion for intangible property, but the court rejected the plaintiff's claim because it would "expand the tort of conversion to encompass the type of intangible property traditionally protected within the scope of trademark law." A claim of conversion would only be appropriate in limited circumstances, for example, if the defendant did not "merely use" plaintiff's trademark but instead attempted to misappropriate the ownership interest "by wrongfully registering ownership of the trademark with the U.S. Patent and Trademark Office." Id. at 490–91. In the course of its ruling, the court also observed that all other courts addressing this issue have reached the same conclusion.

Page 965, new note following note 3.

3A. *Reasonable use of force in other contexts.* The underlying rationale for self-defense is not limited to cases of assault and battery. For example, a "victim of false imprisonment has the right to defend against the violation of his or her personal

liberty." Such a victim, therefore, is justified "for fleeing from or physically resisting an unlawful arrest or escaping from an unlawful detention, so long as the person uses no more force than is necessary to achieve such purpose." Glenn v. State, 849 S.E.2d 409, 417–21 (Ga. 2020). Is reasonable force in this context any different from the justified amount in cases of self-defense? How might the inquiry change if the force is used in the defense of one's property, the subject of the next section?

Page 990, in the section on qualified immunity, add a new paragraph following the first paragraph.

In some cases, "a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question." For example, in Taylor v. Riojas, 141 S. Ct. 52 (2020), the Court ruled that defendant correctional officers were not entitled to qualified immunity from a claim of cruel and unusual punishment, despite the absence of existing precedent based on similar circumstances. That case involved defendants' confinement of plaintiff Trent Taylor "in a pair of shockingly unsanitary cells." Id. at 53. In particular:

> The first cell was covered, nearly floor to ceiling, in massive amounts of feces: all over the floor, the ceiling, the window, the walls, and even packed inside the water faucet. Fearing that his food and water would be contaminated, Taylor did not eat or drink for nearly four days. Correctional officers then moved Taylor to a second, frigidly cold cell, which was equipped with only a clogged drain in the floor to dispose of bodily wastes. Taylor held his bladder for over 24 hours, but he eventually (and involuntarily) relieved himself, causing the drain to overflow and raw sewage to spill across the floor. Because the cell lacked a bunk, and because Taylor was confined without clothing, he was left to sleep naked in sewage.

Id. (quotation marks omitted).

According to one commentator, "the case is significant because it is a rare instance in which the high court rejected a claim of qualified immunity and made clear that no case on point is required in order to hold a government officer liable." Erwin Chemerinsky, SCOTUS Hands Down a Rare Civil Rights Victory on Qualified Immunity, ABA J. (Feb. 1, 2021).

Chapter 14

Page 1004, add just before the *Romaine* case. In recent years, defamation claims have been employed by those accused of sexual assault as well as by their victims. The recent trial of the defamation claims by Johnny Depp and Angela Heard against each other is one example of this phenomenon that is explored in Julia Jacobs, Depp Trial May Provide Playbook for Suing Accusers, N.Y. Times, June 2, 2022, at A20. The article provides a good thumbnail sketch of the pros and cons of the recent spate of celebrity defamation trials.

Page 1033, add to note 5. In Graphnet, Inc. v. Retarus, Inc., 269 A.3d 413 (N.J. 2022), the court explains general damages and special damages consistent with the descriptive passage in the text. But, the court goes on to address nominal damages and their relationship with general and special damages in a case in which the jury awarded $800,000 in nominal damages. Basically, nominal damages are only available when plaintiff cannot prove any special or general damages and should be in a "nominal" amount of no more than $500. The court concludes that because an instruction confused nominal damages with compensatory damages and the jury awarded $800,000 in nominal damages, a new trial was required.

Page 1062, add new note after note 4.

4A. In Banaian v. Bascom, 2022 WL 1482521, at *1 (N.H. 2022), the court confronted a case similar to *Carafano* that arose in the context of Twitter:

> The plaintiff was a teacher at Merrimack Valley Middle School in May 2016, when a student at Merrimack Valley High School "hacked" the Merrimack Valley Middle School website and changed the plaintiff-teacher's webpage, creating a post that "suggest[ed] that [the plaintiff] was sexually pe[r]verted and desirous of seeking sexual liaisons with Merrimack Valley students and their parents." Another student took a picture of the altered website and tweeted that image over Twitter. The retweeter defendants retweeted the original tweet. As a result, the plaintiff was subject to "school-wide ridicule," was unable to work for approximately six months, and suffered financial, emotional, physical, and reputational harm.

The plaintiff sued the retweeters for defamation and intentional infliction of emotional distress. These defendants moved to dismiss, arguing that the plaintiff's claims against them were barred by section 230(c), because their act of clicking on the retweet icon in Twitter made them republishers of the original Twitter content and therefore "users" of an ISP who are protected from liability by section 230(c). The court affirmed the lower court's dismissal on the basis argued by the defendants.

Page 1083–84, add after the discussion of Palin v. New York Times. On remand, the case was tried in early 2022. After all of the evidence was in and while the jury was still deliberating, the judge (Jed Rakoff) granted judgment as a matter of law to the Times on the basis that Palin had failed to introduce sufficient evidence to satisfy her burden to prove actual malice by clear and convincing evidence.[*] Under the law, plaintiff must provide affirmative evidence of reckless disregard by Bennett and cannot simply rely on the jury disbelieving Bennett's denial (there was no dispute over whether Bennett actually knew of the falsehood). Sifting through each piece of evidence presented by Palin to demonstrate that Bennett should have appreciated the falsity, the court, taking Bennett's testimony at face value, concludes that Palin failed to prove reckless disregard by clear and convincing evidence: "In sum, Palin adduced no evidence suggesting that Bennet (and therefore the Times) was aware, at the time [the editorial] was published, that the hypothesized link between her crosshairs map and Loughner's attack had been widely rejected." Palin v. New York Times Co., 2022 WL 599271 at *24 (S.D.N.Y.), reconsideration denied, 2022 WL 1744008 (2022).

Page 1154, add following the discussion of the Logan article the following. In dissents to the denial of certiorari in Berisha v. Lawson, 141 S. Ct. 2424 (2021), Justice Thomas and Justice Gorsuch expressed their views that it was time to reconsider *New York Times v. Sullivan*. Justice Thomas found no historical support for imposing an actual malice hurdle for public figures and concluded: "Instead of continuing to insulate those who perpetrate lies from traditional remedies like libel suits, we should give them only the protection the First Amendment requires" Id. at 2425. Similar to and citing the Logan article discussed above, Justice Gorsuch observed that the state of the media and the ability to express one's views has changed dramatically in the half century since *Sullivan* and that the balance struck by *Sullivan* has become unbalanced in the very different world of today's media. Id. at 2425–30.

Chapter 15

[*] Side story here: Judge Rakoff allowed the jury to keep deliberating after he granted JMOL, in case his decision was overturned on appeal. After the jury ruled for the Times, a law clerk discovered that a couple of jurors had received notification of the JMOL dismissal while they were deliberating. On a motion for reconsideration, the court denied that there was anything amiss in the procedure employed and that, in any case, the plaintiff had not preserved any objection to the process. Palin v. New York Times Co., 2022 WL 1744008, at *8 (S.D.N.Y. 2022) ("Palin failed to object to the Court's stated intention to announce its Rule 50 decision but not to dismiss the jury, not only when the Court announced its decision but also at any of the earlier sessions of argument when the Court proposed this approach."). Stay tuned for how all of this plays out if there is an appeal.

Page 1167, add to Note 10. Data-breach cases permitting recovery have now extended beyond academic endorsement and received a modestly positive reception in the courts. In addition to one court ruling that the economic loss rule does not bar a claim for data breaches, see Chapter 4 in these Update Materials, other courts, confronting the issue of duty and/or legally cognizable harm, have recognized claims arising from a data breach. In Charlie v. Rehoboth McKinley Christian Health Care Servs., 2022 WL 1078553 (D.N.M. 2022), patients' records held by defendant were stolen in a ransomware cyberattack. Among other claims, plaintiffs (a putative class) sued based on negligence and negligence per se for violating the Federal Trade Commission Act. Denying the motion to dismiss, the court holds, relying on § 7 of the Restatement (Third) of Torts: Liability for Physical and Emotional Harm, that defendants owed a duty of reasonable care to secure patients' private data even though the attack was a criminal one involving theft. With regard to damages, the court holds that plaintiffs allegations of extra time spent dealing with spam calls, monitoring their credit, the loss of value of their private information (for which the court provides no elaboration), and emotional distress carry the damages day, requiring denial of defendant's motion to dismiss.

A similar case is Collins v. Athens Orthopedic Clinic, P.A., 837 S.E.2d 310 (Ga. 2019), another putative class action, in which a hacker stole patient records. The trial court dismissed the complaint because stolen data does not constitute, by itself, legally compensable harm. On appeal, the court reverses: the allegation "that criminals are now able to assume their identities fraudulently and that the risk of such identity theft is 'imminent and substantial'" is sufficient for a factfinder to determine that plaintiffs will likely suffer identity theft with concomitant fraudulent transactions. Id. at 315. In doing so, the court notes two recent federal district court opinions reaching the same result. Unlike *Charlie*, *Collins* does not decide whether a duty exists as it only addresses whether damages were sufficiently pled.

Yet another such case is Weisenberger v. Ameritas Mut. Holding Co., 2022 WL 1078211 (D. Neb. 2022), in which a dental insurer suffered a breach of customers' private information due to a cyberattack. A putative class alleged, inter alia, that defendant failed to exercise reasonable care to secure that information. Like *Charlie*, the court finds a duty of reasonable care that extends to preventing foreseeable criminal activity that causes harm to plaintiff. Apparently, defendant did not move to dismiss on damages, as the court does not address that issue.

Page 1168, add at the end of the first paragraph of note 11 b. See Katherine Gabriel, Feminist Revenge: Seeking Justice for Victims of Nonconsensual Pornography Through "Revenge Porn" Reform, 44 Vt. L. Rev. 849, 851 (2020)

(providing a history of the adoption of revenge porn laws, a survey of criticisms of such laws, and a proposal for "combating revenge porn through these laws").

The National Conference of Commissioners on State Law (now known as the Uniform Law Commission) prepared and published the Uniform Civil Remedies for Unauthorized Disclosure of Intimate Images Act in 2019. It provides a civil remedy for violations and authorizes victims to sue anonymously. Remedies include compensatory damages, statutory damages up to $10,000, disgorgement of any monetary gain by the defendant, punitive damages, attorney's fees and injunctive relief. As of the date of this Update Materials in July 2022, it had been enacted in seven states.

Chapter 16

Pages 1285–88, add a new subnote d. to note 7. Another area in which a claim for interference with an economic expectancy has been made is in the inheritance and gift arena. In Barclay v. Castruccio, 230 A.3d 80, 86–93 (Md. 2020), the court reviewed the history of courts' consideration of the claim for interference with an inheritance through wrongful means, its recognition in approximately half the states (which comprises almost all that have addressed the matter), and the tort's acceptance by the Restatement (Third) of Torts: Liability for Economic Harm. The court casts Maryland's lot with those states recognizing the claim.