

FINAL EXAM

Instructions

DO NOT GO BEYOND THIS PAGE UNTIL THE EXAM ACTUALLY BEGINS.

THIS IS A CLOSED BOOK EXAM! While you are waiting for the exam to begin, be sure that you have written your EXAM NUMBER on EACH bluebook, that you have read these instructions, and that you are otherwise ready to begin.

IMPORTANT: This exam will last THREE HOURS. You should plan on spending AT LEAST 20 minutes reading the questions carefully and outlining your answers on a separate sheet of paper. Before writing your answers, REREAD each question to be sure you haven't missed anything.

DOUBLE-SPACE your answers in the bluebook.

Use SEPARATE BLUEBOOKS for EACH QUESTION. Label each bluebook according to each question and, if necessary, book number, e.g., "Question 1, Book 1"; "Question 1, Book 2"; "Question 2"; etc. When you are finished, turn to the back cover of the first bluebook, and place the second, third, fourth, etc. bluebook in order inside the end of the first bluebook, so the whole makes a single package. Then put it in the box at the front.

You are welcome to use abbreviations, but indicate what they are, e.g., `Andropov ("A") would be sued by Brezhnev ("B"), alleging that A would be liable to B ... !

PLEASE IGNORE issues relating to legal causation; assume that any but-for cause of an injury is also a proximate cause of that injury.

Plan on spending at least 15 minutes at the end PROOFREADING your answers. You may not write ANOTHER WORD after time is called.

A STATUTORY APPENDIX is provided that gives the law of this jurisdiction, the State of Evergreen, on some issues. If no law is specified on the point you are interested in, please comment on the possible alternatives.

Each question has been assigned a point total, and the exam as a whole has a point total of **135**. Spend the amount of time on each question reflecting its relative worth.

You may KEEP your copy of the exam questions if you wish.

REMEMBER THE HONOR CODE! Don't identify yourself.

DOUBLE SPACE!

DOUBLE SPACE!

DOUBLE SPACE!

GOOD LUCK!!!

QUESTION 1 (65 points)

The State of Evergreen owns and manages Prism State Beach. The park's natural resources offer a variety of recreational activities including swimming, hiking, camping and off-road driving. One section of the park is designated the Prism Dunes State Vehicular Recreation Area, which contains "unstabilized" or "active" sand dunes. The dunes' configuration is constantly changed by ocean winds. Although their size and shape may vary from day to day or hour to hour, they are commonly characterized by a long sloping side facing the ocean with an opposite, steep "slipface" or "drop-off" side.

About 1:30 on the morning of April 26, 2002, Michael Jorgenson entered the park with two friends. Each was riding a three-wheel all-terrain vehicle (ATV). The park is open for day and night use. A park ranger station located at the entrance point used by the men was unmanned. No sign warning of the slipface configuration of the dunes was posted at the ranger station or anywhere else inside the park. The only signs near the dunes area were posted on the beach about one quarter of a mile away. One read "Sand Highway," a natural route of travel, and the other was a speed limit sign.

Although Jorgenson was experienced on an ATV, he was was a novice dune rider, with the exception of a thirty minute to one hour ride earlier that night. He claims to have been unaware that dunes could have steep sides.

After the men reached the dunes, Jorgenson drove his vehicle up the sloping side of a dune, reached the crest, and started forward slowly over the other side. Although he was going slowly, the "drop-off" side was so steep that the ATV tipped over and he fell 20 to 30 feet down the drop-off side to the dune's base. The fall crushed his spinal cord, causing permanent paralysis from the chest down.

You work for the law firm that represents Jorgenson. You have been asked to evaluate his prospects for recovering tort compensation. You have been furnished the following background information:

(1) The ATV that Jorgenson was riding was a Cushman "Trackster" model manufactured by Outboard Marine, Inc. It was designed to be capable of operation on grades of "45 degrees plus." In order to facilitate an ascent at this angle, however, the vehicle's center of gravity was shifted forward. The result was that it was unable to descend the same grade which (within its design performance specifications) it could ascend, without a serious likelihood of overturning forward. The owners manual pictorially places the center of gravity at approximately the forward one-third of the Trackster. It also states: "USE EXTREME CARE WHEN ATTEMPTING TO STOP WHILE DESCENDING A STEEP INCLINE. THE VEHICLE CENTER OF GRAVITY CHANGES DRASTICALLY WITH THE CHANGE IN TERRAIN." At another point the manual states: "USE CAUTION WHEN OPERATING IN UNKNOWN TERRAIN. SNOW, WATER AND GRASS CAN HIDE STUMPS, LOGS AND HOLES." At yet another point, the manual reads: "USE CAUTION WHEN GOING DOWN HILLS. SUDDEN STOPS ON SOME GRADES COULD CAUSE VEHICLE TO TIP FORWARD." A decal on the dashboard warned the user: "Use caution when going down hills. Sudden stops on some grades could cause vehicle to tip forward."

(2) Jorgenson was a timber cutting contractor, and purchased the Cushman Trackster from George McCall in 1999 for both commercial and recreational use. McCall had purchased the Trackster in June of 1981 from the Cushman dealer in Quincy, Evergreen; before the accident Jorgenson carefully read the owner's manual.

(3) Jorgenson was familiar with tracked vehicles generally, and also had been given basic instruction of some 20 or 30 minutes on the operation of the Trackster at the time he purchased it from McCall. Prior to the accident, Jorgenson had operated the Trackster approximately 80 hours, and was satisfied with it.

(4) Donald Moon, an expert on ATVs, states that if a vehicle's center of gravity is at its horizontal center, it can ascend and descend a hill with equal facility and safety. But if the center of gravity is shifted forward or rearward, the vehicle will respectively ascend or descend with greater ease and conversely descend or ascend with greater difficulty. With the center of gravity forward, the vehicle will climb a steeper hill efficiently and safely, but cannot descend the same hill without a tendency to tip over. Moon stated that because the Trackster's center of gravity is forward, it will go up a given steep hill safely, but having done so, it may not come down the same hill without overturning.

(5) Jorgenson's spinal injuries are serious enough that a partner in your firm has estimated that a jury would assess his total damages (including medical expenses, wage loss, and pain and suffering) at \$3,000,000.

QUESTION 2 (70 points)

Sherrie Mead as an adolescent and young adult had a variety of encounters with law enforcement and with social service agencies. In June 2001, at aged 22, Mead was diagnosed as a "gravely disabled person with a medical history of irresponsible sexual behavior toward other persons," and committed to the Linden Care and Guidance Center, a private, locked mental health facility licensed by the State of Evergreen. Bradley Greenblott, M.D., was assigned as her psychiatrist; he was responsible for prescribing any medication relating to her emotional or mental disorder. Richard Slade, M.D., and Ronald Diebel, M.D., were general practitioners who were responsible for her physical well-being, including treatment for illnesses, accidents, or other medical care not requiring a psychiatrist's expertise. Daniel Ferrigan was appointed as her guardian. Although the Care and Guidance Center assigned male and female patients to separate wings of the building, the patients were not supervised at all times.

In June 2002, Sherrie Mead became pregnant. No one at the Care and Guidance Center was aware that she was pregnant until two weeks before she delivered. According to Ferrigan, if the pregnancy had been "timely discovered or diagnosed," he would have arranged for Sherrie Mead to undergo a therapeutic abortion.

In March 2003 Sherrie Mead gave birth to James Mead.

You work for the law firm that represents the Linden Care and Guidance Center. The firm has received a letter from Ferrigan demanding compensation for allegedly negligent care. Please analyze the risk that your client faces.

SELECTED STATUTES OF THE STATE OF EVERGREEN
ANNOTATED EVERGREEN CODES
CIVIL CODE
DIVISION 3. OBLIGATIONS

§ 1430. Effect of contributory fault

In an action based on fault seeking to recover damages for injury or death to person or harm to property, any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as compensatory damages for an injury attributable to the claimant's contributory fault, but does not bar recovery. This rule applies whether or not under prior law the claimant's contributory fault constituted a defense or was disregarded under applicable legal doctrines, such as last clear chance.

§ 1431. Joint liability

An obligation imposed upon several persons, or a right created in favor of several persons, is presumed to be joint, and not several, except as provided in Section 1431.2, and except in the special cases mentioned in the title on the interpretation of contracts. This presumption, in the case of a right, can be overcome only by express words to the contrary.

§ 1431.1. Findings and declaration of purpose

The People of the State of Evergreen find and declare as follows:

(a) The legal doctrine of joint and several liability, also known as "the deep pocket rule," has resulted in a system of inequity and injustice that has threatened financial bankruptcy of local governments, other public agencies, private individuals and businesses and has resulted in higher prices for goods and services to the public and in higher taxes to the taxpayers.

(b) Some governmental and private defendants are perceived to have substantial financial resources or insurance coverage and have thus been included in lawsuits even though there was little or no basis for finding them at fault. Under joint and several liability, if they are found to share even a fraction of the fault, they often are held financially liable for all the damage. The People--taxpayers and consumers alike--ultimately pay for these lawsuits in the form of higher taxes, higher prices and higher insurance premiums.

(c) Local governments have been forced to curtail some essential police, fire and other protections because of the soaring costs of lawsuits and insurance premiums.

Therefore, the People of the State of Evergreen declare that to remedy these inequities, defendants in tort actions shall be held financially liable in closer proportion to their degree of fault. To treat them differently is unfair and inequitable.

The People of the State of Evergreen further declare that reforms in the liability laws in tort actions are necessary and proper to avoid catastrophic economic consequences for state and local governmental bodies as well as private individuals and businesses.

§ 1431.2. Several liability for non-economic damages

(a) In any action for personal injury, property damage, or wrongful death, based upon principles of comparative fault, the liability of each defendant for non-economic damages shall be several only and shall not be joint. Each defendant shall be liable only for the amount of non-economic damages allocated to that defendant in direct proportion to that defendant's percentage of fault, and a separate judgment shall be rendered against that defendant for that amount.

(b)(1) For purposes of this section, the term "economic damages" means objectively verifiable monetary losses including medical expenses, loss of earnings, burial costs, loss of use of property, costs of repair or replacement, costs of obtaining substitute domestic services, loss of employment and loss of business or employment opportunities.

(2) For the purposes of this section, the term "non-economic damages" means subjective, non-monetary losses including, but not limited to, pain, suffering, inconvenience, mental suffering, emotional distress, loss of society and companionship, loss of consortium, injury to reputation and humiliation.

§ 1431.3. Law of immunity

Nothing contained in this measure is intended, in any way, to alter the law of immunity.

§ 1432. Contribution among joint obligors

Except as provided in § 877 of the Code of Civil Procedure, a party to a joint, or joint and several obligation, who satisfies more than his share of the claim against all, may require a proportionate contribution from all the parties joined with him.

ANNOTATED EVERGREEN CODES
GOVERNMENTAL CODE

§ 815. Liability for injuries generally; immunity of public entity; defenses

Except as otherwise provided by statute:

(a) A public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person.

(b) The liability of a public entity established by this part (commencing with Section 814) is subject to any immunity of the public entity provided by statute, including this part, and is subject to any defenses that would be available to the public entity if it were a private person.

§ 815.2. Injuries by employee within scope of employment; immunity of employee

(a) A public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative.

(b) Except as otherwise provided by statute, a public entity is not liable for an injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability.

§ 815.3. Intentional torts

(a) Notwithstanding any other provision of this part, unless the elected official and the public entity are named as codefendants in the same action, a public entity is not liable to a plaintiff under this part for any act or omission of an elected official employed by or otherwise representing that public entity, which act or omission constitutes an intentional tort, including, but not limited to, harassment, sexual battery, and intentional infliction of emotional distress. For purposes of this section, harassment in violation of state or federal law constitutes an intentional tort, to the extent permitted by federal law. This section shall not apply to defamation.

(b) If the elected official is held liable for an intentional tort other than defamation in such an action, the trier of fact in reaching the verdict shall determine if the act or omission constituting the intentional tort arose from and was directly related to the elected official's performance of his or her official duties. If the trier of fact determines that the act or omission arose from and was directly related to the elected official's performance of his or her official duties, the public entity shall be liable for the judgment as provided by law. For the purpose of this subdivision, employee managerial functions shall be deemed to arise from, and to directly relate to, the elected official's official duties. However, acts or omissions constituting sexual harassment shall not be deemed to arise from, and to directly relate to, the elected official's official duties.

(c) If the trier of fact determines that the elected official's act or omission did not arise from and was not directly related to the elected official's performance of his or her official duties, upon a final judgment, including any appeal, the plaintiff shall first seek recovery of the judgment against

the assets of the elected official. If the court determines that the elected official's assets are insufficient to satisfy the total judgment, including plaintiff's costs as provided by law, the court shall determine the amount of the deficiency and the plaintiff may seek to collect that remainder of the judgment from the public entity. The public entity may pay that deficiency if the public entity is otherwise authorized by law to pay that judgment.

(d) To the extent the public entity pays any portion of the judgment against the elected official pursuant to subdivision (c) or has expended defense costs in an action in which the trier of fact determines the elected official's action did not arise from and did not directly relate to his or her performance of official duties, the public entity shall pursue all available creditor's remedies against the elected official in indemnification, including garnishment, until the elected official has fully reimbursed the public entity.

(e) If the public entity elects to appeal the judgment in an action brought pursuant to this section, the entity shall continue to provide a defense for the official until the case is finally adjudicated, as provided by law.

(f) It is the intent of the Legislature that elected officials assume full fiscal responsibility for their conduct which constitutes an intentional tort not directly related to their official duties committed for which the public entity they represent may also be liable, while maintaining fair compensation for those persons injured by such conduct.

(g) This section shall not apply to a criminal or civil enforcement action brought on behalf of the state by an elected district attorney, city attorney, or Attorney General.

(h) If any provision of this section or the application thereof to any person or circumstances is held invalid, that invalidity shall not affect other provisions or applications of the section which can be given effect without the invalid provision or application, and to this end the provisions of this section are severable.

§ 815.6. Mandatory duty of public entity to protect against particular kinds of injuries

Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty.

§ 820. Liability for injuries generally; defenses

(a) Except as otherwise provided by statute (including Section 820.2), a public employee is liable for injury caused by his act or omission to the same extent as a private person.

(b) The liability of a public employee established by this part (commencing with Section 814) is subject to any defenses that would be available to the public employee if he were a private person.

§ 820.2. Discretionary acts

Except as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused.

§ 820.21. Juvenile court and child protection workers; exceptions to immunity; malice

(a) Notwithstanding any other provision of the law, the civil immunity of juvenile court social workers, child protection workers, and other public employees authorized to initiate or

conduct investigations or proceedings pursuant to Chapter 2 (commencing with Section 200) of Part 1 of Division 2 of the Welfare and Institutions Code shall not extend to any of the following, if committed with malice:

- (1) Perjury.
- (2) Fabrication of evidence.
- (3) Failure to disclose known exculpatory evidence.

(4) Obtaining testimony by duress, as defined in Section 1569 of the Civil Code, fraud, as defined in either Section 1572 or Section 1573 of the Civil Code, or undue influence, as defined in Section 1575 of the Civil Code.

(b) As used in this section, "malice" means conduct that is intended by the person described in subdivision (a) to cause injury to the plaintiff or despicable conduct that is carried on by the person described in subdivision (a) with a willful and conscious disregard of the rights or safety of others.

§ 820.25. Peace officers or law enforcement officials; decisions not to render assistance or to respond to an emergency

(a) For purposes of Section 820.2, the decision of a peace officer, as defined in Sections 830.1 and 830.2 of the Penal Code, or a state or local law enforcement official, to render assistance to a motorist who has not been involved in an accident or to leave the scene after rendering assistance, upon learning of a reasonably apparent emergency requiring his immediate attention elsewhere or upon instructions from a superior to assume duties elsewhere, shall be deemed an exercise of discretion.

(b) The provision in subdivision (a) shall not apply if the act or omission occurred pursuant to the performance of a ministerial duty. For purposes of this section, "ministerial duty" is defined as a plain and mandatory duty involving the execution of a set task and to be performed without the exercise of discretion.

§ 820.4. Execution or enforcement of laws; exception

A public employee is not liable for his act or omission, exercising due care, in the execution or enforcement of any law. Nothing in this section exonerates a public employee from liability for false arrest or false imprisonment.

§ 820.8. Acts or omissions of others

Except as otherwise provided by statute, a public employee is not liable for an injury caused by the act or omission of another person. Nothing in this section exonerates a public employee from liability for injury proximately caused by his own negligent or wrongful act or omission.

§ 831.2. Natural condition of unimproved public property

Neither a public entity nor a public employee is liable for an injury caused by a natural condition of any unimproved public property, including but not limited to any natural condition of any lake, stream, bay, river or beach.

ANNOTATED EVERGREEN CODES
CODE OF CIVIL PROCEDURE**§ 875. Judgment against two or more defendants; contribution; subrogation by insurer; right of indemnity; satisfaction of judgment in full**

(a) Where a money judgment has been rendered jointly against two or more defendants in a tort action there shall be a right of contribution among them as hereinafter provided.

(b) Such right of contribution shall be administered in accordance with the principles of equity.

(c) Such right of contribution may be enforced only after one tortfeasor has, by payment, discharged the joint judgment or has paid more than his pro rata share thereof. It shall be limited to the excess so paid over the pro rata share of the person so paying and in no event shall any tortfeasor be compelled to make contribution beyond his own pro rata share of the entire judgment.

(d) There shall be no right of contribution in favor of any tortfeasor who has intentionally injured the injured person.

(e) A liability insurer who by payment has discharged the liability of a tortfeasor judgment debtor shall be subrogated to his right of contribution.

(f) This title shall not impair any right of indemnity under existing law, and where one tortfeasor judgment debtor is entitled to indemnity from another there shall be no right of contribution between them.

(g) This title shall not impair the right of a plaintiff to satisfy a judgment in full as against any tortfeasor judgment debtor.

§ 876. Determination of pro rata share

(a) The pro rata share of each tortfeasor judgment debtor shall be determined by dividing the entire judgment equally among all of them.

(b) Where one or more persons are held liable solely for the tort of one of them or of another, as in the case of the liability of a master for the tort of his servant, they shall contribute a single pro rata share, as to which there may be indemnity between them.

§ 877. Release of one or more joint tortfeasors or co-obligors; effect upon liability of others

Where a release, dismissal with or without prejudice, or a covenant not to sue or not to enforce judgment is given in good faith before verdict or judgment to one or more of a number of tortfeasors claimed to be liable for the same tort, or to one or more other co-obligors mutually subject to contribution rights, it shall have the following effect:

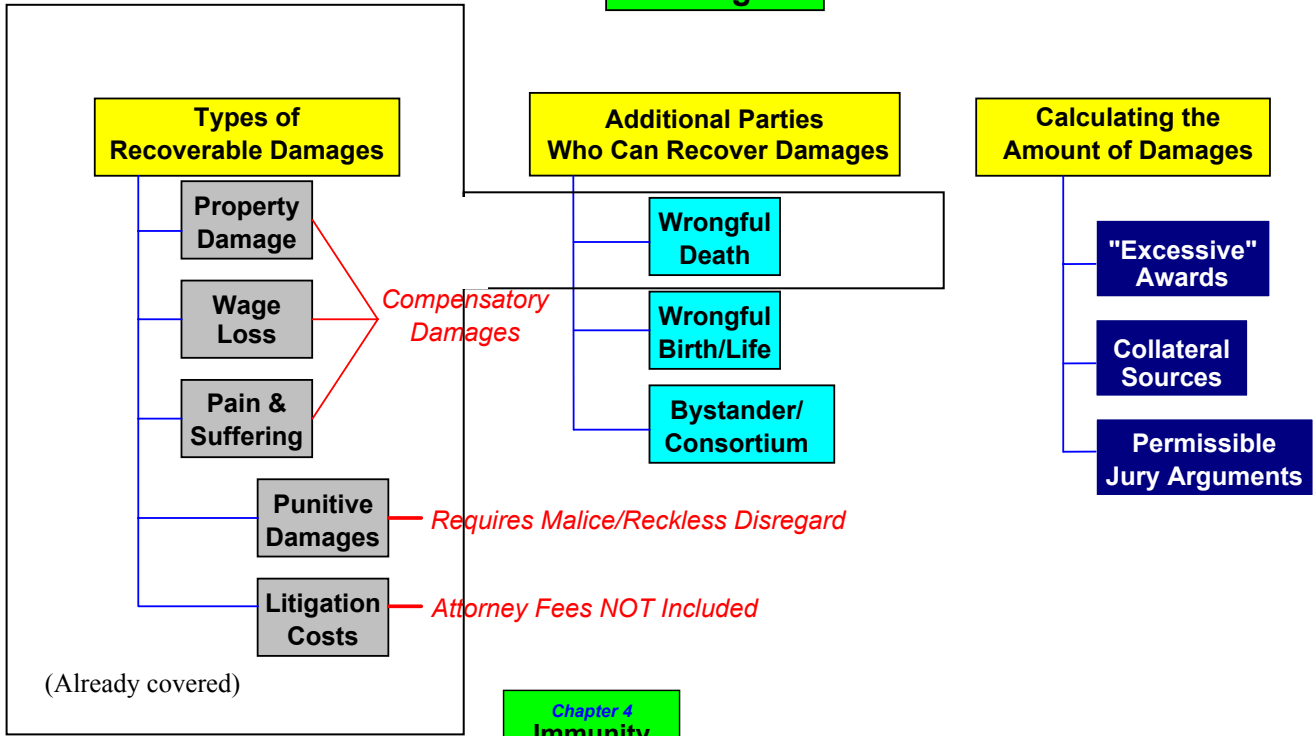
(a) It shall not discharge any other such party from liability unless its terms so provide, but it shall reduce the claims against the others in the amount stipulated by the release, the dismissal or the covenant, or in the amount of the consideration paid for it whichever is the greater.

(b) It shall discharge the party to whom it is given from all liability for any contribution to any other parties.

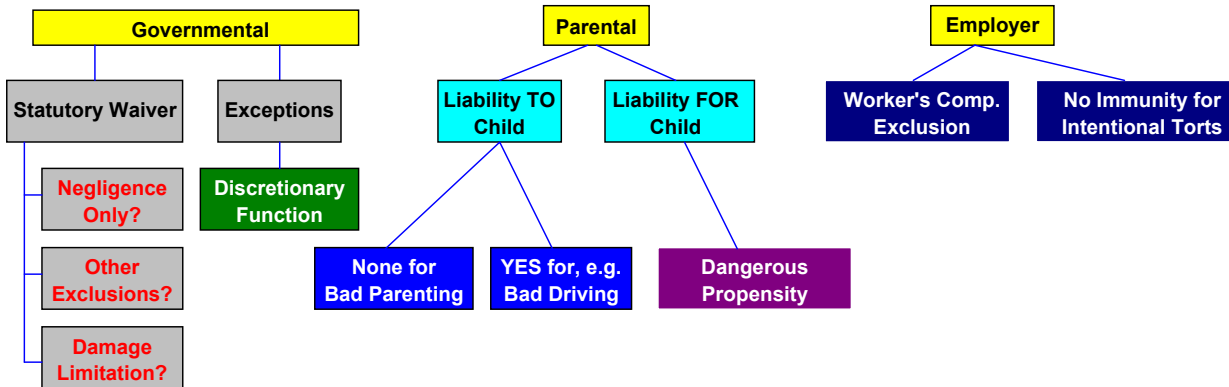
(c) This section shall not apply to co-obligors who have expressly agreed in writing to an apportionment of liability for losses or claims among themselves.

(d) This section shall not apply to a release, dismissal with or without prejudice, or a covenant not to sue or not to enforce judgment given to a co-obligor on an alleged contract debt where the contract was made prior to January 1, 1988.

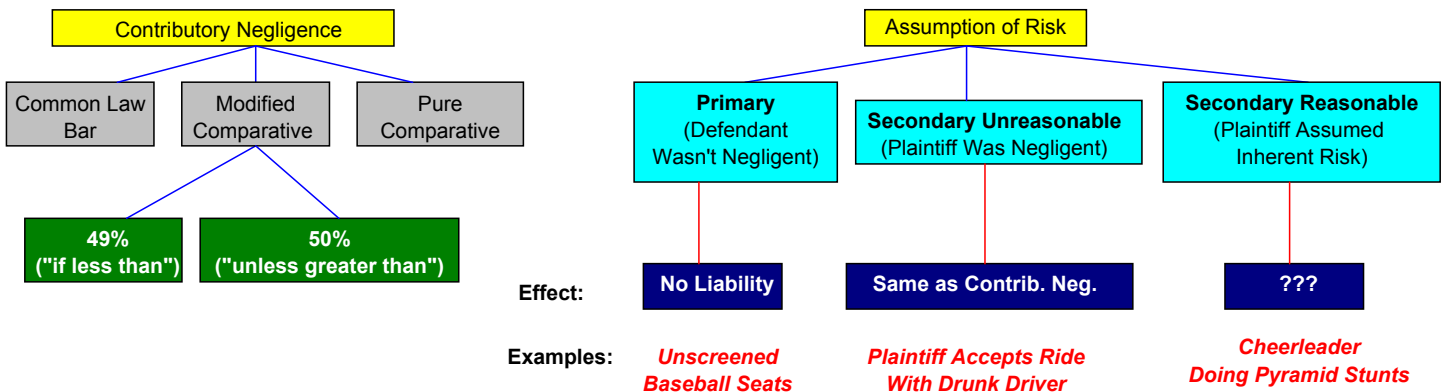
**Chapter 3
Damages**



**Chapter 4
Immunity**

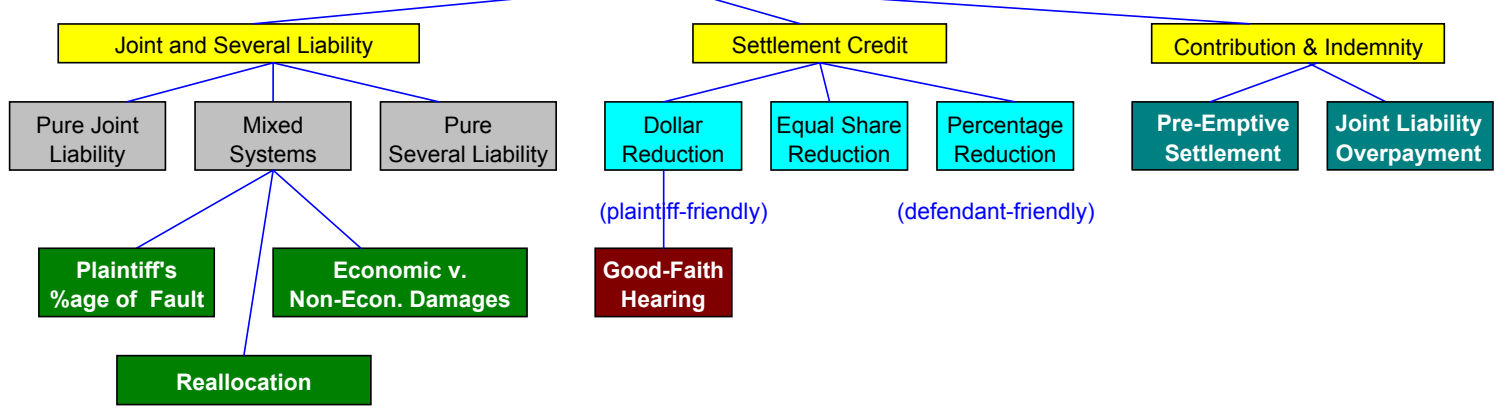


**Chapter 5
Contributory Fault**

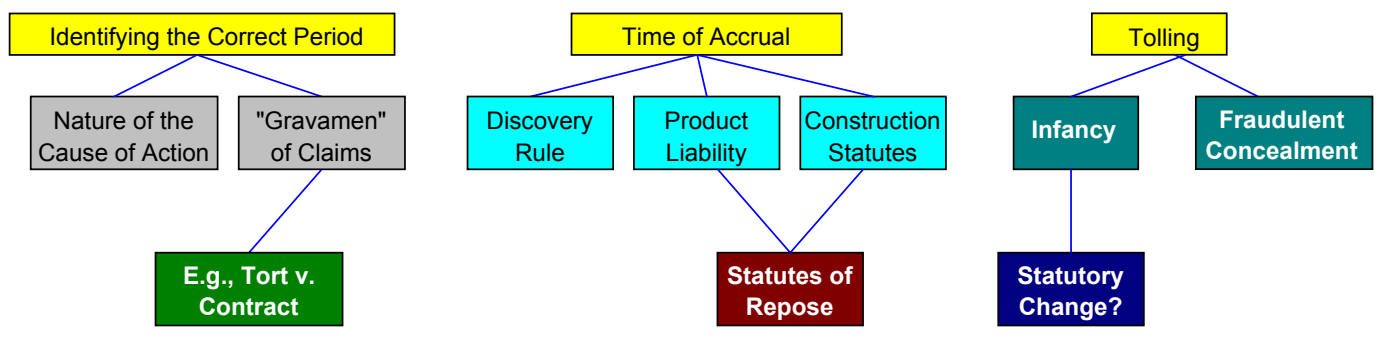


**Chapter 6
Multiple Tortfeasors**

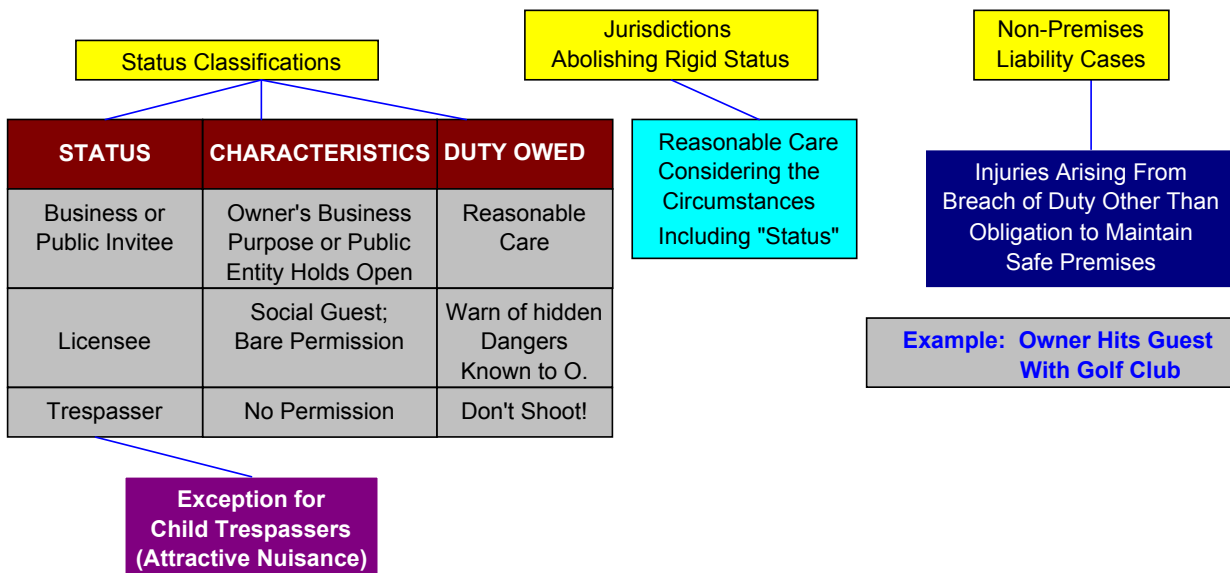
Indivisible Injury?



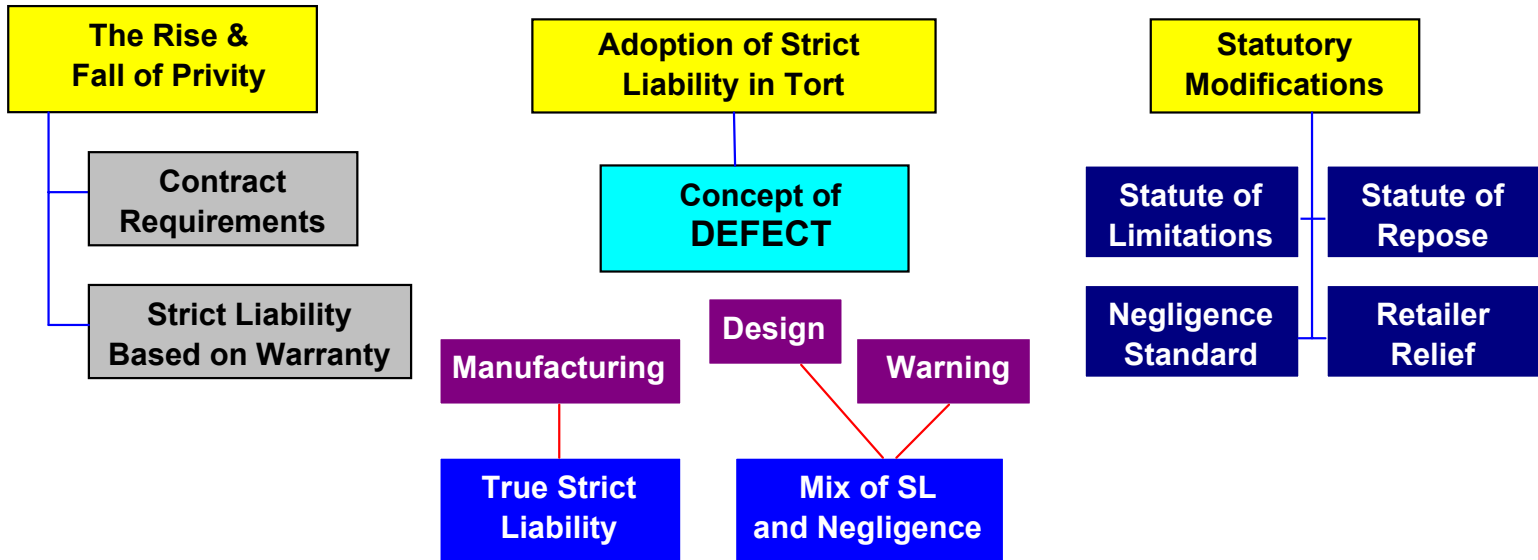
**Chapter 7
Statutes of Limitation**



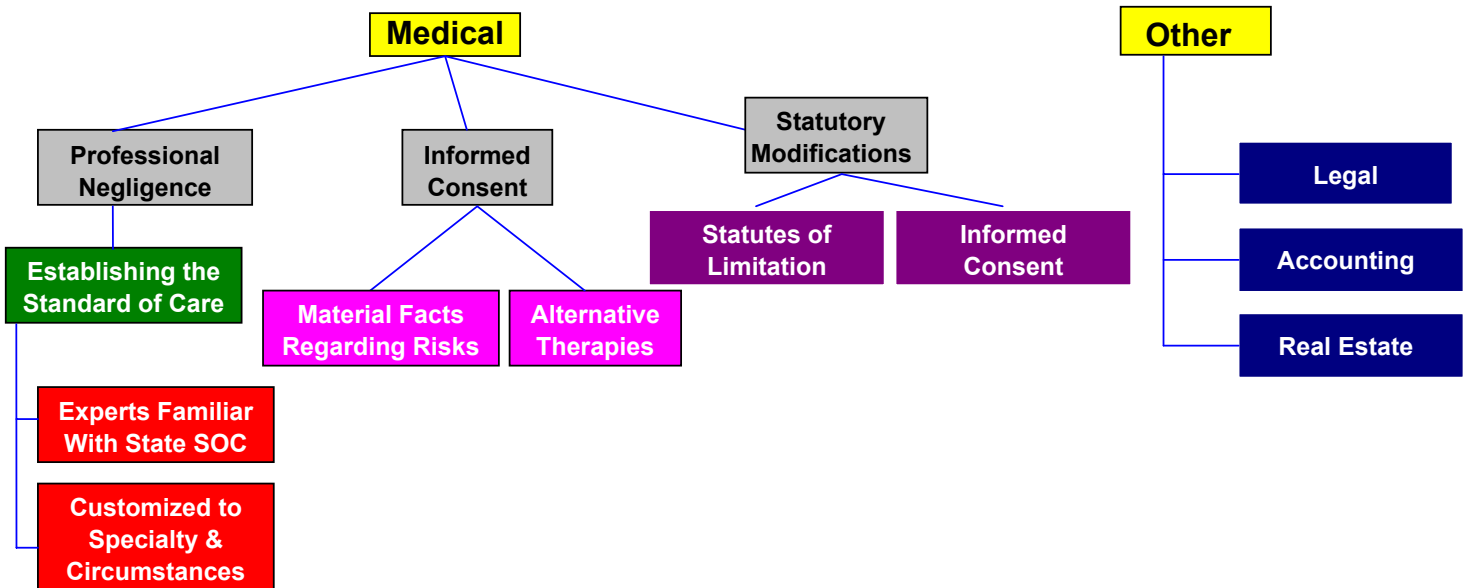
**Chapter 8
Premises Liability**



**Chapter 9
Product Liability**



Chapter 10
Professional Malpractice



Chapter 11
Rescuers, Justifiable Reliance and Special Relationships

What Triggers a Defendant's Duty to Use Reasonable Care?

