

Exam # \_\_\_\_\_

TORTS  
FALL 2009

PROFESSOR DEWOLF  
December 12, 2009

FINAL EXAM

Instructions

DO NOT GO BEYOND THIS PAGE UNTIL THE EXAM ACTUALLY BEGINS. THIS IS A CLOSED BOOK EXAM! Follow all of the directions of the proctor.

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.

POINTS are assigned to each section of the exam based on the rough number of minutes it is expected you will need to complete each portion.

(1) *Multiple Choice* (20 points). Please select the best answer. Some answers may give a wrong reason for an otherwise correct result. Make sure that you read all the answers thoroughly and select the one that comes closest to a correct statement of the law. Circle the correct answer on the exam. Write your answers to the multiple choice questions at the beginning of your answer to Essay #1.

(2) *Essays*: You will have two essay questions. The division is as follows:

Question 1: 55 points

Question 2: 60 points

PLEASE IGNORE issues relating to legal causation; assume that any but-for cause of an injury is also a proximate cause of that injury. DO NOT cross-refer from one essay answer to the other; make sure that each essay answer stands on its own.

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.

REMEMBER THE HONOR CODE! Don't identify yourself.

MERRY CHRISTMAS! / HAPPY HOLIDAYS!

## MULTIPLE CHOICE QUESTIONS

## FACT PATTERN FOR QUESTIONS 1-3

Maxine purchased a car from Fly-by-Night Auto Sales. After two months the car wouldn't start, and a mechanic told Maxine that the car was not worth repairing. Maxine told Fly-by-Night that she wouldn't make further payments on the car unless they put it back in working order. Fly-by-Night insisted that they had no obligation to do so, denying that there was any warranty accompanying the car.

Fly-by-Night transferred the account to Debt Resolution Services. Bob Blinker, an employee of Debt Resolution Services, got the file and stopped by Maxine's apartment one evening. When Maxine answered the door, Blinker said, "Do you know what happens to people who don't pay their debts?" Maxine was quite frightened and said, "What are you talking about?" Blinker replied, "You made a big mistake when you stopped paying for your car. You'll regret it." Maxine said, "Who are you?" Blinker responded, "I'm the guy who's going to get you to pay up." At that point Blinker pulled a pair of handcuffs out of his pocket and began to jingle them. Seeing the handcuffs, Maxine worried that she might be arrested, and realized that she could climb out the back window of her apartment, so she slammed the door to her apartment, striking Blinker in the face.

1. If Maxine sued Blinker for assault, could she recover?
  - (A) Yes, if Blinker's comments caused her to fear an imminent harmful or offensive contact;
  - (B) Yes, but only if Blinker actually wanted to cause her to fear imminent harmful or offensive contact;
  - (C) Yes, providing that Blinker was substantially certain that his comments would cause fear of imminent harmful or offensive contact;
  - (D) No, unless Maxine suffered severe emotional distress.
  
2. If Blinker sued Maxine for battery, could he recover?
  - (A) Yes, but only if the door caused physical harm or contact that would be offensive to a person of reasonable sensibility;
  - (B) Yes, but only if Maxine wanted to cause harmful or offensive contact;
  - (C) No, if Maxine was acting instinctively;
  - (D) No, if Blinker was used to being treated in this way.
  
3. If Maxine sued Blinker for false imprisonment, could she recover?
  - (A) No, because Maxine was never physically harmed;
  - (B) No, if Blinker never succeeded in confining her;
  - (C) Yes, if Blinker intended to make her think that she wasn't free to leave;
  - (D) Yes, if climbing out the back window is not something a reasonable person would do.

4. Paulette Periodontist was treating George Gilbert for gum disease in her clinic. She was observed by some students from the local dental college. Believing that George was under anesthesia, Paulette began to make fun of the George's poor dental hygiene, and complained about treating patients who were on public assistance. One of the students later ran across George in another context and told him what Paulette had said. Could George recover for the intentional infliction of emotional distress?

- (A) Yes, but only if Paulette actually intended to cause emotional distress;
- (B) Yes, if George suffered severe emotional distress as a result;
- (C) No, if George didn't hear the remarks when they were made;
- (D) No, if George was in fact on public assistance.

## ESSAY QUESTIONS

## QUESTION 1 (55 points)

Tyler Perry was a successful accountant. While on vacation in March 2008 he went horseback riding in a remote area of the Evergreen State Forest. Perry's horse stumbled and Perry fell to the ground, severely injuring his back. He was transported by helicopter to the University of Evergreen School of Medicine (UESOM), the premier state university hospital that included a fully-equipped trauma center. At the hospital Perry was assigned to the surgeon on duty, Dr. John Martinez. Dr. Martinez left private medical practice in 1997 to become employed as a full-time, "tenure-track" faculty member of UESOM.

While conducting the surgery on Tyler Perry, Dr. Martinez decided to attempt to realign two vertebrae. In doing so, he ruptured an artery. Before the rupture could be repaired, or additional blood could be transfused, Perry died. Perry, who was 42 years of age at the time of his death, is survived by his wife Wendy Perry, aged 41.

You work in the attorney general's office that represents the state and state agencies. You have been assigned the file for the Perry case and have been asked to analyze the prospects for a potential claim by Wendy Perry for tort compensation. Please prepare a memo with your analysis.

## QUESTION 2 (60 points)

Blaine Kern Artista, Inc. ("BKA") manufactures oversized masks in the form of caricatures resembling various celebrities and characters (hereafter "caricature mask"). The caricature mask covers the entire head of the wearer. Thomas Price was employed as a comedian in a nightclub in Lucky Strike, Evergreen. Part of his act included wearing a caricature mask of then-President George Bush. On August 20, 2008, he was in the course of his act when one of the patrons in the nightclub stood up and began attacking Price for "showing disrespect toward my President." Another patron stood up and told the first patron to "shut up and enjoy the show." Things deteriorated from there. As Price was making his way off the stage and through the crowd to the exit, he was pushed by an unknown person from behind, causing the weight of the caricature mask to strain and injure his neck as he fell to the ground.

You are a new associate in the personal injury firm that represents Price. Price is now unable to turn his head without severe pain. He is no longer able to perform as an entertainer. Another lawyer in the firm has analyzed the damages that Price would be able to prove at trial. She concludes that Price's wage loss and pain and suffering would be assessed at \$1,000,000. You have obtained a report from an expert who says that Price's injuries resulted from the absence of a safety harness that would prevented the caricature mask from causing the kind of injury that Price suffered. Please prepare a memo analyzing the prospects of recovering tort compensation from BKA.

## EVERGREEN REVISED STATUTES

**Title 2. Civil Practice**

## Chapter 17. Judgments

Contribution Among Joint Tortfeasors**§ 17.225. Right to contribution**

1. Except as otherwise provided in this section and ERS § 17.235 to 17.305, inclusive, where two or more persons become jointly or severally liable in tort for the same injury to person or property or for the same wrongful death, there is a right of contribution among them even though judgment has not been recovered against all or any of them.

2. The right of contribution exists only in favor of a tortfeasor who has paid more than his equitable share of the common liability, and his total recovery is limited to the amount paid by him in excess of his equitable share. No tortfeasor is compelled to make contribution beyond his own equitable share of the entire liability.

3. A tortfeasor who enters into a settlement with a claimant is not entitled to recover contribution from another tortfeasor whose liability for the injury or wrongful death is not extinguished by the settlement nor in respect to any amount paid in a settlement which is in excess of what was reasonable.

#### **§ 17.235. Effect of judgment against one tortfeasor**

The recovery of a judgment for an injury or wrongful death against one tortfeasor does not of itself discharge the other tortfeasors from liability for the injury or wrongful death unless the judgment is satisfied. The satisfaction of the judgment does not impair any right of contribution.

#### **§ 17.245. Effect of release or covenant not to sue**

1. When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:

(a) It does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide, but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater; and

(b) It discharges the tortfeasor to whom it is given from all liability for contribution and for equitable indemnity to any other tortfeasor.

2. As used in this section, "equitable indemnity" means a right of indemnity that is created by the court rather than expressly provided for in a written agreement.

#### **§ 17.255. Intentional tort bars right to contribution**

There is no right of contribution in favor of any tortfeasor who has intentionally caused or contributed to the injury or wrongful death.

#### **§ 17.265. Certain rights of indemnity unimpaired**

Except as otherwise provided in ERS § 17.245, the provisions of ERS § 17.225 to 17.305, inclusive, do not impair any right of indemnity under existing law. Where one tortfeasor is entitled to indemnity from another, the right of the indemnity obligee is for indemnity and not contribution, and the indemnity obligor is not entitled to contribution from the obligee for any portion of his indemnity obligation.

#### **§ 17.275. Subrogation of insurer**

A liability insurer, who by payment has discharged in full or in part the liability of a tortfeasor and has thereby discharged in full its obligation as insurer, is subrogated to the tortfeasor's right of contribution to the extent of the amount it has paid in excess of the tortfeasor's equitable share of the common liability. This provision does not limit or impair any right of subrogation arising from any other relationship.

#### **§ 17.285. Enforcement of right of contribution**

1. Whether or not judgment has been entered in an action against two or more tortfeasors for the same injury or wrongful death, contribution may be enforced by separate action.

2. Where a judgment has been entered in an action against two or more tortfeasors for the same injury or wrongful death, contribution may be enforced in that action by judgment in favor of one against other judgment defendants by motion upon notice to all parties to the action.

3. If there is a judgment for the injury or wrongful death against the tortfeasor seeking

contribution, any separate action by him to enforce contribution must be commenced within 1 year after the judgment has become final by lapse of time for appeal or after appellate review.

4. If there is no judgment for the injury or wrongful death against the tortfeasor seeking contribution, his right of contribution is barred unless he has:

(a) Discharged by payment the common liability within the statute of limitations period applicable to claimant's right of action against him and has commenced his action for contribution within 1 year after payment; or

(b) Agreed while action is pending against him to discharge the common liability and has within 1 year after the agreement paid the liability and commenced his action for contribution.

5. The judgment of the court in determining the liability of the several defendants to the claimant for an injury or wrongful death shall be binding as among such defendants in determining their right to contribution.

### **§ 17.295. Equitable shares**

In determining the equitable shares of tortfeasors in the entire liability:

1. If equity requires, the collective liability of some as a group constitutes a single share; and
2. Principles of equity applicable to contribution generally apply.

## **Title 3. Remedies; Special Actions and Proceedings**

### Chapter 41. Actions and Proceedings in Particular Cases Concerning Persons

#### Liability of and Actions Against This State, Its Agencies and Political Subdivisions Waiver of Sovereign Immunity

### **§ 41.031. Waiver applies to State and its political subdivisions; naming State as defendant; service of process; State does not waive immunity conferred by Eleventh Amendment**

1. The State of Evergreen hereby waives its immunity from liability and action and hereby consents to have its liability determined in accordance with the same rules of law as are applied to civil actions against natural persons and corporations, except as otherwise provided in ERS 41.032 to 41.038, inclusive, 485.318, subsection 3 and any statute which expressly provides for governmental immunity, if the claimant complies with the limitations of ERS 41.010 or the limitations of ERS 41.032 to 41.036, inclusive. The State of Evergreen further waives the immunity from liability and action of all political subdivisions of the State, and their liability must be determined in the same manner, except as otherwise provided in ERS 41.032 to 41.038, inclusive, subsection 3 and any statute which expressly provides for governmental immunity, if the claimant complies with the limitations of ERS 41.032 to 41.036, inclusive.

2. An action may be brought under this section against the State of Evergreen or any political subdivision of the State. All actions brought under this section shall be tried to a judge sitting without a jury.

3. The State of Evergreen does not waive its immunity from suit conferred by Amendment XI of the Constitution of the United States.

#### Conditions and Limitations on Actions

### **§ 41.032. Acts or omissions of officers, employees and immune contractors**

Except as provided in ERS 278.0233 no action may be brought under ERS 41.031 or against an immune contractor or an officer or employee of the State or any of its agencies or political subdivisions which is:

1. Based upon an act or omission of an officer, employee or immune contractor, exercising

due care, in the execution of a statute or regulation, whether or not such statute or regulation is valid, if the statute or regulation has not been declared invalid by a court of competent jurisdiction; or

2. Based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of the State or any of its agencies or political subdivisions or of any officer, employee or immune contractor of any of these, whether or not the discretion involved is abused.

#### **§ 41.035. Limitation on award for damages in tort actions**

1. An award for damages in an action sounding in tort brought under ERS 41.031 or against a present or former officer or employee of the State or any political subdivision, immune contractor or State Legislator arising out of an act or omission within the scope of his public duties or employment may not exceed the sum of \$75,000, exclusive of interest computed from the date of judgment, to or for the benefit of any claimant. An award may not include any amount as exemplary or punitive damages.

2. The limitations of subsection 1 upon the amount and nature of damages which may be awarded apply also to any action sounding in tort and arising from any recreational activity or recreational use of land or water which is brought against:

(a) Any public or quasi-municipal corporation organized under the laws of this State.

(b) Any person with respect to any land or water leased or otherwise made available by that person to any public agency.

(c) Any Indian tribe, band or community whether or not a fee is charged for such activity or use. The provisions of this paragraph do not impair or modify any immunity from liability or action existing on February 26, 1968, or arising after February 26, 1968, in favor of any Indian tribe, band or community.

The Legislature declares that the purpose of this subsection is to effectuate the public policy of the State of Evergreen by encouraging the recreational use of land, lakes, reservoirs and other water owned or controlled by any public or quasi-municipal agency or corporation of this State, wherever such land or water may be situated.

#### Actions for Death by Wrongful Act or Neglect

#### **§ 41.085. Heirs and personal representatives may maintain action**

1. As used in this section, "heir" means a person who, under the laws of this State, would be entitled to succeed to the separate property of the decedent if he had died intestate. Unless otherwise established by valid testamentary instruments, "heir" includes the decedent's spouse and children.

2. When the death of any person, whether or not a minor, is caused by the wrongful act or neglect of another, the heirs of the decedent and the personal representatives of the decedent may each maintain an action for damages against the person who caused the death, or if the wrongdoer is dead, against his personal representatives, whether the wrongdoer died before or after the death of the person he injured. If any other person is responsible for the wrongful act or neglect, or if the wrongdoer is employed by another person who is responsible for his conduct, the action may be maintained against that other person, or if he is dead against his personal representatives.

3. An action brought by the heirs of a decedent pursuant to subsection 2 and the cause of action of that decedent brought or maintained by his personal representatives which arose out of the same wrongful act or neglect may be joined.

4. The heirs may prove their respective damages in the action brought pursuant to subsection 2 and the court or jury may award each person pecuniary damages for his grief or sorrow, loss of probable support, companionship, society, comfort and consortium, and damages for pain, suffering or disfigurement of the decedent. The proceeds of any judgment for damages awarded under this subsection are not liable for any debt of the decedent.

5. The damages recoverable by the personal representatives of a decedent on behalf of his estate include:

- (a) Any special damages, such as medical expenses, which the decedent incurred or sustained before his death, and funeral expenses; and
- (b) Any penalties, including, but not limited to, exemplary or punitive damages, that the decedent would have recovered if he had lived,

but do not include damages for pain, suffering or disfigurement of the decedent. The proceeds of any judgment for damages awarded under this subsection are liable for the debts of the decedent unless exempted by law.

### Comparative Negligence

#### **§ 41.141. When comparative negligence not bar to recovery; jury instructions; liability of multiple defendants**

1. In any action to recover damages for death or injury to persons or for injury to property in which comparative negligence is asserted as a defense, the comparative negligence of the plaintiff or his decedent does not bar a recovery if that negligence was not greater than the negligence or gross negligence of the parties to the action against whom recovery is sought.

2. In those cases, the judge shall instruct the jury that:

(a) The plaintiff may not recover if his comparative negligence or that of his decedent is greater than the negligence of the defendant or the combined negligence of multiple defendants.

(b) If the jury determines the plaintiff is entitled to recover, it shall return:

(1) By general verdict the total amount of damages the plaintiff would be entitled to recover without regard to his comparative negligence; and

(2) A special verdict indicating the percentage of negligence attributable to each party remaining in the action.

3. If a defendant in such an action settles with the plaintiff before the entry of judgment, the comparative negligence of that defendant and the amount of the settlement must not thereafter be admitted into evidence nor considered by the jury. The judge shall deduct the amount of the settlement from the net sum otherwise recoverable by the plaintiff pursuant to the general and special verdicts.

4. Where recovery is allowed against more than one defendant in such an action, except as otherwise provided in subsection 5, each defendant is severally liable to the plaintiff only for that portion of the judgment which represents the percentage of negligence attributable to him.

5. This section does not affect the joint and several liability, if any, of the defendants in an action based upon:

(a) Strict liability;

(b) An intentional tort;

(c) The emission, disposal or spillage of a toxic or hazardous substance; or

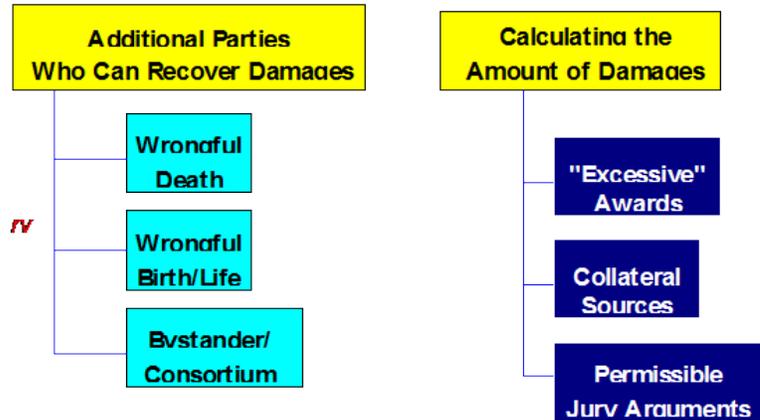
(d) The concerted acts of the defendants;

6. As used in this section:

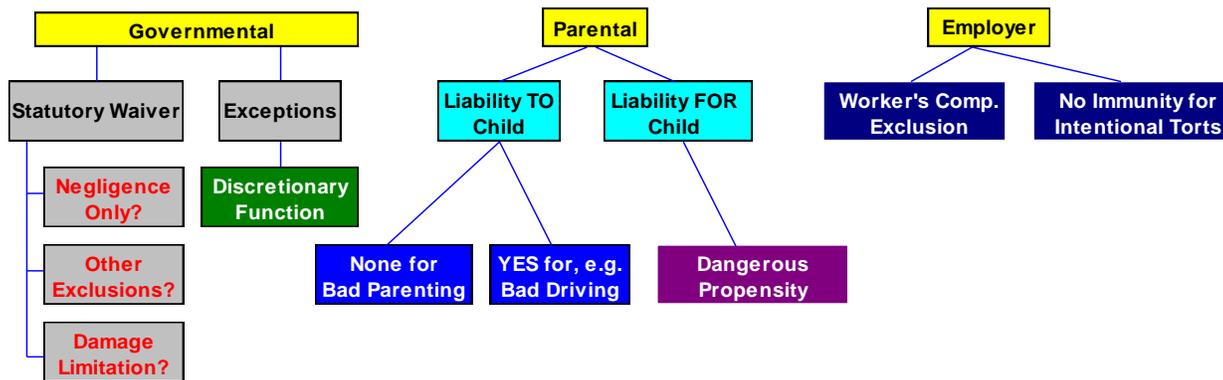
(a) "Concerted acts of the defendants" does not include negligent acts committed by providers of health care while working together to provide treatment to a patient.

(b) "Provider of health care" has the meaning ascribed to it in ERS § 629.031.

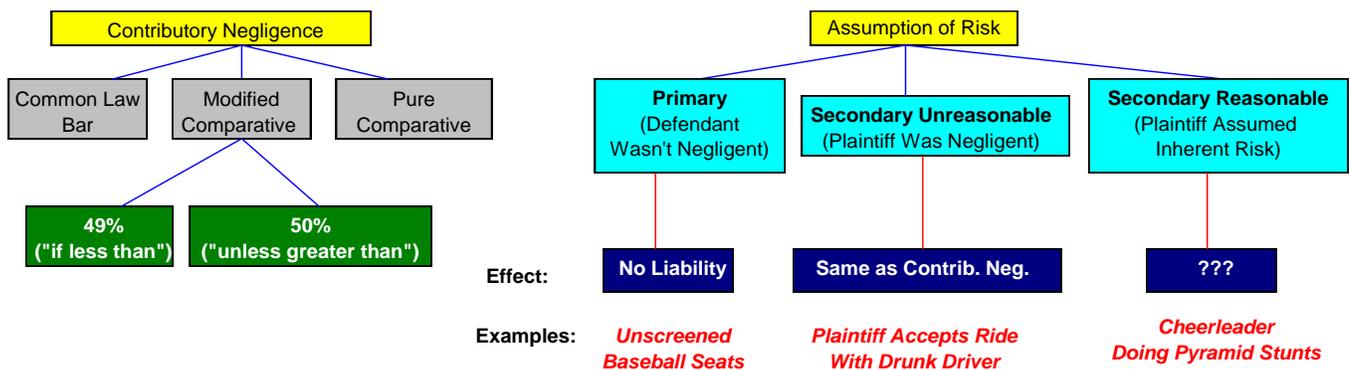
**Chapter 3  
Damages**



**Chapter 4  
Immunity**

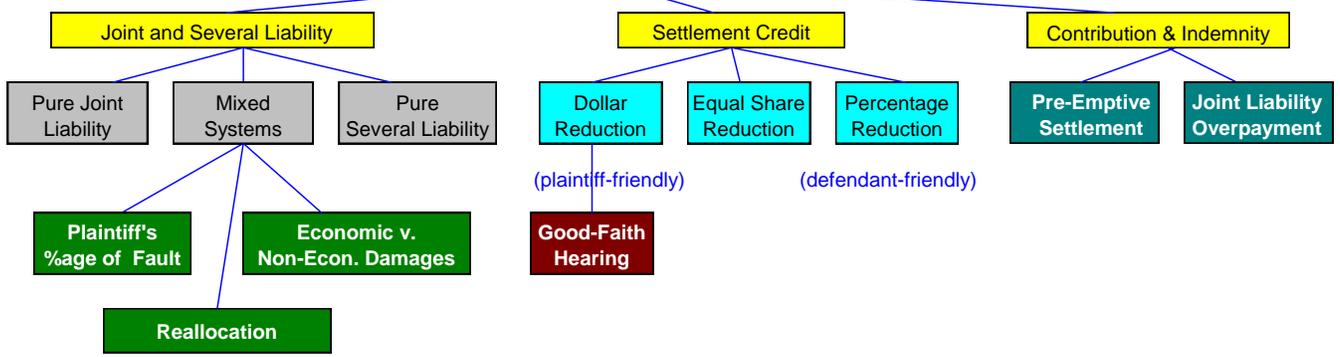


**Chapter 5  
Contributory Fault**

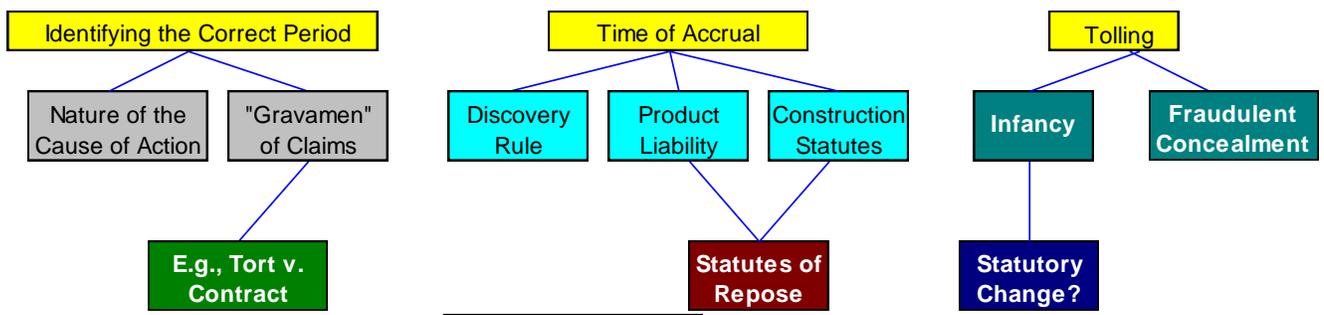


**Chapter 6  
Multiple Tortfeasors**

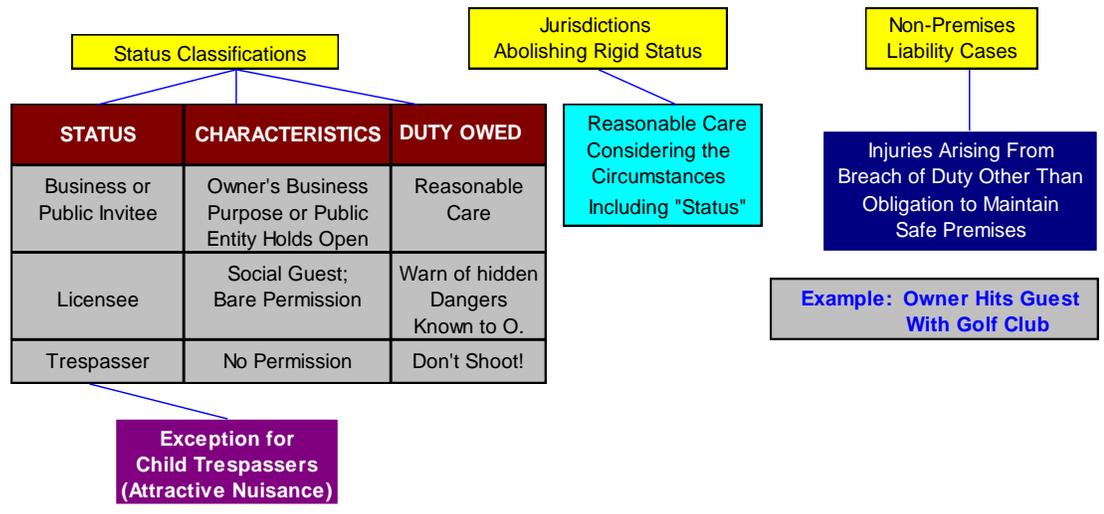
**Indivisible Injury?**



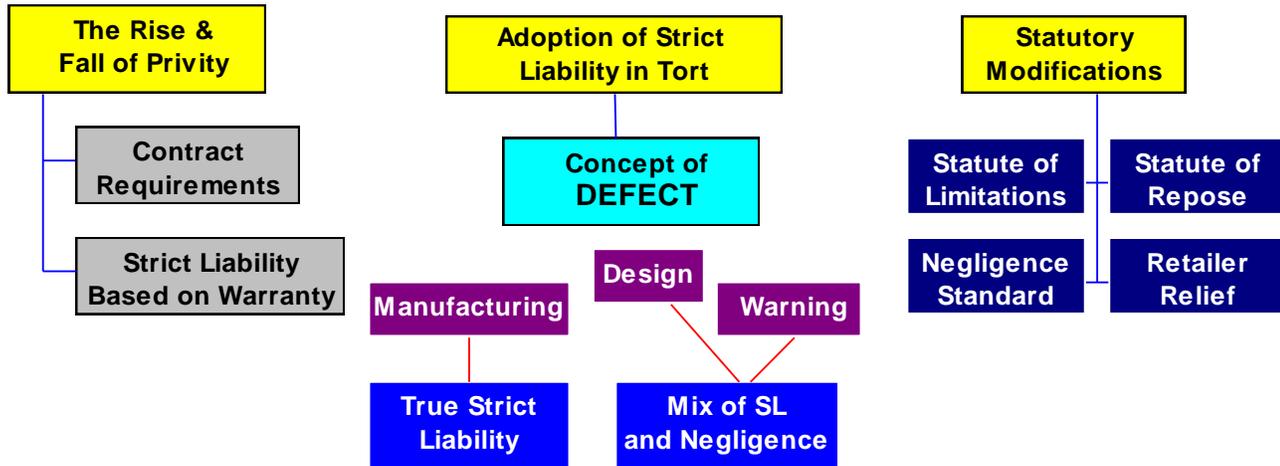
**Chapter 7  
Statutes of Limitation**



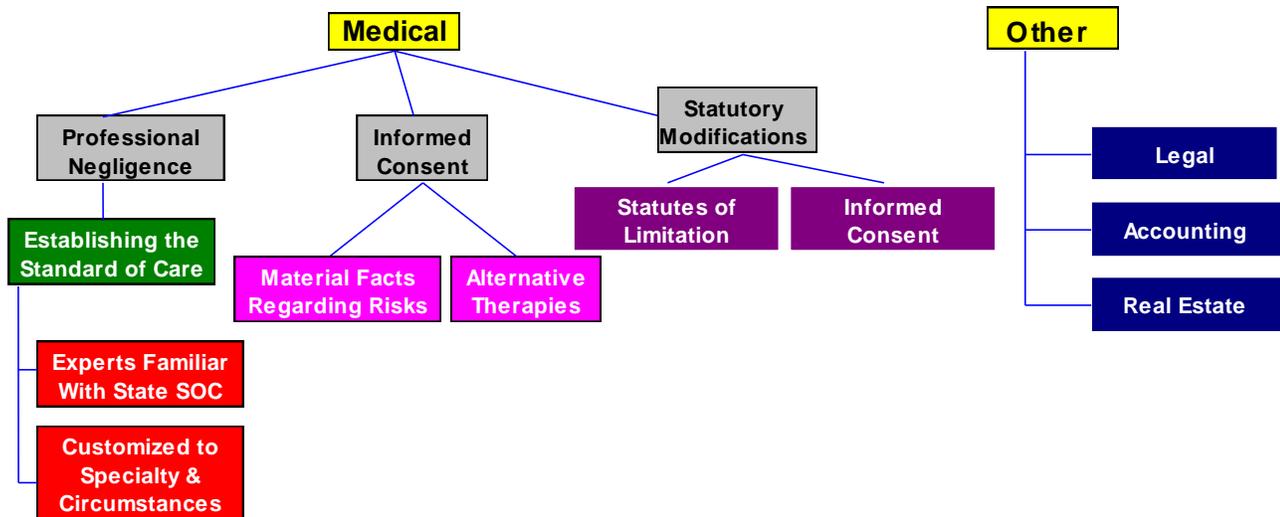
**Chapter 8  
Premises Liability**



**Chapter 9  
Product Liability**

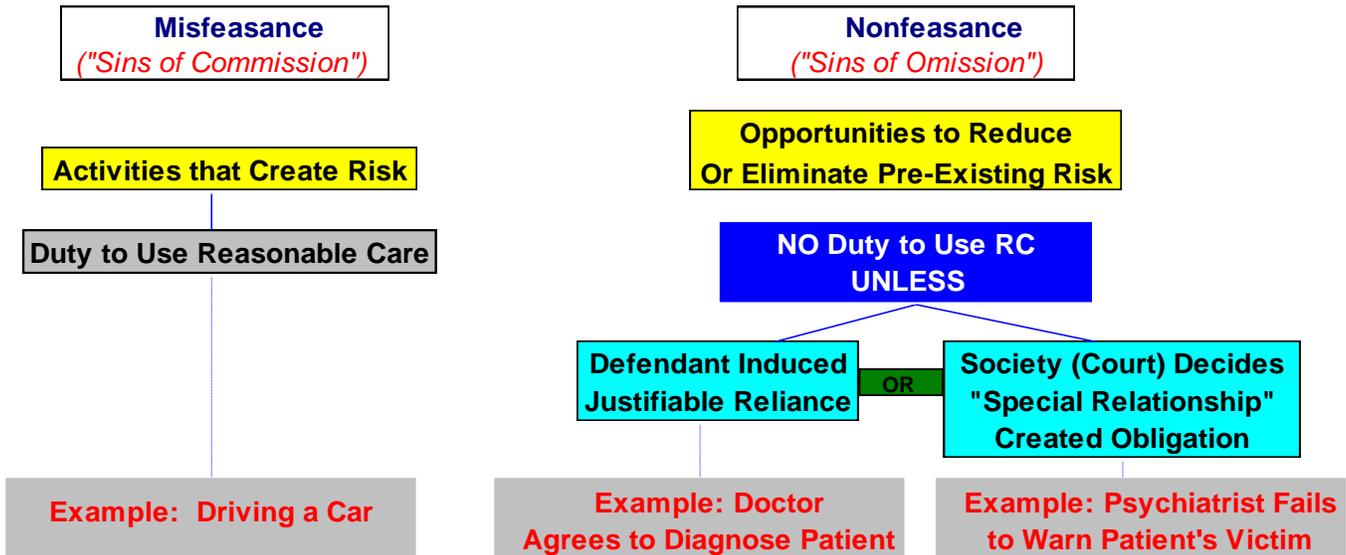


**Chapter 10  
Professional Malpractice**



**Chapter 11**  
**Rescuers, Justifiable Reliance**  
**and Special Relationships**

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



**Chapter 12**  
**Intentional Torts:**  
**The Prima Facie Case**

