



Restatement of the Law Third Torts: Miscellaneous Provisions

Council Draft No. 7
(December 2024)

SUBJECTS COVERED

VICARIOUS LIABILITY

TOPIC 4 Nondelegable Duties (§§ 7-10)

IMMUNITIES

CHAPTER 3 Governmental Entities' and Public Officials' and Employees' Immunities (§§ 8, 11-13)

FIREFIGHTER'S RULE ABOLISHED

VICARIOUS LIABILITY

TOPIC 5 Other Types of Vicarious Liability (§ 11)

TORTIOUS INTERFERENCE WITH A RIGHT TO VOTE OR HOLD OFFICE (§ __)

PRIMA FACIE TORT (§ __)

NEGLIGENCE AND INTENTIONAL TORTS BASED ON THE SAME FACTS (§ __)

LIABILITY OF PROFESSIONALS AND THOSE PRACTICING SKILLED TRADES (§§ __, __)

APPENDIX A Black Letter of Council Draft No. 7

APPENDIX B Black Letter of Sections Approved by Membership

The American Law Institute
4025 Chestnut Street
Philadelphia, PA 19104
Telephone: (215) 243-1600
Email: ali@ali.org Website: www.ali.org

©2024 by The American Law Institute
All Rights Reserved

The American Law Institute

DAVID F. LEVI, President

LEE H. ROSENTHAL, 1st Vice President

IVAN K. FONG, Treasurer

DIANE P. WOOD, Director

TERESA WILTON HARMON, 2nd Vice President

LAURA DENVIR STITH, Secretary

ELEANOR BARRETT, Deputy Director

COUNCIL

DONALD B. AYER, McLean, VA

SCOTT BALES, Arizona Supreme Court (retired), Phoenix, AZ

THOMAS A. BALMER, Oregon Supreme Court, Salem, OR

JOHN B. BELLINGER III, Arnold & Porter, Washington, DC

STEPHANOS BIBAS, U.S. Court of Appeals, Third Circuit, Philadelphia, PA

RICHARD R.W. BROOKS, New York University School of Law, New York, NY

EVAN R. CHESLER, New York University, Arts & Science, Chairman of the Board, New York, NY

J. MICHELLE CHILDS, U.S. Court of Appeals, District of Columbia Circuit, Washington, DC

ALLISON H. EID, U.S. Court of Appeals, Tenth Circuit, Denver, CO

IVAN K. FONG, Medtronic, Minneapolis, MN

MICHAEL J. GARCIA, New York State Court of Appeals, Albany, NY

STEVEN S. GENSLER, University of Oklahoma College of Law, Norman, OK

DANIEL C. GIRARD, Girard Sharp, San Francisco, CA

ABBE R. GLUCK, Yale Law School, New Haven, CT

ROBERTO JOSE GONZALEZ, Paul, Weiss, Rifkind, Wharton & Garrison, Washington, DC

YVONNE GONZALEZ ROGERS, U.S. District Court, Northern District of California, Oakland, CA

ANTON G. HAJJAR, Chevy Chase, MD

CAITLIN HALLIGAN, New York State Court of Appeals, Albany, NY

THOMAS M. HARDIMAN, U.S. Court of Appeals, Third Circuit, Pittsburgh, PA

TERESA WILTON HARMON, Sidley Austin, Chicago, IL

NATHAN L. HECHT, Texas Supreme Court, Austin, TX

SAMUEL ISSACHAROFF, New York University School of Law, New York, NY

WALLACE B. JEFFERSON, Alexander Dubose & Jefferson, Austin, TX

MICHELE C. KANE, The Walt Disney Company (retired), Burbank, CA

PAMELA S. KARLAN, Stanford Law School, Stanford, CA

PETER DOUGLAS KEISLER, Sidley Austin (retired), Washington, DC

ROBERT H. KLONOFF, Lewis & Clark Law School, Portland, OR

HAROLD HONGJU KOH, Yale Law School, New Haven, CT

LEONDR A. KRUGER, California Supreme Court, San Francisco, CA

CAROLYN B. KUHL, Superior Court of California, County of Los Angeles, Los Angeles, CA

CAROL F. LEE, Taconic Capital Advisors, New York, NY

DAVID F. LEVI, Duke University School of Law, Durham, NC

LANCE LIEBMAN*, Columbia Law School, New York, NY

GOODWIN LIU, California Supreme Court, San Francisco, CA

RAYMOND J. LOHIER, Jr., U.S. Court of Appeals, Second Circuit, New York, NY

LORI A. MARTIN, WilmerHale, New York, NY

BRIDGET MARY MCCORMACK, American Arbitration Association-International Centre for Dispute Resolution, New York, NY

TROY A. MCKENZIE, New York University School of Law, New York, NY

DARRELL A.H. MILLER, University of Chicago Law School, Chicago, IL

JUDITH A. MILLER, Chevy Chase, MD

PATRICIA ANN MILLETT, U.S. Court of Appeals, District of Columbia Circuit, Washington, DC

RANDOLPH D. MOSS, U.S. District Court, District of Columbia, Washington, DC

JANET NAPOLITANO, University of California Berkeley, Goldman School of Public Policy, Berkeley, CA

KATHLEEN M. O'SULLIVAN, Perkins Coie, Seattle, WA

STEPHANIE E. PARKER, Jones Day, Atlanta, GA

ERIC A. POSNER, University of Chicago Law School, Chicago, IL

CRISTINA M. RODRÍGUEZ, Yale Law School, New Haven, CT

DANIEL B. RODRIGUEZ, Northwestern University Pritzker School of Law, Chicago, IL

TERESA WYNN ROSEBOROUGH, The Home Depot, Atlanta, GA

LEE H. ROSENTHAL, U.S. District Court, Southern District of Texas, Houston, TX

GARY L. SASSO, Carlton Fields, Tampa, FL

ANTHONY J. SCIRICA, U.S. Court of Appeals, Third Circuit, Philadelphia, PA

**Director Emeritus*

VIRGINIA A. SEITZ, Sidley Austin, Washington, DC
MARSHA E. SIMMS, Weil, Gotshal & Manges (retired), New York, NY
ROBERT H. SITKOFF, Harvard Law School, Cambridge, MA
LAURA STEIN, Mondelēz International, Chicago, IL
LAURA DENVIR STITH, Missouri Supreme Court (retired), Kansas City, MO
CATHERINE T. STRUVE, University of Pennsylvania Carey Law School, Philadelphia, PA
JEFFREY S. SUTTON, U.S. Court of Appeals, Sixth Circuit, Columbus, OH
LARRY D. THOMPSON, Finch McCranie, Atlanta, GA
SARAH S. VANCE, U.S. District Court, Eastern District of Louisiana, New Orleans, LA
SARAH HAWKINS WARREN, Georgia Supreme Court, Atlanta, GA
SETH P. WAXMAN, WilmerHale, Washington, DC
STEVEN O. WEISE, Proskauer Rose, Los Angeles, CA

COUNCIL EMERITI

KENNETH S. ABRAHAM, University of Virginia School of Law, Charlottesville, VA
SUSAN FRELICH APPLETON, Washington University School of Law, St. Louis, MO
KIM J. ASKEW, DLA Piper, Dallas, TX
JOSÉ I. ASTIGARRAGA, Reed Smith, Miami, FL
JOHN H. BEISNER, Skadden, Arps, Slate, Meagher & Flom, Washington, DC
SHEILA L. BIRNBAUM, Dechert LLP, New York, NY
ALLEN D. BLACK, Fine, Kaplan and Black, Philadelphia, PA
AMELIA H. BOSS, Drexel University Thomas R. Kline School of Law (retired), Philadelphia, PA
MICHAEL BOUDIN, U.S. Court of Appeals, First Circuit (retired), Boston, MA
WILLIAM M. BURKE, Shearman & Sterling (retired), Costa Mesa, CA
ELIZABETH J. CABRASER, Lieff Cabraser Heimann & Bernstein, San Francisco, CA
GERHARD CASPER, Stanford University, Freeman Spogli Institute for International Studies, Stanford, CA
EDWARD H. COOPER, University of Michigan Law School, Ann Arbor, MI
N. LEE COOPER, Maynard Nexsen, Birmingham, AL
GEORGE H. T. DUDLEY, Dudley Newman Feuerzeig, St. Thomas, U.S. Virgin Islands
CHRISTINE M. DURHAM, Wilson Sonsini Goodrich & Rosati, Salt Lake City, UT
KENNETH C. FRAZIER, Merck & Co., Inc., Rahway, NJ
PAUL L. FRIEDMAN, U.S. District Court, District of Columbia, Washington, DC
CONRAD K. HARPER, New York, NY
D. BROCK HORNBY, U.S. District Court, District of Maine, Portland, ME
WILLIAM C. HUBBARD, University of South Carolina School of Law, Columbia, SC
CAROLYN DINEEN KING, U.S. Court of Appeals, Fifth Circuit, Houston, TX
CAROLYN B. LAMM, White & Case, Washington, DC
DEREK P. LANGHAUSER, Maine Maritime Academy and Community Colleges, Cumberland Foreside, ME
DOUGLAS LAYCOCK, University of Virginia School of Law (retired), Charlottesville, VA
PIERRE N. LEVAL, U.S. Court of Appeals, Second Circuit, New York, NY
MARTIN LIPTON, Wachtell, Lipton, Rosen & Katz, New York, NY
GERARD E. LYNCH, U.S. Court of Appeals, Second Circuit, New York, NY
MYLES V. LYNK, Arizona State University, Sandra Day O'Connor College of Law, Phoenix, AZ
MARGARET H. MARSHALL, Choate, Hall & Stewart, Cambridge, MA
M. MARGARET McKEOWN, U.S. Court of Appeals, Ninth Circuit, San Diego, CA
JOHN J. "MIKE" McKETTA III, Graves, Dougherty, Hearon & Moody, Austin, TX
ROBERT H. MUNDHEIM, A&O Shearman, Tucson, AZ
KATHRYN A. OBERLY, District of Columbia Court of Appeals (retired), Palm Beach, FL
HARVEY S. PERLMAN, University of Nebraska College of Law, Lincoln, NE
ROBERTA COOPER RAMO**, Modrall Sperling, Albuquerque, NM
DAVID W. RIVKIN, Arbitration Chambers, New York, NY
MARY M. SCHROEDER, U.S. Court of Appeals, Ninth Circuit, Phoenix, AZ
JANE STAPLETON, The University of Sydney Law School, Sydney, Australia
ROBERT A. STEIN, University of Minnesota Law School, Minneapolis, MN
LARRY S. STEWART, Stewart Tilghman Fox Bianchi & Cain (retired), West Palm Beach, FL
ELIZABETH S. STONG, U.S. Bankruptcy Court, Eastern District of New York, Brooklyn, NY
MICHAEL TRAYNOR**, Cobalt LLP, Stinson Beach, CA
FREDERICK WILLIAM (BILL) WAGNER, Wagner McLaughlin (retired), Tampa, FL
WILLIAM H. WEBSTER, Milbank LLP (retired), Washington, DC
HERBERT P. WILKINS, Concord, MA

***President Emeritus and Chair of the Council Emeritus*

**Restatement of the Law Third
Torts: Miscellaneous Provisions**

Comments and Suggestions Invited

ALI welcomes comments on this draft.

To submit comments, we ask that you either send them via email to RTMPcomments@ali.org, or submit them via the [project's page](#) on the ALI website (login required). In either case, the comments will be automatically received by the Reporters and ALI's Director and Deputy Director, as well as by ALI Publications staff, who will post the comments on the project page.

Unless otherwise specified, when you submit comments you authorize ALI to retain the comments in our files and archives, and to post the comments on the project's page on the ALI website. Access to comments on the project page is limited to project participants and ALI members.

Individual email addresses are included below for reference only. Please submit comments on this draft as described above.

Reporters

Professor Nora Freeman Engstrom
Stanford Law School
559 Nathan Abbott Way
Room 350, Neukom Building
Stanford, CA 94305-8602
Email: nora.engstrom@law.stanford.edu

Professor Michael D. Green
Visiting Professor
Washington University in St. Louis School of Law
1 Brookings Dr.
Anheuser-Busch Hall, Room 460
St. Louis, MO 63130-4862
Email: michael.g@wustl.edu

Associate Reporter

Mr. Guy Miller Struve
Davis Polk & Wardwell LLP (Retired)
450 Lexington Avenue, Room 2910
New York, NY 10017-3919
Phone: 212-450-4192
Email: guy.struve@davispolk.com

Director

The Hon. Diane P. Wood
The Executive Office
THE AMERICAN LAW INSTITUTE
4025 Chestnut Street
Philadelphia, PA 19104-3099
Email: dwood@ALI.org

Deputy Director

Ms. Eleanor Barrett
The Executive Office
THE AMERICAN LAW INSTITUTE
4025 Chestnut Street
Philadelphia, PA 19104-3099
Email: ebarrett@ALI.org

Reporters' Conflicts of Interest

The project's Reporters may have been involved in other engagements on issues within the scope of the project; all Reporters are asked to disclose any conflicts of interest, or their appearance, in accord with the Policy Statement and Procedures on Conflicts of Interest with Respect to Institute Projects.

**Restatement of the Law Third
Torts: Miscellaneous Provisions**

(as of November 27, 2024)

REPORTERS

NORA FREEMAN ENGSTROM, Stanford Law School, Stanford, CA
MICHAEL D. GREEN, Washington University in St. Louis School of Law (visiting professor), St. Louis, MO
WILLIAM C. POWERS, JR., University of Texas at Austin School of Law, Austin, TX [deceased 2019]

ASSOCIATE REPORTERS

MARK A. HALL, Wake Forest University School of Law, Winston-Salem, NC
Associate Reporter for Medical Malpractice [to 2023; became a Reporter for Medical Malpractice as a freestanding project in 2023]
TANYA D. MARSH, Wake Forest University School of Law, Winston-Salem, NC
Associate Reporter for Right of Sepulcher [to May 2023]
GUY MILLER STRUVE, Davis Polk & Wardwell (retired), New York, NY [from 2021]

ADVISERS

KENNETH S. ABRAHAM, University of Virginia School of Law, Charlottesville, VA
BRENT R. APPEL, Iowa Supreme Court, Des Moines, IA
SHAWN J. BAYERN, Florida State University College of Law, Tallahassee, FL
CHERI L. BEASLEY, Raleigh, NC
J. BRETT BUSBY, Texas Supreme Court, Austin, TX
DAVID G. CAMPBELL, U.S. District Court, District of Arizona, Phoenix, AZ
W. JONATHAN CARDI, Wake Forest University School of Law, Winston-Salem, NC
EDWARD H. COOPER, University of Michigan Law School, Ann Arbor, MI
NORMAN L. EPSTEIN, Los Angeles, CA [deceased 2023]
ELIZABETH FAIELLA, Faiella & Gulden, Winter Park, FL
GARY FEINERMAN, Latham & Watkins, Chicago, IL
RICHARD H. FRIEDMAN, Friedman Rubin, Bremerton, WA
MARK GEISTFELD, New York University School of Law, New York, NY
MYRIAM E. GILLES, Yeshiva University, Benjamin N. Cardozo School of Law, New York, NY
ABBE R. GLUCK, Yale Law School, New Haven, CT
STEVE C. GOLD, Rutgers Law School–Newark, Newark, NJ
CHARLES E. GRIFFIN, Butler Snow, Ridgeland, MS
MARK A. HALL, Wake Forest University School of Law, Winston-Salem, NC
HEATHER HANSEN, O’Brien & Ryan, Plymouth Meeting, PA
RICHARD L. HASEN, University of California, Los Angeles School of Law, Los Angeles, CA
STEPHEN A. HIGGINSON, U.S. Court of Appeals, Fifth Circuit, New Orleans, LA
JILL R. HORWITZ, University of California, Los Angeles School of Law, Los Angeles, CA
RALPH A. JACOBS, Westport Island, ME
NINA A. KOHN, Syracuse University College of Law, Syracuse, NY
JOSHUA D. KOSKOFF, Koskoff Koskoff & Bieder, Bridgeport, CT
ALEXANDRA D. LAHAV, Cornell Law School, Ithaca, NY
BEVERLY B. MARTIN, Center on Civil Justice, New York University School of Law, New York, NY
MARGARET PENNY MASON, Barclay Damon, New Haven, CT
DAYNA BOWEN MATTHEW, George Washington University Law School, Washington, DC
LEIGH MARTIN MAY, U.S. District Court, Northern District of Georgia, Atlanta, GA
FRANK M. MCCLELLAN, Temple University Beasley School of Law, Philadelphia, PA [deceased 2023]
JESSICA MILLER, Skadden, Arps, Slate, Meagher & Flom, Washington, DC
KENNETH MURPHY, Philadelphia, PA
LEONARD “JACK” NELSON, Samford University Cumberland School of Law, Birmingham, AL
DAVID ORENTLICHER, University of Nevada, Las Vegas, William S. Boyd School of Law, Las Vegas, NV

JIM M. PERDUE, Perdue & Kidd, Houston, TX
PHILIP G. PETERS, JR., University of Missouri School of Law, Columbia, MO
ROBERT L. RABIN, Stanford Law School, Stanford, CA
CHRISTINA C. REISS, U.S. District Court, District of Vermont, Burlington, VT
ELLEN RELKIN, Weitz & Luxenberg, New York, NY
JULIUS N. RICHARDSON, U.S. Court of Appeals, Fourth Circuit, Columbia, SC
CHRISTOPHER JOHN ROBINETTE, Southwestern Law School, Los Angeles, CA
WILLIAM M. SAGE, Texas A&M University School of Law, Fort Worth, TX
NADIA N. SAWICKI, Loyola University Chicago School of Law, Chicago, IL
VICTOR E. SCHWARTZ, Shook, Hardy & Bacon, Washington, DC
MARC M. SELTZER, Susman Godfrey, Los Angeles, CA
JOANNA SHEPHERD, Emory University School of Law, Atlanta, GA
LAURA SIGMAN, Children's National Health System, Washington, DC
AMY J. ST. EVE, U.S. Court of Appeals, Seventh Circuit, Chicago, IL
LARRY S. STEWART, Stewart Tilghman Fox Bianchi & Cain (retired), West Palm Beach, FL
GUY MILLER STRUVE, Davis Polk & Wardwell (retired), New York, NY [to 2021]
DAVID STUDDERT, Stanford Law School, Palo Alto, CA
STEPHEN D. SUGARMAN, University of California, Berkeley School of Law, Berkeley, CA [deceased 2021]
THOMAS D. WATERMAN, Iowa Supreme Court, Des Moines, IA
MALCOLM E. WHEELER, Wheeler Trigg O'Donnell, Denver, CO
JOHN WITT, Yale Law School, New Haven, CT
JENNIFER WRIGGINS, University of Maine School of Law, Portland, ME
ALLISON ZIEVE, Public Citizen Litigation Group, Washington, DC
ADAM S. ZIMMERMAN, University of Southern California, Gould School of Law, Los Angeles, CA
BENJAMIN C. ZIPURSKY, Fordham University School of Law, New York, NY

LIAISONS

For the American College of Surgeons
PATRICK BAILEY, Washington, DC
For the American Medical Association
KYLE PALAZZOLO, Chicago, IL
For the American Property Casualty Insurance Association
LAURA A. FOGGAN, Washington, DC

MEMBERS CONSULTATIVE GROUP

Restatement of the Law Third, Torts: Miscellaneous Provisions (as of November 26, 2024)

MARC T. AMY, Lafayette, LA	SHARONA HOFFMAN, Cleveland, OH
JAMES M. ANDERSON, Pittsburgh, PA	ROGER F. HOLMES, Anchorage, AK
JOSÉ F. ANDERSON, Baltimore, MD	KEVIN D. JEWELL, Houston, TX
CHRISTOPHER EDWARD APPEL, Washington, DC	VINCENT R. JOHNSON, San Antonio, TX
JAMES K. ARCHIBALD, Towson, MD	ALLAN KANNER, New Orleans, LA
RONALD G. ARONOVSKY, Los Angeles, CA	GREGORY C. KEATING, Los Angeles, CA
MICHAEL F. AYLWARD, Boston, MA	D. ARTHUR KELSEY, Richmond, VA
TOM BAKER, Philadelphia, PA	LESLIE CAROLYN KENDRICK, Charlottesville, VA
STEVEN K. BALMAN, Tulsa, OK	HAROLD H. KIM, Washington, DC
JENNIFER S. BARD, Cincinnati, OH	NANCY S. KIM, Chicago, IL
WILLIAM T. BARKER, Chicago, IL	ERIK KNUITSEN, Kingston, Canada
JAMES M. BECK, Philadelphia, PA	PETER R. KOCHENBURGER, Baton Rouge, LA
CHARLES L. BECKER, Philadelphia, PA	CANDACE SAARI KOVACIC-FLEISCHER, Washington, DC
MARK A. BEHRENS, Washington, DC	RONALD J. KROTOSZYNSKI, Tuscaloosa, AL
NEAL S. BERINHOUT, Atlanta, GA	PETER B. KUTNER, Norman, OK
MARY JANE BOWES, Pittsburgh, PA	JOSEPH H. LANG JR., Tampa, FL
THOMAS H. BOYD, Minneapolis, MN	JOHN P. LAVELLE JR., Philadelphia, PA
STUART N. BROTMAN, Knoxville, TN	DOUGLAS LAYCOCK, Charlottesville, VA
ARTHUR H. BRYANT, Malibu, CA	STEVE LEBEN, Kansas City, MO
ELLEN M. BUBLUCK, Phoenix, AZ	LAWRENCE C. LEVINE, Sacramento, CA
JOHN P. BURTON, Santa Fe, NM	MICHAEL E. LEVINE, Miami, FL
KAREN K. CALDWELL, Lexington, KY	WILLIAM PARKER LIGHTFOOT, Washington, DC
STEPHEN CALKINS, Detroit, MI	KYLE D. LOGUE, Ann Arbor, MI
ELENA A. CAPPELLA, Philadelphia, PA	WILLIAM CULLEN MACDONALD, Bethesda, MD
MARTHA E. CHAMALLAS, Columbus, OH	SOLANGEL MALDONADO, Newark, NJ
STEPHEN YEE CHOW, Boston, MA	PATRICK A. MALONE, Washington, DC
MICHAEL G. COLANTUONO, Grass Valley, CA	D. PRICE MARSHALL JR., Little Rock, AR
GEORGE W. CONK, New York, NY	BRETT A. MASON, Atlanta, GA
CHRISTINE NERO COUGHLIN, Winston-Salem, NC	LORELIE S. MASTERS, Washington, DC
CHRISTOPHER SCOTT D'ANGELO, Philadelphia, PA	THOMAS WM. MAYO, Dallas, TX
KEITH L. DAVIDSON, Crystal Lake, IL	CHRISTOPHER J. MCFADDEN, Atlanta, GA
DEBORAH A. DEMOTT, Durham, NC	JAMES C. MCKAY JR., Washington, DC
JOHN L. DIAMOND, San Francisco, CA	RICHARD J. MCNEIL, Irvine, CA
ANTHONY M. DI LEO, New Orleans, LA	STEPHANIE A. MIDDLETON, Greenbrae, CA
JAMES B. DOLAN JR., Boston, MA	JIM A. MOSELEY, Dallas, TX
JOHN FITZGERALD DUFFY, Charlottesville, VA	LUTHER T. MUNFORD, Ridgeland, MS
HOLLY A. DYER, Wichita, KS	VALERIE M. NANNERY, Washington, DC
JORDAN ELIAS, San Francisco, CA	DONALD NOLAN, Oxford, England
RICHARD G. FEDER, Philadelphia, PA	JAMES M. OLESKE JR., Portland, OR
JAY M. FEINMAN, Camden, NJ	ROBERT M. PALUMBOS, Philadelphia, PA
ARTHUR NORMAN FIELD, New York, NY	STEPHEN PATRICK PATE, Houston, TX
JOHN F. FISCHER, Tulsa, OK	ROBERT S. PECK, Washington, DC
PAUL J. FRAIDENBURGH, San Diego, CA	E. FARISH PERCY, Oxford, MS
DAVID R. GEIGER, Boston, MA	JEFFREY M. POLLOCK, Princeton, NJ
SHARON STERN GERSTMAN, Buffalo, NY	POLLY J. PRICE, Atlanta, GA
ELIZABETH BARROWMAN GIBSON, Plano, TX	MARLON A. PRIMES, Cleveland, OH
DONALD G. GIFFORD, Baltimore, MD	ELLEN S. PRYOR, Dallas, TX
PHILIP S. GOLDBERG, Washington, DC	STUART A. RAPHAEL, Richmond, VA
CARLOS GÓMEZ LIGÜERRE, Barcelona, Spain	HUGH MASSEY RAY III, Houston, TX
JAMES GOUDKAMP, Oxford, England	MARGARET RAYMOND, Madison, WI
VALERIE P. HANS, Ithaca, NY	CLIFFORD A. RIEDERS, Williamsport, PA
PAUL T. HAYDEN, Los Angeles, CA	ARMAND JAMES ROBERTSON II, San Francisco, CA
RICHARD CONRAD HENKE, Lansing, MI	CHRISTOPHER T. ROBERTSON, Boston, MA
STEPHEN J. HERMAN, New Orleans, LA	MICHAEL LINDSAY ROBINSON, Winston-Salem, NC
DANIEL EARLE HINDE, Houston, TX	DANIEL B. RODRIGUEZ, Chicago, IL

JOSEPH SANDERS, Houston, TX
NATHAN A. SCHACHTMAN, Haddonfield, NJ
MILTON R. SCHROEDER, Paradise Valley, AZ
ROBERT P. SCHUSTER, Jackson, WY
SUSAN SHARKO, Florham Park, NJ
KENNETH W. SIMONS, Irvine, CA
DOUGLAS G. SMITH, Chicago, IL
CARL A. SOLANO, Philadelphia, PA
SHANIN SPECTER, Philadelphia, PA
VICTOR P. STABILE, Harrisburg, PA
JANE STAPLETON, Sydney, Australia
MICHAEL K. STEENSON, Saint Paul, MN
JEFFREY W. STEMPEL, Las Vegas, NV
EVAN B. STEPHENSON, Denver, CO
JAMES Y. STERN, Williamsburg, VA
H. MARK STICHEL, Baltimore, MD

LAURA DENVIR STITH, Kansas City, MO
CATHERINE T. STRUVE, Philadelphia, PA
JOHN D. TAURMAN, Washington, DC
JEFFREY E. THOMAS, Kansas City, MO
DANIEL MACK TRAYNOR, Bismarck, ND
CARLA C. VAN DONGEN, Bloomington, IL
MOLLY S. VAN HOUWELING, Berkeley, CA
VICTOR D. VITAL, Dallas, TX
ELIZABETH WEEKS, Athens, GA
MERLE WEINER, Eugene, OR
STEVEN O. WEISE, Los Angeles, CA
W. BRADLEY WENDEL, Ithaca, NY
NICHOLAS J. WITTNER, East Lansing, MI
DOUGLAS P. WOODLOCK, Boston, MA
RICHARD W. WRIGHT, Evanston, IL
ERIC H. ZAGRANS, Columbus, OH

The bylaws of The American Law Institute provide that “Publication of any work as representing the Institute’s position requires approval by both the membership and the Council.”

Each portion of an Institute project is submitted initially for review to the project’s Advisers and Members Consultative Group as a Preliminary Draft. As revised, it is then submitted to the Council as a Council Draft. After review by the Council, it is submitted as a Tentative Draft or Discussion Draft for consideration by the membership at an Annual Meeting.

Once it is approved by both the Council and membership, a Tentative Draft represents the most current statement of the Institute’s position on the subject and may be cited in opinions or briefs in accordance with Bluebook rule 12.9.4, e.g., Restatement (Second) of Torts § 847A (AM. L. INST., Tentative Draft No. 17, 1974), until the official text is published. The vote of approval allows for possible further revision of the drafts to reflect the discussion at the Annual Meeting and to make editorial improvements.

The drafting cycle continues in this manner until each segment of the project has been approved by both the Council and the membership. When extensive changes are required, the Reporter may be asked to prepare a Proposed Final Draft of the entire work, or appropriate portions thereof, for review by the Council and membership. Review of this draft is not de novo, and ordinarily is limited to consideration of whether changes previously decided upon have been accurately and adequately carried out.

The typical ALI Section is divided into three parts: black letter, Comment, and Reporter’s Notes. In some instances there may also be a separate Statutory Note. Although each of these components is subject to review by the project’s Advisers and Members Consultative Group and by the Council and the membership, only the black letter and Comment are regarded as the work of the Institute. The Reporter’s and Statutory Notes remain the work of the Reporter.

**Restatements (excerpt of the Revised Style Manual approved by the ALI Council
in January 2015)**

Restatements are primarily addressed to courts. They aim at clear formulations of common law and its statutory elements or variations and reflect the law as it presently stands or might appropriately be stated by a court.

a. Nature of a Restatement. Webster’s Third New International Dictionary defines the verb “restate” as “to state again *or* in a new form” [emphasis added]. This definition neatly captures the central tension between the two impulses at the heart of the Restatement process from the beginning, the impulse to recapitulate the law as it presently exists and the impulse to reformulate it, thereby rendering it clearer and more coherent while subtly transforming it in the process.

The law of the Restatements is generally common law, the law developed and articulated by judges in the course of deciding specific cases. For the most part Restatements thus assume a body of shared doctrine enabling courts to render their judgments in a consistent and reasonably predictable manner. In the view of the Institute’s founders, however, the underlying principles of the common law had become obscured by the ever-growing mass of decisions in the many different jurisdictions, state and federal, within the United States. The 1923 report suggested that, in contrast, the Restatements were to be at once “analytical, critical and constructive.” In seeing each subject clearly and as a whole, they would discern the underlying principles that gave it coherence and thus restore the unity of the common law as properly apprehended.

Unlike the episodic occasions for judicial formulations presented by particular cases, however, Restatements scan an entire legal field and render it intelligible by a precise use of legal terms to which a body reasonably representative of the legal profession, The American Law Institute, has ultimately agreed. Restatements—“analytical, critical and constructive”—accordingly resemble codifications more than mere compilations of the pronouncements of judges. The Institute’s founders envisioned a Restatement’s black-letter statement of legal rules as being “made with the care and precision of a well-drawn statute.” They cautioned, however, that “a statutory form might be understood to imply a lack of flexibility in the application of the principle, a result which is not intended.” Although Restatements are expected to aspire toward the precision of statutory language, they are also intended to reflect the flexibility and capacity for development and growth of the common law. They are therefore phrased not in the mandatory terms of a statute but in the descriptive terms of a judge announcing the law to be applied in a given case.

A Restatement thus assumes the perspective of a common-law court, attentive to and respectful of precedent, but not bound by precedent that is inappropriate or inconsistent with the law as a whole. Faced with such precedent, an Institute Reporter is not compelled to adhere to what Herbert Wechsler called “a preponderating balance of authority” but is instead expected to propose the better rule and provide the rationale for choosing it. A significant contribution of the Restatements has also been anticipation of the direction in which the law is tending and expression of that development in a manner consistent with previously established principles.

The Restatement process contains four principal elements. The first is to ascertain the nature of the majority rule. If most courts faced with an issue have resolved it in a particular way, that is obviously important to the inquiry. The second step is to ascertain trends in the law. If 30 jurisdictions have gone one way, but the 20 jurisdictions to look at the issue most recently went

the other way, or refined their prior adherence to the majority rule, that is obviously important as well. Perhaps the majority rule is now widely regarded as outmoded or undesirable. If Restatements were not to pay attention to trends, the ALI would be a roadblock to change, rather than a “law reform” organization. A third step is to determine what specific rule fits best with the broader body of law and therefore leads to more coherence in the law. And the fourth step is to ascertain the relative desirability of competing rules. Here social-science evidence and empirical analysis can be helpful.

A Restatement consists of an appropriate mix of these four elements, with the relative weighing of these considerations being art and not science. The Institute, however, needs to be clear about what it is doing. For example, if a Restatement declines to follow the majority rule, it should say so explicitly and explain why.

An excellent common-law judge is engaged in exactly the same sort of inquiry. In the words of Professor Wechsler, which are quoted on the wall of the conference room in the ALI headquarters in Philadelphia:

We should feel obliged in our deliberations to give weight to all of the considerations that the courts, under a proper view of the judicial function, deem it right to weigh in theirs.

But in the quest to determine the best rule, what a Restatement can do that a busy common-law judge, however distinguished, cannot is engage the best minds in the profession over an extended period of time, with access to extensive research, testing rules against disparate fact patterns in many jurisdictions.

Like a Restatement, the common law is not static. But for both a Restatement and the common law the change is accretional. Wild swings are inconsistent with the work of both a common-law judge and a Restatement. And while views of which competing rules lead to more desirable outcomes should play a role in both inquiries, the choices generally are constrained by the need to find support in sources of law.

An unelected body like The American Law Institute has limited competence and no special authority to make major innovations in matters of public policy. Its authority derives rather from its competence in drafting precise and internally consistent articulations of law. The goals envisioned for the Restatement process by the Institute’s founders remain pertinent today:

It will operate to produce agreement on the fundamental principles of the common law, give precision to use of legal terms, and make the law more uniform throughout the country. Such a restatement will also effect changes in the law, *which it is proper for an organization of lawyers to promote* and which make the law better adapted to the needs of life. [emphasis added]

TABLE OF CONTENTS

<i>Section</i>	<i>Page</i>
Project Status at a Glance	xv
Reporters' Memorandum	xviii

VICARIOUS LIABILITY

TOPIC 4

NONDELEGABLE DUTIES

§ 7. Effect of a Nondelegable Duty	1
§ 8. Definition of "Independent Contractor"	9
§ 9. Nondelegable Duties Involving Physical Harm.....	15
§ 10. Nondelegable Duties Not Involving Physical Harm.....	25

IMMUNITIES

CHAPTER 3

GOVERNMENTAL ENTITIES' AND PUBLIC OFFICIALS' AND EMPLOYEES' IMMUNITIES

§ 8. United States Immunity	35
§ 11. Public Officials' and Employees' Immunity	44
§ 12. Public-duty Doctrine	58
§ 13. Special Relationships	88

FIREFIGHTER'S RULE ABOLISHED

Firefighter's Rule Abolished.....	96

VICARIOUS LIABILITY

TOPIC 5

OTHER TYPES OF VICARIOUS LIABILITY

§ 11. Special Rule on Vicarious Liability for Sexual Assault	114
§ __. Tortious Interference with a Right to Vote or Hold Office	163
§ __. Prima Facie Tort	181
§ X. Negligence and Intentional Torts Based on the Same Facts	193

LIABILITY OF PROFESSIONALS AND THOSE PRACTICING SKILLED TRADES

§ (#). Standard of Care for Professionals and Those Practicing Skilled Trades	221
§ (#). Cause of Action Against a Professional or Skilled Tradesperson	249
Appendix A. Black Letter of Council Draft No. 7	260
Appendix B. Black Letter of Sections Approved by Membership	266

PROJECT STATUS AT A GLANCE

Apportionment of Liability

Topic 1: Basic Rules of Comparative Responsibility

§§ 4 A and 4 B (T.D. No. 1) – approved at 2022 Annual Meeting

Topic 6: Tort Claims for Economic Harm

§§ 27 through 37 (T.D. No. 1) – approved at 2022 Annual Meeting

Liability for Physical and Emotional Harm

§ __. Medical Monitoring (T.D. No. 3) – approved at 2024 Annual Meeting

§ __. Liability for the Provision of Alcohol (T.D. No. 3) – approved at 2024 Annual Meeting

Chapter 3: The Negligence Doctrine and Negligence Liability

§ 18 A (T.D. No. 3) – approved at 2024 Annual Meeting

Chapter 8: Liability for Emotional Harm

Introductory Note, §§ 48 A through 48 C (T.D. No. 1) – approved at 2022 Annual Meeting

Chapter 8A: Interference with Family Relationships

§§ 48 D and 48 E (T.D. No. 1) – approved at 2022 Annual Meeting

§§ 48 F through 48 K (T.D. No. 3) – approved at 2024 Annual Meeting

Chapter 11: Liability of Medical Professionals and Institutions

Introductory Note, §§ 1 through 3 (T.D. No. 1) – approved at 2022 Annual Meeting*

Chapter 12: Liability in Event of Death

§§ 70 through 72 [Approximately] (T.D. No. 3) – approved at 2024 Annual Meeting

Immunities

Special Note on Immunities (T.D. No. 1) – approved at 2022 Annual Meeting

Chapter 1: Intra-Family Immunities

§§ 1 through 4 (T.D. No. 1) – approved at 2022 Annual Meeting

Chapter 2: Miscellaneous Immunities

§§ 5 through 7 (T.D. No. 1) – approved at 2022 Annual Meeting

Chapter 3: Governmental Entities and Public Officials and Employees Immunities

§§ 9 and 10 (T.D. No. 1) – approved at 2022 Annual Meeting

Parental Standard of Care

§ 10A (T.D. No. 1) – approved at 2022 Annual Meeting

Sepulcher (Interference with Human Remains)

§§ 48 D through 48 F (T.D. No. 2) – approved at 2023 Annual Meeting

Statutes of Limitations and Statutes of Repose for Common-Law Tort Causes of Action

Part 1: Statutes of Limitations

Topic 1: Statutes of Limitations in General

§ 1 (T.D. No. 3) – approved at 2024 Annual Meeting

* This Note and §§ 1 through 3 are now part of Restatement Third, Torts: Medical Malpractice.

Topic 2: When the Statute of Limitations Begins to Run

§§ 2 to 4 (T.D. No. 3) – approved at 2024 Annual Meeting

Topic 3: When the Running of the Statute of Limitations is Suspended (Tolling)

§§ 5 to 8 (T.D. No. 3) – approved at 2024 Annual Meeting

Topic 4: Effect of Defendant Misconduct

§§ 9, 10 (T.D. No. 3) – approved at 2024 Annual Meeting

Topic 5: Contracts Shortening or Lengthening the Statute-of-Limitations Period

§ 11 (T.D. No. 3) – approved at 2024 Annual Meeting

Part 2: Statutes of Repose

Topic 1: Statutes of Repose in General

§ 12 (T.D. No. 3) – approved at 2024 Annual Meeting

Topic 2: When the Statute of Repose Begins to Run

§ 13 (T.D. No. 3) – approved at 2024 Annual Meeting

Topic 3: The Statute of Repose is Not Suspended by Common-Law Tolling Rules

§ 14 (T.D. No. 3) – approved at 2024 Annual Meeting

Topic 4: Effect of Defendant Misconduct

§ 15 (T.D. No. 3) – approved at 2024 Annual Meeting

Topic 5: Contracts Shortening or Lengthening the Statute-of-Repose Period

§ 16 (T.D. No. 3) – approved at 2024 Annual Meeting

Aiding and Abetting Negligence Torts

§ __. Aiding and Abetting Negligence Torts (T.D. No. 3) – approved at 2024 Annual Meeting

§ __. Agreements to Engage in Conduct that is Negligent or Reckless (T.D. No. 3) – approved at 2024 Annual Meeting

Firefighter’s Rule Abolished

Firefighter’s Rule Abolished (T.D. No. 3) – approved as amended at 2024 Annual Meeting; will be submitted for Council approval

Liability for Economic Harm

Chapter 3: Interference with Economic Interests

§ 20 A (T.D. No. 3) – approved at 2024 Annual Meeting

Miscellaneous Provisions

Chapter __: Miscellaneous Torts

Topic __: Spoliation

§ __. “Spoliation” Defined (T.D. No. 3) – approved at 2024 Annual Meeting

§ __. Third-Party Spoliation of Evidence (T.D. No. 3) – approved at 2024 Annual Meeting

§ __. First-Party Spoliation of Evidence (T.D. No. 3) – approved at 2024 Annual Meeting

Defenses Applicable to All Tort Claims

§ __. Equitable Estoppel as a Defense to Tort Liability (T.D. No. 3) – approved at 2024 Annual Meeting

Project Status at a Glance

Harm Before and Regarding Birth

§ __. Prenatal Injury (T.D. No. 3) – approved at 2024 Annual Meeting

Wrongful Pregnancy, Birth, and Life

§ __. Wrongful Pregnancy (T.D. No. 3) – approved at 2024 Annual Meeting

§ __. Wrongful Birth (T.D. No. 3) – approved at 2024 Annual Meeting

§ __. Wrongful Life (T.D. No. 3) – approved at 2024 Annual Meeting

Negligence Liability of Product Suppliers

§ __. Negligence Liability of Product Suppliers (T.D. No. 3) – approved at 2024 Annual Meeting

§ __. Negligence Liability of Independent Contractors that Manufacture, Rebuild, Repair, Maintain, Assemble, or Install Products (T.D. No. 3) – approved at 2024 Annual Meeting

Order of Draft Releases

Preliminary Draft No. 1 – issued February 2020

Council Draft No. 1 – issued August 2020

Preliminary Draft No. 2 – issued August 2021

Council Draft No. 2 – issued December 2021

Tentative Draft No. 1 – issued March 2022

Preliminary Draft No. 3 – issued August 2022

Council Draft No. 3 – issued September 2022

Council Draft No. 4 – issued December 2022

Tentative Draft No. 2 – issued March 2023

Preliminary Draft No. 4 – issued August 2023

Council Draft No. 5 – issued September 2023

Council Draft No. 6 – issued November 2023

Tentative Draft No. 3 – issued April 2024

Preliminary Draft No. 5 – issued August 2024

Council Draft No. 7 – issued December 2024

REPORTERS' MEMORANDUM

November 2024

To: ALI Council

From: Nora Freeman Engstrom and Michael D. Green

Re: January 2025 Council Meeting, Discussion of Council Draft No. 7 of the Miscellaneous Provisions project

This is our seventh, and we expect final, Council Draft for this Miscellaneous Provisions project in the Restatement Third of Torts. We presented Tentative Drafts Nos. 1, 2, and 3 to the membership in 2022, 2023, and 2024, respectively, and the material contained therein was approved, with the exception of the Firefighter's Rule. In particular, at the 2024 Annual Meeting, the membership voted to repudiate, rather than to restate, that Rule, and we have drafted a new Section to implement the membership's determination. That new Section appears in this Council Draft.

This Council Draft No. 7 contains materials covering the last 10 subjects that are on this project's plate. At this meeting, the items we propose to discuss and the order in which we plan to discuss them are:

- Nondelegable Duties Involving Physical and Nonphysical Harm
- U.S. Government Immunity
- Government Employees's Immunity
- Public-Duty Doctrine
- Firefighter's Rule Abolished
- Vicarious Liability for Sexual Assault
- Tortious Interference with a Right to Vote or Hold Office
- Prima Facie Tort
- Negligence and Intentional Torts Based on the Same Facts
- Standard of Care for Professionals and Those Practicing Skilled Trades

We have had a blast since we began this Third Restatement of Torts: Miscellaneous Provisions (initially called Concluding Provisions) project in 2019. Over the past six years, we have covered a broad and eclectic swath of tort law that fell between the cracks of other Third Restatement of Torts projects. With this Restatement (and the other pending Third Restatement of Torts projects (Remedies and Defamation and Privacy)), the Institute will have fulfilled the commitment made at a meeting convened by then-Director Lance Liebman in Austin in 2007 that

Reporters' Memorandum

addressed the future of the Third Restatement of Torts. That meeting resulted in agreement that the Third Restatement of Torts would cover (and supersede) all of the matter addressed in the Second Restatement of Torts and would also address a number of new doctrinal matters that have come down the torts pike since the Second Restatement. We are grateful that we have had the opportunity to contribute to the completion of that assignment. And, we could not have accomplished this task—as reflected in the chart attached to this Memorandum—had we not had the benefit of your wise counsel and support. We are deeply grateful for your many contributions.

As we draft this Memorandum in preparation for what we anticipate is our final trip to Council, we want to take a moment to honor and remember Bill Powers. One of the original Reporters for this Restatement, Bill contributed so much to the Institute during his many years serving as a Reporter for two previous Third Restatement projects—Apportionment of Liability and Liability for Physical and Emotional Harm—and as an Adviser for the Products Liability Restatement. Bill died as the result of a tragic accident at the University of Texas Law School in March 2019 just as we were getting started. We have missed his wise counsel, deep knowledge of tort law, and charming spirit throughout our work on this Restatement.

We welcome your thoughts on any of the material contained herein—and we very much look forward to seeing you in Philadelphia in the new year.

Reporters' Memorandum

Miscellaneous Provision/Subjects to Cover		
<i>Subject</i>	<i>Status</i>	<i>Next Step</i>
Alienation of Affections and Criminal Conversation	Approved at AM 2022	Complete
Apportionment of Liability for Economic Harm	Approved at AM 2022	Complete
Children & Family Torts	Approved at AM 2024	Complete
Concerted Action: Aiding and Abetting	Approved at AM 2024	Complete
Concerted Action: Agreements to Engage in Negligent Conduct	Approved at AM 2024	Complete
Consortium	Approved at AM 2022	Complete
Estoppel	Approved at AM 2024	Complete
Firefighter Rule Abolished	In this C.D. No. 7	
Immunities (Family, Governmental, Charitable, & Miscellaneous)	Approved at AM 2022 (some governmental material is in C.D. No. 7)	
Implied Rights of Action	After consultation with Advisers and Council, opted against treatment, given coverage in other projects of the Third Restatement.	Complete
Negligence and Intentional Torts Based on the Same Facts	In this C.D. No. 7	
Negligent Misrepresentation	Approved at AM 2024	Complete
Non-Commercial Product Seller Liability *	Approved at AM 2024	Complete
Parental Standard of Care	Approved at AM 2022	Complete
Prenatal Injury	Approved at AM 2024	Complete
Prima Facie Tort	In this C.D. No. 7	
Privileges	After consultation with Advisers and Council, opted against treatment, given coverage in other projects of the Third Restatement.	Complete
Public-Duty Doctrine	In this C.D. No. 7	
Tortious Interference with a Right to Vote or Hold Office	In this C.D. No. 7	
Sepulcher (Interference with Human Remains)	Approved at AM 2023	Complete
Standard of Care for Professionals and Those Practicing Skilled Trades	In this C.D. No. 7	
Statutes of Limitations (covered lightly in R2)	Approved at AM 2024	Complete
Wrongful Acts Doctrine	Approved at AM 2022	Complete
Wrongful Death & Survival Actions	Approved at AM 2024	Complete

Subjects Not Included in the Second Restatement		
<i>Subject</i>	<i>Status</i>	<i>Next Step</i>
Vicarious Liability	Approved by Council – January 2023	Slated for T.D. 4
Nondelegable Duties Involving Physical and Nonphysical Harm	In this C.D. No. 7	

* The Products Liability Restatement was limited to the liability of commercial sellers based on product defect.

Reporters' Memorandum

New Subjects Emergent Since the Second Restatement		
<i>Subject</i>	<i>Status</i>	<i>Next Step</i>
Dram Shop and Social Host Liability	Approved at AM 2024	Complete
Exculpatory Agreements/Contractual Waivers of Liability	After consultation with Advisers and Council, opted against treatment, given coverage in other projects of the Third Restatement.	Complete
Firefighter's Rule	Membership disapproved initial draft at AM 2024. New Section in this C.D. No. 7.	
First-Party Insurance Bad Faith	Approved at AM 2024	Complete
Medical Monitoring	Approved at AM 2024	Complete
Spoliation of Evidence	Approved at AM 2024	Complete
Vicarious Liability for Sexual Assault	In this C.D. No. 7	
Wrongful Pregnancy, Wrongful Birth & Wrongful Life	Approved at AM 2024	Complete

VICARIOUS LIABILITY

TOPIC 4¹

NONDELEGABLE DUTIES

- 1 § 7. Effect of a Nondelegable Duty
- 2 § 8. Definition of “Independent Contractor”
- 3 § 9. Nondelegable Duties Involving Physical Harm
- 4 § 10. Nondelegable Duties Not Involving Physical Harm

5 § 7. Effect of a Nondelegable Duty

6 **An actor subject to a nondelegable duty who delegates work to an independent**
7 **contractor (as defined in § 8) is vicariously liable for tortious breaches of the duty committed**
8 **by the independent contractor in the course of carrying out the work.**

9 **Comment:**

- 10 *a. Sources and cross-references.*
- 11 *b. In tort law, an actor subject to a nondelegable duty may delegate work to an independent*
12 *contractor but is vicariously liable for the independent contractor’s torts.*
- 13 *c. The meaning of the term “nondelegable duty” in tort law differs from that in other fields of law.*
- 14 *d. Nondelegable duties give rise to vicarious liability.*
- 15 *e. Nondelegable duties are limited to specific types of harm and do not apply to all torts.*
- 16 *f. Rationale of nondelegable duties.*
- 17 *g. The nondelegable duties restated in the Restatement Third of Torts impose vicarious liability*
18 *for the torts of independent contractors, not employees.*
- 19 *h. Apportionment of liability, indemnity, and contribution.*
- 20 *i. Other bases that may impose liability on the hirer for the torts of an independent contractor.*
- 21 *j. Judge and jury.*

22 *a. Sources and cross-references.* This Section is based upon, and is consistent with,
23 Restatement Third of Torts: Liability for Physical and Emotional Harm § 57, Comment *b*, which
24 addresses nondelegable duties. For the definition of vicarious liability, see § 1. For the

¹ This Topic will be a new Topic 4 in the material on Vicarious Liability. The Council has already approved the preceding three Topics of the Vicarious Liability material: Topic 1 on Vicarious Liability in General; Topic 2 on Respondeat Superior; and Topic 3 on Apparent Authority. Topic 5 will consist of a new Section on the Special Rule on Vicarious Liability for Sexual Assault and a final catchall Section (formerly § 7, now renumbered as § 12) which has already been approved by the Council.

consequences of vicarious liability, see § 2. Vicarious liability for punitive damages is addressed in Restatement Third of Torts: Remedies § 40 (Tentative Draft No. 3, 2024). Nondelegable duties are not the only way in which vicarious liability can arise; other ways in which vicarious liability can arise include respondeat superior (restated in §§ 3 to 5), apparent authority (restated in § 6), and the special rule on vicarious liability for sexual assault (restated in § 11). In addition, various statutes, which are described but not restated in § 12, Comment *d*, provide for vicarious tort liability.

As explained in the Introductory Note to Topic 2, Comment *b*, and as further explained in § 8, an independent contractor is one who is hired to perform work but who is not an employee of the hirer. As defined in § 4, an employee is an agent whose principal controls or has the right to control the manner and means of the agent’s performance of work. Restatement Third of Torts: Liability for Physical and Emotional Harm § 57 states that an actor who hires an independent contractor is generally not subject to vicarious liability for tortious conduct of the independent contractor. Nondelegable duties supply one of several exceptions to that general rule.

b. In tort law, an actor subject to a nondelegable duty may delegate work to an independent contractor but is vicariously liable for the independent contractor’s torts. An actor subject to a nondelegable duty may delegate work to an independent contractor, but the actor is vicariously liable for tortious breaches of the duty committed by the contractor in the course of carrying out the work. Restatement Third, Torts: Liability for Physical and Emotional Harm § 57, Comment *b*.

c. The meaning of the term “nondelegable duty” in tort law differs from that in other fields of law. In fields of law other than tort law, the meaning of the term “nondelegable duty” is the literal meaning conveyed by the words: a duty that may not be delegated. For example, in contract law, a nondelegable duty is a duty whose performance may not be delegated to another. Restatement of the Law Second, Contracts § 318, Comment *c*. Similarly, a duty of a government official is termed nondelegable when the duty must be performed by the government official personally and may not be performed by another. In tort law, by contrast, the term refers to whether the hirer will bear vicarious liability for torts committed by the independent contractor. See Comments *b* and *d*.

d. Nondelegable duties give rise to vicarious liability. As defined in § 1, vicarious liability is liability that is imposed on the defendant based solely on the tortious act of another and the relationship between the defendant and the other. Nondelegable duties give rise to vicarious liability because they impose liability on the hirer of an independent contractor based solely on the tortious conduct of the independent contractor.

e. Nondelegable duties are limited to specific types of harm and do not apply to all torts.

The nondelegable duties restated in the Restatement Third of Torts are described in §§ 9 and 10. As those Sections explain, each of those nondelegable duties applies only to cases involving a specific type of harm (which is generally, but not always, physical harm); they are not applicable when the independent contractor tortfeasor inflicts other types of harm.

In this respect, nondelegable duties differ from the other two principal types of vicarious liability: respondeat superior (restated in §§ 3 to 5) and apparent authority (restated in § 6). Both respondeat superior and apparent authority are defined in general terms, without any distinction based on the types of torts involved or the types of harms they inflict.

f. Rationale of nondelegable duties. Unlike respondeat superior (see § 3, Comment *b*), nondelegable duties cannot be justified on the basis of the hirer's control over the manner and means of the performance of the work, because, in the case of an independent contractor, the hirer does not have such control. See Comment *a*. And unlike apparent authority (see § 6, Comment *b*), nondelegable duties cannot be justified on the basis of the appearance of authority created by the hirer's manifestations, because nondelegable duties do not require any such manifestation. Nor can nondelegable duties be justified solely on the basis of the importance of compensating victims and the risk that independent contractors may be insolvent or otherwise unable to furnish such compensation, because those factors are present in all cases in which independent contractors commit torts, while nondelegable duties are recognized only in certain limited cases.

The most satisfactory explanation for the nondelegable duties set forth in §§ 9 and 10 is that these duties reflect the gravity of the potential harm and the belief that certain risks are so significant that the actor who hires an independent contractor to perform a task posing such risks should be responsible for assuring that a victim injured by such a risk will have a source of compensation. If the independent contractor is financially capable of providing compensation, it will do so, either directly or through an indemnity action by the hirer against the independent contractor. But if the independent contractor chosen by the hirer is not able to provide compensation, the hirer is responsible for supplying compensation to the plaintiff through the nondelegable-duty doctrine. This justification explains why nondelegable duties are limited to torts arising from certain grave risks that cause specific kinds of harm, as described in Comment *e*, rather than applying across the board.

g. The nondelegable duties restated in the Restatement Third of Torts impose vicarious liability for the torts of independent contractors, not employees. The nondelegable duties restated in the Restatement Third of Torts, and described here, as well as in §§ 9 and 10, represent exceptions to the general rule that one who hires an independent contractor is not liable for torts of the independent contractor. See Comment *a*. Therefore, these nondelegable duties govern vicarious liability for the torts of independent contractors but not vicarious liability for the torts of employees. The employer’s liability for the torts of its employees is addressed by the doctrine of respondeat superior, which is restated in §§ 3 to 5. In addition, the doctrine of apparent authority, restated in § 6, can render a hirer liable for the torts of either an employee or an independent contractor if the requirements of that doctrine are met (see § 6, Comment *c*), and § 11 states a special rule of vicarious liability for sexual assaults by employees.

In a minority of states, there are additional doctrines termed “nondelegable duties” that concern vicarious liability for the torts of employees rather than independent contractors. These doctrines are briefly described in the Reporters’ Note.

h. Apportionment of liability, indemnity, and contribution. As in other cases of vicarious liability (see § 2(c)), a defendant who is subject to liability for the tort of an independent contractor based solely on a nondelegable duty is entitled to indemnity from the independent contractor. Also, as in other cases of vicarious liability (see § 2(a)), for purposes of apportionment of liability, a defendant who is subject to liability for the tort of an independent contractor based on a nondelegable duty is assigned the same share of comparative responsibility as the independent contractor. If the hirer is also subject to direct liability for the same tort (see Comment *i*), the direct liability results in the assignment of an additional share of comparative responsibility to the hirer. See § 2, Comment *b*.

Illustration:

1. Aspen Corporation, a store owner, hires Brisk Snow Removal, an independent contractor, to remove snow and ice from Aspen’s property. As a result of Brisk’s negligence, snow and ice accumulate on Aspen’s property, and Carol, a customer of Aspen, is injured when she falls on the snow and ice. The factfinder finds that Carol’s share of comparative responsibility is 15 percent and Brisk’s share is 60 percent. The factfinder also finds that Aspen is subject to direct liability for its own negligence in hiring and retaining Brisk, and that Aspen’s share of comparative responsibility for that direct negligence is 25

percent. Pursuant to Restatement Third of Torts: Liability for Physical and Emotional Harm § 62(a), Aspen is subject to vicarious liability for Brisk’s 60 percent share of comparative responsibility, because Aspen’s duty of care to Carol is nondelegable. Aspen is also subject to direct liability for its 25 percent share of comparative responsibility for its own negligence. Thus, Aspen is liable to Carol for 85 percent of Carol’s damages, although Aspen has a contribution claim against Brisk for 60 percent of Carol’s damages.

Aspen’s claim against Brisk is denominated a contribution claim, rather than an indemnity claim, because, although Aspen is entitled to recover 60 percent of Carol’s damages from Brisk, Aspen’s direct liability for 25 percent of Carol’s damages disqualifies it from asserting an indemnity claim, which is only available to parties held liable solely vicariously (§ 2(c)). Aspen is still entitled to recover the full 60 percent of Carol’s damages attributed to Brisk, as it would have been entitled to do by way of indemnity but for its direct share of liability; however, Aspen is not entitled to recover its reasonable legal expenses, which are available in indemnity but not in contribution. See Restatement Third, Torts: Apportionment of Liability §§ 22, 23.

i. Other bases that may impose liability on the hirer for the torts of an independent contractor. There are a number of ways in which a hirer who delegates work to an independent contractor may be subject to liability for the torts of the independent contractor, even if no nondelegable duty applies.

An actor who hires an independent contractor is not subject to vicarious liability under the doctrine of respondeat superior restated in §§ 3 to 5, because respondeat superior applies only to torts of employees (§ 3), and an independent contractor—by definition—is not an employee. See Comments *a* and *g*.

However, an actor who hires an independent contractor may be subject to vicarious liability under the doctrine of apparent authority restated in § 6, because apparent authority can exist in the absence of an employer–employee relationship. See § 6, Comment *c*, and Comment *g* above. Indeed, it may apply even when one acting with apparent authority is not an agent at all. See § 6, Comment *c*.

In addition, an actor who hires an independent contractor may be subject to direct liability for the tortious acts of the independent contractor. Thus, for example, an actor may be directly liable for the independent contractor’s tortious acts if the actor authorizes or ratifies them.

Restatement of the Law Third, Agency § 7.04 (stating this rule for principals and agents). An actor may also be directly liable for an independent contractor’s tortious conduct if the actor was negligent in selecting, training, retaining, supervising, or otherwise controlling the contractor. Restatement Third, Torts: Liability for Physical and Emotional Harm § 55, Comment *a* (stating this rule for hirers of independent contractors who perform activities that create a risk of physical harm); Restatement Third, Agency § 7.05(1) (stating this rule for principals and agents). All of these forms of direct liability are based on the actor’s *own* tortious conduct, and all may cause the actor to incur liability regardless of whether the actor is or is not also subject to vicarious liability.

j. Judge and jury. The determination whether a nondelegable duty exists is a question of law to be decided by the court. If there are disputed material facts that bear on the existence of a nondelegable duty, the resolution of those facts is a matter for the factfinder. Factual issues affecting whether a nondelegable duty has been violated in a particular case are also questions of fact for the factfinder.

REPORTERS’ NOTE

Comment b. In tort law, an actor subject to a nondelegable duty may delegate work to an independent contractor but is vicariously liable for the independent contractor’s torts. For an unusually clear judicial description of the term “nondelegable duty” in tort law, see *Kelly v. Diesel Constr. Div. of Carl A. Morse, Inc.*, 315 N.E.2d 751, 754 (N.Y. 1974) (“[T]he use of the term ‘nondelegable’ was applied properly not to duties that could not be delegated but to liabilities arising from the delegated duties if breached. The fact and the law always was that the duties could be delegated but that first instance liabilities which arose from breach of the duties could not be delegated as against persons injured by the breach of the duties.”).

Comment c. The meaning of the term “nondelegable duty” in tort law differs from that in other fields of law. Black’s Law Dictionary makes clear that the meaning of the term “nondelegable duty” in contract law differs from the meaning of the term in tort law. See *Duty-nondelegable duty*, BLACK’S LAW DICTIONARY (12th ed. 2024).

Comment d. Nondelegable duties give rise to vicarious liability. For cases recognizing that nondelegable duties give rise to vicarious liability, see, e.g., *Beebe v. United States*, 721 F.3d 1079, 1084-1085 (9th Cir. 2013) (applying Alaska law) (holding that the nondelegable-duty doctrine is a form of vicarious liability); *Jallah v. Diverscape, Inc.*, 2006 WL 2925377, at *2 (Cal. Ct. App. 2006) (“The nondelegable duty theory on which the plaintiffs rely is a type of vicarious liability.”); *Gazo v. City of Stamford*, 765 A.2d 505, 512 (Conn. 2001) (“[W]e view the nondelegable duty doctrine as involving a form of vicarious liability, pursuant to which the party with the duty may be vicariously liable for the conduct of its independent contractor.”); *Am. Nat’l Bank & Trust Co. v. Columbus-Cuneo-Cabrini Med. Ctr.*, 609 N.E.2d 285, 288 (Ill. 1992) (recognizing

nondelegability as a basis for vicarious liability); *Sword v. NKC Hosps., Inc.*, 714 N.E.2d 142, 147 (Ind. 1999) (“Courts employ various legal doctrines to hold people vicariously liable, including . . . the non-delegable duty doctrine.”) (citations omitted); *Simmons v. Tuomey Reg’l Med. Ctr.*, 533 S.E.2d 312, 317 (S.C. 2000) (“The party which owes the nondelegable duty is vicariously liable for negligent acts of the independent contractor.”).

For courts that (contrary to this Restatement) do not view liability arising from nondelegable duties as vicarious, see, e.g., *Armiger v. Associated Outdoor Clubs, Inc.*, 48 So. 3d 864, 874-876 & n.8 (Fla. Dist. Ct. App. 2010); *Saiz v. Belen Sch. Dist.*, 827 P.2d 102, 114-115 (N.M. 1992).

Comment f. Rationale of nondelegable duties. For judicial statements concerning the rationale of nondelegable duties, see, e.g., *Fort Lowell-NSS Ltd. P’ship v. Kelly*, 800 P.2d 962, 967 (Ariz. 1990) (“The [nondelegable duty] exception is premised on the principle that certain duties of an employer are of such importance that he may not escape liability merely by delegating performance to another.”); *Springer v. City & Cnty. of Denver*, 13 P.3d 794, 804 (Colo. 2000) (“The core principle behind all nondelegable duties is that the responsibility is so important to the community that the employer should not be permitted to transfer it to another.”) (quotation marks omitted); *Machado v. City of Hartford*, 972 A.2d 724, 730 (Conn. 2009) (“Nondelegable duties generally are imposed . . . in recognition of the policy judgment that certain obligations are of such importance that employers should not be able to escape liability merely by hiring others to perform them.”) (quotation marks omitted); *Parker v. Neighborhood Theatres, Inc.*, 547 A.2d 1080, 1083 (Md. Ct. Spec. App. 1988) (“The imposition of vicarious liability by the creation of the [nondelegable duty exception] to the general rule is primarily a policy decision, the purpose being the protection of the public generally.”); *Breeden v. Anesthesia W., P.C.*, 656 N.W.2d 913, 920 (Neb. 2003) (“Courts have often deemed a duty to be nondelegable when the responsibility is so important to the community that the employer should not be permitted to transfer it to another.”) (quotation marks omitted); *Brothers v. N.Y. State Elec. & Gas Corp.*, 898 N.E.2d 539, 543 (N.Y. 2008) (“A duty is nondelegable when the responsibility is so important to the community that the employer should not be permitted to transfer it to another.”) (quotation marks omitted).

For a detailed discussion of the rationale of nondelegable duties, with extensive citations and quotations of cases and other authorities, see Restatement Third, Torts: Liability for Physical and Emotional Harm § 57, Reporters’ Notes to Comments *b* and *c* (AM. L. INST. 2012).

Comment g. The nondelegable duties restated in the Restatement Third of Torts impose vicarious liability for the torts of independent contractors, not employees. For cases holding that the nondelegable duties restated in the Restatement Third of Torts do not impose vicarious liability for the torts of employees, see *Nelson v. Gualtieri*, 2021 WL 3563022, at *3-4 (M.D. Fla. 2021) (ruling that the nondelegable-duty doctrine is inapplicable where, to the extent that defendant may be held liable, its liability arises from a respondeat superior theory); *John Y. v. Chaparral Treatment Ctr., Inc.*, 124 Cal. Rptr. 2d 330, 341 (Ct. App. 2002) (noting that plaintiff presented no authority for the proposition that the nondelegable-duty doctrine applies to employees and holding that an employer is liable for acts of an employee “only so long as those acts were done in the course and scope of his employment”); *Canto v. WSFS Fin. Corp.*, 2019 WL 1873411, at *3 (Conn. Super. Ct.

2019) (stating that, “[w]hile it is true the nondelegable duty doctrine and respondeat superior are forms of vicarious liability, the former is concerned with independent contractors, not employees”); *Arsand v. City of Franklin*, 264 N.W.2d 579, 586 (Wis. 1978) (explaining that “negating a nondelegable duty argument would aid the [defendant] only if it could be further established that [the tortfeasor] was an independent contractor, (i.e., not the [defendant’s] servant”).

As mentioned in the Comment, in a minority of states there are doctrines termed “nondelegable duties,” which are not restated in the Restatement Third of Torts and which concern vicarious liability for the torts of employees rather than independent contractors. The best-known example of this type of “nondelegable duty” is the so-called common-carrier exception to the scope-of-employment requirement of the doctrine of respondeat superior. Pursuant to this exception, a minority of states impose vicarious liability on common carriers for assaults committed by their employees against passengers without regard to whether or not the employee was acting within the scope of employment. See generally, e.g., Eric C. Surette, Annotation, *Whether Common Carrier is Vicariously Liable Under State Law for Employee’s Sexual Misconduct*, 66 A.L.R.7th Art. 2, at §§ 4, 7 (originally published in 2021). Where this doctrine exists, it was generally adopted more than a century ago. See, e.g., *Sebastian v. D.C.*, 636 A.2d 958, 961-963 (D.C. 1994) (declining to adopt the doctrine); *Adams v. N.Y. City Transit Auth.*, 666 N.E.2d 216, 218-220 (N.Y. 1996) (abrogating the doctrine). Similar “nondelegable duties” have been recognized by a smaller number of courts with respect to innkeepers and others. See, e.g., *Cox v. Evansville Police Dep’t*, 107 N.E.3d 453, 466 (Ind. 2018) (explaining that “we have applied the [common-carrier] exception outside the common-carrier context—to innkeepers and their guests, theatrical managers and their patrons, and a children’s center and its severely disabled resident”).

Comment h. Apportionment of liability, indemnity, and contribution. For cases holding that a defendant who is held liable for the tort of an independent contractor based on a nondelegable duty is entitled to indemnity from the independent contractor, see, e.g., *Mortg. Guar. Ins. Corp. v. Stewart*, 427 So. 2d 776, 778-779 (Fla. Dist. Ct. App. 1983) (holding that a defendant who has been held liable without personal fault for breach of a nondelegable duty may recover common law indemnity from the negligent independent contractor); *Am. Nat’l Bank & Trust Co. v. Columbus-Cuneo-Cabrini Med. Ctr.*, 609 N.E.2d 285, 288 (Ill. 1992) (recognizing “viability of implied indemnity where a principal is vicariously liable for the conduct of an agent or for the nondelegable acts of an independent contractor”); *Council of Co-Owners Atlantis Condo., Inc. v. Whiting-Turner Contracting Co.*, 517 A.2d 336, 348 (Md. 1986) (“Where the developer has been guilty of no independent negligence and is made to respond in damages solely by reason of vicarious liability resulting from the nondelegable nature of this duty, he will have a right to indemnity from an independent contractor employed by him whose negligence actually caused the breach.”); *Spectron Dev. Lab., a Div. of Titan Corp. v. Am. Hollow Boring Co.*, 936 P.2d 852, 857 (N.M. Ct. App. 1997) (“The existence of a nondelegable duty *to the injured third person* does not, however, imply that the employer cannot recover from the contractor. On the contrary, the employer generally is entitled to indemnification from the contractor.”); *Rogers v. Dorchester Assocs.*, 300 N.E.2d 403, 408-410 (N.Y. 1973) (ruling that a building owner whose liability for

injury inflicted by a defective elevator door was based on a nondelegable duty was entitled to indemnification from the independent contractor hired to maintain the elevator). Compare *Di Vincenzo v. Tripart Dev., Inc.*, 718 N.Y.S.2d 544, 546 (App. Div. 2000) (ruling that a building owner and general contractor could not obtain indemnification from an employee who built defective scaffolding because the purpose of the scaffold law (N.Y. LAB. LAW § 240(1)) was to place responsibility for workers’ safety on the owner and contractor rather than workers).

For a case explaining that, for purposes of apportionment of liability, a defendant who is subject to liability based on a nondelegable duty is assigned the same share of comparative responsibility as the tortfeasor, see *Rashtian v. BRAC-BH, Inc.*, 12 Cal. Rptr. 2d 411, 414-416 (Ct. App. 1992). See also *Smith v. Town of Greenwich*, 899 A.2d 563, 584 (Conn. 2006) (“It is widely recognized that, when one party is vicariously liable for another party’s conduct, the appropriate remedy for an innocent party who has been held vicariously liable is a claim for indemnity rather than for apportionment.”); Restatement Third, Torts: Apportionment of Liability § 13 (AM. L. INST. 2000) (providing that party who is vicariously liable is responsible for entire share of liability allocated to the tortfeasor party).

The statement in Illustration 1 that Aspen has a contribution claim against Brisk for 60 percent of Carol’s damages is supported by Illustration 6 to Restatement Third of Torts: Apportionment of Liability § 23 (AM. L. INST. 2000). Aspen does not have an indemnity claim against Brisk because Aspen’s liability to the plaintiff is not solely vicarious. See *id.* § 22, Illustration 6. See also, e.g., *Wiggs v. City of Phoenix*, 10 P.3d 625, 629 (Ariz. 2000) (stating that “the employer may seek indemnity against the independent contractor in cases of pure vicarious liability, or contribution against an independent contractor in cases in which the employer has some degree of independent liability”); *Leblanc v. Roy Young, Inc.*, 308 So. 2d 443, 448-449 (La. Ct. App. 1975) (stating that the right to contribution between employer and employee arises only when the employer is shown to be independently negligent); *Safeway, Inc. v. Rooter 2000 Plumbing & Drain SSS*, 368 P.3d 389, 398-400 (N.M. 2016) (holding, in case in which jury apportioned responsibility 40 percent to hirer for its fault and 60 percent to independent contractor and contractor paid its 60 percent share to plaintiff, that hirer did not have indemnification claim against contractor for hirer’s 40 percent of responsibility).

Comment j. Judge and jury. For cases supporting the allocation of responsibilities described in the Comment, see § 9, Reporters’ Note to Comment g and § 10, Reporters’ Note to Comment i.

§ 8. Definition of “Independent Contractor”

An “independent contractor” is one hired to perform work who is not an “employee” (as defined in § 4) because the hirer neither controls nor has the right to control the manner and means of the performance of the work.

Comment:

- a. Sources and cross-references.*
- b. Because an independent contractor is one hired to perform work who is not an employee, the black letter and Comments of § 4, defining “employee,” are equally relevant to the definition of “independent contractor” under this Section.*
- c. The key factor in distinguishing employees from independent contractors is whether the hirer controls or has the right to control the manner and means of the performance of the work.*
- d. Subsidiary factors bearing on the distinction between employees and independent contractors.*
- e. The parties’ label for the relationship is not controlling.*
- f. The tests used for purposes of workers’ compensation statutes and other regulatory statutes are irrelevant.*
- g. Gratuitous independent contractors (volunteers).*
- h. Judge and jury.*

a. Sources and cross-references. This Section is based upon, and is consistent with, the definition of “independent contractor” in Restatement Third of Torts: Liability for Physical and Emotional Harm § 55, Comment *b*. For the definition of “employee,” see § 4; see also Introductory Note to Topic 2, Comment *b*.

b. Because an independent contractor is one hired to perform work who is not an employee, the black letter and Comments of § 4, defining “employee,” are equally relevant to the definition of “independent contractor” under this Section. Because everyone hired to perform work who is not an “employee” is an “independent contractor” (and vice versa), the definition of “employee” under § 4 and the definition of “independent contractor” under this Section are two sides of the same coin. For that reason, everything said in § 4 about the factors distinguishing employees from independent contractors is equally relevant to the task of distinguishing independent contractors from employees under this Section. Because tort cases addressing the definition of “employee” are more numerous than those addressing the definition of “independent contractor,” the discussion in the Comments to § 4 is more detailed than the discussion herein and should be consulted when considering the definitional question addressed in this Section.

c. The key factor in distinguishing employees from independent contractors is whether the hirer controls or has the right to control the manner and means of the performance of the work. As the black letter of this Section makes clear, the key factor in determining whether one hired to perform work is an employee or an independent contractor is whether the hirer controls or has the

right to control the manner and means of the performance of the work. For additional discussion of the importance of the hirer's control, see § 4, Comment *b*.

Illustrations:

1. Homeowner Harold hires roofer Carol to repair the roof of Harold's home. Harold has no contractual right to control the manner and means of Carol's performance of the repair work, and Harold makes no attempt to do so. As a matter of law, Carol is an independent contractor; she is not Harold's employee.

2. Same facts as Illustration 1, except that, instead of performing the repair work herself, Carol directs her full-time employee Eileen to perform the work. Carol has the contractual right to control the manner and means of Eileen's performance of the repair work, and she does so. As a matter of law, neither Eileen nor Carol is an employee of Harold. Carol is an independent contractor, and Eileen is Carol's employee.

3. Same facts as Illustration 2, except that Carol is out of town during the week when Eileen repairs Harold's roof. Owing to this absence, Carol does not oversee or inspect Eileen's performance. Same result as Illustration 2. Because Carol has the contractual right to control the manner and means of Eileen's performance of the repair work, regardless of whether Carol exercises her control rights, Eileen is Carol's employee as a matter of law.

d. Subsidiary factors bearing on the distinction between employees and independent contractors. In addition to control or right to control, which is key, courts may consider other subsidiary factors in determining whether one hired to do work is an employee or an independent contractor. These subsidiary factors include: whether the agent is engaged in a distinct occupation or business; whether the type of work done by the agent is customarily done under a principal's direction or without supervision; the skill required in the agent's occupation; whether the agent or the principal supplies the tools and other instrumentalities required for the work and the place in which to perform it; the length of time during which the agent is engaged by the principal; whether the agent is paid by the job or by the time worked; whether the agent's work is part of the principal's regular business; whether the principal and the agent believe that they are creating an employment relationship; and whether the principal is or is not in business. § 4, Comment *c*. For the importance of control, see Comment *c* above.

e. The parties' label for the relationship is not controlling. In distinguishing between employees and independent contractors, the label the parties assign to the relationship, in their

contracts or otherwise, is not controlling. See § 4, Comments *b* and *i*. The parties' characterization of their relationship is one of the subsidiary factors that a factfinder may consider when resolving close cases, but the crucial question is whether the hirer controls or has the right to control the manner and means of the performance of the work. See Comments *c* and *d* above.

Illustration:

4. Same facts as Illustration 2, except that Carol and Eileen have executed a contract that specifies that Eileen is an independent contractor and that Carol does not have the right to control the manner and means of Eileen's performance. In fact, however, Carol does exercise substantial control over the manner and means of Eileen's repair work, including the hours she works, the tasks she prioritizes, and the tools she uses. Same result as Illustration 2. Because Carol controls the manner and means of Eileen's performance of the repair work, Eileen is Carol's employee as a matter of law, notwithstanding the contrary provisions of the contract.

f. The tests used for purposes of workers' compensation statutes and other regulatory statutes are irrelevant. The tests used to distinguish between employees and independent contractors for purposes of workers' compensation statutes and other regulatory statutes have no bearing in tort cases. See § 4, Comments *d* and *i*.

Illustration:

5. Ellen, a sales representative for Acme Corporation, determines for herself which prospective customers to contact and when and how to contact them. In a litigation arising from an automobile accident that occurred while Ellen was driving to visit a prospective customer, the factfinder determines that Ellen is an independent contractor, not an employee, under the test stated in this Section. On appeal, the plaintiff argues that this determination should be reversed because the state's workers' compensation statute classifies Ellen as an employee. This argument is incorrect. Ellen's classification as an employee for workers' compensation purposes has no bearing on her classification under the test stated in this Section.

g. Gratuitous independent contractors (volunteers). An independent contractor may work for compensation or gratuitously. Restatement Third, Torts: Liability for Physical and Emotional Harm § 55, Comment *b*. Workers who are uncompensated may still be classified as independent contractors.

h. Judge and jury. Whether one hired to do work is an employee or an independent contractor is a question for the factfinder, unless the evidence is so clear that a reasonable factfinder could resolve the issue only in one way. See § 4, Comment *j*.

REPORTERS' NOTE

Comment c. The key factor in distinguishing employees from independent contractors is whether the hirer controls or has the right to control the manner and means of the performance of the work. For cases articulating the rule that the key factor that distinguishes an employee from an independent contractor is whether the hirer controls or has the right to control the manner and means of performance of the work, see, e.g., *Gonzalez v. O & G Indus., Inc.*, 267 A.3d 766, 788 (Conn. 2021) (“The fundamental distinction between an employee and an independent contractor depends on the existence or nonexistence of the right to control the means and methods of work.”); *McCubbin v. Walker*, 886 P.2d 790, 795 (Kan. 1994) (“The single most important factor in determining a worker’s status as an employee or independent contractor is whether the employer controls, or has the right to control, the manner and methods of the worker in doing the particular task.”); *Sliter v. Cobb*, 200 N.W.2d 67, 68 (Mich. 1972) (“An independent contractor is one who, carrying on an independent business, contracts to do a piece of work according to his own methods, and without being subject to the control of his employer as to the means by which the result is to be accomplished, but only as to the result of the work.”); *Scott v. SSM Healthcare St. Louis*, 70 S.W.3d 560, 566 (Mo. Ct. App. 2002) (“An independent contractor is one who contracts with another to do something for him but is neither controlled by the other or subject to the other’s control with respect to his physical conduct in the performance of the undertaking.”); *O’Brien v. Spitzer*, 851 N.E.2d 1195, 1196 (N.Y. 2006) (“The terms ‘employee’ and ‘independent contractor’ are familiar ones, and their definitions are well known. Broadly speaking, an employee is someone who works for another subject to substantial control, not only over the results produced but also over the means used to produce the results produced. A person who works for another subject to less extensive control is an independent contractor.”); *Moritz v. C & R Transfer Co.*, 266 N.W.2d 568, 571 (S.D. 1978) (“The seemingly universal definition of an independent contractor is as one who carries on an independent business and contracts to do a piece of work according to his own methods, without being subject to the control of the employer, except as to the product or the result of the work.”); *Limestone Prods. Distrib., Inc. v. McNamara*, 71 S.W.3d 308, 312 (Tex. 2002) (“The test to determine whether a worker is an employee rather than an independent contractor is whether the employer has the right to control the progress, details, and methods of operations of the work.”). See also cases cited in the Reporters’ Note to § 4, Comment *b*.

Illustrations 1 through 3 are identical to Illustrations 1 through 3 in § 4, except that they identify which parties are independent contractors as well as which parties are employees.

Comment d. Subsidiary factors bearing on the distinction between employees and independent contractors. Cases discussing the subsidiary factors that courts consider in distinguishing between employees and independent contractors include *Blankenship v. Overholt*,

786 S.W.2d 814, 815-816 (Ark. 1990) (looking to the factors set forth in Restatement of the Law Second, Agency § 220 (AM. L. INST. 1958) in drawing the line between independent contractor and servant, but stating that the extent of control is the principal factor in determining the relationship); Walker v. Martin, 887 N.E.2d 125, 131 (Ind. Ct. App. 2008) (stating that, in determining whether one is an employee or an independent contractor, court applies the ten-factor analysis described in Restatement Second, Agency § 220 (AM. L. INST. 1958), but extent of control is the single most important factor); Sliter v. Cobb, 200 N.W.2d 67, 68 (Mich. 1972) (“Generally the circumstances which go to show one to be an independent contractor, while separately they may not be conclusive, are the independent nature of his business, the existence of a contract for the performance of a specified piece of work, the agreement to pay a fixed price for the work, the employment of assistants by the employee who are under his control, the furnishing by him of the necessary materials, and his right to control the work while it is in progress except as to results.”); Sakabu v. Regency Constr. Co., Inc., 392 S.W.3d 494, 498 (Mo. Ct. App. 2012) (listing factors to be considered in distinguishing between employees and independent contractors). See also cases cited in the Reporters’ Note to § 4, Comment *c*.

Comment e. The parties’ label for the relationship is not controlling. For cases illustrating the rule that, in distinguishing between employees and independent contractors, the label given by the parties to the relationship is not controlling, see, e.g., Sakabu v. Regency Constr. Co., Inc., 392 S.W.3d 494, 499 (Mo. Ct. App. 2012) (noting that “simply characterizing a party [as] an independent contractor does not make it so”); D’Allaird v. Markline Sales, Inc., 962 N.Y.S.2d 730, 732 (App. Div. 2013) (“Although [the hirer] entered into a ‘sales representative agreement’ with [the tortfeasor] that characterized the latter as an independent contractor, the existence of such an agreement does not compel such a conclusion.”); Pryor v. Southbrook Mall Assocs. Ltd., 1998 WL 802005, at *4 (Tenn. Ct. App. 1998) (noting that “[t]he mere placing of terms such as agent or independent contractor in the contract does not make them such in law.”). See also cases cited in § 4, Reporters’ Note to Comments *b* and *i*.

For cases holding that the parties’ characterization of their relationship is one of the subsidiary factors that may be considered by the factfinder in resolving close cases, but that the crucial question is whether the hirer controls or has the right to control the manner and means of the performance of the work, see, e.g., Huggins v. FedEx Ground Package Sys., Inc., 592 F.3d 853, 860 (8th Cir. 2010) (applying Missouri law) (explaining that “the parties’ characterization of the relationship is not controlling” and is “only one factor out of many”); ConAgra Foods, Inc. v. Draper, 276 S.W.3d 244, 249-250 (Ark. 2008) (ruling that, despite the contrary provisions of the written contract, there was sufficient evidence of actual control of the means and manner of performance to support a finding of employee status); Fisher v. Townsends, Inc., 695 A.2d 53, 59-60 (Del. 1997) (stating that “[t]he intent of the parties is a relevant sub-factor in determining the right of control” but that “[i]t is the actions taken by the parties, not the terms used in the contract, that are dispositive”); Dias v. Brigham Med. Assocs., Inc., 780 N.E.2d 447, 451 (Mass. 2002) (stating that factors to be considered on issue of employment status “may include, but are not limited to, the method of payment (e.g., whether the employee receives a W-2 form from the employer)

and whether the parties themselves believe they have created an employer-employee relationship”); *Fernandez v. Conklin*, 133 N.Y.S.3d 465, 466 (App. Div. 2020) (stating that fact that a contract designates person as independent contractor is to be considered but is not dispositive).

Illustration 4 is identical to Illustration 4 in § 4.

Comment f. The tests used for purposes of workers’ compensation statutes and other regulatory statutes are irrelevant. For cases explaining that the tests used in distinguishing between employees and independent contractors for purposes of workers’ compensation and other regulatory statutes are irrelevant in tort cases, see, e.g., *Williams v. Tenn. River Pulp & Paper Co.*, 442 So. 2d 20, 22-23 (Ala. 1983) (stating that workers’ compensation cases do not help the court to determine the common-law relationship between the hirer and the tortfeasor); *Nichol v. Billot*, 279 N.W.2d 761, 763-766 (Mich. 1979) (explaining difference between control test used to distinguish between employees and independent contractors for respondeat superior purposes and economic reality test used in workers’ compensation cases). See also cases cited in the Reporters’ Notes to § 4, Comments *d* and *e*.

Illustration 5 is not based upon the facts of any decided case. It has been drafted to illustrate the rule stated in Comment *f*.

Comment g. Gratuitous independent contractors (volunteers). For a case recognizing that a volunteer may be an independent contractor, see *Boissonnault v. Bristol Federated Church*, 642 A.2d 328, 328-329 (N.H. 1994). See also cases cited in the Reporters’ Note to § 4, Comment *g*.

Comment h. Judge and jury. Whether one hired to perform work is an employee or an independent contractor is a question for the factfinder, unless the evidence is so clear that a reasonable factfinder could resolve the question only in one way. See, e.g., *Sliter v. Cobb*, 200 N.W.2d 67, 69-70 (Mich. 1972); *Scott v. SSM Healthcare St. Louis*, 70 S.W.3d 560, 567-568 (Mo. Ct. App. 2002); *D’Allaird v. Markline Sales, Inc.*, 962 N.Y.S.2d 730, 732-733 (App. Div. 2013).

§ 9. Nondelegable Duties Involving Physical Harm

(a) Nondelegable duties imposing vicarious liability for certain torts resulting in physical harm are restated in Restatement Third, Torts: Liability for Physical and Emotional Harm §§ 58 to 65.

(b) Nondelegable duties imposing vicarious liability in certain cases of medical malpractice are described in Restatement Third, Torts: Medical Malpractice § 15, Comment *f* (Tentative Draft No. 2, 2024).

(c) A secured party that hires an independent contractor to repossess collateral pursuant to state law has a nondelegable duty to avoid a breach of the peace, so that the secured party is vicariously liable for the independent contractor’s torts if there is a breach of the peace, whether or not the breach of the peace results in physical harm.

Comment:

- a. Sources and cross-references.*
- b. Subsection (a)—nondelegable duties in the Restatement Third, Torts: Liability for Physical and Emotional Harm.*
- c. Subsection (b)—nondelegable duties in the Restatement Third, Torts: Medical Malpractice.*
- d. Subsection (c)—the nondelegable duty of secured parties to avoid a breach of the peace when repossessing collateral.*
- e. Use of independent contractors as security guards.*
- f. A manufacturer’s duties in products-liability law are not “nondelegable” as that term is used here.*
- g. Judge and jury.*

a. Sources and cross-references. For the definition of vicarious liability, see § 1. For the consequences of vicarious liability, see § 2. Vicarious liability for punitive damages is addressed in Restatement Third of Torts: Remedies § 40 (Tentative Draft No. 3, 2024). For nondelegable duties involving torts not resulting in physical harm, see § 10.

The term “physical harm” means “the physical impairment of the human body (‘bodily harm’) or of real property or tangible personal property (‘property damage’).” Restatement Third, Torts: Liability for Physical and Emotional Harm § 4. “Bodily harm includes physical injury, illness, disease, impairment of bodily function, and death.” *Id.*

A plaintiff who has suffered physical harm as the result of a tort for which the defendant is vicariously liable pursuant to a nondelegable duty is also entitled to recover compensation for other resulting harms (often referred to as consequential damages), including compensation for lost earnings and earning capacity, medical expenses, and pain and suffering including emotional harm. Restatement Third, Torts: Remedies §§ 18 to 20 (Tentative Draft No. 2, 2023). The defendant’s vicarious liability under this Section includes liability for such harms. Similarly, the defendant’s vicarious liability for physical harm under this Section includes liability for loss of consortium resulting from physical harm to a family member (Restatement Third, Torts: Liability for Physical and Emotional Harm §§ 48 A to 48 C (added by Restatement Third, Torts: Concluding Provisions (now known as Restatement Third, Torts: Miscellaneous Provisions) (Tentative Draft No. 1, 2022))).

b. Subsection (a)—nondelegable duties in the Restatement Third, Torts: Liability for Physical and Emotional Harm. The Restatement Third of Torts: Liability for Physical and

Emotional Harm states a number of nondelegable duties in §§ 58 to 65. The titles of these Sections provide their subject matter:

Section 58—Work Involving Abnormally Dangerous Activities

Section 59—Activity Posing a Peculiar Risk

Section 60—Work on Instrumentalities Used in Highly Dangerous Activities

Section 61—Activities Involving a Trespass, Nuisance, or Withdrawal of Support

Section 62—Possessors and Lessors of Land

Section 63—Precautions Required by Statute or Regulation

Section 64—Activities Under Public Franchise or in a Public Place

Section 65—Work Accepted as the Hirer’s Performance of the Work

Each of these Sections imposes vicarious liability only for torts resulting in physical harm (or, in the case of § 60, only for serious bodily injury or death). (Although liability for trespass or nuisance may exist without physical harm, § 61 imposes vicarious liability only when physical harm results.) As Comment *a* explains, when physical harm is present, the defendant’s vicarious liability pursuant to those Sections also encompasses consequential harms. Except to that extent, none of these Sections imposes vicarious liability for any type of harm other than physical harm. Even in cases of physical harm, the Sections do not impose vicarious liability for physical harm that is not within the types of physical harm that justify the imposition of a nondelegable duty. See, e.g., Restatement Third, Torts: Liability for Physical and Emotional Harm § 58, Illustration 2 (explaining that one who hires an independent contractor to perform blasting is subject to a nondelegable duty because blasting is an abnormally dangerous activity, but that the nondelegable duty does not extend to a vehicular accident caused by the contractor’s negligent driving, because that harm is not within the types of harm that make blasting abnormally dangerous, i.e., is not within the hirer’s scope of liability (often referred to as proximate cause)).

Section 65 of the Restatement Third of Torts: Liability for Physical and Emotional Harm can also be regarded as an application of the doctrine of apparent authority, as explained in § 6, Comment *k*. As an application of the doctrine of apparent authority, the rule of § 65, like the doctrine of apparent authority generally, is applicable to all types of torts and all types of harms. See § 6, Comment *k*.

c. Subsection (b)—nondelegable duties in the Restatement Third, Torts: Medical Malpractice. The Restatement Third of Torts: Medical Malpractice § 15, Comment *f* (Tentative

Draft No. 2, 2024) notes examples of nondelegable duties in the law of medical malpractice. As stated in that Comment:

[A] provider’s legal obligation to obtain a patient’s informed consent before initiating treatment is nondelegable (although implementation of the duty may be assigned to staff). Similarly, for hospitals, apparent authority principles can apply in a manner that constitutes, or at least strongly resembles, holding hospitals to a nondelegable duty for certain core functions such as nursing services and perhaps emergency care [cross-reference omitted].

d. Subsection (c)—the nondelegable duty of secured parties to avoid a breach of the peace when repossessing collateral. Section 9-609(b)(2) of the Uniform Commercial Code provides that, following default, a secured party may repossess collateral “without judicial process, if it proceeds without breach of the peace.” Under this provision, most courts have held that the secured party’s duty to avoid a breach of the peace when repossessing collateral is nondelegable, and this Restatement adopts this rule. Pursuant to this rule, the secured party is subject to liability if there is a breach of the peace in the course of repossessing the collateral, even if the secured party is without fault and has hired an independent contractor to carry out the repossession.

In some cases, the breach of the peace may result in physical harm to persons or property, and in such cases the secured party is subject to liability for such physical harm and other resulting harm.

Illustration:

1. When John and Mary awaken at 5:30 A.M., they discover that Walter, an independent contractor for Cordon Bank, is attaching their leased Mercedes to a tow truck. John and Mary object, and a heated discussion ensues. John offers to let Walter use the phone to verify that he has mailed a check to Cordon Bank, but Walter refuses. Mary holds on to the passenger side of the tow truck, asking Walter to allow John to remove his personal possessions from the car. Walter accelerates the truck to 25 to 30 miles per hour, and then stops with a jerk, causing Mary to fall off. John falls and breaks his ankle pursuing the truck, and Mary sustains permanent ankle injuries when the Mercedes runs over her foot after her fall. Pursuant to Subsection (c), even though Walter is Cordon Bank’s independent contractor, Cordon Bank is subject to liability to John and Mary for harm resulting from Walter’s tortious conduct.

A breach of the peace may take place even though no physical harm results, because the touchstone for a breach of the peace is the *potential* for immediate violence, not whether violence actually ensues. Such cases render the secured party subject to liability pursuant to its nondelegable duty.

Illustration:

2. Gary is in default on a loan from Cordial Credit Union, which is secured by three vehicles. Cordial hires an independent contractor to repossess the vehicles. The independent contractor repossesses the vehicles around 5:00 A.M. by driving up a private ranch road to the home of Gary’s parents where the vehicles are located. Subsequently, Gary’s parents sue Cordial for trespass. Because of the hour at which the repossession takes place and the fact that the repossession involves a trespass on secluded private property owned by third parties, the factfinder may find that the repossession involves a breach of the peace. If the factfinder makes such a finding, pursuant to Subsection (c), Cordial is subject to liability for the independent contractor’s trespass.

e. Use of independent contractors as security guards. From 1918 to 2007, cases in about a dozen jurisdictions held that businesses or land possessors who hire independent contractors as security guards are subject to a nondelegable duty with respect to torts committed by the independent contractors. These jurisdictions generally impose such liability with respect to intentional torts committed by security guards, such as assault and battery, false imprisonment, and malicious prosecution, as well as negligent torts causing physical harm. On the other hand, cases in nine jurisdictions, decided between 1970 and 2015, refused to recognize such a nondelegable duty. The Reporters have found no subsequent cases either way, and the majority of jurisdictions have no reported cases addressing the issue.

Because of insufficient doctrinal development—and the paucity of recent case law—this Restatement takes no position on the issue, and instead leaves the issue to the future development of case law.

f. A manufacturer’s duties in products-liability law are not “nondelegable” as that term is used here. Some courts have stated that a manufacturer’s duty to produce a nondefective product and duty to warn of product dangers are “nondelegable.” Courts frequently made such statements as modern products-liability law was developing.

This Restatement does not use the term “nondelegable” to describe these duties of a product manufacturer. Nor is the term “nondelegable duty” used in the Restatement Third of Torts: Products Liability. Unlike a “nondelegable duty” within the meaning of this Restatement (§ 7), a manufacturer’s duty to produce a nondefective product and duty to warn of product dangers are not a form of vicarious liability. Instead, they are duties imposed directly on the manufacturer. See Restatement Third, Torts: Products Liability §§ 1, 2. The violation of these duties thus subjects the manufacturer to direct, not vicarious, liability.

The courts that described the manufacturer’s duties as “nondelegable” intend to convey that the manufacturer cannot relieve itself of these duties (to make nondefective products and to reasonably warn of product dangers) by delegating those obligations to others. That statement is accurate, but it does not imply that the manufacturer’s duties are “nondelegable duties” within the meaning of this Restatement.

g. Judge and jury. The determination whether a nondelegable duty exists is a question of law to be decided by the court. If there are disputed material facts that bear on the existence of a nondelegable duty, the resolution of those facts is a matter for the factfinder. Factual issues affecting whether a nondelegable duty has been violated in a particular case are also questions of fact for the factfinder.

REPORTERS’ NOTE

Comment a. Sources and cross-references. On the application of nondelegable duties to loss-of-consortium causes of action resulting from physical harm to a family member, see, e.g., *Rutledge v. Marriott Int’l, Inc.*, 2023 WL 7927747, at *5 (C.D. Cal. 2023) (stating that loss-of-consortium claim is derivative of nondelegable-duty claim and “appear[s] valid”); *Feeney v. State*, 202 N.Y.S.3d 496, 497-498 (App. Div. 2023) (finding liability pursuant to nondelegable duty for physical harm and loss of consortium).

Comment c. Subsection (b)—nondelegable duties in the Restatement Third, Torts: Medical Malpractice. For citations to cases and other materials on nondelegable duties of medical professionals and medical institutions, see Restatement Third, Torts: Medical Malpractice § 15, Reporters’ Note to Comment *f* (AM. L. INST., Tentative Draft No. 2, 2024).

Comment d. Subsection (c)—the nondelegable duty of secured parties to avoid a breach of the peace when repossessing collateral. Cases supporting the majority rule that a secured party’s duty to repossess collateral without a breach of the peace is nondelegable include *Duke v. Garcia*, 2014 WL 1318647, at *10-11 (D.N.M. 2014) (predicting that the New Mexico Supreme Court would impose liability on a secured creditor for acts of an independent contractor during repossession involving a breach of the peace); *Gen. Fin. Corp. v. Smith*, 505 So. 2d 1045, 1047-

1048 (Ala. 1987) (holding that a secured creditor has a nondelegable duty to accomplish repossession without causing a breach of the peace); *Rand v. Porsche Fin. Servs.*, 167 P.3d 111, 118-121 (Ariz. Ct. App. 2007) (ruling that an automobile lessor has a nondelegable duty to repossess its collateral only if it can do so without breaching the peace); *Sammons v. Broward Bank*, 599 So. 2d 1018, 1019-1021 (Fla. Dist. Ct. App. 1992) (ruling that a secured party may not delegate to third persons the secured party’s duty to repossess in a peaceable manner); *Lewis v. Nicholas Fin., Inc.*, 686 S.E.2d 468, 469-470 (Ga. Ct. App. 2009) (ruling that, under UCC § 9-609(b)(2), a secured creditor has a nondelegable duty to accomplish nonjudicial repossession without breaching the peace); *Binion v. Fletcher Jones of Chicago, Ltd.*, 2014 WL 2922206, at *3-4 (Ill. App. Ct. 2014) (following weight of authority that secured creditors have a nondelegable duty not to breach the peace in the course of repossessing secured collateral); *Robinson v. Citicorp Nat’l Servs., Inc.*, 921 S.W.2d 52, 54-55 (Mo. Ct. App. 1996) (following cases holding that the UCC imposes a nondelegable duty on secured creditors to repossess peacefully); *DeMary v. Rieker*, 695 A.2d 294, 300-302 (N.J. Super. Ct. App. Div. 1997) (adopting the rule that a secured party has a nondelegable duty to ensure that repossession is accomplished without a breach of the peace and stating that the rule is “strongly in the public interest”); *Gen. Motors Acceptance Corp. v. Vucich*, 787 N.Y.S.2d 745, 746-747 (App. Div. 2005) (holding that the UCC created a new statutory nondelegable duty on a secured creditor to keep the peace in the course of a repossession); *Ford Motor Credit Co. v. Ryan*, 939 N.E.2d 891, 926-927 (Ohio Ct. App. 2010) (“Because statutory duties are nondelegable, the secured party who must meet the duty is responsible for the actions of the independent contractor hired to carry out the duty.”); *Williamson v. Fowler Toyota, Inc.*, 956 P.2d 858, 860-862 (Okla. 1998) (agreeing with jurisdictions that have held that a secured party has a nondelegable duty to repossess collateral without a breach of the peace); *MBank El Paso, N.A. v. Sanchez*, 836 S.W.2d 151, 153-154 (Tex. 1992) (holding that a creditor cannot escape the duty of peaceable repossession under the UCC by delegating it to an independent contractor).

For contrary cases, see, e.g., *Smart v. Emerald City Recovery, LLC*, 2018 WL 3569873, at *3 n.2 (W.D. Wash. 2018) (expressing skepticism that finance company owed a nondelegable duty to repossess vehicle without breaching the peace); *Jiggetts v. Lancaster*, 531 S.E.2d 851, 853 (N.C. Ct. App. 2000) (ruling that creditor was not liable based on nondelegable duty for assault by independent contractor because repossession of automobiles is not a peculiarly risky activity); *Chong Kil Yom v. Toyota Motor Credit Corp.*, 2016 WL 9076187, at *7-8 (Va. Cir. Ct. 2016) (acknowledging out-of-state authority, but declining to impose nondelegable duty of safe repossession).

Illustration 1, involving a repossession resulting in injuries, is based on *DeMary v. Rieker*, 695 A.2d 294, 300-302 (N.J. Super. Ct. App. Div. 1997).

Among the cases holding that a breach of the peace may take place even in the absence of violence or physical injury are *Madden v. Deere Credit Servs., Inc.*, 598 So. 2d 860, 865 (Ala. 1992) (stating that actual confrontation or violence is not necessary to finding a breach of the peace), and *Salisbury Livestock Co. v. Colo. Cent. Credit Union*, 793 P.2d 470, 475 (Wyo. 1990) (“Confrontation or violence is not necessary to finding a breach of the peace. The possibility of

immediate violence is sufficient.”). See generally Timothy R. Zinnecker, *The Default Provisions of Revised Article 9 of the Uniform Commercial Code: Part 1*, 54 BUS. LAW. 1113, 1142-1146 (1999) (setting forth guidelines for determining when a breach of the peace takes place).

Illustration 2, concerning a repossession possibly resulting in a breach of the peace but not resulting in injuries, is based on *Salisbury Livestock Co.*, 793 P.2d at 472-476.

On the practical effects of the rule that the secured party’s duty to repossess without a breach of the peace is nondelegable, see Jean Braucher, *The Repo Code: A Study of Adjustment to Uncertainty in Commercial Law*, 75 WASH. U.L.Q. 549, 563-566 (1997) (reporting that “[l]enders are increasingly refusing to use independent contractors who do not have insurance to cover liability for breaches of the peace”).

An analogous issue is presented by cases of landlords dispossessing their tenants. See, e.g., *Ikomoni v. Exec. Asset Mgt., LLC*, 709 S.E.2d 282, 285-286 (Ga. Ct. App. 2011) (ruling that a landlord has a nondelegable duty to comply with statutory procedures for dispossession of a tenant). However, the issue has generated significantly less reported litigation. According to Restatement of the Law Fourth, Property Vol. 4, Div. III, Ch. 13, Lessor Remedies, Reporters’ Note to § 13.2 (AM. L. INST., Council Draft No. 9, 2023), 40 jurisdictions now prohibit the use of self-help to retake possession of leased residential property.

Comment e. Use of independent contractors as security guards. Cases imposing nondelegable duties on those who hire independent contractors as security guards include *Suber v. Safeway Stores, Inc.*, 1990 WL 58805, at *2 (D. Kan. 1990) (holding that department stores are relieved from liability only for negligent torts of independent contractor security personnel and not for intentional torts); *Simon v. Safeway, Inc.*, 173 P.3d 1031, 1038-1039 (Ariz. Ct. App. 2007) (ruling that, when a business owner assumes a duty to provide security services, that duty is nondelegable and the owner is liable for the torts of security personnel); *Peachtree-Cain Co. v. McBee*, 327 S.E.2d 188, 191 (Ga. 1985) (stating that “we agree with the imposition of liability upon property owners for the intentional torts committed by the personnel of an independent security agency, where the security agency was hired by the property owners to protect their premises”); *Rockwell v. Sun Harbor Budget Suites*, 925 P.2d 1175, 1179-1180 (Nev. 1996) (ruling that property owner who hires security personnel to protect patrons and property has a nondelegable duty such that security personnel are employees of the property owner, even if the property owner engaged a third party to hire them); *Adams v. F.W. Woolworth Co.*, 257 N.Y.S. 776, 781 (Sup. Ct. 1932) (“A store owner who places a detective agency on his premises for the purpose of protecting his property by various means, including arrests, should not be immune from responsibility to an innocent victim of a false arrest made by the detective agency, even as an independent contractor.”); *Hendricks v. Leslie Fay, Inc.*, 159 S.E.2d 362, 365-367 (N.C. 1968) (holding that a manufacturer that hires a security agency as an independent contractor is liable pursuant to a nondelegable duty for malicious prosecution by agency); *Pusey v. Bator*, 762 N.E.2d 968, 972-975 (Ohio 2002) (ruling that hiring independent contractor to provide armed security guards to protect property imposes a nondelegable duty if someone is injured by a weapon as a result of a guard’s negligence); *Halliburton-Abbott Co. v. Hodge*, 44 P.2d 122, 125-126 (Okla.

1935) (“The weight of authority seems to be that one may not employ or contract with a special agent or detective to ferret out the irregularities of his employees and then escape liability for malicious prosecution or false arrest on the ground that the agent is an independent contractor.”); *Webbier v. Thoroughbred Racing Prot. Bureau, Inc.*, 254 A.2d 285, 289 (R.I. 1969) (ruling that a racetrack’s statutory responsibility for the protection of the public and the preservation of order on its premises is nondelegable and imposing liability for security guards’ assault and battery and false imprisonment); *Pryor v. Southbrook Mall Assocs. Ltd.*, 1998 WL 802005, at *4-5 & n.3 (Tenn. Ct. App. 1998) (citing and following “many cases holding owners and operators of businesses liable for the intentional torts of security guards, even independent contractors”); *Clinchfield Coal Corp. v. Redd*, 96 S.E. 836, 840 (Va. 1918) (“The owner of an operation or enterprise cannot, by securing, through others, special agents, even though they be officers of the law, for the prosecution of offenders around the plant, obtain any immunity from liability for malicious prosecutions which such owner would not be equally entitled to if he himself directly selected and paid the agents and expressly retained the power of control and removal.”); see also *Savinsky v. Bromley Grp., Ltd.*, 740 P.2d 1159, 1162 (N.M. Ct. App. 1987) (holding that summary judgment for defendant was improper because defendant presented no evidence that armed independent contractor security guard was not engaged in inherently dangerous work “and, indeed, the contrary inference is apparent from the evidence presented to the trial court”).

Among the cases declining to impose nondelegable duties on those who hire independent contractors as security guards are *Powell v. City & Cnty. of Denver, Colo.*, 973 F. Supp. 1198, 1203 (D. Colo. 1997) (holding that inherently dangerous exception did not apply to alleged assault on protester by security consultant for family planning clinic); *Schreiber v. Camm*, 848 F. Supp. 1170, 1176-1179 (D.N.J. 1994) (ruling that owner of lodging did not have nondelegable duty regarding negligent shooting of guests by independent contractor security guard); *Mahon v. City of Bethlehem*, 898 F. Supp. 310, 313-314 (E.D. Pa. 1985) (ruling that music festival did not have nondelegable duty with respect to intentional torts of independent contractors because the Restatement Second of Torts does not recognize an intentional tort exception to the general rule that a hirer is not liable for torts of independent contractors); *Brien v. 18925 Collins Ave. Corp.*, 233 So. 2d 847, 849 (Fla. Dist. Ct. App. 1970) (holding that “an owner of real property is not vicariously liable for harm allegedly caused by the negligent discharge of a firearm by an employee of the independent contractor security corporation the owner hires to protect his property”); *Del Signore v. Pyramid Sec. Servs., Inc.*, 537 N.Y.S.2d 640, 642 (App. Div. 1989) (holding that security services provided by independent contractor were not so specialized or hazardous as to impose a nondelegable duty on hirer); *Castro v. Hotel Nikko Saipan, Inc.*, 1995 WL 1943012, at *7 (N. Mariana Islands 1995) (finding, in a jurisdiction that has adopted ALI Restatements as rules of common law, no basis in Restatement Second of Torts for nondelegable duty of hirer for intentional torts of independent contractor security guards), appeal dismissed for lack of jurisdiction, 96 F.3d 1259 (9th Cir. 1996); *Fifth Club, Inc. v. Ramirez*, 196 S.W.3d 788, 792-796 (Tex. 2006) (concluding that “we see no reason to expand an employer’s liability for the acts of its independent contractor solely because the contractor is hired to perform security work”);

Castellanos v. Tommy John, LLC, 321 P.3d 218, 224-234 (Utah Ct. App. 2014) (holding that risk of intentional torts of employees of independent contractor security company did not give rise to a nondelegable duty on the part of the bar that hired the security company); cf. Barnard v. Menard, Inc., 25 N.E.3d 750, 758 (Ind. Ct. App. 2015) (declining to impose nondelegable duty with respect to independently contracted loss prevention officer who physically attacked customer, but indicating that the result might differ if the loss prevention officer was armed); see also Frazier v. Super Fresh Food Mkts., Inc., 1991 WL 53672, at *4 (E.D. Pa. 1991) (holding that supermarket did not have nondelegable duty respecting beating of plaintiff by independent contractor security guards), rev'd without opinion, 952 F.2d 1392 (3d Cir. 1991) (table) (because the lower-court decision was reversed without opinion, the precedential status of its holding is unclear).

On vicarious liability for torts committed by security guards, see generally Robert A. Brazener, Annotation, *Liability of One Contracting for Private Police or Security Service for Acts of Personnel Supplied*, 38 A.L.R.3d 1332 (originally published in 1971).

Comment f. A manufacturer's duties in products-liability law are not "nondelegable" as that term is used here. For cases describing a manufacturer's duty to produce a reasonably safe product as a "nondelegable duty" (a usage avoided by this Restatement, for the reasons stated in the Comment), see, e.g., Romero v. Cincinnati Inc., 171 F.3d 1091, 1096 (7th Cir. 1999) (applying Illinois law) (upholding jury instruction that manufacturer had a nondelegable duty to manufacture a reasonably safe product); Doser v. Savage Mfg. & Sales, Inc., 568 N.E.2d 814, 819 (Ill. 1990) ("A manufacturer has a nondelegable duty to produce a reasonably safe product."); Bilotta v. Kelley Co., Inc., 346 N.W.2d 616, 624 (Minn. 1984) ("[A] manufacturer may not delegate its duty to design a reasonably safe product."); Sage v. Fairchild-Swearingen Corp., 517 N.E.2d 1304, 1307 (N.Y. 1987) (stating that "a manufacturer is under a nondelegable duty to design and produce a product that is not defective"); Deminsky v. Arlington Plastics Mach., 657 N.W.2d 411, 420 (Wis. 2003) (explaining that the rule of strict tort liability means that the duty to design and manufacture a safe product is nondelegable).

For cases using the term "nondelegable duty" to describe a manufacturer's duty to warn of product dangers (also a usage avoided by this Restatement, for the reasons stated in the Comment), see, e.g., Caruolo v. John Crane, Inc., 226 F.3d 46, 56 (2d Cir. 2000) (applying New York law) (stating that the duty to warn of product dangers is nondelegable, and that defendant may not rely on others to issue an adequate warning); Syverson v. AC & S, Inc., 1991 WL 26497, at *3 (9th Cir. 1991) (applying Washington law) (stating that under a strict liability approach the manufacturer's duty to warn is nondelegable); Montgomery Elevator Co. v. McCullough, 676 S.W.2d 776, 782 (Ky. 1984) ("The manufacturer has a non-delegable duty to provide a product reasonably safe for its foreseeable uses, a duty not abrogated by warning to the immediate purchaser.").

Comment g. Judge and jury. For cases supporting the allocation of responsibilities described in the Comment, see, e.g., Madden v. Deere Credit Servs., Inc., 598 So. 2d 860, 867 (Ala. 1992); Sammons v. Broward Bank, 599 So. 2d 1018, 1021 (Fla. Dist. Ct. App. 1992); DeMary v. Rieker, 695 A.2d 294, 302 (N.J. Super. Ct. App. Div. 1997); Ford Motor Credit Co. v.

Ryan, 939 N.E.2d 891, 927 (Ohio Ct. App. 2010); Salisbury Livestock Co. v. Colo. Cent. Credit Union, 793 P.2d 470, 473-475 (Wyo. 1990).

§ 10. Nondelegable Duties Not Involving Physical Harm

(a) An insurer’s duty of good faith and fair dealing is nondelegable, as stated in Restatement Third, Torts: Liability for Economic Harm § 20 A, Comment *o* (added by Restatement Third, Torts: Miscellaneous Provisions (Tentative Draft No. 3, 2024)).

(b) As stated in § 9(c), a secured party that hires an independent contractor to repossess collateral pursuant to state law has a nondelegable duty to avoid a breach of the peace, so that the secured party is vicariously liable for the independent contractor’s torts if there is a breach of the peace, whether or not the breach of the peace results in physical harm.

Comment:

a. Sources and cross-references.

b. Only two types of nondelegable duties not involving physical harm are restated in the Restatement Third of Torts.

c. Subsection (a)—an insurer’s nondelegable duty of good faith and fair dealing.

d. Subsection (b)—the nondelegable duty of secured parties to avoid a breach of the peace when repossessing collateral.

e. Other torts resulting in pure economic harm.

f. Nondelegable duties involving property torts.

g. Torts resulting in pure emotional harm.

h. Defamation and invasion of privacy.

i. Judge and jury.

a. Sources and cross-references. For the definition of vicarious liability, see § 1. For the consequences of vicarious liability, see § 2. Vicarious liability for punitive damages is addressed in Restatement Third of Torts: Remedies § 40 (Tentative Draft No. 3, 2024). For nondelegable duties involving torts resulting in physical harm, see § 9.

The term “physical harm” means “the physical impairment of the human body (‘bodily harm’) or of real property or tangible personal property (‘property damage’).” Restatement Third, Torts: Liability for Physical and Emotional Harm § 4. “Bodily harm includes physical injury, illness, disease, impairment of bodily function, and death.” *Id.* As described in § 9, Comment *a*,

when a tort of an independent contractor results in physical harm covered by a nondelegable duty, the nondelegable duty also encompasses consequential harms.

b. Only two types of nondelegable duties not involving physical harm are restated in the Restatement Third of Torts. The first and Second Restatements of Torts included only nondelegable duties involving physical harm. In the years since the publication of the Second Restatement of Torts, two types of nondelegable duties not involving physical harm have won general judicial acceptance. These nondelegable duties are included in the Restatement Third of Torts, and are described in Subsections (a) and (b) and Comments *c* and *d*.

Other types of nondelegable duties not involving physical harm have not won general acceptance in the courts. See Comments *e* through *h*. This Restatement therefore takes no position on those types of nondelegable duties and instead leaves to further judicial development the question whether and to what extent such types of nondelegable duties should be recognized.

c. Subsection (a)—an insurer’s nondelegable duty of good faith and fair dealing. An insurer is subject to tort liability for insurance bad faith if the insurer fails to perform under an insurance contract without a reasonable basis for its conduct and with knowledge of its obligation to perform or in reckless disregard of whether or not it has an obligation to perform. Restatement of the Law, Liability Insurance § 49 (stating this rule for liability insurance); Restatement Third, Torts: Liability for Economic Harm § 20 A (added by Restatement Third, Torts: Miscellaneous Provisions (Tentative Draft No. 3, 2024)) (stating this rule for first-party insurance).

An insurer’s duty of good faith and fair dealing is nondelegable. Restatement Third, Torts: Liability for Economic Harm § 20 A, Comment *o* (added by Restatement Third, Torts: Miscellaneous Provisions (Tentative Draft No. 3, 2024)). This means that, even if an insurer has delegated the handling or investigation of claims to an independent contractor, the insurer remains liable if the independent contractor acts in a manner that violates the insurer’s duty of good faith and fair dealing. For the reasons described in § 9, Comment *a*, when an independent contractor acts in such a manner, the nondelegable duty of the insurer encompasses not only the resulting economic harm, but also consequential harms, which may include physical and emotional harm.

d. Subsection (b)—the nondelegable duty of secured parties to avoid a breach of the peace when repossessing collateral. As provided in § 9(c) and explained in § 9, Comment *d*, the duty of a secured party to avoid a breach of the peace when repossessing collateral pursuant to Uniform Commercial Code § 9-609(b)(2) is nondelegable. Under this rule, a secured party that hires an

independent contractor to repossess collateral is subject to vicarious liability if there is a breach of the peace in the course of repossessing the collateral, even if the breach of the peace does not result in physical harm. See § 9, Comment *d* and Illustration 2.

e. Other torts resulting in pure economic harm.

(1) *Malpractice by defense counsel retained by an insurer.* In contrast to an insurer’s duty of good faith and fair dealing, the Restatement of the Law, Liability Insurance provides, in accordance with the weight of authority, that a liability insurer’s duty to defend actions against its insured is not nondelegable, so that an insurer is not subject to liability merely because the lawyer the insurer has retained to defend the insured commits malpractice. Id. § 12, Comment *e*. The Restatement of the Law, Liability Insurance explains that it declines to follow the vicarious-liability rule adopted by a minority of courts “because liability insurers’ practice of retaining counsel with adequate liability insurance [cross-reference omitted] adequately addresses the loss-spreading function of that rule.” Id. Under that Restatement, an insurer is subject to liability for negligence by defense counsel only if the insurer has failed to exercise reasonable care in selecting defense counsel (id. § 12(1)) or if the insurer has directed the conduct of defense counsel in a manner that overrides the duty of counsel to exercise independent professional judgment (id. § 12(2))—both of which are forms of direct liability for the insurer’s own acts.

(2) *Legal malpractice in the service of process.* In *Kleeman v. Rheingold*, 614 N.E.2d 712 (N.Y. 1993), an independent contractor process server served the summons and complaint on the defendant’s secretary rather than the defendant personally, and by the time the error was discovered, the statute of limitations had run on the client’s cause of action. The court held that the lawyers who hired the process server were subject to liability, on the ground that lawyers have a nondelegable duty of care “limited to the discrete and unique function of commencing an action through service of process.” Id. at 717.

In the more than 30 years since *Kleeman* was decided, it has not been followed in any other jurisdiction, and there are a few decisions to the contrary. *Kleeman* was noted but not specifically approved in the Restatement of the Law Third, The Law Governing Lawyers § 58, Comment *e* and the Reporters’ Note thereto. For these reasons, this Restatement takes no position with respect to the rule of the *Kleeman* case, but instead leaves the issue to the future development of case law.

f. Nondelegable duties involving property torts. Certain nondelegable duties involving property torts have already been described in the Comments to § 9. As noted in § 9, Comment *b*,

§ 61 of the Restatement Third of Torts: Liability for Physical and Emotional Harm, imposes a nondelegable duty if the actor hiring the independent contractor knows or should know that the activity is likely to involve a trespass, nuisance, or withdrawal of support and the trespass, nuisance, or withdrawal of support results in physical harm. And, as described in § 9, Comment *d*, a secured creditor has a nondelegable duty to avoid breaching the peace when repossessing collateral following default.

Except in the limited situations described in the preceding paragraph, courts have not recognized nondelegable duties involving property torts. In particular, courts have held that secured creditors do not have nondelegable duties with respect to torts committed by independent contractors in the course of repossessing collateral, so long as the independent contractors do not breach the peace. Given this paucity of authority, this Restatement takes no position with respect to other nondelegable duties involving property torts and instead leaves the issue to future judicial development.

g. Torts resulting in pure emotional harm. Courts have not recognized nondelegable duties in the case of torts resulting in pure emotional harm, and this Restatement therefore takes no position on the issue and instead leaves it to future judicial development.

Bystander-emotional-distress claims, addressed by Restatement Third, Torts: Liability for Physical and Emotional Harm § 48, are a difficult category. In some ways, bystander-emotional-distress claims resemble consortium claims—militating in favor of congruent treatment between those two categories (which would counsel in favor of recognizing a nondelegable duty when the independent contractor inflicts an injury of this type). However, in some other ways bystander-emotional-distress claims resemble other “direct” negligent-infliction-of-emotional-distress claims. See *id.* § 47 (addressing “Negligent Conduct Directly Inflicting Emotional Harm on Another”). Those similarities militate in favor of congruent treatment between *those* two categories (which would counsel *against* recognizing nondelegable duties when the independent contractor inflicts an injury of this type). Compounding the difficulty, there is little case law addressing the matter. Given these conceptual difficulties—coupled with the limited case law to offer guidance—this Restatement declines to take a position on the matter and leaves it, instead, to further development.

As described in § 9, Comment *a*, when a tort of an independent contractor results in physical harm covered by a nondelegable duty, the nondelegable duty may also encompass emotional harm consequential to the physical harm, even to a third party (as in the case of loss of

consortium). Because of the presence of physical harm, this is not a case of pure emotional harm. For loss of consortium, see Restatement Third, Torts: Liability for Physical and Emotional Harm §§ 48 A-48 C (added by Restatement Third, Torts: Concluding Provisions (now known as Restatement Third, Torts: Miscellaneous Provisions) (Tentative Draft No. 1, 2022)).

h. Defamation and invasion of privacy. To this point, courts have not recognized nondelegable duties with respect to defamation and invasion of privacy, although few cases address the matter. Because the question has not yet been extensively litigated, this Restatement declines to take a position on the matter and leaves it, instead, to further development.

i. Judge and jury. The determination whether a nondelegable duty exists is a question of law to be decided by the court. If there are disputed material facts that bear on the existence of a nondelegable duty, the resolution of those facts is a matter for the factfinder. Factual issues affecting whether a nondelegable duty has been violated in a particular case are also questions of fact for the factfinder.

REPORTERS' NOTE

Comment b. Only two types of nondelegable duties not involving physical harm are restated in the Restatement Third of Torts. As mentioned in the Comment, the first and Second Restatements of Torts did not include any nondelegable duties not involving physical harm. Leading treatises and reference works dealing with nondelegable duties likewise do not identify or discuss any nondelegable duties that involve harms other than physical harm. See, e.g., DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, *THE LAW OF TORTS* § 432 (2024 update); 41 AM. JUR. 2d *Independent Contractors* §§ 43-49 (2024 update).

For cases stating that nondelegable duties are limited to cases involving physical harm, see, e.g., *Neel v. Fannie Mae*, 2014 WL 896754, at *9 (S.D. Miss. 2014) (declining to impose a nondelegable duty because there was no threat to the physical safety of others); *In re Genetically Modified Rice Litig.*, 2011 WL 339168, at *6 (E.D. Mo. 2011) (“In this case, plaintiffs have not shown physical injury to a person or the potential for use of force or violence that Texas courts appear to require for application of the non-delegable duty doctrine.”); *Norcon, Inc. v. Kotowski*, 971 P.2d 158, 177 (Alaska 1999) (“Nondelegable duties typically concern matters that might endanger the safety of others.”); *Transmedia Network, Inc. v. Countrywide Bus. All., Inc.*, 2002 WL 31151623, at *6 (Cal. Ct. App. 2002) (stating that “the general rule [of nonliability for an independent contractor’s tortious conduct] applies and the exceptions are not applicable where, as here, only economic injury, not physical harm, is pleaded”).

In an effort to perform a comprehensive search for tort cases dealing with nondelegable duties not involving physical harm, the Reporters reviewed all of the state and federal cases in Westlaw using the terms “nondelegable duty” and “non-delegable duty” from the present time

back to the year 1962 (when the membership of The American Law Institute first considered the relevant Sections of the Restatement Second of Torts). The Reporters reviewed more than 8700 such cases. The search resembled nothing so much as an effort to find needles in a haystack. The few cases alleging nondelegable tort duties not involving physical harm that were turned up by the search are described below. For the most part, as described below, the cases found by the Reporters declined to recognize nondelegable tort duties in cases not involving physical harm.

In particular, courts have generally not applied the rule of Restatement Third of Torts: Liability for Physical and Emotional Harm § 63 (AM. L. INST. 2012) so as to impose nondelegable duties based on statutes or regulations for types of harm other than physical harm. In *Meyer v. Holley*, 537 U.S. 280, 290-291 (2003) (applying Fair Housing Act), the United States Supreme Court rejected the argument that the Fair Housing Act imposes a nondelegable duty on corporate officers and owners and stated that “[w]e believe that courts ordinarily should determine that matter in accordance with traditional principles of vicarious liability—unless, of course, Congress, better able than courts to weigh the relevant policy considerations, has instructed the courts differently.” See also, e.g., *Gen. Bldg. Contractors Ass’n, Inc. v. Pennsylvania*, 458 U.S. 375, 395-397 (1982) (applying 42 U.S.C. § 1981) (holding that there is nothing in the language or legislative history of § 1981 to support a conclusion that it imposes a nondelegable duty on an employer for alleged racial discrimination by a labor union); *Henderson v. United Student Aid Funds, Inc.*, 918 F.3d 1068, 1072 (9th Cir. 2019) (applying Telephone Consumer Protection Act) (ruling that FCC orders do not create per se vicarious liability under Telephone Consumer Protection Act). But see *Thiel v. MKA Real Est. Qualified Fund I, LLC*, 2016 WL 5682728, at *13 (Cal. Ct. App. 2016) (holding, in a case involving pure economic harm, that a regulation imposed a nondelegable duty to ensure that securities were sold only to accredited investors).

Comment c. Subsection (a)—an insurer’s nondelegable duty of good faith and fair dealing. Cases and other authorities supporting the nondelegable nature of the insurer’s duty of good faith and fair dealing are cited in Restatement Third of Torts: Liability for Economic Harm § 20 A, Reporters’ Note to Comment *o* (added by Restatement Third, Torts: Miscellaneous Provisions (AM. L. INST., Tentative Draft No. 3, 2024)). While the subject matter of that Reporters’ Note is the nondelegability of a first-party insurer’s duty of good faith and fair dealing, the same rule of nondelegability applies to third-party insurance. See, e.g., *De Dios v. Indem. Ins. Co. of N. Am.*, 927 N.W.2d 611, 620-621 (Iowa 2019) (involving workers’ compensation insurance); *Majorowicz v. Allied Mut. Ins. Co.*, 569 N.W.2d 472, 475-477 (Wis. Ct. App. 1997) (involving automobile liability insurance).

Some courts have held that, while the insurer is subject to liability if its independent contractor violates the insurer’s nondelegable duty of good faith and fair dealing, the independent contractor is not subject to liability because the independent contractor has no contract with the insured. See, e.g., *De Dios v. Indem. Ins. Co. of N. Am.*, 927 N.W.2d 611, 620-621 (Iowa 2019) (ruling that a third-party claims administrator does not owe a duty of good faith to a workers’ compensation claimant but that this does not give the insurer a free pass because “the nondelegable duties imposed by Iowa statutes and administrative regulations remain on the carrier regardless of

any attempt to pass them on to third parties”); *Wathor v. Mut. Assur. Adm’rs, Inc.*, 87 P.3d 559, 562 (Okla. 2004) (holding that a third-party claim administrator whose compensation is not tied to approval or denial of claims does not have a duty of good faith and fair dealing); *Natividad v. Alexis, Inc.*, 875 S.W.2d 695, 697-698 (Tex. 1994) (ruling that the duty of good faith and fair dealing does not extend to agents or contractors of an insurance carrier because “[w]hen the insurance carrier has contracted with agents or contractors for the performance of claims handling services, the carrier remains liable for actions by those agents or contractors that breach the duty of good faith and fair dealing owed to the insured by the carrier”). This holding is not inconsistent with the fact that the insurer’s nondelegable duty is a form of vicarious liability, because it is analogous to the situation in which vicarious liability is imposed despite the fact that the tortfeasor has a defense personal to the tortfeasor (see § 1, Comment *d*). (The corresponding issue does not arise in the case of nondelegable duties with respect to torts resulting in physical harm, because an actor’s liability for the intentional or negligent infliction of physical harm does not depend upon a contractual or other relationship between the actor and the victim.)

Comment e. Other torts resulting in pure economic harm.

(1) *Malpractice by defense counsel retained by an insurer.* For cases on both sides of the issue of whether an insurer is liable for the malpractice of counsel retained by the insurer to defend the insured, see Restatement of the Law, Liability Insurance § 12, Reporters’ Note to Comment *e* (AM. L. INST. 2019).

(2) *Legal malpractice in the service of process.* For cases holding, contrary to *Kleeman v. Rheingold*, 614 N.E.2d 712, 714-718 (N.Y. 1993), that the service of process to commence an action is not a nondelegable duty, see *Ross v. Vakulskas Law Firm, PC*, 2012 WL 4092419, at *3-4 (N.D. Iowa 2012); *Kersten v. Van Grack, Axelson & Williamowsky, P.C.*, 608 A.2d 1270, 1275-1276 (Md. Ct. Spec. App. 1992).

Even in New York, the rule of the *Kleeman* case has been limited to its specific holding and has not been extended to analogous situations. See, e.g., *Cla-Mil E. Holding Corp. v. Medallion Funding Corp.*, 791 N.Y.S.2d 532, 534 (App. Div. 2005) (holding that law firm could not be held liable for marshal’s tortious conduct while repossessing collateral pursuant to ex parte judicial order on theory that marshal was acting on law firm’s behalf); *Kulpa v. Jackson*, 773 N.Y.S.2d 235, 235-236 (Sup. Ct. 2004) (holding that *Kleeman* does not apply to service of process abroad under the Hague Convention, and that “[t]he only nondelegable duty the lawyer has in this situation is to monitor compliance with the Convention and to request, where required, extensions of the time to effectuate service”); *Feldman v. Upton, Cohen & Slamowitz*, 740 N.Y.S.2d 790, 792-793 (Dist. Ct. 2002) (ruling that an attorney who hires an independent contractor to serve process does not have a nondelegable duty to third parties allegedly victimized by “sewer service”).

For a decision rejecting the imposition of a nondelegable duty on lawyers with respect to the examination of real-estate titles, see *Lawyers Title Ins. Corp. v. Groff*, 808 A.2d 44, 49 (N.H. 2002).

For general discussions of the liability of lawyers for malpractice by local counsel and other independent contractors, see Restatement of the Law Third, The Law Governing Lawyers § 58, Comment *e* (AM. L. INST. 2000); RONALD E. MALLIN, LEGAL MALPRACTICE § 5:55 (2024)

update). For a suggestion that a nondelegable duty should be imposed on lawyers who outsource work to independent contractors in a foreign country, see Darya V. Pollak, “*I’m Calling My Lawyer . . . in India!*”: *Ethical Issues in International Legal Outsourcing*, 11 UCLA J. INT’L L. & FOREIGN AFFS. 99, 151 (2006) (“Though making use of the [nondelegable duty] doctrine in this scenario would be a broad departure from its traditional application in areas involving a risk of bodily harm to others, it would be a helpful and simple solution to the otherwise thorny problem of establishing liability within the United States for the negligence of an outsourced lawyer.”).

In *Curb Records v. Adams & Reese L.L.P.*, 1999 WL 1240800, at *4-7 (5th Cir. 1999) (applying Louisiana law), the court held that local counsel had a nondelegable duty to report directly to the client any known instances of malfeasance or misfeasance on the part of lead counsel that an objectively reasonable lawyer in the locality would conclude are seriously prejudicial to the client’s interests. This holding used the term “nondelegable duty” in a different sense than the term is used here.

(3) *Cases addressing other torts resulting in pure economic harm.* For decisions declining to impose nondelegable duties in the case of other torts resulting in pure economic harm, see, e.g., *Gibson v. Eagle Fam. Foods Grp., LLC*, 2023 WL 5574625, at *10 (S.D. Ind. 2023) (rejecting nondelegable duty for popcorn manufacturer to provide accurate information concerning the place of manufacture of the popcorn in claim for economic harm); *Butler v. Unified Life Ins. Co.*, 2019 WL 5302491, at *19 n.4 (D. Mont. 2019) (stating that exclusive appointment to sell insurance policies would not necessarily create nondelegable duty); *Finley v. Atlas Computs., Inc.*, 2011 WL 845925, at *4 (N.D. Okla. 2011) (“In the absence of any legal authority imposing a nondelegable duty giving rise to direct corporate liability for conversion or fraud, Atlas may be liable only for the conversion and/or fraud of its agents or employees acting within the scope of their agency or employment.”); *Carroll v. Fed. Express Corp.*, 1995 WL 494590, at *3-4 (C.D. Cal. 1995) (holding that an employer does not have a nondelegable duty to an employee to conduct accurate drug tests, because any nondelegable duty exists to protect the public, not to protect employees), *aff’d per curiam*, 113 F.3d 163, 165-166 (9th Cir. 1997).

A handful of intermediate appellate decisions have recognized nondelegable duties in the case of other torts resulting in pure economic harm. See *Thiel v. MKA Real Est. Qualified Fund I, LLC*, 2016 WL 5682728, at *10-13 (Cal. Ct. App. 2016) (holding that a real-estate fund could not shield itself from liability for selling securities to unaccredited private placement investors by using an agent or independent contractor); *Barry v. Raskov*, 283 Cal. Rptr. 463, 465-468 (Ct. App. 1991) (holding that a mortgage broker is vicariously liable for fraud or negligence of an independent appraiser it hires to appraise the securing property); *Baccari v. DeSanti*, 431 N.Y.S.2d 829, 832-833 (App. Div. 1979) (ruling that a county recording office’s statutory duty to index filed instruments affecting real property correctly, so that a subsequent title searcher can find them, is nondelegable). These decisions have not been followed in other jurisdictions, have not been followed by other courts even in California and New York, and are not followed by this Restatement.

Comment f. Nondelegable duties involving property torts. For cases declining to find nondelegable duties involving property torts in situations not covered by Restatement Third, Torts:

Liability for Physical and Emotional Harm § 61 (AM. L. INST. 2012) or § 9, Comment *d* above, see, e.g., *Gray v. Great Am. Recreation Ass’n, Inc.*, 970 F.2d 1081, 1083-1084 (2d Cir. 1992) (applying New Jersey law) (ruling that amusement park did not have nondelegable duty to protect patrons’ property, so that amusement park would be liable for alleged conversion of property by its employees only if the requirements of the doctrine of respondeat superior were met); *Danner v. Int’l Freight Sys. of Wash., LLC*, 855 F. Supp. 2d 433, 456 n.30 (D. Md. 2012) (“I have found no case law indicating that a bailee’s duty to use reasonable care to safeguard bailed property is nondelegable”); *Currie v. Sechrist*, 581 P.2d 700, 703 (Ariz. Ct. App. 1978) (ruling that shopping center was not vicariously liable for alleged conversion of automobile from its parking lot by an independent contractor); *Ventoza v. Anderson*, 545 P.2d 1219, 1228-1229 (Wash. Ct. App. 1976) (holding that a principal is not liable for trespass by an independent contractor unless the trespass is the result of the principal’s advice or direction or the principal is aware of the trespass and fails to interfere). Compare *Norboe v. Wells Fargo Bank, N.A.*, 2018 WL 1137575, at *6-7 (Conn. Super. Ct. 2018) (declining to reach a formal decision on whether “the obligations involved in [a mortgagee bank’s] ‘property preservation activities’ are of such importance that the mortgagee should not be able to escape liability merely by hiring others to perform them”).

For cases declining to recognize nondelegable duties with respect to repossession of collateral by an independent contractor in the absence of a breach of the peace, see, e.g., *St. Clair v. Cap. One Bank (USA), N.A.*, 2013 WL 1110810, at *3-4 (D. Minn.) (Magistrate Judge report and recommendation holding that there is no nondelegable duty to collect debts lawfully when breach of the peace is not involved), not appealed on this issue, 2013 WL 1110803, at *2 (D. Minn. 2013); *Binion v. Fletcher Jones of Chicago, Ltd.*, 2014 WL 2922206, at *4 (Ill. App. Ct. 2014) (“[T]he UCC does not make secured creditors generally liable for torts committed by independent contractors working on repossession of collateral for the secured creditors, if the torts do not breach the peace.”); *Chapa v. Traciers & Assocs.*, 267 S.W.3d 386, 390-398 (Tex. Ct. App. 2008) (ruling that parents did not establish the existence of a nondelegable duty when their car was briefly and unknowingly towed with their children inside by an independent contractor repossession company, but no breach of the peace occurred).

Comment g. Torts resulting in pure emotional harm. Cases declining to recognize nondelegable duties involving torts resulting in pure emotional harm include *Walton v. United States*, 484 F. Supp. 568, 575 (S.D. Ga. 1980) (holding that government did not have nondelegable duty to transfer grave sites from condemned property); *Hansell v. Santos Robinson Mortuary*, 75 Cal. Rptr. 2d 361, 365-367 (Ct. App. 1998) (ruling that mortuary did not have nondelegable duty to ensure that cremations were properly performed by independent contractor crematorium); *Lynn v. Superior Ct.*, 225 Cal. Rptr. 427, 428-429 (Ct. App. 1986) (dismissing claims against landlords for emotional distress resulting from wrongful eviction by landlords’ independent contractor trial counsel); *McDonnell v. Music Stand, Inc.*, 886 P.2d 895, 899 (Kan. Ct. App. 1994) (holding that creditor would not be liable for intentional infliction of emotional distress by debt collector if collector was independent contractor); *Chapa v. Traciers & Assocs.*, 267 S.W.3d 386, 390-398 (Tex. Ct. App. 2008) (ruling that parents failed to establish the existence of a nondelegable duty

1 when their car was briefly and unknowingly towed with their children inside by an independent
2 contractor repossession company, but no breach of the peace occurred). For a contrary decision, see
3 *Allen v. Hamden Plains Cemetery Ass’n, Inc.*, 2015 WL 3652242, at *4-6 (Conn. Super. Ct. 2015)
4 (holding that a cemetery association has a nondelegable duty to prevent loss of a grave’s location).

5 For a case in which the applicability of a nondelegable duty to a claim of bystander
6 emotional distress might have been, but was not, discussed, see *Ramos v. United States*, 2017 WL
7 2804955, at *4-7 (M.D. Pa. 2017) (denying defendant hospitals’ motion to dismiss bystander claim
8 for negligent infliction of emotional distress from the death of plaintiff’s child as a result of
9 doctors’ alleged negligence, without discussing nondelegable duty issue).

10 *Comment h. Defamation and invasion of privacy.* For cases refusing to find nondelegable
11 duties with respect to defamation, see, e.g., *Long v. Pendrick Cap. Partners II, LLC*, 374 F. Supp.
12 3d 515, 537 (D. Md. 2019) (ruling that creditor was not liable for alleged defamation by
13 independent contractor debt collector); *Binion v. Fletcher Jones of Chicago, Ltd.*, 2014 WL
14 2922206, at *4 (Ill. App. Ct. 2014) (holding that secured creditor was not liable for defamation
15 committed by independent contractor repossessing collateral for creditor).

16 For cases declining to recognize nondelegable duties with respect to invasion of privacy,
17 see, e.g., *Smith v. State Farm Mut. Auto. Ins. Co.*, 30 F. Supp. 3d 765, 772 (N.D. Ill. 2014)
18 (rejecting plaintiff’s argument that insurance company owed nondelegable duty with respect to
19 unwanted telemarketing calls by independent contractor); *Cooper v. AHS Hosp. Corp./Morristown*
20 *Med. Ctr.*, 2022 WL 2309285, at *3 (N.J. Super. Ct. App. Div. 2022) (declining to hold that
21 hospitals possess a nondelegable duty to ensure patient confidentiality).

22 *Comment i. Judge and jury.* For cases supporting the allocation of responsibilities
23 described in the Comment, see, e.g., *Walter v. Simmons*, 818 P.2d 214, 223-224 (Ariz. Ct. App.
24 1991); *Wathor v. Mut. Assur. Adm’rs, Inc.*, 87 P.3d 559, 561-563 (Okla. 2004); *Peterson v.*
25 *Meritain Health, Inc.*, 508 P.3d 696, 719-720 (Wyo. 2022).

IMMUNITIES

CHAPTER 3

GOVERNMENTAL ENTITIES' AND PUBLIC OFFICIALS' AND EMPLOYEES' IMMUNITIES

§ 8. United States Immunity

§ 9. State Immunity—approved in Tentative Draft No. 1 (2022)

§ 10. Local Governmental Entity Immunity—approved in Tentative Draft No. 1 (2022)

§ 11. Public Officials' and Employees' Immunity

§ 12. Public-duty Doctrine

§ 13. Special Relationships

§ 8. United States Immunity

(a) Except to the extent that the United States consents to tort liability, it is immune from liability.

(b) Statutory provisions—most prominently, the Federal Tort Claims Act—give the requisite consent to suit in tort cases. Where those statutes apply, they govern.

Comment:

a. History.

b. Scope.

c. Brief sketch of the FTCA.

d. Governmental agencies.

e. Governmental employees: the Westfall Act.

f. Immunity deprives the court of jurisdiction.

g. Conduct not tortious.

a. History. In *Gibbons v. United States*, 75 U.S. (8 Wall.) 269 (1868), the Supreme Court declared that the federal government was immune from all liability in tort. In 1946, after decades of enacting private bills to compensate those tortiously injured by federal employees, Congress enacted the Federal Tort Claims Act (FTCA), to provide some exceptions to this blanket immunity. In particular, the FTCA furnishes consent for the United States to be sued in United States District Courts “for money damages . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting

1 within the scope of his office or employment, under circumstances where the United States, if a
2 private person, would be liable to the claimant in accordance with the law of the place where the
3 act or omission occurred.” 28 U.S.C. § 1346(b).

4 The FTCA is the most prominent statute wherein Congress waived the federal government’s
5 immunity from suit for its tortious conduct—but it is not the only such statute. Others include, inter
6 alia, the Suits in Admiralty Act of 1920 (46 U.S.C.A. § 30903(a)), the Admiralty Extension Act (46
7 U.S.C.A. § 30101), and the Public Vessels Act (46 U.S.C.A. § 31102).

8 The Restatement Second of Torts addressed the immunity of the federal government in
9 § 895A. This Section is very similar to, but supersedes, § 895A.

10 *b. Scope.* This Section addresses tort claims against the federal government—and the
11 federal government’s immunity thereto. Companion provisions address claims involving state and
12 local government entities, as well as their employees. See Restatement Third, Torts: Concluding
13 Provisions §§ 9-10 (now known as Restatement Third, Torts: Miscellaneous Provisions)
14 (Tentative Draft No. 1, 2022) and § 11 (Council Draft No. 7, 2024).

15 Another project of the Institute, the Restatement of the Law, Constitutional Torts, is
16 underway and will address individual-capacity damages claims against federal officials, under
17 *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics* (1971), for violations of
18 federal constitutional rights. Consequently, this Section omits discussion of *Bivens* actions.

19 This Section’s discussion of federal government immunity is very limited. Consistent with
20 § 895A of the Second Restatement of Torts, this Section’s treatment is restrained because claims
21 against the federal government are heavily statutory (primarily determined by the language, history,
22 and purpose of the FTCA). It follows that the susceptibility or immunity of the federal government
23 from suit tends to hinge on fine-grained questions of statutory interpretation. Because this
24 Restatement is a common-law Restatement, these detailed questions of statutory interpretation are
25 not within its province.

26 *c. Brief sketch of the FTCA.* As noted, the FTCA provides consent for the United States to
27 be sued in United States District Courts for money damages, and it specifies that, where the United
28 States is susceptible to suit, it “shall be liable . . . in the same manner and to the same extent as a
29 private individual under like circumstances.” 28 U.S.C. § 2674. The FTCA’s consent to suit,
30 however, is limited; it is subject to a battery of exceptions, as set forth in *id.* § 2680. Where an

1 exception exists, the original immunity remains and shields the federal government from tort
2 liability unless some other basis for the imposition of liability exists.

3 Pursuant to 28 U.S.C. § 2680, the federal government retains its immunity when it engages
4 in certain specified activities. These include, inter alia, assessing or collecting taxes or customs
5 duties, imposing quarantines, operating the Treasury, delivering mail, and engaging in certain
6 “combatant activities of the military or naval forces, or the Coast Guard, during a time of war.”
7 Claims arising in foreign countries and claims against certain designated agencies are also excepted.
8 In addition, the United States retains its immunity for “[a]ny claim arising out of assault, battery,
9 false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander,
10 misrepresentation, deceit, or interference with contract,” with some exceptions. 28 U.S.C. § 2680(h).
11 The FTCA further provides that the United States shall not be liable for “an act or omission . . .
12 based upon the exercise or performance or the failure to exercise or perform a discretionary function
13 or duty on the part of a federal agency or an employee of the Government, whether or not the
14 discretion involved be abused.” Id. § 2680(a). This carve-out—the so-called “discretionary function
15 exception,” is frequently invoked—and courts, at times, have struggled to define its boundaries.

16 Two other significant exclusions have been deduced by the U.S. Supreme Court. First, the
17 FTCA’s plain language waives liability only for a “negligent or wrongful act or omission.” In
18 *Laird v. Nelms*, 406 U.S. 797 (1972), the Court held that this phrase does not apply to strict liability
19 in tort for ultrahazardous or abnormally dangerous conduct. Accordingly, if the federal
20 government causes injury by engaging in an abnormally dangerous activity, and if the federal
21 government is otherwise without fault, the federal government is shielded from liability, even
22 though, if the government were a private party, liability would obtain. See Restatement Third,
23 Torts: Liability for Physical and Emotional Harm § 20 (explaining that an actor who engages in
24 an abnormally dangerous activity is subject to liability, even if the actor has taken all reasonable
25 precautions). Second, in *Feres v. United States*, 340 U.S. 135, 146 (1950), the Supreme Court held
26 “that the Government is not liable under the Federal Tort Claims Act for injuries to servicemen
27 where the injuries arise out of or are in the course of activity incident to service.” In subsequent
28 cases, that doctrine—the so-called *Feres* doctrine—has been further refined.

29 Thus, broadly speaking, the federal government’s tort liability is limited to negligent
30 conduct that does not involve the making of a discretionary decision. The remedies provided in
31 the FTCA are exclusive, and they prohibit the provision of prejudgment interest and punitive

1 damages. See 28 U.S.C. §§ 2674, 2679(a) & (b). When a plaintiff sues the federal government
2 under the FTCA, special procedures (including a presentment requirement and a bar on jury trials)
3 govern the litigation. See *id.* § 2675.

4 *d. Governmental agencies.* Unless it has been waived, the tort immunity of the United
5 States extends to its subordinate administrative bodies, such as boards, commissions, corporations
6 and other agencies, so far as they perform the functions of the federal government itself.

7 *e. Governmental employees: the Westfall Act.* Enacted in 1988, the Federal Employees
8 Liability Reform and Tort Compensation Act of 1988, 28 U.S.C. § 2679, commonly known as the
9 Westfall Act, restricts the individual tort liability of federal government employees. The Act's "core
10 purpose [is] to relieve covered employees from the cost and effort of defending the lawsuit, and to
11 place those burdens on the Government's shoulders." *Osborn v. Haley*, 549 U.S. 225, 252 (2007).

12 When a federal employee is sued for the employee's tortious conduct, the Westfall Act
13 empowers the Attorney General to certify that the employee "was acting within the scope of his
14 office or employment at the time of the incident out of which the claim arose." 28 U.S.C.
15 § 2679(d)(1). Upon the Attorney General's certification, the employee is dismissed, the United
16 States is "substituted as the party defendant," and the suit proceeds as an FTCA claim. *Id.*
17 § 2679(d)(2). Alternatively, if the Attorney General "refuse[s] to certify" that the employee was
18 acting within the "scope of office or employment," the defendant-employee may petition the court
19 to make the scope-of-employment determination. *Id.* § 2679(d)(3).

20 *f. Immunity deprives the court of jurisdiction.* Most immunities are affirmative defenses
21 that must be established by the defendant. If an immunity is an affirmative defense, the immunity
22 is waived unless it is properly asserted. See § 9, Comment *j* (addressing the immunity of states and
23 explaining that state immunity is an affirmative defense), and § 10, Comment *m* (same for the
24 immunity of local government entities).

25 Federal immunities are somewhat different. If the United States does not consent to suit,
26 that absence of consent deprives the U.S. district court of subject-matter jurisdiction. Accordingly,
27 because the plaintiff must establish the court's subject-matter jurisdiction, the plaintiff (not the
28 defendant) generally bears the burden of proving that the federal government has furnished its
29 consent. This general principle is subject to two caveats, however.

30 First, difficult questions sometimes arise at the margins. Frequently, these questions
31 involve situations where it is unclear whether the defendant's conduct falls within the discretionary

function exception to the FTCA or doesn't (which itself, as noted in Comment *c*, is a tangled inquiry). On that point, then—whether the defendant or the plaintiff bears the burden of showing that the defendant's conduct is or is not “discretionary”—many courts, quite reasonably, hold that *that* burden properly falls on the defendant, as the defendant is in a better position to understand the scope of the government actor's authority and to prove relevant facts. Accordingly, in these courts, once the plaintiff has successfully invoked jurisdiction by a pleading that facially alleges matters not excepted by 28 U.S.C. § 2680, the burden shifts to the government to prove that its conduct is “based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty,” *id.* § 2680(a).

Second, the jurisdictional nature of the United States's immunity defense does not mean that every FTCA *requirement* is jurisdictional. Across various subject areas, the U.S. Supreme Court has distinguished between statutory requirements that are jurisdictional and mere “claims processing rules” that aren't. See, e.g., *United States v. Kwai Fun Wong*, 575 U.S. 402, 410-412 (2015) (explaining that the FTCA's time limitations are nonjurisdictional).

g. Conduct not tortious. When the federal government is susceptible to suit—whether pursuant to the FTCA or otherwise—liability does not necessarily follow. The federal government's liability under the FTCA depends upon the existence of a state cause of action imposing liability, were the United States a private person. As such, plaintiffs suing the federal government who are able to establish the federal government's susceptibility to suit have just cleared the first hurdle of many; they must still state other elements of their *prima facie* case under governing state law. Then, even if they do, their recovery may be reduced (or eliminated in modified comparative responsibility jurisdictions) because of comparative responsibility or because the federal government is able successfully to offer another affirmative defense.

REPORTERS' NOTE

Comment a. History. For the federal government's broad immunity from suit, see *United States v. Mitchell*, 463 U.S. 206, 212 (1983) (“It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction.”); *United States v. Sherwood*, 312 U.S. 584, 586 (1941) (explaining that the terms of the Government's consent “define that court's jurisdiction to entertain the suit”).

For a broad compilation of statutes wherein the federal government has waived its immunity from suit (including some far beyond the tort law context), see 14 HELEN HERSHKOFF, *FEDERAL PRACTICE & PROCEDURE JURISDICTION* (WRIGHT & MILLER) § 3656 (2024 update).

1 For more on the history of sovereign immunity, and Congress’s gradual creation of
2 exceptions thereto, see Restatement Second, Torts § 895A, Comments *a* and *b* (AM. L. INST. 1979).

3 For discussion of cumbersome compensation procedures prior to the passage of the Federal
4 Tort Claims Act (FTCA), see *United States v. Muniz*, 374 U.S. 150, 154 (1963) (“Private claim
5 bills introduced in the Sixty-eighth through the Seventy-eighth Congresses averaged 2,000 or more
6 per Congress, roughly 20% of which were enacted.”). In addition, *Carroll v. Trump*, 49 F.4th 759
7 (2d Cir. 2022), certified question answered, 292 A.3d 220 (D.C. 2023) offers a helpful primer:

8 [T]he mischief that the FTCA purported to fix was the private claims bills
9 procedure. Because of sovereign immunity, until the FTCA’s enactment in 1946,
10 private citizens who were injured by tortious conduct at the hands of government
11 employees were left without a judicial remedy against the federal government. As
12 a result, persons seeking compensation from the federal government regularly
13 resorted to submitting private claims to their elected representatives—who then
14 were responsible for drafting and pushing bills that would provide compensation to
15 their injured constituents.

16 For decades, this practice was widely criticized as being a costly
17 administrative burden on the work of Congress. And during the joint committee
18 hearings that led to the FTCA’s enactment, various members of Congress expressed
19 their collective displeasure at the private claims bills system, criticizing it as a poor
20 use of time and resources, as well as an unjust remedy for injured victims.

21 The FTCA was the solution to this long-running problem. By waiving
22 sovereign immunity for certain torts, it sought to delegate to the federal courts the
23 resolution of such claims brought by private citizens against government officials.
24 And significantly, the FTCA delegated this burden en masse, without particular
25 concern for the specific role or position of the government employee responsible
26 for committing the tort.

27 *Id.* at 771-772 (citations omitted).

28 *Comment c. Brief sketch of the FTCA.* As the U.S. Supreme Court has explained: “The
29 broad and just purpose which the [FTCA] was designed to effect was to compensate the victims
30 of negligence in the conduct of governmental activities in circumstances like unto those in which
31 a private person would be liable. . . .” *Indian Towing Co. v. United States*, 350 U.S. 61, 68 (1955).
32 For a detailed discussion of the statute’s purpose at the time of enactment, see *United States v.*
33 *Muniz*, 374 U.S. 150, 152-158 (1963).

34 For more on tort claims against the federal government, see generally LESTER S. JAYSON
35 & ROBERT C. LONGSTRETH, *HANDLING FEDERAL TORT CLAIMS: ADMINISTRATIVE AND JUDICIAL*
36 *REMEDIES* (1997) (three volume treatise) and 14 HELEN HERSHKOFF, *FEDERAL PRACTICE &*
37 *PROCEDURE JURISDICTION* (WRIGHT & MILLER) §§ 3654-3658.2 (2024 update).

38 For further discussion of *Feres* and its progeny, see *Taber v. Maine*, 67 F.3d 1029, 1038-
39 1050 (2d Cir. 1995) (describing and also criticizing the doctrine); DAN B. DOBBS, PAUL T. HAYDEN
40 AND ELLEN M. BUBICK, *THE LAW OF TORTS* §§ 337-340 (2024 update).

1 As noted, the discretionary function carve-out has been a source of frequent litigation—
2 and also consternation. See *Baird v. United States*, 653 F.2d 437, 440 (10th Cir. 1981) (stating that
3 the recurring question of whether a governmental function qualifies as “discretionary or
4 nondiscretionary” under the FTCA has become a “quagmire”); WRIGHT & MILLER, *supra* § 3658.1
5 (“The FTCA does not define the term discretionary, and the exact boundaries of the exception
6 remain unclear, despite an immense amount of precedent that has developed on the subject.”).

7 A similar exclusion exists for suits against state and local government entities. There, a
8 Comment to § 9 has set forth detailed guidance concerning what does, and does not, qualify. When
9 interpreting the FTCA, courts might find that discussion instructive. In the context of state
10 immunity for discretionary functions, that Comment provides:

11 To establish this immunity, it is necessary, though not sufficient, for the
12 state, or one of its agents, to exercise discretion with respect to the injury-causing
13 conduct. In the absence of evidence that the decision was made by a person or body
14 in the deliberate exercise of his, her, or its discretion, the decision is not immune
15 from liability. Meanwhile, an action is not protected [as discretionary] if, *inter alia*,
16 it: involves the execution of a set task; concerns routine, mundane, or everyday
17 matters; involves the implementation of previously established policies; or is
18 sufficiently constrained by existing policies or applicable law that no meaningful
19 discretion exists for the task at hand.

20 Beyond that (i.e., beyond the prerequisite of “deliberate exercise of
21 discretion” and aside from the other delineated conduct, clearly on the no-immunity
22 end of the continuum), the following four factors are highly probative: (1) the
23 extent to which the act involves bona fide policymaking, such that it requires a state
24 officer, employee, or body to exercise his, her, or its policy judgment in choosing
25 among alternative courses of action based upon a consideration of social, political,
26 or economic factors; (2) whether the challenged act or omission was a policy
27 decision reached by consciously balancing risks and benefits; (3) where in the
28 governmental hierarchy the decision was made—and whether the decision was
29 made by a party entitled to exercise substantial governmental discretion; and (4) the
30 likely consequences of withholding immunity—whether, to paraphrase the Second
31 Restatement, judicial review of the challenged act would cause the court to second-
32 guess high-level governmental decisions “better left to the administrative officials.”
33 Restatement Second, Torts § 895B, Comment *d*. When factors (1) through (4) do
34 not tilt toward a finding that the action involves the discretionary determination of
35 important governmental policy, the action is not entitled to the protection [as a
36 discretionary act].

37 § 9, Comment *g* (Tentative Draft No. 1, 2022).

38 For a discussion of the special procedural requirements that apply when a suit is initiated
39 against the federal government pursuant to the FTCA, see W. PAGE KEETON ET AL., PROSSER AND

1 KEETON ON TORTS § 131, at 1035-1036 (5th ed. 1984); 2 BARRY A. LINDAHL, MODERN TORT LAW:
2 LIABILITY AND LITIGATION § 16:8 (2024 update).

3 *Comment d. Governmental agencies.* See Restatement Second, Torts § 895A, Comment *c*
4 (AM. L. INST. 1979) (“The tort immunity of the United States extends to all subordinate
5 administrative bodies of the Federal Government, such as boards, commissions, corporations and
6 other agencies of the Government, so far as they perform the functions of the Government itself
7 and so far as the immunity has not been waived by the United States.”); 14 HELEN HERSHKOFF,
8 FEDERAL PRACTICE & PROCEDURE JURISDICTION (WRIGHT & MILLER) § 3655 (2024 update)
9 (“Suits against federal agencies and officers may be barred by the doctrine of sovereign immunity
10 if the conduct in question has been undertaken on behalf of the Government and Congress has not
11 waived the immunity of the United States for the asserted claim.”).

12 *Comment e. Governmental employees: the Westfall Act.* For discussion of the Westfall Act,
13 see 14 HELEN HERSHKOFF, FEDERAL PRACTICE & PROCEDURE JURISDICTION (WRIGHT & MILLER)
14 §§ 3658 (2024 update). See also *Levin v. United States*, 568 U.S. 503, 509 (2013) (explaining that
15 the Westfall Act “makes the remedy against the United States under the FTCA exclusive for torts
16 committed by federal employees acting within the scope of their employment”); *De Martinez v.*
17 *Lamagno*, 515 U.S. 417, 419-420 (1995) (describing the Westfall Act’s operation and effect);
18 *Omnipol, A.S. v. Multinational Def. Servs., LLC*, 32 F.4th 1298, 1305 (11th Cir. 2022) (same).

19 *Comment f. Immunity deprives the court of jurisdiction.* See *United States v. Sherwood*,
20 312 U.S. 584, 586 (1941) (“The United States, as sovereign, is immune from suit save as it consents
21 to be sued, and the terms of its consent to be sued in any court define that court’s jurisdiction to
22 entertain the suit.”) (citations omitted); *Morales v. United States*, 895 F.3d 708, 713 (9th Cir. 2018)
23 (explaining that “if there is no waiver [of sovereign immunity] the court lacks subject matter
24 jurisdiction”); 14 HELEN HERSHKOFF, FEDERAL PRACTICE & PROCEDURE JURISDICTION (WRIGHT
25 & MILLER) § 3654 (2024 update) (“[C]onsidered as a prerequisite for jurisdiction, the absence of
26 consent by the United States to suit has been treated by courts as a fundamental defect that deprives
27 the district court of subject matter jurisdiction.”) (quotation marks omitted); *id.* at § 3658
28 (explaining that “the plaintiff bears the burden of proving that the Government has given its
29 consent to suit”).

30 As noted, there is disagreement concerning whether the defendant or plaintiff bears the
31 burden of showing that the federal government’s decision falls within (or outside of) the FTCA’s
32 discretionary function exception. See *Sharp v. United States*, 401 F.3d 440, 443 n.1 (6th Cir. 2005)
33 (explaining that there is “some debate . . . on the question of which party bears the burden of
34 proving the applicability (or inapplicability) of the discretionary-function exception”); *Abunabba*
35 *v. United States*, 676 F.3d 329, 333 n.2 (3d Cir. 2012) (discussing the division). Compare *Morales*
36 *v. United States*, 895 F.3d 708, 713 (9th Cir. 2018) (“The United States bears the burden of proving
37 the applicability of the discretionary function exception.”); *Keller v. United States*, 771 F.3d 1021,
38 1023 (7th Cir. 2014) (“The discretionary function exception is an affirmative defense to liability
39 under the FTCA that the government must plead and prove.”); *Carlyle v. U.S., Dep’t of the Army*,
40 674 F.2d 554, 556 (6th Cir. 1982) (explaining that, once the plaintiff has “successfully invoked

jurisdiction by a pleading that facially alleges matters not excepted by § 2680,” the burden shifts to the government “to prove the applicability of a specific provision of § 2680”), with *OSI, Inc. v. United States*, 285 F.3d 947, 951 (11th Cir. 2002) (“[S]ince the government has asserted lack of subject matter jurisdiction, [the plaintiff] must prove that the discretionary function exception does not apply . . .”).

For the fact that not all FTCA prerequisites are jurisdictional in nature, see, e.g., *United States v. Kwai Fun Wong*, 575 U.S. 402, 410-412 (2015) (explaining that the FTCA’s time limitations are nonjurisdictional); *Smoke Shop, LLC v. United States*, 761 F.3d 779, 786-787 (7th Cir. 2014) (explaining that § 2675(a)’s exhaustion requirement is not jurisdictional); *Ortiz-Rivera v. United States*, 891 F.3d 20, 24 (1st Cir. 2018) (explaining that “the FTCA’s two-year time bar for presentment is a claims-processing rule, not a jurisdictional requirement”), *WRIGHT & MILLER*, supra § 3654 (explaining that, while the federal government’s immunity from suit is jurisdictional in nature, the *conditions* that reflect “substantive elements of the claim or the procedures that must be used to bring suit” are not); *id.* § 3658 (explaining that, while “some lower courts have treated every aspect of the claims process as . . . grounds for dismissal for a lack of jurisdiction,” this one-size-fits-all framework “does not comport with the Supreme Court’s insistence that claim-processing rules not be treated as jurisdictional unless Congress clearly has stated as such”).

Comment g. Conduct not tortious. It is well established that a finding that the federal government is not immune from suit is merely the first step in a much longer inquiry. Accord *MB Financial Group, Inc. v. U.S. Postal Service*, 545 F.3d 814, 818-819 (9th Cir. 2008) (emphasizing this key point by noting: “We stress that in holding the complaint states a claim for which the Postal Service is not immune, we are not holding that it is liable.”).

After a determination of susceptibility to suit, in order to prevail, the plaintiff must still show that the federal government defendant had a duty, breached the duty, and factually caused an injury within the scope of liability. Then, the federal government defendant is still entitled invoke any “defenses available to [a hypothetical] private party under the applicable state law.” 14 *HELEN HERSHKOFF, FEDERAL PRACTICE & PROCEDURE JURISDICTION (WRIGHT & MILLER) § 3658* (2024 update). For examples of cases that cleared the immunity hurdle but nevertheless foundered, see *McCloskey v. Mueller*, 446 F.3d 262, 267-271 (1st Cir. 2006) (assessing a claim against the FBI as if the claim were brought against a private individual and finding that, seen through that lens, per the Restatement Second of Torts § 315 (AM. L. INST. 1965), the FBI had no duty to control the violent individual who murdered the victim); *Matheny v. United States*, 469 F.3d 1093 (7th Cir. 2006) (Posner, J.) (assessing the claim against the federal government as if it were a claim against a private party and finding that the federal government was subject to the protection of the Indiana Recreational Use Statute, which excuses landowners from liability); *Paige v. Drug Enforcement Admin.*, 665 F.3d 1355, 1362-1363 (D.C. Cir. 2012) (affirming the grant of summary judgment in favor of the DEA because if the DEA had been a private party, it would not have been liable to the plaintiff pursuant to the Restatement Second of Torts § 652D (AM. L. INST. 1977)).

§ 11. Public Officials' and Employees' Immunity

(a) A state or local governmental employee, officer, or authorized agent acting within the scope of employment or authority is subject to tort liability to the extent permitted by state and local law and to the extent limited by the public-duty doctrine stated in §§ 12 and 13.

(b) Notwithstanding Subsection (a), a state or local governmental employee, officer, or authorized agent acting within the scope of employment or authority is immune from liability for acts and omissions that:

(1) constitute the exercise of a judicial or legislative function, or

(2) constitute the exercise of an executive function involving the discretionary determination of important governmental policy.

Comment:

- a. Prior Restatement treatment and terminology.*
- b. History, sources of authority, and scope.*
- c. The core protections of employees from tort liability.*
- d. The variety of statutes providing immunity for governmental actors.*
- e. Relationship to governmental entity immunity.*
- f. Immunity for the exercise of “legislative” or “judicial” functions.*
- g. Immunity for executive functions involving the “discretionary determination of important governmental policy.”*
- h. Governmental actors acting outside the scope of employment or in a highly culpable fashion.*
- i. Suits against governmental actors in their “official capacity.”*
- j. The public-duty doctrine.*
- k. Affirmative defense.*
- l. Conduct not tortious.*
- m. Indemnity for employee liability or costs of defense.*
- n. Judge and jury.*

a. Prior Restatement treatment and terminology. As § 9, Comment *a* and § 10, Comment *a* explain, the first Restatement of Torts contained no provision addressing immunity for state or local governmental entities. That lacuna changed in the Restatement Second of Torts, which, in §§ 895A to 895D, addressed immunity for federal, state, and local governmental entities as well as for “public officers,” which included those exercising judicial and legislative functions. Section

895D, the Section addressing “public officers,” provided individual governmental actors with parallel immunity to their employing bodies when these officers acted within the general scope of authority. This Section replaces § 895D of the Second Restatement of Torts, although it largely tracks the immunities provided in § 895D, while also recognizing the substantial impact of statutory law on the landscape of governmental-actor immunity. This Section, along with §§ 9 and 10, also follows the framework of the Restatement Second of Torts §§ 895B to 895D of providing coordinate immunity for governmental entities and the individuals who perform their work.

This Section addresses the liability of the employees, officers, or authorized agents of a governmental entity (be it the state or a local governmental entity). The individual’s immunity or, conversely, the individual’s susceptibility to suit, does not depend on the individual’s title. Accordingly, for ease of exposition, this Section collectively refers to these individuals as “governmental actors.” In some cases, statutes provide immunity for “employees,” while others include “public officials” or other descriptors. Once again, for ease of exposition, this Section collectively refers to these individuals as “governmental actors,” save for when referring to the language of a specific statute, in which case the language of the statute is employed.

b. History, sources of authority, and scope. Historically, courts developed immunities for governmental actors that largely tracked the immunities provided to governmental entities themselves—giving these actors a nearly impregnable liability shield just like the governmental entities that employed them. Beginning in the middle of the 20th century, courts began cutting back on sovereign immunity, including the protection afforded governmental actors. In the latter part of the 20th century, state legislatures enacted statutes that, in varying degrees, waived this protection, although some legislation rolled back the extent of the earlier waivers and provided targeted immunity for states and governmental actors. Today, every state—or nearly every state—has legislation that prescribes the scope of immunity provided to governmental actors, although, often, separate provisions govern the liability of state governmental actors and those actors affiliated with political subdivisions. Those statutes furnish the primary source of protection for governmental actors, although, in a number of states, specific aspects of immunity, such as judicial or legislative immunities, are matters of common law.

This Section addresses the immunity of governmental actors only when those actors are sued in common-law tort. Because of the Eleventh Amendment and the structure and content of federal civil-rights statutes, including 42 U.S.C. § 1983, when suits assert civil-rights claims (as

opposed to common-law tort claims), immunity rules often differ. See Reporters' Note to Comment *i*. A separate Restatement project, the Restatement of the Law, Constitutional Torts, will address the immunity of governmental actors under 42 U.S.C. § 1983 and other civil-rights statutes and federal constitutional protections.

c. The core protections of employees from tort liability. Courts have been assiduous in protecting governmental actors performing judicial or legislative functions from tort liability. In many states, this protection is furnished via statute—but, even in the absence of express statutory language, courts have furnished this protection via the common law. Courts, too, have shielded governmental actors from liability when they engage in executive functions involving the discretionary determination of important governmental policy. Accordingly, Subsection (b)(2) draws this line. In so doing, this Section not only follows case law; it also tracks the immunity for discretionary determinations and legislative and judicial functions contained in §§ 9 and 10, the companion provisions that address state and local governmental entities, respectively.

d. The variety of statutes providing immunity for governmental actors. As Comment *b* explains, the primary source of immunity for governmental actors is found in positive law. A governmental actor is not liable for acts or omissions if or to the extent that those acts or omissions are immunized by statute. The proper interpretation and applications of relevant statutes is a matter outside the scope of this Restatement.

State statutes addressing the tort liability of governmental actors vary widely. Some expressly create symmetry, specifying that the same immunity that applies to a governmental entity also shields the entity's affiliated governmental actors from liability. Some provide broad immunity for all governmental entities and actors within the scope of employment or authority, subject to specific exceptions. Some mirror the Federal Tort Claims Act, in that they broadly waive immunity and then provide specific exceptions to that waiver. See § 8 (Council Draft No. 7, 2024) (addressing federal government immunity). Others specify particular areas in which governmental entities and actors are immune from suit. Some adopt the structure of the federal Westfall Act, 28 U.S.C. § 2679, which provides that the exclusive remedy for a tort committed by a federal governmental employee who is acting within the scope of employment is a suit against the federal government, thereby functionally immunizing the employee from suit. See *id.*, Comment *e* (addressing the Westfall Act). Still others mandate that the governmental entity defend any employee sued for conduct that occurred within the scope of employment. Regardless of the

1 structure of governmental immunity statutes, these state statutes provide the primary source of
2 immunity that shields governmental actors from liability.

3 *e. Relationship to governmental entity immunity.* As § 10, Comment *p* explains, immunity
4 for governmental actors is independent of the immunity provided to governmental entities. A
5 governmental actor may act tortiously outside the scope of employment or authority or in a highly
6 culpable manner and have no immunity for those torts, even while the governmental entity is
7 immunized. See Comment *h*. In jurisdictions that have adopted state tort claims acts with
8 provisions similar to the federal Westfall Act, 28 U.S.C. § 2679, the governmental entity is subject
9 to liability for some torts while the entity's affiliated governmental actors are not. Yet, for most
10 tortious conduct, immunity for the governmental entity and governmental actors is co-extensive.

11 *f. Immunity for the exercise of "legislative" or "judicial" functions.* Immunity for
12 governmental entities for the exercise of legislative and judicial functions is addressed in § 9,
13 Comments *c-e* (state legislative and judicial immunity) and § 10, Comments *e-g* (local
14 governmental entity legislative and judicial immunity). Those provisions explain the scope,
15 content, and justifications for these immunities. Although those provisions address immunity for
16 governmental entities, not people, the same protections shield governmental actors in the exercise
17 of their official functions, and they are incorporated here by reference. As noted in Comment *c*,
18 courts have vigorously protected those engaged in legislative or judicial functions.

19 *g. Immunity for executive functions involving the "discretionary determination of*
20 *important governmental policy."* Immunity for governmental entities for discretionary
21 determinations is addressed in § 9, Comments *f* and *g* (state discretionary determination immunity)
22 and § 10, Comments *h* and *i* (local governmental entity discretionary determination immunity).
23 Although those provisions address immunity for governmental entities, not people, the same
24 protections shield governmental actors, and they are incorporated here by reference. Once a court
25 concludes that the governmental employee made a discretionary determination of important
26 government policy pursuant to § 9, Comments *f* and *g* or § 10, Comments *h* and *i*, immunity for
27 the employee automatically follows.

28 *h. Governmental actors acting outside the scope of employment or in a highly culpable*
29 *fashion.* Statutory provisions, while worded in a variety of ways, shield governmental actors from
30 suit only when the actors' tortious conduct occurs within the scope of employment. Thus, an actor
31 who commits a tort while acting outside the scope of employment is not immune from liability. A

1 statute may provide specification about when a governmental actor's conduct is within the scope
2 of employment for purposes of immunity from suit. In the absence of such statutory specification,
3 the ordinary rules applicable to whether an employer is vicariously liable for an employee's
4 tortious conduct govern. See [Vicarious Liability] § 5 (Tentative Draft No. 4, 2025; forthcoming);
5 Restatement of the Law Third, Agency § 7.07(2).

6 Likewise, immunity statutes deny immunity to governmental actors who act in a “highly
7 culpable” manner. “Highly culpable” is expressed in somewhat different terms in different statutes,
8 but, in all cases, it means acting more culpably than merely negligently. A government actor who
9 is merely negligent has not acted in a “highly culpable” manner.

10 *i. Suits against governmental actors in their “official capacity.”* A number of states
11 distinguish between suits against governmental actors in their official versus individual or personal
12 capacity. A suit against a governmental actor in the actor's official capacity is treated as a suit
13 against the governmental entity—the governmental entity becomes the real party in interest. By
14 contrast, when suit is brought against a governmental actor in the actor's personal or individual
15 capacity, only the actor is responsible for any judgment that might result. Thus, the essential
16 difference when money damages are sought boils down to whether the plaintiff would recover
17 from the governmental entity or from the governmental actor personally. When a governmental
18 actor is sued in the actor's official capacity, the issue of immunity for the actor collapses into
19 whether the governmental entity has immunity, as only the entity will be responsible for any
20 judgment. By contrast, when suit is brought against a governmental actor in the actor's personal
21 or individual capacity, only the actor is responsible for any judgment that might result (although,
22 in many instances, the individual will be indemnified by the employing governmental entity). See
23 Comment *m*.

24 Typically, when injunctive relief is sought, a governmental actor is sued in the actor's
25 official capacity.

26 *j. The public-duty doctrine.* The public-duty doctrine is not an immunity, but it functions
27 like one in that it shields governmental entities and actors from liability for some actions that
28 implicate discretionary determinations and affirmative duties. See § 12 (restating the public-duty
29 doctrine). Unlike most governmental immunities, the public-duty doctrine is purely a product of
30 common law. It operates even (and especially) when an immunity statute is inapplicable to the
31 plaintiff's claim, sometimes overlaps with or even duplicates the protection from liability afforded

1 by immunity, and it applies equally to state and local governmental entities and governmental
2 actors. See *id.*, Comment *e*. Often the public-duty doctrine becomes more robust in jurisdictions
3 where governmental immunity is abolished or limited.

4 *k. Affirmative defense.* Like a majority of states, this Restatement treats state sovereign
5 immunity as an affirmative defense that can be waived if not appropriately raised. See § 9,
6 Comment *j*. This Restatement also treats immunity for local governmental entities as an
7 affirmative defense. See *id.* § 10, Comment *m*. Consistent with those Sections, and also in line
8 with virtually all courts to address the matter, a governmental actor's claim of immunity is an
9 affirmative defense. Accordingly, governmental actors bear the burden of proving that they are
10 immune from suit, and a governmental actor's failure to assert the actor's immunity in a timely
11 and proper manner waives any such immunity.

12 *l. Conduct not tortious.* On some occasions, a governmental actor may be susceptible to
13 suit because immunity does not obtain, but the actor nevertheless may still not be liable to the
14 plaintiff. Like other claimants, plaintiffs suing governmental actors must still prove all of the
15 elements of their *prima facie* case, and, in certain circumstances, even if they do, their recovery
16 may be reduced (or eliminated in modified comparative responsibility jurisdictions) because of
17 comparative responsibility or because the governmental actor is able successfully to offer another
18 affirmative defense.

19 *m. Indemnity for employee liability or costs of defense.* Some states, contrary to common-
20 law principles, permit or require the governmental entity to indemnify its actors for any liability
21 in tort to which they are subject as well as the costs of defending themselves in the underlying tort
22 action. Indemnity by the employer is the exact opposite of common-law vicarious liability, which
23 provides an indemnity action by a vicariously liable employer against the tortfeasor employee.
24 See [Vicarious Liability] § 2, Comment *d* (Tentative Draft No. 4, 2025; forthcoming) (vicariously
25 liable defendant entitled to indemnity from wrongdoing defendant); Restatement Second, Torts
26 § 886B(2)(a) (same as § 2, Comment *d*).

27 *n. Judge and jury.* A governmental actor's immunity from suit is a question of law for the
28 court. On occasion, however, there will be disputed historical facts that bear on whether immunity
29 exists; the resolution of those facts is a matter properly left to the factfinder.

REPORTERS' NOTE

Comment b. History, sources of authority, and scope. For a discussion of the development of state sovereign immunity, see § 9, *Comment a.*

Comment d. The variety of statutes providing immunity for governmental actors. For statutes providing the same protection to governmental actors as to the governmental entity, see, e.g., ALASKA STAT. ANN. § 09.65.070 (suit against governmental actor is treated as a suit against the state so long as the actor was acting within the scope of office or employment); ARIZ. REV. STAT. ANN. § 12-820.02 (furnishing the same immunity to public entities and to public employees (provided that the public employee has not acted highly culpably)); COLO. REV. STAT. ANN. § 24-10-105 (furnishing all public entities and employees umbrella immunity from tort liability subject to specified exceptions); IND. CODE ANN. § 34-13-3-3 (providing same immunity to governmental entity and employees acting within the scope of their employment for specified activities and subjects); KAN. STAT. ANN. § 75-6104 (same as Indiana); N.D. CENT. CODE ANN. § 32-12.2-02 (“No claim may be brought against the state or a state employee acting within the employee’s scope of employment except a claim authorized under this chapter or otherwise authorized by the legislative assembly.”); WYO. STAT. ANN. § 1-39-104(a) (providing immunity from tort liability to a governmental entity and its public employees); see also, e.g., *Kennedy Funding, Inc. v. City of Brunswick, Ga.*, 91 F. Supp. 3d 1299, 1301 (S.D. Ga. 2015) (“The sovereign immunity analysis applicable to a municipality applies equally to claims against its public employees in their official capacities. Thus, a city employee, in his official capacity, is entitled to sovereign immunity whenever the city that employs him would be so entitled.”).

Yet, that is not universally the case. The Dobbs treatise reports:

In fact, some plaintiffs who would be defeated by the entity’s immunity might prevail in a suit against an individual officer. . . . In still others, the officer has a very broad immunity and the plaintiff’s claim is only a non-jury claim against the state.

DAN B. DOBBS, PAUL T. HAYDEN AND ELLEN M. BUBICK, *THE LAW OF TORTS* § 350 (2024 update); see also *Murray v. Plainfield Rescue Squad*, 46 A.3d 1262 (N.J. 2012) (immunity statute grants an immunity to individual members of city rescue squad, but the immunity does not extend to the rescue squad as an entity).

For states with limitations on tort liability for governmental actors similar to the federal Westfall Act, see FLA. STAT. ANN. § 768.28(1) (entities) and (9) (employees); GA. CODE ANN. § 50-21-25 (applicable to all state officers or employees); IOWA CODE ANN. § 669.5.2.a. (“Upon certification by the attorney general that a defendant in a suit was an employee of the state acting within the scope of the employee’s office or employment at the time of the incident upon which the claim is based, the suit commenced upon the claim shall be deemed to be an action against the state under the provisions of this chapter, and if the state is not already a defendant, the state shall be substituted as the defendant in place of the employee.”); OKLA. STAT. ANN. tit. 51, § 153C (“In no instance in any such action [pursuant to the tort claims act] shall an employee of the state or of a political subdivision of the state acting within the scope of employment be named as defendant);

OR. REV. STAT. ANN. § 30.265(3) (providing that public body be substituted when governmental actors are sued for an amount below the cap on damages provided in the tort claims act for claims against state and local governmental entities); S.C. CODE § 15-78-70 (requiring suit be brought against the governmental entity for which the employee was acting); TEX. CIV. PRAC. & REM. CODE ANN. § 101.106(f) (providing that suit against governmental employee acting within the scope of employment is treated as one against the employee in their official capacity and that, upon motion, employee should be dismissed from the suit); 12 VT. STAT. ANN. § 5602(a) (providing that, for claims that entail tortious conduct by a state employee acting within the scope employment, suit must be brought against the state not the employee). Rhode Island authorizes the attorney general, upon request, to defend any action against employees sued for conduct within the scope of employment. R.I. GEN. LAWS ANN. § 9-31-8.

Comment e. Relationship to governmental entity immunity. A statute may limit the extent of immunity in a way that does not permit common-law supplementation. Thus, an immunity statute that excludes immunity if a governmental actor acts in a highly culpable manner impliedly bars any common-law supplementation for those acts, because the statute plainly means to subject the actor to tort liability. As one treatise explains:

A statute that provides a qualified immunity for particular persons performing particular jobs, but provides for liability in instances where gross negligence can be established will supersede the common law official immunity doctrine for the enumerated individuals and agencies. This is true whether or not the common-law immunity issue involves quasi-judicial immunity, the distinction is without difference because both are common-law immunities subject to legislative modification.

2A MO. PRAC., METHODS OF PRAC.: LITIGATION GUIDE § 29.11 (2023 update).

At the same time, some immunity statutes may expressly provide for, or impliedly permit, common-law supplementation. This is especially true with regard to judicial and legislative functions and discretionary determinations. See, e.g., ARIZ. REV. STAT. ANN. § 12-820.05A (“Except as specifically provided in this article, this article does not affect, alter or otherwise modify any other rules of tort immunity regarding public entities and public officers as developed at common law and as established under the statutes and the constitution of this state.”); MICH. COMP. LAWS ANN. § 691.1407 (“Except as otherwise provided in this act, this act does not modify or restrict the immunity of the state from tort liability as it existed before July 1, 1965, which immunity is affirmed.”); OHIO REV. CODE ANN. § 2744.03(7) (providing, in immunity statute applicable to local governmental entities and their employees, that specified judicial officers and their local governmental employers are “entitled to any defense or immunity available at common law”); VA. CODE ANN. § 8.01-195.3 (“Notwithstanding [adoption of a tort claims act], the individual immunity of judges, the Attorney General, attorneys for the Commonwealth, and other public officers, their agents and employees from tort claims for damages is hereby preserved to the extent and degree that such persons presently are immunized.”); *Berry v. State*, 400 So. 2d 80, 883-84 (Fla. Dist. Ct. App. 1981) (holding that, despite broad legislative waiver of sovereign immunity, the statute did

not preempt common-law judicial immunity); *Palowsky v. Campbell*, 285 So. 3d 466, 468 (La. 2019) (Weimer, J., concurring) (observing that judicial immunity had long been a product of court decisions); see generally *Pontbriand v. Sundlun*, 699 A.2d 856, 867 (R.I. 1997) (“[I]t seems beyond doubt that the Governor *may* be entitled to *some form* of common law qualified immunity for his acts performed in good faith.”); *S.C. Pub. Int. Found. v. Courson*, 801 S.E.2d 185, 187-188 (S.C. Ct. App. 2017) (ruling that nothing in state tort claim act waived common-law legislative immunity); *O’Laughlin v. Windham*, 498 S.E.2d 689, 692 (S.C. Ct. App. 1998) (same ruling as *Courson* with regard to judicial immunity); *Evangelical United Brethren Church of Adna v. State*, 407 P.2d 440, 445 (Wash. 1965) (developing common-law discretionary-determination immunity notwithstanding broad statutory waiver of sovereign immunity); *Fabre v. Town of Ruston*, 321 P.3d 1208, 1214 (Wash. Ct. App. 2014) (declaring that, notwithstanding broad waiver of sovereign immunity, legislative immunity and discretionary-determination immunity endure).

Comment f. Immunity for the exercise of “legislative” or “judicial” functions. The vast majority of cases in which judicial or legislative immunity is at issue involve suits against judicial or legislative *actors*, not courts or legislative *entities*.

For legal support for the proposition that governmental actors have the same legislative or judicial immunity as governmental entities, see MONT. CODE ANN. § 2-9-111 (providing, in consecutive subsections, legislative immunity to governmental entity and any “member of staff” of a legislative body); OHIO REV. CODE ANN. § 2744.03(A)(1) & (6) (providing legislative and judicial immunity to local governmental entities and their employees); UTAH CODE ANN. § 63G-7-201 (providing discretionary-determination immunity to governmental entities and its employees); W. VA. CODE, § 29-12A-5(a)(1) and (2) and (b) (providing legislative and judicial immunity to “political subdivision” and its employees when the latter acts within the scope of employment and without high culpability); *Hulsman v. Hemmeter Dev. Corp.*, 647 P.2d 713, 719 (Haw. 1982) (holding that the same policy that requires judicial immunity for prosecuting attorneys means that the state, as employer, is “likewise immune”); *Nation v. State, Dep’t of Correction*, 158 P.3d 953, 964 (Idaho 2007) (“We hold, therefore, that [the deputy county prosecutor] and the county are immune from the corrections officers’ state law claims because responding to discovery is a quasi-judicial function.”); *Brown v. City of Bordentown*, 348 N.J. Super. 143, 148 (App. Div. 2002) (legislative immunity applicable to local governmental actors extended to local governmental entity); *Hunnicut v. Sewell*, 219 P.3d 529, 535 (N.M. 2009) (holding governmental entities and actor entitled to judicial immunity without separate analysis); *Davey v. State*, 817 N.Y.S.2d 918, 918 (App. Div. 2006) (“The State ‘may not be held liable for actions of [a] state-employed judge where, as here, those actions are cloaked with judicial immunity.’”) (quoting *Montesano v. State of New York*, 782 N.Y.S.2d 362 (App. Div. 2004)); *Harley v. State*, 587 N.Y.S.2d 805, 806 (App. Div. 1992) (affirming grant of summary judgment to governmental entity based on governmental actors’ entitlement to judicial immunity); *Calhoun v. City of Providence*, 390 A.2d 350, 356 (R.I. 1978) (explaining why any immunity for a governmental actor must be extended to the governmental entity as well); *Taggart v. State*, 822 P.2d 243, 250 (Wash. 1992) (providing the same judicial immunity to parole officers as to the governmental entity charged with making parole

determinations to the extent those officers were engaged in judicial function); *Kimbley v. City of Green River*, 663 P.2d 871, 888 (Wyo. 1983) (concluding that, because all of the governmental actors were immune from suit, the governmental entities were also immune).

Courts addressing the immunity of judicial or legislative officials are often quite casual in treating the scope of individual immunity as co-extensive with the immunity of their affiliated governmental entity. See *Stevens v. Helming*, 2012 WL 695609, at **7-8 (Conn. Super. Ct. 2012) (treating individual and entity collectively in determining whether quasi-judicial immunity applied); *McAllister v. Dist. of Columbia*, 653 A.2d 849, 852 (D.C. 1995) (holding immunity of judge and courtroom clerk applicable to the municipality by “imputation”); *Smith v. Delaware State Police*, 2012 WL 5355639, at *3 (Del. Super. Ct. 2012) (addressing immunity of court administrator and court as single inquiry); *Fla. House of Representatives v. Expedia, Inc.*, 85 So. 3d 517, 523 (Fla. Dist. Ct. App. 2012) (treating individual legislator’s immunity as co-extensive with immunity of legislature as entity); *Dawson Cnty. Bd. of Comm’rs v. Dawson Forest Holdings, LLC*, 850 S.E.2d 870, 872 (Ga. Ct. App. 2020) (treating legislative immunity for Board of Commissioners and members of the board as co-extensive); *Labiberte v. State*, 2014 WL 1407808, at *3 (Minn. Ct. App. 2014) (“The district court concluded that the judge was immune from liability for her judicial acts. ‘If a claim is barred on immunity grounds, the governmental entity is entitled to judgment as a matter of law and dismissal is proper.’ Under the doctrine of judicial immunity, a judge cannot be held liable to anyone in a civil action for ‘acts done in the exercise of judicial authority . . . however erroneous or by whatever motives prompted.’”) (quoting *S.J.S. v. Faribault Cnty.*, 556 N.W.2d 563, 565 (Minn. Ct. App. 1996) and *Linder v. Foster*, 295 N.W. 299, 300 (Minn. 1940)); *Bond v. Marion Cnty. Bd. of Supervisors*, 807 So. 2d 1208, 1221 (Miss. 2001) (stating that local governmental entity was entitled to legislative immunity, and because the steps taken by the entity were “integral to the legislative process,” the members of the board were also entitled to immunity); *Brown v. City of Hazlehurst*, 741 So. 2d 975, 982 (Miss. Ct. App. 1999) (treating judicial immunity defense for claims against mayor sued in his official capacity and municipal entity without distinction); *Fasano v. Huff*, 129 Nev. 1113 (2013) (cursorily concluding that governmental entity and judge were entitled to judicial immunity); *Ryan v. Woodcliff Lake Borough*, 2005 WL 4388027, at *1 (N.J. Super. Ct. App. Div. 2006) (summarily affirming the lower court’s determination that governmental entity and governmental actor were entitled to judicial immunity); *Nichols v. N. Carolina Admin. Off. of the Cts.*, 856 S.E.2d 549, 549 (N.C. Ct. App. 2021) (concluding that governmental actor’s judicial immunity required dismissal of claim against governmental entity); *Reasoner v. City of Columbus*, 2003 WL 321551, at *3 (Ohio Ct. App. 2003) (affirming dismissal of the complaint in which governmental actor and entity were sued after concluding governmental actor was entitled to judicial immunity); *Edwards v. Bd. of Educ. of Springfield City Sch. Dist.*, 1983 WL 2457, at *11 (Ohio Ct. App. 1983) (extending legislative immunity to school board and its members); *Germeroth v. City of Oregon City*, 733 P.2d 32, 33 (Or. Ct. App. 1987) (concluding that municipal judge had judicial immunity and that governmental entity’s liability was determined by that ruling justifying dismissal of the complaint against judge and governmental entity); *Wipf v. Hutterville Hutterian Brethren, Inc.*, 834 N.W.2d 324, 335 S.D. 2013) (explaining that “court-appointed

receivers share judicial immunity with the court”); *Cashion v. State*, 1999 WL 722634, at *5 (Tenn. Ct. App. 1999) (concluding issuance of an appellate opinion by judge is a judicial function that also provides immunity for the state from tort liability); *Labrec v. State, Emp. Sec. Dep’t*, 758 P.2d 501, 503 (Wash. Ct. App. 1988) (affirming summary judgment for governmental entity and adjudication officers after concluding officers were entitled to judicial immunity). But see *Patterson v. Cronin*, 650 P.2d 531, 539 (Colo. 1982) (holding that judicial immunity was available only to those “intimately associated with the judicial phase of the criminal process,” which included individual judicial officers but not municipality); *Cruz-Guzman v. State*, 916 N.W.2d 1, 13 (Minn. 2018) (holding that constitutional provision providing legislative immunity to individual actors was inapplicable to state legislative bodies for claims it violated constitutional mandate).

Section 9, Comments *d* and *e* and § 10, Comments *f* and *g* and the affiliated Reporters’ Notes to those Comments can be usefully consulted for elaboration on the scope and content of, and support for, these two immunities.

Comment g. Immunity for executive functions involving the “discretionary determination of important governmental policy.” With some frequency, a governmental employee makes a decision that is claimed to be discretionary and therefore immunized. The governmental entity’s immunity for harm resulting from that decision is the same as the employee’s. See, e.g., KAN. STAT. ANN. § 75-6104 (providing immunity to governmental entities and employees for claims “based upon the exercise or performance or the failure to exercise or perform a discretionary function”); MISS. CODE ANN. § 11-46-9 (providing immunity to governmental entity and its employees for claims based “upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a governmental entity or employee thereof”); OHIO REV. CODE ANN. § 2744.03(3) & (6) (providing discretionary-determination immunity to local governmental entities and their employees); *Montgomery v. City of Montgomery*, 732 So. 2d 305, 312 (Ala. Civ. App. 1999) (holding individual officers and municipality immune from suit based on officers’ discretionary determination to arrest the plaintiff); *Connor v. City of La Crescent*, 2011 WL 2175858, at *5 (Minn. Ct. App. 2011) (“Because the officers are entitled to official immunity from Connor’s tort claims, the doctrine of vicarious official immunity bars Connor’s claims against [the municipal defendant]”); see also *Lang v. State*, 622 N.W.2d 238, 240 (N.D. 2001) (“The State and its employees generally enjoy immunity from liability for discretionary acts.”); *Clark v. Dunn*, 465 S.E.2d 374, 381 (W. Va. 1995) (concluding that, because the governmental actor was entitled to discretionary-determination immunity, governmental entity was also immune from suit). But cf. *Lane v. City of Juneau*, 421 P.3d 83, 88 (Alaska 2018) (explaining that the scope of discretionary-determination immunity under municipal tort claims act is broader for employees than for municipalities).

The Reporters’ Notes to § 9, Comments *f* and *g* and § 10, Comments *h* and *i* can be usefully consulted for elaboration on the scope and content of, and support for, this immunity.

Comment h. Governmental actors acting outside the scope of employment or in a highly culpable fashion. Most immunity statutes applicable to governmental actors, other than those engaging in legislative or judicial functions, specify that immunity is limited to those “acting

within the scope of employment.” See, e.g., KY. REV. STAT. ANN. § 65.2005 (providing immunity to local governmental actors for claims “arising out of an act or omission occurring within the scope of his employment”); IND. CODE ANN. § 34-13-3-3 (providing immunity to “an employee acting within the scope of the employee’s employment”); VT. STAT. ANN. tit. 12, § 5602 (exempting from liability any “employee of the State acting within the scope of employment”). For other statutory language that serves the same “scope of employment” limit on governmental actor immunities, see, e.g., ALA. CODE § 11-47-24(a) (furnishing immunity for actions “arising out of the performance of his official duties”); ALASKA STAT. § 09.50.253(b) (furnishing immunity for acts “within the scope of the employee’s office or employment”); N.M. STAT. ANN. § 41-4-4 (“any public employee while acting within the scope of duty”); WIS. STAT. ANN. § 893.82 (providing immunity for claim based on “any act growing out of or committed in the course of the discharge of the officer’s, employee’s or agent’s duties”).

In determining whether a governmental actor’s tortious conduct occurred within the scope of employment, a statute may provide the rule to be employed. See TEX. CIV. PRAC. & REM. CODE ANN. § 101.001 (“‘Scope of employment’ means the performance for a governmental unit of the duties of an employee’s office or employment and includes being in or about the performance of a task lawfully assigned to an employee by competent authority.”).

However, the vast majority of states do not have particularized statutes. In the absence of a particularized statute, courts look to cases addressing the scope-of-employment inquiry for non-governmental employees and employers. See *Hennagan v. Dep’t of Highway Safety & Motor Vehicles*, 467 So. 2d 748, 750 (Fla. Dist. Ct. App. 1985) (“The ‘course and scope of employment’ test for liability of the private and the public employer are essentially the same.”); *Masters v. Murphy*, 176 N.E.3d 911, 919 (Ill. App. Ct. 2020) (quoting Restatement of the Law Second, Agency (AM. L. INST. 1958) in analyzing whether defendant was acting within the scope of governmental employment to determine whether immunity applied); *Bushong v. Williamson*, 790 N.E.2d 467, 473 (Ind. 2003) (referring to Restatement Second, Agency in explaining concept of scope of employment for governmental employee); *Kemezy v. Peters*, 622 N.E.2d 1296, 1298 (Ind. 1993) (assessing whether police officers who assaulted and battered plaintiff were acting within the scope of employment using ordinary rules of vicarious liability); *Alexander v. Walker*, 435 S.W.3d 789, 792 (Tex. 2014) (referring to Restatement of the Law Third, Agency § 7.07(2) (AM. L. INST. 2006) to determine scope of employment of governmental employee); see also *Neal v. Gatlin*, 111 Cal. Rptr. 117 (Ct. App. 1973) (“For the purpose of the [tort claims act], a public employee is acting in the course and scope of his employment ‘when he is engaged in work he was employed to perform or when the act is an incident to his duty and was performed for the benefit of his employer and not to serve his own purposes or conveniences.’”) (quoting *Burgdorf v. Funder*, 54 Cal. Rptr. 805 (Ct. App. 1966)).

General provisions on vicarious liability are contained in [Vicarious Liability] § 5 (Tentative Draft No. 4, 2025; forthcoming); Restatement of the Law Third, Agency § 7.07(2) (AM. L. INST. 2006).

“Scope of employment” limits are often absent from statutes providing judicial and legislative immunity. Those immunities have their own internal limiting guardrails in requiring governmental actors to engage in a *judicial or legislative function*. See, e.g., ME. REV. STAT. tit. 14, § 8111 (providing governmental actors immunity for “undertaking or failing to undertake any legislative or quasi-legislative act” and “undertaking or failing to undertake any judicial or quasi-judicial act”); MICH. COMP. LAWS ANN. § 691.1407(5) (explaining that judges and legislators “are immune from tort liability for injuries to persons or damages to property if he or she is acting within the scope of his or her judicial, legislative, or executive authority”); MINN. STAT. ANN. § 540.13 (“No member, officer, or employee of either branch of the legislature shall be liable in a civil action on account of any act done in pursuance of legislative duties.”); N.H. REV. STAT. ANN. § 541-B:19(a) (exempting from claims that can be made against the state “[a]ny claim which is based upon the exercise of a legislative or judicial function”).

Courts similarly explain the scope of common-law provided judicial or legislative immunity. See *Withers v. Schroeder*, 819 S.E.2d 49, 52 (Ga. 2018) (“There are two grounds on which a judge will be denied the absolute protection of judicial immunity: (1) committing an act that is nonjudicial in nature; or (2) acting in the ‘complete absence of all jurisdiction.’”) (quoting *Mireles v. Waco*, 502 U.S. 9 (1991)); *Grund v. Donegan*, 700 N.E.2d 157, 161 (Ill. App. Ct. 1998) (providing the same limits on judicial immunity as *Withers*); *Blanton v. Barrick*, 258 N.W.2d 306, 308 (Iowa 1977) (explaining that judicial immunity “applies even when the judge is accused of acting maliciously and corruptly”); *Palowsky v. Campbell*, 285 So. 3d 466, 467 (La. 2019) (holding judicial immunity did not apply to judges’ actions supervising and investigating alleged misconduct by the court’s law clerk as they were engaged in an administrative rather than a judicial function); *Pritchard v. Crouser*, 332 S.E.2d 611, 614 (W. Va. 1985) (“When acting in his judicial capacity a judge is immune from civil liability for any and all official acts.”).

For statutory language denying immunity for governmental actors whose conduct is highly culpable, see ALASKA STAT. § 09.50.253 (limiting immunity to acts “that do not constitute acting, or failing to act, with wilfull, reckless, or intentional misconduct, or with gross negligence or malice”); ARIZ. REV. STAT. ANN. § 12-820.02 (excluding from immunity an employee who “intended to cause injury or was grossly negligent”); ARK. STAT. ANN. § 13-142 (providing immunity “for acts or omissions, other than malicious acts or omissions”); COLO. REV. STAT. ANN. § 24-10-105 (limiting immunity when the governmental actor’s “act or omission was willful and wanton”); CONN. GEN. STAT. ANN. § 4-165(a) (providing immunity except when harm resulted from “wanton, reckless or malicious” behavior); DEL. CODE ANN. tit. 10, § 4001 (furnishing immunity so long as “act or omission complained of was done without gross or wanton negligence”); FLA. STAT. ANN. § 768.28 (9)(a) (furnishing immunity “unless such officer, employee, or agent acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property”); KY. REV. STAT. ANN. § 65.2005 (furnishing immunity unless “employee acted or failed to act because of fraud, malice, or corruption”); LA. STAT. ANN. § 9:2798.1 (withdrawing immunity for “acts or omissions which constitute criminal, fraudulent, malicious, intentional, willful, outrageous, reckless, or flagrant

misconduct”); W. VA. CODE ANN. § 29-12A-5(b) (“An employee of a political subdivision is immune from liability unless . . . [h]is or her acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner”).

Comment i. Suits against governmental actors in their “official capacity.” For states that adopt the principle described in this Comment, see, e.g., *Smith v. Brt*, 211 S.W.3d 485, 489 (Ark. 2005) (“A suit against the city’s official in his or her official capacity is not a suit against that person, but rather a suit against that official’s office.”); *Ex parte Pinkard*, 373 So. 3d 192, 199 (Ala. 2022) (stating that Alabama Constitution’s grant of state immunity “applies not only to suits against the State and its agencies, but also to ‘official capacity’ suits against State officers, employees, and agents” and explaining that this symmetry exists “because a suit against a State agent in his ‘official capacity’ is equivalent to a suit against the office itself”); *Mosby v. Moore*, 716 So. 2d 551, 557 (Miss. 1998) (“A suit against a public official in his official capacity is nothing more than a suit against the entity.”); *Suppes v. Curators of Univ. of Missouri*, 613 S.W.3d 836, 855 (Mo. Ct. App. 2020) (“Sovereign immunity, if not waived, bars suits against employees in their official capacity, as such suits are essentially direct claims against the state.”) (quoting *Betts-Lucas v. Hartmann*, 87 S.W.3d 310, 327 (Mo. Ct. App. 2002)); *Mullis v. Sechrest*, 495 S.E.2d 721, 725 (N.C. 1998) (declaring that “official-capacity suits are merely another way of pleading an action against the governmental entity”); *Franka v. Velasquez*, 332 S.W.3d 367, 382 (Tex. 2011) (observing that “a suit against a government employee in his official capacity is a suit against his government employer with one exception: an action alleging that the employee acted ultra vires”).

The North Carolina Supreme Court explained the process of determining whether plaintiff’s suit against a governmental actor is in the actor’s official or individual capacity when the plaintiff does not specify:

The crucial question for determining whether a defendant is sued in an individual or official capacity is the nature of the relief sought, not the nature of the act or omission alleged. If the plaintiff seeks an injunction requiring the defendant to take an action involving the exercise of a governmental power, the defendant is named in an official capacity. If money damages are sought, the court must ascertain whether the complaint indicates that the damages are sought from the government or from the pocket of the individual defendant. If the former, it is an official-capacity claim; if the latter, it is an individual-capacity claim; and if it is both, then the claims proceed in both capacities.

Meyer v. Walls, 489 S.E.2d 880, 887 (N.C. 1997).

For discussion of the parties who can be sued, the immunity that may apply, and the role of the Eleventh Amendment for federal claims against state and local governmental entities and actors, see 4 & 18A EUGENE MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* §§ 12:246 and 53:290 (2023 update); JOHN E. SANCHEZ & ROBERT D. KLAUSNER, *STATE AND LOCAL GOVERNMENT EMPLOYMENT LIABILITY* § 19:16 (2023 update); CHARLES ALAN WIGHT & ARTHUR MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 3524 (2024 update).

Comment j. The public-duty doctrine. As § 13, Comment *a*, which addresses the public-duty doctrine, explains: “The public-duty doctrine limits government tort liability. To a significant extent, the doctrine was unneeded when sovereign immunity broadly exempted governmental entities from tort liability. With the statutory abolition or modification of sovereign immunity, the public-duty doctrine has become more prominent in some, but not all, states.”

Comment k. Affirmative defense. For courts treating governmental actors' claim of immunity as an affirmative defense, see, e.g., *Reed v. White*, 103 N.E.3d 657, 660 (Ind. Ct. App. 2018) (observing that governmental immunity is an affirmative defense); *Smith v. Twp. of Holly*, 2015 WL 7370112, at *8 (Mich. Ct. App. 2015) (“A governmental employee must raise governmental immunity as an affirmative defense. . . .”) (quoting *Odom v. Wayne Co.*, 760 N.W.2d 217 (Mich. 2008)); *Loftin v. Morales*, 187 S.W.3d 533, 536 (Tex. App. 2005) (“Official immunity is an affirmative defense that protects government employees from personal liability.”).

Comment l. Conduct not tortious. See § 9, Comment *i* (Tentative Draft No. 1, 2022) (providing similarly for liability of state entities when they are not immune from suit); § 10, Comment *l* (providing similarly for liability of local governmental entities when they are not immune from suit); § 8, Comment *g* (Council Draft No. 7, 2024) (same for federal government immunity); Restatement Second, Torts § 895B, Comment *e* (AM. L. INST. 1979) (“The mere fact that a person has not been harmed by governmental action does not automatically mean that his damage was tortious.”).

Comment m. Indemnity for employee liability or costs of defense. For such statutes, see, e.g., KY. REV. STAT. ANN. § 65.2005; MINN. STAT. ANN. § 466.07; WYO. STAT. ANN. § 1-39-104 (b) and (c).

Comment n. Judge and jury. See § 9, Reporters' Note to Comment *k* (Tentative Draft No. 1, 2022); *id.* § 10, Reporters' Note to Comment *n*; see also *Margaris v. Genesee Cnty.*, 919 N.W.2d 659, 663 (Mich. Ct. App. 2018) (“This Court reviews de novo the applicability of governmental immunity as a question of law.”); *Ebin v. City of S. St. Paul*, No. 1999 WL 1057549, at *3 (Minn. Ct. App. 1999) (“Whether a municipality or its officials are protected by official immunity is a legal question that appellate courts review de novo.”).

§ 12.* Public-duty Doctrine

A state or local governmental entity and its employees, officers, and authorized agents, are not liable in tort:

(a) for conduct that exercises an executive function involving the discretionary determination of important governmental policy; or

* This Section will be inserted into coverage of immunities, in what is now denominated “Chapter 3. Governmental Entities' and Public Officials' and Employees' Immunities,” at the end of that Chapter. Although formally not an immunity, it functions similarly to one. At the same time, we will insert a cross-reference to this Section somewhere around § 7(b) LPEH, because this is an instance of withdrawal of duty for policy or principle.

(b) for failure to provide protective services to the public at large, unless:

(1) the governmental actor's conduct has created the risk, or

(2) a special relationship, as addressed in § 13, exists between the governmental actor and the injured person.

This public-duty exemption from liability shields the governmental actor from liability even in the absence of sovereign immunity or a statutory provision conferring immunity from liability.

Caveat: The black letter in this Section, which captures a doctrine typically dubbed the “public-duty doctrine,” has not been adopted as a common-law matter in a majority of jurisdictions. Whether this doctrine should exist and, if so, its scope is, in large part, a function of the state’s rules on sovereign immunity and governmental tort liability. In addition, there has been a modest movement to abolish the public-duty doctrine. Courts abolishing the doctrine do so, sometimes, because they determine the doctrine is superfluous in light of an existing immunity that already limits governmental tort liability in ways similar to the public-duty doctrine. In other states, the move to abolish the doctrine is rooted in a sense that distinguishing public duties from private duties is difficult and can produce confusion. Nevertheless, a significant minority of states continue to recognize the public-duty doctrine, and, in those states, the doctrine is routinely invoked, especially in those jurisdictions with less robust governmental immunities. Accordingly, this Section and § 13, which addresses “special relationships” for purposes of Subsection (b)(2) of this Section, constitute rules on these matters for jurisdictions that employ them. However, this Restatement takes no position on whether the rules stated in these two Sections should be adopted or maintained.

Comment:

a. History and scope.

b. Terminology: this Section’s use of the terms “sovereign immunity” and “governmental actors.”

c. Kinds of tort suits affected.

d. Relationship to governmental immunities.

e. The public-duty doctrine applies to state and local governmental entities and their employees, officers, and authorized agents (collectively, “governmental actors”).

f. Rationale and the role of the “special relationship” exception.

g. The relationship between Subsection (a) and Subsection (b).

- 1 *h. No duty for executive decisions involving the “discretionary determination of important*
- 2 *governmental policy.”*
- 3 *i. What constitutes a “discretionary determination of important governmental policy.”*
- 4 *j. No duty for protective service provided to the public generally.*
- 5 *k. Government services furnished to less than the entire community.*
- 6 *l. The distinction between nonfeasance and misfeasance.*
- 7 *m. Natural risks, third-party risks, and conduct that increases the magnitude of natural or third-*
- 8 *party risks.*
- 9 *n. Subsection (b) and premises liability.*
- 10 *o. Statutes affecting the public-duty doctrine.*
- 11 *p. Conduct not tortious.*
- 12 *q. Takings.*
- 13 *r. Public-duty doctrine procedurally.*
- 14 *s. Judge and jury.*

15 *a. History and scope.* The public-duty doctrine limits government tort liability. To a
16 significant extent, the doctrine was unneeded when sovereign immunity broadly exempted
17 governmental entities from tort liability. With the statutory abolition or modification of sovereign
18 immunity, the public-duty doctrine has become more prominent in some, but not all, states.

19 The first and Second Restatements had no provisions addressing the public-duty doctrine.
20 Some projects of the Third Restatement of Torts have supplied limited coverage of this material.
21 Namely, the Restatement Third of Torts: Liability for Physical and Emotional Harm § 7, Comment
22 *g* discusses discretionary determinations, and it addresses limits to the affirmative duties of public
23 entities in § 37, Comment *i*. This Section and § 13 [special relationships] elaborate on those
24 provisions to more fully flesh out the public-duty doctrine, explain its relationship with
25 governmental immunity, and distinguish it from the ordinary affirmative duties that would apply
26 if the governmental actor were, instead, a private person.

27 Sovereign immunity for state and local governments was addressed in §§ 895B and 895C
28 of the Second Restatement of Torts. The Third Restatement of Torts addresses sovereign immunity
29 for state and local governments and their employees, officers, and authorized agents in this Chapter
30 3. See §§ 9 & 10.

31 It must be emphasized at the outset that the lay of the land for the public-duty doctrine
32 across the United States is quite fractured. As one leading treatise explains: “The American rules
33 governing the tort liability of municipal corporations make a curious patchwork of immunity and

responsibility.” 5 FOWLER HARPER, FLEMING JAMES, AND OSCAR GRAY, HARPER, JAMES, AND GRAY ON TORTS § 29.6, at 737 (rev. 3d ed. 2008). In part, this variation is due to inconsistency in how states have adopted or waived sovereign immunity. As Comment *d* explains, there is significant interplay between the two doctrines. Today, approximately 20 states have a common-law public-duty doctrine, although, in those states, the scope of the doctrine varies considerably. This Section is addressed to those states and to the eight additional states that, at the time of this Restatement, have not yet decided whether to adopt such a rule. As the Caveat above notes, this Restatement sets forth provisions tracing the contours of the public-duty doctrine, but, in so doing, takes no position on whether the rules stated in this Section should be adopted or maintained.

b. Terminology: this Section's use of the terms “sovereign immunity” and “governmental actors.” Sovereign immunity formally extends only to state entities. Nevertheless, local governmental entities have a history of protection from tort liability sometimes (incorrectly) attributed to sovereign immunity and sometimes as the result of legislation that specifically extends state sovereign immunity to local units. A few states classify counties as part of the state. For ease of exposition, this Section's references to “sovereign immunity” include all such limitations on the tort liability of governmental actors. For elaboration on state immunity, see Restatement Third, Torts: Concluding Provisions (now known as Restatement Third, Torts: Miscellaneous Provisions), Chapter 3: Governmental Entities and Public Officials and Employees Immunities § 9 (Tentative Draft No. 1, 2022). For elaboration on local governmental units' immunity, see *id.* § 10.

Likewise, as the black letter makes clear, and as Comment *e* emphasizes, this Section applies regardless of whether the defendant is a state, a local governmental entity—or an employee, officer, or authorized agent of the state or local governmental entity. For ease of exposition, all of these entities and individuals are referred to as “governmental actors” below.

Whether an entity is a governmental one is a matter of state law not addressed in this Restatement.

c. Kinds of tort suits affected. The public-duty doctrine applies to suits asserting tort claims that involve bodily injury or property damage. It does not apply to intentional torts. Only very limited authority addresses whether the public-duty doctrine applies to suits that involve pure economic harm, defamation, or a loss of privacy. Given this paucity of authority, this Restatement takes no position on the public-duty doctrine's application to those claims.

1 *d. Relationship to governmental immunities.* States are sovereigns and, as such, are immune
2 from tort liability unless that immunity has been abrogated or modified by legislation or court
3 decision. Most states have, at least partially, modified sovereign immunity and permitted some tort
4 actions to proceed against governmental entities. Where sovereign immunity bars a suit, the public-
5 duty doctrine has no role as the black letter of this Section recognizes.

6 A number of states retain aspects of immunity for governmental actors. Many of those states
7 also have common-law public-duty doctrines, although a few states have decided that they need
8 only one source of protection for governmental actors. In general, states with robust immunity
9 provisions find less need for the public-duty doctrine; the converse is also true. Justification for the
10 public-duty doctrine overlaps substantially with the justifications that exist today for immunizing
11 government actors (aside from the formalism that no suit can be entertained against the sovereign).

12 Structurally, the public-duty doctrine negates the existence of a necessary element of a
13 *prima facie* claim: a duty of care. See Restatement Third, Torts: Liability for Physical and
14 Emotional Harm § 7(b) (addressing the withdrawal of duty). By contrast, in the majority of states,
15 immunity is an affirmative defense that must be raised in a procedurally appropriate manner and
16 proved by the government entity asserting its entitlement to immunity. See § 9, Comment *j* & § 10,
17 Comment *m*.

18 In states that retain both immunity and the public-duty doctrine, courts address immunity
19 and public duty in two steps. If the governmental actor is immune from suit, a court need not
20 inquire whether the public-duty doctrine *also* exempts the governmental actor from tort liability.
21 If, however, the extant immunity doctrine does not exempt the governmental actor from liability
22 for the actor's alleged tortious action, the public-duty doctrine comes to the fore. However, save
23 in jurisdictions in which immunity is subject-matter jurisdictional, there is no need to address
24 immunity first. If the public-duty doctrine can more efficiently resolve the case, there is no
25 impediment to a court initially addressing whether the public-duty doctrine shields the
26 governmental actor from liability.

27 *e. The public-duty doctrine applies to state and local governmental entities and their*
28 *employees, officers, and authorized agents (collectively, “governmental actors”).* The public-duty
29 doctrine is applicable to all governmental units, entities and their employees, authorized agents,
30 and officers.

f. Rationale and the role of the “special relationship” exception. The public-duty doctrine arises from a structural facet of modern government and the wide array of services contemporary governmental actors provide. First, Subsection (a) reflects the concern that the judicial branch give appropriate deference to a coordinate branch of government when authorized executive action involves the discretionary determination of important government policy. In addition, three related grounds support the protection of Subsection (a): (1) the need to preserve the independent and uncompromised judgment of executive officers in their respective decisionmaking processes; (2) separation-of-powers principles, including the need to limit judicial oversight of, or meddling with, coequal branches of government; and (3) a belief that it would be practically difficult and unwieldy for courts to investigate and evaluate the wisdom or reasonableness of high-level executive decisions. As the Second Restatement summarized when addressing governmental immunity: “The purpose of the immunity is to insure that courts refuse to pass judgment on policy decisions in the province of coordinate branches of government if such a policy decision, consciously balancing risks and advantages, took place.” Restatement Second, Torts § 895B, Comment *d* (quotation marks and alterations omitted).

Subsection (b) addresses a different concern. Much governmental activity consists of protecting the public from risks that arise from the vicissitudes of life. Police officers and firefighters are prominent examples, but building inspectors, social workers, first responders, and other governmental actors devote a good deal of time protecting community members from various hazards. Describing these risks as arising from the vicissitudes of life emphasizes that the government has had no role in *creating* those risks; the government’s only involvement is providing services that undertake to eliminate or ameliorate those risks. The scope of such governmental protective services is quite extensive and addresses, in some instances, potentially catastrophic harm. If courts subjected the government to tort liability every time governmental actors tried to provide protective services and came up short, the extent of the government’s liability could be vast and indeterminate. Moreover, the potential for such liability could skew executive decisionmaking from choices that best serve the community.

The “special-relationship” doctrine, see § 13, which authorizes suit by limited members of the public—ones with a particular connection to the government—balances, and modestly softens, the public-duty doctrine. It creates an exception to the public-duty doctrine to permit suit against government actors for their negligence in undertaking to protect when—and only when—there is

a relationship that limits the potential scope of the governmental actor's liability, and, given that relationship, it is fair and just to single out that individual or group of individuals for special treatment. This "special-relationship" rule employed to permit governmental liability in certain limited cases must be distinguished from the more general special relationships addressed in Restatement Third of Torts: Liability for Physical and Emotional Harm §§ 40 and 41. Sections 40 and 41 provide a basis for affirmative duties for private parties based on special relationships.

When justifying the public-duty doctrine, courts often say: "Because the government owes a duty to the public, it owes a duty to no one." The rationale above provides a better justification for the rule than the "duty to none" conclusion.

g. The relationship between Subsection (a) and Subsection (b). The public-duty doctrine has two independent and independently sufficient bases for eliminating a duty of care for governmental actors. These separate bases are reflected in Subsections (a) and (b).

If the governmental actor makes a discretionary determination within the scope of Subsection (a), it has no tort duty in so doing, regardless of whether the determination relates to the public at large, a class of individuals, or a single person. Additionally, pursuant to Subsection (b), and subject to § 13 (addressing special relationships), a governmental actor owes no duty of reasonable care to eliminate or reduce the risks that the actor has played no role in creating. Removal of the duty pursuant to Subsection (b) does not depend on whether the government exercises discretion in determining how to act.

Illustration:

1. Duane Knock, who had polio as a child and was required to wear leg braces as a result, takes and passes a driver's education course at River Run High School. Pursuant to state policy, the driver's education instructor is delegated discretion to determine whether to issue a driver's license and whether to impose restrictions for those who have disabilities. Knock's instructor issued an unrestricted certificate enabling Knock to obtain a license without any restrictions. After driving for a month, Knock strikes Georgie, a child, injuring him. Georgie's parents, on his behalf, sue the State Department of Motor Vehicles for its policy delegating the determination of whether and under what circumstance to enable a disabled driver to obtain a license to driver's education instructors. They also sue a State Trooper who observed Knock enter his car with leg braces and failed to determine whether Knock could drive the car safely. The Department of Motor Vehicles is protected from tort

1 liability by the public-duty doctrine reflected in Subsection (a), as the determination of who
2 best can assess a disabled person's ability to drive a car is a discretionary determination.
3 See Comment *i* (addressing what constitutes "a discretionary determination of important
4 governmental policy"). The State Trooper is protected by the public-duty doctrine reflected
5 in Subsection (b) because the parents' claim seeks to impose liability for failing to protect
6 the public from the risks of Knock's driving limitations. See Comments *j* and *k* (addressing
7 what constitutes "protective service provided to the public generally").

8 *h. No duty for executive decisions involving the "discretionary determination of important*
9 *governmental policy."* Pursuant to Subsection (a), a governmental actor has no duty with regard to
10 executive decisions involving a discretionary determination of important government policy. This
11 lack of duty may be co-extensive or largely overlap with an immunity that exists under §§ 9 or 10,
12 but where those immunities do not exist or are inapplicable, this Section prevents liability from
13 being imposed. The conduct that involves, and does not involve, the "discretionary determination
14 that results in physical harm to a member of the public" is further delineated below in Comment *i*.

15 *i. What constitutes a "discretionary determination of important governmental policy."* To
16 justify the invocation of Subsection (a) of the public-duty doctrine, the governmental actor must
17 be authorized by law to exercise discretion with regard to the allegedly tortious act or conduct. In
18 addition, the governmental actor must make a decision in the *deliberate* exercise of the discretion
19 afforded by law. In the absence of sufficient evidence to prove that the decision was made by a
20 person or body in the *deliberate* exercise of discretion, the decision is not subject to the removal
21 of duty provided in Subsection (a).

22 Ministerial actions, required by law to be performed, are not discretionary nor are the
23 performance of set tasks, or the implementation of previously established policies. Furthermore,
24 the discretionary decision must be with regard to an *important* aspect of economic, social, or
25 political policy. Performance of routine, mundane, or everyday matters does not constitute the
26 determination of *important* government policy even if those matters provide some measure of
27 discretion. Thus, an action is not protected by Subsection (a) if it, inter alia, involves the execution
28 of a set task; concerns routine, mundane, or everyday matters; involves the implementation of
29 previously established policies; or is sufficiently constrained by existing policies or applicable law
30 that no meaningful discretion exists for the governmental actor taking such action.

Beyond that (i.e., beyond the prerequisite of “deliberate exercise of discretion”) and aside from the other delineated conduct), four factors help to identify conduct that qualifies for protection by the public-duty doctrine from that which does not: (1) the extent to which the act involves bona fide policymaking, such that it requires a state employee, authorized agent, or governmental entity to exercise policy judgment in choosing among alternative courses of action based upon a consideration of social, political, or economic factors; (2) whether the challenged act or omission was a policy decision reached by consciously balancing risks and benefits; (3) where in the governmental hierarchy the decision was made—and whether the decision was made by a party entitled to exercise substantial governmental discretion; and (4) the likely consequences of withholding liability—whether, to borrow from the Second Restatement addressing immunity, judicial review of the challenged act would cause the court to second-guess high-level governmental decisions “better left to the administrative officials.” Restatement Second, Torts § 895B, Comment *d*. When factors (1) through (4) do not tilt toward a finding that the action involves the discretionary determination of important governmental policy, the action is not entitled to the protection of Subsection (a).

Illustrations:

2. A playground is being constructed at a state park. As plans proceed, the park Superintendent, Superintendent Lovelace, considers whether to surface the playground area with a soft, pliable ground covering, so that if children fall off playground equipment, they will be less likely to sustain serious injuries. Superintendent Lovelace evaluates the cost of this covering and decides against the purchase after concluding that there is not sufficient room in the park’s annual budget; to buy the pliable covering would divert funds from other, more pressing, priorities, such as trash removal, parking enforcement, and toilet paper for the park’s bathrooms. Thus, the playground is constructed with a cheaper and firmer synthetic flooring, rather than a safer and more pliable, surface. Two years later, Trayvon, a first grader, falls and is injured on the park playground. In the ensuing lawsuit against the state and Superintendent Lovelace, Trayvon alleges that, if the playground had been covered in the pliable surface, Trayvon’s injury would have been averted. Pursuant to Subsection (a), Superintendent Lovelace’s decision regarding the playground covering involved the discretionary determination of important governmental policy because it involved a high-level decision deliberately and consciously balancing safety as against other governmental

1 priorities. The state and Superintendent Lovelace are, consequently, not liable, because the
2 public-duty doctrine negates the existence of a duty for them. This Illustration is identical
3 to Illustration 12 in § 9, which concludes that the state is immune from liability.

4 3. McGrady is driving on State Route 11 when a rockfall occurs, and a boulder
5 strikes his vehicle, causing serious injuries. Discovery reveals that, three years prior, the
6 state had implemented a three-tier Rockfall Hazard Rating System. Pursuant to this System,
7 Class A sites were deemed the most dangerous with the greatest potential for deadly
8 rockfalls, Class B sites were less dangerous, and Class C sites posed virtually no concerns.
9 In reliance on the Rockfall Hazard Rating System report, the State Department of
10 Transportation pledged it would prioritize adding netting to shore up the safety of Class A
11 sites first—and would turn to Class B sites immediately thereafter. (It could not address all
12 sites simultaneously, given budgetary limits, human-resource constraints, and the need not
13 to simultaneously impede all traffic, which would create hazardous traffic jams.) Given this
14 prioritization, by the time of the accident, the location on State Route 11 where McGrady
15 was injured (which had been classified as a Class B site) had not yet been fortified. The
16 Department of Transportation's decision regarding rockfall protection involved the
17 discretionary determination of important governmental policy because it was a high-level
18 decision that entailed the conscious and deliberate prioritizing of rockfall prevention efforts
19 in light of existing governmental resources. The state is, consequently, not liable because
20 the public-duty doctrine negates the existence of a duty for the state. This Illustration is
21 identical to Illustration 13 in § 9, which concludes that the state is immune from liability.

22 4. Same facts as Illustration 3, except that now, McGrady shows that this particular
23 spot was omitted from the Rockfall Hazard Rating System because it was overlooked.
24 There was no policymaking in failing to rate the site; there was no conscious balancing of
25 risks and benefits; and judicial review of the (non-)decision would not cause the court to
26 second-guess a high-level governmental decision. Consequently, the state is not protected
27 by the public-duty doctrine and is subject to liability to McGrady. Even so, McGrady might
28 still fail in his lawsuit, as explained in Comment *p*. This Illustration is identical to
29 Illustration 14 in § 9, which concludes that the state is not entitled to sovereign immunity.

30 5. Same facts as Illustration 3, except that now McGrady shows that the Rockfall
31 Hazard Rating System had rated this spot along State Route 11 as a Class A site—the most

1 dangerous with the highest potential for deadly rock falls. Yet a mid-level administrator
2 within the State Department of Transportation had subsequently eyed the spot and thought
3 it looked “very secure.” Accordingly, no netting had been installed. Because the challenged
4 action involved a mid-level administrator’s mis-implementation of a previously established
5 policy, the state and the administrator are not protected by the public-duty doctrine and are
6 subject to liability to McGrady. Even so, McGrady might still fail in his lawsuit, as
7 explained in Comment *p*. This Illustration is identical to Illustration 15 in § 9, which
8 concludes that the state is not entitled to sovereign immunity.

9 6. Same facts as Illustration 3, except that now the site is classified as a Class A site,
10 and the Class A classification occurred three years prior to McGrady’s accident. Discovery
11 reveals that, despite the Class A classification, in the ensuing years, no remedial action had
12 been taken to shore up this location—and the state presents no evidence explaining the
13 reason for the inactivity. Because there was no apparent bona fide policymaking behind the
14 delay, the policy (non-)decision was not reached by deliberately and consciously balancing
15 risks and benefits, and judicial review of the (non-)decision would not cause the court to
16 second-guess a high-level governmental decision, the state is not protected by the public-
17 duty doctrine and is subject to liability to McGrady. Even so, McGrady might still fail in
18 his lawsuit, as explained in Comment *p*. This Illustration is identical to Illustration 16 in § 9,
19 which concludes that the state is not entitled to sovereign immunity.

20 7. In 1978, State University constructs metal bleachers at its sports field. Over time,
21 the bleachers deteriorate. One day in 2023, a college student, Kristin, climbs the bleachers
22 when a step gives way. She falls, sustaining an injury. In her ensuing suit, she alleges
23 negligent maintenance and failure to warn of a dangerous condition and proves that,
24 although a university janitor knew the bleachers were rickety and unstable, higher-ups did
25 not know that the bleachers were in a dangerous condition. Because there was no high-
26 level policy judgment, nor any policy decision consciously and deliberately balancing risks
27 and benefits, State University is not protected by the public-duty doctrine and is subject to
28 liability to Kristin. Even so, Kristin might still fail in her lawsuit, as explained in Comment
29 *p*. This Illustration is identical to Illustration 17 in § 9, which concludes that the state is not
30 entitled to sovereign immunity.

1 As the Second Restatement of Torts aptly recognized, the determination of whether an act
2 involves—or does not involve—the discretionary determination of important government policy
3 is complex and fact-dependent, and, regrettably, existing case law applies facially similar standards
4 in different—and sometimes hard-to-justify—ways. Recognizing this complexity, to echo the
5 Second Restatement: “The language used in stating the distinction expresses a standard rather than
6 a precise rule and does little more than to offer guidelines for a court, directing its channels of
7 thought in approaching the problem. It is not to be expected that courts in all jurisdictions will
8 reach full agreement in applying the standard to specific administrative functions.” Restatement
9 Second, Torts § 895B, Comment *d*.

10 *j. No duty for protective service provided to the public generally.* Pursuant to Subsection
11 (b), a governmental actor owes no duty in the provision of protective services intended for the
12 community in general. Unlike Subsection (a), which requires a deliberate choice by a government
13 actor, Subsection (b) does not depend on conscious decisionmaking. Thus, in Illustration 8 below,
14 even if the dispatcher never made a conscious determination, the dispatcher is nevertheless
15 shielded from liability.

16 **Illustrations:**

17 8. Linda’s boyfriend Burton becomes highly agitated when she seeks to break up
18 with him. He warns her that if she leaves him he will take actions against her so that “no
19 one else will want her.” Terrified, Linda seeks police protection from the city of New Pork,
20 although the dispatcher who receives Linda’s call fails to notify the appropriate officer. As
21 a consequence of the dispatcher’s failure, no officer learns of Burton’s threat or ever
22 consciously decides whether to provide Linda protection. Burton follows through, hiring a
23 goon to throw lye in Linda’s face, which disfigures and partially blinds her. Neither New
24 Pork nor the dispatcher is liable to Linda for the failure to provide police protection because
25 neither created the risk reflected in the vicious attack on her, and protection from criminal
26 battery is provided to the community at large. Consequently, the city owed Linda no duty
27 pursuant to Subsection (b).

28 9. Due to a clerical error by Jonesy, a probation officer for Four Seasons County,
29 Bruno is not picked up for a serious probation violation. Shortly thereafter, Bruno assaults
30 and batters Spiros. Based on Subsection (b), Jonesy and Four Seasons County do not have
31 a duty to Spiros, and they are not liable to Spiros for his injuries.

1 *k. Government services furnished to less than the entire community.* Many governmental
2 protective services are provided to the entirety of the community. However, in some instances, a
3 governmental entity may furnish a protective service more narrowly, such that the service benefits
4 only particular individuals. Thus, the fire department may inspect a specific business for fire
5 hazards or a residential building inspector may direct a builder to correct electrical wiring that was
6 installed improperly in a particular home. While these services are specific to an individual
7 business and homeowner, they nevertheless emerge from the more general services offered by the
8 fire department and building department. Accordingly, pursuant to Subsection (b), absent a special
9 relationship (as set forth in § 13), the governmental actor still does not owe a duty to the business
10 or homeowner.

11 **Illustrations:**

12 10. Mike, an inebriated pedestrian, can barely put one foot in front of the other.
13 Nora, a police officer, sees Mike stumbling and inquires if he would like assistance. Mike
14 mumbles something unintelligible—but, before she can inquire or furnish Mike further
15 assistance, Nora is called away by other police business. Without Nora's support, Mike
16 loses his balance, falls, and suffers a head injury. He subsequently sues Nora and the police
17 department alleging that Nora was negligent in leaving him alone, given his condition.
18 Pursuant to Subsection (b), unless the court finds that a special relationship exists per § 13,
19 Nora and the police department are not liable to Mike based on the public-duty doctrine,
20 notwithstanding the fact that Nora offered protective services to Mike alone. The police
21 department and its officers generally offer assistance to those who are sufficiently
22 inebriated in public such that they pose a risk to themselves (and perhaps others).

23 11. Taylor Park Condominium Association suffers serious water damage during a
24 storm. Taylor sues, inter alia, the building inspector for negligence in enforcing the city's
25 building code. The building inspector had inspected the Taylor Park Condo six months
26 before the storm and determined that the newly constructed property complied with the
27 city's building code when, in fact, the contractor's work was deficient in certain respects.
28 Notwithstanding the building inspector's lapse, unless the court finds that a special
29 relationship exists per § 13, the inspector is not liable for the water damage because,
30 pursuant to Subsection (b), the public-duty doctrine shields the inspector from liability.

1 *l. The distinction between nonfeasance and misfeasance.* Subsection (b) is limited to
2 instances of governmental nonfeasance as opposed to misfeasance. The essential difference
3 between misfeasance and nonfeasance is whether the defendant (here, a governmental actor) has
4 contributed to the creation of a risk that results in harm or whether the defendant played no role in
5 the existence of the risk that caused harm.

6 **Illustrations:**

7 12. While driving a city refuse-disposal truck, Russell nods off, crosses the
8 centerline, and crashes into Melanie, injuring her. In Melanie's suit against Russell and his
9 municipal employer, the public-duty doctrine plays no role. Per Subsection (b)(1), by
10 driving on the wrong side of the road, Russell created the risk that resulted in harm to
11 Melanie; thus, Russell injured Melanie via an act of misfeasance, not nonfeasance. And,
12 per Subsection (a), whether to drive on the right or wrong side of the road is not a
13 discretionary determination involving important governmental policy.

14 13. The city of Livingston constructs a storm-water disposal system. The system is
15 designed properly, but a city worker, deviating from the approved plans, botches the
16 system's construction. As a consequence of that failure, after a heavy rain, Ewald's home
17 floods. Despite the fact that the disposal system was for the public generally, in Ewald's suit
18 against Livingston, the public-duty doctrine would play no role because, per Subsection
19 (b)(1), the city worker's negligent performance produced the risk of Ewald's home flooding;
20 thus, Ewald's home was damaged because of the city worker's misfeasance, not
21 nonfeasance. Likewise, per Subsection (a), the city worker's failure to follow the plans does
22 not constitute a discretionary determination involving important governmental policy.

23 That an actor's negligence stems from an omission as opposed to an affirmative act does
24 not determine whether the actor's *conduct* created the risk. As Restatement Third of Torts:
25 Liability for Physical and Emotional Harm § 37, Comment *c* explains:

26 Misfeasance and nonfeasance have a long history as concepts used to explain the
27 distinction between affirmatively creating risk and merely failing to prevent harm.
28 However, this distinction can be misleading. The proper question is not whether an
29 actor's failure to exercise reasonable care entails the commission or omission of a
30 specific act. Instead, it is whether the actor's entire conduct created a risk of harm.
31 For example, a failure to employ an automobile's brakes or a failure to warn about

1 a latent danger in one's product is not a case of nonfeasance governed by the rules
2 in this Chapter [addressing affirmative duties], because in these cases the entirety
3 of the actor's conduct (driving an automobile or selling a product) created a risk of
4 harm. This is so even though the specific conduct alleged to be a breach of the duty
5 of reasonable care was itself an omission.

6 **Illustrations:**

7 14. While on duty and driving her cruiser on routine patrol, Officer Bradshaw
8 approaches an intersection with a red light and neglects to apply the brakes of her vehicle.
9 Consequently, Bradshaw's cruiser crashes into Colby, a pedestrian who was crossing the
10 street with the light. Colby sues the city and Bradshaw for her injuries. Although the
11 specific negligent act alleged by Bradshaw involved a failure to act—a failure to apply the
12 cruiser's brakes—this is a case of misfeasance because Bradshaw's *conduct* in driving her
13 cruiser created the risk that produced Colby's injury. The public-duty doctrine plays no
14 role in Colby's lawsuit because, per Subsection (b)(1), Bradshaw created the risk that
15 resulted in harm to Colby, and per Subsection (a), stopping for red lights at an intersection
16 is not a discretionary determination involving important governmental policy.

17 15. Same facts as Illustration 14, except that, today, Officer Bradshaw is observing
18 traffic crossing the Gotham bridge while finishing her coffee and bear claw. Bradshaw sees
19 Dmitri driving both erratically and at a high speed across the bridge. Because she had still
20 not finished her breakfast repast, Bradshaw decides not to pursue and stop Dmitri. Seconds
21 later, Dmitri crashes into Colby. Because Bradshaw did not contribute to the existence of
22 the risk posed by Dmitri's substandard driving, Subsection (b) applies: the public-duty
23 doctrine denies Bradshaw owing any duty, and she and the city are not liable to Colby for
24 her injuries.

25 16. Same facts as Illustration 15, except that, today, Officer Bradshaw has finished
26 her coffee and bear claw and stops a car being driven erratically. Officer Bradshaw quickly
27 determines that the driver, Alberto, is intoxicated. Yet, rather than arresting Alberto or
28 testing Miguel, Alberto's passenger (to assess his blood-alcohol level), Officer Bradshaw
29 simply directs Miguel to take the wheel and drive home. In so doing, Officer Bradshaw
30 violates police department policy; in this situation, the policy, if followed, would have
31 resulted in Alberto's arrest and a test to assess Miguel's sobriety. Once behind the wheel,

1 Miguel drives off the road, resulting in injuries to Alberto and himself. In their suit against
2 Bradshaw, Subsection (b) is inapplicable; Bradshaw's direction to Miguel created a risk
3 that resulted in his and Alberto's harm, and Officer Bradshaw does not have a special
4 relationship with Miguel. Subsection (a) is similarly inapplicable. Given the police
5 department policy, Bradshaw had no discretion about how to handle the situation once she
6 determined Alberto was intoxicated. Accordingly, the public-duty doctrine plays no role in
7 Alberto and Miguel's lawsuit against Bradshaw and her employer.

8 17. Same facts as Illustration 16, except that Officer Bradshaw handcuffs Alberto
9 and places him in the backseat of her cruiser to transport him to the local jail. During the
10 trip, Bradshaw pulls over when she observes a car stopped in the breakdown lane of the
11 highway. Violating police department policy, Bradshaw leaves the keys in her cruiser when
12 exiting to talk to the driver of the disabled vehicle. Alberto manages to extricate himself
13 and takes off in Bradshaw's vehicle driving 25 M.P.H. over the speed limit, resulting in his
14 crashing into Pulliam. The public-duty doctrine is not applicable in Pulliam's suit against
15 Bradshaw and her employer. Subsection (a) is inapplicable for two reasons: (1) Bradshaw
16 had no discretion to leave the keys in her car because police policy required officers to
17 remove keys from their cruiser when exiting, and (2) whether to remove keys from a police
18 cruiser is not a discretionary determination of important government policy. Subsection (b)
19 is inapplicable because Bradshaw's decision to leave the keys in her car created a risk that
20 resulted in the harm Pulliam suffered, and Officer Bradshaw did not have a special
21 relationship with Pulliam.

22 Sometimes, courts analyze cases similar to Illustration 17 as involving nonfeasance rather
23 than misfeasance because Alberto engaged in highly culpable behavior that led to Pulliam's injury.
24 Relying on § 315 of the Restatement Second of Torts, courts observe that, absent a special
25 relationship, an actor has no duty to control third parties. Section 315, however, must be understood
26 to address only an affirmative duty to control third parties. It does not address the ordinary duty of
27 reasonable care with regard to conduct that provides an occasion for a third party to cause harm.
28 See Restatement Third, Torts: Liability for Physical and Emotional Harm § 37, Comment *d*.

29 *m. Natural risks, third-party risks, and conduct that increases the magnitude of natural or*
30 *third-party risks.* As is the case for private parties, see *id.*, Subsection (b) applies to all risks of
31 legally cognizable harm. It applies to risks resulting from natural forces, such as the threat to a

1 swimmer who is caught in a riptide or a skier who is buried in an avalanche. In both cases,
2 governmental actors may provide services designed to prevent or ameliorate the consequences of
3 those risks, but, pursuant to Subsection (b), they have no tort duty to do so. Subsection (b) also
4 applies to risks that result from the conduct of a third person, whether innocent, negligent, or
5 intentional, so long as, as explained in Comment *l*, the government played no role in contributing
6 to the risk posed by the third party's conduct. Thus, absent a special relationship (as provided in
7 § 13), a governmental actor owes no duty of care to a member of the public at risk because a
8 dangerous individual has committed assaults in the area and remains at loose.

9 *n. Subsection (b) and premises liability.* Because most, although not quite all, risks to which
10 entrants on land are exposed are created by the land possessor, Subsection (b) is inapplicable to
11 tort claims against governmental actors by those injured on land owned or controlled by the
12 government. When a plaintiff is injured on land owned or controlled by the government,
13 Subsection (a) may still shield the government actor from liability. See, e.g., Illustration 2 (finding
14 that the public-duty doctrine shielded the governmental actor from liability, where the risky
15 condition of a state park was a product of a discretionary determination of important governmental
16 policy because, in designing the playground, Superintendent Lovelace deliberately and
17 consciously balanced safety as against other governmental priorities).

18 *o. Statutes affecting the public-duty doctrine.* Statutes may play several roles with regard
19 to the existence *vel non* of the public-duty doctrine and the determination of whether it applies in
20 a given case. First, a statute may provide a legislative version of the public-duty doctrine that
21 displaces the common-law one. When such a statute exists, of course it controls. Second, a statute
22 may withdraw the existence of the public-duty doctrine, perhaps accompanied by adoption of a
23 tort claims act or other provision for immunity from some tort claims. Again, when such a statute
24 exists, it controls, notwithstanding this Section. Third, where the public-duty doctrine exists, a
25 statute may command or specify the action a governmental actor must take in a given situation. In
26 such an instance, no discretion exists, and Subsection (a) is inapplicable. See Illustration 16.
27 Fourth, a statute may empower a governmental actor to engage in certain activities. Such a statute
28 does not, in the abstract, speak to the availability of the public-duty doctrine when the government
29 actor engages in those activities, although the statute may impose conditions that affect whether
30 Subsection (a) applies. Fifth and finally, a statute may single out a specified class of the community
31 for special protection that affects whether a special relationship exists under § 13.

1 *p. Conduct not tortious.* Even when the public-duty doctrine does not bar a tort claim against
2 the government, the governmental actor may still not be liable to a person harmed by the actor's
3 conduct. As the Second Restatement succinctly put it: "The mere fact that a person has been harmed
4 by governmental action does not automatically mean that his damage was tortious." Restatement
5 Second, Torts § 895B, Comment *e*. Like other litigants, plaintiffs suing a governmental actor must
6 still prove all the elements of their prima facie case, including establishing that defendant owes
7 plaintiff a duty of care. Then, even if a plaintiff proves all the elements of the prima facie case, the
8 plaintiff's recovery may be reduced (or eliminated in modified comparative responsibility
9 jurisdictions) because of their own fault or the existence of another valid affirmative defense.

10 *q. Takings.* The U.S. Constitution and almost all state constitutions prohibit the government's
11 taking of private property without compensation. See U.S. CONST. amend. V; e.g., MASS. CONST. pt.
12 I, art. X. Some of those state constitutions include *damaging* property in addition to taking it. Claims
13 based on those constitutional provisions are not addressed in this Section or Restatement.

14 *r. Public-duty doctrine procedurally.* As explained above in Comment *d*, when the public-
15 duty doctrine applies, the doctrine is not an affirmative defense. Instead, the doctrine negates the
16 governmental actor's duty of care to the plaintiff. Accordingly, as is typical with duty in litigation
17 between private parties, the defendant (here, the governmental actor) has the procedural obligation
18 to raise the issue of whether the public-duty doctrine applies to shield the defendant from liability.
19 See Restatement Third, Torts: Liability for Physical and Emotional Harm § 7, Comment *b*
20 (explaining that "[a] defendant has the procedural obligation to raise the issue of whether a no-
21 duty rule or some other modification of the ordinary duty of reasonable care applies in a particular
22 case"). The appropriate method for a defendant to raise the issue is a matter for the procedural
23 rules of the jurisdiction.

24 In most cases, the adjudicative facts that bear on whether the public-duty doctrine applies
25 will not be in dispute. When adjudicative facts are genuinely disputed, as Comment *s* explains, the
26 case should be submitted to the jury, and the plaintiff bears the burden of proving those facts that
27 would negate the existence of the public-duty doctrine.

28 *s. Judge and jury.* Whether the public-duty applies is a question of law for the court.
29 Occasionally, there will be disputed facts that bear on the question; the resolution of those
30 subsidiary issues is a matter properly left to the jury.

REPORTERS' NOTE

Caveat. As the Dobbs treatise aptly explains: “A number of contemporary courts have broadly rejected the public duty doctrine.” DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, *THE LAW OF TORTS* § 346 (2023 update). Courts rejecting the public-duty doctrine have relied, in part, on the difficulty of sorting out those duties that are applicable to the public generally and those duties that are owed in more limited form that includes the injured person. See *Ryan v. State*, 656 P.2d 597, 599 (Ariz. 1982) (“We shall no longer engage in the speculative exercise of determining whether the tort-feasor has a general duty to the injured party, which spells no recovery, or if he had a specific individual duty which means recovery.”); *Leake v. Cain*, 720 P.2d 152, 160 (Colo. 1986) (citing and quoting *Ryan* and observing: “Perhaps the most persuasive reason for the abandonment of the public duty rule is that it creates needless confusion in the law and results in uneven and inequitable results in practice.”). Other courts have decided that the public-duty doctrine is an unnecessary appendage in light of sovereign immunity. Thus, the Alaska Supreme Court left behind the public-duty doctrine, declaring that the “‘duty to all, duty to no-one’ doctrine is in reality a form of sovereign immunity, which is a matter dealt with by statute in Alaska, and not to be amplified by court-created doctrine.” *Adams v. State*, 555 P.2d 235, 241-242 (Alaska 1976).

Comment a. History and scope. The origin of the public-duty doctrine is widely attributed to the U.S. Supreme Court in *South v. Maryland*, 59 U.S. 396 (1855). See *Leake v. Cain*, 720 P.2d 152, 155 (Colo. 1986); David S. Bowers, *Tort Law—The Public-duty Doctrine: Should It Apply in the Face of Legislative Abrogation of Sovereign Immunity?*—*Coleman v. Cooper*, 12 CAMPBELL L. REV. 503, 506 (1990); John Cameron McMillan, Jr., Note, *Government Liability and the Public-duty Doctrine*, 32 VILL. L. REV. 505, 509 (1987). In *South*, the plaintiff sued the sheriff for failing to protect him from being kidnapped. The Supreme Court found the sheriff did not owe the plaintiff an individual duty; instead, the sheriff owed a “public-duty for neglect of which he is amenable to the public, and punishable by indictment only.” *South*, 59 U.S. at 403.

Neither the first nor the Second Restatement of Torts addressed the public-duty doctrine, although at least one court has interpreted § 288(b) of the Second Restatement as doing so. See *Johnson v. Humboldt Cnty.*, 913 N.W.2d 256, 263 (Iowa 2018) (“Section 288 of the Restatement . . . set[] forth the public-duty rule within a negligence provision.”). Section 288 merely addressed when a legislative safety standard would not be adopted as the tort standard of care (negligence per se).

By the Reporters’ count, approximately 20 jurisdictions maintain a common-law public-duty doctrine, although there is variance in the breadth of the doctrine across those states. Statutes addressing public duty have been enacted in another dozen states. For example, the Massachusetts legislature amended its Tort Claims Act after the Supreme Judicial court abolished the common-law public-duty doctrine to eliminate governmental liability for discretionary functions, and the provision of police and fire department services. MASS. GEN. LAWS ANN. ch. 258, § 10; see also *Carleton v. Town of Framingham*, 640 N.E.2d 452, 455 (Mass. 1994) (characterizing the statute as “in effect” “a statutory public duty rule”); MISS. CODE § 11-46-9 (exempting from liability governmental entities and their employees for, inter alia, discretionary functions, or activities

relating to police or fire protection). Ten states have abolished the doctrine and eight states never adopted it. See generally John H. Derrick, Annotation, *Modern Status of Rule Excusing Governmental Unit From Tort Liability on Theory That Only General, Not Particular, Duty Was Owed Under Circumstances*, 38 A.L.R.4th 1194 (originally published in 1985).

Comment c. Kinds of tort suits affected. Few courts have addressed whether the public-duty doctrine applies when the plaintiff sustains only an economic loss, and, even when the facts present the issue, this doctrinal matter is rarely discussed. See, e.g., *Lee Testing & Eng. Inc. v. Ohio Dep't of Transp.*, 2014 WL 17781882014, at *1 (Ohio Ct. App. 2014) (concluding that plaintiff's claim was barred alternatively by economic-loss rule or the public-duty doctrine); *J & B Dev. Co. Inc. v. King Cnty.*, 669 P.2d 468, 472 (Wash. 1983) (analyzing claim for negligently issuing a building permit without addressing the public-duty doctrine's applicability to a claim for pure economic loss); *Woods View II, LLC v. Kitsap Cnty.*, 352 P.3d 807, 819 (Wash. Ct. App. 2015) (ruling that a claim for delay in issuing a building permit that resulted in economic loss was subject to public-duty doctrine). An article about governmental tort liability for negligently issuing building permits—claims that would presumably often result in pure economic loss—contains nary a mention of the issue. See Scott J. Borth, Comment, *Municipal Tort Liability for Erroneous Issuance of Building Permits: A National Survey*, 58 WASH. L. REV. 537 (1983).

Likewise, few cases address whether the public-duty doctrine applies to defamation claims. It seems that the matter is rarely addressed because, when it comes to defamatory statements, public officials already enjoy a conditional privilege. Thus, even absent the public-duty doctrine, these claims face long odds. See, e.g., *R.I. Seekonk Holdings, LLC v. Hines*, 425 F. Supp. 3d 37, 47 (D. Mass. 2019) (holding conditional privilege barred plaintiff's defamation claim against town selectperson). For a court that ruled that claims of defamation and privacy against the Commissioner of Insurance for communications made within the scope of his duties was barred by the public-duty doctrine, see *Larsen v. Chinwuba*, 832 A.2d 193, 194 (Md. 2003). As Comment *a* explains, the Reporters did not find any case in which application of the public-duty doctrine was denied based on the type of harm suffered by the plaintiff. See generally 2 BARRY A. LINDAHL, MODERN TORT LAW: LIABILITY AND LITIGATION § 16:26 (2d ed. 2024 update) (discussing different types of tort claim to which the public-duty doctrine has been applied).

Comment d. Relationship to governmental immunities. Most jurisdictions acknowledge the distinction between the public-duty doctrine, which denies the existence of a duty, and governmental immunities, which, regardless of a duty, hold a governmental actor immune from tort liability. See *Coleman v. East Joliet Fire Protection Dist.*, 46 N.E.3d 741, 753 (Ill. 2016) (“Under the . . . concept of sovereign immunity, despite any ‘apparent duty,’ the governmental entity is immune from tort liability. This does not occur from a denial of the tort’s existence, but rather because the existing liability in tort is disallowed. In contrast, [under the public-duty rule] the tort liability or duty never existed.”) (quotation marks omitted); *Steinke v. S.C. Dep’t of Lab., Licensing & Regul.*, 520 S.E.2d 142, 150 (S.C. 1999) (“A defendant who pleads immunity conditionally admits the plaintiff’s case, but asserts immunity as a bar to liability. In contrast, the public-duty rule is a defense that denies an element of the plaintiff’s cause of action—the existence of a duty of care

to the individual plaintiff.”); 18 EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 53:21 (2024 update) (“The public duty rule is not technically grounded in government immunity, though it achieves much the same results.”). For a state that codified the public-duty doctrine and characterized it as an “immunity,” thereby blurring the distinction between this Section and §§ 9 to 11, see OHIO REV. CODE ANN. § 2743.02 (establishing that “the state is immune from liability in any civil action or proceeding involving the performance or nonperformance of a public duty”); see also UTAH CODE ANN. § 63G-7-202 (“A general duty that a governmental entity owes to the public does not create a specific duty to an individual member of the public, unless there is a special relationship between the governmental entity and the individual member of the public.”).

As the Caveat and the Reporters’ Note to Comment *a* explain, some courts have eschewed use of the public-duty doctrine, preferring to rely solely on immunity provided by statute. Thus, the Alaska Supreme Court left behind the public-duty doctrine, declaring that the “‘duty to all, duty to no-one’ doctrine is in reality a form of sovereign immunity, which is a matter dealt with by statute in Alaska, and not to be amplified by court-created doctrine.” *Adams v. State*, 555 P.2d 235, 241-242 (Alaska 1976).

States with statutory immunity *and* the public-duty doctrine usually begin by determining if the alleged tortious conduct is immunized. See *Allen v. Dist. of Columbia*, 100 A.3d 63, 88 (D.C. 2014) (Easterly, J., dissenting) (“Whether the District government is shielded from suit by sovereign immunity is the first consideration; if it is not, the second consideration is whether there is an actionable duty.”); *Chase v. City of Memphis*, 971 S.W.2d 380, 385 (Tenn. 1998) (determining whether statutory immunity shielded defendant from liability before addressing the public-duty doctrine). But see *Williams v. State*, 664 P.2d 137, 139 (Cal. 1983) (explaining that issue of immunity does not arise unless a duty is determined to exist).

Comment e. The public-duty doctrine applies to state and local governmental entities and their employees, officers, and authorized agents (collectively, “governmental actors”). Courts routinely, and appropriately, apply the public-duty doctrine to all state and local governmental entities, and their employees, authorized agents, and officers. See, e.g., *McCarthy v. Frost*, 109 Cal. Rptr. 470, 472 (Ct. App. 1973) (applying discretionary determination doctrine to state highway patrolmen and the state of California); *Leger v. Kelley*, 116 A.2d 429, 432 (Conn. 1955) (holding that the public-duty doctrine extends to public officials); *Gordon v. Bridgeport Hous. Auth.*, 544 A.2d 1185, 1189-1190 (Conn. 1988) (addressing applicability of public-duty doctrine to city, housing agency, and city police officers); *Wonnum v. Way*, 2017 WL 3168968, at *3 (Del. Super. Ct. 2017) (applying public-duty doctrine to state correctional supervisory personnel who “are public officials . . . eligible for protection of the public duty doctrine”); *Johnson v. Indian River Sch. Dist.*, 723 A.2d 1200, 1201 (Del. Super. Ct.) (applying public-duty doctrine to employees of state department of motor vehicles and to employee of school district), *aff’d*, 723 A.2d 397 (Del. 1998); *Manfre v. Shinkle*, 184 So. 3d 641, 643 (Fla. Dist. Ct. App. 2016) (applying public-duty doctrine in suit against county sheriff); *Trianon Park Condo. Ass’n, Inc. v. City of Hialeah*, 468 So. 2d 912, 923 (Fla. 1985) (addressing public-duty doctrine in the “enforcement of the police power, public safety functions by a state, county, or municipal governmental entity”); *Lee v. Cnty. of Hawaii*, 310

P.3d 1047 (Haw. Ct. App. 2010) (applying public-duty doctrine to prosecutor in suit for negligence in failing to prosecute individual and to County that employed prosecutor); *Green v. Missouri Dep't of Transp.*, 151 S.W.3d 877, 884 (Mo. Ct. App. 2004) (holding public-duty doctrine applied to governmental employees); *Lawson v. Hawkins Cnty.*, 661 S.W.3d 54, 68 (Tenn. 2023) (“The public-duty doctrine . . . applies to governmental entities and employees alike.”).

Comment f. Rationale and the role of the “special relationship” exception. Courts often explain and rationalize the public-duty doctrine by stating that “a duty to all is a duty to none.” That explanation is a conclusion that provides no illumination about the rule. The reasons for the public-duty doctrine are twofold: to limit judicial oversight of, or meddling with, another co-equal branch of government based on separation-of-powers principles and to protect the government from potentially crushing liability. See, e.g., *Trianon Park Condo. Ass’n, Inc. v. City of Hialeah*, 468 So. 2d 912, 922 (Fla. 1985) (“Governments must be able to enact and enforce laws without creating new duties of care and corresponding tort liabilities that would, in effect, make the governments and their taxpayers virtual insurers of the activities regulated.”); *Breese v. City of Burlington*, 945 N.W.2d 12, 20 (Iowa 2020) (explaining that “the limited resources of governmental entities—combined with the many demands on those entities—provide a sound justification for the public-duty doctrine in cases involving nonfeasance”); *Braswell v. Braswell*, 410 S.E.2d 897, 901 (N.C. 1991) (“[T]he public-duty rule recognizes the limited resources of law enforcement and refuses to judicially impose an overwhelming burden of liability for failure to prevent every criminal act.”); *Catone v. Medberry*, 555 A.2d 328, 333 (R.I. 1989) (“The primary purpose of the public duty doctrine is to encourage the effective administration of governmental operations by removing the threat of potential litigation.”); *Prosser v. Kennedy Enterprises, Inc.*, 179 P.3d 1178, 1183 (Utah 2008) (explaining that the public-duty doctrine exists to protect governmental entities from being “mired hopelessly in civil lawsuits . . . for every infraction of the law”); DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, *THE LAW OF TORTS* § 346 (2024 update) (explaining that the public-duty doctrine is frequently justified based on the notion that “courts should leave allocation of resources to the legislature or to the executive”). The elimination of tort liability provided in Subsection (a) is based on similar grounds as sovereign immunity. See § 9, *Comment f*.

The public-duty doctrine developed independently from governmental immunities. See, e.g., *Coleman v. East Joliet Fire Protection Dist.*, 46 N.E.3d 741, 753 (Ill. 2016) (“The public duty rule is not rooted in sovereign immunity nor did the public duty rule develop from any concepts of government immunity from suit. Rather, the public duty rule developed independently and separately from concepts of governmental immunity . . .”). As states’ reliance on statutory sovereign immunity is growing, as outlined in § 9, *Reporters’ Note to Comment a*, the public-duty doctrine is becoming less prevalent as a common-law doctrine. Thirteen states have codified the doctrine, ten states have abolished the doctrine, and eight states never adopted the doctrine. Even in the ten states that have abandoned the public-duty doctrine, sovereign immunity statutes limit governmental entities’ tort liability. These jurisdictions justify abolishing the common-law public-duty doctrine because “the ‘duty to all, duty to no-one’ doctrine is in reality a form of sovereign immunity, which is a matter dealt with by statute . . . and not to be amplified by court-created

doctrine.” *Adams v. State*, 555 P.2d 235, 241 (Alaska 1976); see also *Dewald v. State*, 719 P.2d 643, 653 (Wyo. 1986) (“The public-duty/special-duty rule was in essence a form of sovereign immunity and viable when sovereign immunity was the rule.”). However, sovereign immunity statutes have the same function as the public-duty doctrine in some of these states, granting immunity for suits arising from discretionary functions and governmental efforts to mitigate risk. See NEB. REV. STAT. ANN. § 81-8, 219; NEB. REV. STAT. ANN. § 13-910; N.H. REV. STAT. ANN. §§ 541-B:1 to B:23; OR. REV. STAT. § 30.265. In brief, appropriate protection of governmental actors from tort liability can be provided either by sovereign immunity or by the public-duty doctrine. While both can exist and provide overlapping protection, one or the other may adequately serve this function.

For a critique of the public-duty doctrine, arguing that it “has contributed to a profoundly unbalanced and perverse local-constituent relationship” and that governmental entities “should bear, and indeed embrace, a legally enforceable duty of care to protect their constituents,” see Sarah L. Swan, *Public Duties for the New City*, 122 MICH. L. REV. 309, 322 (2023). For an argument that the public-duty doctrine, a product of courts and common law, is preferable to state legislation creating governmental immunities because of the former’s flexibility, see Daniel J. Kenny, *Dangers, Duties, and Deterrence: A Critique of State Sovereign Immunity Statutes*, 99 N.Y.U. L. REV. 1097 (2024).

Comment g. The relationship between Subsection (a) and Subsection (b). Reflecting the independence of Subsections (a) and (b) is *Violano v. Fernandez*, 907 A.2d 1188 (Conn. 2006). There, the municipality invoked eminent domain on the plaintiffs’ property, which plaintiffs intended to develop into a restaurant. After doing so, the property was broken into, and “all of the plaintiffs’ items, renovations and fixtures were stolen or destroyed.” *Id.* at 1191. Plaintiffs alleged that the break-in occurred because the building was inadequately secured. Concluding that all of the alleged negligent acts were discretionary in nature, the court rejected plaintiffs’ claim that defendants were nevertheless subject to liability because the city’s duty was owed to the private plaintiffs and not to the public generally. As the court put it, “governmental immunity precludes liability regardless of whether the duty is public or private as long as the act complained of is discretionary in nature.” *Id.* at 1201. Thus, even when one of the black-letter Subsections does not apply, the other one may prevent liability.

Also illustrating the principle is *Mullin v. Mun. City of S. Bend*, 639 N.E.2d 278, 282 (Ind. 1994). In *Mullin*, a 911 dispatcher responding to a fire call arranged for the dispatch of fire trucks but no ambulance—and, with no ambulance, one person died in the blaze, while another was injured. In the wrongful death and surviving victim’s suit against the city, the court concluded that the dispatcher’s failure was not a discretionary determination because, in failing to summon an ambulance, the dispatcher violated a governing policy. However, the court also concluded that the provision of first responders was a service provided to the public at large. As such, the court concluded that the city had no tort duty to the plaintiffs.

Some court tend to conflate the two branches of the public-duty doctrine (addressed above in Subsections (a) and (b)). See, e.g., *Wonnum v. Way*, 2017 WL 3168968, at *3 (Del. Super. Ct.

2017) (“The public duty doctrine applies if the State official owes a duty to the public at large rather than to a specific individual when the alleged tortious conduct is discretionary in nature. If Plaintiff’s claims arise from the discretionary acts of the DOC Supervisory Defendants or the DOC Administrative Defendants, the claims are barred by the public duty doctrine.”).

Illustration 7, addressing the issuance of driver’s license to a person with a disability, is based loosely on *Johnson v. Indian River Sch. Dist.*, 723 A.2d 1200 (Del. Super. Ct.), *aff’d*, 723 A.2d 397 (Del. 1998).

Comment h. No duty for executive decisions involving the “discretionary determination of important governmental policy.” For further discussion, see § 9, Reporters’ Note to Comment *f*; § 10, Reporters’ Note to Comment *f* (both explaining the withdrawal of tort liability for discretionary determinations but based on immunity).

Comment i. What constitutes a “discretionary determination of important governmental policy.” For authority that supports Comment *h*’s explanation of what qualifies as a “discretionary determination,” see § 9, Reporters’ Note to Comment *g*; § 10, Reporters’ Note to Comment *i*. Conduct is not discretionary if “there is any statute, city charter provision, ordinance, regulation, rule, policy, or any other directive requiring the government official to act in a prescribed manner.” *Northrup v. Witkowski*, 210 A.3d 29, 41 (Conn. 2019).

Some courts, applying the public-duty doctrine, have stretched the concept of discretionary determinations to shield governmental actors from liability, perhaps failing to appreciate that such decisions more sensibly fall under Subsection (b). See, e.g., *McCarthy v. Frost*, 109 Cal. Rptr. 470, 472 (Ct. App. 1973) (holding, somewhat inexplicably, that highway patrolman who failed to investigate accident that resulted in the death of plaintiff’s decedent could not be the basis for liability because the “decision of a peace officer to investigate or not investigate involves [an] exercise of discretion”).

Comment. j. No duty for protective service provided to the public generally. For courts applying the public-duty doctrine to police services, see, e.g., *Sorace v. United States*, 2014 WL 2033149 (D.S.D. 2014) (holding that the public-duty doctrine shielded police from liability for failing to arrest a drunk driver despite numerous calls about the driver’s erratic behavior that resulted in a fatal accident), *aff’d*, 788 F.3d 758 (8th Cir. 2015); *Ruf v. Honolulu Police Dep’t*, 972 P.2d 1081, 1088 (Haw. 1999) (holding that the police department owed no duty in wrongful-death action in which the decedent was assaulted and murdered by an individual who had been in police custody but who was mistakenly released; explaining: “[T]he failure of the police to provide protection is ordinarily not actionable.”) (citation omitted); *Lundgren v. City of McCall*, 817 P.2d 1080, 1081 (Idaho 1991) (“Municipalities are not liable for the failure to provide police protection in the absence of a special relationship or duty to particular individuals.”); *Coleman v. E. Joliet Fire Prot. Dist.*, 46 N.E.3d 741, 743 (Ill. 2016) (“The common-law ‘public duty rule’ provides that a local governmental entity and its employees owe no duty of care to individual members of the general public to provide governmental services such as police and fire protection services.”); *Barratt v. Burlingham*, 492 A.2d 1219, 1222 (R.I. 1985) (concluding that the public-duty doctrine shielded police officer who observed a drunk driver and attempted to require driver to remain in a

parking lot, where the driver later drove away and injured the plaintiff); *Ezell v. Cockrell*, 902 S.W.2d 394, 396 (Tenn. 1995) (holding that police owed no duty to a plaintiff injured by a drunk driver whom the police failed to arrest); *Christenson v. Hayward*, 694 P.2d 612, 612-613 (Utah 1984) (per curiam) (finding that the public-duty doctrine applied to a police officer's alleged negligent failure to remove an intoxicated driver from the road); DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, *THE LAW OF TORTS* § 345 (2024 update) ("Under the public duty rule a police officer is free to ignore dangerous and illegal conduct committed in his presence; victims injured by such conduct have no claim for his nonfeasance."); W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 131, at 1049 (5th ed. 1984) (explaining that "a failure to provide police protection, like the failure to provide fire protection, is usually immune, either on the ground that the decision to deny such protection is a discretionary or basic policy decision or on the ground that the duty to protect is owed to the public at large and not to any particular person who might be injured").

Illustration 8, involving the attack on a woman who broke up with her boyfriend, is based on the seminal decision in *Riss v. City of New York*, 210 N.E.2d 860 (N.Y. 1968).

Illustration 10, involving the prisoner erroneously released early, is based loosely on *Fryman v. Harrison*, 896 S.W.2d 908, 910 (Ky. 1995). See also *Orzechowski v. State*, 485 A.2d 545 (R.I. 1984) (parole board not liable for negligently paroling a prisoner who went on to injure the plaintiff); see generally Janet Boeth Jones, Annotation, *Governmental Tort Liability for Injuries Caused by Negligently Released Individual*, 6 A.L.R. 4th 1155 (originally published in 1981).

Some courts have held that ordinary affirmative duties applicable to private actors apply to governmental actors. These courts have rejected the greater protection from liability provided by the public-duty doctrine. See, e.g., *R.E. v. State*, 878 P.2d 1341, 1348 (Alaska 1994) (holding that the Division of Family and Youth Services had a duty to exercise reasonable care in issuing licenses to daycare facilities because "[h]aving undertaken the responsibility of licensing, the State was under a duty to exercise reasonable care in carrying out that function"); *City of Kotzebue v. McLean*, 702 P.2d 1309 (Alaska 1985) (holding that the city had a duty to prevent a stabbing when a police officer failed to respond to a life-threatening phone call made by the assailant before the attack); *Wallace v. State*, 557 P.2d 1120 (Alaska 1976) (holding that the Department of Labor, by conducting safety inspections, "voluntarily assumed" a duty of due care in remedying a known, unsafe conditions in a suit arising from the death of a worker at a pipe installation site); *Ryan v. State*, 656 P.2d 597 (Ariz. 1982) (holding the state subject to liability for injuries caused by a juvenile who escaped from the state's custody); *Coffey v. City of Milwaukee*, 247 N.W.2d 132, 139 (Wis. 1976) (declaring that "[a]ny duty owed to the public generally is a duty owed to individual members of the public"); *DeWald v. State*, 719 P.2d 643, 653 (Wyo. 1986) (explaining that the public-duty doctrine is "in essence a form of sovereign immunity" and that, given legislature's abolition of sovereign immunity, the public-duty doctrine "is no longer viable").

Yet these courts often find themselves boxed in—and, unable to rely on the public-duty doctrine, they tend to narrowly interpret their common law on duty and proximate cause (scope of liability), now applicable to the governmental entity, in order to avoid subjecting the government

actor to liability. Thus, in *Leake v. Cain*, 720 P.2d 152, 160 (Colo. 1986), police officers broke up a party at which they had to arrest and handcuff an inebriated and disruptive 18-year-old. They later released the 18-year-old to his 17-year-old brother, after the younger brother assured the officers that he would drive his older brother home. On the way home, the older brother took over driving and hit six persons, killing two. After rejecting continued use of the public-duty doctrine, thereby subjecting the governmental defendants to tort law applicable to private parties, the court concluded that, while the police officers had a duty during the time that they arrested and detained the intoxicated brother, the duty did not extend to the period after they released him to his younger brother. Somewhat inexplicably, the court did not entertain the possibility that, having undertaken to address the risks posed by the older brother, the police officers' release of him could be found negligent. Similarly, in *DeWald v. State*, 719 P.2d 643, 653 (Wyo. 1986), the court, after recognizing the abrogation of the public-duty doctrine, ruled that when a police officer is pursuing a fleeing suspect, any negligence by the officer is not a proximate cause of any harm to a third person. Such a ruling ignores that proximate cause (scope of liability) is a factual matter for the jury and that reasonable minds could find that police chases foreseeably risk just the sort of harm that occurred in *DeWald*. See Restatement Third, Torts: Liability for Physical and Emotional Harm § 29, Comment *q* (AM. L. INST. 2010) (explaining that proximate cause (scope of liability) is generally a matter for the factfinder).

Comment k. Government services furnished to less than the entire community. Courts sometimes speak about governmental protective services as a dichotomy: either services are provided to the community at large or to a specific individual. Exemplifying this tendency, in *Keiswetter v. State*, 373 P.3d 803, 805 (Kan. 2016), the Kansas Supreme Court explained: “[A] plaintiff suing a governmental entity in negligence cannot establish the duty requirement of its claim when the duty is a public one, i.e., owed to the public at large and not to any particular individual.” However, the variety of protective services governmental actors provide reveals that, rather than a dichotomy, the population that may be offered protective services is something of a continuum: requiring smoke and fire detectors in residential construction protects those who reside and visit such buildings; licensing dentists protects those who seek professional dental services; regulating and inspecting nursing homes protects those who reside in them, and so on. Many, and perhaps most, services are provided to a subset—but not the entirety—of the population. For a court that appreciated and relied on the distinction between the public generally and a smaller class of persons, see *Brown v. Tate*, 888 S.W.2d 413, 416 (Mo. Ct. App. 1994) (“The officer’s duty to operate a motor vehicle with the highest degree of care, and to obey traffic rules and regulations, in a non-emergency situation, cannot be said to be a duty owed only to the public at large; it is a duty owed to all who might be injured by negligent operation of the automobile.”). For a contrary ruling to this Comment, see *Bottomlee v. State*, 459 P.3d 493 (Ariz. Ct. App. 2020) (holding a Department of Health Services employee who recommended “tummy time” for infants during licensing inspection of daycare facility owed a duty of care because the employee “endeavored to provide specific protection” to infants at the facility).

Relatedly, some plaintiffs who suffered harm because of a governmental actor's default have claimed that the duty was owed to them individually. *Green v. Missouri Dep't of Transp.*, 151 S.W.3d 877, 884 (Mo. Ct. App. 2004), is one such case. There, the plaintiff, who was injured by an alleged dangerous condition on a road, argued that she was a member of a discrete class: persons using the state's public roads. The court summarily rejected the plaintiff's claim, ruling that, based on precedent, the duty "to properly design and construct highways runs to the public at large." *Id.* The court in *Rich v. City of Mobile*, 410 So. 2d 385, 386-387 (Ala. 1982), explained why the policy behind the public-duty doctrine required rejecting the plaintiff's argument (similar to the one in *Green*) despite its superficial appeal:

There is, indeed, a sense in which the duty of the City's employees, as inspectors, is a duty flowing to the individual homeowners. But to stop here and impose liability is to overlook what we perceive as overriding public policy reasons to hold to the contrary.

These policy considerations may be expressed in terms of the broader requirement of the City to provide for the public health, safety, and general welfare of its citizenry. While, as here, the individual homeowner is affected by the discharge of the City sewer inspector's duty, the City's larger obligation to the whole of its resident population is paramount

See also *Irwin v. Town of Ware*, 467 N.E.2d 1292, 1300 (Mass. 1984) ("Presumably, only where the Legislature specifically designated an identifiable sub-class as the intended beneficiaries of certain public acts would a public employer be open to tort liability."). When courts are faced with issues similar to the one raised in *Green* about whether governmental protective services that are applicable to less than all in the community, courts should consider the justifications that underlie public-duty doctrine and whether barring claims by those in the limited group materially advances those aims.

Comment I. The distinction between nonfeasance and misfeasance. Numerous courts hold that the public-duty doctrine does not shield the governmental actor from liability if the governmental actor contributed to the risk. See, e.g., *Manfre v. Shinkle*, 184 So. 3d 641, 648 (Fla. Dist. Ct. App. 2016) (explaining that public-duty doctrine did not shield the governmental actor from liability when the governmental actor's conduct created or controlled the risk); *Henshilwood v. Hendricks Cnty.*, 653 N.E.2d 1062, 1067 (Ind. Ct. App. 1995) (explaining that the public-duty doctrine "does not apply to an alleged affirmative act of negligence where the entity itself has created the plaintiff's perilous situation"); *Jones v. State*, 38 A.3d 333 (Md. 2012) ("[T]he public duty doctrine does not apply if law enforcement is not engaged in protecting the public from an injurious force caused by a member of the public, but rather is itself the alleged injurious force."); *Dudley v. Mass. State Police*, 78 N.E.3d 136 (Mass. 2017) (finding that the public-duty doctrine did not apply where an officer created a dangerous situation when he released police canine to apprehend fleeing suspect and the canine bit the plaintiff); *Harrison v. Mattapoisett*, 937 N.E.2d 514 (Mass. 2010) (concluding that the public-duty doctrine was inapplicable where officers' conduct in commencing high-speed chase materially contributed to suspect's flight, resulting in

collision with plaintiff's car); *Ariola v. City of Stillwater*, 2014 WL 5419809, at *7 (Minn. Ct. App. 2014) (recognizing, for purposes of public-duty doctrine, that "a general duty of reasonable care when the defendant's own conduct creates a foreseeable risk of injury to a foreseeable plaintiff"); *Bassett v. Lamantia*, 417 P.3d 299, 303 (Mont. 2018) (holding that a police officer was not shielded by the public-duty rule when the officer injured a bystander while pursuing a suspect); *Coty v. Washoe Cnty.*, 839 P.2d 97, 99 (Nev. 1992) (holding doctrine inapplicable when public officer "actively create[s] a situation which leads directly to the damaging result"); *Cope v. Utah Valley State Coll.*, 342 P.3d 243, 252 (Utah 2014) ("When the affirmative acts of a public employee actually causes the harm, the public duty doctrine does not apply."); *Faucheaux v. Provo City*, 343 P.3d 288, 295 (Utah App. 2015) (concluding that police officers responding to a 911 call who tucked an intoxicated woman into bed and admonished her husband to "leave her alone" constituted "affirmative negligent acts" by the officers that were not shielded by the public-duty doctrine); *Garnett v. City of Bellevue*, 796 P.2d 782, 785 (Wash. Ct. App. 1990) (ruling that the public-duty doctrine does not extend to police officers who harassed the plaintiff because plaintiff's emotional distress "resulted from the officer's direct contact with the plaintiff, not the performance of a general public duty of policing"); DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, *THE LAW OF TORTS* § 346 (2024 update) ("When the public entity acts affirmatively, courts may or may not recognize an immunity, but the public duty doctrine as such should have no application."); cf. *Catone v. Medberry*, 555 A.2d 328, 334 (R.I. 1989) (employing a test that inquires whether "the government or its agent engaged in an activity normally undertaken by private individuals," which appears roughly congruent with the misfeasance-nonfeasance distinction in this Comment). But see *Zorchenko v. City of Federal Way*, 549 P.3d 743 (Wash. Ct. App. 2024) (extending the public-duty doctrine to a claim police officer was negligent in locating her cruiser on the highway when responding to a call regarding a traffic accident).

In a number of jurisdictions, statutes do the work of subjecting government actors to a duty of reasonable care when acting in a way that poses risks to others. See, e.g., MO. REV. STAT. § 537.600-.650 (exempting from immunity governmental entities for claims arising from injuries "directly resulting from the negligent acts or omissions by public employees arising out of the operation of motor vehicles or motorized vehicles within the course of their employment").

Illustration 13, concerning the water disposal system, is based loosely on *Linda Lee Corp. v. Covington Co.*, 36 Va. Cir. 590 (1993), but reaches a different result.

Comment m. Natural risks, third-party risks, and conduct that increases the magnitude of natural or third-party risks. See Restatement Third, Torts: Liability for Physical and Emotional Harm § 37, Reporters' Note to Comment *d* (AM. L. INST. 2012).

Comment n. Subsection (b) and premises liability. For courts reflecting the rule stated in Comment *n*, see *Sch. Bd. of Broward Cnty. v. McCall*, 322 So. 3d 655, 656-657 (Fla. Dist. Ct. App. 2021) (noting case law and stating that the city "has the same common law duty as a private person to properly maintain and operate the property") (quoting *City of Belle Glade v. Woodson*, 731 So. 2d 797, 798 (Fla. Dist. Ct. App. 1999)); *Benton v. City of Oakland City*, 721 N.E.2d 224, 232-233 (Ind. 1999) (holding that city owed duty of reasonable care to swimmer at lakeside beach

1 and swimming facility owned and operated by the city and citing cases holding similarly for public
 2 parks); *Gatlin v. City of Miles City*, 291 P.3d 1129, 1133 (Mont. 2012) (holding that the public-
 3 duty doctrine was inapplicable to a tort claim against the city arising from injury in public park);
 4 cf. *McCathern v. City of Oklahoma City*, 95 P.3d 1090 (Okla. 2004) (holding that statutory
 5 immunity did not affect municipality's tort liability as a landowner). But see *McFarlin v. State*,
 6 881 N.W.2d 51, 58 (Iowa 2016) (concluding that public-duty doctrine barred claim by victims of
 7 boating accident on state owned and controlled lake that had submerged dredge pipe).

8 Similarly, courts hold that a duty to exercise reasonable care to maintain highways and
 9 streets is unaffected by Subsection (b)'s exclusion of liability for protective services provided to
 10 the public. See *Wells v. Stephenson*, 561 So. 2d 1215, 1217 (Fla. Dist. Ct. App. 1990) ("Cases
 11 holding an entity liable for failure to report, repair, or maintain a traffic control device are based
 12 on the premise that the entity had some duty, custody, or control over the sign at the intersection.");
 13 *Smith v. City of Preston*, 543 P.2d 848, 851 (Idaho 1975) (holding that municipality has a duty to
 14 exercise "reasonable and ordinary care to keep its streets in a reasonably safe condition for ordinary
 15 travel"); *Fulps v. City of Urbandale*, 956 N.W.2d 469, 470 (Iowa 2021), as amended (Apr. 6, 2021)
 16 (concluding that public-duty doctrine was inapplicable to claim against city for negligence in
 17 maintaining a sidewalk); *Henricksen v. State*, 84 P.3d 38,46 (Mont. 2004) (declaring that "the
 18 State has a duty to maintain sidewalks and highways in a safe condition for ordinary and public
 19 use"); *Siegel v. State of New York*, 290 N.Y.S.2d 351, 357 (Ct. Cl.1968) (holding state liable for
 20 harm resulting from decayed tree that fell on plaintiff's car and stating that governmental entities
 21 must exercise reasonable care with regard to the risk of falling trees); *Ray v. N.C. Dep't of Transp.*,
 22 720 S.E.2d 720, 724 (N.C. Ct. App. 2011) (holding public-duty doctrine did not obviate claims for
 23 negligent maintenance of road), *aff'd as modified sub nom. Ray v. N.C. Dep't of Transp.*, 727
 24 S.E.2d 675 (N.C. 2012); *Hughes v. Wilson*, 199 P.3d 305, 308 (Or. 2008) (explaining that the
 25 county has an obligation to "maintain [its] roads, in their entirety, in a reasonably safe condition
 26 for the benefit of the traveling public"); see generally James O. Pearson, Jr., Annotation, *Liability,*
 27 *in Motor Vehicle-Related Cases, of Governmental Entity for Injury or Death Resulting From Ice*
 28 *or Snow on Surface of Highway or Street*, 97 A.L.R.3d 11 (originally published in 1980). But see
 29 *Georges v. State*, 249 A.3d 1261, 1266 (R.I. 2021) (affirming summary judgment for defendant,
 30 where plaintiff was injured by a pothole because "the state's failure to repair a pothole in this case
 31 is precisely the type of discretionary governmental activity that is shielded from tort liability under
 32 the public-duty doctrine"); *Kimble v. Dyer Cnty. Tennessee*, , at *8 (Tenn. Ct. App. 2020) (finding
 33 state not liable based on public-duty doctrine for failure to remove fallen tree deputy sheriff knew
 34 was blocking a road lane).

35 Of course, as Comment *h* makes plain, if the design, construction, or upkeep of property
 36 involves the "discretionary determination of important governmental policy," the government
 37 actor may still be entitled to the protection of the public-duty doctrine. See Illustration 1.

38 *Comment o. Statutes affecting the public-duty doctrine.* As the Florida Supreme Court
 39 observed with regard to a statute imposing a duty on law-enforcement personnel to impound
 40 livestock that were roaming free: "Governments must be able to enact and enforce laws without

creating new duties of care and corresponding tort liabilities that would, in effect, make the governments and their taxpayers virtual insurers of the activities regulated.” *Trianon Park Condo. Ass’n, Inc. v. City of Hialeah*, 468 So. 2d 912, 922 (Fla. 1985).

For intra-court disagreement about the role of an immunity statute on the public-duty doctrine, compare *White v. Beasley*, 552 N.W.2d 1, 5 (Mich. 1996) (holding immunity statute permits, but does not require, elimination of public-duty doctrine), with *id.* at 13-14 (Levin J., dissenting) (contending statute eliminated public-duty doctrine); see also *Schear v. Bd. of Cnty. Comm’rs of Bernalillo Cnty.*, 687 P.2d 728, 732 (N.M. 1984) (holding enactment of state tort claims act displaced any common-law public-duty doctrine).

Ohio has enacted a statute that is roughly congruent with the common-law public-duty doctrine. See OHIO REV. CODE ANN. § 2743.02. For legislation that adopted a narrower version of the public-duty doctrine than the state’s courts had crafted, see N.C. GEN. STAT. § 143-299.1A (limiting public-duty doctrine to: “(1) a law enforcement officer’s negligent failure to protect the plaintiff from actions of others or an act of God, or (2) a State officer’s, employee’s, involuntary servant’s, or agent’s negligent failure to perform a health or safety inspection required by statute”).

Comment p. Conduct not tortious. It bears emphasis that, on those occasions when the public-duty doctrine is found not to apply, that determination in no way guarantees that the plaintiff will succeed in the ensuing tort suit against the governmental actor. Such a finding merely permits the plaintiff’s suit to move forward. Like other litigants—even absent the public-duty doctrine—plaintiffs suing governmental actors must still prove all of the elements of their prima facie case, and, in certain instances, even if they do, their recovery may be reduced (or eliminated in modified comparative responsibility jurisdictions) because of comparative responsibility or because the governmental actor is able successfully to offer another affirmative defense. See *Munich v. Skagit Emergency Comm’n Ctr.*, 288 P.3d 328, 335 (Wash. 2012) (emphasizing that the non-applicability of the public-duty doctrine “does not automatically result in liability,” that “[p]laintiffs seeking to recover must still establish breach, proximate cause, and damages, just as if they were suing a private defendant,” and that “[i]f the government acted reasonably under the circumstances, no liability will incur”).

Comment q. Takings. See 2A NICHOLS ON EMINENT DOMAIN § 6.01[12][c] (2024 update) (stating that approximately one-half of the states have constitutional provisions requiring compensation when the government damages property); 5 FOWLER HARPER, FLEMING JAMES, AND OSCAR GRAY, HARPER, JAMES, AND GRAY ON TORTS § 29.4, at 727-735 (rev. 3d ed. 2008) (similar to and citing the Nichols treatise).

Comment r. Public-duty doctrine procedurally. See Restatement Third, Torts: Liability for Physical and Emotional Harm § 7, Reporters’ Note to Comment *b* (AM. L. INST. 2010).

Comment s. Judge and jury. Because the public-duty doctrine hinges on the determination of the existence and scope of a governmental actor’s duty, its applicability presents a question of law for the court. See, e.g., *Kuzniar v. Keach*, 709 A.2d 1050, 1055 (R.I. 1998) (stating with regard to disputed issue of whether the public-duty doctrine applied: “[T]he trial justice should determine whether the law imposes a legal duty upon the defendant in the particular factual circumstances

presented in any given case. In so doing, however, the trial justice may require assistance from the trier of fact if the duty-triggering facts are disputed and the evidence shows that a reasonable jury could reach different conclusions on this issue.); *McCoy v. Alderson*, 2008 WL 1748251, at *2 (Wash. Ct. App. 2008) (“The material facts here are not disputed. The only question before us is then one of law—whether the State acting through the Board owed a duty to [the plaintiff], as opposed to a duty to the public at large (the public-duty doctrine). That is a question of law.”); cf. *Doe v. Petersen*, 903 A.2d 191, 200 (Conn. 2006) (explaining that “the issue of governmental immunity is simply a question of the existence of a duty of care, which is a question of law”). On occasion, however, there may be disputed historical facts that bear on the applicability of the public-duty doctrine; the resolution of those is a matter properly left to the factfinder. Typically, these disputed factual questions relate to whether a state actor’s conduct was egregious enough to fall into an exception to the public-duty doctrine, as provided in § 13. See, e.g., *Houle v. Galloway School Lines, Inc.*, 643 A.2d 822, 827 (R.I. 1994) (finding that a factual dispute about the bus driver’s speed created a jury question as to whether an exception to the public-duty doctrine applied).

§ 13. Special Relationships

(a) Notwithstanding § 12(b), a governmental actor is subject to liability to a person who has a special relationship with the governmental actor alleged to have committed a tort.

(b) A special relationship between a governmental actor and another person exists for purposes of Subsection (a) when the other person is sufficiently distinguished from the public at large, and the imposition of liability on the governmental actor is appropriate as informed by the following factors:

(1) Whether the governmental actor, through promises or actions, undertook to act on behalf of the person at risk;

(2) Whether the governmental actor had actual knowledge that inaction could lead to harm;

(3) Whether the person at risk had direct contact with the governmental actor;

(4) Whether the injured person or others assisting the injured person relied on the governmental actor’s actions or promises;

(5) Whether the governmental actor acted in furtherance of promises made to provide protective services and the extent of those acts;

(6) Whether a third person acting on behalf of the person at risk had contact with the governmental actor;

(7) Whether a statute exists that prescribes action by a governmental actor for the benefit of a class of persons that includes the injured person;

(8) Whether a court order exists singling out the person at risk for protective services;

(9) Whether the person collaborated with a governmental actor or actors that put that person at risk of harm;

(10) Whether the governmental actor acted with a high degree of culpability;

(11) Whether there existed an immediate and serious risk of harm to the person at risk when the governmental actor acted or failed to act; and

(12) Whether the person at risk was unable to help themselves.

Comment:

a. History and scope.

b. "Special relationship."

c. Status.

d. Rationale.

e. The factors.

f. The effect of a special relationship.

g. Judge and jury.

a. History and scope. The first and Second Restatements of Torts contained no provisions addressing the public-duty doctrine and, consequently, did not address special relationships in the context of governmental liability. The Restatement Third of Torts: Liability for Physical and Emotional Harm § 7 discussed discretionary functions in Comment *g* and briefly adverted to the special-relationship exception for those suing governmental entities, their employees, authorized agents, and officers (collectively, governmental actors) in § 37, Comment *i*. In particular, that Comment provides:

The imposition of affirmative duties on public entities poses two distinct problems.

First, there is the concern that the judicial branch give appropriate deference to a coordinate branch of government when a decision allocates resources or involves other significant political, social, or economic determinations. . . . The "public duty" doctrine, which denies a tort-law duty to provide police, fire, and other protective services to members of the public generally, reflects this concern.

Second, unlike private persons and entities, governmental entities exist, in significant part, to protect the public from risks that are created by others. Law enforcement, fire protection, building inspection, and social services are only a few of the many governmental operations that provide a significant protective function. The limitless potential liability that might be visited on government entities if affirmative duties were imposed on them for every undertaking has influenced courts in limiting the existence and scope of affirmative duties to which government entities are subject. Some courts insist on a “special relationship” between the plaintiff and a public entity that distinguishes the plaintiff from the public at large before imposing an affirmative duty. . . .

b. “Special relationship.” “Special relationship,” in the context of governmental tort liability, is a term of art that reflects a conclusion that a specific member of the public is sufficiently distinguished from the public at large that the limitation on liability imposed by the public-duty doctrine in § 12 should not be imposed to bar that person’s tort claim. Some affirmative duties imposed on private parties are also denominated as based on special relationships. See Restatement Third, Torts: Liability for Physical and Emotional Harm §§ 40 and 41 (addressing affirmative duties to protect and control, respectively). Despite the overlap in terminology, these latter special relationships are quite different from the ones addressed in this Section, and the two should not be conflated. See *id.*, § 37, Comment *i* (explaining that special relationships, in the context of the public-duty doctrine, are different from, and should not be confused with, other kinds of special relationships that impose affirmative duties either to protect or to control).

c. Status. Among courts employing the public-duty doctrine, all acknowledge the special-relationship exception (although some use different terminology, calling it a “special-duty” exception). As Comment *b* explains, “special relationships” also exist in suits involving private parties, and, in that context, these relationships provide an exception to the no-duty-to-rescue rule.

d. Rationale. An important rationale for the special-relationship exception to the public-duty doctrine is that the existence of the relationship sufficiently singles out the particular plaintiff from the public that the primary concerns behind § 12(b) of the public-duty doctrine are not implicated. These include: (1) respecting separation-of-powers concerns by having the executive, rather than the courts, address matters of concern that affect the entire community; and (2) the potential for vast and indeterminate liability. In addition to the limiting principle above, courts also

1 rely on the unfairness that would exist if a court were to employ the public-duty doctrine when a
2 governmental actor has undertaken to provide protection to a person who justifiably relies on that
3 undertaking. The first four factors in Subsection (b) reflect this unfairness idea and are similar to,
4 though more restrictive than, the basis for imposing an affirmative duty on private actors who,
5 although having no duty to rescue, undertake such a rescue or effort to protect another. See
6 Restatement Third, Torts: Liability for Physical and Emotional Harm §§ 42 and 43.

7 *e. The factors.* When determining whether a special relationship exists for purposes of the
8 public-duty doctrine, jurisdictions vary on the particulars. Some require all of the factors contained
9 in Subsection (b)(1)-(4); others are considerably less demanding. A number of states consider a
10 statute prescribing protective action on behalf of a class of which plaintiff is a member as sufficient
11 to give rise to a special relationship; others consider a protective order as sufficient. Likewise,
12 some states hold that a special relationship can automatically exist if the governmental actor's
13 conduct is especially egregious. Given this variation, this Section does not attempt to resolve the
14 matter. It opts, instead, to leave the determination to individual states, guided by the salient factors
15 set forth in Subsection (b).

16 To satisfy the knowledge requirement contained in Subsection (b)(2), a plaintiff must prove
17 actual knowledge; constructive knowledge is insufficient.

18 Courts do not identify or discuss factors militating against recognition of a special
19 relationship. Rather, the rationale for not extending governmental obligations to the public at large,
20 discussed in Comment *c*, are the reasons for the public-duty doctrine and the limits to the scope of
21 special relationships creating exceptions thereto.

22 *f. The effect of a special relationship.* When a special relationship exists, its effect is simply
23 to remove the barrier of the public-duty doctrine to governmental liability. As is true in other
24 instances when the public-duty doctrine is inapplicable, the governmental entity or actors may still
25 not be liable to a person harmed by the governmental conduct. As the Second Restatement
26 succinctly put it: "The mere fact that a person has been harmed by governmental action does not
27 automatically mean that his damage was tortious." Restatement Second, Torts § 895B, Comment
28 *e*. Like other litigants, plaintiffs suing a governmental actor must still prove all the elements of
29 their prima facie case, although the existence of a special relationship is sufficient to impose a duty
30 of reasonable care on the governmental actor. Then, even if the plaintiff succeeds in establishing
31 liability, a plaintiff's recovery may be reduced (or eliminated in modified comparative

responsibility jurisdictions) because of the plaintiff’s own fault or the existence of another valid affirmative defense.

g. Judge and jury. Whether a special relationship exists such that a duty is owed by a governmental actor to an individual is a matter of law for the court. Determination of historical facts bearing on the special-relationship determination is a matter for the factfinder.

REPORTERS’ NOTE

Comment b. “Special relationship.” See *Cummins v. Lewis Cnty.*, 133 P.3d 458, 469 (Wash. 2006) (“Traditionally, the term ‘special relationship’ has had a completely different meaning when used in the context of the public duty doctrine.”) (Chambers, J., concurring); Daniel J. Kenny, *Dangers, Duties, and Deterrence: A Critique of State Sovereign Immunity Statutes*, 99 N.Y.U. L. REV. 1097, 1118 (2024) (“The ‘special relationship’ approach to the public duty doctrine is distinct from the affirmative duty of care imposed on an actor because of a pre-existing ‘special relationship’ . . .”).

Comment d. Rationale. The rationale for the special-relationship exception to the public-duty doctrine is similar to the special-injury rule of public nuisance, which limits those who can maintain a private action for public nuisance to those who have suffered a special injury, different from that suffered by the public generally. In both cases, these rules avoid the specter of a large number of lawsuits that could impose overwhelming liability. As the Second Restatement of Torts counsels:

[I]t is uniformly agreed that a private individual has no tort action for the invasion of the purely public right, unless his damage is to be distinguished from that sustained by other members of the public. It is not enough that he suffers the same inconvenience or is deprived of the same enjoyment or is exposed to the same threat of injury as everyone else who may be exercising the same public right. Redress of the wrong to the entire community is left to its duly appointed representatives. The reasons usually given for the rule are that it is essential to relieve the defendant of the multiplicity of actions that might follow if everyone were free to sue for the common wrong; and that any harm or interference shared by the public at large will normally be, if not entirely theoretical or potential, at least minor, petty and trivial so far as the individual is concerned.

Restatement Second, Torts § 821C, *Comment a* (AM. L. INST. 1979); see also, e.g., *Hopi Tribe v. Arizona Snowbowl Resort Ltd. P’ship*, 430 P.3d 362, 365 (Ariz. 2018) (articulating the two reasons for the special injury rule described in this Comment).

Courts relying on the unfairness of denying liability in the case of a governmental undertaking to protect a person that the person relies on, include *Cuffy v. City of New York*, 505 N.E.2d 937, 940 (N.Y. 1987) (explaining that, “at the heart of most of these ‘special duty’ cases is the unfairness that the courts have perceived in precluding recovery when a municipality’s voluntary undertaking has lulled the injured party into a false sense of security and has thereby induced him either to relax his own vigilance or to forego other available avenues of protection”);

City of Gary v. Odie, 638 N.E.2d 1326, 1333-1334 (Ind. Ct. App. 1994) (declaring that “we adopt the principles enunciated in *Cuffy* for application in cases in Indiana wherein a special duty is alleged”); Sawicki v. Vill. of Ottawa Hills, 525 N.E.2d 468, 478 (Ohio 1988) (“We now adopt [the *Cuffy*] principles for application to cases in Ohio wherein a special duty is alleged.”); Wolfe v. City of Wheeling, 387 S.E.2d 307, 311 (W. Va. 1989) (quoting *Cuffy*).

Comment e. The factors. For judicial recognition of the variance across states in what is required to establish a special relationship, see White v. Beasley, 552 N.W.2d 1, 4 (Mich. 1996) (“A survey of special-relationship tests reveals deep disagreement among the states regarding the exact nature of the ‘special-relationship’ the plaintiff must prove.”); Ezell v. Cockrell, 902 S.W.2d 394, 401 (Tenn. 1995) (stating that “the test varies from jurisdiction to jurisdiction” and discussing the approaches in other jurisdiction); see generally John H. Derrick, Annotation, *Modern Status of Rule Excusing Governmental Unit From Tort Liability on Theory that Only General, not Particular, Duty Was Owed Under Circumstances*, 38 A.L.R. 1194 (originally published in 1985).

Maryland and New York reflect jurisdictions that substantially limit the creation of a special relationship by requiring that all of four factors exist before a special relationship exists:

- (1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality’s agents that inaction could lead to harm; (3) some form of direct contact between the municipality’s agents and the injured party; and
- (4) that party’s justifiable reliance on the municipality’s affirmative undertaking.

Muthukumarana v. Montgomery Cnty., 805 A.2d 372, 399 (Md. 2002); accord *Cuffy v. City of New York*, 505 N.E.2d 937, 940 (N.Y. 1987) (adopting the same test as articulated in *Muthukumarana*); see also White v. Beasley, 552 N.W.2d 1, 5 (Mich. 1996) (characterizing the *Cuffy* test as “somewhat arbitrarily restrictive” but adopting it for police officers); *id.* at 11 (Cavanagh J., concurring) (criticizing the *Cuffy* factors and advocating that direct contact be eliminated and that justifiable reliance not be required with regard to situations involving ongoing crimes); Conner v. Wright State Univ., 2013 WL 6835270 (Ohio Ct. App. 2013) (applying *Cuffy* factors adopted in legislation enacted in the state); W. Va. State Police v. Hughes, 796 S.E.2d 193, 199-200 (W. Va. 2017) (employing the same requirements as *Muthukumarana*).

The Maryland and New York approaches can lead to troubling results. Thus, in *Muthukumarana*, an adolescent who became severely intoxicated at a party was sexually abused during the party. Afterwards, she was dragged, semi-conscious, out of the house and into a wooded area while lightly dressed and with a winter storm forecast. Someone present called 911 and related her condition and location to the dispatcher who promised the caller that an officer would be dispatched. The dispatcher provided an incorrect address to the officer who never located the victim; she died of hypothermia. Although the dispatcher had promised the anonymous caller that an officer would be dispatched, the court held that no duty existed because the person at risk must have direct contact with the government—contact with a third party was insufficient.

Similarly troubling is *Valdez v. City of New York*, 960 N.E.2d 356 (N.Y. 2011). There, after her boyfriend had threatened to kill her, the plaintiff contacted the police. The police told her

1 to return to her apartment with her two children and that the former boyfriend would be arrested
 2 immediately. She returned with her children and had no further communication with the police.
 3 Yet, 28 hours after the phone conversation, her former boyfriend shot her outside her apartment.
 4 Relying on the fourth *Cuffy* factor of justifiable reliance, the court held that the plaintiff failed to
 5 establish a special relationship because it was not reasonable for the plaintiff to conclude that she
 6 could relax her vigilance indefinitely and exit her apartment some 28 hours later without further
 7 contact with the police.

8 By contrast with Maryland and New York, the Supreme Court of Kansas found that a police
 9 undertaking in response to a 911 call about armed bail bondsmen attempting to break and enter
 10 plaintiff’s home that included going to the scene and speaking to one of the bondsmen was sufficient
 11 to impose a duty. *Williams v. C-U-Out Bail Bonds, LLC*, 450 P.3d 330, 343 (Kan. 2019). The court
 12 relied on provisions in the Second Restatement of Torts that impose an affirmative duty based on
 13 an undertaking. See Restatement Second, Torts § 323 (AM. L. INST. 1965). Similarly, *Ariola v. City*
 14 *of Stillwater*, 2014 WL 5419809, at *8 (Minn. Ct. App. 2014), considered the four *Cuffy* factors but
 15 ruled that “all four need not necessarily be met for a special duty to exist.” Displaying similar
 16 flexibility, Pennsylvania courts have crafted a three-requirement rule to create a special
 17 relationship: (1) awareness of the individual’s particular situation or unique status, (2) knowledge
 18 of the potential for the particular harm which the individual suffered, and (3) voluntarily assuming,
 19 in light of the knowledge, protection of the individual from the precise harm which was occasioned.
 20 *Rankin v. S.E. Pa. Transp. Auth.*, 606 A.2d 536, 539 (Pa. Cmmw. Ct. 1992). Likewise, South
 21 Dakota employs four factors, any combination of which may be sufficient to create a “special duty.”
 22 *Fodness v. City of Sioux Falls*, 947 N.W.2d 619, 626 (S.D. 2020).

23 For courts relying on the existence of a statute to permit suit against a governmental actors
 24 (as contained in Subsection (b)(7)), see *Rees v. State, Dep’t of Health & Welfare*, 137 P.3d 397
 25 (Idaho 2006) (concluding that the Child Protection Act “created a duty owed to a narrow, easily
 26 identified class of persons to be protected from a particular harm. . . . We conclude from this that
 27 the Act creates a special relationship between allegedly abused children and the Department”);
 28 *Massee v. Thompson*, 90 P.3d 394 (Mont. 2004) (holding that domestic-violence statutes were
 29 intended to protect the class of domestic-violence victims and therefore imposed a duty on law
 30 enforcement personnel); *Ezell v. Cockrell*, 902 S.W.2d 394, 402 (Tenn. 1995) (stating that there
 31 exists an exception to the public-duty doctrine when “a statute specifically provides for a cause of
 32 action against an official or municipality for injuries resulting to a particular class of individuals,
 33 of which the plaintiff is a member, from failure to enforce certain laws”); *Halvorson v. Dahl*, 574
 34 P.2d 1190, 1192 (Wash. 1978) (“Liability can be founded upon a municipal code if that code by
 35 its terms evidences a clear intent to identify and protect a particular and circumscribed class of
 36 persons.”); see also DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, *THE LAW OF TORTS*
 37 § 345 (2024 update) (“The public duty doctrine has no application when the court concludes that
 38 a statute . . . has created a special tort duty or specific obligation to a particular class of persons
 39 rather than to the public at large.”); 2 BARRY A. LINDAHL, *MODERN TORT LAW: LIABILITY AND*
 40 *LITIGATION* § 16:29 (2024 update) (identifying conditions for invoking a protective statute to

negate the public-duty doctrine). For a court limiting the role of a statute in creating a duty to those that provide an express or implied cause of action. See *McLean v. City of New York*, 905 N.E.2d 1167, 1171 (N.Y. 2009). Of course, by so limiting the role of statutes, they can have no effect on common-law tort claims because an express or implied right of action is a basis for recover outside common-law tort claims.

For support for Subsection (b)(8), involving court orders, see *Matthews v. Pickett Cnty.*, 996 S.W.2d 162, 165 (Tenn. 1999) (explaining that sheriff's deputies had a special relationship with plaintiff and a duty to arrest ex-husband if he violated court protective order); *DOBBS ET AL.*, supra § 345 ("The public duty doctrine has no application when the court concludes that a . . . court order has created a special tort duty or specific obligation to a particular class of persons rather than to the public at large.").

For courts that accept government collaboration as a basis for a special relationship, as reflected in Subsection (b)(9), see, e.g., *Tanasijevich v. City of Hammond*, 383 N.E.2d 1081, 1083 (Ind. 1978) (holding a special relationship existed based on the plaintiff's cooperation with law enforcement authorities); *Christy v. City of Baton Rouge*, 282 So. 2d 724, 727 (La. Ct. App. 1973) (imposing a duty on police to protect assault victim attacked while assisting officers in effectuating an arrest); *Schuster v. City of New York*, 154 N.E.2d 534, 537 (N.Y. 1958) (permitting wrongful-death action based on decedent's having provided information to police that led to the arrest of a dangerous fugitive).

For a court creating an exception to the public-duty doctrine based on the governmental actor's extreme negligence, consistent with Subsection (b)(10)), see *Verity v. Danti*, 585 A.2d 65, 67 (R.I. 1991) (explaining the state ignored the existence of a tree that completely blocked sidewalk access that led to minor traversing state highway where she was struck by a car and remarking "[w]hen the state embarks on a course of action that is so egregious, we are of the opinion that the public duty doctrine should not cloak the state with immunity"); *Ezell v. Cockrell*, 902 S.W.2d 394, 403 (Tenn. 1995) (claims involving intent, malice or recklessness). In *Tedesco v. Connors*, 871 A.2d 920 (R.I. 2005), the court addressed the "egregious conduct" exception, explaining the appropriate factors in determining if it exists:

- (1) whether that entity created or allowed for the persistence of circumstances that forced a reasonably prudent person into a position of extreme peril; (2) whether that entity had actual or constructive knowledge of the perilous circumstances; and (3) whether that entity having been afforded a reasonable amount of time to eliminate the dangerous condition, failed to do so.

Id. at 924 (quotation marks omitted).

For cases stating that the governmental actor must possess actual knowledge of the peril, see *Cracraft v. St. Louis Park*, 279 N.W.2d 801, 806-807 (Minn. 1979) (stating the first factor is "the state's actual knowledge of the dangerous condition"); *E.P. v. Riley*, 604 N.W.2d 7, 12-13 (S.D. 1999) (same as *Cracraft*); *Vergeson v. Kitsap County*, 186 P.3d 1140, 1146 (Wash. Ct. App. 2008) (same as *Cracraft*). But see *Tedesco v. Connors*, 871 A.2d 920, 924 (R.I. 2005) (stating that the governmental entity must have "actual or constructive knowledge of the perilous circumstance").

FIREFIGHTER’S RULE ABOLISHED

Firefighter’s Rule Abolished

An actor who tortiously creates a peril that occasions the presence of a professional rescuer owes a duty to that professional rescuer consistent with the general principles of the Restatement Third, Torts: Liability for Physical and Emotional Harm §§ 7(a) and 32, notwithstanding the traditional “firefighter’s rule.”

Comment:

- a. Terminology and introduction.*
- b. Past Restatement discussion of the firefighter’s rule.*
- c. The firefighter’s rule reflects a sharp departure from traditional tort principles.*
- d. Past justifications for the firefighter’s rule.*
- e. Current public-policy-based justifications for the firefighter’s rule—and problems therewith.*
- f. Rationale for the rule’s repudiation.*
- g. Doctrinal support for the rule’s repudiation.*
- h. This Section’s effect.*

a. Terminology and introduction. The rule addressed in this Section has historically gone by several different names including the “firefighter’s rule,” the “fireman’s rule,” and the “professional rescuer’s doctrine.” Regardless of the terminology utilized, this rule established that, in the course of an emergency, when on-duty professional rescuers were injured by the very peril that they were called to confront, they had no claim against the actor who tortiously created that peril because, it was said, no duty was owed to these rescuers.

This Section repudiates the so-called firefighter’s rule. It establishes, contra to the traditional firefighter’s rule, that no special rules govern the duty determination that applies to those who imperil professional rescuers. Regardless of whether a person is a firefighter, police officer, dog catcher, lifeguard, friend, or neighbor, when that person is injured in the course of a rescue, typical rules—including typical duty and also scope-of-liability (frequently called proximate cause) rules—apply. For those rules, see Restatement Third, Torts: Liability for Physical and Emotional Harm §§ 7, 29, and 32. This does not, of course, mean that professional rescuers necessarily prevail in tort suits they initiate against others. For further discussion of this Section’s effect, see Comment *g*.

b. Past Restatement discussion of the firefighter’s rule. The Restatement Second of Torts addressed the firefighter’s rule, somewhat elliptically, in § 345. That Section determined whether

Firefighter's Rule Abolished

1 certain entrants on land, who entered the land in the performance of their public duties, were
2 licensees or invitees. In particular, it provided:

3 (1) Except as stated in Subsection (2), the liability of a possessor of land to one who
4 enters the land only in the exercise of a privilege, for either a public or a private
5 purpose, and irrespective of the possessor's consent, is the same as the liability to
6 a licensee.

7 (2) The liability of a possessor of land to a public officer or employee who enters
8 the land in the performance of his public duty, and suffers harm because of a
9 condition of a part of the land held open to the public, is the same as the liability to
10 an invitee.

11 A prior project of the Restatement Third of Torts also discussed (but did not restate) the
12 firefighter's rule. In particular, Restatement Third of Torts: Liability for Physical and Emotional
13 Harm, discussed the rule in two places: §§ 32 and 51. Comment *m* to § 51, a Section titled "General
14 Duty of Land Possessors," expressly declined to take a position on the firefighter's rule's vitality
15 or scope. It did clarify, however, that, if the rule were to endure, it had to be justified on public-
16 policy grounds. It could no longer be justified on its original basis—professional rescuers' status
17 as entrants on the land—since per § 51 (contra the Second Restatement of Torts § 345), except for
18 flagrant trespassers, all land entrants are owed a duty of reasonable care. Likewise, that Third
19 Restatement of Torts addressed the firefighter's rule at § 32, Comment *c*. That Comment observed:
20 "Professional rescuers are often treated differently [from other rescuers] under what is colloquially
21 known as the 'firefighter rule.' Under its modern incarnation, that rule is based on a mélange of
22 public-policy considerations and dealt with under the rubric of duty."

23 *c. The firefighter's rule reflects a sharp departure from traditional tort principles.* In
24 drawing a categorical line to bar *certain* rescuers' causes of action, the firefighter's rule has always
25 deviated sharply from general tort principles, which hold, and have long held, that a party who
26 attempts a rescue and is injured thereby may recover from the actor whose tortious conduct made
27 the rescue necessary. See Restatement Third, Torts: Liability for Physical and Emotional Harm
28 § 32 (articulating the general and longstanding "rescue doctrine"); *Wagner v. Int'l Ry. Co.*, 133
29 N.E. 437, 437 (N.Y. 1921) (Cardozo, J.) (articulating the principle that "[d]anger invites rescue"
30 and that a wrongdoer who imperiled life is accountable for subsequent injury to the rescuer).

d. Past justifications for the firefighter's rule. As Comment *b* explains, in its initial incarnation, the firefighter's rule rested on status-based categories that classified entrants on land—and, in particular, an understanding that *certain* entrants were entitled only to the barest protection. Yet, beginning in the late 1960s, those rigid property-based classifications started to be erased, and their underlying assumptions were reexamined. With the classifications' erasure, the primary doctrinal hook on which the firefighter's rule rested was eliminated. See Restatement Third, Torts: Liability for Physical and Emotional Harm § 51, Comment *m* (explaining that, except for flagrant trespassers, all entrants on land are owed a duty of reasonable care and, therefore, “[t]o the extent that the firefighter rule has historically been grounded in the status of professional rescuers on the land, this Restatement eliminates the basis for that rationale”).

As the firefighter's rule was divorced from its reliance on (largely defunct) land possessor categories, many courts turned to another premise: assumption of risk. In particular, many courts doubled down on the notion that professional rescuers ought to be barred from recovery in tort because, by becoming firefighters or police officers, these public servants impliedly assumed the particular risks one predictably encounters in those notoriously dangerous professions.

But assumption of risk can't bear the weight that courts put on it. There are two kinds of implied assumption of risk: secondary and primary. Neither, when applied to the firefighter's rule, is particularly satisfactory.

Implied secondary assumption of risk is a true affirmative defense that focuses on the individual plaintiff. To benefit from this defense, the defendant must establish that the plaintiff knowingly and voluntarily—and, in its more contemporary iterations, unreasonably—confronted the risk created by the defendant's tortious conduct. Those are factual determinations that require resolution by the factfinder in each case. Thus, this form of assumption of risk—even where it endures—cannot support a categorical rule barring professional rescuers from recovering for their tortiously caused injuries. And, with the advent of comparative fault, this form of assumption of risk mostly *doesn't* endure; in the majority of states, it has been abolished. See Restatement Third, Torts: Liability for Physical and Emotional Harm § 25, Comment *e* (explaining that, with the widespread adoption of comparative responsibility, “[n]o separate defense of assumption of risk is recognized”); see also Restatement Third, Torts: Apportionment of Liability § 2, Comment *i* (explaining that “‘implied assumption of risk,’ does not . . . constitute a [separate] defense unless it constitutes consent to an intentional tort”); *id.* § 3, Comment *c* (explaining that, these days,

1 comparative responsibility principles apply to reduce, but not necessarily to eliminate, a plaintiff's
2 recovery "even when the plaintiff is actually aware of a risk and voluntarily undertakes it").

3 The alternate flavor of assumption of risk—implied primary assumption of risk—is a more
4 plausible basis for the firefighter's rule, as it is not a true affirmative defense; it, instead, implicates
5 the categorical question of when the defendant can be subject to liability. *Id.* § 2, Reporters' Note
6 to Comment *j* ("What courts often call 'primary assumption of risk' is actually a doctrine about
7 the defendant's liability or duty."). Yet, invoking the label of primary assumption of risk leaves a
8 gaping hole: *Why exactly* are professional rescuers singled out for different treatment from others
9 when an actor's tortious conduct results in an emergency that injures the rescuer? As the
10 Restatement explains: "A no-duty ruling represents a determination, a purely legal question, that
11 no liability should be imposed on actors in a category of cases. Such a ruling should be explained
12 and justified based on articulated policies or principles that justify exempting these actors from
13 liability. . . ." Restatement Third, Torts: Liability for Physical and Emotional Harm § 7, Comment
14 *j*. That means that a court intent on justifying the firefighter's rule using primary implied
15 assumption of risk is bound to return to the principles and policies addressed in Comment *e*.
16 Furthermore, primary implied assumption of risk is typically applied to restrict the recovery of
17 those who voluntarily engage in risky *recreational* activities and are injured by a risk inherent in
18 that activity. The doctrine, therefore, is a poor fit for the lifesaving work of professional rescuers.

19 *e. Current public-policy-based justifications for the firefighter's rule—and problems*
20 *therewith.* As Comment *d* explains, over the past 50 years, the rationale that underlies the
21 firefighter's rule has evolved. Now, in the approximately 32 states where the firefighter's rule has
22 been retained, it typically rests, precariously, on a kaleidoscope of public-policy considerations.

23 In particular, in contemporary jurisprudence, where the firefighter's rule is justified, it is
24 typically said to rest on the following three grounds: (1) a desire to avoid double recovery within
25 the tort system on the one hand and the workers' compensation system on the other, sometimes
26 alongside a sense that taxpayers who furnish the rescuer's salary and benefits are analogous to
27 employers who provide workers' compensation coverage and, like employers, are entitled to
28 protection from liability; (2) a market-driven theory that rescuers impliedly exchange their right to
29 sue in order to obtain higher wages and benefits and the related notion that, given this exchange,
30 it is unfair to allow rescuers, already appropriately compensated for accepting risk, to recover on
31 those occasions when the anticipated risk materializes; and (3) an interest in encouraging members

1 of the public to call for assistance whenever that assistance is needed, without hesitation or fear of
2 liability. Yet, all three justifications are susceptible to critique, rest on a dubious empirical premise,
3 or are under- or over-inclusive.

4 Consider first the “double recovery” justification. To the extent the rescuer is a casual
5 volunteer who is not covered by the state’s workers’ compensation law, this justification loses all
6 force. Even when the rescuer is entitled to workers’ compensation benefits (as many even
7 voluntary rescuers are), the rationale is question-begging: On *many* occasions, public workers are
8 entitled to workers’ compensation benefits and are also able to claim for injuries in tort—and, in
9 most instances, no special judicially-created doctrines block such parallel recoveries. Against that
10 backdrop, it is unclear why *particular* public workers are singled out for especially
11 disadvantageous treatment. Or, as the Oregon Supreme Court has put it, it is unclear why, under
12 the firefighter’s rule, “the injured public safety officer must bear a loss which other public
13 employees are not required to bear.” Christensen v. Murphy, 678 P.2d 1210, 1217 (Or. 1984).
14 Worse, the “double recovery” problem that the firefighter rule ostensibly guards against is more
15 imagined than real given subrogation, through which first-party payors are able to recoup their
16 expenditures when a payment is made through the tort system.

17 Also unconvincing is the second justification: that firefighters are already compensated for
18 their exposure to risks. Most obviously, the notion that taxpayers already pay rescuers to confront
19 risk is wholly unsatisfactory when it comes to unpaid firefighters—and this problem is not trivial,
20 as roughly two-thirds of the nation’s firefighters are, in fact, volunteers. Meanwhile, even when
21 professional rescuers *are* compensated, whether their compensation includes a premium for
22 tortiously created risks to which they are exposed logically depends on what the firefighter’s rule
23 is in the particular jurisdiction. Yet, the Reporters have uncovered no evidence that the pay of
24 firefighters or police officers systematically differs based on the jurisdiction’s adoption,
25 revocation, or modification of the firefighter’s rule. See also Restatement Third, Torts: Liability
26 for Physical and Emotional Harm § 51, Reporters’ Note to Comment *m* (articulating this point,
27 while reporting a similar absence of evidence).

28 The third commonly articulated justification—that the firefighter’s rule promotes society’s
29 interest in encouraging members of the public to call for assistance whenever that assistance is
30 needed, without hesitation or fear of liability—is also unpersuasive. The justification assumes that
31 regular people make real decisions in times of emergency based on an obscure tort doctrine. Yet

1 it is not clear how many Americans know about tort doctrines in general, much less the (quite
2 arcane) firefighter's rule in particular, and, even if they did, it is doubtful that that knowledge
3 would override a person's natural instinct, in a time of emergency, to summon the assistance of
4 police officers or firefighters in order to protect oneself, one's property, or one's family. This is
5 especially true because, even assuming the firefighter's rule abrogation creates a disincentive to
6 call for help, that disincentive is naturally blunted by the fact that a high proportion of homeowners,
7 apartment dwellers, and motorists are already insured against any ensuing liability risk.

8 Recognizing these infirmities, the influential Prosser treatise provides: "The argument
9 sometimes offered, that tort liability might deter landowners from uttering such cries of distress,
10 is surely preposterous rubbish." W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 61,
11 at 431 (5th ed. 1984). The Harper, James and Gray treatise offers a similarly dim assessment:

12 As another reason for limiting liability, it has been suggested that landowners would
13 be deterred from calling the police or firefighters if their tort liability were
14 extended. But surely this suggestion has little weight. It is inconceivable that an
15 occupier—even if he knew the extent of his legal duties in the case of a possible
16 hypothetical injury—would be deterred in the ordinary situation.

17 5 FOWLER V. HARPER ET AL., HARPER, JAMES AND GRAY ON TORTS § 27.14, at 294 (3d ed. 2008).

18 For these reasons, this Restatement concludes that the public-policy justifications that
19 ostensibly support the firefighter's rule are weak and do not justify its continuation.

20 *f. Rationale for the rule's repudiation.* This Restatement's rejection of the firefighter's rule
21 reflects a combination of the principles set forth in Comments *c*, *d*, and *e* above. As Comment *c*
22 explains, the firefighter's rule represents a sharp departure from traditional tort principles. As
23 Comment *d* explains, over time, the doctrine said to support the firefighter's rule has undergone a
24 significant shift. And, as Comment *e* explains, the current justifications that supposedly support
25 the firefighter's rule do not bear its weight. Taken together, this Restatement concludes that the
26 current (flimsy) justifications for the rule cannot support the sharp departure from traditional tort
27 principles that the firefighter's rule represents.

28 Further supporting this Restatement's abrogation: Where it is accepted, the rule consigns
29 courts to making numerous subsidiary determinations that are, themselves, difficult to equitably or
30 satisfactorily resolve. Should the rule apply to impose a legal disability on only firefighters?
31 Firefighters plus police officers? What about lifeguards or EMTs? What if the firefighter is a volunteer

Firefighter's Rule Abolished

(as the majority are)? What if the firefighter is off-duty or engaged in a non-emergency activity? What if the tortfeasor's behavior transcends negligence? What if the rescuer is injured on public land rather than on private property occupied by the tortfeasor? Different courts that accept the firefighter's rule have resolved these and numerous other subsidiary questions differently, creating an ever-shifting legal checkerboard that resists consistent, predictable, or equitable application.

g. Doctrinal support for the rule's repudiation. This Section repudiates the firefighter's rule. In so doing, it endorses a minority position. As noted above, approximately 32 states maintain the rule in some form. On the other side of the ledger, a half-dozen states have completely or mostly abolished the firefighter's rule, whether by judicial decision or legislative action, while a handful of states that had not previously adopted the rule have expressly declined to do so. These courts, like this Section, conclude that contemporary justifications for the rule do not support its creation or retention.

h. This Section's effect. This Section removes the doctrinal disability that the firefighter's rule previously placed on certain professional rescuers who are injured when responding to emergencies. It puts professional rescuers on par with other victims, pursuant to Restatement Third, Torts: Liability for Physical and Emotional Harm §§ 7 and 32. In so doing, this Section in no way guarantees that any professional rescuer will succeed in the rescuer's tort suit against the defendant. Like other litigants—even absent the firefighter's rule—professional rescuers must still prove all of the elements of their prima facie case, and, in certain instances, even if they do, their recovery may be reduced (or eliminated in modified comparative responsibility jurisdictions) because of comparative responsibility or because the defendant is able successfully to offer another affirmative defense.

REPORTERS' NOTE

Comment a. Terminology and introduction. The firefighter's rule dates back more than a century to *Gibson v. Leonard*, 32 N.E. 182 (Ill. 1892), which invented the doctrine. For discussion of the rule's history, see David L. Strauss, Comment, *Where There's Smoke, There's the Firefighter's Rule: Containing the Conflagration After One Hundred Years*, 1992 WIS. L. REV. 2031, 2031, 2034-2041.

At its most basic, the firefighter's rule (variously called the "fireman's rule" or "public rescuer's doctrine") establishes that, when, in the course of an emergency, on-duty firefighters or police officers are injured by the very peril they have been called to confront, they have no claim against the actor who tortiously created that peril.

Comment c. The firefighter's rule reflects a sharp departure from traditional tort principles. In barring the claims of particular rescuers, the firefighter's rule deviates sharply from general tort principles, which hold, and have long held, that a party who attempts a rescue and is

injured thereby may recover from the actor whose tortious conduct made the rescue necessary. See Restatement Third, Torts: Liability for Physical and Emotional Harm § 32 (AM. L. INST. 2010); *Wagner v. Int'l Ry. Co.*, 133 N.E. 437, 437 (N.Y. 1921) (Cardozo, J.) (articulating the principle that “[d]anger invites rescue” and that a wrongdoer who imperiled life is accountable for subsequent injury to the rescuer); accord *Sanders v. Alger*, 394 P.3d 1083, 1086-1087 (Ariz. 2017) (explaining that the firefighter’s rule represents “an exception to the rescue doctrine” which typically holds that “an actor who negligently imperils himself or herself may be liable to a person who is physically harmed in attempting to aid or protect the actor”). As the Connecticut Supreme Court has also observed, the rule also marks “an exception to the general rule of tort liability that, as between an innocent party and a negligent party, any loss should be borne by the negligent party.” *Sepega v. DeLaura*, 67 A.3d 916, 920 (Conn. 2017) (quotation marks omitted).

Comment d. Past justifications for the firefighter’s rule. As *Comment d* explains, the firefighter’s rule historically rested on, and was said to emanate from, the limited (though categorical) duty rules that governed entrants on land. In time, as those categorical duty rules were blurred or erased, that basis for the firefighter’s rule gradually eroded. See *Holmes v. Adams Marine Ctr.*, 2000 WL 33675369, at *1 (Me. Super. Ct. 2000) (“The distinction between licensee and invitee has long been abandoned by most jurisdictions . . . and can no longer serve as an underpinning of the rule.”).

With landowner categories eliminated, some courts adapted by justifying the firefighter’s rule on notions of assumption of risk. See *Cristen C. Handley, Comment, Back to the Basics: Restoring Fundamental Tort Principles by Abolishing the Professional-Rescuer’s Doctrine*, 68 ARK. L. REV. 489, 492 (2015) (“Courts once used premises liability to justify the doctrine’s existence before shifting toward assumption of risk.”); *David L. Strauss, Comment, Where There’s Smoke, There’s The Firefighter’s Rule: Containing the Conflagration After One Hundred Years*, 1992 WIS. L. REV. 2031, 2034-2038 (explaining that, in time, courts stopped justifying the firefighter’s rule using “entrant-status classification” and started to justify the rule “based on assumption of risk”). But, as *Comment d* explains, neither secondary nor primary assumption of risk, properly understood, adequately justifies the firefighter’s rule.

The Restatement Third of Torts: Apportionment of Liability § 2 (AM. L. INST. 2000), dismissed implied secondary assumption of risk as supporting the firefighter’s rule. Its Illustration 1 describes a police officer who is injured by a condition on private property after the officer enters the property to make an arrest. In a suit against the landowner who asserts assumption of risk as a defense based on the plaintiff’s becoming a police officer or deciding to enter the land, the Restatement explains that the officer’s “decisions do not constitute a defense under the rule stated in this Section. Whether [the landowner] has full or limited liability to [the police officer] is governed by the substantive law regarding liability (and duty). . . .” *Id.*, *Comment j*, Illustration 1. Other portions of that Restatement project made crystal clear that secondary assumption of risk did not survive the widespread adoption of comparative fault.

Like the Third Restatement, the Uniform Comparative Fault Act collapsed secondary assumption of risk into comparative fault. National Commissioners on Uniform State Laws,

Uniform Comparative Fault Act § 1(b) (1981 Supp.). And the majority of states follow suit. See DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, *THE LAW OF TORTS* § 237 (2024 update) (“After the advent of comparative negligence, courts found it logically or morally difficult to maintain a dual system in which the plaintiff’s fault only reduced damages if it was called contributory negligence, while it barred the plaintiff entirely if it was called assumption of risk. Consequently, most comparative negligence states, by statutory provision or judicial decision, simply ‘merge’ assumption of risk into comparative negligence . . .”).

Meanwhile, some courts rest the firefighter’s rule on implied primary assumption of risk. E.g., *Farnam v. State of California*, 84 Cal. App. 4th 1448, 1451 (2000) (explaining that the “firefighter’s rule is but an application of the doctrine of primary assumption of risk”); *Flowers v. Sting Sec., Inc.*, 488 A.2d 523, 534 (Md. App. 1985) (“A fireman does not assume a risk in the secondary sense, hazard by hazard and fire by fire, and only when he lacks a safer alternative, but in the broad, primary sense as an inherent incident of his occupation.”), *aff’d sub nom. Flowers v. Rock Creek Terrace Ltd. P’ship*, 520 A.2d 361 (Md. 1987); *Mignone v. Fieldcrest Mills*, 556 A.2d 35, 39 (R.I. 1989) (“We believe that the doctrine of ‘primary’ assumption of risk provides a substantially adequate rationale for the retention of the limited-duty rule . . .”). Yet, as Comment *d* explains, this approach is also problematic—and demands an explanation for *why exactly* no duty of care is owed to professional rescuers. See Restatement Third, *Torts: Liability for Physical and Emotional Harm* § 7(b) (AM. L. INST. 2010) (explaining that typical duty rules may give way when “*an articulated* countervailing principle or policy warrants denying or limiting liability in a particular class of cases”) (emphasis added).

For the fact that primary implied assumption of risk typically applies to limit the recovery of participants who voluntarily take part in recreational activities, when the participant is injured by a risk that is inherent to the activity, see, e.g., *Wolf v. Weber*, 52 Cal. App. 5th 406, 410 (2020) (“Under the primary assumption of risk doctrine, a person does not owe a duty to protect others from risks inherent in certain recreational activities.”); *Helm v. 206 Massachusetts Ave., LLC*, 107 A.3d 1074, 1080 (Del. 2014) (“The defense of primary assumption of risk is most often applied in cases of sports-related activities . . .”); *Franks v. Holloway*, 540 P.3d 960, 967 (Haw. Ct. App. 2023), as corrected (Apr. 12, 2024) (“In Hawai‘i, the primary assumption of risk doctrine has been applied to sports-related injuries.”); *Krzenski v. Southampton Union Free Sch. Dist.*, 102 N.Y.S.3d 693, 695 (App. Div. 2019) (“Under the doctrine of primary assumption of risk, by engaging in a sport or recreational activity, a participant consents to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation.”) (quotation marks omitted); *O’Neill v. City of Port Orchard*, 375 P.3d 709, 717 (Wash. Ct. App. 2016) (“Classic examples of implied primary assumption of risk occurs in sport-related cases where the plaintiff, a participant in the sport, assumes the dangers that are *inherent in* and *necessary to* the particular sport or activity.”) (quotation marks omitted); *Barth v. Blue Diamond*, 2017 WL 5900949, at *4 (Del. Super. Ct. 2017) (“Case law suggests that courts should find an implied primary assumption of risk only with respect to certain activities. Delaware cases have noted that primary assumption of risk commonly applies to sports-related activities that involve physical skill

and challenges posing significant risk of injury to participants in such activities, and as to which the absence of such a defense would chill vigorous participation in the sporting activity and have a deleterious effect on the nature of the sport as a whole.”) (cleaned up and quotation omitted); *Cotty v. Town of Southampton*, 64 A.D.3d 251, 253 (N.Y. Sup. Ct. 2009) (“Under the doctrine of primary assumption of risk, a person who voluntarily participates in a sporting activity generally consents, by his or her participation, to those injury-causing events, conditions, and risks which are inherent in the activity.”)

Comment e. Current public-policy-based justifications for the firefighter's rule—and problems therewith. As courts have grappled with the problems surfaced in *Comment d*, some have abolished the firefighter's rule. See *Comment g*. Many others have retained the rule but now justify it in terms of public policy. See *Fordham v. Oldroyd*, 171 P.3d 411, 413 (Utah 2007) (describing the “dominant public policy rationale”); *England v. Tasker*, 529 A.2d 938, 939-942 (N.H. 1987) (discussing and serially discarding the landowner and assumption-of-risk rationales and concluding that “[t]he better justification for the fireman's rule today rests in considerations of public policy”); *Hack v. Gillespie*, 658 N.E.2d 1046, 1049 (Ohio 1996) (discarding the landowner rationale that initially supported the rule and finding, instead, that “Ohio's Fireman's Rule is more properly grounded on policy considerations”); *Pinter v. Am. Fam. Mut. Ins. Co.*, 613 N.W.2d 110, 113 (Wis. 2000) (“[M]ost courts adopting or adhering to the firefighter's rule have justified the rule on public policy grounds.”).

Yet many, including this Restatement, conclude that these public-policy justifications are susceptible to significant and persuasive critique. See, e.g., DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, *THE LAW OF TORTS* § 363 (2024 update) (“Where assumed risk has been abolished as a separate doctrine, and where the special landowners' rules have been abolished as well, the formal supports for the doctrine are shaky.”). Three frequently articulated public-policy justifications—as well as commonly voiced counters thereto—are considered below.

First, some courts hold that, to allow a rescuer to file suit for her injuries in tort would result in double recovery from both the tort system and the state's workers' compensation program. See, e.g., *Syracuse Rural Fire Dist. v. Pletan*, 577 N.W.2d 527, 533 (Neb. 1998). While frequently articulated, however, for reasons explained in *Comment e*, this “double recovery” justification is quite unpersuasive. For starters, to the extent the rescuer is a volunteer who is not covered by the state's workers' compensation law, this justification loses all force. Next, even when the rescuer is entitled to workers' compensation benefits (as many even voluntary rescuers are), the rationale is question-begging: On many occasions, public workers are entitled to workers' compensation benefits and are also able to claim for injuries in tort—and, in most instances, no special doctrines block such parallel recoveries. Against that backdrop, it is unclear why *particular* public workers are singled out for disadvantageous treatment. See *Levandoski v. Cone*, 841 A.2d 208, 215 (Conn. 2004) (“[W]e are not persuaded that, simply because the firefighter or police officer has recourse to workers' compensation benefits, he or she should not also be able to recover from a third party based on negligence. We do not ordinarily put such an elevated burden on recovery. . . .”); W. PAGE KEETON ET AL., *PROSSER AND KEETON ON TORTS* § 61, at 431 (5th ed. 1984) (discussing the

inconsistency); accord Nora Freeman Engstrom, *Exit, Adversarialism, and the Stubborn Persistence of Tort*, 6 J. TORT L. 1, 10-11 (2015) (describing the frequency with which injured workers supplement relatively meager workers' compensation benefits by suing nonemployer defendants in tort).

Worse, given the prevalence of subrogation, the "double recovery" problem that the firefighter rule ostensibly guards against is more imagined than real. See *Levandoski*, 841 A.2d at 215 (explaining that "permitting the plaintiff to recover for the defendant's negligence will tend to reduce workers' compensation costs by permitting the plaintiff's employer to recoup those benefits"). For more on the allocation of payments when a worker receives benefits under both workers' compensation and through the tort system, see Restatement Third, Torts: Apportionment of Liability § C20, Comments *c* and *d* (AM. L. INST. 2000); Andrew R. Klein, *Apportionment of Liability in Workplace Injury Cases*, 26 BERKELEY J. EMP. & LAB. L. 65 (2005). Given these litigation realities, one might argue that what the firefighter's rule *really* does is to deprive cities, counties, and municipalities of funds they could recoup via subrogation from the tortfeasor who caused the loss, stunt cost internalization, and insufficiently deter tortious injury-causing conduct. Accord *Levandoski*, 841 A.2d at 215 (articulating this point); DOBBS ET AL., *supra* § 363 (observing that, "in foreclosing the firefighter's recovery, the courts have eliminated the possibility that the city would recoup any of the monies it has paid in compensation").

Second, some courts have held that a rescuer is compensated to confront dangerous situations; therefore, he cannot complain when the danger he is paid to confront materializes—and that, to permit such "double" compensation would impose an unreasonable burden on taxpayers. Advancing this argument, the Alaska Supreme Court explains:

The negligent party is said to have no duty to the public safety officer to act without negligence in creating the condition that necessitates the officer's intervention because the officer is employed by the public to respond to such conditions and receives compensation and benefits for the risks inherent in such responses. Requiring members of the public to pay for injuries resulting from such responses effectively imposes a double payment obligation on them.

Moody v. Delta W., Inc., 38 P.3d 1139, 1142 (Alaska 2002); see also, e.g., *Furstein v. Hill*, 590 A.2d 939, 944 (Conn. 1991) (summarizing a rationale commonly articulated by others: "permitting firefighters and police officers to recover in tort for occupational injuries caused by the negligence of particular members of the public whom the officer is called upon to aid would impose a double burden on the taxpayers, who already pay such officers to deal with the hazards that may result from the taxpayers' own future acts of negligence"); *Young v. Sherwin-Williams Co.*, 569 A.2d 1173, 1175 (D.C. 1990) (explaining that "the modern rationale for the doctrine—indeed, its basis in the District of Columbia—is that a professional rescuer has assumed the risks of his or her employment and is compensated accordingly by the public, both in pay and in worker's compensation benefits in the event of injury"); *Steelman v. Lind*, 634 P.2d 666, 667 (Nev. 1981) ("A public safety officer . . . cannot base a tort claim upon damage caused by the very risk that he is paid to encounter and with which he is trained to cope.").

The notion that firefighters are already compensated for their exposure to risk is not entirely satisfactory, however. For starters, to the extent the justification circles back on a claim that firefighters are already compensated for their exposure to risks inherent in fighting fires and that taxpayers should not be charged twice, that claim is problematic. An initial problem is, these days, the rule tends to be extended beyond premises liability cases. And, given this extension, it is not clear that those tortfeasors shielded from the firefighter's rule will frequently be taxpayers at all, much less taxpayers in the given jurisdiction; some will be, while others will not be. See *Levandoski*, 841 A.2d at 215 (recognizing that, once the rule extends beyond premises liability cases and shields those who do not own property or pay property taxes in the given jurisdiction, the double taxation argument justifying the rule falters).

Then, the notion that taxpayers already pay rescuers to confront risk is wholly unsatisfactory, at least when it comes to *unpaid* firefighters—and this problem is not trivial, as the majority of the nation's firefighters are, in fact, volunteers. See Joe Uhlman, *The Roof Is on Fire: Dangers to the Volunteer Emergency Services After Mendel v. City of Gibraltar*, 66 U.KAN.L.REV. 819, 821 (2018) (“Volunteer emergency responders—both firefighters and emergency medical services technicians—make up most of the emergency responders in the United States.”); FEMA, *National Fire Department Registry Quick Facts*, last updated Mar. 28, 2024, <https://apps.usfa.fema.gov/registry/summary#:~:text=Of%20the%20active%20firefighting%20personnel,were%20paid%20per%20call%20firefighters> (reporting that, of registered fire departments in the United States, 70 percent are comprised of volunteers and another 15.5 percent are comprised mostly of volunteers); Nat'l Fire Prot. Ass'n, U.S. Fire Department Profile (Sept. 2022), <https://www.nfpa.org/News-and-Research/Data-research-and-tools/Emergency-Responders/US-fire-department-profile> (reporting that, as of 2020, the United States had approximately 1,041,200 firefighters and, of those, 65 percent were volunteers).

Meanwhile, even for professional rescuers who *are* compensated, whether their compensation includes a premium for tortiously created risks to which they are exposed logically depends on what the rule is in the particular jurisdiction. Yet, the Reporters have uncovered no evidence that the pay of firefighters or police officers systematically differs based on the jurisdiction's adoption, revocation, or modification of the firefighter's rule. See also Restatement Third, Torts: Liability for Physical and Emotional Harm § 51, Reporters' Note to Comment *m* (AM. L. INST. 2012) (articulating this point, while reporting a similar absence of authority); accord *Sepega v. DeLaura*, 167 A.3d 916, 929 (Conn. 2017) (making a similar point regarding various professionals affected and not affected by the rule and noting that, to the extent police officers or firefighters do enjoy a wage premium in relation to other professionals, there is no apparent link to the firefighter's rule); cf. *Holmes v. Adams Marine Ctr.*, 2000 WL 33675369, at *2 (Me. Super. Ct. 2000) (“This rationale is not compelling. Expecting a firefighter's salary to adequately compensate him for actual serious injury while performing that job is unjustified.”).

Third, numerous courts justify the rule by explaining that it is in society's best interest for individuals to seek professional emergency assistance when circumstances require. If such a call could generate costly litigation, the thinking goes, individuals might be deterred from seeking

emergency assistance, to the public's detriment. See, e.g., *Sam v. Wesley*, 647 N.E.2d 382, 385 (Ind. Ct. App. 1995) ("The rule was designed to protect victims by encouraging them to seek emergency assistance without fear of subsequent tort liability."); *Pottebaum v. Hinds*, 347 N.W.2d 642, 645 (Iowa 1984) ("Citizens should be encouraged and not in any way discouraged from relying on those public employees who have been specially trained and paid to deal with these hazards."); *Sallee v. GTE S., Inc.*, 839 S.W.2d 277, 279 (Ky. 1992) ("The purpose of the [rule] is to encourage owners and occupiers, and others similarly situated, in a situation where it is important to themselves and to the general public to call a public protection agency, and to do so free from any concern that by so doing they may encounter legal liability based on their negligence in creating the risk."); *Baldonado v. El Paso Nat. Gas Co.*, 176 P.3d 277, 282 (N.M. 2007) ("A policy-based approach to the firefighter's rule will encourage the public to ask for rescue . . ."); *Carson v. Headrick*, 900 S.W.2d 685, 690 (Tenn. 1995) (justifying the rule, in part, with the observation that "public policy is served when citizens are encouraged to summon aid from police, regardless of their negligence"); *Thomas v. CNC Invs., L.L.P.*, 234 S.W.3d 111, 120 (Tex. App. 2007) ("The purpose of the rule is to limit the recovery of firefighters and police officers so that citizens will not be discouraged from relying on the skill, training, and expertise of these public servants."); 65A C.J.S. *Negligence* § 577 (2021 update) ("[T]he purpose of the policy is to encourage owners and occupiers, and others similarly situated, in a situation when it is important to themselves and to the general public to call a public protection agency, and to do so free from any concern that by so doing they may encounter legal liability based on their negligence in creating the risk."); Robert H. Heidt, *When Plaintiffs Are Premium Planners for Their Injuries: A Fresh Look at the Fireman's Rule*, 82 IND. L.J. 745, 783-784 (2007) ("Abolishing the rule encourages a potential defendant fearful of a tort claim against her to delay calling the professional rescuer . . .").

This rationalization is unpersuasive. For starters, it is not clear how many Americans know about tort doctrines in general, much less the firefighter's rule in particular—and it is doubly unclear that individuals' hazy understanding of the firefighter's rule would actually affect real-world behavior in the event of an emergency. Then, even assuming *arguendo* it would, disincentives are apt to be blunted by the fact that a high proportion of homeowners and motorists are already insured against liability risk. In particular, approximately 93 percent of homeowners have homeowners' insurance, while approximately 86 percent of drivers are insured. See SHARON CORNELISSEN, DOUGLAS HELLER & MICHAEL DELONG, CONSUMER FED. OF AM., EXPOSED: A REPORT ON 1.6 TRILLION DOLLARS OF UNINSURED AMERICAN HOMES 5 (2024) (offering home insurance data) See Ins. Info. Inst., *Facts + Statistics: Uninsured Motorists*, <https://www.iii.org/fact-statistic/facts-statistics-uninsured-motorists> (reporting on 2022 statistics) (last visited June 17, 2024) (same for autos). Ultimately, whether the firefighter's rule encourages socially beneficial help-seeking is an empirical question—and, as such, it's fair to ask whether any empirical evidence indicates that the absence of the firefighter's rule really does deter people from summoning help. The Reporters are unaware of even a shred of such evidence.

The Connecticut Supreme Court has expressed similar skepticism. There, in *Sepega v. DeLaura*, 167 A.3d 916, 929 (Conn. 2017), the court observed: "[I]n an emergency situation, it is

unlikely any person would be hesitant to call for help because they are concerned about liability for potential injuries to public safety personnel.” Instead, said the court: “[W]e presume that the primary concern of a person whose house is on fire would be to act to protect the health and safety of the people in the home and to salvage the property.” *Id.* at 930. The court further noted: “No jurisdiction appears to have analyzed whether the absence of the firefighter’s rule actually *does* deter people from calling for emergency assistance.” *Id.* at 929. Further, said the court, it appears that there is no such disparity between injury-seeking behavior in the states that have accepted and refused to accept the rule. *Id.* at 930. Thus, the court concluded: “It is simply inconceivable to us that someone whose house is on fire will debate or hesitate in calling the fire department because he or she fears a firefighter might bring some negligence action if injury occurs. Instead, we presume that the primary concern of a person whose house is on fire would be to act to protect the health and safety of the people in the home and to salvage the property.” *Id.* at 929.

In addition to these three main justifications, there are others. These include that, without the rule, potential liability would place “too heavy a burden on premises owners to keep their premises safe from the unpredictable entrance of fire fighters.” *Christensen v. Murphy*, 678 P.2d 1210, 1217 (Or. 1984) (articulating but disapproving of this rationale); see *Furstein v. Hill*, 590 A.2d 939, 943 (Conn. 1991) (“The most compelling argument for the continuing validity of the rule is the recognition that firefighters and police officers often enter property at unforeseeable times and may enter unusual parts of the premises under emergency circumstances.”). Likewise, some courts reason that the rule should be retained because its abolition would spur additional litigation. E.g., *Moody v. Delta W., Inc.*, 38 P.3d 1139, 1142 (Alaska 2002) (defending the firefighter’s rule on the ground that its abolition would “compound the growth of litigation”); *Walters v. Sloan*, 571 P.2d 609, 613 (Cal. 1977) (lamenting that “abolition of the fireman’s rule would burden our courts with litigation”).

As above, these justifications are unconvincing. Among other counters to the “too heavy burden” argument: “since the landowner is already under a duty to maintain her premises for a host of persons, including invitees and employees, it is hard to see how including firefighters within the scope of an existing duty would create an additional burden.” Louie A. Wright, Note, *The Missouri “Fireman’s Rule”: An Unprincipled Rule in Search of a Theory*, 58 UMKC L. REV. 329, 350 (1990). Furthermore, this rationale seems like a back-door effort to resurrect the premises liability justification for the firefighter’s rule, which the Third Restatement of Torts has already rejected. Restatement Third, Torts: Liability for Physical and Emotional Harm § 51, Comment *m* (AM. L. INST. 2012). Next, to the extent this *is* the rule’s justification, there is no support for its now broadly accepted expansion into nonproperty contexts. Accord *DOBBS ET AL.*, *supra* § 363 (discussing this rationale and observing that “if this is the most legitimate rationale for the rule, then the rule has little support indeed”). And lastly, the worry, as expressed by the *Furstein* court, 590 A.2d at 943, that the abrogation of the rule imposes too heavy a burden on landowners, given that “firefighters and police officers . . . enter property at unforeseeable times,” in “unusual” places, and often in the case of emergency—shouldn’t be a worry, as the negligence standard is already flexible and, by its nature, already takes account of the circumstances the actor confronts. See Restatement Third, Torts: Liability for Physical and Emotional Harm § 3 (AM. L. INST. 2010) (setting forth the

circumstance-dependent negligence standard); *id.* § 9 (“If an actor is confronted with an unexpected emergency requiring rapid response, this is a circumstance to be taken into account in determining whether the actor’s resulting conduct is that of the reasonably careful person.”).

Counters to the “flood of litigation” argument similarly have been expressed. For one, there is, currently, a great deal of litigation about the rule’s jagged edges and myriad exceptions. See Reporters’ Note to Comment *f* below. The rule’s abolition might well, then, *cut down* on litigation—particularly of the appellate kind. See David L. Strauss, Comment, *Where There’s Smoke, There’s the Firefighter’s Rule: Containing the Conflagration After One Hundred Years*, 1992 WIS. L. REV. 2031, 2031, 2040-2041.

Worse, the “flood of litigation” argument fails on its own terms. Courts do not extinguish individual rights merely because the vindication of those rights would take some judicial effort. See, e.g., *Falzone v. Busch*, 214 A.2d 12, 16 (N.J. 1965) (rejecting the argument that a right should not be recognized because its recognition would trigger “a flood of litigations” while observing “the fear of an expansion of litigation should not deter courts from granting relief in meritorious cases; the proper remedy is an expansion of the judicial machinery, not a decrease in the availability of justice”); *Schultz v. Barberton Glass Co.*, 447 N.E.2d 109, 111 (Ohio 1983) (“Even if there may be a possibility of increased litigation, it is not a valid reason for denying a judicial forum. . . . It is the business of the law to remedy wrongs that deserve it, even at the expense of a ‘flood of litigation’; and it is a pitiful confession of incompetence on the part of any court of justice to deny relief upon the ground that it will give the courts too much work to do.”) (quotation marks and citations omitted); cf. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 376 (1977) (“[W]e cannot accept the notion that it is always better for a person to suffer a wrong silently than to redress it by legal action.”). Nor is there evidence that states *without* the firefighter’s rule have been engulfed in a flood of litigation. As the court in *Holmes v. Adams Marine Ctr.*, 2000 WL 33675369, at *2 (Me. Super. Ct. 2000), explained: “Maine . . . has never adopted the firefighter’s rule and the courts have not been flooded.”

Comment f. Rationale for the rule’s repudiation. As noted, the prime reason that this Restatement abrogates the firefighter’s rule is that the rule deviates sharply from traditional tort principles without adequate justification. Accord *Walters v. Sloan*, 20 Cal. 3d 199, 217 (Cal. 1977) (Tobriner, J., dissenting) (“Courts should be hesitant to cut holes in the carefully woven fabric of the requirement of due care, and to deny to certain selected classifications that protection.”); Ami C. Dwyer, Note, *Torts—Negligence—the Fireman’s Rule—Public Policy or Premises Liability? The Proper Basis for the Fire Fighter’s Rule in Maryland Southland Corp. v. Griffith*, 332 Md. 704, 633 A.2d 84 (1993), 24 U. BALT. L. REV. 229, 246 (1994) (“The fireman’s rule is harsh . . . [as it] prevents an injured public servant from recovering damages for his or her injuries caused by an admittedly negligent tortfeasor. Such a drastic divergence from ordinary principles of tort law, which otherwise allow recovery, ought to be limited in scope to those instances where public policy demands such a result.”).

Also relevant is the fact that the firefighter’s rule resists consistent or predictable application. As the South Carolina Supreme Court has recognized, courts “have not been able to agree on the proper parameters for the rule,” and this lack of agreement breeds unpredictability, inconsistency,

and inequity. See *Minnich v. Med-Waste, Inc.*, 564 S.E.2d 98, 101 (S.C. 2002); *id.* at 103 (“The rule is riddled with exceptions . . .”); see also *Edwards v. Honeywell, Inc.*, 50 F.3d 484, 492 (7th Cir. 1995) (“Uncertainty about the rationale of a rule makes its scope difficult to determine . . .”); *Hack v. Gillespie*, 658 N.E.2d 1046, 1048 (Ohio 1996) (recognizing that “those jurisdictions which have adopted or retained some vestige of the rule have done so by applying various legal theories and principles, resulting in several different versions”); accord David L. Strauss, Comment, *Where There’s Smoke, There’s the Firefighter’s Rule: Containing the Conflagration After One Hundred Years*, 1992 WIS. L. REV. 2031, 2061 (1992) (“Implementation of the firefighter’s rule and its extension over the past century has led to a morass of legal analysis that has left judges and juries in the precarious position of continuously having to determine how far the rule reaches and who fits within its many ambiguous exceptions. . . . [I]f a common law doctrine is insufficiently defined and inconsistently applied, its very utility must be questioned and reassessed.”).

Painting with a broad brush, some states have extended the rule quite broadly, while, in many other states, the rule’s application has hewed very closely to its common-law core. Compare *Young v. Sherwin-Williams Co.*, 569 A.2d 1173, 1175 (D.C. 1990) (broadly construing the firefighter’s rule to hold that it conferred immunity, even when the tortfeasor acted willfully or wantonly), with *Espinoza v. Schulenburg*, 129 P.3d 937, 940 (Ariz. 2006) (observing “[w]e adopt the firefighter’s rule, but we construe it narrowly”), and *Levandowski v. Cone*, 841 A.2d 208, 214 (Conn. 2004) (confining the firefighter’s rule “to claims of premises liability”), and *Sallee v. GTE S., Inc.*, 839 S.W.2d 277, 278 (Ky. 1992) (explaining that the court will “narrowly circumscribe” the firefighter’s rule).

Illustrating this divergence, some courts, for instance, apply the rule just to firefighters, excluding police officers. See *Cole v. Hubanks*, 681 N.W.2d 147, 149 (Wis. 2004) (“We conclude that public policy reasons do not support extending the firefighters rule to police officers.”). Most include police officers. See *Apodaca v. Willmore*, 392 P.3d 529, 539 (Kan. 2017) (“In our sister jurisdictions that have adopted the firefighter’s rule, approximately 25 have extended it to police officers . . .”).

But, what about others, including paramedics and EMTs? There is little consensus. See generally Annotation, *Application of “Firemen’s Rule” to Bar Recovery by Emergency Medical Personnel Injured in Responding to, or at Scene of, Emergency*, 89 A.L.R.4th 1079 (originally published in 1991) (“Some courts . . . have held that emergency medical personnel assume the same risks in undertaking a rescue as police officers or firefighters, and have therefore held that they are barred from recovery for their injuries. Other courts have reached the opposite conclusion.”); accord *Sepega v. DeLaura*, 167 A.3d 916, 933 n.16 (Conn. 2017) (recognizing that, in Connecticut, EMTs do not fall within the ambit of the firefighter’s rule and collecting cases from other jurisdictions in accord). Or, if EMTs and paramedics are swept in, what about lifeguards or animal control officers? E.g., *City of Oceanside v. Superior Ct.*, 96 Cal. Rptr. 2d 621, 629 (Ct. App. 2000) (extending the rule to publicly employed lifeguards); *Jamison v. Ulrich*, 206 S.W.3d 419, 425 (Tenn. Ct. App. 2006) (extending the rule to animal-control officers).

Then, what about when the firefighters are volunteers, as most are? A clear majority of courts make no distinction based on whether the rescuer is a paid professional, as opposed to a

volunteer. See *Waggoner v. Troutman Oil Co.*, 894 S.W.2d 913, 916 (Ark. 1995) (explaining that this is the majority position); see, e.g., *Baker v. Superior Ct.*, 129 Cal. App. 3d 710, 716 (1982) (“We do not believe that a valid distinction can be made in the application of the rule, at least in this case, as between ‘professional’ and ‘amateur’ firefighters.”); *Buchanan v. Prickett & Son, Inc.*, 279 N.W.2d 855, 860 (Neb. 1979) (rejecting any paid/unpaid distinction because, inter alia, “[i]t would be impractical to distinguish between volunteers and paid firemen” since volunteer firefighters handle the same responsibilities as professional firefighters). But some other courts distinguish between paid and volunteer rescuers—and refuse to deploy the firefighter’s rule to extinguish the latter’s claims. Here, for example, the Michigan Supreme Court has held: “Although public policy warrants application of the firefighter’s rule to professional firefighters and police officers, that same policy does not dictate that volunteers be precluded from recovery for injuries.” *Roberts v. Vaughn*, 587 N.W.2d 249, 252 (Mich. 1998).

Comment g. Doctrinal support for the rule’s repudiation. Some version of the firefighter’s rule has been adopted by a significant majority of states. This Section thus adopts a minority rule. See *Apodaca v. Willmore*, 392 P.3d 529, 537 (Kan. 2017) (“More than 30 jurisdictions in the United States have adopted the firefighter’s rule”); see also *Moody v. Delta W., Inc.*, 38 P.3d 1139, 1140 (Alaska 2002) (discussing the rule’s broad acceptance); *Aetna Cas. & Sur. Co. v. Vierra*, 619 A.2d 436, 437 (R.I. 1993) (same).

Yet, the rule has been abolished or dramatically curtailed in a sizable minority of states. See *Jolly v. Hoegh Autoliners Shipping AS*, 2021 WL 2661005, at *4 (M.D. Fla. 2021) (“[M]any states . . . have abolished or largely ameliorated the harsh effects of the firefighter’s rule in their states.”); Ehud Guttel & Ariel Porat, *Tort Liability and the Risk of Discriminatory Government*, 87 U. CHI. L. REV. 1, 15 (2020) (“A number of states have abolished the [firefighter’s] rule altogether or statutorily limited its scope. In states where the rule still applies, its scope has been narrowed through substantial exceptions.”).

Authority rejecting or dramatically curtailing the firefighter’s rule includes: FLA. STAT. § 112.182 (providing that a firefighter or law enforcement officer who lawfully enters premises in discharge of duties is an “invitee”); MINN. STAT. ANN. § 604.06 (“The common law doctrine known as the fireman’s rule shall not operate to deny any peace officer . . . or public safety officer . . . a recovery in any action at law or authorized by statute.”; “public safety officer” defined to include firefighters); N.J. STAT. ANN. § 2A:62A-21 (“[W]henever any law enforcement officer, firefighter, or member of a duly incorporated first aid, emergency, ambulance or rescue squad association suffers any injury, disease or death while in the lawful discharge of his official duties and the injury, disease or death is directly or indirectly the result of the neglect, willful omission, or willful or culpable conduct of any person [the injured rescuer] may seek recovery and damages from the person or entity whose neglect, willful omission, or willful or culpable conduct resulted in that injury, disease or death.”); N.Y. GEN. OBLIG. L. § 11-106 (establishing that “whenever any police officer or firefighter suffers any injury, disease or death while in the lawful discharge of his official duties and that injury, disease or death is proximately caused by the neglect, willful omission, or intentional, willful or culpable conduct of any person . . . that police officer or firefighter may seek recovery and damages

from the person [who caused the injury],” while creating a limited carve-out for tort claims against a police officer’s employer or co-employee); *Hopkins v. Medeiros*, 724 N.E.2d 336, 343 (Mass. App. Ct. 2000) (concluding “that the firefighter’s rule has no continuing vitality in Massachusetts”); *Christensen v. Murphy*, 678 P.2d 1210, 1217 (Or. 1984) (abolishing the rule).

In a few additional states, courts have expressly declined to adopt the rule when invited to do so. See, e.g., *Angelo v. Campus Crest at Orono, LLC*, 2017 WL 6540029, at *7 (D. Me. 2017) (recognizing that, in Maine, the rule has never been formally adopted and that “Maine trial courts have twice rejected it”); *Minnich v. Med-Waste, Inc.*, 564 S.E.2d 98, 103 (S.C. 2002) (declining to adopt the firefighter’s rule while explaining: “We are not persuaded by any of the various rationales advanced by those courts that recognize the firefighter’s rule. The more sound public policy—and the one we adopt—is to decline to promulgate a rule singling out police officers and firefighters for discriminatory treatment.”); cf. *Thompson v. FMC Corp.*, 710 So. 2d 1270, 1271 (Ala. Civ. App. 1998) (recognizing that “Alabama has not yet adopted the firefighter’s rule” while declining to do so in the instant case because a determination of the rule’s vitality was not necessary to the case’s resolution); *Bath Excavating & Constr. Co. v. Wills*, 847 P.2d 1141, 1147 (Colo. 1993) (declining to adopt the rule in a particular instance, while expressly withholding judgment on “the question of whether Colorado should judicially adopt a no-duty fireman’s rule”).

Pennsylvania takes a position that is somewhat difficult to classify. The state has not adopted the firefighter’s rule. *Holpp v. Fez, Inc.*, 656 A.2d 147, 149 (Pa. Super. Ct. 1995) (“The ‘fireman’s rule’, which provides that a police officer or fire fighter who enters upon the land of another in connection with official duties cannot recover from the possessor of land for subsequent injuries, has not been adopted in Pennsylvania.”); *Bole v. Erie Ins. Exch.*, 967 A.2d 1017, 1021 (Pa. Super. Ct. 2009) (observing that “Pennsylvania has not adopted the ‘fireman’s rule’”). But, courts simultaneously hold that “a police officer who enters upon another’s land in his or her official capacity and in response to a call for assistance is generally considered a licensee.” *Juszczyszyn v. Taiwo*, 113 A.3d 853, 857 (Pa. Super. Ct. 2015).

In sum, while canvassing the rule’s support, one federal court has recently—and correctly—explained: “The [firefighter’s rule] is a majority rule, but it has been rejected (or never adopted) in a significant minority of jurisdictions.” *Angelo*, 2017 WL 6540029, at *7 n.13; see also *Sepega v. DeLaura*, 167 A.3d 916, 929 (Conn. 2017) (“Although a majority of jurisdictions employ the firefighter’s rule, there are many that do not. In total, eighteen states have abolished the firefighter’s rule, severely limited its application, or have not addressed it at all.”).

Comment h. This Section’s effect. See DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, *THE LAW OF TORTS* § 363 (2024 update) (“It should go without saying . . . that abolishing the special rule of immunity to public safety officers does not necessarily result in liability, which may be defeated by any of the ordinary rules of negligence law.”).

VICARIOUS LIABILITY

TOPIC 5

OTHER TYPES OF VICARIOUS LIABILITY

§ 11. Special Rule on Vicarious Liability for Sexual Assault

§ 12. Other Types of Vicarious Liability (formerly § 7; approved by Council in Council Draft No. 4, included in Tentative Draft No. 2 but not discussed at the 2023 Annual Meeting)

§ 11. Special Rule on Vicarious Liability for Sexual Assault

Notwithstanding §§ 3 and 5, a factfinder may find an employer vicariously liable for an employee's sexual assault of a victim[†] if:

(a) the nature or conditions of the employee's employment creates a reasonably foreseeable risk of sexual assault;

(b) the employer facilitates the sexual assault by providing the employee with substantial power, authority, or influence over the victim, or the opportunity to develop a trusting relationship with the victim;

(c) the victim is particularly vulnerable, by reason of age, mental capacity, disability, incarceration, detention, confinement, medical need, a subordinate relationship with the assaulting employee, or other similar circumstance; and

(d) the sexual assault occurs when the employee is performing work assigned by the employer or engaging in a course of conduct subject to the employer's control.

Comment:

a. *History and scope.*

b. *Doctrinal development supporting this Section.*

c. *Rationale.*

d. *The state of contrary case law.*

e. *Sexual assault and this Section's use of the term "sexual assault" rather than "battery."*

f. *Prerequisites to vicarious liability under this Section.*

[†] There is disagreement as to whether those who have endured sexual violence are more appropriately referred to as "survivors" or as "victims." In keeping with the views of RAINN, we use both terms interchangeably. See Key Terms and Phrases, RAINN, <https://www.rainn.org/articles/key-terms-and-phrases> (last visited Feb. 13, 2024) (explaining that "[s]ome people identify as a victim, while others prefer the term survivor" and so neither term is, in fact, preferred).

- 1 *g. Employee.*
- 2 *h. Foreseeability.*
- 3 *i. The employee's power, authority, or influence over, or the opportunity to develop a trusting*
- 4 *relationship with, the potential victim.*
- 5 *j. Facilitating the assault.*
- 6 *k. Vulnerable victim.*
- 7 *l. Work assigned by the employer or course of conduct subject to the employer's control.*
- 8 *m. Role of motive.*
- 9 *n. Direct liability of employer distinguished.*
- 10 *o. Judge and jury.*

11 *a. History and scope.* The rule stated in this Section did not previously exist but reflects
 12 the core concerns of courts that have imposed vicarious liability for employee sexual assaults. In
 13 particular, this Section's imposition of vicarious liability on employers when the employee
 14 sexually assaults a victim reflects contemporary courts' response to, and evolving understanding
 15 of, sexual violence—particularly when the violence targets vulnerable persons and when the
 16 employee's employment relationship imbues the employee with power, authority, influence over,
 17 or the ability to develop a trusting relationship with, such vulnerable persons. This Section is of a
 18 piece with evolving gender roles and sex-related norms that have led to the #MeToo movement.
 19 And the Section reflects society's dawning recognition that sexual assault can inflict unique and
 20 devastating harm. Nevertheless, as the black letter reveals, this Section is narrowly drawn. In order
 21 for vicarious liability to be imposed pursuant to this Section, the prerequisites as set forth in
 22 Subsections (a) through (d) must be satisfied. In addition, the Section only applies to sexual
 23 assaults—or, technically, batteries: tortious conduct involving intended and offensive contact with
 24 another person. See Restatement Third, Torts: Intentional Torts to Persons § 1 (Tentative Draft
 25 No. 4, 2019) (defining a “battery”). For further discussion of this limitation, as well as this
 26 Section's use of the term “sexual assault,” rather than battery, see Comment *e*.

27 *b. Doctrinal development supporting this Section.* As noted above, this Section breaks with
 28 traditional tort doctrine, insofar as it permits vicarious liability to be imposed, even when the
 29 employee was not acting with a motive to serve the employer's interest. In expanding the ambit of
 30 vicarious liability to encompass certain sexual assaults committed on vulnerable victims, provided
 31 the prerequisites set forth in Subsections (a) through (d) are satisfied, this Section reflects, and is
 32 supported by, an eclectic mix of authority. This authority reflects society's dawning recognition

1 that sexual assaults occur with unnerving frequency, constitute a serious infringement of personal
2 autonomy, and can have serious physical and/or psychological consequences. See Restatement
3 Third, Torts: Intentional Torts to Persons § 18, Comment *c* (Tentative Draft No. 6, 2021)
4 (observing that, despite various efforts to address the problem of sexual assault, “evidence exists
5 that sexual assaults . . . remain frequent”).

6 Thus, this Section is a distillation of case law over the past 30 years or so that responds to
7 contemporary recognition of, and concern with, sexual assault. This recognition and concern is
8 reflected in rape-law reform, the regulation of employment conditions that protect against sexual
9 harassment and sexual violence, a raft of common-law decisions that reflect the exceptional nature
10 of sexual violence, and recent legislation. This recent legislation tends to: (1) protect those subject
11 to sexual depredation; (2) ensure that victims are able to hold responsible parties to account; and
12 (3) limit the confidentiality of settlements involving survivors of sexual violence. This Section
13 seeks to capture and distill these various developments.

14 Because of the limited number of cases supporting this Section and the ongoing nature of
15 the law-reform efforts it reflects, as Comment *a* explains, this Section is carefully circumscribed.
16 It addresses only the core of sexual violence by employees that occurs within the course of their
17 employment duties. It should not, however, stand as an impediment to further doctrinal evolution
18 as courts continue to develop mechanisms to impose vicarious liability on employers for
19 employees’ foreseeable sexual assaults committed on vulnerable victims.

20 At the same time, even in jurisdictions with decisions supporting this Section, none have,
21 as yet, extended vicarious liability to the full extent permitted by this Section. As further developed
22 in Comments *e* to *k*, courts have tended to limit the scope of decisions that are in accord with this
23 Section. This modesty may reflect a reluctance to adopt such a significant breach in conventional
24 vicarious liability or a preference for the incrementalism of the common law. As nothing in this
25 Section should dissuade courts from extending vicarious liability beyond the boundaries of the
26 Section, nothing should dissuade courts from adopting more limited versions of expanded
27 vicarious liability for sexual assaults.

28 This Section reflects a decidedly minority rule. As noted above, classic agency law limits
29 vicarious liability to acts of an employee motivated, at least in some degree, by a desire to serve
30 the employer’s interest. See VL § 5(b) (requiring that the “employee’s conduct is intended by the
31 employee in any way to serve any purpose of the employer”); Restatement of the Law Third,

Agency § 7.07 (excluding from scope of liability employee acts occurring within an “independent course of conduct not intended . . . to serve any purpose of the employer”). Sexual assaults only very rarely serve the employer’s interest, and, as a consequence, many courts have ruled that such conduct is, as a matter of law, outside the scope of employment and therefore not subject to vicarious liability. Many of those decisions are collected in the Reporters’ Note to Comment *d*. Such cases constitute a large majority of the case law addressing vicarious liability for employees’ sexual assaults.

Nevertheless, this Section draws on a longstanding trend evidenced in a substantial number of cases that have employed an eclectic mix of doctrinal hooks to expand vicarious liability for employees’ sexual assaults in certain circumscribed contexts. Those doctrinal hooks employ alternatives to the classic motive-to-serve-the-employer test. They include (1) the aided-by-agency test; (2) the course-of-conduct approach; (3) the characteristic-risk approach; (4) a foreseeability test; (5) the invocation of a nondelegable duty; and (6) a test based on, and borrowed from, Title VII of the Civil Rights Act of 1964. All these doctrines, in piecemeal fashion, alter traditional rules in order to impose vicarious liability on employers for certain employees’ sexual violence. This Section endeavors to find coherence in this varied and evolving authority.

First, some courts have utilized an aided-by-agency test. Rather than the standard scope-of-employment doctrine with its focus on the employee’s motive to serve the employer, aided by agency inquires whether the employment relationship, in some way, enabled the employee to commit the tort for which the employer would be vicariously liable. See VL § 5, Comment *k*. Because it does not rely on the employee’s motive, aided by agency imposes vicarious liability for sexual assaults with some frequency.

Second, adopting the course-of-conduct approach, some courts subtly, but consequentially, expand the typical frame, holding that an employer is vicariously liable for an employee’s sexual assault, not because, in committing the assault, the employee was motivated by a desire to serve the employer’s interest—but because the assault occurred within a broader *course of conduct* that was intended to serve the employer’s interests. That subtle expansion is a reasonably close relation to the well-established rule that an employee’s negligent conduct, even when forbidden by the employer and performed purely to serve the employee’s interests, nevertheless subjects the employer to vicarious liability. Pursuant to this well-established principle, an employee-driver who, despite contrary work rules, speeds for the sole purpose of completing the employee’s

1 deliveries early in order to meet a friend, nevertheless subjects the employer to vicarious liability
2 if the speeding causes an accident.

3 Third, endorsing a characteristic-risk approach, some courts have employed alternative,
4 and broader, formulations of the rule for vicarious liability, such as determining whether the
5 employee's tort constituted a distinctive or foreseeable risk of the employer's enterprise.

6 Fourth, some courts have employed a foreseeability test that, while related to the
7 characteristic-risk approach, inquires more simply whether the employee's sexual assault was
8 reasonably foreseeable and, if so, imposing vicarious liability on the employer for the assault.

9 Fifth, particularly when the employer is a common carrier and the victim is a passenger, a
10 number of courts have invoked the doctrine of nondelegable duty to expand vicarious liability,
11 even though the nondelegable-duty doctrine is ordinarily applied to those that retain independent
12 contractors (not employees). See VL §§ 9 and 10.

13 Sixth, some courts have explicitly relied on the *Ellerth-Farragher* doctrine to expand the
14 scope of common-law vicarious liability for sexual assaults. Created by the U.S. Supreme Court
15 in two cases under the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., the *Ellerth-Farragher*
16 doctrine does not *apply* to state common-law claims. It only applies to federal-law cases involving
17 discrimination, including sexual harassment. But state courts have nevertheless borrowed from the
18 *Ellerth-Farragher* doctrine to support their decision to extend vicarious liability of employers to
19 their employees' sexual assaults.

20 To reiterate a crucial point mentioned above, while this Section draws on the court
21 decisions employing or invoking those five disparate doctrines, it does not adopt any of them more
22 generally. Instead, this Section synthesizes those cases and adopts a special rule of vicarious
23 liability in the particular and circumscribed space identified in the black letter of this Section.

24 Currently, at least 25 states have decisions in which a vicarious liability claim against an
25 employer of an employee who engaged in sexual assault against a vulnerable victim has been
26 permitted to proceed in response to a motion as a matter of law to dismiss the claim. In most—
27 perhaps all—instances, those decisions do not have the same breadth as this Section. And, in a few
28 states, the cases were decided by trial courts or by federal courts ruling on state law in diversity
29 cases. All of these cases, an illustrative sample of which are cataloged in a Table in the Reporters'
30 Note to this Comment, reflect the various methods for vicarious-liability expansion identified
31 above. They reflect a trend in the direction of the black letter and a marked change in the law since

both the Second Restatement of Torts (1965) and the Restatement of the Law Third, Agency (2006) were published.

This Section provides a largely rule-constrained provision for vicarious liability of employees who commit sexual violence. Doing so avoids concerns expressed by courts about drawbacks that would accompany a *wholesale* acceptance of the doctrines set forth above. The aided-by-agency test *is* (as critics claim) open-ended and, if adopted in a wholesale manner, could expansively extend vicarious liability. Nor is a standard based on risks characteristic of the employer's business or a pure foreseeability test satisfactory; these tests are vague, uncertain, malleable, and resist consistent and predictable application. By contrast, this Section requires that: (a) the employment context creates a reasonably foreseeable risk of sexual assault by employees; (b) the assaulting employee have been afforded by the employer power, authority, or influence over, or a trusting relationship that facilitates the assault; (c) a vulnerable individual; and (d) the assault occurs while the employee is engaging in work for the employer. These limits address, and mitigate, some of the concerns expressed by those courts that have declined to extend vicarious liability for sexual assaults.

c. Rationale. The rationale for the liability imposed by this Section is largely congruent with that for the imposition of tort liability more generally: deterrence, compensation, and fairness. First, the deterrence rationale is important but a bit nuanced. In theory, an employer, already subject to liability directly for its own negligence in hiring, training, retaining, supervising, or otherwise controlling its employees, would have appropriate incentives to vet and manage employees. See Restatement of the Law Third, Agency § 7.05(1); Restatement Third, Torts: Liability for Physical and Emotional Harm § 41. But, in practice, in order to prevail in such a negligence action, the plaintiff is obligated to identify the way in which the employer failed to act reasonably. Such information may not be available to victims who are generally unaware of the employer's internal operations and systems. In addition, by placing liability on the employer, tort law encourages employers to research, develop, and identify new mechanisms to address and mitigate foreseeable human defaults. This same kind of deterrence rationale also helps explain why an employer generally incurs vicarious liability in the absence of proof establishing the employer's negligence.

Second, imposing vicarious liability on the employer also serves the goal of compensating victims. With some frequency, the highly culpable employee who commits a sexual assault ends up being incarcerated and, in any case, often has limited assets. Furthermore, exclusions for

1 intentional torts and claims arising from business or professional services would almost surely
2 negate any liability insurance an employee might have. Given these impediments, in many cases,
3 the real question is not whether a victim can recover from the direct tortfeasor or, rather, the
4 tortfeasor's employer; it is whether the victim can recover for the assault at all.

5 Third and finally, the imposition of liability is just. The employer who hires employees to
6 pursue its interests (or the government that does so to serve its public) is fairly charged with the
7 foreseeable costs that that effort imposes on third parties. As one court artfully put it nearly 200
8 years ago: "[T]he reason I am liable is this, that by employing an employee I set the whole thing
9 in motion; and what he does, being done for my benefit and under my direction, I am responsible
10 for the consequences of doing it." *Duncan v. Findlater*, 7 Eng. Rep. 934 (1839). Because the
11 employer forged the relationship, and because the employer benefited from the relationship, it is
12 fair to subject the employer to liability for the foreseeable consequences that flow therefrom.

13 But the case for this expansion of vicarious liability is more than that. It recognizes the
14 special harm of sexual assault, its prevalence, its stubborn durability, and the importance of
15 preventing such violence. To the extent tort law can contribute to addressing the scourge of sexual
16 assault in modern society, it should be employed to support that effort. The compelling nature of
17 claims addressed by this Section is revealed in the ways courts, as described in the Reporters' Note
18 to Comment *b*, have creatively responded to them over the past several decades. As Comment *b*
19 explains, courts have engaged in piecemeal but congruent efforts to modify, expand, or create
20 exceptions to settled doctrine, so as to enable the imposition of vicarious liability for sexual assault.
21 This Section seeks to harmonize those disparate but broadly congruent efforts.

22 *d. The state of contrary case law.* In the interest of transparency, this Comment explains
23 two points about the state of the case law contrary to this Section. First, as stated in Comment *b*, a
24 substantial majority of courts have drawn something of a bright-line rule that sexual assault is
25 outside the scope of employment as a matter of law, which defeats the imposition of vicarious
26 liability. See VL § 5(b) (explaining that an employer is only vicariously liable for an employee's
27 tortious conduct when it occurs within the scope of employment—and, in order to come within the
28 scope of employment, the employee's conduct must be intended to serve, in some way, the
29 employer's interest). Applying a conception of sexual misconduct as motivated solely by the
30 perpetrator's lust or sexual desire, such courts have classified sexual misconduct as personal and
31 not intended to serve any interest of the employer. Second, while the illustrative cases in the Table

contained in the Reporters' Note to Comment *b* reflect the expansion of vicarious liability contained in this Section, no single jurisdiction has adopted the full extent of that expansion and, in some cases have explicitly imposed limits to what expansion they have adopted.

Despite the latter point, there are cases expanding vicarious liability for sexual assault that reflect the full range of the black letter of this Section. Thus, the Table in the Reporters' Note to Comment *b* cites cases involving employees who are police officers, correctional officers, counselors, group-home caregivers, immigration officers, intern supervisors, transportation company employees, little league coaches, and nursing assistants in nursing homes. Those cases include victims who are mentally impaired residents of group homes; minors; parishioners; asylum seekers; interns; users of ride-hailing apps; cruise, train, and bus passengers; little league players; hotel guests; nursing home residents; citizens requiring law enforcement assistance; and convenience store clerks. In all such cases, courts adopted an expanded rule of vicarious liability enabling sexual-assault victims to recover from those employers.

e. Sexual assault and this Section's use of the term "sexual assault" rather than "battery." As the black letter makes plain and as Comment *a* emphasizes, this Section is limited to sexual assaults. Notwithstanding the use of the term "assault," this Section technically addresses sexual battery because it is limited to situations where there is actual, offensive, and nonconsensual contact between the employee and the victim—not merely the anticipation of such contact. Compare Restatement Third, Torts: Intentional Torts to Persons § 1 (Tentative Draft No. 4, 2019) (defining a "battery" as a tort involving intended and offensive contact with another person), with *id.* § 5 (defining an assault as a tort wherein "the actor intends to cause the other to anticipate an imminent, and harmful or offensive, contact with his or her person"). See also *id.* § 18 (Tentative Draft No. 6, 2021) (observing that "almost all reported cases of liability for nonconsensual sexual acts involve liability for battery").

Although technically addressing "batteries," this Section nevertheless utilizes the term "sexual assault" because courts almost universally use that term to describe unconsented-to conduct of a sexual nature, as that conduct is defined by the Restatement Third of Torts: Intentional Torts to Persons § 18 (Tentative Draft No. 6, 2021). Restricted to sexual assault, this Section does not extend to verbal sexual harassment, regardless of how vicious or repugnant it is. Nor does it extend to situations where the victim merely fears unconsented-to physical contact of a sexual nature.

1 In addition to battery, an employee may be liable for assault, intentional infliction of
2 emotional distress, or false imprisonment. This Section neither addresses such liability nor whether
3 the employer is vicariously liable for it. See VL § 5.

4 **Illustrations:**

5 1. Edgar, Emily's supervisor, dislikes Emily and undertakes a campaign to make
6 her miserable; as part of the campaign, Edgar belittles, taunts, and threatens Emily and
7 even tells her that he will rape her. This Section does not impose vicarious liability on
8 Edgar's and Emily's employer. Edgar's conduct, while despicable, does not involve a
9 sexual assault. Because a prerequisite to this Section is not satisfied, the employer's
10 vicarious liability is governed by § 5.

11 2. Same facts as Illustration 1, except that now Edgar adds to his arsenal fondling
12 Emily's breasts. Edgar has, as a matter of law, engaged in a sexual assault of Emily.
13 Accordingly, pursuant to this Section, Edgar's and Emily's employer is subject to vicarious
14 liability for Emily's assault, provided the other prerequisites of Subsections (a) through (d)
15 are satisfied. For the definition of sexual assault, see Restatement Third of Torts:
16 Intentional Torts to Persons § 18 (Tentative Draft No. 6, 2021).

17 *f. Prerequisites to vicarious liability under this Section.* In order to subject an employer to
18 vicarious liability for sexual assault pursuant to this Section, as Comment g explains, the person
19 committing the assault must be an employee of the employer. In addition, each of the prerequisites
20 set forth in Subsections (a) through (d) must be satisfied. These prerequisites are discrete but,
21 sometimes, conceptually overlapping, particularly when it comes to the victim's vulnerability and
22 the assaulting employee's relative empowerment. Overlap or not, each one must be satisfied.
23 Comments *h* through *l* elaborate on the requirements set forth in Subsections (a) through (d),
24 respectively.

25 *g. Employee.* In order to hold an employer vicariously liable for sexual assault under this
26 Section, the person who sexually assaulted the victim must be an employee of the employer. As
27 § 4 explains: "[A]n 'employee' is an agent whose principal controls or has the right to control the
28 manner and means of the agent's performance of work." For further indicia of whether a person
29 is, in fact, an employee, see § 4, Comment *c*.

30 *h. Foreseeability.* As stated in Subsection (a), in order to subject an employer to vicarious
31 liability for sexual assault pursuant to this Section, the assault must be reasonably "foreseeable,"

but this foreseeability requirement is subtly different from the specific fact-bound foreseeability required for negligence or scope of liability (frequently called proximate cause). See Restatement Third, Torts: Liability for Physical and Emotional Harm § 3 (explaining that, whether there is a foreseeable likelihood of harm is a primary factor in determining negligence); *id.* § 29, Comment *j* (explaining the foreseeability test for scope of liability). Rather, Subsection (a) requires a more general sort of foreseeability—a showing that the employer’s business or activity creates an environment in which an employee’s sexual assault is a reasonable possibility. Thus, the operator of a group home for mentally challenged female adolescents is a paradigm where there is serious and reasonable appreciation about the possibility of an employee sexually assaulting a resident. By contrast, a pet-grooming business is not a place where one would reasonably foresee that customers are at risk of being sexually assaulted. This general foreseeability is similar to the general foreseeability employed by some courts to determine whether a duty should exist for a category of conduct.

i. The employee’s power, authority, or influence over, or the opportunity to develop a trusting relationship with, the potential victim. Subsection (b) imposes vicarious liability on an employer under this Section only if the plaintiff proves that the employment: (i) provided the abusive employee power, authority, or influence over the potential victim, or (ii) furnished the circumstances in which the employee develops a trusting relationship with the potential victim, and that power, authority, influence, or relationship facilitated the commission of the sexual assault.

Illustrations:

3. Dante is employed as a police officer by Metroville. One evening, Dante, using the lights and siren on his squad car, stops a car driven by Charlise on a rural road on the outskirts of Metroville where he sexually assaults her. Pursuant to Subsection (b), Dante, as a matter of law, has been invested with sufficient power and authority as a police officer to subject Metroville to vicarious liability for Dante’s assault of Charlise, provided the other prerequisites of Subsections (a) through (d) are satisfied.

4. Temple Emanuel hires Rabbi Shmuel to be its Youth Education Director and Youth Counsellor. Rabbi Shmuel uses his position to ingratiate himself with Yael, an adolescent member of the Temple’s youth group. One Saturday night, after a social event with another Temple’s youth group, Rabbi Shmuel offers to transport Yael home. During that trip, Rabbi Shmuel coerces Yael into having sex with him. Pursuant to Subsection (b),

1 Rabbi Shmuel, because of his position as Youth Counsellor for the Temple has, as a matter
2 of law, been able to develop a trusting relationship with Yael sufficient to subject Temple
3 Emanuel to vicarious liability for Rabbi Shmuel's sexual assault of Yael, provided the other
4 prerequisites of Subsections (a) through (d) are satisfied.

5 5. Jack and Jill are both junior consultants at Varengelis, Inc.; they both work on the
6 same team, and they are both supervised by Nona. During a mandatory Friday night social
7 event at a local tavern, Jack proceeds to repeatedly grope Jill. Jack, as a matter of law, does
8 not have power, authority, or influence over, or a trusting relationship with, Jill. Because
9 Subsection (b) is not satisfied, this Section does not impose vicarious liability on Varengelis
10 for Jack's assault on Jill. Whether Varengelis is vicariously liable to Jill is governed by § 5.

11 6. Max is a nursing assistant at the Green Acres Nursing Home. He is tasked with
12 caring for Patsy, an elderly resident who is largely immobile. While changing Patsy's
13 diaper, Max rubs her breasts. By virtue of his position and assigned work and Patsy's
14 condition, pursuant to Subsection (b), Max has, as a matter of law, sufficient power and
15 authority over Patsy for Green Acres to be subject to vicarious liability for Max's sexual
16 assault of Patsy, provided the other prerequisites of Subsections (a) through (d) are
17 satisfied. (Patsy's status as a vulnerable victim is addressed in Illustration 12.)

18 7. George is the CEO of Videopoly, a movie production studio. George has
19 authority to hire actors for productions that Videopoly produces. George meets Anita, a
20 young aspiring actress, at a cocktail party. At the end of their encounter, George offers to
21 meet with her to provide advice about pursuing her acting career and hints that the meeting
22 might result in her being hired as an intern at Videopoly. During the meeting, in George's
23 office at Videopoly, George overpowers Anita and then rapes her. Because of his position
24 and authority at Videopoly, George may be found to have sufficient power and authority
25 over Anita for Videopoly to be subject to vicarious liability for George's rape of Anita,
26 provided the other prerequisites of Subsections (a) through (d) are satisfied.

27 8. Victor, a veterinarian employed by Animal Center of Metropolis, examines
28 Snoopy, an ill dog brought to Animal Center by its owner, Dana. While looking at the dog
29 in an examining room, Victor proceeds to grope Dana. Victor, as a matter of law, does not
30 have power, authority over, or a trusting relationship with, Dana. Because Subsection (b)
31 is not satisfied, this Section does not impose vicarious liability on Animal Center for

Victor's assault on Dana. Whether Animal Center is vicariously liable to Dana is governed by § 5. (Dana's status as a vulnerable victim is addressed in Illustration 17.)

j. Facilitating the assault. As provided in Subsection (b), this Section subjects an employer to vicarious liability only when the assault is facilitated by the employee's power, authority, influence over, or trusting relationship with, the victim—and the employer provides the power, authority, influence, or trusting relationship *by virtue of* the employment relationship. This facilitation requirement means that the plaintiff must show that the employee's status or relationship vis-à-vis the employer facilitated—i.e., increased the risk of—the sexual assault. It does not require the plaintiff to prove that the status or relationship was a factual cause of the assault; nor does it require the employer do anything affirmative beyond providing power, authority, influence over, or the opportunity for a trusting relationship with the potential victim.

Illustrations:

9. Armand is a correctional officer at the Pluto County jail. While supervising inmates in solitary confinement, Armand sexually assaults Jason, a prisoner in solitary confinement in the jail. Pursuant to Subsection (b), as a matter of law, Armand's employment facilitated his sexual assault of Jason because it provided Armand supervisory authority over, and access to, Jason, whose freedom was constrained. Pursuant to this Section, Pluto County is subject to vicarious liability for Armand's sexual assault of Jason, provided the other prerequisites of Subsections (a) through (d) are satisfied.

10. Same facts as Illustration 9, except that Armand sexually assaults Lindsey, a friend of Jason's, after she visits Jason at the Pluto County jail and while she is walking through the parking lot to retrieve her car and depart. Armand abducts Lindsey in the parking lot as she is entering her car, orders her to drive to a remote area several miles away, and sexually assaults her there. Pluto County is not vicariously liable for Armand's assault of Lindsey under this Section, because, inter alia, Armand's employment did not increase the risk of such; it only furnished the occasion for the initiation of Armand's misconduct. Whether Pluto County jail is vicariously liable to Lindsey is governed by § 5.

11. Mo is a physician assistant employed by Gynecological Associates. During an examination of Amy, a patient of Gynecological Associates, Mo, for his own sexual gratification, digitally penetrates Amy's vagina. Pursuant to Subsection (b), Mo's employment at Gynecological Associates has, as a matter of law, facilitated his sexual

1 assault of Amy because it put Amy in a situation where she had removed her clothing,
2 trusting that Mo would conduct a professional examination. Pursuant to this Section,
3 Gynecological Associates is subject to vicarious liability for Mo's sexual assault of Amy,
4 provided the other prerequisites of Subsections (a) through (d) are satisfied.

5 *k. Vulnerable victim.* As provided in Subsection (c), this Section is limited to sexual-assault
6 victims who are particularly vulnerable to assault because of age, mental capacity, disability,
7 incarceration, detention, a subordinate relationship with the assaulting employee, confinement,
8 medical need, or other similar circumstance leaving the victim at greater risk of assault.

9 **Illustrations:**

10 12. Same facts as Illustration 6, involving the Green Acres Nursing Home. Patsy
11 is, as a matter of law, a vulnerable victim pursuant to Subsection (c) because of her
12 advanced age, incapacity, and the physical circumstances of the encounter. Pursuant to this
13 Section, Green Acres Nursing Home is thus subject to vicarious liability to Patsy, provided
14 the other prerequisites of Subsections (a) through (d) are satisfied.

15 13. Same facts as Illustration 11, involving Gynecological Associates. Amy is, as a
16 matter of law, a vulnerable victim pursuant to Subsection (c) because of the physical
17 circumstance of her examination and her understanding of the reason for Mo's access to
18 her genitalia. Pursuant to this Section, Gynecological Associates is thus subject to vicarious
19 liability for Mo's sexual assault, provided the other prerequisites of Subsections (a) through
20 (d) are satisfied.

21 14. Adam is a six-year-old pupil at the Kinder-Fun preschool where he is sexually
22 assaulted by Jody, a teacher's aide. Adam, because of his age and lack of physical and
23 mental development, is, as a matter of law, a vulnerable victim as provided in Subsection
24 (c). Pursuant to this Section, Kinder-Fun is thus subject to vicarious liability for Jody's
25 sexual assault, provided the other prerequisites of Subsections (a) through (d) are satisfied.

26 15. John is Sally's supervisor at Joy Relations, LLC where they both work. One
27 evening while both are working late, John propositions Sally who declines the proposal.
28 John proceeds to sexually assault Sally. Sally is, as a matter of law, a vulnerable victim
29 pursuant to Subsection (c) because of John's supervisory status. Pursuant to this Section,
30 Joy Relations, LLC is thus subject to vicarious liability for John's sexual assault, provided
31 the other prerequisites of Subsections (a) through (d) are satisfied.

1 16. Same facts as Illustration 15, except that Sally is John's supervisor at Joy
2 Relations, LLC. Sally, as a matter of law, is not a vulnerable victim pursuant to Subsection
3 (c). Accordingly, Joy Relations is not vicariously liable for John's sexual assault pursuant
4 to this Section. Whether Joy Relations, LLC is vicariously liable for Sally's sexual assault
5 is governed by § 5.

6 17. Same facts as Illustration 8. Dana, as a matter of law, is not a vulnerable victim
7 pursuant to Subsection (c) because no indicia of vulnerability are present. Because
8 Subsection (c) is not satisfied, this Section does not impose vicarious liability on Animal
9 Center for Victor's assault on Dana. Whether Animal Center is vicariously liable to Dana
10 is governed by § 5.

11 *1. Work assigned by the employer or course of conduct subject to the employer's control.*
12 As Subsection (d) establishes, vicarious liability under this Section is limited to circumstances in
13 which the employee commits the sexual assault: (i) while performing work assigned by the
14 employer, or (ii) while engaging in a course of conduct subject to the employer's control. See § 5(a).
15 Sexual assaults committed by employees when not so engaged are outside the scope of this Section.

16 **Illustrations:**

17 18. John, a high-school teacher, also coaches the girls' volleyball team. While at an
18 out-of-town tournament, John sexually assaults a member of the team. Pursuant to
19 Subsection (d), when committing the assault, John is, as a matter of law, performing work
20 assigned by the employer or engaging in a course of conduct subject to the employer's
21 control, because his assigned duties include accompanying and supervising the team in the
22 course of competition. Pursuant to this Section, the school is thus subject to vicarious
23 liability for John's sexual assault, provided the other prerequisites of Subsections (a)
24 through (d) are satisfied.

25 19. Similar facts to Illustration 18, except that, after the tournament concludes and
26 John returns home, he sexually assaults a neighbor's child who is a friend of John's
27 daughter's and at their home on a sleepover. John is, as a matter of law, not performing
28 work assigned by the employer or engaging in a course of conduct subject to the employer's
29 control, and, because Subsection (d) is not satisfied, the school is not vicariously liable for
30 the assault pursuant to this Section.

An employee may, employing power, authority, influence over, or a trusting relationship with a vulnerable individual, engage in grooming activity while performing work for the employer but only, later, while off duty and outside the physical premises of the employer, commit a sexual assault. Because of the paucity of case law addressing such circumstances, this Restatement takes no position on this matter, leaving it to further development in the courts.

m. Role of motive. Contrary to the provisions of § 5(b), an employee committing a sexual assault need not be motivated by a desire to serve the employer’s interests. Even when an employee acts purely for the employee’s own personal gratification fully cognizant that the sexual assault serves no interest of the employer’s—indeed, is detrimental to the employer’s interest—under this Section, the employer is subject to vicarious liability.

n. Direct liability of employer distinguished. Vicarious liability is strict liability; no negligent or other tortious conduct by the employer is required for vicarious liability to be imposed. By contrast with vicarious liability, an employer may be liable for its *own* tortious conduct that results in an employee causing harm to another. Employers have a duty of reasonable care in selecting, training, retaining, supervising, or otherwise controlling their employees. They can be liable for such negligence notwithstanding that the negligence permits another—their employee—to commit an intentional tort (and criminal act). See Restatement Third, Torts: Liability for Physical and Emotional Harm § 19 (“The conduct of a defendant can lack reasonable care insofar as it foreseeably . . . permits the improper conduct of . . . a third party.”). Accordingly, if an employer negligently hires a teacher with a history of abusing students, the employer is subject to liability for its own negligence if that employee abuses a student (as well as being subject to liability under this Section).

Illustration:

20. Wee Folks Preschool hires Maxwell as a teacher. Publicly available information reveals that Maxwell has been arrested twice for statutory rape and convicted twice for sexually abusing a minor. While attending to a class at Wee Folks, Maxwell takes a child to a bathroom and proceeds to fondle the child. A jury could find Wee Folks negligent in hiring an employee with a history of criminal sexual misconduct as a teacher, with supervisory authority over young children, and therefore subject to liability for its own negligence. See *id.*, Illustration 2 (involving negligent hiring). Wee Folks is also subject to vicarious liability under this Section.

1 In addition to the ordinary duty of reasonable care in conducting its business or other
2 operations, certain institutions owe certain individuals an affirmative duty to take reasonable steps
3 to protect them from harm, including sexual assault. Among others, a common carrier owes an
4 affirmative duty of reasonable care to its passengers, an innkeeper owes an affirmative duty of
5 reasonable care to its guests, a school owes an affirmative duty of reasonable care to its students,
6 and a correctional institution owes an affirmative duty of reasonable care to its inmates. See
7 Restatement Third, Torts: Liability for Physical and Emotional Harm §§ 40 and 41 (listing the
8 many relationships that impose an affirmative duty of protection).

9 **Illustration:**

10 21. Audrey, a passenger on an overnight bus travelling across Nebraska operated
11 by BlueLine Bus Company, is sexually assaulted by another passenger. Rufus, the driver of
12 the bus, is aware of the passenger's assault but takes no action to assist Audrey or otherwise
13 interrupt the assault. BlueLine is subject to liability for Rufus's failure to exercise
14 reasonable care to protect Audrey, its passenger, from the attack she suffered.

15 *o. Judge and jury.* Whether vicarious liability is expanded to eliminate the requirement of
16 motive and the scope of such an expansion is a question of law for the court. Whether the
17 requirements for the expansion are satisfied is a matter for the factfinder.

REPORTERS' NOTE

18 *Comment a. History and scope.* Social and cultural changes have, if haltingly, empowered
19 victims of sexual abuse to come forward and, sometimes, seek to hold the perpetrators to account.
20 As a result, recent decades have provided numerous revelations of sexual violence. Some involved
21 large institutions, such as the Catholic church, the Boy Scouts, the U.S. Olympic Committee, a
22 movie studio, and public and private universities. In many such cases, the institutional defendant
23 that had enabled pervasive sexual violence settled those claims for large sums. See e.g., Steve
24 Futterman, *Archdiocese of Los Angeles Will Pay \$880 Million to Settle Sexual Abuse Claims*, NPR,
25 Oct. 17, 2024 (“The Catholic archdiocese in Los Angeles has agreed to a massive settlement with
26 more than 1,000 people who say they were sexually abused, dating as far back as the 1950s.”);
27 Dietrich Knauth, *Boy Scouts’ Record \$2.46 Billion Sex Abuse Settlement Upheld by Judge*,
28 REUTERS (Mar. 28, 2023) (reporting that the Boy Scouts settled claims for \$2.6 billion—the largest
29 sexual abuse settlement in U.S. history); Joe Mozingo & John Spano, *\$660-Million Settlement in*
30 *Priest Abuses*, L.A. TIMES (July 15, 2007) (reporting on settlement with 508 victims, the largest,
31 at the time, with the Catholic Church); Shawn Hubler, Joe Mozingo & John Spano, *U.S.C. Agrees*
32 *to Pay \$1.1 Billion to Patients of Gynecologist Accused of Abuse*, N.Y. TIMES (March 25, 2021)
33 (reporting on settlement with victims of campus gynecologist who sexually assaulted hundreds of

female students for a generation); *U. of Michigan Reaches \$490M Settlement Over Sexual Abuse by a Former Sports Doctor*, NPR (Jan. 19, 2022) (reporting that the University of Michigan agreed to a settlement with over 1,000 former student athletes who accused a former Michigan sports doctor of abuse during his four-decade career at the university); Des Bieler, *Penn State Settles Lawsuit with Man Claiming Molestation by Jerry Sandusky*, WASH. POST (Jan. 9, 2018) (reporting that Penn State paid over \$109 million to settle claims with over thirty Sandusky accusers); Martha Chamallas, *Vicarious Liability in Torts: The Sex Exception*, 48 VAL. U. L. REV. 133, 133-135 & n.6 (2013) (explaining and cataloguing institutions publicly identified as embroiled in sexual-assault scandals). Other notable settlements involve jails, prisons, police departments, social service agencies, health- and mental-care providers, and nursing homes.

Some such reports involved settlements by well-known public figures, including Harvey Weinstein and Bill Cosby, that involved allegations of abuse spanning decades. See Jodi Kantor & Megan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades*, N.Y. TIMES (Oct. 5, 2017); Mandalit del Barco & Emma Bowman, *9 More Women Sue Bill Cosby for Alleged Sexual Assaults Decades Ago*, NPR (June 15, 2023); see generally RONAN FARROW, CATCH AND KILL (2019) (reporting on numerous serial sexual abusers and settlements entered into by their employers and other organizations).

In addition to settlements, numerous media reports have documented the prevalence of sexual abuse. See e.g., Michael Rubincam, *Former Pennsylvania Pediatrician Gets At Least 79 Years for Assaults on Children, Patients*, NBC10 PHILADELPHIA (Mar. 18, 2019) (reporting on once beloved pediatrician sentenced for sexually assaulting thirty-one children); Eliza Relman & Azmi Haroun, *The 26 Women Who Have Accused Trump of Sexual Misconduct*, BUS. INSIDER (May 9, 2023); Netflix, *Scouts Honor* (Sept. 6, 2023) (documenting the vast expanse of child sexual abuse occurring within the organization).

In several instances, litigation against institutions and well-known individuals played a significant role in revealing the history and prevalence of sexual abuse. See, e.g., TIMOTHY D. LYTTON, HOLDING BISHOPS ACCOUNTABLE 3-4 (2008) (explaining the role of litigation against the Catholic church and its priests in “bringing the [clergy sexual abuse] scandal to light in the first place, focusing attention on the need for institutional reform, and spurring church leaders and public officials into action”); Boy Scouts of America, *Scoutings Barriers to Abuse*, at <https://www.scouting.org/health-and-safety/safety-moments/scoutings-barriers-to-abuse/> (detailing policies adopted by the organization to protect scouts from sexual abuse).

Academic literature also demonstrates that sexual abuse is common and can have a devastating impact on victims. See CTRS. FOR DISEASE & PREVENTION, THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2016/2017 REPORT ON SEXUAL VIOLENCE 3 (2022) (“One in 4 women (26.8% or 33.5 million) in the United States reported completed or attempted rape victimization at some point in her lifetime.”) (citation omitted); Vanessa Lancaster, *Educator Sexual Misconduct Remains Prevalent in Schools*, PSYCHOLOGY TODAY (May 17, 2023) (reporting that a recent large-scale, multistate survey found that at least 11.7 percent of participants reported having experienced at least one form of educator sexual misconduct during grades K-12); W.

Jonathan Cardi & Martha Chamallas, *A Negligence Claim for Rape*, 101 TEX. L. REV. 587, 590 (2023) (discussing the prevalence of sexual assault); RAPE, ABUSE, & INCEST NATIONAL NETWORK, <https://www.rainn.org/statistics/victims-sexual-violence> (last visited Feb. 4, 2024) (reporting that every 68 seconds a sexual assault occurs).

In addition to its prevalence, the harm that sexual assault can cause its victims accentuates its exceptional nature. The Centers for Disease Control and Prevention (CDC), reports: “[Sexual violence] is a serious public health problem in the United States that profoundly impacts lifelong health, opportunity, and well-being.” Centers For Disease Control and Prevention, Fast Facts: Preventing Sexual Violence <https://www.cdc.gov/violenceprevention/sexualviolence/fastfact.html> (last visited Feb. 4, 2024). Victims can suffer lifetime or chronic post-traumatic stress syndrome, suicide ideation, depression, difficulty in personal relationships, sexual health dysfunction, alcohol and drug abuse, and other adverse effects. In 2013, the American Psychiatric Association updated its Diagnostic and Statistical Manual of Mental Disorders (“DSM-5”) and added “sexual violence” as an intensely stressful event that can justify a diagnosis of posttraumatic stress disorder. See AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 274 (2013); Andrew P. Levin, Stuart B. Kleinman & John S. Adler, *DSM-5 and Posttraumatic Stress Disorder*, 42 J. AM. ACAD. PSYCH. & LAW ONLINE 146 (June 2014) (“DSM-5 presents a wide-ranging set of examples of sexual violence (‘e.g., forced sexual penetration, alcohol/drug-facilitated sexual penetration, abusive sexual contact, noncontact sexual abuse, sexual trafficking’)); see also Cardi & Chamallas, *supra* at 590 (observing that “[t]he harm suffered by survivors of rape and sexual assault is dignitary, emotional, psychological, and frequently existential—33% of people who have experienced rape contemplate suicide, and 13% attempt suicide”); E.R. Dworkin et al., *Sexual Assault Victimization and Psychopathology: A Review and Meta-Analysis*, 56 CLINICAL PSYCH REV. 65, 65-81 (2017) (reporting on meta-analysis of 40 years of research that sexual assault is a “major risk factor for multiple forms of psychological dysfunction across populations and assault types” and that, for some victims it is “a life-altering experience”); L.P. Kelley et al., *A Comparison of PTSD Symptom Patterns in Three Types of Civilian Trauma*, 22 J. TRAUMATIC. STRESS. 227, 227-235 (2009) (revealing that sexual trauma has a more severe impact on mental health than other forms of trauma). Child victims suffer even more severely cognitively because their brains are still developing. See Martin H. Teicher, *Scars That Won’t Heal: The Neurobiology of Child Abuse*, 286 SCI. AM. 68, 68-75 (2002).

A trial court in Connecticut commented on the impact of the dramatic rise in revelations about sexual assaults on the conventional vicarious liability rule. The court reported on a nine-year-old case that held an employee’s sexual violence was not, as a matter of law, within the scope of employment:

[I]n the nine years since Judge Covello initially ruled that, as a matter of law, sexual molestation could not be considered as being within the scope of a priest’s employment, the number of reported allegations of sexual assaults by priests has risen so dramatically that one must wonder whether Judge Covello . . . would be so quick to conclude that there could not possibly be a factual dispute over whether

1 such molestation could take place within the scope of a priest's employment. A
2 contemporary court cannot ignore, for example, the fact that recent reports suggest
3 that "based on survey responses from 97 percent of dioceses (195 dioceses) and
4 from 142 religious communities, representing approximately 80 percent of
5 religious priests across the country . . . the total number of priests with allegations
6 of abuse was 4,392, representing approximately 4 percent of all priests in ministry
7 between 1950-2002."

8 Assuming that these reports are accurate, they would suggest the addition
9 of facts that were not available to those judges who have been confronted with this
10 issue in the past. This is not to say that these statistics would definitively establish
11 that sexual abuse of minors is within the scope of a priest's employment, but rather
12 that it can no longer be said, as a matter of law, that such conduct "represents one
13 of those exceptional cases in which the servant's digression from duty is so clear
14 cut that the disposition of the case is a matter of law." . . . This court, at least, is not
15 prepared to conclude that an activity which might be undertaken by as many as four
16 percent of an employer's employees is a clear cut "digression from duty" as a matter
17 of law.

18 *Nelligan v. Diocese*, 2004 WL 574330, at *2 (Conn. Super. Ct. 2004) (citations and footnote
19 omitted). The United States Supreme Court weighed in with regard to sexual harassment of
20 students at schools:

21 The number of reported cases involving sexual harassment of students in schools
22 confirms that harassment unfortunately is an all-too-common aspect of the
23 educational experience. No one questions that a student suffers extraordinary harm
24 when subjected to sexual harassment and abuse by a teacher, and that the teacher's
25 conduct is reprehensible and undermines the basic purposes of the educational
26 system.

27 *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 292 (1998) (concluding that school district
28 can be held liable for sexual misconduct of a teacher only when school district is aware of such or
29 is deliberately indifferent to circumstance).

30 A commentator addressing the expansion of vicarious liability for sexual abuse in England
31 tied the development to revelations similar to those detailed above. See Paula Giliker, *Vicarious*
32 *Liability in England and Wales*, in *VICARIOUS LIABILITY IN THE COMMON LAW WORLD* 68 (Paula
33 Giliker ed., 2022) (observing that, "undoubtedly it has been revelations of child sexual abuse that
34 have encouraged the courts to widen the doctrine further in the twenty-first century"). See also
35 Christine Beurman, *Vicarious Liability in Australia* in *id.* 98 ("Recent revelations of historic child
36 sexual abuse suffered in institutions charged with the care of children have placed considerable
37 pressure on the doctrine of vicarious liability to adapt.")

38 In response to the growing public awareness of sexual assault in recent decades,
39 legislatures have enacted a number of statutes designed both to prevent sexual abuse and to provide

greater access to justice for its victims. Those statutes, like this Section, are specific (or largely so) to the sexual-assault context, especially when the victims are children.

First, a majority of states have enacted “lookback windows” that revive claims for sexual abuse that had been barred by the statute of limitations. See ChildUSA, *Revival Laws for Child Sexual Abuse: Windows and Age Groups*, <https://childusa.org/sol-rankings/>; Associated Press, *A Look at 15 States Making it Easier to Sue Over Sex Abuse*, AP NEWS (Dec. 1, 2019).

Second, both the federal government and about 18 states have abolished statutes of limitations for sexual-abuse victims. Some states eliminate the statute of limitations for all victims; others eliminate it so long victims sue by a specified age. See ChildUSA, *supra* at *Jurisdictions with No Civil SOL*, <https://childusa.org/2024sol/>. As a result, new victims continue to emerge along with evidence of widespread abuse. See Rebecca Ellis, *Decades of Failures Leave L.A. County Facing up to \$3 Billion in Sex Abuse Claims*, L.A. TIMES (May 1, 2023) (anticipating the emergence of L.A. County as one of the largest alleged institutional sex abuse offenders amid court filings after the enactment of the Child Victims Act).

Third, more than a dozen states have enacted statutes restricting secrecy for settlements of sexual abuse (and related) claims. See, e.g., CAL. CIV. PROC. CODE § 1001; N.J. STAT. § 10:5-12.8; see generally David Freeman Engstrom, Nora Freeman Engstrom, Jonah B. Gelbach, Austin Peters & Garret Wen, *Shedding Light on Secret Settlements: An Empirical Study of California’s STAND Act*, 91 CHI. L. REV. (forthcoming 2025) (identifying all such state statutes).

Congress, as well, has been active in this realm. In 2022, it enacted two statutes singling out sexual assault (and sexual harassment) claims for special treatment. The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, 9 U.S.C. § 402 barred mandatory arbitration or joint-action waivers for sexual assault and sexual harassment claims. The Speak Out Act, 42 U.S.C. § 19403, barred enforcement of pre-dispute nondisclosure and nondisparagement provisions for sexual assault and sexual harassment claims. In 2017, it eliminated a deduction for amounts paid for settlements of sexual-assault claims that are subject to secrecy. Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, § 13307, 131 Stat. 2054.

Both states and the federal government have taken a number of other steps, specifically singling out sexual assault.

The Prison Rape Elimination Act of 2003, 117 Stat. 972 et seq., currently codified at 34 U.S.C. §§ 30301-31309 (“PREA”), passed unanimously by Congress, explicitly seeks to “establish a zero tolerance standard for the incidence of prison rape in the prisons of the United States.” 34 U.S.C. § 30302(1). A number of states have enacted their own versions of PREA that, inter alia, seek to reduce the incidence of sexual assault in correctional institutions. See *Crawford v. Cuomo*, 796 F.3d 252, 260 (2d Cir. 2015) (describing various state efforts). As well, at least one state adopted a special rule creating an exception to the hearsay rule for child victims of assault. COLO. REV. STAT. ANN. § 13-25-129 (“An out-of-court statement made by a person under thirteen years of age, not otherwise admissible by a statute or court rule that provides an exception to the hearsay objection, is admissible in any criminal, delinquency, or civil proceeding in which the person is alleged to have been a victim [if certain specified safeguards exist].”).

1 The New Jersey Supreme Court recognized such legislation in a decision adopting broader
 2 vicarious liability for employers of abusers than would otherwise exist. See, e.g., *Hardwicke v.*
 3 *Am. Boychoir Sch.*, 902 A.2d 900, 920 (N.J. 2006) (observing that: “[T]he CSAA [a statute
 4 providing a discovery rule applying to sexual abuse claims by children] recognizes the
 5 vulnerability of children and demonstrates a legislative intent to protect them from victimization.
 6 In our view, common-law claims based on child abuse are supported by the same compelling
 7 rationale. The CSAA imposes responsibility on those in the best position to know of the abuse and
 8 stop it; application of section 219 [aided-by-agency vicarious liability] of the Restatement to
 9 plaintiff’s common-law claims advances those goals.”).

10 In addition, at least one state has created an exception to governmental immunity for claims
 11 arising from childhood sexual abuse. See KAN. STAT. ANN. § 75-610 (c).

12 Beyond legislation, courts have modified or stretched doctrine in a variety of areas to
 13 recognize the exceptional nature of sexual assault:

14 *Suicide as a superseding cause of harm.* In Alabama, a longstanding rule specified that,
 15 when a tort victim later died by suicide, the act of committing suicide was a superseding cause that
 16 prevented the tortfeasor from being liable for the death, subject to two exceptions: (1) a custodial
 17 relationship made suicide more foreseeable; and (2) the defendant’s tort resulted in an irresistible
 18 impulse. Neither of the exceptions existed in *Rondini v. Bunn*, 338 So. 3d 749 (Ala. 2021), in
 19 which plaintiff’s decedent died by suicide several months after defendant allegedly sexual
 20 assaulted her. The Alabama Supreme Court responded and adopted a third exception for victims
 21 of sexual assaults, ruling “it is unnecessary to analyze whether the decedent’s suicide was a
 22 foreseeable consequence of the sexual assault; liability may attach without regard to whether the
 23 defendant intended or could have reasonably foreseen that result.” *Id.* at 754.

24 *Negligent infliction of emotional distress.* In order to establish a “bystander claim” for
 25 negligent infliction of emotional distress, a plaintiff generally must show contemporaneous
 26 perception of sudden serious injury to a close family member. See Restatement Third, Torts:
 27 Liability for Physical and Emotional Harm § 48 (AM. L. INST. 2012). Nevertheless, in *K.G. v.*
 28 *Smith*, 178 N.E.3d 300, 303, 311 (Ind. 2021), the Indiana Supreme Court created an exception to
 29 the contemporaneous perception requirement for the parents of a child who is sexually abused:
 30 “[W]hen a caretaker assumes responsibility for a child, and when that caretaker owes a duty of
 31 care to the child’s parent or guardian, a claim against the caretaker for the negligent infliction of
 32 emotional distress may proceed when the parent or guardian later discovers, with irrefutable
 33 certainty, that the caretaker sexually abused that child and when that abuse severely impacted the
 34 parent or guardian’s emotional health.” “[J]ustice compels us to fashion a rule permitting a claim
 35 for damages limited to circumstances like those presented here,” remarked the court. *Id.* at 308.
 36 The court also cited a number of other cases that had ruled similarly. *Id.* at 310. These include
 37 *Croft v. Wicker*, 737 P.2d 789, 790, 792 (Alaska 1987) (holding that the parents of a fourteen-
 38 year-old girl raised a valid emotional-distress claim where the defendant sexually molested their
 39 daughter near their home, though not within their view); *Doe Parents No. 1 v. Dep’t of Education*,
 40 58 P.3d 545, 579 (Haw. 2002), as amended (Dec. 5, 2002) (holding that, where a school had

1 negligently permitted one of its teachers to molest several grade-school girls, the parents—despite
 2 never having witnessed the abuse—could recover for their emotional harm); *Bishop v. Callais*,
 3 533 So. 2d 121, 121 (La. Ct. App. 1988) (permitting claim where plaintiffs sought damages for
 4 emotional distress after their minor son endured sexual abuse “while confined at defendants’
 5 facility” for psychiatric treatment).

6 *Non-economic damage caps.* Roy Pompa repeatedly sexually assaulted Amanda Brandt
 7 when she slept over at the Pompa home where one of Pompa’s daughters was Amanda’s best
 8 friend—as one dissenter observed: “What happened to Brandt is horrific and deeply saddening, as
 9 are the stories of every child victim—really any victim—of sexual assault.” The jury awarded
 10 Amanda \$34 million in compensatory damages after hearing evidence about the assault’s
 11 devastating impact on her personality—and her ensuing drug addiction and PTSD. The Ohio
 12 legislature had enacted tort reform that limited non-economic damages to \$250,000 (or three time
 13 the economic damages up to \$350,000). But the provision eliminated the cap if the plaintiff
 14 suffered physical injury that exceeded a specified threshold. The Ohio Supreme Court struck down
 15 the cap as unconstitutional under the Ohio constitution as applied to Brandt and other similar
 16 victims, “namely, those child victims who suffer traumatic, extensive, and chronic psychological
 17 injury as a result of intentional criminal acts and who sue their abusers for civil damages.” The
 18 court reasoned: “Subjecting this group to the compensatory-damages caps for noneconomic loss
 19 has little to no connection to improving the tort system in Ohio. This group comprises victims who
 20 are entitled to the full range of constitutional remedies, regardless of whether their severe injuries
 21 are physical or psychological.” *Brandt v. Pompa*, 220 N.E.3d 703, 714 (Ohio 2022),
 22 reconsideration denied, 200 N.E.3d 286.

23 *Plaintiff no-duty rules.* Ordinarily, in the modern regime of comparative responsibility, a
 24 plaintiff’s failure to exercise reasonable care results in a reduction of recovery, and, in modified
 25 comparative schemes, may bar recovery. A number of courts have eliminated that rule for child
 26 sexual assault and abuse victims who sue third parties for their negligence in enabling or failing to
 27 protect the victim, adopting a no-duty rule that eliminates consideration of any fault that a jury might
 28 otherwise attribute to the victim. See, e.g., *Ammons v. Wash. Dep’t of Soc. & Health Servs.*, 2013
 29 WL 139541, at *5 (W.D. Wash. 2013); *Gillespie v. Calcasieu Parish Sch. Bd.*, 179 So. 3d 966, 972
 30 (La. Ct. App. 2015); *Christensen v. Royal Sch. Dist. No. 160*, 124 P.3d 283, 287 (Wash. 2005).

31 *Plaintiff proceeding pseudonymously.* The Fourth Circuit limits a party’s ability to proceed
 32 pseudonymously to cases involving extraordinary circumstances that require balancing privacy
 33 concerns of a highly personal nature with the public’s interest in openness and potential prejudice
 34 to the defendant. In *Doe v. Mercy High School*, 2024 WL 3103396, at *8 (D. Md. 2024), a case
 35 involving sexual abuse of a high-school student treated by a nurse practitioner at a VA hospital, the
 36 court concluded: “Plaintiff’s privacy interests [pertain] to a highly sensitive and stigmatizing matter,
 37 and ‘substantially outweigh the presumption of open judicial proceedings.’” (quoting *Doe v. Pub.*
 38 *Citizen*, 749 F.3d 246, 274 (4th Cir. 2014)) and citing several other cases ruling the same way).

39 See also Fed. R. Evid. 415 (permitting introduction of similar acts of sexual assault in civil
 40 cases, contrary to the general rule contained in Fed. R. Evid. 404 that bars evidence of prior similar

acts); *State v. Padilla*, 329 N.W.2d 263 (Wis. Ct. App. 1982) (holding that a three-day gap between assault and victim’s report of it did not prevent admission of hearsay report based on excited utterance exception).

Other American Law Institute projects have recognized this evolving consensus in favor of greater accountability. Though they come at the matter from different perspectives, all these sources recognize society’s special concern with sexual assault and society’s interest in providing greater protection for the autonomy interests of potential victims. See Restatement Third, Torts: Intentional Torts to Persons § 18, Comment *b* (reporting on these changes) (AM. L. INST., Tentative Draft No. 6, 2021); Principles of the Law, Student Sexual Misconduct: Procedural Frameworks for Colleges and Universities § 1.1 (AM. L. INST., Tentative Draft No. 1, 2022) (“Sexual assault and related misconduct have been and remain a serious threat to the safety and security of college and university student victims and to their ability to pursue their education on equal terms.”).

Comment b. Doctrinal development supporting this Section. As of the time of publication of this Restatement, approximately 25 jurisdictions have *some* case law that permits vicarious liability for sexual assault. The cataloguing of cases below is not intended to be comprehensive. Rather, it seeks to provide examples or illustrative cases from each jurisdiction that has expanded the typical conception of vicarious liability in order to permit vicarious liability for sexual assaults. The cases, their citations, a thumbnail description of the facts, and the doctrinal basis for concluding vicarious liability might exist are set forth in the Table below:

Cases Expanding Vicarious Liability For Sexual Assault

State	Case and Citation	Description	Doctrinal Basis
AK	<i>Ayuluk v. Red Oaks Assisted Living, Inc.</i> , 201 P.3d 1183 (Alaska 2009)	Mentally impaired resident of assisted living home; employee-caregiver had sex with her numerous times, sometimes without consent. Jury awarded compensatory and punitive damages but the latter only against caregiver.	Adopting aided by agency but limited to instances of “substantial power or authority to control important elements of a vulnerable tort victim’s life or livelihood.”
	<i>Doe v. Samaritan Counseling Ctr.</i> , 791 P.2d 344, 345 (Alaska 1990)	Priest/Pastoral Counsellor who had sexual contact with plaintiff, including intercourse.	Sexual misconduct arose out of and was reasonably incidental to the employee’s legitimate work activities, such that the “motivation to serve” test will have been satisfied. “Given the transference phenomenon that is alleged to have occurred in this case, we hold that it could reasonably be concluded that the resulting sexual conduct was ‘incidental’ to the therapy.”
AZ	<i>Larson v. Berumen</i> , 125 F.3d 858 (9th Cir. 1997), as amended (Oct. 27, 1997)	Sheriff deputy sexually assaulted plaintiff who had sought assistance from sheriff’s office.	Reading <i>State v. Schallock</i> , 941 P.2d 1275 (Ariz.1997), discussed below, to apply to sexual assaults such as occurred here.
CA	<i>Mary M. v. City of Los Angeles</i> , 814 P.2d 1341, 1342 (Cal. 1991)	Police officer raped detainee.	Whether the risk was one “that may fairly be regarded as typical of or broadly incidental” to the enterprise undertaken by the employer.

Other Types of Vicarious Liability, § 11

State	Case and Citation	Description	Doctrinal Basis
CA	Xue Lu v. Powell, 621 F.3d 944, 948 (9th Cir. 2010) (FTCA case employing California law)	Asylum officer sexually assaulted victims who were seeking asylum.	Recognizing enterprise liability adopted in California, which replaces motive with foreseeability in determining scope of employment.
	Beliveau v. Caras, 873 F. Supp. 1393, 1401 (C.D. Cal. 1995)	Apartment manager sexually assaulted tenant while in her apartment repairing a shower faucet.	Concluding that the facts of this case were sufficiently like <i>Mary M.</i> to permit plaintiff to proceed with vicarious liability claim.
CT	Mullen v. Horten, 700 A. 2d 1377, 1381 (Conn. App. Ct. 1997)	Parishioner-plaintiff obtained counselling from Priest/ Psychologist who had sexual relations with plaintiff during counselling sessions.	Sexual misconduct occurred within the scope of pastoral duties and therefore may be found to be “a misguided attempt at pastoral-psychological counseling, or even an unauthorized, unethical, tortious method of pastoral counseling, but not an abandonment of church business.”
	P.K. v. Hartford Roman Cath. Diocese Corp., 2014 WL 4536626, at *4 (D. Conn. 2014)	Priest who repeatedly sexually molested minor.	Court relies on foreseeability of “misguided efforts” to perform employment duties that are deemed within scope of employment as opposed to acts that “are in no way connected to the defendant’s business.”
	Masucci v. United States, 2024 WL 3493214, at *5 (D. Conn. 2024)	Prison doctor who sexually assaulted inmate during gynecological examination.	Denying motion to dismiss the complaint because dismissal “may inadvertently imply that the Government can never be held vicariously liable for sexual assault because it falls outside the scope of employment even for employees providing reproductive medical care to incarcerated citizens—an implication the Court seeks to avoid.”
	Dash v. Western Express, Inc. 2024 WL 3507520 (Conn. Super Ct. 2024)	Senior truck driver sexually assaulted newly hired driver whom he accompanied during training trips.	Precedent does not support a per se rule barring vicarious liability for sexual assaults. Whether trainer had supervisory authority a fact requiring jury determination.
DE	Sherman v. Department of Public Safety, 190 A.3d 148 (Del. 2018)	Police officer took custody of victim detained for shoplifting and threatened her with jail if she did not perform oral sex on him.	Aided by agency and nondelegable duty.
	Doe v. State, 76 A.3d 774 (Del. 2013)	Police officer detained suspected shoplifter and threatened her with jail unless she performed oral sex on him.	Relying on sexual assault being foreseeable and occurring within a course of conduct—transporting a prisoner—that was in service to the employer.
DC	Brown v. Argenbright Sec., Inc., 782 A.2d 752, 758 (D.C. 2001)	Security guard groped 12-year-old detained for alleged shoplifting.	Sexual assault occurred during the course of a search of suspected shoplifter and factfinder could determine actions were, at least in part, motivated by serving the employer’s interest.

Other Types of Vicarious Liability, § 11

State	Case and Citation	Description	Doctrinal Basis
DC	Buie v. D.C., 273 F. Supp. 3d 65, 66 (D.D.C. 2017)	Police officer detained and sexually assaulted plaintiff.	Aided by agency.
FL	Hennagan v. Dep't of Highway Safety & Motor Vehicles, 467 So. 2d 748, 749 (Fla. Dist. Ct. App. 1985)	Highway trooper detained schoolgirl walking home and sexually molested her.	Sexual molestation occurred within conduct that may have been motivated by employer's interests.
	Doe v. Celebrity Cruises, Inc., 394 F.3d 891, 909 (11th Cir. 2004) (federal maritime law)	Crew member sexually assaulted intoxicated ship passenger while assisting her.	Special duty of common carrier to passengers imposes vicarious liability on employer for crew member assaults of passengers.
	Doe v. St. John's Episcopal Par. Day Sch., Inc., 997 F. Supp. 2d 1279, 1289 (M.D. Fla. 2014)	Priest and teacher sexually abused minor-student/congregant/altar boy.	Aided by agency.
IL	Doe v. Sanchez, 52 N.E.3d 618 (Ill. App. Ct. 2016)	Bus driver sexually assaulted a student passenger.	Relied on nondelegable duty of common carriers while recognizing that driver's acts were outside the scope of employment.
IN	Stropes v. Heritage House Childrens Ctr. of Shelbyville, Inc., 547 N.E.2d 244, 249 (Ind. 1989)	Nurses' aide sexually assaulted mentally disabled patient in state facility.	Sexual assault took place within course of conduct assigned by the employer and serving employer's interests. Alternatively, nondelegable duty.
	Cox v. Evansville Police Dep't, 107 N.E.3d 453 (Ind. 2018)	Two consolidated cases in which police officers sexually assaulted women with whom they came in contact while performing employment duties.	"[T]he scope of employment encompasses the activities that the employer delegates to employees or authorizes employees to do, plus employees' acts that naturally or predictably arise from those activities."
	Millard v. McBride, 2007 WL 9771340, at *9 (N.D. Ind. 2007)	Employee of drug rehabilitation center sexually assaulted plaintiff both while a patient and outpatient.	Relying on nondelegable duty owed by facility to its patients and clients.
LA	Samuels v. S. Baptist Hosp., 594 So. 2d 571 (La. Ct. App. 1992)	Rape of minor in hospital psychiatric unit by nursing assistant.	Rape was reasonably incidental to performance of duties as nursing assistant, "although totally unauthorized by the employer and motivated by the employee's personal interest" and "closely connected to his employment duties so that the risk of harm faced by the young female victim was fairly attributable to his employer."
	Applewhite v. City of Baton Rouge, 380 So. 2d 119 (La. Ct. App. 1979)	Police officer threatened pedestrian-victim, an adolescent, with arrest, ordered her into police car, transported her to remote area, and raped her.	Suggestions of apparent agency and sexual assault by employee clothed in authority embedded in performing assigned duties.

Other Types of Vicarious Liability, § 11

State	Case and Citation	Description	Doctrinal Basis
LA	Doe v. Morris, 2013 WL 3933928 (E.D. La. 2013)	Police officer transported college student home because she was intoxicated. The department's policy was that on-duty patrolmen would honor requests to drive intoxicated people home upon request.	Reasoning that the act (of sexual assault) may be forbidden does not negate vicarious liability while giving "special weight" in police cases to the authority vested in such employees.
ME	Costos v. Coconut Island Corp., 137 F.3d 46, 50 (1st Cir. 1998) (applying Maine law)	Hotel manager raped guest in her room.	Using aided by agency to determine vicarious liability.
MN	Fahrendorff v. N. Homes, Inc., 597 N.W.2d 905, 907 (Minn. 1999)	Minor resident of group home sexually assaulted by counselor, a "group home parent."	Rejecting motive for vicarious liability and instead: "Employee's acts were foreseeable (wide lens foreseeability), related to, and connected with acts otherwise within the scope of his employment."
	Marston v. Minneapolis Clinic of Psychiatry & Neurology, Ltd., 329 N. W. 2d 306, 311 (Minn. 1983)	Psychologist sexually abused female patients during counselling appointments.	Rejecting motive to serve employer and employing a test that liability is appropriate when the assault is related to the duties of employee and takes place within time and place of employment.
MT	Doe v. Special Sch. Dist. No. 6, S. St. Paul Pub. Sch., 2023 WL 4695939, at *6 (Minn. Ct. App. 2023)	School teacher groomed student before sexually abusing her when she was in high school.	Finding that plaintiff's claims survived defendant's motion for summary judgment because "there is evidence that [defendant teacher] initiated his advances towards [plaintiff student] using activity that directly related to his legitimate duties as her teacher."
	Smith v. Ripley, 446 F. Supp. 3d 683, 688-692 (D. Mont. 2020)	Child Protection specialist employed by state human services raped plaintiff-mother of children who had been removed from home of plaintiff.	Holding assault was not within the scope of employment but that state had a nondelegable duty of reasonable care to mother to reunify the family. "The State cannot reasonably argue that any of these statutory duties to families are fulfilled when its Child Protection Specialist rapes a case client while on State business."
	Shepherd v. Nat'l R.R. Passenger Corp., 2018 WL 5312199, at *2 (D. Mont. 2018)	Employee of railroad sexually assaulted passenger.	Relying on nondelegable duty owed by common carrier to its passengers.
NV	Anderson v. Mandalay Corp., 358 P.3d 242, 247 (Nev. 2015)	Hotel guest was raped by hotel employee while asleep in her room.	Nevada statute impose vicarious liability for intentional torts when the tort is reasonably foreseeable and jury could so find based on facts of the case.
NJ	Hardwicke v. Am. Boychoir Sch., 902 A.2d 900, 903 (N.J. 2006)	Minor at boarding school sexually abused by music director.	Adopting aided by agency.

Other Types of Vicarious Liability, § 11

State	Case and Citation	Description	Doctrinal Basis
NM	<i>Spurlock v. Townes</i> , 368 P.3d 1213 (N.M. 2016)	Certified question. Inmates sexually assaulted by corrections guard at a prison operated by private company.	Relying on aided by agency
	<i>Pena v. Greffet</i> , 110 F. Supp. 3d 1103, 1105 (D.N.M. 2015)	Mentally disabled inmate sexually abused by correctional officer at a prison operated by private company.	Employing aided by agency (after sniffing out what Reporter Warren Seavey did in including it in Second Restatement of Agency).
NY	<i>BL Doe 3 v. The Female Academy of the Sacred Heart</i> , 2020 WL 11231995 (N.Y. Sup. Ct. 2020), aff'd as modified on other grounds, <i>BL Doe 3 v. Female Acad. of the Sacred Heart</i> , 158 N.Y.S.3d 474 (App. Div. 2021)	Plaintiff alleged sexual abuse by teacher while she was a student at the defendant-school.	Accepting plaintiff's claim that "the rationale behind the alleged abuse was not solely for personal reasons, but in the furtherance of the defendant's business and within the scope of employment" as sufficient to deny defendant's motion to dismiss vicarious liability claim.
	<i>Ark61 v. Archdiocese of New York</i> , 2021 WL 2719320 (N.Y. Sup. Ct. 2021)	High school student subject to "unpermitted sexual conduct" by teacher at defendant-school.	Confusing opinion in which court states that defendant can be vicariously liable for negligence in allowing sexual abuse to take place in school facility.
ND	<i>Crompt v. Greyhound Lines, Inc.</i> , 2003 WL 23008977 (D.N.D. 2003)	Bus driver sexually assaulted 15-year-old passenger during a break on a long-distance bus ride	Concluding, based on North Dakota Supreme Court precedent, that there were issues of fact, including whether employment facilitated the assault, bearing on whether driver was acting within the scope of employment.
OR	<i>Fearing v. Bucher</i> , 977 P.2d 1163, 1168 (Or. 1999)	Priest sexually abused a minor-congregant.	Rejecting defendant's motion to dismiss because "[a] jury reasonably could infer that [the priest's] performance of his pastoral duties with respect to plaintiff and his family were a necessary precursor to the sexual abuse and that the assaults thus were a direct outgrowth of and were engendered by conduct that was within the scope of [the priest's] employment."
	<i>Lourim v. Swensen</i> , 977 P.2d 1157 (Or. 1999)	Volunteer troop leader committed sexual assault on a minor who was a troop member.	Relying on <i>Fearing</i> for its scope of employment analysis.
PA	<i>Patel v. Himalayan Int'l Inst. of Yoga Sci. & Phil. of the USA</i> , 1999 WL 33747891 (M.D. Pa. 1999)	Spiritual leader of "holistic health center" ingratiated himself with plaintiff, a young adult, and coerced her to engage in sex with him.	Employing several grounds and stating "It has been recognized that where 'tortious conduct [of a sexual nature] arises out of and is reasonably incidental to the employees' legitimate work activities, the 'motivation to serve' test [of vicarious liability] will have been satisfied.'"

Other Types of Vicarious Liability, § 11

State	Case and Citation	Description	Doctrinal Basis
SD	Red Elk v. United States, 62 F.3d 1102, 1104 (8th Cir. 1995) (Federal Tort Claims Act case applying South Dakota law)	Police officer raped minor.	Affirming judgment for plaintiff based on vicarious liability theory while reasoning that “foreseeability” is central to the scope-of-employment analysis under South Dakota law. Here, court ruled that it was “foreseeable that a male officer with authority to pick up a teenage girl out alone at night in violation of the curfew might be tempted to violate his trust” where the officer’s conduct was facilitated by “the trappings of his office, and the curfew policy he was to enforce.”
	Brown v. Youth Servs. Int’l, Inc., 89 F.Supp.2d 1095, 1105-1106 (D.S.D.2000)	Counselor at residential juvenile treatment center sexually assaulted residents	Employing a test of whether a nexus existed between employment and “the activity which actually caused the injury sufficient to make the harm foreseeable”; a harm is “foreseeable if the employee’s conduct ‘is not so unusual or startling that it would be unfair to include the loss caused by the injury among the costs of the employer’s business.’”
UT	M.J. v. Wisan, 371 P.3d 21, 33 (Utah 2016)	Leader of church ordered 14-year-old member to marry her first cousin and coerced her to remain living him where she was subjected to sexual assault.	Concluding that, while the proposition that sexual activity of an employee could not be the basis for vicarious liability might have been viable based on 25-year-old precedent, it was sufficiently diminished in light of developing case law and should be rejected in the current case because, however misguided, leader’s conduct that led to plaintiff’s being sexually assaulted might have been motivated by advancing the employer’s interests.
VA	Our Lady of Peace, Inc. v. Morgan, 832 S.E.2d 15 (Va. 2019)	Sexual molestation and rape of resident of nursing home by nursing assistant.	Explaining that Virginia has a presumption that an employee’s actions are within the scope of employment. Molestation occurring within the perimeters of job-related conduct of caring for resident did not rebut the presumption.
	Doe v. Baker, 857 S.E.2d 573, 581 (Va. 2021)	Minister was a serial sexual predator who had retired before the sexual molestation of minor-member, but continued to serve as a spiritual leader for members of the congregation.	Acknowledging that minister’s actions were for self-gratifications and constituted “a marked and unusual deviation from his employer’s business,” but concluding precedent (<i>Our Lady of Peace</i>) required denial of defendant’s demurrer.

Other Types of Vicarious Liability, § 11

State	Case and Citation	Description	Doctrinal Basis
VA	Plummer v. Center Psychiatrists, Ltd., 476 S.E.2d 172, 174 (Va.1996)	Counselor for depressed patient raped her during counseling session	“The test of liability is not the motive of the employee in committing the act complained of, but whether that act was within the scope of the duties of employment and in the execution of the service for which he was engaged.” (quoting Commercial Business Systems v. BellSouth, 453 S.E.2d 261 (Va. 1995)).
VT	Doe v. Forrest, 853 A.2d 48, 50-51 (Vt. 2004)	Deputy sheriff coerced plaintiff, while working alone at convenience store, to perform oral sex.	Relying on Aided by agency.
WV	W. Virginia Div. of Corr. & Rehab. v. Robbins, 889 S.E.2d 88 (W. Va. 2023)	Former inmate brought action against Division of Corrections after a correctional officer elicited from him a disclosure that he was a sex offender within earshot of other inmates. Then, another correctional officer took the inmate to a segregated housing unit and permitted three inmates to enter his cell where they sexually assaulted him.	Finding that inmate sufficiently stated claim for vicarious liability, because “an employer may be liable for the conduct of an employee, even if the specific conduct is unauthorized or contrary to express orders, so long as the employee is acting within the general scope of his authority and for the benefit of the employer.” (quotation marks omitted).

In addition to the jurisdictions reflected in the Table, there are cases from three other jurisdictions—Georgia, Texas and Washington—that support the broad notion that employers should bear liability for their employee’s sexual assaults. In addition, a case decided by the Supreme Court of Arizona that led the Ninth Circuit to conclude that vicarious liability exists for sexual assaults, deserves mention. These cases are not included in the Table, however, because they do not fit well into this Section’s black letter. In *State, Dep’t of Admin. v. Schallock*, 941 P.2d 1275 (Ariz. 1997), the Arizona Supreme Court held summary judgment improper for the employer of the “executive director” of a prosecutor’s advisory council who sexually assaulted a secretary over a lengthy period of time. Because the assaults took place within the confines of the director’s conduct in managing the council, the awareness of the employer of the assaultive conduct, its permitting that conduct to continue, and the concomitant foreseeability that the director engaged in sexual assaults, the employer could be found liable for the director’s sexual assaults. Subsequently, in *Larson v. Berumen*, 125 F.3d 858 (9th Cir. 1997), as amended (Oct. 27, 1997) (applying Arizona law), which is cited in the Table, the court relied on *Schallock* to conclude that the plaintiff, who had sought assistance from the sheriff’s office and who was sexually assaulted by a deputy, could maintain a vicarious liability claim against the office. In *Morgan v. Fellini's Pizza, Inc.*, 64 F. Supp. 2d 1304, 1307 (N.D. Ga. 1999), plaintiff brought suit against her employer for sexual harassment, including “unwelcome and offensive touching.” She asserted both civil rights and common-law tort claims. While acknowledging the rule that an employee’s tortious conduct must occur within the scope of employment for vicarious liability to apply, the court held an exception in Georgia law, ratification of an employee’s tort when the employer knew of it and took no action, applied and, accordingly, denied the employer’s motion for summary judgment. *Id.* at 1317. To be sure, the

ratification theory employed by the court is not specific to sexual-assault torts and could apply to any intentional tort. Similarly, in *Santiero v. Denny's Restaurant Store*, 786 F. Supp. 2d 1228 (S.D. Tex. 2011), a waitress sued her employer asserting vicarious liability for the sexual assaults by her manager. The court denied the restaurant's motion for summary judgment on the ground that, by investing management of the entire restaurant to the supervisor, his acts became "the acts of the corporation itself, and corporate liability is direct rather than vicarious." *Id.* at 1236. Finally, in *Simmons v. United States*, 805 F.2d 1363 (9th Cir. 1986), a Federal Torts Claims Act case applying Washington state law, a mental health counselor engaged in sexual relations with a patient who suffered from transference phenomenon. Because of her inappropriate sexual relationship with the counselor, the patient suffered anxiety, depression, and, ultimately, attempted suicide. She asserted a malpractice claim and was awarded damages by the trial judge sitting as finder of fact. The court of appeals affirmed the trial court's imposition of vicarious liability on the federal government based on Washington state law that includes within the scope of employment an unauthorized or unlawful act done in the course of performing the employee's employment duties.

Most of the cases in the Table were decided in the past 30 years, and, over the past decade, it appears that the trend toward vicarious liability has accelerated. The Restatement of the Law Third, Agency, remarked on this development, observing that jurisdictions "are not in accord on the appropriate standard for vicarious liability when an employee commits an intentional tort involving sexual misconduct in connection with the employee's work." And that Restatement reported on a number of cases that had expanded vicarious liability when employees committed sexual assaults. Restatement Third, Agency § 7.05, Reporter's Note to Comment *e* (AM. L. INST. 2006); see also CHRISTINE BEUERMANN, RECONCEPTUALIZING STRICT LIABILITY FOR THE TORT OF ANOTHER (2019) (reporting on the historical reluctance of courts to impose vicarious liability on churches for sexual misconduct of priests, but explaining: "More recently, however, courts have started to impose strict liability on churches in respect of torts committed by priests.").

Telling, in this regard, are two cases decided by the Utah Supreme Court. In *Birkner v. Salt Lake Cnty.*, 771 P.2d 1053 (Utah 1989), a crisis worker engaged in sexual activity with a resident whom he had been counseling. The resident brought suit against the worker's employer, and the Utah Supreme Court held the employer was not vicariously liable because the employee's conduct "was not intended to further his employer's interest. On the contrary, it served solely the private and personal interests of [the employee]." *Id.* at 1058. Twenty-seven years later, the same court was confronted with a case in which the infamous Warren Jeffs, leader of a "church," forced a 14-year-old member to marry her first cousin, resulting in a number of instances of sexual assault by him. In her suit, alleging the church's vicarious liability for Jeffs's actions, the court observed that the law on scope of employment had "evolved somewhat" in the years since *Birkner*. After surveying a number of doctrines that had furthered that evolution and are detailed in Comment *b*, the court held that it did not need to invoke them because the church could be held vicariously liable on the basis that Jeffs might be found to be furthering the interests of the church, however misguided, in his actions. See *M.J. v. Wisan*, 371 P.3d 21 (Utah 2016).

Often, these cases are limited to specific business contexts or governmental activities or are constrained in other ways, reflecting the classic incremental development of the common law. Thus, the Delaware Supreme Court held that the employer of a police officer who coerced a detainee suspected of shoplifting to perform sexual acts by threatening her with being jailed could be held vicariously liable. See *Sherman v. Dep’t of Public Safety*, 190 A.3d 148 (Del. 2018). Yet, three years later, the court declined to extend vicarious liability to a school district that employed a teacher who developed a sexual relationship with a student, remarking on the difference in the power of police officers and teachers and concluding that “in the space created by that difference, we draw a line.” *Bates v. Caesar Rodney Sch. Dist.*, 263 A.3d 127 (Del. 2021) (unpublished opinion). Other similar limits are addressed in the Reporters’ Note to Comment *d*.

A number of courts and commentators have found support for expanding vicarious liability for sexual assault in established doctrine that imposes vicarious liability when an employee, acting within a course of conduct for the employer, nevertheless commits a tort that is contrary to the employer’s direction or rules. See VL § 5, Comment *b* (explaining: “If the rule were otherwise, an employer could avoid respondeat superior liability simply by issuing instructions barring employees from . . . committing tortious act.”). Professor David Oppenheimer explains this connection in the context of supervisors sexually harassing subordinates:

The comparison of a hypothetical harassing supervisor to the speeding delivery person is helpful in determining whether the supervisor’s harassment falls within the scope of his employment. The driver’s business purpose is to deliver goods, and the supervisor’s business purpose is to oversee the work of subordinate employees. As long as the supervisor’s conduct mixes work-related and non-work-related functions, his sexual harassment is incidental to the performance of the job. Just as the delivery driver’s speeding is within the scope of his employment, the supervisor’s interactions with subordinate employees, including his harassment, are incidental to, and thus within the scope of, his employment.

David Benjamin Oppenheimer, *Exacerbating the Exasperating: Title VII Liability of Employers for Sexual Harassment Committed by Their Supervisors*, 81 CORNELL L. REV. 66, 86 (1995). See *Hennagan v. Dep’t of Highway Safety & Motor Vehicles*, 467 So. 2d 748, 749 (Fla. Dist. Ct. App. 1985) (relying on the proposition that highway trooper’s sexual molestation of schoolgirl during officer’s detention of her was unauthorized but occurred in the course of conduct that furthered the employer’s interests); *Cox v. Evansville Police Dep’t*, 107 N.E.3d 453, 464 (Ind. 2018) (holding that “the tortious act itself need not be intended to serve the employer. . . [r]ather, the tortious act must come from a course of conduct the employee performs in the employer’s service”); *Southport Little League v. Vaughan*, 734 N.E.2d 261, 269 (Ind. Ct. App. 2000) (volunteer little league manager who molested players in the course of fitting them for uniforms was acting sufficiently within his league duties to satisfy scope of employment requirement); *Marston v. Minneapolis Clinic of Psychiatry & Neurology, Ltd.*, 329 N.W. 2d 306, 311 (Minn. 1983) (relying on the assault occurring within the counselling context for which employee was hired to permit jury to find employer vicariously liable regardless of employee’s motive in committing the assault); Mark A.

Geistfeld, *Reformulating Vicarious Liability in Terms of Basic Tort Doctrine: The Example of Employer Liability for Sexual Assaults in the Workplace*, 99 N.Y.U. L. REV. 578 (2024) (arguing vicarious liability for the unauthorized tortious act committed by an employee otherwise engaged in a course of conduct on behalf of the employer reflects a tort, rather than agency, perspective that justifies vicarious liability for sexual assaults in the workplace).

For courts that have employed the aided-by-agency test to expand vicarious liability for sexual assault, see, e.g., *Pena v. Greffet*, 110 F. Supp. 3d 1103, 1105 (D.N.M. 2015); *Doe v. Forrest*, 853 A.2d 48, 50-51 (Vt. 2004). For courts that have relied on foreseeability or “characteristic risk,” see, e.g., *Red Elk v. United States*, 62 F.3d 1102, 1104 (8th Cir. 1995) (Federal Tort Claims Act case applying South Dakota law); *Mary M. v. City of Los Angeles*, 814 P.2d 1341, 1342 (Cal. 1991); *Doe*, 853 A.2d at 58-60; *Stropes v. Heritage House Childrens Ctr. of Shelbyville, Inc.*, 547 N.E.2d 244, 249 (Ind. 1989) (also relying on nondelegable duty to impose vicarious liability).

In addition to state common-law decisions, federal civil-rights legislation and the imposition of vicarious liability for supervisory sexual harassment by the *Ellerth–Farragher* doctrine, while directly applicable only to federal Title VII claims, has influenced state and federal courts in their expansion of common-law vicarious liability doctrine to include sexual-abuse claims. For more on the *Ellerth–Farragher* doctrine, see § 5, Comment *m*.

Professor Martha Chamallas crisply documents and explains this migration of civil-rights law to the common law of torts in Martha Chamallas, *Discrimination and Outrage: The Migration from Civil Rights to Tort Law*, 48 WILLIAM & MARY L. REV. 2115, 2180-2187 (2007). She explains that this migration is “an interpretive process by which courts selectively borrow from the statutory domain to give more concrete meaning to tort standards.” *Id.* at 2183. Doing so enables responses to shifting moral or cultural values to spread from one area of law that is an earlier adopter to the common law, which, because of its processes, can lag in recognizing societal developments. See Mark P. Gergen, *A Grudging Defense of the Role of the Collateral Torts in Wrongful Termination Litigation*, 74 TEX. L. REV. 1693, 1709-1710 (1996) (explaining how this migration process “allows new moral values to be woven into the fabric of the common law”).

Thus, civil-rights law has had a significant impact on the evolution of the classical torts of battery and assault, which have been deployed by sexual and racial harassment victims and victims of sexual and domestic violence to challenge longstanding patterns of oppression and exploitation. Professors Kenneth Abraham and G. Edward White recently tracked the “exponential growth” of the tort of offensive battery, demonstrating that it was in large part due to cases involving sexual battery and the “normative weight” now given to such wrongs, especially since the #MeToo movement. They also note that a “synergy” has developed between the Title VII claim and the battery claim, often brought in the same lawsuit. Kenneth S. Abraham & G. Edward White, *How an Old Tort Became New: The Case of Offensive Battery*, 73 DE PAUL L. REV. (2024).

At the same time as the doctrinal expansion of vicarious liability documented above, courts have imposed greater obligations directly on institutions to take steps to prevent sexual assaults. See Ellen M. Bublick, *Tort Suits Filed by Rape and Sexual Assault Victims in Civil Courts: Lessons for Courts, Classrooms and Constituencies*, 59 S.M.U. L. REV. 55, 61 (2006) (“Courts have

increasingly recognized third-party duties to use reasonable precaution not only to prevent negligent harms, but also to prevent intentional torts [involving sexual assaults]). With regard to direct liability of employers for their own torts, see Comment *n*; Restatement Third, Torts: Liability for Physical and Emotional Harm § 41, Comment *e* (AM. L. INST. 2012).

Two prominent torts scholars, surveying the contemporary landscape of sexual assault and vicarious liability commented tellingly that “the seeming intractability of sexual assault and police violence would seem to warrant at least this much [vicarious liability for a police officer’s sexual assault] of a response on the part of the law, if not something more far-reaching.” John C. P. Goldberg & Benjamin C. Zipursky, *Sherman v. Department of Public Safety: Institutional Responsibility for Sexual Assault*, 16 J. TORT L. 283, 299 (2023).

Commentators are almost universally supportive of the extension of vicarious liability, as adopted in this Section. See CHRISTINE BEUERMANN, RECONCEPTUALISING STRICT LIABILITY FOR THE TORT OF ANOTHER 14 (2019) (asserting that it is the conferral of power—power that can be abused—on the employee that justifies holding the employer liable for torts resulting from the employee’s abuse of power); Jennifer A. Brobst, *Vicarious Liability for Systemic Risks of Sexual Violence in the United States: Not a Modest Proposal*, 99 U. DETROIT MERCY L. REV. 261, 288 (2022) (explaining the toll of sexual abuse and advocating the use of a fact-bound aided-by-agency approach to expand employers’ vicarious liability in this context); Peter Cane, *Vicarious Liability for Sexual Abuse*, 116 L.Q. REV. 21, 25 (2000) (asserting that expanding vicarious liability for sexual assault as the Canadian Supreme Court had done is fair because consistent with tort law’s “ethical principles of personal responsibility”); Martha Chamallas, *Vicarious Liability in Torts: The Sex Exception*, 48 VAL. U. L. REV. 133 (2013) (advocating the adoption of a rule imposing vicarious liability for employee sexual assaults similar to the one in this Section); Paula J. Dalley, *A Theory of Agency Law*, 72 U. PITT. L. REV. 495, 532 (2011) (proposing a cost-benefit internalization theory that would impose vicarious liability when sexual assault is reasonably foreseeable from the operation of the business, including by providing access to vulnerable individuals); Bruce Feldthusen, *Vicarious Liability for Sexual Torts in TORTS TOMORROW: A TRIBUTE TO JOHN FLEMING* (Mullany & Linden eds., 1998) (arguing for simplifying the inquiry for vicarious liability to whether the employment “materially increased” the risk of the sexual assault); Mark A. Geistfeld, *Reformulating Vicarious Liability In Terms of Basic Tort Doctrine: The Example of Employer Liability for Sexual Assaults in The Workplace*, 99 N.Y.U. L. REV. 578 (2024) (advocating a “tort-based rule” to replace the “agency-rule” that would be based on whether the workplace foreseeably created the risk of sexual assault); Goldberg & Zipursky, *supra* at 298 (commenting on and applauding a Delaware case that expanded vicarious liability to encompass a police officer’s sexual assault of a woman detained for shoplifting based on the aided-by-agency test and the nondelegable duty doctrine); Alan Q. Sykes, *The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines*, 101 HARV. L. REV. 563, 589 (1988) (concluding that the imposition of vicarious liability for assaults enabled by employment “appear[s] economically efficient”); Marc L. Gouthro, Note, *Abusive Priests and the Catholic Church’s Potential Liability*, 37 SUFFOLK U. L. REV. 479, 494-496 (2004) (arguing

that justice requires that the Catholic church bear vicarious liability for clergy sexual abuse); Patrick Hornbeck, *Respondeat Superior Vicarious Liability for Clergy Sexual Abuse: Four Approaches*, 68 BUFF. L. REV. 975, 1010-1022 (2020) (advocating an approach to vicarious liability for clergy sexual abuse adopted by several courts that looks to whether the sexual abuse was embedded within or sufficiently causally connected to the employee’s work activities); Shana L. Malinowski, Note, *A Matter of Trust: Imposing Employer Vicarious Liability for the Intentional Torts of Employees*, 3 D.C. L. REV. 167, 168-169 (1995) (proposing an expanded version of vicarious liability to extend to sexual-assault victims “who because of age, or physical or mental ability” are in a trusting relationship with an employee who harms the victim); Rochelle Rubin Weber, Note, *“Scope of Employment” Redefined: Holding Employers Vicariously Liable for Sexual Assaults Committed by Their Employees*, 76 MINN. L. REV. 1513 (1992) (proposing that employers be held vicariously liable for sexual assaults enabled by the exercise of power, authority or access provided by the employment); cf. David Benjamin Oppenheimer, *Exacerbating the Exasperating: Title VII Liability of Employers for Sexual Harassment Committed by Their Supervisors*, 81 CORNELL L. REV. 66 (1995) (arguing that, for Title VII purposes, employers should have a nondelegable duty to protect all employees from sexual harassment by supervisory employees). But cf. Daniel M. Combs, Casenote, *Costos v. Coconut Island Corp.: Creating A Vicarious Liability Catchall Under the Aided-by-Agency-Relation Theory*, 73 U. COLO. L. REV. 1099 (2002) (criticizing the *Costos* court for using the aided-by-agency test to impose vicarious liability on an inn manager’s employer, where the manager obtained a key to enter the plaintiff’s room where he raped her); Daniel Harris, *The Rival Rationales of Vicarious Liability*, 20 FLA. ST. UNIV. BUS. REV. 49 (2021) (arguing that conventional “agency” version of vicarious liability is more prevalent than modern expanded “tort” version of vicarious liability).

The one commentator who unambiguously argues that vicarious liability should not be imposed for sexual assaults that have no motive of serving the employer was, at the time, the General Counsel of the U.S. Conference of Catholic Bishops. See Mark E. Chopko, *Stating Claims Against Religious Institutions*, 44 B.C. L. REV. 1089, 1113-1114 (2003) (“The better view is that criminal impulsive and abusive behavior, contrary to religious teaching and law, is not even remotely in the service of the religion. Such personal acts bar a cause of action [based on vicarious liability].”).

In addition to case law and commentary in the United States, developments in other common-law countries generally support the expansion of vicarious liability contained in this Section. In 1997, the Supreme Court of Canada decided *Bazley v. Curry*, [1997] 2 S.C.R. 534 (Can.), a case in which the employee of a residential facility for emotionally disturbed children sexually abused several residents. The court held the facility could be held vicariously liable for the assaults. Citing fairness, compensation of victims, and deterrence, the court rejected reliance on the semantics of scope of employment and stated that fundamentally the question is “whether the wrongful act is sufficiently related to conduct authorized by the employer to justify the imposition of vicarious liability” and the focus should be on whether “employer’s enterprise and empowerment of the employee materially increased the risk of the sexual assault and hence the harm.” See ALLEN M. LINDEN ET AL., *CANADIAN TORT LAW* 641-650 (12th ed. 2022) (describing the “new approach”

of *Bazley* regarding vicarious liability and the results of *Bazley* in numerous subsequent cases); Peter Cane, *Vicarious Liability for Sexual Abuse*, 116 L.Q. REV. 21, 26 (2000) (case comment on *Bazley* endorsing its “close connection” test as encompassing instances when it is fair to impose vicarious liability). *Bazley* has influenced other common-law jurisdictions. For example, The House of Lords, relying on *Bazley*, expanded the vicarious liability of employers for sexual abuse. See Paula Giliker, *Vicarious Liability in England and Wales*, in VICARIOUS LIABILITY IN THE COMMON LAW WORLD 71 (Paula Giliker ed., 2022) (explaining the expansion of vicarious liability in England and Wales: “The Canadian case of *Bazley* has provided both the test and the theoretical underpinning—enterprise risk—to justify expansion of vicarious liability for sexual abuse reaching a result that the courts regard as fair and just.”). In Australia, the High Court addressed the matter in 2016 in *Prince Alfred College v. ADC* [2016] HCA 37. In a joint judgment, the court suggested that the role of the employee in relation to the victim in terms of “authority, power, trust, control, and the ability to achieve intimacy with the victim” should be taken into account. As one commentator, after canvassing developments in a variety of countries, concluded: “As this book more than ably demonstrates, child sexual abuse cases have prompted significant revision of the law of vicarious liability throughout the common law world.” Christine Beurman, *Vicarious Liability in Australia*, in VICARIOUS LIABILITY IN THE COMMON LAW WORLD 98 (Paula Giliker ed., 2022). Professor Martha Chamallas, a leading feminist torts scholar, writing in 2013, observed that United States courts lag behind these developments in Canada and England. Martha Chamallas, *Vicarious Liability in Torts: The Sex Exception*, 48 VAL. U. L. REV. 133, 138 (2013).

France, a civil-law country, also defines scope of employment broadly to encompass a tort committed by an employee (a *fait illicite*) during the time and at the place where the employee exercised job functions. See *Arno v. Club Med, Inc.*, 22 F.3d 1464, 1469 (9th Cir. 1994) (interpreting French Civ. Code art. 1384 and relying on a case decided by France’s highest court, the *Cour de Cassation*, which also imposed liability on the employer for a rape committed by an employee while on duty: “[a] person is responsible not only for the injury which he causes by his own act, but also for that which is caused by the act of persons for whom he is responsible, or things which he has in his care (including) . . . [m]asters and employers, for the injury caused by their servants and employees in performing the duties for which they are employed”; reversing summary judgment for defendant, holding resort could be found subject to liability for supervisory-employee who raped subordinate employee during business hours on resort premises and then reminded subordinate he would transmit her job evaluation to home office the following week).

Professor Chamallas, after canvassing the case law and rationales, recommended a rule addressing vicarious liability for sexual assaults that is quite similar to the rule provided in this Section:

Vicarious liability shall be imposed if an employer materially increases the risk of tortious action either by conferring power or authority on its employees over vulnerable persons or by regularly placing its employees in situations of intimate or personal contact with clients, customers, or other potential victims.

Chamallas, *supra* at 187.

Comment c. Rationale. Courts and commentators have repeatedly invoked the deterrence and fairness rationales explained in Comment *c*. In holding that municipalities that employed police officers who, while on duty, sexually assaulted citizens could be held vicariously liable, the Indiana Supreme Court explained:

The scope of employment extends beyond authorized acts for two key reasons. First, it is equitable to hold people responsible for some harms arising from activities that benefit them. When employees carry out assigned duties, those employment activities “further the employer’s business” to an appreciable extent, benefiting the employer. But delegating employment activities also carries an inherent risk that those activities will naturally or predictably give rise to injurious conduct. When that happens, the employer is justly held accountable since the risk accompanies the employer’s benefit.

Second, holding employers liable for those injurious acts helps prevent recurrence. Employers can take measures—like selecting employees carefully and instituting procedures that lessen employment dangers—to reduce the likelihood of tortious conduct. Since employers have some control over the risk of injurious conduct flowing from employment activities, imposing liability on employers for that conduct encourages them to take preventive action.

Cox v. Evansville Police Dep’t, 107 N.E.3d 453, 461-462 (Ind. 2018). To fairness and deterrence, the California Supreme Court added compensation and risk spreading—the loss should be borne by those who benefit from the enterprise rather than the victim. *Mary M. v. City of Los Angeles*, 814 P.2d 1341, 1343 (Cal. 1991) (providing three reasons for applying respondeat superior).

Courts and commentators support the proposition in this Comment that vicarious liability can generate incentives for employers to investigate modifications of their operations to reduce the risk of employee sexual assaults beyond what negligence liability provides. Gary Schwartz explains the reasoning:

Though the employer can evidently be held liable for its negligence, two arguments remain in favor of strict liability. Both arguments begin with the observation that the employer’s failure to adopt a precaution might lurk in the background, making it difficult for the plaintiff to identify that failure and then demonstrate it to the satisfaction of judge and jury. The first argument points out that even if the plaintiff can eventually succeed in proving negligence, strict liability spares the legal system the costs of investigating and then litigating the negligence issue. The second argument moves in a contrary direction and assumes that the employer’s failure to adopt a cost-justified precaution might end up escaping the attention of the plaintiff and the court. If so, then the employer, despite its failure, will—in a negligence regime—evade liability; moreover, since employers can anticipate this, they will lack adequate incentives to avoid such failures. By contrast, under vicarious liability employers declining to adopt appropriate precautions will always bear liability, however elusive the facts concerning their failures may be. The intriguing

benefit of strict liability, therefore, is that it can do a better job than a negligence regime in achieving that regime's own goal of encouraging the employer's cost-justified risk-reducing measures.

Gary T. Schwartz, *The Hidden and Fundamental Issue of Employer Vicarious Liability*, 69 S. CAL. L. REV. 1739, 1760 (1996); see also *Bazley v. Curry*, [1999] 2 S.C.R. 534, 554 (“Fixing the employer with responsibility for the employee’s wrongful act, even where the employer is not negligent, may have a deterrent effect. Employers are often in a position to reduce accidents and intentional wrongs by efficient organization and supervision. Failure to take such measures may not suffice to establish a case of tortious negligence directly against the employer.”); *West v. Waymire*, 114 F.3d 646, 649 (7th Cir. 1997) (Section 1983 case with dicta commenting on Indiana law) (Posner, J.) (“The application of the doctrine of respondeat superior in these circumstances [where a police officer sexually molested a 13-year-old] is nourished by the same considerations of policy that impose strict liability, or a nondelegable duty of care, on enterprises engaged in especially hazardous activities. The more hazardous the activity, the more we want the actor to investigate all feasible means of reducing the hazards, whether or not they are means encompassed by a judge’s or jury’s conception of due care.”); *In re Uber Techs., Inc., Passenger Sexual Assault Litig.*, 2024 WL 4211217, at *11 (N.D. Cal. 2024) (observing that the imposition of vicarious liability might reduce the risk of sexual assault as, faced with the specter of vicarious liability, “Uber might, for example, impose more stringent screening requirements for drivers, or it might add more robust monitoring or safety measures in vehicles”); Marco Cappelletti, *A Pluralist View of Vicarious Liability in Tort*, 140 L. Q. REV. 61, 70 (2024) (explaining the incentives provided by vicarious liability); Catherine M. Sharkey, *Institutional Liability for Employees’ Intentional Torts: Vicarious Liability as a Quasi-Substitute for Punitive Damages*, 53 VAL. U. L. REV. 1, 23-27, 30-33 (2018) (identifying under-detection of employer negligent conduct as providing justification for the expansion of vicarious liability).

In terms of compensation, employees often do not have the financial wherewithal to respond to a court judgment in an amount that would adequately compensate a plaintiff for serious harm, such as those involving sexual assaults. As well, many employees engaging in sexual assault end up incarcerated after their criminal conviction for the assault. See Martha Chamallas, *Vicarious Liability in Torts: The Sex Exception*, 48 VAL. U. L. REV. 133, 135 (2013) (explaining that the employee who commits sexual assault is an unlikely source of compensation to victims because “many” wind up being incarcerated for their acts). Nor would typical employees carry insurance that would cover liability incurred in the employment context, and, in any case, liability insurance would not cover liability for the insured’s intentional torts. See Tom Baker, *Insurance in Sociolegal Research*, 6 ANN. REV. L. & SOC. SCI. 433, 436 (2010) (“Because the liability insurance component of homeowner’s and renter’s insurance does not provide coverage for assault claims, the victims of domestic violence, rape, and other crime-torts cannot, as a practical matter, bring tort actions to obtain civil redress for their injuries.”); Merle H. Weiner, *Civil Recourse Insurance: Increasing Access to the Tort System for Survivors of Domestic and Sexual Violence*, 62 ARIZ. L. REV. 957, 967 (2020) (explaining that “perpetrators’ liability insurance policies do not

cover gender-based violence claims arising from intentional conduct”). As the Supreme Court of Canada pithily summarized in a case involving the sexual abuse of a child in a residential facility for emotionally disturbed juveniles, “judgment against the wrongdoer may prove a hollow remedy.” *Bazley v. Curry*, [1997] 2 S.C.R. 534 (Can.). Accord Restatement Third, Torts: Intentional Torts to Persons § 18, Reporters’ Note to Comment *c* (AM. L. INST., Tentative Draft No. 6, 2021) (“Intentional tort claims against the actor committing the battery are often impractical because the actor lacks sufficient assets or insurance (and because insurance, in any case, usually does not cover intentional torts).”).

For others concurring with the fairness rationale of *Cox*, see *Samuels v. S. Baptist Hosp.*, 594 So. 2d 571, 574 (La. Ct. App.) (explaining that employee’s sexual assault was so closely connected with his duties that liability for harm to the female minor patient-plaintiff “was fairly attributable to his employer, who placed the employee in his capacity as a nurse’s assistant and in a position of authority and contact with the victim”), writ denied, 599 So. 2d 316 (La. 1992); *Cappelletti*, *supra* at 72 (declaring that, “as the employer benefits from the activities of its employees, so it should be morally and legally responsible for the harm that these bring about in the world”); JOHN G. FLEMING, *THE LAW OF TORTS* 410 (9th ed. 1999) (explaining that “a person who employs others to advance his own economic interest should in fairness be under a corresponding liability for losses incurred in the course of the enterprise”); Gregory C. Keating, *The Idea of Fairness in the Law of Enterprise Liability*, 95 MICH. L. REV. 1266, 1267 (1997) (arguing a “powerful and important” fairness principle applies in holding enterprises strictly liable for risks created by enterprises that are “recurrent and related”).

Telling evidence of the compelling fairness reflected in this Section is found in cases that employ thin doctrinal justification or manipulate doctrine to permit vicarious liability to be imposed. Thus, in *Johnson v. Allen*, 613 S.E.2d 657 (Ga. Ct. App. 2005), the manager of a storage facility conducted video surveillance of a bathroom stall in a women’s restroom at the facility. Evidence suggested that the camera was not a part of the general video surveillance system in the facility, but a one-off installed by the manager. The system allegedly had been installed in response to rumors of illegal drug sales in the facility, including in the women’s bathroom. The court denied the employer’s motion for summary judgment on the vicarious liability claim, asserting that “there is no evidence that Johnson acted solely for his personal sexual gratification in this case, as opposed to conducting an investigation of suspected criminal conduct for his employer,” although there was no evidence of any “criminal conduct having occurred in the women’s restroom.” *Id.* at 663. For other such instances, see, e.g., *Doe v. Samaritan Counseling Ctr.*, 791 P.2d 344, 348 (Alaska 1990) (concluding that the “motivation to serve” element of vicarious liability is satisfied if the sexual assault “arises out of and is reasonably incidental to the employee’s legitimate work activities”); *Doe v. State*, 76 A.3d 774, 777 (Del. 2013) (stating, in case involving sexual assault of a detainee by a police officer, that: “[W]hether [the officer] was activated in part to serve his employer—has been construed broadly as a matter for the jury to decide. If the act of cutting someone’s throat can be considered a service to the employer paving company on the theory that the employee was controlling traffic, then a sexual assault can be considered a service to the police on the theory that

part of what [the officer] was doing was transporting a prisoner.”); *Brown v. Argenbright Sec., Inc.*, 782 A.2d 752, 758 (D.C. 2001) (holding that a jury could determine that security guard’s conduct, in groping a suspected shoplifter during a search, was, at least in part, motivated by a desire to serve the employer’s interest); *Applewhite v. City of Baton Rouge*, 380 So. 2d 119, 122 (La. Ct. App. 1979) (relying on police officer having abused the “apparent authority” provided by the municipality-employer to impose vicarious liability for the rape of an adolescent).

Another example is *Smith v. Ripley*, 446 F. Supp. 3d 683, 688-692 (D. Mont. 2020). There, a child protection specialist who was employed by the state’s human services department raped a plaintiff-mother; the mother’s children had been removed from her home, and the rape occurred while the specialist was at the mother’s home picking up paperwork. Although the court found that the state was not vicariously liable for the assault, the court concluded that the state had a nondelegable duty: “When the State delegated performance of that duty to [the specialist] by assigning him to [the mother’s] case, it became subject to liability to Smith from the harm he caused by failing to perform the State’s duty.” *Id.* at 692.

For an example of a court canvassing the law to find a doctrinal hook on which to hang vicarious liability for a correctional officer’s sexual assault of an inmate with a debilitating mental illness, see *Pena v. Greffet*, 110 F. Supp. 3d 1103, 1133-1136 (D.N.M. 2015) (canvassing courts’ use of the aided-by-agency test, recognizing that test’s potentially unlimited sweep, and crafting a modified version that “furthers policy considerations [of deterrence, compensation, and responsibility] that would likely motivate the Supreme Court of New Mexico to adopt the rule”).

To be sure, notwithstanding these arguments sounding in deterrence, compensation, and fairness, numerous courts have resisted any expansion of vicarious liability for sexual assault. Some of those courts have voiced the concern that the aided-by-agency test is so open ended that, if adopted, it could eviscerate virtually any limitation on the doctrine of vicarious liability. One court illustrated the theory’s “obvious defect”:

[I]t comes close to creating strict vicarious liability for employers, and, despite purporting to be an exception, it nearly swallows the general rule that respondeat superior does not attach to intentional torts. [R]ead literally, a creative plaintiff’s lawyer could make a colorable argument for vicarious liability in almost every intentional tort case in which the tortfeasor happens to be gainfully employed. If a barista poisoned a patron’s coffee, the patron could sue the coffee shop under the theory that the barista was only able to commit the tort because he or she worked for the coffee shop. If a utility worker used his uniform and credentials to get invited into a woman’s home, and then proceeded to sexually assault the woman, the utility worker’s agency relationship with the utility company could be said to have aided him in his sexual assault. If a drive-by shooting was committed using a company car or a police department—or security company-issued gun, then the plaintiff could name the issuing employer. Most open-endedly of all, a plaintiff might even be able to name a tortfeasor’s employer in a drive-by shooting, even if the employer issued neither the gun nor the car, if the tortfeasor bought the gun or the car using

his or her salary—which, after all, he or she obtained by virtue of the employment (i.e., agency) relationship.

Pena v. Greffet, 110 F. Supp. 3d 1103, 1118 (D.N.M. 2015). See also, e.g., *Werner Enters., Inc.*, 116 F. Supp. 3d 948, 955-956 (D. Neb. 2015) (stating that § 219(2)(d), the Section in the Second Restatement addressing aided by agency, “is phrased so vaguely and devoid of any limiting principles that it would be an exception so broad as to swallow the rule”); *Zsigo v. Hurley Med. Ctr.*, 716 N.W.2d 220, 230 (Mich. 2006) (rejecting use of aided by agency because the breadth of the doctrine could “eviscerate” the scope-of-employment element of vicarious liability) (quotation marks omitted); *E.S. for G.S. v. Brunswick Inv. Ltd. P’ship*, 263 A.3d 527, 539 (N.J. Super. Ct. App. Div. 2021) (expressing the concern that “without principled limitations, § 219(2)(d) [addressing aided by agency] could ‘swallow[] the general rule that respondeat superior does not attach to intentional torts’ and render employers strictly liable for their employees’ private misconduct that occurs outside of the employee’s scope of employment”); *Doe v. Forrest*, 853 A.2d 48, 70 (Vt. 2004) (Skoglund, J., dissenting) (asserting that majority’s adoption of aided by agency in a case involving sexual assault by deputy sheriff creates “a threat of vicarious liability that knows no bounds” that could “eviscerate the general scope of employment rule”).

This Section shares courts’ concerns about the potentially unlimited reach of the aided-by-agency test, if that test were accepted writ large. However, this Section avoids those concerns: It does not adopt aided-by-agency as the basis for vicarious liability writ large. The Alaska Supreme Court, after voicing concerns about aided by agency similar to those of the cases cited above, responded by adopting a rule for vicarious liability similar to the one in this Section. See *Ayuluk v. Red Oaks Assisted Living, Inc.*, 201 P.3d 1183, 1199 (Alaska 2009) (limiting the use of aided by agency to “cases where an employee has by reason of his employment substantial power or authority to control important elements of a vulnerable tort victim’s life or livelihood”).

Another concern that may exist is that employers may be overdeterred by expanded vicarious liability. Or one might worry that expanded liability may engender other socially costly behavior. Thus, for instance, employers might categorically refuse to hire any prospective employee who has any criminal record or other blemish on their record. Yet, these concerns—while real—are not insurmountable. First, any such effect would occur at the margin; because employers are already subject to liability for negligent hiring, many employers already vet prospective employees, including running a background criminal check. Indeed, in some instances, background checks are required by state law. See, e.g., *Fahrendorff v. N. Homes, Inc.*, 597 N.W.2d 905, 907 (Minn. 1999) (describing background criminal check performed by operator of group home, which was required state statutes). Second, although the depth of the margins are critical (and likely unknowable), most might choose some measure of overdeterrence in exchange for some measure of reduced sexual assaults. Professor Timothy Lytton’s careful examination of lawsuits brought based on Catholic priest’s sexual misconduct led him to observe:

The successes of clergy sexual abuse litigation, however, have not been without cost. Fear of litigation has led some church officials to conceal information that they might otherwise have disclosed. Heightened suspicion of priests has impaired

their ability to perform many pastoral duties, and mistrust of the hierarchy has damaged the credibility of the Church. Judgments, settlements, and litigation costs have forced some dioceses to scale back their educational, healthcare, and antipoverty programs, and, in some cases, to file for bankruptcy. Any fair assessment of clergy sexual abuse litigation’s success must take stock of these costs. While I argue that clergy sexual abuse litigation has played a beneficial role in the creation of effective policy responses to clergy sexual abuse, I do not wish to downplay its significant financial and human costs. This requires a hard look at the very real damage wrought by the litigation. In my view, which I shall develop throughout the book, clergy sexual abuse litigation has been, on balance, good for victims, the Church, and the larger society.

TIMOTHY D. LYTTON, *HOLDING BISHOPS ACCOUNTABLE* 6 (2008).

Comment d. The state of contrary case law. As explained in *Comment c*, many courts have held that sexual abuse is outside the scope of employment, most often characterizing the conduct as arising solely from the personal motives of the offending employee that do not further or benefit the interests of the employer. For some of the voluminous case law, see, e.g., *M.D.C.G. v. United States*, 956 F.3d 762, 769-770 (5th Cir. 2020) (applying Texas law) (holding that the government was not vicariously liable for sexual assaults on detainees by border patrol agent because, when the agent “took [the plaintiffs] to a remote location, placed tape over their mouths and wrists, and began to physically and sexually assault them, it is needless to say further that he was not working to advance his employer’s business”); *Doe v. Vigo County, Indiana*, 905 F.3d 1038, 1042-1044 (7th Cir. 2018) (applying Indiana law) (ruling that sexual assault by park maintenance specialist was not within the scope of employment and distinguishing contrary rulings on different facts); *Martin v. Milwaukee County*, 904 F.3d 544, 550-558 (7th Cir. 2018) (applying Wisconsin law) (holding that rapes of prisoner by corrections officer were outside the officer’s scope of employment); *Swarna v. Al-Awadi*, 622 F.3d 123, 144-145 (2d Cir. 2010) (applying New York law) (stating that “New York courts consistently have held that sexual misconduct and related tortious behavior arise from personal motives and do not further an employer’s business, even when committed within the employment context”) (inner quotes and citation omitted); *O’Bryan v. Holy See*, 556 F.3d 361, 383, 385-386 (6th Cir. 2009) (applying Kentucky law) (holding that alleged acts of sexual abuse were not within scope of employment); *Doe v. United States*, 2022 WL 898788, at *4 (E.D. Mo. 2022) (“With respect to sexual misconduct by an employee, Missouri courts have held that such conduct is not within the scope of employment as a matter of law even where, as here, the employee took advantage of his job position to commit the misconduct and the misconduct took place during work hours and at the workplace.”), *aff’d*, 58 F.4th 955, 960-962 (8th Cir. 2023); *Doe v. Uber Techs., Inc.*, 2021 WL 2382837, at *4 (D. Md. 2021) (holding that sexual assaults by Uber drivers are outside the scope of employment); *Murray v. Uber Techs., Inc.*, 486 F. Supp. 3d 468, 476 (D. Mass. 2020) (stating that “in Massachusetts, employers may not be held liable for the sexual misconduct of their employees”); *Doe v. Uber Techs., Inc.*, 2019 WL 6251189, at *2-5 (N.D. Cal. 2019) (holding that plaintiff adequately alleged ostensible agency of former Uber driver, but that sexual

assault was outside scope of employment); *Doe v. Uber Techs., Inc.*, 2020 WL 2097599, at *1-2 (N.D. Cal. 2020) (same); *Hunter v. United States*, 2019 WL 13064757, at *3 (S.D. Fla. 2019) (dismissing claim of vicarious liability for sexual assault and stating that “Florida courts routinely find that an employee who commits a sexual tort towards another person is not acting within the scope of their employment for purposes of vicarious liability”), *aff’d*, 825 Fed. Appx. 699 (11th Cir. 2020); *Doe v. Medeiros*, 266 F. Supp. 3d 479, 489-492 (D. Mass. 2017) (holding that sexual assault by secret shopper was outside scope of employment); *Pearce v. Werner Enters., Inc.*, 116 F. Supp. 3d 948, 953-954 (D. Neb. 2015) (collecting cases and stating that, generally speaking, courts have held that acts of sexual assault or harassment do not fall within scope of harasser’s employment); *Seeley v. St. Anthony’s Cath. Church*, 2013 WL 1791023, at *3-4 (D. Wyo. 2013) (holding that alleged sexual abuse of parishioner by deacon was outside the scope of employment); *Turner v. Wash. Metro. Area Transit Auth.*, 853 F. Supp. 2d 134, 135-136 (D.D.C. 2012) (stating that sexual assault is not within scope of employment), *aff’d per curiam*, 534 F. App’x 2 (D.C. Cir. 2013); *Meyer v. Nava*, 518 F. Supp. 2d 1279, 1290-1291 (D. Kan. 2007) (holding that jailer’s sexual assault of inmate was not within the scope of employment); *Doe v. Swift*, 570 So. 2d 1209, 1213 (Ala. 1990) (ruling that sexual intercourse by psychologist with involuntarily committed patient was “against all rules of his profession and . . . without any benefit to his employer”); *Doe v. Roman Cath. Church of Diocese of Phoenix*, 533 P.3d 214, 222 (Ariz. Ct. App. 2023) (holding that alleged sexual assaults by priest “were committed not for any purpose of his employer, but solely to gratify [the priest’s] personal, apparently sexual desires . . . and therefore the Diocese Defendants cannot, as a matter of law, be vicariously liable for them”); *Regions Bank & Trust v. Stone Cnty. Skilled Nursing Facility, Inc.*, 49 S.W.3d 107, 115 (Ark. 2001) (ruling that employee “was not, by any stretch of the imagination, acting within the scope of his duties as a [certified nursing assistant] when he assaulted [the patient]”); *Z.V. v. County of Riverside*, 189 Cal. Rptr. 3d 570, 574-581 (Ct. App. 2015) (holding that sexual assaults by employees other than police officers are not within scope of employment and disagreeing at length with *Lu v. Powell*, 621 F.3d 944 (9th Cir. 2010) (applying California law)); *Piedmont Hosp., Inc. v. Palladino*, 580 S.E.2d 215, 217-220 (Ga. 2003) (holding that “there can be no serious argument” that hospital employee’s alleged sexual assault furthered the hospital’s interests and that, as a consequence, employee’s sexual assault was outside scope of employment); *Sharples v. State*, 793 P.2d 175, 177 (Haw. 1990) (ruling that, as a matter of law, sexual relations by psychiatrist with patient were not within the scope of employment); *Powell v. City of Chicago*, 197 N.E.3d 219, 223-229 (Ill. App. Ct. 2021) (holding that sexual assault by police officers was outside scope of employment, and rejecting contrary cases from other jurisdictions holding otherwise); *Barnett v. Clark*, 889 N.E.2d 281, 283-286 (Ind. 2008) (holding that sexual assault on applicant for public assistance was outside scope of employment and discussing contrary rulings on different facts); *Giudicessi v. State*, 868 N.W.2d 418, 421-424 (Iowa Ct. App. 2015) (ruling that psychiatrist-employee’s sexual relationship with former patient was outside scope of employment); *Osborne v. Payne*, 31 S.W.3d 911, 915 (Ky. 2000) (holding that diocese was not vicariously liable for adulterous sexual relationship by priest because “[i]t is beyond question that [the priest] was not advancing any cause of the diocese or engaging in behavior

appropriate to the normal scope of his employment”); *Dragomir v. Spring Harbor Hosp.*, 970 A.2d 310, 313-314 (Me. 2009) (ruling that social worker’s sexual relations with patient were not within the scope of employment); *Wolfe v. Anne Arundel County*, 821 A.2d 52, 60 (Md. 2003) (holding that “it is clear from our cases” that alleged rape by police officer following traffic stop was not within scope of employment); *Petrell v. Shaw*, 902 N.E.2d 401, 407-408 (Mass. 2009) (holding that rector’s sexual relationship with plaintiff was not within scope of employment); *Hamed v. Wayne Cnty.*, 803 N.W.2d 237, 244-247 (Mich. 2011) (holding that sexual assault is outside scope of employment); *Franklin v. Turner*, 220 So. 3d 1003, 1007 (Miss. Ct. App. 2016) (“Assuming Swinney was employed as a caretaker for Turner at the time of the attack, nothing within his job description required him to assault Franklin in her apartment. Thus, Swinney would have been acting for purposes unrelated to his employment.”); *Gibson v. Brewer*, 952 S.W.2d 239, 246 (Mo. 1997) (declaring that “intentional sexual misconduct and intentional infliction of emotional distress are not within the scope of employment of a priest, and are in fact forbidden”); *Ballard v. Union Pac. R. Co.*, 781 N.W.2d 41, 53 (Neb. 2010) (FELA case) (stating that it was clear that respondeat superior did not apply because there was “no dispute that the three men were acting entirely upon their own impulses with no benefit to” the employer); *N.X. v. Cabrini Med. Ctr.*, 765 N.E.2d 844, 847 (N.Y. 2002) (ruling that sexual assault committed by physician employed by hospital was a clear departure from the scope of employment, having been committed for purely personal motives); *Medlin v. Bass*, 398 S.E.2d 460, 464 (N.C. 1990) (“While [the employee] was exercising authority conferred upon him by [the employer] when he summoned the minor plaintiff to his office to discuss her truancy problem, in proceeding to assault her sexually he was advancing a completely personal objective.”); *Sitton v. Massage Odyssey, LLC*, 158 N.E.3d 156, 159-160 (Ohio Ct. App. 2020) (ruling that massage parlor was not vicariously liable for employee’s sexual assault of client); *N.H. v. Presbyterian Church (U.S.A.)*, 998 P.2d 592, 599-600 (Okla. 1999) (“Because [the employee] was acting outside the scope of his employment as a matter of law when the molestation occurred, we hold that liability may not be imposed under the doctrine of respondeat superior.”); *R.A. v. First Church of Christ*, 748 A.2d 692, 699-700 (Pa. Super. Ct. 2000) (holding that minister’s sexual abuse of child was not within scope of employment); *Bernie v. Cath. Diocese of Sioux Falls*, 821 N.W.2d 232, 237-240 (S.D. 2012) (concluding that alleged acts of sexual abuse were outside scope of employment as a matter of law); *Jackson v. Burrell*, 2019 WL 237347, at *5 (Tenn. Ct. App. 2019) (declaring that “it strains credulity to view a massage therapist’s act of sexual assault to be within the scope of employment”), *rev’d on another issue*, 602 S.W.3d 340 (Tenn. 2020); *Buck v. Blum*, 130 S.W.3d 285, 288-290 (Tex. App. 2004) (ruling that physician’s sexual assault on patient was outside the scope of employment as a matter of law); *Burton v. Chen*, 532 P.3d 1005, 1009-1011, 1013-1015 (Utah 2023) (holding that sexual abuse by physician’s assistant was outside the scope of employment as a matter of law); *J.H. v. West Valley City*, 840 P.2d 115, 122-123 (Utah 1992) (ruling, as a matter of law, that sexual abuse of member of explorer group by police officer was not within the scope of employment); *Robel v. Roundup Corp.*, 59 P.3d 611, 621 (Wash. 2002) (stating that “where an employee’s acts are directed toward personal sexual gratification, the employee’s conduct falls outside the scope of his or her employment”); *W. Va. Reg’l Jail & Corr.*

1 Facility Auth. v. A.B., 766 S.E.2d 751, 769-770 (W. Va. 2014) (citing “overwhelming majority
 2 support in other jurisdictions concluding that sexual assaults committed on the job are not within
 3 the employee’s scope of employment”); Doe v. Foley, 2020 WL 4781582, at *4 (Wis. Ct. App.
 4 2020) (reviewing cases, and stating that “Wisconsin case law has held that sexual conduct falls
 5 outside one’s scope of employment”).

6 For cases from jurisdictions that have permitted expansion of vicarious liability but limited
 7 the scope of that expansion, see *Ayuluk v. Red Oak Assisted Living, Inc.*, 201 P.3d 1182, 1199
 8 (Alaska 2009) (acknowledging concerns that the aided-by-agency test “risks an unjustified
 9 expansion of employer tort liability” and limiting its use to “cases where an employee has by
 10 reason of his employment has substantial power or authority to control important elements of a
 11 vulnerable tort victim’s life or livelihood,” a determination that should be made by the court rather
 12 than a jury); *Lisa M. v. Henry Mayo Newhall Mem. Hosp.*, 907 P.2d 358, 365-366 (Cal. 1995)
 13 (distinguishing earlier case imposing vicarious liability for police officer’s sexual assault based on
 14 “the unique authority vested in police officers,” and holding that it did not apply to a sexual assault
 15 by a hospital ultrasound technician on a patient); *Farmers Ins. Grp. v. Cnty. of Santa Clara*, 906
 16 P.2d 440, 450 (Cal. 1995) (distinguishing earlier case imposing vicarious liability for police
 17 officer’s sexual assault and following cases holding that “except where sexual misconduct by on-
 18 duty police officers against members of the public is involved, the employer is not vicariously
 19 liable to the third party for such misconduct”) (citations omitted); *Bates v. Caesar Rodney Sch.*
 20 *Dist.*, 2021 WL 4691915, at *1 (Del. 2021) (holding earlier case imposing vicarious liability for
 21 police officer’s sexual assault on an arrestee did not apply to a sexual relationship by a teacher and
 22 wrestling coach with a student because “there is a significant difference between the coercion a
 23 police officer can bring to bear on a detainee—as we recognized in [the earlier case]—and the
 24 influence a teacher can exert upon a student”); *Doe v. Newbury Bible Church*, 933 A.2d 196, 198-
 25 200 (Vt. 2007) (distinguishing prior case in which court adopted the aided-by-agency test to
 26 impose vicarious liability on the employer of a sheriff who sexually assaulted 20-year-old cashier
 27 of convenience store and refusing to impose vicarious liability on a church for sexual misconduct
 28 by its pastor, stating that “[p]rincipled distinctions can be drawn between law enforcement officers
 29 and others in positions of authority”); cf. *Peña v. Greffet*, 110 F. Supp. 3d 1103, 1134 (D.N.M.
 30 2015) (predicting that the New Mexico Supreme Court would “not limit the aided-in-agency
 31 theory’s application to the employment context, but, rather, would do as the Supreme Courts of
 32 California and Vermont have done, and apply it outside the employment context in cases where
 33 the tortfeasor’s relationship with his employer gives him “extraordinary power” over his victim”);
 34 *Spurlock v. Townes*, 368 P.3d 1213, 1217 (N.M. 2016) (responding to certified question that under
 35 aided-by-agency theory, prison was vicariously liable for correctional officer’s sexual assault of
 36 female prisoners, but cautioning: “We thus follow *Ayuluk* in limiting our adoption of aided-by-
 37 agency principles extending vicarious liability to ‘cases where an employee has by reason of his
 38 employment substantial power or authority to control important elements of a vulnerable tort
 39 victim’s life or livelihood.’”).

Comment e. Sexual assault and this Section’s use of the term “sexual assault” rather than “battery.” Every one of the cases identified by the Reporters as expanding vicarious liability for sexual misconduct involved a sexual assault. While no cases were located in which a court declined to extend vicarious liability because the sexual misconduct did not involve a battery, this Section, being prudent, is so limited, while leaving as an open matter whether the principle in this Section should be extended beyond actual physical batteries.

For a similar use of the phrase “sexual assault,” including to refer to actions that technically constitute battery because they involve unconsented-to offensive physical contact (not just the apprehension of such contact), see Principles of the Law, Student Sexual Misconduct: Procedural Frameworks for Colleges and Universities § 1.1 (AM. L. INST., Tentative Draft No. 1, Apr. 2022).

Comment h. Foreseeability. The wide-gauged foreseeability inquiry required by this Section has been employed for duty purposes by some courts, including the Supreme Court of California in *Cabral v. Ralphs Grocery Co., Inc.*, 248 P.3d 1170 (Cal. 2011):

With regard to foreseeability, the court explained, the task “is not to decide whether a particular plaintiff’s injury was reasonably foreseeable in light of a particular defendant’s conduct, but rather to evaluate more generally whether the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed.” Thus, the court adopted categorical foreseeability for purposes of assessing whether the ordinary duty of reasonable care should be displaced.

MARC A. FRANKLIN ET AL., TORT LAW AND ALTERNATIVES 217 (11th ed. 2021). The Harper, James and Gray treatise is in accord: “[W]hat is reasonably foreseeable in this context . . . is quite a different thing from the foreseeably unreasonable risk of harm that spells negligence. . . . The foresight that should impel the prudent man to take precautions is not the same measure as that by which he should perceive the harm likely to flow from his long-run activity in spite of all reasonable precautions on his part.” 5 FOWLER V. HARPER, FLEMING JAMES, JR., & OSCAR S. GRAY, HARPER, JAMES AND GRAY ON TORTS § 26.7, at 30-31 (3d ed. 2008). See also *P.K. v. Hartford Roman Cath. Diocese Corp.*, 2014 WL 4536626, at *1 (D. Conn.), as corrected (Sept. 14, 2014) (explaining that an important factor in sorting out when vicarious liability will be imposed from when it will not is whether the tortious conduct is foreseeable); *In re Uber Techs., Inc., Passenger Sexual Assault Litig.*, 2024 WL 4211217, at *10 (N.D. Cal. 2024) (concluding, with regard to foreseeability, that it “is certainly plausible, given the allegations about Uber’s business model, that sexual assault is a risk ‘inherent in or created by the enterprise’ that Uber has undertaken”) and explaining the different foreseeability inquiry for purposes of vicarious liability than the one for negligence); *Lisa M. v. Henry Mayo Newhall Mem’l Hosp.*, 907 P.2d 358, 362 (Cal. 1995) (observing that “courts have also asked whether the tort was, in a general way, foreseeable from the employee’s duties”); *Mary M. v. City of Los Angeles*, 814 P.2d 1341, 1350 (Cal. 1991) (“In view of the considerable power and authority that police officers possess, it is neither startling nor unexpected that on occasion an officer will misuse that authority by engaging in assaultive conduct. The precise circumstances of the assault need not be anticipated, so long as

the risk is one that is reasonably foreseeable.”); *Dismuke v. Quaynor*, 637 So. 2d 555, 560 (La. Ct. App.), writ denied, 639 So. 2d 1164 (La. 1994) (“Rather than looking for risks that can and should be avoided, the court must essentially decide whether the particular accident is a part of ‘the more or less inevitable toll of a lawful enterprise.’”); *Fahrendorff v. N. Homes, Inc.*, 597 N.W.2d 905, 909 (Minn. 1999) (quoting expert in a case involving sexual assault of a resident at a group home by a counsellor that “inappropriate sexual contact or abuse of power in these situations, although infrequent, is a well-known hazard in this field”); *Red Elk v. United States*, 62 F.3d 1102, 1107 (8th Cir. 1995) (Federal Tort Claims Act case applying South Dakota law) (“In our view it was also foreseeable that a male officer with authority to pick up a teenage girl out alone at night in violation of the curfew might be tempted to violate his trust.”).

Professor Paula Dalley justifies the requirement of foreseeability for vicarious liability, asserting that moral responsibility extends only to reasonably foreseeable consequences and that, from a deterrence perspective, an actor can only take into account harm and costs that can be foreseen. Paula J. Dalley, *A Theory of Agency Law*, 72 U. PITT. L. REV. 495, 501-502 (2011).

Comment i. The employee’s power, authority, or influence over, or the opportunity to develop a trusting relationship with, the potential victim. As one court remarked in holding that the municipal employers of police officers could be held vicariously liable for their sexual assaults:

Cities are endowed with the coercive power of the state, and they confer that power on their police officers. Those officers, in turn, wield it to carry out employment duties—duties that may include physically controlling and forcibly touching others without consent. For this reason, when an officer carrying out employment duties physically controls someone and then abuses employer-conferred power to sexually assault that person, the city does not, under respondeat superior, escape liability as a matter of law for the sexual assault.

Cox v. Evansville Police Dep’t 107 N.E.3d 453, 456 (Ind. 2018). The court added, after surveying other cases involving sexual assaults by police officers: “But the variations in how courts have addressed sexual assaults by police officers reveal a common theme—that police officers’ duties come with broad authority and intimidating power that may affect vicarious liability.” *Id.* at 459-460. For other courts expressing similar views in cases involving sexual assaults by law enforcement officers and other employees with power over their victims, see *Mary M. v. City of Los Angeles*, 814 P.2d 1341, 1342 (Cal. 1991) (“Police officers occupy a unique position of trust in our society. They are responsible for enforcing the law and protecting society from criminal acts. They are given the authority to detain and to arrest and, when necessary, to use deadly force. As visible symbols of that formidable power, an officer is furnished a distinctively marked car, a uniform, a badge, and a gun. Those who challenge an officer’s actions do so at their peril; anyone who resists an officer’s proper exercise of authority or who obstructs the performance of an officer’s duties is subject to criminal prosecution.”); *Sherman v. Dep’t of Public Safety*, 190 A.3d 148, 182 (Del. 2018) (relying on state’s providing authority to police to arrest and deprive individuals of their liberty for imposing responsibility on the State to assure that an arrestee does not suffer harm due to the tortious conduct of such officers); *Doe v. Morris*, 2013 WL 3933928, at

*4 (E.D. La. 2013) (“In police cases, Louisiana courts give special weight to the authority wielded by on-duty police officers in performing the vicarious liability analysis.”); *Latullas v. State*, 658 So. 2d 800 (La. Ct. App. 1995) (holding employer vicariously liable for prison guard’s rape of a prisoner, notwithstanding that the assault was “totally unauthorized . . . and motivated by . . . personal desires” because “the authority bestowed upon him by his employer” enabled the guard to commit the rape); *Samuels v. S. Baptist Hosp.*, 594 So. 2d 571, 574 (La. Ct. App. 1992) (permitting imposition of vicarious liability on hospital for nursing assistant’s sexual assault of an underage psychiatric patient and commenting that the hospital “placed the employee in his capacity as a nurse’s assistant and in a position of authority and contact with the victim”); *Applewhite v. City of Baton Rouge*, 380 So. 2d 119, 121 (La. Ct. App. 1979) (observing that “police officer is a public servant given considerable public trust and authority” as a predicate for holding municipality vicariously liable for the police officer’s sexual assault of a female pedestrian threatened with arrest for “vagrancy”); *E.S. for G.S. v. Brunswick Inv. Ltd. P’ship*, 263 A.3d 527, 541 (N.J. Super. Ct. App. Div. 2021) (remarking that vicarious liability for sexual assaults is imposed “only if the employee-tortfeasor was in a position to exercise unique power over the victim”); *Doe v. Forrest*, 853 A.2d 48, 61 (Vt. 2004) (“What makes the circumstances of this case virtually unique from a policy perspective is the extraordinary power that a law enforcement officer has over a citizen.”). See also John C. P. Goldberg & Benjamin C. Zipursky, *Sherman v. Department of Public Safety: Institutional Responsibility for Sexual Assault*, 16 J. TORT L. 283, 298 (2023) (“Employers who confer on their employees certain extraordinary powers over third parties that can be exercised so as to place those third parties in highly vulnerable positions incur responsibility for those vulnerable individuals’ safety.”).

Professor Mark Geistfeld concurs, suggesting that an employee’s authority over a vulnerable victim “ought to be relevant for evaluating whether the employee’s sexual assault was properly attributable to the employment relationship,” a matter that the motive test ignores. See Mark A. Geistfeld, *Reformulating Vicarious Liability in Terms of Basic Tort Doctrine: The Example of Employer Liability for Sexual Assaults in the Workplace*, 99 N.Y.U. L. REV. 578, 583 (2024).

For a court that distinguished the authority of police officers, for which vicarious liability is imposed, from that of teachers, for which the court declined to extend vicarious liability, see *Bates v. Caesar Rodney Sch. Dist.*, 263 A.3d 127 (Table), 2021 WL 4691915 (Text) (Del. 2021) (stating court’s belief that “there is a significant difference between the coercion a police officer can bring to bear on a detainee—as we recognized in *Sherman*—and the influence a teacher can exert upon a student”); see also *Cox v. Evansville Police Dep’t*, 107 N.E.3d 453, 463 (Ind. 2018) (commenting on the considerable authority conferred upon police officers and suggesting that sexual assaults committed by employees without such authority may not subject the employer to vicarious liability).

Comment j. Facilitating the assault. Numerous cases rely on the role of employment in facilitating or enabling the employee’s sexual assault. See *Ayuluk v. Red Oaks Assisted Living, Inc.*, 201 P.3d 1183, 1200 (Alaska 2009) (requiring that employee’s power over victim “played a substantial role” in sexual assault); *Fahrendorff v. N. Homes, Inc.*, 597 N.W.2d 905, 911-912

(Minn. 1999) (justifying imposition of vicarious liability on employer of group home counsellor who sexually assaulted 15-year-old resident by the fact that the assault would not have occurred but for the counsellor’s employment); *Spurlock v. Townes*, 368 P.3d 1213, 1216 (N.M. 2016) (holding private prison operator vicariously liable for corrections officer’s sexual assault on an inmate because the officer was “aided in accomplishing his assaults by his agency relationship” with his employer); *Bazley v. Curry*, [1997] 2 S.C.R. 534, 560 (Can.) (“It must be possible to say that the employer significantly increased the risk of the harm by putting the employee in his or her position and requiring him to perform the assigned tasks.”).

Comment k. Vulnerable victim. Courts imposing vicarious liability in circumstances similar to that addressed in this Section frequently remark on the vulnerability of the victim or distinguish the case from those in which the victim is not vulnerable. See, e.g., *Doe v. Samaritan Counseling Ctr.*, 791 P.2d 344, 345 (Alaska 1990) (observing, in case that began with kissing and fondling and progressed to sex by a counsellor who was providing emotional and spiritual counseling to a patient, that “[a]ny reasonable practitioner would have been able to see that [the patient] was easy prey for the kind of conduct reportedly engaged in by [the counselor]”); *State, Dep’t of Admin. v. Schallock*, 941 P.2d 1275, 1282 (Ariz. 1997) (distinguishing case involving managing officer’s sexual assault of an intern over whom officer had the power to fire, demote, and control from cases involving sexual assault by a co-employee); *Samuels v. S. Baptist Hosp.*, 594 So. 2d 571, 574 (La. Ct. App.) (acknowledging the helplessness of 16-year-old victim committed to a locked psychiatric ward after a suicide attempt in the course of affirming judgment holding hospital vicariously liable for nursing assistant’s sexual assault), writ denied, 599 So. 2d 316 (La. 1992).

Comment l. Work assigned by the employer or course of conduct subject to the employer’s control. This limitation on vicarious liability is identical to the limitation for vicarious liability generally. See VL § 5(a).

Comment m. Role of motive. For courts that have explicitly eschewed the use of motive in determining vicarious liability for sexual assault, see *Lisa M. v. Henry Mayo Newhall Mem’l Hosp.*, 907 P.2d 358, 361 (Cal. 1995) (“California no longer follows the traditional rule that an employee’s actions are within the scope of employment only if motivated, in whole or part, by a desire to serve the employer’s interests.”); *Cox v. Evansville Police Dep’t*, 107 N.E.3d 453, 464 (Ind. 2018) (explaining that “the tortious act itself need not be intended to serve the employer”); *Doe v. Forrest*, 853 A.2d 48, 55, 58-62 (Vt. 2004) (concluding that deputy sheriff who coerced victim to perform fellatio had no motive to serve employer but adopting aided by agency to overturn summary judgment granted to employer).

Comment n. Direct liability of employer distinguished. When vicarious liability is imposed, liability is imposed solely because of the *relationship* between the employee-tortfeasor and the employer; the plaintiff need not show that the employer, itself, committed a tort. In addition, an employer may also be held liable for its *own* tortious acts in negligently hiring, supervising, training, or otherwise managing their employees. See Restatement of the Law Third, Agency § 7.05(1) (AM. L. INST. 2006) (explaining that an employer is subject to liability for “negligence in selecting, training, retaining, supervising, or otherwise controlling the agent”); Restatement

1 Third, Torts: Liability for Physical and Emotional Harm § 41, Comment *e* (AM. L. INST. 2012)
2 (explaining that an employer’s direct liability “is independent of the vicarious liability of an
3 employer for an employee’s tortious conduct”).

4 In addition to liability for negligence in its operations, an entity may be subject to liability
5 for breaching an affirmative duty to the victim to exercise reasonable care to protect the victim
6 with whom the entity is in a special relationship. Thus, in *BL Doe 3 v. Female Acad. of the Sacred*
7 *Heart*, 158 N.Y.S.3d 474, 478 (App. Div. 2021), in which a high school student brought suit against
8 the school she attended and at which she was sexually assaulted, the court explained:

9 It is well settled that a school owes a common-law duty to adequately supervise its
10 students which requires that the school exercise such care of them as a parent of
11 ordinary prudence would observe in comparable circumstances. The duty owed
12 derives from the simple fact that a school, in assuming physical custody and control
13 over its students, effectively takes the place of parents and guardians. Here, plaintiff
14 alleges in the complaint that instances of sexual abuse by the teacher occurred on
15 school grounds during school hours when defendant was “in a position of in loco
16 parentis” to her. Plaintiff further alleges that defendant knew or should have known
17 that the teacher was sexually abusing minor students and that defendant’s failure to
18 notify “law enforcement or another appropriate governmental agency resulted in
19 her injuries.

20 *Id.* (quotation marks and citations omitted). See also *Brown v. USA Taekwondo*, 483 P.3d 159,
21 166 (Cal. 2021) (holding national organizing committee for Olympic Taekwondo could be held
22 liable for a coach’s sexual predation of 15- and 16-year-old female gymnasts where the committee
23 owed an affirmative duty of reasonable care to gymnasts); *Fahrendorff v. N. Homes, Inc.*, 597
24 N.W.2d 905, 913-914 (Minn. 1999) (Page, J., concurring) (arguing that group home should be
25 liable to sexual-assault victim for its failure to protect her from the counsellor who assaulted her);
26 Restatement Third, Torts: Liability for Physical and Emotional Harm §§ 40 & 41 (AM. L. INST.
27 2012) (setting forth special relationships that impose an affirmative duty).

1 § __. Tortious Interference with a Right to Vote or Hold Office¹

2 (a) An actor is subject to liability to a person if the actor, by a consciously wrongful
3 act, intentionally deprives the person of the lawful right to:

4 (1) vote in a public election; or

5 (2) hold public office.

6 (b) An actor is subject to liability to a person if the actor, by a consciously wrongful
7 act, intentionally and seriously interferes with the person's lawful right to:

8 (1) vote in a public election; or

9 (2) hold public office.

10 **Comment:**

11 a. *Scope and prior Restatement coverage.*

12 b. *Nature of, and support for, the cause of action.*

13 c. *Plaintiff must be a person entitled to vote or hold public office.*

14 d. *Defendant may be a government actor or a private individual.*

15 e. *Definitions: "vote" and "public election."*

16 f. *A consciously wrongful and intentional act.*

17 g. *The defendant must actually prevent, or seriously interfere with, the exercise of the franchise*
18 *or the right to hold public office.*

19 h. *The interference with the right to vote need not affect the election's outcome.*

20 i. *Beyond that stated in Subsections (a) and (b), the plaintiff need not show additional injury.*

21 j. *First Amendment considerations.*

22 k. *Relation to constitutional and statutory claims.*

23 l. *Remedies.*

24 m. *Immunity.*

25 n. *Judge and jury.*

26 a. *Scope and prior Restatement coverage.* This Section is based on—but supersedes—
27 Restatement Second of Torts § 865. Other projects of the Institute concern election litigation and
28 election dispute resolution, but not tort liability. See Principles of the Law, Election
29 Administration: Non-Precinct Voting and Resolution of Ballot-Counting Disputes (2019) and the

¹ Our tentative thought is that, consistent with its placement in the Second Restatement, this Section will slot into a Chapter entitled Miscellaneous Torts contained in this Miscellaneous Provisions Restatement. That Chapter will include, inter alia, Medical Monitoring and Tort Liability Based on Estoppel.

1 ongoing Restatement of the Law, Election Administration. This Section does *not* supersede
2 anything in those projects.

3 This Section expressly addresses the right to vote and the right to hold public office. The
4 law regarding the interference with these two rights has taken definite shape, but this Section's
5 discussion does not suggest or imply a lack of protection for other constitutional and political
6 rights. See Restatement Second, Torts § 865, Comment *c* (offering a similar cautionary note).

7 Like many other Restatement Sections, this Section contains various Illustrations. These
8 Illustrations provide guidance on the common-law claim addressed here. These Illustrations do not
9 address whether the hypothetical plaintiff may assert a claim under state or federal statutory or
10 constitutional law. See Comment *k*.

11 *b. Nature of, and support for, the cause of action.* This Section addresses a common-law
12 tort that originated in England and has long been recognized in the United States. Currently, cases
13 asserting such a right are rare, as the common-law cause of action has been overshadowed by
14 federal and state constitutional and statutory voting-rights laws, which often address similar
15 conduct. See Comment *k*. Yet, even though these common-law claims may be unusual in practice,
16 by all accounts, a cause of action for the tortious interference with the right to vote or hold office
17 endures. Indeed, in recent scholarship, some have observed that common-law tort claims fill
18 important gaps in the current regulatory architecture, as injunctive relief—standing alone—may
19 fail to provide adequate remedies to affected citizens and may also inadequately deter some efforts
20 to suppress the franchise, consigning courts to a game of voting violation whack-a-mole, rather
21 than meaningfully deterring serious misconduct. Accordingly, this Section reaffirms the existence
22 of the common-law tort and delineates its contours.

23 *c. Plaintiff must be a person entitled to vote or hold public office.* As is implicit from the
24 black letter, in order to state a cause of action under this Section, the plaintiff must be entitled to
25 vote or to hold public office. If a plaintiff is proscribed from voting or holding public office under
26 the jurisdiction's rules, the plaintiff may not assert a claim under this Section even if the other
27 elements of the cause of action are satisfied.

28 **Illustration:**

29 1. Javier seeks to vote at his local polling station. By law, in order to vote in Javier's
30 jurisdiction, one must have and furnish a valid photo ID. Javier lacks such an ID. The

1 election official does not allow Javier to cast a regular ballot. As a matter of law, the
2 election official is not liable to Javier pursuant to this Section.

3 *d. Defendant may be a government actor or a private individual.* The rule stated in this
4 Section applies regardless of whether the defendant or defendants are government actors or private
5 individuals. In certain instances, entities may also be subject to liability under principles of
6 vicarious liability. For rules governing vicarious liability, see Restatement Third, Torts:
7 Miscellaneous Provisions (Tentative Draft No. 4, 2025 (forthcoming)).

8 If the defendant is a federal, state, or local governmental entity (such as a city, county, or
9 municipality) or a government employee (whether of the federal government, a state, or a local
10 governmental entity), immunities may come into play. For a discussion of these immunities, see
11 Comment *m* below.

12 *e. Definitions: “vote” and “public election.”* For purposes of this Section, both “vote” and
13 “public election” are defined in accordance with the definition supplied in the Voting Rights Act,
14 codified at 52 U.S.C. § 10310(c)(1). That Section defines a “vote” or “voting” capaciously, as
15 encompassing “all action necessary to make a vote effective in any primary, special, or general
16 election, including, but not limited to, registration . . . or other action required by law prerequisite to
17 voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals
18 of votes cast with respect to candidates for public or party office.” That Section defines an election as
19 “any primary, special, or general election” or any “propositions for which votes are received.”

20 *f. A consciously wrongful and intentional act.* The rule stated in this Section applies when
21 an actor, who knows or should know that another has the right to vote in a public election or to
22 hold public office, performs a consciously wrongful and intentional act. Both prerequisites—a
23 (1) consciously wrongful act that (2) intentionally interferes with the right to vote or to hold public
24 office—must be shown. Prong (1), the “consciously wrongful act,” includes, but is not limited to,
25 actions involving force, fraud, duress, false imprisonment, bribery, misrepresentation, or the abuse
26 of an official position. Meanwhile, prong (2) requires intention to interfere with the right to vote
27 or to hold public office. Intention is defined by the Restatement Third of Torts: Liability for
28 Physical and Emotional Harm § 1. It provides that “[a] person acts with the intent to produce a
29 consequence if: (a) the person acts with the purpose of producing that consequence; or (b) the
30 person acts knowing that the consequence is substantially certain to result.” Accordingly, an act
31 satisfies prong (2) if the act is done either for the purpose of preventing or interfering with a

1 person's right to vote or to hold public office or with knowledge that the act is substantially certain
2 to result in that outcome.

3 Thus, if an actor, in an effort to prevent a person from voting, falsely imprisons the person
4 or excludes the person from the voting place, the person has a cause of action against the actor under
5 this Section. For discussion of false imprisonment, see Restatement Third, Torts: Intentional Torts
6 to Persons §§ 7-10 (Tentative Draft No. 3, 2018). Likewise, if an actor who knows or should know
7 that a person is entitled to vote nevertheless intentionally strikes the person from the voting rolls, the
8 person intentionally excluded from the rolls has a cause of action under this Section. Or, an actor
9 who, for instance, bribes sufficient voters to change the outcome of an election is subject to liability
10 to the candidate who, because of the manipulated votes, has been deprived of the elected office.

11 By the same token, one who, merely by negligence, prevents another from voting or
12 holding public office is not subject to liability. Nor is an actor subject to liability if the actor
13 prevents another from voting or holding public office intentionally but as the result of a reasonable
14 mistake of fact or law. Accordingly, when a registrar of voters refuses to permit a person's name
15 to be added to the voting list, reasonably believing that the person is not a resident or, for whatever
16 other legitimate reasons, ineligible to vote, the registrar of voters is not subject to liability because
17 the registrar has not engaged in a consciously wrongful act.

18 **Illustration:**

19 2. Remy attempts to register the day of the election at the local polling place. Such
20 same-day registrations are permitted in Remy's state, provided that the prospective voter
21 furnishes a valid form of identification (including, *inter alia*, a driver's license) at the time
22 of registration. However, the election official rejects Remy's state driver's license and
23 refuses to allow her to vote, reasonably—but mistakenly—believing that Remy's driver's
24 license is fake because it is in poor repair. Even though the official acts with the purpose
25 of preventing Remy from voting, under this Section, the election official is not, as a matter
26 of law, liable to Remy because there is no consciously wrongful act: The election official
27 has a reasonable (albeit incorrect) belief that Remy is ineligible to vote.

28 The Second Restatement of Torts § 865, Comment *a* specified that, in order to be liable to
29 the plaintiff, in addition to satisfying the standard above, a person needed to act “with knowledge
30 that another has a right to vote in a public election or to hold public office.” But, the Comment
31 was not entirely clear concerning whether the actor's knowledge was to be judged subjectively or

objectively—i.e., whether the Comment was endorsing an actual knowledge or a constructive knowledge standard.

Removing any ambiguity, this Section specifies that an actor is subject to liability if the actor acts with actual or constructive knowledge of a person’s right to vote or to hold public office. This standard is utilized, as it is more commonly used in tort law, avoids unsatisfying swearing contests, is more susceptible to consistent application, and does not require the plaintiff to furnish evidence that is frequently inaccessible to the plaintiff (i.e., what was in the defendant’s mind).

Illustration:

3. Working as a poll watcher, Drake challenges every prospective Latino voter because he believes the prospective voters are poised to vote for the “wrong” candidate. Four Latino voters, deprived of their right to vote because of Drake’s challenges, sue. In the ensuing tort action, Drake defends by testifying that he didn’t *know* that any particular Latino voter was, in fact, entitled to vote under governing law; he subjectively believed that all Latino voters he challenged were ineligible to vote. Even if the factfinder believes Drake’s testimony, under this Section, Drake is nevertheless subject to liability if the factfinder concludes that Drake’s belief concerning the voters’ eligibility was objectively unreasonable.

g. The defendant must actually prevent, or seriously interfere with, the exercise of the franchise or the right to hold public office. The rule stated in this Section predicates liability on the actual denial of the franchise or right to hold public office or the serious interference therewith. Trivial or modest interference will not suffice. Because of insufficient doctrinal development, beyond the guideposts furnished in the Illustrations below, this Section declines further to specify the precise boundaries of what constitutes and does not constitute “serious interference.”

Illustrations:

4. An election official, believing that Emerson is poised to vote for the wrong candidate, prohibits Emerson from voting. Yet, after 10 minutes, the election official has a change of heart and permits Emerson to vote. Because a 10-minute delay in voting is, as a matter of law, not a serious interference, the voting official is not liable to Emerson under this Section.

5. Same facts as Illustration 4, except that, after four hours, the election official has a change of heart and permits Emerson to vote. During this four-hour window, Emerson waits at the polling place. Taking all of the circumstances into account, a factfinder must

determine whether a four-hour delay constitutes “serious interference” with Emerson’s right to cast a ballot.

6. Vince, a candidate for city council, bribes Mary, an election official. Vince has Mary disqualify enough ballots cast for Vince’s opponent, Tanya, so that Vince (wrongfully) wins the election. Without the manipulation, Tanya would have won the election. Tanya learns of the manipulation three months after Vince takes office. In response to a *quo warranto* action (a separate legal proceeding that determines if someone has the right to hold public office), Vince is removed from office, and Tanya is installed on the city council six months after the beginning of Vince’s term in office. Tanya then promptly sues Vince and Mary under this Section. Pursuant to this Section, because a six-month delay constitutes, as a matter of law, “serious interference,” both Vince and Mary are subject to liability, even though Tanya is eventually able to claim her rightful seat on the city council.

h. The interference with the right to vote need not affect the election’s outcome. Subsections (a)(1) and (b)(1) apply when the defendant, by a consciously wrongful act, intentionally deprives a person of the right to vote or seriously interferes with that right. The plaintiff need not show that the defendant’s interference affected the election’s outcome.

Illustration:

7. Dana causes thousands of automated telephone calls (frequently called “robocalls”) to be made to Latino voters in order to dissuade them from voting by mail in an upcoming election. The messages warn that, if they vote by mail, voters’ personal information will be provided to police departments and credit-card companies, and Dana knows that this assertion is false. Some voters, upon hearing these messages, are dissuaded from voting in the upcoming election. Dana acts with the purpose of suppressing the votes of these voters in the hopes of causing these voters’ preferred candidates to lose the election. Eight would-be voters, who hear Dana’s message and fail to vote as a consequence of it, sue. Dana is subject to liability to those eight voters, regardless of whether or not her actions affected the results of the election.

i. Beyond that stated in Subsections (a) and (b), the plaintiff need not show additional injury. As the Restatement Second of Torts § 865, Comment *a* provided: “The rule stated in this Section is not dependent upon the existence of pecuniary or other harm.” One even temporarily wrongfully deprived of the right to vote or hold elected office has sustained a cognizable injury

1 for tort law purposes, so long as the factfinder concludes that there was “serious interference,”
2 even if that deprivation is not accompanied by other harm.

3 *j. First Amendment considerations.* This is a Restatement of common-law principles not of
4 constitutional law. Accordingly, this Restatement does not address whether the First Amendment
5 of the U.S. Constitution may limit the Section’s application when one uses speech or other
6 expressive conduct to interfere with the right to vote or hold public office.

7 **Illustration:**

8 8. Same facts as Illustration 7, in that Dana causes thousands of automated
9 telephone calls (or “robocalls”) to be made to Latino voters in order to dissuade the voters
10 from voting by mail. Whether Dana has any First Amendment defense to liability is beyond
11 the scope of this Restatement.

12 *k. Relation to constitutional and statutory claims.* Many provisions of the U.S. Constitution
13 protect the right to vote, including the Equal Protection Clause of the Fourteenth Amendment, and
14 the Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments. In addition, 42 U.S.C.
15 §§ 1983 and 1985 provide causes of action for certain violations of these rights. State constitutions
16 also protect the right to vote. Federal statutory law, including the Civil Rights Act of 1964 and the
17 Voting Rights Act of 1965, also furnish some protection against voter intimidation and other
18 election-related misconduct, while an array of state statutes also protect the right to vote and hold
19 elected office. The application and interpretation of these constitutional and statutory provisions
20 fall outside the scope of this Section.

21 This Section furnishes a common-law tort cause of action. See Comment *b*. Liability under
22 this Section does not depend on whether or not statutory provisions create a private right of action.
23 Nor do these statutory claims preclude a common-law action under this Section (or vice versa).
24 Accordingly, a plaintiff may sue in common-law tort and also, simultaneously, assert claims pursuant
25 to constitutional provisions or statutes. If a plaintiff proves liability and seeks compensatory damages
26 under both this Section and under constitutional or statutory provisions, damages must be awarded
27 so that plaintiff is restored to the rightful position without a double recovery for the same harms. See
28 Restatement Third, Torts: Remedies §§ 2, 3 (Tentative Draft No. 1, 2022).

29 Liability under this Section does not affect a statutory or common-law claim of *quo*
30 *warranto* to remove from office a person wrongfully declared the winner. Nor does it supersede
31 or affect the rules for election recounts or contests.

Illustration:

9. In an effort to deprive African Americans of the right to vote in a contested congressional election, three election officials refuse to allow African American students to cast ballots. Thereafter, 27 African American students, who were denied the right to vote in the congressional election, sue. Under this Section, the three election officials are subject to liability to the African American students. This common-law liability exists regardless of whether or not the students also assert other constitutional or statutory claims against the three election officials.

l. Remedies. Once a plaintiff establishes a defendant's liability under this Section, a range of potential remedies may be available.

(1). *Compensatory damages.* A plaintiff who suffers a financial loss is entitled to recover for the loss the plaintiff sustains. For example, a plaintiff forced to drive to a distant polling place because the defendant blocked access to plaintiff's regular polling place would be entitled to compensation for the expenses the plaintiff incurred. Likewise, a voter who incurs expenses traveling to a polling place but who is denied the right to vote upon arrival at that polling place is entitled to recoup the travel costs she incurred. Additional compensatory damages may also be available. For instance, a plaintiff who is battered attempting to enter a polling place may recover damages for medical expenses, see Restatement Third, Torts: Remedies § 19 (Tentative Draft No. 2, 2023), pain and suffering, *id.* § 20, and lost earnings, *id.* § 18. A plaintiff whose right to vote or hold office is wrongfully infringed may also suffer emotional distress or dignitary harm as a consequence of the denial. If so, the plaintiff is entitled to recover for these losses. See *id.* § 21 (concerning emotional distress); *id.* § 22 (concerning dignitary harm, and especially Comments *d* and *i* and Illustration 9).

(2). *Punitive damages.* An actor who engages in a consciously wrongful act to disenfranchise or interfere with an eligible voter or someone entitled to hold office may be subject to liability for punitive damages under the standards set forth in Restatement Third of Torts: Remedies §§ 39 to 41 (Tentative Draft No. 3, 2024).

(3). *Nominal damages.* At the very least, a plaintiff whose right to vote or hold office is wrongfully infringed is entitled to nominal damages to serve as a declaration and to vindicate plaintiffs' rights. See *id.* § 38.

(4). *Injunctions.* A plaintiff who has established that a defendant is likely to deprive plaintiff of the right to vote or to hold office in a future election may be able to obtain an injunction

that would prevent this future harm under the rules set forth in Restatement Third of Torts: Remedies §§ 43-57 (Tentative Draft No. 2, 2023 and Tentative Draft No. 3, 2024). A court may issue a temporary restraining order, temporary injunction, or permanent injunction to ensure that actors do not wrongfully interfere with the fair conduct of an ongoing or future election.

(5). *Declaratory judgment.* A plaintiff wrongfully denied the right to vote or to hold public office may seek a declaration as to the loss of the right. See *id.* § 60.

(6). *Restitution.* A person wrongfully deprived of election to public office may be entitled to recover from the person wrongfully placed in office the officer's salary or other benefits of office for the relevant period under the rules stated in the Restatement of the Law Third, Restitution and Unjust Enrichment.

Illustrations:

10. Same facts as Illustration 9, involving the African American students. The students may recover compensatory damages for any financial losses, medical expenses, emotional harm, and dignitary harm they sustained. See Restatement Third, Torts: Remedies §§ 19-22 (Tentative Draft No. 2, 2023). Plaintiffs also may ask the jury to award punitive damages under the standards set forth in *id.* §§ 39-41 (Tentative Draft No. 3, 2024). They also may seek an injunction to prevent future deprivations of their rights under the rules in §§ 43-57 (Tentative Draft No. 2, 2023 and Tentative Draft No. 3, 2024).

11. Same facts as Illustration 6, in which Vince, a candidate for city council, bribes Mary, an election official, to disqualify enough ballots cast for Vince's opponent, Tanya, so that Vince wrongfully wins the election, and Tanya, as a result, is deprived of office for six months. Tanya may recover from Vince for six months of salary in restitution because Vince was unjustly enriched when he assumed office. She also may recover damages from Vince and Mary that do not duplicate any claim in restitution.

12. Same facts as Illustration 7, in that Dana causes thousands of automated telephone calls (or "robocalls") to be made to Latino voters in order to dissuade the voters from voting by mail. Under this Section, Philip, a candidate on the ballot disadvantaged by Dana's disinformation, may bring an action seeking appropriate injunctive relief to prevent Dana from making additional robocalls, consistent with the requirements for the issuance of injunctions. See Restatement Third, Torts: Remedies §§ 43-57 (Tentative Draft No. 2, 2023 and Tentative Draft No. 3, 2024).

m. Immunity. Government entities, officers and employees who may otherwise be liable under this Section may claim immunity under the rules set forth in § 8 (addressing federal government immunity), § 9 (addressing state immunity), § 10 (addressing local government immunity), and § 11 (addressing immunities that shield governmental employees, officers, and authorized agents) (Tentative Draft No. 1, 2022 & Council Draft No. 7, 2024). Immunity from suit is typically an affirmative defense that must be established by the defendant. See *id.* § 9, Comment *j*, § 10, Comment *m*, and § 11, Comment *j*.

n. Judge and jury. The typical allocation of authority obtains. The court must establish the plaintiff's entitlement to vote or to hold office (per Comment *c*), the scope or application of possible immunities (per Comment *m*), when appropriate, the defendant's baseline susceptibility to punitive damages (per Comment *l*), and, when appropriate, the propriety of an injunction and its content (per Comment *l*). The jury must determine whether the other requirements of this Section are satisfied and, if liability is found, assess damages.

REPORTERS' NOTE

Comment a. Scope and prior Restatement coverage. The Restatement of Torts § 865 (AM. L. INST. 1939) reads: "A person who by a consciously wrongful act intentionally deprives another of a right to vote in a public election or to hold public office is liable to the other in an action of tort." The Restatement Second of Torts § 865 (AM. L. INST. 1979) reads: "One who by a consciously wrongful act intentionally deprives another of a right to vote in a public election or to hold public office or seriously interferes with either of these rights is subject to liability to the other." This Section is substantively identical in the black letter to these earlier provisions, although this Section's Comments provides more detail, particularly on available remedies and the relationship to constitutional and statutory claims protecting the right to vote. For more on the tort's historical pedigree, see Reporters' Note to Comment *b* below, as well as Note, *Voting Wrongs and Remedial Gaps*, 137 HARV. L. REV. 1182, 1182 (2024), which observes: "For most of the nation's history, the standard remedy for a voting wrong was damages."

Comment b. Nature of, and support for, the cause of action. On early English recognition of interference with the right to vote as a tort, see *Ashby v. White*, 92 Eng. Rep. 126 (1703). There, the court declared that, because "the right of voting . . . is a thing of the highest importance, and so great a privilege," "it is a great injury to deprive the plaintiff of it." *Id.* at 136; see also *id.* at 136-137 (the right to vote is "a right in the plaintiff by the common law") (statement of Lord Holt in dissent, later endorsed by the House of Lords). The right is longstanding in the United States as well. See *Nixon v. Herndon*, 273 U.S. 536, 540 (1927) (Holmes, J.) (declaring that the right to recover for "private damage" caused by a denial of the right to vote "hardly has been doubted for over two hundred years, since *Ashby v. White*, and has been recognized by this Court") (citation

omitted); see also J. E. Macy, *Personal Liability of Public Officer for Breach of Duty in Respect of Election or Primary Election Laws*, 153 A.L.R. 109 (originally published in 1944) (explaining that “*Ashby v. White* established the justiciable nature of an elector’s right to vote in a political election, and the appropriateness of an action of tort to vindicate that right”).

For a history of the development of a tort action for denial of the right to vote beginning in England and then in the United States, see Note, *Voting Wrongs and Remedial Gaps*, 137 HARV. L. REV. 1182, 1183-1192 (2024). The Note explains: “During the nineteenth century, state courts uniformly adopted a damages action for violations of voting rights.” *Id.* at 1183. See also *Morgan v. Dudley*, 57 Ky. 693, 695 (1858) (“It has been frequently decided that the officers of an election are liable to a civil action for refusing a legal vote.”); *Hanlon v. Partridge*, 44 A. 807, 807 (N.H. 1869) (examining older English cases and determining that a civil action for the wrongful denial of one’s right to vote had long been recognized and affirming judgment for the plaintiff where the defendants “willfully and maliciously neglect[ed] and refus[ed] to insert the plaintiffs’ names on the list of voters”); *Santana v. Registrars of Voters of Worcester*, 425 N.E.2d 745, 749 (Mass. 1981) (“Massachusetts has long recognized a cause of action for damages for wrongful deprivation of the right to vote.”); *Frank v. Eaton*, 225 A.D. 149, 151 (N.Y. App. Div. 1928) (declaring that it is “well settled” that a voter, illegally denied the right to vote, can assert a cause of action for the deprivation); accord *Vargas v. Hudson Cnty. Bd. of Elections*, 949 F.2d 665, 674 (3d Cir. 1991) (discussing a class action, ultimately settled for “\$590 per individual,” involving approximately 1,000 African-American and Hispanic voters who alleged that a range of defendants, including the mayoral candidate, the county board of elections, and the superintendent of elections, tortiously interfered with their voting rights during a mayoral election); *Walje v. City of Winchester, Ky.*, 827 F.2d 10, 12 (6th Cir. 1987) (noting, in dicta, the “long line of cases which uphold money damages as compensation for persons deprived of their right to vote”); *Isabel v. Reagan*, 394 F. Supp. 3d 966, 974 (D. Ariz. 2019) (“The Supreme Court has repeatedly held that actions for damages may be maintained for wrongful deprivations of the right to vote.”) (quotation marks omitted), *aff’d* on other grounds, 987 F.3d 1220 (9th Cir. 2021); Note, *Damage Awards for Constitutional Torts: A Reconsideration After Carey v. Phipps*, 93 HARV. L. REV. 966, 969 (1980) (“[F]or over two hundred years, the deprivation of the right to vote has been recognized as justifying significant damages”); John G. Niles, *Civil Actions for Damages Under the Federal Civil Rights Statutes*, 45 TEX. L. REV. 1015, 1027 (1967) (explaining that it has long been established “that the right to vote is a valuable right secured by the Constitution, and that denial of this right gives rise to a cause of action for substantial damages”). On interference with the right to hold office or to be a candidate, see *Stradford v. Reinecke*, 128 N.E.2d 588, 592 (Ill. App. Ct. 1955) (recognizing that a tort claim has long existed when a candidate has been “wilfully injured in his candidacy by an election official”); *Hill v. Carr*, 186 Ill. App. 515 (1914) (holding that, because a primary candidate had a legal right to have all votes be counted, depriving him of this right constituted an injury for which he could recover damages); *Judd v. Polk*, 102 S.W.2d 325 (Ky. 1937) (holding that a county clerk who refused to print a candidate’s name on a ballot was subject to liability to the wrongfully excluded candidate); *Larson v. Marsh*, 14 N.W.2d 189 (Neb.

1944) (holding that plaintiff had stated a claim when the Secretary of State refused to print the plaintiff’s address on the ballot, which was a ministerial duty imposed by statute, and which, according to the plaintiff, prevented him from receiving all votes intended for him); J. E. Macy, *Personal Liability of Public Officer for Breach of Duty in Respect of Election or Primary Election Laws*, 153 A.L.R. 109 (originally published in 1944) (“A candidate for office may maintain an action for damages against an election official for breach of duty in the casting up, returning, certifying, or otherwise consummating the results of an election whereby the candidate has been directly and injuriously obstructed in his right to the benefit of the voter’s choice.”).

As Comment *b* notes, in recent years, most plaintiffs complaining of the denial of the franchise, have brought statutory or constitutional claims, rather than claims in tort. See Case Note, *Election Law—Voting Rights Act—Eighth Circuit Holds Voting Rights Act Does Not Contain A Private Cause of Action to Enforce Section 2*—Arkansas State Conference NAACP v. Arkansas Board of Apportionment, 86 F.4th 1204, 137 HARV. L. REV. 2424, 2431 (2024) (observing that “the default remedy for voting wrongs is injunctive relief except in rare vote denial or voter intimidation cases”); see also *Palmer v. Bd. of Educ. of Cmty. Unit Sch. Dist. 201-U, Will Cnty., Ill.*, 46 F.3d 682, 686 (7th Cir. 1995) (“Most voting-rights cases seek equitable relief, but damages too are available for a racially motivated deprivation of the right to vote.”).

For discussion of why contemporary plaintiffs have tended to bring statutory or constitutional, rather than common-law, claims, see Note, *Voting Wrongs and Remedial Gaps*, 137 HARV. L. REV. 1182, 1192-1196 (2024) (contending that over the past 40-odd years damages actions fell out of favor because injunctions “could be sought proactively,” injunctions tend to empower civil rights organizations, and some “courts became more willing to grant injunctions, rather than damages, in suits against government officers”); accord *Dillard v. Crenshaw Cnty.*, 640 F. Supp. 1347, 1363 (M.D. Ala. 1986) (granting a preliminary injunction while noting that “[g]iven the fundamental nature of the right to vote, monetary remedies [alone] would obviously be inadequate”).²

Nonetheless, as the author of the 2024 *Harvard Law Review* Note explains, just as a tort law damages action (standing alone) may be inadequate, injunctive relief (standing alone) may also be inadequate. Claims for injunctive relief may fail sufficiently to deter efforts to suppress the exercise of the franchise, in part because, when issuing injunctions, “courts will generally only enjoin the specific legal violation found and generally will not reach beyond the litigation to control future conduct.” Note, *supra* at 1200; see also *id.* at 1182 (explaining that “today’s injunction-heavy system tends to under-deter voting wrongs”). Furthermore, injunctions do not compensate the individual voter, who has been wrongfully deprived of an important and valuable right. Given these persistent deficiencies, the pendulum may be swinging back toward a common-law damages action, possibly initiated alongside other statutory or constitutional claims. Accord Samuel Issacharoff, *Voting Rights at 50*, 67 ALA. L. REV. 387, 409-413 (2015) (recognizing “the

² Although these explanations help to explain why voting rights advocates have sought injunctions, it does not fully explain why so many voting rights advocates have *exclusively* sought injunctions, particularly given that a complementary tort claim is, and has long been, available. That choice is, to us, puzzling.

need for different tools to address different voting rights problems” and observing that “[r]enewed attention to monetary damages may prompt greater private attorney interest in voting rights claims,” and that this attention could be salutary); Kenneth Parreno, Christine Kwon, Victoria Bullock & John Langford, *New and Old Tools to Tackle Deepfakes and Election Lies in 2024*, LAWFARE, Oct. 1, 2024 (encouraging litigators, worried about election interference, to consider reliance on a “centuries-old but firmly established tort: interference with the right to vote”).

The Reporters’ research has uncovered only one contemporary case rejecting a cause of action based on the Restatement Second of Torts § 865 (AM. L. INST. 1979)—and that case has limited bite, as the plaintiff sought to apply § 865 in an unusual context. See *Nichols v. Kansas Pol. Action Comm.*, 11 P.3d 1134, 1140-1142 (Kan. 2000) (addressing claim where plaintiff, a disappointed candidate, alleged that the defendant had made excessive campaign contributions to the plaintiff’s opponent and also failed to file organization statements with the Secretary of State, as required by a Kansas statute); cf. *Veile v. Bd. of Cnty. Comm’rs of Washakie Cnty.*, 860 P.2d 1174, 1179 (Wyo. 1993) (holding, based on the facts presented, that it was not necessary to “determine whether Wyoming recognizes the tort of intentional interference with a right to vote or hold office, Restatement (Second) Torts § 865 (1979), or whether that tort would be properly applied to these facts”).

It appears that the majority of states have recognized a cause of action for tortious interference with the right to vote, in at least some form. See Parreno et al., *supra* (“We’ve surveyed all 50 states and the District of Columbia, and at least 31 jurisdictions have historically recognized tortious interference with voting rights in some form.”).

Comment c. Plaintiff must be a person entitled to vote or hold public office. See *Wiley v. Sinkler*, 179 U.S. 58, 66 (1900) (rejecting the plaintiff’s claim because the plaintiff did not allege that he had “the requisite qualifications of an elector” and stating “[b]ecause of this omission the complaint does not state facts sufficient to constitute a cause of action”); J. E. Macy, *Personal Liability of Public Officer for Breach of Duty in Respect of Election or Primary Election Laws*, 153 A.L.R. 109 (originally published in 1944) (“The plaintiff must sustain the burden of proof to show that he was qualified and entitled to be registered or to cast his ballot, as the case may be.”). For further discussion, see *Willis v. Larson*, 539 P.2d 352 (Wyo. 1975). There, the court held that the plaintiff, a candidate for public office (specifically, to serve as a justice of the peace), was not entitled to damages because he had not fulfilled the requirements to hold the office. In particular, the plaintiff was not licensed to practice law, and a Wyoming statute made a law license a prerequisite to hold the position.

Comment e. Definitions: “vote” and “public election.” This Section adopts the Voting Rights Act’s capacious definitions of “vote” and “public election.” For more on the Voting Rights Act’s definition, see, e.g., *OCA-Greater Houston v. Texas*, 867 F.3d 604, 615 (5th Cir. 2017) (applying the Voting Rights Act) (explaining that, pursuant to the Voting Rights Act: “‘To vote,’ . . . plainly contemplates more than the mechanical act of filling out the ballot sheet. It includes steps in the voting process before *entering* the ballot box, ‘registration,’ and it includes steps in the voting process after *leaving* the ballot box, ‘having such ballot counted properly.’”

Indeed, the definition lists ‘casting a ballot’ as only one example in a nonexhaustive list of actions that qualify as voting.”); *Democracy N. Carolina v. N. Carolina State Bd. of Elections*, 590 F. Supp. 3d 850, 871 (M.D.N.C. 2022) (applying the Voting Rights Act) (“This court finds, as an initial matter, voting using an absentee ballot constitutes ‘voting’ under the VRA The court further finds that ‘voting’ includes the delivery of an absentee ballot to a county board of elections as an action ‘necessary to make a vote effective’—an absentee ballot must be delivered in order to be counted.”). See also Pamela S. Karlan, *Turnout, Tenuousness, and Getting Results in Section 2 Vote Denial Claims*, 77 OHIO ST. L.J. 763, 789 n.17 (2016) (“The Voting Rights Act expressly includes both ‘casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast’ in its definition of ‘voting.’”).

Comment f. A consciously wrongful and intentional act. In demanding that the plaintiff show both a consciously wrongful and intentional act, this Section echoes the Restatement Second of Torts § 865 (AM. L. INST. 1979). Its black letter provided: “One who by a consciously wrongful act intentionally deprives another of a right to vote in a public election or to hold public office or seriously interferes with either of these rights is subject to liability to the other.” Its *Comment a* further clarified: “The rule stated in this Section applies when a person with knowledge that another has a right to vote in a public election or to hold public office does an act either for the purpose of preventing the other from exercising the right or with knowledge that his act is substantially certain to result in the failure of the other to exercise the right.”

On the coupling of the “objective evaluative standard” of a “consciously wrongful act” with the subjective intent standard of purpose or knowledge to a substantial certainty, see James A. Henderson Jr. & Aaron D. Twerski, *Intent and Recklessness in Tort: The Practical Craft of Restating Law*, 54 VAND. L. REV. 1133, 1136 & n.16 (2001). It is arguably true that a consciously wrongful act is, almost by definition, intentional. However, this Section utilizes the terminology “consciously wrongful intentional act,” in order to maintain consistency with the Second Restatement.

On the requirement of intent rather than mere negligence, see *Peavey v. Robbins*, 48 N.C. 339, 342 (1856) (finding that the election inspectors could not be held liable for mere errors in judgment since the plaintiff did not allege that defendants lacked good faith in denying his right to vote); *Jenkins v. Waldron*, 11 Johns 114, 121 (N.Y. 1814) (“It would, in our opinion, be opposed to all the principles of law, justice and sound policy, to hold that officers, called upon to exercise their deliberative judgments, are answerable for a mistake in law, either civilly or criminally, when their motives are pure, and untainted with fraud or malice.”); *Rail v. Potts*, 27 Tenn. 225, 227 (1847) (affirming a verdict for defendants when the jury found that they had acted in good faith and without malice when refusing to permit the plaintiff to vote); see also 29 C.J.S. *Elections* § 129 (“Where election officials act in good faith and on reasonable grounds in denying a candidate placement on the ballot, the officials cannot be held personally liable for damages.”); J. E. Macy, *Personal Liability of Public Officer for Breach of Duty in Respect of Election or Primary Election Laws*, 153 A.L.R. 109 (originally published in 1944) (“By the majority of state courts it is held that an election or registration officer is not liable in damages to a qualified elector for refusing to receive his vote, or to register him as a voter, if . . . his refusal is based upon an error of judgment

in doing so, made in good faith, without malice or misconduct, but that, conversely, he is liable if improper motive be shown.”).

A minority of cases predicate liability on mere negligence. See, e.g., *Bd. of Educ. of Indian Prairie School Dist. No. 204 v. DuPage County Election Com’n*, 793 N.E.2d 954, 961 (Ill. App. Ct. 2003) (recognizing an election board’s potential civil liability in damages for negligence in violating a state election code provision); *Long v. Long*, 10 N.W. 875, 875 (Iowa 1881) (recognizing that a defendant could be found liable without malice, but in such case a plaintiff would only be entitled to nominal damages); *Jeffries v. Ankeny*, 1842 WL 32, at *1 (Ohio 1842) (holding that no malice was required to maintain a suit for disenfranchisement because no other remedy existed for denial of a privilege as valued as voting, while cautioning that, unless malice is shown, only nominal damages may be awarded); *Lincoln v. Hapgood*, 11 Mass. 350, 354 (1814) (determining that a “wicked and base motive” is not necessary to maintain a cause of action based on denial of the right to vote but noting that a defendant’s state of mind is a necessary consideration when determining damages).

While the Restatement Second of Torts § 865 (AM. L. INST. 1979) disclaimed liability for merely negligent acts, it left open the possibility that, in time, a negligence standard could be utilized, at least in certain instances. See *id.*, Comment *a* (“It remains to be seen whether a further development of the principle involved in this Section will apply to some situations such as these, as when a registrar through an honest mistake refuses to permit the plaintiff to vote.”). The better rule remains to reject negligence liability for election administrators. Election administrators already face large challenges conducting fair elections under volatile and stressful conditions; the potential for personal tort liability could dissuade individuals from taking part in this important and necessary work. This is especially true given the patterns of harassment that election administrators have faced in recent years. See JOSHUA FERRER, DANIEL M. THOMPSON, & RACHEL OREY, *ELECTION OFFICIAL TURNOVER RATES FROM 2000-2024*, BIPARTISAN POLICY CENTER 5 (Apr. 2024) (stating that “[i]ncreased hostility could be contributing to recent increases in turnover, with election officials and administration facing heightened scrutiny, threats, and harassment”). See also Comment *m* below on potential immunity for such officials.

Illustration 2, describing an election official who has a reasonable belief that the voter’s identification documents are forgeries, is based loosely on *Jenkins*, 11 Johns 113. It is also consistent with the Restatement Second of Torts § 865, Comment *a* (AM. L. INST. 1979), which provides: “The rule stated in this Section has not applied to one who merely by negligence prevents another from voting”

Comment g. The defendant must actually prevent, or seriously interfere with, the exercise of the franchise or the right to hold public office. This requirement mirrors the Second Restatement, which requires that defendants either “deprive” or “seriously interfere” with the plaintiff’s right to vote. See Restatement Second, Torts § 865 (AM. L. INST. 1979).

Illustration 3, describing an election official who refuses to allow a person to vote on a belief that this person will support the “wrong” candidate, is drawn from *Wayne v. Venable*, 260 F. 64 (8th Cir. 1919). In *Wayne*, the election inspectors were found liable for interfering with

plaintiffs’ right to vote because defendants conspired to block plaintiffs from entering the polling place based on a belief that the plaintiff did not support their favored candidate.

Regarding Illustration 5, involving the four-hour wait, one survey finds that 78 percent of Americans believe that more than 90 minutes is not an “acceptable” wait time to vote. See Alyson Clary, *Mood of the Nation, How Long is Too Long to Wait in Line to Vote? And What Types of Assistance Should be Allowed?*, APM Research Lab (June 29, 2021).

Comment h. The interference with the right to vote need not affect the election’s outcome. See Restatement Second, Torts § 865, Comment *a* (AM. L. INST. 1979) (“[O]ne who has been deprived of a right to vote . . . has an action of tort although the candidate for whom he would have voted would have been defeated even though he had voted.”).

Illustration 7, involving the robocalls that may not have affected the election’s outcome, is based loosely upon National Coalition on Black Civic Participation v. Wohl, Civil Action No: 1:20-cv-08668-JSR, proposed consent decree dated Apr. 8, 2024, <https://ag.ny.gov/sites/default/files/settlements-agreements/project-1599-consent-decree.pdf>; see Lola Fadulu, *2 Men Fined \$1.25 Million for Robocall Scheme to Suppress Black Vote*, N.Y. TIMES, Apr. 9, 2024. For another example of robocalls used to suppress voters, which gave rise to criminal charges and potential civil liability, see State v. Kramer, No. 215-2024-CR-205 (N.H. Grafton Super. Ct. filed May 17, 2024); League of Women Voters of New Hampshire v. Kramer, No. 1:24-cv-00073-SM-TSM (D.N.H. filed Mar. 14, 2024), *discussed at* <https://www.lwv.org/legal-center/league-women-voters-new-hampshire-v-kramer>; Maggie Astor, *Political Consultant Who Orchestrated Fake Biden Robocalls Is Indicted*, N.Y. TIMES, May 23, 2024.

Comment i. Beyond that stated in Subsections (a) and (b), the plaintiff need not show additional injury. The Second Restatement of Torts § 865, Comment *a* (AM. L. INST. 1979) stated: “One who has been wrongfully deprived of a public office can maintain an action although the office has no emoluments.” See also Coleman v. Miller, 307 U.S. 433, 469 (1939) (explaining that, from the time of *Ashby v. White*, it has been established that “a voter’s franchise is a personal right, assessable in money damages”); Wayne v. Venable, 260 F. 64, 66 (8th Cir. 1919) (“In the eyes of the law this right [to vote] is so valuable that damages are presumed from the wrongful deprivation of it without evidence of actual loss of money, property, or any other valuable thing”); Vargas v. Calabrese, 634 F. Supp. 910, 927 (D.N.J. 1986) (“No right is more precious in a democracy than the right to vote.”); Lincoln v. Hapgood, 11 Mass. 350, 355 (1814) (“The right of voting, in such a government as ours, is a valuable right; it is secured by the constitution; it cannot be infringed without producing an injury to the party”).

Comment j. First Amendment considerations. For a discussion of relevant First Amendment considerations, see Kenneth Parreno, Christine Kwon, Victoria Bullock & John Langford, *New and Old Tools to Tackle Deepfakes and Election Lies in 2024*, LAWFARE, Oct. 1, 2024.

Comment k. Relation to constitutional and statutory claims. “In this country the common law tort has been largely superseded by statutes, both state and federal. . . . But the common law action may still be recognized.” Restatement Second, Torts § 865, Reporter’s Note (AM. L. INST. 1979). When a plaintiff recovers under both a common-law and a statutory claim, the plaintiff is

entitled to be made whole, Restatement Third, Torts: Remedies § 2 (AM. L. INST., Tentative Draft No. 1, 2022), but is not entitled to a double recovery, *id.* § 3. Illustration 9, involving the African American students, is loosely based on *Bell v. Southwell*, 376 F.2d 659, 665 (5th Cir. 1967) (applying federal law).

For a discussion of various recently enacted state laws that seek to create private rights of action “to combat the use of deepfakes that spread information around elections,” see Kenneth Parreno, Christine Kwon, Victoria Bullock & John Langford, *New and Old Tools to Tackle Deepfakes and Election Lies in 2024*, LAWFARE, Oct. 1, 2024.

Comment l. Remedies. When the plaintiff prevails under this Section, the full range of compensatory damages are available as described in Restatement Third, Torts: Remedies §§ 2-37 (AM. L. INST., Tentative Draft No. 1, 2022 and Tentative Draft No. 2, 2023). The Supreme Court has opined on the availability of damages for dignitary harm (what it phrases in terms of “presumed damages”) in constitutional cases of denial of voting rights. “In the eyes of the law th[e] right [to vote] is so valuable that damages are presumed from the wrongful deprivation of it without evidence of actual loss of money, property, or any other valuable thing, and the amount of the damages is a question peculiarly appropriate for the determination of the jury, because each member of the jury has personal knowledge of the value of the right.” *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 311 n.14 (1986) (quoting *Wayne v. Venable*, 260 F. 64, 66 (8th Cir. 1919) (modifications by the Court in *Stachura*)).

On the availability of damages for non-economic harm, see *Taylor v. Howe*, 225 F.3d 993, 1012 (8th Cir. 2000) (applying 42 U.S.C. § 1983) (explaining that, when a person is wrongfully denied the right to vote and, as a consequence of that denial, suffers “humiliation, embarrassment, and mental anguish,” that humiliation, embarrassment, and anguish are all compensable); accord Jean C. Love, *Presumed General Compensatory Damages in Constitutional Tort Litigation: A Corrective Justice Perspective*, 49 WASH. & LEE L. REV. 67, 88 (1992) (“Emotional distress may be experienced by a voting rights plaintiff . . .”).

On the possible availability of punitive damages, see J. E. Macy, *Personal Liability of Public Officer for Breach of Duty in Respect of Election or Primary Election Laws*, 153 A.L.R. 109 (originally published in 1944) (“Where improper motive or active misconduct is shown, falling within the legal conception of malice, actual or fictional, whether shown as a necessary element of the cause of action or only in aggravation of damages, the plaintiff may be awarded punitive or exemplary damages in the discretion of the jury.”); see also *Taylor*, 225 F.3d at 1012 (stating in a § 1983 claim that, when a person is denied the right to vote on account of that person’s race, “[p]unitive damages may also be considered”).

On the availability of nominal damages, see *Taylor*, 225 F.3d at 1012 (explaining in the context of a § 1983 claim that, upon proof of intentional denial of, or serious interference with, the right to vote, “at least nominal damages must be awarded”; further noting that “persons whose right to vote was denied altogether should be entitled to more than nominal damages” and additionally observing that “humiliation, embarrassment, and mental anguish are compensable”).

1 The Supreme Court recently used the old English *Ashby* case on voting rights to illustrate
2 that nominal damages should be available in a case in which plaintiff cannot prove actual damages
3 and where there is “no apparent continuing or threatened injury for nominal damages to redress:”

4 An early case about voting rights effectively illustrates this common-law
5 understanding. Faced with a suit pleading denial of the right to vote, the court
6 rejected the plaintiff’s claim because, among other reasons, the plaintiff had not
7 established actual damages. *Ashby v. White*, 92 Eng. Rep. 126 (K. B. 1703).
8 Dissenting, Lord Holt argued that the common law inferred damages whenever a
9 legal right was violated. Observing that the law recognized “not merely pecuniary”
10 injury but also “personal injury,” Lord Holt stated that “every injury imports a
11 damage” and that a plaintiff could always obtain damages even if he “does not lose
12 a penny by reason of the [violation].” *Id.* at 137. Although Lord Holt was in the
13 minority, the House of Lords overturned the majority decision, thus validating Lord
14 Holt’s position . . .

15 *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 799 (2021) (citations simplified).

16 On the potential right of an officeholder to restitution of salary (sometimes referred to in
17 the earlier cases as “emoluments” of office), see *Walker v. Hughes*, 36 A.2d 47, 49 (Del. 1944)
18 (“The great weight of authority supports the rule that the rightful incumbent of a public office may
19 recover from an officer de facto the salary received by the latter during the time of his wrongful
20 tenure”); *Abington v. Reynolds*, 218 S.W. 334 (Mo. 1919); see also J. E. Macy, *Personal*
21 *Liability of Public Officer for Breach of Duty in Respect of Election or Primary Election Laws*,
22 153 A.L.R. 109 (originally published in 1944) (“Where the plaintiff shows that he was actually
23 elected to an office, that he has established his title thereto by direct proceedings, but that by the
24 erroneous act of the defendant he was deprived of the office during the interim, the general measure
25 of damages is the loss of the emoluments of the office during the period of exclusion, and the
26 expense and trouble of vindicating his title.”).

27 Illustration 12, involving a candidate who recovered the lost salary from the wrongfully
28 declared winner, is loosely based upon *Walker*, 36 A.2d at 49.

29 Illustration 13, on intimidation at ballot drop boxes leading to a temporary restraining
30 order, is based upon *Arizona Alliance for Retired Persons v. Clean Elections U.S.A.*, 2022 WL
31 17088041 (D. Ariz. 2022) (applying § 11(b) of the Voting Rights Act of 1965).

32 *Comment m. Immunity.* For the immunity of certain government entities and officials, see
33 §§ 8-11. See also Restatement Second, Torts § 865, Comment *a* (AM. L. INST. 1979) (recognizing
34 that immunities may shield some defendants from liability). For a helpful discussion of ministerial
35 (and thus unprotected) versus discretionary (and thus generally protected) activities in the context
36 of election supervision, see *Larson v. Marsh*, 14 N.W.2d 189, 192 (Neb. 1944).

37 *Comment n. Judge and jury.* See *Wiley v. Sinkler*, 179 U.S. 58, 65 (1900) (“What amount
38 of damages the plaintiff [deprived of the right to vote] shall recover in such an action is peculiarly
39 appropriate for the determination of a jury. . . .”). For the fact that immunities are questions of law
40 for the court, see § 9, Comment *k*; *id.* § 10, Comment *n*; *id.* § 11, Comment *m*.

1 §__. Prima Facie Tort

2 **This Restatement takes no position on the vitality of the so-called “prima facie tort.”**

3 **Comment:**

4 *a. History: the Restatement Second of Torts § 870.*

5 *b. History: § 870 since the Second Restatement.*

6 *c. History: the prima facie tort.*

7 *d. Prerequisites of the prima facie tort, where it is recognized.*

8 *e. No end-run around a recognized cause of action.*

9 *f. Judge and jury.*

10 *a. History: the Restatement Second of Torts § 870.* Titled “Liability for Intended
11 Consequences—General Principle,” the Restatement Second of Torts § 870 provided:

12 One who intentionally causes injury to another is subject to liability to the other for
13 that injury, if his conduct is generally culpable and not justifiable under the
14 circumstances. This liability may be imposed although the actor’s conduct does not
15 come within a traditional category of tort liability.

16 *Id.* According to Comment *a*, the aim of the Section was “to supply a generalization for tortious
17 conduct involving harm intentionally inflicted.” Comment *a* elaborated: “This Section does not
18 attempt to establish precise and inflexible requirements. . . . It is stating a general principle rather
19 than setting forth specific rules.”

20 The Section’s Comment *d*, titled “Relationship to established torts,” offered additional
21 context. It explained that, as of 1979, the time when § 870 of the Second Restatement was
22 published, many tort doctrines, such as “intentional infliction of emotional distress,” and the torts
23 of “injurious falsehood, interference with contractual relations and interference with prospective
24 economic advantage” were not yet “fully developed.” Restatement Second, Torts § 870, Comment
25 *d*. These new causes of action were, essentially, still works in progress. They had blurry boundaries
26 and inchoate obligations; their “contours [were] not yet fully clear.” *Id.* The idea, then, was that
27 during this maturation process, § 870 could supply a “unifying principle”—it could assist courts
28 as they refined and clarified these new causes of action and as they also decided whether to adopt
29 other new torts, not yet imagined. See *id.*, Comment *a*; see also Reporters’ Note to Comment *a*
30 (stating that the Section sought to “offer guidelines for determining when to recognize a new
31 intentional tort or broaden the scope of an existing one”).

Consistent with the Section’s title, the Institute intended for § 870 to *inform* the creation and development of new intentional torts. It did not intend for § 870 to be used as-is or to provide a mechanism for plaintiffs to supplant or make an end-run around established intentional torts once the parameters of those intentional torts were established.

b. History: § 870 since the Second Restatement. In the decades since the Second Restatement of Torts was published, various Restatements have indeed used the principle contained in § 870 to flesh out the boundaries of particular intentional torts, consistent with § 870’s ambition. See, e.g., Restatement Third, Torts: Intentional Torts to Persons § 104, Reporters’ Note to Comment *a* (Tentative Draft No. 1, 2015) (explaining that § 104, which restates a cause of action for the Purposeful Infliction of Bodily Harm is “arguably an exemplar of the desirable use of the principles underlying § 870”).

But, given the recent completion of an entire Third Restatement project addressing Intentional Torts to Persons, as well as the recent publication of an entire Third Restatement project addressing Liability for Economic Harm, no more need be said in this Miscellaneous Provisions project about § 870. While, in 1979, many torts were not yet broadly accepted or fully elucidated—and it was, as a consequence, helpful for the Second Restatement of Torts to supply an overarching principle to guide that elucidation process—now, that matter has been largely addressed. Many torts that were once spottily accepted or poorly defined, today, boast broad acceptance and clearly established elements—or, alternatively, have been carefully considered and squarely rejected. Given this long evolution, § 870 of the Second Restatement of Torts has arguably outlived its usefulness. As a consequence, § 870 of the Second Restatement of Torts is superseded, but not fully restated, here.

At the same time of course, this Restatement’s position vis-à-vis § 870 should not be read to endorse a frozen conception of tort law. Tort law’s evolution is not *done*. Like the common law generally, “the law of torts is anything but static, and the limits of its development are never set.” *Tenneco Oil Co. v. Clevenger*, 363 So. 2d 316, 318 (Ala. Civ. App. 1978). Tort law can and should evolve to respond to new societal expectations, factual circumstances, and technological challenges as those expectations, circumstances, and challenges emerge, and this Section should not impede that process.

c. History: the prima facie tort. As noted above, § 870 of the Second Restatement of Torts, which was titled “Liability for Intended Consequences—General Principle,” sought to supply a

“unifying principle” to assist courts as they endeavored to determine “when to recognize a new intentional tort or broaden the scope of an existing one.” Restatement Second, Torts § 870 Comment *a* & Reporters’ Note to Comment *a*.

Yet, in some tension with that stated aim, some have interpreted § 870 as an attempt to set forth a freestanding cause of action, frequently denominated the “prima facie tort” and occasionally dubbed an “innominate tort” or “liability for intended consequences.” This cause of action—which predated § 870 of the Second Restatement of Torts and, indeed, dates back over a century—is controversial and has not been widely embraced. Indeed, only a handful of states—most notably, Missouri, New Mexico, and New York—have clearly accepted the prima facie tort, and, even in those states, plaintiffs who attempt to assert such a cause of action only very rarely succeed. Given states’ well-entrenched positions on the matter, which date back over a century, this Restatement declines to take a position on the prima facie tort’s contours, desirability, acceptance, or future development. To assist the jurisdictions that have accepted the prima facie tort, Comments *d* through *f* below briefly address the cause of action’s contours and key elements.

d. Prerequisites of the prima facie tort, where it is recognized. In those states that recognize the prima facie tort, to state a prima facie tort claim, the plaintiff must typically show: (1) an intentional act; (2) committed with the specific and malicious intent to inflict injury; (3) undertaken without justification or with insufficient justification; (4) that injures the plaintiff. Courts tend to strictly construe these requirements, and the plaintiff has the burden of proof on each. In addition, in one of the three states clearly to recognize the prima facie tort (New York), the plaintiff must also show that the defendant’s harm caused the plaintiff to incur “special damages,” i.e., that the defendant’s conduct caused the plaintiff to lose something “of economic or pecuniary value.” *Liberman v. Gelstein*, 605 N.E.2d 344, 347 (N.Y. 1992).

Of these four elements, the second one, regarding intent, has been the most carefully elucidated. The case law makes plain that, to establish the requisite intent, the plaintiff must present evidence that the defendant acted with a specific and malicious purpose to inflict injury. A defendant’s mere awareness that the defendant’s conduct was apt to cause harm is insufficient. Nor is it sufficient that the defendant merely intended to commit the act which results in injury.

Indeed, New York goes a step further. There, in order to succeed in a suit alleging the prima facie tort, the plaintiff is obligated to show that the defendant’s *sole* motivation was to inflict

harm—or, as Justice Holmes famously put it, that the act springs from “disinterested malevolence.”
Am. Bank & Tr. Co. v. Fed. Rsrv. Bank of Atlanta, 256 U.S. 350, 357 (1921).

e. No end-run around a recognized cause of action. In the few states that recognize the prima facie tort, it is clear that a plaintiff cannot use the prima facie tort to evade the essential requirements of another well-recognized cause of action. Accordingly, if the plaintiff has—or almost has—a cause of action for, among other things, conversion, defamation, employment discrimination, false imprisonment, fraud, intentional infliction of emotional distress, invasion of privacy, malicious prosecution, tortious interference with contract, tortious interference with economic expectation, tortious interference with parental rights, or wrongful use of civil proceedings, the plaintiff cannot also—or alternatively—recover on a claim for the prima facie tort. The prima facie tort cannot be used to circumvent the well-defined limits (including statutes of limitations) that bound other established causes of action.

Illustration:

1. Marjorie, Dr. Jacoby’s former patient, sues Dr. Jacoby, alleging that Dr. Jacoby committed medical malpractice when he treated her in 2019. In fact, Marjorie’s malpractice suit is groundless. Indeed, Marjorie knows that the suit is frivolous; she institutes the suit only because she holds a grudge against Dr. Jacoby because Marjorie made a romantic overture toward Dr. Jacoby that Dr. Jacoby rebuffed. After Marjorie files the medical malpractice suit, Dr. Jacoby successfully moves to have the suit dismissed as time-barred, as the statute of limitations for a medical malpractice claim has expired. Thereafter, Dr. Jacoby files suit against Marjorie alleging a prima facie tort. Although certain prerequisites of the prima facie cause of action are satisfied, Marjorie is not liable to Dr. Jacoby for a prima facie tort because the action closely resembles—but fails to satisfy the requirements of—a cause of action for wrongful use of civil proceedings. See Restatement Third, Torts: Liability for Economic Harm § 24, Comment *e* & Illustration 9 (explaining that, to state a cause of action for wrongful use of civil proceedings, “the original civil suit at issue must have terminated in favor of the original defendant” and that a dismissal because the initial suit was time-barred does not qualify as a favorable termination).

f. Judge and jury. When a prima facie tort claim is adjudicated, the court first determines whether the evidence is sufficient to permit a jury to find that the actor’s conduct satisfies the four elements of the prima facie tort and also whether the plaintiff is using the prima facie tort to evade

the essential requirements of another well-recognized cause of action. If the cause of action survives this inquiry, it is then for the jury to decide whether the actor’s conduct was in fact (1) an intentional act; (2) committed with the specific and malicious intent to inflict injury; (3) undertaken without justification or with insufficient justification; (4) that injured the plaintiff and, if so, to award damages for the harm. In addition, in New York, the intent element is intensified, as explained in Comment *d*.

When assessing the prima facie tort, the court’s screening function is more robust than is typical, recognizing the open-ended nature of the prima facie tort claim and the wide range of behavior to which it might plausibly apply. This more significant role is warranted because the broad application of the prima facie tort is inconsistent with current case law and could interfere with the exercise of legal rights, deter socially useful conduct, subvert other carefully crafted causes of action, or impinge on constitutionally protected speech.

REPORTERS’ NOTE

Comment a. History: the Restatement Second of Torts § 870. As some courts and commentators have recognized, the Institute did not intend for § 870 of the Restatement Second of Torts to set forth a free-wheeling new cause of action. E.g., *Porter v. Crawford & Co.*, 611 S.W.2d 265, 268-269 (Mo. Ct. App. 1980) (“The Restatement (Second) of Torts, in § 870, has stated a guide for the development of new forms of intentional tort, expressed a rationale for imposing such liability and provided guidelines for the imposition of such liability.”); *Haller v. Borror Corp.*, 552 N.E.2d 207, 212 (Ohio 1990) (observing that the Restatement’s prima facie tort Section “does not create a cause of action but, instead, states a general principle”); 11 STUART M. SPEISER ET AL., *AMERICAN LAW OF TORTS* § 35:2 n.6 (2023 update) (similar).

Instead, in presenting § 870 to the ALI membership, Reporter John W. Wade explained that “870 is a Section involving what amounts to a generalization for intentional torts.” *Proceedings of the American Law Inst.*, May 18, 1976, 53 A.L.I. Proc. 31, 64 (1976). He elaborated:

As you know, there are three kinds of tortious conduct, involving intentional causing of harm, negligence, and strict liability. For the latter two there has always been a generalization that gave to the courts the basis for determining how they would apply to new situations. But in connection with intentional torts, we have had a number of somewhat disassociated, crystallized applications, and the attitude has generally been that that is about as far as it goes, and if you have something new to develop, it is a new tort that is developed. But study indicates that it is possible to have a generalization which can be of assistance to the attorneys and to the judges in determining when it is possible to let one of the established torts spread a little bit or when it is possible to start the development of a new application.

Id. at 64-65.

Thus, the aim of § 870 was to create a *new tool* to guide courts in assessing whether to create a new cause of action or to let an “established tort spread a little bit.” *Id.* The aim of § 870, properly understood, was not, itself, to create a new tort.

Published in 1939, the first Restatement of Torts also contained a § 870. Titled “Liability for Intended Consequences,” that provision provided: “A person who does any tortious act for the purpose of causing harm to another or to his things or to the pecuniary interests of another is liable to the other for such harm if it results, except where the harm results from an outside force the risk of which is not increased by the defendant’s act.” During its 40-year lifetime, § 870 of the first Restatement of Torts was cited approximately 20 times but gained no traction as an independent intentional tort.

Comment b. History: § 870 since the Second Restatement. To provide a concrete example of the evolution *Comment b* (above) describes: As of 1979, the time when this Section of Second Restatement was published, certain tort doctrines, such as “intentional infliction of emotional distress,” and “interference with contractual relations and interference with prospective economic advantage” were not yet “fully developed.” Restatement Second, Torts § 870, *Comment d* (AM. L. INST. 1979). Now, these torts are fully elucidated; their various elements are clearly established in the Third Restatement of Torts. For a contemporary discussion of the elements that compose a claim for intentional infliction of emotional distress, see Restatement Third, Torts: Liability for Emotional and Physical Harm § 46 (AM. L. INST. 2012). For the same regarding tortious interference with contract, see Restatement Third, Torts: Liability for Economic Harm § 17 (AM. L. INST. 2020). For the same regarding tortious interference with economic expectation, see *id.* § 18. For further discussion, see KENNETH S. ABRAHAM & G. EDWARD WHITE, TORT LAW AND THE CONSTRUCTION OF CHANGE: STUDIES IN THE INEVITABILITY OF HISTORY 180-181 (2022); Kenneth S. Abraham & G. Edward White, *Torts Without Names, New Torts, and the Future of Liability for Intangible Harm*, 68 AM. U. L. REV. 2089, 2120 (2019).

For a discussion of the ever-evolving nature of the common law in general and tort law in particular, see *Smith v. Arbaugh’s Rest., Inc.*, 469 F.2d 97, 105 (D.C. Cir. 1972) (“It is the genius of the common law that it recognizes changes in our social, economic, and moral life.”); *Soldano v. O’Daniels*, 141 Cal. App. 3d 443, 454-455 (Ct. App. 1983) (“‘New and nameless torts are being recognized constantly, and the progress of the common law is marked by many cases of first impression, in which the court has struck out boldly to create a new cause of action, where none had been recognized before . . . The law of torts is anything but static, and the limits of its development are never set. When it becomes clear that the plaintiff’s interests are entitled to legal protection against the conduct of the defendant, the mere fact that the claim is novel will not of itself operate as a bar to the remedy.’”) (quoting WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 1, at 3 (4th ed. 1971)); *Hymowitz v. Eli Lilly & Co.*, 539 N.E.2d 1069, 1075 (N.Y. 1989) (explaining that “the ever-evolving dictates of justice and fairness . . . are the heart of our common-law system”); *Gallimore v. Children’s Hosp. Med. Ctr.*, 617 N.E.2d 1052, 1057 (Ohio 1993) (“The common law is ever-evolving and we have the duty, absent action by the General Assembly on a specific question, to be certain that the law keeps up with the ever-changing needs

of a modern society.”); *Brigance v. Velvet Dove Rest., Inc.*, 725 P.2d 300, 303 (Okla. 1986) (“Inherent in the common law is a dynamic principle which allows it to grow and to tailor itself to meet changing needs within the doctrine of stare decisis”) (quotation marks omitted); *McCormack v. Oklahoma Pub. Co.*, 613 P.2d 737, 740 (Okla. 1980) (explaining that the common law “is a dynamic and growing thing and its rules arise from the application of reason to the changing condition of society”).

Comment c. History: the prima facie tort. Notwithstanding the purpose of § 870 of the Second Restatement of Torts, some have viewed § 870 as setting forth a new and largely unbounded form of liability. See *Cotner v. Yoxheimer*, 2008 WL 2680872, at *7 (M.D. Pa. 2008) (“The cause of action of intentional or ‘prima facie’ tort appears in Section 870 of the Restatement (Second) of Torts”).

As Comment *c* explains, the prima facie tort has been clearly adopted in only a handful of states. E.g., *Bandag of Springfield, Inc. v. Bandag, Inc.*, 662 S.W.2d 546, 554 (Mo. Ct. App. 1983) (accepting and refining the prima facie tort); *Schmitz v. Smentowski*, 785 P.2d 726, 734 (N.M. 1990) (holding that the “prima facie tort is recognized in New Mexico”); *Nat’l Nutritional Foods Ass’n v. Whelan*, 492 F. Supp. 374, 382 (S.D.N.Y. 1980) (describing New York courts’ acceptance of the prima facie tort); *Bank of Nova Scotia v. Boynes*, 2016 WL 6268827, at *3 (V.I. Super. Ct. 2016) (“In the Virgin Islands, prima facie tort is recognized as a cause of action.”); cf. *Kruse v. Repp*, 543 F. Supp. 3d 654, 686-688 (S.D. Iowa 2021) (predicting that the Iowa Supreme Court would accept the cause of action); Restatement Third, Torts: Intentional Torts to Persons § 104, Reporters’ Note to Comment *a* (AM. L. INST., Tentative Draft No. 1 2015) (explaining that few jurisdictions endorse the “prima facie tort”); DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, *THE LAW OF TORTS* § 643 (2023 update) (“The only significant jurisprudence on the prima facie tort is found in the courts of Missouri, New Mexico, and New York. . . . [Other] [c]ourts have not usually imposed liability under the doctrine at all much less developed any considered jurisprudence concerning it”); Kenneth S. Abraham & G. Edward White, *Torts Without Names, New Torts, and the Future of Liability for Intangible Harm*, 68 AM. U. L. REV. 2089, 2120 (2019) (“Prima facie tort has been adopted in only a few jurisdictions.”).

In many other states, the law is negative or undecided. See, e.g., *Kirksey v. R.J. Reynolds Tobacco Co.*, 168 F.3d 1039, 1042 (7th Cir. 1999) (applying Illinois law) (observing that Illinois has not yet accepted the prima facie tort); *Beren v. Ropfogel*, 24 F.3d 1226, 1230 (10th Cir. 1994) (applying Kansas law) (“There is some doubt Kansas courts would recognize the ‘prima facie tort’ as a cause of action.”); *Lauter v. Anoufrieve*, 642 F. Supp. 2d 1060, 1094 (C.D. Cal. 2009) (observing that California has not recognized the prima facie tort); *Whitney Info. Network, Inc. v. Gagnon*, 353 F. Supp. 2d 1208, 1213 (M.D. Fla. 2005) (“Florida does not recognize this cause of action”); *Anand v. Indep. Blue Cross*, 2021 WL 3128690, at *19 (E.D. Pa. 2021) (predicting that the “Pennsylvania Supreme Court would not likely recognize prima facie tort as a cause of action”), *aff’d in part, vacated in part, remanded*, 2022 WL 2339476 (3d Cir. 2022); *Devon IT, Inc. v. IBM Corp.*, 805 F. Supp. 2d 110, 131 (E.D. Pa. 2011) (observing that the vitality of the prima facie tort in Pennsylvania is murky, while permitting the claim to proceed); 1202 Cup O’ Dirt LLC v.

1 Badlands Airtime, LLC, 2021 WL 680173, at *6 (D.S.D. 2021) (“The South Dakota Supreme
 2 Court has not recognized a cause of action under the Restatement § 870”); Taylor v. D.C.
 3 Water & Sewer Auth., 957 A.2d 45, 50 (D.C. 2008) (observing, in passing, that “we have not
 4 recognized [the prima facie] tort in the District”); Richard A. Pulaski Const. Co. v. Air Frame
 5 Hangars, Inc., 950 A.2d 868, 877 (N.J. 2008) (declining to determine whether the prima facie tort
 6 exists as a separate cause of action in New Jersey because, even if it did, plaintiff had failed to
 7 state a cause of action for it because “plaintiff . . . possessed a separate, viable remedy against
 8 defendant”); Costell v. Toledo Hosp., 527 N.E.2d 858, 860 (Ohio 1988) (declining to adopt “the
 9 prima facie tort theory”); Patel v. OMH Med. Ctr., Inc., 987 P.2d 1185, 1202 (Okla. 1999) (stating
 10 that Oklahoma has never recognized the prima facie tort as “actionable”).

11 Even where the prima facie tort is ostensibly adopted, it is interpreted “narrowly.”
 12 Restatement Third, Torts: Intentional Torts to Persons § 104, Reporters’ Note to Comment *a* (AM.
 13 L. INST., Tentative Draft No. 1, 2015). Partly given this restrictive interpretation, very few
 14 plaintiffs asserting the prima facie cause of action ever actually prevail. See Abraham & White,
 15 *supra* at 2121 (“[C]ases in which the prima facie tort allegation actually bears weight are rare. Even
 16 in New York, where there have been over a thousand reported cases mentioning the prima facie
 17 tort, it has had the same fate. The cause of action is applicable in only a tiny percentage of those
 18 cases.”); *id.* at 2123 (“We doubt that in the entire history of the tort, there are more than a dozen
 19 reported cases, nationwide, in which the actual imposition of liability on the basis of prima facie
 20 tort, and prima facie tort alone, has been upheld on appeal.”).

21 For the fact that, as explained in Comment *c*, the prima facie cause of action has been
 22 discussed and debated for over a century, see *Schmitz*, 785 P.2d at 734 (“Prima facie tort is not a
 23 recent innovation; its development has been discussed in various law reviews and decisions
 24 spanning practically a century.”).

25 The tort is rooted in Justice Oliver Wendell Holmes’s 1904 observation: “It has been
 26 considered that, prima facie, the intentional infliction of temporal damages is a cause of action,
 27 which, as a matter of substantive law, whatever may be the form of pleading, requires a justification
 28 if the defendant is to escape.” *Aikens v. State of Wisconsin*, 195 U.S. 194, 204 (1904). Even before
 29 that, Holmes, while on the Massachusetts Supreme Court had declared: “[M]otives may determine
 30 the question of liability; that, while intentional interference of the kind supposed may be privileged
 31 if for certain purposes, yet, if due only to malevolence, it must be answered for.” *Moran v. Dunphy*,
 32 59 N.E. 125, 126 (Mass. 1901); see Note, *The Prima Facie Tort Doctrine*, 52 COLUM. L. REV. 503,
 33 504 (1952) (“Justice Holmes was in large measure responsible for the introduction of the doctrine
 34 in this country.”). For further discussion of the history of the prima facie tort, see Kenneth J.
 35 Vandevelde, *The Modern Prima Facie Tort Doctrine*, 79 KY. L.J. 519, 519-525 (1991); Morris D.
 36 Forkosch, *Analysis of the Prima Facie Tort Cause of Action*, 42 CORNELL L. REV. 465 (1957).

37 *Comment d. Prerequisites of the prima facie tort, where it is recognized.* For the elements,
 38 see, e.g., *Tamko Roofing Prod., Inc. v. Smith Eng’g Co.*, 450 F.3d 822, 831 (8th Cir. 2006)
 39 (applying Missouri law) (reciting the prerequisites: “(1) an intentional lawful act by defendant;
 40 (2) defendant’s intent to injure the plaintiff; (3) injury to the plaintiff; and (4) absence of or

insufficient justification for defendant’s act.”); *U.S. for Use & Benefit of Evergreen Pipeline Const. Co. v. Merritt Meridian Const. Corp.*, 95 F.3d 153, 161 (2d Cir. 1996) (applying New York law) (“Under New York law there are four elements to a prima facie business tort claim: (1) an intentional infliction of harm; (2) without excuse or justification and motivated solely by malice; (3) resulting in special damages; (4) by an act that would otherwise be lawful.”); *Kruse v. Repp*, 543 F. Supp. 3d 654, 689 (S.D. Iowa 2021) (“[J]urisdictions applying the prima facie tort require a plaintiff to show (1) an intentional and lawful act; (2) an intent to injure the plaintiff; (3) injury to the plaintiff as a result of the intentional act; (4) and the absence of sufficient justification for the injurious act.” (quotation marks omitted)); *Nazeri v. Missouri Valley Coll.*, 860 S.W.2d 303, 315 (Mo. 1993) (“The elements of a prima facie tort claim are: (1) an intentional lawful act by defendant; (2) defendant’s intent to injure the plaintiff; (3) injury to the plaintiff; and (4) an absence of or insufficient justification for defendant’s act.”); *Schmitz v. Smentowski*, 785 P.2d 726, 734 (N.M. 1990) (setting forth the following prerequisites: “1. An intentional, lawful act by defendant; 2. An intent to injure the plaintiff; 3. Injury to plaintiff, and 4. The absence of justification or insufficient justification for the defendant’s acts.”); 11 STUART M. SPEISER ET AL., *AMERICAN LAW OF TORTS* § 35:1 (2023 update) (“The elements of the prima facie tort are generally recognized to be: [a]n intentional, lawful act by the defendant; [a]n intent to injure the plaintiff; [i]njury or damages to the plaintiff; and [t]he absence of justification or insufficient justification for the defendant’s acts.”); Kenneth J. Vandeveld, *The Modern Prima Facie Tort Doctrine*, 79 KY. L.J. 519, 528 (1991) (“A prima facie tort thus contains the following elements: (1) the intent to injure the plaintiff, (2) without justification, and (3) the defendant’s act which causes (4) injury.”).

At times, it has been thought that the burden of proof as to the justification element (that the action was taken with no or an insufficient justification) rested with the defendant, rather than the plaintiff. See W. PAGE KEETON, *PROSSER AND KEETON ON TORTS* § 190, at 983-984 (5th ed. 1984) (discussing this confusion); *id.* § 130, at 1010-1011 (similar). However, as seen above, contemporary cases tend to place that burden on the plaintiff as an element of the plaintiff’s prima facie case. See, e.g., *Wilt v. Kansas City Area Transp. Auth.*, 629 S.W.2d 669, 672 (Mo. Ct. App. 1982) (explaining that “the burden is on the plaintiff to affirmatively plead and prove an absence of justification on the part of the defendant”); *Bandag of Springfield, Inc. v. Bandag, Inc.*, 662 S.W.2d 546, 555 (Mo. Ct. App. 1983) (similarly allocating the burden of proof regarding justification to the plaintiff).

As Comment *d* notes, of the prima facie elements, the third one has received the most attention. Courts tend to strictly construe this requirement. E.g., *Tamko Roofing Prod., Inc. v. Smith Eng’g Co.*, 450 F.3d 822, 831 (8th Cir. 2006) (applying Missouri law) (“[U]nder Missouri law, a defendant’s mere awareness that its conduct would cause harm is insufficient to prove an actual intent to injure, as required to recover on a theory of prima facie tort. Instead, the plaintiff must present evidence that the defendant undertook the acts with specific, clear-cut, express malicious intent to injure; mere intent to do the act which results in injury is not sufficient.”) (quotation marks and citation omitted); *Thomas v. Special Olympics Missouri, Inc.*, 31 S.W.3d 442, 444 (Mo. Ct. App. 2000) (explaining that “a necessary element of a claim for prima facie tort

is proof of an actual intent to injure, that is, actual malice”); *J.S. DeWeese Co. v. Hughes-Treitler Mfg. Corp.*, 881 S.W.2d 638, 646 (Mo. Ct. App. 1994) (“[T]he prima facie tort doctrine requires an actual intent to injure the plaintiff. Spite or ill-will is necessary to satisfy the requisite intent.”) (quotation marks and citation omitted); *Lexington Ins. Co. v. Rummel*, 945 P.2d 992, 995 (N.M. 1997) (“Intent to injure is distinct from intent to commit the act which results in injury.”); *Beavers v. Johnson Controls World Servs., Inc.*, 901 P.2d 761, 768 (N.M. Ct. App. 1995) (explaining that “to establish a prima facie tort, a plaintiff must prove that the tort-feasor acted maliciously with the intent to cause the injury”); DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, *THE LAW OF TORTS* § 643 (2024 update) (“Courts have also circumscribed the prima facie tort by demanding especially clear evidence of a specific intent to harm the plaintiff.”).

In New York, the plaintiff must in fact show that the defendant’s *sole* aim was to injure the plaintiff. E.g., *U.S. for Use & Benefit of Evergreen Pipeline Const. Co. v. Merritt Meridian Const. Corp.*, 95 F.3d 153, 161 (2d Cir. 1996) (applying New York law) (explaining that, in New York, a plaintiff must show that the defendant was “motivated solely by malice”); *Restis v. Am. Coal. Against Nuclear Iran, Inc.*, 53 F. Supp. 3d 705, 730 (S.D.N.Y. 2014) (“[M]otives other than disinterested malevolence, such as profit, self-interest, or business advantage will defeat a prima facie tort claim.”) (quotation marks omitted); *Hall v. City of White Plains*, 185 F. Supp. 2d 293, 304-305 (S.D.N.Y. 2002) (explaining that, under New York law, “the plaintiff cannot recover unless the defendant’s conduct was not only harmful, but done with the sole intent to harm”) (quotation marks omitted); *Posner v. Lewis*, 965 N.E.2d 949, 952 n.1 (N.Y. 2012) (“[T]here can be no recovery under this theory unless malevolence is the sole motive for defendant’s otherwise lawful act or, in other words, unless defendant acts from disinterested malevolence.”) (cleaned up); *Burns Jackson Miller Summit & Spitzer v. Lindner*, 451 N.E.2d 459, 468 (N.Y. 1983) (“[T]here is no recovery in prima facie tort unless malevolence is the sole motive for defendant’s otherwise lawful act or, in Justice Holmes’ characteristically colorful language, unless defendant acts from ‘disinterested malevolence,’ by which is meant ‘that the genesis which will make a lawful act unlawful must be a malicious one unmixed with any other and exclusively directed to injury and damage of another.’”) (quoting *Am. Bank & Tr. Co. v. Fed. Rsrv. Bank of Atlanta*, 256 U.S. 350, 358 (1921)); *Diorio v. Ossining Union Free Sch. Dist.*, 96 A.D.3d 710, 712 (N.Y. App. Div. 2012) (“[C]entral to a cause of action alleging prima facie tort is that the plaintiff’s intent was motivated solely by malice or disinterested malevolence.”) (quotation marks omitted).

Other states tend to reject that additional requirement as unduly circumscribed. See *Kruse v. Repp*, 543 F. Supp. 3d 654, 689 (S.D. Iowa 2021) (“[T]he majority rule governing the prima facie tort does not require that the defendant be motivated solely or predominantly by a desire to injure the plaintiff.”); see also, e.g., *Schmitz v. Smentowski*, 785 P.2d 726, 735 (N.M. 1990) (“[W]e hold that the act must be committed with the intent to injure plaintiff, or, in other words, without justification, but it need not be shown that the act was solely intended to injure plaintiff.”).

In addition, in New York, the plaintiff must show special damages. For discussion of this special damage requirement, see, e.g., *D.W.M. v. St. Mary Sch.*, 2019 WL 4038410, at *17 (E.D.N.Y. 2019); *Yang v. Northwell Health, Inc.*, 195 A.D.3d 662, 666 (N.Y. App. Div. 2021).

1 The “[c]ausation analysis in prima facie tort does not appear to differ from causation
2 analysis in other torts.” Kenneth J. Vandavelde, *The Modern Prima Facie Tort Doctrine*, 79 KY.
3 L.J. 519, 535 (1991). The standards for factual cause are stated in Restatement Third, Torts:
4 Physical & Emotional Harm §§ 26-28 (AM. L. INST. 2012).

5 *Comment e. No end-run around a recognized cause of action.* “[T]he value and validity of
6 prima facie tort as a separate cause of action depends upon its ability to offer relief for the intentional
7 infliction of harm where the actor’s otherwise lawful conduct cannot be brought within other more
8 traditional categories of liability.” *Healthsource, Inc. v. X-Ray Assocs. of New Mexico*, 116 P.3d
9 861, 872 (N.M. Ct. App. 1995) (quotation marks omitted). Accordingly, it is well established that
10 a plaintiff cannot recover under the prima facie tort as an end-run around another well-recognized
11 cause of action. See *Tamko Roofing Prod., Inc. v. Smith Eng’g Co.*, 450 F.3d 822, 830 (8th Cir.
12 2006) (applying Missouri law) (“Prima facie tort is not a catchall remedy of last resort for claims
13 that are not otherwise salvageable under traditional causes of action.”) (quotation marks omitted);
14 *AccoNat’l Nutritional Foods Ass’n v. Whelan*, 492 F. Supp. 374, 383 (S.D.N.Y. 1980) (“Resort to
15 a notion that deems conduct ‘prima facie’ tortious is . . . reserved for those cases in which the
16 conduct falls outside the ordinary categories of tort, or amounts to no traditional tort.”) (quotation
17 marks and citation omitted); *Rutledge v. Phoenix Newspapers, Inc.*, 715 P.2d 1243, 1246 (Ariz. Ct.
18 App. 1986) (explaining that, where it is recognized, the prima facie tort “is inapplicable where
19 plaintiff can have adequate redress by any of the forms of action known and practiced”), overruled
20 on other grounds, *Godbehere v. Phoenix Newspapers, Inc.*, 783 P.2d 781 (Ariz. 1989); *Yoneji v.*
21 *Yoneji*, 370 P.3d 704, 717 (Haw. Ct. App. 2016) (holding that trustees had no claim against settlor’s
22 granddaughter in prima facie tort because granddaughter’s removal of funds from trust account
23 could be addressed by conversion and conspiracy claims); *Nazeri v. Missouri Valley Coll.*, 860
24 S.W.2d 303, 315 (Mo. 1993) (explaining that the “prima facie tort is not a duplicative cause of
25 action established either by the failure to prove a recognized tort claim, or by the failure of such a
26 claim on account of a particular defense”); *Schmitz v. Smentowski*, 785 P.2d 726, 738 (N.M. 1990)
27 (explaining that the “prima facie tort should not be used to evade stringent requirements of other
28 established doctrines of law”); *Freihofer v. Hearst Corp.*, 480 N.E.2d 349, 355 (N.Y. 1985)
29 (explaining that the “[p]rima facie tort should not become a ‘catch-all’ alternative for every cause
30 of action which cannot stand on its own legs” and consequently “[w]here relief may be afforded
31 under traditional tort concepts, prima facie tort may not be invoked as a basis to sustain a pleading
32 which otherwise fails to state a cause of action in conventional tort”) (quotation marks omitted);
33 *Bank of Nova Scotia v. Boynes*, 2016 WL 6268827, at *3 (V.I. Super. Ct. 2016) (“[P]rima facie
34 tort claims provide relief only where the defendant’s conduct does not come within the requirements
35 of one of the well established and named intentional torts.”) (quotation marks and alterations
36 omitted); DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, *THE LAW OF TORTS* § 643 (2024
37 update) (explaining that existing case law is clear that the “prima facie tort may not be used to evade
38 the essential elements of traditional tort”) (quotation marks omitted); W. E. Shipley, *Comment*
39 *Note—Prima Facie Tort*, 16 A.L.R.3d 1191, at § 7 (originally published in 1967) (“The courts have
40 usually taken the view that conduct actionable under one of the traditional tort categories could not

be made the subject of an action for prima facie tort.”); Philip Halpern, *Intentional Torts and the Restatement: A Petition for Rehearing*, 7 BUFF. L. REV. 7, 11 (1957) (“The function of the prima facie doctrine is to supplement the traditional torts and not to supplant them.”).

Courts, in practice, have hewed to this principle. “[C]ourts have been careful not to allow the prima facie tort doctrine to become a catch-all for what would otherwise be a defective established tort.” James P. Bieg, *Prima Facie Tort Comes to New Mexico: A Summary of Prima Facie Tort Law*, 21 N.M. L. REV. 327, 327-328 (1991).

This fact helps to explain why so few cases asserting the prima facie tort succeed. These days, given how tort law has developed, it is rare that clearly wrongful conduct that plausibly falls under the prima facie tort umbrella is not addressed by another, more specific cause of action. See KENNETH S. ABRAHAM & G. EDWARD WHITE, TORT LAW AND THE CONSTRUCTION OF CHANGE: STUDIES IN THE INEVITABILITY OF HISTORY 180 (2022) (explaining that the prima facie tort’s acceptance has been stunted, in part, because “the number of instances in which . . . no other tort actions were available, ha[s] been small”).

Comment f. Judge and jury. This discussion closely tracks Restatement Third, Torts: Physical & Emotional Harm § 46, Comment g (AM. L. INST. 2012). That Comment addresses the allocation of authority between the judge and jury when adjudicating claims for intentional infliction of emotional distress—a tort that raises similar issues to those raised by the prima facie tort.

1 **§ X. Negligence and Intentional Torts Based on the Same Facts***

2 **A plaintiff may not proceed on a negligence claim against a defendant once facts are**
3 **established that provide the basis for an intentional tort for assault, battery, or false**
4 **imprisonment against that same defendant for that same conduct. If established facts provide**
5 **the basis for a claim for assault, battery, or false imprisonment, the plaintiff may proceed on**
6 **that intentional tort claim but not on a negligence claim.**

7 **Comment:**

- 8 *a. History and scope.*
9 *b. Support.*
10 *c. Established facts.*
11 *d. The structure of tort law.*
12 *e. Conduct and state of mind.*
13 *f. The internal impact of the type of tort claim.*
14 *g. The external impact of the type of tort claim.*
15 *h. Rationale.*
16 *i. Proceeding on both negligence and intentional torts when the facts are uncertain.*
17 *j. Different facts supporting both a negligence and intentional tort claim.*
18 *k. Pleading in the alternative and the mutually exclusive nature of negligence and intentional torts.*
19 *l. Informed consent.*
20 *m. Judge and jury.*

21 *a. History and scope.* This Section states a rule that, when the established facts support a
22 claim for assault, battery, or false imprisonment—which are intentional torts—the plaintiff may
23 not assert a negligence tort based on the same set of facts. For how facts become “established” for
24 purposes of this Section, see Comment *c*.

25 As numerous courts explain it, negligence torts and intentional torts are mutually exclusive
26 or mutually inconsistent; those courts view intentional torts as categorically distinct from
27 negligence. Mutual exclusivity is appropriate, however, only when the very *same facts* form the
28 basis for the two claims. See Comment *j*.

29 The Restatement Second of Torts § 282, Comment *d* explained the difference between
30 negligence torts and intentional torts in a way that reveals that they are mutually inconsistent:

* After discussing the issue at the Advisers and Members Consultative Group meeting in September 2024, we are tentatively of the mind that this Section should be located in the Intentional Torts Restatement.

1 *d. Negligence contrasted with intended harm.* The definition of negligence . . .
2 includes only such conduct as creates liability for the reason that it involves a risk
3 and not a certainty of invading the interest of another. It therefore excludes conduct
4 which creates liability because of the actor's intention to invade a legally protected
5 interest of the person injured or of a third person (see [§] 8 A, Comment *b*, which
6 defines "intent" as including knowledge that the conduct will invade the interest,
7 as well as a purpose to invade it). . . .

8 This Section supersedes § 282, Comment *d* of the Second Restatement even while adopting the
9 same mutually exclusive rule.

10 As Comment *d* and the black letter of this Section make clear, "mutually exclusive" *does*
11 *not mean* that the plaintiff may choose to assert either an intentional or negligence tort when the
12 established facts reveal that the defendant committed an intentional tort involving an assault,
13 battery, or false imprisonment. In such circumstances, the plaintiff has no choice concerning which
14 claim to pursue; the plaintiff may only proceed on the intentional tort. Thus, more accurately, the
15 existence of an intentional tort "preempts" a negligent one. This Section utilizes the term "mutually
16 exclusive" because that is the language employed by courts and because "preemption" is
17 commonly used to express the impact of federal legislation and regulation on state tort law, a
18 matter that has nothing to do with this Section.

19 **Illustration:**

20 1. During a conversation in a bar, Judy becomes agitated when Igor expresses his
21 political views, and she punches Igor in the face, breaking his nose. Igor may pursue an
22 intentional tort claim against Judy. He may not assert a negligence claim.

23 Importantly, however, when different sets of facts exist, even if they occur in close
24 temporal and geographic proximity and one set supports an intentional tort and the other set
25 supports a negligence tort, both may be asserted. See Comment *j*.

26 **Illustrations:**

27 2. Same facts as above, except that, prior to the punch, Judy gesticulates wildly. As
28 she does, her hand, which is clutching her cellphone, makes contact with Igor's beer bottle.
29 That collision causes the beer bottle to shatter, which sends a shard of glass into Igor's arm.
30 For this injury to his arm, Igor may assert a negligence claim against Judy, notwithstanding
31 that the subsequent punch constitutes an intentional tort. Whether Igor may also assert an

1 intentional tort for the injury to his arm is governed not by this Section but by the
2 substantive law of intentional torts.

3 3. Same facts as Illustration 1, except that, after Igor reveals his political views,
4 Judy becomes quite agitated and begins gesticulating wildly with a bottle of beer in her left
5 hand. The beer bottle contacts Igor's nose, breaking it. Because of uncertainty as to whether
6 Judy had the intent to contact Igor's nose, Igor may pursue both an intentional and
7 negligence tort theory until the matter of Judy's intent becomes established. Comment *c*
8 addresses when facts are established, and Comment *i* covers the circumstance in this
9 Illustration when the facts are uncertain.

10 Sometimes, plaintiffs are advantaged by having an intentional, rather than a negligent, tort
11 claim. For example, a plaintiff's negligence does not reduce a plaintiff's recovery from an
12 intentional tortfeasor, and, when the defendant commits an intentional tort, the plaintiff is more
13 likely to recover punitive damages. See Comments *f* and *g*. In addition, a tortfeasor's liability for
14 an intentional tort may not be discharged in bankruptcy.

15 Sometimes, however, plaintiffs are disadvantaged by being limited to an intentional tort
16 claim. For example, the statute of limitations for intentional torts is often shorter than for
17 negligence torts, and immunity doctrines often prevent recovery for intentional torts committed by
18 governmental actors and their employers. See Comment *g*. Furthermore, many insurance policies
19 exclude coverage for conduct that constitutes an intentional tort. Eager to maximize insurance
20 coverage, many plaintiffs who have been assaulted or subject to a battery or false imprisonment
21 would prefer to state a claim for negligence. This Section bars such efforts.

22 Although § 282, Comment *d* was not so limited, this Section addresses only certain
23 intentional torts to persons: assault, battery, and false imprisonment.[†] Intentional infliction of
24 emotional distress is not included both because that tort can be committed by reckless conduct,
25 which is only a matter of degree different from negligent conduct, see Restatement Third, Torts:
26 Liability for Physical and Emotional Harm § 46, and because of a lack of case law addressing the
27 matter. Other intentional torts are not covered by the rule in this Section because of a paucity of

[†] Restatement Third, Torts: Intentional Torts to Persons § 4 (Tentative Draft No. 4, 2019) establishes the tort of Purposeful Infliction of Bodily Harm, a supplement to Battery. Because of its recency, no case law addresses its mutually exclusive status with negligence torts. Nevertheless, because of its similarity to battery, no good reason appears why it should be treated differently from battery in preempting negligence claims.

case law addressing them, although the principles set forth herein may be useful for courts addressing those other intentional torts.

b. Support. Approximately 45 jurisdictions have addressed whether a plaintiff can simultaneously pursue a negligence claim and an intentional tort claim against the same defendant based on the very same facts. Of those, a strong majority have adopted the rule stated in this Section; there are but a handful of jurisdictions with straightforwardly contrary case law. Often, courts confront the issue when a victim who has suffered an assault and/or a battery seeks to bring a negligence claim against the defendant. Numerous courts have ruled as a matter of law against such claims, asserting: “There is no such thing as negligent assault [or battery].” As noted above, this Section is also broadly consistent with the Second Restatement of Torts § 282, Comment *d*.

c. Established facts. This Section applies only when the facts relevant to whether the defendant committed a negligent or intentional tort are not genuinely in dispute. Facts may become established at the pleading stage with facts (but not legal theories) pled by the plaintiff that could constitute only an intentional tort. Or, facts may become established during discovery, by, for example, requests for admission. Or, facts may become established in the course of a motion for summary judgment that determines that there is no genuine issue of material fact about whether an intentional tort occurred. In at least a few cases, the issue has been resolved on a motion for judgment as a matter of law. Finally, the parties may not dispute the facts that bear on whether the defendant’s tortious conduct constitutes a negligent or intentional tort or through a jury finding or verdict.

Most often, the critical facts that may be disputed are whether the defendant acted with a purpose of causing the relevant harm or acted substantially certain that the harm would occur. See Restatement Third, Torts: Liability for Physical and Emotional Harm § 1. Before the rule in this Section becomes operative, the court must determine that there is no genuine dispute about those facts or other facts necessary to establish an intentional tort.

It should be evident that it is the actual facts that matter for the purposes of this Section, not a party’s characterization of those facts. Courts routinely reject parties’ efforts to characterize a claim as “negligent” when the underlying facts reveal that defendant acted in a fashion that constituted an intentional tort.

Illustration:

4. Same facts as in Illustration 1, in which Judy punches Igor in the face. Concerned about maximizing insurance coverage, Igor pleads the facts contained in Illustration 1 and

1 alleges that Judy negligently punched him in the face. Because the facts pled establish that
2 Judy committed an intentional tort, Igor may proceed only on an intentional tort claim and
3 not on a negligence claim.

4 *d. The structure of tort law.* For better or worse, there is an internal structure to tort law
5 forged historically. That structure includes a distinction among three different categories of
6 conduct: (1) conduct or acts that are intended to cause harm to protected interests of others
7 (intentional torts); (2) conduct or acts that are not so intended but that unreasonably pose risks to
8 others (negligence torts); and (3) conduct or acts that are neither intentional nor unreasonable but
9 that nevertheless fall into a category for which liability is imposed without wrongdoing (strict
10 liability torts). True, some torts do not fall neatly into one of these three categories. See, e.g.,
11 Restatement Third, Torts: Liability for Economic Harm § 20 A, Comment *f* (in Restatement Third,
12 Torts: Miscellaneous Provisions (Tentative Draft No. 3, 2024)) (explaining that the tort of bad-
13 faith performance of first-party insurance contract does not fall neatly into either intentional or
14 negligence tort category). But most torts do. For the intent requirement that undergirds intentional
15 torts, see Restatement Third, Torts: Liability for Physical and Emotional Harm § 1.

16 The doctrine of transferred intent holds an actor liable for certain intentional torts when the
17 actor acts to commit the intentional tort on another but instead harms not the other but a third party.
18 See Restatement Third of Torts: Intentional Torts to Persons § 11 (Tentative Draft No. 1, 2015).
19 Often harming the wrong person results from negligence by the tortfeasor in the tortfeasor's
20 attempt to commit an intentional tort. Thus, these transferred-intent cases raise the issue of the
21 application of this Section to those cases. Because of a paucity of case law—the Reporters found
22 only one case on point—this Restatement takes no position on the issue, leaving it to further case
23 law development.

24 *e. Conduct and state of mind.* Both negligence and intentional torts have wrongful conduct
25 in common. But, they differ in that intentional torts require a state of mind to cause harm to
26 another's protected interest while negligence is determined solely by the actor's conduct. Thus, an
27 actor's faulty assessment of a risky situation is not, by itself, a tort. As Professor and Judge Henry
28 Edgerton explained, a century ago: "Whether an actor is blissfully ignorant or carefully
29 contemplating the risks of a particular course of conduct is irrelevant to whether that conduct is
30 determined to be unreasonable and therefore to subject the actor to liability for negligence." Henry

1 W. Edgerton, *Negligence, Inadvertence, and Indifference; The Relation of Mental States to*
2 *Negligence*, 39 HARV. L. REV. 849, 852 (1926).

3 **Illustration:**

4 5. William, a security officer at a professional tennis tournament, sees James, an
5 African American in tennis clothes, on the grounds of the tournament. Unreasonably—
6 because there is no basis for his assessment—William concludes that James is a trespasser.
7 Without further ado, William immediately arrests James and places him in handcuffs. It
8 turns out that James is not only properly on the grounds but a player in the tournament.
9 Despite his error in forming an incorrect belief about James’s status, William has not
10 committed a negligent tort because his actions included the intent of making contact with
11 James, a contact that was at least offensive and perhaps harmful and therefore constituted
12 battery. William’s misjudgment about the reason for James’s presence does not support a
13 claim for negligence because the only conduct it produced constitutes intentional torts
14 (battery and false imprisonment).

15 *f. The internal impact of the type of tort claim.* The type of tort that the defendant allegedly
16 committed affects subsidiary rules internal to tort law. Thus, a defendant who commits an
17 intentional tort may not assert the plaintiff’s negligent conduct as a defense (or partial defense),
18 while a negligent defendant can. See Restatement Third, Torts: Intentional Torts to Persons § 50(a)
19 (Tentative Draft No. 6, 2021). A defendant’s scope of liability (often referred to as proximate
20 cause) is broader for intentional torts than for negligent torts. See Restatement Third, Torts:
21 Liability for Physical and Emotional Harm § 33. Among jurisdictions that have modified joint and
22 several liability, some retain it for intentional tortfeasors. See Restatement Third, Torts:
23 Apportionment of Liability § 12 & Reporters’ Note to Comment *b*. Other special rules imposing
24 joint and several liability in jurisdictions that have generally modified or abolished joint and
25 several liability depend on whether an intentional tort was committed. *Id.* § 14 (imposing joint and
26 several liability on tortfeasor who fails to protect plaintiff from an intentional tortfeasor); see also
27 *id.* § 1, Comment *c* (counselling that courts have flexibility in fashioning apportionment rules for
28 victims of intentional torts). The “firefighter rule,” in those jurisdictions that retain it, is limited to
29 negligent torts and is inapplicable to intentional torts that harm the professional rescuer.

30 *g. The external impact of the type of tort claim.* A number of rules, external to tort law,
31 depend on, or are influenced by, the type of tort claim involved. Sometimes, statutes prescribe

1 different treatment for negligent and intentional torts. While the precise language of those statutes
2 may vary and lead to a different result, when a legislature uses the same language as tort law, a
3 reasonable assumption is that it is relying on tort law to provide the meaning of those terms. Thus,
4 statutes of limitation in some jurisdictions impose different periods for negligent and intentional
5 torts. As noted in Comment *a*, immunity for governmental entities and individuals often turns on
6 whether the underlying tort is intentional or negligent. For example, the Federal Tort Claims Act
7 generally waives sovereign immunity for negligent torts but retains immunity for intentional torts.

8 Some external rules employ distinctions that do not map perfectly with tort law's
9 distinction between intentional and negligent torts but which overlap considerably. Thus, workers'
10 compensation statutes cover only "accidents," which ordinarily excludes from coverage much of
11 what tort law would categorize as intentional torts. Similarly, as noted in Comment *a*, many
12 liability insurance policies cover only "accidents" and have exclusions for harm that is "expected
13 or intended" by the insured. While the interpretation of those terms is a matter of contract law,
14 they have considerable overlap with intentional torts, and some courts seem to adopt the tort
15 distinction between intentional and negligent torts in interpreting and applying the accident
16 requirement for coverage and the exclusion for expected or intended harms.

17 *h. Rationale.* Court opinions assiduously apply the rule in this Section without addressing
18 the reasons for it. The best justification for the rule may be that the structural edifice of the three
19 different types of torts has been relied on for many subsidiary rules, both internal to tort law, see
20 Comment *f*, and external to tort law, see Comment *g*. Many of those subsidiary rules are premised
21 on the distinction among and between those different torts. A number of those subsidiary rules that
22 advantage victims of intentional torts reflect the fact that committing an intentional tort ordinarily
23 reflects greater culpability than committing a negligent tort. Without the rule in this Section,
24 respecting those subsidiary rules would at least be administratively difficult if not impossible.

25 *i. Proceeding on both negligence and intentional torts when the facts are uncertain.* In
26 some cases, a plaintiff may genuinely be uncertain about what transpired, and the facts have to be
27 clarified before a determination can be made concerning whether the defendant committed a
28 negligent or intentional tort. To commit an intentional tort, an actor must have a purpose to cause
29 harm or subjectively be substantially certain that harm will result from the actor's conduct.
30 Restatement Third, Torts: Liability for Physical and Emotional Harm § 1. Facts about an actor's
31 mental state are ones that only the actor has direct access to, although the law permits the use of

1 circumstantial evidence to prove the actor's state of mind. But when there is genuine uncertainty
2 about the actor's state of mind and thus whether the actor committed an intentional or negligence
3 tort, which will require the factfinder to resolve, the claimant may proceed alternatively.

4 **Illustration:**

5 6. While dancing at the Call of the Wild Dance Club late one night when it is
6 extremely crowded, Philip is struck in the back by Larry. Philip suffers significant harm.
7 Larry and Philip knew each other, because Philip was dating Larry's former spouse, Kim.
8 Before Larry could be questioned about the incident, he suffers a severe stroke that renders
9 him incapacitated. Because of the lingering uncertainty as to whether Larry struck Philip
10 intentionally or accidentally, Philip may pursue both a negligence and an intentional tort
11 claim.

12 The same principle applies to mixed questions of fact and law that are deemed facts for
13 purposes of allocating them to the factfinder for determination. Thus, whether a person's
14 apprehension of imminent bodily harm was reasonable may be uncertain and require resolution by
15 the factfinder. The plaintiff in such an instance may maintain both a negligence and an intentional
16 tort claim.

17 *j. Different facts supporting both a negligence and intentional tort claim.* When there are
18 different, or even overlapping, sets of facts, and one set of facts supports a negligence claim and
19 another an intentional tort claim, both may be asserted and pursued. As Illustration 7 below (and
20 also Illustration 2 above) demonstrate, this is so even if the different sets of facts are part of a
21 chronologically compressed course of conduct.

22 **Illustrations:**

23 7. Alana decides to play a prank on Carol whom she knows despises rodents. Alana
24 arranges for a remote-controlled mechanical mouse to approach and climb up the back of
25 Carol's leg. The mouse, in addition to climbing up Carol's leg, shocks her because Alana,
26 when assembling the mouse, carelessly failed to follow instructions. Alana is subject to
27 liability for battery, but not for negligence, based on the mouse's contact with Carol's leg.
28 Alana is subject to liability for negligence, but not battery, based on her carelessness in
29 assembling the mouse that resulted in Carol suffering an electric shock. (Carol *seeks* to
30 obtain recovery for her shock in her battery claim, arguing that the shock harm is within

1 the scope of liability (also, often referred to as proximate cause) for the battery, a matter
2 outside the point of this Illustration.)

3 8. Ginger, a K-9 police officer, on routine patrol, accidentally drops the leash of her
4 dog, resulting in the dog attacking Frank, a pedestrian. After Ginger regains control of the
5 dog, she realizes that Frank is the individual who had assaulted Ginger's spouse the prior
6 week. Ginger then drops her dog's leash with the intention of having the dog attack Frank
7 once again, which it does. Frank may pursue a negligence claim against Ginger for the first
8 attack by the dog and only a battery claim against Ginger for the second attack.

9 A plaintiff may also pursue a negligence claim and a claim for assault, battery, or false
10 imprisonment against different defendants—even if their conduct combines to create one
11 indivisible injury.

12 **Illustration:**

13 9. While at the Watering Hole, the bartender serves Dominic a pitcher of beer even
14 after he had become visibly intoxicated. After downing that pitcher of beer, Dominic
15 stumbles outside and, in the Watering Hole's parking lot, approaches Philip. After
16 exchanging a few angry words, Dominic punches Philip in the face, breaking his jaw. Even
17 though there was just one harm that each of the Watering Hole and Dominic caused (i.e.,
18 an indivisible injury), Philip may simultaneously pursue a negligence claim against the
19 Watering Hole for its negligent provision of alcohol and an assault claim against Dominic.

20 Numerous courts in cases involving the intentional use of force by law enforcement officers
21 have been confronted with claims by the injured victim that the officers were negligent in some
22 fashion prior to their use of force. This might involve a claim that the officer negligently failed to
23 de-escalate a confrontation that would have avoided the occasion for the later use of force.
24 Sometimes, the claim of negligence is quite strong; at other times, it is questionable. Courts
25 appropriately assess carefully such claims and dismiss them when no reasonable jury could find
26 negligence. Such oversight is appropriate because in many use-of-force cases, a claim of negligent
27 omission by the officer might be made, even when a valid basis for that claim is weak or absent.
28 Even when the facts support a legitimate claim for negligence before the use of force, plaintiff
29 must prove that the negligence caused the subsequent use of force that resulted in the injury for
30 which recovery is sought.

Illustration:

10. Same facts as Illustration 5, in which a security guard mistakes a professional tennis player for a trespasser, except that now, James, the player, asserts a negligence claim against William for his pre-arrest unreasonable determination that James was a trespasser. William is not liable for that claim because a mistaken state of mind is not, by itself, a valid negligence claim; James could only state a claim for negligence if the mistake results in unreasonable *conduct*. Here, William's only conduct consists of the arrest and detention of James, and these actions constitute intentional torts for the reasons explained in Illustration 5.

k. Pleading in the alternative and the mutually exclusive nature of negligence and intentional torts. A well-settled precept of procedural law permits a party to plead and proceed alternatively. Thus, a plaintiff injured by a defective product may alternatively plead a negligence, strict liability, and breach-of-warranty claim, and, if successful on any one of them, may recover damages for the harm caused. (But the plaintiff may recover only one damage award for the same harm if successful on multiple claims). To the uninitiated, the rule in this Section might appear to be in conflict with this familiar principle. It isn't. The substance of tort law makes negligence and intentional torts mutually exclusive: they cannot both exist based on the same facts. To borrow from the language of criminal law, a negligence tort is not a "lesser included offense," of an intentional tort. Or, to put it differently: If the facts establish that the defendant intentionally punched the plaintiff on the nose, a factfinder cannot conclude that the contact between the defendant and the plaintiff's nose was merely negligent.

l. Informed consent. Claims based on the failure to obtain effective informed consent may be batteries or negligence actions and are treated differently from the rule prescribed in this Section. Traditionally, any failure to obtain legally effective consent meant that touching a patient by a health-care professional constituted a battery. However, as the law of informed consent developed, most courts ruled that inadequate disclosure of the risks and benefits of a proposed procedure supported a negligence claim rather than a battery, reserving battery for instances in which no consent was obtained for the specific procedure that was performed or for who performed it. See Restatement Third, Torts: Intentional Torts to Persons § 19 (Tentative Draft No. 6, 2021) (explaining that battery has been reserved for instances in which the provider "conducted a procedure that involves physical contact with the patient to which the patient has not consented or

that lies outside the boundaries of the patient’s consent”). Thus, the rule for the former deficiencies in obtaining informed consent is precisely the opposite of the one in this Section: a plaintiff may make a negligence claim for the inadequacies in the informed consent but may not proceed on a battery cause of action. For the latter deficiencies, which support a battery claim, the logic of this Section would limit plaintiffs to a battery claim and would not permit a negligence claim. However, because of a paucity of case law addressing the issue, this Restatement takes no position on the matter.

In those cases in which a health-care professional’s failure to obtain informed consent supports a battery claim and the professional also injures the patient due to negligent treatment, both an intentional tort and negligent tort may be asserted because the two claims are not based on identical facts. See Comment *j*.

Illustration:

11. Dr. Diswicz, an oral surgeon, fails to obtain informed consent—indeed, any consent—from Harold, his patient, who needs to have an implant removed. Dr. Diswicz fails to review Harold’s dental records and x-rays and, as a result, extracts a healthy tooth instead of Harold’s failed implant. Harold may pursue a battery claim for Dr. Diswicz’s unconsented-to touching when he performed the extraction without obtaining consent to the extraction. In addition, Harold may pursue a negligence claim for Dr. Diswicz’s removing the wrong tooth.

m. Judge and jury. Determining the legal effect of established facts with regard to whether a negligence tort, intentional tort, or both may be pursued is a matter for the court. Resolving disputed factual matters is for the factfinder.

REPORTERS’ NOTE

Comment a. History and scope. The Comment from the Second Restatement quoted in Comment *a* can be traced to the first Restatement of Torts, which contained identical language. Restatement of Torts § 282, Comment *c* (AM. L. INST. 1934).

Comment b. Support. For courts that have ruled consistently with this Section, see *State, Dep’t of Corr. v. Heisey*, 271 P.3d 1082, 1092 (Alaska 2012) (explaining that, although plaintiff described his claim as negligent use of excessive force, such use of force entails an intent to employ some degree of force, making it an intentional tort claim and not one of negligence); *Ryan v. Napier*, 425 P.3d 230, 235 (Ariz. 2018) (“The fundamental distinction between negligence and an intentional tort is whether the consequences of the act or omission are unintentional or intentional.”); *Maes v. Tuttoilmondo*, 502 P.2d 427, 428 (Colo. Ct. App. 1972) (explaining that the

plaintiff may not pursue a negligence claim “where the facts are before the court and clearly establish an assault and battery”); *Am. Nat. Fire Ins. Co. v. Schuss*, 607 A.2d 418, 423 (Conn. 1992) (explaining the distinguishing factor between negligent and intentional torts is that the negligent actor does not have the purpose to bring about the harm or substantial certainty that it will occur while the actor who commits an intentional tort does); *Dist. of Columbia v. Chinn*, 839 A.2d 701, 704 (D.C. Ct. App. 2003) (“We hold that since Chinn did not present evidence of a specific and distinct claim of negligence, the trial court erred in instructing the jury on negligence in addition to the instruction on assault and battery.”); *City of Miami v. Sanders*, 672 So. 2d 46, 48 (Fla. Dist. Ct. App. 1996) (“Hence, we come to the inescapable conclusion that it is not possible to have a cause of action for ‘negligent’ use of excessive force because there is no such thing as the ‘negligent’ commission of an ‘intentional’ tort.”); *Rhoden v. Dep’t of Pub. Safety*, 473 S.E.2d 537, 538 (Ga. Ct. App. 1996) (declaring that “it defies logic to classify the decision to effectuate the arrests or use excessive force as negligence”); *White v. Univ. of Idaho*, 797 P.2d 108, 108-110 (Idaho 1990) (concluding that battery requires intent to make contact, negating a negligence claim, which require dismissal of the complaint because the state tort claims act retained immunity for intentional torts); *Rosenberg v. Packerland Packing Co.*, 370 N.E.2d 1235, 1238 (Ill. App. Ct. 1977) (“Plaintiffs failed to state a cause of action . . . for a ‘negligent’ assault; assault is an intentional tort. ‘There is, properly speaking, no such thing as a negligent assault.’”) (quoting WILLIAM L. PROSSER, *THE LAW OF TORTS* § 10, at 41 (4th ed. 1971)); *Boruff v. Jesseph*, 576 N.E.2d 1297, 1299 (Ind. Ct. App. 1991) (stating, in dicta: “Negligent battery, of course, does not exist: battery is an intentional tort, not a tort of negligence.”); *Unruh v. City of Wichita*, 512 P.3d 232 (Kan. Ct. App. 2022) (“We concur that Kansas courts should not recognize a tort of negligent use of excessive force.”), *aff’d*, 540 P.3d 1002 (Kan. 2024); *Ten Broeck Dupont, Inc. v. Brooks*, 283 S.W.3d 705, 732 (Ky. 2009) (reiterating that “there is no such thing as negligent assault”); *Bridges v. Carl E. Woodward, Inc.*, 663 So. 2d 458, 463 (La. Ct. App. 1995) (“Mere knowledge and appreciation of risk does not constitute intent, nor does reckless or wanton conduct or gross negligence. Terms such as ‘reasonably foreseeable,’ ‘likely to occur,’ and ‘should have known’ may raise issues of negligence or gross negligence, but do not amount to ‘intentional act.’”) (citations omitted); *Landry v. Leonard*, 720 A.2d 907, 907 (Me. 1998) (affirming summary judgment against plaintiff who sued armed robber for negligence because the intentional act of committing an armed robbery negated a negligence claim); *Worcester Ins. Co. v. Fells Acres Day Sch., Inc.*, 558 N.E.2d 958, 970 (Mass. 1990) (declaring that “to the extent that the plaintiffs seek to recover in negligence from the same individuals whom they have sued for assault and battery, *for the same acts which are contended to be the basis of those assault and battery claims*, the negligence claims are legally unsupportable”); *Allstate Ins. Co. v. Clarke*, 2007 WL 2710821, at *4 (Mich. Ct. App. 2007) (“Intentional and negligent conduct are separate concepts in the realm of tort. There exists no tort of negligent assault and battery.”); *Byers v. Spaulding*, 725 S.W.2d 893, 895 (Mo. Ct. App. 1987) (“There exists no tort of negligent assault and battery.”); *P.C.B. v. Cha*, 2005 WL 1421465, at *3 (D. Minn. June 17, 2005) (“[T]he same facts cannot give rise to causes of action both for intentional tort and negligence.”) (quoting *Byers v. Spaulding*, 725 S.W.2d 893, 895 (Mo. Ct. App. 1987)); *Puckett v. Clement*, 238 So. 3d 1139, 1146

(Miss. 2018) (“In Mississippi, the torts of negligence, assault, and battery are separate.”); *State Farm Fire & Cas. Co. v. van Gorder*, 455 N.W.2d 543, 545 (Neb. 1990) (“There is no such cause of action as negligent assault and battery.”); *In re Bolles*, 593 B.R. 832, 839 (Bankr. D.N.M. 2018) (“An intentional act may not be the basis for a negligence claim.”); *Thomasson v. Demarco*, 191 N.Y.S.3d 431, 432 (App. Div. 2023) (“It is well settled that no cause of action to recover damages for negligent assault exists in New York.”) (quoting *Wrase v. Bosco*, 706 N.Y.S.2d 434 (App. Div. 2000)); *DelVecchia v. Frontier Airlines, Inc.*, 2021 WL 1214778, at *3 (D. Nev. 2021) (“[A]ny given act may be intentional or it may be negligent, but it cannot be both. Intent and negligence are regarded as mutually exclusive grounds for liability”); *Gipp v. Webb*, 2021 WL 3666276, at *6 (D.N.D. 2021) (“[T]here is generally no claim of negligence that flows from intentionally tortious conduct.”) (quoting *BP Chemicals Ltd. v. Jiangsu Sopo Corp.*, 285 F.3d 677, 685 (8th Cir. 2002)); *Love v. City of Port Clinton*, 524 N.E.2d 166, 167 (Ohio 1988) (“The acts of ‘subduing’ and ‘handcuffing’ are undoubtedly offensive to a reasonable sense of personal dignity. The contact involved is plainly intentional; one cannot accidentally handcuff or subdue another.”); *Kasnick v. Cooke*, 842 P.2d 440, 441 (Or. Ct. App. 1992) (“As a matter of law and fact, there is no such thing as a negligent fist fight.”); *Harris v. City of Pittsburgh*, 2011 WL 5827344, at *7 (W.D. Pa. 2011) (“[T]here is no such thing as a negligent assault.”) (quoting *Sabir v. Dist. of Columbia*, 755 A.2d 449, 452 (D.C. 2000)); *Doe 1 v. Varsity Brands, LLC*, 2023 WL 7222851, at *5 (D.S.C. 2023) (concluding that plaintiffs’ claims of intentional tortious conduct by gym owner required dismissal of plaintiffs’ negligence claims); *City of Watauga v. Gordon*, 434 S.W.3d 586, 594 (Tex. 2014) (concluding that plaintiff’s claim of excessive force in arrest was an intentional tort and hence was not a negligence claim for which immunity was waived by the state tort claims act); *Wagner v. State*, 122 P.3d 599, 610 (Utah 2005) (rejecting plaintiff’s claim that mentally handicapped individual in state custody acted negligently and holding facts supported conclusion that individual committed assault and battery on plaintiff—a claim for which immunity had not been waived by state tort claims act); *Norman v. Ins. Co. of N. Am.*, 239 S.E.2d 902, 905 (Va. 1978) (distinguishing between “malicious and intentional assault” in suit against insured and a negligence claim and ruling that jury’s verdict was for expected and intended injury that was excluded from insured’s liability policy); *Beltran-Serrano v. City of Tacoma*, 442 P.3d 608, 609 (Wash. 2019) (explaining how plaintiff could assert both an intentional tort and a negligent tort with overlapping facts despite the mutual inconsistency of such torts); *Crawford v. Daniels*, 2024 WL 1895105, at *8 (S.D.W. Va. 2024) (observing that “intentional torts and negligence are mutually exclusive”); *Kobos v. Everts*, 768 P.2d 534, 538 (Wyo. 1989) (stating, in dicta: “Intent is not a factor of negligence since negligence precludes intended conduct.”); see also DAN B. DOBBS, PAUL T. HAYDEN AND ELLEN M. BUBLICK, *THE LAW OF TORTS* § 31 (2024 update) (“Any given act may be intentional or it may be negligent, but it cannot be both. Intent and negligence are regarded as mutually exclusive grounds for liability. As the saying goes, there is no such thing as a negligent battery, since battery is defined to require an intentional touching without consent not a negligent one.”); 1 FOWLER HARPER & FLEMING JAMES, *THE LAW OF TORTS* § 3.5, at 3:19 (3d ed. 1996) (“There is no such thing as a negligent assault.”); 4 BARRY A. LINDAHL, *MODERN TORT LAW: LIABILITY AND LITIGATION*

§ 41:4 (2d ed. 2024 update) (“Negligence and an intentional act are generally regarded as inconsistent and mutually exclusive theories, and thus where the evidence showed that the defendant intentionally kicked the plaintiff, it was held that the case could not be submitted on a negligence theory.”); ROBERT E. KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 10, at 46 (5th ed. 1982) (“There is, properly speaking, no such thing as a negligent assault.”); 8 AMERICAN LAW OF TORTS § 26:1 (“[A] jury cannot find both negligence on the part of the defendant and liability for the intentional torts of assault and battery based on the same acts. Once intentional offensive conduct has been established, the actor is liable for assault and not negligence. There is no such thing as negligent battery or negligent assault.”); Sarah L. Swan, *Beltran-Serrano v. City of Tacoma*, 16 J. TORT L. 373, 384 (2023) (“There is no shortage of precedent for the position that intent and negligence are ‘separate and defined categories of behavior distinct from each other’ such that dual claims of both are simply incompatible.”) (quoting Jake Dear and Steven E. Zipperstein, *Comparative Fault and Intentional Torts: Doctrinal Barriers and Policy Considerations*, 24 SANTA CLARA L. REV. 1 (1984)).

Among the handful of courts that have clearly and unambiguously held that a plaintiff may proceed simultaneously with a negligent and intentional tort claim arising from the same facts are: *Etheredge v. Dist. of Columbia*, 635 A.2d 908, 918 (D.C. Ct. App. 1993) (holding that jury could find that police officer who shot plaintiff in confrontation inside private home “used excessive force and failed to act with reasonable prudence when he shot [plaintiff]” and thus was “the prerogative of the jury, not of the judge, to determine whether plaintiff had proved negligence”); *Dairy Rd. Partners v. Island Ins. Co.*, 992 P.2d 93, 114 (Haw. 2000) (explaining, in the course of discussing precedent on whether liability insurers can employ facts extrinsic to the complaint to determine whether they have a duty to defend, that it rejected “the proposition that ‘the words ‘negligence’ and ‘intentional’ are contradictory,’” because “in this jurisdiction, we have never restricted claims sounding in negligence to unintentional or ‘careless’ conduct”); *Taylor v. Hurst*, 1986 WL 6622, at *3 (Tenn. Ct. App. 1986) (affirming trial court’s decision to permit plaintiff to amend the pleadings to allege negligence against defendant who, during confrontation, ordered his German Shepherd to attack plaintiff, which it did, because defendant “failed to take reasonable steps to stop the assault of his dog upon” plaintiff); *Fortenberry v. George*, 2002 WL 1446675, at *1 (Tenn. Ct. App. 2002) (concluding that plaintiff who alleged suffering serious physical injury in the course of a traffic stop that resulted in her arrest was not barred by state tort claims act from pursuing both her assault and battery and negligence claims).

In addition to the above, there is case law in several jurisdictions that does not support the black letter in this Section and which is arguably inconsistent with it:

In *Hackbart v. Cincinnati Bengals, Inc.*, 601 F.2d 516, 524 (10th Cir. 1979) (applying Colorado law), the court was faced with determining the appropriate standard of care for a professional football player during a game. Ruling that recklessness was the appropriate standard, as opposed to a more stringent intentional-tort standard, the court commented: “In ruling that recklessness is the appropriate standard and that assault and battery is not the exclusive one, we are saying that these two liability concepts are not necessarily opposed one to the other. Rather,

recklessness under § 500 of the Restatement might be regarded, for the purpose of analysis at least, a lesser included act.”

Courts in the District of Columbia in cases dealing with police shootings have reasoned that an officer’s violation of police regulations requiring use of the minimum force necessary and limiting discharge of a firearm to circumstances where the officer reasonably believes it is necessary to prevent death or serious injury support a negligence claim. See, e.g., *Dist. of Columbia v. Evans*, 644 A.2d 1008, 1021 (D.C. Ct. App. 1994) (concluding that evidence of violations of two regulations by officers in shooting plaintiff’s decedent supported submission of a negligence claim to jury). Arguably, the flaw in the court’s reasoning is that those regulations do not address the matter of whether the officer violated the regulation intending to shoot the victim intentionally or negligently. Not all regulations or statutes address only risky behavior (negligence) as opposed to behavior intended to do harm. See also *Dist. of Columbia v. Downs*, 357 A.2d 857, 859 (D.C. Ct. App. 1976) (affirming judgment based on jury verdict in which jury concluded that police shooting was not an assault but constituted negligence, reasoning that jury found that officer did not assault decedent but instead acted negligently). See also *Dist. of Columbia v. White*, 442 A.2d 159 (D.C. 1982) (relying on *Downs* and additionally asserting that violation of statute criminalizing the use of excessive force supported negligence per se finding).

Grudt v. City of Los Angeles, 468 P.2d 825, 830 (Cal. 1970), has language that is supportive of the position that both negligence and intentional tort claims can be pursued alternatively:

There is an abundance of authority permitting a plaintiff to go to the jury on both intentional and negligent tort theories, even though they are inconsistent. It has often been pointed out that there is no prohibition against pleading inconsistent causes of action stated in as many ways as plaintiff believes his evidence will show, and he is entitled to recover if one well pleaded count is supported by the evidence.

However, the plaintiff’s negligence claims were about the officers’ preshooting conduct that resulted in decedent-driver, fearing that the plainclothes officers wielding a shotgun were robbers, attempted to escape, which escalated to the point where the officers shot him. See Comment *i*. Thus, the quoted language, to the extent it supports both negligent and intentional tort claims being asserted for the same conduct, is dicta.

Two cases decided by the Maryland Court of Appeals may be inconsistent with this Section but are muddled by the possible conflation of intentional acts and those intentional acts in which the defendant intends to inflict harm. See Restatement Third, Torts: Liability for Physical and Emotional Harm § 1, Comment *b* (AM. L. INST. 2010) (explaining the requisite intent for an intentional tort and contrasting it with ordinary intentional acts). Many acts are intentional. Sometimes, an actor may act intentionally while intending to inflict harm. Sometimes, an actor may act intentionally while creating an unreasonable risk of harm. Or sometimes, an actor may act intentionally but not at all tortiously. In *Ghassemieh v. Schafer*, 447 A.2d 84 (Md. Ct. App. 1982), an adolescent girl removed a chair just as her teacher was about to sit in it. The trial court instructed the jury that if it found the defendant had committed a battery, it could not find that she was negligent. The appellate court concluded the instruction was erroneous, but its explanation raises

the concern that it did not distinguish between acts intended to cause harm and other intentional acts without such intention to inflict harm. “The absence of intent is essential to the legal conception of negligence,” the court acknowledged, but continued, “the presence of an intent to do an act does not preclude negligence.” The concepts of negligence and battery are not mutually exclusive.” *Id.* at 89. Aside from the inconsistency between the two quoted passages, the only way that the second clause can be true is if the act referred to there is not one intended to cause harm. In a subsequent case, *McCance v. Lindau*, 492 A.2d 1352, 1357-1358 (Md. Ct. App. 1985), the court relied on *Ghassemieh*, for the proposition that “one could intend to perform a particular act, but that act may produce unintended consequences.” That statement elides the critical matter of whether the “particular act” that was performed was intended to cause any harm protected by intentional torts. If so, the defendant committed an intentional tort, and the question of “unintended consequences” is one of scope of liability (or proximate cause) for the intentional tort.

An intermediate appellate court in New Jersey reported that a plaintiff alleged “negligent assault [arising] out of the security officer’s attempt to arrest him for operating his automobile while intoxicated.” *Jerolamon v. Fairleigh Dickinson Univ.*, 488 A.2d 1064, 1066 (N.J. Super. Ct. App. Div. 1985). However, the viability of such a claim was not before the court, which was confronted only with the applicability of the state’s charitable immunity statute and the applicability of a privilege for the publication of allegedly libelous matter.

There are a series of cases in North Carolina involving shootings in which the courts permitted a negligence case to be submitted to the jury. Although some of the cases have confused reasoning and incorrect statements of tort law (“Indeed, the intent required for battery may be supplied by grossly or culpably negligent conduct.”), they seem to accept the proposition that negligent and intentional torts are mutually exclusive and justify the outcome on the ground that there was sufficient evidence pointing to a lack of intent to shoot anyone and mere carelessness in firing the gun. The cases are discussed in *Lynn v. Burnette*, 531 S.E.2d 275, 279 (N.C. 2000) (“In the case before us, viewing the evidence in the light most favorable to plaintiff, defendant Burnette intended to shoot at the tire on plaintiff’s vehicle but pulled the trigger before she had properly aimed, causing the bullet to strike plaintiff, similar to [two other cases], and as argued in [a third case.]” (citation omitted)).

The decision of the Supreme Court of South Dakota, in *Tri-State Co. of Minnesota v. Bollinger*, 476 N.W.2d 697, 701 (S.D. 1991), while not directly contrary to this Section, is in tension with it. In determining whether an insurance policy covered harm suffered in a fist fight, the court reported that the insured punched a friend in the face but took an exceedingly narrow view of scope of liability in ruling that the injured friend’s broken ankle could be found not to be intended and reversed the trial court’s grant of summary judgment to the insurer.

Another arguable incursion on the rule in this Section occurred in two cases involving an intentional tort that was allegedly committed by the defendant acting in self-defense. For self-defense to constitute a privilege that excuses the use of force, the actor must reasonably believe that the use of force is both necessary and proportionate in responding to the threat that the other party poses. Restatement Third, Torts: Intentional Torts to Persons § 21 (AM. L. INST., Tentative Draft

No. 6, 2021). When such a reasonable belief does not exist, an actor may not claim the privilege of self-defense and is subject to liability for the intentional tort the actor committed. See *Id.* Comment *h* & Illustration 7. Notwithstanding this legal treatment of unreasonable invocations of self-defense, courts in two states have permitted the person injured by the purported invocation of force in self-defense to pursue a negligence claim against the self-defense actor because of the unreasonableness of the actor’s belief about the necessity of using force. Thus, in *Brown v. Robishaw*, 922 A.2d 1086, 1088 (Conn. 2007), the court permitted the plaintiff to maintain a negligence claim against the defendant who unreasonably employed force in response to a threat posed by the plaintiff. By permitting a negligence claim after the denial of a claim for a self-defense privilege, the court bypassed the ordinary rule that the defendant would be subject to an intentional tort claim rather than a negligence claim. Accord *Blackburn v. Johnson*, 543 N.E.2d 583, 586 (Ill. App. Ct. 1989) (acknowledging that the court was “aware of possibly treading on new ground”). Other cases, addressing denial of the self-defense privilege because reasonable belief does not exist, have ruled contrary to *Brown* and *Blackburn*. See *Brasseaux v. Girouard*, 269 So. 2d 590, 599 (La. Ct. App. 1972) (ruling that a party who, acting in self-defense, resorts to unreasonably excessive or unnecessary force loses the privilege of self-defense and is subject to liability for assault and battery); *Thomasson v. Demarco*, 191 N.Y.S.3d 431, 433 (App. Div. 2023) (observing that a “plaintiff’s allegation that the defendants mistakenly believed that they were acting in self-defense does not convert the time-barred intentional tort of assault into a timely cause of action alleging negligence”); *Mazzaferro v. Albany Motel Enterprises, Inc.*, 515 N.Y.S.2d 631, 633 (App. Div. 1987) (“As to plaintiff’s contention that a claim for negligence arose out of defendants’ employees’ use of unintentionally excessive force, that issue remains subsumed exclusively under a cause of action for assault. Unreasonably excessive force would only have been an issue in the case if defendants had asserted the defense of privilege or justification for the assault.” (citation omitted)).

Comment c. Established facts. *Worcester Ins. Co. v. Fells Acres Day Sch., Inc.*, 558 N.E.2d 958 (Mass. 1990), well illustrates the point of this Comment. There, in an insurance coverage dispute over coverage for rape and sexual abuse by the principals of a day-care center, the principals had previously been criminally tried and convicted. The court brushed aside the plaintiff-victims’ claim that determining the intent of the principals would require psychiatric examination and testimony, declaring “an intent to injure may be inferred as a matter of law from acts of child molestation and rape.” *Id.* 965. In the course of doing so, the court distinguished another case, *Quincy Mut. Fire Ins. Co. v. Abernathy*, 469 N.E.2d 797 (Mass. 1984), in which the tortfeasor threw a piece of blacktop that injured the occupants of a vehicle. There, the court held that summary judgment on insurance coverage was inappropriate because of uncertainty about whether the tortfeasor had the requisite intent to commit a battery.

Facts may become “established” (or recognized as such) at any stage of a case from a motion to dismiss the complaint to post-trial motions and even on appeal. For courts that found that plaintiff’s allegations in the complaint were sufficient to establish the fact that defendant committed an intentional tort and not a negligent one, see, e.g., *Doe 1 v. Varsity Brands, LLC*, 2023 WL 7222851, at *5 (D.S.C. 2023) (concluding that plaintiffs’ claims of intentionally tortious

conduct by gym owner required dismissal of allegations in plaintiffs’ complaint asserting negligence claims); *State, Dep’t of Corr. v. Heisey*, 271 P.3d 1082, 1092 (Alaska 2012) (concluding that plaintiff’s allegations of excessive force were for assault and battery that therefore required dismissal of the complaint because a state statute immunized the state from liability for intentional torts); *Thomasson v. Demarco*, 191 N.Y.S.3d 431, 433 (App. Div. 2023) (explaining that “the complaint alleges intentional, offensive conduct” and therefore plaintiff could not pursue a negligence claim); *Borrer v. Haks Grp., Inc.*, 87 N.Y.S.3d 618, 622 (App. Div. 2018) (affirming dismissal of the complaint pleading negligence because the facts pled revealed defendant committed an intentional tort); *Love v. City of Port Clinton*, 524 N.E.2d 166, 167 (Ohio 1988) (concluding that allegations in the complaint of “subduing” and “handcuffing,” constituted intentional torts that required dismissal of the complaint because statute of limitations had run on any intentional tort). But see *Gipp v. Webb*, 2021 WL 3666276, at *6 (D.N.D. 2021) (concluding that, based on the facts pled, plaintiffs might have either an intentional tort claim or a negligent tort claim arising out of law enforcement officers’ shooting and that while eventually plaintiffs would have to elect which one to pursue, neither should be dismissed at the pleading stage).

For courts finding that the factual record at the summary judgment stage sufficient to rule that the facts negate a negligent tort, see, e.g., *P.C.B. v. Cha*, 2005 WL 1421465, at *4 (D. Minn. 2005) (“Plaintiff has admitted, in his opposition brief, that Officer Cha’s use of ‘excessive force in terms of flipping plaintiff hard to the ground, knocking him out; and assaulting and battering plaintiff, are all tantamount to intentional tort.’ Thus, to the extent that Plaintiff’s negligence claim is based on the act of flipping Plaintiff to the ground, knocking him out, and battering him, summary judgment will be granted dismissing that claim as inconsistent with the intentional tort claim of assault and battery.”) (citation omitted); *Pravda v. City of Albany, New York*, 956 F. Supp. 174, 183 n.9 (N.D.N.Y. 1997) (ruling on defendant’s summary judgment motion: “Plaintiff’s assault and battery and his negligence claims arise out of the same underlying factual allegations. It is well settled that negligence and assault and battery claims are mutually exclusive. . . . Therefore, the court finds that all of Plaintiff’s negligence claims must be dismissed”) (quotation and citation omitted); *Allstate Ins. Co. v. Clarke*, 2007 WL 2710821, at *4 (Mich. Ct. App. 2007) (“[Plaintiff’s] original claim and amended claim both alleged no more than a negligent assault and battery, a nonexistent tort. Because there is no genuine issue of material fact regarding Clarke’s intent to shoot or injure [plaintiff’s decedent], summary disposition of the negligence claim was appropriate”) (citation omitted).

For a court affirming the grant of a directed verdict on plaintiff’s negligence claims, see *Byers v. Spaulding*, 725 S.W.2d 893, 895 (Mo. Ct. App. 1987).

For an appellate court reversing a judgment in favor of plaintiff on his negligence claims, see *Jones v. Marshall*, 750 S.W.2d 727, 728 (Mo. Ct. App. 1988). There, after recounting the evidence with regard to a confrontation between plaintiff and two bouncers at a bar, the court commented: “There was not a scintilla of evidence in the record that would give rise to a triable issue of negligence. Where the only evidence is of an intentional act, submission of a negligence theory is error.” See also *Murray v. Long Island R. Co.*, 313 N.Y.S.2d 610, 612 (App. Div. 1970)

1 (“There was no evidence of negligence or negligence-induced injuries other than the assaultive
2 acts and assault-induced injuries for which recovery was claimed and awarded on the assault
3 causes of action.”), *aff’d* 271 N.E.2d 227 (N.Y. 1971).

4 For courts making the point that it is the historical facts that matter rather than a party’s
5 legal characterization of them, see, e.g., *Crawford v. Daniels*, 2024 WL 1895105, at *8 (S.D.W.
6 Va. 2024) (“[I]t is well-settled that conclusory statements are not entitled ‘to the presumption of
7 truth,’ and describing intentional conduct as ‘negligent’ does not make it so.”) (citation omitted);
8 *Maes v. Tuttoilmondo*, 502 P.2d 427, 428 (Colo. Ct. App. 1972) (commenting that the plaintiff’s
9 characterization of his claim as one of negligence cannot stand “where the facts are before the
10 court and clearly establish no negligence and do establish an assault and battery”); *Borrerro v.*
11 *Haks Grp., Inc.*, 87 N.Y.S.3d 618, 622 (App. Div. 2018) (“As this Court has previously stated, ‘if,
12 based on a reading of the factual allegations, the essence of the cause of action is, as here, assault
13 [or battery], the plaintiffs cannot exalt form over substance by labeling the action as one to recover
14 damages for negligence.’”) (quoting *Schetzen v. Robotsis*, 709 N.Y.S.2d 193, 194 (App. Div.
15 2000)); *Love v. City of Port Clinton*, 524 N.E.2d 166, 167 (Ohio 1988) (explaining that “‘courts
16 must look to the actual nature or subject matter of the case, rather than to the form in which the
17 action is pleaded’”) (quoting *Hambleton v. R.G. Barry Corp.*, 465 N.E.2d 1298, 1302 (Ohio
18 1984)); *Kasnick v. Cooke*, 842 P.2d 440, 441 (Or. Ct. App. 1992) (“Stated differently, plaintiff
19 may not allege facts that necessarily would constitute an intentional tort but then assert that he can
20 prevail by proving only negligence.”).

21 *Comment d. The structure of tort law.* For commentators addressing the structure of tort
22 law and the history of its development, see, e.g., Kenneth S. Abraham & G. Edward White,
23 *Conceptualizing Tort Law: The Continuous (and Continuing) Struggle*, 80 MD. L. REV. 293, 293-
24 342 (2021) (explaining the “untidy, fragmented organizational structure of contemporary tort law”
25 as a product of its history); Thomas C. Galligan Jr., *The Structure of Torts*, 46 FLA. ST. U. L. REV.
26 239 (2022) (attempting to find a common core from the disparate elements of tort); John C. P.
27 Goldberg, *Ten Half-Truths About Tort Law*, 41 VALP. U. L. REV. 1221, 1259-1260 (2008)
28 (explaining the influence of the writ system of pleading on the development of intentional torts);
29 Kenneth Simons, *A Restatement (Third) of Intentional Torts?*, 48 ARIZ. L. REV. 1061, 1079-1089
30 (2006) (noting the general tripartite structure of tort law but arguing that this structure ignores the
31 complexity of different individual torts); NILS JANSEN, *THE STRUCTURE OF TORT LAW* 403-478
32 (Sandy Steel trans., 2021) (explaining that the divisions in tort law are a product of historical
33 accident); KENNETH S. ABRAHAM & G. EDWARD WHITE, *TORT LAW AND THE CONSTRUCTION OF*
34 *CHANGE* 19-197 (2022) (tracing the development of five different aspects of tort law and their
35 response to social change).

36 The one case that the Reporters’ research uncovered that deals directly with the application
37 of the rule in this Section to transferred-intent torts is *Baska v. Scherzer*, 156 P.3d 617, 628 (Kan.
38 2007). In *Baska*, the plaintiff stepped between two boys who were fighting and ended up at the
39 wrong end of several punches that were intended for the other boy. Plaintiff attempted to assert a
40 negligence action, which the court rejected, although a reasonable characterization of the incident

might have been that defendants were negligent in hitting the plaintiff rather than his adversary. The court reasoned that if the punches had reached their intended target, liability for assault and battery would have followed. Given the doctrine of transferred intent, “the fact that the defendants struck the plaintiff does not change the fact that their actions (punching) were intentional.” Accordingly, the court held that the one-year statute of limitation for intentional torts governed, reversed the court of appeals, and affirmed the grant of summary judgment by the trial court. Cf. *Harris v. Richards*, 867 P.2d 325, 326 (Kan. 1994) (obiter dicta suggesting that plaintiff who was mistakenly shot by defendant was subject to negligence statute of limitations). There are, in addition, cases that address an assault and battery exclusion in an insurance policy See, e.g., *First Fin. Ins. Co. v. Bugg*, 962 P.2d 515, 525 (Kan. 1998) (holding assault and battery exclusion in insurance policy applied to suit in which defendant bar-employees were involved in a gunfight with other patrons but shot plaintiff patrons).

Comment e. Conduct and state of mind. As the Connecticut Supreme Court explained, an overlap in conduct but difference in state of mind distinguishes negligence and intentionally tortious conduct:

It is true, of course, that intentional tortious conduct will ordinarily also involve one aspect of negligent conduct, namely, that it falls below the objective standard established by law for the protection of others against unreasonable risk of harm. That does not mean, however, . . . the same conduct can reasonably be determined to have been both intentionally and negligently tortious. The distinguishing factor between the two is what the negligent actor does not have in mind: either the desire to bring about the consequences that follow or the substantial certainty that they will occur. If he acted without either that desire or that certainty, he was negligent; if he acted with either that desire or that certainty, he acted intentionally.

Am. Nat’l Fire Ins. v. Schuss, 607 A.2d 418, 423 (Conn. 1992).

The Prosser treatise’s explanation that negligence is about conduct and not the actor’s state of mind, drawn from an important article by Henry Terry, has been influential and frequently quoted: “Negligence is conduct, and not a state of mind.” W. PAGE KEETON, DAN B DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 31, at 169 (5th ed. 1982) (quoting Henry T. Terry, *Negligence*, 29 HARV. L. REV. 40, 40 (1915)); see also Henry W. Edgerton, *Negligence, Inadvertence, and Indifference: The Relation of Mental States to Negligence*, 39 HARV. L. REV. 849, 852 (1926) (“Whether an actor is blissfully ignorant or carefully contemplating the risks of a particular course of conduct is irrelevant to whether that conduct is determined to be unreasonable and therefore subject the actor to liability for negligence. Because negligence is about conduct not state of mind, an actor’s unreasonable judgment or analysis is irrelevant to whether the actor’s *conduct* constitutes negligence.”); Restatement Third, Torts: Liability for Physical and Emotional Harm § 3 (AM. L. INST. 2010) (explaining when a “person’s conduct lacks reasonable care”); Restatement Second, Torts § 282 (AM. L. INST. 1965) (defining negligence as “conduct”); Peter Cane, *Mens Rea in Tort Law*, 20 OXFORD J. LEGAL STUD. 533, 536 (2000) (“Negligence in tort law is failure to comply with a legally specified standard of conduct, pure and simple. It has no

mental element.”); James Henderson & Aaron Twerski, *Intent and Recklessness in Tort: The Practical Craft of Restating Law*, 54 VAND. L. REV. 1133, 1136 (2001) (reporting that “a particular state of mind is always implicated” for intent but “[n]egligence requires no state of mind other than the volition necessary to commit an ‘act’”). Case law is in agreement. See *Ryan v. Napier*, 425 P.3d 230, 237 (Ariz. 2018) (“An actor’s internal evaluation about whether to use force and the decision to do so are not “acts” and therefore cannot, by themselves, constitute negligence.”); *Booth v. Mary Carter Paint Co.*, 182 So. 2d 292, 299 (Fla. Dist. Ct. App. 1966) (“[N]egligence and intention have no necessary connection. Negligence is not dependent upon bad intention, nor is it necessarily negated by good intention. When the legal rights of others are involved, the question of negligence vel non must stand on the facts themselves, uninfluenced by intention.”).

For a persuasive argument that acquaintance-rape victims should be permitted to pursue a negligence claim against a defendant in addition to an intentional tort claim, see W. Jonathan Cardi & Martha Chamallas, *A Negligence Claim for Rape*, 101 TEX. L. REV. 587 (2023). In the authors’ view, an actor who proceeds to have sex with another when consent is in doubt could be found to have acted unreasonably in pursuing sexual contact. They confront the mutually exclusive hurdle to their proposal and acknowledge its tension with existing doctrine. *Id.* at 641 (“[I]f courts cling to the traditional view that the sexual-conduct claims are exceptional and that the legal doctrine of consent should be the sole touchstone of tort liability, procedural arguments about the mutual exclusivity of the two claims will appear more convincing.”); see also Sarah L. Swan, *Beltran-Serrano v. City of Tacoma*, 16 J. TORT L. 373, 389-390 (2023) (endorsing the Cardi and Chamallas proposal to provide greater redress for victims of sexual assault).

Comment f. The internal impact of the type of tort claim. On comparative fault, see, e.g., *Finnigan v. Sandoval*, 600 P.2d 123, 123-124 (Colo. Ct. App. 1979) (“Plaintiff’s complaint was based on an alleged assault, and the evidence presented was consistent only with that theory of recovery. Thus, the court’s consideration of negligent conduct by defendant and contributory negligence by plaintiff was improper.”); *Ruter v. Foy*, 46 Iowa 132, 132-133 (1877) (“The doctrine of contributory negligence has no application in an action for assault and battery. There can be no contributory negligence except where the defendant has been guilty of negligence to which the plaintiff’s negligence could contribute. An assault and battery is not negligence. The former is intentional; the latter is unintentional.”); *Bauchspies v. Obert*, 51 Pa. Super. 441, 445 (1912) (ruling that, because plaintiff’s claim was for assault and battery, defendant could not assert contributory negligence as a defense); Restatement Third, Torts: Intentional Torts to Persons § 50(a) (AM. L. INST., Tentative Draft No. 6, 2021) (“A plaintiff’s negligent conduct may not be the basis for apportionment of comparative responsibility in a claim against a reckless or intentional tortfeasor.”)

On scope of liability, see, e.g., *Phillips v. Smalley Maint. Servs., Inc.*, 711 F.2d 1524, 1537 (11th Cir. 1983) (applying Alabama law) (quoting the Alabama Supreme Court’s response to a certified question: “[T]here is ‘extended liability’ for intentional torts and the rules of proximate causation are more liberally applied than for mere negligence.”) (citation omitted); *Kowal v. Hofher*, 436 A.2d 1, 3 (Conn. 1980) (“Responsibility for greater consequences may be considered justified in the case of intentional or reckless conduct rather than for mere negligence.”); see also

Restatement Third, Torts: Liability for Physical and Emotional Harm § 33(b) (AM. L. INST. 2010) (“An actor who intentionally or recklessly causes harm is subject to liability for broader ranges of harm that the actor would be liable for if only acting negligently.”).

The firefighter rule, in jurisdictions that retain it, is limited to negligence torts and is inapplicable when a person intentionally harms a professional rescuer. See DAN B. DOBBS, PAUL T. HAYDEN AND ELLEN M. BUBLICK, *THE LAW OF TORTS* § 364 (2024 update). The Reporters found no reported case in which this issue was litigated, but it certainly could arise and may have in cases that have not produced a reported decision.

Tort law limits liability for negligence in a variety of areas other than the firefighter rule. Thus, recreational use statutes that exempt proper owners from liability for negligence often do not extend that exemption to intentional torts by the property owners, although many also deny the exemption for gross negligence or other forms of non-intentional heightened-culpability conduct. See e.g., MO. ANN. STAT. § 537.351(1) (“Except as provided in subsection 2 of this section, a possessor of real property . . . owes no duty of care to a trespasser except to refrain from harming the trespasser by an intentional, willful, or wanton act.”); UTAH CODE § 57-14-204(1)(b) (“Nothing in this part limits any liability that otherwise exists for deliberate, willful, or malicious injury to persons or property”). Similarly, a property owner or occupier does not owe a duty of reasonable care to certain trespassers on the property but remains subject to liability for intentionally causing harm to those individuals. See Restatement Third, Torts: Liability for Physical and Emotional Harm § 52 (AM. L. INST. 2012).

Comment g. The external impact of the type of tort claim. The Restatement Third of Torts: Liability for Physical and Emotional Harm § 5, Comment *a* explained the irony that, compared to plaintiffs injured negligently, the law (perversely) disadvantages plaintiffs who are victims of intentional conduct. In particular, plaintiffs injured by a defendant’s intentional conduct often face a comparatively shorter statute of limitations, broader immunities, and more limited insurance coverage—and these plaintiffs also have a harder time establishing an employer’s vicarious liability. Cases addressing whether the defendant committed an intentional tort or a negligence tort have affected the resolution of cases in each of the following areas:

Statutes of limitation. *Unruh v. City of Wichita*, 540 P.3d 1002, 1014 (Kan. 2024) (concluding the facts supported a claim for only an intentional tort, which was barred by the one-year statute of limitations for intentional torts); *Sanderson Farms, Inc. v. McCullough*, 212 So. 3d 69, 78 (Miss. 2017) (concluding that defendant committed an intentional tort, not a negligent one, and the one-year statute of limitations for intentional torts barred the plaintiff’s claim); *Thomasson v. Demarco*, 191 N.Y.S.3d 431, 432 (App. Div. 2023) (holding that the plaintiff alleged “intentional, offensive conduct” that constituted an intentional tort, which was barred by the one-year statute of limitations); *Lynn v. Burnette*, 531 S.E.2d 275, 281 (N.C. Ct. App. 2000) (concluding that because there was evidence sufficient for a finding that defendant’s shooting plaintiff was accidental, “plaintiff may rely upon the three-year statute of limitations for personal injury”); *Love v. City of Port Clinton*, 524 N.E.2d 166, 167 (Ohio 1988) (ruling that facts pled constituted an intentional tort for which the statute of limitations had expired); *Wise v. Hendricksen*, 407 N.W.2d 567 (Wis. Ct.

App. 1987) (affirming summary judgment because plaintiff’s intentional tort claim was barred by statute of limitations and plaintiffs’ negligence claim could not be maintained because “there is no cause of action for negligent assault and battery”).

Liability insurance coverage. For courts interpreting the expected or intended exclusion congruently with intentionally tortious conduct, see, e.g., *Worcester Ins. Co. v. Fells Acres Day Sch., Inc.*, 558 N.E.2d 958, 964 (Mass. 1990) (explaining that sexual assaults of children fell within expected or intended exclusion because “negligence claims are unsupportable” given the assault and battery committed by defendants); *State Farm Fire & Cas. Co. v. van Gorder*, 455 N.W.2d 543, 545 (Neb. 1990) (ruling on whether insured’s homeowner’s policy covered claim against insured for sexual assault of a child and holding that standard for expected or intended exclusion is if “an insured’s act is to inflict bodily injury or if the character of the act is such that an intention to inflict an injury can be inferred as a matter of law”); *Manufacturers & Merchants Mut. Ins. Co. v. Harvey*, 498 S.E.2d 222, 227 (S.C. Ct. App. 1998) (concluding, in case in which grandparents sexually abused their grandchildren, that the intent to commit sexual abuse coupled with the rule of law that sexual abuse is so inherently harmful that intent to harm exists as a matter of law and thus, that claim was not covered by homeowners’ policy because abuse did not constitute an “occurrence,” which requires an accident); *Three Blind Mice, LLC v. Colony Ins. Co.*, 2018 WL 7500206, at *2 (S.C. Ct. App. 2018) (rejecting insurer’s argument that “battery” exclusion was applicable to any offensive or harmful contact even if they were the result of inadvertence).

Other cases support the proposition that the requirement for an “accident” and the exclusion for “expected or intended” harm are at least as broad as intentional torts. See, e.g., *Dairy Rd. Partners v. Island Ins. Co.*, 992 P.2d 93, 112 (Haw. 2000) (“This court’s primary purpose in *Brooks* and *Blanco* was to ensure that plaintiffs could not, through artful pleading, bootstrap the availability of insurance coverage under an insured defendant’s policy by purporting to state a claim for negligence based on facts that, in reality, reflected manifestly intentional, rather than negligent, conduct.”); *Thornton v. Illinois Founders Ins. Co.*, 418 N.E.2d 744, 747 (Ill. 1981) (comparing definition of occurrence, which required harm was neither “expected nor intended” with exclusion for “assault and battery” and concluding they overlapped); *Landry v. Leonard*, 720 A.2d 907, 907 (Me. 1998) (affirming summary judgment for armed robber’s liability insurer with regard to its duty to defend because the “expected or intended” exclusion applied, citing an earlier case involving a battery in which the court held that the exclusion applied “as a matter of law”); *State Farm Ins. Co. v. Bruns*, 942 A.2d 1275, 1279 (N.H. 2008) (“[P]laintiff has alleged a sexual assault and battery upon a minor, an act that may not be treated as an accident. Accordingly, the claim for sexual assault and battery does not meet the definition of a “loss” in the policy and is, therefore, not entitled to coverage.”); *Lexington Ins. Co. v. Tunney’s Hollywood Tavern, Inc.*, 2002 WL 372951, at *3 (Pa. Com. Pl. 2002) (concluding insurance policy excluded coverage for “intentional acts such as assault and battery”).

For the classic article identifying and analyzing the implications of “underlitigating”—pleading negligence rather than an intentional tort when the facts support the latter—in order to have liability insurance available to satisfy a judgment, see Ellen S. Pryor, *The Stories We Tell: Intentional Harm and the Quest for Insurance Funding*, 75 TEX. L. REV. 1721 (1997). See also

Tom Baker, *Liability Insurance as Tort Regulation: Six Ways that Liability Insurance Shapes Tort Law in Action*, 12 CONN. INS. L.J. 1, 7-9 (2005).

Immunity. See e.g., *Rhoden v. Dep’t of Pub. Safety*, 473 S.E.2d 537, 538 (Ga. Ct. App. 1996) (commenting that “it defies logic to classify the decision to effectuate the arrests or use excessive force as negligence” in explaining that plaintiff’s excessive use of force claim was barred by sovereign immunity that protected intentional torts); *City of Watauga v. Gordon*, 434 S.W.3d 586, 594 (Tex. 2014) (holding that plaintiff’s excessive force claim against governmental entity constitutes an intentional tort that state tort claims act did not authorize); *Jerolamon v. Fairleigh Dickinson Univ.*, 488 A.2d 1064, 1066 (N.J. Super. Ct. App. Div. 1985) (charitable immunity statute covered only negligent torts by employees of charitable entity); *Wagner v. State*, 122 P.3d 599 (Utah 2005) (holding intentional attack on plaintiff by mentally handicapped ward of the state constituted an intentional tort that negated an accidental injury, which was barred based on state governmental immunity act). In addition, the Federal Tort Claims Act, 28 U.S.C. § 2671 et seq. excludes a wide variety of intentional torts, including assault and battery, from its waiver of sovereign immunity for the torts of federal employees other than law enforcement officers) *Id.* at § 2680(h).

Workers’ compensation. See, e.g., LA. STAT. ANN. § 23:1032(B) (“Nothing in this Chapter [on exclusivity] shall affect . . . the liability, civil or criminal, resulting from an intentional act.”); S.D. CODIFIED LAWS § 62-3-2 (exclusive remedy except as to “rights and remedies arising from intentional tort”); *Locke v. SunTrust Bank*, 484 F.3d 1343, 1350 (11th Cir. 2007) (applying Florida law) (concluding that bank employee, who was shot during robbery, did not sufficiently allege facts to establish that employer’s conduct was “substantially certain to result in [her] injury or death,” and thus exclusive remedy for plaintiff was workers’ compensation); *Bridges v. Carl E. Woodward, Inc.*, 663 So. 2d 458, 463 (La. Ct. App. 1995) (“Mere knowledge and appreciation of risk does not constitute intent, nor does reckless or wanton conduct or gross negligence. Terms such as ‘reasonably foreseeable,’ ‘likely to occur,’ and ‘should have known’ may raise issues of negligence or gross negligence, but do not amount to an ‘intentional act.’”) (citations omitted); *Louis v. Burger King Corp.*, 2015 WL 7783360, at *3-4 (N.J. Super. Ct. App. Div. 2015) (holding that sexual assault of employee by co-employee did not establish that employer acted with substantial certainty that harm would occur, such that plaintiff’s claims “do not vault the exclusivity bar of the Act”).

Some workers’ compensation statutes, protective of the worker’s compensation system, employ more rigorous criteria than that required for an intentional tort. See, e.g., FLA. STAT. ANN. § 440.11(b) (exception applies to an intentional tort that results in the employee’s injury or death but only if the employer “deliberately intended to injure the employee” or “engaged in conduct that the employer knew, based on prior similar accidents or on explicit warnings specifically identifying a known danger, was virtually certain to result in injury or death to the employee, and the employee was not aware of the risk because the danger was not apparent and the employer deliberately concealed or misrepresented the danger so as to prevent the employee from exercising informed judgment about whether to perform the work”); MICH. COMP. LAWS ANN. § 418.131(1) (“The only exception to [the] exclusive [worker’s compensation] remedy is an intentional tort. An intentional tort shall exist only when an employee is injured as a result of a deliberate act of the

1 employer and the employer specifically intended an injury. An employer shall be deemed to have
2 intended to injure if the employer had actual knowledge that an injury was certain to occur and
3 willfully disregarded that knowledge. The issue of whether an act was an intentional tort shall be
4 a question of law for the court.”).

5 *Bankruptcy.* The bankruptcy Code provides that debts arising from “willful and malicious
6 injury” cannot be discharged. 11 U.S.C. § 523(a). The Supreme Court ruled that Congress carved
7 at the joint between intentional torts and other non-intentional torts, including ones involving
8 recklessness in § 523(a)(6). See *Kawaauhau v. Geiger*, 523 U.S. 57, 59 (1998) (holding that a debt
9 arising from medical malpractice that involved a non-intentional tort did not fall within the Section
10 523(a)(6) exclusion and was dischargeable).

11 *Comment i. Proceeding on both negligence and intentional torts when the facts are*
12 *uncertain.* Numerous courts recognize the principle contained in *Comment i*. The Reporters have
13 not found any case that rejects the principle. For supportive cases, see *Horstman v. Krumgold*, 130
14 P.2d 721, 722 (Cal. Ct. App. 1942) (holding that, if plaintiff was uncertain about whether the
15 evidence would support a finding that defendant was merely negligent or acted with willful
16 misconduct, plaintiff was entitled to plead and proceed on both theories); *Dormu v. Dist. of*
17 *Columbia*, 795 F. Supp. 2d 7, 30 (D.D.C. 2011) (concluding, in excessive use of force case in
18 which plaintiff complained that handcuffs placed on him were too tight, that uncertainty about
19 whether officer acted intentionally or merely negligently failed to engage lock on handcuffs when
20 applying them permitted plaintiff to pursue both negligent and intentional tort claims); *Zraggen*
21 *v. Wilsey*, 606 N.Y.S.2d 444, 445 (App. Div. 1994) (affirming denial of motion for summary
22 judgment in case involving horseplay at a pool party in which defendant pushed plaintiff into the
23 pool after plaintiff had earlier pushed defendant into the pool that left uncertainty about whether
24 defendant’s contact was offensive, a matter requiring jury determination); *Toomey v. New York*
25 *City Transit Auth.*, 177 N.Y.S.2d 655, 657 (App. Div. 1958) (explaining conflicting evidence
26 about what happened leading up to defendant’s employee shooting and killing plaintiff’s decedent
27 and concluding: “In our opinion, there was sufficient evidence of assault and of negligence on the
28 part of respondent, and its employee, to present a question of fact for determination by the jury.”).

29 *Comment j. Different facts supporting both a negligence and intentional tort claim.*
30 Illustration 8 is based loosely on language in *Ryan v. Napier*, 425 P.3d 230, 238 (Ariz. 2018):

31 To be clear, plaintiffs may plead a negligence claim for conduct that is
32 independent of the intentional use of force or plead negligence and battery as
33 alternate theories if the evidence supports each theory. For example, if the evidence
34 here also supported a finding that [defendant police officer unintentionally dropped
35 [the K-9 dog]’s leash, resulting in the attack against [plaintiff], a negligence claim
36 would have been appropriate.

37 See also *Uribe v. City of Fresno*, 2021 WL 4502949, at *3 (E.D. Cal. 2021) (concluding that
38 allegation that officer was negligent in the course of a foot chase that led to shooting and death of
39 plaintiff’s decedent by failing “to contain,” to “remain in cover,” and to give decedent adequate time
40 to process officer’s commands required resolution by a jury); *Harris v. City of Pittsburgh*, 2011 WL

5827344, at *7 (W.D. Pa. 2011) (“When a plaintiff alleges excessive force by a police officer and adds a negligence claim, the ‘negligence must be distinctly pled and based upon at least one factual scenario that presents an aspect of negligence apart from the use of excessive force itself and violative of a distinct standard of care.’”) (quoting *Dist. of Columbia v. Chinn*, 839 A.2d 701, 711 (D.C. Ct. App. 2003)); *Grudt v. City of Los Angeles*, 468 P.2d 825, 830 (Cal. 1970) (determining that plainclothes officer who confronted driver while wielding a shotgun that led to driver’s attempt to escape by driving toward a second plainclothes officer could be found negligent for failing to have uniformed officers effect the arrest and for the officer’s failure to identify himself when approaching the driver in a threatening manner); *Dist. of Columbia v. Chinn*, 839 A.2d at 711 (recognizing the principle that acts prior to intentional tort can support a negligence claim); *Randolph v. City of Wichita*, 459 P.3d 802, 821-822 (Kan. Ct. App. 2020) (recognizing the possibility of a claim of negligent use of force but concluding such a claim was inapplicable on the facts of the case); Cynthia Lee, *Officer-Created Jeopardy: Broadening the Time Frame for Assessing a Police Officer’s Use of Deadly Force*, 89 GEO. WASH. L. REV. 1362 (2021) (making the case for consideration of pre-use-of-force negligent conduct for purposes of both § 1983 and state tort law claims).

In *Beltran-Serrano v. City of Tacoma*, 442 P.3d 608, 609 (Wash. 2019), a casual encounter between plaintiff who suffered from mental illness and a police officer escalated over a period of time that provided multiple opportunities to de-escalate the encounter, which culminated in the officer shooting the plaintiff. The court explained why, despite the intentional shooting, plaintiff could maintain a negligence action:

The fact that Officer Volk’s conduct may constitute assault and battery does not preclude a negligence claim premised on her alleged failure to use ordinary care to avoid unreasonably escalating the encounter to the use of deadly force. Under well-established negligence principles, police officers owe a duty of reasonable care in situations such as this. *Beltran-Serrano* has presented evidence to allow a jury to find [the failure to] follow accepted practices in Officer Volk’s interactions with him leading up to the shooting and that this negligence resulted in his injuries.

The Eleventh Circuit, in the course of affirming a judgment based on a jury finding of negligence in conducting a wellness check that culminated with officers shooting plaintiff, well explained the principle in this Comment and the basis for the court recognizing the negligence claim:

[Plaintiff] didn’t invent and litigate a new cause of action; rather, there is simply an inevitable overlap between the facts underlying her negligent-wellness-check claim and those surrounding the deputies’ use of force. And although Florida doesn’t recognize claims for negligent use of force, it does recognize the commonsense proposition that ‘distinct act[s] of negligence,’ can occur in conjunction with alleged excessive-force incidents. Just so here—the wellness check involved distinct acts of alleged negligence during which an allegedly excessive use of force occurred.

Ermini v. Scott, 937 F.3d 1329, 1338 (11th Cir. 2019) (applying Florida law) (quoting *City of Miami v. Sanders*, 672 So. 2d 46, 48 (Fla. Dist. Ct. App. 1996)).

1 Claims that officers were negligent in misperceiving the need for, or the extent of, force,
2 as in Illustration 7, are properly turned away by courts. See *Unruh v. City of Wichita*, 540 P.3d
3 1002, 1012 (Kan. 2024) (“Generally, one’s misperception, misjudgment, or misappraisal alone
4 does not provide grounds for negligence.”).

5 An illustration of a court policing the use of pre-use-of-force negligence occurred in
6 *Hernandez v. City of Pomona*, 207 P.3d 506 (Cal. 2009). There, following a traffic stop, plaintiff’s
7 decedent led police officers on a car and foot chase that culminated in the officers shooting and
8 killing plaintiff’s decedent. The court held that California law provided immunity to the officers
9 and their employer for events during the car chase. *Id.* at 519. The court also held that plaintiff was
10 collaterally estopped (based on a prior federal civil rights case) from claiming some of the officers’
11 conduct during the foot chase was negligent and, more importantly, that the officers’ other conduct
12 during the foot chase was not, as a matter of law, negligent. *Id.* at 521. Another effort to police the
13 use of pre-use-of-force negligence occurred in *Han v. City of Folsom*, 2015 WL 1956521, at *1-2
14 (E.D. Cal. 2015). There, officers responded to a 911 call by parents who thought their son needed
15 psychiatric care. The officers confronted the son in his bedroom where he displayed a knife and
16 refused to drop it; after unsuccessfully employing a taser, the officers shot and killed the son. The
17 district court granted summary judgment on the plaintiffs’ wrongful death and negligence claims,
18 reasoning that: “Plaintiffs cannot avoid summary judgment by simply producing an expert’s report
19 that an officer’s conduct leading up to a deadly confrontation was imprudent, inappropriate, or
20 even reckless.” On appeal, the Ninth Circuit reversed, based on plaintiffs’ expert’s opinion that
21 “the police actions were not reasonable under the totality of the circumstances under generally
22 accepted police practices.” *Young Han v. City of Folsom*, 695 F. App’x 197, 199 (9th Cir. 2017);
23 see also W. Jonathan Cardi & Martha Chamallas, *A Negligence Claim for Rape*, 101 TEX. L. REV.
24 587, 641 (2023) (“The determination to police the boundaries of intentional tort and negligence is
25 at its soundest when there are doubts about the validity of the negligence claim.”).

26 Other courts, attempting to constrain the use of pre-use-of-force negligence claims have
27 required that plaintiffs to establish each of the elements of a negligence claim distinct from the
28 battery. Thus, in *Unruh v. City of Wichita*, 540 P.3d 1002, 1004 (Kan. 2024), the court, after
29 explaining the essential difference between an intentional and negligent tort, reiterated the
30 elements of a negligence claim: “(1) the defendant owed plaintiff a legally recognized duty; (2) the
31 defendant breached that duty; (3) the defendant’s breach of duty caused plaintiff’s injuries; and
32 (4) plaintiff suffered damages.” In requiring the identification of a legally recognized duty of care,
33 courts often insist on regulations or statutes that govern law enforcement behavior. Those courts,
34 in their efforts to limit the use of negligence claims in the course of police confrontation situations,
35 fail to take account of the fact that an officer who engages in conduct that creates a risk of harm to
36 a suspect, such as engaging in a car chase, owe a common-law duty of reasonable care to the
37 suspect. The critical difference between negligence and intentional torts for purposes of this
38 Section is whether the defendant acted with the intent required for an intentional tort or, on the
39 other hand, acted carelessly and without such intent.

Comment l. Informed consent. *Cobbs v. Grant*, 502 P.2d 1 (Cal. 1972), is the leading case adopting the principle that ordinarily failures to obtain informed consent should be treated as negligence, reserving battery for circumstances in which the health-care provider performed a different procedure from the one for which consent was obtained. After surveying the mixed case law on the issue and explaining the different implications of whether the claim was treated as a negligent or intentional tort, the court ruled that a failure to explain an inherent risk of a consented-to procedure should be treated as a negligence claim and not battery. *Id.* at 8. Most jurisdictions have followed *Cobbs*. See *Duncan v. Scottsdale Med. Imaging, Ltd.*, 70 P.3d 435, 429 (Ariz. 2003) (“[W]e adopt the reasoning in *Cobbs v. Grant* and hold that claims involving lack of consent, i.e., the doctor’s failure to operate within the limits of the patient’s consent, may be brought as battery actions. In contrast, true ‘informed consent’ claims, i.e., those involving the doctor’s obligation to provide information, must be brought as negligence actions.”); *Brzoska v. Olson*, 668 A.2d 1355, 1366 (Del. 1995) (holding that battery should be limited to instances in which the health-care provider performs a procedure for which no consent had been obtained); *Perin v. Hayne*, 210 N.W.2d 609, 618 (Iowa 1973) (adopting *Cobbs* and holding that the trial court was correct to refuse to charge jury on battery for physician’s failure appropriately to disclose risks of procedure); *Lugenbuhl v. Dowling*, 701 So. 2d 447, 452 (La. 1997) (“[L]iability issues involving inadequate consent are more appropriately analyzed under negligence or other fault concepts.”); *Gerety v. Demers*, 589 P.2d 180, 191 (N.M. 1978) (“Where a patient is informed by a physician as to the nature and extent of the operation but is not reasonably informed of the risk involved, the cause of action is in negligence.”); *Hook v. Rothstein*, 316 S.E.2d 690, 700-701 (S.C. Ct. App. 1984) (“[B]ecause an informed consent action is based on a failure by a physician to make proper disclosure when obtaining consent from a patient and is concerned with the issue of whether the physician departed from the standard of care of the reasonable medical practitioner, the action, we think, is one which properly belongs to the negligence theory.”); 1 FOWLER V. HARPER ET AL., THE LAW OF TORTS § 3.10 & nn. 36-38 (3d ed. 1997) (“The problem of informed consent is essentially one of professional responsibility, not intentional wrongdoing, and can be handled more coherently within the framework of negligence law than as an aspect of battery.”); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 190 (5th ed. 1984) (“Beginning around 1960, however, it began to be recognized that the matter was really one of the standard of professional conduct, and so negligence has now generally displaced battery as the basis for liability.”). But see *Brown v. Wood*, 202 So. 2d 125, 130 (Fla. Ct. App. 1967) (“[W]e believe that the better rule is to allow a plaintiff to bring his action for failure of a doctor to secure informed consent prior to operation in either negligence or assault and battery.”); *Siegel v. Mt. Sinai Hosp. of Cleveland*, 403 N.E.2d 202, 208-209 (Ohio Ct. App. 1978) (“In Ohio, undertaking a surgical procedure on a patient without a valid and effective consent by the patient has been held to constitute a ‘technical assault and battery.’”); *Montgomery v. Bazaz-Sehgal*, 798 A.2d 742, 748 (Pa. 2002) (“[T]he performance of a surgical procedure upon a patient without his consent constitutes a technical assault or a battery because the patient is typically unconscious and unable to object.”) (quotation marks omitted).

LIABILITY OF PROFESSIONALS AND THOSE PRACTICING SKILLED TRADES

§ (#). Standard of Care for Professionals and Those Practicing Skilled Trades

The standard of reasonable care that governs professionals or skilled tradespeople is the care regarded as competent among similar professionals or skilled tradespeople in the same or similar circumstances.

Comment:

- a. History and scope.*
- b. Substantive standard of care only.*
- c. Terminology: “professional” as shorthand.*
- d. Definition of “profession” and “skilled trade.”*
- e. The role of professionally accepted practice.*
- f. Relationship of “custom” to this Section’s “reasonable professional” standard.*
- g. Using versus possessing professional skills.*
- h. Expert testimony and key exceptions.*
- i. National standard.*
- j. Subpar or superior skills.*
- k. Representations regarding subpar or superior skills.*
- l. Two schools of thought.*
- m. Trainees.*
- n. Ordinary versus professional negligence.*
- o. Judge and jury.*

a. History and scope. The Restatement Second of Torts § 299A addressed the standard of care applicable to professionals and tradespeople. It stated: “Unless he represents that he has greater or less skill or knowledge, one who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities.” At the time, § 299A governed all professionals and tradespeople, including, among others, health-care professionals, lawyers, plumbers, electricians, veterinarians, and accountants.

More recent Restatements have restated the professional standard of care enunciated by § 299A, but the effort has proceeded in a piecemeal fashion. Now, lawyers and medical providers

receive particularized treatment; the standard of care that governs lawyers is found in the Restatement of the Law Third, The Law Governing Lawyers § 52, while the standard of care that governs medical providers is found in the Restatement Third of Torts: Medical Malpractice § 5 (Tentative Draft No. 2, 2024). Likewise, the Restatement Third of Torts: Liability for Economic Harm § 4, Comment *c* furnishes the standard of care applicable to professionals, such as accountants, whose services, performed deficiently, can cause economic harm to their clients. In short, then, if a lawyer harms a client, a medical provider harms a patient, or another professional (such as an accountant) causes a client to sustain an economic loss, other Restatement Sections, not this one, guide the analysis. Residual (non-economic) harms inflicted by residual (nonmedical and nonlawyer) tradespeople and professionals are covered here.

This Section, along with the other provisions governing professionals and tradespeople identified above, supersede § 299A of the Second Restatement of Torts.

b. Substantive standard of care only. This Section addresses the substantive standard of care that governs “professionals” and “skilled tradespeople” as those terms are defined by Comment *d*. Beyond a brief discussion in Comment *h* (which supplies the general rule that a plaintiff seeking to show that a professional or skilled tradesperson breached the applicable standard of care must furnish expert testimony, alongside key exceptions to that general rule), this Section does not address matters of evidence. Nor does this Section address other elements of a cause of action pursued against professionals or tradespeople. Those matters, including factual cause, scope of liability (sometimes called proximate cause), affirmative defenses (including the role of exculpatory agreements), and a professional’s duties to clients or customers, as against nonclients or noncustomers, are addressed in § __ [Cause of Action Against a Professional or Skilled Tradesperson].

c. Terminology: “professional” as shorthand. Although this Section’s specialized standard of care applies to skilled tradespeople as well as professionals, see Comment *d*, as a shorthand, this specialized standard is frequently and appropriately called simply a “professional standard,” a “reasonable professional” standard, or a “professional standard of care.” Following this pattern, in the Comments below, the word “professional” (or a variant) is frequently used in lieu of the wordier phrase “professional and skilled tradesperson.” This language is utilized simply for the sake of concision. No difference in meaning is intended, and, as Comment *d* makes plain, this Section applies equally to professionals and skilled tradespeople.

d. Definition of “profession” and “skilled trade.” As Comment *a* explains, lawyers, medical providers, and those whose services cause their clients to suffer pure economic harm are excluded from this Section’s scope, as the standards of care that govern those professionals are addressed in other Restatements. See Comment *a* (outlining this Section’s scope and key exclusions). All other professionals or members of a skilled trade are subject to this Section’s standard of care.

The determination of whether an occupation qualifies as a profession or skilled trade is sometimes straightforward because, in some states, a statute defines those who are and are not professionals or skilled tradespeople subject to a professional (as opposed to ordinary) standard of care. In some states, these statutory definitions are exhaustive; in others, they are illustrative, and, in assessing whether additional occupations qualify, the considerations delineated below may be helpful. When those statutes delineate who is and is not a professional, of course, they control.

Beyond that, the determination of whether an occupation qualifies as a “profession” or “skilled trade” for standard-of-care purposes is based on several considerations. These include: (1) whether the occupation requires specialized knowledge, skill, education, or training; (2) whether the occupation requires a license or is specially regulated; (3) whether the occupation has an internal code of conduct or discipline; and (4) whether the occupation involves complex discretionary judgments. Of these, the first factor—involving specialized knowledge, skill, education, or training—is the most important and is, in fact, necessary but not usually sufficient. When more factors are present, the occupation is more likely to be a profession or skilled trade.

A focus on specialized knowledge, skill, education, and training makes sense because this Section sets forth a special standard of care that governs certain individuals *precisely because* these individuals’ work tends to be complex, specialized, and difficult for lay people to evaluate from scratch—hence the need for expert testimony. See Comment *e* (explaining why professionals are governed by a modified standard of care). If, by contrast, the individual’s work does not feature, *inter alia*, specialized knowledge and skill acquired during a course of specialized education and training, it is logical to conclude that the individual’s work is straightforward enough that it *can* be evaluated by lay persons from scratch, without the benefit of, or need for, expert testimony. In that instance, the general negligence rules, as set forth in Restatement Third of Torts: Liability for Physical and Emotional Harm § 3, provide adequate guidance in assessing whether or not the individual breached.

1 In assessing whether an occupation satisfies this Comment’s definition of a profession or
2 skilled trade, the occupation’s classification for other purposes (such as for determining the
3 applicable statute of limitations), may be relevant but is not determinative.

4 A non-exhaustive list of professionals or skilled tradespeople frequently and appropriately
5 subject to this Section’s special standard are airline pilots, architects, building inspectors,
6 electricians, engineers, plumbers, pharmacists, tractor-trailer truck drivers, surveyors, and
7 veterinarians.

8 *e. The role of professionally accepted practice.* The “reasonable professional” standard
9 adopted in this Section displaces the ordinary rule with regard to the role of the jury in assessing
10 breach. Generally in tort law, a jury is free to substitute its own judgment for the judgment of those
11 within a particular business or vocation. See Restatement Third, Torts: Liability for Physical and
12 Emotional Harm § 13(a) (“An actor’s compliance with the custom of the community, or of others
13 in like circumstances, is evidence that the actor’s conduct is not negligent but does not preclude a
14 finding of negligence.”); *The T.J. Hooper*, 60 F.2d 737, 740 (2d Cir. 1932) (explaining that “a
15 whole calling” may “never may set its own tests” as “there are precautions so imperative that even
16 their universal disregard will not excuse their omission”).

17 When it comes to professionals, by contrast, juries are not entitled to engage in this
18 unfettered, free-wheeling inquiry. If *professionals* agree that something should be done a certain
19 way, then the jury may *not* second-guess that determination. Professionals receive this modified
20 legal treatment not because they have a superior status or are entitled to special protections.
21 Instead, as the Restatement Third of Torts: Liability for Economic Harm § 4, Comment *c* explains,
22 a professionally determined standard is used, in large part, because it is simply more practicable,
23 as “a professional’s methods, nearly by definition, will be difficult for jurors to evaluate from
24 scratch.” Accord Restatement of the Law Third, The Law Governing Lawyers § 52, Comment *b*
25 (explaining that the standard of care that governs lawyers, like the standard that governs other
26 professionals, is professionally based).

27 *f. Relationship of “custom” to this Section’s “reasonable professional” standard.* It is clear
28 that professional norms are entitled to greater deference than the norms of other industries or
29 businesses. See Comment *e*. Yet, prior Restatements have not spoken with one voice about how
30 to address difficult subsidiary questions—and particularly questions that probe the interaction
31 between prevailing professional practices, also known as custom (i.e., how professionals typically

1 behave, on a day-to-day basis), as against this Section’s governing “reasonable professional”
2 standard (i.e., how professionals are expected to behave to be regarded as competent).

3 Frequently, there is no daylight between the two standards (what professionals actually do,
4 as against what professionals agree reflects competent practice) as most professionals, most of the
5 time, behave competently. But occasionally, the two standards are not coterminous. Sometimes,
6 for instance, a situation may be sufficiently unusual that no custom exists. Or, on other occasions,
7 it could be that professionals behave in a particular manner, even though professionals agree that
8 that their everyday conduct is, in fact, objectively unreasonable—the product of human frailty,
9 rather than professional foresight.

10 When custom cannot be ascertained or when the two standards diverge, consistent with
11 some—but certainly not all—courts, this Section adopts the rule enunciated in § 5 of the
12 Restatement Third of Torts: Medical Malpractice (Tentative Draft No. 2, 2024). That provision
13 makes clear that the governing standard is not merely what other medical providers typically do.
14 It is, instead, something subtly different: “the care, skill, and knowledge *regarded as competent*
15 among similar medical providers in the same or similar circumstances.” Restatement Third, Torts:
16 Medical Malpractice § 5(a) (Tentative Draft No. 2, 2024) (emphasis added). According to that
17 Restatement, “prevailing professional practice may fall short of what medical professionals
18 themselves regard as competent; in these circumstances, it should be no defense that many other
19 providers render similarly deficient care.” *Id.*, Comment *c*. Thus, to provide a simple and concrete
20 example, even if the majority of physicians in good standing neglect to wash their hands before
21 seeing a new patient, a non-hand-washing physician may still be found negligent.

22 *g. Using versus possessing professional skills.* This Section’s standard is based on whether
23 the defendant-professional *used* appropriate care. Traditionally, case law, followed by the
24 Restatement Second of Torts, emphasized the need to *possess* as well as apply reasonable
25 professional skills. See Restatement Second, Torts §§ 298, 299, and 299A. Today, by contrast,
26 evidence of a provider’s training or experience may still be admissible, as these factors may make
27 it more or less likely that the provider, in fact, furnished competent care—because, for instance, if
28 a provider was not trained to perform a procedure, it is logically less likely that the provider
29 performed the procedure competently. But the particular reason or reasons *why* a professional
30 acted a certain way is generally unimportant. Put simply: The key question is what a professional
31 did or failed to do. The focus is not the professional’s training, motive, background, or experience.

Accord Restatement Third, Torts: Liability for Physical and Emotional Harm § 12, Comment *b* (explaining that “so long as the jury concludes that the person’s conduct lacks reasonable care, the jury should find the person negligent”); Restatement Third, Torts: Medical Malpractice § 5, Comment *d* (Tentative Draft No. 2, 2024) (“Malpractice is based on whether medical professionals use appropriate care, skill, and knowledge.”).

h. Expert testimony and key exceptions. Instances of professional negligence involve situations and expertise outside the ken of most lay individuals. See Comment *n* (explaining that, if a professional’s action involves everyday judgment, it should be evaluated via the typical tort standard, not via this Section’s standard); Comment *d* (explaining who qualifies as a “professional” or “skilled tradesperson”). Accordingly, a plaintiff alleging professional negligence usually must introduce expert testimony concerning the professional standard of care required under the circumstances and the defendant’s failure to exercise such care. Accord Restatement of the Law Third, The Law Governing Lawyers § 52, Comment *g* (“[A] plaintiff alleging professional negligence . . . ordinarily must introduce expert testimony concerning the care reasonably required in the circumstances of the case and the lawyer’s failure to exercise such care.”); Restatement Third, Torts: Medical Malpractice § 6(a) (explaining that, absent unusual circumstances, a plaintiff alleging that a medical provider breached the standard of care must proffer expert testimony).

There are three key exceptions to this expert-witness requirement. First, a plaintiff need not proffer expert testimony when the defendant-professional’s allegedly negligent actions are within the common understanding of laypersons or when the alleged negligence is so plain or obvious that a layperson can recognize it. Accord Restatement of the Law Third, The Law Governing Lawyers § 52, Comment *g* (“[E]xpert testimony is unnecessary when it would be plain to a nonlawyer . . . that the lawyer’s acts constitute negligence. . . .”); Restatement Third, Torts: Medical Malpractice § 6(a)(2) (Tentative Draft No. 2, 2024) (stating that no expert testimony is required when the issues in dispute are a matter of common knowledge); Restatement Third, Torts: Liability for Economic Harm § 4, Comment *c* (explaining that expert testimony is not needed if “the professional’s negligence [is] so evident that it can be assessed by jurors on the basis of common knowledge”).

Illustrations:

1. Henry, an engineer on a building project, reads the blueprints wrong and has the doors installed where windows should be. Because of his mistake, when Jenny visits the building and opens one of those doors, she falls two stories to the sidewalk below,

1 sustaining serious injuries. Jenny is not required to furnish expert testimony on the
2 professional standard of care because a lay factfinder can readily understand the nature of
3 Henry's negligence.

4 2. Esteban hires Giovanni, an architect, to draw up plans for a new house. The house
5 is to be built on a mountain, and Giovanni designs an eight-foot-tall retaining wall on the
6 elevated side of the slope that will keep the stones farther up the mountainside from
7 tumbling onto Esteban's property. After the house is built, Esteban hosts a party to
8 celebrate. In the middle of the party, rain begins to fall, and the mountainside turns muddy,
9 causing large boulders to slide down the mountain at high speed. The boulders tumble over
10 the eight-foot-high retaining wall and smash into the house, injuring Esteban. When
11 Esteban sues Giovanni for malpractice, he must furnish expert testimony as to the standard
12 of care for architects when designing retaining walls. Without expert testimony, a
13 factfinder is ill-equipped to assess whether Giovanni, in designing an eight-foot-tall wall,
14 acted reasonably under the circumstances.

15 Second, consistent with the majority of courts expressly to address the matter, a plaintiff
16 need not proffer expert testimony if the defendant-professional clearly acknowledges a breach of
17 the standard of care. Accord Restatement Third, Torts: Medical Malpractice § 6(a)(3) (Tentative
18 Draft No. 2, 2024) (stating that no expert testimony is required when the "provider admits
19 breaching the standard of care").

20 **Illustration:**

21 3. Same facts as Illustration 2, except that, at trial, Esteban's lawyer asks Giovanni
22 whether the eight-foot retaining wall was sufficient, and Giovanni admits that, given the
23 property's slope and surroundings, a taller wall was needed. Given Giovanni's admission,
24 Esteban need not present expert testimony on the professional standard for architects when
25 designing retaining walls. Nor must Esteban present expert testimony in order to prove that
26 Giovanni breached the governing standard.

27 Third, consistent with traditional negligence per se principles, if a professional violates an
28 applicable safety statute without excuse, the plaintiff does not need to provide expert testimony to
29 establish the standard of care or its breach. See Restatement Third, Torts: Liability for Physical
30 and Emotional Harm §§ 14 and 38. This exception does not apply if the relevant provision is, itself,
31 ambiguous or subject to inconsistent or shifting interpretations.

Illustration:

4. A state statute that governs the requirements for electrical work in commercial property provides that a “coil cabinet shall not be used as junction box, raceway, or distribution center.” In violation of this statute, Maurice, an electrician, installs a coil cabinet for use as a junction box, which creates a risk of fire. Thereafter, owing to Maurice’s action, a fire starts, burning Leondra. In the trial that ensues, Leondra is not required to present expert testimony on the professional standard of care for electricians; Leondra, instead, can point to Maurice’s statutory violation to show the applicable standard of care as well as its breach.

i. National standard. The black letter establishes that “[t]he standard of reasonable care that governs professionals or skilled tradespeople is the care regarded as competent among similar professionals or skilled tradespeople in the same or similar circumstances.” That, of course, raises the question of *which professionals* supply a baseline comparator. Are the professionals that provide a baseline against which the defendant-professional is judged those who practice nationally? Or, are they only those who practice in the defendant-professional’s particular state or community?

Historically, courts applied a bifurcated standard; they held certain professionals (typically, physicians) to a “locality standard” and others (typically, lawyers) to a broader, national standard. See Restatement Second, Torts § 299A, Comment *g* (creating this bifurcated standard while insisting that “[a] country doctor cannot be expected to have the equipment, facilities, experience, knowledge or opportunity to obtain it, afforded him by a large city”). Today, the division has faded. Most states hold all professionals, including physicians, to a national standard of care. See Restatement of the Law Third, The Law Governing Lawyers § 52, Comment *b*; Restatement Third, Torts: Medical Malpractice § 5, Comment *m* (Tentative Draft No. 2, 2024). Reflecting this same evolution, consistent with roughly half of the states, this Section adopts a national standard of care for all professionals and skilled tradespeople.

While a national standard of care is utilized, relevant circumstances that confronted the professional can and should be considered when assessing the professional’s conduct. And, of course, relevant circumstances can sometimes be informed by one’s location, including, for instance, the resources or options available in the particular location or setting and whether the professional is grappling with an emergency or crisis situation. Accord Restatement Third, Torts: Liability for Physical and Emotional Harm § 9 (“If an actor is confronted with an unexpected

emergency requiring rapid response, this is a circumstance to be taken into account in determining whether the actor’s resulting conduct is that of the reasonably careful person.”); Restatement Third, Torts: Medical Malpractice § 5(b) (Tentative Draft No. 2, 2024) (stating that, when assessing what “constitutes reasonable medical care in a specific situation,” one may consider the “resources available to the provider in the particular location or practice setting”).

j. Subpar or superior skills. Consistent with basic tort principles, professionals may not avoid tort liability by claiming that they have subpar skills. See Restatement Third, Torts: Liability for Physical and Emotional Harm § 12, Comment *b* (stating that the “fact that a person is below average in judgment, knowledge, or skills is generally ignored in considering whether the person is negligent”). Thus, professionals may not lower the standard of care by introducing evidence that their skills or knowledge are not up to snuff. Accord Restatement Third, Torts: Medical Malpractice § 5, Comment *i* (Tentative Draft No. 2, 2024) (“Providers may not diminish the standard of care simply by introducing evidence that their skills or knowledge are not up to par.”).

Illustration:

5. Hanjoon hires Tanay, an engineer, to install an elevator in his home. Soon after the elevator is installed, however, when Hanjoon is in the elevator, it falls to the bottom of the elevator shaft, causing serious injury. Hanjoon sues Tanay, and, in the ensuing litigation, Hanjoon introduces evidence that the elevator should have had three kinds of safety features but only had two, both of which failed. Tanay cannot defend himself by introducing evidence that he did not use the third safety feature because he did not know about it.

Conversely, a professional who *actually has* knowledge or skill superior to that of a reasonable person within the profession or trade must use that superior knowledge or skill. See Restatement Third, Torts: Liability for Physical and Emotional Harm § 12 (stating that if “an actor has skills or knowledge that exceed those possessed by most others, these skills or knowledge are circumstances to be taken into account in determining whether the actor has behaved as a reasonably careful person”); accord Restatement of the Law Third, The Law Governing Lawyers § 52, Comment *d* (“[A] lawyer must exercise any special skill that he has.”) (internal quotation marks omitted); Restatement Third, Torts: Liability for Economic Harm § 4, Comment *c* (“[P]rofessionals with special skills are expected to use them.”).

k. Representations regarding subpar or superior skills. Pursuant to Comment *j*, no accommodation is made for someone with sub-par skills, while a person with superior knowledge

or skill is required to exercise the knowledge or skill possessed. Sometimes, though, individuals make representations regarding their relative skill or knowledge, requiring further analysis.

If professionals represent that they are especially skilled or knowledgeable, they are held to the higher standard of care that reflects the representation. Accord Restatement of the Law Third, The Law Governing Lawyers § 52, Comment *d* (“[A] lawyer who represents to a client that the lawyer has greater competence or will exercise greater diligence than that normally demonstrated by lawyers in good standing undertaking similar matters is held to that higher standard, on which such a client is entitled to rely.”); Restatement Third, Torts: Medical Malpractice § 5, Comment *h* (Tentative Draft No. 2, 2024) (“[P]roviders who represent to patients or the public that they are especially skilled or knowledgeable can be held to a higher standard of care.”); Restatement Third, Torts: Liability for Economic Harm § 4, Comment *c* (“Professionals representing that they are specialists are held to a specialist’s standard. . . .”); Restatement Second, Torts § 299A, Comment *d* (“An actor undertaking to render services may represent that he has superior skill or knowledge, beyond that common to his profession or trade. In that event he incurs an obligation to the person to whom he makes such a representation, to have, and to exercise, the skill and knowledge which he represents himself to have.”). Professionals may also be held to a higher standard of care if their employers make representations on their behalf. Accord Restatement of the Law Third, The Law Governing Lawyers § 52, Comment *d*; Restatement Third, Torts: Medical Malpractice § 5, Comment *h* (Tentative Draft No. 2, 2024).

Also regarding representations, the Second Restatement of Torts § 299A provided a safe harbor for actors who make clear they have “less than the minimum skill common to the profession or trade,” requiring such actors to exercise “only the skill which he represents that he has.” *Id.*, Comment *d*. Thus, stated Comment *d*: “[A] layman who attempts to perform a surgical operation in an emergency, in the absence of any surgeon, and who makes it clear that he does not have the skill or knowledge of a surgeon, is not required to exercise such skill or knowledge.” This example is an extreme one and speaks more to the value of Good Samaritan protections and the emergency doctrine than the standards educated, licensed professionals should be held to. See Restatement Third, Torts: Liability for Physical and Emotional Harm § 9 (“If an actor is confronted with an unexpected emergency requiring rapid response, this is a circumstance to be taken into account in determining whether the actor’s resulting conduct is that of the reasonably careful person.”).

Perhaps for that reason, § 299A's exception was not adopted by companion Third Restatement provisions, and like those provisions, this Section declines to adopt it.

l. Two schools of thought. Where there are two schools of thought, or where there are alternative methods of acceptable conduct, the defendant-professional is to be judged by the professional standards of the group to which the professional belongs or professes to belong. As the Restatement Second of Torts § 299A, Comment *f* notes, "law cannot undertake to decide technical questions of proper practice over which experts reasonably disagree, or to declare that those who do not accept particular controversial doctrines are necessarily negligent in failing to do so."

Yet, as the Prosser treatise colorfully explains: "This does not mean . . . that any quack, charlatan or crackpot can set himself up as a 'school,' and so apply his individual ideas without liability." W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 32, at 187 (5th ed. 1984). To the extent defendants contend that their conduct conformed to an alternative school of thought, that alternative school must be well recognized and in line with the thought of a respectable minority within the profession.

Initially, the burden of producing sufficient evidence of the existence of a second school of thought rests with the defendant. Once the defendant-professional produces sufficient evidence to support a finding that a second school of thought exists, the plaintiff may respond by introducing evidence that the "second" approach is not, in fact, professionally acceptable, or showing that the professional did not competently comply with the "second" approach. The plaintiff bears the burden of persuasion, whether in demonstrating the (un)acceptability of the defendant's favored approach or the defendant's noncompliance therewith. When the evidence on these issues is not in reasonable dispute, then the respectable minority doctrine might form the basis for judgment as a matter of law for either the plaintiff or defendant. Accord Restatement Third, Torts: Medical Malpractice § 5, Comment *k* (Tentative Draft No. 2, 2024) (setting forth this procedural framework).

Illustrations:

6. When stopping a dog's blood flow to the dog's paw during surgery, Dr. Vitittoe, a veterinarian, always uses the method he learned 40 years earlier, which is to tighten a tourniquet near the surgical area. In recent decades, other veterinarians more often use other techniques such as clamping or cauterizing blood vessels for more complex surgeries of extended length. While conducting one such operation on Sadie's paw, Dr. Vitittoe's tourniquet seriously damages Sadie's paw, requiring its subsequent amputation. At trial,

Sadie’s owner’s only qualified expert testifies that, in his opinion as well as in the opinion of many other veterinarians, cauterizing or clamping blood vessels is superior to using a tourniquet. But, on cross-examination, the expert concedes that, in circumstances similar to Sadie’s, tourniquets remain an accepted option for this surgery, still used by a minority of competent veterinarians. Under the “two schools of thought” doctrine, Dr. Vitittoe’s use of a tourniquet does not, as a matter of law, breach the standard of care because plaintiff has offered no evidence that the alternative tourniquet technique is no longer regarded as competent.

7. Same facts as Illustration 6, except that Sadie’s owner’s qualified expert testifies that, in surgeries like Sadie’s, the older tourniquet technique is no longer regarded as an acceptable technique among competent veterinarians, while Dr. Vitittoe’s expert says the opposite. Due to the direct conflict in qualified expert testimony, it is for the factfinder to determine whether Dr. Vitittoe’s use of a tourniquet breached the standard of care—and, on this inquiry, plaintiff bears the burden of persuasion.

As noted above, even when the professional’s alternative approach is clearly acceptable, a factual dispute might still exist over whether a professional competently followed or applied the alternative. Thus, in Illustration 6, if Sadie’s owner’s qualified expert testifies that Dr. Vitittoe applied the tourniquet incompetently by using excessive force, the factfinder would resolve whether Dr. Vitittoe rendered competent treatment.

m. Trainees. The fact that a professional is still in training can sometimes justify classifying the professional as being in a different, lower-skilled, professional category than one who is fully trained. Prior to licensure, it may be appropriate to hold a professional in training to a relaxed “trainee” standard, as long as the trainee is not held out as being fully credentialed. Once professionals are licensed, however, they are held to the professional standard of care, even though they may be inexperienced or still in training. See Restatement Third, Torts: Medical Malpractice § 5, Comment *j* (Tentative Draft No. 2, 2024) (setting forth this standard for medical providers); Restatement Third, Torts: Liability for Physical and Emotional Harm § 12, Comment *b* (holding beginners to the same standard of care as their more experienced counterparts).

n. Ordinary versus professional negligence. Sometimes, a professional’s alleged breach involves a routine act (or the failure to engage in a routine act), distinct from an act that draws upon the professional’s specialized training or expertise. On those occasions, a professional’s

conduct is governed by the ordinary negligence standard of Restatement Third of Torts: Liability for Physical and Emotional Harm § 3, not the special professional negligence standard set forth in the black letter.

Illustrations:

8. Jasmine gets a flat tire and, needing to change her tire, pulls onto a very narrow shoulder near a construction area. As she exits her vehicle, another motorist driving by the construction area collides with her, causing serious injuries. Jasmine sues the engineer that designed the construction area, claiming that the construction area was poorly lit and accompanied by inadequate signage. The alleged negligence—i.e., what constitutes adequate lighting and signage—is not a routine task within the knowledge of laypeople. Designing a construction area is a specialized task requiring professional expertise. Therefore, the engineer’s conduct is to be evaluated pursuant to this Section’s professional standard of care.

9. Leroy hires Eddie, an engineer, to install a water line on his property. As Eddie drives up Leroy’s driveway, Eddie becomes distracted and runs over Leroy’s dog, Bubbles. Driving is a routine, rather than specialized, task. Hence, even though he is an engineer, Eddie’s driving will be assessed under the general negligence standard set forth in Restatement Third of Torts: Liability for Physical and Emotional Harm § 3, not the special professional negligence standard set forth by this Section.

o. Judge and jury. The judge must determine whether the defendant is a professional pursuant to Comment *d*, whether expert testimony is required pursuant to Comment *h*, and, if it is, who is qualified to furnish that expert testimony, and the existence of different schools of professional thought, per Comment *l*, when the defendant introduces such evidence. Then, the factfinder must resolve any disputed issues of material fact as to whether or not the conduct of the professional or skilled tradesperson complied with, or breached, the applicable standard of care. Accord Restatement Third, Torts: Medical Malpractice § 5, Comment *o* (Tentative Draft No. 2, 2024) (delineating a similar allocation of authority between judge and jury in cases involving medical providers).

REPORTERS’ NOTE

Comment a. History and scope. The Restatement Second of Torts § 299A (AM. L. INST. 1965) articulated a specialized standard of care for professionals and skilled tradespeople. That

provision has been superseded, albeit in a somewhat piecemeal fashion. See Restatement of the Law Third, The Law Governing Lawyers § 52, Comment *b* (AM. L. INST. 2000); Restatement Third, Medical Malpractice § 5 (AM. L. INST., Tentative Draft No. 2, 2024); Restatement Third, Torts: Liability for Economic Harm § 4, Comment *c* (AM. L. INST. 2020). This Section completes that process.

Many note that the professional standard of care can be seen as a particularized expression of the general tort law obligation that an individual must exercise the skill that the individual possesses. See Restatement Third, Torts: Liability for Physical and Emotional Harm § 12 (AM. L. INST. 2010); W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 32, at 185 (5th ed. 1984) (noting that it is well established that “if a person in fact has knowledge, skill, or even intelligence superior to that of the ordinary person, the law will demand of that person conduct consistent with it”); see also DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 284 (2023 update) (“Given a recognized risk, all reasonable persons should use the knowledge and skill at their disposal.”). In the words of the Wisconsin Supreme Court: “The profession or trade principle and the superior knowledge rule are closely related. Both doctrines recognize that a reasonable actor will use any relevant special knowledge or skill the actor possesses, including the knowledge and skill the person possesses on account of his or her occupation.” *Dakter v. Cavallino*, 866 N.W.2d 656, 667 (Wis. 2015).

Comment c. Terminology: “professional” as shorthand. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 32, at 185-186 (5th ed. 1984) (similarly discussing those who engage in “skilled trades” as falling under the rubric of “professional practice”).

Comment d. Definition of “profession” and “skilled trade.” Consistent with Comment *d*, most jurisdictions reserve the designation of “profession” or “skilled trade” for occupations featuring some combination of the following: specialized knowledge, skill, education, or training; that require a license or are specially regulated; that have an internal code of conduct; and that call on the individual to make complex discretionary judgments. This Section’s test for whether an occupation is a profession, articulated in Comment *d*, distills factors from case law and also echoes the parameters set forth in Restatement Third of Torts: Liability for Economic Harm § 4, Comment *b* (AM. L. INST. 2020). That provision provides: “In defining which occupational groups are ‘professionals,’ courts consider whether the practice of the occupation requires formal training and a license issued by a public body, whether the occupation has an internal code of conduct and discipline, and whether there is a need for complex discretionary judgments in carrying out the work.”

For discussion of specialized knowledge and skill, see *Lord of Shalford v. Shelley’s Jewelry, Inc.*, 127 F. Supp. 2d 779, 786 (W.D.N.C. 2000) (“‘[P]rofessional services’ has been defined by this Court to mean an act or service arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill. . . .”); *Riverstone Dev. Co. v. Garrett & Assocs. Appraisals, Inc.*, 195 So. 3d 251, 255-256 (Ala. 2015) (concluding that “real-estate appraisers are engaged in a profession requiring specialized knowledge and skill”); *Shimansky v. Clayton*, 2013 WL 1750795, at *3 (Del. Com. Pl. 2013) (“The work. . . required specialized

knowledge and skill. . . and is thus properly classified as ‘professional.’”); *Landaverde v. Navarro*, 189 A.3d 849, 864 (Md. Ct. Spec. App. 2018) (explaining that “[o]ccupations requiring peculiar skill” are held to professional standard of care); *Doble v. Lincoln Cnty. Title Co.*, 692 P.2d 1267, 1269 (Mont. 1985) (explaining that professionals have “special skill”); *Bixenmann v. Dickinson Land Surveyors, Inc.*, 882 N.W.2d 910, 914 (Neb. 2016) (“We have defined a ‘profession’ as a calling requiring specialized knowledge. . . .”) (internal quotation marks omitted); *Doe v. Am. Red Cross Blood Servs., South Carolina Region*, 377 S.E.2d 323, 326 (S.C. 1989) (describing professions as occupations in which people furnish “skilled services for compensation”).

For discussion of specialized education and training, see *Farmers All. Mut. Ins. Co. v. Naylor*, 480 F. Supp. 2d 1287, 1291 (D.N.M. 2007) (explaining that professionals possess “knowledge acquired through specialized intellectual training and study”); *Bixenmann*, 882 N.W.2d at 914 (defining professionals in part by the “long and intensive preparation” they undertake); *Sime v. Tvenge Assocs. Architects & Planners, P.C.*, 488 N.W.2d 606, 609 (N.D. 1992) (“In delineating between professions and nonprofessional vocations, we have noted that as a general rule, a profession is an occupation that requires a college degree in the specific field.”) (internal quotation marks omitted); *Racine Cnty. v. Oracular Milwaukee, Inc.*, 767 N.W.2d 280, 287 (Wis. Ct. App. 2009) (explaining that “a profession is identified by” inter alia “a requirement of extensive formal training and learning”).

For discussion of licensure, see, e.g., *Verition Partners Master Fund, Ltd. v. Cornell*, 2020 WL 2917258, at *4 (D. Del. 2020) (“[T]he parties against whom Delaware has recognized professional negligence causes of action . . . require a license to practice.”); *UPMC v. CBIZ, Inc.*, 2017 WL 4357984, at *18 (W.D. Pa. 2017) (“Clearly, an actuary falls within the scope of this rule due to the specialized skill, education, and certification/licensure of the profession.”); *Ferris & Salter, P.C. v. Thomson Reuters Corp.*, 889 F. Supp. 2d 1149, 1152-1153 (D. Minn. 2012) (explaining computer programmers are not professionals because, among other things, they are not licensed by the state); *Sunset Beach Invs., LLC v. Kimley-Horn & Assocs., Inc.*, 207 So. 3d 1012, 1015 (Fla. Dist. Ct. App. 2017) (“[T]he existence of a license is a valid barometer for determining whether a person is classified as a professional.”); *O’Dell v. Singh*, 2022 WL 1595040, at *3 (Mich. Ct. App. 2022) (“A civil action for malpractice may be maintained against any person professing or holding himself out to be a member of a state licensed profession.”) (internal quotation marks omitted); *Bixenmann*, 882 N.W.2d at 914 (“[T]he requirement of a license to practice one’s occupation, although not dispositive, strongly indicates that an occupation is a profession.”) (internal quotation marks omitted); *Ward v. Ernst & Young*, 435 S.E.2d 628, 632 (Va. 1993) (stating that professionals “are licensed”); *Baechler v. Beaunaux*, 272 P.3d 277, 279 (Wash. Ct. App. 2012) (“Doctors of Veterinary Medicine are professionals who, like other professionals, must be properly schooled, pass an examination, and then be licensed. . . .”); *Racine Cnty. v. Oracular Milwaukee, Inc.*, 767 N.W.2d 280, 287 (Wis. Ct. App. 2009) (explaining that “a profession is identified by” among other things “admission to practice by a licensing body”).

For discussion of whether or not the occupation is specially regulated, see, e.g., *Ferris & Salter, P.C.*, 889 F. Supp. 2d at 1152-1153 (explaining computer programmers are not

professionals because, among other things, they are not regulated); *Riverstone Dev. Co. v. Garrett & Assocs. Appraisals, Inc.*, 195 So. 3d 251, 255-256 (Ala. 2015) (finding it pertinent that appraisers are “regulated by the Alabama Real Estate Appraisers Board”); *Ward v. Ernst & Young*, 435 S.E.2d 628, 632 (Va. 1993) (stating that professionals “are regulated and disciplined in the performance of services”); *Hulse v. First Am. Title Co. of Crook Cnty.*, 33 P.3d 122, 139-140 (Wyo. 2001) (stating that professions are regulated).

A small number of courts also consider whether the occupation requires the exercise of judgment or discretion. See *Farmers All. Mut. Ins. Co.*, 480 F. Supp. 2d at 1290-1291 (stating the need for judgment and discretion strongly indicates a profession); *Command Commc’ns, Inc. v. Fritz Companies, Inc.*, 36 P.3d 182, 189 (Colo. App. 2001) (stating professions require the exercise of judgment); *Klein v. Catalano*, 437 N.E.2d 514, 525 (Mass. 1982) (stating professionals must exercise skilled judgment).

For illustration of how this test is properly applied, see *Dakter v. Cavallino*, 866 N.W.2d 656, 668-671 (Wis. 2015) (applying a test similar to Comment *d* and concluding that semi-trailer truck drivers are held to a “professional or trade” standard of care because, inter alia, drivers must be specially licensed and driving a semi-truck “requires acquired learning and aptitude developed by special training and experience”); *Baechler v. Beauniaux*, 272 P.3d 277, 279-280 (Wash. Ct. App. 2012) (similar regarding doctors of veterinary medicine).

Given the above, one might conclude that members of the clergy qualify as professionals subject to this Section. Yet, clergy are routinely excluded, as courts reason that the application of the “reasonable professional” standard to pastors, rabbis, imams, or priests would inevitably become enmeshed with complex and sensitive judgments. As one court has put it: “It would be impossible for a court or jury to adjudicate a typical case of clergy malpractice, without first ascertaining whether the cleric, in this case a Presbyterian pastor, performed within the level of expertise expected of a similar professional (the hypothetical ‘reasonably prudent Presbyterian pastor’), following his calling, or practicing his profession within the community.” *Schmidt v. Bishop*, 779 F. Supp. 321, 327 (S.D.N.Y. 1991); see, e.g., *Roppolo v. Moore*, 644 So. 2d 206, 208 (La. Ct. App. 1994) (observing that “this Court has no authority to determine or enforce standards of religious conduct and duty”). Of course, however, when members of the clergy behave negligently or engage in intentionally wrongful conduct, they can still be liable in tort—just not pursuant to this Section’s special “professional” standard.

As Comment *d* recognizes, in some states, a profession is defined by statute. When those statutes exist, of course, they control. Examples include COLO. REV. STAT. §§ 12-1.5-101 to -71-104 (listing service providers held to professional standard of care); MICH. COMP. LAWS ANN. § 600.2912 (defining those subject to professional malpractice action); N.J. STAT. ANN. § 2A:53A-26 (enumerating professions).

Simplifying matters slightly, some states supply a separate standard for professionals, while eliminating any independent discussion of “trades.” E.g., *Lite Cookies Ltd. v. Tassy & Assocs., Inc.*, 2011 WL 13162088, at *5 (D.N.M. 2011) (holding oven repair persons to be professionals, omitting any discussion of trades); *Doyle Wilson Stan Clauson Assocs., Inc. v.*

Coleman Bros. Const., LLC, 297 P.3d 1042, 1047 (Colo. App. 2013) (deciding land planning is not a profession and omitting discussion of trades); Bragg v. United States, 741 S.E.2d 90, 100 (W. Va. 2013) (holding that mine inspectors are professionals, while omitting discussion of trades); Triplett v. Jamison, 2010 WL 1815189, at *2-3 (Ky. Ct. App. 2010) (holding the work of an electrician to a professional standard of care, while omitting any discussion of trades).

The Restatement Third of Torts: Liability for Economic Harm § 4, Comment *b* (AM. L. INST. 2020), indicates, without discussion or elaboration, that skilled tradespeople are not subject to a specialized standard of care. To the extent that is the rule articulated in the Economic Harm Restatement for claims involving pure economic loss, that, of course, was not the rule articulated by the Second Restatement of Torts § 299A, and it is not the rule articulated by the vast majority of courts. As such, this Section declines to cordon off skilled tradespeople; those who work in skilled trades are subject to this Section’s special standard of care. E.g., John’s Heating Serv. v. Lamb, 46 P.3d 1024, 1037 (Alaska 2002) (“It is a general rule of law that, when a person holds himself out to the public in any particular employment, work, or trade, there is an implied engagement with those who may employ him that he and his employees in that trade or business possess that reasonable degree of knowledge and skill which is ordinarily possessed by others engaged in the same business or trade. . . .”); Sudberry v. City of Phoenix, 2015 WL 1516600, at *3 (Ariz. Ct. App. 2015) (“[O]ne who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities.”); Rice v. Rice, 2020 WL 4908096, at *2 (Del. Super. Ct. 2020) (“[O]ne who undertakes to render services in the practice of a profession or trade is always required to exercise the skill and knowledge normally held by members of that profession or trade in good standing in communities similar to this one.”); Balfour Beatty Infrastructure, Inc. v. Rummel Klepper & Kahl, LLP, 130 A.3d 1024, 1034 (Md. Ct. Spec. App. 2016) (“[O]ne who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities.”) (quoting Second Restatement of Torts § 299A); L.B.I., Inc. v. B & D Pump, Inc., 1998 WL 566650, at *3 (Minn. Ct. App. 1998) (restating standard of what a reasonably prudent tradesperson would do in a similar situation); Doupnik v. Usher Pest Control Co., 346 N.W.2d 699, 699 (Neb. 1984) (“Unless he represents that he has greater or less skill or knowledge, one who undertakes to render services in the practice of a trade is required to exercise the skill and knowledge normally possessed by members of that trade in good standing in similar communities.”); Sykes v. Propane Power Corp., 541 A.2d 271, 273-274 (N.J. Super. Ct. App. Div. 1988) (“The law is well-settled that one who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession in good standing in similar communities.”) (quotation marks omitted); Pontikis v. Coleman-Toll, LLC, 131 Nev. 1334, at *1 (Nev. Ct. App. 2015) (““One who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities.””) (quoting Second Restatement of Torts § 299A); Dakter v. Cavallino, 866 N.W.2d 656, 665 (Wis. 2015) (“Ordinarily, actors

engaged in a profession or trade must exercise the knowledge and skill that a reasonable member of that profession or trade would exercise under the same or similar circumstances.”); W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 32, at 185-186 (5th ed. 1984) (explaining that those who engage in “skilled trades” are assessed pursuant to the “professional” standard of care).

Comment e. The role of professionally accepted practice. For discussion, see *Collins Co. v. City of Decatur*, 533 So. 2d 1127, 1134 (Ala. 1988) (“When the engineer’s actions meet the standard of those skilled and experienced in that profession, the engineer has met his responsibility.”); *Marquis Towers v. Highland Group*, 593 S.E.2d 903, 906 (Ga. Ct. App. 2004) (“Expert testimony is required [in suits involving professionals] because the court and jury are not permitted to speculate as to the standard against which to measure the acts of the professional in determining whether he exercised reasonable degree of care.”) (punctuation and citation omitted); *Balfour Beatty Infrastructure, Inc. v. Rummel Klepper & Kahl, LLP*, 130 A.3d 1024, 1034 (Md. Ct. Spec. App. 2016), *aff’d*, 155 A.3d 445 (Md. 2017) (“[T]he professional . . . is held to the standard of care that prevails in his or her profession.”).

Comment f. Relationship of “custom” to this Section’s “reasonable professional” standard. Some courts articulate a standard in line with *Comment f.* See, e.g., *Harbor Ins. Co. v. Schnabel Found. Co.*, 992 F. Supp. 419, 423 (D.D.C. 1997) (observing that professionals must “exercise the degree of skill and specialized knowledge as expected of a member of that profession acting under similar circumstances”); *Brennan v. St. Louis Zoological Park*, 882 S.W.2d 271, 273 (Mo. Ct. App. 1994) (“In a professional malpractice case, the plaintiff must present the testimony of a qualified professional as to the degree of care and skill that is generally accepted by those engaged in the profession.”); Pa. Suggested Standard Civil Jury Instructions 15.00 (“Negligence is the failure to use the ordinary care and skill of a person in that profession.”); see also Cheryl M. Bailey, *Veterinarian’s Liability for Malpractice*, 71 A.L.R.4th 811 § 2[a] (originally published in 1989) (“The gravamen of such an action [for a veterinarian’s breach of the duty of care] is that in providing veterinary care, the veterinarian failed to use such reasonable skill, diligence, and attention as might ordinarily have been expected of careful, skillful, and trustworthy persons in the profession.”).

Many courts and model jury instructions articulate a slightly different standard, however, keyed more expressly to custom (i.e., how the professionals actually behave, on a day-to-day basis). See, e.g., *Glass v. Mecham*, 2014 WL 12042521, at *1 (W.D. Okla. 2014) (“In Oklahoma, negligence is the failure to exercise ordinary care, which is that degree of care which ordinarily prudent persons engaged in the same kind of business usually exercise under similar circumstances.”) (cleaned up); *Vista del Mar Condominiums, LLC v. Nichols Brosch Wurst Wolfe & Assocs., Inc.*, 2013 WL 625455, at *3 (D.S.C. 2013) (keying the inquiry on whether the engineer defendants displayed “the degree of knowledge, care, and skill ordinarily used by architectural and engineering professionals”); *Noble v. Worthy*, 378 A.2d 674, 676 (D.C. 1977) (“[Professionals are required] to employ that degree of skill and care ordinarily used by their colleagues”); *Bragg v. United States*, 741 S.E.2d 90, 100 (W. Va. 2013) (“[A] private inspector who inspects a work premises for the purpose of furthering the safety of employees who work on said premises owes a duty of care to those employees to conduct inspections with ordinary skill, care, and diligence

commensurate with that rendered by members of his or her profession.”); *Garaman, Inc. v. Williams*, 912 P.2d 1121, 1123 (Wyo. 1996) (“[A]n engineer must exercise such care, skill, and diligence as others who are engaged in the engineering profession would ordinarily exercise under similar circumstances.”); Mass. Superior Court Civil Practice Jury Instructions § 18.13 (“An architect’s duty is measured by the rule of ordinary and reasonable skill usually exercised by a person in that profession.”).

For a cogent discussion of the subtle difference between the two standards, albeit in the medical realm, see Philip G. Peters, Jr., *The Quiet Demise of Deference to Custom: Malpractice Law at the Millennium*, 57 WASH. & LEE L. REV. 163 (2000):

[T]he reasonable physician standard potentially differs from a custom-based standard of care in one crucial respect. It asks what a reasonable physician would have done, not what is usually done. Juries still will stand in the shoes of the physician but only to hold the defendant to the standard of care expected of a person with special skills, not to immunize physicians who follow the pack. As a consequence of this change, juries may hear jury instructions describing the standard of care in terms of reasonability, rather than compliance with custom, and judges may permit plaintiffs to reach a jury without proving that the defendant failed to do what most physicians do.

Id. 183. For an argument that the slightly different standard this Section adopts is, for many reasons, superior (at least in the medical realm), see Philip G. Peters, Jr., *Modernizing the Medical Malpractice Standard of Care*, 52 SW. L. REV. 465, 470-473 (2024).

As Comment *f* notes, other Restatements’ articulations feature slight variations from the medical standard above and seem to hew more closely to custom, rather than the reasonable professional standard, perhaps because the law regarding professionals other than medical professionals is less developed. See Restatement Third, Liability for Economic Harm § 4, Comment *c* (AM. L. INST. 2020) (“A member of a profession is required to exercise the skill and employ the knowledge normally possessed by members of the profession in similar circumstances. In other words, the trier of fact compares the defendant’s performance to the typical performance of competent members of the defendant’s profession.”); id., Illustration 1 (stating that the standard is “how [professionals] of competent judgment would have customarily” acted under the circumstances); Restatement of the Law Third, The Law Governing Lawyers § 52(1) (AM. L. INST. 2000) (“[A] lawyer who owes a duty of care must exercise the competence and diligence normally exercised by lawyers in similar circumstances.”); Restatement Second, Torts § 299A (AM. L. INST. 1965) (“[O]ne who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities.”).

The handwashing example, unfortunately, has some basis in reality. See Lisa Schencker, *Doctors and Nurses Clean their Hands Only Half as Much as they Should*, CHI. TRIB., Dec 26, 2019.

Comment *g*. *Using versus possessing professional skills*. Consistent with Comment *g*, courts tend to focus on how a professional behaved—not merely what the professional was taught.

See *Linck v. Barokas & Martin*, 667 P.2d 171, 174 n.4 (Alaska 1983) (observing that “the duty of the professional [is] to use such skill, prudence, and diligence as other members of the profession commonly possess and exercise”); *Thomson v. Canyon*, 129 Cal. Rptr. 3d 525, 532 (Cal. Ct. App. 2011) (“The elements of a cause of action for professional negligence are failure to use the skill and care that a reasonably careful professional operating in the field would have used in similar circumstances”); *Pellet v. Keller Williams Realty Corp.*, 172 A.3d 283, 292 (Conn. 2017) (“[Professionals must] exercise that degree of skill and learning commonly applied under all the circumstances in the community by the average prudent reputable member of the profession”); *Noble v. Worthy*, 378 A.2d 674, 676 (D.C. 1977) (“[Professionals are required] to employ that degree of skill and care ordinarily used by their colleagues”); *Rice v. Rice*, 2020 WL 4908096, at *2 (Del. Super. Ct. 2020) (“One who undertakes to render services in the practice of a profession or trade is always required to exercise the skill and knowledge normally held by members of that profession or trade in good standing”). Accord Restatement Third, Torts: Medical Malpractice § 5, Comment *d* (AM. L. INST., Tentative Draft No. 2, 2024) (“Malpractice is based on whether medical professionals *use* appropriate care, skill, and knowledge.”).

Not all states agree, however. E.g., *Evans v. Hood Corp.*, 211 Cal. Rptr. 3d 261, 284 (Cal. Ct. App. 2016) (“As a general matter, those undertaking to render expert services in the practice of a profession or trade are required to have and apply the skill, knowledge and competence ordinarily possessed by their fellow practitioners under similar circumstances, and failure to do so subjects them to liability for negligence.”) (internal quotation marks omitted).

As Comment *g* recognizes, skill and training remain relevant in many circumstances. For instance, evidence of a professional’s training, talent, or experience may make it more or less likely that the professional in fact behaved competently—because if a professional was never trained to perform a certain task, it is logically less likely that the professional, in fact, performed that task competently under the circumstances. In addition, a professional’s skill and training may inform the determination of whether to hold the professional to a higher standard of care. See Comment *j*.

Comment h. Expert testimony and key exceptions. It is exceptionally well established that expert testimony is usually required to establish the professional standard of care. See, e.g., *Montany v. Univ. of New England*, 858 F.3d 34, 37-38 (1st Cir. 2017) (applying Maine law) (“[E]xpert testimony is ordinarily required to establish the duty and breach elements in a negligence action against a [list of professionals].”); *Nedeau v. Armstrong*, 2011 WL 849744, at *4 (E.D. Wash. 2011) (“Expert testimony is usually required to establish the standard of care in professional negligence cases.”); *Shidler v. CVS Pharmacy Inc.*, 2007 WL 601748, at *3 (N.D. Ind. 2007) (“In order for the jury to know if a professional has complied with the applicable standard of care, a party must present expert testimony establishing that standard of care.”); *Aetna Cas. & Sur. Co. v. Leo A. Daly Co.*, 870 F. Supp. 925, 936 (S.D. Iowa 1994) (“The negligence of a professional must ordinarily be shown by expert testimony.”); *Collins Co. v. City of Decatur*, 533 So. 2d 1127, 1134 (Ala. 1988) (“Alabama law requires that expert testimony establish the appropriate standard of care that professionals, such as architects and engineers, must exercise.”); *Mundt v. Frank B. Hall, & Co.*, 1992 WL 12549977, at *3 (Alaska 1992) (“Generally, professional malpractice cases require

expert evidence to establish the required standard of care.”); *Hunter Cont. Co. v. Superior Ct. In & For Cnty. of Maricopa*, 947 P.2d 892, 894-895 (Ariz. Ct. App. 1997) (“Expert testimony is necessary to prove professional negligence when the question to be determined is strictly within the special and technical knowledge of the profession and not within the knowledge of the average layman.”) (internal quotation marks omitted); *Corcoran v. Sanner*, 854 P.2d 1376, 1379 (Colo. App. 1993) (“[B]ecause in most cases of professional negligence the applicable standard is not within the common knowledge and experience of ordinary persons, such standard must be established by expert testimony.”); *Pellet v. Keller Williams Realty Corp.*, 172 A.3d 283, 299 (Conn. App. Ct. 2017) (“It is well established that, [i]f the determination of the standard of care requires knowledge that is beyond the experience of an ordinary fact finder, expert testimony will be required.”) (alteration in original, internal quotation marks omitted); *Rice v. Rice*, 2020 WL 4908096, at *2 (Del. Super. Ct. 2020) (“[A]s a general rule the standard of care applicable to a professional can only be established through expert testimony.”) (internal quotation marks omitted); *City Express, Inc. v. Express Partners*, 959 P.2d 836, 838 (Haw. 1998) (“In a claim for professional negligence, [a professional’s] standard of care must be established by expert testimony, and failing such expert testimony a prima facie case of negligence has not been established. . . .”); *Colburn v. Mario Tricoci Hair Salons & Day Spas, Inc.*, 972 N.E.2d 266, 276 (Ill. App. Ct. 2012) (“Generally, expert testimony is necessary to prove the standard of care in a professional negligence case.”); *Boland-Maloney Lumber Co. v. Burnett*, 302 S.W.3d 680, 686 (Ky. Ct. App. 2009) (“[A]n expert witness is required to establish the standard of care in professional negligence cases in Kentucky.”); *Schultz v. Bank of Am., N.A.*, 990 A.2d 1078, 1086 (Md. 2010) (“Where the plaintiff alleges negligence by a professional, expert testimony is generally necessary to establish the requisite standard of care owed by the professional.”); *LeBlanc v. Logan Hilton Joint Venture*, 974 N.E.2d 34, 44 (Mass. 2012) (“Expert testimony is generally needed to establish this professional standard of care.”); *Bixenmann v. Dickinson Land Surveyors, Inc.*, 886 N.W.2d 277, 279 (Neb. 2016) (“We conclude that the act complained of qualified as a professional act and required expert testimony to establish the standard of care.”); *Boesiger v. Desert Appraisals, LLC*, 444 P.3d 436, 439 (Nev. 2019) (“[E]xpert testimony is typically required to establish the standard of care governing the performance of a [professional].”); *Lemay v. Burnett*, 660 A.2d 1116, 1117 (N.H. 1995) (“This principle is most commonly invoked in professional malpractice cases; courts generally require expert testimony in such cases to prove a breach of the applicable standard of care.”); *Buke, LLC v. Cross Country Auto Sales, LLC*, 331 P.3d 942, 954 (N.M. Ct. App. 2014) (“Expert testimony is generally necessary to explain the applicable standard of conduct, and a plaintiff’s failure to present expert testimony to support a professional malpractice claim is usually fatal.”); *Associated Indus. Contractors, Inc. v. Fleming Eng’g, Inc.*, 590 S.E.2d 866, 870 (N.C. Ct. App. 2004) (“Ordinarily, expert testimony is required to establish the standard of care.”); *Staph v. Sheldon*, 2009 WL 94545, at *3 (Ohio Ct. App. 2009) (“Expert testimony is required to establish the standard of care. . . .”); *Merlini v. Gallitzin Water Auth.*, 980 A.2d 502, 506 (Pa. 2009) (“[T]he most distinguishing feature of professional malpractice is the need for expert testimony to clarify complex issues for a jury of laypersons. . . .”); *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*,

570 S.E.2d 197, 203 (S.C. Ct. App. 2002) (“[E]xpert testimony is required in a professional negligence action to establish both the standard of care and the defendant’s failure to conform to that standard.”); *Mid-W. Elec., Inc. v. DeWild Grant Reckert & Assocs. Co.*, 500 N.W.2d 250, 255 (S.D. 1993) (“Expert testimony is needed to establish the standard of care of a professional. . . .”); *Ling v. BDA&K Bus. Servs., Inc.*, 261 S.W.3d 341, 348 (Tex. App. 2008) (“In a professional malpractice case, the standard of care and the breach of the standard are established by expert testimony.”); *Seaward Int’l, Inc. v. Price Waterhouse*, 391 S.E.2d 283, 287 (Va. 1990) (“[E]xpert testimony is required to establish the appropriate professional standard. . . .”); *Garaman, Inc. v. Williams*, 912 P.2d 1121, 1123 (Wyo. 1996) (“When professional negligence is asserted, we generally require the plaintiff to present expert witness testimony which reveals the standard of care. . . .”).

Companion provisions of the Third Restatement of Torts and the Law Governing Lawyers are in accord. See Restatement of the Law Third, The Law Governing Lawyers § 52, Comment g (AM. L. INST. 2000) (“[A] plaintiff alleging professional negligence . . . ordinarily must introduce expert testimony concerning the care reasonably required in the circumstances of the case and the lawyer’s failure to exercise such care.”); Restatement Third, Torts: Medical Malpractice § 6(a) (AM. L. INST., Tentative Draft No. 2, 2024) (explaining that, in most instances, “[b]reach of the medical standard of care . . . must be established through the testimony of a qualified expert”); Restatement Third, Torts: Liability for Economic Harm § 4, Comment c (AM. L. INST. 2020) (“A plaintiff suing a professional for negligence must provide expert testimony to support the claim if it depends on knowledge, experience, or judgment not commonly possessed by jurors.”).

Also consistent with Comment h, the vast majority of jurisdictions acknowledge that expert testimony is not required if the allegedly negligent act is within the common understanding of the layperson or is so apparent or obvious that a layperson can recognize it. For discussion of this uncontroversial carve-out, see, e.g., *Trishan Air, Inc. v. Fed. Ins. Co.*, 2008 WL 5532026, at *5 (C.D. Cal. 2008) (“The standard of care applicable to a given profession must be determined from the testimony of experts, unless the conduct involved is within the common knowledge of laymen.”); *Barna v. United States*, 89 F. Supp. 2d 983, 1000 (N.D. Ill. 1999) (“[I]f the . . . actions performed [are] so common that a lay person can readily appraise it, no professional expert testimony is required.”); *Mundt v. Frank B. Hall, & Co.*, 1992 WL 12549977, at *3 (Alaska 1992) (“[E]xpert testimony is not required where the subject of inquiry is one of such common knowledge that men of ordinary education could reach a conclusion as intelligently as the witness.”) (internal quotation marks omitted); *Riverstone Dev. Co. v. Garrett & Assocs. Appraisals, Inc.*, 195 So. 3d 251, 258 (Ala. 2015) (“[N]o expert testimony was necessary to establish a breach of the standard of care in that respect because her want of skill and/or lack of care is so apparent that it can be understood by any layperson.”); *Baumgarten v. Coppage*, 15 P.3d 304, 307 (Colo. App. 2000) (“[W]hen subject matter of claim is within common knowledge of ordinary persons, expert testimony is not required.”); *Osborn v. City of Waterbury*, 220 A.3d 1, 7 (Conn. 2019) (“[E]xpert testimony is not required because the alleged claim of error involves a task that is within the common knowledge of a layperson.”); *Nat’l R.R. Passenger Corp. v. McDavitt*, 804 A.2d 275, 285

(D.C. 2002) (explaining that expert testimony not required when the allegedly negligent conduct is “within the realm of common knowledge and everyday experience”); *Colburn v. Mario Tricoci Hair Salons & Day Spas, Inc.*, 972 N.E.2d 266, 276 (Ill. App. Ct. 2012) (“Courts have recognized two exceptions to this rule: where the professional’s conduct is so grossly negligent, or the procedure so common, that the jury can readily appraise it without the need for expert testimony.”) (internal quotation marks omitted); *Boland-Maloney Lumber Co. v. Burnett*, 302 S.W.3d 680, 686 (Ky. Ct. App. 2009) (explaining that no expert testimony is required if “the standard is within the general or common knowledge of laypersons”); *LeBlanc v. Logan Hilton Joint Venture*, 974 N.E.2d 34, 44 (Mass. 2012) (“[W]here the malpractice ‘is so gross or obvious that laymen can rely on their common knowledge to recognize or infer negligence,’ . . . we [do] not require expert testimony.”) (internal citations omitted); *City of Huntington Woods v. Orchard, Hiltz & McCliment, Inc.*, 2012 WL 1649782, at *2 (Mich. Ct. App. 2012) (“[W]here the claimed negligence is a matter of common knowledge and interpretation . . . expert testimony [is] not required.”); *Bixenmann v. Dickinson Land Surveyors, Inc.*, 882 N.W.2d 910, 916 (Neb. 2016) (“Under the common knowledge exception, a party may make a prima facie case of professional negligence even without expert testimony in cases where . . . the alleged negligence may be presumed to be within the comprehension of laypersons.”); *Daniel, Mann, Johnson & Mendenhall v. Hilton Hotels Corp.*, 642 P.2d 1086, 1087 (Nev. 1982) (“It is well settled that the standard of care must be determined by expert testimony unless the conduct involved is within the common knowledge of laypersons.”); *Polyzos v. Cotrupi*, 563 S.E.2d 775, 778 (Va. 2002) (“We have held that expert testimony is unnecessary when the alleged negligent acts or omissions of certain professionals clearly lie within the range of the common knowledge and experience. . . .”); *Coll v. Johnson*, 636 A.2d 336, 338 (Vt. 1993) (“[E]xpert testimony is not required where the alleged violation is so apparent it may be understood by a lay person.”); *Garaman, Inc. v. Williams*, 912 P.2d 1121, 1124 (Wyo. 1996) (“[E]xpert testimony is not required when the professional’s care was so obviously wanting in reasonable skill that laymen would discern it.”) (internal quotation marks omitted); 3 FOWLER V. HARPER, FLEMING JAMES, JR. & OSCAR S. GRAY, HARPER, JAMES AND GRAY ON TORTS § 17.1, at 611 (3d ed. 2007) (“[W]here the standard of care is usually that of the profession, expert testimony is required to make a prima facie case unless the negligence is so grossly apparent that a layman would have no difficulty recognizing it.”) (quotation marks omitted).

Companion Restatement provisions are in accord. See Restatement of the Law Third, The Law Governing Lawyers § 52, Comment g (AM. L. INST. 2000) (“[E]xpert testimony is unnecessary when it would be plain to a nonlawyer. . . that the lawyer’s acts constitute negligence. . . .”); Restatement Third, Torts: Liability for Economic Harm § 4, Comment c (AM. L. INST. 2020) (“On occasion, however, a professional’s negligence may be so evident that it can be assessed by jurors on the basis of common knowledge.”); Restatement Third, Torts: Medical Malpractice § 6(a)(2) (AM. L. INST., Tentative Draft No. 2, 2024) (explaining that no expert testimony is needed if “[t]he provider’s breach is a matter of common knowledge or is otherwise a matter that lay factfinders are competent to decide without the need for expert testimony”).

In addition, consistent with Comment *h*, the majority of states expressly to consider the matter acknowledge that a defendant's own admission of violating the standard of care excuses the need for expert testimony. See *Crosby v. DeMeyer*, 494 S.E.2d 568, 570 (Ga. Ct. App. 1997) (“[I]f the defendant himself testifies that he should have performed . . . an act which the evidence shows he did not perform, . . . the case may become a clear and palpable case of negligence and proof of a professional standard is not required. . . . Given Crosby’s and his attorney’s admissions, the jury was authorized to find for plaintiffs without the necessity of expert testimony regarding the standard of care.”) (internal citations and quotation marks omitted); *Dave Lucas Co. v. Lewis*, 666 S.E.2d 576, 580 (Ga. Ct. App. 2008) (“[I]f the defendant himself testifies that he should have performed and did perform an act which the evidence shows he did not perform, and if causation is shown, the case may become a clear and palpable case of negligence and proof of a professional standard is not required.”) (internal quotation marks omitted); *Taake v. WHGK, Inc.*, 592 N.E.2d 1159, 1171 (Ill. App. Ct. 1992) (“[D]uty and breach of that duty may be inferred from the defendant’s own testimony.”); see also *W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS* § 32, at 188 n.49 (5th ed. 1984) (“The necessary expert testimony may come from the defendant himself.”); cf. *Garaman, Inc. v. Williams*, 912 P.2d 1121, 1124 (Wyo. 1996) (declining to “decide whether, as a general rule, a defendant’s testimony may be used to establish the appropriate standard of care” because, here, the defendant architect’s testimony was “too general to be considered as establishing an appropriate standard of care”); accord *Restatement Third, Torts: Medical Malpractice* § 6(a)(3) (AM. L. INST., Tentative Draft No. 2, 2024) (explaining that no expert testimony is needed to establish breach if “[t]he provider admits breaching the standard of care”).

Finally, a small number of states have permitted applicable statutes or clear industry guidelines to establish the standard of care for a professional in lieu of expert testimony. See *Hice v. Lott*, 223 P.3d 139, 143 (Colo. App. 2009) (“Nor is expert testimony required if a legislative enactment or administrative rule establishes the specific standard of care.”); *Georgia Real Est. Appraisers Bd. v. Krouse*, 681 S.E.2d 737, 742 (Ga. Ct. App. 2009) (“To the extent that these statutes and regulations clearly and unambiguously express the professional standards governing an appraiser’s conduct, no expert testimony was necessary to establish the standards. . . .”); *Bartenfeld v. Chick-fil-A, Inc.*, 815 S.E.2d 273, 278 (Ga. Ct. App. 2018) (“To avoid the requirement of presenting explanatory expert testimony . . . the plaintiff must show that the standards were authoritative and mandatory. . . . In addition, the standards must clearly and unambiguously express the applicable standard of care, and the defendant’s conduct must be so blatant that it clearly violates the standards.”) (internal citations omitted); cf. *Garaman, Inc.*, 912 P.2d at 1124 (declining to hold that a plaintiff was relieved of an obligation to proffer expert testimony where the architect allegedly failed to comply with an applicable building code, because the code itself was difficult to interpret and subject to shifting interpretations).

Comment i. National standard. Approximately half of courts endorse a national, rather than local, standard of care. E.g., *KMC Acquisition Corp. v. Escoc Indus. Mech., Inc.*, 2018 WL 1528210, at *6 (M.D. Ga. 2018) (accepting expert testimony as to national standard for engineers); *Bell v. Jones*, 523 A.2d 982, 988 (D.C. 1986) (“[W]e hold that the standard of care by which the

professional acts of surveyors are measured is a national standard, not a local or regional one.”); *Lumbermens Mut. Cas. Co. v. Thornton*, 92 S.W.3d 259, 268 (Mo. Ct. App. 2002) (requiring auditor to conform to national standards); *Boesiger v. Desert Appraisals, LLC*, 444 P.3d 436, 439 (Nev. 2019) (accepting national standard for appraisers).

Approximately half of states still explicitly require professionals to conform to a local or community standard of care. See *Vista del Mar Condominiums, LLC v. Nichols Brosch Wurst Wolfe & Assocs., Inc.*, 2013 WL 625455, at *3 (D.S.C. 2013) (explaining that, while medical providers are evaluated pursuant to a national standard of care, “[o]ther professional negligence claims . . . are limited to a statewide standard of care under South Carolina law”); *Dale K. Barker Co., PC v. Sumrall*, 2012 WL 13024410, at *21 (D. Utah 2012) (stating professionals must exercise skill used by professionals “in similar communities”); *Sudberry v. City of Phoenix*, 2015 WL 1516600, at *3 (Ariz. Ct. App. 2015) (stating professionals must exercise skill used by professionals “in similar communities”); *Pellet v. Keller Williams Realty Corp.*, 172 A.3d 283, 292-293 (Conn. Ct. App. 2017) (stating that professionals must exercise skill used by professionals “in the community”); *Rice v. Rice*, 2020 WL 4908096, at *2 (Del. Super. Ct. 2020) (stating professionals must exercise skill used by professionals in similar communities); *Sunset Beach Invs., LLC v. Kimley-Horn & Assocs., Inc.*, 207 So. 3d 1012, 1014 (Fla. Dist. Ct. App. 2017) (stating professionals must exercise skill used by professionals “in the community”); *Schiltz v. Cullen-Schiltz & Assocs., Inc.*, 228 N.W.2d 10, 17 (Iowa 1975) (stating professionals must exercise skill used by professionals “in similar communities”); *Davis v. Lafayette C. Greischar Living Trust*, 308 P.3d 31 (Kan. Ct. App. 2013) (stating professionals must exercise skill used by professionals in the same or similar communities); *Greater Lafourche Port Comm’n v. James Constr. Grp., L.L.C.*, 104 So. 3d 84, 89 (La. Ct. App. 2012) (“[T]he burden is upon plaintiff to establish the degree of care and skill required by local standards of the professional involved. . . .”); *Copeland v. Richards*, 2021 WL 137256, at *4 (Mich. Ct. App. 2021) (“[E]xpert testimony was required to establish the standard of care required of an accountant in the same or similar localities. . . .”); *Mary Imogene Bassett Hosp. v. Cannon Design, Inc.*, 9 N.Y.S.3d 687, 690 (App. Div. 2015) (predicating a finding of negligence on “credible expert testimony that [the] defendants deviated from locally prevailing standards of practice”) (alteration in original); *Sykes v. Propane Power Corp.*, 541 A.2d 271, 273-274 (N.J. Super. Ct. App. Div. 1988) (“The law is well-settled that ‘[o]ne who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession in good standing in similar communities.’”); *Balfour Beatty Infrastructure, Inc. v. Rummel Klepper & Kahl, LLP*, 130 A.3d 1024, 1034 (Md. Ct. Spec. App. 2016) (stating professionals must exercise skill used by professionals “in similar communities”); *Overland Constructors, Inc. v. Millard Sch. Dist., Sch. Dist. No. 17, Douglas Cnty.*, 369 N.W.2d 69, 76 (Neb. 1985) (stating professionals must exercise skill used by professionals in the “same or similar communities”); *Swanson v. Larson*, 967 N.W.2d 778, 784 (N.D. 2021) (stating professionals must exercise skill used by professionals “in the community”); *Delaney v. Clifton*, 41 P.3d 1099, 1103 (Or. Ct. App. 2002) (stating professionals must exercise skill used by professionals “in the community”); *WATCO v.*

Pickering Env't Consultants, Inc., 2007 WL 1610093, at *19 (Tenn. Ct. App. 2007) (“Tennessee courts have adopted the ‘same or similar community’ standard of care with respect to professional negligence.”); Madera W. Condo. Ass’n v. Marx/Okubo, 175 Wash. App. 1032, at *5 (Wash. Ct. App. 2013) (stating architects must use skill of reasonable architect “in the same locality”).

Like Comment *i*, companion Restatement provisions apply a national standard but also expressly submit that local conditions and resource constraints are “circumstances” that may properly inform the factfinder’s assessment of the professional’s conduct. See Restatement of the Law Third, The Law Governing Lawyers § 52, Comment *b* (AM. L. INST. 2000); Restatement Third, Torts: Medical Malpractice § 5, Comments *g* & *m* (AM. L. INST., Tentative Draft No. 2, 2024); see also, e.g., Troutwine Ests. Dev. Co., LLC v. Comsub Design & Eng’g, Inc., 854 N.E.2d 890, 900-902 (Ind. Ct. App. 2006) (stating Indiana rejects the “similar locality” rule but considers locality as part of the “same or similar circumstances” inquiry, including that the professional’s conduct was subject to “standards embodied in [the county’s] local regulations and rules”).

Comment j. Subpar or superior skills. It is well established that an actor’s below average or subpar skills are irrelevant when determining whether the actor was negligent. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 32, at 184 (5th ed. 1984); accord Restatement Third, Torts: Liability for Physical and Emotional Harm § 12, Comment *b* (AM. L. INST. 2010); Restatement Third, Torts: Medical Malpractice § 5, Comment *i* (AM. L. INST., Tentative Draft No. 2, 2024) (“Providers may not diminish the standard of care simply by introducing evidence that their skills or knowledge are not up to par.”).

Likewise, it is well established that an actor must use the skills that the actor possesses. As the Prosser treatise explains: “Experienced . . . construction inspectors . . . must use all care which is reasonable in light of their superior learning and experience, and any special skills, knowledge, or training they may personally have over and above what is normally possessed by persons in the field.” W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 32, at 185 (5th ed. 1984). Accord *Dakter v. Cavallino*, 866 N.W.2d 656, 667 (Wis. 2015) (“An actor engaged in a profession or trade who has knowledge or skill superior to that of a reasonable person within that profession or trade must employ such knowledge or skill in order to meet the standard of ordinary care.”); DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 134 (2023 update) (“A physician who knows more than a layman must use that additional knowledge in the practice of medicine. But the point reaches even further. A physician who knows more than other physicians is also expected to use that special knowledge. Physicians who know more must not stop short of appropriate treatment on the ground that other physicians would have done no better. The principle applies equally to any kind of skill or experience. A person with special knowledge about the operation of earth scrapers is expected to use that knowledge to avoid injury to others.”); Restatement Second, Torts § 189 (AM. L. INST. 1965) (“The actor is required to recognize that his conduct involves a risk of causing an invasion of another’s interest if a reasonable man would do so while exercising . . . (b) such superior attention, perception, memory, knowledge, intelligence, and judgment as the actor himself has.”); *id.*, Illustration 14 (“A, a surgeon, is about to perform an operation. Because of long experience with such operations, A has the superior judgment which

should enable him to recognize that it would be very dangerous to use a certain anesthetic upon the particular patient. Nevertheless A uses the anesthetic in the operation, and as a result the patient is injured. A is negligent, although an ordinarily competent and experienced surgeon would not have recognized the risk.”); id. § 290, Comment *f* (“If the actor has special knowledge, he is required to utilize it”); Joseph King, *Reconciling the Exercise of Judgment and the Objective Standard of Care in Medical Malpractice*, 52 OKLA. L. REV. 49, 78-79 (1999) (“Physicians should owe a duty not only to satisfy objectively defined, reasonable, and professionally acceptable standards, but also . . . to give their patients the benefit of any superior knowledge or special insights they actually possess even if beyond that of their professional peers.”).

Comment k. Representations regarding subpar or superior skills. Those who represent they have greater skill or knowledge than that common to the profession or trade incur an obligation to exercise the skill and knowledge they represented themselves as having. See Restatement Second, Torts § 299A, Comment *d* (AM. L. INST. 1965); Restatement Third, Torts: Medical Malpractice § 5, Comment *h* (AM. L. INST., Tentative Draft No. 2, 2024); Restatement of the Law Third, The Law Governing Lawyers § 52, Comment *d* (AM. L. INST. 2000); accord W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 32, at 187 (5th ed. 1984) (explaining that when a professional “represents himself as having greater skill . . . the standard is modified accordingly”).

Comment l. Two schools of thought. Comment *l* is drawn from the Restatement Second of Torts § 299A, Comment *f*. Offering further perspective, the Prosser treatise explains:

Where there are different schools of . . . thought, and alternative methods of acceptable treatment, it is held that the dispute cannot be settled by the law, and the [professional] is entitled to be judged according to the tenets of the school the [professional] professes to follow. This does not mean, however, that any quack, charlatan or crackpot can set himself up as a “school,” and so apply his individual ideas without liability. A “school” must be a recognized one within definite principles, and it must be the line of thought of a respectable minority of the profession.

W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 32, at 187 (5th ed. 1984).¹

Illustrations 6 and 7 are drawn from the Restatement Third, Torts: Medical Malpractice § 5, Illustrations 4 and 5 (AM. L. INST., Tentative Draft No. 2, 2024).

Comment m. Trainees. Very few cases involving non-medical professionals address this principle. For discussion in the medical sphere, see Restatement Third, Torts: Medical Malpractice § 5, Reporters’ Note to Comment *j* (AM. L. INST., Tentative Draft No. 2, 2024); Arpin v. United States, 521 F.3d 769, 774-775 (7th Cir. 2008) (applying Illinois law) (“[T]he majority rule . . . holds residents to the same standard of care as physicians who have completed their residency in the same field of medicine.”). For discussion generally, see Restatement Third, Torts: Liability for Physical and Emotional Harm § 12, Reporters’ Note to Comment *b* (AM. L. INST. 2010) (observing

¹ The specific quote applied to physicians, but elsewhere, the treatise explains that the applicable principles apply equally to other professionals and “skilled trades.” W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 32, at 186 (5th ed. 1984).

that “that an actor’s inexperience is not taken into account in determining negligence is a point that is simply taken for granted in most modern American cases”); accord *Stevens v. Fleming*, 777 P.2d 1196, 1199 (Idaho 1989) (“Individual inexperience is not a legitimate reason for a lower standard of conduct.”).

Comment n. Ordinary versus professional negligence. Most courts have not clearly articulated the boundary between ordinary and professional negligence. Of those jurisdictions that have clearly addressed the question, consistent with *Comment n*, the majority distinguish between acts or omissions that require professional judgment or skill, on the one hand, as against acts or omissions that laypeople commonly perform or that lie within common knowledge and understanding. See *Great S. Excavators, Inc. v. TEC Partners, LLP*, 231 So. 3d 1011, 1013 (Miss. Ct. App. 2017) (“To distinguish between malpractice claims and ordinary negligence, a court should consider: (1) whether the claim pertains to an action that occurred within the course of a professional relationship; and (2) whether the claim raises questions of professional judgment beyond the realm of common knowledge and experience.”) (internal quotations omitted); *Bixenmann v. Dickinson Land Surveyors, Inc.*, 886 N.W.2d 277, 278-279 (Neb. 2016) (“Administrative, clerical, or routine acts demanding no special expertise fall in the realm of simple negligence. If [on the other hand] the allegations of the complaint involve the exercise of professional skill and judgment within the professional’s area of expertise . . . the claim sounds in professional negligence rather than ordinary negligence.”) (internal citations omitted); *Sime v. Tvenge Assocs. Architects & Planners, P.C.*, 488 N.W.2d 606, 609 (N.D. 1992) (“The distinction between ordinary negligence and malpractice turns on whether the acts or omissions complained of involve a matter of . . . science or art requiring special skills not ordinarily possessed by lay persons or whether the conduct complained of can instead be assessed on the basis of common everyday experience.”) (internal citations omitted); see also 4 STUART M. SPEISER ET AL. AMERICAN LAW OF TORTS § 15.1 n.1 (2023 update) (“Administrative, clerical, or routine acts demanding no special expertise fall in the realm of simple, rather than professional, negligence.”).

Georgia courts have established especially clear distinctions between professional negligence and simple or ordinary negligence. A claim of professional negligence involves questioning the effectiveness of the professional’s actions when the professional exercises professional skill and judgment. *Bartenfeld v. Chick-fil-A, Inc.*, 815 S.E.2d 273, 276-277 (Ga. Ct. App. 2018). Simple negligence claims, by contrast, arise when plaintiffs challenge “administrative, clerical, or routine acts demanding no special expertise.” *Id.* at 277 (quotation omitted). See also *Dodge County Hosp. Auth. v. Seay*, 880 S.E.2d 571, 574 (Ga. Ct. App. 2022) (reiterating this line-drawing).

Texas courts have established a slightly different boundary between ordinary and professional negligence. A professional is subject to a professional standard of care as long as the allegedly negligent act or omission “originat[ed], stemm[ed], or result[ed] from the [professional’s] exercise of specialized knowledge, training, or experiencing.” *Whitaker v. R2M Eng’g, LLC*, 603 S.W.3d 530, 535-536 (Tex. App. 2020).

Illustration 8, involving the construction zone, is drawn from *Hamilton-King v. HNTB Georgia, Inc.*, 715 S.E.2d 476 (Ga. Ct. App. 2011).

Comment o. Judge and jury. It is well established that the classification of an occupation as a profession or skilled trade is for the court. See *Bartenfeld v. Chick-fil-A, Inc.*, 815 S.E.2d 273, 277 (Ga. Ct. App. 2018) (“Whether a complaint alleges ordinary negligence or professional malpractice is a question of law for the court, regardless of how the plaintiff categorizes it.”) (quotation marks omitted); *Bixenmann v. Dickinson Land Surveyors, Inc.*, 882 N.W.2d 910, 914, opinion modified on denial of reh’g, 886 N.W.2d 277 (Neb. 2016) (“Whether a particular vocation is a profession is a question of law”); *Kormes v. Murphy*, 9 A.D.2d 1003, 1003 (N.Y. App. Div. 1959) (reiterating that “whether an occupation is a profession is a question of law”); accord *Cerny v. Cedar Bluffs Junior/Senior Pub. Sch.*, 628 N.W.2d 697, 704 (Neb. 2001) (“[D]etermining the standard of care to be applied in a particular case is a question of law.”).

Whether a professional or skilled tradesperson breached the applicable standard of care is a determination for the factfinder. See *Restatement Third, Torts: Liability for Physical and Emotional Harm* § 8(b) (AM. L. INST. 2010) (“When, in light of all the facts relating to the actor’s conduct, reasonable minds can differ as to whether the conduct lacks reasonable care, it is the function of the jury to make that determination.”).

§ (#). Cause of Action Against a Professional or Skilled Tradesperson

A plaintiff’s cause of action against a professional or skilled tradesperson for professional negligence consists of the elements of an ordinary negligence claim, subject to § __’s standard of care.

Comment:

- a. Scope.*
- b. Terminology: “professional” as shorthand.*
- c. Duty: general rule.*
- d. Duty: relationship to other Restatements.*
- e. Duty: affirmative duty to act within the scope of the engagement.*
- f. The applicable standard of care.*
- g. Factual cause and scope of liability.*
- h. Loss of chance.*
- i. Affirmative defenses.*
- j. Disclaimers, exculpatory agreements, and other contracts that affect liability.*
- k. Limitation on scope of service as distinct from disclaimer of liability.*
- l. Judge and jury.*

1 *a. Scope.* This Section articulates how a cause of action against a professional or skilled
2 tradesperson for professional negligence proceeds. The definition of a “professional” or “skilled
3 tradesperson” for purposes of this Section is set forth in § __ [Standard of Care for Professionals
4 and Those Practicing Skilled Trades], Comment *d*.

5 Various causes of action involving professionals are excluded from this Section’s coverage
6 because they have been addressed by prior Restatements. In particular, if a defendant-
7 professional’s conduct causes pure economic loss, then the professional’s conduct is considered
8 pursuant to the Restatement Third of Torts: Liability for Economic Harm. If a defendant-
9 professional is a medical provider, then the medical provider’s conduct is considered pursuant to
10 the principles articulated in the Restatement Third of Torts: Medical Malpractice. And, if the
11 defendant-professional is an attorney, then the attorney’s conduct is considered pursuant to the
12 provisions contained in the Restatement of the Law Third, The Law Governing Lawyers.

13 *b. Terminology: “professional” as shorthand.* Although this Section applies to causes of
14 action lodged against professionals and skilled tradespeople, as a shorthand, these actions are
15 frequently called “professional negligence” actions. Following this usage, in the Comments below,
16 the word “professional” is frequently used in lieu of the wordier phrase “professional and skilled
17 tradesperson.” This language is utilized simply for the sake of concision. No difference in meaning
18 is intended, and this Section applies equally to professionals and skilled tradespeople.

19 *c. Duty: general rule.* Professionals, like all actors, owe others a duty of reasonable care
20 pursuant to Restatement Third of Torts: Liability for Physical and Emotional Harm § 7.
21 Accordingly, professionals and skilled tradespeople generally have a duty to exercise reasonable
22 care whenever their conduct creates a risk of inflicting cognizable harm on another. See *id*.

23 **Illustrations:**

24 1. Pablo, a private building inspector hired by a building’s owner, certifies that the
25 building does not have dangerous levels of lead and is suitable for habitation. Sylvan relies
26 on Pablo’s certification and, along with her children, moves in to the building. Thereafter,
27 Sylvan discovers that the building’s paint contains dangerous levels of lead, and the lead
28 has harmed her children. Sylvan and her children sue Pablo. Although Sylvan did not hire
29 Pablo, Pablo owes a duty of care to Sylvan and her children because Pablo’s undertaking
30 and ensuing negligent misrepresentation created a risk of physical harm, imperiling
31 Sylvan’s children. See § 18 A.

2. Sorcha owns an empty lot and hires Aladdin, an architect, to design condominiums on the lot. Aladdin does, and Sorcha ultimately sells the now-completed condominium to various individuals, including Jack. Unfortunately, Aladdin's building design lacked necessary structural supports, and, after Jack lives in the condominium for three years, the roof collapses, injuring Jack's friend, Lionel. Lionel sues Aladdin, claiming professional negligence. Although Lionel was never Aladdin's client, Aladdin has a duty of care to Lionel because Aladdin's conduct created a risk of physical harm.

d. Duty: relationship to other Restatements. To a casual reader, the Restatement Third of Torts: Liability for Economic Harm §§ 4 and 6 may be read to supply a different and narrower standard, in tension with the broader standard Comment *c* delineates. In particular, those Sections of the Liability for Economic Harm project provide that a professional owes a duty of care only to a narrow class of persons, including, among others, the contracting party and the "limited group of persons for whose benefit the actor performs the service." *Id.* § 6(2)(a). Likewise, the Restatement of the Law Third, The Law Governing Lawyers § 51 details only rare instances in which lawyers owe a duty of care to nonclients.

Given those limited-duty rules, one may wonder why Comment *c*'s duty rule is different and more encompassing. The answer is that the limited rules enunciated by the Restatement Third of Torts: Liability for Economic Harm §§ 4 and 6 and Restatement of the Law Third, The Law Governing Lawyers § 51 are different because of the different kind of harm those Restatements address. Both of those Restatements were trained on pure economic harm, and the rules that govern tort liability for pure economic harm are, for a number of reasons, more circumscribed. See Restatement Third, Torts: Liability for Economic Harm § 1. This Section, by contrast, does not address pure economic harm, and so it is not affected by the limited duty rules that govern those actions. See Comment *a*.

Illustrations:

3. Architect Arnie designs a house for Leandra. After living in the house for two years, Leandra sells the house to Gerald. Sometime after purchase, Gerald discovers that, owing to Arnie's breach, the house's chimney is pulling away from the rest of the structure and is at risk of collapse. The chimney problem causes no personal injuries and no damage to other property besides the house itself, but repairing the unstable chimney is expensive. Leandra's suit to recover the costs of repair is governed by the Restatement Third of Torts:

1 Liability for Economic Harm, which provides that Arnie is not liable in tort for the cost of
2 repair. See *id.* § 6.

3 4. Same facts as Illustration 3, except that, now, the chimney falls on Gerald while
4 he is sleeping, inflicting injury. Pursuant to this Section, Arnie is subject to liability to
5 Gerald for the personal injuries caused by his breach.

6 *e. Duty: affirmative duty to act within the scope of the engagement.* A professional owes a
7 customer or client an affirmative duty of care regarding matters within the scope of the
8 professional's engagement. Accord Restatement Third, Torts: Medical Malpractice § 2 (added by
9 Restatement Third, Torts: Concluding Provisions (now known as Restatement Third, Torts:
10 Miscellaneous Provisions) (Tentative Draft No. 1, 2022)). Conversely, the professional has no
11 obligation to assist a client or customer regarding matters outside the scope of the professional's
12 engagement. Accord Restatement Third, Torts: Liability for Economic Harm § 4, Comment *d* ("A
13 professional has no duty to assist or advise a client in matters outside the scope of the professional's
14 engagement."). When assessing the scope of the professional's engagement, the Restatement Third
15 of Torts: Liability for Economic Harm § 4, Comment *d* advises: "The scope of the engagement
16 may be defined not only by the contract between the parties but by the customs of the profession."

17 **Illustrations:**

18 5. Jasper hires a building inspector, Ian, to inspect his home and to alert him of any
19 dangers. During the course of the inspection, Ian sees that the chimney in Jasper's home is
20 leaning precariously, but he says nothing about it. Shortly after that inspection, the chimney
21 falls, injuring Jasper. Even though Ian's silence may be characterized as inaction, Ian is
22 subject to liability to Jasper for his injuries because the scope of Jasper's engagement
23 included identifying and warning Ian of dangers posed by his home.

24 6. Jasper hires an architect, Amber, to design a new home for him. In the course of
25 the design process, while discussing the architectural plans, Amber frequently visits
26 Jasper's current home. On one of those trips, she sees that the chimney in Jasper's home is
27 leaning precariously, but she says nothing about it. Shortly after that visit, the chimney
28 falls, injuring Jasper. Amber is not liable to Jasper for his injuries because, although she is
29 Jasper's architect, and although she has special knowledge of the chimney's possible
30 danger, she had no duty to warn Jasper about it as matters involving Jasper's current house
31 were outside the scope of Amber's engagement.

f. The applicable standard of care. As § __ [Standard of Care for Professionals and Those Practicing Skilled Trades], Comment *n* explains, professionals may commit acts of ordinary negligence or professional negligence. If a professional commits an act of ordinary negligence, Restatement Third of Torts: Liability for Physical and Emotional Harm § 3 furnishes the applicable standard of care. If, by contrast, a professional commits an act of professional negligence, § __ [Standard of Care for Professionals and Those Practicing Skilled Trades] supplies the applicable standard of care.

g. Factual cause and scope of liability. A professional is subject to liability only if the professional's breach of the duty of care caused the plaintiff's injury and the injury was within the professional's scope of liability (sometimes called proximate cause). For factual cause, see Restatement Third, Torts: Liability for Physical and Emotional Harm § 26. For scope of liability, see *id.* § 29.

h. Loss of chance. In some circumstances, particularly medical negligence, courts have recognized a cause of action for a lost opportunity (or lost chance) for a better outcome. See Restatement Third, Torts: Liability for Physical and Emotional Harm § 26, Comment *n*. The Restatement Third of Torts: Medical Malpractice § 8 (Tentative Draft No. 2, 2024) adopts this lost-chance doctrine and provides that "a lost chance of a substantially better outcome [qualifies] as a compensable injury." *Id.*, Comment *a*. However, Comment *c* of § 8 notes that the justifications for the lost-chance doctrine do not apply equally well to cases of nonmedical negligence. As the Restatement Third of Torts: Liability for Physical and Emotional Harm § 26, Comment *n* synthesizes, the lost-chance concept "is of potentially enormous scope, implicating a large swath of tortious conduct in which there is uncertainty about factual cause, including failures to warn, to provide rescue or safety equipment, and otherwise to take precautions to protect a person from a risk of harm that exists." Accordingly, as that Comment observes: "Whether there are appropriate areas beyond the medical-malpractice area to which lost opportunity might appropriately be extended is a matter that the Institute leaves to future development." Like Restatement Third of Torts: Medical Malpractice § 8, Comment *c* (Tentative Draft No. 2, 2024), this Section declines to extend the loss-of-chance cause of action to nonmedical professionals, deferring the matter to further doctrinal development.

i. Affirmative defenses. The defenses available in lawsuits involving professional negligence generally track the defenses typically available to defendants. There are three primary exceptions.

First, if a professional seeks to avoid liability via a disclaimer or exculpatory agreement, that agreement will be unenforceable, as addressed in Comment *j* below. Second, any plaintiff conduct should be evaluated in light of the special circumstances surrounding the professional–client relationship, including the fact that these relationships generally feature sharp power disparities and informational asymmetries, and a client or consumer is, as a matter of law, not negligent for failing to investigate, detect, or cure a professional’s malpractice. Third, the negligence of a client or customer that necessitates the need for professional services does not “count” for comparative fault purposes. Thus, “in a case involving negligent rendition of a service . . . a factfinder does not consider any plaintiff’s conduct that created the condition the service was employed to remedy.” Restatement Torts, Third: Apportionment of Liability § 7, Comment *m*.

Illustration:

7. Dravon, a dog owner, negligently leaves sugar-free chewing gum in reach of his Labrador Retriever, Lucy. (It is well known that xylitol, an ingredient in sugar-free chewing gum, is poisonous to dogs.) Lucy eats the chewing gum, and so Dravon takes Lucy to a veterinarian, Veronica, for emergency treatment. Veronica provides negligent treatment, which punctures Lucy’s stomach and results in her death. In Dravon’s ensuing suit against Veronica, Dravon’s negligence is not assigned a share of comparative responsibility because that negligence was what necessitated seeking Veronica’s services.

j. Disclaimers, exculpatory agreements, and other contracts that affect liability. On some occasions, professionals seek to include language in contracts with clients or consumers to preclude or substantially limit their liability for breach. These contracts are unenforceable because professionals, by definition, tend to understand their vocation or business and its risks far better than their clients do. Further, if it were otherwise, the value that tort law supplies might quickly dissipate. As the Restatement Third of Torts: Liability for Economic Harm § 4, Comment *e* explains: “To the extent that the parties can eliminate the defendant’s duty in tort simply by saying so, the duty is reduced to a default rule, and a superfluous one at that. . . .” See also Restatement Third, Torts: Medical Malpractice § 10 (Tentative Draft No. 2, 2024) (“An agreement that prospectively eliminates or substantially curtails the liability of a medical professional or institution to a patient for breach of a duty . . . is unenforceable.”).

Illustration:

8. Same facts as in Illustration 7, except that, prior to treating Labrador Retriever, Lucy, veterinarian Veronica has Dravon sign an agreement exculpating Veronica from all liability. This exculpatory agreement is unenforceable, and Veronica remains subject to liability to Dravon for Lucy's death.

On some other occasions, professionals seek to bind clients or consumers via contractual language that does not purport to preclude or substantially curtail their professional liability—but that nevertheless seeks to affect future causes of action that may arise. The interpretation and enforceability of these provisions is determined by the principles stated in Restatement of the Law, Consumer Contracts §§ 2, 3, and 6.

Illustration:

9. Same facts as Illustration 8, except now, before treatment, Veronica has Dravon sign an agreement that specifies that any dispute that may arise between the two parties will be subject to binding arbitration. Whether the agreement is enforceable or unenforceable is to be assessed using the principles set forth in the Restatement of the Law, Consumer Contracts §§ 2, 3, and 6.

k. Limitation on scope of service as distinct from disclaimer of liability. As Comment *j* states, professionals cannot disclaim liability for their own malpractice. It does not follow, however, that their liability is unfettered. To the contrary, professionals generally are entitled to erect reasonable contractual boundaries around the scope of undertakings, so long as they do not disclaim responsibility for the use of due care in performing those undertakings. Thus, lawyers cannot contractually absolve themselves of liability. But lawyers and clients can mutually agree that the lawyer will stick to a particular budget or limit the scope of the representation to this and not that. Compare Restatement of the Law Third, The Law Governing Lawyers § 54(2), with *id.*, Comment *d*. Or, in the medical context, medical providers cannot disclaim liability for medical negligence. See Restatement Third, Torts: Medical Malpractice § 10 (Tentative Draft No. 2, 2024). But, if proper safeguards are in place, a medical provider and patient can mutually agree that the provider will furnish nonstandard or experimental treatment. See *id.* § 11. The same principles apply more generally to other professionals and skilled tradespersons.

Illustration:

10. Tanush, a dog owner, takes his dog, Fifi, to a veterinary clinic to remove certain cysts on Fifi’s back. Before the veterinarian, Vivienne, begins the surgical procedure, Tanush and Vivienne agree that, if Fifi’s cyst removal is on track to cost more than \$1,000, Veronica will temporarily pause the surgery and seek further guidance from Tanush. This agreement is enforceable.

l. Judge and jury. The allocation of authority between judge and jury in professional negligence cases tracks the allocation of authority in typical negligence cases. The judge determines whether the defendant is a professional or skilled tradesperson pursuant to § __ [Standard of Care for Professionals and Those Practicing Skilled Trades], Comment *d*; whether an expert is required pursuant to *id.*, Comment *h*; and, if one is, who is qualified to furnish expert testimony. Then, the factfinder assesses whether or not the professional complied with, or breached, the applicable standard of care, whether the professional caused the plaintiff’s injuries, and whether the injuries fall within the professional’s scope of liability. Accord Restatement Third, Torts: Medical Malpractice § 5, Comment *o* (Tentative Draft No. 2, 2024) (delineating a similar allocation of authority between judge and jury in cases involving medical providers).

REPORTERS’ NOTE

Comment c. Duty: general rule. Significant authority provides that professionals and skilled tradespeople owe a duty of reasonable care to those they imperil. See, e.g., *Arthur v. Bolen*, 41 So. 3d 745, 746 (Ala. 2010) (permitting later purchasers of a house previously built by engineer to sue engineer when attic stairs fell and injured homeowner); *Canale v. KBE Bldg. Corp.*, 2017 WL 4621399 at *1 (Conn. Super. Ct. 2017) (permitting employee to sue designers of her workplace building when roof collapsed on her); *Parent v. Stone & Webster Eng’g Corp.*, 556 N.E.2d 1009, 1012 (Mass. 1990) (explaining that “a defendant under a contractual obligation is liable to third persons not parties to the contract who are foreseeably exposed to danger and injured as a result of [the defendant’s] negligent failure to carry out that obligation”); *Council of Co-Owners Atlantis Condo., Inc. v. Whiting-Turner Contracting Co.*, 517 A.2d 336, 338 (Md. 1986) (“[T]he duty of builders and architects to use due care in the design, inspection, and construction of a building extends to those persons foreseeably subjected to the risk of personal injury because of a latent and unreasonably dangerous condition resulting from that negligence.”); *Sime v. Tvenge Assocs. Architects & Planners, P.C.*, 488 N.W.2d 606, 610 (N.D. 1992) (“[O]ne who undertakes to design and construct a structure has a duty to exercise ordinary care and skill to protect any who foreseeably, or with reasonable anticipation, may be injured by the failure to do so.”); 3 BARRY A. LINDAHL, MODERN TORT LAW: LIABILITY AND LITIGATION § 25.82 (2023 update) (“The duty of

the architect extends to those with whom he or she is in privity and those with whom he or she is not.”); W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 104A, at 723 (5th ed. 1984) (“It is now the almost universal rule that the contractor is liable to all those who may foreseeably be injured by the structure . . .”).

Comment d. Duty: relationship to other Restatements. Illustration 3 is modeled on Restatement Third, Torts: Liability for Economic Harm § 6, Illustration 6 (AM. L. INST. 2020). For a discussion of cases that support that rule, see *id.*, Reporters’ Note to Comment *c*. Of course, the subsequent home purchaser may have other claims, beyond those in tort. See *id.* (explaining that the subsequent home purchase may have a claim under a governing statute or for breach of an implied warranty). Accord *Noble v. Bruce*, 709 A.2d 1264, 1269 (Md. 1998) (explaining that, in personal injury cases, a plaintiff’s claim alleging professional negligence is not defeated by the absence of privity but that, generally, “if the risk created by [the defendant’s] negligent conduct is merely one of economic loss, no tort duty will be found absent a showing of privity or its equivalent”); 3 BARRY A. LINDAHL, MODERN TORT LAW: LIABILITY AND LITIGATION § 25.82 (2023 update) (explaining that, when an architect’s or engineer’s error causes personal injury, a lack of privity imposes no barrier to the plaintiff’s suit, but “where the negligence of the architect or engineer results only in economic injury, privity of contract may be required”). For additional discussion, see 3 FOWLER V. HARPER, FLEMING JAMES, JR. & OSCAR S. GRAY, HARPER, JAMES AND GRAY ON TORTS § 18.5A, at 846-852 (3d ed. 2007) (describing professionals’ limited duties when the only harm is economic).

For a discussion of the limited duty rules that apply to lawyers, see Restatement of the Law Third, The Law Governing Lawyers § 51 (AM. L. INST. 2000). That provision points out that “[m]aking lawyers liable to nonclients . . . could tend to discourage lawyers from vigorous representation,” which tends not to be an issue involving other professionals. *Id.*, Comment *b*. It is also said that “the rule protects the attorney’s duty of loyalty to and effective advocacy for his or her client.” *Noble*, 709 A.2d at 1270.

For an example of a court that held—contrary to Comment *c*—that professionals are subject to limited-duty rules, even when they inflict personal injury, see *Bixenmann v. Dickinson Land Surveyors, Inc.*, 882 N.W.2d 910, 916 (holding that “a surveyor’s duty of reasonable care is to his or her client and generally does not extend to third parties absent fraud or other facts establishing a duty to them”), opinion modified on denial of reh’g, 886 N.W.2d 277 (Neb. 2016).

Comment e. Duty: affirmative duty to act within the scope of the engagement. The discussion in Comment *e* closely tracks Restatement Third, Torts: Liability for Economic Harm § 4, Comment *d* (AM. L. INST. 2020). See also GEORGE L. BLUM ET AL., 57A AM. JUR. 2d § 109 (2024 update) (“Although, generally, mere failure to perform a contract cannot serve as the basis of a tort liability for negligence, liability for negligence may be predicated upon a lack of due care in failing to act as well as upon a negligent performance. Thus, where there is a general duty, even though it arises from the relation created by, or from the terms of, a contract, and that duty is violated, either by negligent performance or negligent nonperformance, the breach of the duty may constitute actionable negligence.”).

Comment g. Factual cause and scope of liability. Like other tort plaintiffs, a plaintiff asserting a cause of action for professional negligence must prove that the defendant factually caused the plaintiff’s injury and that the injury falls within the defendant’s scope of liability (proximate cause). See Restatement Third, Torts: Liability for Physical and Emotional Harm §§ 26 and 29 (AM. L. INST. 2010).

Comment i. Affirmative defenses. For the fact that a defendant-professional can assert affirmative defenses against a plaintiff-client, see Restatement Third, Torts: Liability for Economic Harm § 4, Reporters’ Note to Comment *a* (AM. L. INST. 2020) (explaining that, “to whatever extent a jurisdiction recognizes comparative negligence as a defense to other sorts of negligence claims, it is available as well in tort suits to redress professional negligence”); Restatement of the Law Third, The Law Governing Lawyers § 54, Comment *d* (AM. L. INST. 2000) (“In jurisdictions in which comparative negligence is a defense in negligence and fiduciary-breach actions generally, it is generally a defense in legal-malpractice and fiduciary-breach actions based on negligence to the same extent and subject to the same rules. The same is true of contributory negligence and comparative or contributory fault generally.”).

For the fact that, when assessing a plaintiff’s conduct, a court should remain attuned to the special circumstances surrounding the professional–client relationship, see Restatement of the Law Third, The Law Governing Lawyers § 54, Comment *d* (AM. L. INST. 2000). That Comment explains:

In appraising [defenses lawyers may assert against clients], regard must be had to the special circumstances of client-lawyer relationships. Under fiduciary principles, clients are entitled to rely on their lawyers to act with competence, diligence, honesty, and loyalty The difficulty many clients face in monitoring a lawyer’s performance is one of the main grounds for imposing a fiduciary duty on lawyers. Except in unusual circumstances, therefore, it is not negligent for a client to fail to investigate, detect, or cure a lawyer’s malpractice until the client is aware or should reasonably be aware of facts clearly indicating the basis for the client’s claim

Illustration 7, involving Lucy the Labrador’s ingestion of sugar-free gum, is similar, in substance, to Restatement Third, Torts: Apportionment of Liability § 7, Illustrations 8 and 12 (AM. L. INST. 2000).

Comment j. Disclaimers, exculpatory agreements, and other contracts that affect liability. The discussion of disclaimers and exculpatory agreements echoes Restatement Third, Torts: Liability for Economic Loss § 4, Comment *e* (AM. L. INST. 2020). It also echoes Restatement Third, Torts: Medical Malpractice § 10 (AM. L. INST., Tentative Draft No. 2, 2024), which provides: “An agreement that prospectively eliminates or substantially curtails the liability of a medical professional or institution to a patient for breach of a duty . . . is unenforceable.” And it tracks the Restatement of the Law Third, The Law Governing Lawyers § 54(4)(a) (AM. L. INST. 2000), which provides that a lawyer may not “make an agreement prospectively limiting the lawyer’s liability to a client for malpractice.” That Section’s Comment *c* elaborates:

An agreement prospectively limiting a lawyer’s liability to a client . . . is unenforceable and renders the lawyer subject to professional discipline. The rule

1 derives from the lawyer codes, but has broader application. Such an agreement is
2 against public policy because it tends to undermine competent and diligent legal
3 representation. Also, many clients are unable to evaluate the desirability of such an
4 agreement before a dispute has arisen or while they are represented by the lawyer
5 seeking the agreement.

6 See also Am. Bar Ass’n, Model Rules of Prof’l Conduct R. 1.8(h)(1) (“A lawyer shall not . . . make
7 an agreement prospectively limiting the lawyer’s liability to a client for malpractice unless the
8 client is independently represented in making the agreement . . .”); *id.*, Comment 17
9 (“Agreements prospectively limiting a lawyer’s liability for malpractice are prohibited . . . because
10 they are likely to undermine competent and diligent representation.”).

11 For a general discussion of exculpatory agreements, see Restatement Third, Torts:
12 Apportionment of Liability § 2, Comment *e* (AM. L. INST. 2000).

13 As Comment *j* further explains: When other liability-related provisions are contained in
14 form contracts that professionals ask customers or clients to agree to, their enforceability is
15 addressed by Restatement of the Law, Consumer Contracts §§ 2, 3, and 6 (AM. L. INST. 2024).
16 Notably, § 6(c) provides:

17 [A] contract term is substantively unconscionable if its effect is to:

18 (1) unreasonably exclude or limit the business’s liability or the consumer’s
19 remedies that would otherwise be applicable for:

20 (A) death or personal injury for which, in the absence of a contractual
21 provision in the consumer contract, the business would be liable; or

22 (B) any loss to the consumer caused by an intentional or negligent act or
23 omission of the business; [or]

24 (2) unreasonably limit the consumer’s ability to pursue or express a complaint or
25 seek reasonable redress for a violation of a legal right.

26 Illustrations 8 and 9 track Restatement Third, Torts: Medical Malpractice § 9, Illustrations
27 2 and 3 (AM. L. INST., Tentative Draft No. 2, 2024)

28 *Comment l. Judge and jury.* See *Bixenmann v. Dickinson Land Surveyors, Inc.*, 882
29 N.W.2d 910, 914 (“Whether a particular vocation is a profession is a question of law . . .”),
30 opinion modified on denial of reh’g, 886 N.W.2d 277 (Neb. 2016); *Kormes v. Murphy*, 9 A.D.2d
31 1003, 1003 (N.Y. App. Div. 1959) (reiterating that “whether an occupation is a profession is a
32 question of law”).

APPENDIX A
BLACK LETTER OF COUNCIL DRAFT NO. 7

VICARIOUS LIABILITY

TOPIC 4

NONDELEGABLE DUTIES

§ 7. Effect of a Nondelegable Duty

An actor subject to a nondelegable duty who delegates work to an independent contractor (as defined in § 8) is vicariously liable for tortious breaches of the duty committed by the independent contractor in the course of carrying out the work.

§ 8. Definition of “Independent Contractor”

An “independent contractor” is one hired to perform work who is not an “employee” (as defined in § 4) because the hirer neither controls nor has the right to control the manner and means of the performance of the work.

§ 9. Nondelegable Duties Involving Physical Harm

(a) Nondelegable duties imposing vicarious liability for certain torts resulting in physical harm are restated in Restatement Third, Torts: Liability for Physical and Emotional Harm §§ 58 to 65.

(b) Nondelegable duties imposing vicarious liability in certain cases of medical malpractice are described in Restatement Third, Torts: Medical Malpractice § 15, Comment *f* (Tentative Draft No. 2, 2024).

(c) A secured party that hires an independent contractor to repossess collateral pursuant to state law has a nondelegable duty to avoid a breach of the peace, so that the secured party is vicariously liable for the independent contractor’s torts if there is a breach of the peace, whether or not the breach of the peace results in physical harm.

§ 10. Nondelegable Duties Not Involving Physical Harm

(a) An insurer's duty of good faith and fair dealing is nondelegable, as stated in Restatement Third, Torts: Liability for Economic Harm § 20 A, Comment *o* (added by Restatement Third, Torts: Miscellaneous Provisions (Tentative Draft No. 3, 2024)).

(b) As stated in § 9(c), a secured party that hires an independent contractor to repossess collateral pursuant to state law has a nondelegable duty to avoid a breach of the peace, so that the secured party is vicariously liable for the independent contractor's torts if there is a breach of the peace, whether or not the breach of the peace results in physical harm.

IMMUNITIES

CHAPTER 3

**GOVERNMENTAL ENTITIES' AND PUBLIC OFFICIALS' AND
EMPLOYEES' IMMUNITIES**

§ 8. United States Immunity

(a) Except to the extent that the United States consents to tort liability, it is immune from liability.

(b) Statutory provisions—most prominently, the Federal Tort Claims Act—give the requisite consent to suit in tort cases. Where those statutes apply, they govern.

§ 11. Public Officials' and Employees' Immunity

(a) A state or local governmental employee, officer, or authorized agent acting within the scope of employment or authority is subject to tort liability to the extent permitted by state and local law and to the extent limited by the public-duty doctrine stated in §§ 12 and 13.

(b) Notwithstanding Subsection (a), a state or local governmental employee, officer, or authorized agent acting within the scope of employment or authority is immune from liability for acts and omissions that:

(1) constitute the exercise of a judicial or legislative function, or

(2) constitute the exercise of an executive function involving the discretionary determination of important governmental policy.

§ 12. Public-duty Doctrine

A state or local governmental entity and its employees, officers, and authorized agents, are not liable in tort:

(a) for conduct that exercises an executive function involving the discretionary determination of important governmental policy; or

(b) for failure to provide protective services to the public at large, unless:

(1) the governmental actor's conduct has created the risk, or

(2) a special relationship, as addressed in § 13, exists between the governmental actor and the injured person.

This public-duty exemption from liability shields the governmental actor from liability even in the absence of sovereign immunity or a statutory provision conferring immunity from liability.

§ 13. Special Relationships

(a) Notwithstanding § 12(b), a governmental actor is subject to liability to a person who has a special relationship with the governmental actor alleged to have committed a tort.

(b) A special relationship between a governmental actor and another person exists for purposes of Subsection (a) when the other person is sufficiently distinguished from the public at large, and the imposition of liability on the governmental actor is appropriate as informed by the following factors:

(1) Whether the governmental actor, through promises or actions, undertook to act on behalf of the person at risk;

(2) Whether the governmental actor had actual knowledge that inaction could lead to harm;

(3) Whether the person at risk had direct contact with the governmental actor;

(4) Whether the injured person or others assisting the injured person relied on the governmental actor's actions or promises;

(5) Whether the governmental actor acted in furtherance of promises made to provide protective services and the extent of those acts;

(6) Whether a third person acting on behalf of the person at risk had contact with the governmental actor;

(7) Whether a statute exists that prescribes action by a governmental actor for the benefit of a class of persons that includes the injured person;

(8) Whether a court order exists singling out the person at risk for protective services;

(9) Whether the person collaborated with a governmental actor or actors that put that person at risk of harm;

(10) Whether the governmental actor acted with a high degree of culpability;

(11) Whether there existed an immediate and serious risk of harm to the person at risk when the governmental actor acted or failed to act; and

(12) Whether the person at risk was unable to help themselves.

FIREFIGHTER'S RULE ABOLISHED

Approved as amended at 2024 Annual Meeting; will be submitted for Council approval

Firefighter's Rule Abolished

An actor who tortiously creates a peril that occasions the presence of a professional rescuer owes a duty to that professional rescuer consistent with the general principles of the Restatement Third, Torts: Liability for Physical and Emotional Harm §§ 7(a) and 32, notwithstanding the traditional “firefighter’s rule.”

VICARIOUS LIABILITY

TOPIC 5

OTHER TYPES OF VICARIOUS LIABILITY

§ 11. Special Rule on Vicarious Liability for Sexual Assault

Notwithstanding §§ 3 and 5, a factfinder may find an employer vicariously liable for an employee’s sexual assault of a victim if:

(a) the nature or conditions of the employee’s employment creates a reasonably foreseeable risk of sexual assault;

(b) the employer facilitates the sexual assault by providing the employee with substantial power, authority, or influence over the victim, or the opportunity to develop a trusting relationship with the victim;

(c) the victim is particularly vulnerable, by reason of age, mental capacity, disability, incarceration, detention, confinement, medical need, a subordinate relationship with the assaulting employee, or other similar circumstance; and

(d) the sexual assault occurs when the employee is performing work assigned by the employer or engaging in a course of conduct subject to the employer's control.

§ . Tortious Interference with a Right to Vote or Hold Office

(a) An actor is subject to liability to a person if the actor, by a consciously wrongful act, intentionally deprives the person of the lawful right to:

- (1) vote in a public election; or
- (2) hold public office.

(b) An actor is subject to liability to a person if the actor, by a consciously wrongful act, intentionally and seriously interferes with the person's lawful right to:

- (1) vote in a public election; or
- (2) hold public office.

§ . Prima Facie Tort

This Restatement takes no position on the vitality of the so-called "prima facie tort."

§ X. Negligence and Intentional Torts Based on the Same Facts

A plaintiff may not proceed on a negligence claim against a defendant once facts are established that provide the basis for an intentional tort for assault, battery, or false imprisonment against that same defendant for that same conduct. If established facts provide the basis for a claim for assault, battery, or false imprisonment, the plaintiff may proceed on that intentional tort claim but not on a negligence claim.

LIABILITY OF PROFESSIONALS AND THOSE PRACTICING SKILLED TRADES

§ (#). Standard of Care for Professionals and Those Practicing Skilled Trades

The standard of reasonable care that governs professionals or skilled tradespeople is the care regarded as competent among similar professionals or skilled tradespeople in the same or similar circumstances.

§ (#). Cause of Action Against a Professional or Skilled Tradesperson

A plaintiff's cause of action against a professional or skilled tradesperson for professional negligence consists of the elements of an ordinary negligence claim, subject to § __'s standard of care.

APPENDIX B

BLACK LETTER OF SECTIONS APPROVED BY MEMBERSHIP

Note: The text shown below is for reference only. It may not yet have been revised to reflect discussion at the applicable meeting.

APPORTIONMENT OF LIABILITY

Topic 1: Basic Rules of Comparative Responsibility

§ 4 A. Wrongful Acts Doctrine (T.D. No. 1) (approved 2022)

A person injured by an actor's tortious conduct is not barred from recovery merely because the person was engaged in an illegal, tortious, or otherwise wrongful act at the time of suffering harm. A person's illegal, tortious, or otherwise wrongful act affects that person's recovery only when the conditions set forth in § 4 B are satisfied.

§ 4 B. Criminal Conduct and Other Statutory Wrongs as Plaintiff Negligence Per Se (T.D. No. 1) (approved 2022)

(a) An injured victim is negligent if, without excuse, the victim violates a criminal statute or other regulatory safety provision designed to protect against the type of accident caused by the victim's conduct and if he or she is within the class of persons the statute is designed to protect.

(b) If the negligence in Subsection (a) is a factual cause of the victim's harm, the effect of that negligence on his or her recovery is provided in Restatement Third of Torts: Apportionment of Liability § 7. Otherwise, the victim's negligence has no effect on his or her recovery.

(c) If an injured victim acts wrongfully but does not violate a criminal or other regulatory safety provision, and if the wrongful act is a factual cause of his or her harm, and if the harm suffered by the victim is within his or her scope of responsibility (scope of liability), the effect of that conduct on the victim's recovery is provided in Restatement Third of Torts: Apportionment of Liability § 7. Otherwise, the victim's wrongful conduct has no effect on his or her recovery.

Topic 6: Tort Claims for Economic Harm

§ 27. Apportionment of Liability for Tort Claims for Economic Harm—General Principle (T.D. No. 1) (approved 2022)

The rules stated in the Restatement Third, Torts: Apportionment of Liability, apply to tort claims for economic harm.

§ 28. Apportionment of Liability Issues and Outline of This Topic (T.D. No. 1) (approved 2022)

(a) Apportionment of liability in a tort case involves one or more of four principal issues:

(1) situations in which harm can be divided by factual causation, so that the factfinder first divides the harm into its indivisible component parts based on factual causation and then separately apportions liability for each such part (addressed in § 29 below);

(2) application of comparative responsibility between a plaintiff and a defendant (§§ 30 and 31 below);

(3) application of comparative responsibility between a defendant and another tortfeasor (§§ 32 and 33); and

(4) reallocation of damages from one defendant to another, by way of either indemnity (§ 35) or contribution (§ 36).

(b) Other apportionment of liability issues include:

(1) settlement (§§ 34 and 36(b)); and

(2) situations involving multiple theories of recovery for the same indivisible harm (§ 37).

§ 29. Apportionment of Liability When Harm Can be Divided by Factual Causation (T.D. No. 1) (approved 2022)

(a) When harm can be divided by factual causation, the factfinder first divides the harm into its component parts and separately determines which parties are responsible for each component part and then apportions liability for each such part under Topics 1 through 4 of the Restatement Third, Torts: Apportionment of Liability.

(b) Harm can be divided by factual causation into component parts when the evidence provides a reasonable basis for the factfinder to determine:

(1) that a portion of the harm for which the plaintiff seeks recovery was factually caused by the tortious conduct of a defendant, multiple defendants, or another relevant person or persons to whom the factfinder assigns a percentage of comparative responsibility; and

(2) what portion of the harm was separately caused by the conduct described in (1) above.

Otherwise, the harm cannot be divided by factual causation. Liability for such indivisible harm is apportioned among the parties under Topics 1 through 4 of the Restatement Third, Torts: Apportionment of Liability.

(c) Regardless of whether the harm the plaintiff has suffered is divisible or indivisible, any party's liability depends on the factfinder's determination that the party's conduct is sufficient for liability to be imposed on that party for an indivisible or divisible component of harm.

§ 30. Comparing Responsibility of Plaintiff and Intentional Tortfeasor Defendant (T.D. No. 1) (approved 2022)

A plaintiff's negligent or reckless conduct may not be the basis for apportioning comparative responsibility to the plaintiff in a claim against a tortfeasor who intended to cause harm on which the tortfeasor's liability is based.

§ 31. Comparing Responsibility of Plaintiff and Non-Intentional Tortfeasor Defendant (T.D. No. 1) (approved 2022)

A plaintiff's negligent conduct that is a cause of harm to that plaintiff and is within that plaintiff's scope of responsibility reduces that plaintiff's recovery against a non-intentional tortfeasor defendant in proportion to the share of comparative responsibility the factfinder assigns to that plaintiff for that harm.

§ 32. Joint and Several Liability of Intentional Tortfeasors (T.D. No. 1) (approved 2022)

Each defendant who intended to cause harm on which that defendant's liability is based is jointly and severally liable to the plaintiff for any indivisible injury that the defendant's tortious conduct factually caused.

§ 33. Comparative Responsibility Share of Non-Intentional Tortfeasor Defendant (T.D. No. 1) (approved 2022)

(a) Except as provided in Subsections (b) through (d) below, a defendant found to be a non-intentional tortfeasor is assigned a share of comparative responsibility determined as set forth in Restatement Third, Torts: Apportionment of Liability § 8. The effect of that assignment on the share of damages payable by the defendant is determined pursuant to the applicable Track A through E, as described in Topic 2 of the Restatement Third, Torts: Apportionment of Liability.

(b) A defendant who is liable to a plaintiff based on a failure to protect the plaintiff from the specific risk of an intentional tort committed by another person is jointly and severally liable for the share of comparative responsibility assigned to the intentional tortfeasor in addition to the share of comparative responsibility assigned to the defendant for failure to protect.

(c) A defendant whose liability is imputed based on the tortious acts of another is liable for the entire share of comparative responsibility assigned to the other, regardless of whether joint and several liability or several liability is the governing rule for independent tortfeasors who cause an indivisible injury.

(d) When two or more defendants are liable because they acted in concert, all of those defendants are jointly and severally liable for the share of comparative responsibility assigned to each defendant engaged in that concerted activity.

§ 34. Effect of Settlement on Apportionment of Liability (T.D. No. 1) (approved 2022)

(a) When two or more persons are or may be liable for the same harm and one such person discharges only that person's liability to the plaintiff by settlement and the nonsettling person is found liable to the plaintiff, the nonsettling person is entitled to a credit against any judgment awarding damages to plaintiff in the amount of the settling person's share of comparative responsibility.

(b) In such a case, neither the settling person nor the nonsettling person may make a contribution claim against the other.

§ 35. Indemnity (T.D. No. 1) (approved 2022)

(a) When two or more persons are or may be liable for the same harm and one of them discharges the liability of another in whole or in part by settlement or discharge of judgment, the person discharging the liability is entitled to recover indemnity in the amount paid to the plaintiff, plus reasonable legal expenses incurred in connection with plaintiff's claim, if:

(1) the indemnitor has agreed by contract to indemnify the indemnitee; or

(2) the indemnitee was not liable except vicariously for the tort of the indemnitor.

(b) A person who is otherwise entitled to recover indemnity pursuant to contract may do so even if the party against whom indemnity is sought would not be liable to the plaintiff.

§ 36. Contribution (T.D. No. 1) (approved 2022)

(a) Except as provided in Subsections (b) and (c) below, a person who has paid more than that person's share of comparative responsibility for plaintiff's damages, and has thereby discharged in whole or in part the liability of another person to plaintiff for the same harm, is entitled to contribution from the other for the amount paid to plaintiff in excess of the payor's share of comparative responsibility, to the extent that the other has not paid its share of comparative responsibility and is no longer subject to liability to the plaintiff.

(b) When two or more persons are or may be liable for the same harm and one of them discharges only that person's liability to the plaintiff by settlement, neither the settling person nor the nonsettling person may make a contribution claim against the other.

(c) A person who has a right of indemnity against another person under § 35 does not have a right of contribution against that person and is not subject to liability for contribution to that person.

§ 37. Apportionment of Liability When a Plaintiff Prevails on More Than One Legal Theory (T.D. No. 1) (approved 2022)

When a plaintiff asserts multiple legal theories of recovery against the same defendant for the same indivisible injury, and when the plaintiff prevails on two or more such theories, the defendant's liability for the plaintiff's injury is calculated separately for each such legal theory pursuant to the rules of the Restatement Third, Torts: Apportionment of Liability.

Judgment then is entered for the plaintiff against the defendant for the highest amount to which the plaintiff is entitled under any such legal theory.

LIABILITY FOR PHYSICAL AND EMOTIONAL HARM

§ . Medical Monitoring (T.D. No. 3) (approved 2024)

An actor is subject to liability to a person for the reasonable expenses of medical monitoring, even absent manifestation of present bodily harm, if all of the following requirements are satisfied:

- (1) the actor exposed the person to a significantly increased risk of a particular serious future bodily harm;
- (2) the actor, in exposing the person to a significantly increased risk of the particular serious future bodily harm, has acted tortiously;
- (3) the actor's tortious conduct factually causes the person to be at a significantly increased risk of the particular serious future bodily harm, and the increased risk is within the actor's scope of liability;
- (4) a medical monitoring regimen exists that makes expedited detection and treatment of the particular serious future bodily harm both possible and beneficial;
- (5) the medical monitoring regimen is different from that normally recommended in the absence of the exposure; and
- (6) the medical monitoring regimen is reasonably necessary, according to generally accepted contemporary medical practices, to enable expedited detection and treatment of the particular serious bodily harm, so as to prevent or mitigate the harm.

When an actor is liable for medical monitoring expenses, barring exceptional circumstances, monies should not be paid on a lump-sum basis. Instead, appropriate steps should be taken to ensure that funds earmarked for medical monitoring are used as intended and are not diverted to other purposes.

§ . Liability for the Provision of Alcohol (T.D. No. 3) (approved 2024)

(a) If a statute governs liability for injury caused by the provision of alcohol, an actor's liability for furnishing alcohol to another is governed by that statute.

(b) In the absence of a governing statute, a commercial establishment:

(1) is subject to liability for negligently providing alcohol to underage patrons when the underage patrons' intoxication factually causes subsequent injury; and

(2) is subject to liability for negligently providing alcohol to visibly intoxicated patrons (whether or not of legal drinking age) when the patrons' intoxication factually causes subsequent injury.

(c) In the absence of a governing statute, a social host:

(1) is subject to liability for recklessly providing alcohol to underage guests when the underage guests' intoxication factually causes subsequent injury; and

(2) is not liable for providing alcohol to guests of legal drinking age, even if the guests are served past the point of intoxication and even if the guests' intoxication factually causes subsequent injury.

Chapter 3: The Negligence Doctrine and Negligence Liability

§ 18 A. Negligent Misrepresentation Causing Physical Harm (T.D. No. 3) (approved 2024)

(a) An actor who negligently furnishes false information is subject to liability for any physical harm factually caused by another's reliance on the information that is within the actor's scope of liability.

(b) An actor's negligence may occur in ascertaining the accuracy of the information, in the manner in which it is communicated, or in other ways that result in the communication of false information.

(c) An actor is subject to liability pursuant to this Section regardless of whether the person who received or relied upon the actor's misrepresentation is the person who suffered physical harm.

Chapter 8: Liability for Emotional Harm

§ 48 A. Loss of Spousal Consortium (T.D. No. 1) (approved 2022)

The spouse of a person who suffers physical or emotional harm, factually caused by an actor's tortious conduct and within the actor's scope of liability, may recover for the loss of society resulting from the other spouse's harm. Loss of society includes loss of affection,

comfort, companionship, love, and support, impairment of conjugal relations, and loss of services.

§ 48 B. Loss of Child Consortium (T.D. No. 1) (approved 2022)

The parent of an unemancipated minor child who suffers physical or emotional harm factually caused by an actor's tortious conduct and within the actor's scope of liability may recover for the loss of society resulting from the child's injury. Loss of society includes loss of affection, comfort, companionship, love, and support, and loss of services.

§ 48 C. Loss of Parental Consortium (T.D. No. 1) (approved 2022)

A minor child of a parent who suffers physical or emotional harm, factually caused by the tortious conduct of an actor and within the actor's scope of liability, may recover for the loss of society resulting from the parent's injury. Loss of society includes loss of affection, comfort, companionship, love, and support, and the loss of services.

Chapter 8A: Interference with Family Relationships

§ 48 D. Alienation of Spousal Affections Abolished (T.D. No. 1) (approved 2022)

An actor who alienates one spouse's affections from the other spouse is not subject to liability for the harm caused to the other spouse due to the deterioration or destruction of the marital relationship.

§ 48 E. Criminal Conversation Abolished (T.D. No. 1) (approved 2022)

An actor who has sexual intercourse with one spouse is not subject to liability to the other spouse for any harm caused to the other spouse due to the impairment or destruction of the marital relationship.

§ 48 F. Spousal Abduction and Enticement Abolished (T.D. No. 3) (approved 2024)

One who compels or otherwise induces a spouse physically to separate or remain apart from the other spouse is not liable for the harm thus caused to the marital relationship.

§ 48 G. Alienation of Betrothed's Affections Abolished (T.D. No. 3) (approved 2024)

An actor who alienates one fiancé or fiancée's affections from the other is not liable for inducing a breach of the marriage contract or for the harm thus caused to the premarital or future marital relationship.

§ 48 H. Alienation of a Child's Affections Abolished (T.D. No. 3) (approved 2024)

An actor who alienates a child's affections from a parent is not liable for the harm thus caused to the parent due to the impairment or destruction of the parent-child relationship.

§ 48 I. Parental Claim for Seduction of a Minor Abolished (T.D. No. 3) (approved 2024)

An actor who has sexual intercourse with a minor is not liable to the minor's parent because of the sexual intercourse. This Section does not address the actor's liability to the minor or the actor's responsibility under other law.

§ 48 J. Tortious Interference with Parental Rights (T.D. No. 3) (approved 2024)

An actor is subject to liability to a parent who has custodial responsibilities over a minor child if the actor, with knowledge that the parent does not consent, intentionally and by affirmative conduct:

- (a) compels or induces the child to leave the parent, or
- (b) detains the child and prevents the child from returning to the parent's custody.

§ 48 K. Alienation of Parent's Affections Abolished (T.D. No. 3) (approved 2024)

An actor who alienates a parent's affections from a child is not liable for the harm thus caused to the child due to the impairment or destruction of the parent-child relationship.

Chapter 11: Liability of Medical Professionals and Institutions*

§ 1. Patient and Provider Defined (T.D. No. 1) (approved 2022)

In this Chapter:

(a) “Medical provider” means a professional who offers and provides medical care. For issues addressing communication, holding out, representation, or the like, “medical provider” includes an entity or individual who, in the circumstances, is appropriately regarded as acting on behalf of the provider.

(b) “Patient” means a person receiving medical care. For issues addressing awareness, information, understanding, agreement, consent, or the like, “patient” includes a representative legally authorized in the particular circumstances to stand in for the patient.

§ 2. Patient-Care Relationship (T.D. No. 1) (approved 2022)

(a) A patient-care relationship arises when a medical provider manifests an intent to care for a patient and:

- (1) the provider initiates care without the patient’s objection;
- (2) the patient reasonably believes that the provider has undertaken to provide care; or
- (3) the patient reasonably relies on the provider to provide care.

(b) The scope of a patient-care relationship is determined by a patient’s reasonable understanding of its scope, based on common understandings and on what the provider undertakes or holds out as offering.

(c) A patient-care relationship ceases when:

- (1) the patient indicates he or she wants the provider to cease care, and the provider complies;
- (2) the medical conditions that the provider undertook to treat no longer require care, and the patient does not have a reasonable basis to believe that the provider has continued the relationship;
- (3) the provider gives clear notice to the patient of the provider’s intent to terminate the relationship; or

* In 2023, Medical Malpractice was approved as a stand-alone project. All of the Medical Malpractice material is now contained in that project.

(4) the provider becomes legally, physically, or mentally incapable of providing care and, if able, gives the patient timely notice of that incapacity.

§ 3. Duties to Patients and Others (T.D. No. 1) (approved 2022)

(a) A medical provider's duties to a patient within the scope of any patient-care relationship include:

- (1) to exercise reasonable care, as described in § 4;
- (2) to comply with the requirements of informed consent provided in § 9;
- (3) to use reasonable care in protecting confidential patient information from release without justification; and
- (4) to not terminate the relationship in a manner that fails to give the patient a reasonable opportunity to obtain an alternative source of care without significantly compromising the patient's health.

(b) In addition to duties arising from a patient-care relationship, medical providers are also subject to general tort-law duties, both to patients and to others, specified in other portions of the Restatement Third of Torts, when applicable.

(c) Medical providers who breach a duty identified in Subsection (a) or (b) are subject to liability for physical harm caused by the breach.

Chapter 12: Liability in Event of Death

§ 70 [Approximately]. Actions for Causing Death (Wrongful Death) (T.D. No. 3) (approved 2024)

An actor's liability for tortiously causing the death of another is determined by the statute creating the right of action and its interpretation. The measure of damages for wrongful death is addressed by § 23 of the Restatement Third of Torts: Remedies (Tentative Draft No. 2, 2023).

§ 71 [Approximately]. Survival of Tort Actions Upon the Death of the Victim (T.D. No. 3) (approved 2024)

Under statutes providing for the survival or revival of tort actions, a person's cause of action may proceed, even if the person dies before the final resolution of the claim. The

measure of damages for such an action is addressed by § 24 of the Restatement Third of Torts: Remedies (Tentative Draft No. 2, 2023).

§ 72 [Approximately]. Survival of Tort Actions Upon the Death of the Tortfeasor (T.D. No. 3) (approved 2024)

Under statutes providing for the survival of a tort action, a person's cause of action may proceed even if the tortfeasor dies before the final resolution of the claim.

IMMUNITIES

Chapter 1: Intra-Family Immunities

§ 1. Spousal Immunity (T.D. No. 1) (approved 2022)

A spouse is not immune from tort liability to the other spouse because of the marital relationship.

§ 2. Parental Immunity (T.D. No. 1) (approved 2022)

A parent is not immune from tort liability to his or her child.

§ 3. Child Immunity (T.D. No. 1) (approved 2022)

A child is not immune from tort liability.

§ 4. No Immunity for Other Familial Relationships (T.D. No. 1) (approved 2022)

As with spouses, parents, and children, other family members are not immune from tort liability to another family member.

Chapter 2: Miscellaneous Immunities

§ 5. Charitable Immunity (T.D. No. 1) (approved 2022)

Subject to contrary statutory provisions, an actor engaged in charitable, educational, religious, or other benevolent activity is not immune from tort liability.

§ 6. Immunity of a Minor (T.D. No. 1) (approved 2022)

(a) A minor is not immune from tort liability.

(b) The effect of a minor's age and incapacity on whether the minor has committed a tort is addressed in Restatement Third of Torts: Liability for Physical and Emotional Harm § 10 (negligence) and Restatement Third of Torts: Intentional Torts to Persons § 2, Comment *a* (intent to commit a battery).

§ 7. Immunity of an Actor with a Mental or Emotional Disability (T.D. No. 1)
(approved 2022)

(a) An adult actor with a mental or emotional disability is not immune from tort liability.

(b) The effect of an actor's mental or emotional disability on whether the actor has committed a tort is addressed in Restatement Third of Torts: Liability for Physical and Emotional Harm § 11(c) (negligence) and Restatement Third of Torts: Intentional Torts to Persons § 2, Comment *a* (intent to commit a battery).

Chapter 3: Governmental Entities and Public Officials and Employees Immunities

§ 9. State Immunity (T.D. No. 1) (approved 2022)

(a) Unless a state consents to suit or otherwise abrogates its immunity, it is immune from tort liability.

(b) Even when a state generally consents to tort liability, it remains immune from tort liability for acts and omissions that:

- (1) are specifically immunized by statute,
- (2) constitute the exercise of a judicial or legislative function, or
- (3) constitute the exercise of an administrative function involving the discretionary determination of important governmental policy.

§ 10. Local Governmental Entity Immunity (T.D. No. 1) (approved 2022)

(a) Except as stated in Subsection (b), a local governmental entity is not immune from tort liability.

(b) A local governmental entity is immune from tort liability for acts or omissions that:

- (1) are specifically immunized by statute,
- (2) constitute the exercise of a legislative or judicial function, or

(3) constitute the exercise of an administrative function involving the discretionary determination of important governmental policy.

PARENTAL STANDARD OF CARE

§ 10A. Parental Standard of Care (T.D. No. 1) (approved 2022)

(a) When conduct of a parent does not involve an unemancipated minor child's discipline, supervision, or care, the parent is subject to tort liability when the parent fails to exercise reasonable care under all of the circumstances.

(b) When conduct of a parent involves an unemancipated minor child's discipline, supervision, or care, the parent is subject to tort liability to his or her unemancipated child only when the parent acts recklessly.

SEPULCHER (INTERFERENCE WITH HUMAN REMAINS)

§ 48 D. The Right of Sepulcher (Disposition of Human Remains) Defined (T.D. No. 2) (approved 2023)

The "right of sepulcher" is the right of a person or group of persons:

- (1) to control the remains of a deceased individual; and
- (2) to determine the place and manner of the disposition of such remains.

§ 48 E. Interference with the Right of Sepulcher (T.D. No. 2) (approved 2023)

An actor who, without privilege, intentionally, recklessly, or negligently interferes with the right of sepulcher, as defined by § 48 D, is subject to liability to the holder(s) of such right.

§ 48 F. Infliction of Emotional Harm by Mistreatment of Human Remains (T.D. No. 2) (approved 2023)

An actor who, without privilege, intentionally, recklessly, or negligently mistreats human remains is subject to liability for emotional harm suffered as a result of such mistreatment by:

- (1) the person or persons who hold the right of sepulcher, as defined by § 48 D,
and
- (2) close family members of the decedent.

**STATUTES OF LIMITATIONS AND STATUTES OF REPOSE
FOR COMMON-LAW TORT CAUSES OF ACTION**

PART 1

STATUTES OF LIMITATIONS

TOPIC 1

STATUTES OF LIMITATIONS IN GENERAL

§ 1. Definition of Statute of Limitations (T.D. No. 3) (approved 2024)

A statute of limitations is a statute that provides a plaintiff a legislatively defined period of time to sue on a cause of action against a defendant and that bars the cause of action after the legislatively defined period has expired without suit being brought.

TOPIC 2

WHEN THE STATUTE OF LIMITATIONS BEGINS TO RUN

§ 2. When the Statute of Limitations Begins to Run—All-Elements Rule (T.D. No. 3) (approved 2024)

Except as otherwise provided in § 3 (discovery rule) or § 4 (continuing torts), the statute of limitations begins to run on a cause of action when all of the necessary elements of the cause of action have occurred.

§ 3. When the Statute of Limitations Begins to Run—Discovery Rule (T.D. No. 3) (approved 2024)

Even if the statute of limitations would otherwise begin to run on a cause of action pursuant to § 2 (the all-elements rule), the statute of limitations does not begin to run until the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, the existence of all of the necessary factual elements of the cause of action against the defendant.

§ 4. When the Statute of Limitations Begins to Run—Continuing Torts (T.D. No. 3) (approved 2024)

Certain repetitive or continuous conduct by a defendant against a plaintiff gives rise to a “continuing tort.” In such cases, special rules, other than those set forth in §§ 2 and 3,

govern when the statute of limitations accrues. These special rules apply in the following narrow circumstances:

(a) If a rule of law requires all damages resulting from repeated or continuous tortious conduct to be sought in a single action, the statute of limitations begins to run as soon as the statute of limitations begins to run for any tort that is part of the continuing tort.

(b) If the plaintiff's injury is a cumulative and progressive result of repeated or continuous tortious conduct, none of which separately causes identifiable discrete cognizable injury, and if further exposures to the defendant's tortious conduct incrementally exacerbate the plaintiff's condition, the statute of limitations does not begin to run until after the cessation of the tortious conduct affecting the plaintiff.

(c) If the cause of action is for false imprisonment, the statute of limitations begins to run only after the cessation of the false imprisonment.

TOPIC 3

WHEN THE RUNNING OF THE STATUTE OF LIMITATIONS IS SUSPENDED (TOLLING)

§ 5. Statutory Tolling Rules (T.D. No. 3) (approved 2024)

Most tolling rules are created by statute. This Restatement does not restate statutory tolling rules.

§ 6. Continuous Representation (T.D. No. 3) (approved 2024)

The running of the statute of limitations on a client's cause of action against a lawyer or law firm for legal malpractice is tolled for any period of time during which the lawyer or law firm continues to represent the client with respect to the same or a substantially related matter.

§ 7. Continuous Medical Treatment (T.D. No. 3) (approved 2024)

The running of the statute of limitations on a patient's cause of action against a medical professional or medical institution for medical malpractice is tolled for any period of time during which the medical professional or medical institution continues to treat the patient for the same or a substantially related condition.

§ 8. Equitable Tolling (T.D. No. 3) (approved 2024)

Equitable tolling suspends the statute of limitations when both of the following conditions are satisfied:

- (a) The plaintiff has been diligently pursuing the plaintiff's rights, and
- (b) Some extraordinary circumstance prevents the plaintiff from bringing a timely action.

TOPIC 4

EFFECT OF DEFENDANT MISCONDUCT

§ 9. Equitable Estoppel (T.D. No. 3) (approved 2024)

If a defendant, by words or conduct, or by silence when the defendant has a duty to speak, causes a plaintiff not to bring a timely action, and the plaintiff's reliance on the defendant's words, conduct, or silence in forbearing to bring a timely action is reasonable, equitable estoppel bars the application of the statute of limitations until after the plaintiff's reasonable reliance has ceased.

§ 10. Fraudulent Concealment (T.D. No. 3) (approved 2024)

If a defendant, by words or conduct, or by silence when the defendant has a duty to speak, commits fraud that causes a plaintiff not to bring a timely action, the doctrine of fraudulent concealment bars the application of the statute of limitations until after the plaintiff has discovered, or in the exercise of reasonable diligence should have discovered, the defendant's fraud.

TOPIC 5

CONTRACTS SHORTENING OR LENGTHENING THE STATUTE-OF-LIMITATIONS PERIOD

§ 11. Contracts Shortening or Lengthening the Statute-of-Limitations Period (T.D. No. 3) (approved 2024)

(a) A plaintiff and a defendant may agree by an otherwise valid contract to shorten the statute-of-limitations period applicable to a present or future cause of action by the

plaintiff against the defendant, provided that the contract affords the plaintiff a reasonable opportunity to bring an action.

(b) A plaintiff and a defendant may agree by an otherwise valid contract to lengthen the statute-of-limitations period applicable to a present or future cause of action by the plaintiff against the defendant.

(c) If either the plaintiff or the defendant is a consumer, any contract shortening or lengthening the statute-of-limitations period is governed by the rules restated in Restatement of the Law, Consumer Contracts (Revised Tentative Draft No. 2, 2022).

PART 2

STATUTES OF REPOSE

TOPIC 1

STATUTES OF REPOSE IN GENERAL

§ 12. Definition of Statute of Repose (T.D. No. 3) (approved 2024)

A statute of repose is a statute that provides a plaintiff a legislatively defined period of time running from the date of a specified event, such as a tortious act, the sale of a product, or the completion of a building project, to sue on a cause of action against a defendant, and that bars the plaintiff's cause of action after the legislatively defined period has expired without suit being brought, regardless of whether the plaintiff could have sued during that period.

TOPIC 2

WHEN THE STATUTE OF REPOSE BEGINS TO RUN

§ 13. When the Statute of Repose Begins to Run (T.D. No. 3) (approved 2024)

The statute of repose begins to run on a cause of action by a plaintiff against a defendant on the date of the event specified in the statute of repose, such as a tortious act, the sale of a product, or the completion of a building project, regardless of whether the plaintiff is yet able to sue on the cause of action.

TOPIC 3

**THE STATUTE OF REPOSE IS NOT SUSPENDED BY COMMON-LAW
TOLLING RULES**

**§ 14. The Statute of Repose Is Not Suspended by Common-Law Tolling Rules (T.D. No. 3)
(approved 2024)**

The running of the statute of repose is not suspended by common-law tolling rules.

TOPIC 4

EFFECT OF DEFENDANT MISCONDUCT

§ 15. Effect of Defendant Misconduct (T.D. No. 3) (approved 2024)

The rules of § 9 (equitable estoppel) and § 10 (fraudulent concealment) apply to statutes of repose just as they do to statutes of limitations.

TOPIC 5

**CONTRACTS SHORTENING OR LENGTHENING THE STATUTE-OF-
REPOSE PERIOD**

**§ 16. Contracts Shortening or Lengthening the Statute-of-Repose Period (T.D. No. 3)
(approved 2024)**

The rules of § 11 (contracts shortening or lengthening the statute-of-limitations period) apply to statutes of repose just as they do to statutes of limitations.

AIDING AND ABETTING NEGLIGENCE TORTS

§ . Aiding and Abetting Negligence Torts (T.D. No. 3) (approved 2024)

An actor is subject to liability for aiding and abetting if:

- (a) another commits a negligence tort causing physical, emotional, or dignitary harm to a third person;
- (b) the actor had actual knowledge that the other might engage in negligent or reckless conduct posing a risk to a third person or persons; and
- (c) the actor substantially assisted or encouraged the other to engage in, and thereby increased the risk of, that negligent or risky conduct.

§ . Agreements to Engage in Conduct that is Negligent or Reckless (T.D. No. 3)
(approved 2024)

(a) Actors are subject to liability for harm resulting from concerted action if:

- (1) they agree to engage in conduct that is negligent or reckless;
- (2) each actor engages in the conduct to which they agreed;
- (3) at least one of the actors' agreed-to conduct factually causes cognizable physical, emotional, [or dignitary harm] to another; and
- (4) the harm is within the scope of liability of the agreed-to negligent or reckless conduct.

(b) Liability of multiple actors under this Section is joint and several, in the absence of a statute modifying the rule. If a statute modifies the rule of joint and several liability for claims under this Section, apportionment of liability among those found liable is in accordance with the statute.

FIREFIGHTER'S RULE ABOLISHED

Firefighter's Rule Abolished (T.D. No. 3—approved as amended at 2024 Annual Meeting; will be submitted for Council approval)

An actor who tortiously creates a peril that occasions the presence of a professional rescuer owes a duty to that professional rescuer consistent with the general principles of the Restatement Third, Torts: Liability for Physical and Emotional Harm §§ 7(a) and 32, notwithstanding the traditional “firefighter’s rule.”

LIABILITY FOR ECONOMIC HARM

Chapter 3: Interference with Economic Interests

§ 20 A. Bad-Faith Performance of First-Party Insurance Contract (T.D. No. 3)
(approved 2024)

An insurer is subject to tort liability to its insured when:

- (a) the insurer's claims processing of a first-party insurance policy lacks a reasonable basis;
- (b) the insurer acted with knowledge of the lack of a reasonable basis or acted in reckless disregard of the lack of a reasonable basis; and

(c) the insurer’s deficient performance is a factual cause of harm to the insured and the harm is within the insurer’s scope of liability.

MISCELLANEOUS PROVISIONS

Chapter __: Miscellaneous Torts

§ __. “Spoliation” Defined (T.D. No. 3) (approved 2024)

For purposes of this Restatement, “spoliation” refers to the destruction, mutilation, or significant alteration of physical or tangible evidence.

§ __. Third-Party Spoliation of Evidence (T.D. No. 3) (approved 2024)

An actor who intentionally spoliates evidence, as spoliation is defined in § __, is subject to liability for the harm thus caused if:

- (a) the actor knew that civil litigation was pending or probable;
- (b) the actor, although not a party to the underlying litigation, was duty-bound to preserve evidence for it;
- (c) the actor intentionally destroyed, mutilated, or significantly altered the evidence for the purpose of defeating or undercutting a party’s ability to vindicate that party’s interest in the pending or probable civil action; and
- (d) the destruction, mutilation, or significant alteration of evidence prejudiced the party by significantly impairing the party’s ability to vindicate the party’s interest in the underlying civil action.

§ __. First-Party Spoliation of Evidence (T.D. No. 3) (approved 2024)

An actor who intentionally spoliates evidence, as spoliation is defined in § __, is subject to liability for the harm thus caused if:

- (a) the actor knew that civil litigation involving the actor was pending or probable;
- (b) the actor was duty-bound to preserve the evidence;
- (c) the actor intentionally destroyed, mutilated, or significantly altered the evidence for the purpose of defeating or undercutting an opponent’s ability to vindicate the opponent’s interest in the pending or probable civil action; and

(d) the destruction, mutilation, or significant alteration of evidence prejudiced the opponent by significantly impairing the opponent's ability to vindicate the opponent's interest in the underlying civil action.

DEFENSES APPLICABLE TO ALL TORT CLAIMS

§ . Equitable Estoppel as a Defense to Tort Liability (T.D. No. 3) (approved 2024)

(a) If a person makes a definite misrepresentation of fact to an actor expecting, or with reason to expect, that the actor will rely upon it, and the actor, relying upon the misrepresentation, engages in conduct that is tortious but that would not be tortious if the facts were as they were represented to be, the person is not entitled to:

- (1) assert a claim in tort against the actor for the tortious conduct, or
- (2) regain property or its value that the actor thus acquired.

(b) A person is not entitled to assert a claim in tort against an actor if a person realizes that an actor, because of the actor's mistaken belief of fact, is about to engage in conduct that is tortious but that would not be tortious if the facts were as the actor believes them to be, and the person (1) could easily inform the actor of the actor's mistake but (2) fails to do so.

HARM BEFORE AND REGARDING BIRTH

§ . Prenatal Injury (T.D. No. 3) (approved 2024)

(a) If an actor tortiously causes harm to a fetus, and the fetus is later born alive, the actor is subject to liability to the child for the harm thus caused.

(b) If an actor tortiously causes harm to a fetus, and the fetus is not born alive, the existence and extent of liability depend upon the applicable wrongful-death statute.

WRONGFUL PREGNANCY, BIRTH, AND LIFE

§ . Wrongful Pregnancy (T.D. No. 3) (approved 2024)

An actor who tortiously causes a woman to suffer an unwanted pregnancy or the unwanted continuation of a pregnancy and the subsequent birth of a child is subject to liability for the unwanted pregnancy and the subsequent birth of an unplanned child.

§ . Wrongful Birth (T.D. No. 3) (approved 2024)

(a) An actor is subject to liability to the parents for the wrongful birth of a child born with a disability when the actor's tortious conduct denies parents the opportunity to decide whether:

(1) to conceive a child who may be born with a disability, if, had they known of the risk of such a birth, the parents would have chosen not to conceive the child; or

(2) to terminate the pregnancy of a fetus who may be born with a disability, if, had they known of the risk of such a birth, the parents would have chosen to terminate the pregnancy.

(b) When local law does not permit the parents to recover damages for the extraordinary costs of care for their child for the period after the child reaches majority, the actor is subject to liability to the child for any such costs.

§ . Wrongful Life (T.D. No. 3) (approved 2024)

A child born with a disability who would not have been born but for an actor's tortious conduct has not suffered a legally cognizable harm and therefore has no tort claim against the actor for being born with the disability.

NEGLIGENCE LIABILITY OF PRODUCT SUPPLIERS

§ . Negligence Liability of Product Suppliers (T.D. No. 3) (approved 2024)

A product supplier breaches its duty of reasonable care if the supplier:

(a) fails to provide information:

(1) about a dangerous condition of a product; or

(2) necessary to enable safe use of a product it distributes when the lack of such information makes the product unreasonably unsafe; or

(b) distributes a product whose dangers make it unreasonably unsafe even when appropriate information about those dangers is provided.

If a product supplier breaches its duty of care, it is subject to liability if, additionally, the supplier's breach is a factual cause of bodily injury, property damage, or legally cognizable emotional harm that is within the supplier's scope of liability.

§ . Negligence Liability of Independent Contractors that Manufacture, Rebuild, Repair, Maintain, Assemble, or Install Products (T.D. No. 3) (approved 2024)

(a) An independent contractor that negligently manufactures, rebuilds, repairs, maintains, assembles, or installs a product is subject to liability for bodily injury, property damage, or legally cognizable emotional harm factually caused by the contractor's negligence and within the contractor's scope of liability.

(b) An independent contractor that manufactures, rebuilds, repairs, maintains, assembles, or installs a product for another and returns the product to the other is liable for bodily injury, property damage, or legally cognizable emotional harm factually caused by the contractor's negligence in failing to identify and disclose an unreasonably dangerous condition when the harm sustained is within the contractor's scope of liability.

