Restatement of the Law Third
Torts: Remedies

Preliminary Draft No. 1

(October 14, 2020)

SUBJECTS COVERED

INTRODUCTION	The Right to a Remedy (§ 1)
CHAPTER 1	Compensatory Damages
TOPIC 1	General Rules for Measuring Compensatory Damages (§§ 2-9, 11-16)
APPENDIX	Black Letter of Preliminary Draft No. 1

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Restatement of the Law Third
Torts: Remedies

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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

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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]

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PROJECT STATUS AT A GLANCE

History of Material in This Draft

The Council approved the initiation of this project in January 2019.

All of the material in this draft is new.

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REPORTERS' MEMORANDUM

RESTATEMENT THIRD, TORTS: REMEDIES

Preliminary Draft No. 1

September 28, 2020

We look forward to finally meeting with our Advisers and with the Members Consultative Group and to hearing your reactions to this initial draft. We regret that we cannot safely meet in person.

This draft contains a preliminary table of contents for the entire project. The higher the proposed Section number, the more preliminary that table is. We think that the basic structure is sound and that any structural changes will be modest. Individual Sections are much more tentative. Please let us know if you think that something important is missing from or out of place in this preliminary table of contents.

This draft, Preliminary Draft No. 1, contains the Introduction and all but two Sections of Chapter 1, Topic 1. Topic 1 contains General Rules for Measuring Compensatory Damages. These rules are not tied to specific torts or kinds of harm. They are mostly not even tied to torts; most of these rules are trans-substantive rules of remedies that apply to torts and to other causes of action as well.

One Section missing from this draft is § 10 on loss of chance. That Section is on hold until we see what the project on Concluding Provisions writes with respect to loss of chance and medical malpractice. The other missing Section is § 17 on presumed damages. It did not occur to us to include such a Section until we were finalizing this draft. Presumed damages are rare outside of defamation cases, and there is a separate project on Defamation and Privacy, so we expect that this Section will be short.

Topic 2 will address compensatory damages for specific categories of harm in personal-injury cases. Topic 3 will address compensatory damages for specific categories of harm in business and property-damage cases. And Topic 4 will address compensatory damages for specific torts that are not adequately addressed by the more general rules in Topics 1, 2, and 3.

Chapter 2 will address other monetary remedies—nominal damages, punitive damages, and disgorgement of the wrongdoers' profits.

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Chapter 3 will address specific relief—principally injunctions against tort, but also ejectment and quiet title, replevin and its analogs, and constructive trusts. The choice between damages and injunctions goes to the very heart of remedies, and it will get substantial attention in this Restatement.

A few of these projected Sections will consist principally of cross-references to other Institute projects. Section 6 in this draft, on scope of liability, is an example. We expect to give similar treatment to § 28 on what is often called pure economic loss, § 37 on defamation, and §§ 42 and 55 on restitution, and to §§ 52 and 53 on ejectment and replevin if those remedies are fully addressed in Restatement Fourth, Property.

Much of this draft updates and expands on what was stated in Restatement Second, Torts, generally in more summary fashion. In § 4 on consequential damages, and § 9 on the collateral-source rule, we have tried to define in functional terms familiar phrases that courts have long defined in conclusory and less informative terms. No change is intended from what most courts appear to have meant all along.

Some Sections propose substantive changes to earlier Institute work or resolve issues explicitly left open, and some of these changes and resolutions may be controversial. These are extensively addressed in the Comments to the respective Sections; we flag them for you here.

Section 7 on avoidable consequences is disproportionately long, because the rule has many applications, and because we address a serious disagreement about what the rule should be or whether the rule should even exist. In a Comment in Restatement Third, Torts: Apportionment of Liability, the Institute abandoned the rule that tort plaintiffs cannot recover for harms they reasonably should have avoided; it folded the issue into the law of comparative responsibility. Few courts have adopted this change in the 20 years since the Institute proposed it, and we believe that there are sound reasons for retaining the traditional rule. The surviving Reporter from the earlier project (Michael Green), and the Reporters for Restatement Third, Torts: Concluding Provisions (Michael Green and Nora Freeman Engstrom), favor retaining the approach of the Apportionment Comment. We have the greatest respect for Mike and Nora, and we have attempted to fairly state their views in our Comments, but we have not been persuaded. We have restated what we think the law actually is. Section 7 is substantially expanded from the last prepublication draft

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we shared with Mike and Nora, so we don't know what they will say about it, but we anticipate that they will post their views to the project website. We submit this disagreement to the deliberative processes of the Institute.

Section 7 also contains a change from the first two Restatements of Torts. Those Restatements both said that a plaintiff who is denied compensation for damages that should have been avoided can recover what it would have cost to avoid those damages. We think that this is clearly the right rule, and that it is implicit in the rest of the rules on avoidable consequences. We suggest it in Comment *s* to § 7. But we do not state it as the law, because we found remarkably few modern cases either way. Should we state it as the law? Are logic, policy, and older authority a sufficient basis to do so? If anyone knows a modern case addressing the issue, please send it to us.

Section 8 on offsetting benefits abandons the Second Restatement's requirements that the benefit be "special" to the plaintiff and that it accrue to the same "interest" as the one that was harmed. These rules are often stated in dicta tracking the Second Restatement, but they appear to have little support in actual holdings, and reasons for the same-interest requirement have never been explained.

Section 11 on multiple sufficient causes resolves an issue that was left open in the Restatement Third, Torts: Liability for Physical and Emotional Harm § 27, Comment *d*. The question posed there was whether a defendant's liability for damages in the context of multiple sufficient causes should be reduced or extinguished if another sufficient cause of plaintiff's injury was innocent rather than tortious. Here too we lay out both sides of the debate and explain why we favor a rule that defendant is liable for the full amount of plaintiff's damages, less any adjustment for plaintiff's comparative responsibility, if the other sufficient cause or causes of plaintiff's damages are innocent.

Section 12 on taxes reflects the growth in tax-malpractice litigation since the Second Restatement and a greater judicial willingness to occasionally take account of significant tax consequences in other contexts. We are grateful to Professor Susan Morse, a tax scholar at the University of Texas, who gave us substantial help with this Section.

Section 13 on interest reflects a considerable liberalization, both by statute and judicial decision, in the award of prejudgment interest since the completion of the Second Restatement.

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Section 15 on litigation expenses rejects a tentative suggestion in the Second Restatement that plaintiffs who recover punitive damages should also get their attorneys' fees. We believe that this rule now survives only in Ohio. This Section also gives expanded treatment to the numerous exceptions to the general rule against awarding attorneys' fees to prevailing litigants.

Section 16 on remittitur, additur, and new trials based on excessive or inadequate damages is new. These issues were deliberately omitted from earlier Restatements as procedural or too diverse to restate, but we think they are essential to the administration of damage remedies and need to be addressed. The Section endorses comparative review of verdicts, and we anticipate that this Section may spark some debate.

We invite your comments on these and any other issues, both in our meeting and outside the meeting. The most reliable way to reach us is by email to dlaycock@virginia.edu and rhasen@law.uci.edu. Always copy the project's website; the address for that website is earlier in the front matter, on the page that lists the Reporters, Director, and Deputy Director.

We are grateful for outstanding research assistance from Hannah Bartlett, Kayley Berger, Timothy Duong, Jack Feinfield, Patrick Randall, and Delia Tasky at Irvine; Paul Hill, Billy Pavord, Amanda Salz, and Brandt Vernon at Texas; and Bethany Labrinos and Marija Nicksic at Virginia. We could not have done this without them, but we have also tried to be sure that at least one of us looked at every case before we cited it. Special thanks also to Kent Olson, a senior librarian at Virginia who went above and beyond in tracking down fugitive sources.

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INTRODUCTION

THE RIGHT TO A REMEDY

§ 1. Availability of Tort Remedies

A plaintiff who establishes a defendant's liability in tort is entitled to an appropriate remedy. The most common tort remedy is compensatory damages. In some cases, other remedies are available in addition to or instead of compensatory damages. These remedies are:

(a) nominal damages (§ 38),

(b) punitive damages (§§ 39-41),

(c) restitution of defendant's gains (§§ 42 and 55),

(d) injunctions against threatened or continuing torts (§§ 43-51),

(e) specialized remedies for the recovery of chattels or possession of land (§§ 52-53), and

(f) declaratory judgments to determine or clarify the rights of the parties (§ 54).

Comment:

a. History and scope. The Restatement Second, Torts, recognized compensatory damages, injunctions, and other remedies as appropriate in particular cases. This Restatement reorganizes, consolidates, and expands the Second Restatement's discussion of remedies. Restatement Second, Torts § 901 is superseded, principally by this Section and § 2.

b. Remedies, assuming liability. This Restatement puts liability issues to one side, assuming that plaintiff can prove defendant's liability (or, in the case of preliminary injunctive relief, likelihood of liability). Similarly, this Restatement does not take a position on the question whether a jurisdiction should recognize specific torts discussed in this Restatement, but considers only the appropriate remedy and the scope or measure of that remedy if the jurisdiction recognizes a specific tort. Illustrations describe conduct that causes or threatens harm and creates the need for a remedy, and the Illustrations assume that the conduct described is tortious. Often the tort will be obvious. But when the assumed tort is not obvious, this Restatement takes no position on whether the conduct is or should be a tort. Other parts of the Restatement Third, Torts, consider the standards for liability.

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It is common to speak of liability rules as "substantive" when contrasting liability rules with remedial rules. This casual usage rarely causes any serious confusion, but it is not accurate, because the law of remedies is also substantive. Except for a few details in the law of preliminary relief, remedies law is no part of the procedural rules by which disputes are litigated. What and how much a plaintiff recovers is part of the plaintiff's substantive entitlement and not simply a rule for processing disputes. The law of remedies determines the practical extent of plaintiff's rights and of defendant's liabilities, and a plaintiff's rights under liability rules are meaningless without effective remedies. As many cross-references in this Restatement may suggest, the line between remedies law and the rest of the substantive law is often unclear or disputed. When it is necessary to distinguish remedies law from the rest of the substantive law, this Restatement will refer to liability rules, the law governing liability, or similar formulations.

c. The most common tort remedy is compensatory damages. Given their frequent use in tort litigation, compensatory damages take up a major portion of this Restatement. Compensatory damages are the dominant remedy in tort because torts often occur suddenly (as with most personal injuries), or they proceed in secret before the potential plaintiff discovers what has happened (as with most frauds and latent injuries from harmful substances). Either way, a potential plaintiff often lacks sufficient warning to obtain an injunction before the tort occurs. But when a tort is continuing or repeated, or in other circumstances in which a threatened tort can be anticipated, an injunction against the defendant is an important remedy. And some torts can be reversed, as when converted or misappropriated property is returned to its owner in replevin or pursuant to an injunction.

Many torts are profitless to the defendant, and without some benefit to defendant, restitutionary remedies are inapplicable. Punitive damages are exceptional, reserved for especially egregious cases. The remaining tort remedies are specialized, or beneficial to a plaintiff only in limited situations. These various limitations leave compensatory damages as by far the most common and most important tort remedy.

d. Other appropriate remedies in addition to or instead of compensatory damages. Although compensatory damages are the most common remedy in tort, this Restatement also considers other appropriate remedies for tort liability.

Injunctive relief seeks to prevent future harm, including the continuing effects of a tort committed in the past. Courts enforce injunctions through the contempt power, which is used to

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coerce defendant's behavior. Declaratory judgments declare the rights and responsibilities of the parties. Declaratory judgments are implicitly coercive, because the court can follow through with an injunction if necessary.

Nominal damages are awarded to vindicate a right without regard to actual damages; they function like a declaratory judgment with respect to past events. Punitive damages award more than the sum needed to restore tort victims to their rightful position (see § 2); they are designed to punish wrongdoing and to provide greater deterrence than compensatory damages alone.

Restitutionary remedies are generally measured by an intentional tortfeasor's profits from the wrong. These remedies are attractive to a plaintiff when the defendant's provable profits exceed the plaintiff's provable damages, or when the plaintiff has a restitutionary claim to recover specific property. A plaintiff generally seeks restitution of a defendant's profits only in these circumstances, with the result that when restitutionary remedies are available, they often award more than the recovery available or collectible as compensatory damages. The principal goal of these restitutionary remedies is to ensure that conscious wrongdoers do not profit from their wrongs. Restitutionary claims to specific property are generally administered through equitable remedies such as constructive trust or equitable lien, which give the successful plaintiff a priority in bankruptcy.

Courts may award some remedies, such as punitive damages, in addition to compensatory damages; neither the purpose nor the measure of punitive damages duplicates the purpose or measure of compensatory damages. Other remedies may be duplicative of or inconsistent with compensatory damages. An award of nominal damages is duplicative of an award of compensatory damages for the same tort, and its declaratory purpose is fully served by the award of compensatory damages. Similarly, it would be improperly duplicative for a court both to enjoin future tortious conduct and also to compensate plaintiff with compensatory damages for expected losses from the threatened tortious conduct that is now enjoined.

e. Substitutionary and specific remedies. Compensatory damages are substitutionary; they offer a sum of money as a substitute for plaintiff's true rightful position, a position in which the plaintiff had not been injured in the first place. Specific remedies also aim to restore plaintiffs to their rightful position, or to preserve threatened plaintiffs in that position by preventing the tort. These remedies seek to restore or preserve the rightful position in kind, rather than with an equivalent sum of money. These specific remedies include injunctions against threatened or

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continuing torts, injunctions to undo or repair the consequences of a tort, restoration of specific property, declaratory judgments, and constructive trusts and other specific restitutionary remedies.

f. Terminology. Some courts and commentators refer to the award of a wrongdoer's profits in restitution as "damages," or as an alternate measure of damages. But that usage is both inaccurate and confusing and will never appear in this Restatement. The award of a wrongdoer's profits, or any other restitutionary remedy, is fundamentally different from compensatory damages. In some forms, such as disgorgement, restitution is an alternate monetary remedy, but it is not an alternate measure of the plaintiff's damages. Some restitutionary relief is specific (and traditionally available from courts of equity), and results in the plaintiff obtaining an interest in property to which defendant holds title, such as through a constructive trust.

Unlike compensatory damages, the award of punitive damages is not a measure of the plaintiff's rightful position. But the term "damages" is not confusing in this context, in part because it is so familiar and well understood, and in part because speakers and writers who mean punitive damages never use the word "damages" without the modifier "punitive."

Because remedies issues arise only if the injured person chooses to sue, after the parties are in court and generally after liability has been established, this Restatement will generally refer to "plaintiff" and "defendant" rather than to "an actor" and similar formulations common in many other Restatements.

REPORTERS' NOTES

a. History and scope. The Restatement Second, Torts, Division 13 (AM. L. INST. 1979), considered Remedies, with Chapter 47 focused on damages and Chapter 48 focused on injunctions. The Scope Note to Chapter 47 lists additional provisions touching on damages in the Restatement Second, Torts. Section 901 of that Restatement attempts to list all the purposes of tort remedies in the black letter; this Section lists the remedies themselves, and saves the discussion of purposes for Comments and for later Sections on each remedy. The Restatement Second set out the definition of damages and the types of damages available in particular circumstances, such as compensatory, punitive, and nominal damages. §§ 902-909. It set out general rules for calculating compensatory damages. §§ 910-923. Several Sections of the Restatement Second outlined what damages may be appropriate for specific torts. §§ 924-932 (including fraudulent and negligent misrepresentation, defamation, privacy invasions, and interference with contractual relations). Most of these Sections will be superseded by this Restatement; the specifics will be noted later, in the Comments to the various superseding Sections.

b. Remedies, assuming liability. The Supreme Court has repeatedly held that the law of damages is substantive for purposes of Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938). Gasperini

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v. Ctr. for Humanities, Inc., 518 U.S. 415 (1996) (holding that state law governs whether a verdict on a state-law claim is excessive); Monessen Sw. Ry. Co. v. Morgan, 486 U.S. 330, 335 (1988) ("It has long been settled that 'the proper measure of damages . . . is inseparably connected with the right of action' and therefore is an issue of substance." (quoting Chesapeake & Ohio Ry. Co. v. Kelly, 281 U.S. 485, 491 (1916))); see also Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal Co., 492 U.S. 257 (1989) (holding that state law governs punitive-damages issues on a state-law claim).

It seems clear in principle that rules governing the availability of injunctions or other equitable relief are equally critical to the ultimate outcome for the parties and equally a part of the substantive law. But the tradition of the federal equity power has led federal courts to sometimes treat rules on equitable remedies as controlled by federal law for *Erie* purposes. See Michael T. Morley, *The Federal Equity Power*, 59 B.C. L. REV. 217 (2018) (describing this tradition and rejecting it as rooted in a pre-*Erie* understanding of law). Leading scholars who defend the traditional practice do so not on the ground that the law of equitable remedies is procedural, but rather on the desirability of an "equity exception" to *Erie*. See Caprice L. Roberts, *Remedies, Equity and Erie*, 52 AKRON L. REV. 493, 498 (2018); John T. Cross, *The Erie Doctrine in Equity*, 60 LA. L. REV. 173, 174 (1999). See also Douglas Laycock, *How Remedies Became a Field: A History*, 27 REV. LITIG. 161 (2008) (treating remedies as substantive, and reviewing conflation of remedies and procedure under the writ system and in its lingering aftermath).

c. The most common tort remedy is compensatory damages. On the common use of compensatory damages in tort cases, see Restatement Second, Torts § 901 and Comment *a* (AM. L. INST. 1979) ("The first purpose of tort law ['to give compensation, indemnity or restitution for harms'] leads to compensatory damages."); Haines v. Comfort Keepers, Inc., 393 P.3d 422, 429 (Alaska 2017) ("[P]rimary purpose of tort law is to provide just compensation to the tort victim, and compensatory damage awards are designed to achieve this purpose."); Godfrey v. State, 898 N.W.2d 844, 868 (Iowa 2017) ("[I]n the common law regime, remedies at law—or damages—were usually the first choice to remedy a protected right"); In re Bradley Est., 835 N.W.2d 545, 556 n.51 (Mich. 2013) ("Although other remedies might be available in some circumstances, an action for damages is an essential remedy for a tort."); Hoyal v. Pioneer Sand Co., 188 P.3d 716, 720 (Colo. 2008) ("A principal function of tort law is to compensate a victim for the wrongdoing of the tortfeasor."); Rizzuto v. Davidson Ladders, Inc., 905 A.2d 1165, 1173-1174 (Conn. 2006) ("[T]he primary function of tort law" is "determining when compensation [is] required") (alteration by the court); Clay Electric Co-op, Inc. v. Johnson, 873 So. 2d 1182, 1190 (Fla. 2003) ("The primary purpose of tort law is that wronged persons should be compensated for their injuries and that those responsible for the wrong should bear the cost of their tortious conduct.").

In this Restatement, Chapter 1, Topic 1, sets forth general rules for establishing and measuring compensatory damages. Topic 2 covers personal injury. Topic 3 covers injury to economic interests and to real, personal, and intangible property. Topic 4 concludes with the measure of compensatory damages applicable to specific torts with somewhat special rules, for those jurisdictions recognizing those torts.

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d. Other appropriate remedies in addition to or instead of compensatory damages. Chapter 2 of this Restatement considers other monetary remedies, including nominal damages, punitive damages, and the restitutionary remedy of disgorgement. Chapter 3 considers injunctive and other forms of specific relief, including permanent injunctions, preliminary injunctions, temporary restraining orders, and other specific remedies, including remedies for recovering possession of land or chattels, declaratory judgments, and constructive trusts and other specific restitutionary remedies. Chapter 3 concludes with equitable defenses to claims for specific relief.

On duplicative and inconsistent remedies, see § 3 on the one-satisfaction rule and § 48 on the prohibition of double recoveries through both damages and an injunction. See also Carey v. Piphus, 435 U.S. 247, 266-267 (1978) (holding that plaintiff in a § 1983 action may recover nominal damages when he could not prove compensatory damages); Magnett v. Pelletier, 488 F.2d 33, 35 (1st Cir. 1973) ("If a compensable injury has been shown, compensatory damages must be given; if not, nominal damages should not be used to compensate plaintiff in any substantial manner, since he has shown no right to such compensation."); Polin v. Chung Cho, 87 Cal. Rptr. 591, 595 (Ct. App. 1970) (if plaintiffs in trespass action "obtain an injunction which will avert further damage, they are not entitled to damages beyond the date when the injunction is granted.").

e. Substitutionary and specific remedies. On the rightful-position standard, see § 2. Compensatory damages are a substitutionary remedy; the plaintiff suffers an injury and receives a sum of money in exchange, as compensation for that injury. Specific remedies—principally injunctions against threatened or continuing torts—are the subject of Chapter 3 of this Restatement.

f. Terminology. On restitution, see § 42 on disgorgement of a defendant's profits, and § 55 on constructive trusts and other specific restitutionary remedies, as well as the Restatement Third, Restitution and Unjust Enrichment (AM. L. INST. 2011), especially § 51 on disgorgement.

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CHAPTER 1
COMPENSATORY DAMAGES

TOPIC 1
GENERAL RULES FOR MEASURING COMPENSATORY DAMAGES

§ 2. The Rightful Position

A plaintiff who establishes a defendant's liability in tort generally is entitled to a remedy that will restore that plaintiff, as nearly as possible, to the position he or she would have occupied if the tort had not been committed. This basic principle is implemented by more specific rules, some of which limit its reach.

Comment:

a. History and scope. The principle of restoring plaintiffs to the positions they would have occupied but for the wrong is stated, under the heading "General Principle," in the first Comment to § 901—the first Section of the Chapter on remedies in both the Restatement of Torts and the Restatement Second, Torts.

b. The rightful position. In this Restatement, the position plaintiffs would have occupied but for the wrong is often referred to as their "rightful position." Restoration to the rightful position is the goal of all compensatory remedies, but the focus here is on tort remedies. Restoration to the rightful position aims to compensate for all the losses caused by a tort and to make plaintiffs as well off as they would have been if the tort had not been committed. This formulation leads to the familiar but-for test of causation of damages; as a first approximation, a defendant is liable for all those harms, but only those harms, that would not have occurred but for the tort. Restoration to the plaintiff's rightful position does corrective justice between the parties; it shifts the costs of defendant's negligence or wrongdoing from the plaintiff who suffered those costs back to the defendant who inflicted them.

Sometimes, the rightful position is the position that plaintiff occupied immediately before the tort. But it is not entirely accurate to say that compensatory damages should restore plaintiffs to the position they occupied before the wrong. Often, the rightful position is some future position that plaintiff would have come to occupy if the defendant had not interfered. If a plaintiff is injured and unable to work, or if a tort damages or disrupts a business, the plaintiff's lost earnings or lost

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profits are part of the damages, but they are not money that the plaintiff ever had before. These losses are money the plaintiff would have earned but for the tort.

c. As nearly as possible. Courts generally recognize that the rightful position cannot be fully or precisely restored in any but the simplest cases, and often qualify their statements of the rightful-position principle with phrases such as "to the extent possible," "as nearly as possible," "as closely as possible," and the like. Damages must be proved with a reasonable degree of certainty under all the circumstances, including the nature of the injury. See § 5. For some losses, restoration to the rightful position can be relatively precise, or even exact. Out-of-pocket expenses incurred before trial can be compensated exactly if the plaintiff kept good records; lost earnings up to the date of trial can be compensated exactly if the plaintiff was steadily employed at a fixed wage. Other plaintiffs have more variable earnings, the loss of which can only be approximated. See § 18. The value of damaged or destroyed property may be determined with relative precision if there is an active market for similar items, but often can only be estimated for unusual or one-of-a-kind items. See §§ 23-26. Future damages must be predicted, and such predictions are necessarily quite approximate.

For some elements of damage, genuine restoration to the rightful position is impossible, and the basic principle gives only metaphorical guidance. Human life, physical injury to the person, pain and suffering, disability, disfigurement, emotional distress, and dignitary harms are never bought or sold in any market and are valued in dollars only for purposes of tort law and, for some of these harms, for evaluating health-and-safety regulations. Courts are often reduced to saying only that those who suffer such harms should receive fair or reasonable compensation. See §§ 20-22.

d. Economic incentives. Requiring defendants to compensate for all the compensable injuries they cause has the effect of forcing them to internalize the costs of those injuries, and thus creates incentives for potential tortfeasors to spend up to equivalent sums on safety precautions to avoid inflicting such injuries in the first place. The point is usually discussed in terms of taking precautions equal to the expected value of an injury, conceived in terms of its probability and severity. When those probabilities and the cost of precautions are aggregated across the universe of potential injuries, the same point can be stated in terms of the total cost of accidents and the total cost of safety precautions. Many analysts view it as wasteful for potential defendants to spend more on safety precautions than the injuries would cost.

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But because most tort victims do not pursue tort remedies, because most of those who do pursue such remedies settle before trial, and because most settlements are for less than the amount that would have been recovered if the plaintiff had prevailed at trial and proved the full amount of all damages suffered, the risk of compensatory damages alone does not provide incentives to spend aggregate sums on safety equal to the aggregate cost of preventable tortious injuries (or spending in any individual situation equal to the expected cost of injuries). Concerns for reputation and market competition in the business context, and for the potential tortfeasor's own personal safety in many individual contexts, provide additional incentives to exercise due care. For some intentional or otherwise egregious torts, supra-compensatory remedies such as punitive damages or the disgorgement form of restitution may provide additional deterrence.

e. Implementing rules. The goal of restoring plaintiffs to their rightful positions is a valuable guide to interpretation of specific damage rules in novel or ambiguous situations. But some specific damage rules explicitly limit recoverable damages to less than the rightful position. Rules that limit the scope of liability provide that some harms caused by a tort are not compensable; statutes that cap recovery for certain kinds of damages mean that harms that exceed the cap are not compensable. See §§ 5, 20. Emotional distress is recoverable only for a subset of tortious conduct. See §§ 20-22. The rightful-position principle is subject to these and other more specific rules.

REPORTERS' NOTES

a. History and scope. Restatement Second, Torts § 901 (AM. L. INST. 1979) is broader than this Section; the black letter attempts to state the purposes of all tort remedies and not just of compensatory damages. Comment *a* says that "the law of torts attempts primarily to put an injured person in a position as nearly as possible equivalent to his position prior to the tort." An identical statement appears in Restatement of Torts § 901, Comment *a*. In this Restatement, the purposes of other remedies are addressed in the Sections that restate those remedies. Restatement Second, Torts § 901 is superseded by this Section and by § 1, and by other Sections stating the purpose of various remedies.

b. The rightful position. The principle of restoring plaintiffs to the positions they would have occupied but for the wrong is very widely stated by courts and commentators, and in many contexts. See, e.g., Babb v. Wilkie, 140 S. Ct. 1168, 1178 (2020) ("Remedies generally seek to place the victim of a legal wrong . . . in the position that person would have occupied if the wrong had not occurred." (alteration by the Court); E.J. Brooks Co. v. Cambridge Sec. Seals, 105 N.E.3d 301 (N.Y. 2018); J & D Towing, LLC v. Am. Alt. Ins. Corp., 478 S.W.3d 649 (Tex. 2016); Carrozza v. Voccola, 90 A.3d 142 (R.I. 2014); Brooks v. City of Huntington, 768 S.E.2d 97 (W. Va. 2014); MCI Commc'ns Servs. v. CMES, Inc., 728 S.E.2d 649 (Ga. 2012); Schoenholz v.

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Hinzman, 289 P.3d 1155 (Kan. 2012); Wooley v. Lucksinger, 61 So. 3d 507 (La. 2011); Lampi v. Speed, 261 P.3d 1000 (Mont. 2011); Weitz v. Green, 230 P.3d 743 (Idaho 2010); Gateway Foam Insulators, Inc. v. Jokerst Paving & Contracting, Inc., 279 S.W.3d 179 (Mo. 2009); Rizzuto v. Davidson Ladders, Inc., 905 A.2d 1165 (Conn. 2006); Vaught v. A.O. Hardee & Sons, Inc., 623 S.E.2d 373 (S.C. 2005); Thompson v. King Feed & Nutrition Serv., Inc., 105 P.3d 378 (Wash. 2005); Bynum v. Magno, 101 P.3d 1149 (Haw. 2004); Porter v. City of Manchester, 849 A.2d 103 (N.H. 2004); Brennen v. Aston, 84 P.3d 99 (Okla. 2003); Moorhead v. Crozer Chester Med. Ctr., 765 A.2d 786 (Pa. 2001); JAMES M. FISCHER, REMEDIES § 1.0 at 2-3 (3d ed. 2014); 4 FOWLER V. HARPER, FLEMING JAMES, JR., & OSCAR S. GRAY, HARPER, JAMES AND GRAY ON TORTS § 25.1 at 578-579 (3d ed. 2007); DOUGLAS LAYCOCK & RICHARD L. HASEN, MODERN AMERICAN REMEDIES 14 (5th ed. 2019).

For the specific phrase "rightful position," see *J & D Towing*, 478 S.W.3d at 655, 677; Maloney v. Home & Inv. Ctr., Inc., 994 P.2d 1124, 1133 (Mont. 2000); DAN B. DOBBS & CAPRICE L. ROBERTS, LAW OF REMEDIES § 3.1 at 215 (3d ed. 2018); FISCHER, REMEDIES § 1.0 at 2-3; LAYCOCK & HASEN, REMEDIES 14.

c. As nearly as possible. See, e.g., E.J. Brooks Co. v. Cambridge Sec. Seals, 105 N.E.3d 301, 307 (N.Y. 2018) ("to the extent possible"); Wooley v. Lucksinger, 61 So. 3d 507, 623, 632 (La. 2011) ("as closely as possible"); Vaught v. A.O. Hardee & Sons, Inc., 623 S.E.2d 373, 375 (S.C. 2005) ("as nearly as possible"); Thompson v. King Feed & Nutrition Serv., Inc., 105 P.3d 378, 383 (Wash. 2005) ("as nearly as possible"); Porter v. City of Manchester, 849 A.2d 103, 119 (N.H. 2004) ("as nearly as possible"); Moorhead v. Crozer Chester Med. Ctr., 765 A.2d 786, 790 (Pa. 2001) ("as nearly as possible").

d. Economic incentives. For a leading statement of the idea that tort remedies should provide appropriate incentives to exercise due care, including spending on safety precautions up to the cost of the injuries to be prevented, see RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 6.1 at 191-196 (9th ed. 2014); see also DAN B. DOBBS, PAUL T. HAYDEN, & ELLEN M. BUBLICK, THE LAW OF TORTS § 14 at 29-31, §§ 160-162 at 504-522 (2d ed. 2011) (fairly presenting the idea and arguments for and against it); Restatement Third, Torts: Liability for Physical and Emotional Harm § 3 (AM. L. INST. 2010) (defining "negligence" in terms of the foreseeable likelihood and severity of harm and the burden of precautions). A vast literature on the economic analysis of torts and tort remedies is well beyond the scope of this Note.

In any individual case that goes to trial, the tort system can in principle award full compensation. If that result could be universalized, then tort liability would provide incentives to spend on safety precautions equivalent to the full cost of tortious injuries. And this model is often used for heuristic purposes.

But most tort victims file no claim. Studies are collected in DAVID M. ENGEL, THE MYTH OF THE LITIGIOUS SOCIETY: WHY WE DON'T SUE (2016). Few cases are tried; those that are not dismissed mostly settle. In the largest nationwide study, only three percent of tort, contract, and real-property cases in state courts went to trial. LYNN LANGTON & THOMAS H. COHEN, CIVIL BENCH AND JURY TRIALS IN STATE COURTS, 2005 (NCJ 223851, rev. 2009), available at

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https://www.bjs.gov/content/pub/pdf/cbjtsc05.pdf. And most settlements are necessarily for less than full compensation, because each side gives up part of what it hopes to gain at trial in order to achieve settlement. One study found that the *mean* settlement in medical-malpractice cases is smaller than the *median* jury verdict, even though means exceed medians in any distribution with no upper limit. Ronen Avraham, *An Empirical Study of the Impact of Tort Reforms on Medical Malpractice Settlement Payments*, 36 J. LEGAL STUD. S183 (2007). The goal of restoring plaintiffs to their rightful position is often not achieved.

Compensation in tort is a surprisingly small part of the total sources of compensation for injured Americans. Other sources include workers' compensation, various government-run social-insurance programs, and first-party medical, disability, and accident insurance. See Ellen Smith Pryor, *Part of the Whole: Tort Law's Compensatory Failures Through a Wider Lens*, 27 REV. LITIG. 307 (2008). First-party property insurance often compensates tortiously caused property damage.

e. Implementing rules. Specific rules designed to limit compensation to less than the rightful position necessarily limit the principle stated here. But rules not so designed should be interpreted in light of the basic principle of restoration to the rightful position.

> The law of torts attempts primarily to restore the injured party to as good a position as he held prior to the tort. In accomplishing that result, courts must be mindful of the fact that rules governing the proper measure of damages in a particular case are guides only and should not be applied in an arbitrary, formulaic, or inflexible manner, particularly where to do so would not do substantial justice.

Brooks v. City of Huntington, 768 S.E.2d 97, 102 (W. Va. 2014) (quoting Myers v. Arnold, 403 N.E.2d 316, 321 (Ill. App. Ct. 1980)).

§ 3. One Satisfaction

(a) Except as provided in Subsection (b), a plaintiff cannot recover an amount of compensatory damages that exceeds one full compensation for an indivisible injury. In determining whether plaintiff has received full compensation, the finder of fact shall take into account all sources of payment made on account of the injury, except as otherwise provided with respect to collateral sources under the rules set forth in § 9.

(b) A plaintiff who settles with a defendant for an amount that turns out to be greater than that defendant's share of responsibility for the amount of the final judgment, as determined by the finder of fact, is entitled to keep the entire settlement. Other defendants are not entitled to a credit for the amount that the settling defendant paid in excess of that defendant's share.

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Comment:

a. History and scope. Restatement Second, Torts, contains a number of Sections discussing aspects of the one-satisfaction rule, most notably § 886, "Satisfaction of a Judgment Against One of Several Tortfeasors," and § 885(3) on the effect of payments intended as compensation. Restatement Third, Torts: Apportionment of Liability superseded these Sections—§ 25 superseded § 886, and § 16 superseded § 885(3). This Section and § 9 supersede Restatement Second, Torts § 920A, "Effect of Payments Made to Injured Party."

This Section builds upon Restatement Third, Torts: Apportionment of Liability §§ 16, 24, and 25, and Restatement Second, Judgments § 50(2). Contribution and indemnity rules governing the responsibility of multiple tortfeasors to reimburse one another for payments made to plaintiff are addressed in Restatement Third, Torts: Apportionment of Liability §§ 22-23, and Restatement Third, Restitution and Unjust Enrichment § 23. These Sections are *not* superseded.

b. Rationale for the rule. The one-satisfaction rule is an uncontroversial corollary of the rightful-position standard set forth in § 2: A plaintiff injured by a tort generally is entitled to a sum of money that will restore that plaintiff, as nearly as possible, to the position he or she would have occupied if the tort had not been committed. Giving the plaintiff full compensation accomplishes that goal, and giving the plaintiff more than full compensation overremediates. Once a plaintiff has received full compensation for an injury through judgments, settlements, or other payments that are not subject to the collateral-source rule, plaintiff's claim is "satisfied," and there is no basis for plaintiff to seek additional compensatory damages for that injury. Partial payments toward satisfaction reduce the amounts tortfeasors owe plaintiff.

The one-satisfaction rule promotes justice under the rightful-position standard and also promotes judicial and administrative efficiency. There may be disputes over application of the rule, such as whether plaintiff has indeed received full compensation for an injury, whether a payment was made on account of the injury or on account of a related but distinct injury, or whether plaintiff is entitled to a payment on account of an injury because it came from a collateral source. Some jurisdictions reject the exception in Subsection (b). But there are essentially no disputes over the soundness of the basic rule in Subsection (a).

c. Mechanics of the rule. Restatement Third, Torts: Apportionment of Liability § 25 states detailed rules for determining when and how payments following a judgment reduce, and in some circumstances satisfy, plaintiff's claims against multiple tortfeasors. Roughly speaking and subject

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to some minor exceptions, when one defendant pays plaintiff after judgment for the full amount of plaintiff's damages for an indivisible injury, plaintiff can recover no more in compensatory damages from any tortfeasor who caused the injury. When a defendant partially pays, plaintiff's right to recovery is reduced by the value of the payment. See Restatement Second, Judgments § 50(2). Compare Illustration 4 and the somewhat different rule for payments pursuant to settlements. When a judgment on account of one injury is paid by a defendant who is not liable for plaintiff's other injuries, such as in the case of divisible injuries, that defendant's payments do not constitute satisfaction of the plaintiff's claim against other tortfeasors or reduce the liability of those tortfeasors. These rules are incorporated and not repeated here.

The Apportionment Restatement, including §§ 16 and 24, also states specific rules for determining how to treat settlement payments for purposes of determining satisfaction of plaintiff's claim. These Sections consider issues such as how to determine whether a voluntary payment in exchange for a release of one tortfeasor releases other tortfeasors, and how to treat settlement amounts when a defendant goes to trial after plaintiff settles with a different defendant.

Sometimes payments to plaintiff come not after a judgment or formal settlement, but in some other way, such as through an informal settlement. This Section clarifies that all payments made to plaintiff on account of an indivisible injury, except for payments subject to the collateral-source rule, act to reduce or satisfy the amount that other tortfeasors owe the plaintiff for that injury. Section 9 of this Restatement explains that a collateral-source payment, such as the proceeds of first-party insurance, is not credited against the amount that the tortfeasor owes the plaintiff, unless the jurisdiction's statutory law provides otherwise.

Illustrations:

1. Alice suffers an indivisible injury in a two-car collision. Alice sues Betty, the driver of one of the cars, and the factfinder determines that Alice suffered $100,000 in damages and that Betty bears 100 percent of the responsibility for Alice's injuries. Judgment is entered against Betty in the amount of $100,000. Betty pays the judgment. Alice may not recover any additional damages from Charlie, the driver of the second car.

2. Same facts as Illustration 1, except that Alice sues both Betty and Charlie, and the jury finds the two defendants equally responsible in a jurisdiction that applies traditional rules of joint and several liability. Betty pays Alice $30,000 following the

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judgment. Betty may recover no more than an additional $70,000 in total from Betty, Charlie, or both.

3. Same facts as Illustration 2, except that Alice also receives a $20,000 payment from her own medical insurer. Even though the insurance company made the payment "on account of the injury," neither Betty nor Charlie is entitled to an offset for the $20,000 payment if the jurisdiction adheres to the common-law collateral-source rule. See § 9. If the jurisdiction has repealed the collateral-source rule, or limited that rule in a way that entitles defendants to credit for payments by first-party medical insurers, then Betty may recover no more than an additional $50,000 from Betty, Charlie, or both.

4. Dana suffers an indivisible injury when she uses a product manufactured by Manufacturer and sold to her by Seller. She sues both Manufacturer and Seller, and she settles with Seller for $100,000 before trial. At trial, the jury assigns 90 percent of the responsibility to Manufacturer and 10 percent to Seller. The jury awards Dana $500,000. The extent to which Manufacturer may offset all or part of the $100,000 settlement payment against its $500,000 damage judgment depends upon the rules contained in Restatement Third, Torts: Apportionment of Liability § 16. Those rules generally provide, with some exceptions, that Manufacturer is entitled to a $50,000 credit, based on Seller's share of responsibility, and not to a $100,000 credit, based on the amount of Seller's settlement.

Illustration 4 recognizes a modest exception to the one-satisfaction rule, as described in Subsection (b). Assuming that the judgment against Manufacturer is collectible, Dana will recover $550,000 ($450,000 from Manufacturer plus $100,000 from Seller) for an injury the jury valued at $500,000. But if Dana had settled with Seller for only $20,000, she would be undercompensated. Manufacturer would still get a $50,000 credit based on Seller's share of responsibility, so that Dana would collect only $470,000 for the $500,000 injury ($450,000 from Manufacturer plus $20,000 from Seller). The risk of a settlement more or less favorable than the jury's award is thus allocated to the settling plaintiff.

Some states would give Manufacturer a $100,000 credit based on the amount of the settlement. This approach better implements the one-satisfaction rule, but it creates other difficulties. The Apportionment Restatement adopts the credit based on share of responsibility and gives multiple reasons explaining why that is the better rule.

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The rule for payments on a judgment is different from this rule for payments pursuant to a settlement. Restatement Second, Judgments § 50(2) provides for a credit based on the amount of the payment, not on the share of responsibility, for payments on a judgment against multiple defendants. When all defendants are subject to the same judgment, the value of the injury has been fixed by the judgment, and it is no longer necessary to address the risk that a partial settlement is especially favorable or unfavorable.

The one-satisfaction rule also recognizes that if the rules in the initial forum in which plaintiff sought relief prevented the plaintiff from obtaining full compensation, plaintiff may seek additional compensation in another forum. For example, consider a plaintiff who suffered a single indivisible injury caused by two defendants, and the case against one defendant goes to arbitration under rules limiting recovery of certain damages. The damages awarded would not constitute full compensation for damages that were unavailable in the arbitration but are available in a lawsuit against the second defendant.

d. Alternative legal theories. The one-satisfaction rule applies in the case of multiple legal theories, or multiple characterizations of the same harm, just as it applies to multiple defendants. Plaintiff can recover once for each harm suffered, no matter how many ways that harm is described or how many legal rules were violated to inflict it. This issue arises most commonly when one or more statutory claims overlap with each other or with a common-law claim. See Illustration 6. But it can also arise with two or more common-law claims.

Illustration:

5. Tom was subjected to an unconstitutional search, which led to a criminal prosecution that was eventually dropped. While the prosecution was pending, Employer fired Tom from his job and told several people that Tom had been dealing drugs and stealing from clients. Tom sued Employer in state court for breach of his employment contract, defamation, and intentional infliction of emotional distress. He sued City and the Officers who conducted the search in federal court for constitutional violations and the state-law torts of false arrest and malicious prosecution. The suit against Employer was tried first. The jury awarded Tom $3 million, and Employer paid the judgment.

The jury verdict fixes the value of the injuries that Employer inflicted on Tom, and the resulting judgment has been satisfied. Tom cannot claim any further damages from City or Officers for causing him to lose his job or causing Employer to defame him. It is

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irrelevant that his claims against City and Officers are against different defendants and are based on different legal theories. He can still sue City and Officers for any distinct harms, unrelated to Employer's actions, caused by the search and prosecution.

The possibility that harms from one defendant or one cause of action are not entirely congruent with the harms from another defendant or another cause of action is briefly examined in Restatement Third, Torts: Apportionment of Liability § 25, Comment *b*.

e. Relationship to other remedies. A plaintiff who has received full compensation for an injury may obtain additional relief that is not intended as compensation, such as punitive damages, see §§ 39-41, or other punitive remedies. A plaintiff also may be able to obtain full compensation in the form of compensatory damages for defendant's past harm as well as an injunction barring future harm. Injunctions and damages must be coordinated so as to prevent double recovery. See § 48. On a plaintiff's right to choose to obtain restitution measured by defendant's gains as an alternative to compensatory damages, see §§ 42, 55.

Illustration:

6. Bill sues Soap Co. for property damage that occurred when a free sample of Soap Co.'s shampoo dissolved the plumbing fittings in his bathroom. Bill recovers a judgment against Soap Co., which is satisfied. Separately, Bill sues Retailer, who provided the free sample, pursuant to the state's consumer-protection act for deceptive trade practices. The consumer-protection act provides for recovery of three times the actual damages suffered due to a violation of the act, plus attorneys' fees. Collection of Bill's judgment against Soap Co. is not a satisfaction of Bill's claim against Retailer.

Retailer is entitled to a credit for Soap Co.'s payment against the compensatory portion of any judgment under the consumer-protection act (the amount of damages found by the finder of fact), but not against the punitive portion (the amount equal to two times the compensatory portion and awarded under the treble-damages provision) or against the attorneys' fees. That Bill's claims against Soap Co. and Retailer are based on completely different legal theories might affect how the credit is calculated; whether comparative responsibility applies depends on the provisions and interpretation of the consumer-protection act. But the distinct legal theories are otherwise irrelevant. Bill is entitled to be compensated once and only once for the loss of his plumbing fixtures.

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REPORTERS' NOTES

a. History and scope. Restatement Second, Torts § 886 (AM. L. INST. 1979), "Satisfaction of a Judgment Against One of Several Tortfeasors," was drafted when "the predominant concern was reforming the law so that a plaintiff who settled with one jointly and severally liable party would not be barred from suing other jointly and severally liable parties, if the terms of the settlement so permitted." Restatement Third, Torts: Apportionment of Liability § 25, Comment *a* (AM. L. INST. 2000).

Apportionment § 25 superseded Second Restatement § 886 and offered broader rules on satisfaction of judgments and the reduction of amounts due to plaintiffs after full or partial payments on a judgment. Section 16 of the Apportionment Restatement offered similar rules for payments pursuant to a settlement with some but not all of the tortfeasors. Section 16 superseded the Second Restatement's § 885(3), which provided that "[a] payment by any person made in compensation of a claim for a harm for which others are liable as tortfeasors diminishes the claim against the tortfeasors, at least to the extent of the payment made, whether or not the person making the payment is liable to the injured person and whether or not it is so agreed at the time of payment or the payment is made before or after judgment."

Sections 16, 24, and 25 of the Apportionment Restatement (AM. L. INST. 2000) provide detailed rules on the mechanics of the one-satisfaction rule in various contexts. Section 25 also relies upon Restatement Second, Judgments § 50(2) (AM. L. INST. 1982). That Section provides: "Any consideration received by the judgment creditor in payment of the judgment debtor's obligation discharges, to the extent of the amount of value received, the liability to the judgment creditor of all other persons liable for the loss." See Restatement Third, Torts: Apportionment of Liability § 25, Comment *g* and Reporters' Note to Comment *g*.

This Section does not repeat the detailed rules contained in the Apportionment Restatement, but instead states a general principle that a plaintiff is entitled to no more than the full amount of compensatory damages, excluding collateral sources not credited to defendants, for a particular injury. This Section and § 9 supersede Restatement Second, Torts § 920A (AM. L. INST. 1979), "Effect of Payments Made to Injured Party," which distinguished between payments made on behalf of a tortfeasor that are credited against the tortfeasor's liability and collateral-source payments that are not.

On aspects of the one-satisfaction rule, see 3 DAN B. DOBBS, PAUL T. HAYDEN, & ELLEN M. BUBLICK, THE LAW OF TORTS § 488 at 72-74 (2d ed. 2011); JAMES M. FISCHER, UNDERSTANDING REMEDIES § 15.6 at 151 (3d ed. 2014); DOUGLAS LAYCOCK & RICHARD L. HASEN, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 17-18 (5th ed. 2019); 3 JACOB A. STEIN, PERSONAL INJURY DAMAGES §§ 14:26-14:36 (3d ed. 1997 & Supp.). See also DAN B. DOBBS & CAPRICE L. ROBERTS, LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION § 3.3(6) at 236-237 (3d ed. 2018) (addressing the closely related question of combining multiple measures of damage in ways that result in two recoveries for the same harm).

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b. Rationale for the rule. The one-satisfaction rule is uncontroversial and well accepted as consistent with principles of justice and efficiency. Sky View at Las Palmas, LLC v. Mendez, 555 S.W.3d 101, 113 (Tex. 2018) (as corrected on reh'g) ("the rule is intended to prevent a plaintiff's double recovery based on a single injury, regardless of a legal conclusion of joint liability"); Mahon v. B.V. Unitron Mfg., Inc., 935 A.2d 1004, 1015 (Conn. 2007) ("Connecticut courts consistently have upheld and endorsed the principle that a litigant may recover just damages for the same loss only once. The social policy behind this concept is that it is a waste of society's economic resources to do more than compensate an injured party for a loss and, therefore, that the judicial machinery should not be engaged in shifting a loss in order to create such an economic waste." (internal quotations omitted)); Kirkpatrick v. Chrysler Corp., 920 P.2d 122, 130 (Okla. 1996) ("Allowing additional opportunities to recover from other potential tortfeasors after a plaintiff has already had one full opportunity to prove the full amount of his damages, an amount which has then been paid, or where the plaintiff has agreed he has been paid full compensation, would also breed inefficiency and thwart the beneficial goal of bringing finality to litigation."); see also Gallagher v. Mercy Med. Ctr., Inc., 207 A.3d 634, 640-643 (Md. 2019) ("[T]he dispositive question in any one satisfaction rule claim is *did* the satisfaction compensate the plaintiff for all of his or her injuries; the question is not *by which vehicle* did the plaintiff obtain full compensation for his or her injuries.").

On why payments from collateral sources often do not count in determining whether a judgment has been satisfied or an injury has been fully compensated, see § 9.

On the one-satisfaction rule as a corollary of the rightful-position standard, see LAYCOCK & HASEN, MODERN AMERICAN REMEDIES at 17 ("A corollary of the rightful-position standard is the one-satisfaction rule. The phrase has more than one meaning, but the settled core is that plaintiff cannot recover the same item of damage more than once.").

c. Mechanics of the rule. Restatement Third, Torts: Apportionment of Liability § 25 (AM. L. INST. 2000) sets forth the basic rules for applying the one-satisfaction rule in the context of judgments. Sections 16 and 24 provide additional rules in the context of partial settlements. This Restatement incorporates these rules, as well as those in Restatement Second, Judgments § 50(2) (AM. L. INST. 1982), and extends them to all contexts in which payments are made to a plaintiff on account of an injury, including through informal settlements. An example of informal settlement is Douglas v. Adams Trucking Co., 46 S.W.3d 512 (Ark. 2001), in which defendant's insurer made partial payments to plaintiff, seemingly on account. Settlement negotiations ultimately failed, the case was tried, and those payments were credited against the damages they had partially compensated.

Collateral sources are excluded from the calculation of full compensation under the common-law rules set forth in § 9 of this Restatement and the now-superseded rule of Restatement Second, Torts § 920A (AM. L. INST. 1979).

One-satisfaction litigation often involves knotty questions, such as whether two related injuries are the same or distinct, whether a verdict or settlement was intended to cover all the injuries or only some of the injuries, whether a settlement with one tortfeasor should be credited

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in favor of the remaining tortfeasors, and if so, how much of the settlement should be credited. Some of these difficulties are illustrated in the cases quoted in Reporters' Note to Comment *b*.

In a narrow set of cases, the amount of the first judgment may not be binding in a second suit. One example is when the first forum was authorized to give only limited relief. See, e.g., Lee L. Saad Constr. Co. v. DPF Architects, P.C., 851 So. 2d 507, 521 (Ala. 2002) ("It has long been the law in Alabama that a person can sue any number of parties, obtain a judgment against any one, or several of them, but can gain but one satisfaction. Once the judgment has been satisfied for a single injury, no other suits by the plaintiff against any tortfeasor are permitted in regard to the same injury. Moreover, a judgment awarding damages to an injured person in one proceeding acts as a limitation on the amount of damages that might be recovered in a subsequent proceeding against others responsible for the injury. However, if there were limitations on the competence of the forum in the first action preventing him from obtaining the full measure of his damages . . . then the injured party may still be entitled to seek those damages unavailable to him in the first action." (internal citations and quotations omitted)).

Restatement Second, Judgments § 26(1)(c) (AM. L. INST. 1982), addresses this issue in the context of claim preclusion. It provides that if a plaintiff was unable to pursue a particular legal theory or remedy in the first litigation, the resulting judgment does not preclude later litigation to pursue that legal theory or remedy. See also Zucker v. Baker, 274 N.Y.S.2d 918 (App. Div. 1966) (satisfaction of judgment in an action based on dram-shop act, which provided for maximum recovery of $25,000 and did not permit recovery of other damages permitted by wrongful-death act, did not bar second suit in different jurisdiction under the wrongful-death act).

Illustration 1 derives from Restatement Third, Torts: Apportionment of Liability § 25, Illustration 3 (AM. L. INST. 2000). Illustrations 2-4 are fictitious. The reasons for basing the credit on the settling defendant's share of responsibility instead of on the amount of the settlement are set out in Comments *c* and *e* to § 16 of the Apportionment Restatement. The possibility that a favorable settlement with fewer than all defendants may enable plaintiff to recover more than one full satisfaction is justified by those reasons and by a fair allocation of the risk of a favorable or unfavorable settlement:

> *e. Recovery of more than the factfinder's damage award*. Under the rule stated in this Section, a plaintiff may recover more than the damages determined by the factfinder. That occurs when the plaintiff settles with one defendant for an amount greater than the settling tortfeasor's comparative share of the plaintiff's damages. This result is appropriate; since the plaintiff bears the risk of an inadequate settlement (in which case the plaintiff will recover less than the damages determined by the factfinder), the plaintiff should also obtain the benefit of a favorable settlement. Limiting the plaintiff's recovery to the damages determined by the factfinder would provide an unjustified windfall to the nonsettling defendant.

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Restatement Third, Torts: Apportionment of Liability § 25, Comment *e*. Subsection (b) of this Restatement incorporates this rule.

d. Alternative legal theories. Illustration 5 is based on Janusz v. City of Chicago, 832 F.3d 770 (7th Cir. 2016) (Illinois law). The district court dismissed all claims for damages based on loss of employment. This dismissal was not a final judgment, because the claims for other damages caused by the search remained to be decided. Janusz waived those claims so that the judgment would become final and he could appeal; the court of appeals affirmed the dismissal of the claim for damages related to the actions the employer had taken in response to the actions of the city and the officers.

Another common-law example is Forster v. Boss, 97 F.3d 1127 (8th Cir. 1996). Buyers bought a lakefront lot. Sellers fraudulently represented that once the sale closed, buyers could obtain a permit to build a boat dock from the electric utility that managed the lake. In fact, sellers had such a permit and knew that their permit would make it impossible for buyers to obtain one. Plaintiffs claimed fraud and loss of their littoral rights. The court recognized that there were two independent legal theories, but there was only one lost boat dock, and buyers could recover only once. See also Sky View at Las Palmas, LLC v. Mendez, 555 S.W.3d 101, 107 (Tex. 2018) (as corrected on reh'g) (fraud and breach of various contracts; "There can be but one recovery for one injury, and the fact that more than one defendant may have caused the injury or that there may be more than one theory of liability does not modify this rule.").

e. Relationship to other remedies. The one-satisfaction rule assures that plaintiff does not receive more than full compensation for an injury. It does not limit other remedies that are not meant to be compensatory, such as punitive damages, see §§ 39-41, or other punitive remedies. Burgess v. Porterfield, 469 S.E.2d 114, 118 (W. Va. 1996) ("There is a common view among the majority of jurisdictions that because punitive damages are awarded not to compensate a plaintiff but to punish an individual wrongdoer, the 'one satisfaction' principle is not offended by a court's refusal to deduct settlement monies from a punitive damage award.").

Illustration 6, on statutory penalties, is based on Illustration 2 in Restatement Third, Torts: Apportionment of Liability § 25 (AM. L. INST. 2000). That Restatement said only that satisfaction of the judgment for single damages does not discharge the claim for treble damages. This Restatement endorses that conclusion and further extends the analysis of the Illustration, specifying the extent to which Retailer's liability is reduced. The two treatments of the Illustration are not inconsistent.

Injunctive relief is also permissible, so long as it does not result in a double recovery, as explained in § 48. See Forster v. Boss, 97 F.3d 1127 (8th Cir. 1996), described in Reporters' Note to Comment *d*. Buyers did not actually seek double damages for loss of the boat dock; they sought an injunction to give them their boat dock and also damages for loss of the boat dock. The court was clear that this would also be a double recovery. See LAYCOCK & HASEN, MODERN AMERICAN REMEDIES, at 314-315 ("where it is possible to prevent harm by injunction, the court can prevent it, or let it happen and compensate for it. For each element of harm, the rightful position requires that the court do one or the other, but not both. Just as there can be no double recovery in damages,

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there can be no double recovery in injunctions, or in a combination of damages and injunctions. This is an application of the one-satisfaction rule . . .").

Restitution presents a somewhat different question. Compensating a plaintiff for a loss and disgorging defendant's profits on the basis of unjust enrichment may or may not be duplicative, depending on the circumstances. But courts often require plaintiffs to elect remedies, choosing either a restitution or a damage theory. This issue is explored in §§ 42 and 55.

§ 4. Direct and Consequential Damages

(a) A plaintiff who establishes a defendant's liability in tort is entitled to compensation for the damages from the direct impact of the tortious conduct as well as the damages suffered later as a further consequence of that conduct, whether or not the amount of these direct or consequential damages was reasonably foreseeable.

(b) Other tort doctrines limit compensation for both direct and consequential damages, including requirements that damages be reasonably certain (§ 5), within the scope of defendant's liability (§ 6), and not reasonably avoidable (§ 7). Special rules for particular types of harm, such as emotional distress (§§ 20-21) and economic loss not resulting from injury to the plaintiff's person or damage to the plaintiff's property (§ 28), may also limit a plaintiff's recovery of both types of damages.

Comment:

a. History and scope. This Section supersedes Restatement Second, Torts § 904, on general and special damages, and § 917, on scope of liability. It draws on Restatement Second, Torts §§ 435 and 461 on the "thin skull" plaintiff rule, and supersedes those Sections to the extent they were not already superseded by earlier provisions of the Third Restatement on scope of liability. This Section also draws on Restatement Third, Torts: Liability for Physical and Emotional Harm § 31, and § 29, Comment *p*. These two Sections are *not* superseded.

b. Direct and consequential damages. When a tort defendant injures a plaintiff, the plaintiff may suffer some damages from the initial impact of the tort, such as a broken nose from a punch in the nose. This Restatement terms these damages "direct" damages. This term describes both the temporal element of these damages as close in time to defendant's tortious conduct and their priority in the causal sequence of events flowing from that conduct. These damages might better be called "initial" damages, but courts do not use that term. The plaintiff may also incur additional damages as a consequence of the direct or initial impact, such as medical expenses and lost wages.

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These consequences, such as a medical procedure to repair the broken nose, are generally suffered later in time and with additional steps in the causal sequence. This Restatement terms these later-occurring damages "consequential" damages.

This terminology replaces the "general" and "special" damages terminology used in the Second Restatement, which continues to be relevant for certain pleading rules. See Comment *f*. It also modifies common definitions of consequential damages, which tend to be so vague that they communicate almost nothing and are often in tension with common usage in various legal specialties. Consequential damages are often defined in terms of degrees of foreseeability: consequential damages are said to occur naturally and foreseeably, but not necessarily or inevitably. Consequential damages are often thought to be more suspect or more subject to exaggeration. General and special damages are often said to be synonyms for direct and consequential damages. But pain and suffering is generally viewed as general damages, and medical expenses and lost earnings as special damages, so in personal-injury cases, it is general damages that are often viewed as suspect and subject to exaggeration, and special or consequential damages that are concrete and measurable.

c. Nothing turns on these definitions. In tort, unlike contract, nothing of significance turns on whether damages are characterized as direct or consequential. The definition of consequential damages matters more in contract cases, because consequential damages are generally not recoverable unless the possibility of such damages was disclosed or reasonably knowable to defendant before the contract was made. Terminology also matters in interpreting the common contract clause that excludes recovery for "consequential" damages, usually without defining them. But even in contracts, the Restatement Second, Contracts § 351 and Comment *b* rejected terms such as "special" and "consequential" damages as "often misleading," and focused instead on the question whether damages were reasonably foreseeable as a consequence of a breach.

In tort, while the distinction between direct and consequential damages is sometimes helpfully descriptive, it ultimately has no legal significance. Consequential damages represent real losses to plaintiffs; plaintiffs who do not recover their consequential damages are not restored to the position they would have occupied but for the wrong. Limitations on damages generally apply to all damages, direct as well as consequential. A plaintiff's right to recover either type of damage requires proof that the defendant's conduct was a factual cause of plaintiff's injury. Both direct and consequential damages in tort must be reasonably certain, within the scope of defendant's

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liability, and not reasonably avoidable. See Comment *g*. Courts may exclude recovery of both direct and consequential damages for particular types of harm, such as certain claims for emotional distress or economic losses not resulting from damage to plaintiff's person or property. Importantly, the extent of direct and consequential damages need not be reasonably foreseeable. See Comment *d*. The most that can be said is that there will more often be litigable issues about causation, scope of liability, avoidable consequences, and reasonable certainty with respect to consequential damages than with respect to direct damages.

Some jurisdictions require that some consequential damages (termed "special damages" in such rules) be pleaded specifically to be recoverable. This problematic practice is assessed in Comment *f*.

Illustration:

1. Robert and Vernon were partners in a business venture. They had a dispute, and Robert wrongfully attached $1 million of Vernon's funds. The undisputed evidence showed that at the time of the wrongful attachment, Vernon had planned to buy 200,000 shares of Computer Co. stock for $450,000. Robert neither knew nor had reason to know of Vernon's planned purchase of the stock, but Robert did know that Vernon could have used the attached funds for investments. When the wrongful attachment was dissolved, the price of Computer Co. stock had risen substantially and Vernon was able to purchase only 95,000 shares of Computer Co. for approximately $450,000. Vernon sought to recover damages in the amount of $330,000. This figure represented the additional $240,000 he had to pay for the 95,000 shares of Computer Co. he did purchase, plus $90,000 in lost profits on the 105,000 shares of Computer Co. he was unable to purchase.

Vernon may recover the additional $240,000 he had to pay for the 95,000 shares of Computer Co. These consequential damages were reasonably certain and within the scope of Robert's liability, even though the amount of these consequential damages was not reasonably foreseeable. The additional $90,000 representing the lost profits on the 105,000 shares not purchased was within the scope of Robert's liability; whether Vernon can recover those damages depends on whether Vernon can prove these lost profits with reasonable certainty.

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d. Thin-skull plaintiff: No requirement that extent or amount of harm be foreseeable. Among the most well-accepted principles of tort remedies is the "thin skull" or "egg shell" plaintiff rule: a defendant is liable for the full extent of the damages caused to the plaintiff, even if the extent of those damages was not foreseeable. A defendant takes the plaintiff as defendant finds the plaintiff. This is true for all kinds of damages, including physical harm, emotional harm, and property damage. The injury suffered must be within the scope of liability (§ 6), and courts sometimes describe this requirement in terms of foreseeability, but the *extent* of harm suffered as part of that injury need not have been foreseeable.

The Restatement Third, Torts: Liability for Physical and Emotional Harm, like the Second Restatement before it, recognized the "thin skull" plaintiff principle. This Section reiterates the principle in the context of rules on tort remedies, and makes clear that the principle applies to both direct and consequential damages. Thus, defendant will be liable for the full extent of damages if a punch to plaintiff's nose causes serious and immediate physical problems because plaintiff, thanks to a preexisting condition, cannot control bleeding from the nose, or if the punch to plaintiff's nose causes serious consequential damages such as a later expensive surgery to repair the nose necessitated by plaintiff's unusually fragile bone structure.

Illustration:

2. Jennifer was driving her automobile, manufactured by Motor Co., on the highway when the voltage regulator in the car failed due to negligent installation. The failure caused the battery fluid to boil, which produced toxic fumes that reached the interior of the car. Jennifer suffered chronic vocal-cord dysfunction as a result. Jennifer was a popular vocal performer who earned several million dollars each year. All of Jennifer's lost earnings due to her vocal-cord injury are within the scope ofMotor Co.'s liability for its negligence as a matter of law, and she may recover these damages if they are proven with reasonable certainty. It is irrelevant that Motor Co. had no way to know of Jennifer's unusual talent or her consequent vulnerability to vocal-cord injuries.

e. Worsening of condition. If a plaintiff who seeks to recover compensatory damages for the harm caused by a defendant's tortious conduct has a preexisting condition, plaintiff is entitled—consistent with the thin-skull plaintiff rule—to recover damages for the worsening of that condition caused by defendant's tortious conduct. But defendant is not responsible for those

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losses that plaintiff would have suffered irrespective of defendant's tortious conduct. Thus, if plaintiff had 80-percent leg mobility before defendant's tortious conduct, and defendant's tortious conduct reduces plaintiff's mobility to 55 percent, defendant should be liable for the 25-percent diminution in mobility, and not the full 45-percent loss of mobility.

On occasion, tortious conduct that concurs with a preexisting condition of the other person may only accelerate the onset of harm that eventually would have happened anyway. In that circumstance, the damages must be adjusted so that defendant is liable only for the acceleration. For example, if a person suffering from a terminal illness had six months to live, but the negligence of a health-care professional reduces the person's life expectancy to two months to live, the professional would be liable for the lost four months, not the full value of the originally expected six months.

Illustration:

3. Abramo was a resident of the Fair Acres nursing facility and suffering from a number of serious medical conditions. One day, when transferring Abramo for medical treatment at a nearby hospital, Fair Acres negligently mishandled Abramo, resulting in permanent painful injury to his sacrum. Abramo later moved to the Pleasant Valley nursing facility. Although Abramo was at serious risk of falling, Pleasant Valley employees negligently allowed Abramo to fall repeatedly, eventually leading to numerous broken vertebrae in his back and much greater overall pain, including in Abramo's sacral area. Pleasant Valley is responsible for all losses associated with its negligence, including medical costs and pain and suffering resulting from the falls. If the trier of fact can determine the extent of Abramo's sacral pain before Pleasant Valley's negligence, the trier of fact should discount the pain-and-suffering damages as to that preexisting pain.

f. Vocabulary and pleading rules. The Restatement Second, Torts § 904, following pleading rules in many states and under federal practice, distinguished between "general" and "special" damages. "General damages" were damages that did not have to be specifically pleaded because they would be obvious from the face of the complaint. In contrast, "special damages" were damages that would not be obvious from the face of the complaint and that the plaintiff must plead specifically in order to recover.

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Although recognizing that some statutes and court rules still rely upon the distinction between general and special damages, this Restatement abandons the "general" versus "special" damages categorization for purposes of tort law. This is a Restatement of tort remedies, not of civil procedure, and in any event, a Restatement cannot change codified rules of procedure. What this Restatement can say is that the distinction between general and special damages communicates nothing useful about torts or about remedies. And because the meaning of these terms is often indeterminate, the requirement that special damages be specially pleaded can be a trap for unwary litigators. The purpose of an enhanced pleading requirement for special damages is notice: a defendant should understand the type and extent of damages the plaintiff seeks in a lawsuit. Tort complaints should comply with applicable rules, but more fundamentally, they should give fair notice of the type and extent of damages a plaintiff seeks from a defendant. This is true whether plaintiff seeks direct or consequential damages, and whether plaintiff seeks damages based on transactions in a market, on lost transactions that would have occurred in a market, or on harms such as pain and suffering that are not bought or sold in any market.

Illustration:

4. Same facts as Illustration 2, except that Jennifer seeks damages for her past and expected future medical expenses and emotional-distress damages in addition to her lost earnings. Each type of damage is recoverable from Motor Co., whether the damages would in the past have been classified as "general" or "special" or "consequential." Jennifer must comply with local pleading rules, but it should be sufficient that her complaint put Motor Co. on notice of the type and general extent of claims sought.

g. Relationship to other rules limiting direct and consequential damages. Although a plaintiff need not prove that the extent of direct or consequential damages was foreseeable, see Comment *d*, the plaintiff must comply with other rules for the recovery of damages contained elsewhere in this Restatement. Thus, a plaintiff cannot recover either direct or consequential damages if the damages are not reasonably certain (§ 5), if they are not within the scope of liability (§ 6), or if they are reasonably avoidable (§ 7). Special rules for particular types of harm, such as emotional distress (§§ 20-21) and economic harm not resulting from damage to plaintiff's person or property (§ 28), may also limit a plaintiff's recovery of both direct and consequential damages.

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One particularly tricky area concerns the relationship between the thin-skull plaintiff rule and the scope-of-liability rules, which limit recovery to harms within the risk that made defendant's conduct tortious. Thus, consider a plaintiff who has a heart attack after being accidentally punched by the defendant. Defendant might argue that plaintiff cannot recover because a heart attack is not a harm within the risk of being punched in the nose (which could be construed as limited to damage to the nose and surrounding parts of the face). A tort-remedies analysis would construe the nature of the harm more broadly to cover physical harm to the body, and then apply the thin-skull plaintiff rule to allow plaintiff to recover for the heart attack even though the extent of plaintiff's harm was unforeseeable.

The Restatement Third, Torts: Liability for Physical and Emotional Harm suggested that in a very narrow set of cases the thin-skull plaintiff rule is in tension with scope-of-liability rules, and correctly concluded that in a close case the thin-skull plaintiff rule should prevail. This Restatement reaffirms this choice. The well-settled thin-skull rule protects the most vulnerable among us, compensating the harms that they actually suffer when tortious injuries aggravate their existing infirmities.

Illustration:

5. Same facts as Illustration 2, except that Jennifer was not a popular vocal performer with a track record of earning millions of dollars per year. Instead, she was a very talented vocal performer who was just beginning to be paid for performances. Although Jennifer is entitled to recover direct and consequential damages even if the extent of those damages are not foreseeable, she cannot recover damages for lost earnings as a vocal performer, because she cannot prove her lost future earnings with reasonable certainty. See § 5.

REPORTERS' NOTES

a. History and scope. This Section supersedes Restatement Second, Torts § 904 (AM. L. INST. 1979), on general and special damages, and § 917, on the thin-skull-plaintiff rule as a rule of remedies. It supersedes Restatement Second, Torts §§ 435 and 461 (AM. L. INST. 1965), on the thin-skull-plaintiff rule as a rule of liability, to the extent that they were not already superseded by Restatement Third, Torts: Liability for Physical and Emotional Harm §§ 29-36 (AM. L. INST. 2010). This Section also draws on Restatement Third, Torts: Liability for Physical and Emotional Harm § 31 and § 29, Comment *p*, on the thin-skull-plaintiff rule as a rule of liability.

On general and special and direct and consequential damages, see DAN B. DOBBS & CAPRICE L. ROBERTS, LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION §§ 3.3(3)-3.3(4) at

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228-233 (3d ed. 2018); JAMES M. FISCHER, UNDERSTANDING REMEDIES § 6.4 at 31-34 (3d ed. 2014); 4 FOWLER V. HARPER, FLEMING JAMES, JR., & OSCAR S. GRAY, HARPER, JAMES AND GRAY ON TORTS § 25.5 at 617-622 (3d ed. 2007); DOUGLAS LAYCOCK & RICHARD L. HASEN, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 55-59 (5th ed. 2019); CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 8 at 32-35 (1935); JACOB A. STEIN, PERSONAL INJURY DAMAGES § 1:4 (1997 & Supp.). On the thin-skull plaintiff rule, see 1 DAN B. DOBBS, PAUL T. HAYDEN, & ELLEN M. BUBLICK, THE LAW OF TORTS § 206 at 711-713 (2d ed. 2011); STEIN, PERSONAL INJURY §§ 11:1-11:6.

b. Direct and consequential damages. Courts contrast "consequential" damages with "direct" damages, although they speak of consequential damages far more often. "Direct" damages reflects the temporal aspect and the causal sequence of damages caused by the immediate impact of the tort in contrast to those occurring later both in time and in the causal sequence. "Initial" damages might better convey the essential point, but that term is not in common use. See LAYCOCK & HASEN, REMEDIES at 55 ("If there is any useful content to these terms, it is that 'general' damages should refer to the value of what plaintiff lost from the initial impact of defendant's wrongdoing, such as the value of the property destroyed or not delivered, or the reduction in the value of property that was damaged or defective. Consequential damages should refer to everything that happens to plaintiff as a consequence of this initial loss. Perhaps 'initial' or 'nonconsequential' damages would be a better term than 'general' or 'direct,' but neither is used.").

The problematic nature of common definitions is reflected elsewhere in scholarly commentary. Professors Dobbs and Roberts write that "Judicial definitions of general damages are usually vague or almost tautological." DOBBS & ROBERTS, REMEDIES § 3.3(3) at 228. Even so, "the actual decisions make clear that courts hold a fairly precise idea about general damages. General damages are market-based damages." Id. By this they mean loss in the market value of some damaged or misappropriated asset (or contract-market damages in contract cases). They do not mean income or expense items with a market value; as they say, courts generally treat those damages as consequential. They also say that "special damages mean the same as consequential damages," giving the example of "lost profits." Id. § 3.3(4) at 231. But they note that these statements do not apply to personal-injury damages. In that context, pain and suffering is treated as general damages, but pain and suffering is the least market-based damage of all.

Professor McCormick said "general damages" in the case of personal injury certainly included damages for "physical pain and mental suffering," which a plaintiff could recover without a specific allegation that plaintiff suffered them. MCCORMICK, DAMAGES § 8 at 35. For many other damage items, he said the categorization depended on the facts of the case and how it was pleaded. Id.; see also LAYCOCK & HASEN, REMEDIES at 56 (noting that personal-injury lawyers call pain and suffering "general" damages and damages for market-based losses such as medical expenses "special" damages).

Professor Fischer writes that "General damages are those damages that flow necessarily and inherently from the wrong. Special or consequential (the terms are interchangeable) damages are all other damages that are caused by the wrong. The distinction between general and special

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damages is well established but can be tricky." FISCHER, REMEDIES § 6.4 at 31. He says that in most cases the distinction relates only to pleading, but he also offers examples of courts treating general and special damages differently on questions such as causation rules and avoidable consequences. Id. at 32. He notes that "some claims may be easily cast as sounding in general or special damages." Id. at 34.

Professor Galligan emphasized that these terms are used quite differently in tort and in contract. Thomas C. Galligan Jr., *Contortions Along the Boundary Between Contracts and Torts*, 69 TUL. L. REV. 457, 469-470 (1994) ("[O]ne who suffers personal injury recovers not only tort 'special' damages, such as medical expenses, and any lost wages, but also recovers 'general' damages for pain and suffering, mental anguish, and potentially for loss of enjoyment of life. Special damages in torts are those damages that are more easily calculable. One notes some irony here: special damages in torts are more certainly calculated, in contracts they are less certain (consequentials are contract special damages); general damages in torts are less certain, in contracts they are more certain (formulas are contract general damages). Thus, special damages in torts are like general damages in contracts and general damages in torts are analogous to special damages in contracts." (citations omitted)).

Courts continue to offer conflicting definitions of the line between general and special damages in tort, sometimes emphasizing degrees of foreseeability and sometimes equating general damages with damages that cannot be precisely calculated or measured in any market. Compare Taylor v. Franko, 2011 WL 2746714, at *4 (D. Haw. 2011) (Hawaii law) ("As is evident from the definitions of these terms, general damages 'embrac[e] items not subject to precise mathematical calculations.'"); and Duncan v. Kan. City S. Ry. Co., 773 So. 2d 670, 682 (La. 2000) ("General damages are those which may not be fixed with pecuniary exactitude; instead, 'they involve mental or physical pain or suffering, inconvenience, the loss of intellectual gratification or physical enjoyment, or other losses of life or life-style which cannot be definitely measured in monetary terms.'"); with Bynum v. Mango, 101 P.3d 1149, 1153 (Haw. 2004) ("General damages 'encompass all the damages which naturally and necessarily result from a legal wrong done'." (citation omitted)); and Cross v. Berg Lumber Co., 7 P.3d 922, 932 (Wyo. 2000) ("General damages are those which naturally and necessarily flow from the wrongful act; they are implied by law and are the natural consequences of the wrongful act.").

Many courts consider special damages in tort synonymous with economic loss or injury that can be calculated in monetary terms. Nuwave Inv. Corp. v. Hyman Beck & Co., 114 A.3d 738, 740 (N.J. 2015) ("Actual damages deemed 'special' compensate a plaintiff for specific economic or pecuniary loss."); West v. Bd. of Cnty. Comm'rs, 273 P.3d 31, 37 n.19 (Okla. 2011) ("Economic or special damages are defined as those which can either be assigned an exact dollar figure or calculated with reasonable mathematical certainty."); Estate of Jones v. Phillips ex rel. Phillips, 992 So. 2d 1131, 1150 (Miss. 2008) (stating that the terms "special damages" and "economic damages" are interchangeable).

c. Nothing turns on these definitions. Given all the problems and inconsistencies with these definitions, it is not surprising that they do little analytic or doctrinal work. Judicial statements

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about the availability of damages in tort are broad and do not limit recovery to direct or general damages. Dodson v. Ferrara, 491 S.W.3d 542, 567 (Mo. 2016) ("A plaintiff is entitled to full compensation for past or present injuries that the plaintiff has shown by a preponderance of the evidence were caused by the defendant"); Royal Indem. Co. v. Factory Mut. Ins. Co., 786 N.W.2d 839, 850 (Iowa 2010) ("tort damages are not limited by the reasonable contemplations of the parties. Instead, the amount of direct injury is compensated, whether its extent was contemplated or not."); Cook v. Cook, 607 S.E.2d 459, 462 (W. Va. 2004) ("Generally, a tort plaintiff is entitled to all damages proximately caused by a wrongdoer's actions.").

Illustration 1 is based on Vanderbeek v. Vernon Corp., 50 P.3d 866 (Colo. 2002). In *Vanderbeek*, the Colorado Supreme Court rejected application to tort claims of the contracts rule of Hadley v. Baxendale, 156 Eng. Rep. 145 (1854), even to a purely economic tort like wrongful attachment of property. "The victim of a tort has no opportunity to negotiate with the tortfeasor—no opportunity to allocate the risk that a particular consequence will occur or evaluate the cost if it should. Therefore, whether he reasonably contemplated a particular consequence as the probable result of the tort at the time it occurred is irrelevant." Id. at 871. The court explained that "consequential damages should be assessed under traditional tort standards." Id. Under those standards, damages must be proximately caused by defendant's conduct, id. at 872, and "reasonably ascertainable," id. at 873. Although the court stated that consequential damages in tort must be "reasonably foreseeable," id. at 870, the standard the court applied did not require that the extent of the harm be foreseeable. The court held that the lost profits on the 105,000 shares not purchased were too speculative to be recovered, in part because the price of the stock had fluctuated greatly and it is not clear when the plaintiff would have sold the stock if purchased. This was an application of the requirement of reasonable certainty, not of any distinction between direct and consequential damages. The extra cost of the 95,000 shares purchased was recoverable.

d. Thin-skull plaintiff: No requirement that extent or amount of harm be foreseeable. The Restatement Third, Torts: Liability for Physical and Emotional Harm § 31 (AM. L. INST. 2010) provides a broad statement of the thin-skull-plaintiff rule in the context of scope of liability: "When an actor's tortious conduct causes harm to a person that, because of a preexisting physical or mental condition or other characteristics of the person, is of a greater magnitude or different type than might reasonably be expected, the actor is nevertheless subject to liability for all such harm to the person." Note the emphasis here on plaintiff's preexisting conditions; the Section is titled "Preexisting Conditions and Unforeseeable Harm." In the classic case of Vosburg v. Putney, 50 N.W. 403 (Wis. 1891), defendant's slight offensive kick of plaintiff's leg caused the spread of a preexisting infection and the leg's eventual amputation. The defendant was liable even though the jury found the extent of the harm unforeseeable.

Restatement Third, Torts: Liability for Physical and Emotional Harm § 29, Comment *p* (AM. L. INST. 2010) generalizes the point beyond preexisting conditions: "If the type of harm that occurs is within the scope of the risk, the defendant is liable for all such harm caused, regardless of its extent. Even when a foreseeability standard is employed for scope of liability, the fact that the actor neither foresaw nor should have foreseen the extent of harm caused by the tortious

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conduct does not affect the actor's liability for the harm. One of the primary applications of this rule occurs when the injured person has a preexisting condition creating an unusual susceptibility. In some such cases, the extent of the harm is unforeseeable; the actor is nevertheless subject to liability for the full extent of the harm."

Reporters' Note to Comment *b* of § 31 (AM. L. INST. 2010) states: "Every United States jurisdiction adheres to the thin-skull rule; more precisely, extensive research has failed to identify a single United States case disavowing the rule." That Note provides an extensive list of court cases applying the thin-skull-plaintiff rule in a wide variety of contexts. More recent cases applying or recognizing the rule include Darden v. City of Fort Worth, 880 F.3d 722 (5th Cir. 2018) (federal law) (obese arrestee with heart condition died after being tasered and held by officers); Koch v. United States, 857 F.3d 267 (5th Cir. 2017) (admiralty law) (plaintiff with serious preexisting spine and joint problems permanently disabled after accident); Golnick v. Callender, 860 N.W.2d 180 (Neb. 2015) (plaintiff with spinal stenosis further injured in automobile accident);Carter v. Wallace & Gale Asbestos Settlement Tr., 96 A.3d 147 (Md. 2014) (long-time heavy smoker died from asbestos exposure); Estate of Niehaus v. Asia Nails LLC, 2017 WL 3160081 (Mich. Ct. App. July 25, 2017) (diabetic died from having feet placed in hot water during pedicure).

Courts regularly allow thin-skull plaintiffs to recover both direct and consequential damages without discussing the distinction between the two types of damages. For example, in *Koch*, the appeals court upheld an award of $2.83 million in damages including substantial damages for future medical treatment and past and future pain and suffering. See also Gaunt v. Progressive Sec. Ins. Co., 92 So. 3d 1250, 1272 (La. Ct. App. 2012) (affirming trial-court award of $100,000 to thin-skull plaintiff for expected future back surgery).

Reporters' Note to Comment *d* of § 31 confirms that the thin-skull rule applies to property damage as well as to other types of injuries and cites the available cases.

Illustration 2 is based on Illustration 3 from Restatement Third, Torts: Liability for Physical and Emotional Harm § 31 (AM. L. INST. 2010), which was loosely based on Vaughn v. Nissan Motor Corp., 77 F.3d 736 (4th Cir. 1996). Jennifer's lost earnings in Illustration 2 are consequential damages by most definitions, including the definition in this Section.

Restatement Second, Torts, also addressed the thin-skull rule. Section 461 (AM. L. INST. 1965) discussed the issue in the context of negligence claims for physical harm: "The negligent actor is subject to liability for harm to another although a physical condition of the other which is neither known nor should be known to the actor makes the injury greater than that which the actor as a reasonable man should have foreseen as a probable result of his conduct."

Section 435 (AM. L. INST. 1965), also in the context of negligence, discussed the issue in the context of rules on the scope of liability (a doctrine called "legal cause" in the Second Restatement). When a defendant's conduct was a "substantial factor" in causing plaintiff's injury, then "the fact that the actor neither foresaw nor should have foreseen the extent of the harm or the manner in which it occurred does not prevent him from being liable." Id. § 435(1). However, an actor's conduct could not be found to be the "legal cause of harm" "where after the event and looking back from the harm to the actor's negligent conduct, it appears to the court highly

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extraordinary that it should have brought about the harm." Id. § 435(2). Along similar lines, the Second Restatement's § 917 (AM. L. INST. 1979) provided that "a person negligently inflicting a comparatively slight injury on a person who, if well, would have suffered little harm, may become liable for the other's serious illness induced in a large measure by the bad physical condition of the other. (See § 461). Likewise, although a contracting party who breaks his contract in failing to supply a machine would not be liable for the damages occasioned by the shutting down of a plant in which the machine was a necessary unit unless at the time of making the contract he knew or should have known the facts (see Restatement, Second, Contracts, Chapter 16 (Tent. Draft)), one who negligently destroys the machine may be responsible for the ensuing loss although he had no reason to know in advance of the machine's importance."

For criticism of the thin-skull rule from an economic perspective, see Steve P. Calandrillo & Dustin E. Buehler, *Eggshell Economics: A Revolutionary Approach to the Eggshell Plaintiff Rule*, 74 OHIO ST. L.J. 375 (2013).

e. Worsening of condition. On liability for the worsening of plaintiff's condition, see, e.g., Long v. Arnold, 386 P.3d 1217 (Alaska 2016) (affirming judgment based on pattern jury instruction authorizing damages for aggravation of preexisting condition); In re Standard Jury Instructions in Civil Cases, 192 So. 3d 1190 (Fla. 2016) (approving new pattern jury instruction on aggravation of preexisting injuries); Moreno v. City of Gering, 878 N.W.2d 529 (Neb. 2016) (affirming judgment for damages from aggravation of preexisting spinal condition); Maier v. Santucci, 697 A.2d 747, 749 (Del. 1997) ("aggravation of a preexisting condition is compensable under Delaware law."). Illustration 3 is based on O'Rangers v. Cadia Rehab. Silverside, 2019 WL 1531520 (Del. Super. Ct. Apr. 8, 2019).

Restatement Third, Torts: Liability for Physical and Emotional Harm § 31, Comment *c* (AM. L. INST. 2010), addressed the issue of acceleration of inevitable harm:

> This Restatement does not address damages issues, but a note about the matter is appropriate. On occasion, tortious conduct that concurs with a preexisting condition of the other person may only accelerate the onset of the harm. When this situation obtains, the measure of damage must be adjusted to reflect that the actor has not caused the other person to suffer the harm long-term or until death, but rather for some shorter period, as indicated by the evidence in the case. See Maurer v. United States, 668 F.2d 98, 100 (2d Cir. 1981) (applying federal law) ("when a plaintiff has a preexisting condition that would inevitably worsen, a defendant causing subsequent injury is entitled to have the plaintiff's damages discounted to reflect the proportion of damages that would have been suffered even in the absence of the subsequent injury, but the burden of proof in such cases is upon the defendant to prove the extent of the damages that the preexisting condition would inevitably have caused"); Steinhauser v. Hertz Corp., 421 F.2d 1169, 1172–1173 (2d Cir. 1970) (applying New York law); Kegel v. United States, 289 F. Supp. 790, 795–796 (D. Mont. 1968) (Federal Tort Claims Act case); Dorsey v. Muilenburg, 345

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S.W.2d 134, 142 (Mo. 1961); Haws v. Bullock, 592 S.W.2d 588, 591 (Tenn. Ct. App. 1979).

The Second Circuit in *Maurer*, cited approvingly by the Third Restatement § 31 (AM. L. INST. 2010), held that defendant should bear the burden of proving the extent to which plaintiff suffered loss due to a preexisting condition. *Maurer* relied upon Evans v. S.J. Groves & Sons Co., 315 F.2d 335, 347-348 (2d Cir. 1963). In contrast, in O'Brien (Newark) Cogeneration, Inc. v. Automatic Sprinkler Corp. of America, 825 A.2d 524, 530 (N.J. Super. Ct. App. Div. 2003), the court concluded that "the party in the best position to present evidence of non-aggravation or exacerbation is plaintiff. Plaintiffs should understand and appreciate whether and how a defendant's tort may have affected their prior or post injuries or conditions. The effect on plaintiff of defendant's tort is uniquely within plaintiff's knowledge. Thus, in a routine personal injury aggravation claim, we do not shift the burden to defendants and to prevail, plaintiffs must separate those damages caused by a particular defendant's negligence from any prior or post injuries or conditions." Accord Moreau v. Walgreen Co., 387 F. App'x 202 (3d Cir. 2010) (New Jersey law) (following *O'Brien*).

The better rule is that the defendant bears the burden of proving the extent to which a preexisting condition of the plaintiff is responsible for plaintiff's injuries. Placing the burden on plaintiffs seems unfair, because plaintiff often will not be able to produce evidence under a preponderance standard to show how much of plaintiff's injuries are due to a preexisting condition. Such information is not always "uniquely within plaintiff's knowledge." Moreover, between a party that tortiously caused injury to plaintiff and an injured plaintiff, the tortfeasor's culpability and the fact that the tortfeasor caused at least some injury to the plaintiff provides ample justification for burden-shifting on this question.

f. Vocabulary and pleading rules. Federal Rule of Civil Procedure 9(g) provides: "If an item of special damages is claimed, it must be specifically stated." Many state rules of procedure have similar or identical provisions. But the common basic generalizations—that pain and suffering is general damages and that medical expenses and lost earnings are special damages—do not exhaust the possibilities, and it is not always clear which damage items are special damages.

The rules differentiating general from special damages in the Second Restatement are arbitrary in places and, in the Second Restatement's own words, "[n]o generalization can be made." Restatement Second, Torts § 904, Comment *b* (AM. L. INST. 1979). "In personal injury cases, harm to earning capacity, expenses for medical treatment and similar items are ordinarily treated as bases for special damages. Whether harm to earning capacity in the future is an item of special damages depends on the nature of the harm alleged." Id.

Such rules can act as a pleading trap for the unwary litigator.

> In a tort like negligence, in which some damage to the plaintiff is an essential element of his claim, the question whether any given item of damages constitutes special damages often will be one of relationship between the allegations of harm and the offer of proof. It became in reality an aspect of the

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> problem of variance between pleading and proof. Thus, if the allegation of harm is in general terms ("great bodily injury"), nearly any item of bodily injury and most of the consequences of the injury are usually allowed to be shown. If, on the other hand, the plaintiff's allegations of harm are most specific (e.g., "striking plaintiff upon the head and breaking his skull, inflicting serious and permanent injuries to his head, skull, eyes," etc.) this may be held to limit what may be shown.

Id., Comment *c*. This approach creates perverse incentives; plaintiffs who plead more detail about the tort or the injury assume greater obligations to plead in detail about damages, on pain of having evidence of damages potentially excluded. It may be safer not to plead anything in detail. This Restatement abandons the distinction between general and special damages for purposes of tort law, and urges less technical pleading rules that give defendants fair notice of the nature and extent of damages plaintiffs seek in a tort lawsuit.

g. Relationship to other rules limiting direct and consequential damages. Other rules limiting damages can be applied to all damages, without any need to distinguish between direct and consequential damages. See §§ 5-8, where this distinction does not appear.

On the tension between the thin-skull rule and scope-of-liability rules, see Restatement Third, Torts: Liability for Physical and Emotional Harm § 29, Comment *p* (AM. L. INST. 2010):

> It is difficult to reconcile [the thin-skull] rule with the principle that scope-of-liability limitations are designed to avoid, so far as possible, a disparity between degree of culpability and extent of liability. Nevertheless, other policies are at work, including the fact that the injured person may be wholly without any culpability. The rule in this Comment may be justified by the empirical intuition that cases rarely arise where the harm is within the scope of the risk but the extent of it is unforeseeable. Also, the administrative convenience of avoiding the sometimes uncertain and indeterminate inquiry into whether the extent of the harm was unforeseeable justifies the refusal to attempt to identify and treat differently this modestly sized class of cases.

Id. And as stated in Comment *g*, the thin-skull rule protects vulnerable victims of torts.

§ 5. Reasonable Certainty

To establish liability for compensatory damages for the harm caused by a defendant's tort, a plaintiff must prove the existence of damages by a preponderance of the evidence and must prove the amount of damages with reasonable certainty considering the nature of the tort, the nature of the damages, and the evidence that is or should be reasonably available.

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Comment:

a. History and scope. This Section is substantially taken from Restatement Second, Torts § 912, which this Section supersedes.

b. Rationale for standard. The reasonable-certainty requirement flows from the underlying requirement that plaintiffs have to prove each element of a tort by a preponderance of the evidence. Just as a plaintiff in a battery suit must prove under the preponderance standard that the defendant intended contact with the plaintiff or a third person, the plaintiff also must prove by the same preponderance standard that the defendant caused the plaintiff to suffer damage from the contact. Thus, if the defendant punches the plaintiff in the nose and the plaintiff suffers a broken nose, the plaintiff must prove by a preponderance of the evidence that each item of the damages claimed, such as medical bills, lost wages, and pain and suffering, were actually caused by defendant's tortious conduct.

But while plaintiff must prove *the existence of* damages by a preponderance of the evidence, plaintiff does not have to prove *an exact amount* by a preponderance of the evidence, which would be an impossible standard. Except in the simplest cases, the evidence will support a range of numbers, and no particular number is more likely than not. Instead, the standard is whether plaintiff has proved the amount of damages with reasonable certainty under the circumstances, and whether the factfinder's approximation of the amount is a reasonable one.

The reasonable-certainty standard for the amount of damages is not one of absolute or mathematical certainty. The requirement is one that reasonably diligent plaintiffs can meet under the circumstances, taking into account the nature of the injury and the kinds of evidence that are available, or that should have been available, to quantify and prove the amount of damages. The rules should not be so onerous as to prevent plaintiffs from recovering damages for meritorious claims when proof of the extent of damages is unusually difficult. But the rules should not be so lax as to allow the award of damages based upon mere speculation. It is a flexible standard that is tied to the type of proof that a reasonably diligent plaintiff could produce in a similar case.

Illustration:

1. George was injured on the job in Owner's factory and filed a workers'-compensation claim. Owner fired George in retaliation for filing the claim. George testified that he had been unable to find comparable work, but that he had found some seasonal work before trial working in an orchard, which paid less than his prior salary. George

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testified that he had planned to work until at least age 67 and had earned a monthly salary of $3,400 before the accident. A reviewing court should sustain a jury award for George's past lost wages, less income from work in the orchard, if the jury reasonably could have accepted George's testimony and other evidence about his inability to find work since he was fired. It should also sustain an award of damages based upon George's expected lost future work opportunities up through at least age 67, without any credit for future orchard work, if the jury reasonably could have accepted George's testimony and other evidence that he is unlikely to obtain such work using reasonable diligence and would otherwise have worked until age 67. The court should allow this jury award if George proved by a preponderance of the evidence he had suffered past and expected future lost wages, even though the exact amount of these wages could not be proven with mathematical precision.

c. Relaxation of certainty standard. Courts relax the certainty requirement if the defendant's wrong has made it difficult for the plaintiff to prove damages. It is commonly said that uncertainties are resolved against the wrongdoer. This is most obviously true when the wrongdoer has destroyed evidence. In other cases, it is the tort itself that eliminates evidence or makes it impossible to estimate what would have happened but for the tort.

Illustration:

2. Richard defrauded Film Studio by failing to pay Studio the proper amounts owed as a percentage of gross receipts for screening Studio's films at Richard's six theaters. Richard was an experienced film exhibitor who methodically destroyed, every 30 to 35 days, the only original business records that could verify daily attendance and cash receipts from each of his six theaters, in violation of a contractual obligation to keep records for four years. Studio sued Richard for fraud, and it used expert testimony to reconstruct his accounting records with as much precision as possible based upon the available evidence. The court should reject Richard's argument that Studio failed to prove damages with reasonable certainty, because Richard caused the difficulty in ascertaining the amount of damages by destroying the necessary records.

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d. Existence and extent of damages. Whether plaintiff suffered damages, and whether defendant's tort caused those damages, are yes-or-no questions that can be governed by the usual rules on burden of proof and preponderance of evidence. The amount of damages—proving a specific number—is not such a question. But courts often state the distinction less precisely, saying simply that damages must be proven with reasonable certainty, and then clarifying that it is more important for a plaintiff to prove with reasonable certainty the fact that the plaintiff suffered damages than to prove with reasonable certainty the extent of those damages.

Such statements do not mean that the fact of damages must be literally "certain," or more certain than any other element of the tort. Rather, they reflect both the requirement that plaintiff prove all elements of a tort under the preponderance standard and the reality that proving the exact amount of damages is often difficult or impossible. As the Supreme Court of Alaska recently explained in an especially clear statement, "the elements of a tort cause of action—including the *fact* of damages (i.e., the fact that the plaintiff suffered harm)—must be proven by a preponderance of the evidence; the *amount* of damages is a separate factual issue that, in the case of lost profits, must be proven to a reasonable certainty, based on evidence that 'afford[s] sufficient data from which the court or jury may properly estimate the amount of damages.'"

Proving the amount of damages is especially difficult when it comes to damages for which there is no easily determined market value, or when damages are based on evidence of market transactions that never happened, but that would have happened but for the tort. Whether phrased as a preponderance standard or as a reasonable-certainty requirement, requiring proof of the existence of damages serves an important evidentiary function, especially when there is a risk that damages could be feigned or exaggerated. The more relaxed standard for proof as to the amount of damages responds to the difficulty of proving the amount of damages with precision. But even though the standard is more relaxed, a plaintiff seeking damages still must provide evidence of the amount that is reasonable under the circumstances.

If it is clear that plaintiff has been damaged, courts are reluctant to hold that the amount of damages has not been proved with reasonable certainty. But they must do so on occasion; if they do not, plaintiffs would have no obligation to prove the amount of damages at all.

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Illustration:

3. Daughters sued Stepmother for conversion related to their late father's estate. Daughters established liability by proving that Stepmother engaged in manipulative activities during their father's dying days to contravene their father's wishes regarding the disposition of the estate. They established that their father would have left them certain assets in his will but for Stepmother's tortious activities. State law requires that damages for conversion be measured at the time of the wrong. At trial, which took place two years after the conversion, Daughters put on no evidence of the value of the assets at the time Stepmother committed the conversion. Instead, two witnesses testified at trial that the current value of the assets was "over a million dollars" or "seven figures." Stepmother conceded that the current value of the assets was in the "millions of dollars." The court should deny the award of damages to Daughters, even though they proved that they suffered damage caused by Stepmother's tortious conduct, because they did not prove with sufficient certainty the value of the assets at the time of the wrong.

Illustration 3 is a harsh result. Stepmother has wrongfully deprived Daughters of "millions of dollars," and she is going to get away with it. But Daughters appear to have made no serious effort to prove damages. Even their evidence of value at the time of trial was vague and skimpy; it would not enable a court to enter judgment for any specific number of millions. More fundamentally, evidence of value at the time of trial was, at most, weak and indirect evidence of value two years earlier. Value at the time of trial was not the measure of damages, and evidence directed to the wrong measure is unlikely to prove damages with reasonable certainty under the proper measure. Direct evidence of value at the time of conversion was undoubtedly available through discovery, prices of publicly traded securities, and for assets not publicly traded, expert testimony. Or Daughters might have sought to recover the assets in kind, without having to value them at all. Daughters' remedy after this nearly total failure of proof is to sue their attorney for legal malpractice.

e. Economic and noneconomic damages. Tort reformers have popularized the terms "economic damages" and "noneconomic damages." These terms are misleading, as explained in Comments to § 20, but they cannot entirely be avoided. As the Restatement Third, Torts: Apportionment of Liability § E18 explained, "economic damages" are damages such as medical expenses and lost earnings that "can be valued by reference to the market valuation."

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"Noneconomic damages" are those such as pain and suffering and loss of society "that are not susceptible to market valuation." Market-based or economic damages can generally be proved with greater certainty than non-market or noneconomic damages.

Noneconomic damages are the most extreme example of the type of damages for which the amount cannot be proven with mathematical certainty, or even with what would in other contexts be the minimum requirements of reasonable certainty. With no market for pain and suffering, a plaintiff can offer little more than descriptions of the injury and of its effects. Courts deciding whether plaintiffs have proven their damages with sufficient certainty can do little more than require reasonable compensation and police awards that appear to be outliers compared to other similar cases. Sections 19 and 20 of this Restatement examine the issues presented by noneconomic damages.

Similar problems can arise in other contexts. Proving the amount of damages to reputation in defamation suits is often so difficult that courts have allowed "presumed damages" to substitute for actual proof of damages.

In cases involving market losses, it is often easier to prove damages with reasonable certainty. Plaintiffs typically offer documents, percipient witness testimony, and expert opinion corroborating market values, foregone economic opportunities, and costs plaintiffs have incurred or will incur. But even here, damages often include market transactions prevented by the tort, and in most cases, what would have happened but for the tort can only be estimated. Lost profits are perhaps the most common source of litigation over reasonable certainty. Lost profits from an existing business are often proved by comparing the profits after the tort to the profits in a similar period before the tort, or by comparing the profits after the tort to the profits of a similarly situated business in the same period. Factfinders should accept reasonable efforts to prove the amount of damages consistent with the type of evidence available to prove it.

Illustrations:

4. Christopher negligently hit Kevin's tractor-trailer rig with his car, damaging Kevin's trailer. Kevin, who worked independently, was unable to haul loads while the trailer was being repaired. To prove lost earnings for this period, Kevin presented the factfinder with his weekly earnings statements for 17 weeks—the nine weeks that preceded the accident, the four weeks that followed it when he could not use his trailer, and the four weeks that followed the permanent repair of his trailer. Each of these statements set out his

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weekly gross earnings, the expenses that a freight-hauling company had advanced, and his net earnings. Kevin did not present other evidence of his expenses, except for his annual cost of buying food on the road. If the factfinder awards damages for lost earnings based on this evidence, a reviewing court should uphold the award against an objection that damages were not proved with reasonable certainty. This is so even though there may have been better or more extensive evidence to demonstrate Kevin's likely earnings and expenses during the period of the repair, such as evidence proving the specific jobs that Kevin could have been hired to do had Driver not caused the accident.

5. Restaurant owned an easement that guaranteed its customers the right to travel through Subdivision to reach Restaurant. Customers could also reach Restaurant from the other direction, but that was much less convenient. Subdivision blocked access to Restaurant through Subdivision. Restaurant offered detailed evidence that its revenues had sharply declined, but offered no evidence of expenses or profit margins or whether marginal expenses had declined and to what extent. Restaurant has not proved damages with reasonable certainty. Lost profits depend on the relationship between revenues and expenses, and evidence of expenses was presumably available and in Restaurant's control.

f. Past and future damages. Past damages are typically easier to prove than expected future damages; yet a jury may also award expected future damages (discounted to present value when appropriate, as defined in § 14) based upon reasonably certain evidence as to the future damages' likely existence and extent. Only when evidence of future damages veers into speculation should factfinders deny recovery for future damages.

Illustration:

6. Steven severely injured his ankle when he slipped on ice as he entered Casey's General Store. The factfinder found that Casey was negligent in failing to remove the ice. Steven submitted evidence showing that he had incurred $50,000 in medical expenses, and his expert at trial testified that he would likely need a further surgery in the future. Although the expert had only "limited personal experience" with the cost of the expected future surgery, the expert opined that it would cost approximately $20,000. The jury may award the $50,000 for medical expenses already incurred. If the jury accepts the credibility of

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Steven's expert, it may award $20,000 for the expected future surgery. Each amount has been proved with reasonable certainty.

g. Lost profits from new businesses, new jobs, or new ventures. [This Comment will have to be coordinated with § 27 on lost profits, and perhaps all or part of it will be moved there.] One area in which plaintiffs have had special difficulty proving damages with reasonable certainty is when defendant's tortious conduct has interfered with plaintiff's new business or a new job. Some courts historically had a per se rule rejecting plaintiffs' claims for damages to a new business, on grounds that proof of such damages necessarily would be speculative. The modern and better approach is not a per se rule against recovery but instead to afford the plaintiff an opportunity to prove such damages with reasonable certainty. Even so, plaintiffs in such circumstances often lose on certainty grounds, because many new ventures fail, which means that any plaintiff's new business was at risk of failure even without the tort.

The task is one of finding evidence that rises above speculation. For example, if a plaintiff has never worked in a job before and cannot demonstrate the necessary skills or an opportunity to work in that job, future earnings for that job have not been proved with reasonable certainty. Similarly if plaintiff was starting a new business, more than plaintiff's hopes or speculation is required to prove that the business more likely than not would have earned profits and to prove an approximate amount of those profits. Such a plaintiff might prove lost profits based on the experience of a similar business that plaintiff ran elsewhere, or had run in the past. Or plaintiff might prove lost profits by the experience of similar businesses owned by others plus proof that plaintiff had the necessary skills, experience, and capital to succeed in similar fashion. Sometimes plaintiff might expect large profits, but be able to prove only that there would at least have been some smaller amount of profits.

If the tort destroys a fledgling business or makes it impossible for a new business to begin, it might reasonably be said that defendant has made it impossible for plaintiff to prove damages with reasonable certainty. If the new business had been able to proceed, its profits would be known. But courts have generally not taken that view, at least not explicitly. The threshold question in the new-business cases is whether there would have been profits at all, and therefore whether there are damages at all. If plaintiff shows by a preponderance of the evidence that there would have been profits, it is then necessary to quantify those lost profits with reasonable certainty. At that point,

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courts should accept reasonable approximations, recognizing that because of defendant's tort, there can be no direct evidence from actual experience.

Illustration:

7. Toy Co. ran an established store selling toys, educational products, and computer training for children. Lab Co. ran a separate business in offices directly above the Toy Co. store. A Lab Co. employee negligently left a sink running in the offices over the weekend, which overflowed and caused extensive water damage in the Toy Co. store. Before the flood, Toy Co. had run a small website which had not made significant profits, and it had been in the process of developing a large new Internet-based educational toy business to be promoted by other successful partner websites. Toy Co. had made these plans just as e-commerce was becoming a major source of revenue for retailers.

Toy Co.'s business was closed for several months because of the water damage, and during that time its employees devoted all of their time to rebuilding the physical store rather than to working on the company's new website. By the time the store was up and running again, a competitor had launched a successful website for educational toys, and partner websites were no longer interested in a promotional deal with Toy Co. Toy Co. claimed lost profits from the unlaunched website business, and it presented expert evidence of the profits likely to be made by the competitor who had entered the industry. It also introduced documentary evidence of the value of its lost inventory and costs of repairing its physical store. The court should uphold an award of damages for the lost inventory and costs for repairing the physical store consistent with the documentary and other evidence. The court might also have upheld an award of lost profits from the physical store, if Toy Co. had offered reasonably certain evidence of those lost profits. The court should not uphold an award of damages for lost profits for the abandoned e-commerce site. Absent better evidence that Toy Co. profitably could have launched its website, those damages have not been proved with reasonable certainty.

REPORTERS' NOTES

a. History and scope. The certainty requirement is stated in Restatement Second, Torts § 912 (AM. L. INST. 1979), which this Section supersedes, and Restatement of Torts § 912 (AM. L. INST. 1939). See DAN B. DOBBS & CAPRICE L. ROBERTS, LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION § 3.4 at 238-240 (3d ed. 2018); JAMES M. FISCHER, UNDERSTANDING REMEDIES

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§ 8.1 at 55-57 (3d ed. 2014); 4 FOWLER V. HARPER, FLEMING JAMES, JR., & OSCAR S. GRAY, HARPER, JAMES AND GRAY ON TORTS § 25.3 at 590-603 (3d ed. 2007); DOUGLAS LAYCOCK & RICHARD L. HASEN, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 126-136 (5th ed. 2019); CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES §§ 25-32 at 97-126 (1935); JACOB A. STEIN, PERSONAL INJURY DAMAGES §§ 1:14, 6:26, 8:24 (1997 & Supp.); Tun-Jen Chiang, *The Information-Forcing Dilemma in Damages Law*, 59 WM. & MARY L. REV. 81 (2017).

The Second Restatement's § 912 covered a number of related but peripheral issues, such as damages for interference with a lost chance, Comment *f*, and whether plaintiffs may rely upon per-diem arguments in asking a jury to determine damages for noneconomic damages such as pain and suffering, Comment *b*. This Restatement addresses these issues in §§ 10 and 20, respectively. Section 912 also included Comments discussing certainty in the context of particular types of economic damages, such as harm to chattels and land. This Section does not follow that lead, as the certainty rule that applies to economic damages does not depend upon whether the damage is to land, chattel, or other particular property or economic interests.

b. Rationale for standard. Courts recognize that requiring too much certainty in proof of damages would deprive plaintiffs of compensation in many cases of undoubted injury. Instead, the standard for proving damages is reasonable certainty under the circumstances, a standard that avoids speculation while taking account of what evidence is reasonably available. Mueller v. Hill, 345 P.3d 998, 1004 (Idaho 2015) ("'[E]vidence is sufficient if it proves the damages with reasonable certainty. Reasonable certainty requires neither absolute assurance nor mathematical exactitude; rather, the evidence need only be sufficient to remove the existence of damages from the realm of speculation.'" (citations omitted)); Ellison v. R & B Contracting, Inc., 32 S.W.3d 66, 79 (Ky. 2000) (holding that plaintiffs "proved their damages through just and reasonable inference as far as was reasonably possible, 'and with as much certainty as the nature of the tort and circumstances permit,'" and declining defendant's "invitation to hold plaintiffs to a standard of mathematical precision" (quoting Restatement Second, Torts § 912)); Vortex Sports & Ent., Inc. v. Ware, 662 S.E.2d 444, 450-451 (S.C. Ct. App. 2008) ("the law does not require absolute certainty of lost profits but only reasonable certainty that the damages are not purely speculative and there exists a fairly accurate method to estimate the lost profits"); MCCORMICK, DAMAGES § 26 at 100 ("The epithet '*certainty'* is overstrong, and the standard is a qualified one of 'reasonable certainty' merely or, in other words, of 'probability.'").

The Restatement Second was quite clear on this point. Comment *a* to § 912 recognized the tradeoffs involved, noting that courts should not impose responsibility for harm without "definiteness of proof of the amount of damage so far as is reasonably possible. It is even more desirable, however, that an injured person not be deprived of substantial compensation merely because he cannot prove with complete certainty the extent of harm he has suffered."

Many courts use the language of reasonable certainty in describing how confident a medical or scientific expert must be about the opinions offered. Restatement Third, Torts: Liability for Physical and Emotional Harm § 28 (AM. L. INST. 2010). Comment *e* to that Section explains

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that this language should be abandoned, or understood as no more than the application of the preponderance standard: "The implication that the reasonable-certainty standard requires something more than the preponderance standard is belied by courts that have provided a definition of or explained the phrase—the vast majority of those courts state that the standard is equivalent to the usual preponderance requirement." That Comment is entirely accurate, but its context must be made clear. It applies to expert testimony offered on questions that may be complex or difficult but that, for legal purposes, are ultimately yes-or-no questions, such as whether exposure to defendant's substance caused plaintiff's disease. That is a particular version of the question whether the tort caused plaintiff's damages, and it is properly governed by the preponderance standard.

But the *amount* of plaintiff's damages is governed by the reasonable-certainty standard, and in that context, reasonable certainty cannot be reduced to or equated with a preponderance of the evidence. If damages are reasonably estimated to be between $40,000 and $50,000, no specific number within that range is more likely than not. But not only that; no specific number within that range is likely at all. There are 10,000 possible numbers, or, because the jury can also award cents, a million possible numbers. The requirement of proving the amount of damages with reasonable certainty can also be understood as reliably narrowing the possibilities to a reasonable range.

Illustration 1 is based on Best Formed Plastics, LLC v. Shoun, 51 N.E.3d 345 (Ind. Ct. App. 2016). In *Shoun*, in addition to subtracting the wages that plaintiff earned in the orchard from the amount of his lost wages, the parties also subtracted unemployment and workers'-compensation benefits. In many jurisdictions, these insurance payments are collateral sources and would not be subtracted in computing lost wages. See § 9, Comment *c*.

For more on lack of mathematical certainty required to prove the amount of damages, see Union Oil Co. v. Buffalo Marine Servs., Inc., 538 F. App'x 575 (5th Cir. 2013) (federal law) (holding it sufficient for plaintiff to show number of barrels of oil shipped in three months before and three months after defendant's oil spill, with average profit margin on each barrel; plaintiff was not required to show specific vessels that would have docked but for the spill).

c. Relaxation of certainty standard. Illustration 2 is based on Paramount Pictures Corp. v. Thompson Theaters, Inc., 621 F.2d 1088 (10th Cir. 1980) (Oklahoma law). See also MCCORMICK, DAMAGES § 27(b) at 101 ("Where the defendant's wrong has caused the difficulty of proof of damage, he cannot complain of the resulting uncertainty."). Although standards of proving damages with reasonable certainty may be higher in contract than in tort, the Restatement Second, Contracts § 352, Comment *a* (AM. L. INST. 1981) provides that doubts about certainty of damages for breach of contract "are generally resolved against the party in breach."

In the leading federal case, defendants' antitrust conspiracy was of such duration and geographic breadth that neither plaintiff nor any comparable business had any experience of a free and competitive market. It was impossible to prove what plaintiff's profits would have been in such a market, but the Court held that damages had been proved with reasonable certainty. It accepted evidence of a similar business that had benefited from the conspiracy but had been weaker

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than plaintiff's business in other ways, and evidence from before and after the conspiracy was tightened and made more effective. Bigelow v. RKO Radio Pictures, 327 U.S. 251 (1946):

> The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created. . . . [T]he wrongdoer may not object to the plaintiff's reasonable estimate of the cause of injury and of its amount, supported by the evidence, because not based on more accurate data which the wrongdoer's misconduct has rendered unavailable. . . . "The constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done. Difficulty of ascertainment is no longer confused with right of recovery" for a proven invasion of the plaintiff's rights.

Id. at 265-266 (citation omitted).

Common-law torts are rarely as pervasive as nationwide antitrust conspiracies, but some torts do inherently minimize or eliminate evidence of the extent of harm. In Pauma Ridge Mut. Water Co. v. Birch, 2008 WL 1813165 (Cal. Ct. App. Apr. 23, 2008), defendant tapped into a well that was physically on his land, but to which plaintiff owned the water rights. Defendant claimed that he had installed a water meter, which showed that only minimal amounts of water had been taken. Plaintiff offered evidence of how much supplemental water it had purchased before and after defendant had tapped into the well; this comparison implied that much larger amounts had been taken. Plaintiff attempted to corroborate this estimate with additional evidence based on more indirect measures. The court quoted *Bigelow* and earlier California cases to similar effect, indicating that damages had been proved with reasonable certainty, although it ultimately held that defendant had waived the issue.

There were analogous facts in a very different context in Brink's Inc. v. City of New York, 717 F.2d 700 (2d Cir. 1983) (New York law), where Brink's employees collecting coins from city parking meters stole large quantities of coins. Collections went up sharply after Brink's was replaced. Brink's pointed to many problems with this before-and-after evidence; the city's expert attempted to adjust the data to account for those problems. The court relied on *Bigelow* and found the evidence of damages to be reasonably certain. See also In re Neurontin Mktg. & Sales Practices Litig., 712 F.3d 21, 49 (1st Cir. 2013) (federal law) (fraud in sale of pharmaceuticals; "the factfinder is afforded a greater deal of freedom to estimate damages where defendant, as here, has created the risk of uncertainty"); Raishevich v. Foster, 247 F.3d 337 (2d Cir. 2001) (federal law) (relying on *Bigelow* in affirming trial court's valuation of plaintiff's photographic prints, which defendant had destroyed; plaintiff had very few sales at market prices to support finding of market value).

d. Existence and extent of damages. Illustration 3 is based on Saewitz v. Saewitz, 79 So. 3d 831 (Fla. Dist. Ct. App. 2012). The daughters argued that their stepmother had failed to cooperate with discovery, but they had made no effort to enforce their discovery requests. The

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court also noted that counsel had a detailed list of all the assets, but had not asked any witness to value the items on the list.

Courts routinely require plaintiffs to prove both the existence and extent of damages, but to provide greater proof of the existence of damages than of the extent of those damages. Uncertainty as to "the fact of damages" "is fatal to recovery, but uncertainty as to the measure or extent of the damages does not bar recovery." Cedar v. Johnson, 921 N.W.2d 178, 183-184 (S.D. 2018). "In lost profit cases, Florida's courts have clearly held that once causation is proven with reasonable certainty, uncertainty as to the precise amount of the lost profits will not defeat recovery so long as there is a reasonable yardstick by which to estimate the damages." Nebula Glass Int'l, Inc. v. Reichhold, Inc., 454 F.3d 1203, 1217 (11th Cir. 2006) (Florida law); see also MCCORMICK, DAMAGES § 26 at 99 ("The certainty rule, in its most important aspect is a standard requiring a reasonable degree of persuasiveness in the proof of the fact and the amount of the damage.").

Although the black letter of Restatement Second, Torts § 912 (AM. L. INST. 1979) spoke in terms of a plaintiff proving both the "extent of harm" and the "amount of money representing adequate compensation," Comment *a* to that Section makes it clear that the drafters' first concern was with proving the *existence* rather than *extent* of harm. See id. ("In all of these cases, the recovery of damages for a particular harm is dependent upon proof that the harm occurred as the result of the tortious conduct, and normally the plaintiff can recover damages for the harm only by proving this with the same degree of certainty as that required in proving the existence of the cause of action."); Story Parchment Co. v. Patterson Parchment Paper Co., 282 U.S. 555, 562 (1931) ("The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount"). Even though the requirement related to proving the extent of damages is more relaxed than proving the existence of damages, plaintiffs still must make reasonable efforts to establish amount.

The Alaska quotation is from Recreational Data Servs., Inc. v. Trimble Navigation Ltd., 404 P.3d 120, 136 (Alaska 2017) (emphasis in original; citations omitted). For other clear statements of the underlying principle that the fact of damages must be proved by a preponderance of the evidence and the amount of damages must be proved with reasonable certainty, see Torres-Martinez v. United States, 639 F. App'x 471, 472 (9th Cir. 2016) (Arizona law) ("The purpose of the 'reasonable certainty' test is to relieve the plaintiff of proving damages with absolute certainty, not to relieve the plaintiff of proving causation by a preponderance of the evidence."); Hill v. Republic of Iraq, 328 F.3d 680, 681 (D.C. Cir. 2003) (federal law) ("plaintiff must prove that the projected consequences are 'reasonably certain' (i.e., more likely than not) to occur, and must prove the amount by a 'reasonable estimate'").

e. Economic and noneconomic damages. Illustration 4 is based on French v. Dilleshaw, 723 S.E.2d 64 (Ga. Ct. App. 2012). Illustration 5 is based on Post & Beam Equities Grp., LLC v. Sunne Vill. Dev. Prop. Owners Ass'n, 124 A.3d 454 (Vt. 2015). See also Motion Med. Techs., L.L.C. v. Thermotek, Inc., 875 F.3d 765 (5th Cir. 2017) (Texas law) (plaintiff proved changes in revenue and cost of goods sold, but offered no evidence of overhead or indirect costs; court held

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that damages had not been proved, because damages must be based on net profits, not gross profits).

On the more flexible standard of proof for noneconomic damages, see Owens-Corning Fiberglass Corp. v. Martin, 942 S.W.2d 712, 719 (Tex. Ct. App. 1997) ("Because the measure of damages in a personal injury case is not subject to precise mathematical calculation, each case must be measured by its own facts, and considerable latitude and discretion are vested in the jury."); LAYCOCK & HASEN, REMEDIES at 131 ("Commercial damages must generally be proved with more certainty than personal injury damages.").

On presumed damages as a substitute for proof of actual damages under a reasonable-certainty standard, see Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299 (1986), analyzing cases awarding presumed damages for interference with the right to vote:

> Presumed damages are a *substitute* for ordinary compensatory damages, not a supplement for an award that fully compensates the alleged injury. When a plaintiff seeks compensation for an injury that is likely to have occurred but difficult to establish, some form of presumed damages may possibly be appropriate. In those circumstances, presumed damages may roughly approximate the harm that the plaintiff suffered and thereby compensate for harms that may be impossible to measure.

Id. at 310-311 (citations omitted; original emphasis). See also Virgo v. Lyons, 551 A.2d 1243 (Conn. 1988) (holding that federal award of constitutional damages for battery by police officers precluded state claim to common-law damages for the same harm, even if one claim was characterized as actual damages and the other as presumed damages). For presumed damages in defamation, see Restatement Third, Torts: Defamation and Privacy.

f. Past and future damages. Illustration 6 is based on Brown v. Casey's Retail Co., 2018 WL 3966399 (Minn. Ct. App. Aug. 20, 2018). See also Pietrzak v. Eggen, 295 N.W.2d 504, 507 (Minn. 1980) ("In a civil action the plaintiff has the burden of proving future damages to a reasonable certainty. This rule insures that there is no recovery for damages which are remote, speculative, or conjectural. However, it is not necessary that the evidence be unequivocal or that it establish future damages to an absolute certainty. Instead, the plaintiff must prove the reasonable certainty of future damages by a fair preponderance of the evidence. In short, the plaintiff is entitled to an instruction on future damages if he or she has shown that such damage is more likely to occur than not to occur.").

g. Lost profits from new businesses, new jobs, or new ventures. Illustration 7 is based on Kids' Universe v. In2Labs, 116 Cal. Rptr. 2d 158 (Ct. App. 2002). In Recreational Data Servs., Inc. v. Trimble Navigation Ltd., 404 P.3d 120 (Alaska 2017), a new business offered projections but little evidence to show the reliability of those projections; it had failed to prove its damages with reasonable certainty. The court said that new businesses can recover their lost profits, but that they are held to the same evidentiary standards as existing businesses.

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On the lack of a modern per se rule barring profits for a lost business on certainty grounds, see Anderson v. Litzenberg, 694 A.2d 150 (Md. Ct. Spec. App. 1997) (holding that self-employed plaintiff could recover for lost earning capacity even though his business was not yet profitable); 1 ROBERT L. DUNN, RECOVERY OF DAMAGES FOR LOST PROFITS § 4.3 at 378 (6th ed. 2005) ("What was once a rule of law has been converted into a rule of evidence."); STEIN, PERSONAL INJURY § 6:26 (collecting lost-profits cases for new businesses and self-employed individuals). For cases repudiating a per se rule against recovery of lost profits by new businesses, see, e.g., Sunnyland Farms, Inc. v. Cent. N.M. Elec. Coop., Inc., 301 P.3d 387 (N.M. 2013) (overruling contrary decision and affirming award of lost profits); Olivetti Corp. v. Ames Bus. Sys., Inc., 356 S.E.2d 578 (N.C. 1987) (rejecting per se rule but affirming finding that lost profits had not been proved with reasonable certainty).

On the reasonable certainty requirement in connection with tort damages for plaintiffs unable to begin a new job, see Jones v. O'Day, 692 S.E.2d 774, 777 (Ga. Ct. App. 2010) ("It is not permissible to allow a recovery of lost earning capacity based upon an occupation in which the plaintiff had never engaged or had not demonstrated the skill and capacity to successfully pursue."). In Licudine v. Cedars-Sinai Med. Ctr., 208 Cal. Rptr. 3d 170 (Ct. App. 2016), the court held that a prospective law student had not proved lost earning capacity with reasonable certainty. Plaintiff showed that she had been admitted to law school, and that she was unable to attend as a result of defendant's medical malpractice. But she offered no evidence on her likelihood of graduating, passing the bar, and finding a job, and no evidence of what lawyers earn. The court affirmed the grant of a new trial on damages because of other issues about how the case was tried, but it emphasized that plaintiffs generally do not get a second chance if they fail to prove their damages the first time.

§ 6. Scope of Liability (Proximate Cause)

Rules that limit the scope of defendant's liability on policy grounds sometimes bar compensation for harm caused by a tort and suffered by a plaintiff. These rules are restated in §§ 29–36 of the Restatement Third, Torts: Liability for Physical and Emotional Harm.

Comment:

a. Relationship to remedies. Multiple rules limit or bar recovery of damages that judges may view as too remote from, or too unrelated to, the tortfeasor's conduct or responsibility. Courts traditionally discussed these policy-based rules in terms of "proximate cause," "foreseeability," and related terms; in the Restatement Third, Torts: Liability for Physical and Emotional Harm, they are more helpfully discussed in terms of "scope of liability."

Lawyers, judges, and scholars often consider these rules as part of the primary substantive law that governs an actor's conduct. But the principal effect of these rules is to limit recovery of

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damages that plaintiff undoubtedly suffered, in the wake of tortious conduct that defendant undoubtedly committed. In many of these cases, but not in all, there is also little doubt that the defendant was a factual cause of the plaintiff's damage.

Rules that limit the scope of liability often leave the plaintiff worse off than if the tort had not been committed; they are a substantial exception to the rightful-position principle stated in § 2. These rules are noted here because they are an important and substantial limitation on tort remedies, and because they are an important example of the limits on the principle stated in § 2, limits referenced but not detailed in § 2 itself. These rules have been restated elsewhere, and that restatement need not be repeated or elaborated here.

REPORTERS' NOTES

a. Relationship to remedies. See Restatement Third, Torts: Liability for Physical and Emotional Harm §§ 29-36 (AM. L. INST. 2010). On the economic-loss rules, another important limitation on remedies that is often viewed as substantive, see § 28 and Restatement Third, Torts: Liability for Economic Harm §§ 3 and 7 (AM. L. INST. 2020). See generally DAN B. DOBBS & CAPRICE L. ROBERTS, LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION § 3.4 at 240 (3d ed. 2018); DOUGLAS LAYCOCK & RICHARD L. HASEN, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 102-120 (5th ed. 2018); CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES §§ 72-76 at 260-274 (1935).

§ 7. Avoidable Consequences (Mitigation of Damages)

(a) A plaintiff cannot recover damages for any harm caused by defendant's negligent or strict-liability tort if the plaintiff could have avoided that harm by reasonable effort or expenditure after the commission of the tort and failed to do so.

(b) A plaintiff cannot recover damages for any harm caused by defendant's intentional or reckless tort if

(1) the plaintiff was aware of the tort and of a means to avoid that harm by reasonable effort or expenditure after the commission of the tort, and

(2) the plaintiff intentionally or recklessly failed to do so.

(c) A plaintiff is entitled to compensation for the cost of reasonable efforts to avoid threatened harm resulting from a tort whether or not those efforts are successful.

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Comment:

a. History and scope. Subsections (a) and (b) are substantially taken from Restatement Second, Torts § 918. Subsection (c) is substantially taken from Restatement Second, Torts § 919.

In a Comment to Restatement Third, Torts: Apportionment of Liability § 3, the Institute proposed elimination of the common-law rule of avoidable consequences, with the issues it addresses folded into the law of comparative responsibility. This suggested reform of the law was based on serious arguments of logic and policy, explored below, but no cases were cited to support the proposed new rule, and neither the black letter nor the title of the Section stated or signaled this dramatic change in a way that many readers would be likely to recognize. In the ensuing 20 years, the proposal has drawn little judicial attention and less judicial support. The great majority of courts continue to apply the common-law rule of avoidable consequences with little change, and they maintain the basic distinction between avoidable consequences and comparative responsibility. This Section restates the law as it exists today, and not as the Institute proposed 20 years ago. Comments *b*-*h* address the relationship between the avoidable-consequences rule and the comparative-responsibility rule and the fundamental choice between them; Comments *i*-*s* address the existing rule.

This Section supersedes Restatement Second, Torts §§ 918-919, the second paragraph of Comment *b* to Restatement Third, Torts: Apportionment of Liability § 3, and Illustrations 4 and 5 to that Section. Because it is a serious matter to withdraw the Institute's position in an earlier portion of the same overall Restatement, these Comments and the accompanying Reporters' Notes review the relevant history and law in considerable detail.

b. Relationship to comparative responsibility. The rule of avoidable consequences addresses plaintiff's post-injury failure to take reasonable steps to minimize damages. It has many applications, explored below; the simplest example is failure to get proper medical care after a physical injury. The Apportionment project treated avoidable consequences as a doctrine to mitigate the harshness of the old rule on contributory negligence. Instead of entirely barring any recovery when plaintiff fails to get proper medical care, the rule of avoidable consequences bars only the damages that proper medical care would have avoided. On this view, when comparative responsibility replaced the old rule of contributory negligence, it should also have replaced the derivative rule of avoidable consequences. And on this view, continued adherence to the rule of

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avoidable consequences is an obsolete and retrograde refusal to accept the full implications of comparative responsibility.

This account of the avoidable-consequences rule probably does not reflect the rule's origins and certainly does not reflect its scope. The rule that a defendant is not liable for the avoidable consequences of its wrongdoing is a longstanding rule of damages—the leading treatise calls it a "cardinal" rule of damages—and the rule is not confined to tort cases. It appears to have originated from a genuine sense of a duty to minimize loss and avoid waste, and from a concern that might be described in modern terms as the moral hazard of letting damages accumulate at defendant's expense. Older treatises on damages, written when contributory negligence was a total bar to recovery, treat avoidable consequences as an independent rule of damages, designed to require responsible behavior by plaintiffs; they do not mention or hint at its supposed role in ameliorating the law of contributory negligence.

The avoidable-consequences rule applies in contract as well as in tort. Restatement Second, Contracts § 350; U.C.C. § 2-715(2)(a)) (AM. L. INST. & UNIF. LAW COMM'N 1977). It applies, with a plaintiff-friendly modification, to intentional torts as well as to negligence. It applies to most other legal wrongs, including statutory causes of action. Contributory negligence was not a bar to recovery in contract, or on most statutory claims, and it was not a bar to claims for intentional tort. Restatement Second, Torts § 481. But the rule of avoidable consequences applies in all these contexts. We cannot simply say that the rule of avoidable consequences should be abolished because the rule of contributory negligence has been abolished.

Even so, avoidable consequences is related to contributory negligence and thus to modern rules of comparative responsibility. Both avoidable consequences and comparative responsibility address ways in which the plaintiff may be partially responsible for the harm suffered. The plaintiff's failure to act reasonably to avoid or minimize the harm caused by defendant is a form of negligence, and it could in principle be subjected to the comparative-responsibility rules.

The most common distinction offered by courts is that comparative responsibility applies to the plaintiff's conduct before or simultaneously with the tort, and avoidable consequences applies to plaintiff's conduct after the tort. That is generally true, but the distinction runs deeper. The two sets of rules are fundamentally different, and the differences are adapted to distinct fact patterns.

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It is possible to apply rules about comparative responsibility if the harm to plaintiff is indivisible. Harm is indivisible for this purpose if each actor is a cause of all the harm and all the harm is within each actor's scope of liability. Restatement Third, Torts: Apportionment of Liability § 26. Comparative-responsibility rules ask the finder of fact to apportion responsibility for all of this harm among the plaintiff and the defendant or defendants, and to apportion all the damages according to percentages of responsibility. So if plaintiff is 20-percent responsible and defendant is 80-percent responsible, plaintiff can recover 80 percent of all the damages under most comparative-responsibility rules.

The rule of avoidable consequences proceeds differently. It is possible to apply this rule only if it is possible to identify particular items or increments of harm that plaintiff reasonably should have avoided. The rule denies any recovery for these avoidable harms, and it does not reduce recovery at all for other harms—although recovery for other harms might be separately reduced by comparative responsibility for the original injury. See Illustration 1. If no identifiable item or increment of harm can be causally attributed to the plaintiff's failure to avoid that harm, then the rule of this Section cannot apply.

Illustration:

1. Jay's automobile collided with Liz's automobile. The jury allocated 80 percent of responsibility for the collision to Jay and 20 percent to Liz. Liz suffered a compound fracture in her leg, bruised internal organs, and the total loss of her automobile, and the broken leg prevented her from working at her job for six weeks. The jury found that if Liz had done reasonable physical therapy as instructed by her doctor, she could have returned to work after four weeks. Each party's negligence was a factual cause of all the harm. But these harms are separable for purposes of the avoidable-consequences rule. Liz should recover no lost income for the fifth and six weeks, because she reasonably should have avoided all of that harm. She should recover 80 percent of her lost income for the first four weeks and 80 percent of all her other damages.

c. The conceptual argument for and against each rule, and some policy implications. The rules of comparative responsibility ask jurors to apportion responsibility for harm that is jointly caused by more than one actor. The harms addressed by the avoidable-consequences rule fit within this broad statement of the comparative-responsibility principle, because both the defendant's tort

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and the plaintiff's subsequent failure to avoid the consequences of the tort are factual causes of the harm that should have been avoided.

In Illustration 1, Liz's fifth and sixth weeks off work would not have happened if Jay had driven more carefully, or if Liz had driven more carefully, and they would not have happened if Liz had done her physical therapy. From the perspective of the comparative-responsibility rules, the last two weeks of lost work is an indivisible harm that was jointly caused by Jay's negligence and Liz's negligence, and a jury should apportion responsibility. On this view, Liz's failure to do physical therapy is no different from her negligent driving that contributed to the collision. Each is a cause of the harm she suffered. Jay's negligent driving is also a factual cause of all the harm, including her slow recovery.

All of that is true as far as it goes. But the typical situations subject to the two rules are also different in important ways. With respect to Liz's negligent driving, the only choices are comparative responsibility, completely barring any recovery for Liz, or allowing Liz a full recovery despite her negligent contribution to the collision. There is no other plausible way to apportion the damages; without comparative responsibility, it is all or nothing.

But with respect to her failure to do physical therapy, courts have a choice between two rules and two means of apportionment. The choice is not comparative responsibility or nothing; courts may apportion damages by comparative responsibility or by applying the doctrine of avoidable consequences. Each rule offers a method for dividing the total amount of damages between plaintiff and defendant. The comparative-responsibility rule is sometimes called "fault apportionment" or "responsibility apportionment"; the avoidable-consequences rule is sometimes called "causal apportionment." It is conceptually possible to apply either method of apportionment—either the comparative-responsibility rule or the avoidable-consequences rule. It is necessary to choose.

In deciding how to apportion responsibility for the avoidable portion of the harm, a salient fact is that Jay has absolutely no control over whether Liz does her physical therapy. Liz is 100-percent responsible for her failure to do so. This is quite different from the pre-accident situation, in which Jay can at least control his own behavior that contributes to causing the accident. Courts may decide on policy grounds that it is fairer to put responsibility for the failure to take reasonable steps in mitigation on the party who had full control over whether to take those steps. When it

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comes to post-tort conduct that may pile up damages entirely within Liz's control, a court reasonably may put the entire responsibility on her.

Some courts justify the avoidable-consequences rule by saying that Liz's failure to mitigate damages is the proximate cause of her delayed recovery. Under this older, more intuitive approach, plaintiff's causal contribution to the harm that should have been avoided is a more direct and more immediate cause than defendant's negligence in causing the accident. Under the approach of Restatement Third, Torts: Liability for Physical and Emotional Harm § 29, courts might reasonably conclude that Liz's decision not to do physical therapy is not within the risk that made Jay's driving negligent, and therefore, not within Jay's scope of liability.

Critics of the avoidable-consequences rule say that there are no degrees of causation. Each party is either a cause of the harm or not, and if each is a cause, then it is for the jury to apportion responsibility. That is an accurate description of factual causation, and it is an accurate statement of how the comparative-responsibility rules work. But it ignores the ability of courts to limit liability for certain damages on policy grounds under the proximate-cause or scope-of-liability labels. And it ignores the reality that the strength of the causal connection between a party's action and an injury suffered by the plaintiff is a relevant consideration affecting defendant's liability. The Apportionment project recognized this very point as central to the application of comparative responsibility: "the strength of the causal connection between the person's risk-creating conduct and the harm" is one of only two black-letter criteria for apportioning responsibility. Restatement Third, Torts: Apportionment of Liability § 8. The rule of avoidable consequences in effect says that, within its scope, the difference in the strength of the causal connection is sufficiently great that plaintiff should bear all the responsibility for reasonably avoidable consequences, and courts should not fold consideration of this question into the overall assessment of responsibility.

The avoidable-consequences rule is also broadly consistent with Apportionment § 26 on damages that "can be divided by causation." That Section says that harm is divisible by causation if there is "a reasonable basis for the factfinder to determine" that one person's negligence was not "a legal cause" of some of the harm. The Institute has since abandoned the phrase "legal cause," but that phrase required both factual cause and proximate cause—or as we would now say, that the harm at issue was factually caused by the actor and was within the actor's scope of liability. Whether or not a court concludes that the harm that should have been avoided is outside defendant's scope of liability, the rule of avoidable consequences proceeds on a closely analogous

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idea. It makes one party solely responsible for harms that can be divided by causation and fairly attributed to that party. There are sound policy reasons in this context for a modest broadening of the criteria for holding damages to be divisible by causation. It is permissible to make Liz solely responsible for those additional damages that were solely within her control.

Plaintiff's sole control over decisions about whether and how to minimize damages means that the choice between the two rules has important consequences for incentives. Either rule encourages plaintiffs to act responsibly in the face of actual and threatened harms, to seek medical care in personal-injury cases, and to follow medical advice. The avoidable-consequences rule provides considerably stronger incentives for such behavior. It does so at a time when plaintiff is more likely to be represented by a lawyer who can advise about the rule and how to comply with it, and at a time when defendant no longer has any ability to limit, control, or avoid the damages that have been caused. Subject to financial and other constraints, plaintiff is entirely in control of choices about minimizing harm. The avoidable-consequences rule takes account of these constraints on plaintiff while holding plaintiff entirely responsible for unreasonable choices. Plaintiffs need make only reasonable efforts to avoid the consequences of the tort, and in most states, the standard for what is reasonable is deferential to plaintiffs.

At the same time, the avoidable-consequences rule probably does little to undermine defendants' incentives to exercise due care before the initial injury. It seems unlikely that many defendants rely on the prospect that their injury victims may fail to minimize damages or on the rule about who will be held responsible and to what extent if that happens. Over the long run, the aggregate cost of settlements and judgments might conceivably be affected at the margins in ways that might influence some repeat players on the defense side, but any such effect seems too attenuated to matter much. It is certainly much more attenuated than the immediate choices and applicable rules facing plaintiffs.

These consequences for incentives are related to consequences for fairness. Supporters of the comparative-responsibility rule think that it is always fairer to apportion responsibility for all the damage items among all the persons whose conduct contributed to causing those damages. Supporters of avoidable consequences think that it is fairer to apportion responsibility to plaintiff for decisions that were entirely within plaintiff's control and entirely beyond defendant's control.

d. Distributional consequences. The choice between the two rules also has distributional consequences, but precisely because the choice is between two means of apportionment, the net

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effect of those consequences is unpredictable. Under comparative responsibility, plaintiffs can recover partial compensation for the harm they should have avoided. With respect to the arguably avoidable harm (but only that harm), the avoidable-consequences rule also becomes all or nothing. Plaintiff can recover in full for harm that could not reasonably have been avoided, but nothing for harm that reasonably should have been avoided. Plaintiffs would benefit by getting partial compensation in cases where they now get none, but they would also get only partial compensation in cases where they now get full recoveries. Judges and juries might evaluate plaintiff's post-accident conduct less generously if they hold plaintiff partially responsible, rather than entirely responsible, for failure to minimize damages.

e. Fit with the law of remedies more generally. It would be odd, and sometimes problematic, to abandon the avoidable-consequences rule in tort cases subject to comparative responsibility while retaining it for other torts, for contracts, for employment discrimination, and nearly everywhere else in the law. In areas of doctrinal overlap, these distinctions could potentially put a premium on clever pleading. Treating wrongful discharge as a tort would get one set of rules; treating it as breach of the employment contract, or as discrimination, would get a different set of rules. Of course there are similar anomalies in other areas of doctrinal overlap, but courts might reasonably hesitate before creating another one.

f. Trial management and issue submission. Finally, the choice between the two rules has consequences for trial management and for the issues submitted to juries. Avoidable consequences is a much simpler rule. Did plaintiff act reasonably or not? If not, which items of damage, or how much of the damage, would have been avoided if plaintiff had acted reasonably? It has its own standard of reasonableness, which is not the same as the general negligence standard; it demands less of plaintiffs. See Comment *j*.

Submitting failure to mitigate as a comparative-responsibility issue is much more complex and arguably requires factfinders to make evaluations that are not logically commensurable. There is a conceptual difficulty, and a potential for jury confusion, in trying to combine comparative responsibility for the plaintiff's failure to act reasonably to avoid the consequences of the tort, and the usually quite different comparative responsibility for causing the accident, into a single overall assessment of comparative responsibility for the harm that should have been avoided. In Illustration 1, Jay's 80-percent responsibility for the collision must somehow be combined with his zero-percent responsibility for Liz's failure to do physical therapy—two actions that are almost

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wholly disconnected from each other—into a combined assessment of his responsibility for the final two weeks of Liz's inability to work. The task becomes more difficult still if the separate standard of reasonableness for avoidable consequences is preserved—and courts in the few comparative-responsibility states have so far attempted to preserve it.

Some courts have visibly struggled with this problem after deciding to admit evidence of failure to wear a seat belt. The New Jersey court required eight paragraphs to explain a six-step process by which the jury and the trial judge could apportion responsibility; the Wisconsin court offered a five-step process. Or—and this appears to be what actually happens—juries could just be told to apportion responsibility and be left to their own devices to figure out how. There are somewhat similar issues in other cases of sequential injuries, as in crashworthiness cases and cases of medical malpractice that aggravates an initial injury. So courts and juries have coped with such issues in apportioning responsibility among defendants. But courts have a choice about whether to expand the scope of the problem to a new set of cases and to apportionment between defendants and the plaintiff.

Some courts have also feared that in states that entirely bar any recovery if plaintiff's percentage of responsibility is over some threshold (typically 50 percent), there is a risk that plaintiff's negligence that might have barred recovery only for a particular item of damages would bar any recovery at all if avoidable consequences were assimilated into comparative responsibility. This concern is based on a legal misconception, but it may be justified in fact. Legally, this fear misunderstands what the Apportionment project proposed. As explained in that project's Reporters' Notes, responsibility for the unavoidable harm was to be assessed separately from responsibility for any avoidable harms. The plaintiff's responsibility for failing to avoid the avoidable harm would not have influenced the apportionment of responsibility for causing the accident and the unavoidable harms. But this misunderstanding is common and persistent, and it seems likely that many juries would have the same misunderstanding. And in the very limited actual experience, it appears that juries do have this misunderstanding.

In the three states with significant numbers of reported cases applying comparative responsibility to avoidable-consequences issues—Iowa, Louisiana, and New Jersey—plus Missouri and Washington, which have a few, there are 12 reported accounts of juries applying a failure-to-mitigate percentage to the entire award of damages, including several discounts of more than 50 percent, and only three accounts of juries distinguishing different items of damages and

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applying the failure-to-mitigate discount to some damages and not others. These opinions give few details, and of course many opinions do not describe the verdict in sufficient detail to apply this categorization at all, so this is a small and nonrandom sample with limited information. But it is alarming. Sometimes the jury may reasonably conclude that all the damages were avoidable, but this is not the most common pattern, and surely not 80 percent of the cases (12 out of 15). Jury instructions in these states do not sufficiently caution the jury about separating the various items of damages. Perhaps that could be fixed, or perhaps these instructions reflect the judgments of experienced judges about the limits of what can be accomplished with instructions.

g. Overview of the competing arguments. Few courts have explored these competing arguments, and none in any depth. Trial attorneys, some of whom have clients who would benefit from a switch to comparative responsibility, do not appear to have been pushing the issue, so judges have not often had to explain their reasons for adhering to the avoidable-consequences rule. But the rule has not continued simply by inertia. Widespread judicial adherence to the rule of avoidable consequences appears to reflect an equally widespread judicial intuition that the cases subject to the rule are different from the cases subject to the comparative-responsibility rules. In a few states, there has been active resistance to legislation attempting to apply comparative responsibility to avoidable consequences.

The two sets of cases are different. Whether those differences justify two different rules is a matter of judgment. We cannot make that judgment by showing that either rule is fallacious if analyzed solely in terms of the considerations underlying the other rule. We cannot make that judgment by arbitrarily allocating the burden of persuasion to one side or the other. It is not enough to say that comparative responsibility has turned out to have many implications and this should be one more. Rather, we have a set of cases that falls within the usual formulation of two different rules. We have to choose whether to adhere to the more specific rule that has long governed these cases, or to expand the reach of a newer and more general rule that could also plausibly cover these cases.

h. The clear majority rule and the case for restating it here. Whoever has the better of these arguments in principle, there is little doubt about what courts have done in fact. This Section restates the traditional rule of avoidable consequences in part because courts have overwhelmingly adhered to that rule. There is a clear majority rule, and no clear basis for adopting the minority rule instead—apart from the fact that the Institute did it 20 years ago, hoping that courts would follow.

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A large body of case law can be restated under the majority rule. There is value in restating this law, because many courts, probably most courts, will adhere to the traditional rule for the foreseeable future. There are only a few actual cases that could be restated applying comparative responsibility to issues long treated as avoidable consequences. For the minority of jurisdictions that adopt or will adopt the comparative-responsibility rule, much of what is stated here may be ignored. But even in those states, decisions on whether to submit avoidable consequences to the jury at all may continue to guide whether and in what circumstances to instruct juries to consider failure to mitigate damages as part of comparative responsibility.

New Jersey is the only state to apply comparative responsibility to these issues by judicial decision and then adhere to and actually implement that decision. New Jersey insists that it is still applying avoidable consequences and not comparative responsibility, but it requires percentage allocations of responsibility that make its rule comparative responsibility in all but name.

Seven states—Alaska, Indiana, Iowa, Minnesota, Missouri, North Dakota, and Washington—have provided by statute that failure to mitigate damages is part of comparative responsibility. Perhaps the most remarkable thing about this issue is that only Iowa has effectively implemented this statute. In Indiana, the supreme court interpreted the statute not to apply to "post-accident" failure to mitigate—that is, not to apply to any cases where avoidable consequences applies. In Alaska, all the reported decisions have simply ignored the statute, even though the state's pattern jury instruction calls attention to it. In Minnesota and Washington, a single supreme court decision in each state applies the statute with little elaboration, but two contrary Minnesota decisions have not been overruled, most decisions in the courts of appeals in each state ignore the statute, and the pattern jury instructions in each state still state the rule of avoidable consequences. In Missouri, a plurality opinion of the supreme court adopted comparative responsibility as a common-law rule at about the same time that the statute was enacted. But more recently, that court appeared to apply avoidable-consequences reasoning without noting either the statute or the earlier decision. Separately, it approved a pattern jury instruction that states the rule of avoidable consequences, and use of that instruction is mandatory in the state. Decisions in the Missouri courts of appeals are about evenly split. In North Dakota, four supreme-court cases are evenly split, and none of them addresses the statute. Perhaps something will come of the supreme-court decisions in Minnesota (2010) and Washington (2017), but nothing has come of them yet. More recent

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decisions in the courts of appeals in those states are not yet numerous, but they continue to apply avoidable consequences.

The pattern jury instructions in five of these seven states—Indiana, Minnesota, Missouri, North Dakota, and Washington—state the rule of avoidable consequences and not the rule enacted by the statute. In Alaska, there are two pattern jury instructions—one for cases subject to the Comparative Fault Act and one for all other cases—and the reported cases appear to uniformly use the one for all other cases even when the Act applies. In Minnesota, Missouri, and Washington, the committees responsible for pattern jury instructions took published note of the comparative-responsibility rule and rejected it despite the legislation enacting it. The Minnesota committee commented that attempting to apply comparative responsibility in this context "may result in problems." The Alaska committee appears to have rejected comparative responsibility for all cases not directly controlled by the statute.

In Louisiana, a comparative-responsibility instruction appears to have been used in about half of reported cases in the courts of appeals, without explanation. No statute or precedent authorizes it. The other half of those cases and the two cases in the supreme court continue to use avoidable consequences. There is a dictum in the Vermont Supreme Court commenting favorably on the Apportionment project's comparative-responsibility proposal, but expressly not adopting it, and the Vermont rule has not been changed.

If we count every one of these states, including isolated dicta and statutes that have never been implemented, we get 10 states with some support for comparative responsibility. There is a tiny bit of ambiguity in the cases in Florida, Kentucky, and Maine; if we count them as well, we get 13 out of 51 jurisdictions. But this is an unduly generous way to count; Florida, Indiana, Kentucky, Maine, and Vermont rather clearly remain avoidable-consequences states. If we count only states with reported cases actually applying comparative responsibility, we get five. If we count only states where the comparative-responsibility rule has been explicitly adopted and effectively implemented, we get two—Iowa and New Jersey.

Nor is there any notable trend towards applying comparative responsibility. Much of the support for comparative responsibility in this context dates from decades ago. The first supreme court decisions applying comparative responsibility in Iowa and New Jersey were in 1991 and 1988 respectively. The plurality decision doing so in Missouri was in 1987. The decisions giving rise to very modest ambiguity in Florida and Kentucky—both seat-belt cases, so they did not

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involve post-accident conduct—were in 1996 and 1987. Of the seven statutes applying comparative responsibility to avoidable consequences, one was enacted in 1978 (Minnesota), five in the 1980s, and one (the Indiana statute that has been interpreted not to apply to post-accident conduct) in 1998. No other state has followed Iowa and New Jersey in the ensuing 30-some years. The decisions and statutes in the other states have not been regularly followed, and have not given rise to a settled body of law, even in their own states. There are more recent decisions in Minnesota and Washington, finally taking note of their statutes. But two states belatedly applying statutes from 30 and 40 years ago do not make a trend.

i. Duty to mitigate? The rule of avoidable consequences is often discussed in terms of "mitigation of damages," or of a "duty to mitigate damages." "Mitigation of damages" is entirely accurate, and talk of duty has roots going back to the origins of the rule. But any "duty" to mitigate is not a tort duty in the usual sense. This "duty" creates no obligation to any other person. No one can sue a plaintiff for breach of the duty to mitigate damages; a plaintiff can choose to mitigate or not without incurring liability. The rule is simply that plaintiffs cannot recover compensation for harms that they reasonably could have avoided. Stated another way, the law treats plaintiffs as though they took reasonable steps in mitigation, whether or not they actually did. But plaintiff's "duty" to mitigate is often a useful informal construction in discussing how much a plaintiff is reasonably expected to do to avoid damages that would otherwise be suffered, and so the usage continues. And "mitigation," or efforts to "mitigate," is often the easiest way to refer to what a plaintiff did, or should have done, to avoid the consequences of the tort. "Avoidable consequences" most naturally refers not to what plaintiff should have done, but to the harms that would have been avoided if plaintiff had done it. There are occasional attempts to distinguish mitigation and avoidable consequences, but there is no remotely consistent or settled usage to that effect. In practice, these are simply two names for the same rule.

j. What is reasonable, in general. The burden on a plaintiff to avoid the harmful consequences of a tort is not onerous. By the time the court or jury reaches the issue of avoidable consequences, the defendant is an adjudicated tortfeasor and the plaintiff is suffering from some injury to person, property, or both. Plaintiff may have limited resources, the best course of action may be unclear, decisions may be required urgently and under considerable stress, and defendant cannot complain with the benefit of hindsight that plaintiff made the wrong choice. Plaintiff need not incur unusual risk, difficulty, or embarrassment for defendant's benefit. The potential benefits

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of any course of action must be weighed against the costs and risks, and the balance should be assessed from the perspective of a reasonable person in plaintiff's position. So long as plaintiff does not act unreasonably under all the circumstances, recovery for harms actually suffered is not limited by the rule of this Section.

The timing of mitigation may also be assessed in terms of reasonableness. Sometimes a plaintiff must take a reasonable step in mitigation very quickly to avoid a large potential loss, as when a boat is about to sink. At other times, plaintiff can reasonably take a longer period to contemplate a step in mitigation, as when a plaintiff considers nonemergency surgical alternatives to repair physical harm caused by defendant's negligence.

Because the issue ultimately turns on reasonableness, avoidable consequences very often presents an issue for the jury. But courts frequently hold that plaintiff's efforts to mitigate damages were reasonable as a matter of law and that the issue should not be submitted to the jury; they sometimes refuse to admit evidence of potential steps in mitigation after concluding, on an offer of proof or a motion in limine, that plaintiff should not reasonably have been expected to take those steps. Courts visibly take this issue from the jury more often than they take defendant's liability from the jury, although they do not state any rule to that effect. The issue most commonly arises on the question whether the court should instruct the jury on avoidable consequences, and that procedural context does not appear to trigger the more stringent standards associated with motions for directed verdict or for judgment notwithstanding the verdict. Avoidable consequences is generally treated as an affirmative defense, with the burdens of raising the issue and of persuasion on the defendant. The few courts applying comparative responsibility in this context appear so far to be trying to preserve these rules and practices, separately deciding whether to submit avoidable consequences for jury consideration as part of comparative responsibility.

Illustrations:

2. Emma negligently steered her boat and collided with Sam's boat, which was tied up at the dock. The collision caused a leak in Sam's boat. Sam turned on the boat's pumps to pump out the water, but the water continued coming in slightly faster than the pumps could pump it out. Sam took no other steps to save the boat, and six days after the collision, it sank to the bottom. A nearby shipyard would have charged $300 to raise the boat and inspect it for possible repairs, but Sam left the boat at the bottom. Sam's failure to make

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more than token efforts to save his boat is unreasonable as a matter of law. He cannot recover for the loss of his boat.

3. Emma negligently steered her boat and collided with Sam's boat on the open sea. Sam and his crew were rescued, but the boat quickly sank in deep water. A salvor could have raised the boat and inspected it for possible repairs, but the cost of raising it would have been half the value of the boat, and the possibility of repair if that were done was unknowable before it was raised. Sam refused to spend the money to raise the boat. The jury should be instructed on avoidable consequences. If the jury finds that Sam's decision not to raise the boat was reasonable, it should award as damages the full value of the boat.

In the typical case, plaintiff suffers some continuing harm, such as physical injury to person or property, and allegedly fails to take reasonable steps, such as following medical advice or searching for employment, to minimize that harm. But failure to avoid consequences can also consist of failing to take reasonable precautions in response to increased risks created by the tort.

Illustration:

4. Acme Mining, in the course of expanding its mine shaft, cut into Basic Mining's adjacent shaft. The court held that the tort was complete at that time. Water flowed through the resulting gap and into Basic's shaft, and Basic's supervisor noticed that more water was accumulating in the shaft than before. The supervisor took no precautions to protect Basic's equipment, neither investigating the source of the water nor storing the equipment at a higher level when it was not in use. Two months later, after a night of heavy rain, Basic's shaft was flooded and its equipment was submerged in water and severely damaged. Basic's failure to take precautions after the tort is evidence of failure to avoid the consequences of the tort. Whether Basic's actions were reasonable in light of the foreseeable risk is a question for the jury.

k. Medical care. One who suffers physical injury to the person must of course seek reasonable medical care. But plaintiff need not submit to painful, risky, or experimental treatments unless the benefits of such treatment clearly outweigh the costs. The likelihood that the treatment will be successful, the degree of cure to be achieved, the risks, pain, and inconvenience of the treatment, and the monetary costs and plaintiff's ability to pay those costs are all factors to be

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considered, both by the jury and by the judge in deciding whether to submit the issue to the jury. Defendant must prove both that plaintiff unreasonably refused treatment or failed to follow medical instructions, and that this failure aggravated plaintiff's injuries or prevented or delayed recovery. The chance that the proposed treatment would have been successful goes to both issues, so they are not always cleanly separated.

Illustrations:

5. Marie developed carpal-tunnel syndrome after landing on her wrist in a trip-and-fall accident caused by Bank's negligence. Marie did not have surgery to repair her wrist. Expert testified at trial that surgery for carpal-tunnel syndrome has a high rate of success and no risk beyond that inherent in any surgery. Expert also acknowledged on cross-examination that the surgery was not foolproof and that a few patients were worse off after the surgery than before. In light of the high success rate and limited risks, the jury should be instructed on avoidable consequences. If it finds that Marie's decision to refuse surgery was unreasonable, it should not award damages for future harm that the surgery would, more likely than not, have avoided.

6. Tyrone suffered permanent injuries to his hand as a result of the negligence of defendant's nursing staff. He lost much of the hand's function and experienced pain and disfigurement, and the hand was prone to infection. An initial surgery to partially repair the damage resulted in an infection that required a second surgery. Three different physicians recommended a third surgery, but they each recommended a different surgery, each believing that his or her recommendation would bring some improvement. None claimed to offer a complete restoration of the hand, and each surgery risked further pain and additional disfigurement. Tyrone refused further surgery. In light of the uncertain benefits, significant risks, medical disagreement, and his multiple bad experiences with medical treatment, Tyrone's decision to refuse further surgery was reasonable as a matter of law. The jury should not be instructed on avoidable consequences.

The test of reasonableness in these cases is generally an objective one, but it takes into account plaintiff's individual circumstances, such as the medical history in Illustration 6. Some plaintiffs, for individualized reasons beyond their control, often involving some form of mental illness, are unable to pursue the objectively reasonable course of action. Courts generally excuse

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such a plaintiff's failure to mitigate. Some courts invoke the thin-skull plaintiff rule, § 4, Comment *d*, saying that plaintiff suffers from a preexisting condition that makes this plaintiff vulnerable to greater injury than the typical plaintiff. Some courts say the decision not to mitigate damages was reasonable from plaintiff's perspective or in plaintiff's situation. These cases appear to some observers to be more about subjective good faith than objective reasonableness, but the opinions are generally not written that way. Courts do not expressly ask what a reasonable victim of a particular form of mental illness would do, but they do ask what was reasonable for the particular plaintiff under all the individual circumstances.

Illustration:

7. David negligently caused an accident that severely damaged Peter's right knee, leaving Peter unable to walk. The knee could probably be repaired with surgery that carries moderate risks and is successful 90 percent of the time. But Peter also suffered from clinical depression, which caused him to focus only on the risks and to discount the substantial chances of success. Consequently, Peter refused the surgery. Peter can recover for the harms that would likely have been avoided by the surgery, including the permanent inability to walk, if the jury finds that the decision to refuse surgery was not unreasonable from Peter's perspective.

A recurring issue is an obese plaintiff's failure to lose weight despite medical advice that doing so would alleviate the plaintiff's injuries. These cases are not entirely consistent, but courts have generally been sympathetic to the great difficulty of permanently losing weight. Courts often hold as a matter of law that it is not unreasonable to try to lose weight and fail in the attempt, while sometimes finding that plaintiff did not sufficiently try.

l. Alternate employment. A plaintiff who is unable to work at the job held before being injured, but who is not totally unable to work, must make reasonable efforts to find alternate employment appropriate to his or her post-injury condition and must accept such employment when available. The same rules apply to a plaintiff who loses employment because of any other tort. But such a plaintiff need not accept a demeaning position or employment significantly beneath his or her post-tort skills and abilities. Such a plaintiff need not immediately accept a low-paid position if there remains a reasonable prospect of finding a higher-paid position, and need not move to accept employment an unreasonably long distance from home.

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Illustrations:

8. Realty Board denied Harold access to the Multiple Listing Service by means that were held to be tortious. This exclusion made it impossible for Harold to work as a self-employed realtor. Harold insisted on his right to access and made no effort to find employment with another realtor. Realty Board showed that such jobs were available in the immediate area and identified two realtors who would have hired Harold. Harold's refusal to consider other employment in his field and locality was unreasonable as a matter of law. In calculating Harold's damages, the income he likely would have earned from this employment should be subtracted from the income he lost from not being self-employed.

9. Charlie suffered an injury to his knee that would worsen with time and eventually leave him unable to work in his job as a train conductor. John, who tortiously caused the injury, argued that Charlie could have transferred to a train-engineer position, where he would work in a seated position and probably be able to work until a normal retirement age. Charlie responded that if he became an engineer, he would lose all his seniority, take an immediate cut in pay, lose his paid position with the union, and possibly have to accept a geographic transfer, resulting in the loss of his wife's job. Charlie had sufficient reasons not to seek the position as an engineer as a matter of law, and the jury should not be instructed on avoidable consequences.

m. Inability to pay. Steps that a plaintiff would reasonably be expected to take are generally excused if plaintiff lacks the funds to take those steps, or if the cost would be disproportionate to plaintiff's income or assets. In principle, the cost of mitigating damages can ultimately be recovered from defendant, but that prospect is necessarily uncertain, given the inherent risks of litigation, and largely irrelevant to a plaintiff who has no ready access to cash in the meantime. Some plaintiffs had limited resources even before the tort, and many face the problem that the tort has ended or disrupted their income and produced unexpected bills for medical treatment, repairs to property, or both.

Illustration:

10. Same facts as Illustration 3, but it is undisputed that Sam did not have sufficient liquid assets to pay the salvor to raise his boat. His decision not to raise the boat is reasonable as a matter of law, and he can recover the full value of the boat.

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Some jurisdictions refuse to consider inability to pay when measuring loss-of-use damages for property awaiting repair or replacement. These states appear not to view the issue as one of avoidable consequences; they invoke the rule that compensation for destroyed property is limited to the value of the property—or in a growing number of states, the value of the property plus loss of use for a reasonable time in which to replace it. See § 24. That approach has spread to repairable property, limiting loss-of-use damages to the time reasonable repairs would have taken if plaintiff could have paid for them. The results of these rules leave plaintiffs uncompensated for serious harms caused by the tort, but courts have feared open-ended liability for loss of use. Defendants could avoid open-ended liability by paying for repair or replacement, but they are generally unwilling to do so when liability is disputed. Resolution may be delayed indefinitely, especially if the case also presents serious personal injuries with larger sums at issue.

n. Personal privacy, dignity, and autonomy. Some decisions are too personal and intimate to be directed by law, with the result that some steps that might avoid some of the compensable consequences of defendant's tort need not be taken unless the plaintiff so chooses. No state requires the surviving spouse in a wrongful-death case to remarry to mitigate damages, and if plaintiff does remarry, only a few states reduce damages on that account. See § 8. In states that recognize claims for wrongful birth, wrongful pregnancy, or wrongful life, the mother need not undergo an abortion, and parents need not put the child up for adoption, to mitigate damages. It appears that no defendant has been so bold as to argue that a plaintiff who could do so must accept work in a strip club. In a fraud case against a cruise line that misrepresented the accessibility of its bathrooms, a court has held that a wheelchair-bound plaintiff was not required to mitigate damages by accepting embarrassing assistance in using the bathroom.

Religious beliefs are also personal and intimate, but courts have divided when a plaintiff's religious beliefs prevent otherwise reasonable steps to mitigate damages. These cases arise when for religious reasons a plaintiff refuses some treatment, most commonly a blood transfusion, and defendant claims that this refusal delayed or prevented recovery. Some judges say that it is not unreasonable to practice one's religion, so damages should not be reduced for a religiously motivated refusal of treatment. Others say just as firmly that it is per se unreasonable to refuse treatment for religious reasons, or that treating the refusal as per se unreasonable will avoid judicial inquiry into the reasonableness of the religious teaching. Still others leave it to the jury. The issue is influenced by conflicting views over constitutional issues that have been both unclear and in

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flux for decades. On the one hand, the plaintiff's (or decedent's) exercise of religion is protected by state and federal constitutions and statutes, and defendants generally take their victims as they find them. On the other hand, some courts say that plaintiff is attempting to impose the costs of his or her religion on defendant. At least some of these opinions reflect rather obvious hostility to the plaintiff's religious commitments.

o. The seat-belt cases. Plaintiff's failure to use a seat belt, wear a motorcycle helmet, or use any other safety device designed to reduce injury if something goes wrong, straddles the line between comparative responsibility and avoidable consequences. As in the comparative-responsibility cases, failure to use a seat belt is pre-accident conduct. But as in the avoidable-consequences cases, it affects only the amount of damages; it does not contribute to causing the accident. Seat-belt evidence has been offered on theories of avoidable consequences, comparative responsibility, assumption of risk, product misuse, and to show that the vehicle was crashworthy when all its features are considered. The results of cases sometimes vary with the theory, but a substantial majority of jurisdictions still exclude evidence of failure to use a seat belt. Most states that admit such evidence do so on a comparative-responsibility theory, but at least some admit seat-belt evidence on an avoidable-consequences theory. Statutes in many states bar the admission of seat-belt evidence or limit the reduction of damages to token amounts. The seat-belt cases are outside the scope of the avoidable-consequences rule as formulated in this Section, because they do not involve anything the plaintiff did, or could have done, "after the commission of the tort." This Section thus adheres to the majority rule with respect to seat belts and avoidable consequences. This Section takes no position on seat belts and comparative responsibility.

p. Illegitimate demands. Courts occasionally say that plaintiffs need not mitigate damages by submitting to what they reasonably view as a tortfeasor's illegitimate demands, and cases that say no such thing explicitly are sometimes best understood as resting on this principle. Victims of an armed robbery need not comply with the robber's demands, even if they later sue a negligent third party that had a duty to protect them from crime. See Illustration 11. Courts have sometimes held that a plaintiff whose car is seized without authority need not pay towing, storage, or parking charges to redeem the car, and suggested that political protesters arrested without cause need not post a bond to mitigate damages. These cases generally involve some degree of intentional wrongdoing; without that, the court is much less likely to view plaintiff's stubborn refusal to submit as justified. These cases are thus akin to the intentional-tort cases in Comment *q*.

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Illustration:

11. Joe rented a room in Motel. As Joe returned to the room from Motel's swimming pool, an armed man accosted him, entered the room with him, and demanded all his money. Joe attempted to push the man out of the room; the robber responded by pistol whipping Joe and shoving him to the floor. The robber then took Joe's wallet from the nightstand and fled. Joe sued Motel for failure to warn and failure to protect its grounds. Motel argued that Joe should have mitigated his damages by not resisting the robber and by surrendering his wallet. Joe was not required to submit to the robber, and the jury should not be instructed on avoidable consequences.

A related idea, not tied to intentional wrongdoing, is that plaintiff need not surrender a legal claim or substantial right in order to mitigate damages. Refusal to settle is not a failure to mitigate.

Illustration:

12. Mike, a car enthusiast, searched across two states for a particular model and color combination of an expensive imported car. He finally found that car at Dealer. In response to Mike's specific questions, Dealer falsely stated that the car was brand new, that it had never been damaged, and that it had a driver-side airbag. An airbag sticker under the hood was from a different car. When Mike discovered the truth, he sued for damages for fraud.

Dealer offered to rescind the sale. It offered to repaint the car. It offered a different car in exchange for the one that had been misrepresented. Mike refused each of these offers and made various counteroffers, which Dealer refused. Mike's rejection of Dealer's settlement offers is, as a matter of law, not a failure to mitigate damages. The jury should not be instructed on avoidable consequences.

q. Intentional and reckless torts. This Section carries forward the rule for intentional or reckless torts as stated in Restatement Second, Torts—that damages are reduced only if plaintiff is also intentional or reckless in failing to mitigate damages. The Restatement Second used the word "heedlessly"; this Restatement, following usage in the Restatement Third, Torts: Liability for Physical and Emotional Harm § 2, uses the word "recklessly," which has a more clearly defined and widely understood meaning.

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The rationale for the rule is most easily understood in the context of continuing thefts, embezzlements, and other forms of conversion. Courts have explained the rule partly on fairness grounds, reasoning that victims who were merely careless or naive should be protected from intentional wrongdoing, but that they should not be allowed to stubbornly refuse to do anything to help themselves. And courts have also reasoned that applying avoidable consequences to such cases might enable and encourage the intentional tortfeasors.

When defendant is the thief, barring recovery for later thefts in the series would enable the thief to retain the stolen property or its proceeds. A claim in unjust enrichment would solve that problem, but few of these cases allude to that possibility. When the defendant is a more-or-less innocent third party who received the stolen property and is strictly liable in conversion, the defendant is worse off, facing greater liability, because of plaintiff's failure to discover and stop the thefts sooner. But the cases do not appear to draw any distinctions based on the identity of the defendant.

The rule requires that plaintiff have actual knowledge of the tort, and the cases reject the standard of whether plaintiff should have known. The cases often turn on whether and when the plaintiff learned about the tort.

Illustration:

13. Grain Co. habitually neglected to lock its silo. Thief repeatedly drove to the silo in the wee hours of the morning and stole grain, one truckload at a time. Thief sold the grain to Dealer. Grain Co. suspected theft early on, but did not actually discover the theft and the thief until the scheme had continued for two years and 100 truckloads of grain had been stolen. Thief went to prison, and Dealer was held strictly liable in conversion. Grain Co.'s negligence in failing to lock its silo, even after it suspected theft, and any possible negligence in its failure to confirm the theft earlier, do not raise an issue of avoidable consequences, because these negligent acts occurred before Grain Co. knew about the tort.

At least some cases say that the rule of avoidable consequences simply does not apply to intentional torts, so that damages are not reduced even if plaintiff made no effort to mitigate damages. It may be doubted whether these courts would adhere to that rule in cases of unusually irresponsible failure to avoid the consequences of the tort.

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Cases of failure to avoid the consequences of an intentional tort that happens all at once appear to be scarce. But if, for example, defendant intentionally shoots or beats the plaintiff, and defends on the ground that plaintiff did not obtain reasonable or adequate medical care, the rule of Subsection (b) would increase the deference given to plaintiff's judgments about medical choices. Damages would be reduced only if plaintiff's decision to reject a proposed form of treatment were reckless or worse.

r. The expenses of mitigation. A plaintiff who incurs expenses, or suffers additional damage, in a reasonable attempt to avoid the consequences of a tort, may recover those expenses or damages, whether or not the attempted mitigation is successful. Plaintiff's effort to mitigate damages is an entirely foreseeable consequence of the tort, an effort forced upon the plaintiff by the rule of this Section with such pressure that it is often referred to as a "duty" to mitigate damages. That usage is not entirely accurate, as explained in Comment *i*, but its inaccuracy is more technical than factual, rooted in the somewhat different meaning of "duty" in tort law's primary rules of duty and liability. Talk of a "duty" to mitigate captures the pressure on plaintiffs accurately enough. And quite apart from legal rules, simple self interest presses plaintiffs to try to minimize the harms they suffer from a tort.

When a plaintiff is forced to choose a means of attempting to mitigate damages, and to choose under the pressure of time and of the injury or loss inflicted by the tort, it is inevitable that some of the choices will turn out to be mistaken. Not all attempts to mitigate damages will be successful. But so long as plaintiff does not act unreasonably, defendant is responsible for the costs and cannot complain that the choice turned out to be unsuccessful.

Illustration:

14. Trucking Co.'s negligence caused Railroad's train to derail, damaging four locomotives. Railroad attempted to repair the locomotives, but eventually and correctly concluded that they were beyond repair. If the jury finds that it was reasonable to attempt repairs, Railroad can recover the cost of the attempted repairs plus the value of the locomotives.

s. Mitigation expenses that should have been incurred but were not. When a plaintiff fails to mitigate damages, damages are limited to those that would have been suffered if plaintiff had properly mitigated. It follows that these damages should include whatever amount the unattempted

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mitigation efforts would have cost, because those costs would have been part of the damages if plaintiff had mitigated. See Comment *r*. Put another way, what plaintiff is barred from recovering is the net savings that would have resulted from a successful effort to mitigate.

Thus in Illustration 2, Sam should recover the $300 cost of raising and inspecting the boat, and what it would have cost to repair the boat if that cost can be adequately proved. And in Illustration 5, Marie should recover the cost of the surgery she did not have. Defendant's theory in each case is that damages would have been reduced if Sam had raised and repaired the boat and if Marie had had the surgery. But damages would not have been reduced to zero; they would have been reduced to the cost of the mitigation efforts that defendants insist should have been undertaken. Defendants' torts inflicted harm on Sam and Marie, and there was no way for Sam or Marie to reduce that harm to zero.

Put another way, the rule of this Section allows defendant to measure damages on the basis of what plaintiff should have done instead of on the basis of what plaintiff actually did. But when damages are measured in this way, the cost of what plaintiff should have done becomes a damage item; defendant cannot claim the savings from what plaintiff should have done without also acknowledging the costs. Defendant cannot claim that Marie should have had surgery without acknowledging that she would have had to pay the surgeon.

In many cases, the dollar cost of properly mitigating damages would be negligible or unprovable, so that little would turn on whether the costs were recoverable. Thus in Illustration 8, where Harold failed to contact local realtors for possible employment, the principal cost of a job search would have been in time rather than money. Harold's time while unemployed would be hard to value, and unless the job search were lengthy, the total amount of time expended would not be substantial.

Earlier Restatements state the rule proposed in this Comment as the law: that when plaintiff's actual damages are denied for failure to reasonably mitigate damages, plaintiff should recover what it would have cost to mitigate. Older treatises also state this rule as law. This rule is logically entailed in the well-settled rules that plaintiffs can recover the damages that would have been suffered if they had properly mitigated and that reasonable costs of mitigation are recoverable. Yet hardly any modern cases explicitly consider the possibility. Courts neither apply nor reject the rule proposed in this Comment. Either plaintiffs are not asking for these damages, or these damages are being awarded or denied without comment. Neither possibility seems very

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plausible, but it is hard to think of a third. The rule of this Section necessarily implies that a plaintiff who fails to reasonably mitigate damages can recover what reasonable mitigation efforts would have cost. But this corollary is not flatly stated as the law, because so few modern cases address the issue.

REPORTERS' NOTES

a. History and scope. The common-law rule of avoidable consequences is stated in Restatement Second, Torts §§ 918-919 (AM. L. INST. 1979), which this Section supersedes, and in Restatement of Torts §§ 918-919 (AM. L. INST. 1939). See 1 DAN B. DOBBS, PAUL T. HAYDEN, & ELLEN M. BUBLICK, THE LAW OF TORTS §§ 229-231 at 820-832 (2d ed. 2011); DAN B. DOBBS & CAPRICE L. ROBERTS, LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION § 3.9 at 273-278, § 8.5 at 707-711 (3d ed. 2018); JAMES M. FISCHER, UNDERSTANDING REMEDIES §§ 13.1-13.7 at 121-133 (3d ed. 2014); 4 FOWLER V. HARPER, FLEMING JAMES, JR., & OSCAR S. GRAY, HARPER, JAMES AND GRAY ON TORTS § 25.4 at 604-616 (3d ed. 2007); DOUGLAS LAYCOCK & RICHARD L. HASEN, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 89-94 (5th ed. 2019); CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES §§ 33-42 at 127-158 (1935); JACOB A. STEIN, PERSONAL INJURY DAMAGES §§ 18.1-18.18 (3d ed. 1997 & Supp.).

But compare Restatement Third, Torts: Apportionment of Liability § 3, Comment *b*, and especially Illustrations 4 and 5 (AM. L. INST. 2000). Section 3 is entitled "Ameliorative Doctrines for Defining Plaintiff's Negligence Abolished." The black letter provides that: "Plaintiff's negligence is defined by the applicable standard for a defendant's negligence. Special ameliorative doctrines for defining plaintiff's negligence are abolished." Comment *b*, entitled "*Timing of the plaintiff's and defendant's conduct: last clear chance, mitigation of damages, and avoidable consequences*," says that "This Section applies to a plaintiff's unreasonable conduct that aggravates the plaintiff's injuries." Two Illustrations are classic avoidable-consequences cases, in which plaintiff fails to follow medical advice (Illustration 4) or goes skiing before a broken leg has fully healed (Illustration 5). The Illustrations say that these actions affect plaintiff's share of responsibility, but that they do not bar all recovery for harms that would have been avoided if plaintiff had behaved more carefully.

The Comment just quoted, and especially the Illustrations, seem clearly intended to abolish any separate defense of avoidable consequences. There is a somewhat cryptic cross-reference to § 918 of the Restatement Second (AM. L. INST. 1979), but there is no statement that § 918 is withdrawn or superseded, and the tables of affected Sections do not mention § 918. This Section supersedes Illustrations 4 and 5 and the second paragraph of Comment *b*.

For most readers, nothing in the title of § 3 or in the black letter signals abolition of the common-law rule of avoidable consequences. Both sentences of the black letter address the rules for defining plaintiff's negligence, but avoidable consequences is more readily thought of as a rule defining the consequences of plaintiff's negligence than as a rule defining what constitutes plaintiff's negligence. And because the rule wholly bars recovery for items of damage that could

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have been avoided, it is not ameliorating in the usual sense of that word. An earlier draft had explained that the Reporters viewed avoidable consequences as a rule that ameliorated the law of contributory negligence, holding a plaintiff whose negligence aggravated the injury but did not cause the accident responsible only for the damages that should have been avoided rather than for all the damages. Restatement Third, Torts: Apportionment of Liability § 3, Comment *b*, at 49-53 (AM. L. INST., Preliminary Draft No. 1, May 31, 1995). That explanation was omitted from the final version for reasons that are not explained. This edit left little apparent connection between the proposed abolition of the rule of avoidable consequences and the black letter or the title of the Section.

Perhaps in part because of these drafting issues, or perhaps because of deeper judicial intuitions about differences in the situations addressed by comparative responsibility and avoidable consequences, the proposed change has gotten little judicial attention. See Reporters' Note to Comment *h*.

b. Relationship to comparative responsibility. For early accounts of the avoidable-consequences rule, see MCCORMICK, DAMAGES §§ 33-42 at 127-158, 1 THEODORE SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES 164-173 (7th ed. 1880), and 1 J. G. SUTHERLAND, A TREATISE ON THE LAW OF DAMAGES 148-155 (1882). (The Sedgwick treatise dates from 1847, but the seventh edition was the first to devote a section to avoidable consequences. There were passing references to the doctrine, and examples of its application, from the first edition on. THEODORE SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES 98-99 (1st ed. 1847).) None of these sources described the rule as a means of mitigating the rigors of the contributory-negligence bar. McCormick attributed the rule to the need "to protect and conserve the economic welfare and prosperity of the whole community" by discouraging "even persons against whom wrongs have been committed from passively suffering" or "actively increasing" damages that they could reasonably avoid. MCCORMICK, DAMAGES § 33 at 127. He noted that the contributory-negligence rule has similar "motives," but clearly distinguished the two doctrines. Id. at 128-129. Sedgwick and Sutherland each put the rule in terms of the plaintiff's "duty," to both defendant and society, to minimize losses. 1 SEDGWICK, DAMAGES at 165 note a ("It is not only the moral but the legal duty of a party who seeks redress for another's wrong to use due diligence in preventing loss thereby."); 1 SUTHERLAND, DAMAGES at 148 ("The law imposes upon a party injured from another's breach of contract or tort, the active duty of making reasonable exertions to render the injury as light as possible."). Sutherland did not mention contributory negligence at all in connection with avoidable consequences. This early talk of plaintiff's "duty" survives in the common modern formulation that plaintiff has a "duty to mitigate damages." See Comment *i*.

"The avoidable consequences rules, or rules for minimizing damages, are cardinal instruments of damage measurement. . . . Minimizing damages rules apply in all kinds of cases, including contract, tort, and statutory claims." DOBBS & ROBERTS, REMEDIES § 3.9 at 273. For statutory claims, see, e.g., Ford Motor Co. v. EEOC, 458 U.S. 219 (1982). For clear explanations of the difference between avoidable consequences and comparative responsibility, see DOBBS, HAYDEN, & BUBLICK, TORTS § 229 at 822-823 ("two radically different systems for reducing the

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plaintiff's award"); DOBBS & ROBERTS, REMEDIES § 3.9 at 277-278. For the Institute's position on comparative responsibility, see Restatement Third, Torts: Apportionment of Liability § 7 (AM. L. INST. 2000).

Illustration 1 is hypothetical. For an explanation of how avoidable consequences may be applied after an allocation of comparative responsibility as in Illustration 1, see Williams v. Jader Fuel Co., 944 F.2d 1388, 1402 (7th Cir. 1991) (Illinois law). For an example of a verdict separately accounting for both rules in this way, see Karn v. Aspen Com. Painting, Inc., 133 N.E.3d 85, 88 (Ill. App. Ct. 2019).

For the widespread view that the rule of this Section applies only to plaintiff's conduct after the tort, see, e.g., Oakly Enters., LLC v. NPI, LLC, 354 P.3d 1073 (Alaska 2015); Nabors Well Services, Ltd. v. Romero, 456 S.W.3d 553 (Tex. 2015); McKinley v. Casson, 80 A.3d 618 (Del. 2013); Trs. of Univ. of D.C. v. Vossoughi, 963 A.2d 1162 (D.C. 2009); Shuette v. Beazer Homes Holdings Corp., 124 P.3d 530 (Nev. 2005); Walter v. Wal-Mart Stores, Inc., 748 A.2d 961 (Me. 2000); Lynch v. Scheininger, 744 A.2d 113 (N.J. 2000). Focusing on this obvious difference has led some courts to blur or disregard the deeper difference between causal apportionment and apportionment based on percentages of responsibility.

c. The conceptual argument for and against each rule, and some policy implications. For the avoidable-consequences rule characterized as "causal apportionment," see Langlois v. Town of Proctor, 113 A.3d 44, 52 (Vt. 2014); 1 DOBBS, HAYDEN, & BUBLICK, TORTS § 229 at 821-823; DOBBS & ROBERTS, REMEDIES § 3.9 at 278.

Cases explaining the avoidable-consequences rule in terms of proximate cause include Hallas v. Boehmke & Dobosz, Inc., 686 A.2d 491 (Conn. 1997); Young v. Thota, 271 S.W.3d 822, 829 (Tex. Ct. App. 2008) (quoting Moulton v. Alamo Ambulance Serv., Inc., 414 S.W.2d 444, 449 (Tex. 1967)); Williams v. Manchester, 864 N.E.2d 963 (Ill. App. Ct. 2007); see also 1 DOBBS, HAYDEN, & BUBLICK, TORTS § 229 at 822 ("The plaintiff would be deemed to be the sole proximate cause of the costs associated with those additional [and avoidable in the hypothetical under discussion] weeks of care."). This formulation may be largely intuitive, based on the sense that plaintiff's unreasonable failure to avoid the harm is a greater and more immediate cause, or it may be rooted in an implicit policy judgment that defendant should not be held responsible for a matter entirely within plaintiff's control. That policy judgment can readily be restated in terms of the formulations in Restatement Third, Torts, concerning scope of liability and harm within the risk.

Restatement Third, Torts: Apportionment of Liability § 26 (AM. L. INST. 2000) says that harm is divisible if one relevant actor is not a "legal cause" of that harm. This phrase was taken from the Second Restatement, where it meant a causal relationship sufficient to support legal liability and was also defined in terms of conduct being a "substantial factor" in bringing about the harm. Restatement Second, Torts § 9, Comment *b* (AM. L. INST. 1965). The term required defendant's conduct to be a proximate cause of the harm, id. § 435(2), as well as a factual cause; these two concepts were combined in the idea of "legal cause." The Institute has since abandoned all these terms—legal cause, proximate cause, and substantial factor. Restatement Third, Torts:

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Liability for Physical and Emotional Harm § 29 (AM. L. INST. 2010) and Special Note on Proximate Cause at the beginning of Chapter 6.

The Apportionment project was caught in this transition, more or less forced to use the old vocabulary, but the meaning of § 26 seems clear enough. For those courts that say that plaintiff's failure to mitigate damages is the sole proximate cause of the harm that should have been avoided, the avoidable-consequences rule could be deduced from, or is simply an application of, § 26. Stopping short of that claim, the avoidable-consequences rule is closely analogous to § 26, slightly broadening the criteria for holding damages to be divisible by causation.

The effect on incentives is essentially the reason for the avoidable-consequences rule offered in early treatises on damages. See Reporters' Note to Comment *b*. It is briefly considered in Munn v. Algee, 924 F.2d 568 (5th Cir. 1991), one of the few opinions to explicitly compare avoidable consequences to comparative responsibility and give reasons for adhering to the former. The *Munn* opinion said:

> Apportioning wrongful death damages is inconsistent with the mitigation of damages doctrine. If a jury finds that a certain consequence of the defendant's negligence could reasonably have been avoided by the plaintiff, the plaintiff cannot recover for that consequence. The bar on recovery is total; retreating to notions of causation is inappropriate in light of the purposes of the doctrine, which are to encourage plaintiffs to reduce the societal costs of their injuries and to ensure fair treatment of defendants. That the defendant's negligence may have caused the avoidable injury is irrelevant.

Id. at 576 n.16. The comparison is somewhat overstated, because a partial reduction of damages under comparative-responsibility principles would also "encourage plaintiffs to reduce the societal costs of their injuries and to ensure fair treatment of defendants." Id. But the incentive effects would be smaller, because the anticipated reduction in damages would be smaller. This statement also captures the court's view, which appears to be widespread, that comparative responsibility and avoidable consequences are fundamentally different doctrines, and that one should not displace the other.

d. Distributional consequences. The net distributional consequences of changing the rule are hard to predict. The most obvious effect is that some plaintiffs would get partial recoveries in cases in which they now get no recovery. But others would get partial recoveries in cases in which they now get full recoveries. It might be that juries would put most of the responsibility on plaintiffs, acting on the same intuitions that support the existing rule. The substantive standard might well be less favorable to plaintiffs. Judges now apply, and juries are often instructed, on a standard for avoidable consequences that is deferential to plaintiffs' choices. See Comment *j*. The usual standard for assessing plaintiff's negligence under comparative responsibility is identical to the standard for assessing defendant's negligence. Restatement Third, Torts: Apportionment of Liability § 3 (AM. L. INST. 2000). But the few courts that have seriously experimented with comparative responsibility in this context continue to instruct on the standards for avoidable

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consequences. They say that if the jury finds plaintiff responsible under those standards, then it should reduce damages by a percentage to account for plaintiff's failure to mitigate damages.

e. Fit with the law of remedies more generally. On the broad range of damage claims to which the avoidable-consequences rule applies, see Comment *b* and Reporters' Note to Comment *b*. In particular, avoidable consequences is very frequently litigated in both statutory and common-law employment claims. See Comment *l*. See also Restatement of the Law, Employment Law § 9.01(a), (b) and Comments *f* and *g* (AM. L. INST. 2015), id. § 9.05(b) and Comment *c*.

The avoidable-consequences rule is closely related to the offsetting-benefits rule and the collateral-source rule, because one way in which plaintiffs can mitigate damages is to secure an offsetting benefit. See § 8, Comment *c*. Severing that relationship by absorbing avoidable consequences into comparative responsibility does not give rise to any obvious or predictable difficulties. But the law of unintended consequences remains in effect; unexpected anomalies are possible.

f. Trial management and issue submission. The six- and five-part methods for addressing avoidable harms in terms of comparative responsibility are proposed in Waterson v. Gen. Motors Corp., 544 A.2d 357 (N.J. 1988), and in Foley v. City of West Allis, 335 N.W.2d 824 (Wis. 1983) (Abrahamson, J.), with respect to plaintiff's failure to use a seat belt, and in Stehlik v. Rhoads, 645 N.W.2d 889 (Wis. 2002), with respect to plaintiff's failure to wear a helmet in an all-terrain vehicle. Each of these cases involved pre-accident negligence that did not contribute to the accident but aggravated the damages. These courts attempted to structure the complex process of combining apportionments of responsibility for the accident and responsibility for the damages attributable to not using the safety device. The problem is surveyed in 1 DOBBS, HAYDEN, & BUBLICK, TORTS § 230 at 824-827 ("the complexities become quite difficult."). Most juries would presumably apportion responsibility in some simpler and more intuitive fashion, but the results might vary widely, and might bear little resemblance to those envisioned by more careful judicial analyses. The jury's task is considerably simpler if the rule of avoidable consequences is retained after the adoption of comparative responsibility, as in Illustration 1, because then there is no need to somehow combine two disparate assessments of responsibility.

For the argument that assimilating avoidable consequences to comparative responsibility might harm the plaintiffs that the change was intended to help, see Williams v. Jader Fuel Co., 944 F.2d 1388 (7th Cir. 1991) (Illinois law); Ostrowski v. Azzara, 545 A.2d 148 (N.J. 1988); and 1 DOBBS, HAYDEN, & BUBLICK, TORTS § 230 at 824-825; see also Searles v. Fleetwood Homes of Pa., Inc., 878 A.2d 509 (Me. 2005) (stating rather incidentally that if failure to avoid consequences were analyzed under comparative responsibility, the result would change if plaintiff were held more than 50-percent responsible). As explained in Comment *f*, this fear reflects a misunderstanding of what the Restatement Third, Torts: Apportionment of Liability proposed. But it is a common misunderstanding, and it appears to be actually happening. The 15 reported cases characterized in Comment *f* are collected and fully cited in the Appendix. Very briefly, the 12 cases applying a mitigation discount to all the damages are *Tanberg*, *Baker*, and *McDonnell* in Iowa; *Thomas* and *Ford Motor* in Louisiana; *Great Northern*, *Besler*, *Stemple*, *Steinhauer*, and

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Geler in New Jersey; and *Fox* and *Jaeger* in Washington. The three cases in which the finder of fact appeared to distinguish the damages are *Ober*, *Ainsworth*, and *Etheredge*, all in Louisiana.

g. Overview of the competing arguments. There are reasonable arguments for each of the competing rules. The Reporters are more persuaded by the arguments for avoidable consequences. Moreover, avoidable consequences is the majority rule by a lopsided margin, and whatever one thinks of the policy arguments, they are not nearly so unbalanced in favor of comparative responsibility as to justify restating the minority rule.

h. The clear majority rule and the case for restating it here. The cases, statutes, and jury instructions supporting the summary in Comment *h* are collected in the Appendix to these Notes. A 2013 article, strongly supportive of the Restatement Third, Torts: Apportionment of Liability's attempt to fold avoidable consequences into comparative responsibility, found that nothing had come of the attempt:

> [T]his revolutionary proposition has escaped the attention of the Anglo-American legal community. It has barely been mentioned by American courts and has not yet been discussed in the academic literature. . . . Courts continue to recognize and apply the [avoidable consequences] doctrine routinely. . . . [T]he doctrine seems alive and well in virtually all common law jurisdictions. Within the United States, it has shown remarkable endurance in the face of comparative fault statutes . . . . All in all, therefore, there is still a universal consensus among courts and commentators that under American tort law mitigation of damages and comparative (or contributory) negligence are still two clearly distinguishable concepts that should not be confused with each other.

Yehuda Adar, *Comparative Negligence and Mitigation of Damages: Two Sister Doctrines in Search of Reunion*, 31 QUINNIPIAC L. REV. 783, 785, 794, 811-812 (2013).

Professor Adar appears to have missed only a very few judicial mentions of the alternatives. And he could write basically the same thing today. Most avoidable-consequences opinions proceed without reference to comparative responsibility. Among the occasional exceptions that discuss the question, few apply comparative-responsibility rules to post-accident conduct, which has always been the classic domain of the avoidable-consequences rule.

Some courts have applied comparative responsibility or taken note of the Restatement proposal in seat-belt cases or other cases about pre-accident failure to use safety devices that would have reduced the harm to plaintiff—cases that have generally not been subject to the rule of avoidable consequences. Ridley v. Safety Kleen Corp., 693 So. 2d 934 (Fla. 1996); Wemyss v. Coleman, 729 S.W.2d 174 (Ky. 1987); City of Chi. v. M/V Morgan, 248 F. Supp. 2d 759 (N.D. Ill. 2003) (dictum), aff'd, 375 F.3d 563 (7th Cir. 2004). These jurisdictions have not extended these decisions to post-accident failure to avoid consequences.

A few courts have expressly rejected applying comparative responsibility to a failure to mitigate damages, without mentioning the Restatement proposal. See Munn v. Algee, 924 F.2d 568 (5th Cir. 1991) (Mississippi law); Nabors Well Servs., Ltd. v. Romero, 456 S.W.3d 553 (Tex.

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2015) (admitting seat-belt evidence on comparative responsibility, but insisting that plaintiff's post-accident conduct is different and remains subject to the avoidable-consequences rule); Braverman v. Granger, 844 N.W.2d 485 (Mich. Ct. App. 2014).

The Uniform Comparative Fault Act, promulgated in 1977, defines "fault" to include "unreasonable failure to avoid an injury or to mitigate damages." The Uniform Apportionment of Tort Responsibility Act, promulgated in 2002, similarly defines "contributory fault" to include "unreasonable failure to avoid or mitigate harm." The first of these two proposals is the obvious source of the statutory language in seven states subjecting avoidable consequences to the rule of comparative fault. ALASKA STAT. ANN. § 09.17.900; IND. CODE ANN. § 34-6-2-45; IOWA CODE ANN. § 668.1; MINN. STAT. ANN. § 604.01; MO. ANN. STAT. § 537.765; N.D. CENT. CODE ANN. § 32-03.2-01; WASH. REV. CODE ANN. § 4.22.015. But as summarized in Comment *h* and detailed in the Appendix, these statutes have generally not been implemented, except in Iowa.

i. Duty to mitigate? On vocabulary, see DOBBS & ROBERTS, REMEDIES § 3.9 at 273 n.198. The phrase "avoidable consequences" is more precise as a label for the rule, this Restatement adheres to it, and many courts use it, but judicial opinions speak of "mitigation of damages" and the "duty to mitigate" considerably more often than they speak of "avoidable consequences." This may partly be a matter of custom or familiarity. But the relative frequency of usage also flows from the fact that what is most commonly at issue is the adequacy or reasonableness of plaintiff's efforts to mitigate.

j. What is reasonable, in general. The Washington Court of Appeals has held that it is proper to refuse a jury instruction that "every person has the duty to mitigate damages." Sutton v. Shufelberger, 643 P.2d 920, 922 (Wash. Ct. App. 1982). The proposed instruction could be understood to mean an absolute duty to mitigate, but plaintiff need only make reasonable efforts to mitigate. "The standard by which the reasonableness of the injured party's efforts is to be measured is not as high as the standard required in other areas of law." State Dep't of Health Servs. v. Superior Court, 79 P.3d 556, 564 (Cal. 2003).

For the rule that the burden of proof is on defendant, see, e.g., Sun Val, LLC v. Comm'r of Transp., 193 A.3d 1192 (Conn. 2018); Kiribati Seafood Co. v. Dechert LLP, 83 N.E.3d 798 (Mass. 2017); Walker v. Office of Chief Info. Tech. Officer, 127 A.3d 524 (D.C. 2015); McKinley v. Casson, 80 A.3d 618 (Del. 2013); McCormick Int'l USA, Inc. v. Shore, 277 P.3d 367 (Idaho 2012); Tibbetts v. Dairyland Ins. Co., 999 A.2d 930 (Me. 2010). Rules or statutes on pleading sometimes list failure to mitigate damages as an affirmative defense. See, e.g., WIS. STAT. ANN. § 802.02(3). Courts sometimes say that defendant's burden to prove that damages could have been avoided is the same as plaintiff's burden to prove that damages were caused by the tort in the first place, and the Iowa court has drawn the corollary that if plaintiff's claim requires expert medical testimony, then defendant's avoidable-consequences defense also requires expert medical testimony. Greenwood v. Mitchell, 621 N.W.2d 200 (Iowa 2001).

Illustration 2 is based on Gaspar v. Dowell Div., Dow Chem. Co., 750 F.2d 460, opinion modified but result reaffirmed, 754 F.2d 1259 (5th Cir. 1985). Compare Tedd Bish Farm, Inc. v. Sw. Fencing Servs., LLC, 867 N.W.2d 265 (Neb. 2015), where plaintiff recovered $2854 for the

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cost of repairing an irrigation pipe damaged by defendant, but could not recover more than $10,000 in lost profits from crops not grown during the year that plaintiff delayed making the repair. The expense of repair was reasonable in proportion to the loss to be avoided, plaintiff could afford to make the repairs, and it was unreasonable for him not to do so. Illustration 3 is a hypothetical variation on *Gaspar* and Illustration 2. Illustration 4 is based on Williams v. Jader Fuel Co., 944 F.2d 1388 (7th Cir. 1991) (Illinois law).

As *Tedd Bish* illustrates, a plaintiff who delays repairing damaged property cannot recover for loss of use after the point at which the delay becomes unreasonable. Where plaintiff has the funds to make the repairs, defendant's refusal to admit liability is not a reason to delay. James Hardie Gypsum (Nev.) Inc. v. Inquipco, 929 P.2d 903 (Nev. 1996). That case also held, perhaps more controversially, that plaintiff's desire to preserve the property as evidence was not a reason to delay. Plaintiff could have given defendant a reasonable deadline to inspect the damaged truck, or plaintiff could have replaced the truck and preserved the damaged truck as evidence. But if replacement were more expensive than repair, defendant would predictably also attack this second option under the avoidable-consequences rule. The plaintiff had delayed repairs for 16 months, and the sheer length of that delay likely influenced the court's decision.

Pressure on plaintiff to make a quick decision gets particular emphasis in Memphis Light, Gas & Water Div. v. Starkey, 244 S.W.3d 344 (Tenn. Ct. App. 2007). The city utility's high-pressure gas line ran through an easement along one boundary of defendant's property. In his effort to develop the property, defendant excavated into the easement and uncovered the gas line; he refused all demands to stop digging until the city threatened to arrest him. The city then moved quickly to again cover the pipeline, fearing that without ground support from all directions it could rupture and cause an explosion. Defendant claimed that the city had used far more dirt than necessary and that he should not be liable for the excess cost. The court held that the city faced an emergency and that making the pipeline safe as quickly as possible was more important than precisely measuring how much dirt was needed. The city recovered the full cost of its mitigation efforts, including the allegedly surplus dirt. The court also emphasized the reckless nature of defendant's conduct, although it did not invoke the rule of Subsection (b) and Comment *q* on intentional and reckless torts.

On protecting plaintiffs who choose between two reasonable alternatives, see, e.g., Monahan v. Obici Med. Mgmt. Servs., Inc., 628 S.E.2d 330 (Va. 2006), where defendant's nurse told plaintiff to either go directly to the emergency room, or to go home and rest and go to the emergency room if he got worse. He chose the second alternative and suffered a stroke; defendant claimed that the choice of the more conservative course was a failure to mitigate damages. The court held as a matter of law that it was not, and granted a new trial on damages because the trial court had instructed on avoidable consequences. Defendant also argued that plaintiff and his wife had acted unreasonably by driving to a major medical center rather than to a community hospital that was 20 minutes closer. That was surely also a reasonable choice, but the court did not reach that issue, because it found no evidence that the 20-minute delay had aggravated plaintiff's damages.

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In Justus v. Rosner, 821 S.E.2d 765 (N.C. 2018), expert witnesses testified that plaintiff's condition could have been ameliorated if she had returned to the defendant doctor who had treated her initially. The jury brought in a verdict of $1.00, which the trial judge attributed to its impression that she had not mitigated her damages by returning to defendant. He granted a new trial, holding that plaintiff had taken adequate steps to mitigate damages by seeking treatment from other doctors, and the state supreme court affirmed.

In McFarland v. Brier, 769 A.2d 605 (R.I. 2001), defendant's trade-secret and unfair-competition torts forced plaintiffs to cut prices, and they sued for lost profits. Defendant argued that once a preliminary injunction issued and the illegal conduct ended, plaintiffs should have mitigated damages by raising their prices back to the original level. But plaintiffs argued, and the court held, that they made a reasonable choice to maintain the new lower prices, because having once offered customers the lower prices, they might have lost customers if they had suddenly raised the prices. See also Nat'l Liab. & Fire Ins. Co. v. R & R Marine, Inc., 756 F.3d 825 (5th Cir. 2014) (not unreasonable for owner of sunken vessel to award salvage contract to apparent low bidder with contingency clauses that turned out to make that contract far more expensive).

It is implicit in these decisions that an unreasonable choice between alternatives is not protected, even if the course chosen partially avoids the consequences of the tort. Otherwise, there would be no need to decide whether plaintiff's choice was reasonable. So, for example, if it were unreasonable in *Monahan* to drive to the more distant hospital, then plaintiff could not recover damages that would have been avoided by going directly to the nearby hospital. Or if plaintiff loses a job as a result of a tort, turns down a new job paying 90 percent of the former salary, and accepts instead a new job paying 70 percent of the former salary, plaintiff would have to have a good reason for turning down the better-paying job. In the absence of such a reason, the 20-percent difference in pay would be an unrecoverable avoidable consequence. These results clearly follow from settled principles, but we have found few reported decisions that squarely fit this pattern. One that apparently does, but with few details, is Flowers v. Harborcenter Dev., LLC, 93 N.Y.S.3d 483, 486 (App. Div. 2019), in which the court granted a new trial on plaintiff's lost earnings because "there is a question, under the circumstances, of whether the part-time job that he took was a reasonable mitigation of his damages."

Another case that comes close is Quinlan v. Curtiss-Wright Corp., 41 A.3d 739 (N.J. Super. Ct. App. Div. 2012), an employment-discrimination case in which plaintiff lost a job that paid $200,000 per year, and later accepted a new job that paid only $96,000 per year. Defendant argued that she had given up on her job search too soon, or that she should have continued looking even after accepting the new job, and the trial court instructed the jury to consider this theory in assessing whether she had acted reasonably to mitigate damages. The Appellate Division, remanding for a new trial on other grounds, quoted that instruction without questioning it. But its attention was focused on a different issue: who has the burden of proof on whether plaintiff will or will not mitigate damages in the future. (Answer: Neither side. Instruct the jury that plaintiff has the burden of proving her future salary loss, and don't mention burden of proof on future

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mitigation. The court adhered to the usual rule that defendant has the burden of proof on the adequacy of mitigation efforts prior to trial.)

It seems likely that a plaintiff sufficiently diligent to mitigate in part would rarely decline further or better mitigation opportunities without a plausible reason. And courts tend to accept the reasons of a plaintiff who has made some substantial effort. These speculations about human behavior may help explain why we found so few cases deciding the issue.

In Ford Motor Co. v. EEOC, 458 U.S. 219 (1982), the Supreme Court appeared to penalize plaintiffs' choice between reasonable alternatives. Ford refused to hire three female applicants for jobs that had been informally reserved for men. The women sued for employment discrimination; while the case was pending, they accepted similar positions at General Motors. A position then opened up at Ford, and Ford offered it to each of the three women in turn, but with no seniority. They each turned down the Ford job, and still later, they were laid off at GM. The Court held that they could not recover lost pay for the time after the GM layoff.

Viewed solely in terms of avoidable consequences, the decision is surely wrong. The plaintiffs had to choose between two uncertain alternatives, and it was surely reasonable to stay at GM with a bit of seniority rather than move to Ford with none. But the case did not involve a tort in the ordinary sense, and the decision was embedded in policy choices about the employment-discrimination statute. It may also have rested on an implicit view that once Ford offered reinstatement, the causal chain to any future damages had been broken, and that Ford should not be held responsible for layoffs at GM.

Several courts have held that a plaintiff need not file for bankruptcy to mitigate damages. Cases are collected in Bohna v. Hughes, Thorsness, Gantz, Powell & Brundin, 828 P.2d 745 (Alaska 1992). *Bohna* was a legal-malpractice case in which the lawyer's strategy resulted in a large judgment in excess of policy limits against the client. Plaintiff need not sue a third party who is likely judgment proof to avoid the consequences of legal malpractice, *McCormick*, 277 P.3d 367, or file an appeal that is not shown to be likely to succeed, *Kiribati*, 83 N.E.3d 798, and MB Industries, LLC v. CNA Ins. Co., 74 So. 3d 1173 (La. 2011), or sue some third party in another state, Covino v. Peck, 559 A.2d 868 (N.J. Super. Ct. App. Div. 1989). The defendant lawyer in *Covino* failed to file within the statute of limitations, but plaintiff might have refiled in Mississippi. Some courts generalize that a legal-malpractice plaintiff never has to file new litigation to mitigate damages, because litigation is inherently uncertain. Rubin Res., Inc. v. Morris, 787 S.E.2d 641 (W. Va. 2016). Such generalizations are rarely necessary, because it is usually possible to point to some more specific risk or uncertainty. But see Borley Storage & Transfer Co. v. Whitted, 710 N.W.2d 71 (Neb. 2006), in which the attorney failed to perfect a security interest in the assets of a corporation that later went bankrupt, and the client/creditor failed to sue the individual who had guaranteed the corporate note. The court affirmed a zero verdict based on failure to mitigate damages. The opinion does not discuss the chances of collecting from the guarantor, but perhaps that issue was explored before the jury.

k. Medical care. Cases on refusing surgery are collected in Annotation, 62 A.L.R.3d 9 (1975 & Supp.). An Indiana court, after surveying cases from other jurisdictions, listed four factors

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relevant to the reasonableness of plaintiff's decision: "1) the likelihood that the surgery will correct or improve the condition; 2) the risk involved in the surgery; 3) the pain or inconvenience caused by the surgery; and 4) the ability of the plaintiff to bear the cost of the surgery." Simmons v. Erie Ins. Exch., 891 N.E.2d 1059, 1067 (Ind. Ct. App. 2008). These factors are not a formal test, but similar ideas recur in many opinions, and they seem largely a matter of common sense.

Illustration 5 is based on Albert v. Monarch Fed. Sav. & Loan Ass'n, 743 A.2d 890 (N.J. Super. Ct. App. Div. 2000). The court commented that if the success of surgery had to be guaranteed, there would never be a case in which a plaintiff's refusal of surgery would be submitted to the jury. To similar effect, in a case in which the evidence was somewhat less one-sided on the costs and benefits of surgery, is Yost v. Union R.R. Co., 551 A.2d 317 (Pa. Super. Ct. 1988). Other examples include Jancura v. Szwed, 407 A.2d 961 (Conn. 1978) (plaintiff refused surgery and failed to do prescribed exercises; avoidable consequences should have been submitted to the jury); Lawrence v. City of Shreveport, 948 So. 2d 1179 (La. Ct. App. 2007) (no recovery for 11 months of pain and suffering when plaintiff delayed knee replacement for 11 months after clear medical advice to have it done); Dishaw v. Jones, 745 N.Y.S.2d 327, 329 (App. Div. 2002) (recovery limited when plaintiff refused treatment for damage to jaw and refused recommended fusion surgery in her neck, choosing instead to "live with" those problems).

Illustration 6 is based on Flemings v. State, 19 So. 3d 1220 (La. Ct. App. 2009). Faced with similarly equivocal medical testimony regarding treatment of a brain injury, a Washington court said that avoidable consequences should "not be submitted [to the jury] if the evidence shows that a proposed treatment might not be successful or if there is conflicting testimony as to the probability of a cure, because it is not unreasonable for a plaintiff to refuse treatment that offers only a possibility of relief." Cox v. Keg Rests. U.S., Inc., 935 P.2d 1377, 1380 (Wash. Ct. App. 1997). Other examples include Automatic Merch., Inc. v. Ward, 646 P.2d 553 (Nev. 1982) (not unreasonable to refuse elective surgery that had not been unambiguously recommended by physician and when plaintiff was responding to nonsurgical treatment); Lee v. Pathmark Stores, Inc., 767 N.Y.S.2d 94, 95 (App. Div. 2003) (zero verdict for future pain and suffering was against the great weight of the evidence when testimony was that "pain and suffering might have been partially alleviated" by treatment plaintiff had declined); Baker v. Smith, 2002 WL 31307887 (Iowa Ct. App. Oct. 16, 2002) (error to instruct on avoidable consequences when medical testimony was equivocal, and more important, when no one had advised plaintiff to have surgery, and the idea for surgery emerged only in a deposition a month before trial).

For cases that focus specifically on whether plaintiff's alleged failure to follow medical instructions caused any harm, see Morgan v. Scott, 291 S.W.3d 622 (Ky. 2009); Willis v. Westerfield, 839 N.E.2d 1179 (Ind. 2006); Monahan v. Obici Med. Mgmt. Servs., Inc., 628 S.E.2d 330 (Va. 2006); Studer v. DHL Express (USA), Inc., 2009 WL 775437 (Iowa Ct. App. Mar. 26, 2009) (all holding that court should not instruct on avoidable consequences where defendant offered insufficient evidence that plaintiff's failure to follow advice did any harm); see also In re Williams, 205 P.3d 1024 (Wyo. 2009) (same substantive ruling in a different procedural posture).

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In the early 20th century, when surgery was riskier and outcomes less reliable, courts often said that a plaintiff is never required to submit to major surgery. See MCCORMICK, DAMAGES § 36 at 136-137. This rule appears to survive in at least a few places. McDonnell v. McPartlin, 708 N.E.2d 412, 420 (Ill. App. Ct. 1999) ("Illinois law is clear: a plaintiff has no duty to mitigate his damages by submitting to serious or major surgery," citing a line of decisions from the appellate court), aff'd on other grounds, 736 N.E.2d 1074 (Ill. 2000); Harris v. Equitable Life Assur. Soc'y, 572 P.2d 593, 595 (Okla. Ct. App. 1977) ("It is clearly the law in Oklahoma in the area of tort litigation as well as in workmen's compensation litigation that an injured party is not required to undergo major surgery to recover benefits," citing a line of state-supreme-court cases). These cases appear to still be good law in Oklahoma. The Illinois rule is stated a bit less absolutely in Williams v. Manchester, 864 N.E.2d 963 (Ill. App. Ct. 2007). The Wisconsin court reviewed its evolution away from this rule and clearly rejected it in Lobermeier v. Gen. Tel. Co., 349 N.W.2d 466 (Wis. 1984).

The avoidable-consequences issue can also arise with respect to nonsurgical treatments. The Iowa court held that it was not unreasonable for plaintiff to stop doing prescribed home exercises when he had done them for "quite a while" and quit when he felt they were no longer doing any good, defendant's expert conceded that little improvement could be expected after six to twelve weeks, and other medical testimony was equivocal. Greenwood v. Mitchell, 621 N.W.2d 200 (Iowa 2001).

There are conflicting decisions on whether failure to follow medical instructions goes to comparative responsibility or avoidable consequences. This issue has been controversial when applied to ailments or injuries that gradually worsen over time, so that the date of injury and sometimes the date of negligence become ambiguous. On appropriate facts, plaintiff's failure to follow instructions may be viewed as a cause of the initial injury. Walker v. MaineGeneral Med. Ctr., 792 A.2d 1074 (Me. 2002); Chudson v. Ratra, 548 A.2d 172 (Md. Ct. Spec. App. 1988); McMullen v. Vaughan, 227 S.E.2d 440 (Ga. Ct. App. 1976). Compare Bryant v. Calantone, 669 A.2d 286 (N.J. Super. Ct. App. Div. 1996) (failure to follow medical instructions goes to avoidable consequences). In Cox v. Lesko, 953 P.2d 1033 (Kan. 1998), the court affirmed an instruction that authorized the jury to consider failure to follow medical advice under comparative responsibility or under avoidable consequences, but not both. The D.C. court concluded, some time ago now, that the majority rule is to apply avoidable consequences to cases of failure to follow directions after the initial medical negligence. Durphy v. Kaiser Found. Health Plan, 698 A.2d 459 (D.C. 1997). Scott v. Cent. Va. Family Physicians, Inc., 2017 WL 2378164 (Va. June 1, 2017), is a recent example holding that failure to follow a physician's discharge instructions raises the issue of failure to mitigate.

Illustration 7 is based on Small v. Combustion Eng'g, 681 P.2d 1081 (Mont. 1984), in which the court said that the decision to refuse surgery was not unreasonable from plaintiff's perspective. The thin-skull-plaintiff rule was the principal rationale in Botek v. Mine Safety Appliance Corp., 611 A.2d 1174 (Pa. 1992). Plaintiff in *Botek* suffered from post-traumatic stress disorder for several years while refusing all treatment; his condition improved rapidly when he

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finally sought treatment. But the jury apparently found, and the court held, that his mental condition had made it emotionally impossible for him to seek treatment earlier. The thin-skull-plaintiff rule is restated in Restatement Third, Torts: Liability for Physical and Emotional Harm § 31 (AM. L. INST. 2010). Compare Fox v. Evans, 111 P.3d 267 (Wash. Ct. App. 2005), in which the jury was allowed to attribute 22 percent of plaintiff's damages to her failure to treat her depression. The court carefully reviewed the medical testimony on whether further treatment would likely have improved her condition; it did not appear to consider whether her depression was itself the reason she refused treatment.

In Chancellor v. Taylor, 711 P.2d 660 (Ariz. Ct. App. 1985), plaintiff suffered a torn anterior cruciate ligament (ACL) and an injury to his foot that caused pain when walking. Both injuries were permanent unless treated; a low-risk and generally successful surgery was available for each. Plaintiff had jogged and played racket sports on a regular basis; the injuries ended that, and they caused him difficulties on the job. But he refused the surgeries. The opinion contains no indication of mental illness as in *Small* and *Botek*. But plaintiff testified that he had had surgery before and that he was very afraid of two major surgeries and two general anesthetics. The court refused to hold that plaintiff's choices were unreasonable as a matter of law.

Weight-loss cases are collected in Annotation, 24 A.L.R.5th 174 (1994 & Supp.). See, e.g., *Morgan*, 291 S.W.3d 622 (treating obesity as a preexisting condition subject to the thin-skull-plaintiff rule); Rivera v. Kolsky, 82 N.Y.S.3d 554 (App. Div. 2018) (refusing to submit issue to the jury when physician testified that bariatric surgery was a personal decision, and that much of the damage would not have been avoided in any event); *Studer*, 2009 WL 775437 (affirming refusal of jury instruction when plaintiff was instructed to lose weight and did not, but defendant failed to prove that he acted unreasonably or that losing weight would have avoided the damages); Badeaux v. State, 690 So. 2d 203 (La. Ct. App. 1997) (holding that plaintiff was unable to lose weight and had done as much as she could to mitigate her damages). But cf. Tanberg v. Ackerman Inv. Co., 473 N.W.2d 193 (Iowa 1991) (holding that failure to make reasonable efforts to lose weight is a failure to mitigate damages, and collecting cases), overruled on the related but somewhat different ground of reaching this result without expert testimony, *Greenwood*, 621 N.W.2d 200; Richard v. Bayou Lafourche Fresh Water Dist., 2009 WL 1279039 (La. Ct. App. May 8, 2009) (affirming decision as not manifestly erroneous where trial court reduced damages because of plaintiff's failure to lose weight or participate in physical therapy; the facts are not clearly stated but the court implies that plaintiff made no effort to lose weight); Boland v. Wal-Mart Stores, Inc., 2000 WL 1425760 (Wis. Ct. App. Sept. 28, 2000) (upholding remittitur where there was "considerable evidence" that plaintiff failed to follow medical advice with respect to medications, physical therapy, and losing weight); see also Sepulvado v. Turner, 862 So. 2d 457 (La. Ct. App. 2003) (one of the rare cases where plaintiff succeeded in losing weight).

l. Alternate employment. "Although the unemployed or underemployed claimant need not go into another line of work, accept a demotion, or take a demeaning position, he forfeits his right to backpay if he refuses a job substantially equivalent to the one he was denied." Ford Motor Co. v. EEOC, 458 U.S. 219, 231-232 (1982) (footnotes omitted) (an employment-discrimination case,

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but describing the common-law rule). The dissenter in a well-known contract case said that the pro-plaintiff half of this rule "seems to reflect the simple and humane attitude that it is too severe to demand of a person that he attempt to find and perform work for which he has no training or experience." But he also commented that "the rule may have had its origin in the bourgeois fear of resubmergence in lower economic classes." Parker v. Twentieth Century-Fox Film Corp., 474 P.2d 689, 695 n.2 (Cal. 1970) (Sullivan, C.J., dissenting). However that may be, both halves of the rule in the Supreme Court's formulation are well settled. The majority in *Parker* held that the female lead in a western to be filmed in Australia was, as a matter of law, not equivalent to the female lead in a musical to be filmed in California where the plaintiff actress would have had approval rights over the director and the screen play. The dissenter argued only that the issue should have been submitted to the jury.

The courts' approach to avoidable consequences in this context does not appear to vary with the theory of the case; loss of work because of personal injury, tort suits for wrongful discharge, breach-of-contract suits by discharged employees, and claims under the employment-discrimination laws or other regulatory statutes all appear to be interchangeable for purposes of avoidable consequences. The cases cited in this Note are tort cases unless otherwise indicated.

Illustration 8 is based on Young v. Whidbey Island Bd. of Realtors, 638 P.2d 1235 (Wash. 1982). Illustration 9 is based on Edwards v. Atchison, Topeka & Santa Fe Ry. Co., 684 N.E.2d 919 (Ill. App. Ct. 1997).

In Frye v. Memphis State Univ., 806 S.W.2d 170 (Tenn. 1991), plaintiff made no effort to find other employment after being wrongfully discharged from his position as a tenured professor. The trial court found a failure to mitigate damages and limited damages to one year; the case had dragged on for 11 years. The state supreme court reversed on the ground that the defendant had so damaged plaintiff's professional reputation that any search for comparable employment would have been futile; this conclusion was supported by the testimony of plaintiff and of four witnesses who were in position to hire people in plaintiff's field.

Ford v. Nicks, 866 F.2d 865, 873 (6th Cir. 1989), was a statutory employment-discrimination case in which the court applied what it described as "a traditional rule on mitigation of damages." Plaintiff was an assistant professor of education, discharged from a state university. The court held that she did not have to seek high-school teaching jobs, even though she had high-school teaching experience. She had taken real-estate courses and gotten a broker's license, which she did not have to do; she did not follow up and begin work as a broker. Without deciding whether it was unreasonable not to go to work as a broker once she had a license, the court held that there was no evidentiary basis for estimating her possible earnings as a broker. But the court did find it unreasonable to turn down a comparable college job 70 miles away; she and her husband could have lived halfway between the two cities. The court distinguished an earlier case holding that a waitress did not have to take a job 25 miles away when she could not afford to repair her car, NLRB v. Westin Hotel, 758 F.2d 1126 (6th Cir. 1985), and a case holding that plaintiff did not have to interview for a job 223 miles away, Rasimas v. Mich. Dep't of Mental Health, 714 F.2d 614 (6th Cir. 1983).

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In Vincent v. BNSF Ry. Co., 228 P.3d 1123 (Mont. 2010), the defendant employer offered plaintiff work as an inspector after she was injured on the job. The inspector position had been created for injured workers and required only the ability to use a cell phone and operate a vehicle. Plaintiff refused to apply for the inspector position because it was a nonunion job and it would require her to work with a person she disliked. But she had worked nonunion jobs in the past, and she had applied for a conductor position, which would also have required her to work with the person she disliked. The court held that failure to mitigate damages had been properly submitted to the jury. Working with a person she disliked would probably not have been a sufficient reason to refuse a job offer in any event, but the court was able to avoid that issue by pointing to her application for the conductor position. See also Ark. Okla. Gas Corp. v. Dir., Ark. Emp. Sec. Dep't, 94 S.W.3d 366 (Ark. Ct. App. 2002) (holding, in an unemployment-compensation case, that loss of seniority and union protection were not sufficient reasons to turn down a job).

Sometimes the dispute centers on whether plaintiff was medically able to return to work. See CSX Transp., Inc. v. Miller, 46 So. 3d 434 (Ala. 2010), where plaintiff made no effort to find work after retiring from the railroad, and variously testified that his neck pain prevented any employment and that he just wanted to enjoy his retirement; avoidable consequences was properly submitted to the jury. An example the other way is Hall v. Nix, 60 So. 3d 61 (La. Ct. App. 2011), in which defendant cited evidence that plaintiff's vision problems were correctable, but the court found that her refusal to seek employment was reasonable because her physician said that she was legally blind and that he had not cleared her to return to work.

In Walker v. Office of Chief Info. Tech. Officer, 127 A.3d 524 (D.C. 2015), the court applied common-law mitigation principles to a civil-service dispute that dragged on for 13 years before plaintiff was finally reinstated to his old position. Plaintiff's search for other work was sporadic, and he spent much of his time working on the appeals from his termination. The administrative-law judge found a failure to mitigate damages and awarded no back pay. The court reversed:

> On this record, any deduction in the back pay awarded to Mr. Walker must rest not on vague and unexplored references to positions that he turned down, but on clear and reasoned findings that are particularized as to the time period of the deduction and the reasonable course of mitigation that Mr. Walker failed to follow during that period. To the extent the ALJ determined that Mr. Walker was required to have taken one of those positions as a mitigation measure, he needed to make findings to that effect that identified the position and the date it was offered, explained why turning it down was unreasonable, explored whether taking it would have prejudiced Mr. Walker's ongoing legal claims against the District, and addressed the earlier findings suggesting that the position was not comparable to the one from which Mr. Walker was wrongfully terminated. In the absence of such particularized findings, the record does not contain "relevant evidence as a reasonable mind might accept as adequate to support a conclusion" that Mr. Walker is entitled to no back pay for the entire thirteen-year period.

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Id. at 535 (footnote omitted). This standard may demand more of defendant than most courts would, but the evidence it points to is always relevant, and the decision probably should be understood in light of the harshness and near-certain error in the result below. While it seems likely from the facts summarized in the opinion that the plaintiff did not do enough to search for other work, it is also impossible to believe that he reasonably should have been employed continuously for 13 years at the same or better pay as that which he had lost. See also Ford v. GACS, Inc., 265 F.3d 670 (8th Cir. 2001) (Missouri law) (court properly refused to instruct on avoidable consequences when plaintiff did not look for other work, but expert witness testified that he was unemployable after injury, and defendant offered no evidence that he would have found work if he had tried).

m. Inability to pay. See NLRB v. Westin Hotel, 758 F.2d 1126 (6th Cir. 1985) (reasonable not to apply for a job 25 miles away when plaintiff could not afford to repair her car); Ferguson v. Loewer Powersports & Equip., 33 So. 3d 446 (La. Ct. App. 2010) (plaintiff's failure to get surgery excused by inability to pay for it without invading retirement accounts); Francis v. Dahl, 107 P.3d 1171, 1173 (Colo. Ct. App. 2005) ("a plaintiff's failure to mitigate damages is excused if there were reasonable grounds for the failure, including financial inability of the plaintiff."); Seagers v. Pailet, 656 So. 2d 700 (La. Ct. App. 1995) (reasonable to delay surgery when plaintiff could not pay for it); Bailey v. Amisub (Saint Joseph Hosp.), Inc., 489 N.W.2d 323 (Neb. Ct. App. 1992) (holding it proper to admit evidence of ability or inability to pay on issue of failure to mitigate damages).

On inability to pay and loss of use, compare Geoscience Eng'g & Testing, Inc. v. Allen, 2004 WL 2475280 (Tex. Ct. App. Nov. 4, 2004), with Persinger v. Lucas, 512 N.E.2d 865 (Ind. Ct. App. 1987). In *Geoscience*, plaintiff was out of work because of his injury and could not afford to repair his car; he recovered loss-of-use damages for 15 months. The court said that to cut off loss-of-use damages "would be penalizing him for his lack of financial resources, denying him recovery of the damages he suffered . . ., and allowing the insurance company to reap the benefit of its refusal to pay the meritorious claim." *Geoscience*, 2004 WL 2475280, at *4 (quoting Mondragon v. Austin, 954 S.W.2d 191, 194 (Tex. Ct. App. 1997)). In *Persinger*, plaintiff's unrepairable car sat in a repair shop accruing storage charges because she could not pay $35 to have it towed from the repair shop to a junk yard. The court allowed recovery of the storage charges, on the ground that plaintiff was unable to avoid those damages. But it refused recovery for loss of use beyond 30 days, which would have been ample time to replace the car if plaintiff could have afforded to replace the car at all. The court cited several older cases from various jurisdictions to similar effect.

In Gateway Foam Insulators, Inc. v. Jokerst Paving & Contracting, Inc., 279 S.W.3d 179 (Mo. 2009), plaintiff could have reduced its lost profits by promptly repairing its truck, but it was unable to finance the repairs; the court affirmed an award of all the lost profits. In Valencia v. Shell Oil Co., 147 P.2d 558 (Cal. 1944), defendant damaged a truck used in plaintiff's business. Plaintiff couldn't pay the cost of repair, so the truck sat in the shop; plaintiff recovered $250 per month for 17 months of loss of use. In Hoover v. Montanus, 439 N.Y.S.2d 263 (Rochester City Ct. 1981),

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plaintiff could not afford to pay for repairs for 10 weeks; then he discovered a source from which he could borrow. The court allowed loss-of-use damages for the entire 10-week period. In Urico v. Parnell Oil Co., 708 F.2d 852 (1st Cir. 1983), the court allowed loss-of-use damages for two years during which plaintiffs were unable to pay for repairs. But it placed heavy emphasis on defendant's liability insurer's unreasonable failure to settle the claim. Liability was clear, and the insurer appeared to be using plaintiffs' inability to retrieve their truck as a source of leverage to extract a more favorable overall settlement. See also Annotation, 18 A.L.R.3d 497, § 21 (1968 & Supp.).

n. Personal privacy, dignity, and autonomy. The remarriage issue appears to have been litigated exclusively in the context of the benefits of actual or potential remarriage; those cases are in the Reporters' Notes to § 8. Our research was not exhaustive, but we have encountered no case in which a court ruled on an argument that plaintiff made insufficient effort to remarry and thus failed to mitigate damages.

On abortion, see Lovelace Med. Ctr. v. Mendez, 805 P.2d 603 (N.M. 1991); Johnson v. Univ. Hosps., 540 N.E.2d 1370 (Ohio 1989); Smith v. Cote, 513 A.2d 341 (N.H. 1986); Jones v. Malinowski, 473 A.2d 429 (Md. 1984); Univ. of Ariz. Health Scis. Ctr. v. Superior Court, 667 P.2d 1294, 1301 n.5 (Ariz. 1983) ("The decision not to conceive a child is quite different from the decision to abort or put the child up for adoption once it has been conceived."); Sherlock v. Stillwater Clinic, 260 N.W.2d 169 (Minn. 1977). But see Robak v. United States, 658 F.2d 471 (7th Cir. 1981) (dictum, distinguishing other cases); Sorkin v. Lee, 434 N.Y.S.2d 300 (App. Div. 1980).

For the holding that a disabled plaintiff need not accept assistance in the bathroom to mitigate damages, see Carnival Cruise Lines, Inc. v. Goodin, 535 So. 2d 98 (Ala. 1988).

On refusing medical treatment for religious reasons, compare Wilcut v. Innovative Warehousing, 247 S.W.3d 1 (Mo. Ct. App. 2008) (holding as a matter of law, under workers'-compensation statute, that plaintiff was entitled to full recovery with no reduction for effects of refusing blood transfusion), with Braverman v. Granger, 844 N.W.2d 485 (Mich. Ct. App. 2014) (holding as a matter law that religious motivation is inadmissible and that reasonableness of refusing blood transfusion must be assessed in wholly secular terms), and Williams v. Bright, 658 N.Y.S.2d 910, 915-916 (App. Div. 1997) (holding that jury should be instructed that plaintiff's religious faith is "a factor for you to consider" in deciding whether she acted reasonably "under all the circumstances confronting her"). Older cases are collected in Annotation, 3 A.L.R.5th 721 (1992 & Supp.), and Note, *Medical Care, Freedom of Religion, and Mitigation of Damages*, 87 YALE L.J. 1466 (1978).

See also In re Williams, 205 P.3d 1024 (Wyo. 2009) (refusing to consider constitutional issues in a workers'-compensation case, but holding that the employer had not proved that blood transfusion would have saved the employee's life). Courts should not lightly assume that refusing a blood transfusion prevented or significantly delayed recovery, and plaintiffs' lawyers should not neglect the issue. In large part because of Jehovah's Witness patients, and also because of issues about the safety of the blood supply, there has been substantial progress in the ability to treat even

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very serious injuries and surgeries without blood transfusions. See Charles H. Barron, *Blood Transfusions, Jehovah's Witnesses, and the American Patients' Rights Movement*, in ALTERNATIVES TO BLOOD TRANSFUSION IN TRANSFUSION MEDICINE (Alice Maniatis et al. eds., 2011) (reviewing the evolution of U.S. law and medical practice protecting the right to refuse blood transfusions).

On evidence of hostility, consider Munn v. Algee, 924 F.2d 568 (5th Cir. 1991), where the court affirmed a zero verdict for the wrongful death of a Jehovah's Witness who refused a blood transfusion; the medical evidence on whether the transfusion would have saved her life was conflicting. The trial judge also allowed defendant to elicit evidence of unrelated but unpopular Jehovah's Witness teachings, including their refusal to salute the flag or serve in the military and their belief that everyone but Jehovah's Witnesses will be damned. One judge in the majority said that the admission of this evidence was harmless error; the other judge in the majority held that it was relevant and admissible. These rationales are inconsistent; if a judge thought the evidence relevant, then surely a jury might have thought it relevant and relied on it. If that were so, and if it were error to admit the evidence, then the error could not have been harmless. Judge Rubin dissented.

o. The seat-belt cases. Seat-belt cases are collected in Annotation, 62 A.L.R.5th 537 (1998 & Supp.), and more succinctly but less currently in Estep v. Mike Ferrell Ford Lincoln-Mercury, Inc., 672 S.E.2d 345 (W. Va. 2008). Motorcycle-helmet cases are collected in Annotation, 85 A.L.R.4th 365 (1991 & Supp.). See also 1 DOBBS, HAYDEN, & BUBLICK, TORTS § 231 at 827-832; DOBBS & ROBERTS, REMEDIES § 8.5(3) at 709-711. Cases excluding seat-belt evidence on the issue of avoidable consequences include Vizzini v. Ford Motor Co., 569 F.2d 754 (3d Cir. 1977) (correctly predicting that Pennsylvania would exclude seat-belt evidence, at least in strict-liability cases); Wright v. Hanley, 387 S.E.2d 801 (W. Va. 1989); State v. Ingram, 427 N.E.2d 444 (Ind. 1981); Fields v. Volkswagen of Am., Inc., 555 P.2d 48 (Okla. 1976); Britton v. Doehring, 242 So. 2d 666 (Ala. 1970). See also Webber v. Butner, 923 F.3d 479 (7th Cir. 2019) (Indiana law) (excluding evidence of failure to wear a hardhat on issues of avoidable consequences and comparative responsibility); McKinley v. Casson, 80 A.3d 618 (Del. 2013) (excluding evidence of failure to wear a motorcycle helmet on the issue of avoidable consequences); Olson v. Prosoco, Inc., 522 N.W.2d 284 (Iowa 1994) (affirming refusal to instruct on avoidable consequences when plaintiff failed to wear safety goggles before the injury). In some of these states, including Pennsylvania, 75 PA. CONS. STAT. § 4581(e), the issue is now controlled by statutes codifying the earlier judicial decisions.

Cases admitting seat-belt evidence on an avoidable-consequences theory include Spier v. Barker, 323 N.E.2d 164 (N.Y. 1974), and arguably, Law v. Superior Court, 755 P.2d 1135, 1142 (Ariz. 1988) (holding seat-belt evidence admissible on the ambiguous theory that "the comparative negligence statutes apply the doctrine of avoidable consequences to pre-accident conduct"). See also Halvorson v. Voeller, 336 N.W.2d 118 (N.D. 1983) (admitting evidence of failure to wear a motorcycle helmet on the issue of avoidable consequences, and collecting both helmet and seat-belt cases).

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The age of many of these decisions is perhaps noteworthy. The Texas court overruled earlier decisions and held seat-belt evidence admissible on comparative responsibility. Nabors Well Servs., Ltd. v. Romero, 456 S.W.3d 553 (Tex. 2015). The court said that the longstanding rule excluding seat-belt evidence arose at a time when contributory negligence completely barred recovery, when no law required seat-belt use, and when most people did not use them. All of those things had changed, and tort reformers had repealed a statute that codified the exclusion of seat-belt evidence. The court said that the vast majority of drivers and passengers now wear seat belts, but that half of those killed in auto accidents were not wearing seat belts. There is no sign so far that this opinion is the beginning of a trend. But the reasoning has considerable force, and it may be offered to both courts and legislatures elsewhere. There is clearly a tension here between the loss-spreading and corrective-justice policies of tort law.

p. Illegitimate demands. Illustration 11 is based on InTown Lessee Assocs., LLC v. Howard, 67 So. 3d 711 (Miss. 2011). This part of the opinion is rather summary, treating the issue as obvious, but it appears to reject both avoidable-consequences and comparative-responsibility arguments. On unlawfully seized vehicles, see O'Brien v. Isaacs, 116 N.W.2d 246 (Wis. 1962) (plaintiff refused to pay unjustified $1.00 parking charge, replevied his car, and recovered $41 in rental-car expenses); Murrell v. Trio Towing Serv., Inc., 294 So. 2d 331 (Fla. Dist. Ct. App. 1974) (holding that plaintiff did not have to mitigate damages by paying storage charges, because a converter cannot place conditions on return of the property). See also Grenier v. Barclay Square Com. Condo. Owners' Ass'n, 834 A.2d 238 (N.H. 2003) (reaching an equivalent result by holding that plaintiff had not sought to recover the storage fees as damages, but had simply demanded that defendant return his vehicles, so that it was defendant's responsibility to pay the accumulated fees). Compare Sinclair v. Fotomat Corp., 189 Cal. Rptr. 393 (Ct. App. 1983) (holding that plaintiff should have mitigated damages by paying the $1.00 surcharge demanded to retrieve his developed film; the court plainly doubted his claims on the merits in any event), hearing denied and opinion ordered not to be published (Cal. 1983).

On refusal to post bail, see Tatum v. Morton, 562 F.2d 1279 (D.C. Cir. 1977), in which Quakers protesting the war in Vietnam were arrested while holding a prayer vigil on the sidewalk outside the White House. They refused to post bail of $10 each. The court of appeals refused to state a flat rule either way, but remanded for a "more sensitive treatment" of the reasonableness of their claim that to post bail would be to legitimate their arrests. Id. at 1284; see also Smith v. Rowe, 761 F.2d 360 (7th Cir. 1985) (holding that a prisoner who was deprived of her job as a prison law librarian and placed in segregation, in retaliation for assisting other prisoners with their legal claims, was not required to accept a job in the prison laundry to get out of segregation sooner).

Illustration 12 is based on Gunn Infiniti, Inc. v. O'Byrne, 996 S.W.2d 854 (Tex. 1999). Nothing in the opinion turns on the fact that fraud is an intentional tort. The court noted that similar offers without an explicit or implicit demand for a release would be an offer to mitigate damages, which plaintiff could not unreasonably refuse. But defendant described its offers as attempts to "settle" with plaintiff, which the court interpreted as requiring a release of all claims. Id. at 859-860. Compare Sun Val, LLC v. Comm'r of Transp., 193 A.3d 1192 (Conn. 2018), in which

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defendant's contractor, acting without authorization, dumped large quantities of excavated material on plaintiff's property. This material appears to have been mostly dirt, but it included environmental contaminants that required remediation and limited the marketability of the property. The contractor offered to remove 30 truckloads of the material in exchange for a release, and the court concluded that the release could have been drafted narrowly to preserve plaintiff's claim for any consequential damages. It is not clear from the court's summary of the contractor's offer that such a narrow release was contemplated or that the contractor would have accepted it. The court reaffirmed the principle that plaintiff need not sacrifice a substantial right in order to mitigate damages, but on the court's view of the facts, held that it was unreasonable for plaintiff to refuse the contractor's offer.

q. Intentional and reckless torts. See Restatement Second, Torts § 918(2) (AM. L. INST. 1979); Forster v. W. Dakota Veterinary Clinic, Inc., 689 N.W.2d 366 (N.D. 2004) (a defamation case, affirming a jury instruction that damages should be reduced only if plaintiff intentionally or heedlessly failed to mitigate damages after learning of the defamation); Flanagan v. Prudhomme, 644 A.2d 51 (N.H. 1994) (paraphrasing and applying § 918(2) in a trespass case in which defendants blocked plaintiffs' access to a lake, making it impossible for them to rent out their cottage; court relied on both the intentional wrong and on defendants' failure to prove that the cottage could have been rented if plaintiffs had made greater efforts).

"Recklessly" is defined in Restatement Third, Torts: Liability for Physical and Emotional Harm § 2 (AM. L. INST. 2010); the definition requires knowledge of the risk or of facts that make the risk obvious, and a failure to take steps of such obvious benefit in proportion to their cost as to demonstrate indifference to the risk. See also Model Penal Code § 2.02(2)(c) (AM. L. INST., Proposed Official Draft 1962) (defining "recklessly" in similar but not identical terms for criminal-law purposes).

Illustration 13 is based on W. Consol. Coop. v. Pew, 795 N.W.2d 390 (S.D. 2011). Two dissenters would have held that a duty not to intentionally or heedlessly fail to mitigate damages arose once plaintiff suspected theft. But in general, the cases appear to reject a should-have-known standard. And for the most part, they do not apply comparative-responsibility principles as between plaintiffs and defendants in intentional-tort cases. See Restatement Third, Torts: Intentional Torts to Persons § 50 (AM. L. INST., Preliminary Draft No. 7, Aug. 7, 2020).

For similar holdings, see Angelos v. First Interstate Bank, 671 P.2d 772 (Utah 1983) (employee was forging employer's signature on checks from customers and depositing to her own account; in suit against bank that accepted the forged endorsements there was no duty to mitigate until scheme was discovered); S.C. Johnson & Son, Inc. v. Morris, 779 N.W.2d 19 (Wis. Ct. App. 2009) (continuing scheme in which plaintiff's employees inflated transportation invoices and took kickbacks from the transportation companies; no duty to mitigate damages until scheme was discovered); Strawberry Water Co. v. Paulsen, 207 P.3d 654 (Ariz. Ct. App. 2008) (no duty to mitigate damages from ongoing theft of water until theft was discovered, and alleged negligence in failing to discover the theft earlier was not a failure to mitigate). For the claim in unjust

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enrichment, see Restatement Third, Restitution and Unjust Enrichment §§ 40-41 (AM. L. INST. 2011) (describing claims for unjust enrichment arising from conversion or misappropriation).

Compare Sec. State Bank v. Benning, 433 N.W.2d 232 (S.D. 1988), in which the bank failed to mitigate damages after discovering that its borrower was selling collateral and not accounting for the proceeds. The rule of avoidable consequences applied to the bank's conduct after it learned of the conversion, and the court affirmed a zero verdict. The bank argued that its actions in continuing to finance the borrower after discovering the diversion of collateral were reasonable business judgments in a difficult situation, and the court made nothing of the difference between ordinary and intentional or heedless failure to mitigate.

For the view that avoidable consequences is wholly inapplicable to intentional torts, see Pub. Util. Dist. No. 2 v. Comcast of Wash. IV, Inc., 336 P.3d 65 (Wash. Ct. App. 2014), a trespass case, and Fletcher v. City of Independence, 708 S.W.2d 158 (Mo. Ct. App. 1986), a nuisance case. Compare McFarland v. Brier, 769 A.2d 605, 611 (R.I. 2001) ("We are not willing, however, to hold that there is no duty to mitigate damages in an intentional tort situation."). West Virginia held for a time that employees who had been discharged maliciously had no duty to mitigate damages; that rule was abolished by statute. See W. VA. CODE ANN. § 55-7E-3; Martinez v. Asplundh Tree Expert Co., 803 S.E.2d 582 (W. Va. 2017). In Georgia, intentional torts are exempt by statute from any duty to mitigate. See citations under Georgia in the Appendix.

r. The expenses of mitigation. Illustration 14 is based on Toledo Peoria & W. Ry. v. Metro Waste Systems, Inc., 59 F.3d 637 (7th Cir. 1995) (Illinois law). An example of successful mitigation expenses is CUNA Mut. Life Ins. Co. v. L.A. Cnty. Metro. Transp. Auth., 133 Cal. Rptr. 2d 470 (Ct. App. 2003). Plaintiff spent money to protect its historic building from damage that would or might be caused by defendant's construction of a subway line under the adjacent street. Plaintiff acted on expert advice, and its building had been damaged before by an earthquake. The building suffered no damage from the subway construction. The court held that plaintiff could recover its mitigation costs, and that it need not prove that the building would have been damaged but for those expenditures.

Another clear example is Carlson Indus. v. E.L. Murphy Trucking Co., 214 Cal. Rptr. 331 (Ct. App. 1985), in which a $200,000 crane was damaged in transit. Plaintiff's expert testified that the crane was worthless unless subjected to an inspection for hidden damage; the inspection would cost $50,000. Plaintiff feared future liability if the crane failed or collapsed as a result of hidden damage. The court held that the inspection was a reasonable means to mitigate damages, that the cost was recoverable, and that the cost was "actual loss" within the meaning of an applicable statute regulating interstate shipments.

See also Anderson v. Hannaford Bros. Co., 659 F.3d 151 (1st Cir. 2011) (Maine law) (holding that when a massive data breach had already led to fraudulent charges on credit cards of some members of the class, costs of new credit cards and of identity-theft insurance for all the others were recoverable as reasonable costs of mitigating future damages); Toll Bros., Inc. v. Dryvit Sys., Inc., 432 F.3d 564 (4th Cir. 2005) (Connecticut law) (holding that if builder reasonably feared that supplier's synthetic stucco would allow water to enter and damage homes,

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then replacing the stucco was a recoverable cost of mitigating threatened damage of future liability to homeowners); Oakly Enters., LLC v. NPI, LLC, 354 P.3d 1073 (Alaska 2015) (holding that when defendant's equipment was leaking diesel fuel on plaintiff's land, plaintiff could recover the cost of removing that equipment as a cost of mitigating damages); Columbia Gas Transmission, LLC v. Ohio Valley Coal Co., 126 N.E.3d 1203 (Ohio Ct. App.) (allowing recovery of funds spent to protect pipeline from anticipated subsidence to be caused by coal mine), appeal allowed, 130 N.E.3d 292 (Ohio 2019); O'Brien (Newark) Cogeneration, Inc. v. Automatic Sprinkler Corp., 825 A.2d 524 (N.J. Super. Ct. App. Div. 2003) (holding that in wake of fire caused or aggravated by defendant's negligence, plaintiff could recover extra labor costs incurred to accelerate repairs in order to avoid or minimize liability to customers). In many of these cases, it is impossible to know whether there would have been any future damages but for the plaintiff's efforts at prevention; the dissenter in *Toll Brothers* argued that future damage had not been shown to be probable or more likely than not. But in each of these cases, the plaintiff's choice appeared reasonable as of the time it was made. The burden is on plaintiff to prove that it made these expenditures to mitigate damages and that it was reasonable to do so. Am. Milling Co. v. Tr. of Distrib. Tr., 623 F.3d 570 (8th Cir. 2010) (admiralty law) (affirming as not clearly erroneous findings that owner of damaged casino boat had not proved reasonable need for extra advertising expenditures or reasonable need to pay its employees during the time that the boat was closed for repairs in order to keep them from resigning).

And consider Bendar v. Rosen, 588 A.2d 1264 (N.J. Super. Ct. App. Div. 1991), in which plaintiff had diagnostic x-rays following an automobile accident. Shortly thereafter, she discovered that she was pregnant. She aborted the pregnancy for fear the child would be deformed, calling it the hardest decision of her life and the most totally overwhelming thing that had ever happened to her. She was diagnosed with post-traumatic stress syndrome in the aftermath. The court affirmed damages for both the emotional distress and the financial cost of the abortion. Defendants argued the case, and the court wrote the opinion, in terms of causation and remoteness. But note too that the abortion was an attempt to mitigate damages; the cost and emotional distress of a seriously deformed child might have been much greater than the reasonably anticipated cost of the abortion. The subsequent emotional distress, perhaps much greater than anticipated, was also a cost of the abortion. All these damages were costs of her attempt to mitigate damages. Costs of mitigation were recoverable, and it does not appear to have occurred to anyone to argue otherwise.

Often the costs of mitigation duplicates damages that would have been recoverable anyway. The most common example, so obvious that it generally goes unremarked, is medical expenses in personal-injury cases. They are a necessary cost, incurred by plaintiff and caused by defendant's negligence; they also avoid the additional damages that would be suffered if plaintiff's injuries were left untreated. In Tedd Bish Farm, Inc. v. Sw. Fencing Servs., LLC, 867 N.W.2d 265 (Neb. 2015), in which defendant damaged plaintiff's irrigation pipe, defendant was presumably responsible for the cost of repairing the pipe; repairing the pipe was also a reasonable cost of avoiding the much greater damage of losing a crop for lack of water. And in Kiribati Seafood Co. v. Dechert LLP, 83 N.E.3d 798 (Mass. 2017), in which the court contemplated the possibility that

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legal-malpractice plaintiffs might be required in some circumstances to mitigate damages by appealing, it said that the expenses of the appeal would then be recoverable as damages.

In other cases, damages subject to some rule that would generally bar their recovery become recoverable after all if they are the reasonable cost of mitigating damages. Government entities can generally not recover the cost of public services rendered in response to a tort, such as the cost of suppressing a negligently caused fire. But if the fire threatens the government's own property, then fire suppression is a recoverable cost of mitigating damages. State v. Black Hills Power, Inc., 354 P.3d 83 (Wyo. 2015) (collecting cases). In Kelleher v. Marvin Lumber & Cedar Co., 891 A.2d 477 (N.H. 2005), defendant installed defective windows in plaintiff's home. The windows rotted, leaked, and had to be replaced; the leaking water damaged the walls and floors beneath the windows. The economic-loss rule would generally prevent recovery in tort for the damage to the windows themselves. See § 27 and Restatement Third, Torts: Liability for Economic Harm § 3 (AM. L. INST. 2020). But on these facts, plaintiff had to replace the windows to prevent further damage to the walls and floors, so the cost was recoverable as the expenses of mitigating damages.

When mitigation is so successful that no damages are incurred, it seems obvious that plaintiff cannot recover for the damage prevented, and few cases discuss the issue. One that does is Jensen v. Matute, 289 So. 3d 1136 (La. Ct. App. 2020). Plaintiff's vintage cello was damaged in an automobile collision. The cello was repairable, but repairs took four months. During the delay, plaintiff continued to perform with his student cello, which he still owned. He testified that the student cello was much inferior, but he lost no engagements and no income, and incurred no expense for a replacement cello. The court denied damages for loss of use.

s. Mitigation expenses that should have been incurred but were not. See Bancroft v. Aulisio, 2017 WL 2493139 (Cal. Ct. App. June 9, 2017); Lisko v. Uhren, 204 S.W. 101 (Ark. 1918); Lloyd v. Lloyd, 13 A. 638 (Vt. 1888); Restatement Second, Torts § 918, Comment *b* (AM. L. INST. 1979); Restatement of Torts § 918, Comment *b* (AM. L. INST. 1939); DOBBS & ROBERTS, REMEDIES § 3.9 at 273-274; MCCORMICK, DAMAGES § 42 at 157; 1 SUTHERLAND, DAMAGES at 148, 150.

Dobbs and Roberts say that the law of avoidable consequences consists of four distinct rules: defendant is not liable for any damages actually avoided; defendant is not liable for any damages that reasonably should have been avoided; defendant is liable for the cost of reasonable efforts to mitigate damages; and if plaintiff fails to reasonably mitigate damages and damages are reduced accordingly, defendant is liable for what reasonable mitigation efforts would have cost. They say that the first three rules are "generally accepted," and that the fourth rule "may be implicit in the scheme reflected by the first three," but that the fourth rule is "apparently not clearly established." DOBBS & ROBERTS, REMEDIES § 3.9 at 273-274. It is not clearly established, but it should be. It is logically entailed in the first three rules.

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APPENDIX

The Current Law on Avoidable Consequences by Jurisdiction

The Reporters have attempted to list at least three cases from each jurisdiction—cases more recent than the comparative-fault revolution and, where possible, more recent than the publication of the Restatement Third, Torts: Apportionment of Liability in 2000. In states where the law is unsettled or inconsistent, we have attempted to cite all the cases that cast light on what the state is doing in fact. There is enormous variation from state to state in the number of reported cases on these issues.

We have also reported the pattern jury instruction from each state that has one. These instructions are a good indication of what juries are being told and how the rule is being implemented. Forty-two states and the District of Columbia have a relevant instruction, and 41 of these—all but Iowa and New Jersey—state the rule of avoidable consequences. Except as otherwise indicated, all jury instructions are available on Westlaw.

Seven states best characterized as comparative-fault states are italicized even though the rule has not been effectively implemented in most of them. Six states best characterized as avoidable-consequences states, but with at least some ambiguity or some support for comparative responsibility, are underlined. We have been quite generous in listing some of these states as ambiguous. States that adhere to the rule of avoidable consequences, with no hint of arguable ambiguity, are boldfaced.

Alabama adheres to the rule of avoidable consequences. Flint Constr. Co. v. Hall, 904 So. 2d 236, 253 (Ala. 2004) (jury "properly charged" that "It is the duty of the one injured to exercise ordinary care to reduce his damages. . . . He can recover only such damages as would have been sustained had such care been exercised."); Avco Fin. Servs. Inc. v. Ramsey, 631 So. 2d 940, 942 (Ala. 1994) ("We begin our analysis by recognizing the long-standing rule that the law imposes upon all parties who seek recompense from another a duty to mitigate their losses or damages. It is equally well established that a plaintiff can recover only for that damage or loss that would have been sustained if the plaintiff had exercised such care as a reasonably prudent person would have exercised under like circumstances to mitigate the damage or loss . . . ."); Carnival Cruise Lines, Inc. v. Goodin, 535 So. 2d 98, 103 (Ala. 1988) ("Generally, an injured party is required to mitigate his damages in a reasonable manner consistent with what an ordinarily prudent person would do in similar circumstances."); 1 Ala. Pattern Jury Instr. – Civ. 11.41 (3d ed. 2019) ("(Name of plaintiff) must have used the efforts that a reasonably prudent person would have used to minimize the harm caused by (name of defendant)'s wrongful conduct. This is called mitigation of damages. (Name of plaintiff) can recover only the money compensation that would be due if a reasonable effort had been made.").

Alaska *adopted the comparative-responsibility solution to avoidable consequences by statute, Alaska Stat. § 09.17.900, and the pattern jury instructions implement the statute, but the reported cases have ignored it.* Oakly Enters., LLC v. NPI, LLC, 354 P.3d 1073, 1081 (Alaska

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2015) ("the damages rule of avoidable consequences bars injured parties from recovering damages for any harm they could have avoided 'by the use of reasonable effort or expenditure after the commission of the tort.'"); McCubbins v. State, 984 P.2d 501, 505 n.5 (Alaska 1999) (jury instructed that "[i]f you decide that it is more likely true than not true that plaintiff could have avoided any loss or part of any loss with reasonable efforts and without undue risk, hardship or embarrassment, you may not require the defendant to pay the amount plaintiff could have reasonably avoided," and jury cautioned not to confuse instruction on comparative fault with separate instruction on avoidable consequences); Chizmar v. Mackie, 896 P.2d 196, 212 n.14 (Alaska 1995) (noting that "fault is apportioned by percentage in tort actions. In addition, a plaintiff's recovery is reduced to the extent that reasonable steps to mitigate damages were not taken," citing a pre-comparative-fault case in which a traditional avoidable-consequences instruction was given); Bohna v. Hughes, Thorsness, Gantz, Powell & Brundin, 828 P.2d 745, 754 (Alaska 1992) ("No one's interests are served by allowing a plaintiff to recover as damages that which the plaintiff could have reasonably avoided in the first place."); Buoy v. ERA Helicopters, Inc., 771 P.2d 439, 444 n.5 (Alaska 1989) (jury instructed that "[i]f you decide that it is more likely than not that Plaintiff could have minimized or avoided any loss with reasonable efforts, you may not require the Defendant to pay the amount Plaintiff could have reasonably avoided.").

The state's pattern jury instruction gives two different instructions on avoidable consequences, depending on whether the case is subject to the Comparative Fault Act. Both instructions begin: "The plaintiff is not entitled to be paid for any loss or for part of any loss (he) (she) could have avoided with reasonable efforts and without undue risk, hardship or embarrassment, even though the loss originally resulted from an act or omission for which the defendant is legally responsible. If you decide that it is more likely true than not true that the plaintiff could have avoided any loss or part of any loss with reasonable efforts and without undue risk, hardship or embarrassment . . ." The first instruction concludes: "you may not require the defendant to pay the amount the plaintiff could have reasonably avoided." The second instruction concludes: "then you must assign a percentage of fault to the plaintiff equal to the percentage of the damages caused by the plaintiff's failure to do so." Alaska Pattern Jury Instr. – Civ. 20.18A (2003). The first instruction also cautions the jury not to confuse avoidable consequences with comparative fault. It appears that courts have been using the first instruction and applying the rule of avoidable consequence without regard to the statute.

Arizona adheres to the rule of avoidable consequences. Univ. of Ariz. Health Scis. Ctr. v. Superior Court, 667 P.2d 1294, 1301 n.5 (Ariz. 1983) ("The rules requiring mitigation of damages require only that reasonable measures be taken."); Strawberry Water Co. v. Paulsen, 207 P.3d 654 (Ariz. Ct. App. 2008) (treating comparative fault and mitigation of damages separately, and relying on Restatement Second, Torts § 918 (AM. L. INST. 1979)); S Dev. Co. v. Pima Cap. Mgmt. Co., 31 P.3d 123, 136 (Ariz. Ct. App. 2001) ("a tort plaintiff has the duty to mitigate its damages and 'cannot recover for losses due to ''avoidable consequences.''"). Arizona Pattern Jury Instructions – Civil (2017) do not address the issue.

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Arkansas adheres to the rule of avoidable consequences. Henry v. Mitchell, 428 S.W.3d 454, 462 (Ark. 2013) ("The [defendants] were required to show both how [plaintiff] could have taken action to mitigate his damages and the amount of damages that might have been avoided by his proper mitigation."); Minerva Enters. Inc. v. Howlett, 824 S.W.2d 377, 382 (Ark. 1992) (same); Bill C. Harris Constr. Co. v. Powers, 554 S.W.2d 332, 336 (Ark. 1977) ("The doctrine of avoidable consequences limits the amount of recoverable damages in that a party cannot recover damages resulting from consequences that he could reasonably have avoided"); S. Bldg. Servs. v. City of Fort Smith, 427 S.W.3d 763, 769 (Ark. Ct. App. 2013) ("The doctrine of mitigation of damages applies in both tort and contract cases."). Arkansas Model Jury Instructions – Civil (2020) do not address the issue.

California adheres to the rule of avoidable consequences. State Dep't of Health Servs. v. Superior Court, 79 P.3d 556, 558 (Cal. 2003) ("The avoidable consequences doctrine is well established and broadly applied . . . ."); Alaniz v. Sun Pac. Shippers, L.P., 261 Cal. Rptr. 3d 702, 711 (Ct. App. 2020) ("plaintiffs cannot be compensated for damages that they could have avoided by reasonable effort or expenditure."); Pebley v. Santa Clara Organics, LLC, 232 Cal. Rptr. 3d 404 (Ct. App. 2018) ("under the avoidable consequences doctrine as recognized in California, a person injured by another's wrongful conduct will not be compensated for damages that the injured person could have avoided by reasonable effort or expenditure."); JUD. COUNCIL OF CAL. JURY INSTR. – CIV. 3930 (2020) ("If you decide [*name of defendant*] is responsible for the original harm, [*name of plaintiff*] is not entitled to recover damages for harm that [*name of defendant*] proves [*name of plaintiff*] could have avoided with reasonable efforts or expenditures.").

Colorado adheres to the rule of avoidable consequences. Ballow v. PHICO Ins. Co., 878 P.2d 672, 680 (Colo. 1994) ("plaintiff may not recover damages for injuries which he or she reasonably might have avoided."); Banning v. Prester, 317 P.3d 1284, 1288 (Colo. Ct. App. 2012) ("a plaintiff may not recover damages for injuries that might reasonably have been avoided."); Lascano v. Vowell, 940 P.2d 977 (Colo. Ct. App. 1996) (same). Colorado Jury Instructions – Civil (2020) do not address the issue.

Connecticut adheres to the rule of avoidable consequences. Sun Val, LLC v. Comm'r of Transp., 193 A.3d 1192, 1203 (Conn. 2018) ("We have often said in the contracts and torts contexts that the party receiving a damage award has a duty to make reasonable efforts to mitigate damages."); Hallas v. Boehmke & Dobosz, Inc., 686 A.2d 491, 497 (Conn. 1997) ("the theoretical foundation for the plaintiff's duty to mitigate damages is that the defendant's negligence is not the proximate, or legal, cause of any damages that could have been avoided had the plaintiff taken reasonable steps to promote recovery and avoid aggravating the original injury."); Preston v. Keith, 584 A.2d 439, 443 (Conn. 1991) ("you should reduce any award you might give her to such a sum as you think measures the amounts which her damages have been increased by her failure . . . to mitigate damages. . . ."); Conn. Judicial Branch Jury Instr. – Civ. 3.4-8 (2019), available on Lexis ("The plaintiff is not entitled to be compensated for any injury or aggravation of injury caused by [his/her] failure to minimize damages.").

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Delaware adheres to the rule of avoidable consequences. McKinley v. Casson, 80 A.3d 618, 627 (Del. 2013) (discussing mitigation and comparative negligence separately; "The duty to mitigate damages generally arises after a defendant has breached its duty to a plaintiff."); Brzoska v. Olson, 668 A.2d 1355, 1367 (Del. 1995) ("A party has a general duty to mitigate damages if it is feasible to do so."); Counts v. Acco Babcock, Inc., 1988 WL 81394, at *2 (Del. July 15, 1988) ("an injured party is required to mitigate his damages."); Del. Pattern Jury Instr. – Civ. § 22.4 (2006) ("An injured party must exercise reasonable care to reduce the damages resulting from the injury. If you find that [***plaintiff's name***] failed to undergo reasonable medical treatment to reduce [***his/her***] damages, [__or that [***he/she***] failed to follow reasonable medical advice__], then any damages resulting from that failure are not the responsibility of [***defendant's name***] and should not be included in your award.").

The District of Columbia adheres to the rule of avoidable consequences. Trs. of Univ. of D.C. v. Vossoughi, 963 A.2d 1162, 1178 (D.C. 2009) ("The doctrine of avoidable consequences, also known as the duty to mitigate damages, bars recovery for losses suffered by a non-breaching party . . . that could have been avoided by reasonable effort and without risk of substantial loss or injury."); Foster v. George Wash. Univ. Med. Ctr., 738 A.2d 791, 795 n.6 (D.C. 1999) ("damages may flow from the wrongful act or omission of the defendant, and if some of these damages could reasonably have been avoided by the plaintiff, then the doctrine of avoidable consequences prevents the avoidable damages from being added to the amount of damages recoverable."); Durphy v. Kaiser Found. Health Plan, 698 A.2d 459, 467 (D.C. 1997) ("a patient's non-cooperation with the doctor's instructions *after* the doctor's alleged negligent act and subsequent negligence of the patient, which aggravates the injury primarily sustained at the hands of the physicians, does not discharge the [physician] from liability, but only goes in mitigation of damages." (emphasis added by the court)); 1 D.C. Jury Instr. – Civ. § 12.07, available on Lexis ("If [Defendant] has proved it is more likely than not that [Plaintiff] did not take reasonable steps to avoid or minimize the damages suffered, then [Plaintiff] may not receive those damages that could or should have been avoided or minimized.").

Florida adheres to the rule of avoidable consequences, with just a hint of ambiguity. Sys. Components Corp. v. Fla. Dep't of Transp., 14 So. 3d 967, 982 (Fla. 2009) ("The doctrine of avoidable consequences, which is also somewhat inaccurately identified as the 'duty to mitigate' damages, commonly applies in contract and tort actions."); Penton Bus. Media Holdings, LLC v. Orange Cnty., 236 So. 3d 495, 497 (Fla. Dist. Ct. App. 2018) ("Although this defense is sometimes mistakenly identified as invoking a 'duty to mitigate,' the defense is actually based on the doctrine of avoidable consequences, which simply 'prevents a party from recovering those damages inflicted by a wrongdoer that the injured party *could have* reasonably avoided.'" (emphasis added by the court)). These cases are more recent than Ridley v. Safety Kleen Corp., 693 So. 2d 934 (Fla. 1996), which subsumed avoidable consequences into comparative negligence in a seat-belt case. *Ridley* has not been extended to post-injury failure to avoid the consequences of tort. One intermediate court extended *Ridley* to a case of alleged negligence after the tort, without noticing that it was an extension. Compare the apparently isolated decision in Jacobs v.

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Westgate, 766 So. 2d 1175, 1181 (Fla. Dist. Ct. App. 2000) ("avoidable consequences . . . was abolished with the adoption of comparative negligence."), with Huitt v. State Farm Mut. Auto. Ins. Co., 2012 WL 12904165 (M.D. Fla. Apr. 2, 2012) (recognizing that *Ridley* was limited to seat-belt cases). Florida Standard Jury Instructions – Civil, https://jury.flcourts.org/civil-jury-instructions-home/civil-instructions/, do not address the issue.

Georgia has codified the rule of avoidable consequences. Ga. Code Ann. § 51-12-11 ("When a person is injured by the negligence of another, he must mitigate his damages as far as is practicable by the use of ordinary care and diligence. However, this duty to mitigate does not apply in cases of positive and continuous torts."); Smith v. Reddick, 735 S.E.2d 15, 19 (Ga. Ct. App. 2012) ("Georgia law is clear, though, that [plaintiff] had a duty to mitigate these damages by seeking an alternate means of earning a living."); R & R Insulation Servs., Inc. v. Royal Indem. Co., 705 S.E.2d 223, 237 (Ga. Ct. App. 2010) ("Closely allied to the doctrine of contributory negligence is the rule of avoidable consequences, which denies recovery for any damages which could have been avoided by reasonable conduct on the part of the plaintiff. And a plaintiff injured by the negligence of another must mitigate his damages as far as is practicable by the use of ordinary care and diligence."); Ga. Suggested Pattern Jury Instr. – Civ. 66.015 (5th ed. 2020) ("When a person is injured by the negligence of another, he or she must mitigate his or her damages as much as is practicable by the use of ordinary care and diligence. If you believe that a party has suffered damages as alleged, under the law, that party is bound to reduce those damages, as much as is practicable, by the use of ordinary care. If you believe that by the use of such care, that party could have reduced the damages, you would determine to what extent and reduce such damages to that extent.").

"Positive and continuous torts" are "(1) fraud; (2) ongoing violations of property rights, and (3) intentional torts such as assault and battery." Wachovia Bank of Ga., N.A. v. Namik, 620 S.E.2d 470, 473 (Ga. Ct. App. 2005). These torts are "exempt from the requirement that plaintiff mitigate his damages." Id.

Hawaii adheres to the rule of avoidable consequences. Kalima v. State, 468 P.3d 143, 161 n.14 (Haw. 2020) ("In contract or in tort, the plaintiff has a duty to make every reasonable effort to mitigate his damages."); Miyamoto v. Lum, 84 P.3d 509, 521 (Haw. 2004) ("where plaintiff's subsequent injuries are brought about by plaintiff's negligence, defendant is only liable for the original injuries, as proximate cause of defendant's negligence. This result may be reached under the theory of avoidable consequences, that is, plaintiff by the use of reasonable care could have avoided the subsequent fall and the injuries and damages that resulted."); Tabieros v. Clark Equip. Co., 944 P.2d 1279, 1316 (Haw. 1997) (same as *Kalima*); Haw. Rev. Jury Instr. – Civ. 8.18 (2020) ("Any plaintiff claiming damages resulting from the wrongful act of a defendant has a duty under the law to use reasonable diligence under the circumstances to mitigate or minimize those damages. If you find plaintiff(s) suffered damages, plaintiff(s) may not recover for any damages which he/she/it/they could have avoided through reasonable effort.").

Idaho adheres to the rule of avoidable consequences. McCormick Int'l USA, Inc. v. Shore, 277 P.3d 367, 371 (Idaho 2012) ("The doctrine of avoidable consequences, or the duty to

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mitigate, is an affirmative defense that provides for a reduction in damages where a defendant proves that it would have been reasonable for the plaintiff to take steps to avoid the full extent of the damages caused by the defendant's actionable conduct."); Weinstein v. Prudential Prop. & Cas. Ins. Co., 233 P.3d 1221, 1249 (Idaho 2010) ("[A] plaintiff who is injured by actionable conduct of a defendant is ordinarily denied recovery for damages which could have been avoided by reasonable acts, including reasonable expenditures, after actionable conduct has taken place."); Belk v. Martin, 39 P.3d 592, 600 (Idaho 2001) ("The duty to mitigate, also known as the 'doctrine of avoidable consequences,' provides that a plaintiff who is injured by actionable conduct of a defendant is ordinarily denied recovery for damages which could have been avoided by reasonable acts."); Idaho Jury Instr. – Civ. 9.14 (2013), available on Lexis ("A person who has been damaged must exercise ordinary care to minimize the damage and prevent further damage. Any loss that results from a failure to exercise such care cannot be recovered.").

Illinois adheres to the rule of avoidable consequences. Cockrum v. Baumgartner, 447 N.E.2d 385, 390 (Ill. 1983) ("In general, under the law of damages a plaintiff cannot recover for elements of damage he could reasonably have avoided."); Karn v. Aspen Com. Painting, Inc., 133 N.E.3d 85, 88 (Ill. App. Ct. 2019) (jury separately reduced damages for comparative negligence and failure to mitigate damages); Williams v. Manchester, 864 N.E.2d 963, 986 (Ill. App. Ct. 2007) ("Closely allied to the doctrine of contributory negligence is the rule of 'avoidable consequences,' which denies recovery for any damages which could have been avoided by reasonable conduct on the part of the plaintiff."); Ill. Pattern Jury Instr. – Civ. 33.01 (2020) ("In fixing the amount of money which will reasonably and fairly compensate the plaintiff, you are to consider that an injured person must exercise ordinary care to obtain medical treatment. Damages proximately caused by a failure to exercise such care cannot be recovered.").

Indiana adheres to the rule of avoidable consequences, despite having enacted a statute that appears to provide otherwise. Willis v. Westerfield, 839 N.E.2d 1179, 1190 (Ind. 2006) (distinguishing comparative fault from mitigation of damages; "mitigation of damages is an affirmative defense that may reduce the amount of damages a plaintiff is entitled to recover, but does not affect the ultimate issue of liability."); Kocher v. Getz, 824 N.E.2d 671, 674-675 (Ind. 2005) ("The phrase 'unreasonable failure to avoid an injury or to mitigate damages' included in the definition of 'fault' under Indiana Code § 34-6-2-45(b) applies only to a plaintiff's conduct *before* an accident or initial injury. . . . While a plaintiff's post-accident conduct that constitutes an unreasonable failure to mitigate damages is not to be considered in the assessment of fault, a plaintiff 'may not recover for any item of damage that [the plaintiff] could have avoided through the use of reasonable care.'" (emphasis in original)); Harris v. Jones, 143 N.E.3d 1012 (Ind. Ct. App. 2020) (affirming judgment based on Model Civil Jury Instruction 935); Kimbrough v. Anderson, 55 N.E.3d 325, 338 (Ind. Ct. App. 2016) ("The amount of damages a plaintiff is entitled to recover is reduced by those damages which reasonable care would have prevented."); IND. MODEL JURY INSTR. – CIV. 935 (2019) ("A plaintiff must use reasonable care to minimize [his][her] damages after [he] [she] is [injured][harmed]. [*Plaintiff*] may not recover for any item of damage that [he][she] could have avoided through the use of reasonable care. . . . Do not

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consider failure to minimize damages as fault. Rather you may consider failure to minimize damages to reduce the amount of damages that [*plaintiff*] claims.").

***Iowa** adopted the comparative-responsibility solution to avoidable consequences by statute, and Iowa has actually implemented the statute.* Iowa Code Ann. § 668.1(1); Greenwood v. Mitchell, 621 N.W.2d 200, 205-208 (Iowa 2001) (interpreting statute to apply comparative responsibility separately to damages causally attributable to failure to mitigate and to damages not so attributable). The statute appears to have been implemented in the reported cases, except for two early cases in which lawyers and judges might not yet have understood the change. See Olson v. Sumpter, 728 N.W.2d 844, 846 n.3 (Iowa 2007) (jury instructed to treat failure to mitigate damages as part of comparative fault); Coker v. Abell-Howe Co., 491 N.W.2d 143, 150 (Iowa 1992) ("We hold that the Iowa legislature adopted the avoidable consequences doctrine as an element of fault in Iowa Code section 668.1. . . . When appropriate under the facts, Iowa Uniform Civil Jury Instruction 400.8 [on avoidable consequences] should advise the jury that it applies only to the plaintiff's alleged fault occurring in time after the act of fault alleged against the defendant."); Tanberg v. Ackerman Inv. Co., 473 N.W.2d 193 (Iowa 1991) (jury found plaintiff 70 percent at fault for failure to mitigate damages), overruled on other grounds, *Greenwood*, 621 N.W.2d 200; Provin v. Tomlonovic, 2016 WL 146452 (Iowa Ct. App. Jan. 13, 2016) (jury apparently instructed to consider avoidable consequences as comparative fault); Baker v. Smith, 2002 WL 31307887 (Iowa Ct. App. Oct. 16, 2002) (jury found plaintiff 80 percent at fault for failure to mitigate damages; court held that trial judge should not have instructed on mitigation); McDonnell v. Chally, 529 N.W.2d 611 (Iowa Ct. App. 1994) (jury found plaintiff 40 percent at fault based on failure to mitigate damages); Ort v. Klinger, 496 N.W.2d 265, 268 (Iowa Ct. App. 1992) (jury instructed both that "[i]f you find that Plaintiff failed to mitigate damages, you will include this as part of Plaintiff's fault in your comparison of fault," and that plaintiff "cannot recover for any damages that might have been avoided"; judgment affirmed on defendant's appeal). But see Olson v. Prosoco, Inc., 522 N.W.2d 284, 291 (Iowa Ct. App. 1994) ("The doctrine of avoidable consequences states that a party cannot recover damages that result from consequences that a party could reasonably have avoided."); Welter v. Humboldt Cnty., 461 N.W.2d 335 (Iowa Ct. App. 1990) (jury instructed that "[i]f you find that [plaintiff] failed to use reasonable means to minimize his damages, he cannot recover for any damage caused by such failure."). See Iowa Jury Instr. – Civ. § 400.7 (2018), available on Lexis (giving detailed instruction on defendant's burden to prove failure to mitigate, and stating that if jury finds that defendant carried that burden, "you shall assign a percentage of fault to the plaintiff for the time period after the failure to mitigate").

Kansas adheres to the rule of avoidable consequences. Schoenholz v. Hinzman, 2010 WL 445693, at *8 (Kan. Ct. App. Jan. 29, 2010) ("A party injured by actions of another is under a duty to exercise reasonable care to avoid loss or to mitigate and minimize the resulting damage."), rev'd in part, on other grounds, 289 P.3d 1155 (Kan. 2012); Bender v. Kan. Secured Title & Abstract Co., 119 P.3d 670, 679 (Kan. Ct. App. 2005) (remanding for determination of whether plaintiff "has failed to mitigate losses under traditional tort mitigation analysis"); Kan. Pattern

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Instr. – Civ. 171.42 (2019) ("In determining the amount of damages sustained by plaintiff, you should not include any loss which plaintiff could have prevented by reasonable care and diligence exercised by plaintiff after the loss occurred.").

In a holding described as "fact-driven" and "fact-sensitive," Cox v. Lesko, 953 P.2d 1033, 1035, 1041 (Kan. 1998), the court affirmed an instruction that authorized the jury to evaluate plaintiff's failure to follow medical instructions either under comparative fault or avoidable consequences, cautioning that it should not do both. Id. at 1038. *Cox* adjusted the usual chronological line between the two rules, but it clearly did not combine them, and it does not appear to have led to any broader change in Kansas law. For divided decisions elsewhere on whether failure to follow medical advice goes to avoidable consequences or comparative responsibility, see Reporters' Note to Comment *k*. The issue tends to arise if plaintiff's condition worsens over time, making the date of injury or the date of negligence ambiguous.

Kentucky adheres to the rule of avoidable consequences, with a bit of ambiguity. The supreme court adopted the Uniform Comparative Fault Act's definition of "fault," as a matter of Kentucky common law, in a seat-belt case. That definition includes failure to avoid or mitigate damages. Wemyss v. Coleman, 729 S.W.2d 174 (Ky. 1987). It adhered to that definition of fault after the legislature adopted parts of the Act but not the definition of "fault." Owens Corning Fiberglas Corp. v. Parrish, 58 S.W.3d 467 (Ky. 2001). But *Owens Corning* also said: "if distinct causes produce distinct harms, or if distinct causes produce a single harm and the evidence presented at trial provides a reasonable basis for determining the contribution of each cause to the single harm, a trial court should instruct the jury to apportion the damages to the distinct causes without resorting to comparative fault. If, however, as is the case here [asbestosis and smoking both caused shortness of breath], the evidence does not permit apportionment of the damage between separate causes, then comparative fault principles apply, and the trial court should instruct the jury to apportion damages according to the proportionate fault of the parties." Id. at 478. A nearby footnote added: "if injuries cannot be separately apportioned, then the comparative negligence ratio controls, unaltered by some independent assessment of *degree of causation*." Id. at 478 n.33 (emphasis added).

These passages might conceivably mean completely separate causes, as when one defendant breaks plaintiff's leg and another defendant breaks plaintiff's arm. But the reference in text to "the contribution of each cause to the single harm," and the footnote reference to "degree of causation," both appear to negate that reading. This opinion is less than clear, but it seems to say that courts should apply avoidable consequences when that is possible, and comparative responsibility when it is not.

No case has been found that discusses the remaining ambiguity. But courts continue to apply the mitigation rules without noting any difficulty. Morgan v. Scott, 291 S.W.3d 622, 640 n.44 (Ky. 2009) (plurality opinion) (after treating comparative fault among defendants, and separately treating alleged failure to mitigate damages, court said that "[i]t is well-settled in this Commonwealth that a party must mitigate his damages"); Blue Sky Inc. v. Millers Lane Ctr., LLC, 2020 WL 4500590, at *11 (Ky. Ct. App. July 17, 2020) ("A party is required to mitigate his

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damages."); CSX Transp., Inc. v. Begley, 2008 WL 3165840, at *4 (Ky. Ct. App. 2008), aff'd on other grounds, 313 S.W.3d 52 (Ky. 2010) (applying "well-established rule that a plaintiff has an obligation to mitigate his damages"); Geyer v. Mankin, 984 S.W.2d 104, 108 n.6 (Ky. Ct. App. 1998) ("Failing to mitigate damages by not following a doctor's advice following an injury is relevant only to the amount of damages and not to fault."). The pattern jury instruction states the rule of avoidable consequences. 2 Donald P. Cetrulo, Ky. Instr. to Juries – Civ. § 39.21 (2019), available on Lexis ("if you are further satisfied from the evidence that P failed to exercise ordinary care in treating or obtaining proper treatment for his injuries, you will exclude from the amount of the award so much of his damages as you believe from the evidence would have been avoided by the exercise of such care." (citing *Geyer*, 984 S.W.2d 104)).

Louisiana is unclear and apparently unsettled. The two supreme-court cases state or apply the rule of avoidable consequences. Guidry v. Dwight Manuel, Inc., 887 So. 2d 456, 457 (La. 2004) ("The jury found [defendant] 100 percent at fault and awarded the [plaintiffs] $67,120 reduced by $29,120 for failure to mitigate damages, for a total award of $38,000."); Philippe v. Browning Arms Co., 395 So. 2d 310, 318 n.12 (1980) ("The doctrine of avoidable consequences bars recovery of those damages which occurred after the initial injury and which might have been averted by reasonable conduct on the part of the plaintiff."). The much more numerous court-of-appeals cases allow trial judges and juries to do it either way. No state-wide pattern jury instruction has been found.

For avoidable-consequences cases, see Brown v. Breaux Bridge Ventures, LLC, 239 So. 3d 319, 329 (La. Ct. App. 2018) (stating that because plaintiff did not undergo recommended surgery, "it would be reasonable" for jury to award no damages for time after the surgery was recommended); Jenkins v. Wallace C. Drennan, Inc., 2008 WL 8922431 (La. Ct. App. Dec. 17, 2008) (jury reduced damages by $14,344.66 for failure to mitigate damages); Lawrence v. City of Shreveport, 948 So. 2d 1179 (La. Ct. App. 2007) (no recovery for period during which plaintiff unreasonably delayed surgery); Greenhead Gun Club, L.L.C. v. City of Shreveport, 914 So. 2d 62 (La. Ct. App. 2005) (judge in bench trial refused to award damages for specific period in which damages could have reasonably been avoided); Koehn v. Rhodes, 882 So. 2d 757 (La. Ct. App. 2004) (judge in bench trial withheld damages for specific medical expenses because of failure to mitigate damages); Moreau v. N. Am. Fire & Cas. Ins. Co., 806 So. 2d 809, 815-816 (La. Ct. App. 2001) (treating comparative fault and avoidable consequences separately; "The doctrine of avoidable consequences bars recovery of those damages which occurred after the initial injury and which might have been averted by reasonable conduct on the part of the plaintiff.").

For comparative-fault cases, see Thomas v. Boyd, 245 So. 3d 308 (La. Ct. App. 2017) (jury found plaintiff 55 percent at fault for failing to mitigate damages; quoted jury instruction on mitigation does not indicate whether jury should apply percentages or reduce damages by the amount that was avoidable); Ober v. Champagne, 166 So. 3d 254, 258 (La. Ct. App. 2014) (jury found plaintiff 15 percent at fault for failure to mitigate damages, but trial judge correctly applied 15-percent reduction to "all categories of damages except to [plaintiff's] past medical expenses"); Ratliff v. LSU Bd. of Supervisors, 38 So. 3d 1068 (La. Ct. App. 2010) (treating failure to mitigate

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damages as going to comparative fault); Ford Motor Credit Co. v. Dunham, 2009 WL 4981913 (La. Ct. App. Dec. 23, 2009) (verdict form reprinted in opinion; plaintiff's negligence and failure to mitigate damages combined in single series of questions on comparative fault; damages before and after failure to mitigate not distinguished); Ainsworth v. Anderson, 920 So. 2d 270 (La. Ct. App. 2005) (judge in bench trial reduced general damages, but not special damages, by 15 percent for failure to mitigate damages); Etheredge v. St. Paul Mercury Ins. Co., 814 So. 2d 119 (La. Ct. App. 2002) (judge in bench trial reduced damages for medical bills by two-thirds for failure to mitigate damages; reversed on ground that plaintiff had adequately mitigated damages).

For cases that state or apply both methods in the same case, or that do not explain the method, see Britt v. City of Shreveport, 55 So. 3d 76 (La. Ct. App. 2010) (judge in bench trial reduced damages for failure to mitigate, without explaining how much or by what method; defendant argued that he should have stated a percentage; judgment affirmed); Campbell v. Robinson, 10 So. 3d 346 (La. Ct. App. 2009) (judge in bench trial reduced general damages by 10 percent for failure to regularly attend physical therapy and by $3000 for failure to seek dental care); Saulny v. Tricou House, L.L.C., 839 So. 2d 392, 395 (La. Ct. App. 2003) (judge in bench trial awarded "lower than normal" damages because of failure to mitigate damages, without identifying how much lower or method used to determine how much lower); Domonter v. C.F. Bean Corp., 761 So. 2d 629, 639 (La. Ct. App. 2000) (reducing all damages by 30 percent for comparative fault and lost earnings by an additional 50 percent for failure to mitigate; "[t]he reduction for plaintiff's failure to attempt to obtain any type of work is separate and distinct from the reduction for fault.").

Maine adheres to the rule of avoidable consequences, but it is not entirely clear how the avoidable consequences are measured. In re Hannaford Bros. Co. Customer Data Sec. Breach Litig., 4 A.3d 492, 496 (Me. 2010) ("The doctrine of mitigation of damages, or avoidable consequences, encourages plaintiffs to take reasonable steps to minimize losses caused by a defendant's negligence by prohibiting recovery for any damages that the plaintiff could reasonably have avoided."); Searles v. Fleetwood Homes of Pa., Inc., 878 A.2d 509, 520-521 (Me. 2005) ("[d]istinguishing between comparative negligence and mitigation of damages," but stating that "the practical effect of the instructions can be the same" unless there is evidence that plaintiff might be equally or more at fault than defendant); Walter v. Wal-Mart Stores, Inc., 748 A.2d 961 (Me. 2000) (same, and warning that it is important to avoid duplicate reductions of damage, one under each doctrine); 1 Me. Jury Instr. Manual – Civ. § 7-104, available on Lexis ("damages that otherwise would be awarded to the plaintiff may be reduced when the defendant proves more likely than not (a) that plaintiff could have reduced his damages and (b) the amount by which damages that would otherwise be awarded to the plaintiff should be reduced because of plaintiff's failure to reduce damages.").

Hannaford and the pattern jury instruction state the traditional rule. *Searles* and *Walter*, by stating that the effect of the two rules "can be the same," imply that damages might be reduced by a percentage under avoidable consequences as under comparative responsibility. It is not clear whether this implication was intended, or whether the court was simply not thinking about the applicable measure under the two rules. No case has been found that squarely holds the two

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measures to be the same.

Maryland adheres to the rule of avoidable consequences. Jones v. Malinowski, 473 A.2d 429, 435 (Md. 1984) ("Our cases and the Restatement (Second) of Torts § 918 (1979) recognize the doctrine of 'avoidable consequences' in tort actions—the duty to minimize damages—denying recovery of any damages that could have been avoided by reasonable conduct on the part of the plaintiff."); Am. Hous. Pres., LLC v. Hudson SLP, LLC, 2016 WL 7496181, at *18 (Md. Ct. Spec. App. Dec. 20, 2016) ("The doctrine of mitigation of damages, or avoidable consequences, encourages plaintiffs to take reasonable steps to minimize losses caused by a defendant's negligence by prohibiting recovery for any damages that the plaintiff could reasonably have avoided."); Hopkins v. Silber, 785 A.2d 806, 816 (Md. Ct. Spec. App. 2001) ("The duty to mitigate damages 'serves to reduce the amount of damages to which a plaintiff might otherwise have been entitled had he or she used all reasonable efforts to minimize the loss he or she sustained as a result of a breach of duty by the defendant.'"); Md. Pattern Jury Instr. – Civ. 10:6 (5th ed. 2019) ("A plaintiff has a duty to use reasonable efforts to reduce damages but is not required to accept the risk of additional loss or injury in these efforts.").

Massachusetts adheres to the rule of avoidable consequences. Kiribati Seafood Co. v. Dechert LLP, 83 N.E.3d 798, 810 (Mass. 2017) ("A plaintiff in a negligence action has a duty to mitigate damages 'that were avoidable by the use of reasonable precautions.'"); Guar.-First Tr. Co. v. Textron, Inc., 622 N.E.2d 597, 600 (Mass. 1993) ("the general requirement that a party seeking damages take reasonable action to limit or mitigate damages 'translates into the rule that recovery for loss of use is limited to the time reasonably necessary to make repairs.'"); Yacino v. Peloquin, 2013 WL 2631162, at *1 (Mass. App. Ct. June 13, 2013) (rejecting claim of improper jury argument on ground that the passages objected to "were part of permissible arguments that [plaintiff] had a duty to mitigate damages"); Bodycote IMT, Inc. v. Nalco Co., 2009 WL 1704571, at *3 (Mass. App. Ct. 2009) (trial judge properly ruled "that the failure-to-inspect evidence had been admitted previously in the liability phase of the trial on the issue of comparative negligence, and that Nalco would not be permitted to 'double-dip' by introducing the same evidence as failure to mitigate"); Mass. Super. Ct. Prac. Jury Instr. – Civ. § 2.1.14(d) (2020), available on Lexis ("A plaintiff who is injured by a defendant's negligence has a duty to take reasonable steps to mitigate [his/her] damages. A defendant is relieved of liability for any portion of the plaintiff's damages that could reasonably have been mitigated by the plaintiff.").

Michigan adheres to the rule of avoidable consequences. Meemic Ins. Co. v. Fortson, 2020 WL 4355288, at *7 (Mich. July 29, 2020) ("the common-law rule requiring an injured party in a contract or tort action to mitigate damages applies in suits for work-loss benefits under the no-fault act."); Morris v. Clawson Tank Co., 587 N.W.2d 253, 257 (Mich. 1998) ("Where one person has committed a tort, breach of contract, or other legal wrong against another, it is incumbent upon the latter to use such means as are reasonable under the circumstances to avoid or minimize the damages. The person wronged cannot recover for any item of damage which could thus have been avoided."); Braverman v. Granger, 844 N.W.2d 485, 491 (Mich. Ct. App. 2014) (expressly rejecting argument that "the doctrine of avoidable consequences [was] implicitly abrogated by the

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adoption of comparative negligence"); Mich. Model Jury Instr. – Civ. 53.05 (2019) ("A person has a duty to use ordinary care to minimize his or her damages after [he or she / his or her property] has been [injured / damaged]. . . . You must not compensate the plaintiff for any portion of [his / her] damages which resulted from [his / her] failure to use such care.").

Minnesota *adopted the comparative-responsibility solution to avoidable consequences by statute. The most recent supreme-court decision implements the Act; the pattern jury instructions and the great majority of cases do not.* Minn. Stat. Ann. § 604.01(1a) ("Fault includes . . . unreasonable failure to avoid an injury or to mitigate damages. . . ."); Moorhead Econ. Dev. Auth. v. Anda, 789 N.W.2d 860, 891 (Minn. 2010) ("comparative fault should have been presented to the jury because all of the foregoing evidence tends to demonstrate [plaintiff] may have been at fault by 'unreasonabl[y] fail[ing] to avoid an injury or to mitigate damages.'"). But see Indep. Sch. Dist. No. 622 v. Keene Corp., 511 N.W.2d 728, 731 (Minn. 1994) (applying a standard avoidable-consequences analysis and stating that "[w]ith respect to mitigation, the statute appears to contemplate actions by the injured party, here the school district, which at the time the injury occurred would have limited damages"), overruled on other grounds, Jensen v. Walsh, 623 N.W.2d 247 (Minn. 2001). *Moorhead* cites *Keene* for related points, but does not overrule, disapprove, or take note of its contrary interpretation of the statute. See also Lesmeister v. Dilly, 330 N.W.2d 95 (Minn. 1983) (noting the statutory definition in a contract case to which it did not apply before applying the traditional duty to mitigate damages); Adee v. Evanson, 281 N.W.2d 177, 180 (Minn. 1979) ("Plaintiff has a duty to mitigate damages by acting reasonably in obtaining treatment for her injury."). The Comparative Fault Act was amended to define "fault" to include failure to mitigate damages in 1978. *Adee* did not mention it, and *Moorhead* did not mention *Adee*.

The great bulk of cases in the court of appeals, both before and after *Moorhead*, apply the traditional rule of avoidable consequences. Brown v. Casey's Retail Co., 2018 WL 3966399, at *4 (Minn. Ct. App. Aug. 20, 2018) ("A plaintiff in a personal-injury action has a duty to mitigate his damages 'after a legal wrong has occurred, but while some damage may still be prevented.'"); Fick v. Edwardson, 2018 WL 1787703, at *5 (Minn. Ct. App. Apr. 16, 2018) ("a [p]laintiff has a duty to mitigate damages by acting reasonably in obtaining treatment for her injury."); St. Germaine v. Girard, 2008 WL 4007425, at *3 (Minn. Ct. App. Sept. 2, 2008) ("An injured party has a duty to mitigate damages by acting reasonably in obtaining treatment."); Rouse v. Marshall, 2007 WL 2472554, at *3 (Minn. Ct. App. Sept. 4, 2007) ("Minnesota law has long held that a plaintiff has a duty to mitigate damages by acting reasonably in obtaining treatment."); Russell v. Fleming, 2000 WL 170012 (Minn. Ct. App. Feb. 15, 2000) (affirming judgment limiting loss-of-use damages to 25 days, because plaintiff failed to mitigate damages by promptly having car repaired); Sylvester Sales Co. v. Anoka Elec. Co-op., 1992 WL 20697 (Minn. Ct. App. Feb. 11, 1992) (approving jury instruction stating traditional rule on duty to mitigate damages); Waseca Sand & Gravel, Inc. v. Olson, 379 N.W.2d 592, 595 (Minn. Ct. App. 1985) ("The instruction sufficiently conveyed respondent's obligation to mitigate damages. . . ."); see also Graffunder v. City of Mahtomedi, 376 N.W.2d 282, 285 (Minn. Ct. App. 1985) (citing *Lesmeister* for the statutory definition of fault and citing *Adee* for the rule that "[a] party has a duty to act reasonably in avoiding the consequences

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of the tortfeasor's act").

The only court-of-appeals decision found that clearly applies the statute is Lane v. Martinson, 1989 WL 5629, at *2 (Minn. Ct. App. Jan. 31, 1989) ("On remand for new trial, Lane's negligence in following Dr. Martinson's instruction and in caring for his hand may be compared with any negligence by Martinson.").

The committee drafting pattern jury instructions noted the statute and refused to change the instruction to conform to it. 4A Minn. Prac. Jury Instr. Guide – Civ. 91.45 (6th ed. 2019) ("A person who is injured has a duty to act reasonably in getting treatment and care for his or her *(injury)(harm)*. He or she is limited to those damages that he or she would have experienced if he or she had acted reasonably in getting treatment and care, *[including a surgical operation that a reasonable person would undergo]*."). Instruction 91.47 states a substantially identical instruction for failure to mitigate lost earnings. The Use Note to 91.47 says that "[c]onsistent with its position regarding damages for personal injury, the Committee has taken the position that this provision of the Act should have no impact on the special verdict forms that are submitted to the jury in cases where unreasonable failure to mitigate is an issue. Rather, the issue should be handled pursuant to this instruction." And the note on Authorities to the instruction on comparative fault says that "inclusion of failure to mitigate damages in the comparative fault question may result in problems, particularly in cases where the plaintiff was not at fault in causing the accident, although he may have been at fault in failing to take precautions to avoid further injuries. In such cases, it may be desirable to submit the issue of mitigation of damages separately under CIVJIG 91.45." 4 Minn. Prac. Jury Instr. Guide – Civ. 28.15 (6th ed. 2019).

Mississippi adheres to the rule of avoidable consequences. Trigg v. Farese, 266 So. 3d 611, 626 (Miss. 2018) ("these concerns can adequately be addressed by the application of two familiar principles of law. First, the plaintiff has a duty to mitigate his damages."); InTown Lessee Assocs., LLC v. Howard, 67 So. 3d 711, 721 (Miss. 2011) ("we have no case law that supports [defendant's] argument that the victims of this armed robbery had a duty to mitigate their damages by abiding by the robber's demands."); Ill. Cent. R.R. Co. v. Winters, 863 So. 2d 955, 959 (Miss. 2004) ("It is well established that a party has a duty to mitigate its damages."); Manhattan Nursing & Rehab. Ctr., LLC v. Pace, 134 So. 3d 810, 818 (Miss. Ct. App. 2014) ("an injured plaintiff is not allowed to recover for damages that he did not take reasonable efforts to avoid."); Miss. Prac. Model Jury Instr. – Civ. § 10:6 (2d ed. 2019) ("You are instructed that the plaintiff was under a duty after suffering harm, if any, to exercise due care and take reasonable steps to avoid or diminish the damages resulting from that harm. You are further instructed that the plaintiff is not entitled to damages for the harm that *[he/she/it]* could have avoided by the use of due care, nor for the harm which proximately resulted from *[his/her/its]* own conduct, if any, which contributed to *[his/her/its]* damages.").

***Missouri** has adopted the comparative-responsibility solution to avoidable consequences by statute, Mo. Stat. Ann. § 537.765, but practice is inconsistent, and the state's rules of civil procedure require that judges give the approved pattern jury instruction, which is a traditional avoidable-consequences instruction.* Compare Love v. Park Lane Med. Ctr., 737 S.W.2d 720, 726

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(Mo. 1987) (plurality opinion) (applying comparative fault to failure to mitigate as matter of common law, apparently unaware of the statute that had just taken effect); Skinner v. Leggett & Platt, Inc., 325 S.W.3d 520 (Mo. Ct. App. 2010) (citing *Love* and submitting failure to follow medical instructions as comparative fault); Children's Wish Found. Int'l, Inc. v. Mayer Hoffman McCann PC, 2010 WL 1656454 (Mo. Ct. App. Apr. 27, 2010) (elaborate dictum citing *Love* and stating that comparative fault includes failure to mitigate damages, before holding that comparative fault does not apply to legal malpractice); Naes v. Reinhold Dev. Co., 950 S.W.2d 681, 683 (Mo. Ct. App. 1997) (citing *Love* and concluding that "there is support for considering mitigation as an element of fault in the context of comparative fault and not solely as a limitation of provable damage"); Bus. Men's Assur. Co. v. Graham, 891 S.W.2d 438 (Mo. Ct. App. 1994) (citing statute and stating that failure to mitigate should be submitted as part of comparative fault (but facts involved alleged failure to prevent the initial damage)); Stone v. Duffy Distribs. Inc., 785 S.W.2d 671 (Mo. Ct. App. 1990) (citing *Love* and approving submission of failure to mitigate as part of comparative fault); with Gateway Foam Insulators, Inc. v. Jokerst Paving & Contracting, Inc., 279 S.W.3d 179, 187 (Mo. 2009) ("Plaintiff had a responsibility to act within a reasonable time period to reduce its damages."); Rider v. YMCA of Greater Kansas City, 460 S.W.3d 378, 386 (Mo. Ct. App. 2015) (noting that jury instruction on mitigation of damages "is to be used by the jury in calculating *damages*, not *percentages of fault*" (emphasis in original)); Riddell v. Bell, 262 S.W.3d 301, 305 (Mo. Ct. App. 2008) ("The failure to mitigate damages is an affirmative defense," which is how the Approved Jury Instruction classifies it); Ameristar Jet Charter, Inc. v. Dodson Int'l Parts, Inc., 2004 WL 76342 (Mo. Ct. App. Jan. 20, 2004) (holding that it was error to modify Approved Jury Instruction on mitigation of damages), rev'd in part, on other grounds, 155 S.W.3d 50 (Mo. 2005); Tillman v. Supreme Express & Transfer, Inc., 920 S.W.2d 552, 554 (Mo. Ct. App. 1996) (reversing because the instructions "allowed the jury to confuse issues of fault with the issue of mitigation").

See Mo. Approved Jury Instr. – Civ. 32.29 (8th ed. 2020) (setting out the elements of failure to mitigate damages); id. 4.01 ("If you find that plaintiff failed to mitigate damages as submitted in Instruction Number ___, in determining plaintiff's total damages you must not include those damages that would not have occurred without such failure."). The Committee Comment to these instructions notes the conflict between *Love* and *Tillman*, not mentioning any other cases, and the need for uniformity, and chooses avoidable consequences over comparative fault. These instructions are approved by the supreme court, MO. R. CIV. P. 70.01, and their use is mandatory: "Whenever Missouri Approved Instructions contains an instruction applicable in a particular case that the appropriate party requests or the court decides to submit, such instruction shall be given to the exclusion of any other instructions on the same subject." MO. R. CIV. P. 70.02(b).

Montana adheres to the rule of avoidable consequences. DeTienne v. Sandrock, 431 P.3d 12, 18 (Mont. 2018) (expert witness "explained that [plaintiff] took appropriate steps 'to mitigate his beverage sales losses by employing his liquor license under a different business model,' and she offset [plaintiff's] beverage income in her calculations beginning in 2013, when he began to realize income from his new location."); Kraft v. High Country Motors, Inc., 276 P.3d

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908, 918 (Mont. 2012) ("The duty of the injured party to reduce or mitigate damages 'is a positive duty, within limits. . . .' A 'damaged party is only expected to do what is reasonable under the circumstances and need not embark upon a course of action which may cause further detriment to him.'"); Vincent v. BNSF Ry. Co., 228 P.3d 1123 (Mont. 2010) (holding that there was sufficient evidence to support an instruction on mitigation of damages); Mickelson v. Mont. Rail Link, Inc., 999 P.2d 985 (Mont. 2000) (holding that plaintiff had adequately mitigated damages); Mont. Pattern Jury Instr. – Civ. 25.94 (2d ed. 2003), available only in hard copy ("The plaintiff has a duty to minimize his/her damages. However, that duty does not require him/her to do what is unreasonable or impracticable …."); Mont. Pattern Jury Instr. – Civ. 4.08 (2d ed. 2003) ("Any amounts the Plaintiff earned or, with reasonable diligence, could have earned during the period for which the award is made must be deducted from the amount awarded.").

Nebraska adheres to the rule of avoidable consequences. Tedd Bish Farm, Inc. v. Sw. Fencing Servs., LLC, 867 N.W.2d 265, 271 (Neb. 2015) ("'Under the doctrine of avoidable consequences, which is another name for the failure to mitigate damages, a wronged party will be denied recovery for such losses as could reasonably have been avoided, although such party will be allowed to recover any loss, injury, or expense incurred in reasonable efforts to minimize the injury.' 'A plaintiff's failure to take reasonable steps to mitigate damages bars recovery, not in toto, but only for the damages which might have been avoided by reasonable efforts.'"); Roth v. Wiese, 716 N.W.2d 419, 435 (Neb. 2006) ("The doctrine of mitigation of damages applies only to postevent occurrences."); Borley Storage & Transfer Co. v. Whitted, 710 N.W.2d 71, 80 (Neb. 2006) (same as *Tedd Bish*); Neb. Jury Instr. – Civ. 4.70 (2d ed. 2019) ("If you assess damages, then you must consider the defendant's claim that the plaintiff failed to take reasonable steps to minimize *(his, her)* damages. The defendant is not liable for any damages that could have been prevented if the plaintiff had done so.").

Nevada adheres to the rule of avoidable consequences. Hall v. Ortiz, 2013 WL 7155073, at *2 (Nev. Oct. 21, 2013) ("[A]n injured person cannot recover for damages that could have been avoided by the exercise of reasonable care."); Shuette v. Beazer Homes Holdings Corp., 124 P.3d 530, 546 (Nev. 2005) ("Comparative negligence applies only to conduct that proximately contributes to an injury's causation, and not to subsequent acts that merely aggravate the injury or its consequences. . . . [M]itigation issues exist when the wrongdoer attempts to minimize the damages owed by showing that the harmed person failed to take reasonable care to avoid incurring additional damages."); Greco v. United States, 893 P.2d 345, 350 (Nev. 1995) ("the 'avoidable consequences rule' . . . requires plaintiffs to mitigate their damages in tort cases. . . ."). Nevada Pattern Jury Instructions – Civil (2011), available on Lexis, do not address the issue.

New Hampshire adheres to the rule of avoidable consequences. Kelleher v. Marvin Lumber & Cedar Co., 891 A.2d 477, 496 (N.H. 2005) ("a party cannot recover damages flowing from consequences which that party could reasonably have avoided."); Mailloux v. Town of Londonderry, 864 A.2d 335, 342 (N.H. 2004) (same); RAL Auto. Grp., Inc. v. Edwards, 861 A.2d 795, 799 (N.H. 2004) (same); Anglin v. Kleeman, 665 A.2d 747, 751 (N.H. 1995) (same); 1 N.H. Jury Instr. – Civ. NS9.111, available on Lexis ("If you decide [name of defendant] is responsible

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for the original harm, [name of plaintiff] is not entitled to recover damages for harm that [name of defendant] proves [name of plaintiff] could have avoided with reasonable efforts or expenditures.").

New Jersey *is an intermediate case, but effectively it adopted comparative responsibility without the label.* New Jersey clearly distinguishes avoidable consequences from comparative responsibility, and nominally adheres to avoidable consequences, but it instructs juries to state or measure the consequences that should have been avoided in percentages of the damages. In practical effect, this is more like adopting comparative responsibility. See Komlodi v. Picciano, 89 A.3d 1234, 1248, 1253 (N.J. 2014) ("Unlike comparative negligence, the doctrine of avoidable consequences is not a defense to liability and serves only to mitigate damages. Avoidable consequences will reduce a recovery because a plaintiff cannot claim as damages the additional injury she causes to herself after a defendant commits a tortious act," but the jury should be instructed to "decide what percentage, if any, of [plaintiff's] damages were caused by a failure on her part to exercise reasonable care to avoid or mitigate those damages—provided she was capable of doing so."); Lynch v. Scheininger, 744 A.2d 113, 125 (N.J. 2000) (plaintiff "cannot recover for any portion of the harm that by the exercise of ordinary care he could have avoided."); Ostrowski v. Azzara, 545 A.2d 148, 154-155 (N.J. 1988) (distinguishing avoidable consequences from contributory and comparative negligence, and asserting that "[t]he confusion between the existence of a cause of action and the diminution of damages has been the result of the melding of these principles in some jurisdictions under the Uniform Comparative Fault Act," but stating that "expressing mitigation of damages as a percentage of fault which reduces plaintiff's damages may aid juries in their just apportionment of damages"); N.J. Model Jury Charges – Civ. 8.11B (2009), available on Lexis ("Failure or refusal to [exercise reasonable care to minimize damages] bars recovery for consequences which could have been avoided by the exercise of such care. . . . If you find that the plaintiff did not act reasonably to avoid or to alleviate injury, you shall assess in terms of percentages the degree to which the injuries were the result of the plaintiff's own unreasonable failure to minimize or to avoid further injury.").

The court's reason for continuing to distinguish the two rules appears to be its persistent fear that failure to mitigate might put some plaintiffs over the threshold of 51-percent responsibility and entirely bar any recovery. "In particular, we must avoid the indiscriminate application of the doctrine of comparative negligence (with its fifty percent qualifier for recovery) when the doctrines of avoidable consequences or preexisting condition apply." *Ostrowski*, 545 A.2d at 153-154.

On whether juries understand this distinction, see S.W.K. v. Atl. Health Sys., Inc., 2018 WL 6625979 (N.J. Super. Ct. App. Div. Dec. 19, 2018) (setting out jury instructions, which do not caution jury to distinguish avoidable damages from other damages; court rejected plaintiff's argument that the jury was likely confused); Great N. Ins. Co. v. Schwartz, 2011 WL 2304135, at *1 n.4 (N.J. Super. Ct. App. Div. June 1, 2011) ("award was reduced by twenty-five percent based upon the jury's finding that she failed to mitigate her damages. . . ."); Besler v. Bd. of Educ., 2008 WL 3890499, at *1 (N.J. Super. Ct. App. Div. Aug. 25, 2008) (jury reduced damages by 51 percent for failure to mitigate damages); Dukes v Sebe, 2007 WL 655041 (N.J. Super. Ct. App. Div. Mar.

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6, 2007) (jury instructed to reduce damages by percentage if it found failure to mitigate damages; instruction did not distinguish avoidable and unavoidable damages); Stemple v. Bores, 2006 WL 4186814, at *2 (N.J. Super. Ct. App. Div. July 19, 2006) ("jury reduced the award to [one plaintiff] by 90% and the award to [other plaintiff] by 95% based on its findings that they had failed to mitigate damages"; judgment reversed on ground that mitigation should not have been submitted to the jury); Steinhauer v. Cooper, 2006 WL 2403439, at *1 (N.J. Super. Ct. App. Div. Mar. 28, 2006) (jury "apportioned fifty percent of her non-preexisting condition to her 'avoidable consequences. . . .'"); Geler v. Akawie, 818 A.2d 402, 406 (N.J. Super. Ct. App. Div. 2003) (entire verdict "was reduced by one-third as the result of the operation of the doctrine of avoidable consequences").

New Mexico adheres to the rule of avoidable consequences. Air Ruidoso, Ltd. v. Exec. Aviation Ctr., Inc., 920 P.2d 1025, 1031 (N.M. 1996) ("It is a well established principle in New Mexico that an injured party has a responsibility to mitigate its damages, or run the risk that any award of damages will be offset by the amount attributable to its own conduct."); Lovelace Med. Ctr. v. Mendez, 805 P.2d 603, 620 (N.M. 1991) ("The law in this state is that a person injured by the tort of another is required to use ordinary care to minimize or lessen the injuries sustained."); Muncey v. Eyeglass World, LLC, 289 P.3d 1255, 1269 (N.M. Ct. App. 2012) (defendant "had the burden to establish its affirmative defense of failure to mitigate"); Skeen v. Boyles, 213 P.3d 531, 540 (N.M. Ct. App. 2009) (same as *Air Ruidoso*); N.M. Unif. Jury Instr. – Civ. 13-1811 (2020) ("In fixing the amount of money which will reasonably and fairly compensate plaintiff, you are to consider that an injured person must exercise ordinary care to minimize or lessen [his] [her] damages. Damages caused by [his] [her] failure to exercise such care cannot be recovered.").

New York adheres to the rule of avoidable consequences. Ornstein v. N.Y. City Health & Hosps. Corp., 881 N.E.2d 1187, 1193 (N.Y. 2008) ("a defendant who believes that a plaintiff has unreasonably failed to take steps to relieve emotional distress arising from an exposure incident can raise a failure to mitigate damages defense."); Flowers v. Harborcenter Dev., LLC, 93 N.Y.S.3d 483, 485-486 (App. Div. 2019) ("We agree with defendants that the court erred in failing to instruct the jury on mitigation of damages insofar as it applied to past and future lost wages. . . . [W]e grant a new trial on damages for past and future lost wages only."); Rivera v. Kolsky, 82 N.Y.S.3d 554, 557 (App. Div. 2018) ("A party seeking to avail itself of the affirmative defense of failure to mitigate damages must establish that the injured party failed to make diligent efforts to mitigate its damages, and the extent to which such efforts would have diminished those damages."); N.Y. Pattern Jury Instr. – Civ. 2:325 (2019) ("A person who has been injured is not permitted to recover for damages that could have been avoided by using means which a reasonably prudent person would have used to (cure the injury, alleviate the pain).").

North Carolina adheres to the rule of avoidable consequences. Justus v. Rosner, 821 S.E.2d 765, 771 (N.C. 2018) ("the rule in North Carolina is that an injured plaintiff, whether h[er] case be tort or contract, must exercise reasonable care and diligence to avoid or lessen the consequences of the defendant's wrong. If [s]he fails to do so, for any part of the loss incident to such failure, no recovery can be had. This rule is known as the doctrine of avoidable consequences

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or the duty to minimize damages." (modifications by the court)); Champs Convenience Stores, Inc. v. United Chem. Co., 406 S.E.2d 856, 866 (N.C. 1991) ("the trial judge did not err in failing to give defendant's proposed instruction on mitigation of damages in that the trial judge in substance gave the proposed instruction."); Mauney v. Carroll, 795 S.E.2d 239, 242 (N.C. Ct. App. 2016) ("Plaintiff has a duty to mitigate his damages"); N.C. Pattern Jury Instr. – Civ. 810.24, (2019) ("A person is not permitted to recover for injuries *he* could have avoided by using means which a reasonably prudent person would have used to cure *his* injury or alleviate *his* pain.").

***North Dakota** adopted the comparative-responsibility solution to avoidable consequences by statute, N.D. Cent. Code § 32.03-2.01, but the state's pattern jury instruction is a traditional avoidable-consequences instruction, and practice is inconsistent.* There are avoidable-consequences cases and comparative-fault cases, but the parties did not dispute the choice between the two rules, and the court did not comment on the choice, in any of these cases. In Cartier v. Nw. Elec., Inc., 777 N.W.2d 866 (N.D. 2010), and in Anderson v. Jacobson, 622 N.W.2d 730 (N.D. 2001), the trial judge instructed the jury to treat failure to mitigate damages as part of comparative fault. Neither party challenged that instruction. In Forster v. W. Dakota Veterinary Clinic, Inc., 689 N.W.2d 366 (N.D. 2004), the court approved an avoidable-consequences instruction based on § 918 of Restatement Second, Torts (AM. L. INST. 1979). The case was a defamation case, but the court has since indicated that comparative fault applies to defamation claims. Norberg v. Norberg, 889 N.W.2d 889 (N.D. 2017). In Smith v. Anderson, 451 N.W.2d 108 (N.D. 1990), three years after the statute was enacted, defendant argued that plaintiff caused much of her own injuries by negligent athletic activities after the collision at issue; the court held that that argument was adequately covered by the instruction on proximate cause and that a separate instruction on mitigation of damages was not required. For the pattern jury instruction, see N.D. Pattern Jury Instr. – Civ. § 74.25 (2016), available on Lexis ("One who has been injured in [person] [or] [property] has the duty to exercise ordinary care to avoid loss or minimize the resulting damages. One who fails to do so cannot recover damages for any injury that could have been prevented by the exercise of ordinary care.").

Ohio adheres to the rule of avoidable consequences. Columbia Gas Transmission, LLC v. Ohio Valley Coal Co., 126 N.E.3d 1203, 1212 (Ohio Ct. App.), appeal allowed, 130 N.E.3d 292 (Ohio 2019) ("Mitigation of damages (or avoidable consequences) means that one injured by the tort of another is not entitled to recover damages for any harm that he could have avoided by the use of *reasonable effort* or expenditure after the commission of the tort." (emphasis added by the court)); Lake v. Love, 90 N.E.3d 36, 41 (Ohio Ct. App. 2017) ("An injured party has a duty to mitigate and cannot recover for damages that could have reasonably been avoided."); Braum v. Kinderdine, 27 N.E.3d 602, 608 (Ohio Ct. App. 2015) ("It is a fundamental principle of the law of damages that one who is injured in his or her person or property by a wrongful act or omission, whether as a tort or a breach of contract, must use reasonable care to avoid loss and minimize the damages resulting."). Ohio Official Jury Instructions Civil (2020) do not address the issue.

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Oklahoma adheres to the rule of avoidable consequences. Osage Nation v. Bd. of Comm'rs, 394 P.3d 1224, 1237 n.39 (Okla. 2017) ("A duty to mitigate damages has an ancient origin and operates to prevent a plaintiff from recovering for damages which could have been avoided."); Morris v. Sanchez, 746 P.2d 184, 189 (Okla. 1987) ("under Oklahoma law, one is only required to take reasonable actions in mitigation of damages."); James v. Midkiff, 888 P.2d 5, 6 (Okla. Ct. App. 1994) ("The duty to mitigate damages in a personal injury action merely requires the use of ordinary care to secure timely medical treatment after an injury."); Okla. Unif. Jury Instr. – Civ. 5.3 (2d ed. 2018) ("In fixing the amount of money that will reasonably and fairly compensate *[Plaintiff]*, you are to consider that an injured person must exercise ordinary care to obtain proper treatment. Damages cannot be recovered for an injury resulting from a failure to exercise such care.").

Oregon adheres to the rule of avoidable consequences. Hamlin v. Hampton Lumber Mills, Inc., 246 P.3d 1121, 1124 (Or. 2011) ("The jury found that plaintiff's lost wages were $10,000, but that he had unreasonably failed to mitigate $4,000 of those damages."); Hansen v. Bussman, 549 P.2d 1265, 1275 (Or. 1976) ("defendant has the burden of proving that plaintiff unreasonably failed to mitigate her damages by submission to surgery."); Zimmerman v. Ausland, 513 P.2d 1167, 1169 (Or. 1973) ("if the facts are such that the court must hold, as a matter of law, that the plaintiff failed to mitigate her damages by submission to surgery when a reasonable person would have done so, the plaintiff would not be entitled to claim damages for what might otherwise be a permanent injury."); Or. Unif. Jury Instr. – Civ. 73.01 (2019) ("A person who suffered damage has a duty to exercise reasonable care to avoid increasing that damage. There can be no recovery for increased damage caused by the failure to exercise such care.").

Pennsylvania adheres to the rule of avoidable consequences. Moorhead v. Crozer Chester Med. Ctr., 765 A.2d 786, 790 (Pa. 2001) ("a plaintiff has a duty to mitigate damages, and a defendant may show such facts in mitigation to preclude the plaintiff from obtaining full compensation for damages occasioned by himself or herself."); Mader v. Duquesne Light Co., 199 A.3d 1258, 1267 (Pa. Super. Ct. 2018), appeal granted, 217 A.3d 193 (Pa. 2019) ("plaintiffs have a duty to mitigate damages. . . . It is appropriate for a trial court to reduce the recovery of an injured party by the amount of losses which could have been avoided by the reasonable efforts of the injured party."); Atwood v. Power Sys. Elec. Inc., 77 Pa. D. & C.4th 473 (Pa. Ct. Com. Pl. 2005) (rejecting claim that standard civil jury instruction on mitigation of damages was inadequate), aff'd mem., 809 A.2d 978 (Pa. Super. Ct. 2002); Pa. Suggested Standard Jury Instruc. 7.100 (4th ed. 2019) ("The law requires a person who is injured by the negligence of another to take all reasonable steps to minimize [his] [her] damages. The defendant has the burden to prove that the plaintiff failed to take such steps and that some damages could have been avoided. You must not award the plaintiff damages for harm that could have been reasonably avoided.").

Rhode Island adheres to the rule of avoidable consequences. Roadepot, LLC v. Home Depot, U.S.A., Inc., 163 A.3d 513, 525 (R.I. 2017) ("a party claiming injury that is due to breach of contract or tort has a duty to exercise reasonable diligence and ordinary care in attempting to minimize its damages."); McFarland v. Brier, 769 A.2d 605, 610 (R.I. 2001) ("The law in Rhode

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Island is well settled that a party claiming injury 'has a duty to exercise reasonable diligence and ordinary care in attempting to minimize its damages.'"); Tomaino v. Concord Oil of Newport, Inc., 709 A.2d 1016, 1026-1027 (R.I. 1998) ("Under Rhode Island law a party claiming injury that is due to breach of contract or tort has a duty to exercise reasonable diligence and ordinary care in attempting to minimize its damages. . . . [F]ailure to do so does not create liability; that party is simply prohibited from recovering that amount of damages he or she could have reasonably avoided."); R.I. Jury Instr. – Civ. § 10004.4.1 (2002), available on Lexis ("Under Rhode Island law, a person who is claiming damages for personal injuries is required to use reasonable diligence to curtail his or her damages.").

South Carolina adheres to the rule of avoidable consequences. Nestler v. Fields, 824 S.E.2d 461, 464 (S.C. Ct. App. 2019) (holding that it was erroneous not to instruct jury that plaintiff "had a duty to mitigate his damages"); Singleton v. Stack, 2019 WL 459998, at *2 (S.C. Ct. App. Feb. 6, 2019) ("The reasonableness of actions to mitigate damages is ordinarily a question for the jury."); Holland v. S.C. Elec. & Gas Co., 2009 WL 9528978, at *2 (S.C. Ct. App. June 4, 2009) (treating comparative negligence and mitigation of damages as entirely separate issues, and stating that "[a] party injured by the acts of another is required to do those things a person of ordinary prudence would do under the circumstances to mitigate his damages, but the law does not require him to exert himself unreasonably or incur substantial expense to avoid damages."); S.C. Requests to Charge – Civ. § 13-12 (2d ed. 2016) ("A party who has suffered injury or damage from the actionable conduct of another is under a duty to make all reasonable efforts to minimize the damages incurred. To the extent that he reasonably could have so minimized those damages and failed to do so, he is not entitled to recover from the other party.").

South Dakota adheres to the rule of avoidable consequences. Arrowhead Ridge I, LLC v. Cold Stone Creamery, Inc., 800 N.W.2d 730, 735 (S.D. 2011) ("The law imposes upon a party injured from another's breach of contract or tort the active duty of making reasonable exertion to render the injury as light as possible. If, by his negligence or willfulness, he allows the damages to be unnecessarily enhanced, the increased loss, that which was avoidable by the performance of his duty, falls upon him."); Jurgenson v. Smith, 611 N.W.2d 439, 442 (S.D. 2000) ("Mitigation of damages is an affirmative defense."); Wasland v. Porter Auto & Marine, Inc., 600 N.W.2d 904, 907 (S.D. 1999) ("That a plaintiff must do all that is reasonable to minimize damages after a tort or breach of contract has occurred is well established."); S.D. Pattern Jury Instr. – Civ. 50-140-10 (2019), available only in hard copy ("a person who suffers personal injury must exercise reasonable care to avoid further injury that could be prevented by the exercise of reasonable care after the injury occurred. Plaintiff cannot recover for loss or harm which could have been avoided by the exercise of reasonable care.").

Tennessee adheres to the rule of avoidable consequences. Maddox v. Olshan Found. Repair & Waterproofing Co., 2019 WL 4464816, at *22 (Tenn. Ct. App. Sept. 18, 2019) ("One who is injured by the wrongful conduct of another, whether by tort or breach of contract, must exercise reasonable care and diligence to avoid loss or minimize damages."); Kirby v. Memphis Light Gas & Water, 2019 WL 1895862, at *4 (Tenn. Ct. App. Apr. 29, 2019) (same); Memphis

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Light, Gas, & Water Div. v. Starkey, 244 S.W.3d 344, 353 (Tenn. Ct. App. 2007) ("one who is injured by the wrongful or negligent act of another, whether by tort or breach of contract, is bound to exercise reasonable care and diligence to avoid loss or to minimize or lessen the resulting damage, and to the extent that damages are the result of his active and unreasonable enhancement thereof, or due to his failure to exercise such care and diligence, he cannot recover."); Tenn. Prac. Pattern Jury Instr. – Civ. 14.51 (2020) ("A person who has been injured has the duty to mitigate damages by using reasonable diligence in caring for an injury and employing reasonable means to accomplish healing. When one does not use reasonable diligence to care for injuries and they are aggravated as a result of that failure, the damages you determine must be limited to the amount of damage that would have been suffered had the injured person used the diligence required.").

Texas adheres to the rule of avoidable consequences. JCB, Inc. v. Horsburgh & Scott Co., 597 S.W.3d 481, 486 n.3 (Tex. 2019) ("The avoidable consequences rules, or rules for minimizing damages, are cardinal instruments of damages measurement. . . . Minimizing damages rules apply in all kinds of cases, including contract, tort, and statutory claims." (ellipsis by the court)); J & D Towing, LLC v. Am. Alternative Ins. Corp., 478 S.W.3d 649, 677 (Tex. 2016) ("Whether framed as a duty of mitigation or a doctrine of avoidable consequences, the principle is the same: A plaintiff may not recover loss-of-use damages for a period longer than that reasonably needed to replace the personal property."); Nabors Well Servs., Ltd. v. Romero, 456 S.W.3d 553, 560 (Tex. 2015) ("We recognize the universality of the rule that an injured person cannot recover damages which can be avoided by that care and treatment of his injury which an ordinary prudent person would exercise in the same or similar circumstances."); Tex. Pattern Jury Charges – Civ. 28.10 (2020), available on Lexis ("Do not include any amount for any condition resulting from the failure, if any, of *Paul Payne* to have acted as a person of ordinary prudence would have done under the same or similar circumstances in caring for and treating *his* injuries, if any, that resulted from the occurrence in question.").

Utah adheres to the rule of avoidable consequences. Gibbs M. Smith, Inc. v. U.S. Fid. & Guar. Co., 949 P.2d 337, 345 (Utah 1997) ("The doctrine of avoidable consequences, also referred to as mitigation of damages, generally operates to prevent one against whom a wrong *has been* committed from recovering any item of damage arising from the wrongful conduct which could have been avoided or minimized by reasonable means." (emphasis added by the court)); Hansen v. Mountain Fuel Supply Co., 858 P.2d 970, 976 (Utah 1993) ("the doctrine of 'avoidable consequences' mandates that the plaintiff submit to medically advisable treatment. Failure to do so may destroy the plaintiff's right to recover for a condition that he or she could have thereby avoided or alleviated."); Alpine Orthopaedic Specialists, LLC v. Utah State Univ., 263 P.3d 501, 503 n.2 (Utah Ct. App. 2011) ("Mitigation of damages is a substantive law doctrine 'requiring a plaintiff, after an injury or breach of contract, to make reasonable efforts to alleviate the effects of the injury or breach.'"); Model Utah Jury Instr. – Civ. 2020 (2d ed.), https://www.utcourts.gov/resources/muji/ ("[Name of plaintiff] has a duty to exercise reasonable diligence and ordinary care to minimize the damages caused by [name of defendant]'s fault. Any damages to [name of plaintiff] should not include those that [name of plaintiff] could have avoided by taking reasonable

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steps.").

Vermont adheres to the rule of avoidable consequences, but it has commented favorably on applying comparative responsibility while unambiguously declining to change its rule. State v. Baker, 177 A.3d 1093, 1102 (Vt. 2017) ("a plaintiff may not recover for any damages that the plaintiff could have avoided or minimized through reasonable care or expenditure."); Langlois v. Town of Proctor, 113 A.3d 44, 51 (Vt. 2014) ("Under the mitigation of damages doctrine—also known as the doctrine of avoidable consequences—a plaintiff may not recover for any damages that the plaintiff could have avoided or minimized through reasonable care or expenditure. We have recognized damages mitigation as part of Vermont's common tort law for well over a century."); Schnabel v. Nordic Toyota, Inc., 721 A.2d 114, 119 (Vt. 1998) ("There exists a general duty to mitigate damages."); Vt. Jury Instr. – Civ. § 11-11.15 (2010), available on Lexis ("Under the law, [Name of Plaintiff] must make reasonable attempts to prevent the worsening of [his/her] injuries after the [describe the accident] and to help recover from them. If [Name of Plaintiff] has not done so, [Name of Defendant] cannot be expected to pay damages for the worsening, or lack of improvement, caused by [Name of Plaintiff's] failure. Your award must not include compensation for any such failure.").

The Vermont court commented favorably on the Restatement Third, Torts: Apportionment of Liability's proposal in dictum, but declined to adopt it, because the issue had not been briefed and because the case involved allegations only of plaintiff's pre-injury conduct. *Langlois*, 113 A.3d at 55.

Virginia adheres to the rule of avoidable consequences. Scott v. Cent. Va. Family Physicians, Inc., 2017 WL 2378164, at *3 (Va. June 1, 2017) ("A medical professional's discharge instruction is sufficient to create a burden to mitigate damages if it informs the patient to take steps for his own protection."); Monahan v. Obici Med. Mgmt. Servs., Inc., 628 S.E.2d 330, 338-339 (Va. 2006) ("A patient's duty to mitigate damages after receiving negligent medical care is a specific application of the general requirement that: 'One who is injured by the wrongful or negligent acts of another, whether as the result of a tort or of a breach of contract, is bound to exercise reasonable care and diligence to avoid loss or to minimize or lessen the resulting damage, and to the extent that his damages are the result of his active and unreasonable enhancement thereof or are due to his failure to exercise such care and diligence, he cannot recover.'"); Holley v. Pambianco, 613 S.E.2d 425, 428 (Va. 2005) ("the defense had the right to attempt to prove that the plaintiff had failed to mitigate his damages."); Va. Prac. Jury Instr. – Civ. § 23:13 (2019) ("It is the duty of one who claims to have been injured by the wrongful or negligent act of another to exercise reasonable care and diligence to avoid loss and to minimize or lessen the resulting damage, and to the extent that his or her damages are the result of his or her active and unreasonable enhancement thereof or are due to his or her failure to exercise such care and diligence, he or she cannot recover.").

Washington *has adopted the comparative-responsibility solution to avoidable consequences by statute, Rev. Code Wash. § 4.22.015, and the supreme court has belatedly noticed the statute and affirmed a jury instruction under it, but most court-of-appeals decisions apply*

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avoidable consequences, and the state's pattern jury instruction is a traditional avoidable-consequences instruction. The supreme-court case is Taylor v. Intuitive Surgical, Inc., 389 P.3d 517 (Wash. 2017). The jury instruction is Washington Pattern Instruction No. 33.01 (7th ed. 2019) ("A person who is liable for an injury to another is not liable for any damages arising after the original *[injury] [event]* that are proximately caused by failure of the injured person to exercise ordinary care to avoid or minimize such new or increased damage."). The official Comment notes the relevant provision of the Comparative Fault Act, but says that "[t]he WPI Committee has retained the common law formulation because the case law appears to follow this approach," citing two cases decided on the same day by the state's court of appeals. Cobb v. Snohomish Cnty., 935 P.2d 1384 (Wash. Ct. App. 1997); Cox v. Keg Rests. U.S., Inc., 935 P.2d 1377 (Wash. Ct. App. 1997). Both opinions state the rule of avoidable consequences. The jury was instructed under comparative fault in *Cox*, and under the traditional rule of avoidable consequences in *Cobb*.

Practice is inconsistent, but there are more reported cases applying the traditional rule of avoidable consequences than applying comparative responsibility to the issue, including cases since *Taylor*. For comparative-fault cases, see Jaeger v. Cleaver Constr., Inc., 201 P.3d 1028 (Wash. Ct. App. 2009) (jury apportioned 85 percent of fault to plaintiffs, based on combined assessment of contributory negligence and failure to mitigate); Fox v. Evans, 111 P.3d 267 (Wash. Ct. App. 2005) (affirming judgment on verdict in which jury attributed 22 percent of damages to plaintiff's failure to mitigate). No others have been found.

For avoidable-consequences cases, see Sager v. Mena, 2018 WL 5802522 (Wash. Ct. App. Nov. 5, 2018) (jury deducted $6250 for failure to mitigate damages); Ainsworth v. Progressive Cas. Ins. Co., 322 P.3d 6, 19 (Wash. Ct. App. 2014) ("The doctrine of mitigation of damages, sometimes referred to as the doctrine of avoidable consequences, prevents recovery for those damages the injured party could have avoided by reasonable efforts taken after the wrong was committed."); Jones v. City of Seattle, 2012 WL 540540, at *8 (Wash. Ct. App. Feb. 21, 2012) ("An injured party generally may not recover damages proximately caused by that person's unreasonable failure to mitigate."); TransAlta Centralia Generation LLC v. Sicklesteel Cranes, Inc., 142 P.3d 209, 212 (Wash. Ct. App. 2006) ("The doctrine of mitigation of damages, or avoidable consequences, prevents an injured party from recovering damages that the injured party could have avoided if it had taken reasonable efforts after the wrong was committed."); Marinkovich v. Polyclinic, 2004 WL 1598765 (Wash. Ct. App. July 19, 2004) (affirming jury instruction based on Pattern Instruction No. 33.01); O'Malley v. Grp. Health Co-op, 2001 WL 1515874, at *6 (Wash. Ct. App. Nov. 26, 2001) ("A tortfeasor is generally not liable for damages proximately caused by an injured party's unreasonable failure to avoid injury or mitigate damages."); Neighbors v. Kjorsvick, 2001 WL 287470, at *4 (Wash. Ct. App. Mar. 26, 2001) ("The burden of proving the feasibility of mitigating damages and the amount by which they could have been mitigated is upon the one who caused the injury."); Kimmet v. Bluemer, 2000 WL 1552685 (Wash. Ct. App. Oct. 19, 2000) (holding that point of Pattern Instruction No. 33.01 was sufficiently covered by other instructions); McAlpin v. Boeing Co., 1998 WL 1180033 (Wash. Ct. App. Dec. 27, 1998) (affirming verdict based on Pattern Jury Instruction No. 33.01).

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West Virginia adheres to the rule of avoidable consequences. Rubin Res., Inc. v. Morris, 787 S.E.2d 641, 647 (W. Va. 2016) ("The theoretical foundation for a plaintiff's duty to mitigate damages is that the defendant's negligence is not the proximate cause of any damages that could have been avoided had the plaintiff taken reasonable steps to mitigate."); CJH, Inc. v. Quadruple S, Farms, LLC, 2013 WL 2462192, at *3 (W. Va. June 7, 2013) ("[A] person whose property is endangered or injured [must] use reasonable care to mitigate damages; but such person is only required to protect himself from the injurious consequence of the wrongful act by the exercise of ordinary effort and care and moderate expense."); Cook v. Cook, 607 S.E.2d 459, 467 (W. Va. 2004) ("a party cannot recover damages flowing from consequences that the party could reasonably have avoided."). West Virginia Pattern Jury Instructions for Civil Cases (2017) do not address the issue.

Wisconsin adheres to the rule of avoidable consequences. Marciniak v. Lundborg, 450 N.W.2d 243, 247 (Wis. 1990) ("one injured by the tort of another is not entitled to recover damages for any harm that he could have avoided by the use of reasonable effort."); Lobermeier v. Gen. Tel. Co., 349 N.W.2d 466, 476 (Wis. 1984) ("To summarize Wisconsin law on mitigation of damages in tort actions: An injured party is obligated to exercise that care usually exercised by a person of ordinary intelligence and prudence, under the same or similar circumstances."); S.C. Johnson & Son, Inc. v. Morris, 779 N.W.2d 19, 28 (Wis. Ct. App. 2009) ("The law in Wisconsin is well settled that there is a duty to mitigate both breaches of contract and negligence causes of action."); Wis. Jury Instr. – Civ. 1731, available only in hard copy ("A person who has been damaged may not recover for losses that (he) (she) knows or should have known could have been reduced by reasonable efforts."). Instruction 1732 separately addresses the duty to mitigate in intentional-tort cases, tracking Restatement Second, Torts § 919 (AM. L. INST. 1979) and anticipating Subsection (b) of this Section.

Wyoming adheres to the rule of avoidable consequences. Vahai v. Gertsch, 455 P.3d 1218, 1232 (Wyo. 2020) (summarizing evidence in support of verdict, including evidence that plaintiff "did not mitigate her damages"); Stocki v. Nunn, 351 P.3d 911 (Wyo. 2015) (affirming judgment based on Pattern Jury Instruction 4.08); McWilliams v. Wilhelm, 893 P.2d 1147, 1148-1149 (Wyo. 1995) ("One who is injured by the wrongful act of another must exercise reasonable care and diligence to avoid loss or to minimize the resulting damages. The failure to take reasonable action to prevent an increase or extension of damages prevents any recovery for damages resulting from that failure."); Wyo. Pattern Jury Instr. – Civ. 4.08 (2015), https://www.wyomingbar.org/for-the-public/jury-instructions/ ("A person has the duty to take reasonable steps under the circumstances to reduce [his] [her] injuries and damages. Any damages resulting from a failure to take such reasonable steps cannot be recovered.").

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§ 8. Offsetting Benefits

If a defendant's tort harms the plaintiff and also causes the plaintiff to receive a benefit that the plaintiff would not have received but for the tort, the finder of fact should generally reduce the plaintiff's damages by the amount of the benefit. The court may refuse to set off such a benefit if it would be inequitable or inappropriate to do so. The court shall not set off any benefit that plaintiff is entitled to retain under § 9 on compensation from collateral sources.

Comment:

a. History and scope. This Section is substantially taken from Restatement Second, Torts § 920, which is now superseded. Details of how the rule is stated have been modified as explained in Comments *d*, *e*, and *f*. Many of the cases arise in a few recurring fact patterns. See Comments *h*, *i*, *j*, and *k*.

b. The rule and its limits. It might seem to be a clear corollary of the rightful-position standard in § 2 that an injured plaintiff should recover only the net damages—the harm suffered minus any benefit conferred. And very often the law proceeds in just this way. Whenever damages are calculated on a net basis—whenever losses are netted against savings or new revenues—the offsetting-benefits rule is implicitly at work. Very often, this netting seems such an obvious part of the damage calculation that it is unnecessary to invoke any rule. See Illustration 1. In practice, courts and litigants explicitly invoke the offsetting-benefits rule when the parties disagree about how to treat some less routine benefit. See Illustrations 2 and 3.

Illustrations:

1. Jose was injured in an automobile accident, and for six months, he was unable to work in his job as an ironworker on high-rise construction sites. But for three of those months, he found work as a janitor, at wages equal to about half his unionized construction wage. The wages from his janitor job should be set off against the lost wages from his construction job.

2. Nancy suffered from breast cancer, which metastasized to her bones. Her physician prescribed a drug to protect her bones from breaking. Pharmaceutical Co. manufactured and distributed the drug but did not warn physicians or patients that the drug could also cause jaw and dental problems. Nancy suffered no broken bones, but she did develop serious jaw and dental problems. The jury should be instructed to set off the

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benefits the drug conferred by protecting Nancy's bones against the harm it did by damaging her jaw and teeth.

3. Bob Buyer purchased an apartment building from Sue Seller. Matt Manager had managed the property for Seller, who was a passive and absentee investor, and Buyer dealt exclusively with Manager in negotiating the purchase. Shortly after the closing, Buyer discovered extensive water damage and dry rot inside the walls. Manager had not disclosed that he had been repairing repeated and extensive water leaks for years. Buyer sued Seller and Manager for fraud. The court in a bench trial awarded $200,000 against Manager, but exonerated Seller, finding that she had known nothing about the water problems.

Seller cross-claimed against Manager for $46,000 in attorneys' fees, the cost of defending against Buyer's lawsuit, to be awarded as damages under the collateral-litigation exception. See § 15. The court found that Manager's fraud had inflated the sales price by at least $200,000, and that Seller had received the benefit of this inflated price. This benefit should be set off against Seller's damages, with the result that Seller should recover nothing from Manager.

In Illustration 1, the offset is so routine and obvious that the court is unlikely even to mention the offsetting-benefits rule. But it is applying the offsetting-benefits rule. Cases like Illustration 2 recur, but less often; Illustration 3 would recur rarely, if at all. In nonroutine cases that generate disagreement, offsets for benefits conferred are subject to significant exceptions that are not easy to state.

c. Relationship to other rules. Many benefits conferred as a result of tort are not set off because they are subject to the collateral-source rule. In general, when a source independent of the defendant confers benefits on plaintiff in response to the tort and not in exchange for any consideration, as with providers of free medical care, or in performance of an obligation undertaken for consideration paid earlier, as with insurers, the benefits are subject to the rules of § 9. When a source independent of defendant confers benefits that plaintiff would not have received but for the tort and does so in exchange for fresh consideration, as with a new employer, the benefits are subject to the rule of this Section. A new employer, or any other third party that receives fresh consideration from the plaintiff, acts out of self interest. Such a party is not acting to aid or compensate the plaintiff, is not out of-pocket because of the tort, and so is not within the policy reasons for the collateral-source rule. Discussion of those reasons is deferred to § 9.

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As the example of alternate employment also illustrates, sometimes the available means by which plaintiff might mitigate damages is to take advantage of some alternate source of revenue, or some in-kind benefit, that would not have been available but for the tort. Of course plaintiff may not recover for damages actually avoided and thus never suffered. One may plausibly say that this result is an application or a corollary of the avoidable-consequences rule, or that the revenue or other benefit thus obtained must be set off against plaintiff's damages under the offsetting-benefits rule. Nothing of substance turns on the choice of explanation, but the offsetting-benefits explanation is the better one. The usual formulation of the avoidable-consequences rule does not explicitly address the case of damages actually avoided. See § 7. And in cases like Illustration 1, the avoidable-consequences rule may not require Jose to take the janitorial job at a wage so far below what he had been earning. The offsetting-benefits rule does explicitly address the receipt of this benefit, and it is irrelevant to the offsetting-benefits rule that the janitorial wage was so small. The more fundamental point is simply that these three rules—avoidable consequences, offsetting benefits, and collateral source—are deeply interconnected.

d. Special benefits. Earlier Restatements required that defendant confer "a special benefit" on the plaintiff. By "special benefit," these Restatements meant a benefit conferred on plaintiff individually and not as part of some group or class of which plaintiff was a part. The Restatement Second, Torts, illustrated this requirement with a hypothetical case in which pollution from defendant's factory destroyed plaintiff's vegetation, but the factory's presence increased the value of all property in the neighborhood, including plaintiff's. Such cases do not appear to arise with any frequency; few if any decisions turn on the special-benefit requirement. This Restatement omits the requirement. Any such cases that arise may be better addressed in terms of whether an offset would be inequitable or inappropriate.

e. Benefit to the interest that was harmed. Earlier Restatements also required that the benefit accrue to the same "interest" as the one that was harmed. The cases commonly recite the offsetting-benefits rule with this same-interest requirement included, because they quote or closely paraphrase the earlier Restatements. But the requirement would produce anomalous results if taken seriously, and it is often ignored. The largest single group of modern offsetting-benefits cases is the wrongful-birth and wrongful-pregnancy cases, which often set off emotional benefits against financial damages—results that are impossible to reconcile with the same-interest requirement. A minority of these decisions apply the same-interest requirement, adopting it from the Restatement

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Second, Torts, without giving any reasons for it. Cases applying the same-interest requirement in other contexts are scarce at best. That requirement is no longer the majority rule, if it ever was, and the policy reasons that supported it are far from clear. The same-interest requirement is omitted from this Restatement.

The illustrations of this requirement in Restatement Second all involved intentional torts—defamation and false imprisonment—and all posited that the torts generated publicity that enabled the plaintiff to earn large sums of money. These extra earnings were to be set off against damages if plaintiff claimed damages from lost income, but not if plaintiff claimed only emotional distress or damage to reputation. The offset against lost income is clearly sound; the rationale for refusing any offset against other damages is not apparent. The cases cited were marginally relevant at best.

One might reasonably believe that the benefit of money and the harm of emotional distress are not commensurable. But the law necessarily acts as if they were. The court will compensate emotional distress with money, and if plaintiff has already received a large sum of money as a result of the tort, that money is wholly commensurable with the money to be paid by defendant. Probably the windfall income should be taken into account, but if not, distinguishing among the plaintiff's various interests fails to explain why not.

If a court finds it inappropriate to set off a benefit that is too remote from, or too unrelated to, the damages suffered, it has ample authority to refuse an offset as the rule is formulated in this Section. Any policy concerns previously addressed by the same-interest requirement are better addressed through explicit consideration of the exception for inequitable or inappropriate applications of the rule. There is no need for a more formalistic rule about the plaintiff's various interests, which might correspond quite imperfectly to judgments about equity and appropriateness.

There is no same-interest requirement in the statement of the offsetting-benefits rule in Restatement Second, Contracts § 347 (expectancy damages) or § 349 (reliance damages). Neither the Contracts nor the Torts Restatements offer any reason for the difference in treatment.

f. Inequitable or inappropriate applications. Earlier Restatements said that benefits should not be set off if it would be inequitable do so. This Restatement expands the exception to applications that would be inequitable or inappropriate, out of concern that "inequitable" may not capture the full range of considerations.

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Either formulation is unavoidably vague. One concern is that plaintiffs should not in effect be charged for benefits that were thrust upon them, that they cannot readily convert to cash, and that they may not have wanted. See Illustration 4. This is the rule in the law of restitution and unjust enrichment, and the same policy applies to offsetting benefits in tort. But this policy cannot be stated as a rule. The child in the wrongful-birth and wrongful-pregnancy cases was thrust upon the parents by defendant's negligence, cannot be sold for cash, and was initially unwanted, but many courts have found other and ample reasons to require an offset.

Sometimes the benefit is something to which plaintiff was entitled anyway. See Illustration 5. Sometimes the benefit appears as a windfall that should more appropriately go to plaintiff than to defendant, especially if defendant was highly culpable. See Illustration 6. Sometimes the issue is analogous to scope of liability; the benefit is too remote from, or too tenuously connected to, defendant's tort. See Illustration 7. These examples are not exhaustive. Whether an offset would be inequitable or inappropriate is for the considered judgment of the court.

Illustrations:

4. Bar Association, an integrated bar with mandatory membership, required all its members to buy life insurance through its group plan. In a lawsuit brought by a class of members, the court held the program to be ultra vires and therefore illegal, and it awarded as damages the amount of premiums paid during the period covered by the class action. Bar Association argued that the class members had had insurance coverage during that time and that the value of this coverage was a benefit that should be set off against the damages. It would be inequitable to set off the value of the insurance against its cost, because class members might not have wanted the insurance. Moreover, class members who do want the insurance could opt out of the class; those class members who remain have indicated that they in fact do not want the insurance.

5. City built a new street. In the course of construction, City deprived Rick's lot of lateral support, damaging the lot and causing subsidence that damaged Rick's house. City argued that the new street and associated improvements had increased the value of Rick's lot, and that this benefit should be set off against the damages. It would be inappropriate to set off this benefit, because Rick is entitled to receive and benefit from the municipal services and improvements that City chooses to provide.

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6. Jim and Phil were each serving long terms in a state prison. Jim murdered Phil. In the ensuing criminal prosecution, the state sought to recover the costs of Phil's funeral and burial as restitution. Jim responded that he had saved the state the much larger cost of feeding and housing Phil for the rest of his sentence. It would be inappropriate to set off the cost of food and housing against the cost of funeral and burial.

7. Dick negligently rode his bicycle and knocked down Jane, a pedestrian. Jane suffered minor injuries and was hospitalized overnight, with the result that she missed her scheduled flight to New York. The flight she would have taken crashed on takeoff, killing everyone on board. Dick is not entitled to an offset for the value of having saved Jane's life. This benefit is only incidentally related to Dick's negligence.

In Illustration 7, a change of flights is not within the risk that made Dick's careless cycling negligent. If the collision caused Jane to postpone her trip, and if she died when the new flight crashed, Dick would not be liable for her death, and for the same reasons, he should not benefit when his negligence causes her to miss the fatal flight. Dick's negligent cycling had no effect on the risk of a plane crash and no effect on which plane crashed.

These symmetrical limits on the damages for which Dick is liable and the benefits for which he gets credit have been offered as a rationale for the same-interest requirement. But the same-interest requirement cannot explain these results. Jane's interest in avoiding physical injury, and her interest in avoiding fatal physical injury, are surely part of the same interest. Dick might have killed her in the cycling accident if, for example, she forcefully hit her head on the pavement when she fell, or if she were knocked to the ground in front of a moving car. And she might have survived a plane crash with nonfatal injuries. It is not any difference in the interests at stake, but the fortuity of which plane crashed, that makes the benefit too remote from the tort in the one case, and her death too remote from the tort in the other.

g. Causation. Defendant's tort may be part of a larger course of conduct, only part of which is tortious. Damages should not be reduced on account of benefits conferred by the nontortious portions of defendant's conduct, but only on account of benefits caused by the tort itself.

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Illustrations:

8. Same facts as Illustration 5, except that in addition, Rick shows that City could have, and should have, taken proper precautions to build the street without damaging his lot. The tort was not the source or cause of the benefit to Rick's property. Building the street conferred the benefit; building it negligently was the tort. This would be another rationale for denying any offset.

9. Donald Doctor diagnosed Patricia Patient with stage-three endometrial cancer. Doctor treated her with radiation and surgery, eliminated the cancer, and saved her life. But he neglected available means to protect surrounding tissues from the radiation, causing radiation burns, disfigurement, and permanent sexual and excretory dysfunction. Doctor is not entitled to an offset for the value of having saved Patient's life. The benefit resulted from the treatment, which should have been performed without negligence. The tort caused only the harms.

If plaintiff benefits from some new opportunity created or made available by defendant's tort, as in Illustration 1 on alternative employment, it is essential that plaintiff could not have taken advantage of that opportunity but for the tort. Causation is not shown if the opportunity was there all along but plaintiff was not motivated to take advantage of it until after the tort.

Illustration:

10. Rocky's development of his limestone quarry caused the local water table to drop, making Neighbors' artesian wells unreliable. To secure a reliable water supply, Neighbors sought and obtained annexation by nearby City. Annexation and the resulting city services increased the value of Neighbors' properties. This increase in value should not be set off against the damages from loss of the wells. If Neighbors had wanted to be annexed by City, they could have sought annexation at any time, whether or not Rocky committed a tort. This result may be explained by lack of causation, by the likelihood that this was a benefit Neighbors did not want, or both.

h. Wrongful birth and wrongful pregnancy. [We might move this to § 32 on wrongful birth and wrongful life when we get that far. Wherever we put it, we will cross-reference it in the other Section.] The wrongful-birth and wrongful-pregnancy cases are in some ways unique, with

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powerful and competing policy arguments influencing judgments about what offsets are appropriate and to what extent. But it would be a mistake to simply set these cases aside. As already noted, they are the largest single set of offsetting-benefits cases, courts cite them in other contexts, and they will inevitably influence how the offsetting-benefits rule is understood and applied.

Most courts that recognize claims for wrongful birth or wrongful pregnancy allow some form of offset for the value of having an additional child. Some courts hold that this benefit exceeds the damages against which it is set off as a matter of law; some courts leave the amount of the offset to the finder of fact. Some courts hold that an offset should be required, but that the benefit of the extra child is impossible to value, so that the net damages are too speculative to be recovered at all. Many courts hold it appropriate to set off the value of the extra child against the ordinary costs of childrearing, but not against the costs of pregnancy and delivery or against the extra costs of raising and caring for a disabled child.

In all these cases, a benefit that is mostly intangible and emotional is set off against damages that are mostly financial, in disregard of the supposed same-interest requirement. See Comment *e*. Some courts also allow the emotional benefit of parenting the extra child to be set off against the emotional distress of an unwanted pregnancy or of bearing and raising a seriously disabled child. Some of this latter group of courts have invoked the same-interest requirement, allowing an offset against emotional distress but not against the extra costs of child rearing. In all these variations, courts are making policy-informed judgments about what offsets are appropriate.

i. Remarriage. [We might leave this here, or move it to § 29 on wrongful death when we get that far. Wherever we put it, we will cross-reference it in the other Section.] Another recurring source of litigation is the remarriage of the plaintiff spouse in a wrongful-death case. Remarriage provides a new source of financial support, companionship, society, services, etc.—all the elements of damage in most states. Remarriage does not offset the plaintiff's grief and emotional distress at the loss of the first spouse, but in most states, grief and the negative emotions associated with bereavement are not compensable anyway. See § 29. Yet the great majority of states exclude evidence of the plaintiff's remarriage or instruct the jury not to consider remarriage as a basis for reducing the damages. The reasons most often given for this rule are unsatisfactory; less commonly cited reasons explain more and better. Whatever the reason offered, courts are in effect saying that they consider it inappropriate to set off this benefit against the damages.

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Perhaps the most common reason offered for disregarding plaintiff's remarriage is that plaintiff's damages are fixed at the moment the first spouse died and that later events are irrelevant. This is more a restatement of the rule than a rationale for the rule. Courts often consider events after the tort but before the trial when measuring damages, and plaintiffs more commonly receive offsetting benefits after the tort than simultaneously with the tort.

Some courts analogize the second spouse to a collateral source; some even say that the second spouse *is* a collateral source. And of course the common-law rule is that the benefits from collateral sources are not to be considered as an offset. See § 9. The analogy is helpfully suggestive, but the claim that the second spouse actually fits into the collateral-source rule is strained at best. The new spouse does not intend to compensate the plaintiff and does not act out of charity or in performance of a prior obligation; the new spouses enter into the second marriage for their mutual benefit. And the collateral-source rationale is vulnerable to increasingly widespread legislative limitations on the collateral-source rule.

Some courts say that the value of any benefit from the second spouse is too speculative to be considered. We cannot know what the second spouse's income would be over the long run, or even whether the marriage will last. These are genuine but familiar difficulties. These same courts project the deceased spouse's income into the future as far as a normal retirement age, and they assume that the first marriage would have lasted—even in cases where the first marriage was troubled.

Perhaps the strongest reason for the rule is the danger of testimony comparing the two spouses. Objective evidence that the second spouse has a lower income than the first might be an irritant to the second marriage; testimony that the second spouse is inferior or less satisfactory in any more subjective way could put intolerable strain on the second marriage. Merely asking the plaintiff to think about this comparison could be a danger to the second marriage. But without such testimony, jurors would have no basis to even speculate about the success of the second marriage, either financially or emotionally. They might have to assume that the two marriages were entirely equal, so that all losses from the death of the first spouse were entirely offset from the date of the second marriage forward. In the wrongful-birth and wrongful-pregnancy cases, many courts have worried about creating incentives for parents to testify that their extra child was more a burden than a benefit. Many fewer courts have made the parallel argument about testimony comparing spouses, but the danger is at least as great.

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Another reason that some courts mention is the risk of interfering with the very personal and intimate decision about whether and how soon to remarry. Elaborating this reason somewhat, the law supports and encourages marriage and should not penalize it. If evidence of remarriage were admissible, surviving spouses could evade the rule by delaying remarriage until after trial and all appeals were concluded. Defendants should not be given such a power to interfere with plaintiff's personal life. Delaying marriage might disrupt or even end the second relationship. Plaintiff and the potential second spouse could live together without marrying, or date steadily and exclusively without living together, raising difficult issues about whether defendant should be allowed to introduce evidence of such an informal relationship, and how informal it might be and still be admissible.

Another reason is rarely or never stated but surely plays some role in judicial intuitions. Grief and associated emotional distress is a very large part of the real loss of a wrongful death, whether or not a state is willing to compensate it. If remarriage were treated as eliminating the damages that are compensable, or as reducing those damages to just the losses suffered during the period between the death and the remarriage, the gap between what is legally compensable and the actual loss (including what is formally not compensable) would loom much larger. And the jury's ability to quietly compensate grief under other headings would be considerably reduced. Of course courts cannot say this; they cannot say that what they are unwilling to compensate explicitly should be compensated implicitly, or contemplate that juries might frequently or even systematically fail to follow their instructions. But it also seems likely that courts are well aware of the gap between theory and practice.

Tort reformers have enacted statutes in a few states providing that the jury should be told of the plaintiff's remarriage. Most of these statutes fail to specify how the jury is to use this information, and courts in two jurisdictions have held that the jury should be told *not* to use this information to reduce the damages.

Judges occasionally admit evidence of remarriage on some other issue. If plaintiff testifies to being emotionally devastated, unable to function, or unable to make new relationships, defendant may show that plaintiff was simultaneously engaged in a courtship that led to a new marriage. The judge must then instruct the jury on how it can and cannot use this evidence.

Some states tell the jury about the fact of remarriage in order to avoid difficulties associated with trying to conceal it from the jury. If plaintiff has changed her name on remarriage, some

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courts view it as a violation of judicial integrity to let her testify under her former name. States that admit the fact of remarriage for one of these purposes then instruct the jury not to consider this fact. Often this instruction is given twice, at the beginning of the trial and again at the end.

j. Medical treatment. Another recurring fact pattern is medical treatment without informed consent, as in Illustration 2. If the proposed treatment offers both benefits and risks, and the risks are not disclosed to the patient, the patient has not given informed consent. If the risks come to fruition, the patient can sue for the resulting damages. But if there was no comparably effective alternative treatment—if the benefits could not have been obtained without the risks—then defendant is entitled to an offset for the benefits conferred by the treatment. These cases differ from those in which the treatment itself is performed negligently, as in Illustration 9. If the risk is an unavoidable concomitant of the treatment no matter how carefully performed, and if there is no satisfactory alternative, then the benefits and the harms are inseparable. Both flow directly from the treatment and, going one step further, from the lack of informed consent.

k. Tax benefits. For the treatment of tax benefits, see § 12.

REPORTERS' NOTES

a. History and scope. The rule of offsetting benefits is stated in Restatement Second, Torts § 920 (AM. L. INST. 1979), which is now superseded, and Restatement of Torts § 920 (AM. L. INST. 1939). See DAN B. DOBBS & CAPRICE L. ROBERTS, LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION § 3.8 at 272-273 (3d ed. 2018); JAMES M. FISCHER, UNDERSTANDING REMEDIES §§ 14.0-14.1 at 134-137 (3d ed. 2014); 4 FOWLER V. HARPER, FLEMING JAMES, JR., & OSCAR S. GRAY, HARPER, JAMES AND GRAY ON TORTS § 25.4 at 613-616 (3d ed. 2007); DOUGLAS LAYCOCK & RICHARD L. HASEN, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 94-96 (5th ed. 2019); CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 40 at 146-148 (1935); Arial Porat & Eric Posner, *Offsetting Benefits*, 100 VA. L. REV. 1165 (2014).

b. The rule and its limits. Illustration 1 is based on any number of cases in which plaintiff finds alternate employment after defendant's tort causes loss of an earlier job. Illustration 2 is based on Guenther v. Novartis Pharm. Corp., 2013 WL 4456505 (M.D. Fla. Aug. 16, 2013). Illustration 3 is based on Heckert v. MacDonald, 256 Cal. Rptr. 369 (Ct. App. 1989).

c. Relationship to other rules. For the collateral-source rule, see § 9. For avoidable consequences and mitigation of damages, see § 7.

d. Special benefits. See Restatement Second, Torts § 920, Comment *c* and Illustration 7 (AM. L. INST. 1979). None of the three cases cited as the basis for this Illustration of the special-benefit requirement actually support it. In Wyatt v. Cent. Coal & Coke Co., 209 S.W. 585 (Mo. Ct. App. 1918), and in Mayrant v. City of Columbia, 64 S.E. 416 (S.C. 1909), the increase in property values was the result of general market conditions and not a benefit conferred by

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defendant. In Levi v. Schwartz, 95 A.2d 322 (Md. 1953), the city in building a new street deprived plaintiff's lot of lateral support. The court refused to set off the value of the street and other city improvements to the neighborhood, not on the ground that these benefits were common to the whole neighborhood, but on the ground that these were benefits ordinarily provided by cities and were benefits to which plaintiff was entitled. It may reasonably be said that plaintiff held this entitlement in common with other residents of the neighborhood, but that does not appear to have been the ground of decision.

The phrase "special benefit" appears frequently in routine recitations of the offsetting-benefits rule, which very often quote or closely paraphrase earlier Restatements. This makes it difficult to search for modern cases applying or refusing to apply the special-benefit requirement. With that important caveat, we note that we have encountered no case that squarely turns on the special-benefit requirement.

e. Benefit to the interest that was harmed. Cases that squarely turn on the same-interest requirement are also hard to find. Some of the wrongful-birth cases rely on the same-interest requirement to refuse an offset. A greater number simply ignore it. See Reporters' Note to Comment *h*; see also the ambiguous allusion in Brown v. Colegio de Abogados in Reporters' Note to Comment *f*.

Professor Marks has defended the same-interest requirement as parallel to scope-of-liability rules. John Marks, *Symmetrical Use of Universal Damages Principles—Such as the Principles Underlying the Doctrine of Proximate Cause—to Distinguish Breach-Induced Benefits That Offset Liability from Those That Do Not*, 55 WAYNE L. REV. 1387, 1411-1414 (2009). Defendants are liable only for those damages that are within the risk that makes their conduct negligent. Restatement Third, Torts: Liability for Physical and Emotional Harm §§ 29-30 (AM. L. INST. 2010). Perhaps they should be credited with only those offsetting benefits that fall within that same risk.

But the same-interest requirement as formulated in earlier Restatements went well beyond any such argument. Just because plaintiff's financial interest, say, was not harmed in a particular case does not show that this interest was not at risk or not within the risk that made defendant's conduct negligent or worse. The same negligent conduct might easily have done financial harm if circumstances had been only slightly different—if both plaintiff and defendant had not been lucky. In the intentional-tort cases used as Illustrations in Restatement Second, Torts, the plaintiff might easily have lost income, and if plaintiff sued for that lost income, the later lecture fees and the like would then have become an offset.

f. Inequitable or inappropriate applications. Illustration 4 is based on Brown v. Colegio de Abogados, 613 F.3d 44, 53 (1st Cir. 2010) ("The ordinary rule in tort law is that damages are not reduced by conferring undesired benefits of some other species."). The cryptic reference to "some other species" may be an allusion to the same-interest requirement. Or the court might have meant only that the cash paid in premiums was a different "species" from the more abstract value of insurance coverage during a period in which no claim arose. Both the cost of premiums and the value of insurance would accrue to the plaintiffs' financial interest.

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In Marciniak v. Lundborg, 450 N.W.2d 243 (Wis. 1990), the court allowed recovery of the full cost of rearing a healthy child in a wrongful-pregnancy case. The court refused to set off the benefits of parenting the child, on the ground that an offset would be inequitable because the parents had not wanted the benefits. For the rule generally precluding liability in restitution for benefits that might not have been wanted, see Restatement Third, Restitution and Unjust Enrichment § 2 (AM. L. INST. 2011).

Illustration 5 is based on Levi v. Schwartz, 95 A.2d 322 (Md. 1953), and on the rationale the court invoked in that case. The Restatement Second used this case to illustrate the special-benefit requirement. See Reporters' Note to Comment *d*.

Illustration 6 is based on United States v. House, 808 F.2d 508 (7th Cir. 1986). Note that "restitution," as the word is used in the criminal law, is really compensation, and is no part of "restitution" as the word is used elsewhere in this Restatement or in the Restatement Third, Restitution and Unjust Enrichment.

Illustration 7 is based on Restatement Second, Torts § 920, Illustration 8 (AM. L. INST. 1979). Professor Marks's proposed symmetry principle (see Reporters' Note to Comment *e*) casts further light on Illustration 7. But as noted in the Comment, the same-interest requirement cannot explain this Illustration.

g. Causation. Illustration 8 is based on Levi v. Schwartz, 95 A.2d 322 (Md. 1953), which suggests the facts but does not discuss causation.

Illustration 9 is based on Scott v. Brooklyn Hosp., 480 N.Y.S.2d 270 (Sup. Ct. 1984). The explicit rationale of this case would seem to be an unstated assumption in much medical-malpractice litigation. The benefits of the treatment should not be offset against the harm from what went wrong if defendant should have avoided what went wrong.

Illustration 10 is based on Cline v. Am. Aggregates Corp., 582 N.E.2d 1 (Ohio Ct. App. 1989).

In Gorski v. Smith, 812 A.2d 683 (Pa. Super. Ct. 2002), defendant lawyer represented plaintiff real-estate developers in the sale of some of their land. The sales contract warranted that the city had approved the subdivision of the land and that it was ready for immediate development. In fact, the subdivision lacked a sewer permit, and the city was unwilling to issue one because it lacked capacity to serve a new subdivision. The deal fell through, a jury found the developers liable to the buyers for breach of warranty, and a second jury found the lawyer liable to the developers for legal malpractice. While this litigation was going on, the city expanded its sewer capacity. It belatedly issued the permit, and the developers sold the land to a new buyer at a higher price than that in the original contract. The court held that this increase in the land's value should not be set off against the damages, because the legal malpractice did not cause the increase in value. Rather, the city caused the increase in value by expanding its sewer system and issuing the permit. It is clearly true that the legal malpractice did not cause land to rise in value. But if the legal malpractice were the reason the first deal fell through, then but for the malpractice, the developers would never have received the higher price. The court did not discuss this possibility. But it seems likely that the land could not have been sold at all until the sewer problems were

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resolved, and that when those problems finally were resolved, the value would go up and the developers would reap the benefit—whether or not there had been any legal malpractice or a failed deal in the meantime.

h. Wrongful birth and wrongful pregnancy. As of September 2020, the Institute's annotations collect 89 cases that cite the offsetting-benefits Section of Restatement Second, Torts. Fifty-nine of these cases, or about two-thirds, are claims for wrongful life, wrongful birth, or wrongful pregnancy. For other collections of cases, see Annotation, 89 A.L.R.4th 632 (1991 & Supp.); Annotation, 74 A.L.R.4th 798 (1989 & Supp.); Annotation, 83 A.L.R.3d 15 (1978 & Supp.). For analysis, see 2 DAN B. DOBBS, PAUL T. HAYDEN, & ELLEN M. BUBLICK, THE LAW OF TORTS § 371 at 496-498 (2d ed. 2011); DOBBS & ROBERTS, REMEDIES § 8.2 at 695-698. For other damage issues in these cases, see §§ 32-33 of this Restatement.

For cases allowing an offset for the benefit of the extra child in an amount to be determined by the factfinder, see, e.g., Tomlinson v. Metro Pediatrics, LLC, 412 P.3d 133 (Or. 2018); Burke v. Rivo, 551 N.E.2d 1 (Mass. 1990); Blake v. Cruz, 698 P.2d 315 (Idaho 1984); Jones v. Malinowski, 473 A.2d 429 (Md. 1984); Univ. of Ariz. Health Scis. Ctr. v. Superior Court, 667 P.2d 1294 (Ariz. 1983); Harbeson v. Parke-Davis, Inc., 656 P.2d 483 (Wash. 1983); Ochs v. Borrelli, 445 A.2d 883 (Conn. 1982); Sherlock v. Stillwater Clinic, 260 N.W.2d 169 (Minn. 1977). Few of these opinions discuss the same-interest requirement. In *University of Arizona*, the dissenter relied heavily on the same-interest requirement; the majority did not reply.

For cases holding as a matter of law that the benefit of a healthy child exceeds the costs of child rearing, see, e.g., Chaffee v. Seslar, 786 N.E.2d 705 (Ind. 2003); Emerson v. Magendantz, 689 A.2d 409 (R.I. 1997); Fassoulas v. Ramey, 450 So. 2d 822 (Fla. 1984); Nanke v. Napier, 346 N.W.2d 520 (Iowa 1984); Cockrum v. Baumgartner, 447 N.E.2d 385 (Ill. 1983); Schork v. Huber, 648 S.W.2d 861 (Ky. 1983); Boone v. Mullendore, 416 So. 2d 718 (Ala. 1982); Mason v. Western Pennsylvania Hospital, 453 A.2d 974 (Pa. 1982); Beardsley v. Wierdsma, 650 P.2d 288 (Wyo. 1982); Coleman v. Garrison, 349 A.2d 8 (Del. 1975). Most of these cases offered multiple rationales for refusing recovery; the offsetting benefit was only one.

For cases refusing recovery for child-rearing expenses principally on the ground that the court would have to set off the benefits of the extra child but those benefits are impossible to value with reasonable certainty, see, e.g., Hitzemann v. Adam, 518 N.W.2d 102 (Neb. 1994); Girdley v. Coats, 825 S.W.2d 295 (Mo. 1992); Johnson v. Univ. Hosps., 540 N.E.2d 1370 (Ohio 1989); Jackson v. Bumgardner, 347 S.E.2d 743 (N.C. 1986); Miller v. Johnson, 343 S.E.2d 301 (Va. 1986); McKernan v. Aasheim, 687 P.2d 850 (Wash. 1984). *McKernan* involved the birth of a healthy child; when the child is born disabled, Washington does not consider the offsetting benefit too speculative to value. *Harbeson*, 656 P.2d 483.

Marciniak v. Lundborg, 450 N.W.2d 243 (Wis. 1990), allowed recovery of the expense of raising a healthy child, rejecting any offset on the explicit ground that it would be inequitable, because the parents had not wanted the benefit.

Some courts have relied on the same-interest requirement, or at least invoked it, drawing a variety of conclusions from its application. For cases of this sort that allow recovery of child-

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rearing costs, see *Tomlinson*, 412 P.3d 133 (setting off emotional benefits against emotional distress, but not against child-rearing costs); Lovelace Med. Ctr. v. Mendez, 805 P.2d 603 (N.M. 1991) (refusing to set off emotional benefits against financial costs of raising a healthy child, on the ground that these were different interests, and refusing recovery for emotional distress to avoid trial testimony on the emotional harms and benefits of the extra child); *Blake*, 698 P.2d 315 (setting off emotional benefits against emotional distress, but not against child-rearing costs); *Harbeson*, 656 P.2d 483 (same); Phillips v. United States, 575 F. Supp. 1309 (D.S.C. 1983) (predicting South Carolina law) (same). The Georgia court relied in part on the same-interest requirement to conclude that the emotional benefits of parenting could not be set off against the financial costs, and therefore, that child-rearing costs should not be recoverable at all. Fulton-DeKalb Hosp. Auth. v. Graves, 314 S.E.2d 653 (Ga. 1984).

For courts arguably invoking the same-interest requirement, see Lininger v. Eisenbaum, 764 P.2d 1202 (Colo. 1988) (rejecting an offset with the same language, but allowing recovery for the extra expense of raising a blind child); Plowman v. Fort Madison Cmty. Hosp., 896 N.W.2d 393 (Iowa 2017) (rejecting an offset because the "pleasure" of parenthood was "sufficiently unrelated" to the extra financial costs of raising a disabled child (quoting *Lininger*), and leaving measure of damages to be considered on remand). The "sufficiently unrelated" language in *Plowman* and *Lininger* appears to have been an allusion to, or a modest variation on, the same-interest requirement, although that requirement was not explicitly invoked in either case.

Some courts have noted that setting off the benefits of an additional child against the costs of child rearing does not actually apply the offsetting-benefits rule as formulated in the Restatement Second, Torts, because it does not comply with the same-interest requirement. *Girdley*, 825 S.W.2d 295; *Marciniak*, 450 N.W.2d 243; *Johnson*, 540 N.E.2d 1370; Morris v. Sanchez, 746 P.2d 184 (Okla. 1987); Smith v. Gore, 728 S.W.2d 738 (Tenn. 1987). None of these courts appeared to adopt, endorse, or apply the same-interest requirement. These comments came in the course of surveying the field, or in criticizing the dissent as inconsistent with one of the sources it principally relied on.

i. Remarriage. Remarriage cases are collected in Annotation, 88 A.L.R.3d 926 (1978 & Supp.), and in Annotation, 87 A.L.R.2d 252 (1963 & Supp.). For cases considering the issue as a matter of first impression, and therefore discussing it at greater length, see, e.g., Taylor v. S. Pac. Transp. Co., 637 P.2d 726 (Ariz. 1981); Groesbeck v. Napier, 275 N.W.2d 388 (Iowa 1979); Kimery v. Pub. Servs. Co., 562 P.2d 858 (Okla. 1977); Dubil v. Labate, 245 A.2d 177 (N.J. 1968); Bunda v. Hardwick, 138 N.W.2d 305 (Mich. 1965) (overruling earlier cases).

For the rationale that damages are fixed at the moment of the first spouse's death, see, e.g., Kuhnke v. Fisher, 683 P.2d 916 (Mont. 1984); Pape v. Kan. Power & Light Co., 647 P.2d 320 (Kan. 1982); *Taylor*, 637 P.2d 726; Addair v. Bryant, 284 S.E.2d 374 (W. Va. 1981); Wood v. Detroit Edison Co., 294 N.W.2d 571 (Mich. 1980); *Groesbeck*, 275 N.W.2d 388; Wilson v. Piper Aircraft Corp., 577 P.2d 1322 (Or. 1978); *Kimery*, 562 P.2d 858; Davis v. Liesenfeld, 240 N.W.2d 548 (Minn. 1976); Wiesel v. Cicerone, 261 A.2d 889 (R.I. 1970); McFarland v. Ill. Cent. R.R. Co., 127 So. 2d 183 (La. 1961).

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For cases invoking, or analogizing to, the collateral-source rule, see, e.g., Kenney v. Liston, 760 S.E.2d 434 (W. Va. 2014) (dictum); *Pape*, 647 P.2d 320; *Taylor*, 637 P.2d 726; *Addair*, 284 S.E.2d 374; *Wood*, 294 N.W.2d 571; *Groesbeck*, 275 N.W.2d 388; *Kimery*, 562 P.2d 858; *Wiesel*, 261 A.2d 889; *Dubil*, 245 A.2d 177; *Bunda*, 138 N.W.2d 305.

For the rationale that the benefits of remarriage are speculative, see, e.g., Wooten v. Amspacher, 307 S.E.2d 232 (S.C. 1983); *Pape*, 647 P.2d 320; *Addair*, 284 S.E.2d 374; *Wood*, 294 N.W.2d 571; *Groesbeck*, 275 N.W.2d 388; *Kimery*, 562 P.2d 858; *Davis*, 240 N.W.2d 548; Reynolds v. Willis, 209 A.2d 760 (Del. 1965) (arguing that if evidence of remarriage were admitted, evidence of possible remarriage must also be admitted, and that the benefits of an unidentified future spouse would be totally speculative).

For the dangers of testimony comparing the two spouses, see *Wood*, 294 N.W.2d 571.

For the danger of discouraging remarriage, see *Taylor*, 637 P.2d 726; *Davis*, 240 N.W.2d 548.

Connecticut excludes evidence of remarriage because it conceives the claim only as a survival action—as a claim belonging to the decedent to recover damages suffered by the decedent. Sanderson v. Steve Snyder Enters., Inc., 491 A.2d 389 (Conn. 1985). The remarriage of the surviving spouse has no effect on the damages to the decedent.

For cases refusing any offset simply on the basis of precedent, see, e.g., Call v. Heard, 925 S.W.2d 840 (Mo. 1996); Fudge v. City of Kansas City, 720 P.2d 1093 (Kan. 1986); Hardware State Bank v. Cotner, 302 N.E.2d 257 (Ill. 1973).

For cases holding that the jury should be informed of plaintiff's remarriage and told not to consider it, see, e.g., Watson v. Fishbach, 301 N.E.2d 503 (Ill. 1973) (collecting cases on both sides of the issue); *Wood*, 294 N.W.2d 571; *Dubil*, 245 A.2d 177. For a court willing to go to some lengths to conceal remarriage from the jury, for fear that the jury would misuse the information, see *Wiesel*, 261 A.2d 889. This court thought that a cautionary instruction would be inadequate, that the integrity of the judicial process is not threatened by withholding irrelevant information, and that to introduce the fact of remarriage would be "putting a premium on form and overlooking substance." Id. at 895.

For the minority rule, allowing an offset for the benefits of remarriage, see Campbell v. Schmidt, 195 So. 2d 87 (Miss. 1967); Jensen v. Heritage Mut. Ins. Co., 127 N.W.2d 228 (Wis. 1964). Each court resolved the issue summarily, giving little in the way of reasons. The Wisconsin court said that it was "not impressed" with the argument that damages must be measured as of the date of death. Id. at 234.

In addition to Mississippi and Wisconsin, there is a line of appellate-court cases in Illinois that allow the benefits of remarriage to be set off against loss of consortium but not against loss of financial support. This line originated in Carter v. Chi. & Ill. Midland Ry. Co., 474 N.E.2d 458 (Ill. App. Ct. 1985). The court reasoned that the Illinois Supreme Court did not authorize damages for loss of consortium in a wrongful-death case until after its decisions in *Watson* and *Hardware* holding that damages should not be reduced on account of plaintiff's remarriage. The appellate court therefore limited the supreme court's rule on remarriage to the claim for loss of financial

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support. It offered no reasons; it seemed to treat this conclusion as the obvious meaning of the supreme-court cases. And the supreme court has not reviewed the issue.

A year after holding in *Wood* that evidence of remarriage is not admissible, the Michigan Supreme Court allowed defendants to ask plaintiff's expert if one of his assumptions was that plaintiff would not remarry. Schaible v. Myers, 311 N.W.2d 297 (Mich. 1981). Defendants mentioned that question and answer in closing argument, although they did not expressly urge the jury to reduce damages because of the possibility of remarriage. Defendants had posed this question as one in a series about the expert's assumptions, and the court held that defendants were entitled to test those assumptions.

Some jurisdictions have enacted statutes making evidence of the plaintiff's remarriage admissible. FLA. STAT. ANN. § 768.21(6)(c); OHIO REV. CODE ANN. § 2125.02(A)(3)(b)(iii); TEX. CIV. PRAC. & REM. CODE ANN. § 71.005; V.I. CODE ANN. tit. 5, § 76(e)(6)(c). The Florida and Virgin Islands statutes have been interpreted to admit the evidence only for the purpose of disclosing the fact to the jury, but not for the purpose of reducing the damages. Smyer v. Gaines, 332 So. 2d 655 (Fla. Dist. Ct. App. 1976); Solis v. Virgin Islands Tel. Corp., 2016 WL 3552189 (D.V.I. June 23, 2016). Neither statute has been interpreted by the highest court in the jurisdiction. The Ohio statute explicitly provides that the fact of remarriage can be considered in determining damages. The Ohio court rejected constitutional attacks on the statute in Peña v. Ne. Ohio Emergency Affiliates, Inc., 670 N.E.2d 268 (Ohio 1995).

For cases allowing evidence of a quick remarriage to rebut claims of severe emotional distress, see, e.g., In re Air Crash Disaster, 767 F.2d 1151 (5th Cir. 1985); Keesee v. Gen. Refuse Serv., Inc., 604 S.E.2d 449 (W. Va. 2004).

j. Medical treatment. See Guenther v. Novartis Pharm. Corp., 2013 WL 4456505 (M.D. Fla. Aug. 16, 2013) (setting off benefits of cancer treatment against damage to teeth and jaw); Gracia v. Meiselman, 531 A.2d 1373 (N.J. Super. Ct. Law Div. 1987) (awarding no damages, on the ground that the plaintiff's benefits from oral surgery exceeded the harm of nerve damage with resulting permanent numbness in a small area of his chin and lower lip). For medical malpractice more generally, see Restatement Third, Torts: Concluding Provisions §§ __-__.

k. Tax benefits. See § 12.

§ 9. Compensation or Benefits from Collateral Sources

(a) Except as otherwise provided by statute, the finder of fact shall not reduce the damages awarded to a plaintiff on account of any payment or benefit, in cash or otherwise, that a collateral source pays or provides to or on behalf of the plaintiff either

(1) gratuitously, or

(2) in performance of an obligation undertaken for consideration paid before plaintiff discovered the injuries or losses, or

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(3) under the terms of an insurance policy, whenever purchased, or

(4) under the terms of a social-welfare program sponsored by a government or nonprofit entity.

(b) A collateral source is a person or entity that is either

(1) independent of any defendant, or

(2) a defendant or affiliated entity acting in a different capacity from the one in which defendant committed the tort and paying from a fund to which plaintiff contributed, or to which another person contributed on plaintiff's behalf.

Comment:

a. History and scope. This Section is derived from Restatement Second, Torts § 920A, which is now superseded by this Section and by § 3. The definition of collateral sources and the specification of what kinds of payments are subject to the rule track traditional understandings that have often been left implicit. The common-law rule restated here has been limited or modified by statute in a substantial majority of the states. These statutes vary greatly in their content and in the extent to which they displace the common-law rule.

b. The debate over the common-law rule. The common-law collateral-source rule restated here provides, where it is still the law, that compensation, assistance, free services, and the like that plaintiff receives from sources other than defendant do not reduce the damages owed by defendant. The rule further provides that evidence of such benefits is generally not admissible. Critics charged that the collateral-source rule allowed double recoveries; plaintiff could recover medical expenses or lost wages, say, first from a medical or disability insurer and then again from a tortfeasor. The rule's defenders responded in three principal ways.

First, collateral sources, and especially first-party insurers, were often entitled to subrogation—a right to be reimbursed out of the tort recovery. When subrogation worked as it should, there was no double recovery. Plaintiff recovered once; plaintiff's first-party insurers recovered once; and the loss was placed on the tortfeasor, where it belonged. But some academic critics said that it was wasteful to litigate whether defendant's liability insurer should reimburse plaintiff's medical or disability insurer; either insurer could spread the loss. And for the defense-side interests that set out to change tort law, the goal was to reduce the liability of tortfeasors—a goal that would not be achieved if first-party insurers retained subrogation rights.

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Second, even when subrogation was not sought, the rule's defenders thought it better that plaintiff get a double recovery than that defendant be absolved of liability. In the case of gratuitous benefits, the donors intended to benefit the plaintiff, not defendant. In the case of insurance benefits, plaintiffs had first-party insurance only because they had paid insurance premiums, often for many years. Very often, plaintiffs had paid into social-welfare plans or programs in similar fashion. They were entitled to the benefit of their bargain and of their thrift and foresight; neither insurance benefits nor social-welfare benefits should go to defendant. From a law-and-economics perspective, potential tortfeasors would have inadequate incentives to take reasonable care if they could ignore all losses covered by first-party insurance.

Evidence of medical expenses, lost income, and other insured losses was also thought necessary to help show the seriousness of the injury. With evidence of no or minimal medical expenses and time off work, how badly hurt could plaintiff be? But this problem could be solved by admitting evidence of both the loss and the collateral-source reimbursement.

Third, the apparent double recovery often merely offset losses that went uncompensated, or undercompensated, elsewhere in the litigation process. Personal-injury plaintiffs rarely recover their attorneys' fees, some damages are hard to quantify and prove, and most cases settle for less than plaintiff's full damages. Normally, the legal system does not deliberately overcompensate in one area to offset perceived undercompensation in another. But this third rationale has been persuasive to many, and it also operates as a backstop to the first two sets of arguments—as a response to the charge that those arguments lead to double recoveries in at least some cases.

One or more of these arguments generally prevailed in the courts. The rule was well settled and reasonably uniform across the country, at least in its broad outlines. This Section restates the common-law rule because these arguments, taken in combination, are persuasive and because, except as modified by statute, it is the overwhelming majority rule. This Section then briefly surveys the statutory limits and modifications, which are decidedly nonuniform.

c. The kinds of payments that qualify. Both collateral sources and many of the sources of offsetting benefits under § 8 are third parties that pay money to plaintiff or for plaintiff's benefit—money that, but for the tort, plaintiff would never have received. The courts have long had a clear intuitive sense, only occasionally articulated, of what counts as a collateral source and what counts as an offsetting benefit. In the collateral-source cases, the payments are generally made gratuitously or in fulfillment of a promise made in exchange for consideration paid earlier; in the

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offsetting-benefit cases, the payments are made for fresh consideration. So plaintiff's insurers, an employer's sick-pay plan, family members who chip in to pay medical bills, a government agency that pays emergency subsistence, disability, or Medicaid benefits, or a doctor or hospital that provides free medical care—all are acting to help plaintiff and to compensate or ameliorate plaintiff's injuries. All these sources are out of pocket because of defendant's tort and plausibly have at least a moral claim to reimbursement—whether or not they pursue a subrogation claim or could do so successfully under the particular rules of the relevant jurisdiction. They are collateral sources.

By contrast, if plaintiff loses one job and finds another, or suffers a tortious interference with contract and later makes a substitute contract with a third party, the new job and the new contract are offsetting benefits. The new employer and the new contractual partner are acting at arm's length and in their own self-interest. They receive fresh consideration, suffer no loss, and have no plausible claim to reimbursement. They are not a collateral source of compensation.

Subsections (a)(1) and (a)(2) state this traditional understanding. Plaintiffs may have paid for benefits in cash, as with insurance premiums or social-security taxes, or with their labor, as with employer-sponsored fringe benefits. Subsections (a)(3) and (a)(4) address modest variations. Insurance policies are typically issued one year at a time and are renewable, so that plaintiff may pay new premiums for continued coverage after the injury occurs. The same issue may arise in social-welfare programs with insurance-like features; plaintiff may continue to pay into the program to maintain continued eligibility for benefits. In either case, plaintiff benefits from a renewal or continuation of a policy or program for which consideration was paid before the tort. If plaintiff acquires a new insurance policy that covers preexisting conditions, the collateral-source rule still applies. For prepaid benefits and insurance coverage, see Illustrations 1, 2, 3, and 6. For gratuitous benefits, see Illustrations 4, 5, and 6.

Social-welfare programs providing collateral-source payments are most commonly operated by governments, and sometimes by labor unions or fraternal-benefit societies. In the case of some unusual source of payment that fits the policies of the collateral-source rule but does not readily fit into one of the four categories listed in Subsection (a), courts of course have discretion to apply the rule as seems appropriate.

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Illustrations:

1. Jenny was injured in an automobile accident and incurred $6200 in medical bills. She had paid for medical insurance before the accident, and most of the bills were paid by her medical insurer. Under the common-law rule, the fact of this insurance is not admissible in evidence, and the amount of these insurance payments does not reduce defendant's liability.

2. Negligent treatment at defendant Hospital left Mary disabled, forcing her to retire. Mary received an early-retirement pension from her former employer. Because the employer undertook the obligation to pay this pension in exchange for Mary's former service to the employer, it is a collateral source of compensation. Under the common-law rule, the fact of the pension is not admissible in evidence, and the amount of the pension does not reduce Hospital's liability for Mary's lost earning capacity.

3. Larry had part of his salary withheld each month and paid into an Executive Insurance Plan sponsored by his employer. The employer also contributed to the Plan. When Larry died as a result of Surgeon's medical malpractice, Larry's widow collected $722,000 from the Executive Insurance Plan. Because Larry paid for this benefit through his withheld salary and through his service to his employer, it is a collateral source of compensation. Under the common-law rule, the fact of the payment is not admissible in evidence, and the amount of the payment does not reduce Surgeon's liability to Larry's survivors.

4. Nancy suffered brain damage in an automobile accident caused by defendant's negligence. She suffered from confusion and memory loss that limited her ability to care for herself. Her husband John stayed home from work for six weeks to care for her, and continued to take time off thereafter to take her to medical appointments and to assist her in other ways made necessary by the injury. John is a collateral source of care, and under the common-law rule, Nancy can recover the reasonable market value of that care. The case is treated as though Nancy had paid for John's care and John had reimbursed her. The fact of the care must be admitted in evidence to show that it was reasonable and so that the factfinder can determine its market value.

5. Devante was injured in an automobile accident and, for six months, was unable to work at his job as a drywall hanger and plasterer. His employer did not have a sick-pay

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or disability plan, but nevertheless, it voluntarily continued to pay Devante's full salary for the entire six months. Because its payments were gratuitous, the employer is a collateral source. The result is the same if the court understands these payments as having been paid in consideration of Devante's prior service. Under the common-law rule, the fact of these payments is not admissible in evidence, and the amount of these payments does not reduce defendant's liability for Devante's lost earning capacity.

6. Contractor negligently started a fire that destroyed historic Synagogue. Synagogue was rebuilt with the proceeds of fire insurance, which were insufficient, plus $20 million in charitable donations. The fire insurance is a collateral source because it is insurance and because Synagogue had paid for coverage prior to the fire. The charitable donors are collateral sources because they contributed gratuitously. Under the common-law rule, the fact of these payments is not admissible in evidence, and the amount of these payments does not reduce Contractor's liability.

d. Direct payments and benefits from defendant or on defendant's behalf. If a defendant, or someone acting on behalf of a defendant, makes a payment to or on behalf of plaintiff, in full or partial compensation for plaintiff's losses, that payment must be credited against defendant's liability. Such payments are sometimes called direct payments, or payments from direct sources.

Restatement Second, Torts § 920A(1) stated a black-letter rule that such payments are to be credited against defendants' liability. This Restatement does not change that rule. It is omitted from the black letter because the result seems obvious and because it is the clear negative implication of Subsection (b). It is also included within the broader statement of the one-satisfaction rule in § 3. Section 920A(1) also said that defendant is entitled to credit for payments by a person potentially subject to liability for the same tort, whether or not that person is ultimately named as a defendant. Applications of this rule can be more complex. It is not addressed here, because most of its potential applications are addressed in Restatement Third, Torts: Apportionment of Liability §§ 16, 24-25.

Illustrations:

7. Lonnie was driving his tractor on a state highway when Freightco's vehicle hit him from behind, injuring Lonnie and destroying the tractor. In a series of payments over the course of a year, Freightco's liability insurer paid Lonnie $110,000 as he documented

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particular items of damage—$63,000 for lost income from his chicken farm, $19,000 for the tractor, $18,000 for medical expenses, and $10,000 for a hired hand to replace Lonnie's own labor. Settlement negotiations ultimately failed and the negligence case against Freightco went to trial. The jury found for Lonnie and awarded $178,000—$78,000 for lost income, property damage, and medical expenses, and $100,000 for pain and suffering.

Freightco's liability insurer is a direct source of payment, because it acted on Freightco's behalf and so is not independent for purposes of the rule of this Section. Freightco is therefore entitled to credit its insurer's payments against the lost income, property damage, and medical expenses. Because there was no understanding or intention that the insurer was paying for Lonnie's pain and suffering, Freightco is not entitled to credit the remaining $32,000 against the award for pain and suffering.

8. Paula was injured in an automobile accident with Nick. Nick's insurer paid $7500 of Paula's medical expenses under the no-fault medical-pay clause of his auto-insurance policy. At trial, Paula established that Nick was liable, that she had incurred $26,000 in medical expenses, and that she had experienced substantial pain and suffering. The jury awarded $100,000 in a general verdict. If the court is willing to assume that this verdict must include at least $7500 in medical expenses, then the $7500 previously paid for medical expenses must be credited against this verdict. If the court concludes that it has no way to know what damages the jury compensated, then the payment cannot be credited. It was defendant's responsibility to request a verdict form that listed medical expenses separately from the other damages.

Comment *j* addresses the question whether payments must be categorized and matched with corresponding items of damage, as the court held in the case on which Illustration 7 is based, and as the court assumed in the case on which Illustration 8 is based.

e. Defendants acting in multiple capacities. Courts typically say that a collateral source is one that is independent of any defendant. In most cases, it is readily apparent whether the payment came from a truly independent source or directly from or on behalf of a defendant.

But the usual formulation about independent sources can be misleading when a defendant commits a tort in one capacity and pays benefits in another. Then courts explain that literal independence is not determinative, but that what matters is the purpose, nature, or character of the

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payment. Such issues most commonly arise with respect to torts by governments and sometimes with respect to torts by employers.

f. Governments. Under the Federal Tort Claims Act, the United States is liable for its torts under the law of the state where the tortious act or omission occurred. The United States also administers a vast array of programs that may provide or pay for medical care, disability benefits, pension benefits, or other social-welfare benefits to injured plaintiffs. These programs work in a great variety of ways and are funded in a variety of ways, and each variation must be assessed under the collateral-source rule or what is left of it in each of the 50 states. Generalizations are therefore difficult and are necessarily subject to exceptions.

Subject to that important caveat, federal benefits from an earmarked fund to which plaintiff has specifically contributed are generally treated as independent of the United States and subject to the common-law collateral-source rule where it prevails. Benefits funded from general tax revenues are generally treated as direct payments by the United States and credited against its tort liability. The possibility of future benefits is generally not credited against the tort liability. With respect to medical care, this rule rests principally on the ground that plaintiff is entitled to seek private medical care and is not obligated to use the Veterans Administration or any other source of free government care. With respect to both medical and other benefits, courts also say that there is no vested right to such benefits, which remain subject to legislative modification or repeal.

Illustrations:

9. Louise suffered long-term paralysis as a result of a vaccination for which the United States had assumed all liability. She was forced to retire five years earlier than planned. She began receiving Social Security retirement benefits, and many of her medical expenses were paid by Medicare. Louise had paid Social Security and Medicare taxes for much of her working career. Because Louise helped pay for these benefits, they are collateral sources of compensation even though an agency of the defendant paid the benefits. Under the common-law rule, the fact of these payments is not admissible in evidence, and the amount of these benefits does not reduce the government's liability.

10. Charles underwent surgery in a Veterans Administration hospital, and the surgeon's malpractice left him quadriplegic. He received further treatment and rehabilitation services from the V.A. in the wake of the surgery. The V.A. is funded out of general tax revenues. Charles had paid federal taxes all his adult life, but he had not paid

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into any special fund to support medical care at the V.A. His military service to the nation was of great value, but that service did not help fund medical care from the V.A.

In a suit against the United States, Charles cannot recover the value of past medical care provided without charge by the V.A. This care was a direct benefit provided by defendant. The value of free medical care from the V.A. would be a recoverable item of damages in a suit against any other defendant, but whatever that value might be, the United States is entitled to a credit of equal amount for having provided that care without charge.

Charles can recover the estimated value of all future medical expenses reasonably necessary to treat the effects of the surgeon's malpractice. The United States is not entitled to a credit for the possibility that the V.A. might provide that care for free, nor is Charles required to mitigate damages by seeking all his future medical care from the V.A. Charles is entitled to seek future medical care in the private sector, and whatever his intentions at the time of trial (which he need not disclose), and whatever his ultimate choice, the factfinder must award the reasonable market value of future medical care.

Similar issues can arise with respect to state and local governments, but only a few reported cases have been found. Two cases held that Medicaid is a collateral source that should not be deducted from the damages for which the state is responsible; a third case held that Medicaid is a direct payment by the sponsoring government, to be credited against that government's tort liability, because it is funded from general tax revenue. It is perhaps noteworthy that only this third opinion focused on the issue. A municipal pension plan to which the employee contributed has been held to be a collateral source in a suit against the city; this holding is consistent with the rule in suits against the United States.

g. Employers. Workers'-compensation laws, which are outside the scope of this Restatement, provide the exclusive remedy against most employers for on-the-job injuries. But railroad, longshore, and maritime workers have tort remedies under federal statutes or the federal maritime law. And occasionally, employees have tort claims against their employers for injuries that are not job related. Here too there are variations, but the dominant rule appears to be that payments from employer-sponsored or employer-funded insurance policies intended as a fringe benefit, social-welfare program, or otherwise part of the employee's compensation package are collateral-source benefits and are not credited against the employer's liability. See Illustrations 11 and 12. But payments from the employer's liability insurance, or any other policy or plan intended

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to defray or fulfill the employer's potential liability, are payments on behalf of the employer and are credited against the employer's liability. See Illustration 13. A group medical-insurance plan that covers any sickness or injury, whether or not job related, is generally viewed as a fringe benefit and therefore as a collateral source. A similar plan that covers only job-related sickness or injury is generally viewed as insuring the employer's liability. The relevant intention may also be clarified or specified by a collective-bargaining agreement.

Illustrations:

11. A police officer employed by City accidentally shot Steve, who was also employed by City. Steve was off duty and standing in his front yard when the accident happened. Most of Steve's medical expenses were paid by City's comprehensive group health-insurance plan. That plan was self-insured, meaning that City bore ultimate liability for all claims, including Steve's. Because the plan was part of Steve's compensation package, it is a collateral source and treated as though it were separate from City. Under the common-law rule, the fact of these payments is not admissible in evidence, and the amount of these payments does not reduce City's liability.

12. Michelle suffered permanent injuries to her back while working for Railroad. She received disability benefits under the Railroad Retirement Act. The Act is a substitute for Social Security in the railroad industry, and both Michelle and Railroad had paid taxes into the fund earmarked for these benefits. Because these payments are part of a social-welfare program for the benefit of railroad employees, and not an effort by Railroad to satisfy its tort liabilities to employees, and also because Michelle contributed to the fund, they are a collateral source. The fact of these payments is not admissible in evidence, and the amount of these payments does not reduce Railroad's liability.

13. Shawn, an employee of Railroad, suffered an on-the-job injury when his chair collapsed as he listened to a safety lecture. His medical bills were paid by an insurance policy, funded by Railroad, which covered the medical expenses from any on-the-job injury. Shawn's union had agreed in a collective-bargaining agreement that payments under this policy would be credited against Railroad's liability for on-the-job injuries. Shawn's medical expenses were paid on behalf of Railroad, and the amount of those payments must be credited against Railroad's liability.

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h. Discounted medical bills. One of the most frequently litigated collateral-source issues in recent years is insurance discounts on medical bills. Consider a hospital that bills $10,000 as the reasonable value of its services. If plaintiff's medical insurer pays only $4000 pursuant to a contract with the hospital, and the hospital writes off the rest, is the $6000 discount a collateral-source payment by the hospital? Or is the actual amount of the medical expenses only $4000? A clear majority of jurisdictions has held that plaintiff may recover the $10,000 originally billed. Some have relied on the collateral-source rule and some on other rationales. This issue is addressed in § 19 on medical expenses.

i. Admitting collateral-source evidence for other purposes. The collateral-source rule is both a rule of evidence and a substantive rule of damage measurement; evidence of collateral-source payments is generally inadmissible. The evidence rule is not a principal concern of this Restatement. But it is important to note that many jurisdictions admit evidence of collateral-source payments when relevant to other issues, with an instruction that damages should not be reduced because of these payments. Such evidence may be admitted to impeach plaintiff's testimony about financial hardship, or when it goes to whether plaintiff is malingering, or to some other genuine issue. Such evidence often has substantial prejudicial effect, and many courts are cautious about admitting it even if the jurisdiction permits it.

j. Except as otherwise provided by statute. All common-law rules are subject to statutory modification, which means that every Section of this Restatement is implicitly subject to the qualification, "except as otherwise provided by statute." The qualification is made explicit in this Section because statutory modifications to the common-law collateral-source rule are so widespread. Those seeking to limit tort liability have frequently succeeded in limiting the collateral-source rule, but only occasionally succeeded in repealing it.

The result is a disparate array of legislative compromises. Some 35 states have statutes limiting or modifying the collateral-source rule in at least some cases. Under most of these statutes, the common-law rule continues to apply in at least some cases, and often in many cases. Only limited generalizations are possible.

Some of these statutes apply to all or most torts, or to all torts causing injury to the person; some apply only to specific torts, most commonly to medical malpractice. Some apply to all or most collateral sources; some apply only to specific collateral sources; a few apply only to one or two collateral sources. Some attempt to define "collateral source," or to list collateral sources;

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some do not. Many of these statutes do not apply to any collateral source that retains subrogation rights, which means that they do not apply to most cases of compensation from insurers or from federal benefit programs. A few expressly repeal state-law subrogation rights; some are silent on subrogation.

Some do not apply to benefits that plaintiff paid for in whole or in part, which again means that they do not apply to most first-party insurance or, depending on statutory interpretation in each state, most employee fringe benefits. Some *do* apply to insurance policies that plaintiff paid for, and some of these expressly provide for taking account of plaintiff's insurance premiums; many others do not. Some say explicitly that the damages should be reduced by the amount of collateral-source payments subject to the statute; some say only that the amount of collateral-source payments is admissible in evidence and leave decisions about what to do with that evidence to the discretion of the factfinder. Some provide for submitting the issue to the jury; some say that the jury should not be informed and that collateral-source payments should be deducted from the verdict on posttrial motion.

In a few states, such statutes have been held unconstitutional on state-law grounds. Some of these decisions were based on defects that a determined legislature could fix, such as allegedly discriminatory distinctions among the cases to which the statute applied. Some courts have said that these statutes are in derogation of the common law and should be narrowly construed.

A recurring issue has been whether the total of all collateral-source payments should be credited against the entire verdict, or whether collateral-source payments intended to compensate a particular category of damage should be credited against only the amount awarded for that same category of damage. The statutes are generally silent or unclear on this question, but a substantial majority of courts addressing the issue have required such matching. Substantial sums can turn on this choice. Crediting collateral-source payments by category generally requires a special verdict or findings of fact that award damages by category.

Illustration:

14. A negligent crane operator dislodged a steel beam, which fell and struck Ricardo, causing permanent injuries. He sued the crane operator's employer in tort. The jury awarded $200,000 in damages in a special verdict, itemized as follows:

$6000 for past medical expenses

$28,000 for past lost earnings

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$80,000 for future lost earnings

$66,000 for future lost pension benefits

$20,000 for pain and suffering

Defendant proved that Ricardo will more likely than not receive $140,000 in disability retirement benefits from his own employer. These benefits are a collateral source, but Ricardo's state has repealed the collateral-source rule. The disability retirement benefits should be credited against the $66,000 in lost pension benefits, entirely eliminating that item of damage. Ricardo should recover the remaining $134,000 in damages.

To see what is at stake in Illustration 14, consider alternative possible outcomes. If the collateral-source benefits were credited in bulk, without matching to categories of damage, Ricardo would receive a tort judgment of $60,000—the $200,000 jury verdict minus the $140,000 in future pension benefits. Even if the collateral-source benefits are credited by category, the court must decide which damage items the disability benefits replace. If the disability pension were understood to replace both the lost regular pension and the future lost earnings ($146,000 in total), then Ricardo would still recover only $60,000 in tort, because the entire collateral-source benefit could be credited against some item of damages.

The choices in Illustration 14 are a matter of statutory interpretation in each state with a statute that requires collateral-source payments to be credited against the verdict. The same issue can arise with respect to direct payments. See Illustrations 7 and 8. There are fewer cases, but these cases also appear to require matching.

REPORTERS' NOTES

a. History and scope. The collateral-source rule is stated in Restatement Second, Torts § 920A(2) (AM. L. INST. 1979), and in Restatement of Torts § 920, Comment *e* (AM. L. INST. 1939), where it is briefly summarized as an exception to the offsetting-benefits rule. There are briefer Comments to similar effect in Restatement of Torts § 924, Comments *c* and *f* (AM. L. INST. 1939). This Section supersedes § 920A, and § 8 of this Restatement supersedes § 920.

See 3 DAN B. DOBBS, PAUL T. HAYDEN, & ELLEN M. BUBLICK, THE LAW OF TORTS § 482 at 25-34 (2d ed. 2011); DAN B. DOBBS & CAPRICE L. ROBERTS, LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION § 3.8 at 269-272 (3d ed. 2018); JAMES M. FISCHER, UNDERSTANDING REMEDIES §§ 15.1-15.7 at 139-153 (3d ed. 2014); 4 FOWLER V. HARPER, FLEMING JAMES, JR., & OSCAR S. GRAY, HARPER, JAMES AND GRAY ON TORTS § 25.22 at 801-829 (3d ed. 2007); DOUGLAS LAYCOCK & RICHARD L. HASEN, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 96-102

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(5th ed. 2019); CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 87 at 310, § 90 at 324-325 (1935); JACOB A. STEIN, PERSONAL INJURY DAMAGES §§ 13.1-13.14 (1997 & Supp.).

Restatement Second, Torts § 920A(1) (AM. L. INST. 1979), on payments by or on behalf of defendants, is now omitted from the black letter but is addressed in Comment *d*. Payments by actual or potential codefendants are addressed in Restatement Third, Torts: Apportionment of Liability §§ 16, 24-25 (AM. L. INST. 2000).

b. The debate over the common-law rule. The arguments for the common-law rule are nicely canvassed in Sunnyland Farms, Inc. v. Cent. N.M. Elec. Coop., Inc., 301 P.3d 387 (N.M. 2013); Helfend v. S. Cal. Rapid Transit Dist., 465 P.2d 61 (Cal. 1970); and in the sources cited in Reporters' Note to Comment *a*.

c. The kinds of payments that qualify. Courts often simply describe collateral-source payments as compensation from a source independent of defendant. Or they give examples: "The collateral source rule applies to payments made by various sources, including insurance companies, beneficent bosses, or helpful relatives." Hoeflick v. Bradley, 637 S.E.2d 832, 833 (Ga. Ct. App. 2006). The Louisiana court collected cases illustrating a diverse set of examples: Medicare, Social Security, sick leave, annual leave, retirement pensions, free medical services rendered as a professional courtesy or by the Veterans Administration, employer-paid insurance benefits, and worker's benefits received from an employer other than defendant. Bozeman v. State, 879 So. 2d 692 (La. 2004). The Restatement Second attempted a complete listing by category: insurance policies, employment benefits, gratuities, and "social legislation benefits," with explanatory elaborations of each category. Restatement Second, Torts § 920A, Comment *c* (AM. L. INST. 1979).

Illustration 1 is based on Warren v. Ballard, 467 S.E.2d 891 (Ga. 1996). Payments under a plaintiff's uninsured-motorist coverage are a frequently litigated collateral source that should not be credited to the tortfeasor. There is a substantial opinion on this issue in Hairston v. Harward, 821 S.E.2d 384 (N.C. 2018), collecting cases to the same effect from elsewhere, and holding it irrelevant that the uninsured-motorist insurer had waived its subrogation rights. More jurisdictions taking the same position are collected in Ex parte Barnett, 978 So. 2d 729 (Ala. 2007). The (possibly unique) minority rule is represented by Haynes v. Yale-New Haven Hosp., 699 A.2d 964 (Conn. 1997), which held that the uninsured-motorist insurer is analogous to a joint tortfeasor, and therefore not a collateral source.

Illustration 2 is based on Mahoney v. Neb. Methodist Hosp., Inc., 560 N.W.2d 451 (Neb. 1997).

Illustration 3 is based on Hunter v. Ura, 163 S.W.3d 686 (Tenn. 2005). A Tennessee statute had repealed the collateral-source rule in medical-malpractice cases, except for insurance policies that the plaintiff or decedent had paid for in whole or in part. The court held that decedent had paid for this policy in part through salary withholding. The court did not consider whether he would have paid for the policy within the meaning of the statute if the employer had paid the entire premium, and decedent's contribution had simply been to work for the employer and to take part of his compensation as an insurance plan instead of as additional salary. In Van Waters & Rogers,

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Inc. v. Keelan, 840 P.2d 1070 (Colo. 1992), the court held that the employee had paid for a disability-pension plan with his service to the employer, which brought the case within a similar exception to the Colorado statute limiting the collateral-source rule. This question is ultimately a matter of statutory interpretation in each state with such a provision, but on any realistic economic assessment of the employment relationship, the Colorado decision is correct.

Illustration 4 is based on Hutchings v. Childress, 895 N.E.2d 520 (Ohio 2008). Market value would presumably be proved by what it would have cost to hire a home health aide or some similar service to provide the same care. The court also held that the husband could not recover lost wages or salary for the time he spent caring for his wife. This is not a collateral-source issue, and the holding was not explained, but it seems correct. His time can be valued in the market for home health care, or in the market for his regular occupation, but to award both would be a form of double recovery—two valuations of the same time and labor.

Another example is Bandel v. Friedrich, 584 A.2d 800 (N.J. 1991), in which a permanently disabled plaintiff recovered the value of years of free care from his mother. For the minority rule refusing compensation for the value of free services, see Schultz v. Harrison Radiator Div. Gen. Motors Corp., 683 N.E.2d 307 (N.Y. 1997). *Bandel* lists Illinois as adhering to the minority rule, citing Peterson v. Lou Bachrodt Chevrolet Co., 392 N.E.2d 1 (Ill. 1979), but *Peterson* was explicitly overruled in Wills v. Foster, 892 N.E.2d 1018 (Ill. 2008).

Illustration 5 is based on Bullard v. Alfonso, 595 S.E.2d 284 (Va. 2004). The result would be the same if wages or salary were continued by disability insurance or a pension plan, and regardless of whether the employer, the employee, or both paid for the plan. Even if the employee made no cash contribution to the plan, it is part of the employee's compensation, purchased with labor prior to any injury. Such an insurance plan is equally subject to the collateral-source rule if the court instead views it as a gratuitous benefit provided by the employer.

Illustration 6 is based on Wausau Bus. Ins. Co. v. Turner Constr. Co., 151 F. Supp. 2d 488 (S.D.N.Y. 2001). The charitable contributions were at issue because a New York statute had largely repealed the collateral-source rule. The case settled without a ruling on the issue, but publicity about the case led the New York legislature to expressly provide that defendants do not get credit for charitable contributions to plaintiffs. That is, it re-enacted (or unrepealed) the collateral-source rule with respect to charitable contributions. N.Y. C.P.L.R. § 4545(b).

Another case applying the collateral-source rule to property insurance is *Hoeflick*, 637 S.E.2d 832, in which plaintiff's car was damaged in a collision with defendant's cow. Plaintiff's collision coverage paid for all but $500 of the damage, but this payment did not reduce defendant's liability, and if the case had gone to trial (it was resolved on summary judgment), the fact of this payment would not have been admitted in evidence. The collateral-source rule has been applied to environmental-cleanup costs paid by plaintiff's insurer, Windsor Sch. Dist. v. State, 956 A.2d 528 (Vt. 2008), or by the federal government reimbursing a state government, La. Dep't of Transp. and Dev. v. Kan. City S. Ry. Co., 846 So. 2d 734 (La. 2003).

Unusual and rarely litigated sources of compensation are very often gratuitous, or they can be understood as social-welfare benefits, or both. In Luwisch v. Am. Marine Corp., 956 F.3d 320 (5th

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Cir. 2020) (admiralty law), plaintiff's attorney paid plaintiff's medical expenses. The attorney was held to be a collateral source.

In Jewell v. Fletcher, 377 S.W.3d 176 (Ark. 2010), a former client with a claim against a dissolving law firm had recovered $40,000 from the state's Client Security Fund. The court held that the Fund was a collateral source, in part because plaintiff was obligated to repay the Fund if he later recovered from the law firm. The Fund is covered by this Section because, from the client's perspective, its payments were gratuitous; it might also be reasonably understood as a social-welfare program run by a government. In Moulton v. Groveton Papers Co., 323 A.2d 906 (N.H. 1974), the failure of defendant's dam caused a flood that destroyed two bridges. One of the plaintiffs, a town, was obligated under state law to rebuild the bridges, but the state responded to the flood with an appropriation that paid seven-eighths of the cost. The court held that the town could recover only its one-eighth share of the cost. The opinion reviews the arguments for and against the collateral-source rule and concludes that the town should not get a double recovery; it is not clear whether the court believed that the state was not a collateral source or whether it was carving out an exception to the collateral-source rule. The state's appropriation was gratuitous, so it was a collateral source under the definition offered here. Compare *Louisiana Department of Transportation*, 846 So. 2d 734, where a similar payment from a larger unit of government was held to be a collateral source.

Unemployment compensation is a collateral source under this Section, because it is a social-welfare program operated by a government. See Salitros v. Chrysler Corp., 306 F.3d 562, 573 (8th Cir. 2002) (federal law) ("Workers' compensation benefits are considered a collateral source, as are unemployment insurance and social security payments" (citation omitted)). But the issue should not often arise, because a worker who is unavailable for work, because of injury or otherwise, is generally ineligible for unemployment compensation. The relationship of workers'-compensation systems to the tort system is sometimes controlled by statute. Where the issue is left to common law, most courts appear to hold that workers'-compensation benefits are a collateral source. See Nason v. Pruchnic, 204 A.3d 861 (Me. 2019); Martin v. BNSF Ry. Co., 352 P.3d 598 (Mont. 2015); Morel v. Napalitano, 64 A.3d 1176 (R.I. 2013); Jones v. Bowe Indus., Inc., 282 P.3d 316 (Alaska 2012); Diaz v. State, 285 P.3d 873 (Wash. 2012); Miller v. State Farm Mut. Auto. Ins. Co., 993 A.2d 1049 (Del. 2010); *Salitros*, 306 F.3d 562.

d. Direct payments and benefits from defendant or on defendant's behalf. There are fewer reported cases of direct payments from defendants than from collateral sources, presumably because defendants are reluctant to make such payments, and when they do, less remains at stake, so that plaintiff is less likely to sue and the parties are more likely to settle. Illustration 7 is based on Douglas v. Adams Trucking Co., 46 S.W.3d 512 (Ark. 2001), which collects a number of older cases from a variety of jurisdictions. Illustration 8 is based on Schaffer v. Curtis-Perrin, 109 P.3d 1098 (Idaho 2005). In *Schaffer*, the result was controlled by statute. Whether to credit payments under medical-pay clauses was heavily litigated across the country under common law in the 1960s. A few jurisdictions refused to credit such payments, holding that because medical-pay clauses were a different coverage and paid for with a separate premium, they were a collateral source. Conflicting decisions are collected in Annotation, 11 A.L.R. 3d 1115 (1967 & Supp.).

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In *Schaffer*, the court assumed that the medical-expense payment had to be matched with a damage award for medical expenses. But it was also willing to infer that the verdict included those expenses. There are similar holdings, requiring that defendant's pretrial direct payment must match damages included in the verdict but inferring such a match despite a general verdict, in Turner v. Mun. of Anchorage, 171 P.3d 180 (Alaska 2007), and Cottrell v. Burlington N. R.R. Co., 863 P.2d 381 (Mont. 1993). In these direct-payment cases, defendant is not seeking to claim credit for plaintiff's insurance or other benefits, but rather is seeking to avoid paying twice. For more on the matching issue, see Comment *j* and Reporters' Note to Comment *j*.

e. Defendants acting in multiple capacities. The issue of defendants acting in multiple capacities has arisen principally with respect to government torts and government social-welfare programs, and with respect to employer torts and employee fringe benefits. The decisions in these cases may be driven by the view, usually left unstated, that the plaintiffs in these cases should not receive less compensation than similarly situated plaintiffs who receive similar insurance or social-welfare benefits from clearly independent sources.

f. Governments. Cases on the liability of the United States are collected in Annotation, 104 A.L.R. Fed. 492 (1991 & Supp.). Illustration 9 is based on Manko v. United States, 830 F.2d 831 (8th Cir. 1987) (Illinois law). A more recent example is Clanton v. United States, 943 F.3d 319 (7th Cir. 2019). Clanton was severely injured by medical malpractice in the United States Public Health Service; Medicare paid for part of his continuing medical care. The court held that Medicare is a collateral source, because Clanton paid into the fund and because it is not designed to cover the government's liabilities. The United States suggested that it should get credit at least for the fraction of benefits paid from general tax revenues instead of from Clanton's contributions. It is not clear what this meant, because Medicare is funded entirely from earmarked taxes. Perhaps the government was referring to Clanton's employers' contributions. In any event, the court rejected the suggestion in principle, noting that various courts had raised this possibility but that no court had ever adopted it.

Illustration 10 is based on Malmberg v. United States, 816 F.3d 185 (2d Cir. 2016). Additional cases supporting the same distinction between past and present medical care are collected in Molzof v. United States, 6 F.3d 461 (7th Cir. 1993). Medical malpractice by the V.A. is a common source of such cases, and the result is supported in such cases by the perceived injustice of requiring plaintiff to return to the same hospital and medical team that caused the injury in the first place, but the results do not depend on that. The result should be the same if a military veteran is injured in an accident with a vehicle owned by the United States or driven by a federal employee engaged in government business.

The rule that the government is not liable for past medical care provided without charge originated in dictum in such an auto-accident case. Brooks v. United States, 337 U.S. 49, 54 (1949) ("It would seem incongruous, at first glance, if the United States should have to pay in tort for hospital expenses it had already paid, for example."). But the parties had not argued the issue in *Brooks*, the opinion did not mention the collateral-source rule, and the Court remanded the issue.

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The Court's initial skepticism about double liability has not been generalized beyond the case of past care.

In two cases in which the state highway department and state prison officials, respectively, injured plaintiffs, and the state's Medicaid program paid their medical bills, courts held that the Medicaid benefits were a collateral source and that its payments should not be deducted from plaintiffs' recovery. Bozeman v. State, 879 So. 2d 692 (La. 2004); Gilding v. State, 2012 WL 2505495 (Haw. Ct. App. 2012). But the court's attention was focused elsewhere in each case; neither state appears to have squarely argued that Medicaid was not a source independent of the tortfeasor. Compare District of Columbia v. Jackson, 451 A.2d 867 (D.C. 1982), holding that because Medicaid is funded from general tax revenues, it is not a collateral source independent of the government tortfeasor that funded it. The federal Medicaid statute requires state plans to pursue tortfeasors directly when the expected recovery exceeds the cost of litigation. 42 U.S.C. § 1396a(a)(25).

Another variation on government tortfeasors is illustrated by Cady v. City of New York, 243 N.Y.S.2d 661 (App. Div. 1963), aff'd, 198 N.E.2d 901 (N.Y. 1964). Plaintiff's husband was a New York City fireman, apparently killed in the line of duty. Firefighters were not covered by workers' compensation and the city was liable in tort. The widow received a pension equal to half decedent's salary. The pension was funded from various sources, including decedent's contributions; if those funds were inadequate, the city was liable to pay from general revenue. The Appellate Division recited these facts and held that the pension was a collateral source. The Court of Appeals affirmed summarily, citing Eichel v. N.Y. Cent. R.R., 375 U.S. 253 (1963), which held that Railroad Retirement Act benefits for injured railroad workers were a collateral source.

In 1984, Mayor Edward Koch of New York City supported a bill to repeal the collateral-source rule on the ground that the city often paid twice in such cases: generous benefits plus liability in tort. New York's repeal of the collateral-source rule is one of the most thorough in the country, so it is unlikely that this issue could arise again in New York.

g. Employers. Illustration 11 is based on Handy v. City of Lawton, 835 P.2d 870 (Okla. 1992). Illustration 12 is based on Sloas v. CSX Transp., Inc., 616 F.3d 380 (4th Cir. 2010). The rule with respect to Railroad Retirement Act benefits originated in Eichel v. N.Y. Cent. R.R. Co., 375 U.S. 253 (1963). *Sloas* and similar cases affirm that that rule has survived a legislative amendment. There is a more detailed explanation of benefits under the Act in Laird v. Ill. Cent. Gulf R.R. Co., 566 N.E.2d 944 (Ill. App. Ct. 1991). *Laird* also thought it relevant that benefits under the Act are based on wages paid and years of service, and not on severity of injury. Illustration 13 is based on Strasburg v. Union Pac. R.R., 839 N.W.2d 273 (Neb. 2013).

h. Discounted medical bills. See § 19, Comment _.

i. Admitting collateral-source evidence for other purposes. There is considerable diversity of judicial opinion on the use of collateral-source evidence for purposes other than simply reducing plaintiff's damages. If plaintiff testifies to financial hardship caused by medical bills, or inability to afford medical treatment, defendant sometimes offers evidence of medical insurance or other collateral-source payments to impeach that testimony. Conflicting cases on the admissibility of

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such evidence are collected in Estrada v. Port City Props., Inc., 258 P.3d 495 (Okla. 2011). If defendant raises a triable issue of whether plaintiff is malingering, it may offer evidence of collateral-source payments to show that plaintiff can afford to malinger or has incentives to malinger. Conflicting cases on the admissibility of this evidence are collected in Annotation, 47 A.L.R.3d 234 (1973 & Supp.).

Impeachment was at issue in Warren v. Ballard, 467 S.E.2d 891 (Ga. 1996), the case on which Illustration 1 is based. Plaintiff there testified to the financial hardship of struggling to pay off her medical debt. The court held that her insurance coverage was not admissible to impeach that testimony. It said that anxiety over medical debt is not a compensable damage item, and therefore, testimony about such anxiety is not relevant to any material issue and that impeachment of such irrelevant testimony is therefore also irrelevant. This rather technical reasoning may have been a response to the countervailing problem; it is hard to confine the jury's use of collateral-source evidence to impeachment.

Evidence of collateral-source payments is highly prejudicial, because juries are generally unfamiliar with subrogation and may perceive plaintiff as greedily seeking a second recovery after having already been compensated. Courts have therefore granted new trials when such evidence is erroneously admitted, or when defendant succeeds in repeatedly mentioning or alluding to collateral-source payments. See, e.g., Tipton v. Socony Mobil Oil Co., 375 U.S. 34 (1963); Wilson v. IHC Hosps., Inc., 289 P.3d 369 (Utah 2012); Cates v. Wilson, 361 S.E.2d 734 (N.C. 1987).

j. Except as otherwise provided by statute. Statutes limiting or repealing the collateral-source rule are collected, with a brief analysis of each statute, in Bryce Benjet, *A Review of State Law Modifying the Collateral Source Rule: Seeking Greater Fairness in Economic Damages Awards*, 76 DEF. COUNS. J. 210 (2009).

Illustration 14 is based on Oden v. Chemung Cnty. Indus. Dev. Agency, 661 N.E.2d 142 (N.Y. 1995). The court held that the disability pension should be credited only against the lost regular pension, leaving a judgment of $134,000. But in Andino v. Mills, 106 N.E.3d 714 (N.Y. 2018), the court held that a disability pension must be credited against lost salary and a lost regular pension, resulting in a much greater reduction in plaintiff's damages. The difference in the two cases was that in *Oden*, the disability pension would not be reduced if plaintiff worked and earned wages or salary. But in *Andino*, the disability pension would be reduced if plaintiff earned wages or salary before becoming eligible for normal retirement; after retirement age, plaintiff would again be free to work without losing the pension. The court therefore viewed the disability pension as replacing wages and salary before retirement age, and as replacing ordinary pension after retirement age. This distinction is better viewed as a detail of New York law than as a rule suitable for restatement. But it illustrates the kinds of inquiries and distinctions that inevitably arise once it is decided that collateral-source payments must be matched with categories of damages.

For other cases requiring matching, see Griffin v. Philip Morris USA, Inc., 730 F. App'x 848 (11th Cir. 2018) (Florida law); Stevens v. Novartis Pharms. Corp., 247 P.3d 244 (Mont. 2010); Turner v. Mun. of Anchorage, 171 P.3d 180 (Alaska 2007); Heine v. Simon, 702 N.W.2d 752 (Minn. 2005); Jones v. Kramer, 838 A.2d 170 (Conn. 2004); Walker v. Am. Cyanamid Co., 948

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P.2d 1123 (Idaho 1997); Buchman v. Bd. of Educ., 652 N.E.2d 952 (Ohio 1995); Shivers v. Schmiege, 776 N.W.2d 669 (Mich. Ct. App. 2009); Saitta v. Hiller, 2008 WL 2404208 (N.J. Super. Ct. App. Div. 2008); Mester v. Barrett, 1994 WL 776983 (Mass. App. Ct. 1995).

Any matching requirement appears to have been rejected in DeCastris v. Gutta, 604 N.E.2d 359 (Ill. App. Ct. 1992). In Oregon, the rule appears to be that matching is not required, and that collateral-source benefits can be deducted from a general verdict, except that they should not be deducted if it is clear that the verdict does not include any damages that were compensated by the collateral source. Wade v. Mahler, 1 P.3d 485 (Or. Ct. App. 2000). Perhaps this can be understood as matching, with the burden on plaintiff to show that matching is impossible.

Most courts hold that matching requires the factfinder to itemize damages and that matching is impossible with a general verdict. E.g., *Stevens*, 247 P.3d 244. But see Jontony v. Colegrove, 984 N.E.2d 368 (Ohio Ct. App. 2012), allowing the trial judge to review the evidence and match collateral-source payments with categories of damage that the judge infers must have been included in the verdict. Courts appear to be more willing to infer what damages must be included in the verdict in cases of direct payments. See Reporters' Note to Comment *d*.

For cases holding statutory limits on the collateral-source rule unconstitutional on state-law grounds, see Johnson v. Rockwell Automation, Inc., 308 S.W.3d 135 (Ark. 2009); Thompson v. KFB Ins. Co., 850 P.2d 773 (Kan. 1993); Denton v. Con-Way S. Express, Inc., 402 S.E.2d 269 (Ga. 1991); and Carson v. Maurer, 424 A.2d 825 (N.H. 1980), overruled on other grounds, Cmty. Res. for Justice, Inc. v. City of Manchester, 917 A.2d 707 (N.H. 2007). The more numerous cases upholding such statutes include Marsh v. Green, 782 So. 2d 223 (Ala. 2000); Reid v. Williams, 964 P.2d 453 (Alaska 1998); Bernier v. Burris, 497 N.E.2d 763 (Ill. 1986); Fein v. Permanente Med. Grp., 695 P.2d 665 (Cal. 1985); Pinillos v. Cedars of Lebanon Hosp. Corp., 403 So. 2d 365 (Fla. 1981); Rudolph v. Iowa Methodist Med. Ctr., 293 N.W.2d 550 (Iowa 1980); and Eastin v. Broomfield, 570 P.2d 744 (Ariz. 1977).

Sorrell v. Thevenir, 633 N.E.2d 504 (Ohio 1994), held a repeal of the collateral-source rule without matching unconstitutional. So in Ohio, matching of collateral-source categories with damage categories is required in order to make statutory limits on the common-law rule constitutional. *Buchman*, 652 N.E.2d 952.

§ 10. Loss of Chance

[This Section is on hold until we see what the medical-malpractice Reporters do with it in Restatement Third, Torts: Concluding Provisions.]

Comment:

a. History and scope.

REPORTERS' NOTES

a. History and scope.

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§ 11. Multiple Sufficient Causes

(a) If a defendant's tortious conduct is one of two or more sufficient factual causes of an indivisible harm to a plaintiff, and

(1) if none of the other sufficient factual causes is tortious, the defendant is liable for the full amount of plaintiff's damages, less any reduction to account for the plaintiff's comparative share of responsibility under the rules stated in Restatement Third, Torts: Apportionment of Liability.

(2) if one or more of the other causes is tortious, each defendant is liable for that defendant's comparative share of responsibility under the rules stated in Restatement Third, Torts: Apportionment of Liability.

(b) If all or part of the harm to a plaintiff resulting from multiple sufficient causes is divisible, each defendant is liable, under the rules stated in Restatement Third, Torts: Apportionment of Liability § 26, for the portion of the divisible harm caused by that defendant's tortious conduct.

Comment:

a. History and scope. This Section primarily responds to a question left open by Restatement Third, Torts: Liability for Physical and Emotional Harm (LPEH) § 27, Comment *d*. It builds upon §§ 27 and 36 of that Restatement, and on Restatement Third, Torts: Apportionment of Liability § 26, to state the remedies rules applicable to harms resulting from multiple sufficient causes. These Sections are *not* superseded. Sections 27 and 36 of Restatement Third, LPEH superseded the rules on multiple sufficient causes in Restatement Second, Torts § 432(2). This Section makes no further changes to § 432(2). Subsection (a)(1) of this Section is new; Subsections (a)(2) and (b) incorporate rules from the Apportionment project.

b. Multiple sufficient causes. In the paradigmatic example of multiple sufficient causes, two independent fires combine to burn down plaintiff's home. Either fire alone would have been enough to cause the exact same damage. Defendant negligently started one of the fires. The other fire may have been of unknown origin, naturally caused, or caused by another defendant's tort. Applying the usual rules of but-for causation (now found in Restatement Third, LPEH § 26), a claim by plaintiff against defendant would fail on causation, because the same damage would have occurred whether or not defendant's negligence started one of the fires. Section 2 of this Restatement suggests the same result.

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Courts have long recognized an exception to but-for causation in these circumstances, as have all three Restatements of Torts. The most recent statement of these rules, in Restatement Third, LPEH § 27, is entitled "Multiple Sufficient Causes." It provides: "If multiple acts occur, each of which under § 26 alone would have been a factual cause of the physical harm at the same time in the absence of the other act(s), each act is regarded as a factual cause of the harm." Two fires is the simplest example; more frequently litigated examples involve environmental harms, toxic torts, and drugs with harmful side effects.

In the multiple-fire example, a factfinder could determine that the defendant was a factual cause of plaintiff's harm if the defendant acted negligently by starting a fire that would have burned plaintiff's home had it been the only fire. In such a case, the fire ordinarily would be within the scope of defendant's liability to the plaintiff (see § 6), because a risk of a negligently started fire is that it could spread and burn others' property. See Restatement Third, LPEH § 29. Restatement Third, LPEH § 36 recognized a narrow circumstance in which a defendant's tortious conduct could be a sufficient factual cause of plaintiff's injury under § 27 but not within the scope of liability. On this scope-of-liability issue, see Comment *e*.

Some very old cases refused to apply the multiple-sufficient-causes rule if the origin of the second fire was not tortious, such as a lightning strike or non-negligent conduct by a third party, the plaintiff, or even the defendant. These nontortious causes are often referred to as "innocent" causes. But the clear modern trend is that the innocent or tortious nature of other sufficient causes is irrelevant to whether defendant's tortious conduct was a factual cause of plaintiff's injury. This more recent rule is reflected in the Restatements. This rule is stated here in Subsection (a)(1) and addressed in Comment *d*.

c. Apportionment of damages among multiple sufficient tortfeasors. Cases involving multiple tortious causes of harm appear to be far more commonly litigated than cases involving a combination of tortious and innocent sufficient causes. For example, consider a plaintiff whose lake is stocked with fish. The lake is damaged and the fish are killed when Defendants 1 and 2 each separately and tortiously cause salt water from nearby oil operations to flow into plaintiff's lake. If the plaintiff can prove that the exposure to the salt water from either Defendant 1 or Defendant 2 alone would have caused the loss of plaintiff's fish, plaintiff can rely upon the multiple-sufficient-causes rule of Restatement Third, Torts: Liability for Physical and Emotional Harm § 27 to prove factual causation.

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Assuming that the death of the fish was within each defendants' scope of liability, each defendant should be liable to plaintiff for the damage. Whether this liability should be joint and several, or apportioned between the defendants in some other way, should be determined under the rules for allocating responsibility in Restatement Third, Torts: Apportionment of Liability. That Restatement provides alternative rules tailored to each jurisdiction's treatment or alteration of joint and several liability.

Illustration:

1. Dina was driving carelessly down the street as Paula entered a crosswalk. Victor was driving down the same street at the same time and also was driving negligently. Dina and Victor hit Paula simultaneously, killing her. Expert testimony in a wrongful-death suit brought by Paula's heirs establishes that each driver alone hit Paula with such force that she would have been killed regardless of the actions of the other driver. The factfinder determined that both Dina's and Victor's negligence were factual causes of Paula's death, and that they were subject to liability. Dina and Victor are each liable to pay damages for wrongful death to Paula's heirs. Whether Dina and Victor are jointly and severally liable or subject to a different apportionment rule depends upon the jurisdiction's rules for apportionment of responsibility as set forth by the Restatement Third, Torts: Apportionment of Liability. These same rules should be consulted to determine the proper apportionment of responsibility if Paula also was negligent in entering the crosswalk.

Subsection (a)(2) incorporates the rules of the Apportionment project into this Restatement principally for reasons of clarity and completeness. It does not modify or add to those rules.

Illustration:

2. Tobacco Co. and Smoking Co. falsely advertised the safety of their products for many decades. Prior to 1965, these advertisements were tortious. After 1965, all tort causes of action based on tobacco advertising were preempted by federal regulation, meaning that the defendants were not subject to liability for post-1965 advertising. Rose smoked cigarettes from both companies from 1945 until her death from lung cancer in 1985. Before she died, she and her husband sued Tobacco Co. and Smoking Co. She testified that she

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had relied on their safety claims. There was also evidence that she knew that smoking was dangerous to her health.

The jury found that each company's pre-1965 advertising was a factually sufficient cause of Rose's death and that her own fault in continuing to smoke also contributed to causing her death. The jury should apportion responsibility and damages among Rose and defendants' pre-1965 false advertising following the rules contained in Restatement Third, Torts: Apportionment of Liability.

d. Damages when one or more of the multiple sufficient causes is innocent. As noted in § 27, Comment *d*, of Restatement Third, Torts: Liability for Physical and Emotional Harm (LPEH), most judicial analyses of multiple sufficient causes implicitly conflate two questions. The first is whether plaintiff can prove factual causation in the context of multiple sufficient causes. Yes, they all say. The second is whether a defendant's liability for damages in the context of multiple sufficient causes should be reduced or extinguished if another sufficient cause of plaintiff's injury was innocent.

Almost all courts have treated the answer to the first question as implicitly answering the second: If the tortious defendant's conduct is a factual cause of plaintiff's injuries, the defendant is liable for plaintiff's damages. And while the two questions are conceptually distinct, it makes sense to connect them in this way. To determine that defendant's tort is a factual cause of plaintiff's harm would be a pointless academic exercise unless it follows that defendant is liable for that harm. But the Reporters' Notes to § 27, summarizing a lively academic debate over the second question, left it open for resolution in a future torts restatement focused on remedies. Subsection (a)(1) resolves the question.

When a defendant's tortious conduct constitutes one of at least two multiple sufficient causes of plaintiff's injury, defendant is liable for the full amount of plaintiff's damages, less any adjustment for plaintiff's comparative responsibility, if the other sufficient cause or causes of plaintiff's damages are innocent.

This rule follows judicial precedent. The modern cases are not numerous, but they are essentially unanimous. They are collected in Restatement Third, LPEH § 27, Reporters' Note to Comment *d*. That Note characterizes the case law as "largely consistent, although limited in quantity and in coherence." It cites only two cases that could be read as arguably indirect support for relieving the defendant of liability, neither of which confronted the issue. No court has rejected

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liability in the decade since that Restatement's publication. In contrast, the Virginia Supreme Court recently embraced the rule that a tortiously acting defendant cannot escape liability by pointing to an innocent additional sufficient cause of plaintiff's injuries. The few other courts weighing in during the last decade have also restated the majority rule, and no recent cases appear to reject it. The point about innocent causes appears to have been dictum in these recent cases, but dictum that was closely integrated into the court's reasoning.

In the face of essentially unanimous modern authority, it should take a compelling reason to embrace what would be at best a small minority rule. But the issue is debated among scholars, who see difficult questions of corrective justice and efficiency, as well as coherence with other tort-law doctrines. As the Restatement Third, LPEH summarized: "The argument in favor of liability is that the fortuity of some other innocent cause should not absolve a tortfeasor whose conduct was fully sufficient to cause the plaintiff's harm. Imposing liability in such a circumstance serves the policy of deterrence. A no less forceful response is that the plaintiff is no worse off for the tortfeasor's act—the innocent cause alone would have put the plaintiff in precisely the predicament he or she is in. [¶] There is respectable academic commentary on both sides of this debate."

The main academic argument against imposing liability is that the majority rule is inconsistent with how the law treats some other situations of overlapping harm. For example:

> [I]f a plaintiff is permanently disabled by a tortfeasor and, due to an act of God, dies before trial, damages will be limited to the period before plaintiff's death. Damages for the period the plaintiff would have lived in the absence of the act of God are overlapping—both the tortious act and the act of God each are independent causes of that loss. Indeed, natural death (or the actuarially predicted date) always ends the period for which damages accrue even though both the tortious cause and death overlap in producing the harm for which damages might be recovered. Even hypothetical events that do not occur but would have caused the harm in the absence of the tort serve as a limitation on damages. Thus, in a wrongful-death case, damages are measured in reference to the actuarially predicted date of death.

For multiple reasons, this academic argument about potential inconsistency is insufficient to justify abandoning the majority rule.

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First, the rule is longstanding, lopsided within the courts, and backed by the intuition that a tortious defendant should not be exonerated by the fortuity of another innocent or tortious cause. Indeed, the reason courts crafted the multiple-sufficient-causes exception to but-for causation in the first place was to make sure that tortfeasors did not benefit from fortuity. It is hard to imagine that those courts recognized a broader class of factual causes than simply but-for causation for any reason *other* than to make such defendants liable for their tortious conduct towards plaintiffs. Otherwise, the courts would have been altering the rules on factual causation for no reason at all.

Second, the inconsistency between the majority rule and judicial treatment of other cases of overlapping harm is of marginal relevance. Plaintiff's eventual death is inevitable, and no one thinks that damages should extend to the end of time; how to account for premature but nontortious deaths is a small side issue to the much larger issue of taking account of human mortality and life expectancy. An innocent, concurrent, and factually sufficient cause of the same harm is not inevitable; judging by the number of reported cases, it is in fact quite rare, and a certain degree of inconsistency is probably unavoidable in dealing with rare and anomalous cases.

The more direct comparison is to multiple tortious causes. It would be inconsistent to say that defendant is exonerated by the fortuity of a concurrent innocent cause but not by the fortuity of a concurrent and entirely independent second tortfeasor, or vice versa. Neither defendant's culpability, nor the benefits of deterrence, nor the widespread judgment that defendant's tort is a factually sufficient cause of plaintiff's injury, is in any way dependent on whether the other sufficient cause is innocent or tortious.

Similarly, any inconsistency in the existing rules is no greater than the arguable inconsistency between the thin-skull-plaintiff rule—which holds a tortious defendant liable even for an unforeseeable extent of harm—and general scope-of-liability rules, which excuse defendants from liability when harm is not within the risk that makes a defendant's conduct tortious. See § 3, Comment *d*. Both of those rules are of course well settled. Restatement Third, LPEH, notes the inconsistency and endorses both rules, in part because of administrative convenience and in part because of the fairness arguments behind the thin-skull-plaintiff rule.

The greatest anomalies seem impossible to eliminate, and they arise with multiple tortious causes as well as with a tortious and an innocent cause. Suppose two hunters accidentally shoot the plaintiff, and that either shot would be instantly fatal. If the two bullets arrive simultaneously, both hunters are liable, and traditionally, they were jointly and severally liable. If one of the hunters

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can show that the other hunter's bullet arrived first, the hunter whose bullet arrived second had no role in causing the death and therefore entirely escapes liability. That anomaly is embedded in LPEH § 27. Little is changed if we substitute a lightning strike for the second hunter. If defendant's bullet and the lightning arrive simultaneously, defendant is liable under the rule of this Section. If the lightning strikes first, defendant has no liability. The cases depend on a fortuity of timing, but whether the slightly prior cause is tortious or innocent does not affect the nature of that fortuity.

Third, endorsing a no-liability rule would affect few cases, because cases of multiple sufficient causes are already rare, and because those who advocate a no-liability rule have proposed adjustments that would make it very difficult for defendants to prevail even in those few cases. For example, some of the scholars who advocate the no-liability rule would shift the burden to the tortious defendant to prove that the other cause was both sufficient and innocent, and at least one scholar would raise the defendant's standard of proof to a near certainty that the same injury would have happened even if only the innocent cause had been present. The effect of such changes would be to limit even further the number of cases to which this rule would apply, making a no-liability rule a further complication of the law and an additional issue for litigation with little payoff.

Finally, there is no obvious way to decide how to reduce damages in these circumstances. Making defendant pay half of plaintiff's damages seems more arbitrary than Solomonic. Nothing else in the law of damages provides a fair means of reducing damages, meaning that the choice is between making the defendant pay full damages or nothing. For reasons stated above, it is more equitable to make the tortfeasor whose act was a sufficient cause of plaintiff's injury pay the full damages when the other sufficient cause was innocent.

Illustrations:

3. Electrico negligently maintained its electrical transmission lines, and a wind storm knocked down a poorly maintained line. The line started a fire that burned toward Maria's home. About the same time as the Electrico fire started, a lightning strike caused a second fire near Maria's home. The fires joined together and burned down Maria's home. Expert testimony establishes that either fire alone was large enough and on the same trajectory to have burned down Maria's home had the other fire not existed. The factfinder finds that Electrico is subject to liability to Maria for failing to maintain its lines and that Electrico's negligence was a factual cause of Maria's property damage. Electrico is liable for the full extent of Maria's damages.

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4. Same facts as Illustration 1, except that Victor had an unexpected and unforeseeable heart attack as his car neared the crosswalk. The factfinder determines that Dina acted negligently and is subject to liability to Paula, that Victor did not act negligently, and that both Dina's and Victor's driving were factual causes of Paula's death. Dina is liable for the full extent of damages to Paula's heirs.

5. Same facts as Illustration 4, except that Paula also acted negligently, entering the crosswalk against the light. Responsibility should be apportioned between Dina and Paula under the comparative-responsibility rules contained in Restatement Third, Torts: Apportionment of Liability.

e. The scope of liability and trivial contributions to a sufficient causal set. The plaintiff must prove both that the defendant's tortious conduct was a factual cause of plaintiff's injury and that the injury was within the scope of defendant's liability to make out a prima facie case for negligence. The scope-of-liability question, still commonly referred to by many courts as "proximate cause," asks normative questions about the appropriateness of imposing liability on defendants, primarily limiting liability in circumstances in which the harm that the plaintiff suffers is not within the risk that made defendant's conduct tortious. See Restatement Third, Torts: Liability for Physical and Emotional Harm (LPEH) § 29. A special scope-of-liability rule applies to some cases of multiple sufficient causes.

Although the factual-cause question and the scope-of-liability question are separate, courts have often confused the two in their analyses of cases involving multiple sufficient causes. One reason for confusion stems from unclear language used in the Second Restatement's precursor to the current rules for multiple sufficient causes. Under Restatement Second, Torts § 432(2), a factfinder could find a defendant to be a factual cause of plaintiff's injury if the defendant's conduct was a "substantial factor" in causing that injury.

Courts interpret the Second Restatement's "substantial factor" language in a variety of ways, with some courts reading the standard as relaxing the but-for test for factual cause and other courts reading the standard as providing the factfinder with leeway to relieve a defendant from liability on policy grounds even when the defendant's tortious conduct was a factually sufficient cause of plaintiff's injury. That is, some courts say that the tortious conduct might be a substantial factor even though it is not a but-for cause of the harm, and other courts say that tortious conduct might not be a substantial factor even if it is a but-for cause or one of multiple factually sufficient

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causes. This confusion appears especially pronounced in toxic-tort cases, such as those in which a plaintiff has been exposed to a toxic substance such as asbestos from a number of defendants, with plaintiff exposed to much more asbestos from some defendants compared to others.

Restatement Third, LPEH § 27 rejected the Second Restatement's "substantial factor" language, but in § 36, it preserved the ability of a factfinder or a court, in a very narrow set of circumstances, to reject liability. The Section provides that, "When an actor's negligent conduct constitutes only a trivial contribution to a causal set that is a factual cause of harm under § 27, the harm is not within the scope of the actor's liability." Thus, imagine that it takes 100 pounds of force to push a rock off a cliff. Defendant 1 provides 98 pounds of force, Defendant 2 provides 99 pounds of force, and Defendant 3 provides 3 pounds of force. All three defendants push the rock, which falls off the cliff and injures the plaintiff. Defendant 3 is a member of the causal set (with Defendant 1 or Defendant 2) that pushed the rock down, but a factfinder could determine that Defendant 3 made a trivial contribution and should not be liable. See LPEH § 27, Illustration 3.

Illustration:

6. Jerry worked for 40 years as an asbestos-insulation installer. During that time, he was exposed to asbestos fibers from insulation manufactured by a dozen manufacturers. In the case of most of the manufacturers, Jerry was exposed to their products on a daily basis for years. Jerry's 40 years of substantial exposure to asbestos was considerably more than required to cause Jerry's mesothelioma. Jerry's exposure to the product of one manufacturer, Centurion Company, however, occurred at a commercial construction site where other installers were using a Centurion product. Centurion's product was installed in a single day, on a different floor of the building from where Jerry worked that day. Competent and reliable expert testimony was introduced that explained that Jerry would have inhaled some fibers from Centurion's product during that day, but that the amount would be minuscule compared to Jerry's exposure to other defendants' asbestos products. Even if Centurion's manufacture and sale of its asbestos product was tortious, and even if its fibers were part of the causal set that caused Jerry's mesothelioma, Centurion is not subject to liability to Jerry.

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f. Divisible harm. All the examples discussed so far in these Comments involve multiple sufficient causes of indivisible injuries. For example, two defendants each expose plaintiff to carcinogenic chemicals that cause the single injury of cancer. There is no way to divide plaintiff's cancer into a part of damage for which each defendant is responsible. The rules in Subsection (a) speaks to such indivisible harm.

Sometimes, however, multiple defendants injure a plaintiff in divisible, or partially divisible, ways. Consider two actors, acting independently of one another, negligently shooting at the same time in the direction of the plaintiff. Defendant 1 shoots plaintiff in the eye and Defendant 2 shoots plaintiff in the leg. Such a situation does not call for the application of the rules of multiple sufficient causes, because Defendant 1 is a but-for cause of plaintiff's eye injury and Defendant 2 is a but-for cause of plaintiff's leg injury. The harm is divisible, not indivisible. Defendant 1 is responsible for the eye injury and Defendant 2 for the leg injury. Restatement Third, Torts: Apportionment of Liability § 26 sets forth the rules for the apportionment of responsibility in cases of divisible, or partially divisible, harms. This Restatement does not modify or add to that Section's analysis, but references § 26 for purposes of clarity and completeness.

REPORTERS' NOTES

a. History and scope. The first and Second Restatements included identical language allowing plaintiffs to prove factual causation in the case of multiple sufficient causes under a "substantial factor" test. Restatement of Torts § 432(2) (AM. L. INST. 1934); Restatement Second, Torts § 432(2) (AM. L. INST. 1965) ("If two forces are actively operating, one because of the actor's negligence, the other not because of any misconduct on his part, and each of itself is sufficient to bring about harm to another, the actor's negligence may be held by the jury to be a substantial factor in bringing it about."). Neither Restatement directly addressed damages. Restatement Third, Torts: Liability for Physical and Emotional Harm rejected the substantial-factor language of earlier Restatements and superseded the Second Restatement's treatment of multiple sufficient causes. It restated the rule for multiple sufficient causes in terms of factual causation in § 27 (AM. L. INST. 2010) and as to scope of liability in § 36 (AM. L. INST. 2010). Restatement, Third, Torts: Apportionment of Liability (AM. L. INST. 2000) sets out the rules for apportioning shares of responsibility among multiple actors. See also 1 DAN B. DOBBS, PAUL T. HAYDEN, & ELLEN M. BUBLICK, THE LAW OF TORTS § 189 at 631-636 (2d ed. 2011); CHARLES T. MCCORMICK, DAMAGES § 73 at 261-263 (1935).

b. Multiple sufficient causes. The history of the treatment of multiple sufficient causes among courts and commentators is detailed in Restatement Third, Torts: Liability for Physical and Emotional Harm § 27, Reporters' Notes (AM. L. INST. 2010). That history is not repeated here.

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"There is near-universal recognition of the inappropriateness of the but-for standard for factual causation when multiple sufficient causes exist." Id. § 27, Reporters' Note to Comment *a*.

Section 27, Reporters' Note to Comment *d* explicitly left open the question answered in Subsection (a) of this Section: "While Comment *d* continues the treatment in the first two Restatements—reaffirming that both the innocent and the tortious causes are factual causes of the harm—it defers to the law of damages the question of whether and to what extent the tortfeasor might be assessed damages. Neither of the first two Restatements addresses this matter, nor does this part of Restatement Third."

c. Apportionment of damages among multiple sufficient tortfeasors. Illustration 1 is hypothetical. Illustration 2 is based on Cipollone v. Liggett Group, Inc., 893 F.2d 541 (3d Cir. 1990), with the timeline modified to make both defendants liable. If the post-1965 advertising is viewed as innocent, and even if the post-1965 advertising were also sufficient to cause Rose's death, the result in Illustration 2 is not changed. Damages are apportioned among the multiple tortfeasors without regard to the innocent cause of the harm.

Joint and several liability is the longstanding rule in cases of indivisible injury involving multiple tortious actors whose conduct satisfies the multiple-sufficient-cause standard of Restatement Third, Torts: Liability for Physical and Emotional Harm § 27 (AM. L. INST. 2010). Carter v. Wallace & Gale Asbestos Settlement Tr., 96 A.3d 147, 158-159 (Md. 2014); Velsicol Chem. Corp. v. Rowe, 543 S.W.2d 337, 342 (Tenn. 1976) (collecting citations to earlier cases and scholarly commentary); Landers v. E. Tex. Salt Water Disposal Co., 248 S.W.2d 731 (Tex. 1952) ("Where the tortious acts of two or more wrongdoers join to produce an indivisible injury, that is, an injury which from its nature cannot be apportioned with reasonable certainty to the individual wrongdoers, all of the wrongdoers will be held jointly and severally liable for the entire damages and the injured party may proceed to judgment against any one separately or against all in one suit."); 1 DOBBS, HAYDEN, & BUBLICK, TORTS § 189 at 633 & n.9 (2d ed. 2011); Daniel J. Bussel, *Liability for Concurrent Breach of Contract*, 73 WASH. U. L.Q. 97, 114-115 (1995) ("Tort law also has grappled with the problem of allocating responsibility among multiple sufficient but not necessary causes. The classic example is that of two fires each sufficient to destroy particular property. If both fires are negligently set and combine to destroy the property, the authorities agree that joint and several liability is the appropriate solution."); see also Lakes of Rosehill Homeowners Ass'n, Inc. v. Jones, 552 S.W.3d 414 (Tex. Ct. App. 2018) (legislative enactment of proportionate liability scheme does not abrogate Texas's rule of joint and several liability if each defendant's proportionate responsibility for indivisible harms cannot be proven). *Landers* provides the basis for the example in the Comment regarding oil producers tortiously sending salt water into plaintiff's lake.

Some of these courts, such as the courts in *Carter* and *Jones*, hold that shares of responsibility cannot be apportioned among tortious defendants in cases of indivisible injury. For divisible harm, see Comment *f*. Although joint and several liability has been the historic norm in these cases, courts sometimes have created an exception when one defendant's contribution, while causally sufficient, was trivial compared to the contributions of other defendants. See Comment *e*.

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Joint and several liability has been a target of tort reformers and came under pressure as jurisdictions moved from contributory-negligence defenses to comparative responsibility. Each jurisdiction sets its own rules on the apportionment of responsibility. Restatement Third, Torts: Apportionment of Liability sets out rules for apportioning responsibility by providing alternative rules depending on whether and how jurisdictions have modified traditional joint and several liability rules for multiple tortfeasors, and explaining how to take account of plaintiff's actions in allocating shares of responsibility. See Restatement Third, Torts: Apportionment of Liability § 12 (AM. L. INST. 2000) (joint and several liability applicable under all regimes for intentional tortfeasors); id. §§ A18, B18, C18, D18, and E18 (setting forth rules for allocating shares of responsibility for indivisible injuries depending upon whether the jurisdiction has accepted, abandoned, or altered traditional rules of joint and several liability).

The question of apportionment and its relationship to joint and several liability commonly now also arises in a statutory context, that of liability for pollution damages under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). In Burlington N. & Santa Fe Ry. Co. v. United States, 556 U.S. 599, 614-615 (2009), the Supreme Court held that CERCLA defendants seeking to avoid imposition of joint and several liability for pollution damage bear the burden of proving that a reasonable basis for apportioning damages among defendants exists. See also Pakootas v. Teck Cominco Metals, Ltd., 905 F.3d 565, 588 (9th Cir. 2018) ("CERCLA liability is ordinarily joint and several, except in the rare cases where the environmental harm to a site is shown to be divisible."), cert. denied sub nom. Teck Metals Ltd. v. Confederated Tribes, 139 S. Ct. 2693 (2019). For commentary on how defendants in CERCLA cases should be able to prove divisibility, see Steve C. Gold, *Dis-Jointed? Several Approaches to Divisibility After* Burlington Northern, 11 VT. J. ENVTL. L. 307 (2009).

Compare Paroline v. United States, 572 U.S. 434, 451-452 (2014), discussing, but rejecting as inapplicable, Restatement Third, Torts: Liability for Physical and Emotional Harm § 27 (AM. L. INST. 2010). The context was a criminal restitution claim against a possessor of child pornography. The problem in *Paroline* was that defendant had two images of the complainant, "thousands" of other offenders had those or other images of her, and defendant's two images were "surely not sufficient to cause her entire losses from the ongoing trade in her images." If the Court had considered the two images on one computer as part of a causal set sufficient to cause all the harm, it would still have found that cause trivial in comparison to all the other causes of the same harm. See Comment *e.*

d. Damages when one or more of the multiple sufficient causes is innocent. Restatement Third, Torts: Liability for Physical and Emotional Harm (LPEH) § 27, Comment *d* (AM. L. INST. 2010) cites numerous cases in which modern courts "have accepted the proposition that the tortious actor is subject to liability when the [other sufficient] cause did not involve tortious conduct."

Since the publication of § 27, the Virginia Supreme Court reached the same conclusion in Ford Motor Co. v. Boomer, 736 S.E.2d 724 (Va. 2013). In *Boomer*, the court considered causation standards for plaintiffs who suffered asbestos-related disease after being exposed to asbestos from a number of sources. The court, endorsing the § 27 standards for multiple sufficient causation,

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concluded: "The exposure must have been 'a' sufficient cause: if more than one party caused a sufficient exposure, each is responsible. Other sufficient causes, whether innocent or arising from negligence, do not provide a defense." Id. at 732; see also id. ("We note that, while the Commonwealth currently only offers a model jury instruction as to concurrent negligence, concurring causes are not so limited: use of the multiple-sufficient-causes approach remains appropriate whether the concurring causes are all tortious in nature or whether some are innocent."). The court did not discuss the scholarly debate noted in § 27, Reporters' Note to Comment *d*.

The few other court decisions since the drafting of § 27 are consistent, and none mention the scholarly debate. New York v. United Parcel Serv., Inc., 942 F.3d 554, 598 (2d Cir. 2019) ("[T]ort principles typically do not permit a defendant to avoid paying damages by arguing that another tortfeasor's (or even innocent party's) actions would have been sufficient to produce the claimed harm absent the defendant's tortious conduct."); Boim v. Holy Land Found. for Relief & Dev., 549 F.3d 685, 697 (7th Cir. 2008) (en banc) (relying on Second Restatement's version of the rule); id. at 722 (Wood, J., concurring in part) ("The other examples the *en banc* majority uses fit the rule articulated in Restatement (Third) § 27. Thus, if there were two wrongful causes and a third innocent one (two arsonists plus a lightning strike, for example), any of which would have caused the injury at issue, the person responsible for one of the wrongful acts cannot take refuge in the fact that other sufficient causes were also present.").

On resolving the tensions between the thin-skull-plaintiff rule and the general treatment of the scope of liability, see § 4, Comment *g*.

This Reporters' Note does not restate the scholarly debate over whether the presence of an innocent sufficient cause should relieve or lessen a tortfeasor's liability. Section 27, Reporters' Note to Comment *d* fairly and extensively describes it. One commentary that postdates the Restatement discussion is Anthony M. Dillof, *Doomed Steamers and Merged Fires: The Problem of Preempted Innocent Threats in Torts*, 30 GA. ST. U. L. REV. 703 (2014). Professor Dillof argues that "the preemption of an innocent threat should reduce the damages available to a plaintiff in those cases where, and only where, had it not been for the defendant's tortious conduct, the plaintiff would have suffered the very same, or identical, harm as the harm actually suffered." Id. at 707.

In another commentary coming after approval of § 27, Professor Mark Gergen notes fairness and administrability reasons for not allowing a tortious defendant off the hook via proof of an innocent sufficient cause:

> Several reasons justify this result and the rule. If the competing causes all are wrongs against the claimant, then it seems perverse to allow each wrongdoer to evade legal responsibility for the loss by pointing to the other. The rule is not limited to competing wrongs, indicating other reasons exist for the rule. Often it is not certain whether a competing cause would have been sufficient without the wrong. It is thought better to cast the loss on a wrongdoer whose wrong probably would have been a sufficient cause of the loss had the other possibly sufficient cause not been operating concurrently. Insofar as the law's goal is deterrence, it

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> seems senseless to allow a wrongdoer to escape legal responsibility for a loss that would normally result from his wrongful conduct on the ground that another fortuitous event prevented the loss from occurring. And denying a wrongdoer the opportunity to try to evade responsibility for a loss by establishing a competing sufficient cause simplifies litigation.

Mark P. Gergen, *Causation in Disgorgement*, 92 B.U. L. REV. 827, 834-835 (2012) (citations omitted).

On the arguments for shifting the burden to the defendant to prove that an innocent cause would have been sufficient to cause the plaintiff's injury, see Michael D. Green, *The Intersection of Factual Causation and Damages*, 55 DEPAUL L. REV. 671, 703 (2006) ("[T]here is reason to impose the burden of production on the defendant with regard to duplicated or overdetermined harm. One reason is that proving a negative is quite difficult. . . . A second reason to shift the burden of proof might be that the defendant is culpable and has harmed the plaintiff, and if there is to be a decision based on an absence of evidence, the defendant should bear that risk rather than the plaintiff."). On arguments that the defendant should have to prove to a near certainty that an innocent cause would have done the same damage in the absence of defendant's tortious conduct, see Richard W. Wright, *The Grounds and Extent of Legal Responsibility*, 40 SAN DIEGO L. REV. 1425, 1435 (2003) ("A defendant who tortiously caused the plaintiff's injury should not be able to avoid liability upon a mere possibility, or even a probability, that the injury would have happened anyway as a result of some nontortious condition. Rather, the defendant should be able to avoid liability only if the injury almost certainly would have happened anyway as a result of one or more nontortious conditions.").

One final complication: it is possible for there to be multiple sufficient causes (or "multiple sufficient causal sets" as described in Comment *e* and Reporters' Note to Comment *e*) of plaintiff's injury, and for a factfinder to also determine that plaintiff should bear some of the responsibility under the rules of the Restatement Third, Torts: Apportionment of Liability (AM. L. INST. 2000). Thus, consider a plaintiff who contracts lung cancer after being exposed to Manufacturer 1's tobacco products at a time when it was not tortious to sell tobacco and Manufacturer 2's tobacco products at a time when it was tortious to sell tobacco. The factfinder determines that each manufacturer's conduct was a sufficient cause of plaintiff's lung cancer. Because Manufacturer 1's conduct was innocent, Manufacturer 2 would be liable for all of the damages. However, if the factfinder determines that plaintiff was comparatively responsible in choosing to smoke tobacco even after the risks were known, the factfinder may allocate some responsibility to plaintiff under the Restatement Third, Torts: Apportionment of Liability rules. See Major v. R.J. Reynolds Tobacco Co., 222 Cal. Rptr. 3d 563, 582-583 (Ct. App. 2017) (discussing the use of comparative responsibility in the context of multiple sufficient causal sets). As in Subsection (a)(1), so under Subsection (a)(2), a factfinder may reduce a defendant's liability as appropriate to take into account plaintiff's comparative responsibility under the Apportionment rules.

Illustration 3 is based on the classic case, Kingston v. Chi. & Nw. Ry. Co., 211 N.W. 913 (Wis. 1927). *Kingston* overruled Cook v. Minneapolis, St. Paul and Sault Ste. Marie Ry. Co., 74

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N.W. 561 (Wis. 1898). See Restatement Second, Torts § 432, Reporter's Notes (AM. L. INST. 1965). Illustrations 4 and 5 are hypothetical.

e. The scope of liability and trivial contributions to a sufficient causal set. This Restatement is not intended to add to or alter the rules contained in Restatement Third, Torts: Liability for Physical and Emotional Harm (LPEH) § 36 (AM. L. INST. 2010). The rule is included here for the sake of completeness. Illustration 6 is based on § 36, Illustration 1.

In Bostic v. Ga.-Pac. Corp., 439 S.W.3d 332, 351 (Tex. 2014), the Texas Supreme Court gave the following example of a case in which a plaintiff suing asbestos manufacturers for an asbestos-related disease could win on factual-causation grounds but lose under the scope-of-liability test: "Suppose a plaintiff shows that his exposure to a defendant's product more than doubled his chances of contracting a disease, but the evidence at trial also established that another source of the toxin increased the chances by a factor of 10,000. In this circumstance, a trier of fact or a court reviewing the sufficiency of the evidence should be allowed to conclude that the defendant's product was not a substantial factor in causing the disease."

Bostic, like many other cases involving claims of multidefendant responsibility for an asbestos-related disease, mixes concepts from the Second and Third Restatements in relation to both factual causation and scope of liability. In *Bostic*, the court cited to the Third Restatement's concepts on scope of liability but also applied "substantial factor" language from the Second Restatement.

The asbestos cases' causation analyses have been muddled, in part because they often involve cases in which there is no question that plaintiffs have developed an asbestos-related disease from exposure to the products of many defendants, but it is difficult to obtain reliable scientific evidence on the causal role of each defendant's product for plaintiff's disease. For an extensive discussion of the judicial approaches to causation in the asbestos context, see Restatement Third, LPEH § 27, Reporters' Note to Comment *e* (AM. L. INST. 2010).

Comment *f* to § 27 noted potential liability for "multiple sufficient causal sets," which is substantively different from the classic two-fires example of multiple sufficient causes. "In some cases, tortious conduct by one actor is insufficient, even with other background causes, to cause the plaintiff's harm. Nevertheless, when combined with conduct by other persons, the conduct overdetermines the harm, i.e., is more than sufficient to cause the harm." The Restatement gave the following example in Illustration 3:

> Able, Baker, and Charlie, acting independently but simultaneously, each negligently lean on Paul's car, which is parked at a scenic overlook at the edge of a mountain. Their combined force results in the car rolling over the edge of a diminutive curbstone and plummeting down the mountain to its destruction. The force exerted by each of Able, Baker, and Charlie would have been insufficient to propel Paul's car past the curbstone, but the combined force of any two of them is sufficient. Able, Baker, and Charlie are each a factual cause of the destruction of Paul's car.

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Courts have begun applying this example in cases involving a number of asbestos defendants—cases in which proof of each defendant's contribution to plaintiff's injury is uncertain. See Major v. R.J. Reynolds Tobacco Co., 222 Cal. Rptr. 3d 563, 581-582 (Ct. App. 2017). *Bostic* may be an example of a court applying this rule without explicitly relying upon it.

f. Divisible harm. As noted in the Comment, Subsection (b) is simply a cross-reference to the rules contained in Restatement Third, Torts: Apportionment of Liability § 26 (AM. L. INST. 2000) and related Sections. It is not intended to alter the analysis there.

The CERCLA cases at the end of Reporters' Note to Comment *c* use the concept of divisibility in a different sense from how it is used here and in Apportionment § 26. These cases ask whether "there is a reasonable basis for determining the contribution of each cause to a single harm." Burlington N. & Santa Fe Ry. Co. v. United States, 556 U.S. 599, 614 (2009) (quoting Restatement Second, Torts § 433A(1)(b) (AM. L. INST. 1965)). As the vocabulary is used here, this is an issue of apportioning responsibility for a single indivisible harm, and the *Burlington* opinion uses forms of the word "apportion" far more often than forms of the word "divisible." The CERCLA cases say that a harm is divisible if a sufficient basis for apportionment exists.

§ 12. Taxes

(a) Damages That Will Not Be Taxed.

The finder of fact shall not reduce the amount of damages on the ground that the plaintiff's receipt of the damages will be exempt from income taxes or on the ground that the plaintiff would have paid taxes on income that the award of damages will replace.

(b) Damages That Will Be Taxed.

(i) With respect to damages that will be subject to income taxes, the court generally should assume that the taxes incurred as a result of the tort will approximately equal the taxes that would have been incurred but for the tort, so that the finder of fact can ignore the effect of taxes. This rule is subject to the exception stated in Subsection (b)(ii).

(ii) If either party proves with reasonable certainty that the taxes on the judgment, plus any other taxes that the plaintiff incurred or will incur as a result of the tort, will be substantially different from the taxes that plaintiff would have incurred but for the tort, and that this difference is within the scope of liability, then the finder of fact shall account for this difference in measuring damages. But this Subsection does not apply to punitive damages, to taxable damages that compensate for emotional distress, or to taxable damages that compensate for any other harm in

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which the original loss had no tax consequences. This Subsection also does not apply to the tax-exempt damages governed by Subsection (a).

Comment:

a. History and scope. This Section is derived from Restatement Second, Torts § 914A, which is now superseded. That Section noted caveats to what is now Subsection (a); those caveats have been omitted. Section 914A stated some applications of Subsection (b)(i) as an absolute rule. Subsection (b)(ii) is new, responding to developments in the case law. This Section addresses common issues and patterns in tort litigation; it does not attempt to identify every tax issue that might arise in a tort case. This Section takes account of certain rules of tax law, but it does not restate those rules; tax law is outside the scope of this Restatement.

b. Damages that will not be taxed. Compensatory damages received "on account of personal physical injury or physical sickness" are generally excluded from gross income, and are thus exempt from federal income taxes, under 26 U.S.C. § 104(a)(2). Most states have similar or identical exclusions for state income-tax purposes, often because they adopt the federal definition of taxable income. Damages for physical injury or sickness often replace lost income that, but for the tort, would have been received in the ordinary course of the taxpayer's employment or business and would have been subject to income taxes in the year received.

Defendants have long argued that plaintiffs' lost earnings should be calculated on the basis of net earnings after tax, because plaintiffs do not lose the amounts that would have been payable to governments in taxes. Money that would have been taxed as earnings will instead be received tax free pursuant to the judgment. In effect, defendants argue that these tax savings are an offsetting benefit, although they do not explicitly invoke the offsetting-benefits rule in § 8.

This defense-side argument would plainly be fallacious if the judgment were taxable, because there would be no tax savings. Plaintiffs would not be made whole if the taxes they would have paid on lost earnings were deducted in calculating damages and then they paid a second round of taxes on the judgment that replaced their lost income. That would be "a double deduction for taxation," as the Supreme Court has said. The issue of how to treat taxes in personal-injury cases is a function of § 104's exclusion from gross income.

A substantial majority of states addressing this issue have held that taxes should not be taken into account. That is, damages should be based on the gross earnings that plaintiff lost, and not adjusted downward to net earnings on the ground that plaintiff would have paid taxes but for

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the injury or on the ground that the judgment will not be taxed. Subsection (a) adopts the majority rule in state courts, both because it is the majority rule and because it is the better rule, more consistent with surrounding principles in the law of remedies for tort.

Illustration:

1. Walter was shopping at Garden Co. when a concrete-block wall collapsed, crushing Walter and leaving him permanently disabled. He offered evidence that the present value of his gross earnings, from the date of the accident to his projected retirement, would have been $500,000. Garden Co., using different assumptions, offered evidence of a lower number. Garden Co. also offered evidence that Walter would have paid income taxes, with a present value of $70,000, on his lost earnings. Garden Co.'s evidence of income taxes should be excluded as irrelevant, and the factfinder should find the amount of lost earnings on the basis of the parties' conflicting evidence of projected gross earnings.

Many reasons have been offered for the majority rule. The most persuasive reason is that the exclusion from income in § 104 is a tax benefit for victims of personal injury. It is not a benefit for tortfeasors. This characterization probably captures Congress's reasons for preserving the exclusion, but more fundamentally, it states what Congress has done in fact. Congress has conferred a tax benefit on successful tort plaintiffs; it has not conferred a tax benefit on tortfeasors. A tax benefit for tortfeasors would presumably be a credit or deduction for funds paid in satisfaction of tort judgments or tort settlements—a credit or deduction that would appear on the tortfeasor's tax return instead of an exclusion from income that affects only the plaintiff's tax return. As with any other gratuitous benefit, the benefit should go to the injured donee and not to the tortfeasor who caused the injury. The exclusion of personal-injury judgments from taxation is analogous to, and may even be understood as, a form of compensation from a collateral source. See § 9.

Courts have also defended the rule on the ground that consideration of taxes unduly complicates the litigation. Because lost earnings are such a common feature of personal-injury damages, the additional complexity would arise not just in exceptional cases, but in the great majority of cases. Future earnings, and not just past earnings, are often at issue. Moreover, because the tax code is frequently amended in unpredictable ways, it is impossible to know what tax rules and rates would have applied to the future income that plaintiff would have earned but for the

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injury. There is force to these arguments from complexity, but future taxes are not unique in this respect; there are many other complexities, and many other uncertain future events that must be predicted, in measuring damages from a permanent or long-lasting injury. And courts have successfully dealt with the complexity of measuring tax consequences in contexts in which it is necessary to do so. But it is not necessary in personal-injury cases, and doing so would misapply § 104 of the Internal Revenue Code.

For another set of judgments on which no tax will be due, based on a completely different rationale, see Comment *h*.

c. The minority rule. In cases controlled by federal law, and in a small minority of states, damages in personal-injury cases are calculated on the basis of net income, on the theory that plaintiff has not lost money that would have gone to governments in taxes. The criticisms of this rule are the mirror image of the arguments for the majority rule—that it unduly complicates the litigation and that it appropriates plaintiff's tax benefit and confers it on defendant instead.

A majority of the United States Supreme Court may be understood to have implicitly rejected the view that § 104 confers a tax benefit on personal-injury victims, although the Court offered no other rationale for the exclusion's existence. But the significance of § 104 for state law on measurement of damages is ultimately a state-law question. And a majority of state courts have found the Supreme Court's interpretation unpersuasive.

d. State and federal law. Rules for the measurement of damages are substantive, so the federal rule applies to all torts governed by federal law, whether tried in state or federal court. This category includes tort claims by rail, longshore, and maritime workers for on-the-job injuries. It presumably also includes civil-rights and constitutional claims resulting in physical injury, such as police-brutality claims, but authority on that question is scarce. The federal rule does not apply to claims governed by substantive state law, whether tried in state or federal court. So state law applies to this issue in common-law tort cases, including in diversity jurisdiction and in suits against the United States under the Federal Tort Claims Act.

e. Damages that will be taxed. Taxable tort judgments are a broad and miscellaneous category that includes many judgments for property damage and most judgments for defamation, conversion, fraud, and all the other torts discussed in Restatement Third, Torts: Liability for Economic Harm. Subsection (b) applies to disputes about whether to account for taxes in cases that result in these taxable judgments.

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In the great majority of cases, the court and the parties can reasonably assume that all tax consequences of the tort will roughly balance out. They can and usually do simplify the litigation by ignoring the net effect of taxes. Litigating tax calculations under alternate scenarios is likely to be expensive, and the amounts at stake—the net effects of any differences in tax treatment—are generally modest.

The judicial view that tax consequences are necessarily conjectural and uncertain, expressed in many of the personal-injury cases, also appears in cases with taxable judgments and further discourages any attempt to litigate tax consequences in these cases. Tax consequences can often be proved with reasonable certainty (§ 5), but litigants attempting to do so fail to satisfy that standard with some frequency, and the burden of adequately proving tax consequences is often or usually disproportionate to any benefit in more precise measurement of damages.

These two points are related. If the amount in controversy is modest, and the litigation is expensive and complicated, the parties will often drop or compromise the issue, and busy judges will encourage or pressure them to do so. Opinions often go further, and refuse to admit evidence or entertain arguments about tax consequences if there is no reason to think that those consequences are large or that the gain in precision will justify the difficulty of the resulting litigation.

The court and the parties can also assume that plaintiff's taxes are none of defendant's business, and that most tax consequences are not within the scope of defendant's liability. In most cases, the only tax consequence of a tort is that some income is moved from one year to another (typically, from the year or years in which the harm is suffered to the year of collecting the judgment). And very commonly, the reason plaintiff owes more or less tax in one year than would have been owed in the other is that something else in plaintiff's tax situation has changed—something unrelated to the tort. Or the reason may be that Congress has amended the tax law. The tort had no effect on the risk that Congress would change the tax law, and typically had no effect on the risk of other changes in plaintiff's tax situation.

For all these reasons, the traditional view is that the tax consequences of torts and of tort judgments are generally not to be considered. Subsection (b)(i) recognizes this traditional practice.

But occasionally, there is a large mismatch with respect to tax treatment—a mismatch that is within the scope of liability and that cannot justly be ignored. Subsection (b)(ii) allows the parties to litigate such mismatches. There are two potential sources of such mismatches, and

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Subsection (b)(ii) is drafted in general terms to cover both. Both of these issues can arise in the same case, but more commonly, the court must deal with only one of them at a time.

First, the events that plaintiff experiences as a result of the tort, or the transactions that plaintiff enters into because of the tort, may be subject to substantially different tax treatment than the events or transactions that plaintiff would have experienced but for the tort. See Comment *f*. The Second Restatement did not address this possibility.

Second, and less frequently, the judgment itself may be taxed in a way that is inconsistent with the tax treatment of the losses plaintiff suffered or with the way in which those losses were measured. See Comment *h*. The Second Restatement stated an absolute rule that these differences are not to be taken into account.

All tort damages must be must be proved with reasonable certainty (§ 5) and be within the scope of liability (§ 6), whether or not those rules are mentioned in any other Section. These qualifications are included in the black letter in this Section because they loom so large in separating the tax consequences that can be ignored from those that can be litigated. The amount at issue has also been a factor in some of the cases. But how large a tax consequence must be to justify litigation cannot be stated as a rule.

f. Tax consequences as damages, or as reducing damages. The first set of cases addressed in Subsection (b)(ii) are those in which defendant's tort substantially increases or decreases plaintiff's tax liability, thus substantially increasing or decreasing plaintiff's damages. In some cases, increased tax liability is the entirely foreseeable consequence of a tort, within the risk that made defendant's conduct tortious, and the principal item of damages. The clearest examples are cases of professional malpractice with respect to tax matters, whether by an attorney, accountant, actuary, or investment adviser. Fraud in the sale of tax shelters raises similar issues. Or a transaction may be designed to achieve some specific tax benefit, such as sheltering a capital gain, and defendant tortiously prevents the transaction from being completed as planned, so that the tax benefit is lost.

Typically in these cases, the plaintiff entered into a transaction, or took some other financial step, that would not have been undertaken if proper advice had been given, and this transaction caused plaintiff to incur tax liabilities that would not have been incurred but for the tort. Or the tax professional had a duty to advise plaintiff to take some step to avoid a tax liability, and failed to give that advice. To refuse to compensate the increased tax liability in such cases would be to

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ignore the substance of defendant's tort duty and of the parties' transaction. Damages in such cases include both the additional taxes incurred and any tax penalties assessed. Courts have taken a variety of approaches to whether plaintiff can recover interest paid to the taxing authorities. See Comment *g*.

Illustration:

2. Investors owned a business incorporated in the Cayman Islands. The business held $30 million in accumulated profits that were exempt from U.S. taxes so long as the money remained outside the United States. Accountant sold Investors an investment vehicle that, according to Accountant, would enable the corporation to distribute profits to shareholders in the United States without incurring additional taxes. Investors distributed profits as Accountant advised. The Internal Revenue Service held Accountant's investment vehicle to be a sham and assessed $13 million in additional taxes, interest, and penalties against Investors. The finder of fact found that Accountant fraudulently misrepresented the likelihood that its investment vehicle would perform as promised; that but for this fraud, Investors would have left their money in the Caymans and continued to profitably invest it from there; and therefore, that they would not have incurred the additional taxes, interest, or penalties.

Investors may recover the additional taxes and penalties from Accountant. The better view, but a distinctly minority rule, is that Investors can also recover the interest paid to the taxing authorities to the extent that it exceeded the interest or investment return that they earned while they retained the money that they owed in additional taxes. See Comment *g*.

In cases such as Illustration 2, defendant's error caused plaintiff to take some financial step that incurred additional tax liability. Such cases must be distinguished from those in which defendant caused only a filing or reporting error. If a later audit uncovers the error and assesses additional taxes, these are taxes that plaintiff owed anyway and that should have been reported on the original return; they do not represent an increase in taxes that were caused by defendant's error. But plaintiff can recover any penalties assessed for filing the late or inaccurate return.

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Illustration:

3. Roger sold land in the mistaken belief that he had tax credits available to shelter the capital gain on the sale. On the day his tax return was due, Accountant advised him that the credits were not available, that he owed substantial taxes that he had not expected, and that he should request an extension of time in which to file his return while Accountant worked through unresolved issues on the return. Accountant failed to advise Roger that he should pay the taxes with his extension request, and Roger did not pay the taxes until he filed the return several months later. The state and federal taxing authorities assessed interest and penalties for failure to pay the taxes on time.

Roger can recover the penalties caused by Accountant's failure to advise him to pay his taxes with the extension request. Roger cannot recover the unexpected taxes on the sale of the land, because those taxes would have been payable anyway; they were not caused by the accountant's malpractice. The interest should be treated as in Illustration 2.

Substantial differences in tax treatment occasionally arise in other contexts. Such cases can arise when defendant's tort disrupts a tax-advantaged transaction (Illustration 4), or when either the original or substitute transaction, but not both, is subject to some form of specialized tax treatment (Illustration 5). Usually the tort creates additional tax liability as damages, but the tort can also create tax savings that reduce damages.

Illustrations:

4. Suzanne planned to sell real property worth substantially more than what she had paid for it years before. She planned to invest the proceeds of the sale in a different property. She retained Title Co. to organize and document the two transactions so that they would qualify as a like-kind exchange under 26 U.S.C. § 1031, thus deferring any tax on her capital gain from the first property. The legal and real-estate professionals employed at Title Co. negligently mishandled the two transactions, causing them not to qualify under § 1031, and causing Suzanne to owe $100,000 in capital-gains taxes. Suzanne can recover these taxes from Title Co.

5. Plaintiff entered into a contract to acquire half the worldwide oil reserves of Third Party. Defendant tortiously interfered with that contract and permanently prevented the acquisition. Plaintiff proved damages by showing that the likely cost of finding equivalent

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reserves through exploration would be $7 billion greater than the cost of acquiring those reserves from Third Party. Defendant proved that because of tax subsidies for oil exploration, and because of a tax penalty on the way the deal with Third Party had been structured, Plaintiff would have owed $2 billion in additional taxes if the deal with Third Party had been completed. Plaintiff would not owe these taxes if it replaced the reserves by exploration, as its damage model assumed. Plaintiff's damages should be reduced by the $2 billion difference in tax treatment. The tax savings are an offsetting benefit (§ 8), and they are within the scope of liability because they necessarily follow from Plaintiff's damage model.

g. Interest, penalties, and fees. When a taxing authority reviews a tax return and assesses additional tax, it generally charges interest on that tax and often charges penalties for not having reported the tax liability voluntarily and in timely fashion. The taxpayer may also incur fees for lawyers and accountants to resolve the dispute with the taxing authorities. It is widely agreed that plaintiff can recover the associated penalties and the fees incurred in resolving the matter to the extent that these expenses resulted from defendant's malpractice. With respect to fees, see § 15.

Courts are divided with respect to the interest on overdue taxes. In these cases, interest expense is alleged as consequential damages. This interest is distinct from the prejudgment and postjudgment interest addressed in § 13; plaintiff actually paid this interest, and may recover it even in states that do not routinely award prejudgment interest in tort. In states that allow both forms of interest, care must be taken to avoid awarding the same interest twice under different headings.

The largest group of states allows recovery of all interest paid to the taxing authorities as the result of the tort. This rule overcompensates any plaintiff who earned at least some investment return between the time the taxes should have been paid and the time they were actually paid. Some plaintiffs may have earned as much or more on their funds as the rate they paid to the taxing authorities; for them, the majority rule yields substantial compensation even though there was no loss at all.

A considerably smaller group of states denies any recovery of interest, on the ground that plaintiff had the use of the money while the interest accrued. This rule often undercompensates; it assumes that plaintiff was able to invest the money for a return as high as the rate charged by the taxing authorities, even though some plaintiffs are unable to do that.

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Neither of these rules accurately measures plaintiff's loss, but either might be defended on the ground of simplicity. The court in effect irrebuttably presumes either that plaintiffs earn nothing with the money not yet in paid in taxes, or that they earn whatever rate the taxing authorities are charging. Inquiry into plaintiff's actual situation is avoided.

A very small group of states treat the award of interest as a jury issue that depends on a factual inquiry into whether plaintiff was actually damaged by having to pay the interest. One such case affirmed a jury finding that plaintiff had been damaged, based on testimony that if plaintiff had known about the additional tax liability, he could have paid it by taking advantage of income averaging to spread out the payments and by borrowing from relatives at little or no interest. By implication, if he had testified that he would have borrowed the money from a bank at a higher interest rate, he would not have recovered interest. But for the tort, he would have been paying interest to the bank instead of to the taxing authorities.

Four federal courts in diversity cases, each attempting to apply the law of a state with no decision squarely in point, have said that the proper measure is the difference between the interest payable to the taxing authorities and the interest or investment return plaintiff earned on the funds during the period for which the interest was charged. The equivalent rule for plaintiffs with few liquid assets would be the difference between the interest payable to the taxing authorities and the interest plaintiff would have paid to borrow elsewhere to pay the taxes. This approach may be understood as a more structured version of the factual inquiry described in the previous paragraph. These diversity cases are not authoritative, but they state the rule that most nearly restores plaintiffs to the position they would have occupied but for the wrong. See § 2. This Restatement adopts this approach as the better rule. See Illustration 2.

h. Taxation of judgments, the tax-benefit rule, and return of capital. The second way in which tax consequences can loom large is if the tax treatment of the judgment is inconsistent with the tax treatment of plaintiffs' losses, or inconsistent with how those losses were measured. Here too, courts and parties can generally assume that tax consequences will net out. In the most commonly litigated situation, the tort reduces plaintiff's income, or it causes some other kind of loss for which the plaintiff takes a tax deduction. Plaintiff's damages should not be reduced on account of these tax savings, because these tax savings will be approximately offset by the taxes on the judgment.

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One reason this offset works so reliably in so many cases is the tax-benefit rule. Tax law generally provides that if a taxpayer claims a loss or deduction that reduces taxes in one year, and recovers all or part of the amount of that loss or deduction in a later year, the later recovery is taxable income.

The tax-benefit rule goes far to ensure that taxes on the judgment will match any taxes initially saved by deducting the loss caused by the tort (or by not reporting the income that was never earned because of the tort). In the simplest case, defendant destroys property used in plaintiff's business and plaintiff takes a tax deduction for that loss in the year of the tort. If plaintiff recovers the value of that property pursuant to a tort judgment in a later year, the proceeds of the judgment will be taxable income under the tax-benefit rule. The tax on the judgment will approximately offset the tax savings from the earlier deduction, subject to possible disparities caused by changes in plaintiff's tax situation or amendments to the tax code. These changes will normally be unrelated to the tort and outside the scope of defendant's liability (see Comment *e*), and in any event, the parties should be discouraged or prevented from litigating modest disparities.

And in fact, the rule is rarely litigated in such simple cases. Defendants are more likely to raise the issue in cases with more complex facts or more specialized tax benefits. But the tax-benefit rule makes it generally unnecessary to litigate tax consequences in these cases as well. When the tax-benefit rule applies, plaintiff will not retain the benefits, so the offsetting-benefits rule does not apply. Compare § 8.

Illustration:

6. Broker sold Laura four investments in tax shelters, fraudulently stating that the risks of these investments were limited. All four ventures failed, resulting in a total loss of her investment. These investment losses substantially reduced her taxable income and thus her taxes. These tax savings should not be subtracted from her damages, because the taxes on the judgment will approximately offset the earlier tax savings.

A common variation on these facts is less commonly litigated in tort, but frequently litigated between the tort plaintiff and the taxing authorities. Often, plaintiff's tax saving is delayed until after the judgment. It is therefore less visible to defendant and, if the issue is raised, appears less certain to the court. For a variety of reasons based in tax law, plaintiff may not be allowed to deduct the loss in the year it is suffered. The most common such reason is that a loss is not

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deductible if the taxpayer has a reasonable prospect of recovering that loss, and of course the taxpayer/tort-plaintiff claims a reasonable prospect of winning the lawsuit. But in this and similar situations, the judgment when recovered will be netted against the original loss; there is no net income unless the judgment exceeds the loss (as tax law would measure it). In the tax litigation and tax literature, these are commonly described as return-of-capital cases. The relevant point for tort purposes is that the tax consequences of the tort still approximately balance out and can generally be disregarded.

Illustration:

7. In 2015, Broker stole $200,000 from Harvey's account with Investment Co. Harvey claimed a $200,000 deduction on his 2015 federal tax return and filed a lawsuit against Broker and Investment Co. In 2017, the Internal Revenue Service disallowed the deduction on the ground that at the end of 2015, Harvey had a reasonable prospect of recovering the money. In 2019, Harvey finally recovered a judgment against Broker and Investment Co. Because the amount of the judgment will be netted against the amount of the loss on Harvey's tax return for the year in which he collects the judgment, the court should disregard the effect of taxes when it calculates damages.

i. Judgment taxed at substantially higher (or lower) rate than that applicable to plaintiff's losses. Occasionally, it is clear that the tax savings from the loss and the taxes on the judgment do not come close to balancing out. The extreme case is when a taxable judgment replaces lost income that would have been tax exempt. Tax law will often, perhaps normally, characterize the revenue from the judgment so as to avoid this result, but that is not always possible. If a taxable judgment replaces tax-exempt income, it is necessary to increase the amount of the judgment so that the net recovery to plaintiff after tax is equal to the original tax-exempt loss. This element of damages is sometimes referred to as "tax neutralization," or as "grossing up" the award, by analogy to gross and net salary income.

Illustration:

8. LeBron had large amounts of money in his tax-deferred retirement plan, raising the possibility that he might eventually owe tax on excess distributions. Accountant advised LeBron to withdraw all his funds in a lump sum and take advantage of transition rules that

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would minimize the tax liability. LeBron was skeptical, but Accountant was insistent, offering detailed spreadsheets that showed the advantages of a lump-sum withdrawal. LeBron eventually agreed and withdrew the funds. Unfortunately, two figures in the spreadsheets had been reversed, leading to serious errors in the calculations and thus erroneous advice.

The court in a bench trial calculated damages using after-tax numbers, comparing LeBron's net investment return from the assets after the lump-sum distribution to what his net investment return would have been if the assets had been left in the retirement plan. This calculation yielded damages of $500,000. Because damages were calculated net of taxes, but the court found that the judgment would be taxable, the court should gross up the damages, so that LeBron will net $500,000 after paying taxes on the judgment.

The court can do this by dividing the net investment losses by a number equal to one minus LeBron's marginal tax rate. For simplicity, assume that LeBron is in the (slightly fictional) 40-percent bracket. The court would divide $500,000 in net losses by .6, yielding damages of $833,333.33.

A much simpler situation has been widely litigated in employment-law cases. If multiple years of lost income are collected in a single year pursuant to a judgment, much of the judgment will be taxed at the highest marginal rate. If the income had been earned in ordinary course over the years, much more of it—all of it for plaintiffs of modest means—would have been taxed at significantly lower rates. Some courts are now grossing up the lost income, awarding an amount to compensate for the effects of the judgment being taxed at a higher rate than the income it replaces. A smaller number of courts have refused such damages.

It does not appear so far that any common-law tort cases have addressed the effects of bunching income into the year the judgment is collected. It may be that there are relatively few tort cases not involving personal injury in which damages are measured by multiple years of lost income. Certainly such cases are possible; consider lasting damage to a business, or tortious interference with a long-term contract. If and when the issue arises, there appears to be no good reason why the issue should be treated differently in tort than in statutory employment-law cases.

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Illustration:

9. Jennifer had a contract to buy a government-subsidized apartment building from Developer. The United States would subsidize the rents for 20 years, the apartments would be rented to low-income tenants, and the portion of the rent paid by tenants would be capped at affordable levels that, together with the government subsidy, would allow the private investor to make a profit. Sam, hoping to get this deal for himself, sent the government false information about Jennifer. Before she could get the facts clarified, the government found her ineligible for the program and cancelled the contract.

In Jennifer's suit for tortious interference with contract, she proved that the present value of her taxable profits from the building would have been $50,000 a year for 20 years. Because her other income was both modest and relatively stable, much of the building income would have been taxed at 28 percent and the rest at 31 percent. When she collected the $1,000,000 judgment in a single year, more of it was taxed at 31 percent, much of it at 36 percent, and most of it at 39.6 percent. The present value of these extra taxes was about $70,000. Jennifer can recover these taxes from Sam.

Theoretically, there could be cases in which the judgment is tax-advantaged in some way, or taxed at lower rates than the rates that would have applied to the income plaintiff lost. If such a case were to arise, defendant should be able to show the need for an adjustment of damages to take account of the difference in tax treatment. In practice, the tax-benefit rule makes it unlikely that such a case will arise.

j. Losses with no tax consequences. Some judgments are taxable even though they compensate losses that had no tax consequences. Compensation for emotional distress is the principal example. Punitive damages are also taxable, and there is no corresponding loss and thus no tax consequence associated with a loss. Subsection (b)(ii) does not apply to such judgments. It is meaningless to talk about a mismatch of tax consequences in emotional-distress or punitive-damage cases, because there is no tax deduction or loss of income and no substitute transaction or other taxable event—no tax consequences to which the tax on the judgment could be compared. There is simply a cash payment that Congress decided to tax. That is a matter between plaintiff and the taxing authorities. Neither punitive damages, nor compensation for emotional distress, nor compensation for any other loss unconnected to tax consequences, should be inflated on the ground that the judgment will be taxable.

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REPORTERS' NOTES

a. History and scope. This Section is derived from Restatement Second, Torts § 914A (AM. L. INST. 1939), which is now superseded. See JAMES M. FISCHER, UNDERSTANDING REMEDIES §§ 17.0-17.5 at 165-174 (3d ed. 2014); 4 FOWLER V. HARPER, FLEMING JAMES, JR., & OSCAR S. GRAY, HARPER, JAMES AND GRAY ON TORTS § 25.12 at 733-741 (3d ed. 2007); DOUGLAS LAYCOCK & RICHARD L. HASEN, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 136-142 (5th ed. 2019); JACOB A. STEIN, PERSONAL INJURY DAMAGES §§ 6:17, 15:12-15:14 (1997 & Supp.); Annotation, 16 A.L.R.4th 589 (1982 & Supp.).

Section 914A had two overlapping Subsections. Subsection (1) stated flatly that the amount of the judgment should not be adjusted on account of the tax treatment of the judgment. This Section recognizes exceptions to that rule. Section 914A did not address the possibility that the tort itself might substantially change plaintiff's tax situation. This Section addresses that possibility.

Subsection (2) said that the judgment should not be adjusted on account of the fact that the judgment would not be taxed but that it compensated for loss of future benefits that would have been taxed. This Section restates that rule. Caveats to this rule as stated in § 914A, omitted from this Section, are discussed in Reporters' Note to Comment *b*.

b. Damages that will not be taxed. Most state supreme courts to address the issue have held that damages should not be reduced because of taxes that would have been paid on lost earnings. Illustration 1 is based on Hoyal v. Pioneer Sand Co., 188 P.3d 716 (Colo. 2008); in the actual case, the victim died. For similar holdings, see Hicks ex rel. Saus v. Jones, 617 S.E.2d 457 (W. Va. 2005); Johnson v. Manhattan & Bronx Surface Transit Operating Auth., 519 N.E.2d 326 (N.Y. 1988); Rivera v. Phila. Theological Seminary, 507 A.2d 1 (Pa. 1986); Klawonn v . Mitchell, 475 N.E.2d 857 (Ill. 1985); Yukon Equip., Inc. v. Gordon, 660 P.2d 428 (Alaska 1983), overruled on other grounds, Williford v. L.J. Carr Invs., Inc., 783 P.2d 235 (Alaska 1989); Cates v. Brown, 645 S.W.2d 658 (Ark. 1983); McNally v. Eckman, 466 A.2d 363 (Del. 1983), overruled on other grounds, Wright v. State, 953 A.2d 144 (Del. 2008); Maricle v. Spiegel, 329 N.W.2d 80 (Neb. 1983); Dehn v. Prouty, 321 N.W.2d 534 (S.D. 1982); Michaud v. Steckino, 390 A.2d 524 (Me. 1978); Hinzman v. Palmanteer, 501 P.2d 1228 (Wash. 1972); Oddo v. Cardi, 218 A.2d 373 (R.I. 1966); Spencer v. Martin K. Eby Constr. Co., 350 P.2d 18 (Kan. 1960); Hoge v. Anderson, 106 S.E.2d 121 (Va. 1958); Briggs v. Chi. Great W. Ry. Co., 80 N.W.2d 625 (Minn. 1957); Dempsey v. Thompson, 251 S.W.2d 42 (Mo. 1952). Only four state supreme courts adhere to the minority rule. See Reporters' Note to Comment *c*. There is a similar majority among intermediate appellate courts in states where the supreme court has not yet addressed the issue.

Some of these courts suggested possible exceptions to the rule: that perhaps the taxes that would have been paid on earnings prior to trial should be considered (because those are easier to calculate), or that perhaps taxes should be considered for plaintiffs in very high tax brackets (because the tax savings will be greater), or that perhaps wrongful-death cases should be distinguished from other personal-injury cases (because wrongful-death plaintiffs can recover only what the decedent would have spent on them). Section 914A noted caveats with respect to two of

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these possible exceptions (past damages and high tax rates), and adopted the third possible exception (wrongful death) in a Comment that was not reflected in the black letter. Some wrongful-death acts require that damages be based on net income. See, e.g., FLA. STAT. ANN. § 768.21(1).

The caveats and the Comment-based exception are omitted here. It is not clear that any of these distinctions has led to a well-developed doctrine. More fundamentally, none of these potential distinctions affects the basic judgment that the exclusion from gross income is a tax benefit for injured plaintiffs.

The exclusion from gross income in 26 U.S.C. § 104 was originally enacted in 1918, and there is evidence that Congress at that time doubted whether compensation for personal injury is income within the meaning of the Sixteenth Amendment. Revenue Bill of 1918, H.R. Rep. No. 65-767 (1918), https://www.scribd.com/document/24601648/House-Report-65-767. But that cannot be the reason why Congress has left the exclusion in place through a century of amendments and recodifications and as constitutional understandings of income grew more capacious. Today, the Internal Revenue Code expressly taxes damages for emotional distress. See § 104(a). If Congress believes that damages for emotional distress are income within the Sixteenth Amendment, it must necessarily believe that damages for physical pain and suffering are also income within the Sixteenth Amendment; there is no plausible distinction between the two. And Congress surely has the power to tax damages that replace lost income that would have been taxable if earned—the only damages actually at issue in the debate over how to measure lost earnings. Constitutional doubt can no longer explain § 104's exclusion from gross income.

Whatever the motivation, the unambiguous effect of the exclusion is to confer a tax benefit on injured plaintiffs. And § 104(a) has repeatedly been amended to exclude from gross income other compensatory payments to other sympathetic victims. One of these additions distinguishes between insurance policies the injured individual paid for with after-tax income (benefits excluded) and policies paid for by the injured individual's employer or with the employee's untaxed income (benefits taxable). 26 U.S.C. § 104(a)(3). A similar distinction between employee-paid and employer-paid benefits also appears in some of the collateral-source-rule cases and in statutes modifying that rule. See § 9(a)(3) and Comment *c*. As it has evolved, § 104(a) looks more and more like a collateral source of compensation to selected taxpayers suffering from injury or disability.

If defendant commits a tort in the course of a trade or business, then the damages defendant pays are generally deductible as a business expense. That is the tax benefit to defendants. There is no such deduction for other tortfeasors, such as a negligent driver on a personal errand, and no separate rule giving preferential tax treatment, beyond the deduction for ordinary business expenses, for tort liabilities incurred in a trade or business. Only the plaintiff's tax treatment departs from the usual rules.

In addition to the question of how to measure damages, there is a related but distinct issue of whether the jury must be given a cautionary instruction that the amount of its verdict will not be taxed. The substantive issue of measurement can be handled by admitting evidence only of plaintiff's (or decedent's) gross earnings, and excluding evidence of net earnings. The jury-

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instruction issue is whether the jury should be cautioned not to inflate its verdict to allow for taxes that the jury might assume will be assessed, but that will not actually be assessed because of § 104. Whether to give such an instruction is an issue of trial procedure outside the scope of this Restatement. A majority of states, heavily overlapping with but not identical to the majority on the measurement issue, holds that no such instruction should be given, or in some of these states, that it need not be given. Some of the cases on both the measurement issue and the jury-instruction issue are collected in Annotation, 16 A.L.R.4th 589 (1982 & Supp.).

c. The minority rule. The minority rule is most famously represented by Norfolk & W. Ry. Co. v. Liepelt, 444 U.S. 490 (1980), which held that net earnings are the only realistic measure of what plaintiff lost, and which denied the relevance of § 104. For state supreme courts applying the minority rule, see Caldwell v. Haynes, 643 A.2d 564 (N.J. 1994); Blanchfield v. Dennis, 438 A.2d 1330 (Md. 1982); Adams v. Deur, 173 N.W.2d 100 (Iowa 1969); and Floyd v. Fruit Indus., Inc., 136 A.2d 918 (Conn. 1957). But compare *Adams* with Iowa-Des Moines Nat'l Bank v. Schwerman Trucking Co., 288 N.W.2d 198 (Iowa 1980), treating estate-tax savings from a wrongful death as a collateral source that should benefit the survivors and not the defendant.

Liepelt must be taken to have rejected the view that the exclusion from income in § 104 confers a tax benefit on tort plaintiffs. But what the Court actually said means nearly the opposite: "we see nothing in the language and are aware of nothing in the legislative history of § 104(a)(2) to suggest that it has any impact whatsoever on the proper measure of damages in a wrongful-death action." 444 U.S. at 496 n.10. Precisely. But for § 104, damages would have to be measured by plaintiff's gross earnings, because a deduction for taxes in measuring damages would be duplicated by taxes on the judgment, resulting in "a double deduction for taxation." Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 503 (1968). *Hanover Shoe* was an antitrust case, so § 104 did not apply, and the judgment was fully taxable. If damages must be measured by gross earnings when § 104 does not apply, as the Court said in *Hanover Shoe*, and if § 104 has no "impact whatsoever" on the measurement of damages, as the Court said in *Liepelt*, then damages have to be measured by plaintiff's gross earnings in § 104 cases as well. The Court in *Liepelt* actually interpreted § 104 to change the measure of damages, without acknowledging that it was doing so.

Congress did not expressly tax damages for emotional distress until a 1996 amendment. Small Business Jobs Protection Act of 1996 § 1605, Pub. L. No. 104-188, 110 Stat. 1755 (1996). That amendment was of course unavailable to the Court when it decided *Liepelt* in 1980. Section 104's exclusion from income can no longer be explained by constitutional doubt, but that may have been less obvious in 1980 than it is now.

d. State and federal law. It is well settled that the measure of damages is substantive for purposes of Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938). See § 1, Comment *b* and Reporters' Note to Comment *b*. Whether to subtract taxes from damages for lost earnings is a measurement issue, and therefore, state law controls on state-law claims tried in federal court. For diversity cases, see, e.g., Miller v. Union Pac. R.R. Co., 900 F.2d 223 (10th Cir. 1990); Robichaud v. Theis, 858 F.2d 392 (8th Cir. 1988); Smith v. Indus. Constructors, Inc., 783 F.2d 1249 (5th Cir. 1986); and Vasina v. Grumman Corp., 644 F.2d 112 (2d Cir. 1981).

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For the application of state law to claims under the Tort Claims Act, see, e.g., Palmer v. United States, 146 F.3d 361 (6th Cir. 1998); and Manko v. United States, 830 F.2d 831 (8th Cir. 1987). The United States successfully argued in some older cases that failure to reduce damages by amounts that plaintiff would have paid in taxes is a form of punitive damages, which are not available under the Tort Claims Act. But that argument cannot survive Molzof v. United States, 502 U.S. 301 (1992), which held that punitive damages for this purpose are only those damages awarded for egregious wrongdoing and understood as punitive at common law. Compare *Manko*, 830 F.2d 831 (rejecting the government's argument and anticipating *Molzof*), with, e.g., Hollinger v. United States, 651 F.2d 636 (9th Cir. 1981) (accepting the government's argument).

For the application of federal law to federal tort claims in state court, see Norfolk & W. Ry. Co. v. Liepelt, 444 U.S. 490 (1980) (reversing a state-court judgment for failing to apply the newly announced federal rule to a railway worker killed on the job); CSX Transp., Inc. v. Moody, 313 S.W.3d 72 (Ky. 2010) (recognizing that federal law controls).

On applying the federal rule to federal civil-rights claims, see Kendrick v. Jefferson Cnty. Bd. of Educ., 13 F.3d 1510 (11th Cir. 1994), and Davis v. Little, 851 F.2d 605 (2d Cir. 1988). Each court thought it clear that *Liepelt* applies to all federal claims for damages from personal injury, but neither was an unqualified holding. In *Kendrick*, it was unclear whether the judgment would be within § 104 as it then read, and in *Davis*, defendant had failed to preserve the issue. See also Fanetti v. Hellenic Lines Ltd., 678 F.2d 424, 431 (2d Cir. 1981) (stating in dictum that *Liepelt* applies "at least to all claims for future wages based solely on federal law"). This statement cannot be taken literally without an implicit limitation to awards that will be exempt from tax under § 104, as the Eleventh Circuit explicitly recognized in *Kendrick*.

e. Damages that will be taxed. The classic citations for assuming that taxes on the judgment will come close enough to offsetting tax savings from the losses being compensated are Randall v. Loftsgaarden, 478 U.S. 647 (1985), a securities-fraud case, and Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968), an antitrust case. *Randall* was a statutory claim seeking rescissory damages; the Court relied on the wording of the statute and also on the tax-benefit rule. See Comment *h*. In *Hanover Shoe*, the Court recognized that relying on taxes on the judgment to offset the taxes that would have been paid but for the violation produced only a "rough result," but it held that this rough result was "the most satisfactory outcome." Id. at 503. The same idea occurs in many of the common-law tort cases cited below.

Restatement Third, Torts: Liability for Physical and Emotional Harm reformulated the test for scope of liability in a way that is helpfully clarifying with respect to these tax issues. That Restatement says that "An actor is not liable for harm when the tortious aspect of the actor's conduct is of a type that does not generally increase the risk of that harm." § 30 (AM. L. INST. 2010). When Congress amends the tax code, or when plaintiffs have extra income or deductions in Year 2 that make their tax situation different from what it was in Year 1, there is nothing unusual or unforeseeable or even remote about those changes. These kinds of changes happen nearly every year. But defendant's tort did not affect the risk of either kind of change. Section 30's formulation based on harms within the risk of defendant's conduct is of course closely related to the traditional

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foreseeability test. These tax cases are a factual context in which the shift in emphasis may affect the result, or at least make it easier to see and explain the right result. The cases refusing to consider tax changes have not often put the point in terms of foreseeability, proximate cause, or scope of liability. But a similar intuition appears to underlie statements that plaintiff's taxes are no concern of defendant, or none of defendant's business.

On change in rates, see Beim v. Hullfish, 83 A.3d 31 (N.J. 2014), where plaintiffs' 97-year-old decedent was killed in an automobile accident in 2008. If he had lived until 2009, the taxes on his estate would have been much less; if he had lived to 2010, the estate taxes would have been zero. The court held that the extra taxes were not "pecuniary damages" within the meaning of the wrongful-death act. In Oddi v. Ayco Corp., 947 F.2d 257 (7th Cir. 1991) (Illinois law), defendant argued that the 28-percent maximum tax rate then in effect could not last long. Defendant turned out to be right about the politics, but the court held that defendant had not proven any other number as a likely future rate. In each of these cases, actual or potential changes in rates dropped out of the damage calculation.

f. Tax consequences as damages, or as reducing damages. The largest area in which plaintiffs suffer damages in the form of increased tax liability is professional malpractice with respect to tax advice. See Jacob L. Todres, *Tax Malpractice Damages: A Comprehensive Review of the Elements and the Issues*, 61 TAX LAW. 705 (2008). Some of these cases are examined from a defense perspective in Anthony E. Rebollo, *Responding to "Gross-Up" Claims in Tax Malpractice Cases*, 20 J. TAX'N 353 (2006). Illustration 2 is based on Yung v. Grant Thornton, LLP, 563 S.W.3d 22 (Ky. 2018), but modifies the result with respect to interest. Plaintiffs in *Yung* recovered taxes, interest, and penalties.

Other examples include Oddi v. Ayco Corp., 947 F.2d 257 (7th Cir. 1991) (Illinois law) (negligent advice on how to manage distributions from tax-deferred retirement plan; plaintiff recovered net loss of income resulting from additional taxes; interest and penalties not at issue); Jamison, Money, Farmer & Co. v. Standeffer, 678 So. 2d 1061 (Ala. 1996) (negligent advice resulted in disability payments being taxable instead of tax exempt; plaintiff recovered taxes and interest; penalties not at issue); Lien v. McGladrey & Pullen, 509 N.W.2d 421 (S.D. 1993) (negligent advice led client to prematurely redeem preferred stock, causing taxes that could have been avoided; plaintiff recovered taxes and interest; penalties not at issue); Linck v. Barokas & Martin, 667 P.2d 171 (Alaska 1983) (attorneys failed to advise widow to disclaim her inheritance from husband; plaintiff stated a claim even though she was still alive and second estate tax at her death had not yet been incurred); Cattau v. Nat'l Ins. Servs. of Wis., Inc., 865 N.W.2d 215 (Wis. Ct. App. 2015) (plaintiffs stated claim for negligent misrepresentation with respect to retirement benefits, causing damages in form of additional taxes and interest); Maese v. Garrett, 329 P.3d 713 (N.M. Ct. App. 2014) (negligent advice that plaintiff could withdraw funds from annuity without tax consequences; plaintiff recovered taxes, interest, and penalties).

Illustration 3 is based on Frank v. Lockwood, 749 N.W.2d 443 (Neb. 2008), but again modifies the result with respect to interest. The court affirmed a jury verdict for the full amount of penalties, but reversed the award of interest because plaintiff had not shown that he was harmed

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by paying interest. There was also evidence that plaintiff had entered into the underlying transaction in reliance on bad tax advice, but the jury had apparently not credited that evidence; the verdict did not include the extra taxes. Another example is Haddad Motor Grp., Inc. v. Karp, Ackerman, Skabowski & Hogan, P.C., 603 F.3d 1 (1st Cir. 2010) (Massachusetts law), where the court affirmed an award of interest and penalties; the jury had apparently concluded that the taxes would have been due even without defendant's malpractice.

Illustration 3 is not inconsistent with the widespread judicial reluctance to litigate complex tax issues with modest consequences. The verdict for penalties and interest in the case on which it is based was $37,000, and the cost of litigating penalties and interest already assessed for late payment was presumably modest. The amount of taxes at issue was much larger, and the litigation over the taxes was likely more complex.

New York refuses to compensate damages in the form of additional tax liability. This rule originated in an influential opinion in Alpert v. Shea Gould Climenko & Casey, 559 N.Y.S.2d 312 (App. Div. 1990). The Court of Appeals does not appear to have passed on the issue, but it did cite *Alpert* favorably in Lama Holding Co. v. Smith Barney Inc., 668 N.E.2d 1370 (N.Y. 1996). Both *Alpert* and *Lama* appear to have been cases where plaintiff failed to prove causation; the tax liability would have been incurred even without the tort. But New York courts have applied *Alpert* without distinction to cases in which the tort did cause the tax liability. Compensation may also be less generous when plaintiff sues under the federal securities laws. See DCD Programs, Ltd. v. Leighton, 90 F.3d 1442 (9th Cir. 1996), and cases there cited.

Illustration 4 is based on Kreisers Inc. v. First Dakota Title Ltd. P'ship, 852 N.W.2d 413 (S.D. 2014). There is a similar result on a breach-of-contract theory in Alexsey v. Kelly, 614 N.Y.S.2d 736 (App. Div. 1994). The opinion does not cite *Alpert* or its progeny, the New York tort cases refusing compensation for increased tax liability in tort. There is an analogous result in Walker v. Signal Cos., 149 Cal. Rptr. 119 (Ct. App. 1978), where plaintiffs planned to shelter the capital gain from selling their principal residence by investing the proceeds in a new and more expensive house. Defendant fraudulently represented that it would build the new house and complete it before the deadline expired for sheltering the capital gain, never intending to actually do so. Plaintiffs recovered the extra taxes on the sale of the first house. See also In re Estate of Forgey, 906 N.W.2d 618 (Neb. 2018), a suit for breach of fiduciary duty in which the only damages were $854,000 in additional liability for estate taxes.

Illustration 5 is based on Texaco, Inc. v. Pennzoil Co., 729 S.W.2d 768 (Tex. Ct. App. 1987), with some modification of the facts to better focus the issue. The court treated defendant's tax arguments as relevant to the measure of damages, but on the facts, it held that plaintiff had adequately accounted for the tax incentives for oil exploration and that defendant had failed to prove that the disrupted transaction would have been subject to a tax penalty.

g. Interest, penalties, and fees. For cases awarding interest and penalties, see Reporters' Note to Comment *f*. Other cases allowing recovery of tax penalties are collected in Jacob L. Todres, *Tax Malpractice Damages: A Comprehensive Review of the Elements and the Issues*, 61 TAX LAW. 705, 731 n.165 (2008). Cases on recovery of the costs of correcting the error—mostly professional

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fees—are collected in id. at 733-736. A more recent example affirming the award of such fees is Firmani v. Dar-Court Builders, LLC, 793 S.E.2d 596 (Ga. Ct. App. 2016).

The divided cases on recovery of interest are reviewed in Todres, 61 TAX LAW. at 722-731, in Frank v. Lockwood, 749 N.W.2d 443 (Neb. 2008), and in O'Bryan v. Ashland, 717 N.W.2d 632 (S.D. 2006). *Frank* rebuttably presumed that plaintiffs are not harmed by paying interest and held that plaintiff had not shown otherwise; *O'Bryan* is the case holding that plaintiff was harmed because he might have avoided interest by borrowing from relatives. For a well-reasoned opinion announcing a rule against awarding interest, see Leendertsen v. Price Waterhouse, 916 P.2d 449 (Wash. Ct. App. 1996).

The federal cases adopting the difference between the interest paid to the Internal Revenue Service and the interest earned before the taxes were paid are Haddad Motor Grp., Inc. v. Karp, Ackerman, Skabowski & Hogan, P.C., 603 F.3d 1 (1st Cir. 2010) (Massachusetts law); Streber v. Hunter, 221 F.3d 701 (5th Cir. 2000) (Texas law); Seippel v. Jenkins & Gilchrist, P.C., 341 F. Supp. 2d 363 (S.D.N.Y. 2004) (Virginia law); and Ronson v. David S. Talesnick, CPA, 33 F. Supp. 2d 347 (D.N.J. 1999) (New Jersey law). The Fifth Circuit labeled this the "interest-differential rule." Some of these cases explicitly treat the interest earned as an offsetting benefit. See § 8.

Leendertsen criticized the interest-differential rule on the ground that defendant should not be responsible if plaintiff invested unwisely and earned little or no return. That issue can be addressed with causation and scope-of-liability rules (§ 6), and with the avoidable-consequences rule (§ 7). Plaintiffs who lose money in risky investments cannot blame defendants for that loss, even if the money would not have been available to lose if defendants had not given bad tax advice. Similarly if they hold substantial sums in a non-interest-bearing account without good cause, that loss is not reasonably attributable to defendant's tort.

h. Taxation of judgments, the tax-benefit rule, and return of capital. Illustration 6 is based on Cody v. Edward D. Jones & Co., 502 N.W.2d 558 (S.D. 1993). There are similar results in cases arising from the sale of tax shelters in Burdett v. Miller, 957 F.2d 1375 (7th Cir. 1992) (Illinois law) (breach of fiduciary duty), and Boettcher & Co. v. Munson, 854 P.2d 199 (Colo. 1993) (state-law securities fraud).

The tax-benefit rule was originally deduced from the logic of the tax system and is partially codified in 26 U.S.C. § 111. See Hillsboro Nat'l Bank v. Comm'r, 460 U.S. 370 (1983). Casualty losses of the sort commonly caused by torts are typically deductible if suffered in a trade or business, and occasionally in other contexts, under 26 U.S.C. § 165. The issue can therefore arise in a range of tort contexts. In Fullmer v. Wohlfeiler & Beck, 905 F.2d 1394 (10th Cir. 1990) (Utah law), negligent auditors caused plaintiffs to suffer investment losses; the court refused to consider the resulting tax savings, relying on the tax-benefit rule.

Coty v. Ramsey Assocs., Inc., 546 A.2d 196 (Vt. 1988), was a nuisance case. One damage item was the cost of air conditioners that plaintiffs purchased to reduce odors in their motel. They took depreciation deductions on the air conditioners; the court held the resulting tax savings to be irrelevant. It relied partly on the collateral-source rule (§ 9), and partly on the view that if it

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considered such tax deductions, it would also have to consider taxes on the judgment. It appeared to assume, but did not make explicit, that taxes on the judgment would offset the deductions taken.

In Firmani v. Dar-Court Builders, LLC, 793 S.E.2d 596 (Ga. Ct. App. 2016), negligence in the design of a pension plan led to additional tax liability. The court affirmed an award of damages based on the net increase in the directly affected taxes. It also affirmed the exclusion of evidence of other tax savings, relying in part on the collateral-source rule and in part on what it called the "general rule" that in cases involving "financial damages," damages should not be reduced by the tax savings from claiming a deduction for damage items.

In Cox v. Superior Court, 120 Cal. Rptr. 2d 45 (Ct. App. 2002), plaintiff received a substantial disability pension tax-free. California had repealed the collateral-source rule in medical-malpractice cases. The court held that the pension was admissible in evidence under the statute, but that the tax-exempt status of the pension was not admissible. It relied partly on the wording of the statute, partly on the view that tax consequences are necessarily speculative, and partly on earlier cases from other contexts holding that tax consequences are not to be considered.

Illustration 7 is based on Jeppsen v. Comm'r, 128 F.3d 1410 (10th Cir. 1997), the litigation over the tax audit, and Jeppsen v. Piper, Jaffray & Hopwood, Inc., 879 F. Supp. 1130 (D. Utah 1995), confirming an arbitration award in Harvey's favor on the tort claim. Because the merits of the tort claim were resolved in the arbitration proceeding, we do not know whether either side made arguments about the tax treatment of the damages.

The return-of-capital concept is applied to a wide range of judgments and settlements compensating for the loss of, or damage to, some tangible or intangible asset that plaintiff had held in an after-tax form. There is a fair amount of tax litigation over whether particular judgments or settlements qualify for this treatment. See Annotation, 173 A.L.R. 558 (1948 & Supp.). The resulting uncertainty has generated at least some litigation in the underlying tort suits, in which plaintiff claims, and defendant denies, that the judgment will be taxed because the taxing authorities will not allow it to be netted with the original loss. It appears to have been difficult for plaintiffs to prove that they will be subject to this disadvantageous tax treatment. See Anthony E. Rebollo, *Responding to "Gross-Up" Claims in Tax Malpractice Cases*, 20 J. TAX'N 353 (2006). If a plaintiff succeeds in this proof, the case becomes one discussed in Comment *i*: the judgment will be taxed without an offset or deduction for the original loss.

i. Judgment taxed at substantially higher (or lower) rate than that applicable to plaintiff's losses. Illustration 8 is based on Oddi v. Ayco Corp., 947 F.2d 257 (7th Cir. 1991) (Illinois law). Both the district court and the court of appeals noted that if a taxable judgment compensates a loss of taxable income, taxes will generally balance out and should be disregarded. But here, with a taxable judgment and a loss of income calculated net of tax, taxes would not balance out, or even come close, and an adjustment was required. For similar holdings in contract cases, see O'Toole v. Northrop Grumman Corp., 499 F.3d 1218 (10th Cir. 2007) (New York law); and Home Savings v. United States, 399 F.3d 1341 (Fed. Cir. 2005).

Oddi is cited in Reporters' Note to Comment *f*, because the principal source of damages was excess tax liability. It also appears here, because the judgment was taxable, but the damages

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were measured net of taxes. The two issues are related but distinct. Measuring the tax consequences in *Oddi* required a comparison of projected investment returns with and without the lump-sum withdrawal. Because taxes were the biggest difference between the two projections, net return after taxes was the best way to make the comparison, and perhaps the only effective way. And measuring damages net of tax set up the disparity between the measurement of damages and taxation of the judgment.

Plaintiffs have sought tax gross ups in at least some tax malpractice cases of the sort in Illustrations 2 and 4, but have not succeeded in proving that the Internal Revenue Service would tax their recovery. See Anthony E. Rebollo, *Responding to "Gross-Up" Claims in Tax Malpractice Cases*, 20 J. TAX'N 353 (2006).

For employment cases that gross up awards of back pay, or authorize trial courts to do so in their discretion, see Clemens v. Centurylink Inc., 874 F.3d 1113 (9th Cir. 2017); EEOC v. N. Star Hosp., Inc., 777 F.3d 898 (7th Cir. 2015); Eshelman v. Agere Sys., Inc., 554 F.3d 426 (3d Cir. 2009); Sears v. Atchison, Topeka & Santa Fe Ry. Co., 749 F.2d 1451 (10th Cir. 1984); Economy v. Sutter E. Bay Hosps., 243 Cal. Rptr.3d 495 (Ct. App. 2019); and Quinlan v. Curtiss-Wright Corp., 976 A.2d 429 (N.J. Super. Ct. App. Div. 2009), rev'd on other grounds, 8 A.3d 209 (N.J. 2010). The holding on taxes survived the remand. See Quinlan v. Curtiss-Wright Corp., 41 A.3d 739 (N.J. Super. Ct. App. Div. 2012). For cases refusing to gross up, see Fogg v. Gonzales, 492 F.3d 447 (D.C. Cir. 2007); Miss. Dep't of Hum. Servs. v. McNeel, 10 So. 3d 444 (Miss. 2009); and Barber v. State Personnel Bd., 247 Cal. Rptr. 3d 474 (Ct. App. 2019).

Some of the cases approving gross ups emphasize that back pay is an equitable remedy and that equity is committed to make-whole remedies. But of course, the make-whole principle is also fundamental to tort damages. See § 2. There is no good reason to treat back pay in employment cases differently from lost earnings in tort. For criticism of the settled rule that back pay is equitable, see Restatement Third, Restitution and Unjust Enrichment § 4, Comment *c* and Illustration 1 (AM. L. INST. 2011); LAYCOCK & HASEN, REMEDIES at 586-587.

Illustration 9 is loosely based on Sonoma Apartment Assocs. v. United States, 127 Fed. Cl. 721 (2016), authorizing a gross up of damages in a breach-of-contract action against the government. The court of appeals eventually held that plaintiffs had not proved the tax effects with reasonable certainty. 939 F.3d 1293 (Fed. Cir. 2019). Most obviously, one plaintiff was a young adult member of the investing family. The family was affluent, but the young adult was still in a low tax bracket, and his damage model assumed that he would remain in that bracket for 20 years. See also Paris v. Remington Rand, 101 F.2d 64 (2d Cir. 1939) (rejecting gross up in breach-of-contract action as speculative, even when the additional taxes had already been paid); Besler v. Bd. of Educ., 2008 WL 3890499, at *19-20 (N.J. Super. Ct. App. Div. Aug. 25, 2008) (reversing decision to gross up damages for emotional distress).

j. Losses with no tax consequences. Damages for emotional distress are now taxable by the express terms of 26 U.S.C. § 104(a). Punitive damages correspond to no loss against which they might be offset; they have long been treated as taxable. Comm'r v. Glenshaw Glass Co., 348 U.S. 426 (1955). There may be other examples of taxable judgments for losses without tax

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consequences, but if so, they arise in unusual circumstances and have not given rise to significant litigation.

§ 13. Interest

(a) Except as otherwise provided by statute or rule of court, a plaintiff who establishes a defendant's liability in tort is entitled to prejudgment interest at a reasonable market rate, on the amount of damages found by the finder of fact, from the date or dates of injury (or a reasonable approximation thereof) to the date of judgment.

(b) A plaintiff who obtains a judgment awarding damages in tort is entitled to postjudgment interest on the amount of that judgment as provided by statute or rule of court.

Comment:

a. History and scope. This Section is derived from Restatement Second, Torts § 913, which is now superseded. This Section reflects substantial judicial and legislative evolution towards a more nearly compensatory approach to prejudgment interest. In many states, statutes now control this issue in whole or in part. This Section is retained despite the growth of legislation, both to maintain continuity with earlier Restatements and because those Restatements have become seriously inaccurate as statements of the current law. Interest is an important part of compensation and potentially at issue in every case, and interest on past damages must be carefully integrated with calculation of the present value of future damages. See § 14. This Section restates the basic principles and gives examples of the many detailed rules that vary from state to state.

b. Prejudgment interest and the rightful position. In a perfect world, plaintiff would not be injured in the first place. Failing that, plaintiff would be instantly compensated for each injury as it occurs. But that is equally impossible. Litigation is slow, delays are inevitable, and the more serious the injury, the longer the delay is likely to be. A dollar paid months or years after the injury is not equivalent to a dollar paid simultaneously with the injury. Interest from the time of injury to the time of payment is thus essential to complete compensation.

c. Doctrinal evolution. The historic rule was that prejudgment interest would be awarded only if damages were "liquidated" or "ascertainable," and then only simple interest and at the "legal rate," which was rarely tied to market rates. Doctrine evolved gradually and unevenly through much of the 20th century, and the meaning of "ascertainable" varied widely among American jurisdictions. Disputes over liability generally did not make damages unascertainable,

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but disputes over the amount of damages often did. Some states required near mathematical certainty; some came to hold that most damages in business contexts were ascertainable.

The rule that defendant owed interest only if damages were ascertainable rested on the view that a defendant who could not ascertain the amount due would be unable to pay. This rationale implicitly treated interest not as an element of compensation, but as a penalty on defendants who failed to pay promptly. The same courts that often refused interest on past damages generally insisted that future damages be reduced to present value. Taking account of the effects of interest was thus a matter of right for defendants, but a sometime matter of discretion for plaintiffs.

These traditional rules came under enormous pressure during the period of high interest rates in the 1970s and 1980s. The prime interest rate was in double digits for nearly eight years, peaking at 21.5 percent in December 1980. No prejudgment interest at all in many cases, interest well below the market rate in most of the remaining cases, and compound interest in hardly any cases added up to a substantial departure from the general rule that plaintiffs should be restored to the position they would have occupied but for the wrong. See § 2. Rules restricting the award of interest had originated when most wealth was held in land and tangible property, when income could not always be promptly reinvested, and when medieval religious prohibitions on interest still had a lingering influence on the law. These rules became obsolete when the litigant who possessed the disputed funds could get compound interest on demand at any bank, money market fund, or bond fund, and when litigants without the funds paid compound interest on their credit-card debt and lines of credit and generally had to promise compound interest in the event of ever falling behind on debt with a fixed payment schedule. High interest rates focused attention on the problem and made it less tolerable.

Courts and legislatures increasingly recognized that interest is not a penalty, but an essential element of full compensation. As this recognition spread, many states changed the traditional rules. Awarding interest on all or most tort damages is the clear trend of decisions and the better rule, and it has become the majority rule.

But the trend to liberalize the award of prejudgment interest lost momentum as interest rates declined and as it encountered the countervailing movement to limit tort recoveries. Interest rates have been at historic lows for more than a decade as this Section is drafted in 2020. With interest rates so low, much less is at stake in disputes over prejudgment interest, and there is little

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pressure for further reform. Some day, interest rates will rise, and these issues will again become salient. For now, the states are divided.

d. States refusing prejudgment interest on pain and suffering and the like. About 20 states still adhere to more or less stringent versions of the ascertainability rule. These range from states that refuse all prejudgment interest in tort to states that award prejudgment interest on medical expenses and lost earnings in personal-injury cases but not on damages for pain and suffering. Damages for lost earnings and medical expenses incurred before trial are as ascertainable as most other damages. But some versions of the ascertainability rule require that damages be ascertainable on the date of the injury. On that stringent standard, these damages were not ascertainable, because on that date, no one could accurately predict the course of medical treatment or the length of time off work.

e. States awarding prejudgment interest in tort, including on pain and suffering and the like. About 30 states award prejudgment interest in tort, including in personal-injury cases. Some of these states award interest as of right, some in the discretion of the court. In some of this latter group, that discretion is exercised cautiously. In 10 or possibly 11 of these states, the award of prejudgment interest depends on the history of settlement offers. See Comment *f*.

Damages for pain and suffering, emotional distress, and similar harm that cannot be valued in any market are the extreme case of damages that are not ascertainable. Few states awarded interest on these damages at the time of the Second Restatement. That Restatement rested the rule on the ground that these damages were not ascertainable and on the additional ground that "there is no equivalence" between these harms and money. But of course the law must assume or create such an equivalence when it awards damages, and if the damages had been paid at the time of the injury, plaintiff could have earned interest on the money.

Illustration:

1. Doctor performed laser surgery on Patient's eye in a negligent manner, causing permanent loss of sight in that eye. In an itemized verdict, the jury awarded $50,000 in "past economic loss" and $20,000 in "past noneconomic loss." The jury returned its verdict four years after Doctor performed the surgery. The court should add to this verdict four years of simple interest on the entire $70,000, at the rate specified by statute, or if no such rate is specified, then at a reasonable market rate.

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f. States that tie interest to settlement offers. In 10 or 11 states, plaintiffs are entitled to prejudgment interest only if they make a sufficient settlement offer that is rejected. These rules are set out in statutes or rules of court. Most commonly, plaintiff must obtain a judgment greater than the last rejected settlement offer. Or plaintiff must obtain a judgment equal to some percentage of the last rejected settlement offer. In one state, the court must find that plaintiff made a good-faith effort to settle and that defendant did not. These rules are principally designed to encourage settlement, but when they are satisfied, they lead to interest on all the damages, without regard to ascertainability. On the fundamental divide between states that award interest for intangible personal-injury damages and those that do not, these are states that do.

g. Litigation delay. Another reason commonly cited for the award of prejudgment interest is to discourage litigation delay. Either party may be the source of delay, but the incentives to delay are all on defendant's side. Plaintiff is injured and in need of funds, often urgently so. Defendant would rather not pay, and if paying at all, would rather pay later than sooner. If plaintiff will not recover interest, then the longer the delay before judgment or settlement, the better for defendant. That incentive to delay is neutralized if interest accrues at a market rate. The accrual of interest affects settlements as well as judgments, because the value of plaintiff's claim gradually increases as interest accrues.

The routine award of interest implements both policies; it both compensates plaintiff and discourages defendant's delay. But some states toll the accrual of interest during any period of litigation delay for which plaintiff is held responsible. In states that award interest as a matter of discretion, the parties' relative responsibility for delay can be an important factor in the exercise of discretion. Other states reject such considerations as irrelevant, on the ground that the purpose of awarding interest is simply to compensate.

h. Timing. The injuries from a tort do not all occur immediately or simultaneously. Many of the most important elements of damage—lost earnings, lost profits, medical expenses, pain and suffering—accrue over time. In principle, interest should be calculated on each item of damage from the date it accrues. But those calculations would be wholly unworkable, requiring juries to separately find a date and a value for each item of damage. Courts, litigants, and statutes all simplify the process by choosing one or a few dates from which to calculate interest. Common dates for the beginning of interest include the date of the initial injury, the date of plaintiff's first demand, or the date the lawsuit is filed. For damages that accrue on a regular schedule, such as

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lost earnings for a salaried worker, interest can be awarded on some average basis, such as interest from the midpoint between the date plaintiff became unable to work and the date plaintiff returned to work. The language in the black letter is intended to encompass any of these practical solutions.

Some statutes or rules of court provide for a lag time before interest begins to accrue, such as six months after defendant learns of the claim, or a year or even two years after the filing of the complaint. Such rules are partly legislative compromise, partly an allowance of time for defendant to investigate the claim and perhaps settle the case, and partly a rough approximation or average for damages that accrue over time. At least one court created such a rule judicially. It thought that awarding interest starting six months after the tort better approximated precise calculation than awarding interest from the date of the tort.

Prejudgment interest should not be awarded for damages that will not be suffered until after the judgment. See § 14.

Illustration:

2. Same facts as Illustration 1. The jury also awarded $150,000 in "future economic loss" and $450,000 in "future noneconomic loss." The jury had been instructed to discount these damages to their present value at the date of trial. The court should award no prejudgment interest on this $600,000, because these damages had not been suffered before trial and have not been valued as of a date before trial.

i. Procedure. Procedure is generally outside the scope of this Restatement, but one widespread procedural practice has important implications for whether interest can be awarded at all. In many jurisdictions, the judge adds interest to the verdict on postjudgment motion. A plaintiff who wants prejudgment interest must get a verdict form that separates the damages on which interest can be awarded from the damages on which interest cannot be awarded. So if a state awards interest on property damage but not on pain and suffering, the verdict form must separate these items of damage. For the same reason, the jury must generally separate past damages from future damages.

j. Rates. There is little agreement with respect to interest rates. Many states set a prejudgment interest rate by statute. This statutory rate may be either a fixed rate or a variable rate tied to some index. Fixed rates inevitably become out of touch with the market as interest rates change over time, and few legislatures regularly amend the statutory rate to match the market.

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Some states enacted high fixed rates when interest rates were historically high and left them in place as interest rates became historically low. The rates in these statutes are now very high compared to the rates commonly chosen by courts or legislatures elsewhere, but they are not high compared to what consumers and small or risky businesses actually pay to borrow.

Variable rates work better, but that observation does not tell a court or legislature how to set the rate or what index to choose. A compensatory interest rate would be the rate that plaintiff could earn if the judgment had been collected, or, if plaintiff has few liquid assets, the typically higher rate that plaintiff would pay to borrow the funds not yet collected from defendant. Some scholars have suggested using the rate that defendant would pay on unsecured debt, on the ground that this best measures the credit risk that plaintiff is forced to bear. The trouble with any of these approaches is that they require litigation to choose a rate. Courts and parties have committed substantial time and money to such litigation in cases with large amounts at stake and long litigation delays during periods of high interest rates, and the effort may have been justified in those circumstances, but courts and legislatures generally prefer to avoid the time and expense by simply designating a rate. The rates designated are often low—often the prime rate, the Federal Reserve discount rate, or the rate on 52-week Treasury bills. One court that uses the Treasury-bill rate in most cases has held it unconstitutional in eminent-domain cases, because it fails to provide the "just compensation" that the Takings Clause requires.

Some statutes and rules of court add a percentage to these rates, such as prime plus two percent. Except for the strongest borrowers, a business's cost of capital is higher than these rates, and a successful business figures its own internal rate of return at much higher rates. So business plaintiffs still view prejudgment interest as undercompensatory, and business defendants may view prejudgment interest as a cheap way to borrow. For consumer and personal-injury plaintiffs, the prime rate exceeds what they can get on savings accounts or money-market funds, but it is much lower than what they would pay to borrow needed funds while awaiting collection of the judgment.

k. Compounding. Most jurisdictions still award only simple interest, but there has been significant legislative and judicial support for compound interest, especially in federal courts. Any market rate of interest would of course be that rate compounded, but the law has generally not taken account of that development in the credit markets.

l. Punitive damages. Courts should not award prejudgment interest on punitive damages, and few if any jurisdictions do so. Because punitive damages are unnecessary to compensation,

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interest on punitive damages is also unnecessary to compensation. For punitive damages, see §§ 39-41.

m. Postjudgment interest. The law and history of postjudgment interest are entirely different. Nearly every state provides by statute, and the rest provide by rule of court, that judgments bear interest at a specified rate. This statutory rate, often referred to as "the legal rate," may be either fixed or variable and may be either simple or compounded. Depending on market conditions or the index chosen, the statutory rate may be fully compensatory, undercompensatory, or overcompensatory. Whatever the rate, interest accrues as a matter of right at that rate. The statute eliminates judicial discretion and eliminates litigation over the award of interest. Subsection (b) recognizes this statutory regime.

REPORTERS' NOTES

a. History and scope. This Section is derived from Restatement Second, Torts § 913 (AM. L. INST. 1979), which is now superseded, and Restatement of Torts § 913 (AM. L. INST. 1939). See DAN B. DOBBS & CAPRICE L. ROBERTS, LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION § 3.6 at 249-263 (5th ed. 2018); JAMES M. FISCHER, UNDERSTANDING REMEDIES §§ 16.0-16.3 at 153-164 (3d ed. 2014); DOUGLAS LAYCOCK & RICHARD L. HASEN, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 143-150 (5th ed. 2019); CHARLES T. MCCORMICK, DAMAGES §§ 50-59 at 205-233 (1935); JACOB A. STEIN, PERSONAL INJURY DAMAGES §§ 17:57-17:64 (1997 & Supp.); Michael S. Knoll, *A Primer on Prejudgment Interest*, 75 TEX. L. REV. 293 (1996). The Second Restatement authorized interest only for property damage (and then only if the value could be "ascertained from established market prices"), and for other "pecuniary harms" "if required to avoid an injustice."

b. Prejudgment interest and the rightful position. Every person of even the least financial sophistication understands that a dollar in hand today is worth more than a dollar to be received a month, a year, or a decade from now. A dollar received when the judgment is collected is not worth as much as a dollar received much earlier, when the injury occurred. And therefore, a dollar received when the judgment is collected does not fully compensate a loss valued at a dollar when the injury occurred. Interest is the standard measure of compensation for these or any other delays in the payment of money, and it is essential to full compensation. Indeed, compound interest at the market rate is essential to full compensation, but few courts have been so detailed or so expansive in their endorsements of the need for interest.

Courts have increasingly recognized the basic point. "Our cases since 1933 have consistently acknowledged that a monetary award does not fully compensate for an injury unless it includes an interest component." Kansas v. Colorado, 533 U.S. 1, 10 (2001). "Since the ideal of instant adjudication cannot be met, and money is worth less the later it is received, it is ordinarily unjust not to award prejudgment interest between the time of the accident and the adjudication."

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McConkey v. Hart, 930 P.2d 402, 405 (Alaska 1996). "A law that denies recovery of prejudgment interest frustrates this [compensatory] goal. If a judgment provides plaintiffs only the amount of damages sustained at the time of the incident, plaintiffs are not fully compensated." Cavnar v. Quality Control Parking, Inc., 696 S.W.2d 549, 552 (Tex. 1985).

c. Doctrinal evolution. Illustrative decisions in the transition away from the ascertainability rule include Cavnar v. Quality Control Parking, Inc., 696 S.W.2d 549 (Tex. 1985), and Busik v. Levine, 307 A.2d 571 (N.J. 1973). The unevenness of the transition is nicely illustrated by contrasting Monessen Sw. Ry. v. Morgan, 486 U.S. 330 (1988) (no interest in cases under the Federal Employer's Liability Act, because the statute is silent, and because when it was enacted, courts did not award interest in personal-injury cases) with Loeffler v. Frank, 486 U.S. 549, 558 (1988) (one week later, awarding interest in employment-discrimination cases under the Civil Rights Act of 1964, which contains detailed remedies provisions and is also silent on interest, because "[p]rejudgment interest, of course, is 'an element of complete compensation'").

d. States refusing prejudgment interest on pain and suffering and the like. For states adhering to some version of the ascertainability rule, see Nelson v. AmSouth Bank, N.A., 622 So. 2d 894, 895 (Ala. 1993) ("where the damages can be ascertained by mere computation"); Dorsett v. Buffington, 429 S.W.3d 225, 232 (Ark. 2013) ("definitely ascertainable by mathematical computation, or if the evidence furnishes data that make it possible to compute the amount without reliance on opinion or discretion"); BECO Constr. Co. v. J-U-B Eng'rs Inc., 233 P.3d 1216, 1220 (Idaho 2010) ("only when damages are liquidated or are ascertainable by mere mathematical process"); Miller v. Botwin, 899 P.2d 1004, 1012 (Kan. 1995) ("definitely ascertainable by mathematical computation"); Hartford Cnty. v. Saks Fifth Ave. Distrib. Co., 923 A.2d 1, 13 (Md. 2007) (no interest "in tort cases where the recovery is for bodily injury, emotional distress, or similar intangible elements of damage not easily susceptible of precise measurement"); Coho Res., Inc. v. McCarthy, 829 So. 2d 1, 20 (Miss. 2002) ("No award of prejudgment interest may rationally be made where the principal amount has not been fixed prior to judgment"); Meyer v. Harvey Aluminum, 501 P.2d 795, 798 (Or. 1972) ("interest is not allowable on unliquidated damages"); Austin v. Stokes-Craven Holding Corp., 691 S.E.2d 135, 154 (S.C. 2010) (no prejudgment interest "on an unliquidated claim"); Rekhter v. State, 323 P.3d 1036, 1047 (Wash. 2014) ("possible to compute the amount with *exactness*, without reliance on opinion or discretion"); Stewart Title Guar. Co. v. Tilden, 181 P.3d 94, 103 (Wyo. 2008) ("readily computable by basic mathematical calculation"). See also Hunter v. Ura, 163 S.W.3d 686, 706 (Tenn. 2005) ("trial court must consider whether the amount of the obligation was certain or ascertainable and whether the existence of the obligation was disputed on reasonable grounds," but "certainty of plaintiff's claim is but one of many nondispositive facts").

California authorizes prejudgment interest in the discretion of the jury in personal-injury cases, CAL. CIV. CODE § 3288, but the court interpreted this statute not to apply to pain and suffering or emotional distress. Greater W. Chester Homeowners Ass'n v. City of Los Angeles, 603 P.2d 1329 (Cal. 1979). Florida awards interest for pecuniary damages in tort, but not in personal-injury cases. Bosem v. Mut. Holdings, Inc., 46 So. 3d 42 (Fla. 2010); Amerace Corp. v.

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Stallings, 823 So. 2d 110 (Fla. 2002). New York awards interest in personal-injury cases only from the date of the liability determination, Love v. State, 583 N.E.2d 1296 (N.Y. 1991), but in wrongful-death cases from the date of death. N.Y. EST. POWERS & TRUSTS LAW § 5-4.3.

Versions of the ascertainability rule are codified in some states. ARIZ. REV. STAT. ANN. § 44-1201(D)(1) (no interest on "unliquidated" damages); MONT. CODE ANN. § 27-1-211 ("capable of being made certain by calculation"); S.D. CODIFIED LAWS § 21-1-13.1 (mandating prejudgment interest but excluding "intangible damages such as pain and suffering, emotional distress, loss of consortium, . . . loss of enjoyment of life, or loss of society and companionship"); UTAH CODE ANN. § 78B-5-824(1) (in personal-injury cases, only on "special damages actually incurred"); W. VA. CODE ANN. § 56-6-31 (court "may" award interest only on "special or liquidated damages").

For cases interpreting these statutes, see Metzler v. BCI Coca-Cola Bottling Co., 329 P.3d 1043 (Ariz. 2014) (no interest in personal-injury cases except pursuant to offer-of-judgment rule); Jim's Excavating Serv., Inc. v. HKM Assocs., 878 P.2d 248 (Mont. 1994) (refusing interest because verdict did not match amount alleged in complaint); Heer v. State, 432 N.W.2d 559 (S.D. 1988) (awarding interest on value of destroyed hogs, but not on other property, because proof was uncertain and varied from amounts alleged in complaint); USA Power, LLC v. PacifiCorp, 372 P.3d 629, 666 (Utah 2016) (in a case outside the statute, approving interest only if "the amount of the loss can be calculated with mathematical accuracy"); Corbett v. Seamons, 904 P.2d 229 (Utah Ct. App. 1995) (awarding interest on past lost earnings in personal-injury case); Tri-State Petroleum Corp. v. Coyne, 814 S.E.2d 205, 211 (W. Va. 2018) (stating that to be eligible for prejudgment interest, special damages must be "certain or capable of being rendered certain by reasonable calculation"); Jackson v. Brown, 801 S.E.2d 194 (W. Va. 2017) (awarding interest on lost earnings in personal-injury case).

In Illinois, prejudgment interest can be awarded in equity in the discretion of the court, but never in an action at law unless authorized by contract or statute, and the principal statute does not apply to tort claims. See Tri-G, Inc. v. Burke, Bosselman & Weaver, 856 N.E.2d 389 (Ill. 2006); 815 ILL. COMP. STAT. 205/2.

e. States awarding prejudgment interest in tort, including on pain and suffering and the like. Illustration 1 is loosely based on McConkey v. Hart, 930 P.2d 402 (Alaska 1996).

In some jurisdictions, courts led the way in expanding prejudgment interest. The federal courts award prejudgment interest without statutory authorization, including in tort cases controlled by federal law, City of Milwaukee v. Cement Div., Nat'l Gypsum Co., 515 U.S. 189 (1995), except when a statute creating the cause of action has been interpreted to provide otherwise, Monessen Sw. Ry. v. Morgan, 486 U.S. 330 (1988) (Federal Employers' Liability Act). Texas adopted prejudgment interest in personal-injury cases without statutory authorization, Cavnar v. Quality Control Parking, Inc., 696 S.W.2d 549 (Tex. 1985); the rule has since been codified. TEX. FIN. CODE ANN. § 304.102. New Jersey, Pennsylvania, and Vermont adopted prejudgment interest by rule of court. N.J. CT. R. 4:42-11(b); PA. R. CIV. P. 238; VT. R. CIV. P. 54(a). By judicial decision in Vermont, interest is mandatory if the damages are "reasonably

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ascertainable," and awarded in the discretion of the court in other cases. Ring v. Carriage House Condo. Owners' Ass'n, 112 A.3d 754 (Vt. 2014). Interest on lost earnings and medical expenses is mandatory, Smedberg v. Detlef's Custodial Serv., Inc., 940 A.2d 674 (Vt. 2007), but interest on pain and suffering is discretionary. D'Arc Turcotte v. Estate of LaRose, 569 A.2d 1086 (Vt. 1989). Kentucky also awards interest as of right if the damages are liquidated, and in the discretion of the court if not, but both halves of this authorization appear to be narrowly interpreted. Nucor Corp. v. Gen. Elec. Co., 812 S.W.2d 136 (Ky. 1991).

Statutes providing for interest on all tort damages, including pain and suffering, include COLO. REV. STAT. ANN. § 13-21-101(1); IOWA CODE ANN. §§ 535.3, 668.13; LA. STAT. ANN. § 13:4203; ME. REV. STAT. ANN. tit. 14, § 1602-B; MICH. COMP. LAWS ANN. § 600.6013(8) (except in medical-malpractice cases); MINN. STAT. ANN. § 549.09(1)(b); NEV. REV. STAT. ANN. § 17.130(2); N.M. STAT. ANN. § 56-8-4(B) (in the discretion of the court, guided by two statutory criteria); N.Y. EST. POWERS & TRUSTS LAW § 5-4.3 (only in wrongful-death cases); N.C. GEN. STAT. ANN. § 24-5; N.D. CENT. CODE § 32-03-05 (in the discretion of the jury); OKLA. STAT. ANN. tit. 12, § 727.1(E); TEX. FIN. CODE ANN. § 304.102 (codifying *Cavnar*, with some modification in adjacent sections); VA. CODE ANN. § 8.01-382 (in the discretion of the jury).

For cases interpreting these statutes, see Scholz v. Metro. Pathologists, P.C., 851 P.2d 901 (Colo. 1993) (applying Colorado statute to "noneconomic" damages in personal-injury case); Guzman v. Des Moines Hotel Partners, 489 N.W.2d 7 (Iowa 1992) (applying Iowa statute to personal-injury damages); Beebe v. Larche, 218 So. 3d 1114 (La. Ct. App. 2017) (applying Louisiana statute to personal-injury damages); Batchelder v. Tweedie, 294 A.2d 443 (Me. 1972) (applying Maine statute to personal-injury damages); Denham v. Bedford, 287 N.W.2d 168 (Mich. 1980) (applying Michigan statute to personal-injury damages and holding that it should be liberally construed); Lienhard v. State, 431 N.W.2d 861 (Minn. 1988) (applying Minnesota statute to personal-injury damages); Crummy v. Enter. Minn., 2012 WL 360391 (Minn. Ct. App. Feb. 6, 2012) (awarding prejudgment interest on damages for mental anguish); State v. Eaton, 710 P.2d 1370 (Nev. 1985) (interpreting Nevada statute to apply to pain-and-suffering damages); Southard v. Fox, 833 P.2d 251, 254 (N.M. Ct. App. 1992) (interpreting New Mexico statute to apply to "nonpecuniary" damages that were not ascertainable); Toledo v. Iglesia ni Christo, 962 N.E.2d 773 (N.Y. 2012) (awarding prejudgment interest on wrongful-death verdict that included pain and suffering and loss of parental society); Beaver v. Hampton, 427 S.E.2d 317 (N.C. 1993) (applying North Carolina statute to personal-injury damages); Kreidt v. Burlington N. R.R., 615 N.W.2d 153, 159 (N.D. 2000) (interpreting statute authorizing interest on obligations "not arising from contract" to include interest on "noneconomic damages"); Shepard v. Capitol Foundry of Va., Inc., 554 S.E.2d 72, 76 (Va. 2001) (noting that generally worded authorization for interest includes interest on "sorrow, mental anguish, and solace" in a wrongful-death case). In cases described here simply as awarding interest on "personal-injury damages," those damages presumably included pain and suffering, but the opinion did not specify what the damages were.

In Hawaii, prejudgment interest is paid on the full amount of a tort judgment, but in the discretion of the court; interest can be withheld. See Loman v. Gerber, 2007 WL 4533502 (Haw.

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Dec. 21, 2007) (brief explanation in an accident case); Tri-S Corp. v. W. World Ins. Co., 135 P.3d 82 (Haw. 2006) (more thorough explanation in a contract case). The statute authorizing interest explicitly applies to tort and contract without distinction. HAW. REV. STAT. ANN. § 636-16.

Massachusetts and New Hampshire have identical statutes that mandate prejudgment interest for "pecuniary harms," explicitly including personal-injury cases. MASS. GEN. LAWS ANN. ch. 231, § 6B; N.H. REV. STAT. ANN § 524:1-b. The courts in each state appear to award interest on the entire verdict, including pain and suffering. Carey v. Gen. Motors Corp., 387 N.E.2d 583 (Mass. 1979); Pepin v. Beaulieu, 151 A.2d 230 (N.H. 1959). The Rhode Island statute also authorizes interest on "pecuniary damages," 9 R.I. GEN. LAWS ANN. § 21-10, but "pecuniary damages" has been interpreted to mean "compensatory damages." Murphy v. United Steelworkers of Am. Loc. No. 5705, AFL-CIO, 507 A.2d 1342 (R.I. 1986).

f. States that tie interest to settlement offers. Some states authorize or mandate interest on all tort damages, including pain and suffering, but only if plaintiff makes a sufficient settlement offer that defendant rejects. ALASKA STAT. ANN. § 09.30.070; ARIZ. R. CIV. P. 68(g)(1); CONN. GEN. STAT. ANN. § 52-192a(c); DEL. CODE ANN. tit. 6, § 2301(d); GA. CODE ANN. § 51-12-14(a); IND. CODE ANN. § 34-51-4-7 (in the discretion of the court); MO. ANN. STAT. § 480.040(3); NEB. REV. STAT. § 45-103.02(1); OHIO REV. CODE ANN. § 1343.03(C); WIS. STAT. ANN. § 807.01.

For cases interpreting these statutes, see Metzler v. BCI Coca-Cola Bottling Co., 329 P.3d 1043 (Ariz. 2014) (applying Arizona rule to personal-injury damages); Cardenas v. Mixcus, 823 A.2d 321 (Conn. 2003) (applying Connecticut statute to personal-injury damages); Shapira v. Christiana Care Health Servs., Inc., 99 A.3d 217 (Del. 2014) (applying Delaware statute to personal-injury damages); Grissett v. Wilson, 353 S.E.2d 621 (Ga. Ct. App. 1987) (applying Georgia statute to personal-injury and loss-of-consortium damages); Kosarko v. Padula, 979 N.E.2d 144 (Ind. 2012) (interpreting Indiana statute to wholly abolish ascertainability rule but to leave discretion in the court); Hayes v. Price, 313 S.W.3d 645 (Mo. 2010) (applying Missouri statute to personal-injury damages); Martensen v. Rejda Brothers, Inc., 808 N.W.2d 855 (Neb. 2012) (applying Nebraska statute to personal-injury damages); Moskovitz v. Mt. Sinai Med. Ctr., 635 N.E.2d 331 (Ohio 1994) (applying Ohio statute to wrongful-death and survivor damages); Nelson v. McLaughlin, 565 N.W.2d 123 (Wis. 1997) (applying Wisconsin statute to personal-injury damages).

Utah adopted such a statute in 2014. UTAH CODE ANN. § 78B-5-824(2). The provision has not yet been construed by an appellate court, and it is not clear how it relates to the earlier provision in § 78B-5-824(1). Neither subsection expressly limits the other; taken at face value, they provide that plaintiff may recover prejudgment interest on special damages in all personal-injury cases under subsection (1), and may recover additional prejudgment interest, on general damages, under the offer-of-settlement provision in subsection (2). But the Utah courts have been resistant to prejudgment interest, and they might conceivably read each section to implicitly limit the other, so that interest may be recovered only on special damages and only under the offer-of-settlement provision.

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g. Litigation delay. On the dual purposes of awarding interest, see, e.g., Kosarko v. Padula, 979 N.E.2d 144, 150 (Ind. 2012) (purposes of prejudgment-interest statute are "to encourage settlement, to incentivize expeditious resolution of disputes, and to compensate plaintiff for the lost time value of money due to unreasonable delay"); Hayes v. Price, 313 S.W.3d 645, 655 (Mo. 2010) (prejudgment-interest statute "compensates claimant for the true cost of money damages," and it "promotes settlement and deters unfair benefit from the delay of litigation"); Greensleeves, Inc. v. Smiley, 68 A.3d 425, 439 (R.I. 2013) (purposes of prejudgment interest are to "encourage early settlement of claims and to compensate an injured plaintiff for delay in receiving compensation"); Kontowicz v. Am. Standard Ins. Co., 714 N.W.2d 105, 117 (Wis. 2006) ("Prejudgment interest generally is considered compensation for the time value of money and a means of preventing defendants from prolonging litigation and benefitting from the delay.").

On taking account of responsibility for delay, see, e.g., Gen. Motors Corp. v. Devex Corp., 461 U.S. 648 (1983) (interest may be denied in exceptional circumstances, including when plaintiff is responsible for undue delay); Roxas v. Marcos, 969 P.2d 1209 (Haw. 1998) (court has discretion to deny interest if defendant caused no delay or if plaintiff did cause delay). Compare *Greensleeves*, 68 A.3d at 439 (despite dual purposes of awarding interest, "interest is not a penalty," and "it accordingly follows that *responsibility for the delay should not be the controlling factor*" in deciding whether to award interest (quoting Love v. State, 583 N.E.2d 1296, 1298 (N.Y. 1991)) (emphasis added by the Rhode Island court)).

h. Timing. New York computes interest on each item of damage from the date it was incurred or "upon all the damages from a single reasonable intermediate date." Milbrandt v. A.P. Green Refractories Co., 588 N.E.2d 45, 50 (N.Y. 1992). The quoted language comes from a statute that applies to property-damage cases, N.Y. C.P.L.R. § 5001(b), but the Court of Appeals has applied it more generally. Hawaii authorizes the judge to choose the date from which to measure interest "to conform with the circumstances of each case." HAW. REV. STAT. ANN. § 636-16. In a patent case in which damages were calculated on the basis of a reasonable royalty that should have been paid annually, the Supreme Court affirmed an award of interest running from the date that each annual payment should have been made. Gen. Motors Corp. v. Devex Corp., 461 U.S. 648 (1983).

The case awarding interest from six months after the injury is Cavnar v. Quality Control Parking, Inc., 696 S.W.2d 549 (Tex. 1985). The court believed that interest from the day of the tort would be overcompensatory, and that interest should begin to accrue as damages accrued, but that deciding "precisely when each element of a plaintiff's damage award was incurred would impose an onerous burden on both the trial bench and bar." Id. at 555. This six-month rule, with some modifications, has since been codified. TEX. FIN. CODE ANN. § 304.104. OKLA. STAT. ANN. tit. 12, § 727.1(E) provides that interest in personal-injury cases shall accrue beginning two years after the filing of the complaint. More commonly, interest runs from the date of the tort, COLO. REV. STAT. ANN. § 13-21-101(1), or the date of the complaint, MASS. GEN. LAWS ANN. ch. 231, § 6B.

Illustration 2 is loosely based on McConkey v. Hart, 930 P.2d 402 (Alaska 1996).

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i. Procedure. The federal practice will serve to illustrate. A motion for prejudgment interest is a motion to alter or amend the judgment under FED. R. CIV. P. 59(e). Osterneck v. Ernst & Whinney, 489 U.S. 169 (1989).

The award of prejudgment interest must be coordinated with present-value calculations. See § 14, Comment *g*. The simplest and safest way to do this is to discount future damages to their value at the date of judgment, and to award no prejudgment interest on that amount. Some courts discount future damages to an earlier date and then award prejudgment interest on the discounted amount. See, e.g., Toledo v. Iglesia ni Christo, 962 N.E.2d 773 (N.Y. 2012), and Griffin v. Gen. Motors Corp., 403 N.E.2d 402 (Mass. 1980). Each court discounted future damages to the date from which prejudgment interest accrued—the date of the death in *Toledo* and of the complaint in *Griffin*. The procedure can work if the same interest rate is used for both prejudgment interest and discounting to present value, but there is rarely a way to ensure that the same interest rate will be used. Section 14 rejects this procedure on the ground that it is too prone to serious errors.

At least some courts have interpreted their state interest statute to require prejudgment interest on future damages even though those damages have not been discounted to the date from which prejudgment interest accrues. Scholz v. Metro. Pathologists, P.C., 851 P.2d 901 (Colo. 1993). This procedure undoubtedly awards interest that cannot reasonably be understood as compensatory.

On the inability to award prejudgment interest on a general verdict that fails to separate past and future damages, see Adams v. Toyota Motor Corp., 867 F.3d 903 (8th Cir. 2017) (Minnesota law); Guzman v. Des Moines Hotel Partners, 489 N.W.2d 7 (Iowa 1992); Stickler v. Quilici, 655 P.2d 527 (Nev. 1982); Meyer v. Dixon Brothers, 369 N.W.2d 658 (S.D. 1985); Weeks v. Calderwood, 191 P.3d 1 (Utah 1979). But if plaintiff offered no evidence on future damages, a general verdict will suffice. Albios v. Horizon Cmtys., Inc., 132 P.3d 1022 (Nev. 2006).

j. Rates. Statutes that provide for prejudgment interest at a rate well above the current prime rate include CAL. CIV. CODE § 3291 (10%); COLO. REV. STAT. ANN. § 13-21-101(1) (9% compounded annually); CONN. GEN. STAT. ANN. § 37-3b (10%); MASS. GEN. LAWS ANN. ch. 231, § 6B (12%); N.Y. C.P.L.R. § 5004 (9%); 9 R.I. GEN. LAWS ANN. § 21-10 (12%); VT. STAT. ANN. tit. 9, § 41a(a) (12% "by the actuarial method," which means compounded). Such rates are sometimes defended on the ground that they encourage settlement and discourage delay. Cases rejecting constitutional attacks on such rates are collected in Concord Gen. Mut. Ins. Co. v. Gritman, 146 A.3d 882 (Vt. 2016). Statutes and rules tying rates to an index include GA. CODE ANN. § 51-12-14(c) (prime plus 3%); OKLA. STAT. ANN. tit. 12, § 727.1(I) (average Treasury bill rate); PA. R. CIV. P. 238 (prime plus 1%).

There is no federal statute on prejudgment interest, and no settled rule on an appropriate rate, but the prime rate and the Treasury-bill rate are the most commonly used. For fully reasoned opinions with large sums at stake awarding compound interest at the prime rate, see Cement Div., Nat'l Gypsum Co. v. City of Milwaukee, 144 F.3d 1111 (7th Cir. 1998); and In re Oil Spill by the Amoco Cadiz, 954 F.2d 1279 (7th Cir. 1992), both in admiralty. See also Oldham v. Korean Airlines Co., 127 F.3d 43 (D.C. Cir. 1997) (prime rate in wrongful-death case). The Second Circuit

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says the rate is in the discretion of the trial court, but should be based on short-term risk-free instruments such as Treasury bills. N.Y. Marine & Gen. Ins. Co. v. Tradeline (L.L.C.), 266 F.3d 112 (2d Cir. 2001) (a contract case, but that did not appear to matter). The Second Circuit has also upheld the SEC's use of (and in litigation, demand for) the rate charged by the Internal Revenue Service on past-due taxes. SEC v. First Jersey Sec., Inc., 101 F.3d 1450 (2d Cir. 1996). The Fifth Circuit has required the prime rate, Alberti v. Klevenhagen, 896 F.2d 927 (5th Cir.), modified on other grounds, 903 F.2d 352 (5th Cir. 1990), and also approved use of the much lower statutory postjudgment-interest rate by analogy. Raspanti v. Caldera, 34 F. App'x 151 (5th Cir. 2002).

For the holding that the Constitution requires a fully compensatory rate in takings cases, including when the property owner raises the claim in a tort suit under 42 U.S.C. § 1983, see Schneider v. County of San Diego, 285 F.3d 784 (9th Cir. 2002). The court said the proper rate is the rate that a prudent investor could earn by investing in a "wide range of government and private obligations with both short term and long term maturities." Id. at 793. In other tort cases, the Ninth Circuit awards prejudgment interest at the much lower rate specified by federal statute for postjudgment interest. W. Pac. Fisheries, Inc. v. SS President Grant, 730 F.2d 1280 (9th Cir. 1984).

k. Compounding. Colorado and Vermont provide for compounding by statute. COLO. REV. STAT. ANN. § 13-21-101(1); VT. STAT. ANN. tit. 9, § 41a. Texas adopted daily compounding in Cavnar v. Quality Control Parking, Inc., 696 S.W.2d 549 (Tex. 1985), but the legislature subsequently provided for simple interest only. TEX. FIN. CODE ANN. § 304.104.

There has been significant sentiment for compound interest in federal courts. See Saulpaugh v. Monroe Cmty. Hosp., 4 F.3d 134 (2d Cir. 1993) (only compound interest makes plaintiff whole); Randolph v. Laeisz, 896 F.2d 964 (5th Cir. 1990) (affirming award of interest compounded daily to injured longshore worker); EEOC v. Ky. State Police Dep't, 80 F.3d 1086 (6th Cir. 1996) (stating that compound interest is necessary to make plaintiff whole, but leaving issue to discretion of the trial court); Am. Nat'l Fire Ins. Co. v. Yellow Freight Sys., Inc., 325 F.3d 924, 938 (7th Cir. 2003) ("compound interest ought to be the norm in federal matters"); Price v. Stevedoring Servs. of Am., Inc., 697 F.3d 820 (9th Cir. 2012) (en banc) (rejecting simple interest as an inherited rule no longer supported by any plausible reason in light of ubiquitous compound interest in the market).

For the more common rule of simple interest only, see, e.g., N. Idaho Bldg. Contractors Ass'n v. City of Hayden, 432 P.3d 976, 990 (Idaho 2018) ("Prejudgment interest is not compounded."); Metro. Prop. & Liab. Ins. Co. v. Ralph, 640 A.2d 763 (N.H. 1994) (interpreting silent statute to mean simple interest); Henderson v. Camden Cnty. Mun. Util. Auth., 826 A.2d 615 (N.J. 2003) (same); Tri-State Refin. & Inv. Co. v. Apaloosa Co., 431 N.W.2d 311 (S.D. 1988) (reversing award of compound interest in a fraud case); Hensley v. W. Va. Dep't of Health & Hum. Res., 508 S.E.2d 616 (W. Va. 1998) (no compound interest except as expressly authorized by statute).

At least some courts have taken the rule against compound interest to mean that postjudgment interest cannot be awarded on the prejudgment interest included in the judgment. Larsen v. Pacesetter Sys., Inc., 837 P.2d 1273 (Haw. 1992); Vaughn v. Franklin, 785 So. 2d 79

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(La. Ct. App. 2001). This is a mistaken inference; pre- and post-judgment interest have always been treated as entirely separate questions, and postjudgment interest should accrue on the entire judgment. Madrigal v. Allstate Indem. Co., 697 F. App'x 905 (9th Cir. 2017) (federal law); Sperry v. Field, 205 P.3d 365 (Colo. 2009); Heritage Bank v. Bruha, 812 N.W.2d 260 (Neb. 2012); Uniroyal Goodrich Tire Co. v. Mercer, 890 P.2d 785 (Nev. 1995); Nakoff v. Fairview Gen. Hosp., 694 N.E.2d 107 (Ohio Ct. App. 1997); *Hensley*, 508 S.E.2d 616.

l. Punitive damages. For cases refusing prejudgment interest on punitive damages, see, e.g., Seaward Constr. Co. v. Bradley, 817 P.2d 971 (Colo. 1991); Murphy v. United Steelworkers of Am. Loc. No. 5705, AFL-CIO, 507 A.2d 1342 (R.I. 1986); Cavnar v. Quality Control Parking, Inc., 696 S.W.2d 549 (Tex. 1985); D'Arc Turcotte v. Estate of LaRose, 569 A.2d 1086 (Vt. 1989).

m. Postjudgment interest. Statutes or rules of court providing for postjudgment interest are universal, and the usual accrual rule is from the date the judgment is entered. These statutes specify the interest rate in a variety of ways. See, e.g., OKLA. STAT. ANN. tit. 12, § 727.1(I) (prime plus 2%); TEX. FIN. CODE ANN. § 304.003 (prime, with a floor of 5% and a cap of 15%). Postjudgment interest on federal judgments is at "the weekly average 1-year constant maturity Treasury yield," compounded annually. 28 U.S.C. § 1961(a). This is an artificial rate calculated by the Federal Reserve and designed to match the average rate on one-year Treasury securities.

§ 14. Present Value

For any damage that can be valued by prices in a market, and that plaintiff will not incur until after the date of judgment, the finder of fact should award an amount that, if safely invested from the date of judgment to the date on which the damage will be incurred, would yield principal and interest that in total is equal to the amount of the damage. Principal categories of damage subject to this rule are lost earnings, lost profits, and the cost of medical and rehabilitative services.

Comment:

a. History and scope. This Section is derived from Restatement Second, Torts § 913A, which is now superseded. The implementation of this rule interacts with the measurement of future damages, and some of the rule's complexities are necessarily deferred to § 18 on lost earnings, § 19 on medical expenses, and § 27 on lost profits.

b. Present value and the rightful position. Tort judgments compensate for all damages in a single sum determined at the time of judgment. The verdict includes damages already incurred before trial and future damages that will not be incurred until after trial. In the case of permanent or long-lasting injuries, or in wrongful death, damages may extend many years into the future. Plaintiff is entitled to prejudgment interest on the damages that were incurred or suffered before

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trial. See § 13. And defendant is entitled to an adjustment for the interest that plaintiff can earn on the amount of the judgment after it is collected but before the future damages are incurred.

In common parlance, future damages must be reduced, or discounted, to present value. When interest rates are high, many dollars can turn on this calculation. An amount of money at the date of judgment, if invested at high interest rates for long periods, can produce a sum several times as large as the original judgment. But these interest rates can be misleading, because unusually high interest rates are typically accompanied by expectations of unusually high inflation. The interest on the judgment may yield a much larger number of future dollars, each of which is worth much less than a dollar was worth at the time of trial.

In an era of extremely low interest rates, many fewer dollars are at stake. The vocabulary of "reducing" or "discounting" can become misleading; present-value calculations do not always result in reducing the damages. Future damages may be inflating at a rate higher than the interest rate used for present-value calculations.

In principle, reducing future damages to present value is the mirror image of awarding prejudgment interest on past damages. The task in either case is to properly account for the time value of money. But the rules for the two situations have never been entirely parallel or consistent. The inconsistencies favor plaintiffs in some ways and favor defendants in other ways.

The starting point in either case is the goal of restoring plaintiff to the rightful position. See § 2. Suppose plaintiff will lose $100,000 that, but for the tort, would have been received 10 years after the judgment. Awarding $100,000 at the time of the judgment, plus the 10 years of interest that plaintiff will be able to earn, would put plaintiff in a better-than-rightful position. The goal of present-value calculations is to identify the sum to be awarded at the time of judgment that, together with interest, will produce an amount equal to the loss by the time the loss will be incurred.

c. Doctrinal evolution and the significance of inflation. The period of very high interest rates in the 1970s and 1980s caused judges to focus on the present-value question and led to important reforms in the law. Historically, courts had reduced future damages to present value using market rates of interest, while ignoring the effects of inflation as too speculative. This one-sided approach benefited defendants and undercompensated plaintiffs. It became untenable when both interest rates and inflation were very high, and when judges came to understand that the expected inflation rate is an important influence on the market interest rate. The explanations of

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the rule in this and later Sections reflect the recognition that courts must take account of interest rates, inflation, and the relationship between them.

d. Methods of calculation. Predicting future interest rates and future inflation is of course a difficult task, but it is somewhat simplified by the relationship between the two. If a consistent approach is used to estimate both, then the inevitable errors will tend to be offsetting. If the finder of fact predicts high inflation, this expected inflation will inflate its estimate of future damages, benefiting plaintiff. But this prediction should necessarily entail a prediction of high interest rates, and reducing future damages to present value at a higher interest rate will reduce future damages more substantially, benefiting defendant. The details of these calculations present different issues with respect to wages, medical expenses, and profits, and so must be deferred to those Sections. But three basic approaches can be stated here.

The first approach is for the finder of fact to inflate all future damages by an expected inflation rate, and then discount those damages to present value using market interest rates. Under this "market-rate" method, if the finder of fact expects inflation to average one percent, and interest rates on safe investments to average two percent, it would inflate all market-based damage items by one percent a year, and then discount the resulting total by two percent a year.

The second approach is to net out the prediction of future inflation and future interest rates, and discount future damages by the difference, which is often called the "real" interest rate—i.e., the market interest rate net of inflation. Under this method, called the "real-interest-rate" method (or in some courts, the "below-market-discount-rate" method), if the finder of fact expects inflation to average one percent, and interest rates on safe investments to average two percent, it would calculate all future damages in current dollars and discount those damages by one percent per year—two-percent interest minus one-percent inflation. This netting introduces a slight distortion, but the effect of that distortion is trivial in the context of all the other uncertainties in this process. This approach has the further advantage that the factfinder need not actually predict the inflation rate or the interest rate. It need only estimate the relationship between the two.

The Pennsylvania courts hold that if they net out interest rates against inflation, they can assume that the result is zero. The real-interest-rate method might yield a discount rate of zero in particular economic conditions. But under this "total-offset" method, Pennsylvania assumes a discount rate of zero in every case. The total-offset method is related to but distinct from the real-interest-rate method.

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Illustrations:

1. Denzel was permanently disabled in an accident caused by defendant's negligence. He earned $100,000 a year in his job before the injury, and he was 12 years from retirement. The judge in a bench trial is attempting to determine how much in damages to award Denzel for the last year that he would have worked. (For simplicity, Illustrations 1-3 omit the lost earnings that Denzel would have received in years one through eleven.) The judge expects inflation to average one percent over the next 12 years, and interest rates on safe investments to average two percent. Under the market-rate method, the judge multiplies Denzel's $100,000 current salary by 1.01, and repeats that 12 times. This calculation estimates that Denzel's final salary, 12 years after the judgment, would have been $112,682.50. Then, to account for interest on the judgment, the judge divides this number by 1.02, and repeats that 12 times. This calculation estimates the present value of Denzel's final-year salary to be $88,849.38.

2. Same facts as Illustration 1, except that the judge uses the real-interest-rate method. Still expecting an inflation rate of one percent and interest rates of two percent, the judge discounts Denzel's current salary by the difference between the two predictions, or one percent. The judge divides Denzel's current $100,000 salary by 1.01, and repeats that 12 times. This calculation would estimate the net present value of Denzel's final-year salary to be $88,744.92. This result is slightly different from the result in Illustration 1, because the two calculations are nearly but not quite equivalent.

3. Same facts as Illustration 1, except that the judge uses the total-offset method. The present value of Denzel's final salary, 12 years after the judgment, would be $100,000—the same as his present salary.

The standard formula for any given year is that the present value of one future dollar is equal to

$$1 / (1 + i)^n$$

where i is the interest rate and n is the number of years until the dollar would have been received (or will be needed to pay medical expenses or other damage items). In Illustration 1, i (the interest rate) is two, and n (the number of years) is 12; this is why the step of dividing by 1.02 must be repeated 12 times. Note that this is the formula for compound interest. Future damages have always been discounted to present value at compound interest, because plaintiff could earn compound

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interest if all or part of the judgment is invested, even as most courts continue to award only simple interest before judgment. See § 13, Comment *k*.

For the sake of simplicity, Illustrations 1 to 3 assume lost earnings only in plaintiff's final year before retirement. But of course in most actual cases, plaintiff claims lost earnings for each year between the injury and projected retirement. The factfinder must do the calculation in the Illustrations separately for each year. In the formula, *n* would equal one for the first year, two for the second year, and so on up to 12 for the 12th year. The factfinder would then total the results for all the years. With the help of present-value tables or computer spreadsheets, the factfinder can do the calculations in many fewer steps, but must still calculate a value for each year separately and then total those values. With computer programs or more sophisticated formulas, the factfinder could in principle estimate the total for all the years at issue in a combined calculation. These tools are often available to expert witnesses, but they are rarely or never available to jurors and do not appear to be much used by judges.

e. Pain and suffering and other damages that cannot be valued in a market. The rule of this Section applies only to what are often called "economic" damages—damages that can be valued in a market. With only a handful of exceptions, courts have not discounted damages for future pain and suffering, emotional distress, loss of society, loss of consortium, or other damages that cannot be valued by prices in a market—damages that are often called "noneconomic." Reasons for minimizing the use of these labels are discussed in § 20; see also § 5, Comment *e*.Restatement Third, Torts: Apportionment of Liability § E18, Comment *c*, first defined "economic" and "noneconomic" damages in terms of whether the damages can be valued in a market.

Courts that have considered the issue have reasoned that the award for future pain and suffering is such an impressionistic estimate that it makes little sense to subject it to potentially precise present-value calculations. Attempting such calculations would require the finder of fact to allocate pain and suffering to particular years. Some factfinders may do that, but most do not, and any such allocation would necessarily be a crude approximation.

The refusal to discount future pain-and-suffering damages is somewhat in tension with the increasing trend to award prejudgment interest on damages for pretrial pain and suffering. See §13, Comments *d-f*. But the relevant calculations proceed in opposite directions, and the award of prejudgment interest is much simpler. Once the factfinder fixes a number for pretrial damages,

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however impressionistic, it is a simple matter to calculate interest on that award, and this interest is money that plaintiff could have actually earned if the damages had been assessed and paid promptly.

Calculating a precise number now that, if invested, would yield an impressionistic number years later seems different to many judges, and is certainly more complex.

f. Rates. Some states specify by statute the interest rate to be used for discounting, but in federal court and in most states, the appropriate interest rate is an issue of fact. The factfinder must choose an interest rate. Prominent cases say that the victim of a long-lasting personal injury, or the widow or widower and orphans of a decedent, need not accept any investment risk. Future damages should be discounted to present value using the interest rate on the safest and best investments. This standard would seem to require using the interest rates on U.S. government bonds or on government-insured savings accounts.

The "safest" investments might also be taken to imply only the shortest-term instruments—30-day Treasury bills or demand savings accounts—because longer-term investments carry interest-rate and inflation risk. But longer-term investments also generally pay higher interest, largely because of those risks. Tort plaintiffs can get some of those higher interest rates while avoiding the risks by matching investment maturities to anticipated damages. A plaintiff seeking to replace 30 years of lost earnings could in principle buy government bonds maturing in each of the next 30 years, getting higher interest rates on the longer-term maturities, and knowing that each bond would pay the principal at face value in the year in which the money is needed. Of course life is not always so predictable, and it may reasonably be doubted how many tort plaintiffs have the financial sophistication to execute this strategy. But the Supreme Court has said that in cases controlled by federal law, courts may use either short-term interest rates or this mix of staggered short, medium, and long-term rates. It is also reasonable to use the rates available from local banks, because many personal-injury victims will be unfamiliar with more sophisticated investment vehicles. It does not appear that many jurors are instructed on the safest-and-best standard, and it is not clear how many judges take it literally, especially in years when interest rates are very low.

In an environment of very low interest rates, there are periods when expected inflation exceeds the interest rate on the safest and best investments, and there are likely to be many cases in which plaintiff's future wage increases may be expected to exceed that interest rate. The total-offset method becomes more plausible in such an environment, and it is entirely possible that

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adjusting for inflation and interest, or inflation, interest, and other sources of wage increases, will result in inflating rather than discounting an award for lost future earnings. It seems nearly inevitable that the cost of future medical care will inflate much more rapidly than the interest rate on the safest and best investments, although many cases appear to treat earnings and medical expenses interchangeably for this purpose. These issues are taken up in §§ 18 and 19.

g. Timing. The calculation of present value must be coordinated with the award of prejudgment interest. Future damages should be discounted to their value as of the date of judgment. When this is done, no prejudgment interest should be awarded on the present value of future damages, and postjudgment interest should accrue from the date of judgment.

In principle, future damages can be discounted back to their value as of the date of the injury, or to some other date from which prejudgment interest is awarded. When the calculation is done this way, prejudgment interest should be awarded on the discounted amount to the date of judgment, and postjudgment interest should accrue thereafter. This method is also in common use. But it is so prone to error, and sometimes egregious errors, that this Section provides only for discounting to the date of judgment.

These two methods would be mathematically equivalent if the applicable interest rates were all the same. But often they are not. Sometimes they are dramatically different.

Illustration:

4. Doug was killed in a construction accident in 2015. His family's wrongful-death action was tried in 2020, and the jury awarded $2,000,000 in damages for future lost earnings over an expected working life of 27 years. The judge on posttrial motion discounted the future damages to present value at an annual rate of one percent. Pursuant to an applicable statute, the judge awarded prejudgment interest on damages suffered before judgment at an annual rate of nine percent. Doug's future earnings should be discounted to present value as of the date of judgment in 2020, and no prejudgment interest should be awarded on the discounted amount. Postjudgment interest should accrue on the discounted amount from the date of judgment.

It would be mathematically equivalent to discount Doug's earnings to the day he died in 2015, and then to award five years of prejudgment interest on the discounted amount *at the same interest rate* used to discount the damages, and for postjudgment interest to accrue thereafter. But if Doug's earnings are discounted to the day he died at one interest

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rate, and then prejudgment interest is awarded at a different rate, serious errors can result. In this Illustration, the difference between discounting at one percent and awarding prejudgment interest at nine percent, for five years, would be $800,000.

The risk of error is so great that this Restatement rejects the approach of discounting plaintiff's future damages to the date of death, the date of injury, or any other date before judgment. When discounting future damages to present value, courts typically use a conservative interest rate, as explained in Comment *f*. When calculating prejudgment interest, they use a wide range of rates that do not necessarily match the rates used to discount future damages. Some use the rate on 52-week Treasury bills, which is typically a bit higher than the even shorter-term rates on 30-day Treasury bills or demand savings accounts. Other courts use the prime rate, or the prime rate plus one or two percent. Statutes in some states specify a rate that is well above market rates. If future damages are discounted back to the date of death at one percent or less, and then prejudgment interest is awarded at nine percent under the New York statute, or 12 percent under the Vermont statute, plaintiff can make a significant profit from the difference in interest rates.

Perhaps this result could be justified if the state has a sufficiently stringent policy of encouraging defendants to settle cases early, enforced by punitive prejudgment interest rates. But this Restatement takes the position that this result cannot be justified. It is remarkable—and indefensible—to award $800,000, not for any harm found by the jury, but for disparities in the method of calculating adjustments to the jury's verdict. Such results are erroneous both in terms of the rule of this Section and its reasons for discounting future damages to present value in the first place, and also in terms of the rightful-position principle in § 2. These errors can be avoided by discounting future lost earnings to the day of judgment, so that no prejudgment interest is awarded on the present value of future damages and the statutory rate does not come into play with respect to those damages.

Even without a statute, future damages are often discounted at a real interest rate, net of inflation, but prejudgment interest is necessarily awarded at a market interest rate, because damages incurred before trial are not adjusted for pretrial inflation. Prejudgment interest is typically awarded by the judge, who has no way to know what rate the jury used to discount future damages, or if it discounted them at all. The potential for error, and sometimes very large error, is so great that this Section adopts only the rule of discounting to the day of judgment.

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h. Procedure and the capacity of factfinders. In some states, the court discounts the jury's verdict to present value on postjudgment motion. This is analogous to the most common procedure for awarding prejudgment interest. But it is far more common to treat discounting to present value as an issue of fact, to be resolved by the factfinder. It seems unlikely that many juries can handle the necessary calculations; even judges often have difficulty. Juries are instructed to discount future damages to present value, but are often given no instructions on how to do it. The math involved is not complex; all the calculations can be done with simple arithmetic. But the process is unfamiliar to most jurors and many lawyers. Even the simplest way to do the arithmetic requires many steps, and it is easy to get confused or make a mistake. It seems likely that in many cases, no one on the jury knows how to begin.

Expert witnesses may prepare exhibits with calculations based on the witness's assumptions, and these exhibits may be admitted in evidence. But if the jury rejects the witness's assumptions, then it is largely on its own to do the calculations with a different set of numbers. Present-value tables may be introduced into evidence, or the court may judicially notice such tables and attach them to jury instructions. Judging impressionistically from reported opinions, it is common for these sorts of assistance to be offered and also common for the jury to be offered no help at all. We simply do not know how often juries make reasonable efforts to approximate present value, how many attempt careful calculations, how many attempt to discount future damages impressionistically and without any actual calculations, and how many simply ignore the issue. Jurors could almost certainly use more help, but judges are understandably reluctant to focus undue attention on the issue or to unduly influence how the jury resolves it.

Despite the frequent focus on the complexity of the calculations, what is far more difficult is choosing the numbers that go into the calculations—predicting future inflation and interest rates, the future course of plaintiff's injury and possible recovery, and the career and earnings that plaintiff would have had but for the injury.

REPORTERS' NOTES

a. History and scope. This Section is based on Restatement Second, Torts § 913A (AM. L. INST. 1979), which is now superseded. Restatement of Torts § 924, Comment *d* (AM. L. INST. 1979) touched very briefly on the issue. See 3 DAN B. DOBBS, PAUL T. HAYDEN, & ELLEN M. BUBLICK, THE LAW OF TORTS § 482 at 23-25 (2d ed. 2011); DAN B. DOBBS & CAPRICE L. ROBERTS, LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION § 3.7 at 263-265 (3d ed. 2018); JAMES M. FISCHER, UNDERSTANDING REMEDIES § 9.3 at 73-79 (3d ed. 2014); 4 FOWLER V. HARPER,

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FLEMING JAMES, JR., & OSCAR S. GRAY, HARPER, JAMES AND GRAY ON TORTS §§ 25.2 at 585 n.4, 25.8 at 684 n.10, 25.11 at 723-733 (3d ed. 2007); DOUGLAS LAYCOCK & RICHARD L. HASEN, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 150-162 (5th ed. 2019); CHARLES T. MCCORMICK, DAMAGES § 86 at 299, 304-307 (1935); 3 JACOB A. STEIN, PERSONAL INJURY DAMAGES §§ 15:1-15:11 (3d ed. 1997 & Supp.).

b. Present value and the rightful position. Just as compensation paid at the time of judgment is worth less than the same number of dollars paid simultaneously with the injury, see § 13, so compensation paid at the time of judgment is worth more than the same number of dollars paid over the years as future lost earnings or medical expenses accrue. In an early and much cited case, the Supreme Court said that "it is self[-]evident that a given sum of money in hand is worth more than the like sum of money payable in the future." Chesapeake & Ohio Ry. Co. v. Kelly, 241 U.S. 485, 489 (1916) (federal law). *Kelly* is commonly cited as the beginning of the law of present value in federal court, but it cited numerous earlier cases to the same effect from state courts.

There is a certain hypothetical quality about the rule of this Section. Many tort plaintiffs do not invest their tort compensation and draw it down as damages are incurred over the years; they may spend all or most of it within a few months or years after they receive it. They may do this through imprudence or because the judgment or settlement is inadequate, barely covering debts and deferred needs accumulated between their injury and their receipt of compensation. But they *might* invest their compensation for the long term, and the measurement of damages has always proceeded on that basis. What they actually do is their business and not the business of factfinders.

c. Doctrinal evolution and the significance of inflation. Federal cases refusing to consider the effect of future inflation, but using a market interest rate to discount future damages to present value, are collected in Jones & Laughlin Steel Corp. v. Pfeifer, 462 U.S. 523 (1983) (federal law). The results of this approach were always undercompensatory, and significantly so whenever inflation was more than nominal. Most courts did not address the problem until the period of very high inflation and interest rates in the 1970s and 1980s. *Jones & Laughlin* was the principal federal response; see also O'Shea v. Riverway Towing Co., 677 F.2d 1194 (7th Cir. 1982) (Posner, J.) (explaining problems with the traditional approach). Many of the cases seriously considering this issue are from this period of high interest rates, which is why many of the citations in these Notes are to cases that may now seem somewhat older.

d. Methods of calculation. Jones & Laughlin did not choose a method of calculation. It encouraged real-interest-rate approaches while leaving the choice to trial courts based on the evidence before them. The opinion sets out the three methods of calculation with detailed explanations. The case is authoritative in cases controlled by federal law; it has been influential in state-law cases as well.

Illustrations 1-3 are based on *Jones & Laughlin*, simplified to a single year of wages in order to illustrate the basic point. In almost any real case, the finder of fact would have to find 12 years of lost earnings, and discount all 12 years to present value. As the Court explained in *Jones & Laughlin*, the finder of fact must determine:

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> (1) the amount that the employee would have earned during each year that he could have been expected to work after the injury; and (2) the appropriate discount rate, reflecting the safest available investment. The trier of fact should apply the discount rate to each of the estimated installments in the lost stream of income, and then add up the discounted installments to determine the total award.

462 U.S. at 537-538. Illustrations 1-3 are also simplified by assuming that Denzel would have been paid annually instead of monthly or biweekly. This assumption is nearly universal in practice; no one in litigation does these calculations one pay period at a time.

These calculations can be simplified with a table of present values, and such tables are sometimes given to jurors with the jury instructions. Such a table is reprinted in LAYCOCK & HASEN, REMEDIES at 1061-1063. Expert witnesses may use computer programs to streamline their calculation; such programs have not been given to jurors.

In Illustration 2, the mathematical equivalent of the procedure in Illustration 1 would be not to subtract one percent from two percent, but to divide 1.02 by 1.01, and discount by the result—to divide Denzel's current salary by 1.00990099, and repeat that 12 times. This would produce the same result as Illustration 1 to the penny.

Because the present value of future damages is generally treated as an issue of fact, the method of estimating or calculating present value is left to the factfinder. Some courts have expressed a decided preference, usually for a real-interest-rate approach, but few jurisdictions have adopted a rule requiring either the market interest rate or the real interest rate as a matter of law. A notable exception is the Fifth Circuit's decision, authoritative in the Eleventh Circuit as well, in Culver v. Slater Boat Co., 722 F.2d 114 (5th Cir. 1983) (en banc). *Culver* held that to avoid trials over competing economic forecasts, the real-interest-rate approach should be used in all cases and juries should be so instructed.

Pennsylvania adheres to the total-offset rule as a matter of law. Helpin v. Trs. of Univ. of Pa., 10 A.3d 267 (Pa. 2010) (future business profits); Kaczkowski v. Bolubasz, 421 A.2d 1027 (Pa. 1980) (future earnings). Alaska adopted a somewhat different version of total offset in Beaulieu v. Elliott, 434 P.2d 665 (Alaska 1967), but a later statute provides that this method can be used only if both parties agree. Alaska Stat. Ann. § 09.17.040(b)-(c).

e. Pain and suffering and other damages that cannot be valued in a market. Authorities rejecting present-value calculations for pain and suffering and the like include CSX Transp., Inc. v. Begley, 313 S.W.3d 52 (Ky. 2010) (collecting federal cases); Levine v. Wyeth, 944 A.2d 179 (Vt. 2006); Drews v. Gobel Freight Lines, Inc., 578 N.E.2d 970 (Ill. 1991) (loss of society); Friedman v. C & S Car Serv., 527 A.2d 871 (N.J. 1987) (collecting state and federal cases, and holding that pain and suffering should not be discounted to present value even if plaintiff argues that the jury should value pain and suffering on a basis of so many dollars per unit of time); Mullins v. Summers, 485 So. 2d 1126, 1129-1130 (Ala. 1986) (quoting the state's pattern jury instruction: "Damages for disability including pain, suffering, and mental anguish are not reduced to present value."); 3 KEVIN F. O'MALLEY, JAY E. GRENIG, & WILLIAM C. LEE, FEDERAL JURY PRACTICE & INSTRUCTIONS § 128:22 (6th ed. 2010 & Supp.) (offering this unofficial but influential suggested

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instruction: "Your duty to discount to present value applies to loss of future earnings or future medical expenses only. If you should find that plaintiff _____ is entitled to damages for future pain and suffering or future mental anguish, then such award is not subject to any reduction for the present use of such money."); see also Oliveri v. Delta S.S. Lines, Inc., 849 F.2d 742 (2d Cir. 1988) (collecting state and federal cases); FISCHER, REMEDIES§ 73.1.3 at 514.

Oliveri tried to reconcile two lines of conflicting cases in the Second Circuit by holding that damages for pain and suffering should be reduced to present value impressionistically: "to accept the concept of discounting awards for non-pecuniary losses, but to forgo the precision appropriate for discounting future earnings." Id. at 751. There is a somewhat similar holding in Salgado v. County of Los Angeles, 967 P.2d 585 (Cal. 1998).

Michigan discounts pain and suffering and all similar damages. Statutes require that juries find lost earnings, medical expenses, and "noneconomic damages" separately, that future damages in each category be found separately for each future year, and that all three categories be discounted to present value at five percent compounded annually. MICH. COMP. LAWS ANN. §§ 600.6305, 600.6306, and 600.6306a. This discount rate appears to be an estimated market rate, which requires that factfinders allow for inflation in valuing future damages.

Judge Posner required that damages for future pain and suffering be reduced to present value in Abernathy v. Superior Hardwoods, Inc., 704 F.2d 963 (7th Cir. 1983) (Indiana law), a case in which plaintiff's attorney suggested that the jury value pain and suffering at $10 per day. Suggesting a specific amount for each future day may invite the response of discounting that amount to present value, but the opinion did not explicitly connect the court's unusual holding to this feature of the jury argument. Five years later, Judge Posner took the opposite position. Needham v. White Lab'ys, Inc., 847 F.2d 355, 360 (7th Cir. 1988) (Illinois law) ("courts do not discount future losses due to disfigurement or pain and suffering, as distinct from loss of earnings or medical expenses"). No difference in controlling state law explains these two cases; *Needham* cited an Illinois case for not discounting, but *Abernathy* cited no Indiana case in support of discounting. *Abernathy* has been much cited in the Seventh Circuit, but never for its holding on discounting pain-and-suffering damages.

Some mostly older cases are collected in Annotation, 28 A.L.R. 1177 (1924 & Supp.); a few require discounting pain-and-suffering damages, but most do not.

f. Rates. In cases controlled by federal law, the Supreme Court has long held that discounting to present value should be based on interest rates on "the best and safest investments" and "the safest available investment," because the injured worker "is entitled to a risk-free stream of future income to replace his lost wages." Jones & Laughlin Steel Corp. v. Pfeifer, 462 U.S. 523, 537-538 (1983). The initial reference to "the best and safest investments" came in Chesapeake & Ohio Ry. Co. v. Kelly, 241 U.S. 485, 491 (1916), in which the Court also said that plaintiffs should not be expected to exercise investment skill, but could use those safe investments "which require the least care." *Jones & Laughlin* talked about the bond market; *Kelly* implied that the relevant interest rate should be that available on savings accounts, which are more familiar to most plaintiffs and are now government insured.

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The strategy described in Comment *f*—of buying bonds maturing in each year over a 30-year future—cannot be replicated with savings accounts. But a plaintiff could get some of the same benefits by buying certificates of deposit maturing in one to five years, and then, as each certificate matured, reinvesting the funds not needed for current consumption in a new five-year certificate. The result, after the initial start-up period, would be a rotating series of five-year certificates with one-fifth of them maturing each year. These five-year certificates would typically pay higher interest than demand accounts or one-year certificates.

Jones & Laughlin said that a federal court should not be reversed if it uses a real-interest-rate approach, chooses a discount rate between one and three percent, and gives reasons for its choice. The Second Circuit refined this to a strong preference for a two-percent discount rate, at least if neither party has proved that some other rate would be more appropriate. See, e.g., Ammar v. United States, 342 F.3d 133 (2d Cir. 2003). Keep in mind that these figures were estimates of the *real* interest rate, net of inflation.

However plausible those estimates may have been in 1983 or 2003, when *Jones & Laughlin* and *Ammar* were decided, they are quite implausible as these Notes are written. On August 6, 2020, a day of no particular significance but the day on which the Reporters happened to check, the *market* yield to maturity on U.S. Treasury bonds was 0.09 percent for three months and 1.18 percent for 30 years. The yield was *negative* on all Treasury Inflation Protected Securities (TIPS), at any maturity. The principal amount on these TIPS bonds is adjusted for inflation; the interest rate on TIPS bonds may be the market's best single indicator of a current real interest rate.

Treasury bonds are presumed to carry no investment risk, but the longer maturities carry enormous interest-rate and inflation risk. They are *not* the safest and best investments unless used as part of a staggered portfolio of the sort described in Comment *f*. A recurrence of high inflation would render the real interest rate on today's 30-year bonds deeply negative, and a plaintiff who had to sell such a bond to raise cash would get a fraction of its face value, even though the United States would pay in full at maturity. The long tradition of "discounting" or "reducing" future damages to present value should not obscure these realities. When market interest rates are very low, real interest rates are likely to be negative, and a damage judgment will not earn a real investment return; if safely invested, it will lose value over time.

Of course these very low interest rates may not last. Interest rates fluctuate, and predicting their course over the long term is more or less impossible. In a case of the wrongful death or permanent disability of a young person, in which damages extend over several decades, defendants can argue that a two-percent real interest rate is more likely on average than a continuation of the current low rates. Plaintiffs can respond that current rates are the best evidence available, that the bond market is predicting that these rates will last for at least 30 years, and that any higher numbers are entirely speculative. In a period of high interest rates, plaintiffs and defendants might switch sides on this set of arguments. Veasley v. United States, 201 F. Supp. 3d 1190 (S.D. Cal. 2016), is an example of competing expert witnesses using experience over many decades, instead of current rates, to predict future interest rates, future rates of wage growth, and future medical inflation. In

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Koser v. Atchison, Topeka & Santa Fe Ry. Co., 928 P.2d 85 (Kan. 1996), plaintiff's expert witness used the long-term average of rates on AAA-rated municipal bonds.

However the argument is presented, and whatever evidence is offered, cases with very long-term damages pose questions that judges and jurors cannot reasonably answer. But these cases require an answer about future interest rates and future inflation, either explicitly or implicitly. These answers satisfy the certainty rule in § 5 because no greater certainty is possible under the circumstances.

Typical jury instructions do not inform juries of the right to rely on safe investments, or anything else about choosing an interest rate. And of course the federal decisions announcing the safest-and-best standard are not binding in cases controlled by state law. The rates used by judges and expert witnesses appear to vary considerably. In Salgado v. County of Los Angeles, 967 P.2d 585 (Cal. 1998), the jury was instructed to use "the highest rate of return consistent with reasonable security." Id. at 588. This seems more akin to the Prudent Investor Rule (Restatement Third, Trusts § 90 (AM. L. INST. 2007)) than to the safest and best investments. It may be a better approximation of what a well-advised tort plaintiff would do with a lump-sum judgment. But we have no reason to believe that many tort plaintiffs are so well advised. This instruction was not at issue in the state supreme court.

An Alaska statute requires the use of "long-term future interest rates in the best and safest investments." ALASKA STAT. ANN. § 09.17.040(b). Long-term rates are usually (not always) higher than short-term rates. And as noted, long-term fixed-income investments carry more interest-rate and inflation risk than short-term investments; they will lose more of their value if interest rates or inflation rates rise. To invest exclusively in long-term investments would not be prudent, let alone safest and best, for most tort plaintiffs.

A Georgia statute provides for a five-percent annual discount rate "or any other discount rate as the trier of fact may deem appropriate." GA. CODE ANN. § 51-12-13(a).

g. Timing. Illustration 4 is based on Toledo v. Iglesia ni Christo, 962 N.E.2d 773 (N.Y. 2012), but rejects the result. Future damages were discounted to their value as of the date of death at 4.33 percent per year. This rate was not explained, but it appears to have been the rate available on an annuity contract purchased pursuant to a New York statute requiring that tort judgments with future damages greater than $250,000 be paid with an annuity instead of in a lump sum. N.Y. C.P.L.R. § 5041(e). Prejudgment interest was awarded (on the present value of the annuity) at nine percent, as mandated by N.Y. C.P.L.R. § 5004. It was six years from the date of death to the date of judgment, and the original award for future damages was $3,562,000. With this long time period and large sums at stake, plaintiffs gained about $733,000 on the difference in interest rates applied at different stages of the calculation. The court seems to have believed that this result was dictated by the intersection of an earlier precedent with multiple New York statutes enacted at different times, but the result seems indefensible, and courts allowed any discretion should avoid such outcomes.

Coordinating present-value calculations with prejudgment interest is a matter of consistency, but consistency is hard to achieve. The Supreme Court has said that "[i]t is both easier

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and more precise" to discount the entire stream of lost earnings back to the date of injury and then award prejudgment interest on the discounted sum. Jones & Laughlin Steel Corp. v. Pfeifer, 462 U.S. 523, 538 n.22 (1983). This may be true in bench trials controlled by federal law, in which the court has discretion to choose consistent interest rates and to discount back to the date of injury. But even there, the relevant criteria for choosing a future discount rate may not match up with the more discretionary criteria for choosing a prejudgment interest rate. And in a federal jury trial, the jury chooses the interest rate for discounting to present value, but the judge chooses the interest rate for prejudgment interest, usually with no way to know what rate the jury used. In cases controlled by state law, statutes often intervene, specifying prejudgment interest rates and some date other than the date of injury for the commencement of prejudgment interest. See § 13. In all these contexts, there is no guarantee that the two rates will be the same and a substantial risk that they will not be. The resulting errors are not likely to be so huge as in *Toledo*, but they will be errors even so, and some of the errors will be large.

h. Procedure and the capacity of factfinders. The Pennsylvania court, which later adopted the total-offset rule, once said that "[t]rial judges and lawyers freely admit that the application of the 'present worth rule' is beyond the understanding and capabilities of most lay persons serving on juries. In the very least, it is a tedious and laborious task." Brodie v. Phila. Transp. Co., 203 A.2d 657, 659 (Pa. 1964). More recently, a Vermont trial judge commented that "judges and lawyers are universally incapable of performing the discount calculations with or without a calculator and the tables of historic interest rates and inflationary factors." Levine v. Wyeth, 944 A.2d 179, 196 (Vt. 2006). "Universally" is too strong, but the problem is real; it is certainly true that many lawyers and judges are incapable of these calculations. In Steppi v. Stromwasser, 297 A.2d 26 (Del. 1972), the trial judge attempted to discount the jury's verdict to present value, and used a table to simplify the task, but completely bungled the job, doing the calculation as though a lifetime of future earnings would have been received in a lump sum in the year plaintiff retired. This error had the effect of hugely undercompensating the plaintiff.

Despite these difficulties, the issue is commonly submitted to juries, and some courts hold that it must be submitted to the jury unless both sides waive their constitutional right to jury trial. Clark v. Container Corp. of Am., Inc., 589 So. 2d 184 (Ala. 1991); *Steppi*, 297 A.2d 26.

The Supreme Court has held that the Federal Employers' Liability Act requires that the choice of interest rate and the process of discounting be submitted to the jury. It did not expressly invoke the Seventh Amendment, but it described the choice of interest rate as an "essentially factual question." Monessen Sw. Ry. Co. v. Morgan, 486 U.S. 330, 342 (1988). It has also held that the jury must be instructed in such cases to discount future damages to present value. St. Louis Sw. Ry. Co. v. Dickerson, 470 U.S. 409 (1985). But it has not held that the instruction must tell jurors how to do it or that expert testimony must be offered to assist them.

The Second Circuit suggested that the parties stipulate that the jury should find only the plaintiff's future lost earnings, unadjusted for inflation, and let the judge discount to present value on posttrial motion. Oliveri v. Delta S.S. Lines, Inc., 849 F.2d 742 (2d Cir. 1988). But it recognized that it had no authority to require such a stipulation.

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New York requires juries to itemize their verdicts in personal-injury cases, to separate past damages from future damages, and to find the number of years over which future damages will be incurred. N.Y. C.P.L.R. § 4111(d) and (e). In cases with future damages in excess of $250,000, and apparently in all medical-malpractice cases (but subsection (d) on medical malpractice is less clear than subsection (e) on large verdicts), the statute requires the jury to award the full amount of damages without discounting to present value. The judge then does the discounting, and tends to some additional calculations, on posttrial motion. N.Y. C.P.L.R. §§ 5031 and 5041.

Courts often instruct juries to reduce future damages to present value without telling them how to do it, and without requiring expert testimony. The Florida Pattern Jury Instruction is not unusual; it gives juries a definition but no hint of a method:

> **Any amount of damages which you allow for [loss of earnings] [the estate's loss of net accumulations], [or] [**(describe any other future economic loss which is subject to reduction to present value)**] should be reduced to its present money value and only the present money value of these future economic damages should be included in your verdict.**
>
> **The present money value of future economic damages is the sum of money needed now which, together with what that sum will earn in the future, will compensate** (claimant) **for these losses as they are actually experienced in future years.**

Fla. Standard Jury Instruc. 502.7, https://jury.flcourts.org/civil-jury-instructions-home/civil-instructions/#500.

The Florida Supreme Court said that expert testimony on the issue is admissible but not required, and it declined to mandate a calculation method on the ground that it lacked the expertise to do so. Delta Air Lines v. Ageloff, 552 So. 2d 1089 (Fla. 1989). This decision led an intermediate court to comment that "it is unrealistic to direct a jury to perform an economic calculation which the Florida Supreme Court candidly recognizes is beyond its own expertise." Walt Disney World Co. v. Blalock, 640 So. 2d 1156, 1159 (Fla. Dist. Ct. App. 1994).

Mullins v. Summers, 485 So. 2d 1126 (Ala. 1986), is another example of a jury being told to discount future damages to present value but given no instructions on how to do it. The court affirmed the verdict with reservations, commenting that the jury likely had no idea how to do it, and expressing a desire to study the issue and devise a better rule. Nothing appears to have come of that expression of interest.

The privately recommended federal instruction gives somewhat more guidance. It first instructs on future lost earnings and future medical expenses, and then says:

> Under these circumstances, the result is that plaintiff _____ will in effect be reimbursed in advance of the loss, and so will have the use of money that plaintiff would not have received until some future date but for the verdict.
>
> In order to make a reasonable adjustment for the present use, interest free, of money representing a lump-sum payment of anticipated future loss, the law requires you to

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> discount, or reduce to its present worth, the amount of the anticipated future loss, by taking (1) the interest rate or return that plaintiff _____ could reasonably be expected to receive on an investment of the lump-sum payment, together with (2) the period of time over which the future loss is reasonably certain to be sustained.
>
> Then reduce, or in effect deduct from, the total amount of anticipated future loss whatever that amount would be reasonably certain to earn or return if invested at such rate of interest over such future period of time. Include in the verdict an award for only the present-worth—the reduced amount—of anticipated future loss.
>
> …
>
> [*As already explained to you, this computation is readily made by using the so-called "present-worth" tables I have judicially noticed and received in evidence in this case.*]

3 O'MALLEY, GRENIG, & LEE, FEDERAL JURY PRACTICE & INSTRUCTIONS § 128:22. We might reasonably wonder how many juries can accurately interpret a present-value table without assistance. And the somewhat intuitive approach of calculating how much interest could be earned and subtracting that number from the damages is not the approach of the present-value table, which presents for each future year a value of one dollar, a value that must be multiplied by the damages that will be incurred in that future year.

Another approach is illustrated by Regent Care of San Antonio, L.P. v. Detrick, 2020 WL 2311943 (Tex. May 8, 2020). Both sides presented evidence of future medical expenses already discounted to present value, with no explanation of how they had done the discounting or what rates they had used, and the jury was instructed to find the amount that would fairly and reasonably compensate the plaintiff "if paid now in cash." Id. at *6. This approach was indirectly at issue on appeal; the court held that damages had been discounted to present value, and that ordering them paid over time pursuant to a statute providing for structured judgments would improperly "double discount" the damages. Id.

Richardson v. Chapman, 676 N.E.2d 621 (Ill. 1997), summarizes an example of expert testimony explaining, at least in general terms, how the witness discounted damages to present value.

A Georgia court upheld a jury instruction that said, "after you have determined, if any, future medical expenses and future pain and suffering, you will be authorized to reduce that by 5 percent." CSX Transp., Inc. v. Barnett, 405 S.E.2d 506, 508 (Ga. Ct. App. 1991). The court noted that this was "not a perfect instruction in that it did not include future earnings, and because amounts awarded for pain and suffering need not be reduced to present value," but it rather dubiously held that the omission of lost earnings was harmless to the appealing defendant. Id. The court did *not* note that reducing future damages by five percent is not at all the same as reducing those damages to present value at five percent per year, as authorized by a Georgia statute. A federal district judge appears to have made the same mistake in a bench trial in Shaw v United States, 741 F.2d 1202 (9th Cir. 1984). The case involved an infant who was horribly brain damaged

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at birth, and even with a discount rate of just one percent, the error inflated the damages by nearly a million dollars.

Some courts hold that plaintiff must introduce evidence of the present value of future damages. E.g., Kay v. Menard, 754 A.2d 760 (R.I. 2000). Other courts just as firmly hold that the burden is on defendant to introduce such evidence if defendant wants future damages reduced to present value. E.g., CSX Transp., Inc. v. Casale, 441 S.E.2d 212 (Va. 1994). And still others hold that either side may offer expert testimony, but that neither side is required to do so. E.g., Sahrbacker v. Lucerne Prods., Inc., 556 N.E.2d 497 (Ohio 1990). A California court recently held that the court should not discount future damages to present value at all if neither party introduces evidence of an appropriate discount rate. Lewis v. Ukran, 248 Cal. Rptr. 3d 839 (Ct. App. 2019). This holding may be equivalent in practice to putting the burden of going forward on the defendant who wants future damages discounted.

This is a body of law that is not working well, and probably cannot be made to work well. The necessary calculations are not well adapted to jury trials. But it is also easy to exaggerate the significance of the problem. There are huge uncertainties in the prediction of long-term future damages; present value is only one, and particularly in times of low interest rates, it is one of the less important. It may be that many juries do reasonably well with the help of expert testimony or by discounting impressionistically and in round numbers.

Guessing at present value seems problematic because—perhaps only because—precise calculations are possible and are so often bungled or not attempted. Grossly erroneous guesses or miscalculations can seriously prejudice one side or the other, but that is equally true of all the other elements of future damages. The system accepts a fair amount of guesswork on all the other questions necessary to estimate future damages, because for most of those questions, precise calculations are not possible. Trial lawyers on both sides could do a better job of presenting this issue to juries, but they may reasonably believe that they will accomplish more for their clients by addressing other issues, and that how to calculate present value is not a tactically or strategically wise place to spend their time unless unusually large sums turn on the issue. The legal system should not attach undue importance to the system's difficulty in handling present-value calculations.

§ 15. Litigation Expenses

(a) Subject to the exceptions in Subsection (b), a plaintiff cannot recover compensation for attorneys' fees or other litigation expenses.

(b) A court may award compensation for attorneys' fees and other litigation expenses to a plaintiff who establishes a defendant's liability in tort if

(1) the tort caused the plaintiff to incur attorneys' fees to investigate, negotiate, or litigate a dispute with a person other than the defendant;

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(2) the tort alleged and proven is bad faith conduct by an insurer;

(3) a statute authorizes the award of attorneys' fees;

(4) the court awards the attorneys' fees from a common fund that benefits others similarly situated with the plaintiff;

(5) the court awards the attorneys' fees as a sanction for bad-faith conduct in the litigation; or

(6) the court awards the attorneys' fees as a sanction for contempt of court or as compensation for harm that defendant's contempt of court caused.

Comment:

a. History and scope. This Section supersedes Restatement Second, Torts § 914. That Section stated a general rule, commonly known as the "American Rule," against the recovery of attorneys' fees and other expenses of litigation in a tort action. It also included a Subsection authorizing recovery of attorneys' fees incurred in litigation collateral to the tort suit. Comment *a* noted other exceptions but concluded that "[t]he cases are not sufficient to establish individual exceptions or adequately related to permit the crystallization of a composite rule."

This Section states the general rule and the main exceptions to it, without attempting to state the details of most of the exceptions. The collateral-litigation exception is also stated fully, because it is a rule of damages—governed by the usual principles of tort damages—compensating harms that are caused by the tort and are within the scope of liability. The exception for insurance bad faith is stated in Restatement of the Law, Liability Insurance § 50, which this Section adopts; that exception generally applies to first-party insurance as well. The roots of the other exceptions are outside of tort law, and their details vary greatly across jurisdictions and statutory schemes. This Section adopts the analysis of the common-fund exception in Restatement Third, Restitution and Unjust Enrichment § 29. The list of exceptions in this Section is not intended to be exhaustive.

Section 914 suggested that attorneys' fees may be available in some tort actions allowing punitive damages, but this Section rejects a possible punitive-damages exception to the rule as inconsistent with the great majority of modern case law. See Comment *g*.

This Section does not address the award of court costs under generally applicable statutes or rules of procedure. The reference in the black letter to "other litigation expenses" refers to expenses not allowable as costs, such as the actual fees of expert witnesses.

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b. Rationale for normally excluding attorneys' fees from tort compensation. In most tort suits, the parties bear their own attorneys' fees, a concept commonly referred to as the "American Rule," given its ubiquity in the United States, and in contrast to the "loser pays" "English Rule" in the United Kingdom. Common-law tort cases are the principal remaining domain of the American Rule, least affected by the growing numbers of exceptions. The total number of common-law tort cases within the six exceptions restated in this Section are a small fraction of the number of tort cases subject to the American Rule.

Despite its ubiquity in this country, the rule remains somewhat controversial. Supporters justify it on grounds that making the loser pay the winner's attorneys' fees would penalize those who bring unsuccessful lawsuits or offer unsuccessful defenses. And it would deter tort victims of modest means from filing suit at all. There is less concern about deterring defendants of modest means from defending, because there is little reason to sue such defendants unless they have liability insurance, and if they do, their insurer pays their legal fees. The rule also simplifies litigation by eliminating disputes over the proper amount of attorneys' fees.

But the failure to compensate a successful plaintiff's attorneys' fees is inconsistent with the rightful-position standard (see § 2), because tort plaintiffs must pay attorneys' fees (often a percentage of the recovery under a contingent-fee arrangement) out of awards for damages that are measured without regard to those fees. Defense-side interests argue that the risk of liability for defendant's attorneys' fees would deter frivolous lawsuits, and that a successful defendant is not restored to its rightful position if it is not compensated for its attorneys' fees.

Regardless of any academic or political controversy, the rule is well established in American law. Only Alaska has a general rule providing that the losers in litigation pay a portion of the winners' attorneys' fees. Fees are awarded in Alaska under a schedule that is generally well below market rates. The bar is reported to be generally happy with the rule, and its effects on litigation incentives appear to be modest.

Illustration:

1. Lupe was struck by Gary's automobile while crossing the street. Lupe hired a lawyer to sue Gary for negligence. The lawyer agreed to accept as compensation 40 percent of any recovery from Gary. The jury found for Lupe and awarded $100,000 in damages, representing full compensation for her loss. Lupe's lawyer deducted $40,000 from Lupe's damages, leaving Lupe with $60,000. Lupe has no right to recover the additional $40,000

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from Gary, even though the recovery of only $60,000 will leave Lupe in less than the rightful position.

c. The collateral-litigation exception. The collateral-litigation exception is not an award of fees in the same sense as most of the other exceptions, and it generally does not apply to the fees incurred in suing or otherwise dealing with the tort defendant. Rather, it is an award of compensatory damages that includes attorneys' fees caused by the tort and incurred in dealing with someone other than the tort defendant. The award is not discretionary; a plaintiff who proves these damages is entitled to recover them.

When defendant's wrong causes plaintiff to litigate with a third party, plaintiff can recover the expenses of that litigation, including attorneys' fees, as consequential damages. A wide range of torts may cause third-party litigation, but the torts that most commonly give rise to damages within this exception include malicious prosecution, abuse of process, wrongful attachment, false imprisonment, false arrest, legal malpractice, tortious interference with contract, and slander of title. These cases typically involve litigation concluded before the trial of the primary tort suit, and this chronological sequence of the two cases greatly simplifies the task of proving the fees, but the sequence should not be essential to application of the rule. It is not uncommon for the claim against the third party, and the claim against the tortfeasor who made it necessary to sue the third party, to be joined in the same complaint.

When the exception applies, it allows recovery only of attorneys' fees from the dispute with third parties—the collateral dispute—as damages in the tort suit. It generally does not allow for the recovery of attorneys' fees incurred in the tort suit—the primary dispute. See Illustrations 2-4. But some courts recognize exceptions to this limitation for bad-faith failure to pay insurance claims and for slander of title. See Comment *d* and Reporters' Note to Comment *c*.

The rule is most commonly referred to as the collateral-litigation exception, but it goes by a variety of names. In California, it is called the tort-of-another doctrine; in Colorado, it is called the wrong-of-another doctrine. In the District of Columbia, it is called the tort of wrongful involvement in litigation. In Florida, it is called the wrongful-act doctrine. Despite the reference to litigation in some of these names, the exception is not limited to actual litigation expenses. It also applies to attorneys' fees incurred in resolving disputes without litigation. See Illustration 4.

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Illustrations:

2. Andy falsely accused Gino of stealing his car. Police arrested Gino, and Gino hired a lawyer to defend him in a criminal prosecution. Gino was released and the charges were dropped after he reasonably spent $10,000 in attorneys' fees. Gino later successfully sued Andy for malicious prosecution, reasonably spending $5000 to bring that case. The $10,000 in attorneys' fees from the criminal case are recoverable in the tort case as consequential damages. The $5000 in attorneys' fees in the tort case are not recoverable under the American Rule, unless some other exception applies.

3. Wilbur consulted Attorney One for advice on protecting his assets from a potential creditor. Attorney One advised him to convey his interests in multiple family businesses to various family members. Attorney One did not advise him that this procedure carried substantial risks. After the transfers were complete, Wilbur's father moved to entirely exclude him from the operation and profits of the businesses. Wilbur hired Attorney Two to sue his father. That case eventually settled, but Wilbur reasonably paid $250,000 in fees and expenses to Attorney Two. Wilbur can recover these fees and expenses from Attorney One if he establishes Attorney One's liability for legal malpractice. He cannot recover the fees incurred in the malpractice suit against Attorney One, unless some other exception applies.

4. Thief broke into Julia's home and stole antique silver worth some $40,000. Several years later, Julia saw some of the distinctive silver items in Dealer's display window. She hired Attorney to recover the silver. Attorney's investigation, and negotiations with Dealer, eventually led to recovery of all the silver without litigation. The investigation revealed that Dealer had recently purchased the silver from Sam. Sam had purchased the silver from another dealer shortly after the theft. Attorney reasonably charged $11,000 for the work required to recover the silver. In an action for conversion damages against Sam, Julia can recover the $11,000 in legal fees for Attorney's investigation and negotiation with Dealer. She cannot recover the legal fees incurred in suing Sam, unless some other exception applies.

See also § 8, Illustration 3, in which an exonerated defendant in a fraud case proved the fees incurred in defending against the fraud claim as damages in a cross-claim against the fraudster,

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and § 12, Comment *g*, on awarding fees incurred in dealing with the tax authorities as a result of professional malpractice by an attorney or accountant.

d. The insurance-bad-faith exception. An insurer that responds to an insurance claim in bad faith commits a tort and not just a breach of contract. This rule is stated with respect to liability insurance in Restatement of the Law, Liability Insurance § 49; it also applies to first-party insurance. And by one route or another, nearly every state awards attorneys' fees to successful insurance-bad-faith plaintiffs. Id. § 50. These fee awards generally appear to be nondiscretionary.

Some of these cases are simply applications of the collateral-litigation exception. If a liability insurer wrongfully refuses to provide a defense, the most immediate damages are that the insured must employ counsel to defend against a tort claim. Other cases, especially in the context of first-party insurance, are an extension of the collateral-litigation exception. They award fees in the bad-faith case for the cost of suing the insurer to obtain a defense or to obtain coverage; they treat that litigation as collateral to the bad-faith case even though the defendant is the same and even if the two claims are joined in the same lawsuit. Some of these cases award fees on the bad-faith claim as well—in the bad-faith case. This last result cannot be rationalized in terms of collateral litigation; it must be viewed as a separate exception for insurance-bad-faith claims. Finally, in many states, statutes provide for the award of fees in insurance-bad-faith cases.

e. Statutory exceptions. Despite the American Rule, statutes allow the recovery of attorneys' fees in a great variety of circumstances. More than 200 federal statutes and almost 4000 state statutes authorize awards of attorneys' fees, and more have been enacted since these counts were published. Few of these statutes apply in common-law tort litigation, but some do—most notably, statutes authorizing fees in insurance-bad-faith cases. See Comment *d*. And see the statute in Illustration 5. In claims for constitutional torts, such as police brutality or discrimination by government officials, statutory provisions for attorneys' fees apply to most cases under federal law and to cases under state law in many states.

Many of these statutes, but very far from all, apply to causes of action in which the typical defendant has much greater means than the typical plaintiff, such as consumer protection, civil rights, antitrust, and securities law. Either explicitly or by interpretation, most statutes of this type allow only prevailing plaintiffs to obtain an award of fees, and not prevailing defendants unless the claim was frivolous or in bad faith. This one-sided approach restores successful plaintiffs to their rightful position without allowing the risk of liability for defendants' fees to deter them from

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filing suit at all. A smaller number of statutes allow the prevailing party, whether plaintiff or defendant, to recover fees under the same or similar standards. Some statutes mandate an award of fees; some vest broad discretion in the trial judge; some are nominally discretionary but interpreted to mandate fees in all but highly exceptional circumstances. The statutes vary widely, as does state and federal practice on how to decide issues such as when the statutes apply, who is a prevailing party entitled to fees, and how to set the amount of compensation. This Restatement does not consider these issues.

Illustration:

5. Developer proposed to build a large apartment complex. Neighborhood Association objected. After hearings before the zoning board and then mediation, Developer agreed to modify the project and Association agreed to drop its opposition. These agreements were embodied in a contract. Francisco, who owned a single-family home across the street from the project and was a member of Association, appeared before the zoning board and continued to object to the project as modified. In response to questions from the board, Association's president stated that Association agreed with Francisco's objections. The board denied zoning for the project.

Developer sued Francisco for tortious interference with its contract with Association. The court dismissed the complaint for failure to state a claim, because there was no allegation that Francisco had asked Association to support his objections or otherwise breach its contract. He reasonably paid an attorney $15,000 to successfully defend him against Developer's lawsuit. A statute in the jurisdiction provides that defendant is entitled to attorneys' fees in any tort suit that is dismissed for failure to state a claim. Developer is liable to Francisco for $15,000 in attorneys' fees.

f. The common-fund exception. If a plaintiff employs an attorney to sue a defendant for a wrong and recovers funds that will benefit third parties, attorneys' fees may be awarded out of the fund. Note that unlike all the other exceptions, this is not an award of fees against the defendant. Rather, each plaintiff or potential plaintiff who benefits from the fund pays a pro rata share of the fees. This exception is justified on grounds of restitution: plaintiffs who benefit from the fund would be unjustly enriched if they could collect their share of the fund without paying their share

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of the fees that made the fund possible. The common-fund exception typically applies in class actions, but it is not limited to class actions.

Restatement Third, Restitution and Unjust Enrichment § 29 covers issues related to common-fund recoveries. This Section adopts that analysis as it pertains to attorneys' fees and does not add to that discussion.

g. The bad-faith-litigation exception. Federal courts, and some state courts, can award attorneys' fees in response to bad-faith conduct in litigation. Such awards both sanction the bad-faith conduct and compensate the opposing litigant for the attorneys' fees incurred in responding to the bad-faith conduct. In federal court, the power to award attorneys' fees is part of a court's inherent powers to manage its proceedings and assure compliance with its orders. But attorneys' fees awarded on this basis must include only those fees that were a but-for consequence of the other side's violations. Amounts spent in a lawsuit pursuing other defendants besides the defendant who acted in bad faith during the litigation, or pursuing claims or theories against the bad-faith defendant that were not affected by the bad-faith conduct, are not recoverable under this exception.

Illustration:

6. Harley sued Tire Co. in products liability, alleging that Tire Co. manufactured a defective tire that malfunctioned and caused his injuries in a motorhome accident. Although Harley's lawyers repeatedly asked in discovery for records of "all tests" done on the tire model at issue, Tire Co. produced nothing relevant. The case settled on the eve of trial. After the settlement, Harley's lawyer learned that in another lawsuit, Tire Co. had disclosed testing results on the tire model showing that it got dangerously hot when traveling at highway speeds. Harley filed a motion for attorneys' fees and showed that the case would have settled much earlier if Tire Co. had properly responded to discovery. The court should award against Tire Co. and in favor of Harley all the attorneys' fees that would not have been incurred but for Tire Co.'s bad-faith responses to discovery. This rule requires the court to reasonably assess the course the litigation would have taken in the wake of full disclosure of the test results.

Fees under this exception are imposed for bad-faith conduct *in* litigation; the American Rule generally bars the imposition of fees for bad-faith conduct that is the *subject* of litigation. Thus, even if the subject matter of the underlying tort case involves fraud or other bad-faith

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conduct that might merit the award of punitive damages, that is not a valid reason to award attorneys' fees in the great majority of American states. This Restatement rejects the Second Restatement's suggestion of a punitive-damages exception to the American Rule.

Illustration:

7. Bob kidnapped and beat Juan, causing severe personal injuries. Juan successfully sued Bob for false imprisonment, assault, and battery. The jury awarded Juan $50,000 in compensatory damages and $200,000 in punitive damages. The attorneys' fees that Juan incurred are not recoverable under the American Rule or under the bad-faith-litigation exception to the rule, because Bob's despicable conduct did not occur in the litigation itself. The jury's award of punitive damages does not change this result.

h. The contempt-of-court exception. Courts possess inherent power to punish for willful disobedience of court orders, or to coerce compliance with such orders, and such orders are sometimes issued in tort cases. See §§ 44-45. To recover attorneys' fees under this exception in federal court and in many states, the party seeking such fees must prove that the other party or the other party's attorney willfully disobeyed court orders. Although willfulness is required, the award typically comes in an action for civil, not criminal, contempt, and the fees are awarded to the opposing party, not the court.

Illustration:

8. Danielle sued her neighbor Frank for trespass in a dispute over underlying property rights. The court entered preliminary injunctions forbidding either party from contacting or harassing the other or damaging the other's property. After he was notified of this injunction, Frank cut Danielle's shrubs, damaged her drain pipe, peered over her wall, and photographed her in her backyard. The court found that these acts were willful violations of the injunction and held Frank in civil contempt. Danielle incurred $5000 in attorneys' fees litigating the motion to hold Frank in contempt. The court in its discretion may hold Frank liable for these fees.

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REPORTERS' NOTES

a. History and scope. This Section supersedes Restatement Second, Torts § 914 (AM. L. INST. 1979), which stated a general rule that plaintiffs cannot recover attorneys' fees and litigation expenses as compensation in a tort suit. That Section also stated the collateral-litigation exception in the black letter, and mentioned other exceptions in Comment *a*, including a possible exception to allow attorneys' fees in punitive-damage suits. This Restatement rejects that exception. See Reporters' Note to Comment *g* below.

This Restatement does not attempt to summarize the many statutory exceptions to the American Rule. Nor does it address how courts determine the amount of reasonable attorneys' fees when they are available. On the insurance-bad-faith exception, this Restatement adopts the rules of Restatement of the Law, Liability Insurance § 50 (AM. L. INST. 2019). On the common-fund exception, it adopts the rules of Restatement Third, Restitution and Unjust Enrichment § 29 (AM. L. INST. 2011).

On the intricacies of fee issues, see 1 DAN B. DOBBS, PAUL T. HAYDEN, & ELLEN M. BUBLICK, THE LAW OF TORTS § 25 at 60-62 (2d ed. 2011); DAN B. DOBBS & CAPRICE L. ROBERTS, LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION § 3.10 at 279-312 (3d ed. 2018); JAMES M. FISCHER, UNDERSTANDING REMEDIES §§ 210-214 at 945-983 (3d ed. 2014); DOUGLAS LAYCOCK & RICHARD L. HASEN, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 919-973 (5th ed. 2019); CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES §§ 60-71 at 234-259 (1935); JACOB A. STEIN, PERSONAL INJURY DAMAGES §§ 17:1-17:56.1 (3d ed. 1997 & Supp.).

The list of exceptions is not meant to be exhaustive, and it allows room for legislative and judicial consideration of additional exceptions. For example, federal courts have rejected a private-attorney-general theory whereby a private litigant vindicating a strong public policy is entitled to fees. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975). But a few states have embraced it. DOBBS & ROBERTS, REMEDIES, § 3.10(2) at 285-287; STEIN, PERSONAL INJURY DAMAGES § 17:54; LAYCOCK & HASEN, REMEDIES at 928. This Restatement expresses no view on potential additional exceptions.

b. Rationale for normally excluding attorneys' fees from tort compensation. What is now known as the American Rule was described as "[t]he general practice of the United States" as early as 1796. Arcambel v. Wiseman, 3 U.S. (3 Dall.) 306 (1796). Courts have defended the rule primarily on grounds that making the loser pay would penalize those who would pursue potentially meritorious litigation. Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718 (1967) ("[S]ince litigation is at best uncertain one should not be penalized for merely defending or prosecuting a lawsuit, and . . . the poor might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included the fees of their opponents' counsel."); Maytown Sand and Gravel, LLC v. Thurston Cnty., 423 P.3d 223, 246 (Wash. 2018) ("The primary justification for adopting the American rule is that it encourages aggrieved parties to air their grievances in court."), abrogated on other grounds, Yim v. City of Seattle, 451 P.3d 694 (Wash. 2019); Innes v. Marzano-Lesnevich, 136 A.3d 108, 113 (N.J. 2016) ("The purposes behind

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the American Rule are threefold: (1) unrestricted access to the courts for all persons; (2) ensuring equity by not penalizing persons for exercising their right to litigate a dispute, even if they should lose; and (3) administrative convenience.").

But the well-established rule is in tension with the rightful-position standard set forth in § 2. See Rodulfa v. United States, 295 F. Supp. 28, 29 (1969) ("[U]nder our system of law, a person who is successful in the litigation is a part loser because he has to pay his own expenses and counsel fees."); DOBBS, HAYDEN, & BUBLICK, TORTS § 25 at 60 ("The 'American rule' about attorney fees is that the losing party is not required to pay the winning party's fees. Regardless who wins the case, the plaintiff pays her own attorney and the defendant pays his. There are exceptions, but in the overwhelming number of common law tort cases, this is the rule. One result of this rule is that the plaintiff who prevails in the litigation may not be fully compensated after she deducts the costs of attorney fees and other litigation expense." (footnote omitted)); LAYCOCK & HASEN, REMEDIES at 923-924 ("One might suppose that successful plaintiffs should always recover attorneys' fees under the rightful-position principle. . . . [¶] American law has never viewed the matter that way. Attorneys' fees are viewed as an ancillary remedy, separate from the merits, unavailable unless specifically authorized by statute or rule."). For additional arguments against the American Rule, see DOBBS & ROBERTS, REMEDIES § 3.10(1) at 280-282.

The Alaska rule for two-way partial fee shifting is set out in Alaska Rule of Civil Procedure 82. Evaluations of the rule are reported in Douglas C. Rennie, *Rule 82 & Tort Reform: An Empirical Study of the Impact of Alaska's English Rule on Federal Civil Case Filings*, 29 ALASKA L. REV. 1 (2012), and Susanne Di Pietro & Teresa W. Carns, *Alaska's English Rule: Attorney's Fee Shifting in Civil Cases*, 13 ALASKA L. REV. 33 (1996).

Illustration 1 is fictitious; the rule is too well settled to produce modern illustrative cases in routine personal-injury litigation. *Maytown Sand*, 423 P.3d 223, is a modern example of actual litigation in another context, refusing fees to a successful plaintiff in a case of tortious interference with contract.

c. The collateral-litigation exception. The collateral-litigation exception is not an ancillary matter like other fee awards. Under this exception, fees are awarded as consequential damages, subject to the general rules of causation and scope of liability. Some of the torts in which the collateral-litigation exception commonly arises are listed in Horgan v. Felton, 170 P.3d 982, 989 (Nev. 2007) (Maupin, C.J., concurring). The Reporters have supplemented his list. As Professor Fischer put it, "[t]he common theme . . . is that the defendant's wrongdoing required the plaintiff to incur attorneys' fees in an action involving a third party. [¶] This third party tort exception to the American Rule distinguishes between attorneys' fees incurred *as a result* of the defendant's wrongdoing and attorneys' fees incurred t*o establish* the wrongfulness of defendants' doings." FISCHER, REMEDIES § 211.4 at 955 (emphasis added).

Restatement Second, Torts § 914(2) (AM. L. INST. 1979) stated the rule as follows: "One who through the tort of another has been required to act in the protection of his interests by bringing or defending an action against a third person is entitled to recover reasonable compensation for loss of time, attorney fees and other expenditures thereby suffered or incurred in the earlier action."

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See also DOBBS & ROBERTS, REMEDIES § 3.10(3) at 288-292; LAYCOCK & HASEN, REMEDIES at 927-928; MCCORMICK, DAMAGES § 66 at 246; Annotation, 45 A.L.R.2d 1183 (1956 & Supp.). The rule is a general rule of damages; it applies in contract as well as in tort. See, e.g., Masonic Temple Ass'n v. Ind. Farmers Mut. Ins. Co., 837 N.E.2d 1032 (Ind. Ct. App. 2005) (collecting both tort and contract cases from other jurisdictions).

On the various names for the rule, see Musser v. Provencher, 48 P.3d 408 (Cal. 2002); Rocky Mountain Festivals, Inc. v. Parsons Corp., 242 P.3d 1067 (Colo. 2010); Perry v. Scholar, 696 F. Supp. 2d 91 (D.D.C. 2010) (D.C. law); Schwartz v. Bloch, 88 So. 3d 1068 (Fla. Dist. Ct. App. 2012). "Tort of another" and similar names appear to derive from the way the rule was worded in Restatement Second.

Horgan demonstrates some of the close line-drawing problems that courts face in determining the scope of this exception. The Nevada Supreme Court recognized the "clear majority rule" that in a suit for slander of title, plaintiff can recover the attorneys' fees incurred in clearing the title. 170 P.3d at 987. But it held that a plaintiff who sues only in quiet title cannot recover those fees, citing cases from several states. Courts should not arbitrarily distinguish two related causes of action, but when the quiet-title suit resolves the matter, there is less likely to be two litigations such that one can be viewed as collateral to the other. And quiet title typically does not end in damages at all, but only in clearing the title. In *Horgan*, plaintiffs filed only the quiet-title suit, the trial court awarded fees for prosecuting that lawsuit in that same lawsuit, and the supreme court reversed.

Other cases award the fees incurred in the quiet-title action in a subsequent slander-of-title action. See E. Shore Title Co. v. Ochse, 160 A.3d 1238 (Md. 2017); Paidar v. Hughes, 615 N.W.2d 276 (Minn. 2000); Colquhoun v. Webber, 684 A.2d 405 (Me. 1996). *Colquhoun* states this to be the majority rule, citing legal encyclopedias and a Section of Restatement Second, Torts, on defamation damages. *Colquhoun* is also noteworthy for awarding fees even though there was no litigation with a third party; the quiet-title suit and the subsequent slander-of-title action were against the same defendants. For a similar holding in a malicious-prosecution context, see Thomas v. Sinclair, 2003 WL 1871106 (Cal. Ct. App. Apr. 14, 2003). In *Ochse*, the plaintiffs had already recovered the fees under a fee-shifting provision in their contract with the third party. The court held that the fees were recoverable damages, but that the third party was not a collateral source and that plaintiffs could not recover the fees a second time from the tort defendant.

Slander of title appears to be a special case, in which some courts do not require collateral litigation; they award the attorneys' fees incurred in the slander-of-title action in that same action. See Brown v. Hanson, 798 N.W.2d 422 (S.D. 2011). In TXO Prod. Corp. v. Alliance Res. Corp., 419 S.E.2d 870 (W. Va. 1992), aff'd on other grounds, 509 U.S. 443 (1993), a lessee of an oil-and-gas lease filed a frivolous quitclaim deed by which a third party purported to convey the land to the lessee. The lessee then sued the true owner (the lessor) for a declaratory judgment that the lessee was really the owner. It appears that the lessee did not expect to win this lawsuit, but hoped to extract a settlement that would reduce the royalties it was paying. The owner-lessor successfully defended against the declaratory-judgment action and counterclaimed for slander of title, incurring

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$19,000 in attorneys' fees. The court affirmed an award of the fees. One may view the defense of the declaratory-judgment action as collateral to the slander-of-title counterclaim, although it is not clear that the court carefully distinguished fees for the defense from fees for the counterclaim. Cases awarding and sometimes refusing fees in slander of title are collected in Annotation, 4 A.L.R.4th 532 (1981 & Supp.). Many of these cases are unclear about whether they are talking about fees from an earlier quiet-title suit as such, or simply any legal work or lawsuit necessary to clear the title, and whether they are talking about fees in collateral litigation or in the lawsuit in which the fees were awarded.

Some courts draw fine lines based on causation, for example distinguishing litigation necessitated by defendant's tort from litigation necessitated by the third party's intransigence. See FISCHER, REMEDIES § 211.4 at 954-955 (describing as "difficult to make consistently" and "evanescent" the distinctions between those cases in which the collateral-litigation exception applies and those cases in which it does not).

Other courts view the rule more expansively and less technically. See Collier v. Manring, 309 S.W.3d 848, 853 (Mo. Ct. App. 2010) (noting that plaintiff must prove a tort duty, a breach of that duty, and proximate causation of the resulting legal fees, and concluding "[t]here is no hypertechnical formula about fees that may be recovered as an element of damages; neither is it an esoteric concept embedded in the shrouds of legal history. It is simply a logical exception to the general rule, and the Restatement has sought to state the principle."). In *Collier*, plaintiffs sued family members over a bungled estate plan and sued the lawyer whose malpractice caused the bungling. The court held the lawyer liable for the fees incurred in the claim against the family members; one claim was collateral to the other, and it was irrelevant that they had been joined in a single complaint.

Similar cases are collected in Third Eye Blind, Inc. v. Near N. Ent. Ins. Servs., LLC, 26 Cal. Rptr. 3d 452 (Ct. App. 2005). Defendant, an insurance broker, procured incomplete coverage for plaintiff, a band, with the result that the insurer refused coverage and refused to provide a defense when the band got sued. The band retained lawyers to defend the claim and sue the insurer, and eventually won the case against the insurer, so that the insurer paid the claim and reimbursed the costs of the band's defense in the initial action. The insurance broker was liable for the fees incurred in suing the insurance company, because the coverage dispute would never have arisen if the broker had obtained full coverage in the first place.

The *Collier* court's logic—that the fees in the collateral litigation are naturally and proximately caused by the tort—might also apply to the fees incurred in suing the tortfeasor, and that step has been taken in some of the insurance-bad-faith cases and slander-of-title cases. But it cannot be generalized without wholly swallowing the American Rule.

Illustration 2 is fictionalized in the interest of simplicity; malicious-prosecution cases worth appealing on this issue tend to have additional complications. See Castellano v. Fragozo, 311 F.3d 689 (5th Cir. 2002) (awarding fees for the defense of the criminal case under the collateral-litigation exception and fees for the tort case, against defendants acting under color of law, under 42 U.S.C. § 1988(b) (see Reporters' Note to Comment *e*)), vacated on other grounds, 352 F.3d 939

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(5th Cir. 2003) (en banc); Bhatia v. Debek, 948 A.2d 1009 (Conn. 2008) (awarding fees for the defense of the criminal case under the collateral-litigation exception and fees for the tort case as punitive damages (see Comment *g*)); Tech. Comput. Servs., Inc. v. Buckley, 844 P.2d 1249 (Colo. Ct. App. 1992) (awarding fees incurred in defense of employer's lawsuit but not the fees incurred in counterclaim for abuse of process).

Illustration 3 is based on Schwartz v. Bloch, 88 So. 3d 1068 (Fla. Dist. Ct. App. 2012). There are similar holdings in Perry v. Scholar, 696 F. Supp. 2d 91 (D.D.C. 2010) (D.C. law), in which the defendant attorney's negligent advice to a union pension plan caused the plan administrator to incur legal fees defending lawsuits by union members, and in Nettleton v. Stogsdill, 899 N.E.2d 1252 (Ill. App. Ct. 2008), in which the defendant attorney's failure to proceed in a divorce trial required plaintiff to retain new counsel and file a new divorce proceeding. The rule has also been applied in a suit against an attorney by the client's opponent. The attorney advised his client to engage in a series of fraudulent transfers; a creditor sued the attorney for fraud and recovered the fees incurred in litigation challenging the transfers and challenging the discharge of the debt in bankruptcy. Chapman Lumber, Inc. v. Tager, 952 A.2d 1 (Conn. 2008).

Illustration 4 is based on Welch v. Kosasky, 509 N.E.2d 919 (Mass. App. Ct. 1987). Another example is Chi. Title Ins. Co. v. Accurate Title Searches, Inc., 164 A.3d 682 (Conn. Ct. App. 2017), where plaintiff relied on defendant's incomplete and erroneous title search. It settled the resulting claims without litigation and recovered both the amount of the settlement and the fees incurred in investigating the claims and negotiating the settlement.

Illustration 3 in § 8 is based on Heckert v. MacDonald, 256 Cal. Rptr. 369 (Ct. App. 1989).

d. The insurance-bad-faith exception. See FISCHER, REMEDIES § 211.5 at 956-957. For liability-insurance examples, see Restatement of the Law, Liability Insurance § 50, Reporters' Note to Comment *b* (AM. L. INST. 2019). For early cases awarding fees in first-party insurance as a common-law development, see DeChant v. Monarch Life Ins. Co., 547 N.W.2d 592 (Wis. 1996); Filasky v. Preferred Risk Mut. Ins. Co., 734 P.2d 76 (Ariz. 1987); Brandt v. Superior Court, 693 P.2d 796 (Cal. 1985). The California cases continue to distinguish the fees incurred to recover benefits under the policy from the fees incurred in the bad-faith claim. Pulte Home Corp. v. Am. Safety Indem. Co., 223 Cal. Rptr. 3d 47 (Ct. App. 2017). When the exception expands to include fees in the bad-faith claim, it becomes simply an insurance exception to the American Rule. The rationale, often not clearly stated, appears to be similar to the implicit rationale for treating bad-faith breach of an insurance contract as a tort in the first place. The insured who has suffered a loss is in straitened and sometimes desperate circumstances. There is always a temptation for the insurer to resist payment or to take advantage of those circumstances, and an effective remedy needs to be something more than simply paying the original claim with interest.

Statutory provisions for fees in insurance litigation are now widespread. See, e.g., COLO. REV. STAT. ANN. § 10-3-1116; 215 ILL. COMP. STAT. ANN. 5/155; S.D. CODIFIED LAWS § 58-12-3; TEX. INS. CODE ANN. § 541.152. Many of these statutes are not confined to bad-faith claims in tort, but extend to other kinds of insurer misbehavior with lesser standards of culpability. See also Barnes v. Okla. Farm Bureau Mut. Ins. Co., 11 P.3d 162 (Okla. 2000) (rejecting insurance-bad-

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faith exception as inconsistent with American Rule, in context of particular class of policies that had been excepted from statute providing for two-way fee shifting in suits against insurance companies).

e. Statutory exceptions. The statistics on the number of statutes allowing attorneys' fees appear in LAYCOCK & HASEN, REMEDIES at 925 ("The federal count is from Henry Cohen, Congressional Research Service, *Awards of Attorneys' Fees by Federal Courts and Federal Agencies* (2008), available at www.fas.org/sgp/crs/misc/94-970.pdf [https://perma.cc/F29Z-G5VW]; the state count is from Susan M. Olson, *How Much Access to Justice from State 'Equal Access to Justice Acts'?* 71 Chi.-Kent L. Rev. 547, 552–553 (1995)."). Many of these statutes are inapplicable in common-law tort suits. For examples of attorneys'-fee statutes that do apply in common-law tort suits, see the insurance-bad-faith statutes in Reporters' Note to Comment *d*, and COLO. REV. STAT. ANN. § 13-17-201, providing for recovery of defendant's attorneys' fees from plaintiff in a tort action if defendant obtains dismissal at the motion-to-dismiss stage. Illustration 5 is based on Krystkowiak v. W.O. Brisben Cos., 90 P.3d 859 (Colo. 2004). The court noted that, if defendant had prevailed only on the basis of his First Amendment defense, fees would not have been available, because that would have required a motion for summary judgment rather than a motion to dismiss. There is a substantial volume of litigation under this Colorado statute.

Many state and federal civil-rights statutes provide attorneys' fees for the prevailing party. There is a general provision for fee awards in federal constitutional litigation against state and local officials and local governments in the Civil Rights Attorneys' Fees Award Act of 1976, as amended, 42 U.S.C. § 1988(b). Fee awards under statutes of this type are nearly automatic for prevailing plaintiffs, but generally require bad-faith or frivolous litigation for awards to prevailing defendants. Compare Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) (plaintiff's fees), with Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978) (defendant's fees).

f. The common-fund exception. Restatement Third, Restitution and Unjust Enrichment § 29 (AM. L. INST. 2011) covers issues related to common-fund recoveries. This Section adopts that analysis. See also DOBBS & ROBERTS, REMEDIES § 3.10(2) at 282-287; FISCHER, REMEDIES § 211.3 at 950-954; LAYCOCK & HASEN, REMEDIES at 939-953; MCCORMICK, DAMAGES § 62 at 237-239; STEIN, PERSONAL INJURY DAMAGES §§ 17:41-17:48.

g. The bad-faith-litigation exception. Illustration 6 is based on Goodyear Tire & Rubber Co. v. Haeger, 137 S. Ct. 1178 (2017), which sets forth the but-for standard for recovery of attorneys' fees under this exception. For a general defense of a federal court's inherent power to impose attorneys' fees for bad-faith litigation, see Chambers v. NASCO, Inc., 501 U.S. 32 (1991). The Court in *Chambers* upheld an award of the entire amount of attorneys' fees, and the Court in *Haeger* later explained that this was appropriate under a but-for standard, "because literally everything the defendant did—'his entire course of conduct' throughout, and indeed preceding, the litigation—was 'part of a sordid scheme' to defeat a valid claim." *Haeger*, 137 S. Ct. at 1188 (quoting *Chambers*, 501 U.S. at 51, 57).

For an example of a state court applying the exception to award attorneys' fees as a consequence of bad-faith litigation, see Lederle v. Spivey, 213 A.3d 481 (Conn. 2019). See also

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Maurice v. Chester Hous. Assocs. Ltd. P'ship, 204 A.3d 71 (Conn. App. Ct. 2019) (applying the *Haeger* but-for test under Connecticut law); Barnes v. Okla. Farm Bureau Mut. Ins. Co., 11 P.3d 162 (Okla. 2000) (rejecting insurance-bad-faith exception, but remanding to consider award of fees under bad-faith litigation exception).

On the exception generally, see FISCHER, REMEDIES § 211.6 at 957; LAYCOCK & HASEN, REMEDIES at 926-927; STEIN, PERSONAL INJURY DAMAGES § 17:53.

As discussed in Reporters' Note to Comment *a*, Restatement Second, Torts § 914 (AM. L. INST. 1979) raised the possibility of allowing attorneys' fees based not on litigation conduct but on underlying conduct that led to the lawsuit and that merits the award of punitive damages. "This has been especially true when gross fraud is involved." § 914, Comment *a*. In support of this statement, the Second Restatement cited Schlein v. Smith, 160 F.2d 22 (D.C. Cir. 1947), and Freemont Oil Co. v. Marathon Oil Co., 192 N.E.2d 123 (Ohio Ct. Com. Pl. 1963).

Only the Restatement Second appears to have cited *Freemont* for this proposition, but in fact Ohio has a longstanding exception: if punitive damages are awarded, then attorneys' fees may be awarded as compensatory damages. Phoenix Lighting Grp., L.L.C. v. Genlyte Thomas Grp., L.L.C., 2020 WL 1445428 (Ohio Mar. 25, 2020); Roberts v. Mason, 10 Ohio St. 277 (1859). The early Ohio cases suggest that this rule was once more widespread, but it has mostly disappeared under the influence of the American Rule.

Connecticut offers a different kind of exception. Ohio allows attorneys' fees *in addition to* conventional punitive damages; in Connecticut, attorneys' fees are the *measure* of punitive damages unless a statute enacts a different measure for a particular set of cases. Juries are instructed that, if they decide to award punitive damages, they should award plaintiff's attorneys' fees as the amount of punitive damages or indicate on the verdict form that the judge should do so. Bifolck v. Philip Morris, Inc., 152 A.3d 1183 (Conn. 2016); Hanna v. Sweeney, 62 A. 785 (Conn. 1906).

The other case cited in the Restatement Second, *Schlein*, does not represent current views about the law outside of the few states with unusual rules. See Centex Corp. v. United States, 486 F.3d 1369, 1373 (Fed. Cir. 2007) ("While *Schlein* seems to be a case in which a district court was allowed to award attorney fees based solely on bad faith primary conduct, it does not represent the prevailing view of the bad faith exception at common law, as indicated by the great majority of courts that have disapproved such awards."); Shimman v. Int'l Union of Operating Eng'rs, Loc. 18, 744 F.2d 1226, 1231 (6th Cir. 1984) (distinguishing *Schlein* as "not applicable to an attorney fee award arising from a federal statutory claim for which punitive damages are inappropriate" and holding that "[t]o allow an award of attorney fees based on bad faith in the act underlying the substantive claim would not be consistent with the rationale behind the American Rule regarding attorney fees."); see also Maytown Sand and Gravel, LLC v. Thurston Cnty., 423 P.3d 223, 250 (Wash. 2018) ("The bad faith exception to the American rule arises out of a court's equitable power to regulate and manage the affairs of the court and the parties before it. Sanctioning parties for prelitigation conduct that occurred *before* the court was involved and *before* litigation was initiated exceeds the scope of that authority. Compensating aggrieved parties for harm caused by

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malicious, prelitigation conduct fits more naturally within the meaning of damages and is therefore limited to that context." (internal citation omitted)), abrogated on other grounds, Yim v. City of Seattle, 451 P.3d 694 (Wash. 2019). An exception in torts cases involving bad pre-litigation conduct would threaten to swallow much of the American Rule.

Illustration 7 is based on Sanchez v. Rowe, 870 F.2d 291 (5th Cir. 1989) (Texas law). Defendant was a border-patrol agent, but that did not affect the result; the case was decided under the common law of Texas as incorporated by the Federal Tort Claims Act.

h. The contempt-of-court exception. On courts' inherent power to punish willful disobedience of court orders through an award of attorneys' fees, see Chambers v. NASCO, Inc., 501 U.S. 32 (1991); Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975); Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714 (1967); Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399 (1923). See LAYCOCK & HASEN, REMEDIES, at 927; STEIN, PERSONAL INJURY DAMAGES § 17:53; Annotation, 43 A.L.R.3d 793 (1972 & Supp.).

Illustration 8 is based on Camalo v. Estrada, 257 So. 3d 202 (La. Ct. App. 2018). See also Chevron Corp. v. Donziger, 384 F. Supp. 3d 465 (S.D.N.Y. 2019), appeal pending, No. 19-1584 (awarding fees for contempt of orders aimed at securing funds derived from fraudulent scheme and making them available for collection of judgment).

§ 16. Excessive and Inadequate Damages (New Trials, Remittitur, and Additur)

(a) A court may review the amount of compensatory damages awarded by a jury to determine if the award is excessive or inadequate.

(b) A court concluding that an award of damages is excessive may in its discretion order a new trial, or a new trial on the issue of damages or, if allowed in the jurisdiction, a remittitur, which gives the choice between a new trial and accepting a lower amount of damages as determined by the court. This lower amount may be, as directed by each jurisdiction's rules, either a reasonable amount based on all the evidence or the largest amount that could be upheld if awarded by the jury.

(c) A court concluding that an award of damages is inadequate may in its discretion order a new trial, or a new trial on the issue of damages or, if allowed in the jurisdiction, an additur, which gives the choice between a new trial and accepting a higher amount of damages as determined by the court. This higher amount may be, as directed by each jurisdiction's rules, either a reasonable amount based on all the evidence or the smallest amount that could be upheld if awarded by the jury.

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(d) The choice to accept a remittitur may be offered to the plaintiff whose damages are at issue, and the choice to accept an additur may be offered to the defendant or defendants obligated to pay those damages. Alternatively, the jurisdiction may require the unanimous consent of the affected plaintiff and all affected defendants to accept a remittitur or additur.

(e) A court must have a strong evidentiary basis to hold a jury's damage award to be excessive or inadequate. Key factors for a court to consider in determining whether an award is excessive or inadequate are (1) gross inconsistency between the damages proven by the evidence and the amount awarded by the jury; (2) the likelihood that the award was due to the jury's emotional reaction to the case rather than to a rational evaluation of the evidence on damages; and (3) the discrepancy between the amount awarded for any damages that cannot be valued in a market and the amounts awarded for such damages in similar cases.

Comment:

a. History and scope. The Restatement Second, Torts, explicitly declined to address issues of inadequate or excessive damages, declaring the matter primarily "procedural" and noting that the standards for review of damages are subject to wide variation. Restatement Second, Torts, Division 13, Chapter 47, Note on Excessive and Inadequate Damages. That Note is now superseded. The Note raised legitimate concerns, but the result was to omit a body of law that is essential to the administration of damage remedies. This Section takes positions on some of the disagreements among jurisdictions; it identifies and clarifies other disagreements without resolving them. It focuses on substantive questions regarding judicial review of the amount of compensatory damages, although it also notes procedural divides among jurisdictions. Judicial review of the amount of *punitive* damages is considered in § 41.

b. Authority and procedure for remittitur and additur. The Second Restatement correctly noted the wide variation among the states for review of damage awards for excessiveness or inadequacy. Some states do not allow remittitur or additur at all; other states (and the federal courts) allow remittitur but not additur. The Supreme Court has ruled that additur violates the Seventh Amendment right to a jury trial, a right that has not been incorporated to apply against the states. Each state's courts must decide what rules of remittitur and additur are consistent with that state's guarantee of jury trial. In those states not permitting remittitur or additur, the judicial

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remedy for excessive or inadequate damages is an order granting a new trial, either on all issues or only on damages.

The source of authority to use remittitur or additur may be judicial, legislative, or a rule of civil procedure. In Missouri, for example, the state supreme court barred the use of remittitur but the state legislature restored it a few years later. In some jurisdictions, a judge can order remittitur or additur *sua sponte*; in other states, the aggrieved party must move for remittitur or additur. In most states, the plaintiff must agree to the remittitur or else the court will grant a new trial; in a minority of jurisdictions, both parties must agree or the court will order a new trial. A parallel split applies to additur. This Restatement takes no position on this question of who must consent.

c. Justifications for review of the amount of damages, and for remittitur and additur. Just as courts ordinarily should not second-guess jury determinations of liability, they similarly should not second-guess determinations of damages. Courts should and do order new trials on the ground that damages are excessive or inadequate, or grant remittiturs or additurs, in only a small minority of cases.

In certain circumstances, a damage award can be so inconsistent with the evidence, so likely swayed by emotion rather than reason, or so much of an outlier compared to similar cases that judicial policing of the verdict is warranted. See Subsection (e) and Comment *e*. Remittitur or additur rather than an outright grant of a new trial serves useful judicial purposes. It gives the party on the losing side of the posttrial motion the option to accept an amount deemed more reasonable by the court rather than forcing that party to undergo the risk and expense of a new trial; the outright new trial is actually a more draconian remedy. Remittitur and additur can also assist in posttrial settlement by offering the court's assessment of a reasonable damage amount. The dominant view has been that remittitur does not usurp the power of the jury because a new trial remains an option, and many states take the same view of additur. No doubt remittitur and additur are powerful tools: the potential expenses of a new trial and the chances that a new jury could return a less favorable award, or that a court would again modify a new award, will push litigants to accept the remittitur or additur. But they have a choice.

d. The standard for determining the amount of damages to be proposed. States differ on whether a court granting a remittitur must choose the highest amount that would not be set aside as excessive or whether it may choose a reasonable amount of damages based on all the evidence. The parallel issue arises with respect to additur and the smallest amount that would not be set aside

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as inadequate. The principal argument for choosing the largest or smallest amount that would not be set aside is that this standard minimizes the judicial intrusion into the province of the jury. Some authorities argue that no other approach can be reconciled with the constitutional right to jury trial.

One response is that the intrusion into the jury's function consists in setting the damage award aside; once the court has taken that step, it should try to get the amount right. Setting an amount is an exercise of judicial discretion; a reasonableness standard best protects and guides that discretion. How much will reasonably compensate the plaintiff is a more direct and arguably more manageable inquiry than trying to identify the largest award in excess of reasonable compensation that is not *so* excessive that it would be set aside (or the smallest inadequate amount that is not *so* inadequate that it would be set aside). The protection for the right to jury trial is in the party's (or parties') right to elect a new trial instead of accepting the remittitur or additur.

More jurisdictions use the reasonable-amount approach, but a substantial number award the largest (in remittitur cases) or smallest (in additur cases) permissible amount. In deciding whether to set the verdict aside, courts are to view the evidence in the light most favorable to the party benefiting from the verdict. It would seem to be a sensible corollary to say that the court should continue to view the evidence in that light as it sets a reasonable amount of damages for a remittitur or additur. And perhaps most judges do so. But states that authorize the judge to choose a reasonable amount of damages do not appear to require that the evidence be viewed in that light when setting the amount.

This Restatement views the question as a close one and takes no position on these competing standards for choosing the amount to which a verdict should be remitted or increased. The black letter in Subsections (b) and (c) permits the court to choose either rule for setting the amount of the remittitur or additur. But this Restatement does reject the old rule in a few jurisdictions that the judge should remit to the *lowest* amount the evidence would support, or grant an additur to the *highest* amount the evidence would support. That rule is the most intrusive on the jury's verdict, it deprives the court of the benefit of the jury's independent judgment, and it results in many more new trials, because the party subject to the remittitur or additur has little incentive to accept it.

e. Standards for determining whether damages are excessive or inadequate. One of the criticisms of judicial policing of damage awards for excessiveness or inadequacy is that it is a standardless exercise. This is especially a concern when the judicial standard is vague and

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amorphous, such as an undefined "shock the conscience" standard. One judge's conscience may be shocked by a damage award that seems entirely appropriate to another judge.

Courts also appear to find damages excessive far more often than they find damages inadequate. If judges are to set aside jury assessments of damages, they must be alert to equally protect both plaintiffs and defendants from inadequate and excessive awards.

A judge granting a new trial, a new trial on damages, or remittitur or additur, should give a statement of the specific reasons for reaching a conclusion of excessiveness or inadequacy. Subsection (e) lists the three most important factors that courts should consider in determining the excessiveness or inadequacy of damages. It is not an exhaustive list.

First and foremost, a jury's award of damages should be consistent with the evidence. Often the evidence before the jury would allow for a range of reasonable damages. It is not enough that the reviewing judge would have reached a different damage amount. Instead there must be a gross inconsistency between the evidence of damages presented to the jury and the amount awarded. These types of calculations are easiest with tangible damages with a market value. The calculations are more difficult for damages such as pain and suffering; without a market measure, it is more difficult for a court to find gross inconsistency. Nonetheless, it is possible for a reviewing court to find gross inconsistency if, for example, the evidence shows a plaintiff who suffered only minor emotional distress and the jury awards a very high amount of damages, or a plaintiff who unquestionably suffered serious emotional distress and the jury awards a very small amount of damages.

Second, tort cases often involve serious personal injuries, emotional harm, dignitary harm, and bad behavior by one or both parties, raising emotional issues for jurors. Emotion is expected in sensitive cases, and that alone is not a basis for finding damages excessive or inadequate. But judicial policing of damages is appropriate when a large inconsistency between evidence at trial and the amount awarded by the jury appears to be the result of the jury's emotional reaction to the case rather than a rational evaluation of the evidence.

This is not an easy determination, and a judge should not attribute a verdict to emotion except in a clear case. But the trial judge sees and hears the parties, witnesses, lawyers, and jurors, and has some capacity to assess their effect on each other. As one court has said, "[i]t is the judge who sees the jurors wince, weep, snicker, avert their eyes, or shake their heads in disbelief." A corollary to this point is that an appellate court should be reluctant to second-guess a trial court's

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well-documented determination that emotion in fact swayed a jury decision. In extreme cases, remittitur or additur may be an insufficient remedy. Courts often say that if the amount of the verdict reflects "passion and prejudice," the remedy should be a new trial on all issues, because those emotions may have influenced the verdict on liability as well as on damages.

Third, for so-called noneconomic damages—damages that cannot be valued in a market—excessiveness or inadequacy may be demonstrated by showing that the damage award is a significant outlier compared to amounts awarded and upheld in similar cases. In the absence of a market baseline, a comparison of pain-and-suffering awards in similar circumstances serves as the most useful benchmark of excessiveness or inadequacy. The problem is to identify the most appropriate comparator cases. Cases that involve similar facts, torts, and injuries occurring in the same or nearby jurisdictions are the most appropriate referent. When similar cases are clustered around one set of damage figures, or within a range, and the amount awarded in the case under review is greatly different, or well outside the range, courts should consider setting aside the amount of damages.

Courts engaged in such comparative review of verdicts are often accused of selecting comparable cases to justify a predetermined result, and of ignoring other equally comparable cases that would support a different result. This is obviously a risk of the method. Courts can avoid this hazard in part by being alert to the risk and consciously resisting it. A judge can also reduce this risk by stating on the record an intention to consider comparable verdicts and inviting both sides to bring such verdicts to the court's attention.

Despite the risks, comparative review done right has the virtue of tying the remittitur or additur decision to the judgments of other juries. The court is not left at large, relying only on the judge's own judgments, impressions, and experience. This Restatement endorses a careful comparative approach, despite a divide in the courts over the approach's usefulness. Comparative review must be done right to be useful, and it is only one factor for courts to consider in the analysis of excessiveness or inadequacy.

Illustrations:

1. Michael was injured in a motorcycle accident that Bruce's negligence caused. The evidence established that Michael suffered muscle tears, broken vertebrae, broken ribs, and other injuries that left him in serious and permanent pain. The evidence also established that the injuries interfered with Michael's enjoyment of life, including his ability to see

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movies with his wife, engage in sexual relations, and to hold his newborn daughter without fear of dropping her due to weakness in his left arm. Bruce conceded liability and the jury awarded $1.5 million in damages, which included compensation for Michael's pain and suffering. The trial court remitted the amount to $400,000, citing to four other cases involving much less serious injuries that resulted in settlements or damage awards that were much lower than the amount awarded to Michael. The court expressed skepticism about the extent of Michael's injuries despite evidence from Michael, his wife, and medical experts describing his injuries. The court stated without elaboration that the jury disliked Bruce, suggesting that the damages reflected animus toward him.

The court of appeals should reverse the remittitur and reinstate the verdict. The trial court should have viewed the evidence in the light most favorable to the prevailing party, should have explained and justified how the other cases it had used for comparison involved injuries similar to Michael's, and should have documented how, if at all, the jury's behavior, such as its visible reactions to events in the courtroom, showed that it was swayed by emotional appeals against Bruce.

2. Barbara was injured in an automobile accident caused by defendant's negligence. Barbara put on considerable evidence that the accident left her with a permanent injury and serious, unremitting pain, although she continued to work at her job with accommodations. Some of the witnesses testifying as to the day-to-day effects of the accident on Barbara's life, including her husband's testimony on his loss-of-consortium claim, had limited credibility. The jury awarded Barbara only $200 in damages and rejected the loss-of-consortium claim. The trial court should grant a motion for additur (if allowed in the jurisdiction) based on the undisputed evidence that the accident left Barbara with a permanent injury and serious pain, and after comparing amounts awarded in similar cases that the parties' brought to the court's attention. The court should consider whether the husband's lack of credibility spilled over into the jury's consideration of the extent of Barbara's injuries. If the jurisdiction does not allow additur, it should grant a new trial on damages.

3. Sherry was a patient of Surgical Group. Doctors there performed cosmetic surgeries on Sherry, who was dissatisfied with the results. The disputes led to additional corrective surgery and then, after an escalating series of disputes, to Sherry complaining to

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the state medical board and posting various disparaging statements about Surgical Group on consumer review sites and on her own website. Lawsuits followed, with Sherry accusing Surgical Group of medical battery and Surgical Group and Doctors suing Sherry for defamation and false-light invasion of privacy.

Surgical Group's evidence on damages was entirely subjective and based solely on Doctors' vague and conclusory testimony. Doctors offered no evidence of any net loss to their income and called no independent witnesses to show that their professional reputations had been damaged. No physician testified that he or she declined to refer surgical candidates to Doctors or that members of the public declined to seek Doctors' services as a result of seeing Sherry's web posts or learning of her complaints to professional boards. Doctors testified to emotional distress, but did not testify to seeking counseling or treatment or to taking time off work. The jury found for Doctors and awarded $11 million in compensatory damages. The verdict was the largest civil jury verdict in the state in the year it was issued, the 30th largest civil verdict in the state in the preceding 10 years, and four times the largest previous defamation verdict in the state.

The court should grant a new trial. Remittitur is an inadequate remedy, because there is little evidence on which the court could base a reasonable assessment of damages, and because the verdict is so disproportionate to the evidence as to suggest that emotion or prejudice might have affected the jury's findings on liability as well.

REPORTERS' NOTES

a. History and scope. The Second Restatement declined to set forth rules related to judicial review of excessive and inadequate damages, despite the risk of leaving an "incomplete impression" of judicial practice. The drafters cited wide variation in standards and their view that the issue is primarily procedural rather than substantive.

> The standards vary so widely, however, and they are so inextricably mixed with the procedure of trial and appellate practice, that the whole matter has been regarded as procedural, and outside the scope of this Restatement. Thus, if the damages are determined to be sufficiently excessive or inadequate the trial court may grant a new trial, grant a new trial confined to the issue of damages, grant a remittitur subject to differing conditions, or perhaps grant an additur. What options are available and the extent to which they can be exercised by the trial court or the appellate court are procedural questions that depend upon the statutes and the rules

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of court as well as the judicial decisions of the particular jurisdiction. They are not treated in this Chapter.

Restatement Second, Torts, Division 13, Chapter 47, Note on Excessive and Inadequate Damages. This Note is now superseded.

Courts have long policed damages for excessiveness and inadequacy in considering whether to grant or deny a new trial, or a new trial on damages issues, or for purposes of ordering remittitur or additur. This Restatement, while recognizing wide variation and procedural intricacies related to remittitur and additur, states basic substantive standards for review of the amount of compensatory damages. See 3 DAN B. DOBBS, PAUL T. HAYDEN, & ELLEN M. BUBLICK, THE LAW OF TORTS § 479 at 9-12 (2d ed. 2011); JAMES M. FISCHER, UNDERSTANDING REMEDIES § 73.1.3 at 513-514 (3d ed. 2014); DOUGLAS LAYCOCK & RICHARD L. HASEN, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 212-213 (5th ed. 2019); CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES §§ 18-19 at 71-84 (1935); 3 JACOB A. STEIN, PERSONAL INJURY DAMAGES § 22:41 (3d ed. 1997 & Supp.).

This Section does not consider issues related to review of the amount of punitive damages, which are addressed in § 41. Review of the amount of punitive damages is a fundamentally different exercise, in part because setting the amount of punitive damages involves not only evidence before the jury, but also considerations of punishment and deterrence.

b. Authority and procedure for remittitur and additur

i. Remittitur

Remittitur in its "present form" is "often credited to" Justice Story when he was a Circuit Judge in Blunt v. Little, 3 F. Cas. 760 (C.C.D. Mass. 1822). See Orientale v. Jennings, 218 A.3d 806, 814-815 (N.J. 2019); Dimick v. Schiedt, 293 U.S. 474 (1935). In *Blunt*, Justice Story upheld a verdict on liability "but found that the $2000 damages award was excessive." *Orientale*, 218 A.3d at 815. He ordered a new trial unless the plaintiff were willing to remit $500 of his damages. This use of remittitur was accepted by the United States Supreme Court and "uniformly applied by the lower federal courts." Id. (citing *Dimick*, 293 U.S. at 483).

It appears that remittitur is actually a good bit older; it appears to have been already familiar when the Supreme Court recommended it as "perhaps, the easiest way" to correct an excessive award in Arcambel v. Wiseman, 3 U.S. (3 Dall.) 306, 306 (1796). For more on the history of the emergence of remittitur and additur, see Fleming James, Jr., *Remedies for Excessiveness or Inadequacy of Verdicts*, 1 DUQ. L. REV. 143 (1963).

All the federal circuits and most states employ some form of remittitur. Irene Deaville Sann, *Remittiturs (and Additurs) in the Federal Courts: An Evaluation with Suggested Alternatives*, 38 CASE W. RES. L. REV. 157 (1987). A majority of jurisdictions have determined that remittitur does not violate the constitutional guarantee of trial by jury. Kaitlyn Abernathy Hansen, Note, *A Distinction Without A Difference: Revisiting the Constitutionality of Additur in Federal Courts*, 48 U. MEM. L. REV. 625, 659 (2017).

In some states, remittitur is available as a rule of civil procedure. See, e.g., ALA. R. CIV. P. 59(f); Sarah M. R. Cravens, *The Brief Demise of Remittitur: The Role of Judges in Shaping*

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Remedies Law, 42 LOY. L.A. L. REV. 247, 250 (2008). In other states, remittitur has been established through legislation. See, e.g., FLA. STAT. ANN. § 768.74. Some courts employ remittitur through the common law. See, e.g., *Orientale*, 218 A.3d 806; Exxon Mobil Corp. v. Albright, 71 A.3d 30 (Md. 2013). Cravens explains how the Missouri Supreme Court abolished remittitur in Firestone v. Crown Ctr. Redevelopment Corp., 693 S.W.2d 99 (Mo. 1985), only to see the Missouri legislature restore the device two years later in MO. REV. STAT. § 537.068.

Some states allow the judge to review the amount of a judgment *sua sponte*, while others allow review only upon a motion by one of the parties. See, e.g., CONN. GEN. STAT. ANN. § 52-216a (allowing *sua sponte* consideration: "If the court at the conclusion of the trial concludes that the verdict is excessive as a matter of law, it shall order a remittitur."); ME. R. CIV. P. 59(a) (requiring a motion by one of the parties: "The justice or judge before whom an action has been tried may on motion grant a new trial . . . [but it shall] not be granted solely on the ground that the damages are excessive until the prevailing party has first been given an opportunity to remit.").

Most courts allow remittitur based on just the plaintiff accepting a lower amount; other courts require both the plaintiff and the defendant to agree to the remittitur. *Orientale*, 218 A.3d at 819 (requiring both to agree: when damages awards are "grossly excessive or grossly inadequate, the trial court retains the power to . . . grant a new trial or offer the parties a remittitur or an additur. Going forward, however, unless both parties consent to a remittitur or an additur, the court must grant a new trial."); Cohen v. Yale-New Haven Hosp., 800 A.2d 499, 503-504 (Conn. 2002) (requiring only one party to agree: in remittitur: "a plaintiff is presented with a choice of accepting the remittitur, with the result that a reduced judgment is entered in the plaintiff's favor, or rejecting the remittitur, in which case the jury's award is set aside and a new trial is ordered.").

ii. Additur

Some state courts and the federal courts are more hesitant to employ additur than remittitur, with the federal courts deeming additur impermissible under the Seventh Amendment. Dimick v. Schiedt, 293 U.S. 474, 486 (1935) ("[T]he practice of substituting a remission of the excess for a new trial is not without plausible support in the view that what remains is included in the verdict. . . . But, where the verdict is too small, an increase by the court is a bald addition."). *Dimick* is not binding on the states, because the Seventh Amendment has not been incorporated against the states. See Freeman v. Wood, 401 N.E.2d 108, 112 (Mass. 1980) (the "*Dimick* decision has been widely deplored by the commentators. It is not binding on the States, as the Seventh Amendment has not been extended to them."). In 1935, Charles McCormick called *Dimick* "a surprisingly conservative recent decision." MCCORMICK, DAMAGES § 19 at 82.

Even in the federal courts where additur is prohibited, the court can increase an award that is too low if the damages amount is uncontested. The federal courts do not view this as a true additur. See, e.g., Liriano v. Hobart Corp., 170 F.3d 264, 272-273 (2d Cir. 1999) (under *Dimick*, "federal courts are denied the same freedom to use additur that is enjoyed by many state court judges. In this case, however, there was no true additur. . . . [The court] simply adjusted the jury award to account for a discrete item that manifestly should have been part of the damage calculations and as to whose amount there was no dispute.").

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Many states allow additur through statutes, rules of civil procedure, or case law. See, e.g., CAL. CIV. PROC. CODE § 662.5 ("If the ground for granting a new trial is inadequate damages, issue a conditional order granting the new trial unless the party against whom the verdict has been rendered consents to the addition of damages in an amount the court in its independent judgment determines from the evidence to be fair and reasonable."); FLA. STAT. ANN. § 768.74 ("If the court finds that the amount awarded is excessive or inadequate, it shall order a remittitur or additur, as the case may be."); MISS. CODE ANN. § 11-1-55 ("additur or remittitur [is permitted] if the court finds that the damages are excessive or inadequate for the reason that the jury or trier of the facts was influenced by bias, prejudice, or passion, or that the damages awarded were contrary to the overwhelming weight of credible evidence."); Baudanza v. Comcast of Mass. I, Inc., 912 N.E.2d 458, 464 (Mass. 2009) (stating that Massachusetts allows additur by "[i]nterpreting the Massachusetts Constitution, [and] explicitly consider[ing] and reject[ing] the rationale of the *Dimick* opinion, holding that "[t]here is no relevant analytic difference between remittitur and additur."); Caudle v. Swanson, 103 S.E.2d 357 (N.C. 1958) (allowing additur after reviewing the practice of additur in Delaware, Illinois, Massachusetts, New Jersey, New York, Rhode Island, and Washington); Genzel v. Halvorson, 80 N.W.2d 854, 859 (Minn. 1957) ("the practice of using additur is in the interest of the sound administration of justice"); Fisch v. Manger, 130 A.2d 815, 823 (N.J. 1957) ("the practices of Remittitur and Additur violate none of our constitutional interdictions and, if fairly invoked, serve the laudable purpose of avoiding a further trial where substantial justice may be attained on the basis of the original trial.").

Other jurisdictions have enacted statutes on additur to allow the procedure in response to judicial rejection of the practice. See, e.g., Stewart v. Partamian, 465 S.W.3d 51, 59 (Mo. 2015) (stating the "legislature superseded [the court's abolition of remittitur] and enacted § 537.068, which provides for both remittitur and additur"); ITT Hartford Ins. Co. v. Owens, 816 So. 2d 572, 579 (Fla. 2002) (Wells, C.J., concurring in part and dissenting in part) ("Florida did not recognize additurs until there was a statutory mandate for additurs. Thereafter, this Court upheld the constitutionality of the statute as being remedial.").

Some state courts prohibit additur, but this is a "minority" position. Joseph R. Posner, *Rethinking the Additur Question in Federal Courts*, 16 SUFFOLK J. TRIAL & APP. ADVOC. 97, 107 (2011). See, e.g., Carlson v. Westoff, 3 P.3d 1268 (Kan. 2000) (additur not favored under Kansas law); Routh Wrecker Serv., Inc. v. Washington, 980 S.W.2d 240, 243 (Ark. 1998) ("Arkansas does not recognize the principle of additur"); Bohrer v. Clark, 590 P.2d 117 (Mont. 1978) (stating that the trial court lacked authority to provide an additur).

Typically, additur is initiated by filing a motion, though a few states allow the judge to grant it *sua sponte*. See, e.g., Rash v. Moczulski, 153 A.3d 719 (Del. 2016) (allowing a *sua sponte* grant of additur); Dedeaux v. Pellerin Laundry, Inc., 947 So. 2d 900, 908 (Miss. 2007) ("Any party aggrieved by the amount of damages awarded pursuant to a jury verdict may file a motion for an additur."); *Owens*, 816 So. 2d 572 (additur on motion); Massman Constr. Co. v. Mo. Highway & Transp. Comm'n, 914 S.W.2d 801, 803 (Mo. 1996) (additur is "an authorized after-trial motion").

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Some courts allow additur based on the defendant accepting a higher amount, while other courts require both the defendant and the plaintiff to agree to the additur. See, e.g., Reid v. Hindt, 976 A.2d 125, 131 (Del. 2009) (requiring only the defendant's consent: "The plaintiff may not be satisfied with the amount of the additur, but she is not adversely affected since she is receiving more than the amount awarded by the jury."); Lee v. Ball, 116 P.3d 64 (Nev. 2005) (defendant's consent required for additur); Orientale v. Jennings, 218 A.3d 806 (N.J. 2019) (requiring both parties' consent for additur); *Dedeaux*, 947 So. 2d 900 (same); Waste Mgmt., Inc. v. Mora, 940 So. 2d 1105 (Fla. 2006) (same).

The New Jersey opinion in *Orientale* is a substantial review of the whole area of both remittitur and additur. It requires both parties to consent as a way to avoid constitutional doubts; the remitted or added-to judgment is ultimately entered by mutual consent. In effect, the case is settled. In *Orientale*, the trial judge awarded an additur and defendant consented. Plaintiff appealed; she thought the added amount was still inadequate and preferred a new trial. The case presented unusual incentives, because plaintiff had already recovered $100,000 from the other driver. The case that gave rise to the additur was a suit against plaintiff's own insurer for additional damages under her underinsured motorist coverage. She would recover nothing unless the damage award exceeded the $100,000 already collected. The trial judge increased the jury's verdict from $200 to $47,300; with either number, plaintiff had a take-nothing judgment. So plaintiff had no incentive to accept the additur, and defendant had no incentive to resist it.

c. Justifications for review of the amount of damages, and for remittitur and additur. Despite recognition that juries ordinarily should have wide berth to determine not only liability but also the amount of damages, courts have long policed awards for excessiveness and, to a lesser extent, inadequacy. Ronald J. Allen & Alexia Brunet, *The Judicial Treatment of Noneconomic Compensatory Damages in the 19th Century*, 4 J. EMPIRICAL LEGAL STUD. 365 (2007), found extensive judicial policing of noneconomic damages in 19th-century tort cases, and in examining a large database of such cases, found that "no case prior to 1900 permitted a noneconomic compensatory damages award exceeding $450,000 in current dollars." Id. at 365.

On the rationale for remittitur, see STEIN, PERSONAL INJURY DAMAGES § 22:41 ("Remittitur saves the time and expense of a new trial and considering the crowded court docket and the limited judicial resources, remittitur is a particularly attractive alternative to a new trial." (footnote omitted)). The arguments against remittitur and additur are canvassed, and partially responded to, in David Baldus, John C. MacQueen, & George Woodworth, *Improving Judicial Oversight of Jury Damages Assessments: A Proposal for the Comparative Additur/Remittitur Review of Awards for Nonpecuniary Harms and Punitive Damages*, 80 IOWA L. REV. 1109 (1995):

> [O]n at least three levels, commentators have expressed strong reservations about the system and have urged limitations or outright repeal. The most common argument is that additur/remittitur is an excessive intrusion into the exercise of jury discretion, although constitutional claims on this ground have been almost uniformly rejected.

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Narrower arguments address the capacity of additur/remittitur review to achieve its stated goals of economy, efficiency, uniformity, and fairness. The argument from economy and efficiency is that remittitur review, as opposed to a new trial, encourages plaintiffs to seek excessive damages awards and engage in misconduct at trial that might enhance their damages awards. Normally, with remittitur review available, the only likely penalty for such plaintiff behavior is a reduction of the award to the highest permissible level, rather than a new trial. Second, defendants have little incentive *not* to seek remittitur, which consequently consumes trial court time and resources in appraising the propriety of the awards and calculating adjustments. Third, the procedure invites judicial tinkering, especially at the appellate court level, which consumes even more judicial resources. The argument concludes that the repeal of additur/remittitur review would eliminate these incentives and opportunities, thereby reducing the total amount of litigation and cost.

On the uniformity issue, critics advance an "impossibility" hypothesis, arguing that there is no suitable "rule of measurement" for pain and suffering that would permit the conduct of an effective review. Others have argued that the subjective nature of the review process makes it inevitably opaque and unprincipled. As a consequence, the results appear to be as arbitrary and inconsistent as the jury awards they are intended to rationalize, or more so.

Finally, the practice allegedly fails on fairness grounds. Defendants are denied a new trial when they believe an award accepted by a plaintiff pursuant to a remittitur order is too high. Yet it is principally plaintiffs who feel "blackmailed" by the court when they are forced to surrender a major part of what appears to them a fair award won by the credibility of their testimony and the skill of their counsel. The choice is particularly difficult for plaintiffs who are ill, old, or cannot afford the cost or delay of a new trial. Finally, pressure from plaintiff's counsel, who may be anxious to collect legal fees, can further aggravate the plaintiff's dilemma.

The case against any form of additur/remittitur review has some force. However, the strong tradition of additur/remittitur review in this country and the perceived risk of either increased costs through frequent new trials or no effective controls at all make judicial or legislative repeal of the procedure unlikely. Moreover, some of the assumptions underlying the case against additur/remittitur review may not be correct, especially those dealing with the incentive for irresponsible behavior by plaintiffs and defendants. In fact, the available data suggest that additur/remittitur reviews, particularly in state courts, are not a particularly common occurrence. However, concerns about the capacity of additur/remittitur to produce a reasonable level of consistency in an open, objective, and principled manner without undue time, expense, and complexity appear to be well placed.

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Id. at 1128-1129 (footnotes omitted).

Remittitur appears relatively rare today. Id. at 1130 ("The most definitive study of post-trial settlements estimates that in two large jurisdictions, 25% of cases resulting in plaintiff verdicts resulted in post-trial reductions of the plaintiff's award. Of those reductions, 62% were the product of a post-trial settlement between the parties, while only 23% were reduced by trial or appellate courts."); see also Orientale v. Jennings, 218 A.3d 806, 820 (N.J. 2019) ("According to a review by the Conference of Civil Presiding Judges, over the past three years, our trial courts [in New Jersey] granted only eight remittiturs and additurs, and only three were accepted."). In the first study quoted, note that 23 percent of 25 percent is less than six percent of plaintiff verdicts. On remittitur's potential to spur settlement, see Baldus, MacQueen, & Woodworth, at 1130. Remittitur appears to have been more common in the 19th century. Allen & Brunet at 382 (finding judicial remittiturs in 10 percent of cases in a database of 19th-century tort cases involving noneconomic damages).

A study of Texas medical-malpractice awards of at least $25,000 from 1988 to 2003 found that "most jury awards received 'haircuts.' Seventy-five percent of plaintiffs received a payout less than the adjusted verdict (jury verdict plus prejudgment and postjudgment interest), 20 percent received the adjusted verdict (within +/- 2 percent), and 5 percent received more than the adjusted verdict. Overall, plaintiffs received a mean (median) per-case haircut of 29 percent (19 percent) . . . . The larger the verdict, the more likely and larger the haircut." David A. Hyman, Bernard Black, Kathryn Zeiler, Charles Silver, & William M. Sage, *Do Defendants Pay What Juries Award? Post-Verdict Haircuts in Texas Medical Malpractice Cases, 1988–2003*, 4 J. EMPIRICAL LEGAL STUD. 3, 3-4 (2007). Because larger verdicts were reduced more, the aggregate reduction—the reduction from the sum of all verdicts to the sum of all amounts actually paid—was 56 percent. That is, less than half the amounts awarded by juries were actually paid. The key points for present purposes are that caps on punitive damages and on damages in death cases explained much of the reductions, and the most important factor was the extent of insurance coverage. "Remittitur accounts for a small percentage of the haircuts." Id. at 4; see also id. at 6 ("Judicial oversight (remittitur, jnov, and appellate reversal) directly affected 5 percent of the plaintiff verdict cases (19 of 306 cases—15 remittitur, 3 jnov, 1 appellate reversal of a plaintiff verdict), and can explain roughly 3 percent of the aggregate haircut.").

d. The standard for determining the amount of damages to be proposed. Courts use various methods to determine the proper amount to be remitted or added. The federal courts are divided, and remarkably, the Supreme Court appears not to have resolved the matter. 11 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2815.

Not every opinion is perfectly clear, but there appear to be at least 24 states that require a judge to simply determine a "reasonable" amount. See CSX Transp., Inc. v. Long, 703 So. 2d 892, 899 (Ala. 1996) ("This Court, when it concludes that a judgment is excessive, has the authority under [a state statute], subject to certain state constitutional constraints, to determine the proper amount of a recovery and to affirm the judgment subject to the plaintiff's filing a remittitur of the amount in excess of the proper amount."); Desert Palm Surgical Grp., P.L.C. v. Petta, 343 P.3d

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438 (Ariz. Ct. App. 2015); CAL. CIV. PROC. CODE § 662.5(a)(2) (a trial court may remit an award "as the court in its independent judgment determines from the evidence to be fair and reasonable"); Marks v. Dist. Court in and for Seventeenth Judicial Dist., 643 P.2d 741, 744 (Colo. 1982) ("[A] trial court has the power . . . to deny the new trial on the condition that the plaintiff will agree to a remittitur of the amount of the damages found by the court to be excessive."); Allen v. Giuliano, 135 A.2d 904 (Conn. 1957); Normius v. Eckerd Corp., 813 So. 2d 985, 988 (Fla. Dist. Ct. App. 2002) ("Even though the amount of excess is not always capable of being worked out with mathematical precision, the remittitur amount should be arrived at by 'reasoning actuated and controlled by the facts in the records and guided by an honest, sincere purpose to do justice to both parties' in light of those facts." (quoting De la Vallina v. De la Vallina, 107 So. 339, 339 (Fla. 1926)); Spence v. Maurice H. Hilliard, Jr., P.C., 389 S.E.2d 753 (Ga. 1990); Quick v. Crane, 727 P.2d 1187 (Idaho 1986); Tri-G, Inc. v. Burke, Bosselman & Weaver, 856 N.E.2d 389 (Ill. 2006); D'Annolfo v. Stoneham Hous. Auth., 378 N.E.2d 971, 979 (Mass. 1978) ("Our rule 59(a) [remittitur rule] does not require the judge to give the plaintiff the opportunity to remit only so much of the amount of the verdict as exceeds the maximum amount which the jury warrantably might have allowed . . . . [A] judge has discretion to fix the amount of remittitur to bring the verdict anywhere within the range of verdicts supported by the evidence."); Soltis v. Geary, 176 N.W.2d 633, 635 (Minn. 1970) (upholding trial judge's order of remittitur based upon judge's "independent appraisal of the evidence bearing on damages and his determination that the award was within permissible evidentiary limits"); Dedeaux v. Pellerin Laundry, Inc., 947 So. 2d 900 (Miss. 2007); Belknap v. Bos. & Me. R.R., 49 N.H. 358, 358 (1870) ("When the verdict is set aside on the ground of excessive damages, the court . . . will give the plaintiff the option of reducing the verdict to the sum, which the court consider reasonable, and upon his remitting the excess, will give him judgment for the residue, and deny the motion for a new trial . . . ."); Orientale v. Jennings, 218 A.3d 806, 820 (N.J. 2019) ("Logic suggests that the parties are most likely to mutually agree to a remittitur or an additur that is a fair and reasonable award. A defendant seeking a new trial based on a grossly excessive damages award is unlikely to consent to a remittitur that is the *highest* amount that a reasonable jury could have awarded the plaintiff, and the same reasoning applies to the *lowest* amount in the case of additur. If the objective is to encourage settlement, then the remittitur or additur must be an amount that both parties would deem reasonable—not the highest or lowest sustainable amount. . . . In setting 'the proper amount of an additur or remittitur, the [trial] court must attempt the difficult task of determining the amount that a reasonable jury, properly instructed, would have awarded.' In short, in fixing the remittitur or additur amount, the court must 'reach a fair damage verdict on the basis of the evidence it saw and heard.'" (alteration in original)); Caudle v. Swanson, 103 S.E.2d 357, 362 (N.C. 1958) (holding that under remittitur a defendant "will pay no more than a reasonable jury might award against him"); Moskovitz v. Mount Sinai Med. Ctr., 635 N.E.2d 331, 344 (Ohio 1994) ("No simple mathematical formula can be applied as to either a minimum or a maximum, [in setting a remittitur] and there is a wide range between those figures. The decision rests as much on policy considerations as it does anything else and some degree of arbitrariness cannot be totally divorced from the decision, whether made by

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us or by the jury."); Ungaro v. Ciaccia, 104 A.2d 240 (R.I. 1954); Rush v. Blanchard, 426 S.E.2d 802, 806 (S.C. 1993) ("The trial court has wide discretionary power to reduce the amount of a verdict which in his or her judgment is excessive."); Roth v. Jelden, 118 N.W.2d 20, 26 (S.D. 1962) ("When [a trial judge] has concluded that a remittitur is proper the amount thereof is . . . a discretionary matter . . . ."); Pope v. Moore, 711 S.W.2d 622 (Tex. 1986); Bodon v. Suhrmann, 327 P.2d 826, 828 (Utah 1958) ("[T]he power to order a new trial conditionally: that is, to order that a new trial be granted unless the party adversely affected by the order agrees to a remittitur or an additur of the damages to an amount within proper limits as viewed by the court."); Shepard v. Capitol Foundry of Va., Inc., 554 S.E.2d 72, 75 (Va. 2001) (holding that a remittitur entered by a trial judge must bear a "reasonable relation to the damages disclosed by the evidence"); Bingaman v. Grays Harbor Cmty. Hosp., 699 P.2d 1230, 1232-1233 (Wash. 1985) ("If a jury's verdict is tainted by passion or prejudice, or is otherwise excessive, both the trial court and the appellate court have the power to reduce the award or order a new trial. Because of the favored position of the trial court, it is accorded room for the exercise of its sound discretion in such situations." (footnote omitted)); Powers v. Allstate Ins. Co., 102 N.W.2d 393, 400 (Wis. 1960) ("[W]here an excessive verdict is not due to perversity or prejudice, and is not the result of error occurring during the course of trial, the plaintiff should be granted the option of remitting the excess over and above such sum as the court shall determine is the reasonable amount of plaintiff's damages . . . .").

In contrast, at least 15 states appear to have embraced the highest maximum allowable award for remittiturs. Exxon Corp. v. Alvey, 690 P.2d 733, 742 (Alaska 1984) ("'[M]aximum possible recovery' approach is more appropriate in a remittitur context, because it comes closer to approximating the decision made by the jury."); Travis Lumber Co. v. Deichman, 319 S.W.3d 239, 250 (Ark. 2009) ("[W]e allow a remittitur down to the most liberal amount that we would approve if the jury had returned a verdict for that sum."); Reid v. Hindt, 976 A.2d 125, 131 (Del. 2009) (stating that in a remittitur or additur motion that "the court still defers to the jury and reduces the jury's award to the absolute maximum amount that the record can support (in the case of remittitur) and increases the award to the absolute minimum amount that the record requires (in the case of additur)"); Jasper v. H. Nizam, Inc., 764 N.W.2d 751, 777 (Iowa 2009) ("When a remittitur of damages is granted, only the excess of the award is remitted. Generally, this standard means the award should be reduced 'to the maximum amount proved' under the record." (quoting In re Knickerbocker, 827 F.2d 281, 289 n.6 (8th Cir. 1987)) (internal citation omitted)); Dixon v. Prothro, 840 P.2d 491, 496 (Kan. 1992) ("When a court lowers excessive damages, what remains is technically what has been found by the jury but with only the excess taken off."); Thibodeaux v. Donnell, 219 So. 3d 274 (La. 2017); Nyzio v. Vaillancourt, 382 A.2d 856, 861 (Me. 1978) ("Under this view of the function of a remittitur, the Court reduces the jury's award of damages to that amount which is the 'maximum permissible' as a rational jury determination."); Hebron Volunteer Fire Dep't, Inc. v. Whitelock, 890 A.2d 899, 912 (Md. Ct. Spec. App. 2006) ("the trial court, in making its determination, must make a fair and reasonable assessment of the evidence it has seen and heard during the trial and determine the highest amount that a reasonable jury would award to fairly compensate a plaintiff for his or her loss based on that evidence."); MICH. CT. R.

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2.611(E)(1) (providing for the entry of a judgment that is the "highest (if the verdict was excessive) amount the evidence will support"); Ince v. Money's Bldg. & Dev., Inc., 135 S.W.3d 475 (Mo. Ct. App. 2004); Hafner v. County of Onondaga, 723 N.Y.S.2d 574 (App. Div. 2000); Neal v. Bavarian Motors, Inc., 882 A.2d 1022, 1028 (Pa. Super. Ct. 2005) ("A remittitur should fix the highest amount any jury could properly award, giving due weight to all the evidence offered."); Meals ex rel. Meals v. Ford Motor Co., 417 S.W.3d 414 (Tenn. 2013); Haynes v. Golub Corp., 692 A.2d 377 (Vt. 1997); Roberts v. Stevens Clinic Hosp., Inc., 345 S.E.2d 791, 800 (W. Va. 1986) ("Thus, we have decided to dispose of the one meritorious assignment of error, namely the excessiveness of the verdict, simply by asking ourselves: 'What is the highest jury award under the facts of this case that would not be monstrous and enormous, at first blush beyond all measure, unreasonable and outrageous, and such as manifestly shows jury passion, partiality, prejudice, or corruption?'").

Some states reason that providing the maximum amount in remittitur is preferable because "it is the least intrusive on the jury's verdict and thus most faithful to the jury's intent." Follo v. Florindo, 970 A.2d 1230, 1248 (Vt. 2009). Professor Mary Kay Kane has argued that although the constitutionality of remittitur is well settled, it rests on a "shaky foundation," and that the maximum recovery rule "is the only theory that has any reasonable claim of being consistent with the Seventh Amendment." 11 WRIGHT & MILLER § 2815. The states that authorize remittitur to a reasonable amount do not interpret their state rights to jury trial that way.

Michigan at one time appeared to let the trial court pick which standard to apply. Precopio v. City of Detroit, Dept. of Transp., 330 N.W.2d 802, 813 (Mich. 1982). But the rules of civil procedure now require that remittitur be to the highest amount supported by the evidence. MICH. CT. R. 2.611(E)(1).

A few states, at least in some older cases, appeared to embrace the odd rule that a trial court granting a remittitur must pick the *lowest* amount supported by the evidence. See Izumi v. Kwan Doo Park, 351 P.2d 1083, 1087 (Haw. 1960) ("[W]here the specifications of error are directed to procedural errors, all leading to an excessive verdict, as well as to the excessive verdict itself, and the amount of such excessiveness can be readily ascertained with reasonable mathematical definiteness, it is proper to grant a new trial unless the plaintiff consents to a remittitur large enough to reduce the verdict to the lowest amount that the court would be willing to sustain."); Swanson v. Schultz, 270 N.W. 43, 46 (Wis. 1936) ("[T]he court determines from the evidence the lowest amount that an impartial jury properly instructed would reasonably award and uses that amount in framing the option to be offered to the creditor."); Weidman v. Barnes, 197 N.W. 425, 425 (Neb. 1924) ("Where a jury by its verdict has settled all issues in favor of plaintiff, but because of an erroneous instruction may have awarded excessive damages, an appellate court may properly permit the judgment to stand on remission by plaintiff of all above the lowest amount the evidence would warrant.").

The lowest-amount standard makes no sense, because it is most intrusive on the jury's verdict and it deprives the court of the benefit of the jury's independent judgment. Earl v. Bouchard Transp. Co., 917 F.2d 1320, 1328 (2d Cir. 1990) (calling this standard the "most intrusive upon jury awards" and remarking that "[u]nder this standard, a plaintiff would typically do better by

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opting for a second trial than he would by accepting the district court's remitted judgment. Thus, this standard not only gives the least weight to the jury's apparent intent to award a generous verdict, but it also encourages plaintiffs to reject the remittitur and opt for a costly second trial."). Alaska considered and rejected the lowest-amount rule, for substantially the same reasons in *Alvey*, 690 P.2d 733.

It is not clear if any jurisdictions still follow this standard. Although *Weidman* has not been overruled, a more recent Nebraska case states that a court cannot grant a remittitur unless the court "could rationally ascertain the extent of the excess of [the] verdict." Main v. Sorgenfrei, 118 N.W.2d 648, 658 (Neb. 1962). *Weidman* may have been a special case from the beginning, because the error there was not an excessively generous jury, but a misinstructed jury. The court need not defer to the jury's verdict when it is based on an erroneous measure of damages.

The statement in the Hawaii opinion appears to be limited to those cases in which the amounts to be remitted are sufficiently definite, a standard that often will be difficult to meet in tort cases. Beyond that, the Hawaii statement may be a typographical error; there are nearby references to segregating the excess, correcting the excess, and the amount of the excess, and to distinguishing and separating "the erroneous part." *Izumi*, 351 P.2d at 1087-1088. And there are citations to three earlier Hawaii cases that appear to have remitted to the maximum that could be supported. Id. at 1088.

The Wisconsin rule appears to have originated in the view that because additur and remittitur give the choice to one party, and no choice to the other, the right to a jury trial required that the amount be set in the way most favorable to the party with no right to choose. Heimlich v. Tabor, 102 N.W. 10 (Wis. 1905). This rule was abandoned, and *Heimlich* expressly overruled, in *Powers*, 102 N.W.2d 393. The more recent statement of the rule in *Swanson*, 270 N.W. 43, must be taken to have been implicitly overruled with *Heimlich*. *Powers* adopted the rule that damages should be remitted to a reasonable amount.

A parallel disagreement between the reasonable-amount and maximum-amount standard over remittitur applies to additur. For adding damages up to a reasonable amount, see, e.g., *Orientale*, 218 A.3d at 820 ("In setting 'the proper amount of an additur or remittitur, the [trial] court must attempt the difficult task of determining the amount that a reasonable jury, properly instructed, would have awarded.' . . . [T]he court must 'reach a fair damage verdict on the basis of the evidence it saw and heard.'" (internal citation omitted)); Baudanza v. Comcast of Mass. I, Inc., 912 N.E.2d 458, 465 (Mass. 2009) ("In ordering an additur or remittitur, the judge is not obliged to make the smallest modification possible; rather, the judge has discretion to bring the verdict anywhere within the range of verdicts supported by the evidence" (internal quotation marks omitted)); *Dedeaux*, 947 So. 2d at 908 (additur amounts should be "fairly responsive to the evidence rather than one targeted to a minimum . . . sustainable verdict"); Jehl v. S. Pac. Co., 427 P.2d 988, 995 (Cal. 1967) ("If the court decides to order an additur, it should set the amount that it determines from the evidence to be fair and reasonable.").

In other states, the court will increase the amount with an additur only to the smallest amount that would not be set aside as inadequate. See, e.g., *Reid*, 976 A.2d at 131 ("the court still

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defers to the jury . . . and increases the award to the absolute minimum amount that the record requires (in the case of additur)."); Arnold v. Darczy, 528 N.W.2d 199, 200 (Mich. Ct. App. 1995) ("additur set by the court must be the lowest the evidence will support" (emphasis omitted)).

Subsections (b) and (c) of this Section take no position on this choice, except to reject a lowest-amount standard for remittitur (and, should any court try to apply it, a highest-amount standard for additur). The reality of any complex tort case is that the evidence may support a wide range of possible damage measures, and selecting any specific amount on a reasoned basis is a difficult task. The choice between choosing a maximum or minimum permissible amount or choosing a reasonable alternative amount within the permissible range may make a substantial difference in practice. But the courts are divided, and there is no clear basis in the principles of either tort law or remedies law to choose between these alternatives.

e. Standards for determining whether damages are excessive or inadequate. The biggest problem with judicial review of damage awards for excessiveness or inadequacy is specifying an appropriate evaluative framework. Appeals to the judicial conscience provide too little guidance. Nonetheless, many courts "simply look to the standard of 'excessiveness' of the verdict." Sarah M. R. Cravens, *The Brief Demise of Remittitur: The Role of Judges in Shaping Remedies Law*, 42 LOY. L.A. L. REV. 247, 250 (2008); see also Exxon Mobil Corp. v. Albright, 71 A.3d 30, 97 (Md. 2013) ("we will reverse a trial court's denial of a motion for remittitur only where the verdict is 'grossly excessive' or 'shocks the conscience of the court.'").

However, in some jurisdictions, "excessiveness" is measured via a specific standard of proof or by using a list of factors to help define "excessiveness." Saleh v. Ribeiro Trucking, LLC, 32 A.3d 318, 323 (Conn. 2011) (a judge ordering a remittitur must include in the "memorandum of decision clear, definite and satisfactory reasons for so ordering. Merely stating that an award shocks the conscience or the sense of justice of the court or that the award does not fall within the necessarily uncertain limits of fair and reasonable compensation will not be sufficient.").

The three key factors described in Subsection (e) draw from standards set forth in judicial decisions, statutes, and rules of civil procedure. See, e.g., FLA. STAT. ANN. § 768.74(5)(a)-(e) (using factors to define excessiveness such as whether passion interfered and whether the jury ignored evidence); GA. CODE ANN. § 51-12-12(a) ("the court should not interfere with the jury's verdict unless the damages awarded by the jury are clearly so inadequate or so excessive as to be inconsistent with the preponderance of the evidence in the case"); STEIN, PERSONAL INJURY DAMAGES § 22:41 ("In determining whether to order remittitur, the judge evaluates three issues: (1) was the award supported by the evidence, (2) was the jury award excessive, and, if excessive, (3) was the amount of the award so unreasonable as to 'shock the judicial conscience.' As part of this evaluation, the judge examines whether the excessiveness of an award might be the product of passion, prejudice or misconduct on the part of the jury. If such motivation is found, a new trial must be ordered and the issue of remittitur is moot." (footnotes omitted)); Cravens, 42 LOY. L.A. L. REV. at 250. The comment about the trial judge observing the jury wince, weep, and otherwise react to the evidence originated in Jastram v. Kruse, 962 A.2d 503 (N.J. 2008).

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Judge Weinstein has used a statistical method to determine if a remittitur is warranted. Geressy v. Digit. Equip. Corp., 980 F. Supp. 640, 657 (E.D.N.Y. 1997) (describing the three-step process: "First, identify the normative group—what kinds of cases are sufficiently similar to serve as the referent group for determining what is *reasonable*? Second, determine what constitutes a deviation from that group. Third, define statistically and intuitively how far a verdict can deviate before that deviation becomes material. After this three step analysis, the court reviews the more traditional examination of economic damages and the statistical analysis for non-economic damages and decides how much leeway should be allowed the fact finders before determining that a jury verdict *deviates materially*."). The "deviates materially" standard is prescribed by a New York statute, N.Y. C.P.L.R. § 5501(c), which applied in a diversity case; Judge Weinstein appears to have developed the rest. Baldus, MacQueen, & Woodworth, fully cited in Reporters' Note to Comment *c*, also offer a detailed set of proposals for identifying outliers in the award of noneconomic damages through comparative analysis. Comparative analysis is ubiquitous in tort practice and in settlement negotiations; Professor Lahav notes that practicing lawyers compare verdicts in similar cases (although more as "an art" rather than "rigorously or systematically") to determine the value of a particular case. Alexandra D. Lahav, *The Case for "Trial by Formula,"* 90 TEX. L. REV. 571, 596-597 (2012).

The Fifth Circuit has applied a "maximum recovery rule" that requires upholding a challenged damage award if it is within a certain percentage of the award upheld by courts in the relevant jurisdiction in similar cases. In jury trials, the court under this approach allows a 50-percent enhancement. "Refusing to overturn jury awards that are within 150% of the highest comparable award prevents the court from substituting its own opinion for that of a jury. The relevant jurisdiction for purposes of the maximum recovery rule is the state providing the substantive law for the claim." Puga v. RCX Sols., Inc., 922 F.3d 285, 297 (5th Cir. 2019) (internal quotation marks omitted). See also Clanton v. United States, 943 F.3d 319 (7th Cir. 2019) (affirming district-court decision to uphold $13.5 million in noneconomic damages after district court compared the amount with factually similar cases, after excluding cases that were unhelpful comparators, and after comparing the ratio of economic and noneconomic damages in comparator cases).

Actual experience with comparative analysis of verdicts is harshly criticized in Lawrence James Madigan, *Excessive Damage Review in the Fifth Circuit: A Quagmire of Inconsistency*, 34 TEX. TECH L. REV. 429 (2003), and in JoEllen Lind, *The End of Trial on Damages? Intangible Losses and Comparability Review*, 51 BUFF. L. REV. 251 (2003). Of course, if it is done right, comparative review is not a ratchet; it can suggest additur as well as remittitur and either reduce or uphold large verdicts.

Courts are divided over comparative analysis. New York courts seem to have the most developed practice of engaging in comparisons. Baldus, MacQueen, & Woodworth, 80 IOWA L. REV. at 1134. See, e.g., Rozmarin v. Sookhoo, 102 N.Y.S.3d 67 (App. Div. 2019); Senko v. Fonda, 384 N.Y.S.2d 849 (App. Div. 1976). Levka v. City of Chicago, 748 F.2d 421 (7th Cir. 1984), is credited with starting federal courts down the road of comparative review of noneconomic

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damages. See Lind, 51 BUFF. L. REV. at 274. California courts look to comparative analysis as only one factor in reviewing the amount of damage awards for excessiveness. Seffert v. L.A. Transit Lines, 364 P.2d 337, 343 (Cal. 1961) ("While the appellate court should consider the amounts awarded in prior cases for similar injuries, obviously, each case must be decided on its own facts and circumstances. Such examination demonstrates that such awards vary greatly."); Fernandez v. Jimenez, 253 Cal. Rptr. 3d 236 (Ct. App. 2019).

For a recent example under Florida law of a trial court engaging in a detailed comparative analysis of similar cases involving emotional-distress damages for the tortious death of a child, see Dougherty v. WCA of Florida, LLC, 2019 WL 691063 (Fla. Cir. Ct. Jan. 29, 2019) (remitting $25-million award for pain and suffering for two parents after 20-year-old child was run over by defendant's garbage truck to $8.2 million after comparing damage verdicts in numerous similar cases).

The New Jersey Supreme Court rejected the comparative approach, citing concerns over the value of such analysis. Cuevas v. Wentworth Grp., 144 A.3d 890, 906-907 (N.J. 2016) ("We do not believe that having our trial courts review snippets of information about cases that are not truly comparable is a worthwhile use of judicial resources or likely to bring greater justice to either plaintiffs or defendants" and citing similar cases rejecting comparative review in Kansas, Montana, and Virginia). The New Jersey court instead endorsed a shock-the-conscience standard relying on an "amalgam" of the judge's experience, an alternative standard that seems much more prone to inconsistency across cases than the attempt to compare to similar cases. See also Munn v. Hotchkiss Sch., 165 A.3d 1167 (Conn. 2017) (reaffirming rejection of comparative analysis of noneconomic damages verdicts); id. at 1191-1196 (McDonald, J., concurring) (lamenting the lack of standards and consistency in Connecticut review of jury verdicts for excessiveness, suggesting full review of the state's approach, and noting evidence from comparative analysis that verdicts are affected by the race of the parties); Davis v. City of Chicago, 2020 WL 1090727 (Ill. App. Ct. Jan. 31, 2020) (engaging in some comparative analysis of emotional distress awards despite 1997 Illinois Supreme Court case discouraging the practice), appeal denied, 147 N.E.3d 687 (Ill. 2020); Morga v. Fedex Ground Package Sys., Inc., 420 P.3d 586 (N.M. Ct. App. 2018) (declining to engage in comparative analysis of verdicts despite a 1961 New Mexico Supreme Court case authorizing the practice).

Although courts should not be required to undertake a statistical analysis, the policing of awards for outliers should be done in a methodical and not haphazard way. States differ in how they undertake the analysis of outliers. Courts should focus on similar cases in terms of the nature of the torts, the extent of the injuries, and the awards upheld in the same and nearby jurisdictions. For an argument, based upon the findings from experiments with mock jurors, that courts should provide juries with damages in comparable cases to guide juror decisionmaking, see Hillel J. Bavli & Reagan Mozer, *The Effects of Comparable-Case Guidance on Awards for Pain and Suffering and Punitive Damages: Evidence from a Randomized Controlled Trial*, 37 YALE L. & POL'Y REV. 405 (2019).

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Illustration 1 is based on Pinto v. Morgan, 2009 WL 4254439 (N.J. Super. Ct. App. Div. 2009), in which the court said that in a close case, the tie must go to the jury. The rules of appellate review are beyond the scope of this Section, but the trial-court decision in Illustration 1 should be reversed whether the standard is abuse of discretion, clearly erroneous, or any other plausible standard.

Illustration 2 is based on Orientale v. Jennings, 2017 WL 3137736 (N.J. Super. Ct. App. Div. 2017). The New Jersey Supreme Court reversed on other grounds in Orientale v. Jennings, 218 A.3d 806 (N.J. 2019), holding that both parties must consent to a remittitur or additur in New Jersey or the court must order a new trial on the issue of damages. *Orientale* is further described in Reporters' Note *b.ii*.

Illustration 3 is based on Desert Palm Surgical Grp., P.L.C. v. Petta, 343 P.3d 438 (Ariz. Ct. App. 2015).

§ 17. Presumed Damages

[This Section is a late addition and has not been drafted yet. It will refer to the relevant Section of the project on Defamation and Privacy, and briefly restate the occasional use of presumed damages in other contexts, especially constitutional torts.]

Comment:

a. History and scope.

REPORTERS' NOTES

a. History and scope.

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Appendix

Black Letter of Preliminary Draft No. 1

§ 1. Availability of Tort Remedies

A plaintiff who establishes a defendant's liability in tort is entitled to an appropriate remedy. The most common tort remedy is compensatory damages. In some cases, other remedies are available in addition to or instead of compensatory damages. These remedies are:

(a) nominal damages (§ 38),

(b) punitive damages (§§ 39-41),

(c) restitution of defendant's gains (§§ 42 and 55),

(d) injunctions against threatened or continuing torts (§§ 43-51),

(e) specialized remedies for the recovery of chattels or possession of land (§§ 52-53), and

(f) declaratory judgments to determine or clarify the rights of the parties (§ 54).

§ 2. The Rightful Position

A plaintiff who establishes a defendant's liability in tort generally is entitled to a remedy that will restore that plaintiff, as nearly as possible, to the position he or she would have occupied if the tort had not been committed. This basic principle is implemented by more specific rules, some of which limit its reach.

§ 3. One Satisfaction

(a) Except as provided in Subsection (b), a plaintiff cannot recover an amount of compensatory damages that exceeds one full compensation for an indivisible injury. In determining whether plaintiff has received full compensation, the finder of fact shall take into account all sources of payment made on account of the injury, except as otherwise provided with respect to collateral sources under the rules set forth in § 9.

(b) A plaintiff who settles with a defendant for an amount that turns out to be greater than that defendant's share of responsibility for the amount of the final judgment, as

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determined by the finder of fact, is entitled to keep the entire settlement. Other defendants are not entitled to a credit for the amount that the settling defendant paid in excess of that defendant's share.

§ 4. Direct and Consequential Damages

(a) A plaintiff who establishes a defendant's liability in tort is entitled to compensation for the damages from the direct impact of the tortious conduct as well as the damages suffered later as a further consequence of that conduct, whether or not the amount of these direct or consequential damages was reasonably foreseeable.

(b) Other tort doctrines limit compensation for both direct and consequential damages, including requirements that damages be reasonably certain (§ 5), within the scope of defendant's liability (§ 6), and not reasonably avoidable (§ 7). Special rules for particular types of harm, such as emotional distress (§§ 20-21) and economic loss not resulting from injury to the plaintiff's person or damage to the plaintiff's property (§ 28), may also limit a plaintiff's recovery of both types of damages.

§ 5. Reasonable Certainty

To establish liability for compensatory damages for the harm caused by a defendant's tort, a plaintiff must prove the existence of damages by a preponderance of the evidence and must prove the amount of damages with reasonable certainty considering the nature of the tort, the nature of the damages, and the evidence that is or should be reasonably available.

§ 6. Scope of Liability (Proximate Cause)

Rules that limit the scope of defendant's liability on policy grounds sometimes bar compensation for harm caused by a tort and suffered by a plaintiff. These rules are restated in §§ 29-36 of the Restatement Third, Torts: Liability for Physical and Emotional Harm.

§ 7. Avoidable Consequences (Mitigation of Damages)

(a) A plaintiff cannot recover damages for any harm caused by defendant's negligent or strict-liability tort if the plaintiff could have avoided that harm by reasonable effort or expenditure after the commission of the tort and failed to do so.

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(b) A plaintiff cannot recover damages for any harm caused by defendant's intentional or reckless tort if

(1) the plaintiff was aware of the tort and of a means to avoid that harm by reasonable effort or expenditure after the commission of the tort, and

(2) the plaintiff intentionally or recklessly failed to do so.

(c) A plaintiff is entitled to compensation for the cost of reasonable efforts to avoid threatened harm resulting from a tort whether or not those efforts are successful.

§ 8. Offsetting Benefits

If a defendant's tort harms the plaintiff and also causes the plaintiff to receive a benefit that the plaintiff would not have received but for the tort, the finder of fact should generally reduce the plaintiff's damages by the amount of the benefit. The court may refuse to set off such a benefit if it would be inequitable or inappropriate to do so. The court shall not set off any benefit that plaintiff is entitled to retain under § 9 on compensation from collateral sources.

§ 9. Compensation or Benefits from Collateral Sources

(a) Except as otherwise provided by statute, the finder of fact shall not reduce the damages awarded to a plaintiff on account of any payment or benefit, in cash or otherwise, that a collateral source pays or provides to or on behalf of the plaintiff either

(1) gratuitously, or

(2) in performance of an obligation undertaken for consideration paid before plaintiff discovered the injuries or losses, or

(3) under the terms of an insurance policy, whenever purchased, or

(4) under the terms of a social-welfare program sponsored by a government or non-profit entity.

(b) A collateral source is a person or entity that is either

(1) independent of any defendant, or

(2) a defendant or affiliated entity acting in a different capacity from the one in which defendant committed the tort and paying from a fund to which plaintiff contributed, or to which another person contributed on plaintiff's behalf.

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§ 11. Multiple Sufficient Causes

(a) If a defendant's tortious conduct is one of two or more sufficient factual causes of an indivisible harm to a plaintiff, and

(1) if none of the other sufficient factual causes is tortious, the defendant is liable for the full amount of plaintiff's damages, less any reduction to account for the plaintiff's comparative share of responsibility under the rules stated in Restatement Third, Torts: Apportionment of Liability.

(2) if one or more of the other causes is tortious, each defendant is liable for that defendant's comparative share of responsibility under the rules stated in Restatement Third, Torts: Apportionment of Liability.

(b) If all or part of the harm to a plaintiff resulting from multiple sufficient causes is divisible, each defendant is liable, under the rules stated in Restatement Third, Torts: Apportionment of Liability § 26, for the portion of the divisible harm caused by that defendant's tortious conduct.

§ 12. Taxes

(a) Damages That Will Not Be Taxed.

The finder of fact shall not reduce the amount of damages on the ground that the plaintiff's receipt of the damages will be exempt from income taxes or on the ground that the plaintiff would have paid taxes on income that the award of damages will replace.

(b) Damages That Will Be Taxed.

(i) With respect to damages that will be subject to income taxes, the court generally should assume that the taxes incurred as a result of the tort will approximately equal the taxes that would have been incurred but for the tort, so that the finder of fact can ignore the effect of taxes. This rule is subject to the exception stated in Subsection (b)(ii).

(ii) If either party proves with reasonable certainty that the taxes on the judgment, plus any other taxes that the plaintiff incurred or will incur as a result of the tort, will be substantially different from the taxes that plaintiff would have incurred but for the tort, and that this difference is within the scope of liability, then the finder of fact shall account for this difference in measuring damages. But this

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Subsection does not apply to punitive damages, to taxable damages that compensate for emotional distress, or to taxable damages that compensate for any other harm in which the original loss had no tax consequences. This Subsection also does not apply to the tax-exempt damages governed by Subsection (a).

§ 13. Interest

(a) Except as otherwise provided by statute or rule of court, a plaintiff who establishes a defendant's liability in tort is entitled to prejudgment interest at a reasonable market rate, on the amount of damages found by the finder of fact, from the date or dates of injury (or a reasonable approximation thereof) to the date of judgment.

(b) A plaintiff who obtains a judgment awarding damages in tort is entitled to postjudgment interest on the amount of that judgment as provided by statute or rule of court.

§ 14. Present Value

For any damage that can be valued by prices in a market, and that plaintiff will not incur until after the date of judgment, the finder of fact should award an amount that, if safely invested from the date of judgment to the date on which the damage will be incurred, would yield principal and interest that in total is equal to the amount of the damage. Principal categories of damage subject to this rule are lost earnings, lost profits, and the cost of medical and rehabilitative services.

§ 15. Litigation Expenses

(a) Subject to the exceptions in Subsection (b), a plaintiff cannot recover compensation for attorneys' fees or other litigation expenses.

(b) A court may award compensation for attorneys' fees and other litigation expenses to a plaintiff who establishes a defendant's liability in tort if

(1) the tort caused the plaintiff to incur attorneys' fees to investigate, negotiate, or litigate a dispute with a person other than the defendant;

(2) the tort alleged and proven is bad faith conduct by an insurer;

(3) a statute authorizes the award of attorneys' fees;

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(4) the court awards the attorneys' fees from a common fund that benefits others similarly situated with the plaintiff;

(5) the court awards the attorneys' fees as a sanction for bad-faith conduct in the litigation; or

(6) the court awards the attorneys' fees as a sanction for contempt of court or as compensation for harm that defendant's contempt of court caused.

§ 16. Excessive and Inadequate Damages (New Trials, Remittitur, and Additur)

(a) A court may review the amount of compensatory damages awarded by a jury to determine if the award is excessive or inadequate.

(b) A court concluding that an award of damages is excessive may in its discretion order a new trial, or a new trial on the issue of damages or, if allowed in the jurisdiction, a remittitur, which gives the choice between a new trial and accepting a lower amount of damages as determined by the court. This lower amount may be, as directed by each jurisdiction's rules, either a reasonable amount based on all the evidence or the largest amount that could be upheld if awarded by the jury.

(c) A court concluding that an award of damages is inadequate may in its discretion order a new trial, or a new trial on the issue of damages or, if allowed in the jurisdiction, an additur, which gives the choice between a new trial and accepting a higher amount of damages as determined by the court. This higher amount may be, as directed by each jurisdiction's rules, either a reasonable amount based on all the evidence or the smallest amount that could be upheld if awarded by the jury.

(d) The choice to accept a remittitur may be offered to the plaintiff whose damages are at issue, and the choice to accept an additur may be offered to the defendant or defendants obligated to pay those damages. Alternatively, the jurisdiction may require the unanimous consent of the affected plaintiff and all affected defendants to accept a remittitur or additur.

(e) A court must have a strong evidentiary basis to hold a jury's damage award to be excessive or inadequate. Key factors for a court to consider in determining whether an award is excessive or inadequate are (1) gross inconsistency between the damages proven by the evidence and the amount awarded by the jury; (2) the likelihood that the award was due to

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the jury's emotional reaction to the case rather than to a rational evaluation of the evidence on damages; and (3) the discrepancy between the amount awarded for any damages that cannot be valued in a market and the amounts awarded for such damages in similar cases.

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