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TORT LAW
Responsibilities and Redress

Fifth Edition

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To Julie
—J.C.P.G.

For my parents, Will & Leatha Kendrick
—L.C.K.

For Max
—A.J.S.

To Antonia
—B.C.Z.

Summary of Contents

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Preface to the Fifth Edition

This edition features the most important change to TORT LAW since it first saw the light of day more than fifteen years ago. Leslie Kendrick, Vice Dean, White Burkett Miller Professor of Law and Public Affairs, and Director of the Center for the First Amendment at the University of Virginia School of Law has joined as a co-author. Her fellow authors still cannot believe their good fortune. Leslie is an outstanding scholar, an award-winning teacher, a former Chair of the AALS Section on Torts and Compensation Systems, and a seasoned and successful litigator who has argued important tort cases in state and federal court. The book has already benefited enormously from her wisdom and judgment, and will continue to do so for years to come.

Tort-related events have come fast and furious since the publication of the Fourth Edition, and we have aimed, and will aim, to keep up with them in this and future editions. Tragically, recent years have reminded us that tort law often fails to achieve its promise of securing the right to redress for all persons. In response, we have added new materials in Chapter 9 designed to support discussions of federal civil rights and tort claims against police for use of excessive force. Other updates include the addition of new principal cases in Chapters 2 and 5 (addressing contemporary duty-of-care issues), in Chapter 4 (addressing causation questions raised in toxic tort litigation), in Chapter 6 (addressing implied rights of action under state privacy laws and wrongful life claims), and in Chapter 11 (addressing the increasingly litigated tort of public nuisance). Elsewhere we have revised and added notes to reflect important developments in the field, including, for example, the publication of new Torts Restatement volumes by the American Law Institute.

We once again are keen to acknowledge the editorial support provided by Aspen Publishing, especially from Joe Terry and Shannon Davis, and by Darren Kelly and Melanie Field of The Froebe Group. We also benefited from outstanding research assistance provided by Lillian Childress, Meaghan Haley, Rachel Hankers, Julia Keller, Samantha McCarthy, Nirajé Medley-Bacon, Karina Miranda, Amanda Rutherford, and Doriane Nguenang Tchenga. Our work on this edition has been

generously supported by the Benjamin C. Cardozo School of Law, Fordham University School of Law, Harvard Law School, and the University of Virginia School of Law.

John C.P. Goldberg
Leslie C. Kendrick
Anthony J. Sebok
Benjamin C. Zipursky

Cambridge, MA; Charlottesville, VA; New York, NY
January 2021

Preface to the First Edition

This book has been written to help a new generation of law students learn an area of law — Torts — that is at once ancient and contemporary, rule-governed and flexible, well-established and controversial.

American tort law traces back to the law of medieval England, a time and place in which government efforts to secure citizens' security from injury were relatively modest. Today, tort law — itself a complex institution — exists within a vastly more complex regulatory state that devotes substantial effort to promoting safety and to providing for citizens' welfare. We hope to give students a sense of where tort law has come from, and of the roles it plays, and might play, in our modern system of government.

As an evolving body of doctrine shaped in courtrooms around the country, tort law simultaneously empowers and limits individuals in their ability to invoke the legal system, and likewise empowers and limits legal decision-makers such as judges and juries faced with the task of deciding whether to hold one person liable for another's injuries. We aim to help students appreciate both the constraining and the power-conferring aspects of tort law.

Tort has been a part of American law since the nation's founding. Today, however, it is at a crossroads: Lawyers, politicians, and academics disagree sharply about its continued utility and viability. We seek to enable students to see why tort law is basic to our legal system, but also why it has become a source of controversy.

In pursuing these pedagogic goals, we have been guided by five themes:

1. As its title suggests, this book is organized around the general theme of responsibilities and redress. Tort law, in our view, has two fundamental features. First, it articulates and imposes on members of society a set of legal obligations — i.e., responsibilities — to avoid injuring others. Second, it empowers persons to bring suit to establish that they have been injured by another's failure to heed this sort of obligation — i.e., to pursue and obtain redress. Tort is a core part of the first-year curriculum for these reasons: It examines the law's imposition of basic obligations not to injure others, as well as the law's recognition of the right of aggrieved persons to seek redress through the courts for violations of those obligations.

2. We have edited the cases in this book lightly, in a conscious effort to allow readers to experience the "thick" contexts out of which tort law emerges. Put simply, we aim to allow students to read the facts of each case for themselves. We also try to let the judges speak for themselves through their opinions. Our hope is that this approach

will help beginning law students appreciate the degree to which judgments about legal responsibilities are sensitive to facts, and to see that common-law principles are not extracted from some "heaven of legal concepts," but instead derive from ordinary experience. Further, we hope that, by presenting cases edited in this way, we will aid students in developing the capacity to read carefully, an essential tool for good lawyering.

3. The cases and the notes in this book aim to demonstrate to students how the substance of a body of law like torts is heavily influenced by rules of procedure, by the institutions that have been created to handle tort litigation, and by other bodies of law that address some of the same conduct and issues addressed by tort law. Thus, throughout the book, we point out ways in which the demands of trial and appellate processes shape tort doctrine. In various places, we also explore the role played by legislatures in developing, or responding to developments in, tort doctrine. Another of the book's aspirations is to ensure that students appreciate that tort is but one part of the law, and that it can only be adequately understood in relation to other areas of law, including civil procedure, contracts, property, employment law, anti-discrimination law, and constitutional law.

4. Apart from retaining "classic" tort opinions that all law students are expected to know, we have sought as much as possible to use contemporary cases presenting situations that students will be able to recognize. We hope that, by employing these sorts of cases to illuminate the basic concepts of tort law, we will make the subject less archaic and mysterious to novice lawyers, while also helping them to begin to think for themselves about the various choices that courts and lawmakers must make as they carry tort law forward into the future. We also believe that the use of relatively recent cases will help students perceive the relevance of the subject and the significance of the issues that are currently in play in the law of tort.

5. This book adopts a perspective on law that we hope is refreshing. It is, of course, vital that first-year law students come to appreciate that "the law" is not a rule book—that there is play in its joints and deep tensions in its soul. Yet it is equally important that students not be left with the skeptical lesson that law is nothing more than what a particular judge or jury says it is. Thus, in these materials, we strive to help students grasp how the key concepts of tort—concepts such as "reasonable care," "causation," and "intent"—structure and organize legal analysis even as they point it in new directions. A good lawyer, we hope to demonstrate, is one who appreciates both the limits and the flexibility of tort doctrine; one who has a sense of how to make innovative and progressive arguments from within the law. For these reasons, our book has a number of distinctive features. Particularly in its early chapters, it contains a good deal of expository text, in part to help students overcome the steep learning curve encountered in the first weeks of law school. It also contains a number of opinions from intermediate appellate courts, in part because these courts tend to approach cases as presenting problems in the application of law, rather than occasions to rework it. The book also includes some "easy" cases. These opinions can help students avoid basic confusions by providing clear examples of certain torts, or certain concepts. Lastly, the notes following the principal cases strive to be explanatory rather than Delphic. If our

own engagement with this subject has taught us anything, it is that tort law, even when presented in a relatively straightforward way, is more than rich enough to captivate students and professors alike.

We owe more debts than we can acknowledge. Thanks to the many faculty and students who over the years have taken the time to review draft materials, to make suggestions for improvements, and to correct our mistakes. Equal thanks to our students for bearing with us as we have field-tested the book manuscript and our revisions to it. Each edition has benefited from careful and insightful comments provided by anonymous reviews arranged by our editors at Aspen Publishing.

The book has benefitted from the excellent research assistance of Vijay Bilaga, Lia Brooks, Will Edmonson, Kristina Hill, James Killelea, Erin McMurray, John Rue, Michael Samalin, Lillith Shilton, Elizabeth TeSelle, and Allen Woods. Renee Cote and Curt Berkowitz provided expert editorial assistance in preparing the original manuscript for publication. Jessica Barmack, Melody Davies, Elizabeth Kenny, Carol McGeehan, and Richard Mixer were instrumental in launching this project, helping it take shape, and seeing it through to initial publication. Renee Hawkins generously served double-duty as word processer and editorial advisor. Enid Zafran prepared the Table of Cases and Index. The publication of the first edition was made possible by generous research support from Brooklyn Law School, Fordham University School of Law, and Vanderbilt University Law School.

John C. P. Goldberg
Anthony J. Sebok
Benjamin C. Zipursky

Nashville, Brooklyn, Manhattan
April 2004

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Notes on the Text

Omissions from judicial opinions reproduced herein are marked with ellipses, except for omitted internal citations, which are not marked unless only part of a citation has been removed. In some opinions we have added paragraph breaks to improve their comprehensibility. For the same reason, we have sometimes deleted headings and subheadings. Numbered footnotes to judicial opinions appear as in the original text. Our additions to the text of judicial opinions are marked with square brackets and/or asterisked and bracketed footnotes. References to scholarly books and articles mentioned in our text and notes can be found in the *References/Further Readings* section at the end of each chapter.

TORT LAW

PART I

OVERVIEW

CHAPTER 1

AN INTRODUCTION TO TORTS

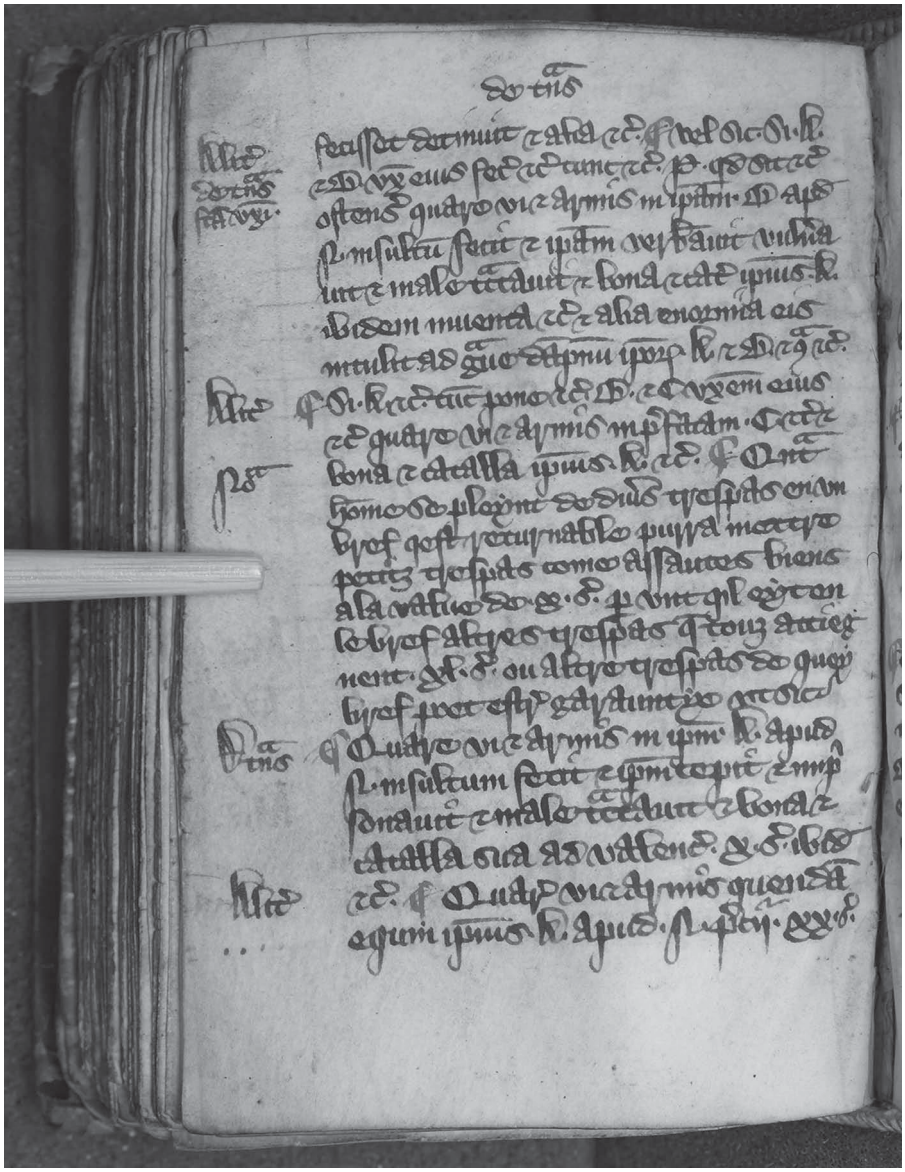
I. WHAT IS A TORT?

Among the courses listed on your schedule, Torts might seem one of the more mysterious. Most entering law students have a rough idea of what a contract or a crime is. The term *tort*, by contrast, tends not to conjure up a clear mental picture or definition.

A brief turn to history may shed some light. Lawyerly usage of the word "tort" dates back to medieval England. There it served primarily as a synonym for "wrong" or "trespass."* Each of these nouns described a category or generic type of misconduct. But what kind? Proceeding still further back in time, we learn that tort derives from the Latin word "*torquere*": to twist. This derivation proves quite illuminating. When a person commits a tort, he acts in a manner that is figuratively "twisted": His acts lack rectitude; they are *wrongful*. Beyond this, a tort is a special sort of wrongful act, one that literally involves a twisting—an *injuring*—of another. And a tort is a special sort of wrong in a second, related sense. When the law identifies misconduct as a tort, it determines that it is the sort of misconduct that entitles the victim to ask a court to assist her in her effort to *set things straight* as between her and the person who has wronged her.

In sum, to commit a tort is to act in a manner that the law deems wrongful toward and injurious to another, such that the other gains a right to bring a lawsuit to obtain relief from the wrongdoer (or *tortfeasor*). The word "torts" in turn refers to a collection of named and relatively well-defined legal wrongs that, when committed, generate a right of action in the victim against the wrongdoer. These include assault, battery, conversion, defamation, defective product sales (products liability), false imprisonment, fraud, intentional infliction of emotional distress, intentional interference with contract or economic advantage, invasion of privacy, negligence, nuisance, and trespass to land or personal property. Tort law consists of the rules and principles that

* Here we mean trespass in its older, broader sense—the sense one finds, for example, in the biblical counsel that we "forgive the trespasses of others."



Entry from an English Register of Writs c. 1375-1425: In the royal courts of medieval England, a lawsuit was usually commenced by the filing of a document known as a "writ." To promote uniformity, these writs were recorded in volumes ("registers") such as this one. The phrase "vi et armis," indicating an allegation of wrongdoing involving a forcibly inflicted injury, can be seen in the third line.

define wrongful conduct, delineate the circumstances under which a victim can obtain redress, and designate the form that such redress may take. As this book's title suggests, tort law articulates legal responsibilities or duties that persons owe to one another, and provides victims of conduct breaching those duties with the power to obtain redress against those who have wronged them.

Torts is a first-year course for a number of reasons. Tort suits tend to present legal disputes that are manageable for students untrained in the law. Tort has also become a visible and politically contested part of the American legal landscape. As such it provides a platform for discussion of current policy issues surrounding law. Finally, tort introduces law students to basic legal categories (e.g., civil liability, private rights of action) and basic concepts (e.g., duty, reasonableness, causation) that will continue to figure prominently in upper-level courses ranging from employment law to securities law to constitutional law. To begin to understand the distinctive domain and concerns of tort law, these materials commence with a judicial opinion concerning a suit that raises a claim for the particular tort of *negligence.*

II. AN EXAMPLE OF A TORT SUIT

The judicial decision you are about to read—Walter v. Wal-Mart Stores, Inc.—arose out of an appeal from a $550,000 judgment against Wal-Mart. That judgment was entered by a trial judge at the conclusion of a two-day jury trial held in Knox County, Maine, in 1999. The trial in turn arose out of a suit brought by a woman named Antoinette Walter. Walter sued Wal-Mart because a pharmacist named Henry Lovin, who worked in the pharmacy department at a Wal-Mart store, misread her prescription for cancer medication and gave her the wrong drug, causing her to suffer serious illness.

As you will see, Wal-Mart had relatively little to say in its own defense. In this respect, the case was atypically one-sided. Indeed, the trial judge took the unusual step of announcing that, based on the evidence presented at trial, any reasonable jury would have to conclude that Walter had proven she was the victim of Wal-Mart's negligence. In other words, the judge found that the plaintiff had so clearly proven her case that he was entitled to conclude, without the aid of the jury, that Wal-Mart had acted carelessly toward her so as to injure her. However, the judge's determination that Wal-Mart had committed negligence against Walter still left one open issue for the jury: the amount of compensation she was entitled to receive from Wal-Mart in light of the injury it had wrongly inflicted upon her. On that issue, the jury decided on the figure of $550,000.

The text that follows is an edited version of an opinion issued by the Maine Supreme Court in response to Wal-Mart's appeal of the trial court's entry of judgment against it. As you will see, in appealing, Wal-Mart argued to the Supreme Court that the trial judge erred in concluding that the jury should not even have had a chance to decide for Wal-Mart. It also argued that the amount of the jury's verdict was excessive, and that the trial was defective in other ways. In light of these alleged problems in the trial, Wal-Mart's appeal sought an order from the Maine Supreme Court setting aside the trial court's judgment. Further, Wal-Mart asked the court either to dismiss Walter's tort suit altogether or to order a new trial so that Wal-Mart could raise its defenses without being handicapped by the erroneous rulings allegedly committed by the trial judge.

The seven members of the Maine Supreme Court unanimously concluded that the trial judge did not commit any of the errors alleged by Wal-Mart. In particular, they ruled that the judge was correct in determining that this was an open-and-shut case

for Walter. Notice that, in upholding this determination, the court first defines the tort of negligence in terms of constituent parts or "elements." It then explains why the plaintiff's evidence clearly established that these elements were satisfied in this case. Along the way, the court's opinion also explains why Wal-Mart's main argument against liability was so weak that the trial judge was entitled to reject it without sending that issue to the jury, and why the jury's award of $550,000 was not excessive.

As you read the opinion, pay attention to what Walter had to prove to make out a claim of negligence, and to why the members of the court concluded that she provided ample proof. Also, consider whether the $550,000 award was appropriate and, if so, what it is meant to represent or accomplish. Finally, think about the role that the parties' lawyers played and might have played in resolving this dispute.

Walter v. Wal-Mart Stores, Inc.

748 A.2d 961 (Me. 2000)

CALKINS, J.

[¶1] Wal-Mart Stores, Inc. appeals from a judgment entered in the Superior Court (Knox County, *Marsano, J.*) following a jury trial awarding damages to Antoinette Walter in the amount of $550,000 for her claim of pharmacist malpractice. . . .

I. FACTS

[¶2] Walter, an eighty-year-old resident of Rockland, was diagnosed with a type of cancer which attacks the lymphatic system. Dr. Stephen Ross, Walter's treating physician and a board-certified oncologist, termed her condition treatable with the proper medication. Dr. Ross prescribed Chlorambucil, a chemotherapy drug, for Walter. On the prescription slip, he explicitly called for Chlorambucil, the generic name, because he feared that the drug's brand name, Leukeran, could be confused with other drugs with similar trade names.

[¶3] Walter took the prescription for Chlorambucil to the pharmacy in the Wal-Mart store in Rockland on May 7, 1997. Henry Lovin, a Maine licensed pharmacist and an employee of Wal-Mart, was on duty at the pharmacy. Instead of giving Walter Chlorambucil, as called for in the prescription, Lovin gave her a different drug with the brand name of Melphalen. The generic name for Melphalen is Alkeran. Lovin did not speak with Walter at the time he filled the prescription, but he provided her with an information sheet which described the effects of Melphalen. Melphalen is also a chemotherapy drug, but it is a substantially more powerful medication than Chlorambucil. Melphalen is typically given in smaller doses over shorter periods of time than is Chlorambucil, and doctors monitor it more closely. Melphalen has a very toxic effect on the body, and it substantially suppresses bone marrow. It has a longer life in the body than Chlorambucil, which means that any side effects from it last longer.

[¶4] To the extent that Walter noticed that the information sheet and bottle label read Melphalen, it did not make an impression on her. She assumed that the drug she had been given was the same as Dr. Ross had prescribed, and she began taking the prescribed dosage. Within seven to ten days of starting the drug treatment, Walter began to suffer from

nausea and lack of appetite. When she referred to the information sheet, Walter saw that such side effects are common for chemotherapy drugs. She continued to take the Melphalen. During the third week after starting the medication Walter noticed bruises on her arms and legs, and during the fourth week she developed a skin rash on her arms and legs. Although the information sheet warned that bruises and rashes should prompt a call to the doctor, Walter waited a few days before attempting to contact Dr. Ross.

[¶5] Dr. Ross testified at trial that his notes indicated that Walter should have had blood tests two weeks after starting medication and that she was to have scheduled an appointment with him within four weeks of beginning the medication. He also testified that because Chlorambucil is slow-acting, he does not insist that his patients have blood tests done in fourteen days but only that they have blood work periodically. Walter testified that she understood she was to have a follow-up appointment with Dr. Ross in four weeks and blood tests sometime before that appointment.

[¶6] On the twenty-third day after starting the medication, Walter had blood tests done. She attempted to reach Dr. Ross by phone to tell him about the side effects, but she was unsuccessful until June 3, 1997. On that day Dr. Ross told her that her blood levels were low and to stop taking the medication immediately. He scheduled an appointment for June 5. Walter, however, was rushed to the hospital later in the day on June 3 when she suffered gastrointestinal bleeding. Following her emergency admission, Walter remained in the hospital five weeks and received numerous blood transfusions. She suffered several infections, and a catheter was placed in her chest. The bruising and skin rash continued. For a period of time she was unable to eat because of bleeding gums and an infection in her mouth. Because of her weakened immune system, Walter's visitors could not come within ten feet of her.

[¶7] Prior to receiving the Melphalen, Walter lived independently and was active. Following her hospital discharge on July 7, 1997, she was physically weak. She initially had to make daily trips to the hospital and later went less frequently. She had to have additional transfusions after she left the hospital. Melphalen did have the effect of causing her cancer to go into remission. Walter's total medical bills for her treatment came to $71,042.63.

[¶8] The two-day jury trial was held in February 1999. Wal-Mart moved for judgment as a matter of law at the close of Walter's case on the grounds that she had failed to present expert testimony on the standard of care by pharmacists, and the motion was denied. At the close of the evidence Walter moved for a judgment as a matter of law, and the court granted Walter's motion concluding that she was entitled to judgment on liability. During Walter's closing argument, Wal-Mart moved for a mistrial arguing that certain comments by Walter's counsel were improper, and the motion was denied. The jury awarded Walter $550,000 in damages. Wal-Mart's post-trial motion for judgment as a matter of law or a new trial was denied.

II. Walter's Motion for Judgment on Liability

. . .

[¶10] The effect of the [trial] court's grant of Walter's motion was a determination, as a matter of law, that[:] Wal-Mart had a duty to Walter which it breached; that breach caused Walter harm; and Walter was not negligent — or if she was negligent, her neg-

ligence [could not entirely exculpate Wal-Mart]. The only issue left for the jury was the amount of damages caused by Wal-Mart's negligence and whether those damages should be reduced because of any action or inaction by Walter. . . . [Wal-Mart now seeks reversal of the court's ruling. Walter insists that it was proper.]

A. Wal-Mart's Representations to the Jury

[¶11] . . . Walter contends that Wal-Mart . . . admitted liability in its [attorney's] opening statement to the jury. . . .[1]

[¶13] Wal-Mart's [attorney's] opening statement admitted the error made by its pharmacist in filling the prescription but . . . there was no . . . admission of negligence. Furthermore, the statement taken in its entire context, does not contain an unequivocal admission that the mistake in filling the prescription caused Walter's harm. . . . For these reasons, we cannot conclude that there was [an] . . . admission that Wal-Mart was liable for Walter's damages. . . .

B. Wal-Mart's Negligence

[¶14] Walter had the burden to prove that Wal-Mart, through its pharmacist employee, owed a duty to Walter that it breached, thereby causing her harm. In Tremblay v. Kimball, 77 A. 405 (Me. 1910), we held that pharmacists owe their customers a duty of ordinary care, but that "ordinary care" for a pharmacist means that "the highest practicable degree of prudence, thoughtfulness, and vigilance and the most exact and reliable safeguards" must be taken. 77 A. at 408.

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1. Wal-Mart's counsel began his opening statement by explaining the process of a lawsuit and why Wal-Mart denied liability in [filing its formal answer to the complaint by which Walter commenced this lawsuit]. He then stated:

> What I'm here to tell you right now is since the filing of the complaint and filing of the answer, Wal-Mart has never denied responsibility for this incident. Never.
>
> Going back to what happened. [Walter's attorney] and I are in substantial agreement in terms of what happened on May 7, 1997, and what has to [sic] occurred since. . . . [We] have a difference of opinion as to what constitutes fair, reasonable and just compensation for Mrs. Walter. That's why we are here. We can't agree. It's as simple as that. We just can't agree on that issue. We need your help. . . .
>
> It's not because we are blaming Mrs. Walter. It's not because we are trying to deflect blame. And it's not because we are trying to sort of make the issues obscure or distracting. We are going to put all the cards on the table. There are no secrets. There are no major disputes as to what occurred. . . .
>
> The hardest issue and the one that is going to be in your laps at the end of tomorrow is what monetary amount represents fair and just compensation for Mrs. Walter? You will be asked to consider medical bills and what she went through during the hospitalization and what she has done [sic] through since then. Wal-Mart is here, and I'm here to ask you as the conscience of the community what that figure is. That's really why we are here. . . .
>
> The evidence in this case will show that . . . on May 7, 1997 . . . Mr. Lovin was given a prescription for Chlorambucil. What came to his mind was Alkeran. And from there the mistake was made. And it was sort of on a path of not being able being [sic] corrected in his mind. He was confident that Chlorambucil was Alkeran. It was a mistake. And it's a mistake for which he's deeply sorry. But that's irrelevant.
>
> The fact is that a mistake was made. That he didn't realize it at the time and wasn't told of the mistake until June 3rd when he received a call from Dr. Ross. . . .

[¶15] Lovin, the Wal-Mart pharmacist, readily admitted that he made an error in filling Walter's prescription. He testified that he thought that the brand name for Chlorambucil was Alkeran, and he filled the prescription with Alkeran, which is Melphalen. Lovin said that he made a "serious error" that did not "satisfy the proper standard of care for a pharmacist." He admitted that he would have discovered the error if he had followed the standard four-step process utilized to check for errors. He acknowledged that to comply with the standard of pharmacy care he should have checked the stock bottle against the prescription. He further admitted that the standard of practice required that he counsel Walter when she picked up the prescription, at which time he would have showed her the drug and discussed it with her. He testified that he did not counsel her, but if he had done so, he would have discovered the error. He also said that Walter would have no reason to suspect that she was given the wrong drug.

[¶16] Pursuant to the standard of "the highest practicable degree of prudence, thoughtfulness, and vigilance and the most exact and reliable safeguards" . . . , Lovin's testimony established that the standard was breached. Even if we were to determine that the standard of practice for pharmacists is the skill and diligence exercised by similar professionals, Lovin's testimony established that standard and the breach of it. None of this evidence was disputed. A jury, acting reasonably, could not have found that Wal-Mart was not negligent.

C. Causation

[¶17] In order to establish liability a plaintiff in any negligence action must show that the defendant's negligence was the . . . cause of the plaintiff's harm. Wal-Mart argues that Walter's motion should have been denied because she failed to prove that Wal-Mart's negligence in filling the prescription was the cause of her injury. Causation means "that there be some reasonable connection between the act or omission of the defendant and the damage which the plaintiff has suffered." Wheeler v. White, 714 A.2d 125 [, 127 (Me. 1998)]. . . .

[¶18] There was uncontroverted medical evidence that Melphalen, which Wal-Mart provided Walter erroneously, caused damage to her body. . . . Dr. Ross testified that the Melphalen made Walter seriously ill, to the point that he was not sure she would survive, and that her lack of energy after her release from the hospital was the result of the illness caused by the wrong medication. Wal-Mart's expert oncologist also testified that the side effects of Melphalen caused the lengthy hospitalization, and the hospitalization itself likely caused Walter's malaise and depression after her discharge.

[¶19] Wal-Mart['s] . . . expert speculated that if a blood test had been done fourteen days after starting the medication it might have shown lowered blood levels and, depending on how low those levels were, Walter's physician might have stopped the medication, and if the medication had been stopped sooner, the harmful effect may have been less. Wal-Mart's expert did not testify that there would have been no damage if a blood test had been done on the fourteenth day. In fact, in his description of Melphalen, he noted it has a long life in the body and that its side effects last longer.[3] . . . No reasonable factfinder could

3. The blood tests alone did not reveal that the wrong medication had been given. Dr. Ross did not discover that she was taking the wrong medication until after she was admitted to the hospital.

have found that Wal-Mart's negligent act in misfilling the prescription was not a substantial cause in bringing about Walter's suffering. "[W]hen the totality of the evidence adduced in *any particular case* is so overwhelming that it leaves open to a fact-finder, acting rationally, only one conclusion on the issue, the issue is then determined as a matter of law." Laferriere v. Paradis, 293 A.2d 526, 528 (Me. 1972). The trial court did not err in granting judgment as a matter of law to Walter on the issue of causation.

D. Comparative Negligence and Mitigation of Damages

. . .

[¶21] Under Maine's comparative negligence statute, the damages owing to a plaintiff may be reduced when the plaintiff's harm is partly the result of the plaintiff's own fault, and fault is defined as the negligence that would give rise to the defense of contributory negligence. *See* 14 M.R.S.A. §156 (1980). If the plaintiff's fault is equal to or greater than that of the defendant, the plaintiff cannot recover damages.

. . .

[¶22] [Wal-Mart argued that the trial judge erred by failing to instruct the jury to consider whether Walter was herself at fault for not determining, at the time the medicine was dispensed, that Lovin had improperly filled her prescription. Had such an instruction been given, Wal-Mart argued, the jury might have assigned fault to Walter, which — under Maine's comparative fault statute — would have resulted in a reduction in her damages award or, if her fault was deemed equal to or greater than Lovin's, no recovery at all. Based in part on Lovin's trial testimony that Walter "would have no way of knowing" that she had been given the wrong medication, the Supreme Court concluded that there was no basis for attributing fault to Walter for failing to recognize that she was being sold the wrong drug, and hence no trial court error in declining to give a comparative fault instruction. — EDS.]

. . .

[¶23] [Wal-Mart also appealed on the ground that the trial court erred in failing to instruct the jury to consider assigning fault to Walter based on her failure to promptly contact Dr. Ross after she began to experience side effects from the medication. The Maine Supreme Court concluded that the trial court had — in a different instruction pertaining to the calculation of damages — adequately informed the jury that it could reduce its award to Walter if it found that she had unreasonably delayed in contacting Dr. Ross, and that her delay worsened her injuries. — EDS.]

. . . .

III. WAL-MART'S MOTION FOR JUDGMENT AS A MATTER OF LAW

[¶31] Wal-Mart moved for judgment as a matter of law on the ground that Walter failed to present any expert evidence on the pharmacist's standard of care. It points out that Lovin was not designated as an expert. In this case the testimony of an expert was not necessary. We have said that where professional negligence and its harmful results "are sufficiently obvious as to lie within common knowledge" no expert testimony is necessary. . . . The negligence of the pharmacist and the harmful results were sufficiently obvious to be within the common knowledge of a lay person. It does not take

an expert to know that filling a prescription with the wrong drug and failing to take the steps in place in that pharmacy to check for the wrong drug is negligence.

IV. Wal-Mart's Motion for Mistrial

[¶32] Wal-Mart moved for a mistrial because of three comments made by Walter's counsel during closing argument. First, Walter's attorney stated that the pharmacist attempted to accept responsibility but his employer, Wal-Mart, refused to accept responsibility for Walter's injury. Wal-Mart objected, and the objection was sustained. The court admonished counsel that the only issue was damages and told the jury that they were not to be swayed by any bias or predisposition towards one party or the other. [Wal-Mart's second objection is omitted.—Eds.] Third, while referring to the amount of damages the jury could award, during rebuttal, Walter's counsel told the jury it should consider how much money professional basketball players are paid. Wal-Mart objected and the objection was sustained. Wal-Mart argues that the effect of the three comments was to prejudice the jury against Wal-Mart so that it would punish Wal-Mart by the amount of damages.

[¶33] We review a refusal to grant a motion for a mistrial for abuse of discretion. *See* Sheltra v. Rochefort, 667 A.2d 868, 871 (Me. 1995). The judge sustained the objections to the comments, told the jurors to ignore the comments, and gave curative instructions. The trial judge did not abuse his discretion. . . .

V. Wal-Mart's Motion for New Trial

[¶34] After the verdict Wal-Mart moved for a new trial. . . . Wal-Mart . . . contends that the damages were excessive and the size of the verdict demonstrates that the judge and jury were biased against Wal-Mart.

[¶35] "When a court refuses to grant a new trial on the ground of an excessive damage award, the ruling will not be reversed except for clear and manifest abuse of discretion." Gilmore v. Central Maine Power Co., 665 A.2d 666, 670 (Me. 1995). . . .

[¶36] Walter's total medical bills and expenses equalled $71,042.63. The jury awarded Walter $550,000 in damages. Presumably, the additional $479,000 of Walter's recovery is in compensation for her pain and suffering. The jury heard several witnesses, including Walter herself, testify about the painful treatment she received in the hospital, the long recovery process, and the continuing difficulties she faces. In light of this evidence, which must be considered favorably to Walter, the jury's award of damages is rational. "Although the verdict may seem large, it reflects the considered opinion of the jury within the range of evidence of sufficient probative character. . . ." [*Michaud v. Steckino*], 390 A.2d [524,] 537 [(Me. 1978)]. (quoting Fotter v. Butler, 145 Me. 266, 273, 75 A.2d 160, 164 (1950)). . . .

Judgment affirmed.

[Concurring opinion omitted.—Eds.]

A. Common Law and Statute

1. ***Appellate Courts.*** The Maine Supreme Court is composed of seven justices, one of whom, Justice Calkins, wrote the excerpted opinion that you have just read.

As is evident from *Walter*, the court is an appellate court—it decides appeals brought to it by litigants who believe there are legal grounds for challenging adverse lower-court decisions. Because it filed the appeal, Wal-Mart is dubbed the *appellant.* (For the appellate phase of the litigation, Ms. Walter, the plaintiff at the trial level, is deemed the *respondent.*) As indicated by its name, the Maine Supreme Court is the court of last resort for issues governed by Maine law. Thus, the decision in *Walter*—issued in April of 2000—conclusively resolved a lawsuit that had been commenced two years earlier, and that concerned an act of carelessness that took place another year before that.*

2. *Negligence and Judge-Made Law.* We stated above that torts are injurious wrongs for which victims are entitled to seek redress. In *Walter,* the tort alleged is negligence. Much of this book aims to provide insight into that particular tort. For now, we can define it as a failure to heed a duty of reasonable care that causes an injury to a person to whom that duty is owed. Thus, to establish that she was a victim of negligence, Walter had to prove (1) that Wal-Mart owed her a *duty* of reasonable care, (2) that it *breached* that duty, (3) that the breach of duty *caused* her to suffer adverse effects, and (4) that these effects are recognized by the law as an *injury*.

In most U.S. jurisdictions, torts such as negligence are *common law causes of action*. This means that the plaintiff's ability to sue in the first place, and the terms on which she can obtain redress, are established by judicial decisions rather than by a statute passed by a legislature. In *Walter*, for example, the Maine Supreme Court states in ¶14 that, "Walter had the burden to prove that Wal-Mart, through its pharmacist employee, owed a duty to Walter that it breached, thereby causing her harm." This description of the tort of *negligence*—which is consistent with the one we provided a moment ago—derives from prior Maine judicial decisions that have defined negligence in terms of the four elements of duty, breach, causation, and harm (injury). The court did not provide a citation to those earlier decisions, perhaps because this basic description of negligence is so well-established as to not warrant the effort. By contrast, the court does cite earlier decisions to help define the elements of breach and causation. *See* ¶¶14, 17. Likewise, it cites earlier decisions for procedural rules, such as the rule that the trial court's decision not to grant a new trial can only be overturned if it constitutes a clear abuse of discretion. *See* ¶35.

3. *The Principle of Stare Decisis.* The court's reliance on earlier decisions to guide its legal analysis was not simply a matter of choice. Rather, the court was obligated to rely on them. This obligation stems from a core principle of the common law called *stare decisis*. *Stare decisis*—which translates as "let the decision stand—is a complex notion. Here is a rough description of its content:

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* State and federal courts maintain websites from which opinions may be downloaded. (For Maine decisions, see www.courts.maine.gov.) Publishing companies also reproduce judicial opinions in hardbound volumes that can be found in law libraries, as well as in databases accessible to subscribers. The citation that follows the case-caption at the beginning of *Walter v. Wal-Mart*—748 A.2d 961—informs you that the decision can be found starting at page 961 of volume 748 of the Atlantic Reporter, Second Series, published by West Publishing Co.

> A court that is presently required to resolve an issue of law ("the present court") must accept the resolution of that issue that is contained in a prior judicial decision involving other litigants if:
>
> a. the prior decision was rendered by a court with the *authority* to render decisions that are *binding* on the present court;
> b. the issue was *actually resolved* in the prior decision, rather than assumed away;
> c. the resolution of the issue was *necessary* to the prior decision; and
> d. the issue arose in the prior decision in *comparable circumstances* to those of the present decision.

By obliging subsequent courts to follow prior courts' decisions, the principle of *stare decisis* functions to promote a reasonable degree of consistency across decisions within a jurisdiction, and thereby to advance basic values associated with the rule of law, such as predictability and comparable treatment of similarly situated litigants.

The application of *stare decisis* can sometimes be straightforward and sometimes subtle. For example, the citation by the *Walter* court to the 1910 *Tremblay* decision in ¶14 for the proposition that pharmacists owe their patients "ordinary care" was routine. Contrast the court's treatment in a footnote (omitted from the above opinion excerpt) of two other court decisions that indicated a willingness to assign some degree of responsibility to patients who failed to prevent or mitigate injuries caused by an erroneous prescription:

> We are aware of two cases from other jurisdictions in which a comparative negligence instruction was given when a pharmacist gave the plaintiff the wrong medication. The facts in one case, however, make it distinguishable from Walter's situation. In Forbes v. Walgreen Co., 566 N.E.2d 90, 91 (Ind. App. 1991), the plaintiff had been taking medication for headaches. When she had the prescription refilled, she noticed that the medication she was given was different in size, shape, and color from what she had been taking, but she took it anyway for several months. The wrong medication did not cause her to be sick, but it was ineffective on her headaches. *See id.* Walter had never taken her medication previously and had no reason to be suspicious of its size, shape, or color. In the other case, the ten percent reduction of plaintiff's damages for comparative negligence was not appealed or discussed. *See Van Hattern v. Kmart Corp.,* 719 N.E.2d 212, 222 (Ill. App. 1999). . . .

Walter v. Wal-Mart Stores, Inc., 748 A.2d 961, 969 n. 5 (Me. 2000).

The first thing to observe is that the Maine court was not obligated to follow these precedents for a very basic reason: They were issued by courts within other states' judicial systems. Each state's tort law forms a distinct body of law. The courts of one state do not have *authority* to issue decisions about substantive tort law that are binding on the courts of another state. Rather, out-of-state precedents such as these are at best *persuasive* authorities—helpful or informative, but not *controlling*.

Second, even if we were to imagine that these earlier decisions had been issued by the Maine Supreme Court itself, the *Walter* court would still have had reasons not

to follow them. Thus, the footnote quoted above asserts that the first precedent is *distinguishable*—it was decided on facts sufficiently different from those in *Walter* that one can say without contradiction that the plaintiff in the earlier case failed to mitigate her damages, while Ms. Walter did not. As for the second out-of-state precedent, the court avoided it on the ground that it resolved the issue of the plaintiff's failure to mitigate without analysis, and therefore was not entitled to deference. In other instances, a court might decline to follow a prior decision's resolution of an issue on the ground that the resolution was not *necessary* to the decision—that the earlier court could have resolved the dispute in front of it without ever addressing the issue in question. This idea is sometimes conveyed by saying that the prior resolution was not part of the *holding* of the case, but instead constituted *dictum*.

Finally, note that, even though the principle of *stare decisis* is central to the operation of the common law system, it is not understood by courts—particularly courts of last resort, as is the Maine Supreme Court on issues of Maine law—to state an absolute or inexorable rule that controlling precedents must be followed no matter what. Indeed, courts sometimes conclude that precedents ought to be overruled or abandoned because social or economic circumstances have changed since the time of the original decision, or because the precedent runs counter to important policies or principles, or because they conclude that the initial decision was erroneous at the time it was rendered. As we will see, the question of when departure from otherwise binding precedent is warranted is one of the most difficult issues in common law analysis.

4. *The Varying Role of Statutes.* Tort law need not be judicial in origin. Many European countries have statutes that create and define the general parameters of tort liability. For example, Section 823(1) of the German Civil Code translates in part as follows:

> Anyone who intentionally or negligently injures life, body, health, freedom, ownership or any other right of another in a manner contrary to the law shall be obliged to compensate the other for the loss arising.

A handful of states, including California and Louisiana, whose legal systems reflect the influence of European civil law (as opposed to English common law) have similar provisions. However, because these statutes are written so broadly, they require extensive judicial interpretation as they are applied to concrete cases. As a result, the tort law of those states is in many respects indistinguishable from that of a common law jurisdiction such as Maine.

In European and Anglo-American jurisdictions, statutes can also create what amount to new tort causes of action for specific situations. For example, Massachusetts General Laws, Chapter 93A, is a statute that protects consumers against unfair business practices. In aid of that goal, it states:

> Any person who . . . suffers any loss of money or property . . . as a result of the use . . . by another person . . . of . . . an unfair or deceptive act or practice . . . [may sue for damages and may also recover reasonable attorneys' fees and litigation costs if successful].

Chapter 93A and its counterparts sometimes permit suits for injuries caused by questionable business practices even though, for one reason or another, the practices do not amount to fraud or some other common-law tort.

In addition to creating new tort causes of action, statutes interact with the common law of tort in other ways. For example, statutes can limit tort remedies that would otherwise be available by setting dollar caps on damage awards. Alternatively, as discussed in Chapter 6, statutes that specify certain standards of conduct—for example, laws that require cars to be driven with their headlights on after dusk and before sunrise—are sometimes treated by the courts as setting the standard of care that will govern the resolution of a tort suit by someone who is injured by a failure to comply with these standards. As noted in *Walter*, the legislature and governor of Maine enacted a statute—14 M.R.S.A. §156—with very important ramifications for tort law. Under that statute, which was originally passed in 1965, if there is some evidence presented at trial that the plaintiff's fault helped bring about her own injuries, the jury will be asked to consider that evidence and to assign a percentage fault to both the plaintiff and the negligent defendant, which assignment will have the effect of reducing or barring any recovery by the plaintiff. The place of statutes in tort law will be a recurring issue in these materials.

5. *The Torts Restatements.* The American Law Institute (ALI) is a private organization founded in the 1920s that is composed of judges, lawyers, and scholars. Its stated mission is to promote clarity and consistency in the application of the law. In aid of this goal, the ALI from time to time publishes treatises covering particular areas of common law such as Contracts, Property, and Torts. These treatises are titled "Restatements." Each Restatement aims to identify "black letter" law: rules and standards on which there is broad consensus among judges from different jurisdictions. Each also provides commentary that elaborates on these rules. Unlike statutes, regulations, and prior judicial decisions within a jurisdiction, a Restatement does not itself have the force of law. However, Restatements have sometimes been enormously influential, and particular provisions often are incorporated into common law by judicial decision.

Each Restatement is shepherded through the ALI by a "Reporter" or set of Reporters. The Reporters, eminent scholars in the relevant field, serve as the primary authors of the Restatements. For this reason, the Restatements tend to reflect a particularly scholarly "take" on the law. The Restatement of Torts has already gone through two versions, and its third iteration is presently under construction. The First Restatement was published in the mid-1930s, with Francis Bohlen acting as primary Reporter. The Second Torts Restatement was published in the mid-1960s and early 1970s; its Reporter was William Prosser, aided by John Wade. The Third Restatement is being published in installments. Thus far, provisions pertaining to the following topics have been published: "Products Liability" (1998) (James Henderson and Aaron Twerski, Reporters); "Apportionment of Liability" (2000) (Michael Green and William Powers, Reporters); "Liability for Physical and Emotional Harm" (2 volumes: 2010 & 2012) (Michael Green, William Powers and Gary Schwartz, Reporters); "Liability for Economic Harm" (2020) (Ward Farnsworth, Reporter); and "Intentional Torts to Persons" (partially completed) (Kenneth Simons and Jonathan Cardi, Reporters).

Additional provisions on property torts and other matters are currently being drafted. We will refer regularly to the Torts Restatements, particularly the Third Restatement, throughout this book.

B. Responsibilities in Tort

Negligence suits like Ms. Walter's aim to establish that another person or entity was legally at fault, and hence legally responsible, for the plaintiff having suffered an injury. Yet, even in an apparently simple case such as this one—which involves a single victim allegedly injured as the result of an in-person interaction with a single careless actor—allegations and attributions of responsibility are not as straightforward as they might first seem. Consider, for example, a seemingly simple question. Why is the caption of this case "Walter v. Wal-Mart Stores, Inc."? More specifically, why isn't it "Walter v. Lovin"?

1. *Respondeat Superior.* A negligence suit such as Ms. Walter's alleges that a specific individual engaged in conduct that was careless as to her well-being and injured her. Yet, in many instances, a negligence plaintiff will often seek to establish not (or not only) that the careless individual owes her compensation, but instead (or also) that *the entity* for which that individual worked owes her compensation. Ms. Walter, for example, did not seek any compensation from the pharmacist, Henry Lovin, which is why he is not named in court documents as a party to the suit. Instead, she sought compensation from the corporate bank accounts of Wal-Mart, Lovin's employer.

Plaintiffs who sue entities such as corporations often are able to recover from them because of a longstanding substantive rule of tort law called *respondeat superior* (literally, "let the master answer [for the wrongs of the servant]"). Under that rule, an employer is held *vicariously liable* for wrongful acts of its employees committed within the scope of their employment. This responsibility attaches even if the employer (i.e., the firm's managers) were careful in supervising the employee's job performance.

In *Walter* itself, the evidence produced at trial revealed that Wal-Mart policy requires all of its pharmacists to follow certain procedures to protect against errors. Thus, each is supposed to check the bottle from which he dispenses medication against the original prescription to ensure that they match. In addition, the pharmacist is always supposed to discuss with the patient the drug he is dispensing to her, which provides another opportunity to catch mistakes. Lovin, however, did neither of these things. Given this policy, and depending on whether Wal-Mart and its store manager took reasonable measures to implement it, one can argue that Wal-Mart *management* was *not* careless in terms of how it set up and operated the pharmacy from which the medication was dispensed to Ms. Walter. Even so, Wal-Mart would still be subject to liability. This is because, under *respondeat superior*, liability attaches to Wal-Mart vicariously, that is, simply because Lovin acted carelessly in performing his job as a Wal-Mart pharmacist, notwithstanding that his actions were perhaps in violation of company policies.

The doctrine of *respondeat superior* is not the only basis for holding corporations, organizations, and government entities liable in tort law, but it is perhaps the primary basis for doing so. (We consider the content and justifications for the doctrine more

fully in Chapter 8.) To the extent it does function to impose liability on employers, it does *not* thereby immunize careless employees from liability. In other words, the doctrine functions to add another entity to the roster of potentially responsible parties, not to substitute one for another. Given this fact, it is worth asking one more question about the caption of the *Walter* case: Why doesn't it read Walter v. Wal-Mart Stores, Inc. & Lovin? The immediate answer is that Ms. Walter did not bring suit against Lovin. But, given that she could have, that answer simply provokes another question: Why didn't Ms. Walter sue Lovin in addition to suing Wal-Mart? Can you think of any strategic reasons why her lawyer might advise against it?

2. *Multiple Tortfeasors.* *Respondeat superior* adds an important layer to tort attributions of responsibility. Another source of complexity is that tort cases often allege or identify wrongdoing on the part of multiple actors. Reexamine the facts laid out in ¶¶2-8 of the majority opinion. Do they identify anyone else (other than Wal-Mart or Lovin) who might be found to have carelessly contributed to Ms. Walter's injury?

What about Walter's physician, Dr. Ross? Did he act with ordinary care in failing to arrange a blood test within two weeks of the commencement of her treatment? Alternatively, or in addition, was it careless of him to respond to her description of her symptoms by arranging for her to come into the office two days later, by which time she had been hospitalized? Suppose this was carelessness and that it did have some role in producing Walter's injuries. How would these suppositions affect your assessment of Wal-Mart's responsibility? Should one or the other be held responsible, or should both? Interestingly, although it was probably open to each of them, neither Walter's attorney nor Wal-Mart's attorney sought to add Dr. Ross as an additional party to the lawsuit, which perhaps would have enabled the jury, at its discretion, to assign some responsibility to him.

It is increasingly common for modern negligence suits to involve claims against and among multiple parties, each of whom is alleged by the others to have been partly or wholly responsible for a given victim's injury. In this respect, at least,

Check Your Understanding

Revisiting *Walter v. Wal-Mart*

- Explain how the actions of pharmacist Henry Lovin amounted to a tort committed by Lovin against Antoinette Walter. What were the consequences for Walter, Lovin, and Wal-Mart of the Maine courts' determination that Lovin's actions were careless and had caused an injury to Walter?
- If juries are normally supposed to decide the "breach" and "causation" issues raised by a negligence claim, why didn't the jury in *Walter v. Wal-Mart* decide those issues? Who decided not to submit these issues to the jury, and why was it legally permissible to bypass the jury on those issues?
- The legal rules that define the tort of negligence and the doctrines of *stare decisis* and *respondeat superior* were all critical to the resolution of Walter's lawsuit. Where do these rules come from? By what procedures did they become part of Maine law?

Walter is helpfully old-fashioned in its simplicity. Much of the discussion of "duty," "cause," and "apportionment" in Chapters 2, 4, 5, and 7 concerns the complexities introduced into negligence law by the presence of multiple potentially responsible parties.

3. *Comparative Responsibility.* There is another group of actors whose conduct must be considered in gauging tort law as a system for articulating and enforcing responsibilities. This group consists of the victims who are bringing the tort suits. To what extent does their own conduct bear on the question of responsibility for their injuries? As noted above, under the Maine comparative fault statute, a party who can be deemed to have been at fault for her own injuries may find that her recovery is reduced or barred because of that fact. Most U.S. jurisdictions apply similar rules. Principles of comparative responsibility are discussed further in Chapter 7.

4. *Insurance.* Although it did not figure in *Walter*, there is often one other key player that figures in modern tort suits alleging negligence, namely, an insurance company that has provided *liability insurance* to the defendant. A liability insurance policy is a special kind of contract. In exchange for regular payments (premiums), the insurer agrees to pay for (indemnify) certain liabilities incurred by persons insured under the policy. So, for example, a physician or attorney will typically maintain malpractice insurance to cover liability if she is successfully sued for professional misconduct by a patient or client. Retailers likewise often carry liability insurance for injuries caused to customers and others in the course of their operations. Wal-Mart is so large and wealthy that it "self-insures." Rather than paying premiums to an insurance company, it sets aside a portion of its assets to cover anticipated liabilities. Liability insurance is discussed further in Chapter 8.

Insurance can also relate to tort litigation in another way. Sometimes victims have insurance — so-called first-party insurance — that covers certain costs they might incur, such as health insurance to cover the costs of one's medical care. Walter was in fact covered by Medicare, which is a federal insurance program by which the government pays for certain healthcare services provided to persons over the age of 65. However, under the substantive tort law of Maine, Wal-Mart was barred from arguing that *it* should benefit, by way of a reduced damages award, from the fact that Walter's medical expenses were mostly or entirely covered by Medicare. As we note in Chapter 8, whether juries in tort cases should be given information as to first- and third-party insurance coverage is currently a hotly debated topic.

C. The Role of Lawyers

The legal rules and economic realities that help determine the ability of clients to secure representation and proceed with or fend off tort suits are of central importance to the operation of tort law. Indeed, a practicing tort lawyer would likely tell you that, for purposes of practicing law, a working knowledge of the "nuts and bolts" of getting a case to

and through court is of primary importance. The point of such an observation is not that knowledge of tort law is irrelevant to practice. Rather, it is a way of emphasizing that an understanding of tort doctrine can only get the aspiring torts practitioner so far.

Unfortunately, given space constraints, and the complexity of substantive tort doctrine alone, we can here only touch upon basic procedural aspects of tort litigation. Other courses, such as civil procedure and evidence, will provide you with greater knowledge of these topics. *In the discussion that follows, we simplify matters by limiting the discussion to a two-party tort lawsuit in which a plaintiff such as Walter brings a single tort claim against a defendant such as Wal-Mart.* As cases in later chapters demonstrate, tort cases can involve many parties, as well as various different claims raised by different parties.

1. *Attorneys and Contingent Fees.* Tort actions are lawsuits that are conducted by lawyers who are paid to represent their clients. Lawyers arrange for payment by means of either a contingent fee contract or an hourly rate contract. Under an hourly rate contract, the attorney and client agree to a per-hour rate, the lawyer keeps track of the hours worked on the case, and then the lawyer sends regular bills to the client during the pendency of the litigation. The hourly rate contract is the prevalent form of contract between corporate clients and their counsel.

Contingent fee contracts free the client from any obligation to provide the lawyer with up-front or interim compensation for his labor. In exchange, the lawyer is given the right to obtain a specified percentage of any recovery, often about 33 percent. Under this type of contract, if the tort suit results in no recovery, the client pays nothing by way of fees. However, the client is obligated to pay certain costs—for example, copying costs and court filing fees—regardless of outcome. In the United States, most personal injury plaintiffs secure legal representation through a contingent fee contract.

2. *The Contingent Fee Contract: History.* The shape of modern American tort law has been driven at least in part by significant changes in the regulation of contracts between attorneys and their clients. Early American law, like the English law from which it derived, treated attorneys not so much as private-sector service providers but as public officials. Accordingly, the amount a lawyer could charge his client was determined based on schedules developed and implemented by courts and legislatures. More strikingly, at least to the modern eye, contingent fee contracts, regardless of the percentage charged, were deemed not only void but also *criminal*. Any person who financed or otherwise assisted the progress of another's lawsuit in return for a portion of the proceeds of that suit could be prosecuted for the crime of *champerty* and, if found guilty, fined or imprisoned.* Finally, early American law adopted the *loser-pays* rule. Under this rule, the party who loses the suit must pay the legal costs incurred by the prevailing party. As indicated, these sums were set by the courts, but they still threatened to impose a significant burden on the unsuccessful plaintiff (as well as the unsuccessful defendant). Each of these features of Revolutionary era law served in some degree to hinder tort litigation.

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* Champerty was closely related to two other crimes: *maintenance* and *barratry*. Maintenance was defined as officious intermeddling in the lawsuit of another. Barratry was broadly defined to include any effort to stir up litigation.

Early in the 1800s, this regulatory scheme began to break down. In part, this happened because the idea that legislatures and courts should heavily regulate lawyers' fees ran counter to the professional interest of the emerging bar, as well as two core tenets of American political culture: anti-elitism and faith in free markets. The notion that a person should be denied the ability to assert his legal rights simply because he lacked disposable income struck many as fundamentally unjust. Likewise, the notion that the attorney and client should not be free to set the terms of their business relationship increasingly seemed an unwarranted piece of paternalism.

Between 1800 and 1850, state and federal courts began to enforce attorney-client contracts in which clients voluntarily agreed to pay higher-than-statutory fees to their attorneys. Likewise, courts started to rule that contingent fee contracts between lawyers and their clients fell outside the definition of champerty and were therefore enforceable. Eventually, the blanket ban on contingent fee contracts gave way to much more selective bans; contingent fees were decriminalized, except with respect to certain representations. That pattern holds true today: Most states still do not permit lawyers to represent criminal defendants or persons in divorce proceedings on the basis of a contingent fee contract, but do permit them to do so for other representations, including representation in tort suits.

By the early twentieth century, American courts had also shifted away from the loser-pays rule, which meant that the prevailing party was no longer allowed to recover its litigation costs from the other party. For plaintiffs, the rejection of the loser-pays rule arguably reduced the downside risks of litigation and thus may have encouraged the commencement of tort litigation. Because this rule stood in contrast to the English approach, it soon came to be dubbed the "American rule."

3. *Modern Practice.* With some important exceptions, U.S. law today tends not to set caps or otherwise limit the rates charged in contingent fee contracts. In this regard, lawyers are treated no differently than other service providers such as building contractors or repairmen: We rely on the "market" to set fair rates. The market for lawyers has a number of imperfections, however. For example, it is only since the 1970s that lawyers have advertised widely for clients instead of relying on referrals. There is some evidence that, as the supply of lawyers has increased, and as bans on advertising have been lifted, contingent fees have gone down in response to competition. Today, the rate is likely to be in the vicinity of 33 percent. Beyond this, the degree to which personal injury lawyers compete on price is unclear.

Also, important aspects of the older conception of the lawyer as public official have endured, and provide the basis for judicial regulation of lawyer-client contracts. Every state court system has adopted binding rules of professional conduct that, among other things, prohibit lawyers from collecting clearly excessive fees. Violations of these rules do not necessarily constitute a crime, nor even the tort of legal malpractice. They do, however, subject attorneys to disciplinary actions, including disbarment. The standard for "clearly excessive" fees is obviously vague, and its application depends on factors such as the complexity of the case, the likelihood of success on the merits,

etc.* Furthermore, although the prohibitions on champerty have been loosened in the United States, as well as in other common law systems, U.S. lawyers are still prohibited by the rules of professional responsibility from raising money to pursue litigation by partnering with non-lawyers. Their clients, however, are now allowed in most states to sell portions of their lawsuits to investors, and many legal finance firms now treat litigation as an "asset" that can deliver profits if purchased at a price lower than the expected return on investment.

In common law tort actions in the United States, the American rule against fee shifting continues to predominate. However, federal and state statutes have carved out important exceptions to the rule. You may have noticed, for example, that the Massachusetts Consumer Protection Act, quoted above, provides that a plaintiff who prevails is entitled to attorneys' fees from the defendant. Likewise, federal statutes authorizing persons to sue for certain acts of race, gender, and disability discrimination entitle successful plaintiffs to recover fees from the opposing party. Fee-shifting provisions encourage individuals with meritorious claims to bring suit. Consider, as we proceed through these materials, why legislatures might use them selectively to encourage some types of suits but not others.

Even though the legal validity of contingent fee contracts in tort suits is thus now well established, courts and commentators have expressed many concerns over their use. These critics argue that the pendulum has swung too far in the direction of

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* In 1990, England allowed "Conditional Fee Agreements" (CFAs) in suits for personal injuries or human rights violations. Under the terms of a CFA, if the case is lost, the lawyer is not paid. If the case is won, the lawyer is paid the fee that she would normally charge (based on an hourly rate and the time spent on the case) plus an additional "success fee" of up to 100% of the normal fee. In 2000, CFAs were extended to all civil cases, excluding family law cases. One arguable drawback of CFAs is that, since English law still applies the loser-pays rule to civil litigation, a losing party whose opponent obtained representation through a CFA is responsible for both the opposing attorney's legal fees and any success fee that was agreed to under the CFA. In 2013, England modified the application of the loser-pays rule where there is a CFA, so that the success fee is now paid by the winning party. Thus, if the winning party who arranged for a CFA is the plaintiff, the success fee is taken out the damages she receives. If the winning party who arranged for a CFA is the defendant, the success fee is paid out of pocket by the defendant. (In both cases a party who agrees to a CFA can purchase insurance to cover the cost of the success fee.) However, in order to protect personal injury plaintiffs from paying "too much" of their award to their own lawyer if they win, a success fee in personal injury cases greater than 25% of the plaintiff's damages is now forbidden, excluding damages for future healthcare and economic loss.

In 2013, England also allowed "Damages-Based Agreements" (DBAs). DBAs are only available to plaintiffs. Under a DBA, if the case is lost, the lawyer is not paid, while if the case is won, the lawyer receives a percentage of the damages recovered (a contingency fee). In order to avoid an increase in adverse costs borne by losing defendants as a result of the operation of the English Rule, the losing defendant is responsible for only the portion of the legal fees that the plaintiff's lawyer would have normally earned (based on hourly rate and time spent on the case). If the contingent fee due to the lawyer exceeds that amount, the winning plaintiff, rather than the defendant, makes up the shortfall. Again, however, personal injury claims are subject to a 25% cap.

In 2007 the German Constitutional Court ruled that, under certain circumstances, clients and lawyers may have a right to agree to a contingency fee contract, and in 2006, Italy permitted lawyers to charge a contingent fee in civil cases. These countries, like all of Europe, continue to adhere to the loser-pays rule.

plaintiffs, and that contingent fees foment litigation by eliminating most of the up-front cost of suing. These criticisms call to mind the picture of "ambulance-chasing" lawyers aggressively promoting litigation regardless of their clients' interests.* Other critics suggest that contingent fee contracts are bad even for clients with meritorious claims because they encourage lawyers to push for quick settlements that generate very high returns relative to the effort put into the case, rather than to pursue their clients' best interests. Many, however, continue to defend contingent fees both on freedom-of-contract grounds and as necessary to ensure widespread access to justice, particularly in a country reluctant to fund legal services for the poor. Empirical studies seem to indicate that the rate of return on contingent fee contracts is not significantly higher than on hourly contracts.

D. Proceeding Through Court

1. *Complaints and Private Rights of Action.* In tort suits, the sequence of legal events begins at the behest of the injured person, who, if represented by an attorney, will have his lawyer draft a document called a *complaint*. Roughly speaking, we can say that a tort suit is commenced when the complaint is *served on* (i.e., delivered to) the defendant, and filed with the court that will preside over the lawsuit. A typical tort complaint is a modest document. It briefly identifies the most basic allegations contained in the plaintiff's suit, demands a jury trial, and requests that the court order the award of appropriate relief in the event that the defendant is held liable. A copy of the complaint in the *Walter* case is provided in the Appendix.

The role of the plaintiff's complaint in commencing a tort suit attests that tort is in an important sense *private* law rather than public law. The public might have an interest in a given tort suit. Indeed, the outcome of Ms. Walter's suit might conceivably affect how Wal-Mart, a global retailer, goes about dispensing prescription medications. Still, the matter is private in that tort law operates in the particular manner of empowering a private citizen, rather than a government official, to commence a legal proceeding, at her option. Likewise, the point of the suit, at least in the first instance, is for that citizen to obtain redress from the person who has allegedly wronged her.

2. *Answers and Motions to Dismiss.* Typically, a tort defendant will respond to a complaint by having his attorney file an *answer*—a document that will probably admit certain basic facts alleged in the complaint, while also denying others, as well as denying liability. (Wal-Mart's answer to Walter's complaint is reproduced in the Appendix.) In lieu of an answer, a defendant might instead file a *motion to dismiss* the plaintiff's complaint. A *motion* is a formal request for a ruling from the court, usually made by a party to the lawsuit. As its name suggests, a motion to dismiss requests that the trial judge enter judgment for the defendant at the very outset of the suit, on the basis of nothing more than the paper pleadings. Because there has been no opportunity for the plaintiff to build her case, a heavy burden is placed on the movant/defendant.

* In fairness, we should note that the defense bar is just as frequently accused of manipulating hourly fee arrangements by overstaffing cases and otherwise "overlawyering" cases by pursuing unnecessary motions and needless discovery.

Essentially, the defendant has to demonstrate that, no matter what evidence the plaintiff may be able to present in support of her tort claim as the suit goes forward, the claim contains some fatal defect that prevents the court from affording any manner of relief to the plaintiff.

By their nature, motions to dismiss will only be granted on issues that can be resolved with minimal or no factfinding. As a result, they are usually—though not exclusively—granted on procedural issues. Thus, motions to dismiss often assert that the plaintiff has commenced her tort suit in a court that has no jurisdiction (no authority) to resolve the dispute. Alternatively, they might assert that the plaintiff has waited too long to commence her action and has thus lost the right to sue. For example, suppose a plaintiff files a complaint alleging that she broke her leg after slipping on a carelessly maintained floor in defendant's restaurant. Suppose further that the complaint demonstrates on its face that the plaintiff served and filed her complaint three years after the slip-and-fall, thereby failing to comply with a statutory rule specifying that such a suit must be commenced within two years of the accident. In such a situation, a court would grant a motion to dismiss the suit on the ground that the suit is time-barred, which renders it impossible for the plaintiff to prevail no matter what evidence she might discover and present at trial. *Cf.* Meiselmann v. McDonald's Restaurants, 759 N.Y.S.2d 506 (App. Div. 2003).

3. *Discovery.* If the suit is not resolved on a motion to dismiss, the lawyers commence the process called *discovery*, whereby they attempt to secure information relevant to the tort suit. Discovery often takes the form of *document requests*, which seek copies of relevant documents in the possession of adversaries or third parties. It also may consist of *interrogatories*—written questions—addressed to the parties to the lawsuit. As indicated in the Appendix, the attorney for Ms. Walter invoked these mechanisms to obtain documents describing Wal-Mart's internal policies for the dispensation of prescription medicines, to identify the particular pharmacist who mishandled her prescription, and to identify persons whom Wal-Mart intended to call as witnesses at trial. Likewise, Wal-Mart's attorney sought to obtain records as to Walter's medical condition before and after her treatment, and records of the expenses she incurred in obtaining medical treatment, including records as to which of those expenses were covered by health insurance.

Another important discovery tool is the *deposition*. A deposition is an interview that is conducted by an attorney for one of the parties in the presence of counsel for the other party. Often a deposition will take place in a conference room at a law firm or at the office of the person being interviewed (the *deponent*). During a deposition, the deponent is under oath, and the questions put to her, as well as her answers, are recorded by a stenographer. Deponents in a tort suit may include anyone who possesses information about the dispute, especially those who may end up serving as testifying witnesses should the case proceed to trial. In *Walter*, for example, Wal-Mart's attorney deposed the plaintiff to get further information about her account of how events unfolded. Among other things, depositions allow counsel to learn more about the strengths and weaknesses of the opponent's case and the likely impact that a given witness will have at trial.

4. *The Jury Trial.* The Seventh Amendment to the United States Constitution grants to each party involved in the litigation of certain suits, including tort suits, the right to demand a jury trial. That right, however, only applies to suits tried in federal courts. Still, most state constitutions provide the same guarantee for suits in state court. (The relevant provision of the Maine Constitution is Article I, Section 20.) Thus, unless the parties agree to forgo that right, if their case goes to trial, they will litigate it to a jury. If they do agree to waive that right and present evidence to the trial judge without a jury, the proceeding is known as a *bench trial*.

At a jury trial, the attorneys for the parties, overseen by the judge, select a jury of six to twelve men and women drawn from a pool made up of those who have received a notice to report for jury duty. (Individuals receive such notices based on random selections from lists such as lists of registered voters in the relevant locality.) The process of jury selection is beyond the scope of this discussion. Still, it is worth noting that many lawyers regard it as one of the most critical phases of the trial, because it will help determine the jurors' receptivity to the parties' evidence and arguments. Probably most civil juries today are comprised of six jurors. As specified by Maine law, *Walter* was heard by a jury of nine, although one juror was excused because of illness.

After a jury has been selected, the attorneys for the plaintiff and defendant take turns making opening statements that describe in general terms what the dispute is about and the kind of decisions the jurors will be asked to make. Although opening statements often are dramatic, they rarely garner legal analysis of the sort given by the justices of the Maine Supreme Court to the opening statement of Wal-Mart's attorney, Mr. Franco.

Next, the plaintiff's attorney, and then the defendant's attorney, present evidence by calling witnesses to testify and by introducing documents and other forms of physical evidence. In complex cases, the presentation of evidence can take weeks or even months. In a simple case, this process may take only a day or two. In *Walter*, for example, Walter's attorney called four witnesses. The first two were Dr. Morse—a longtime friend of the plaintiff—and Walter herself. Both testified primarily to how the episode affected Walter's health and quality of life. The third witness, Dr. Ross, testified to the medical effects of the misfilled prescription. Finally, Henry Lovin, the Wal-Mart pharmacist, testified as to the circumstances and character of his mistake. The defense offered the testimony only of Dr. Pickus, an oncologist who testified that the drug mistakenly given to Walter had the desired effect of causing her cancer to go into remission. He further opined that the depression experienced by Ms. Walter after being released from the hospital was unlikely to be linked *biologically* to the medication. (As the majority opinion notes in ¶18, however, Dr. Pickus also stated that Ms. Walter's depression likely was linked to her hospitalization, which he admitted was caused at least in part by her ingesting the wrong medicine.)

After the evidence is submitted, the attorneys give their closing arguments. Then it is the trial judge's job to instruct the jury on the applicable law. This entails informing the jury of the elements that must be proven before the plaintiff can prevail. The judge will also instruct the jury on any defenses potentially available to the defendant that would prevent or limit the assignment of responsibility to the defendant. For example,