### *Topics for Further Discussion*

1. It appears that Saban initially gave indications that it would be entering into a contract with Cosrich, although no formal contract was signed, and then changed its mind to go with a better prospective partner, Tsumura. What do you think of the actions of Saban? Was it clever to use competition to get the best deal? Or was it unfair to Cosrich? Should the law have protected Cosrich in this case?

2. What about the actions of Tsumura? What kind of behavior do you suppose might have allowed Cosrich to claim interference with prospective economic advantage against Tsumura?

3. Should Cosrich have a claim for the "thousands of dollars" it spent on drawings, clay figurines, layouts, etc. based on the assumption that it was already chosen as the exclusive licensee? If so, under what legal theory?

## Unintentional Torts (Negligence)

We now turn to the area of negligence, the category of tort cases making up the bulk of civil lawsuits. The *prima facie* elements of a negligence case are: (1) the existence of a duty owed by the defendant to the plaintiff; (2) a breach of that duty; (3) damage to the person or property of the plaintiff; and (4) a causal relationship between the breach of duty and the resulting harm.

### Duty Owed

Every person in society owes a general duty of care to avoid harm to the interests of other persons. This means that we all have an obligation not to engage in activities creating an unreasonable risk of injury to innocent parties or their property. If we fail to meet this duty, then we will be liable for the damage we cause. When we are driving our cars or watering the plants on our balconies for instance, we have a duty to do so in a safe manner so that the car does not crash, or the plant does not fall onto a pedestrian walking below. As the following case demonstrates, this duty can be far reaching, including actions that induce others to behave recklessly.

#### Weirum v. RKO General

539 P.2d 36 (Cal. 1975)

Mosk, J.

A rock radio station with an extensive teenage audience conducted a contest which rewarded the first contestant to locate a disk jockey who moved around in an automobile. Two minors driving in separate automobiles attempted to follow the disc jockey's automobile to its next stop. In the course of their pursuit, one of the minors negligently forced a car off the highway, killing its sole occupant. In a suit filed by the surviving wife and children of the dead person, the jury delivered a

verdict against the radio station. We now must determine whether the station owed decedent a duty of due care.

The facts are not disputed. Radio station KHJ is a successful Los Angeles broadcaster with a large teenage following. Among the programs was a contest broadcast on July 16, 1970, the date of the accident. On that day, Donald Steele Revert, known professionally as "The Real Don Steele," a KHJ disc jockey and television personality, traveled in a conspicuous red automobile to a number of locations in the Los Angeles metropolitan area. In Van Nuys, 17-year-old Robert Sentner was listening to KHJ in his car while searching for "The Real Don Steele." Meanwhile in Northridge, 19-year-old Marsha Baime heard and responded to the same information. For the next few miles the Sentner and Baime cars jockeyed for position closest to the Steele car, reaching speeds up to 80 miles an hour. The Steele auto left the freeway at the Westlake off ramp. Either Baime or Sentner, in attempting to follow, forced the dead person's car onto the center divider, where it overturned. Baime stopped to report the accident. Sentner, after pausing momentarily to relate the tragedy to a passing policeman, continued to pursue Steele, successfully located him and collected a cash prize.

Decedent's wife and children brought an action for wrongful death against Sentner, Baime, RKO General, Inc. as owner of KHJ, and the maker of decedent's car. Sentner settled prior to the commencement of trial for the limits of his insurance policy. The jury returned a verdict against Baime and KHJ in the amount of $300,000 and found in favor of the manufacturer of decedent's car. KHJ appeals from the ensuing judgment and from an order denying its motion for judgment notwithstanding the verdict. Baime did not appeal.

The primary question for our determination is whether defendant owed a duty to decedent arising out of its broadcast of the giveaway contest. The determination of duty is primarily a question of law. It is the court's "expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection." Any number of considerations may justify the imposition of duty in particular circumstances, including the guidance of history, our continually refined concepts of morals and justice, the convenience of the rule, and social judgment as to where the loss should fall. While the question whether one owes a duty to another must be decided on a case-by-case basis, every case is governed by the rule of general application that all persons are required to use ordinary care to prevent others from being injured as the result of their conduct. However, foreseeability of the risk is a primary consideration in establishing the element of duty. Defendant asserts that the record here does not support a conclusion that a risk of harm to decedent was foreseeable.

While duty is a question of law, foreseeability is a question of fact for the jury. The verdict in plaintiffs' favor here necessarily embraced a finding that decedent was exposed to a foreseeable risk of harm.

We conclude that the record amply supports the finding of foreseeability. These tragic events unfolded in the middle of a Los Angeles summer, a time when young

people were free from the constraints of school and responsive to relief from vacation tedium. Seeking to attract new listeners, KHJ devised an "exciting" promotion. Money and a small measure of momentary publicity awaited the swiftest response. It was foreseeable that defendant's youthful listeners, finding the prize had eluded them at one location, would race to arrive first at the next site and in their haste would disregard the demands of highway safety.

It is of no consequence that the harm to decedent was inflicted by third parties acting negligently. Defendant invokes the maxim that "an actor is entitled to assume that others will not act negligently." This concept is valid, however, only to the extent the intervening conduct was not to be anticipated. If the likelihood that a third person may react in a particular manner is a hazard which makes the actor negligent, such reaction whether innocent or negligent does not prevent the actor from being liable for the harm caused thereby. Here, reckless conduct by youthful contestants, stimulated by defendant's broadcast, constituted the hazard to which decedent was exposed. Defendant could have accomplished its objectives of entertaining its listeners and increasing advertising revenues by adopting a contest format which would have avoided danger to the motoring public.

We are not persuaded that the imposition of a duty here will lead to unreasonable extensions of liability. Defendant is fearful that entrepreneurs will henceforth be burdened with an avalanche of obligations: an athletic department will owe a duty to an ardent sports fan injured while hastening to purchase one of a limited number of tickets; a department store will be liable to injuries incurred in response to a "while-they-last" sale. The contest was no commonplace invitation to an attraction available on a limited basis. It was a competitive scramble in which the thrill of the chase to be the one and only victor was intensified by the live broadcasts which accompanied the pursuit. In the situations described by defendant, any haste involved in the purchase of the commodity is an incidental and unavoidable result of the scarcity of the commodity itself. In such situations there is no attempt, as here, to generate a competitive pursuit on public streets.

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## *Topics for Further Discussion*

1. The Court says that: "While duty is a question of law, foreseeability is a question of fact for the jury." What does this statement mean? What is the difference between foreseeability and hindsight, which, as we know, is always 20/20?

2. Are you convinced by the Court's distinguishing of other contest operators and ticket sellers? What if a child is trampled during the grand opening promotion of a new department store offering a mink coat for $1.00 to the first customer to reach the sales counter when the doors open on the first day? What if the injured person was trampled while walking down the street, as opposed to having been in the store?

3. Why did the plaintiffs sue the automobile manufacturer in the *Weirum* case, and why did the court dismiss the claims against the car manufacturer? Would the

radio station be liable if, instead of crashing into another car, only the teenage driver was killed after her car ran off the road? How about if the driver of the speeding car was an adult instead of a teenager?

4. What public policy concerns does the Court point to in support of the conclusion that the radio station owed a duty to the victim of the car crash? An innocent person was killed in the car accident in the *Weirum* case and that is a terrible loss to society. Why isn't an award against the reckless driver of the car a sufficient social policy response?

## Do Social Media Companies Owe a Duty to Their Users?

The increasing role of social media platforms, and particularly the question of legal liability for harmful content posted on their sites by users and third parties, has become a highly controversial issue in both the courts and in Congress. Social media companies are currently shielded from such liability under Section 230 of the Communications Decency Act of 1996, which was passed in the early days of the internet to avoid "publisher liability" under common law principles and to encourage growth of the internet. However, as the internet has developed, social media companies have come to play a more active role by, for example, utilizing algorithms to highlight certain content and direct it to users. Have they changed from mere publishers to "content providers"? And what if controversial content used to attract attention and "clicks" contains hate speech, terrorist activities, or dangerous activities for children?

One recent example is a wrongful death case brought by the parents of a 10-year-old girl who strangled herself to death while watching a "blackout contest" (a "sport" of choking oneself until blacking out) on TikTok, Inc. The contents were posted on the site by a third party; however, TikTok's algorithm directed this video to the user's "for you" page. Although this might be analogized to the *Weirum* case, the judge dismissed all of the plaintiffs' claims on defendants' motion for summary judgment on the grounds that the defendants are immunized under Section 230 of the Communications Decency Act. See *Anderson v. TikTok Inc.*, E.D. Pa., No. 2:22-cv-01849 (2022). There are currently over 20 bills pending in Congress to amend Section 230. In addition, the Supreme Court recently granted certiorari for two related cases that challenge Section 230 immunity in connection with the use of social media platforms by terrorist groups. See *Gonzalez v. Google LLC*, No. 21-1333 (U.S. Apr. 4, 2022).

## Special and Limited Duties

The particular circumstances of the defendant can also lead to the creation of a special duty or an elevated standard of conduct. Professionals, such as doctors and lawyers, owe their patients and clients a higher level of care than what might be required under the general duty of care. They must act in a manner that is consistent

with the level of knowledge, skill, and expertise that a member of the same profession would exhibit under similar circumstances. Common carriers (bus operators, taxis, ferries, etc.) and innkeepers are also held to a higher standard of conduct since they hold themselves out as providing these services for hire on an expert basis. Statutes can increase the standard of care required, such as laws imposing strict liability on parties dealing with hazardous waste or demolition experts. In an opposite manner, courts have sometimes limited the duty owed for policy reasons in order to achieve a social objective, as shown in the following case.

## Benejam v. Detroit Tigers, Inc.

635 N.W. 2d 219 (Mich. Ct. App. 2001)

Bandstra, C.J.

In this case, we are asked to determine whether we should adopt, as a matter of Michigan law, the "limited duty" rule that other jurisdictions have applied with respect to spectator injuries at baseball games. Under that rule, a baseball stadium owner is not liable for injuries to spectators that result from projectiles leaving the field during play if safety screening has been provided behind home plate and there are a sufficient number of protected seats to meet ordinary demand. We conclude that the limited duty doctrine should be adopted as a matter of Michigan law and that there was no evidence presented at trial that defendants failed to meet that duty. Further, we conclude that there is no duty to warn spectators at a baseball game of the well-known possibility that a bat or ball might leave the field. We therefore conclude that there is no evidence to support the verdict rendered on behalf of plaintiffs against defendant and we reverse and remand.

### Facts

Plaintiff Alyssia M. Benejam, a young girl, attended a Tigers game with a friend and members of the friend's family and was seated quite close to the playing field along the third base line. The stadium was equipped with a net behind home plate, and the net extended part of the way down the first and third base lines. Although Alyssia was behind the net, she was injured when a player's bat broke and a fragment of it curved around the net. There was no evidence, and plaintiffs do not contend, that the fragment of the bat went through the net, that there was a hole in the net, or that the net was otherwise defective. Plaintiffs sued the Tigers, claiming primarily that the net was insufficiently long and that warnings about the possibility of projectiles leaving the field were inadequate. Alyssia suffered crushed fingers as a result of the accident and the jury awarded plaintiffs non-economic damages (past and future) totaling $917,000, lost earning capacity of $56,700 and $35,000 for past and future medical expenses.

### Standard of Care/Protective Screening

There is no Michigan case law directly on point. Our review finds that there is an inherent risk of objects leaving the playing field that people know about when they attend baseball games. Also, there is inherent value in having most seats

unprotected by a screen because baseball patrons generally want to be involved with the game in an intimate way and are even hoping that they will come in contact with something thrown from the field (in the form of a souvenir baseball that a spectator can keep if they catch it). In other words, spectators know about the risk of being in the stands and, in fact, welcome that risk to a certain extent. On the other hand, the area behind home plate is especially dangerous and spectators who want protected seats should be able to find them in this area. Balancing all of these concerns, courts generally have adopted the limited duty doctrine that prevents liability if there are a sufficient number of protected seats behind home plate to meet the ordinary demand for that kind of seating. If that seating is provided, the baseball stadium owner has fulfilled its duty and there can be no liability for spectators who are injured by a projectile from the field.

The limited duty rule does not ignore or abrogate usual premises liability principles. Instead, it identifies the duty of baseball stadium proprietors with greater specificity than the usual "ordinary care/reasonably safe" standard provides. The limited duty precedents "do not eliminate the stadium owner's duty to exercise reasonable care under the circumstances to protect patrons against injury." Rather, these precedents "define that duty so that once the stadium owner has provided 'adequately screened seats' for all those desiring them, the stadium owner has fulfilled its duty of care as a matter of law." By providing greater detail with regard to the duty imposed on stadium owners, the rule prevents lots of litigation that might signal the end or substantial alteration of the game of baseball as a spectator sport. Applying the limited duty rule here, we conclude that plaintiffs have failed to provide any proof sufficient to find that liability could be imposed. Clearly, there was a screen behind home plate and there was no proof whatsoever that persons wanting seats protected by the screen could not be seated.

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## *Topics for Further Discussion*

1. The Michigan Supreme Court refused to hear the case on appeal. The result in the *Benejam* case was that Alyssia Benejam got no compensation for her injury. In public policy terms, the entire harm resulting from the accident must be borne by her and her family. Do you agree with the Court's balancing of interests in this case? What evidence could she have shown that might have allowed her to prevail?

2. Does the fact that the broken bat curved around the protective netting suggest that the design of the netting was defective? Does the person who designed the net owe a duty to patrons at the game to prevent foreseeable harm, such as that caused by a broken bat curving around the safety net? The court says a person wanting a protected seat can ask for one behind the netting. Isn't that what Alyssia did?

3. How difficult would it have been for the Detroit Tigers to warn patrons about the danger of getting hit by a bat or ball? Parking lot operators routinely warn patrons that they are not responsible for items stolen from parked cars. Do you

think that Alyssia would have asked for her money back if her ticket had contained such a warning? Why doesn't the court find that Alyssia assumed the risk of getting hit by the broken bat to avoid establishing a limited liability rule? On the issue of a duty to warn, the court held that there was no duty because the danger of being hit by a flying baseball or bat is well known.

4. Similar incidents continued, with one news report stating that there were a total of 808 reports of fan injuries in baseball stadiums, mainly due to foul balls, from 2012 to 2019. An incident in Houston in 2019, in which a foul ball fractured the skull of a two-year-old girl, prompted the baseball stadium there to extend netting further down the sidelines. In early 2020 Major League Baseball initiated a similar requirement for all baseball stadiums.

## Reasonable Person Standard

The common law does not generally impose an affirmative duty to act for the benefit of others. If there is no duty owed, then there can be no liability in tort. Having decided to act, however, an individual must do so in a reasonable and safe manner. A number of States have adopted "Good Samaritan" laws, named after the story of the same name in the New Testament of the Bible, to exempt people who come to the aid of those in trouble (i.e., with no duty to do so) from liability as a way of encouraging people to assist those in need even when there is no duty to do so.

Whether or not a person has acted negligently is determined by measuring the defendant's behavior against the objective standard of the "reasonable person." The reasonable person is deemed to have the same basic physical characteristics of the defendant, and to possess average intelligence and the same general knowledge of things as the average member of the community. Experts, like doctors and lawyers, are deemed to possess the level of skill of practitioners in their geographical region and area of specialization.

The defendant who owes a duty, whether general or specific, to a plaintiff, will be in breach of that duty when the defendant's actions fall short of the applicable standard of care. This decision is one that can only be made on a case-by-case basis by the judge or jury in light of all of the proven facts and circumstances. The plaintiff bears the burden of showing not only what happened, but also that the actions of the defendant were unreasonable and, therefore, negligent.

## Causation

The next element of a negligence claim is for the plaintiff to demonstrate causation. In order to recover, the plaintiff must show that the defendant's conduct was the cause in fact of the injury. This is often decided by using the "but for" test. Under this test, the question is whether the injury would have occurred "but for" the actions of the defendant. If the answer is "No," then causation is satisfied. Courts

have modified this test to allow for cases where the defendant's behavior was a joint cause of the harm by asking whether the action was a "substantial factor" in the chain of causation.

The ultimate legal test for causation is whether the conduct complained of is the proximate or legal cause of the injury to the plaintiff. The concept of proximate cause serves to limit liability by cutting off the chain of causation when the injury is deemed to be too remote. This is frequently expressed in terms of the foreseeable nature of the harm as we saw in the *Weirum* case. The general rule is that the wrongdoer is liable for all harm that is reasonably foreseeable as a result of his or her acts or omissions. Hence, a defendant will be liable for all foreseeable damage, even though it results from an intervening force. Such intervening forces are called dependent intervening forces, and include causes such as a subsequent medical malpractice or the negligence of rescuers. For example, assume A is driving recklessly and causes an accident that harms B. If B is picked up in an ambulance driven by C, and C has an accident on the way to the hospital because he failed to put on his siren, C's intervening negligence will not relieve A of liability for the initial injury or the additional injuries caused by the second accident. However, when the plaintiff is unable to produce evidence showing a direct causal relationship to the tort, courts will cut off liability as shown in the following case.

## Cyr v. Adamar Assocs.

752 A.2d 603 (Me. 2000)

Rudman, J.

Thelma Cyr, the personal representative for the estate of her daughter, Rachelle Williams, appeals from a summary judgment entered in the Superior Court in favor of Adamar Associates. Cyr contends that she is entitled to recover from Adamar Associates for the wrongful death of Williams. We disagree and affirm the judgment.

On Sunday, November 5, 1995, Rachelle Williams was a registered guest at the Ramada Inn in Lewiston. The Ramada is a facility owned and operated by Adamar Associates. Williams and some of her colleagues from Pizza Hut were in Lewiston for a seminar. That evening, Williams and her co-workers socialized in the Ramada lounge. While in the lounge, Williams noticed that a man, later discovered to be Lloyd Franklin Millett, was staring at her. Around 11:00 P.M., Williams placed a twenty dollar bill on the table and told her colleagues to pay for the beer that she had just ordered because she was going to the ladies' room and would return shortly. Williams also left her cigarettes and lighter at the table in the lounge.

Williams never returned to the lounge. Her corpse was found the next day in a field adjacent to the Ramada parking lot. Ramada did not own the field. Williams had been raped, assaulted and strangled to death; her injuries were consistent with a struggle. Lloyd Franklin Millett later pleaded guilty to murdering Williams.

Cyr asserts that the Ramada breached its duty of care to Williams because Millett's attack was foreseeable and because the Ramada's inadequate security precautions proximately caused Williams' death. Although an innkeeper has a duty to protect its patrons from foreseeable injuries, the innkeeper is not liable for the resulting injuries unless the innkeeper's conduct, or lack thereof, is found to be the proximate cause of the patron's injuries.

Proximate cause is an action occurring in a natural and continuous sequence, uninterrupted by an intervening cause, that produces an injury that would not have occurred but for the action. "A negligent act is the proximate cause of an injury only if the actor's conduct is a substantial factor in bringing about the harm." Although proximate cause is usually a question of fact for the jury, the court has a duty to direct a verdict for the defendant if the jury's determination of proximate cause would be based on speculation or conjecture.

In the present case, no evidence exists to support a conclusion that the Ramada proximately caused Williams' death. Although it would not be unreasonable to assume that Millet abducted Williams from the Ramada' premises, the evidence does not reveal whether Williams voluntarily left the Ramada property with Millet or whether he abducted her. The lack of such evidence and the discovery of Williams' body on property not owned by the Ramada manifest that the relation between the Ramada' security measures and Williams' death is too uncertain and tenuous to hold Adamar liable.

Adamar was entitled to a judgment as a matter of law because without any evidence for the jury to consider regarding the circumstances leading to the assault, the jury would be basing its determination of liability on pure conjecture. There being no genuine issues of material fact and no evidence of proximate cause, the trial court properly entered a summary judgment in favor of Adamar.

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## *Topics for Further Discussion*

1. In *Daniel v. Days Inn of America, Inc.*, 356 S.E. 2d 129 (S.C. Ct. App. 1987), a woman was invited to a hotel room by a guest of the hotel. She was brutally raped and tortured in the room by three men over a five to six hour period. She sued the hotel. The hotel's motion for summary judgment was granted by the trial judge. The South Carolina Court of Appeals reversed writing that:

> An innkeeper is not automatically exonerated from negligence when a criminal act is the actual cause of the invitee's injuries. The hotel's acts or omissions may be negligent if the hotel realized or should have realized that its conduct involved unreasonable risks of harm through the conduct of a third person, even though such conduct of the third person is criminal. Our Supreme Court has held in an analogous case that while a storeowner is generally not charged with the duty of protecting its customers against

> criminal acts of third parties, the intervening criminal act of another may not always relieve the storeowner of liability for his negligence. Although a proprietor of a hotel is not an insurer of the safety of his guests against improper acts of other guests or third persons, he is bound to exercise reasonable care in this respect for their safety, and may be held liable on grounds of negligence for failure to do so.

Can you distinguish the facts of *Cyr* from those in *Daniel*?

2. The general rule is that a negligent act or omission is the proximate cause of the harm if the harm is a natural and probable consequence which, in light of the facts and circumstances, is reasonably foreseeable. The court has to determine whether an intervening cause should cut off liability. An intervening cause will relieve the tortfeasor of liability if such intervening cause was not reasonably foreseeable at the time of the tortfeasor's act or omission. Is it reasonably foreseeable that people might be the victims of crime while staying in hotels? If so, what precautions must a hotelkeeper make to prevent this foreseeable harm? What duty does a hotel owe to its patrons while in the bar? How about while they are in their rooms? Should the duty be the same towards visitors as it is to registered guests?

## Joint and Several Liability

When there are two or more defendants, and each is found to be responsible for the harm, then each is fully liable for the entire amount of the award. This is called joint and several liability. For example, if defendants A and B cause harm to plaintiff C, and C is awarded a judgment in the amount of $1 million, C can seek recovery of the full amount from either A or B. If C seeks recovery only from A, then A can sue B requiring him to contribute his share of the award. However, if B is deceased or bankrupt, A will still be required to pay the entire amount of the award. Some states, such as Arizona, have abolished joint and several liability in tort cases involving personal injury, property damage, or wrongful death. Other states limit joint and several liability to cases involving non-economic or punitive damages.

## Defenses

Defenses to a claim of negligence include contributory negligence, comparative negligence, and assumption of risk. Under the traditional common law doctrine of contributory negligence, a plaintiff whose negligence contributed to the harm was completely barred from recovery. This strict and overly harsh rule has given way to the doctrine of comparative negligence. This requires the judge or jury to allocate the percentage of fault between the plaintiff and defendant and to reduce any damage award by the percentage of fault attributed to the plaintiff.

Assumption of risk operates in much the same manner as consent. A plaintiff may be denied recovery if the defendant can show that the plaintiff was aware of the

risk of injury and voluntarily assumed it. For example, if A gets into a car driven by B knowing that B is drunk, A will be found to have assumed the risk of a crash. Assumption of risk can be either express or implied. As with informed consent, courts will examine the facts carefully to make sure that the risk assumed was the same as the risk that actually caused the harm. If patient A assumes the risk of open heart surgery, and is then seriously injured when a nurse accidentally bumps the surgeon's arm while he is cutting, patient A will not be deemed to have assumed that risk.

## Remedies

In most tort cases the ultimate goal is to recover monetary damages. Since monetary damages are paid to remedy injury, they are not taxed. There are cases where the appropriate remedy will include injunctive relief instead of or along with monetary damages. The basic formula for compensatory damages in tort is that the plaintiff should recover all actual damages suffered as a result of the defendant's negligence. In other words, the plaintiff should be restored to the position he was in before becoming a tort victim.

Damages must be proven with specificity and cannot be speculative. Determining actual damages is not always as straightforward as it might seem. For example, a plaintiff may seek damages for the pain and suffering resulting from an injury. There may also be a claim for lost wages or loss of consortium (intimate relations) if the plaintiff is married. These elements of damage can be proven by direct or expert testimony.

What about a case where a doctor commits malpractice by ineffectively performing a sterilization procedure on a woman who then becomes pregnant? Should actual damages include the reasonable costs of raising the unintended child? The majority trend in the U.S. is to permit full recovery of these expenses in the same manner as any other foreseeable consequence of a doctor's negligence. *Burke v. Rivo*, 551 N.E.2d 1 (Mass. 1990) is a leading "wrongful birth" case. The Massachusetts Supreme Court rejected a number of arguments against damages writing that: "While we firmly reject a universal rule that the birth of an unexpected healthy child is always a net benefit, we also firmly reject any suggestion that the availability of abortion or of adoption furnishes a basis for limiting damages payable by a physician but for whose negligence the child would not have been conceived."

Common law imposes a duty to mitigate on all injured parties. The duty to mitigate requires the injured party to take reasonable steps to stop or reduce the harm caused by defendant's tort. The emphasis is on reasonable steps, and plaintiffs are not required to go to unusual lengths to mitigate. Nevertheless, if the plaintiff fails to act reasonably to reduce the damage, the court will reduce the amount of damages by the amount they could have been reduced had the plaintiff acted prudently to mitigate them.