

Tort Law for Paralegals: Chapter 12

Chapter Outline

The screenshot shows a digital learning interface with a black header bar containing the text "Tort Law for Paralegals: Chapter 12". On the left side, there is a vertical stack of seven blue buttons with white text: "Lecture Hints", "Answers to Case Questions", "Problems", "Problem Answers", "Projects", "Project Answers", and "Chapter Quiz". The main content area on the right is titled "Chapter Outline" and "Chapter 12" in bold. Below this, the title "Special Tort Actions" is displayed in a large font. A summary paragraph follows: "Summary: This chapter discusses the torts of private and public nuisance, wrongful death and survival statutes, and wrongful birth/wrongful life." Below the summary, the text "CHAPTER OUTLINE" is shown, followed by "I. NUISANCES" and "A. Nuisance defined:". Under "A. Nuisance defined:", there is a numbered list starting with "1. Unreasonable or unlawful use of one's real property." and a partially visible second item "2. Substantial interference with the use and enjoyment of property." A vertical scrollbar is located on the right side of the content area.

Step Text

Chapter 12

Special Tort Actions

Summary: This chapter discusses the torts of private and public nuisance, wrongful death and survival statutes, and wrongful birth/wrongful life.

CHAPTER OUTLINE

I. NUISANCES

A. Nuisance defined:

1. Unreasonable or unlawful use of one's real property.
2. Such use injures someone or interferes with owner's use of his or her land.

B. Types of nuisance: Public, private, and mixed.

1. Some nuisance situations can involve both public and private types and are sometimes called mixed nuisances.

II. PRIVATE NUISANCES

A. Occur when tortfeasor uses his or her land in such a way as to unreasonably and substantially interfere with another person's use and enjoyment of his or her land

B. Elements

1. Using one's land so as to
2. Unreasonably and substantially interfere with
3. Another person's use and enjoyment of his or her land.

C. Parties involved:

1. The tortfeasor (defendant) is the land user whose activities offend his or her neighbor(s).
2. The neighboring land user(s)-plaintiff(s)-sue the tortfeasor for private nuisance.

D. Unreasonable and substantial interference

1. Defined in terms of offensiveness to the reasonable person
 2. Would a reasonable person, with ordinary sensibilities, find the tortfeasor's land use unreasonably offensive?
 3. Community standard
-

a. In private nuisance cases, the reasonable person standard is normally defined by community standards.

b. How would people living in community in which the alleged nuisance is taking place react to the activity?

E. Use and enjoyment

1. Term of art in nuisance law

2. Includes injury to nuisance neighbors' pleasure in using their land

III. EXAMPLES OF PRIVATE NUISANCES

A. Physical effects on land

1. Ground vibrations, such as constant vibrations from manufacturing facility affecting neighbors (especially residential neighbors)

2. Pollution of water or soil, such as chemical plant discarding pollutants into ground or ponds, streams, underground well water supplies, and so forth

3. Crop destruction, such as coal-burning electricity plant emitting coal dust in its smoke, which falls upon neighboring crops and hinders their growth

4. Flooding, such as downstream landowner erecting a dam that causes flooding on upstream landowners' properties

5. Excessive clutter, such as a junk yard next door

6. Unwanted excavations, such as a strip-mining operation that leaves land barren and hole-ridden next to landowner's woods

B. Health hazards or offending the sensibilities:

1. Sensibilities = physical senses (sight, hearing, smell, taste, touch).

2. Nuisances can offend people's sensibilities and create health hazards.

3. Noxious odors, such as from trash dumps, livestock farms, chemical processing plants

4. Smoke and dust, such as smoke emissions from factory into air that neighbors are forced to breathe; consider example of smokers/nonsmokers in public places.

5. Excessive noise and temperatures, such as factory noise that prevents neighbors from sleeping, or causes nervousness; or factory excess heat that is carried by the air across neighbor's land

6. Incessant telephone calling, such as creditors calling debtors late at night to intimidate them into paying bills

C. Unwanted associations with neighboring uses: Neighbors may file nuisance lawsuits against adjacent prostitution house, X-rated movie theaters, adult video or bookstores, and liquor or gambling establishments.

IV. COMING TO THE NUISANCE

A. Defense that defendant uses to counter plaintiff's private nuisance claims

B. Definition: Plaintiff owned or used land in location in which alleged nuisance activity was already occurring; thus, plaintiff "came to the nuisance" and cannot recover against defendant.

C. This defense is similar to the assumption of risk defense.

V. PUBLIC NUISANCES A. Definition: Land use that injures public at large rather than just a single individual.

B. A public nuisance unreasonably interferes with the public's enjoyment of legal rights common to the public.

C. Elements

1. Tortfeasor's use of land that

2. Unreasonably and substantially interferes with public's use and enjoyment of legal rights common to public.

D. Public at large = general public. Includes general population living in area affected by public nuisance, such as neighborhood, end of town, entire city, and the like.

E. Unreasonable and substantial interference: Same definition as used in private nuisance.

F. Use and enjoyment of common legal rights

1. The tortfeasor's land use must interfere with the public's common legal rights.

2. Common legal rights = public's right to peaceably assemble in public places, right to use public streets and sidewalks without being subjected to offensive activities, or right to safe and healthy conditions in one's neighborhood.

G. Government as plaintiff

1. Governmental entities file public nuisance lawsuits on behalf of citizens affected.

2. Actions are usually filed through city or county prosecutors' offices, or state attorney general's offices.

3. Governments have constitutional, statutory, and/or common law authority to protect citizens against public nuisances under police power.

a. Police power = governments' authority to protect public health, safety, welfare, or morals.

H. Most public nuisances are defined by statutes or ordinances.

VI. EXAMPLES OF PUBLIC NUISANCES

A. Gambling

B. Prostitution

C. Distribution of sexually explicit material

D. Sale of alcohol

E. Allowing weeds or poisonous plants to grow on one's land

F. Failure to comply with health code provisions requiring one's land to be kept clean or free of vermin

G. Keeping of unrestrained wild or vicious animals on one's property

VII. MIXED NUISANCES

A. Definition: Activities that constitute both public and private nuisances simultaneously.

B. Rule: The greater the number of persons adversely affected by allegedly offensive land use, the more likely it is that the use will be considered a public, as well as a private, nuisance.

C. An adversely affected neighboring landowner brings a private nuisance lawsuit, whereas the government files a public nuisance action.

VIII. NUISANCES PER SE

A. Latin per se = "by itself."

B. Activities are nuisances per se if they violate public nuisance statutes or ordinances.

C. Violation of statute is prima facie evidence that a public nuisance exists, and the defendant is liable as a matter of law.

IX. COMING TO THE NUISANCE IS NO DEFENSE IN PUBLIC NUISANCE

A. This defense is ineffective in public nuisance cases, because the defense focuses on the individual plaintiff coming to a preexisting use.

B. Public nuisances affect members of the general public, who are entitled to live in areas without public nuisances.

X. REMEDIES FOR NUISANCES

A. Equitable remedies

1. Not money damages

2. The court orders the defendant to do (or not to do) something (mandamus orders; injunctions).

B. Equitable nuisance remedies 1. Abatement

a. The court orders the defendant to cease, or abate, the nuisance activity.

b. Abatement is often a permanent order, in the form of a permanent injunction.

2. Injunctions

a. The court orders the defendant to cease doing the nuisance activity.

b. Types of injunctions: Temporary and permanent

(1) Temporary restraining orders (TROs): Court forbids defendant to engage in alleged nuisance activity from early point in lawsuit, usually until court can hold hearing to determine if nuisance has occurred and what relief would be appropriate. Often issued for 10-day periods, by statute or procedural rule.

(2) Permanent injunctions

(a) The court orders the defendant to permanently abate the nuisance activity.

(b) Usually issued after trial on merits

(c) If the defendant violates the order, the court could hold the defendant in contempt, further ordering monetary fines or imprisonment.

C. Money damages

1. Alternative to equitable remedies, when nuisance activity cannot reasonably be abated

2. Example: Extremely offensive odors created by privately owned water treatment plant-the public need for clean water precludes abatement as a reasonable remedy, so neighbors are paid money damages as compensation for private nuisance.

XI. SURVIVAL AND WRONGFUL DEATH STATUTES A. Definition: Statutes giving cause of action to surviving family members of deceased tort victim against tortfeasor whose negligence or intentional torts resulted in victim's death. B. Typical fact pattern: 1. The tortfeasor commits a tort against the victim. 2. The victim dies as result of the tortfeasor's actions.

3. The victim's spouse and/or children sue the tortfeasor for wrongfully causing the victim's death.

C. Plaintiffs in wrongful death actions

1. Surviving spouse or children of decedent; could also be parents of deceased children or decedent's estate

2. Some statutes also allow the decedent's siblings or other relatives to file wrongful death actions.

D. Wrongful death damages

1. Victim's lost lifetime earnings potential

2. Loss of consortium = recovery for victim's family (usually spouse) for lost love and companionship of decedent.

E. Defenses: Defendant may use any defenses applicable to specific tort that produced victim's fatal injury.

XII. WRONGFUL BIRTH/WRONGFUL LIFE

A. Definition: Lawsuits for wrongful birth of child.

1. Typical fact patterns:

a. A couple visited a genetic counselor who missed or failed to reveal a genetic problem. The parents sue the counselor for wrongful birth.

b. A couple have a child born with birth defects as result of the mother's illness during pregnancy, when the physician negligently advised the couple that the child would not be harmed by the mother's illness.

2. Relatively new tort in American law, having arisen within past 25 years

3. Plaintiff's damages

a. Medical expenses incurred during pregnancy and delivery

b. Sometimes, the defendant is ordered to pay the plaintiffs for the cost of raising the plaintiffs' child until the age of majority.

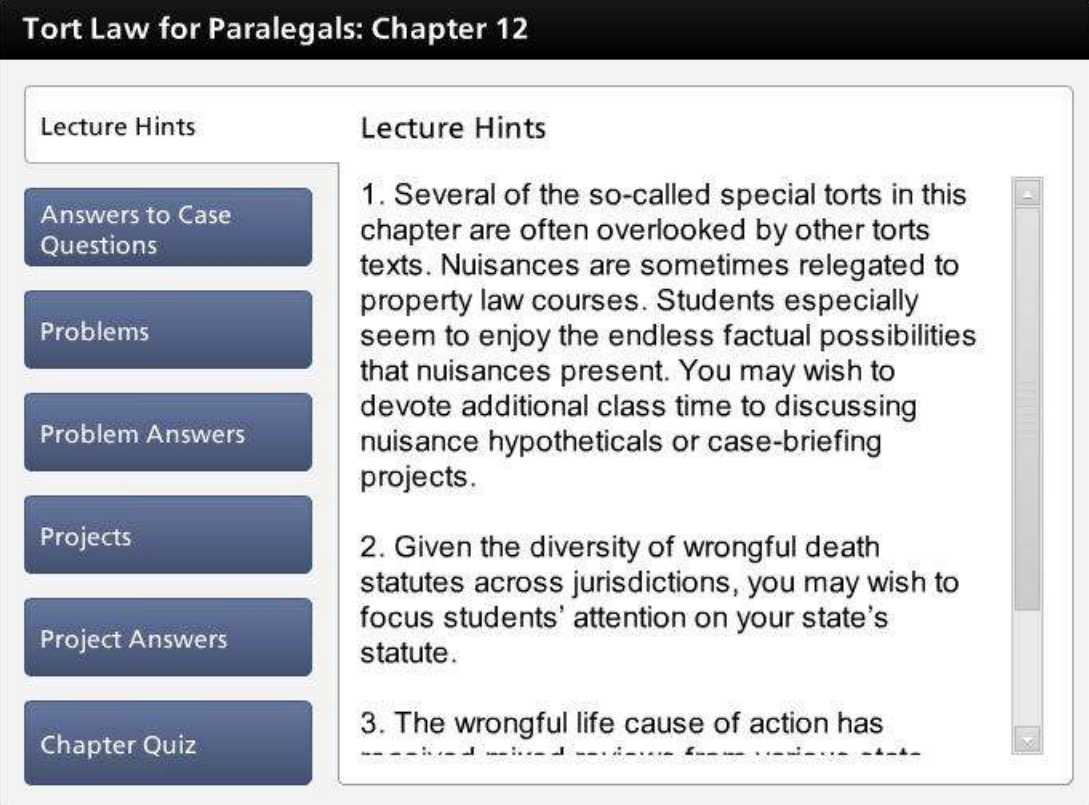
B. Lawsuits for wrongful life of child

1. Typical fact pattern: Sterilization procedure fails or is unsuccessful. The child who was unwanted or born disabled seeks damages for the value of the so-called impaired life versus an unimpaired life.



Lecture Hints

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Lecture Hints

1. Several of the so-called special torts in this chapter are often overlooked by other torts texts. Nuisances are sometimes relegated to property law courses. Students especially seem to enjoy the endless factual possibilities that nuisances present. You may wish to devote additional class time to discussing nuisance hypotheticals or case-briefing projects.
2. Given the diversity of wrongful death statutes across jurisdictions, you may wish to focus students' attention on your state's statute.
3. The wrongful life cause of action has received mixed reviews from various state

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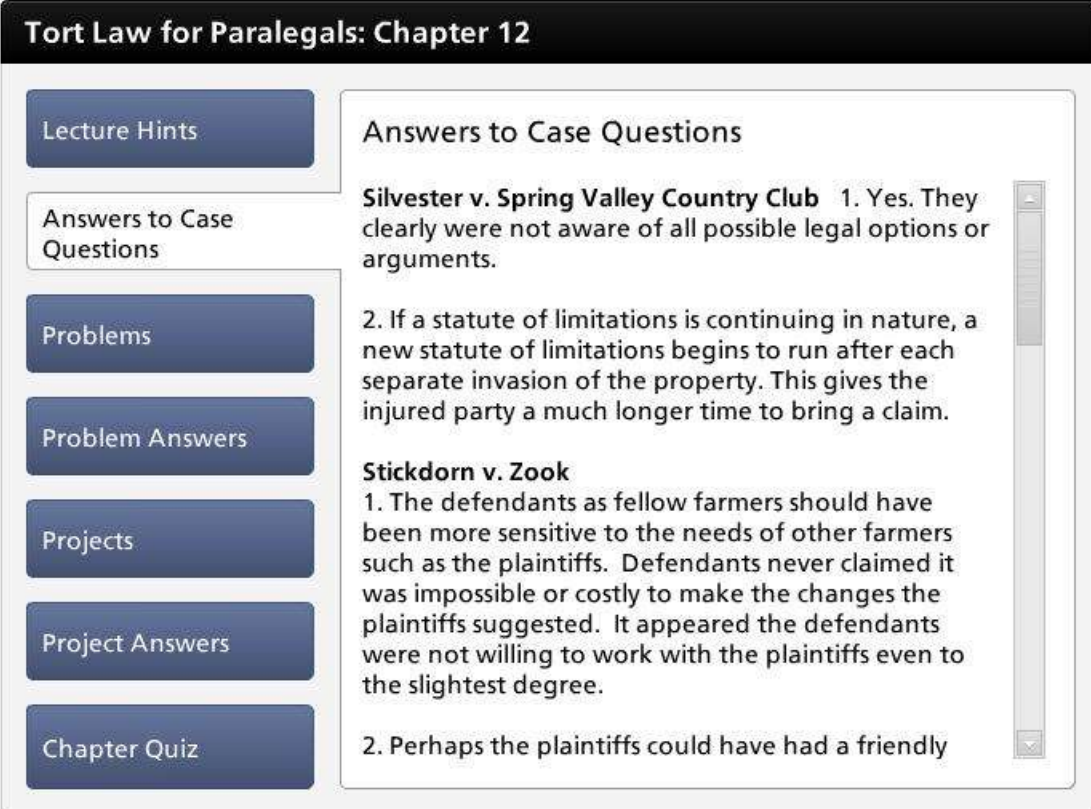
2. Given the diversity of wrongful death statutes across jurisdictions, you may wish to focus students' attention on your state's statute.

3. The wrongful life cause of action has received mixed reviews from various state courts. If your jurisdiction has ruled on the subject, you may wish to concentrate class discussion on those particular court decisions.



Answers to Case Questions

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Answers to Case Questions

Silvester v. Spring Valley Country Club 1. Yes. They clearly were not aware of all possible legal options or arguments.

2. If a statute of limitations is continuing in nature, a new statute of limitations begins to run after each separate invasion of the property. This gives the injured party a much longer time to bring a claim.

Stickdorn v. Zook

1. The defendants as fellow farmers should have been more sensitive to the needs of other farmers such as the plaintiffs. Defendants never claimed it was impossible or costly to make the changes the plaintiffs suggested. It appeared the defendants were not willing to work with the plaintiffs even to the slightest degree.

2. Perhaps the plaintiffs could have had a friendly

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2. Perhaps the plaintiffs could have had a friendly third party intercede, or take the matter to arbitration.

Patterson v. City of Richmond

1. If other people were to be in the position of Russell and Rhoads, most likely they would have complained much more frequently to both the neighbor and animal control. It is also possible they would have gotten other neighbors involved to bolster their case.

2. Sometimes when you take matters into your own hands, you don't necessarily know the temperament of the people you are dealing with, and don't know how they will respond. It's easier to let trained security handle the matter and deal directly with the problem guests.

United States Environmental Protection Agency v. Port Authority of New York and New Jersey

1. Plaintiffs' claim was flawed because the EPA and Browner were not necessary parties; "No More Tolls" failed to assert any injuries to itself; plaintiffs failed to satisfy the notice requirements for the Maryland and New Jersey defendants; venue was improper for some defendants; and plaintiffs failed to state a claim upon which relief could be granted. The complaint does not identify any violation of specific emission standards, and tollbooths do not actually emit air pollutants.

2. No. Plaintiffs do not appear to have done their research thoroughly. Plaintiffs are concerned about the emission of pollutants from automobiles, yet they are proceeding against the tollbooth owners and operators.

Smith, Jr. v. R.J. Reynolds Tobacco Co. 1. The court allowed the personal representative to amend the complaint instead of starting a new legal action so that the decedent's rights would be preserved.

2. By being part of the "Engle" class, the personal representative could get the benefit of the findings that already occurred in the Engle case, and not have to retry those issues.

Torres v. Sarasota County Public Hospital Board

1. Yes. If a complete history had been taken, the need for subsequent caesarean sections would have been noted in the record.

2. The court considered this a medical malpractice claim rather than a wrongful life claim.

Problems

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Problems

In the following hypotheticals, identify the relevant cause(s) of action, suitable defense(s) (if any), and appropriate remedies.

1. Pestro Chemical Corporation manufactures Dredroxiphine, a poison used in insect sprays. A railway line delivers tanker cars full of the chemical to be unloaded into the plant. On breezy days, the fumes from the unloading stations drift across the highway onto Jorge's farm. The odors are pungent and are especially irritating to the sinuses. When Jorge and his family work outside on windy days, they are constantly besieged by the poison's smell. Their eyes water excessively, their noses run, and they are gripped by sneezing fits. Other farmers in the area have complained of similar symptoms. Visits to the family physician revealed that Jorge has absorbed minute amounts of the chemical in his lungs and through his skin. Medical studies link

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studies link exposure to the chemical with several forms of cancer. Jorge has farmed on his property since 1947. Pestro constructed its plant in 1972.

2. Wowser's Video Palace rents X-rated videotaped movies. A local ordinance restricts rental of such materials to persons over the age of 18 years. Wowser's employees never check customer identifications, however, and often rent X-rated movies to underage individuals. Citizens Rallying Against Pornography, a local citizens' group, has asked the county prosecutor to take action against Wowser's. The prosecutor has asked you to summarize the appropriate cause(s) of action in a short paragraph.

3. Quintin and Ursella Xenopher were driving along Interstate 928 on the beltway around the city. Terri was driving while intoxicated. Her blood alcohol level was .214, and a state criminal statute provides that .10 is legally drunk. A related state civil statute provides injured parties with a tort cause of action against a tortfeasor who causes injuries while violating criminal statutes. Terri's automobile collided with the Xenopher's vehicle, killing Quintin. Ursella suffered permanent disability in her left leg.

4. Dr. Sarah David, M.D., performed a tubal ligation upon Jennifer Colfield to prevent impregnation. Jennifer was a single, 24-year-old woman who had a sexual relationship with her boyfriend, Scott. Six months after her operation, Jennifer discovered that she was pregnant. She could not afford the costs of raising a child, but she did not want to get an abortion. Scott refused to subsidize Jennifer's medical expenses or contribute to the child's upbringing. The local adoption agencies (managed by rigid-thinking administrators) refused to speak with Jennifer, because she had a history of narcotic abuse. She did not consult with out-of-town adoption agencies, which would have been happy to assist her in placing the child in a foster home.

Problem Answers

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Problem Answers

1. Pestro Chemical Corporation is engaged in a private nuisance as a toxic tort, and Jorge would sue to abate Pestro's chemical production. Pestro's method of unloading the tanker cars allowed airborne toxic chemical vapors to be carried onto Jorge's farm. Whenever Jorge and his family worked outdoors on windy days, they suffered severe physical reactions from breathing the chemical-tainted air. This constitutes an unreasonable and substantial interference with Jorge's use and enjoyment of his real estate. Reasonable persons in the community, such as other neighboring farmers, would find Pestro's activities highly offensive, because they would significantly interfere with their farming activities, most of which necessarily are conducted outdoors in the open air. Pestro's actions proximately caused Jorge's (and his family's) injuries. In particular, Jorge has been exposed to a powerful carcinogen. Thus, Jorge's private nuisance action against Pestro would be successful. Pestro could not successfully invoke the coming-to-the-nuisance defense,

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coming-to-the-nuisance defense, because Jorge has lived on his farm since 1947 and Pestro built its plant in 1972. Jorge would petition the trial court for abatement, requesting a permanent injunction against Pestro's Dredoxiphine production. Pestro would argue excessive economic hardship from abatement and would insist that money damages would be more appropriate in this case. However, because Pestro's poison is a carcinogen, its production presents a substantial health hazard. In its balancing test, the trier-of-fact would weigh this health threat against the economic hardship to the corporation. (In certain cases, the court might rule on this issue as a matter of law, depending on statutory regulation of poison production, health codes, etc.). As a hypothetical juror, assess this balancing of land uses. You may conclude that the health risk is more important than the economic injuries to defendant. There is a possible abatement solution that would minimize the defendant's economic hardships while protecting the neighboring landowners from exposure to the toxic chemicals. The court could order Pestro to cease open-air unloading of its tanker cars. Pestro could construct buildings within which the chemicals could be unloaded from trains. This would virtually eliminate any open-air contamination, and thus Jorge (and his family and neighbors) would not be exposed to the airborne contaminants. Pestro could continue producing the poison in safer confines. This targeted-use abatement would accommodate both parties and resolve the nuisance problem equitably. Jorge could also sue under a theory of strict liability, because Pestro was engaged in an abnormally dangerous activity. Under this cause of action, Jorge could recover monetary damages for his (and his family's) personal injuries caused by Pestro's activities.

2. In this hypothetical, your summary (for the county prosecutor) should conclude that Wowser's Video Palace was engaged in a public nuisance. Citizens Rallying Against Pornography filed its complaint with the proper government authority, the prosecutor, who is empowered to enforce the local ordinance restricting X-rated video rentals to persons over the age of 18. Because Wowser's routinely rented such materials to underage customers, it violated the ordinance. This constitutes a public nuisance *per se*. Wowser's activity satisfies the elements for public nuisance. By renting its sexually explicit videos to underage youth, Wowser's unreasonably and substantially interfered with the public's use and enjoyment of a legal right common to the public, which is the right to protect children from exposure to pornographic materials. The ordinance establishing age restrictions for video rentals is a valid exercise of the state's police power to protect public welfare and morals. The appropriate remedy in this case depends on the penalties prescribed by the ordinance. The hypothetical facts are silent on this point. Probably, the ordinance prescribes monetary fines for first violations. Abatement through permanent injunction would probably be authorized for subsequent violations. The ordinance might also include imprisonment penalties for violations.

3. Terri would be liable to Ursella Xenopher under two tort theories: negligence per se, as applied to Ursella's injuries, and wrongful death, as applied to the late Quintin Xenopher. Terri violated the state criminal statute by driving while intoxicated. According to a related state civil statute, persons who are injured as result of a tortfeasor's criminal conduct may sue the tortfeasor under applicable tort law. Terri's conduct is at least negligent, although it actually rose to the level of willful and wanton misconduct. In any event, Terri's violation of the criminal statute means that she is presumed negligent under the civil statute and thus Ursella has a negligence per se cause of action. Ursella could recover damages for her personal injuries caused in the collision. Further, pursuant to the civil statute, Ursella could recover damages against Terri for the wrongful death of Ursella's husband, Quintin. Depending on the state's wrongful death statute, Ursella could probably recover loss of consortium and lost lifetime earnings potential.

4. Jennifer Colfield's cause of action against Dr. Sarah David would be wrongful birth. Jennifer would have to prove that Dr. David was negligent in performing an ineffective sterilization operation. To establish medical malpractice, Jennifer would need expert testimony to establish the professional medical community standard of care. Jennifer could also invoke *res ipsa loquitur* to shift the burden of proof to the defendant, as such operations do not usually fail in the absence of negligence. Jennifer's damages would include all medical expenses associated with her pregnancy and her child's birth. Some states would permit recovery of childrearing expenses, although others specifically exclude this type of damages.

Projects

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Projects

1. Read the case of *Smolker v. Pacific Villa Home Owner's Association* in Appendix C at the student companion website. Who was successful? Why?
2. How does your state define wrongful birth/wrongful life actions?
3. Find a case in your jurisdiction with similar issues to the *Smolker* case. Does the court reach a similar finding? Explain your answer.

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Project Answers

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Project Answers

1. The homeowner's association was successful. The board was held to have acted in good faith by having meetings concerning the repair plans.
2. This project is a state-specific problem. You might wish to supply digest citations to assist students in locating your state's common law defining wrongful birth/wrongful life actions.
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