

## Tort Law for Paralegals: Chapter 13

### Chapter Outline

**Tort Law for Paralegals: Chapter 13**

Lecture Hints

Answers to Case Questions

Problems

Problem Answers

Projects

Project Answers

Chapter Quiz

Chapter Outline

Chapter 13

Tort Immunities

**Summary:** This chapter discusses the tort immunities of governmental (sovereign) immunity, immunity of public officers, immunity for children of tender years, workers' compensation, and family immunity/spousal immunity, as well as tort reform and tort trends.

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I. SOVEREIGN (GOVERNMENTAL) IMMUNITY

A. Definition: Governments' immunity from liability for torts committed by their employees.

### Step Text

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### Tort Immunities

**Summary:** This chapter discusses the tort immunities of governmental (sovereign) immunity, immunity of public officers, immunity for children of tender years, workers' compensation, and family immunity/spousal immunity, as well as tort reform and tort trends.

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## CHAPTER OUTLINE

### I. SOVEREIGN (GOVERNMENTAL) IMMUNITY

A. Definition: Governments' immunity from liability for torts committed by their employees.

#### B. Historical origins

1. English and Western European law declared that the king could not be sued by his subjects without his consent.
2. The king (and his agents) were immune from tort liability because the king was given divine right by God to rule. Immunity was originally based on premise that the king could not commit legal wrongs against anybody.
3. Gradually, common law viewed sovereign immunity as "the king can do no wrong."

#### C. American applications

1. Sovereign immunity was adopted by American courts as part of English common law at the time of American independence.
2. The king was replaced by the concept of governmental entities.
3. State, local, and federal governments were immune from tort liability unless they consented to suit through statutes or constitutions.

D. Early-twentieth-century cases: American courts began distinguishing between governmental functions that were and were not immune from tort liability (the so-called governmental/proprietary function distinction).

#### E. Governmental functions

1. When governmental employees committed torts against citizens, the government was immune from liability if the tortfeasor employees had been engaged in governmental functions.
2. Governmental functions examples: police, fire, public medical services.

#### F. Proprietary functions

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1. Definition: Business-like activities in which governments engage, and for which governments are liable for their employees' torts committed during the pursuit of these functions (e.g., municipality providing utility services).

2. Fee standard

a. Used by courts to distinguish governmental from proprietary functions

b. If the governmental activity charged user fees, then the activity was considered proprietary.

G. Modern trends

1. Modern courts have abandoned the governmental/proprietary distinction in favor of outright abolition of common law sovereign immunity.

2. Legislatures have enacted statutes abolishing most governmental tort immunities.

H. Excerpts from Am. Jur. 2d Municipal, School, and State Tort Liability (1988)

## II. TORT IMMUNITY FOR PUBLIC OFFICERS

A. Legislators and judges enjoy absolute immunity from tort liability while performing official governmental activities.

B. Executive branch officers enjoy absolute immunity for administrative officials performing judicial or legislative functions.

C. Rationale for immunity: Public officials must be free to perform a variety of governmental activities without fear of reprisal by angry citizens disadvantaged by adverse governmental decisions. Such citizens might file endless tort actions against public officials, having a chilling effect on governments' ability to perform necessary public tasks.

## III. TORT IMMUNITY FOR CHILDREN OF TENDER YEARS

A. Young children enjoy complete, or limited, tort immunity under common law.

B. "Children of tender years" is defined as young children under the age of seven.

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C. Absolute immunity for intentional torts: Most states still follow ancient common law that children of tender years are absolutely immune from intentional tort liability because they are too young to understand, and thus form the requisite intent to commit, such torts.

D. Limited immunity for negligence

1. Under most states' common law, children of tender years may be liable for negligent actions, depending on the state's reasonable young child standard.

2. Reasonable person = young child same age and experience as defendant.

3. A minority of states hold that children under age seven cannot commit negligence and are immune from liability. Most states place the age lower, at three or four years, for absolute negligence immunity to apply.

#### IV. FAMILY RELATIONSHIPS

A. Spousal immunity: At common law, spouses were immune from suit from each other. This has been abolished by a majority of states and suit can now be brought.

B. Family immunity: At common law, suits between family members were also prohibited. In some states this has now been abolished, and suits between family members are permitted. Family immunity only covers suits between parent and child, and does not address suits between other family members such as brothers, sisters, or other relatives.

#### V. TORT TRENDS AND TORT REFORM

A. Tort trends: Changes in the tort system that are predictive of the direction that tort actions are headed for the future.

1. Just some of the evolving issues: Gay marriage; unions and demands for associated benefits; in vitro fertilization; pollution actions against car manufacturers, oil refineries, and electric utility companies for causing global warming; veterinary malpractice; allowing emotional distress claims following land contamination; actions for percholate contaminating groundwater; toxic torts; air and water contamination from fracking; and cybersquatting, cyberstalking, and cyberbullying. B. Tort reform: The effort to reduce the amount and kind of tort litigation and excessive damage awards.

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1. This effort is primarily spearheaded by the defense bar.
  2. Some examples of tort reform are: ADR, caps on attorney fees, shortening of statutes of limitation, elimination of joint and several liability, and the collateral source rule.
  3. Other examples of tort reform: Closely regulated lawsuits, consent to arbitrate forms, and contracts that limit the parties' options in the event of suit.
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## Lecture Hints

5 seconds

**Tort Law for Paralegals: Chapter 13**

Lecture Hints

Answers to Case Questions

Problems

Problem Answers

Projects

Project Answers

Chapter Quiz

Lecture Hints

1. The issue of sovereign immunity is a legal monster, encompassing a myriad of statutes, court decisions, and constitutions at the federal, state, and local levels. This author has attempted to simplify the concepts for the purposes of this course, because the importance of governmental tort liability has diminished significantly within the past 20 years. Thus, students should be adequately served with an abbreviated analysis of the subject.
2. Similarly, there is little litigation involving the tort immunity afforded public officers. This topic may be quickly covered with a few illustrations.

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3. Students should find the children-of-tender-years defense to be the most interesting topic in this chapter. You may wish to supplement class discussions with additional hypotheticals to illustrate.



## Answers to Case Questions

5 seconds

**Tort Law for Paralegals: Chapter 13**

Lecture Hints

Answers to Case Questions

Problems

Problem Answers

Projects

Project Answers

Chapter Quiz

### Answers to Case Questions

**Stone v. The Regents of the University of California**

1. The Regents did not defend Stone because the injury occurred to his private patients, and thus fell outside the scope of his employment with the university.
2. Yes. Dr. Stone's actions were so outrageous that there was no way the Regents could have foreseen that something like this might occur.

**Lieberman v. Marino**

1. Taser training might have changed the result, as the officer might not have used the Taser so many times. However, the officer was using the Taser in response to the plaintiff's erratic behavior, and the officer's reaction might have been the same even with training.
2. No. This is an alleged "§ 1983" violation. It is a

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2. No. This is an alleged “§ 1983” violation. It is a question of whether a constitutional violation resulted from a municipal policy or custom.

**Rollinson v. Beresowskyj**

1. The reader might disagree with the court’s decision, as the defendant minor had a known history of assaultive conduct. If his mother could not control the child, perhaps she should have sought assistance in this regard.

2. The defendants are described with a more sympathetic background, as the mother is sickly and weak, gaining your sympathy. However, the plaintiff’s injuries were described in detail and were quite serious. It’s hard to say who would get more sympathy from a jury.

3. Although the plaintiff’s exact injuries were not foreseeable, it appears that the defendant child had no control over himself, and would strike out with the least provocation.

**State Compensation Insurance Fund v. Workers’ Compensation Appeals Board and Garcia**

1. Yes, the six-month rule is fair, as psychiatric injuries can be hard to document and prove.

2. Employees are better off with workers’ compensation. There is a guaranteed fund of money for their injuries. Employees can collect for injuries without regard to their own fault or negligence.

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## Problems

5 seconds

### Tort Law for Paralegals: Chapter 13

Lecture Hints

Answers to Case Questions

Problems

Problem Answers

Projects

Project Answers

Chapter Quiz

#### Problems

In the following hypotheticals, identify the kind of tort committed, and whether any type of immunity exists to protect the defendant from tort liability.

1. Superior Court Judge Emily Doud McKinnley granted summary judgment to the defendant in a negligence lawsuit. The plaintiff had sued the defendant for negligently causing personal injuries. The plaintiff suffered extensive injuries and was unable to work for the remainder of his life. Upon appeal, the state court of appeals reversed Judge McKinnley's summary judgment order. The appellate court admonished the trial judge for refusing to accept certain key evidence that the plaintiff offered at hearing. The appellate court stated that there was no legal basis for granting summary judgment in the case. The trial transcript clearly indicated that the judge had become angry at plaintiff's counsel's attempts to admit the evidence despite warnings to

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become angry at plaintiff's counsel's attempts to admit the evidence despite warnings to desist. After the appeal, the plaintiff wished to sue Judge McKinnley for judicial malpractice.

2. Shelby Sarville drives a garbage truck for the City of New Ventura. The city charges its customers a monthly trash-hauling fee, which is based on the size of the trash container used. Citizens may use the city's service, although many people hire private trash companies instead. One day, while backing up to empty a trash dumpster, Shelby failed to look in his rearview mirrors. A five-year-old girl tried to squeeze between the truck and dumpster on her bicycle. She mistimed the squeeze, and the truck crushed her against the dumpster, causing severe internal injuries. (Be sure to address the contributory negligence issue in this case.)

3. Daphne is an 8-year-old girl who often plays with her neighborhood friends. While hiking through the woods on Saturday afternoon, two of Daphne's neighbors, Paul (age 7) and Anne (age 10), decided to "ditch" Daphne; that is, the duo would abandon Daphne in the woods and flee the scene. The sun had just gone down, and it was becoming quite dark when Paul and Anne ditched Daphne. Once Daphne realized that she was alone in the forest, she became frightened and ran toward home. She twisted her ankle and fell, striking her head against a tree root. She was knocked unconscious. Several hours later, a police search party located her. She suffered a concussion and dehydration.

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## Problem Answers

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**Problem Answers**

1. The plaintiff's "judicial malpractice" lawsuit against Superior Court Judge Emily Doud McKinley would fail. Judge McKinley would successfully invoke the absolute tort immunity defense. Judge McKinley was performing her official capacities as a judge, albeit rather badly, if one accepts the court of appeals' admonitions. Nonetheless, the judge would be immune from tort liability, regardless of how incompetently she performed her duties. The plaintiff's appropriate avenue of relief would be to file judicial misconduct charges against the judge with the state supreme court, under the state's Code of Judicial Conduct.
2. Shelby Sarville's negligence in backing up the garbage truck may be imputed to his employer, the City of New Ventura, under respondeat superior. The city would argue sovereign immunity, assuming that such a defense was still available in this hypothetical jurisdiction. The city would characterize its trash collection service as a governmental function, because it provides a public

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available in this hypothetical jurisdiction. The city would characterize its trash collection service as a governmental function, because it provides a public health service to the general public. However, this characterization is faulty. The city's trash collection is a proprietary function, clearly comparable to services available from private trash haulers in the area. Further, the city assessed users' fees for this service, which, under the fee standard, indicates a proprietary function. Because proprietary functions carry no immunity from tort liability, the city would be liable to the five-year-old victim injured as a result of Shelby's negligence. Contributory negligence would be another possible defense in this hypothetical. The five-year-old girl tried to squeeze between the truck and dumpster as the truck was backing up. This suggests that the girl violated her duty of reasonable care to herself and contributed to her own injuries through her own negligence. However, this victim is a child of tender years. Just as extremely young children are immune from negligence liability, so are they immune from contributory negligence. The facts do not address whether the courts in this hypothetical's jurisdiction consider five-year-old children absolutely immune. Assuming not, the reasonable five-year-old person standard would be applied to determine if the girl acted unreasonably under the circumstances. Preschool children frequently misjudge the speed and distances of approaching vehicles, thinking that they can avoid harm through a speedy burst. The girl here may have acted as a reasonable five-year-old, who might not fully appreciate the dangers involved. If this were the court's decision, then the girl would not have been contributorily negligent, and so this defense would fail.

3. Daphne (through her parents or guardian) would sue Paul and Anne (through their parents or guardian) for negligently causing Daphne's injuries, and for intentional or reckless infliction of emotional distress. The intentional/reckless infliction cause of action would be dismissed under the common law child's absolute immunity for intentional torts. Thus, Paul and Anne (and their family) would not be liable to Daphne under these tort theories. Under negligence, however, absolute immunity for children of tender years is not available, at least for Anne. Anne, at age 10, should reasonably have anticipated that Daphne, age 9, would become frightened when she discovered herself alone in the darkened woods. A reasonable 10-year-old person would have foreseen that, frightened and panicky, Daphne would run to escape the forest first and, in doing so in the darkness, could trip, fall, and severely injure herself. Daphne's injuries were reasonably foreseeable. Thus, Anne's behavior fell below the reasonable standard of care among child playmates under the circumstances. Anne's ditching maneuver would be a breach of duty that proximately caused Daphne's injuries. At age 7, Paul would probably escape liability, even if absolute child immunity were not available. Younger siblings often mimic elder siblings' behavior without considering the potentially adverse consequences. Paul's behavior, then, could be viewed as acceptable for a reasonable 7-year-old playing with his older 10-year-old sister and plaintiff. Defendants would argue that Daphne assumed the risk and was contributorily negligent in causing her

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own injuries. These defenses would probably be available, because Daphne, at age 8, is above the typical tender-years age ceiling of 7 or below. Thus, Daphne would not be immune from these defenses. However, the defenses would fail. A reasonable 8-year-old person often plays in the woods with friends during daylight and would not anticipate being abandoned after dark. Finding herself alone in the forest, a reasonable 8-year-old might become extremely frightened and react, just as Daphne did, by fleeing rapidly from the scene. Because of Daphne's youth, she could be excused from anticipating the dangers involved in running through the dark woods. Accordingly, she would not have knowingly assumed this risk. Further, her behavior complied with the reasonable person standard, so she was not contributorily negligent.

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## Projects

5 seconds

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- Lecture Hints
- Answers to Case Questions
- Problems
- Problem Answers
- Projects
- Project Answers
- Chapter Quiz

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1. Read the Doe v. Cutter Biological case in Appendix C at the student companion website. Here, the plaintiff seeks to hold two defendants liable, although the plaintiff admits it is not possible to prove which defendant caused the plaintiff's injuries. Is the joint and several liability doctrine fair? Explain. Which particular immunity was involved in this case? What is the enterprise theory? Define the concert-of-action theory.
2. Have the students locate a case with similar issues in your jurisdiction. Do the courts differ as to their approach to this subject?

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5 seconds

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- Lecture Hints
- Answers to Case Questions
- Problems
- Problem Answers
- Projects
- Project Answers**
- Chapter Quiz

#### Project Answers

1. Just because a plaintiff cannot precisely prove the percent of liability in a tort action, the defendants should not be absolved of all responsibility for their acts. Obviously, a plaintiff would feel that this doctrine is fair, whereas a defendant would think the doctrine very unfair. In *Doe v. Cutter Biological*, the Idaho blood shield statute precluded providers of blood products or derivatives from being held liable for anything other than their own negligence. Enterprise liability is used when a plaintiff cannot identify the precise manufacturer of a product that caused injury, so all manufacturers that produced the product to the same specifications are held joint and severally liable. The concert-of-action theory is a criminal law concept. If plaintiffs can establish that all defendants acted tortiously pursuant to a common design, they will all be held liable for the entire result.
2. This question has a state-specific answer.

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5 seconds

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Lecture Hints

Answers to Case Questions

Problems

Problem Answers

Projects

Project Answers

#### Chapter Quiz

[Click here for the Chapter Quiz.](#)

Chapter Quiz

### ***Step Text***

[Click here for the Chapter Quiz.](#)

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