meant to pay for them and only stuffed them in his pocket while he looked at DVDs. He was apprehended by security guards before he left the store.

**Cases**

Three recent cases discuss the crime of shoplifting under Arcadia law. In one, a man who was carrying a large trash can walked out of a hardware store to determine if it would fit in his car. He claimed that he had no intention of taking the can without paying for it, but only wanted to see whether it would fit in his car. The court found that he was not guilty of shoplifting. In another case, a woman was arrested in the parking lot of a drug store with six bottles of nail polish in her pockets. Though she claimed she intended to pay for them but forgot, the court found her guilty of shoplifting. In the last case, a woman entered the fitting room of a clothing store. When she emerged, she was wearing four shirts, one under another. Each had the price tag attached. She was stopped in the adjacent parking lot by store security and charged with shoplifting. The court found her guilty of shoplifting.

CHAPTER 2

# Analyzing Legal Issues

**When you master this chapter, you will understand:**

1. how the American legal system is structured;
2. what a legal issue is; and
3. how to identify and analyze legal issues.

## A. The Legal System

In Chapter 1, you were introduced to the principles of legal analysis and applied these principles to non-legal problems and simple legal problems. You learned how "legal" analysis is similar to everyday analysis: it is a logical way of identifying past similar situations, finding a rule that makes sense of them, and applying that rule to a new situation to predict an outcome.

In this chapter you will consider analysis in a more advanced legal context. But first you will need some basic information about the American legal system, including why the law so often is difficult to find and apply.

### 1. Why the law is rarely definitive

Before coming to law school, you probably thought that the trick to becoming a lawyer was in knowing where to look for the law and once you found it, using it. In fact, as you no doubt have already begun to sense, there often is no single place to look for "the law," that is, the specific rule that can dictate the resolution of a dispute or the outcome of a case. It may seem surprising that laws may be difficult to find or that rules may be so unclear or uncertain that the lawyer must spend a lot of time trying to figure out what they actually mean. Why the law is so often unclear, incomplete, uncertain, or ambiguous is itself a complex question. There are several reasons, each stemming from a different facet of the American legal system:

a. *The law is not always a part of a written code.* Much of "the law" consists of the judgments of courts about how particular disputes should be decided. Rules that emerge from judicial opinions lie at the heart of the common-law system, discussed at greater length below. Although much law is embodied in the opinions of the courts, it is rarely spelled out in **black-letter** form—that is, in a clearly-stated, precise, and well-settled rule. To discern the law, the lawyer often must synthesize the rules from the opinions of various courts that have considered an issue under different circumstances.

b. *Compromise fosters fuzziness.* **Statutes**—laws enacted by a legislature—are the result of political compromise. Legislators with different agendas and political outlooks must often compromise on the wording of a statute just to secure enactment. Similarly, the justices of the U.S. Supreme Court, and judges on other appellate courts, often compromise to obtain sufficient votes to decide the case their way. Such compromises frequently take the form of broad, ambiguous, and unclear language to appease the many sides of debates.

c. *Language is ambiguous.* Even when law is explicitly stated in rule form, language is inherently ambiguous, and what might seem to the legislator a straightforward declaration may turn out, when interpreted or applied by the courts in different cases, to be far from clear.



d. *Efficiency requires generality.* Even black-letter law is often necessarily stated in generalities to avoid the time-consuming and ultimately impossible task of listing every possible situation to be covered. For example, a statute might prohibit "deception" and "misrepresentation" in commercial dealings without spelling out what each such deceptive practice and misrepresentation might be.

e. *Fuzziness prompts still more analysis.* Because the law so often is unclear, disputes cannot easily be settled simply by referring to a rule. The rules must be interpreted, and that is why so many disputes wind up in court. But in deciding a particular case, a court might itself be less than clear, and so parties to future disputes may find it necessary to return to court to challenge interpretations of previous court rulings.

f. *Laws are imperfect.* Legislators are not infallible, and they have no greater ability to foresee everything that should fall within a rule than do most people attempting to predict the future. Likewise, the law-makers are often unable to foresee political, social, and economic developments that might require a rule, so when something new comes along, governmental agencies, courts, and lawyers might try to apply laws not designed for the purpose, leading to interpretations that the framers of the law might never have contemplated.

g. *Lawmakers are imperfect.* Sometimes laws are poorly drafted, owing to mistakes about the meaning of language and the purposes to be served by the law, failure to proofread, or a lazy or indifferent approach to writing.

For all these reasons, the lawyer faces a difficult task just in understanding what the law is. *That is why the mastery of language, the ability to read closely and to fathom meaning from dense prose, is such an important part of the lawyer's craft.*

### 2. The common-law system

Elementary civics textbooks often explain that the three branches of government—the legislature, the executive, and the judiciary—have different roles to play in making and enforcing law. In the elementary view, the legislature *makes* the law, the executive *enforces* it, and the courts *interpret* it. However, this view is much too simplistic to be useful to the law student in understanding the legal system. In reality, all three branches of government are actively involved in making law.

Historically, law as we know it originated in the courts. Roots of the **common law**—the law that was supposed to be common to all of England, not merely to the territory controlled by a particular duke or baron—emerged from courts established by the British monarchs in the eleventh and twelfth centuries. The courts did not announce rules the way Parliament would later enact laws. Rather,

in resolving disputes brought before them, judges said they were being guided by ancient principles, customs, and traditions of the people. For centuries, common-law judges persisted in claiming that they were not declaring law, only "finding" pre-existing rules and principles. In fact, however, the common-law courts over several centuries fashioned, often out of whole cloth, large branches of law—what today we know as torts, contracts, and property law, among others. The common law is often called the "unwritten law," in contrast to the enactment of explicit laws by the legislature. But in fact the common law is written down, in the opinions of the judges stating the reasons they had for deciding each case as they did. Not surprisingly, this common-law system has led, and is continuing to lead, to a staggering number of written opinions.

Although the term "common law" is often used in a narrow sense to describe claims that are judge-made, as opposed to those created by statute, the common-law system has a broader sense, referring to the judicial tradition of deciding cases. The common-law tradition rests on two basic principles.

First, judges apply and construe the law on a *case-by-case* basis. That is, they discuss and interpret the law only so far as is needed to resolve the particular issue in the case before them. They avoid general, theoretical pronouncements, confining themselves to the job of determining how the law applies to the case at hand. In a slander case, therefore, the judge will decide only whether the particular words were slanderous under the circumstances. Of course, the judge may discuss the tort of slander generally, but only to explain and justify the reasoning behind the particular decision, not to create an all-encompassing definition of the tort. A general definition can be sought only by reading many decisions to see the contours and boundaries of the concept as the courts have developed it.

Second, judges use decisions in prior cases with similar facts to resolve present cases. This second principle is a corollary of the first: applying the law incrementally on a case-by-case basis would create chaos unless the cases were consistent with each other. This principle is called ***stare decisis***, which is Latin for *to stand by things decided.* (*Stare decisis* is the shortened form of the Latin phrase *stare decisis et non quieta movere*, which means "to stand by precedents and not to disturb settled principles of law.") Specifically, *stare decisis* means that a judge in a particular court must follow decisions made by judges in courts to which that decision could be appealed. Under the principle of *stare decisis*, decisions by these judges are **binding authority**, and the judge must follow them.

Unfortunately for the student, the principle of *stare decisis* is not, and probably could not be, rigidly followed. If every decision were required to conform to previous ones, the first judge to rule would set the law for all time. The common-law system is much more flexible, allowing the law to change to adapt to changing circumstances. Flexibility is built into the general common-law system in two ways. First, judges can **distinguish** a later case from a previous one, by pointing



to different facts that might require a different outcome. Often the differences are real, but sometimes judges purport to find distinctions that do not really exist; in creating the "fiction" of difference, they can change the law to suit their policy purposes. Over time, the continuing distinctions lead to new rules. Second, appellate courts, or so-called "higher" courts, are not legally bound to adhere to the principle of *stare decisis*. For any number of reasons, the United States Supreme Court, and state supreme courts, might decide that a previous rule was wrong and **overrule** the case or cases that established it.

Further complicating the picture of law-making is the role of the legislature. The common-law courts do not act in a vacuum. Legislatures, consisting of elected representatives of the people, are law-making bodies. The statutes they enact are superior to the rules announced by courts, in the sense that a statute can alter, modify, and even abolish a common-law rule, as well as other statutes previously enacted.

In the late nineteenth century in America, legislatures began to encroach on the common law by adopting statutes on matters formerly rooted in common-law principles. At first the courts resisted, sometimes refusing to enforce the statutes, almost always reading the statutes narrowly. But in time the courts conceded the legitimacy of legislative rule. Today it is well understood that statutes supersede common-law rules. For example, at common law in the nineteenth century, an employee could not sue his employer if the employee was injured by a fellow employee. This was the so-called "fellow-servant rule." But because this rule usually meant that injured employees had no remedies, legislatures in most states abolished the rule. When it then appeared that companies would be swamped with lawsuits, legislatures responded with workers' compensation statutes, which barred injured employees from pressing common-law claims against their employers, and in return gave injured employees the right to recover money in an administrative proceeding without having to prove that the employer was at fault.

Although the legislature can alter a common-law rule, or create law in areas in which the common law is silent, the common-law system continues to work. The legislatures are no more sealed off from the courts than the courts are from the legislatures. Courts must necessarily be involved in statutory law because people question the meaning of the statutes. The meaning of legislation is rarely free from doubt. Common-law principles therefore apply to statutory cases too. Frequently, definitions of statutory terms (such as "deadly weapon" or "intended use") develop on the same case-by-case basis that leads to common-law principles. When construing statutes, judges limit themselves to deciding only what is necessary to the particular case, not to explaining the statute's general meaning. And *stare decisis* applies as well: the court must construe the statute consistently with prior, binding authority. That is why no statute can be understood in the

legal sense simply by reading it: the lawyer must be aware of the many cases that have considered and settled its meaning.

And so it should by now be clear why "the law" is no simple thing that can easily be looked up and then routinely applied to resolve a dispute or accomplish some other objective. The American legal system is complex and sprawling, and the law can only be "found" and ultimately understood by a diligent search for the appropriate statutes and cases and a careful reading and analysis of what they say.

### 3. Civil law: The difference between statutory and common-law claims

A person's right to sue another in a civil suit is based on *either* a statute or the common law. A **claim** is a set of requirements, which, if proven, establishes a person's right to a judgment against another. A statutory claim is based on a law enacted by a legislature. A common-law claim is based on law that is judge-made.

For example, many state legislatures have passed laws prohibiting employers from firing employees who report dangerous or illegal activities of the employer to the authorities. Typically, these whistleblower statutes give fired employees the right to sue their employers. An employee who believes his firing violated the state's whistleblower statute therefore has a statutory claim against his employer, and he may sue his employer, seeking a judgment against him.

Similarly, many state legislatures have passed "Dram Shop Acts." These laws give people who are injured by intoxicated drivers the right to sue business owners who sold or served liquor to the drivers. Before these laws were passed, courts in some states refused to hold business owners liable in such cases. Dram Shop Acts make business owners civilly liable when they sell or serve liquor to drivers who are later involved in car accidents.

In contrast, common-law claims are claims that courts have traditionally accepted, even though they have no statutory basis. Tort claims (such as negligence and trespass) are often rooted in the common law.

Whether judges interpret statutory law or common law, they do the same thing: apply general legal principles to the specific case. In both situations, judges look to prior cases to see how the statutory provision or general common-law principle has been applied in similar situations by other judges. The judge construing a statute, however, must often also consider the legislature's purpose in passing the statute and construe it consistently with that purpose.

### 4. The difference between civil and criminal law

In a civil lawsuit, one person (the **plaintiff**) sues another (the **defendant**) because the plaintiff believes that the defendant harmed him. The plaintiff's harm might be physical injury, mental distress, economic loss, or something else. Whatever the harm, the plaintiff wants a **judgment**, requiring the defendant to provide a **remedy**. Although the usual remedy is for the defendant to pay the plaintiff money (**damages**), sometimes the defendant must do something (**specific performance**) or not do something (**injunctive relief**). Civil law determines whether a plaintiff is entitled to a judgment against a defendant in a lawsuit and what that remedy will be.



In a criminal **prosecution**, a government (federal, state, or local) charges an individual (also called the defendant) with committing a crime, such as murder, burglary, or fraud. Crimes are created by statute and usually are compiled in a **penal code**. For constitutional reasons, there can be no common-law crimes. In a criminal case, the government seeks to punish the defendant for committing the crime. The punishment may be a jail sentence, fine, probation, or community service.

Sometimes one event becomes the basis for both civil and criminal lawsuits. For instance, the family of a victim killed by a reckless driver may bring a civil action against the driver for wrongful death; the state may independently prosecute the driver for the crime of vehicular homicide.

## B. What Is a Legal Issue?

The first challenge the lawyer or judge faces when a legal problem arises is identifying the **legal issue.** A legal issue is a question about what the law means or how (or whether) it applies to the facts of a particular situation. The law, whether in the form of a common-law principle or a statutory provision, is often expressed in general terms. That generality is necessary because the law cannot anticipate and specifically address every conceivable situation. For instance, under tort law, a person has a claim against someone who slanders him. But what type of statements are slanderous? The law cannot list every comment a person might make and categorize it as slanderous or not slanderous. Certainly some comments are slanderous on their face and others are not. It is slanderous to call someone a criminal if you know he has broken no laws; it is not slanderous to call someone "honest" even if he is not. But other comments are not so clear-cut. For example, it may or may not be slanderous to call someone a "scoundrel."

Much of the actual practice of law (and *most* of the questions raised in law school) involve a middle ground between events that clearly fit and clearly do not fit within a legal rule. In this middle ground lies the legal issue: "Are these words slanderous?" "Did A trespass on B's property?" "Was that dog provoked?" Lawyers (and law students) must know how to recognize when the situation with which they are presented raises legal issues.

## C. Identifying Legal Issues

Legal issues do not reveal themselves. Lawyers ferret them out by carefully considering their clients' rights and obligations in particular situations. Law students do exactly the same thing for fictitious characters in classroom discussions and on papers and exams.

In litigation, lawyers often uncover issues when trying to determine if a client has a good case (or a good defense). Typically a prospective client who wants to sue someone will tell his story and ask the lawyer, "Can I sue?" or "Do I have a case?" The client's questions—"Can I sue?" or "Do I have a case?"—are not legal questions. To answer these questions, you, as a lawyer, must ask yourself a different one: does your client have a legal claim against someone? It is by trying to answer *this* question that you come upon legal issues.

### 1. Identifying your client's claim

The law recognizes many distinct claims: negligence, slander, breach of contract, and so on. Some rights, and therefore some civil claims, are created by the legislature. These are statutory claims. Others have no statutory basis, but rather are created by courts. These are common-law claims. Claims, whether statutory or common law, have distinct requirements. The careful lawyer lays out the claim's requirements in a way that will promote a thorough analysis. Sometimes statutes or the courts express the requirements as a list. Each item on the list is called an **element**. By way of illustration, the elements of the common-law claim of civil trespass could be stated this way:

> D is liable to P for trespass if,
> 1. without P's permission,
> 2. D intentionally
>  (A) enters P's land; or
>  (B) causes someone or something to enter P's land; or
>  (C) remains on P's land; or
>  (D) fails to remove from P's land something that he had permission to place there but thereafter had a duty to remove. [Adapted from the Restatement of Torts 2d § 158.]

### 2. Matching the elements of the claim to the facts of your case

Listing the elements of a claim—breaking the claim into its components—helps lawyers focus on each requirement separately, allowing them to determine systematically which elements of their clients' claims are satisfied and which must be more carefully considered. For example, consider whether D trespassed on P's land in the following situation:

> D lives in a three-story house that borders P's land. D installed on this house an awning that juts out over P's property, knowing that the awning would overhang P's land. D did not obtain P's permission to install the awning.

To determine whether P has a claim of trespass against D, you must first lay out the elements of the claim and then match them up to the specific facts of P's case. In other words, you must determine whether the facts of P's case satisfy—that is, meet—all of the requirements of the claim.

Your first step is to understand the elements of trespass. D must act *intentionally* and *without P's permission*. The requirements listed in (A), (B), (C), and (D) are connected by an "or." When the law specifies one thing *or* another thing as a requirement, you need satisfy only *one*. Therefore, P has a claim for trespass against D if, without P's consent, D intentionally did *any one* of the things listed in these four requirements.

Your next step is to match the elements to the particular facts of P's case. You know that D acted intentionally—since he knew the awning would overhang P's land—and that he did not have P's permission. To establish his claim, P must *also* satisfy any one of the four items listed in (A) through (D). Matching just (B) will be sufficient to satisfy this element because (A) through (D) are alternative ways to establish the claim of trespass. P's case does not meet the criteria in (A), (C), and (D): D did not enter P's land; D did not remain on P's land; and D did not fail to remove from P's land something that he was under a duty to remove. Therefore, the only possible match is (B): "causes . . . something to enter P's land."

You must then determine whether D, by installing the awning over P's property, intentionally and without permission "cause[d] . . . something to enter P's land." There is no question about D's intent and his lack of permission. But did the awning "enter" P's land even though it did not touch the ground? *This question raises an issue.* Your matching of the elements of trespass to the facts raises a question that cannot be answered without further research and analysis.

- Once a lawyer determines the client's potential claim (or claims), he must see if the facts of the client's case satisfy all of the *elements* of the claim.
- A lawyer often discovers legal issues when trying to match the elements of a particular claim to the facts of the client's case.

**Do Exercises 2-A, 2-B(1), and 2-B(2) Now, p. 35**

### 3. About defenses

A plaintiff's right to a judgment against a defendant depends not only on whether the plaintiff has a claim, but also on whether the defendant has a **defense** to the claim. A defense is a set of requirements, which if proven, may defeat the plaintiff's right to a judgment on his claim. Even a plaintiff who satisfies all the elements of his claim may nonetheless be unable to obtain a judgment against the defendant if the defendant can establish a defense. For example, one defense to a claim of breach of contract is disaffirmance. Generally, the disaffirmance defense gives a person the right to void a contract that is not for necessaries (such as food, clothing, or shelter) if he is a minor.

Like claims, most defenses have elements too. The elements of the defense of disaffirmance to a breach of contract claim might be expressed this way:

> D may disaffirm a contract he has made if
> 1. he is under age 18 and
> 2. the contract is not for necessaries, such as food, clothing, or shelter.

Approach questions about defenses as you would claims: identify the elements of the defense and match each of them against the facts. When matching, distinguish easy matches from problematic ones, recognizing that the problematic ones may raise issues. For instance, suppose Fred, a fifteen-year-old high school student, decided he needed a cell phone. He went to an electronics store and, in exchange for a free cell phone, signed an agreement for a very expensive annual calling plan. When the first bill came, Fred realized he had made a big mistake and did not pay it. The phone company sued him for breach of the agreement. To determine whether Fred may assert the defense of disaffirmance, you would match the elements outlined above to these facts. You could conclude that the first element is satisfied because Fred is under age 18. It is not as clear, however, whether the cell phone is a "necessary." Your matching the second element of the defense to the facts therefore raises a question that cannot be answered without further research and analysis.



**Do Exercises 2-C(1) and 2-C(2) Now, p. 36**

### 4. How to identify an issue in a legal claim

Consider the following situation:

> Recently, Frank, an eleven-year-old, was hit by a reckless driver and died immediately. Frank's aunt, Susan Johnson, saw the crash in which Frank's body was hurled into the air. She was standing three feet away from the accident when it occurred. Johnson suffered severe emotional shock as a result of witnessing the accident. She has retained your firm and wants to know whether she has a claim against the driver for her anguish.
>
> Since Frank was three, his mother worked outside the home and Johnson took care of him during the day. She regularly prepared his meals, helped him with his homework, and drove him to after-school activities. Every summer, Johnson took Frank with her to Florida, where they would stay with Frank's grandparents (Johnson's parents).

***Step 1. Identifying the claim.*** You should first ask: what claim might Johnson have against the driver? Sometimes the type of claim is obvious—a contractor who has not been paid for work satisfactorily completed has a claim for breach of contract. But sometimes a claim is not obvious, and the lawyer must do some preliminary research, looking for claims that might be supported by his client's situation. A lawyer often gathers the **necessary facts** and determines his client's claim concurrently: knowing which facts are necessary—the facts that will determine the outcome of the case—depends on knowing the elements of the claim, and vice versa.

From your research, you learn that Johnson may have a claim against the driver of the car for negligent infliction of emotional distress, which is a common-law tort claim in Arcadia, where the accident occurred.

***Step 2. Identifying the elements of the claim.*** The controlling case in Arcadia on negligent infliction of emotional distress—the primary case in the jurisdiction that the courts follow—has listed the elements of this claim as follows:

> When the defendant injures a third person, the plaintiff has a claim against the defendant for negligent infliction of emotional distress if
> 1. the plaintiff was closely related to the injured person;

2. the plaintiff was present at the scene of the accident and aware that the third person was being injured; and
3. as a result, the plaintiff suffered an emotional shock.

***Step 3. Determining whether your client's facts satisfy the elements of the claim.*** After you have identified a possible claim and determined its elements, your next step is to match each of the elements to the particular facts of your case. In doing so, you determine whether the facts of your case satisfy the elements of the claim.

*Easy matches: the second and third elements.* A cursory review of the case law indicates that the second and third elements of negligent infliction of emotional distress are satisfied. The second element is satisfied because Johnson, from a distance of three feet, saw the car hit Frank. The third element is also satisfied: we know that Johnson suffered emotional shock from witnessing the accident.

*A harder match: the first element.* Whether Johnson is "closely related" to Frank is less clear. A quick review of the cases indicates that while spouses, parents, and siblings of a victim are *always* considered "closely related" to the victim, more distant family members, like aunts, uncles, and cousins, are only *sometimes* considered "closely related."

*You have identified an issue:* Does the relationship between Frank and his aunt satisfy the "closely-related" element of the claim of negligent infliction of emotional distress? Identifying the issue is only your first step. Now you must analyze it.

## D. Analyzing Legal Issues

Analyzing a legal issue is a three-step process: (1) finding similar cases; (2) identifying a rule that explains the holdings in those cases; and (3) applying that rule to your situation to predict an outcome. Therefore, to analyze whether the relationship between the aunt and her nephew satisfies the "closely-related" element of negligent infliction of emotional distress you would

1. find cases considering the "closely-related" element that are factually similar to your case;
2. identify a rule that either is expressly stated in those cases or that explains their holdings; and
3. apply that rule to your case to predict how a court would resolve the issue of whether Johnson and her nephew Frank were "closely related."



***Step 1. Find Similar Cases.*** Your first step is to find cases involving similar facts. You might have a personal opinion about whether Johnson and her nephew were "closely related," but only the opinion of the courts, not your opinion, matters to the outcome of your client's case. So you do additional research, looking this time not for cases that generally list the elements of the claim of negligent infliction of emotional distress, but for cases that will help you predict how a court would decide the particular question of whether Johnson was "closely related" to her nephew Frank. In other words, you are focusing your research on the "closely-related" element of the claim, looking for cases with facts that are like yours.

You find nine cases in your jurisdiction, all binding authority, dealing with the "closely-related" element. Three of these cases consider whether a victim's spouse or parents are closely related to the victim. In these cases, the courts held that spouses and parents were closely related because they were members of the victim's immediate family. In three other cases, the court held that close friends of the victim could not recover because no "blood or conjugal relationship" existed between the friends and the victims. The three remaining cases involved aunts and uncles of the victim. Here are summaries of the facts and holdings of these three cases.

### Case 1: Smith v. Jones

The uncle witnessed the death of his five-year-old nephew, who was killed by a reckless driver.

*Relationship between uncle and victim.* The uncle and nephew lived in the same neighborhood. The uncle visited the nephew's home almost every day and during those visits often read to his nephew or played with him. The boy slept at his uncle's house two nights a week (when the boy's mother, a single parent, worked at a nearby restaurant). The uncle took the boy to numerous baseball and football games during the year.

*Holding on the issue.* The uncle had a claim for negligent infliction of emotional distress because he was "closely related" to the boy. Characterizing the relationship between the boy and his uncle as "extremely close" and acknowledging that the uncle was a "father figure" for the boy, the court found them "closely related" even though the uncle was not a member of the boy's immediate family (*i.e.*, not a parent, sibling, or grandparent).

### Case 2: Patrick v. Michaels

The aunt witnessed an accident in which her two-year-old nephew was severely burned.

*Relationship between aunt and victim.* The aunt and nephew lived in the same house in the suburbs for about a year. The aunt was a young professional, commuting to her job in the city and working long hours and weekends. She was living with her sister and brother-in-law until she saved enough money to buy an apartment in the city. She occasionally cleaned the apartment but never bathed the child, babysat for him, or changed his diapers.

*Holding on the issue.* The aunt was not "closely related" to the boy because she did not have a close, loving relationship with the child.

**Case 3: Mills v. Donaldson**

The uncle witnessed the hit-and-run death of his seven-year-old niece by a taxi.

*Relationship between uncle and victim.* The uncle moved into his sister's house five years before the accident, shortly after his sister's husband abandoned her and her four children (including the niece). Since then, the uncle, a construction worker who works long hours, has supported his sister and the children. Although not the primary caregiver for the children, he has developed strong emotional ties to them and, in addition to supporting the family, has assumed other responsibilities normally associated with parenting: disciplining and teaching the children, doing school work with them, and attending parent-teacher meetings at their school.

*Holding on the issue.* The uncle was "closely related" to the niece because he acted as a "surrogate father" to her.

***Step 2. Identify a Rule.*** Cases and statutes often provide express rules that explain the meaning of an element of a claim. Sometimes, however, no express definition of the element is provided or the provided definition is too vague to give any practical assistance in predicting the outcome. There is no express definition here. You therefore must make sense of the three cases *as a whole* by identifying a correct and useful rule that explains and reconciles their holdings. Your rule must explain why the court held that the plaintiff in Case 2 was not "closely-related" to the victim but that the plaintiffs in Cases 1 and 3 were. Reviewing the three cases, you might determine that when considering whether aunts or uncles are "closely related" to nephews and nieces, the court looks at whether they had a relationship similar to that between a parent and child.

Often, making a chart that summarizes the holdings and necessary facts on an issue helps you identify a rule. A chart of these cases on the "closely-related" issue might look like this:



| | Parental Relationship? | Closely Related? |
|---|---|---|
| Case 1: *Smith v. Jones* | Yes | Yes |
| Case 2: *Patrick v. Michaels* | No | No |
| Case 3: *Mills v. Donaldson* | Yes | Yes |
| Your case | ? | ? |

After studying the chart, you might write the following rule:

> *Aunts and uncles are "closely related" to their nephews and nieces if they have frequent contact with them and assume significant parental responsibility for their welfare.*

Is this the correct rule? It is correct in the sense that it explains and reconciles the three cases. However, you could formulate a different rule based on the same cases. Arguably, the responsibility need not be "parental"; perhaps a close relationship that was not like that of a parent and child would suffice. The cases fall on the extreme ends of the spectrum of possible relationships. In two of the cases, the relationships were parental or nearly so (Cases 1 and 3); in the other, the relationship was nearly non-existent. You cannot be certain that the relationship must be parental because no case tests the "middle ground." Nonetheless, characterizing the required relationship as "parental" seems a defensible choice because in both Cases 1 and 3 the courts stressed that the uncles were surrogate fathers to the victims.

Remember, identifying rules is an *art,* not a science. You identify rules to predict how an issue in an *undecided* case will be resolved. The facts of your case will determine how broadly or narrowly you frame the rule.

***Step 3. Apply Your Rule.*** The third step is to use your rule to predict whether a judge would hold that your client was "closely related" to her nephew. To make that prediction, complete the chart for your case. Was Johnson like a parent to Frank? Under your rule, she was "closely related" to him only if you can answer yes.

Johnson's relationship with Frank is analogous to the plaintiffs' relationships in Cases 1 and 3. (In both those cases, the court held that a parental relationship existed.) Like the plaintiffs in these cases, Johnson spent much time with the child and assumed many parental responsibilities. You could therefore predict that a court would be likely to hold that Johnson had a parental relationship with Frank. If they did have a parental relationship, you could then predict that a court would be likely to hold that Johnson was "closely related" to Frank.

Therefore, Johnson can satisfy the first element of the claim for negligent infliction of emotional distress.

You must conclude your analysis by answering the question that prompted your research in the first place: does Johnson have a claim for negligent infliction of emotional distress? Since you now know that Johnson can satisfy *all* three elements of the claim, you could conclude that a court would most likely find that she does.

**Do Exercises 2-D(1), 2-D(2), and 2-D(3) Now, p. 37**



## EXERCISES

**Exercise 2-A**

*Consider whether, in the following cases, D trespassed on P's land. Apply the elements of trespass set forth on p. 26 to the facts. Identify possible issues.*

Case 1: D, running near P's property, slips and falls into T, who falls onto P's property.

Case 2: D cuts down a tree on a hill on his property. The tree rolls down the hill onto P's property.

Case 3: D owns a waste-processing plant. D's containment system fails; the stench of garbage invades P's property.

Case 4: D, with P's permission, parks his car in P's driveway for a three-month period during which D's house is renovated. After the renovation project is completed, D refuses to remove his car from P's property.

**Exercise 2-B(1)**

*Read the following case excerpt. Identify the elements of a common-law fraud claim in Olympus.*

> *Deluca v. Fletcher*: In Olympus, a person may be liable for common-law fraud if he knowingly makes a false statement of material fact to another person who justifiably relies on the statement and suffers damages by relying on the statement.

**Exercise 2-B(2)**

*Read the facts in each example. Apply the elements of fraud that you identified in Exercise 2-B(1) to the facts. For each example, list issues that may arise from applying the elements to the facts.*

**Example A**

Arthur Endicott, a builder, constructed a single-family house on a site adjacent to an abandoned industrial landfill. Margaret Wang, the purchaser of the house, claims that Endicott told her the surrounding property had never been used for industrial purposes. She learned of the former use of the adjacent property when a local newspaper ran a story about possible toxic contamination at the site. Wang asserts that she would not have bought the house had she known of its proximity to the abandoned landfill. She has not been able to sell her house; prospective buyers fear health hazards in the neighborhood.

**Example B**

Harvey Simpson was, until recently, the director of marketing for CFQ, a mid-sized corporation. Elizabeth Wagner, the president and chief executive officer of ZWE, a large multi-national corporation, offered Simpson a job as ZWE's vice president for marketing. Wagner assured Simpson that ZWE was financially sound. Simpson accepted the offer and resigned from his job at CFQ; he would make substantially more money and have more responsibility in the new position. On Simpson's first day at ZWE, Wagner told him that the company was experiencing financial difficulties and therefore had to eliminate the vice president for marketing position. Wagner offered Simpson a job as a salesperson in the marketing department; the salary for this position was slightly lower than the salary Simpson had earned at CFQ.

**Exercise 2-C(1)**

*In Olympus, consent is a defense to a claim of common-law battery. Read the following case excerpt. Identify the elements of consent.*

> *James v. Rogers*: In Olympus, consent is a defense to a claim of common-law battery if the plaintiff expressly or impliedly consents to the contact engaged in by the defendant.

**Exercise 2-C(2)**

*Read the facts in each example. Apply the elements of consent that you identified in Exercise 2-C(1) to the facts. For each example, list issues that may arise from applying the elements of consent to the facts. Predict whether the defense of consent can be established in each example.*



**Example A**

Paula Henson is a personal trainer at a gym. Ken Bernard is one of Henson's clients. During a strength-training workout, Henson grabbed Bernard's ankle and flexed his leg to his chest. Bernard doubled over in pain. He suffered a muscle injury which required arthoscopic surgery to repair.

**Example B**

Tommy Washington joined his high school's baseball team. At a recent game, Zachary Prescott, the pitcher for the opposing team, hit Washington on the chest with a ball when Washington was batting. Washington stopped breathing and was rushed to the hospital.

**Exercise 2-D(1)**

*Read the following case excerpt. Identify the elements of a common-law battery claim in Olympus.*

> *Walters v. Stern:* In Olympus, a person may be held liable for common-law battery if he intentionally touches another person in a harmful or offensive manner.

**Exercise 2-D(2)**

*Read the following case excerpts. Use them to write rules for the "intentional touching" and "harmful or offensive contact" elements of battery identified in Exercise 2-D(1).*

> *Alexander v. Riley:* Riley asserts that she did not commit common-law battery because she did not touch Alexander's body. This argument is without merit. In Olympus, the "intentional touching" element of battery includes any contact the defendant intentionally makes with the plaintiff's body, clothing, or objects in the plaintiff's physical possession. Riley deliberately

pulled on the plaintiff's shirt, causing it to rip. The "intentional touching" element is therefore satisfied.

*Sakamura v. Turner:* Turner maintains that he did not commit common-law battery because Sakamura suffered no physical injury. This argument is without merit. In Olympus, a plaintiff is not required to prove that he suffered physical injury to prevail on a claim of battery. "Harmful or offensive contact" is defined as touching that causes actual physical injury, pain, or discomfort or touching that causes pain or discomfort or that is offensive to the plaintiff's personal dignity. Turner slapped Sakamura in the face during a business meeting, causing Sakamura to suffer mild pain and great humiliation. The contact in this case was both harmful and offensive.

**Exercise 2-D(3)**

*Read the facts in each example. Apply the elements of battery that you identified in Exercise 2-D(1) to the facts. For each example, list issues that may arise from applying the elements to the facts. Predict whether a claim of common-law battery can be established in each example.*

**Example A**

Peter Conrad is a manager at FGH Corp. Jason Young is one of Conrad's subordinates. After suffering a skiing injury, Young walked to work with a cane. Conrad, believing that Young was faking the injury, teased him and then grabbed his cane. Young stumbled and bumped his head on the copy machine. He did not suffer any physical injuries.

**Example B**

Edward Finch and Sally Booker were standing next to each other on a crowded subway train during the evening rush hour commute. The train lurched. To maintain her balance, Booker grabbed Finch's arm. She cut Finch with a key she was holding in her hand.

CHAPTER 3

# *Reading Cases and Writing Case Briefs*

**When you master this chapter, you will understand:**

1. what a case is;
2. how reading cases helps you understand the law and analyze legal problems;
3. what a case brief is; and
4. how to write a useful case brief.