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GOD V. THE MITIGATION OF DAMAGES DOCTRINE: WHY
RELIGION SHOULD BE CONSIDERED A PRE-EXISTING
CONDITION⁺

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I. INTRODUCTION

According to the 2004-2005 United States Census Bureau Statistical Abstract of the United States, Americans identify with at least thirty-five different self-described Christian religious groups.¹ Of those Christian groups, there are at least four that have special tenets regarding medical treatment that are central to their religious

⁺Winner of the *Journal of Law and Health*'s Best Note Award, 2006.

¹U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2004-2005, No. 67, SELF-DESCRIBED RELIGIOUS IDENTIFICATION OF ADULT POPULATION: 1990 AND 2001 55 (2005), available at <http://www.census.gov/prod/2004pubs/04statab/pop.pdf>.

beliefs. Together, members of the Jehovah's Witnesses, Church of God, Pentecostal Free Will Baptist Church, and Christian Science Church constitute slightly more than four-and-a-half percent of the United States's total population.²

Jehovah's Witnesses represent the most well known group with such prohibitions on their members' conduct. This group recognizes the importance of modern medicine, and its members receive treatment as most Americans do, with one exception:³ Jehovah's Witnesses believe it is a sin to receive a blood transfusion, including one's own recycled blood,⁴ or to use most types of blood products.⁵ Abstaining from these treatments is so important to Jehovah's Witnesses that most of them carry a medical emergency card indicating they explicitly do not consent to such treatment should they be unable to be consulted in the event such treatment may be deemed necessary.⁶ The Free Exercise Clause of the United States Constitution requires physicians to respect this request.⁷

Unlike the Jehovah's Witnesses, some other religious groups have a different view. Specifically, Christian Scientists believe that faith healing is the only true

²*Id.* These four minority Christian religions comprise a greater percentage than all non-Christian religions in the United States combined, including Jews, Muslims, Buddhists, Hindus, the Native American Church, and Scientologists. *Id.*

³Jehovah's Witnesses Official Web Site, http://www.watchtower.org/medical_care_and_blood.htm (last visited Aug. 5, 2006).

⁴J.L. Dixon & M.G. Smalley, *Jehovah's Witnesses: The Surgical/Ethical Challenge*, 246 *JAMA* 2471, 2472 (1981), available at http://www.watchtower.org/library/hb/article_06.htm. Jehovah's Witnesses refuse "transfusion of whole blood, packed RBCs, and plasma, as well as WBC and platelet administration." *Id.* This tenet is based on scripture in *Genesis* 9:3-4: "Only flesh with its soul—its blood—you must not eat," and *Acts* 15:19-21: "Abstain from . . . fornication and from what is strangled and from blood." *Id.*

⁵Recent changes in the church have led to reclassification of several blood products. Wikipedia, *Jehovah's Witnesses and Blood Transfusions*, http://en.wikipedia.org/wiki/Jehovah's_Witnesses_and_blood.htm (last visited Aug. 5, 2006). So, while there is still a direct ban that will result in disfellowshipping and shunning from other members of the society if a Witness accepts red or white cells, platelets, or plasma, members must respect Witnesses who decide to use products composed of fractions of red or white cells, platelets, or plasma (including hemoglobin based substitutes, interferons, interleukins, albumin, globulins, clotting factors, and wound healing factors). Associated Jehovah's Witnesses for Reform on Blood, <http://www.ajwrb.org/review6-15-04.shtml> (last visited Aug. 5, 2006). The Society considers accepting these products as a personal decision each Witness must make after careful prayer and meditation. *Id.*

⁶Jehovah's Witnesses Official Web Site, http://www.watchtower.org/library/hb/article_04.htm (last visited Aug. 5, 2006). There has been extensive litigation over whether hospitals have an obligation to do whatever it takes to save patients, regardless of their religious beliefs. The law is clear that it is an infringement on one's Free Exercise Clause rights if a hospital or physician is aware of an adult's religious beliefs but does not respect the patient's wishes. See Kristine Cordier Karnezis, *Patient's Right to Refuse Treatment Allegedly Necessary to Sustain Life*, 93 A.L.R. 3D 67 (2005). The issue is still hotly debated when medical decisions involve children. See 61 AM. JUR. 2D *Physicians, Surgeons, and Other Healers* § 161 (2004).

⁷See e.g., *Fosmire v. Nicoleau*, 551 N.E.2d 77 (N.E.1990).

medicine.⁸ Members of this group believe prayer is the best treatment for ailments.⁹ Members can pray for themselves or may call upon a Christian Science practitioner for prayerful assistance.¹⁰

The Pentecostal Free Will Baptist Church (PFWBC) is another minority Christian group that believes in divine healing. This faith believes that “the Bible teaches that the healing provided in the atonement is both spiritual and physical.”¹¹ Members of the PFWBC believe “it is God’s highest will for His people to anoint, lay hands on, and pray for the healing of the sick.”¹² Nevertheless, although this faith believes “the Bible teaches that there is nothing morally wrong with taking medicine, or receiving human aid, if one is not able to fully trust the Lord,”¹³ by receiving medical treatment, the logical conclusion is that one who accepts such treatment does not fully trust the Lord.

Unfortunately, even though the First Amendment of the United States Constitution¹⁴ was designed on our founders’ beliefs that religious freedom and the freedom to exercise one’s religion were of chief importance,¹⁵ our courts systematically discriminate against members of these minority Christian religions for exercising those very rights.¹⁶ While it is commonly accepted that individuals have the right to practice these medically restrictive tenets,¹⁷ courts still punish plaintiffs by forcing them, when tortiously injured, to choose between what the majority considers “reasonable” and their own religious convictions.¹⁸

The public policy behind the mitigation of damages doctrine is sound, but it should not apply when something as sacred as the right to exercise one’s religion is involved. The doctrine intends to discourage wasted resources and to promote the least possible loss.¹⁹ Nevertheless, the doctrine does not properly take into account

⁸MARY BAKER EDDY, *SCIENCE AND HEALTH WITH KEY TO THE SCRIPTURES* 157 (First Church of Christ, Scientist 1994) (1875).

⁹Religious Tolerance: Church Beliefs, http://www.religioustolerance.org/cr_sci.htm (last visited Oct. 30, 2006). Christian Scientists do find it acceptable, however, to have bones set, cuts stitched, and teeth worked on by a dentist. DEWITT JOHN, *THE CHRISTIAN SCIENCE WAY OF LIFE* 127-28 (1962).

¹⁰Religious Tolerance: Church Beliefs, http://www.religioustolerance.org/cr_sci.htm (last visited Oct. 30, 2006).

¹¹Faith and Practices of the Pentecostal Free Will Baptist Church, Inc., <http://www.pfwb.org/faithpractices.htm#faithart9> (last visited Oct. 30, 2006).

¹²*Id.*

¹³*Id.*

¹⁴“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .” U.S. CONST. amend. I.

¹⁵*United States v. Ballard*, 322 U.S. 78, 87 (1944).

¹⁶*See, e.g., Munn v. Algee*, 924 F.2d 568 (5th Cir. 1991) (Rubin, J., dissenting); *Williams v. Bright*, 658 N.Y.S.2d 910 (N.Y. App. Div. 1997) (Rosenberger, J., dissenting).

¹⁷*See supra* text accompanying note 6.

¹⁸*See infra* Part III.B.

¹⁹*See infra* note 29.

the personal loss a plaintiff is forced to accept by violating his religious beliefs in order to receive a full damage award. Instead, applying the doctrine only encourages courts to judge the religious beliefs of a plaintiff on a “reasonableness” standard, which is distinctly prohibited by the First Amendment.

Courts should end discrimination against minority religions by considering plaintiffs who profess such beliefs as plaintiffs with a pre-existing condition consisting of those beliefs. This way, the pre-existing condition doctrine could be incorporated to provide some protection for such plaintiffs, ending their struggle between doing what their religious beliefs tell them is right and receiving just compensation for tortious injuries. These plaintiffs are not seeking *extra* compensation for their injuries. Rather, they seek permission to exercise their religious beliefs while being made whole as tort law enables other plaintiffs to be made whole.

The decisions an injured plaintiff must make in these kinds of cases are not a matter of purposefully failing to receive medical treatment just to reap greater damage awards. Negligent conduct leaves these plaintiffs with crippling injuries,²⁰ lasting pain,²¹ or even worse: many have lost their lives from blood loss.²² Money is not the basis of their decision—following the mandates of their religion is the basis of their decision. These plaintiffs do not sit idly by in anticipation of their damage award, hoping to endure further suffering so to be awarded more money. They are often faced with the awful choice of either living with the knowledge that they have sinned²³ or dying²⁴ because of their beliefs. The purpose of such a cause of action is to make the plaintiff whole. The negligent action of the defendant, and only that negligent action, put the plaintiff in the position where this choice was necessary. So, why is it that courts tolerate such discrimination?

Addressing this quandary, in Part II, this note discusses the background of the mitigation of damages doctrine. Next, it explores case history exemplifying the treatment of religion regarding this doctrine. It examines two primary cases illustrating how courts treat plaintiffs who make such a religious choice, as well as several cases that deal with individualized assessment for the receipt of government benefits. This section concludes with a discussion about why the current law does not work to truly protect the rights of plaintiffs forced into such difficult decisions by tortious defendants.

Part III discusses the thin-skull plaintiff doctrine in-depth and examines the different types of recognized pre-existing conditions. Next, this section presents studies on how the brain processes religion and how each individual’s genetic

²⁰*See, e.g.*, *Christianson v. Hollings*, 112 P.2d 723 (Cal. Ct. App. 1941).

²¹*See, e.g.*, *Montgomery v. Bd. of Ret.*, 109 Cal. Rptr. 181 (Cal. Ct. App. 1973).

²²*See, e.g.*, *Munn v. Algee*, 924 F.2d 568 (5th Cir. 1991).

²³Sometimes the possibility that one may be shunned or excommunicated because of such a decision is a risk individuals with religious beliefs must face as well. *See, e.g.*, Carol Harrington, *Father Shunned by Family for Defying Faith to Save Child*, *TORONTO STAR*, Mar. 11, 2002, at A7.

²⁴Not only dying, but also living with a condition causing chronic pain, some type of disability, or shortened life expectancy, etc. that a doctor believes internal surgery could alleviate.

makeup influences one's beliefs. This research gives courts even more incentive to consider religious beliefs as a pre-existing condition.

Part IV analyzes how and why courts should apply the doctrine of pre-existing conditions to religious beliefs. It discusses how courts already recognize conscientious objectors to war and provide them with a religious exemption to combative duty and how considering religious beliefs as a pre-existing condition is consistent with this practice. In addition, this section illustrates how treating religious beliefs as a pre-existing condition will be consistent with three major cases the United States Supreme Court has issued as guideposts for dealing with First Amendment rights in situations of this nature.

Part V concludes that the ability to exercise one's religious beliefs is too important to be swept up in the mitigation of damages doctrine when the public policy reasons behind the doctrine are simply meant to prevent waste. Instead, courts should use tools already at hand to offer First Amendment protections to plaintiffs by requiring a defendant to take his victim, as a whole, as he finds him. Religious beliefs cannot be separated from the man simply because they are not what the majority believes is reasonable. Our country was founded upon that basic principle, and to do otherwise allows the majority to impose forbidden value judgments upon minorities.

II. CASE AND LEGAL BACKGROUND OF ISSUE

The basic premise underlying the mitigation of damages doctrine is to prevent waste, specifically, to prevent a plaintiff from incurring greater injury from the tort than is necessary given the specific circumstances of each case.²⁵ Still, this doctrine is not unlimited; a plaintiff is only required to act "reasonably" and generally is not required to go to extremes or do anything in conflict with his personal morals.²⁶ Nevertheless, courts still find a plaintiff who made a choice based on his religious beliefs acted "unreasonably" according to the doctrine of mitigation of damages when his choice was different from that which someone without his beliefs would have made if that person's choice would have resulted in less injury to the plaintiff.²⁷

A. *Background on the Mitigation of Damages Doctrine and Religious Choices*

The Restatement (Second) of Torts states the doctrine of mitigation of damages concisely: "One injured by the tort of another is not entitled to recover damages for any harm that he could have avoided by the use of reasonable effort or expenditure after the commission of the tort."²⁸ The Restatement goes on to explain the reasoning behind this rule: "Recovery for the harm is denied because it is in part the result of the injured person's lack of care, and public policy requires that persons

²⁵RESTATEMENT (SECOND) OF TORTS § 918 cmt. a (1979).

²⁶*Id.* at cmt. c.

²⁷*See infra* Part III.B.

²⁸RESTATEMENT (SECOND) OF TORTS § 918 cmt. j (1979) ("Thus when a water company illegally refuses to turn on water unless the plaintiff pays a substantial bill that he does not owe and agrees not to sue for the return of the money, a customer who refuses to pay the bill is entitled to recover for the harm caused by the lack of water, even though he had the money and, if he had paid, would have been entitled to restitution because of the duress.").

should be discouraged from wasting their resources, both physical or economic.”²⁹ Thus, the general damages rule is that “[i]f harm results because of [the plaintiff’s] careless failure to make substantial efforts . . . the damages for the harm suffered are reduced to the value of the efforts he should have made . . . in addition to the harm previously caused.”³⁰ The burden of proof is on the defendant to prove that aggravation of the condition resulted from the plaintiff’s failure to seek or to follow medical advice.³¹

To determine whether an injured plaintiff has taken reasonable action to mitigate his damages, courts consider the plaintiff’s “physical and mental condition after an injury.”³² The plaintiff is under a “duty to use ordinary care in following [medical] advice,” and “damages may be decreased . . . if, but only if, a reasonably prudent person would have followed the medical advice given, and if the failure of the plaintiff to do so causes a worsening of his . . . condition.”³³ Additionally, “[a] person is not ordinarily required to surrender a right of substantial value in order to minimize loss.”³⁴ Nevertheless, this part of the rule does not apply to religious beliefs.³⁵

Generally, a plaintiff is not required to go to extremes to mitigate his damages: “It is frequently reasonable for a person threatened by further harm from a tortious act to refuse to subject himself to pain or to a danger of a different kind, which it would be necessary to undergo if the further harm is to be averted.”³⁶ Courts have interpreted “pain or . . . danger of a different kind” to mean that injured plaintiffs need not subject themselves to extremely dangerous³⁷ surgeries, extremely painful treatment,³⁸ or treatment that will be unlikely to significantly improve their condition.³⁹ Conversely, courts have held that failure to mitigate damages because of

²⁹*Id.* at cmt. a; *see also*, 22 AM. JUR. 2D *Damages* § 371 (2004) (“A plaintiff cannot refuse treatment and then claim damages for conditions resulting from that refusal.”).

³⁰RESTATEMENT (SECOND) OF TORTS § 918 cmt. b (1979).

³¹3 DAMAGES IN TORT ACTIONS (MB) § 16.03 (2005).

³²RESTATEMENT (SECOND) OF TORTS § 918 cmt. c (1979).

³³22 AM. JUR. 2D *Damages* § 371 (2004).

³⁴RESTATEMENT (SECOND) OF TORTS § 918 cmt. j (1979).

³⁵Gary Knapp, *Refusal of Medical Treatment on Religious Grounds as Affecting Right to Recover for Personal Injury or Death*, 3 A.L.R. 5th 721 (2004).

³⁶RESTATEMENT (SECOND) OF TORTS § 918 cmt. d (1979).

³⁷22 AM. JUR. 2D *Damages* § 374 (2004).

³⁸RESTATEMENT (SECOND) OF TORTS § 918 cmt. d (1979).

³⁹22 AM. JUR. 2D *Damages* § 373 (2004) (“[I]f the proposed treatment could result in the aggravation of an existing condition or the development of an additional condition of ill health, or if the prospect for improved health is slight, then there should be no duty to undergo treatment.”); *see also id.* at § 375 (“A plaintiff will not be charged with lack of care for failing to obtain a particular treatment if there is conflicting medical testimony as to the probability of a cure, or if a surgeon was only recommending exploratory surgery that appeared to be worthwhile to try.”).

religious beliefs,⁴⁰ laziness,⁴¹ or a belief that the tortfeasor will be liable for all costs⁴² is within the scope of action a plaintiff is liable for himself. Then, his award is reduced to the extent that he did not mitigate his damages under the given circumstances. Nevertheless, “the plaintiff must have known of the means of mitigation; there must be evidence that the plaintiff had been advised by a doctor that he or she should submit to a particular treatment,”⁴³ for this doctrine to apply. Furthermore, so long as a plaintiff picks a reasonable treatment option, if, in hindsight, another option may have been more successful, the plaintiff’s choice will not bar his full recovery.⁴⁴

B. Mitigation of Damages, Beliefs, and Religion

The doctrine of mitigation of damages generally does not require injured parties to “make efforts that conflict with certain personal choices.”⁴⁵ For example, in cases of wrongful life or wrongful birth, courts have ruled, as a matter of law, that mitigation of damages is not necessary to the extent it necessitates either adoption or abortion.⁴⁶

In *Tropi v. Scarf*,⁴⁷ the plaintiff’s pharmacist negligently filled her birth control prescription with tranquilizers.⁴⁸ The plaintiff subsequently became pregnant and gave birth to a healthy child.⁴⁹ She filed suit against the pharmacist, seeking

⁴⁰See, e.g., *Munn v. Algee*, 924 F.2d 568 (5th Cir. 1991).

⁴¹See, e.g., *Thomas v. Plovodba*, 653 F. Supp. 1300 (E.D. Wis. 1987) (finding that plaintiff did not mitigate damages by missing job interviews, demonstrating bad hygiene at interviews, and showing up to interviews poorly dressed).

⁴²3 DAMAGES IN TORT ACTIONS (MB) § 16.02 (2005) (“[T]he injured party may not just stand idly by and watch his losses grow in anticipation of recovering enhanced damages.”).

⁴³22 AM. JUR. 2D *Damages* § 377 (2004).

⁴⁴RESTATEMENT (SECOND) OF TORTS § 918 cmt. c (1979).

⁴⁵*Id.* at cmt. j.

⁴⁶3 DAMAGES IN TORT ACTIONS (MB) § 16.02 (2005); *Comras v. Lewin*, 443 A.2d 229, 230 (N.J. Super. Ct. App. Div. 1982)

The right to have an abortion may not be automatically converted to an obligation to have one. The decision whether or not to undertake that medical procedure must rest on a number of factors, including the stage to which the pregnancy has progressed, the health and condition of the woman at the time and the professional judgment and counsel received.

Id. *Smith v. Gore*, 728 S.W.2d 738, 751-52 (Tenn. 1987) (rejecting abortion or adoption as part of duty to mitigate the court stated: “We think that not only would imposing these choices upon a plaintiff impermissibly infringe upon Constitutional rights to privacy in these matters, but the nature of these alternatives is so extreme as to be unreasonable. . . .”); see also *Tropi v. Scarf*, 187 N.W.2d 511 (Mich. Ct. App. 1971); *Sherlock v. Stillwater Clinic*, 260 N.W.2d 169 (Minn. 1977); *Morris v. Sanchez*, 746 P.2d 184, 189 (Okla. 1987).

⁴⁷*Tropi*, 187 N.W.2d at 511.

⁴⁸*Id.* at 512.

⁴⁹*Id.* at 513.

damages for the costs associated with the child and for pain and anxiety.⁵⁰ In his defense, the pharmacist asserted that the plaintiff failed to mitigate her damages by not having an abortion when she discovered she was pregnant or, alternatively, by giving the child up for adoption after its birth.⁵¹

The court found that the defendant had to take his victim as he found her, including her personal beliefs.⁵² It observed, “[a] living child almost universally gives rise to emotional and spiritual bonds which few parents can bring themselves to break.”⁵³ Then, the court went on to quote from *McCormick on Damages*, explaining how it interpreted reasonableness:

If the effort, risk, sacrifice, or expense which the person wronged must incur in order to avoid or minimize a loss of injury is such that under the circumstances a reasonable man might well decline to incur it, a failure to do so imposes no disability against recovering full damages.⁵⁴

Ultimately, the *Tropi* Court found that the burden such a hard decision would have on the plaintiff’s conscience tipped the reasonableness scale in favor of the plaintiff’s decision because it would be worse for the plaintiff to give the child away than for her to keep him.⁵⁵ It stated:

[E]ven though the parents may not want to rear the child they may conclude that the psychological impact on them of rejecting the child and placing him for adoption, never seeing him again, would be such that, making the best of a bad situation, it is better to rear the child than to place him for adoption.⁵⁶

In addition, the court ruled that “the defendant does not have the right to insist that the victim of his negligence have the emotional and mental makeup of a woman who is willing to abort or place a child for adoption.”⁵⁷ In essence, the court found that the pharmacist had to take his victim as he found her. Accordingly, the plaintiff could recover the full amount of damages for the costs of having the child, including lost wages, medical and hospital expenses, and for her pain and anxiety, and possibly even the costs of rearing the child to majority.⁵⁸

Nevertheless, even though abortion constitutes “medical treatment,” and courts consider the psychological impact an abortion would have on the parent, when

⁵⁰*Id.*

⁵¹*See id.* at 519.

⁵²*Id.* at 520.

⁵³*Tropi*, 187 N.W.2d at 519.

⁵⁴*Id.* (citing CHARLES TILFORD MCCORMICK, DAMAGES § 35 (2d ed. 1952)).

⁵⁵*Id.*

⁵⁶*Id.* at 520.

⁵⁷*Id.*

⁵⁸*Id.* at 520-21 (Michigan law did not preclude damages for raising the child to majority because “there need only be a basis for reasonable ascertainment of the amount of the damages.”).

confronted with a case where other medical treatment can have a similar psychological impact, a court will still reduce damages when it finds the plaintiff was “unreasonable” in failing to seek or consent to treatment.⁵⁹ Courts routinely reduce damages even though medical decisions based on religious beliefs can have this kind of psychological impact on the plaintiff.⁶⁰

1. Two Significant Cases

*Munn v. Algee*⁶¹ exemplifies the current law regarding religion and mitigation of damages. In *Munn*, the defendant’s negligent driving caused an automobile accident that seriously injured the plaintiff.⁶² The physicians treating the plaintiff sought her consent to perform a blood transfusion.⁶³ Because the plaintiff was a Jehovah’s Witness, she would not consent to the treatment because she believed doing so would be committing a grievous sin.⁶⁴ Later, after the plaintiff lost consciousness, her husband, who was also a Jehovah’s Witness, would not consent to a blood transfusion on his wife’s behalf.⁶⁵ The plaintiff subsequently died during surgery

⁵⁹In his book, *Ideals, Beliefs, Attitudes, and the Law*, Guido Calabresi suggests an interesting scenario that, much like abortion, courts may also recognize as an exception to mitigate. GUIDO CALABRESI, *IDEALS, BELIEFS, ATTITUDES, AND THE LAW* 49-50 (Syracuse University Press 1985). In his example, Calabresi wonders what might happen if a deeply religious Catholic woman were to be injured in such a way that made pregnancy very dangerous to her health. *Id.* If the woman took the teachings of the Catholic church literally she would be forbidden to use any method of birth control with her husband other than the rhythm method (or abstinence). *Id.* If she subsequently became pregnant and was injured as a result, Calabresi postulates that she would be able to recover because of how the Learned Hand test for reasonableness is stated:

One must weigh the benefits and harms that would occur from doing one thing against the benefits and harms that would occur from doing the other, each discounted by the likelihood of the harms and benefits occurring. If on striking that balance a given behavior is reasonable, it is not rendered unreasonable merely because an unwanted result chanced to come about.

Id. Accordingly, a court would also find it not reasonable to expect her to have an abortion for the same reasons stated in *Troppi*. See *supra* Part II.B.

⁶⁰See, e.g., *Munn v. Algee*, 924 F.2d 568 (5th Cir. 1991); *Corlett v. Caserta*, 562 N.E.2d 257 (Ill. App. Ct. 1990). Assuming, of course, that the jurisdiction does not have a specific statute allowing for compensatory protection for damages resulting from injury that let the plaintiff make a religious choice not to be conventionally treated. See, e.g., WIS. STAT. § 102.42 (2005) (providing for worker’s compensation coverage of Christian Science treatment if the employee wishes to receive that type of treatment but giving employers the option not to cover these services). These statutes are rare, but given the current state of the law, they are the only way legislatures can ensure religious exercise protection for their constituents in the realm of private tort damage awards.

⁶¹*Munn*, 924 F.2d at 568.

⁶²*Id.* at 570-71.

⁶³*Id.* at 571.

⁶⁴See *id.* See also *Munn v. Algee*, 719 F. Supp. 525, 526 (N.D. Miss. 1989), *aff’d*, 924 F.2d 568 (5th Cir. 1991).

⁶⁵*Munn*, 924 F.2d at 571.

from blood loss.⁶⁶ Mrs. Munn's surviving spouse and her children brought a wrongful death claim against the negligent driver on her behalf, and Mr. Munn sought damages for his injuries as well.⁶⁷ "The court granted a directed verdict in favor of plaintiffs on the question of liability."⁶⁸

The main issue in *Munn* was whether it was admissible to have allowed Munn to be questioned, on cross examination, about practices and beliefs of the Jehovah's Witnesses that did not pertain to the reasonableness of Mrs. Munn's refusal of a blood transfusion or to the sincerity of her beliefs.⁶⁹ On appeal, the court found that the trial court abused its discretion by allowing in such testimony, including whether Jehovah's Witnesses salute the United States flag.⁷⁰ Nevertheless, the majority found that such evidence was merely harmless error and did not adversely influence the jury.⁷¹ Judge Rubin wrote a grilling dissent in the case, adamantly disagreeing with this outcome.⁷²

The court went on to examine whether the trial court allowed the jury to assess the reasonableness of Munn's beliefs.⁷³ The jury instruction used to decide the case "attempt[ed] to accommodate Mrs. Munn's religious beliefs."⁷⁴ In affirming the denial of a damage award for the wrongful death claim, the court ruled that when the trial court decided the plaintiff did not mitigate her damages as required by law, it was only evaluating the reasonableness of her refusal of a blood transfusion, not the reasonableness of her beliefs as a Jehovah's Witness.⁷⁵

The dissent in *Munn* took issue against the validity of this jury instruction.⁷⁶ Judge Rubin pointed out that the award the jury returned for pain and suffering was undoubtedly influenced by the jury's negative perception of Jehovah's Witnesses, as it was significantly less than a typical award for injuries as extensive as Mrs. Munn

⁶⁶*Id.*

⁶⁷*Id.*

⁶⁸*Id.*

⁶⁹*Id.* at 572.

⁷⁰*Id.* at 572, 581.

⁷¹*Munn*, 924 F.2d at 573.

⁷²*See id.* at 579-80 (dissenting opinion).

⁷³*Id.* at 574 (majority opinion).

⁷⁴*Id.* The actual jury instruction stated:

In determining whether or not Elaine Munn's decision to refuse the blood transfusion was unreasonable, you may consider that the blood transfusions were medically recommended. But, you may also consider her religious beliefs and related teachings, together with the known risks of blood transfusions, if you find that to be a factor in her decision.

Id. at 578.

⁷⁵*See id.* at 578.

⁷⁶In closing, Judge Rubin stated, "Algee's lawyer deliberately threw the proverbial skunk of inadmissible evidence into the jury box. No amount of conjecture that the jury *might* not have smelled the stink can undo the odor that, even now, permeates the record." *Id.* at 585 (emphasis in original).

suffered.⁷⁷ Additionally, in addressing the utter lack of *any* award to Mr. Munn, Judge Rubin stated:

I can conceive of no reason but general dislike of the plaintiff for a jury to award medical expenses against an admittedly liable defendant, but to award nothing for pain and suffering when the uncontroverted evidence was that Munn suffered pain and general discomfort from his ‘bruises and contusions’ for several months.⁷⁸

The second issue in *Munn* was whether the trial court violated Munn’s First Amendment rights when it determined that she failed to mitigate damages because of her religious beliefs against blood transfusions.⁷⁹ Addressing the Free Exercise concern raised, the court relied on *Employment Division, Department of Human Resources v. Smith*.⁸⁰ In that case, the United States Supreme Court examined a law that burdened Smith’s ability to practice his religion.⁸¹ Because the burdensome law was neutral on its face, not specifically discriminating against any particular religion, the Court held that it was constitutional.⁸²

The *Munn* Court decided that the facts at hand were similar enough to warrant the same outcome as in *Smith*. It found that the mitigation of damages doctrine could be compared to “generally applicable rules imposing incidental burdens on particular religions,” so it did “not violate the Free Exercise Clause” to hold the plaintiff to a reasonable person standard for mitigating damages.⁸³ But by dismissing this claim so easily, the court missed the point of *Smith*—in cases of individualized assessment, a plaintiff is entitled to greater protection.⁸⁴ Specifically, in cases of individualized assessment, the government must justify rules that burden the exercise of religion with a compelling government purpose.⁸⁵ What greater instance could there be for individualized assessment than by a jury of one’s peers, given an instruction such as the *Munn* jury used?

The *Munn* court also found that this case did not violate the Establishment Clause. It recognized that the reasonableness of a plaintiff’s religious beliefs could be subject to scrutiny by a jury, and such an examination of the plaintiff’s religion could involve weighing the reasonableness of religious beliefs in violation of the Establishment Clause.⁸⁶ In a circular explanation for its finding, the court reasoned that the Establishment Clause was not violated in this case because Munn interjected

⁷⁷*Munn*, 924 F.2d at 583, 585.

⁷⁸*Id.* at 585.

⁷⁹*Id.* at 574-75.

⁸⁰*Employment Div., Dep’t of Human Res. v. Smith*, 494 U.S. 872 (1990).

⁸¹*Id.* at 874.

⁸²*Id.* at 885-86.

⁸³*Munn*, 924 F.2d at 574.

⁸⁴*See Smith*, 494 U.S. at 884.

⁸⁵*See infra* Part III.B.

⁸⁶*Munn*, 924 F.2d at 574-75.

religion into the case himself in an attempt to explain his wife's conduct that a jury would probably find unreasonable without the religious explanation.⁸⁷ In a footnote, the court directed that future cases should be decided using an objective person standard and, as such, should disallow accommodating a plaintiff's religious beliefs.⁸⁸

*Williams v. Bright*⁸⁹ is another case with an outcome similar to *Munn*. This case also involved a Jehovah's Witness plaintiff who was in a car accident that caused her serious injuries.⁹⁰ Surgery was an option for the plaintiff in this case, and her physicians believed it would prevent her from being wheelchair-bound for the rest of her life.⁹¹ Unfortunately, the plaintiff "was obliged to refuse these recommended surgeries because her church prohibit[ed] the blood transfusions they would necessarily entail."⁹²

Attempting to protect the plaintiff's right to freely exercise her religion, the trial court gave the jury an instruction that required it to consider what a reasonable Jehovah's Witness would have done in the same situation.⁹³ Nevertheless, on appeal, the court found this instruction to be in error. Specifically, it found that the court's instruction was a "sham inquiry," and the court "foreclosed the issue [of her religious beliefs] in her favor without any supporting evidence."⁹⁴ This decision, the court reasoned, "effectively provided government endorsement to those beliefs."⁹⁵

Then, the court went on to explain that even if the trial court had required evidence of the plaintiff's beliefs, it would necessarily find itself in a quandary as to how to do so.⁹⁶ Even so, what the court ignored is that courts have been able to put themselves in a situation to discern such a fact in many instances. For example, courts have successfully addressed this same issue in cases arguing over conscientious objector exemption to combative service,⁹⁷ as well as in cases of individualized assessment.⁹⁸

Similar to *Munn*, *Williams* contains a censorious dissent, authored by Judge Rosenberger, who believed the jury instruction was proper.⁹⁹ He asserted that this instruction was in line with the rule of mitigation of damages, which does not require

⁸⁷*Id.* at 575.

⁸⁸*Id.* at 575 n.12.

⁸⁹*Williams v. Bright*, 658 N.Y.S.2d 910 (N.Y. App. Div. 1997).

⁹⁰*Id.* at 911.

⁹¹*Id.* at 912.

⁹²*Id.*

⁹³*Id.*

⁹⁴*Id.* at 914.

⁹⁵*Id.*

⁹⁶*Id.*

⁹⁷*See infra* Part IV.B.

⁹⁸*See infra* Part II.B.2.

⁹⁹*See Williams*, 658 N.Y.S.2d at 916.

one to minimize one's losses at the expense of personal beliefs.¹⁰⁰ Furthermore, Judge Rosenberger emphasized that the jury charge was "in conformity with our tort system" and "allow[ed] for an assessment of the actual situation of [the] victim"¹⁰¹ Pointing out that the "eggshell plaintiff" has not been limited to physical infirmities," Judge Rosenberger stressed that this instruction followed the basic premise that a defendant must take his victim as he finds him.¹⁰²

2. Individualized Assessments for Benefits

There are several cases concerning state benefits that directly address Free Exercise concerns, but unlike tort cases, courts in these instances carefully follow a First Amendment analysis that recognizes the danger of crossing into the forbidden territory of judging religious beliefs.

For example, in *Montgomery v. Board of Retirement*,¹⁰³ the plaintiff would not undergo surgery to remove a tumor.¹⁰⁴ If she underwent the surgery, it was very likely that she would fully recover and be able to return to work; however, without the surgery, it was likely that she would remain disabled and perhaps even die from the tumor.¹⁰⁵

The court found that the county violated the Free Exercise Clause when it denied Montgomery disability retirement benefits for her decision not to undergo surgery because of her beliefs as a member of the Church of God.¹⁰⁶ The court ruled that the denial of retirement benefits indirectly burdened the employee's free exercise of religion by forcing her to choose between following the precepts of her religion and the disability benefits.¹⁰⁷

In deciding this case, the court relied on the United States Supreme Court decision in *Sherbert v. Verner*.¹⁰⁸ *Sherbert* presented a similar situation, where the plaintiff was a Seventh-Day Adventist who would not work on Saturday, the Sabbath-Day for her religion.¹⁰⁹ She sought new employment after her employer discharged her for refusing to work mandatory Saturday shifts, but she could not find a position that would allow her to observe her Sabbath-Day.¹¹⁰ When she applied for unemployment benefits, the state denied her claim because of her refusal to work on

¹⁰⁰*Id.* at 918 (quoting RESTATEMENT (SECOND) OF TORTS § 918 cmt. j (1979)).

¹⁰¹*Id.* at 919.

¹⁰²*Id.*

¹⁰³*Montgomery v. Bd. of Ret.*, 109 Cal. Rptr. 181 (Cal Ct. App. 1973).

¹⁰⁴*Id.* at 183.

¹⁰⁵*Id.*

¹⁰⁶*Id.* at 183-84 (finding that position as "member, officer, worker, and teacher" in the church precluded plaintiff from committing the sin of undergoing internal surgery).

¹⁰⁷*Id.* at 184.

¹⁰⁸*Sherbert v. Verner*, 374 U.S. 398 (1963).

¹⁰⁹*Id.* at 399.

¹¹⁰*Id.*

Saturdays.¹¹¹ The Court applied a two-part test: (1) whether the application of the unemployment statute imposed any burden upon the free exercise of the claimant's religion; and (2) if so, whether there was a compelling state interest that justified the infringement upon Free Exercise rights.¹¹²

In *Sherbert*, the Court ruled that the state's unemployment scheme was unconstitutional, as it forced her to "choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand."¹¹³ The Court noted "condition[ing] the availability of benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties."¹¹⁴ Therefore, just as in *Sherbert*, the government burdened the plaintiff in *Montgomery* in her practice of religion because it forced her to choose between receiving benefits and violating a tenet of her religious faith.

Furthermore, in *Montgomery*, the court addressed the second part of the *Sherbert* test: "[W]hether some compelling state interest justifies the substantial infringement of appellant's First Amendment right."¹¹⁵ *Sherbert* reasoned that when such an important right is at stake, the state would have to show more than a rational basis for its infringement.¹¹⁶ Specifically, in *Sherbert*, the state did not meet its burden of proof; the possibility that fraudulent claimants could take advantage of the system and cripple it by diluting available funds and interfering with employer scheduling was not sufficient.¹¹⁷ Therefore, in *Montgomery*, although the state reasoned that the government had an interest in "preserving the life and health of its citizens," this interest was not great enough to merit infringing on First Amendment rights.¹¹⁸ There was no evidence in *Montgomery* that making exceptions to accommodate First Amendment rights would disrupt or dilute the retirement plan enough to justify the state in its denial.¹¹⁹ Additionally, the court determined that there was no alternative that would infringe less upon her Free Exercise rights.¹²⁰

More recently, the United States Supreme Court has reinforced the importance of protecting religious rights when cases of individualized assessment are at issue. In

¹¹¹*Id.* at 399-400.

¹¹²*Id.* at 403.

¹¹³*Id.* at 404.

¹¹⁴*Id.* at 406.

¹¹⁵*Montgomery v. Bd. of Ret.*, 109 Cal. Rptr. 181 (Cal. Ct. App. 1973).

¹¹⁶*Sherbert*, 374 U.S. at 406.

¹¹⁷*Id.* at 407.

¹¹⁸*Montgomery*, 109 Cal. Rptr. at 185 (stating that "[w]hen considerations of conscience grounded upon religious beliefs are involved, the state interest in preserving health pales into insignificance").

¹¹⁹*Id.* "Furthermore, in a constitutional context involving basic rights, the preservation of moneys is not of primary significance." *Id.* (citing *Goldberg v. Kelly*, 397 U.S. 254 (1970)).

¹²⁰*Id.*

Smith,¹²¹ the Supreme Court addressed this topic directly. In this case, Smith was fired from his job for sacramental use of peyote, which was an illegal drug in Oregon.¹²² When he applied for unemployment benefits, the Employment Appeals Board denied his request because his employer discharged him for work-related “misconduct.”¹²³ The Court found that it was permissible for a state to pass a law that “incidentally forbids . . . the performance of an act that [a] religious belief requires . . . if the law is not specifically directed to religious practice and is otherwise constitutional as applied to those who engage in the specified act for nonreligious reasons.”¹²⁴ In reaching its conclusion, the Court determined that the *Sherbert* test was reserved for an instance that specifically “lent itself to individualized governmental assessment of the reasons for the relevant conduct.”¹²⁵ In *Smith*, the *Sherbert* test was inapplicable because a law of valid and neutral general applicability was applied as a total prohibition against particular conduct, and any burden placed upon a particular religion was merely incidental.¹²⁶

C. Lack of a Realistic Solution

As these cases illustrate, courts do not apply the law fairly across the board when the same facts are at hand. Courts dealing with tort damages hold that it is impermissible for a jury to consider if a person acted reasonably given his religious beliefs,¹²⁷ although courts dealing with government benefits require beliefs to be an inviolable right of the plaintiff that are not to be subjected to an objective test of reasonableness.¹²⁸ Furthermore, courts do not recognize that judgment by a jury of a plaintiff’s actions in tort cases is an instance of individualized assessment, thereby invoking the protections of *Sherbert*. The result is a constitutional mess that must leave plaintiffs wondering what “Free Exercise rights” really means.

It is obvious that if one has to choose between recovering damages and asserting the right to follow one’s faith, cases like *Munn* and *Williams* discourage the free exercise of religion. In *Williams*, the court believed it would be endorsing the beliefs of the plaintiff if it accepted as fact that the plaintiff held the beliefs she professed.¹²⁹ Notwithstanding, the *Williams* court, as well as the *Munn* court,¹³⁰ ignored the subsequent consequence of holding a plaintiff to a reasonable person standard. The standard that courts hold the objective, reasonable person to is the standard of the majority. Accordingly, the system of beliefs (religious or otherwise) that the juror

¹²¹Employment Div., Dep’t of Human Res. v. Smith, 494 U.S. 872, 874 (1990).

¹²²*Id.*

¹²³*Id.*

¹²⁴*Id.* at 873.

¹²⁵*Id.* at 884.

¹²⁶*Id.* at 885.

¹²⁷See *supra* Part II.A.

¹²⁸See *supra* Part II.B.

¹²⁹*Williams v. Bright*, 658 N.Y.S.2d 910 (N.Y. App. Div. 1997).

¹³⁰See *supra* Part II.B.1.

must follow when making this “reasonableness” decision are the beliefs of the majority. Therefore, the court allows the majority’s system of beliefs to be controlling because the standard that it judges “reasonableness” by is that of the majority. Accordingly, it violates the Establishment Clause by allowing for judicial acknowledgement of a certain set of beliefs as “the right ones.” Accordingly, if the court were endorsing anyone’s religious beliefs it would be endorsing the beliefs of the majority, and this endorsement cuts to the very purpose for the Establishment Clause.

A look at one of the United States Supreme Court’s on-point decisions sheds some light on the subject. *Walz v. Tax Commission of New York*¹³¹ addressed a problem significantly similar to the issue stated above. In *Walz*, the Court upheld a New York statute from constitutional attack that granted property tax exemptions to religious organizations so long as they only used the property for “religious worship.”¹³² The Court held that this statute did not violate the Establishment Clause because it granted tax exemption to all religious groups, not just to select churches or groups.¹³³ To the contrary, the Court found that allowing religious groups “freedom from taxation . . . operated affirmatively to help guarantee the free exercise of all forms of religious beliefs.”¹³⁴ Allowing judicial acknowledgement of all religious beliefs in tort cases would be neutral as well, staying safely within constitutional limits.

The *Williams* Court did have a valid point when it raised the issue of what would happen had conflicting expert testimony on the plaintiff’s religious beliefs been presented.¹³⁵ It is clear that the law does not allow this inquiry: the Supreme Court specifically addressed this issue long ago. In *United States v. Ballard*,¹³⁶ the defendant was indicted on mail fraud charges for organizing a group that distributed and sold literature through the mail putting forth the defendant’s religious doctrines and for soliciting funds and memberships from those who responded.¹³⁷ The Supreme Court adamantly opposed submitting to the jury the question of whether there was truth in the defendant’s beliefs.¹³⁸ The Court identified the primary error involved with such a jury instruction. It stated:

The religious views espoused by respondents might seem incredible, if not preposterous, to most people. But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the triers of fact undertake that task, they enter a forbidden domain. The First Amendment

¹³¹*Walz v. Tax Comm’n of N.Y.*, 397 U.S. 664, 666 (1970).

¹³²*Id.*

¹³³*Id.* at 672-73.

¹³⁴*Id.* at 678.

¹³⁵*Williams v. Bright*, 658 N.Y.S.2d 910 (N.Y. App. Div. 1997).

¹³⁶*United States v. Ballard*, 322 U.S. 78 (1994).

¹³⁷*See id.* at 79.

¹³⁸*Id.* at 86.

does not select any one group or any one type of religion for preferred treatment. It puts them all in that position.¹³⁹

Ballard set the foundation for cases in the future regarding religious beliefs. No court may charge a jury to judge whether one's beliefs are true or false.¹⁴⁰ To do so directly contradicts the Free Exercise Clause. Essentially, allowing a jury to judge one's actions stemming from the right to freely exercise one's religion does just that—it forces the jury to judge whether the beliefs of a plaintiff are reasonable. A court cannot separate the plaintiff's actions and his beliefs in this instance because the actions represent the beliefs themselves. Instead, the issue for the jury is whether the defendant himself held these beliefs.¹⁴¹

The *Williams* court did not complete its thought on the conflicting expert testimony in its rush to argue that when the trial court simply accepted the plaintiff's beliefs as a fact it endorsed her beliefs in violation of the Establishment Clause.¹⁴² The court did not stop and note that cases of individualized assessment and conscientious objection force such a delicate question upon courts that have found a test that satisfies such a difficult inquiry. The root of this test is that the beliefs of the individual must be considered part and parcel of his persona, with no limit upon which system of beliefs are offered this treatment.¹⁴³ To take any other approach impermissibly steps upon the toes of his freedom to exercise. Essentially, courts treat the individual *as it finds him*.

Arguing over what is the proper reasonable person standard for each case or whether reasonable believers of whatever religion are acting reasonably does not offer plaintiffs adequate protection of their constitutional rights. There will never be a reasonable solution if courts are limited to these two choices. The objective (majority belief) reasonable person standard clearly violates the Establishment Clause, as explained above. Meanwhile, a reasonable belief standard allows the impermissible inquiry into beliefs that *Williams* complains of.¹⁴⁴ The only remedy is to take the approach that a defendant must simply take his victim as he finds him—with religious beliefs as part and parcel of the individual.

¹³⁹*Id.* at 87.

¹⁴⁰*See id.*

¹⁴¹*Id.* at 84.

¹⁴²*Williams v. Bright*, 658 N.Y.S.2d 910 (N.Y. App. Div. 1997).

¹⁴³This test must also focus on the individual who holds the beliefs, not the way others of his religious group hold beliefs. *See Thomas v. Review Bd. of the Indep. Employment Sec. Div.*, 450 U.S. 707 (1981). In this case, the plaintiff, a Jehovah's Witness, argued it was against his personal religious beliefs to work on tanks even though other Witnesses did not share this belief. *Id.* at 714. The Court ruled the *Sherbert* test still applied and the plaintiff was entitled to unemployment benefits even though not all Jehovah's Witnesses would have made the same decision. *Id.* at 715, 720. The Court stated, "the guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect." *Id.* at 715-16.

¹⁴⁴*Williams*, 658 N.Y.S.2d at 910. *See supra* Part II.B.1.

III. HOW RELIGIOUS BELIEFS FIT AS A PRE-EXISTING STATE OF THE PLAINTIFF

There are several different types of pre-existing conditions that courts recognize, all of which require the defendant to take his victim as he finds him. Courts allow recovery for injuries compounded by such pre-existing conditions, regardless of whether they are foreseeable to the defendant.¹⁴⁵ Most often, physical conditions are the subject of litigation; however, courts have applied the doctrine of pre-existing conditions in instances outside of the strictly physical sense as well.¹⁴⁶ Furthermore, science has found physical traces in the body that at least show a predisposition to religious beliefs.¹⁴⁷ Consequently, it is reasonable to treat religious beliefs as a pre-existing condition of a plaintiff.

A. What is a Pre-Existing Condition?

The law concerning aggravation of pre-existing conditions is very clear, and courts throughout the United States universally apply it.¹⁴⁸ Generally, a defendant must take his plaintiff as he finds him, and the defendant is liable to the plaintiff for injuries that occur because of any special sensitivity the plaintiff has, such as a “pre-existing disease, condition, or predisposition to injury.”¹⁴⁹ Such a person is often referred to as an “eggshell skull”¹⁵⁰ or “thin-skull” plaintiff.¹⁵¹ When a defendant encounters such a plaintiff, it is irrelevant whether the plaintiff’s pre-existing condition makes his damages “more extensive than could have been foreseen or reasonably expected.”¹⁵² For example, if a plaintiff has an abnormally thin skull and suffers death from an injury that would normally cause only a bump on a normal person, the rule is that the defendant is liable for all of his victim’s injuries.¹⁵³ As is any plaintiff, the plaintiff with the thin skull is still responsible for mitigating his damages, if possible, even though the injury he suffers is greater than what the defendant could expect from a plaintiff without such a pre-existing condition.¹⁵⁴ But a court will not deny him recovery for any extensive injuries that occur because of his pre-existing condition.¹⁵⁵

¹⁴⁵See *infra* Part III.A.

¹⁴⁶See *infra* Part III.A.2.

¹⁴⁷See *infra* Part III.B.

¹⁴⁸2 DAMAGES IN TORT ACTIONS § 15.03(1)(a) (2005) (citing to a decision applying this doctrine in every state).

¹⁴⁹*Id.*

¹⁵⁰W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 43 (West 5th ed. 1984).

¹⁵¹2 DAMAGES IN TORT ACTIONS § 15.03(1)(a) (2005).

¹⁵²*Id.* at (1)(b); see also *Figueroa-Torres v. Toledo-Davila*, 232 F.3d 270, 275 (1st Cir. 2000) (emphasizing that foreseeability of extensive injury is not required when a plaintiff has a pre-existing condition).

¹⁵³KEETON ET AL., *supra* note 150, at 292.

¹⁵⁴3 DAMAGES IN TORT ACTIONS § 16.01 (2005).

¹⁵⁵2 DAMAGES IN TORT ACTIONS § 15.03(1)(b) (2005).

1. Mental Conditions

Courts treat many mental maladies as pre-existing conditions when plaintiffs claim the defendant's tortious conduct resulted in injury.¹⁵⁶ Schizophrenic episodes,¹⁵⁷ post-traumatic stress disorder,¹⁵⁸ and depression¹⁵⁹ are common pre-existing mental conditions that require application of the thin-skull plaintiff doctrine.

For example, in *Barlow v. Plummer*,¹⁶⁰ the plaintiff was involved in a car accident that caused her whiplash¹⁶¹ and triggered a relapse of her reoccurring mental illness.¹⁶² The defendant's negligence did not cause her depressive disorder, but it aggravated her condition so that where she had been stable before the accident, she now suffered a relapse of her depression.¹⁶³ Accordingly, she was entitled to damages for the aggravation of her pre-existing condition.¹⁶⁴

*Botek v. Mine Safety Appliance Corp.*¹⁶⁵ presents another case where the court considered emotional damage caused by the defendant's negligence. Botek participated in a firefighter training exercise, which required the use of an oxygen mask.¹⁶⁶ Unfortunately, the manufacturer of his air pack had mistakenly filled it with carbon monoxide instead of oxygen.¹⁶⁷ Botek passed out and awoke to find emergency personnel treating him with oxygen.¹⁶⁸ He suffered headaches, disorientation, and nausea immediately after the incident; however, as time went by, his mental condition deteriorated severely.¹⁶⁹

The examining psychologist at trial concluded that Botek suffered from Post-Traumatic Stress Syndrome caused by the accident, and this disorder kept him from seeking treatment for the problem for several years.¹⁷⁰ The court stated, "[i]t is

¹⁵⁶22 AM. JUR. 2D *Damages* § 239 (2004).

¹⁵⁷*See, e.g.*, *Turner v. Haynie*, 607 S.W.2d 86 (Ark. Ct. App. 1980).

¹⁵⁸*See, e.g.*, *Botek v. Mine Safety Appliance Corp.*, 611 A.2d 1174 (Pa. 1992).

¹⁵⁹*See, e.g.*, *Barlow v. Plummer*, 195 So. 2d 321 (La. Ct. App. 1967).

¹⁶⁰*Id.*

¹⁶¹*Id.* at 322.

¹⁶²*Id.* at 324 (explaining that Barlow was diagnosed as a pseudoneurotic schizophrenic).

¹⁶³*See id.* at 325-26.

¹⁶⁴*Id.* at 325. On appeal, the court reduced the amount of damages awarded by \$3,000. It found that plaintiff's "emotional [and] mental disturbance[s] so triggered [were] not of such a nature that it disabled [plaintiff] or caused her any great suffering" because it only took her "seven or eight visits to her treating psychiatrist over a period of five or six months" to "completely restore her to her former condition."

¹⁶⁵*Botek v. Mine Safety Appliance Corp.*, 611 A.2d 1174 (Pa. 1992).

¹⁶⁶*Id.* at 1174.

¹⁶⁷*Id.*

¹⁶⁸*Id.* at 1175.

¹⁶⁹*Id.*

¹⁷⁰*Id.*

simple black letter law that a tortfeasor must take its victim as it finds him.”¹⁷¹ Furthermore, the court asserted, “[i]t is clear that where a claimant’s rejection of treatment is part of his emotional injuries, he may recover damages in spite of the failure to receive treatment.”¹⁷² Therefore, although it is likely that not all plaintiffs who are injured will suffer such emotional disturbances as Botek did, he had some type of predisposition that caused him to react this way. The court recognized this predisposition and it is for that reason that the principle that a tortfeasor must take his victim as he finds him was applicable in this case.

Similarly, the court considered the mental condition of the plaintiff in *Tropi*, as explained earlier.¹⁷³ The court considered the plaintiff’s mental makeup an inseparable part of her so the defendant had to take her as he found her: unwilling to give up her child.¹⁷⁴

Proving emotional disturbances presents a challenge to parties in court; however, just as with proving one adheres to certain religious beliefs, courts deal with the issue with regularity.¹⁷⁵ In each case involving mental disturbance, so long as the trier of fact concludes that the parties present sufficient evidence, it considers these emotional or mental characteristics part of the plaintiff and the defendant must take him as he finds him.¹⁷⁶ As one court pointed out when dealing with such a situation, “‘guarantee of genuineness’ [sic] might ultimately be found ‘in the circumstances of the case.’”¹⁷⁷

2. Physical Conditions

The most easily recognized pre-existing conditions involve pre-existing physical maladies.¹⁷⁸ Back conditions,¹⁷⁹ Parkinson’s disease,¹⁸⁰ diabetes,¹⁸¹ epilepsy,¹⁸² and

¹⁷¹*Id.* at 1177.

¹⁷²*Id.*

¹⁷³*See Tropi v. Scarf*, 187 N.W.2d 511 (Mich. Ct. App. 1971).

¹⁷⁴*Id.* at 520.

¹⁷⁵*See, e.g., Turner v. Haynie*, 607 S.W.2d 86, 87 (Ark. Ct. App. 1980) (stating that “appellee was not a ‘strong’ individual at the time of his injury,” and his “previous mental ailments” were aggravated by the injury); *Tobin v. Steisel*, 475 N.E.2d 101, 102 (N.Y. 1985) (regarding “traumatic neurosis with depression”); *Boodram v. Brooklyn Developmental Ctr.*, 773 N.Y.S.2d 817 (N.Y. Civ. Ct. 2003) (stating that negligence of her employer by failing to prevent sexual harassment in the work place caused post-traumatic stress disorder to develop in Plaintiff); *see also Barlow v. Plummer*, 195 So. 2d 321 (La. Ct. App. 1967); *Botek v. Mine Safety Appliance Corp.*, 611 A.2d 1174 (Pa. 1992).

¹⁷⁶*See Boodram*, 773 N.Y.S.2d at 825, 826 (explaining the characteristics that courts consider include the severity of the condition, its duration, whether there are physical manifestations of the condition, the medical treatment a plaintiff may receive in response to the condition, as well as witness testimony).

¹⁷⁷*Id.* at 826 (citation omitted).

¹⁷⁸22 AM. JUR. 2D *Damages* § 239 (2004).

¹⁷⁹*Piecynski v. Duffy*, 875 F.2d 1331 (7th Cir. 1989); *Winn v. Fry*, 714 P.2d 269 (Or. Ct. App. 1986).

¹⁸⁰*Hollie v. Radcliffe*, 200 So. 2d 616 (Fla. Dist. Ct. App. 1967).

brittle bones¹⁸³ are only a few examples of pre-existing physical conditions that courts have found to be aggravated by a defendant's tortious conduct. Although most of these physical conditions are beyond the control of the plaintiff, obesity presents itself as a notable exception.

Obesity can be a controversial pre-existing physical condition because a plaintiff can exercise a significant degree of control over his own bodyweight. Like plaintiffs who make religious medical choices that affect the success of their medical recovery, defendants have tried to argue that voluntary actions of the plaintiff led to their obesity. Accordingly, they argue the defendant should not be liable for damages caused when the weight of the plaintiff resulted in greater injury than would have occurred in a person who was not overweight.

For example, in *Close v. New York*,¹⁸⁴ the overweight plaintiff had been advised by her doctors to lose weight in order to relieve pain she experienced as a result of an injury sustained in an accident.¹⁸⁵ The court decided it should not reduce her damage award even though she failed to lose weight because she was overweight before her accident and had not been able to stay on a healthy diet.¹⁸⁶ Therefore, although the plaintiff may have been able to mitigate her damages by losing weight, the court did not require her to do so to receive her full damage award. Instead, it considered her weight to be a pre-existing condition.

Conversely, in *Moctezuma v. Industrial Commission of Arizona*,¹⁸⁷ the court ruled that the claimant was not entitled to worker's compensation benefits when her doctor prescribed a weight reduction program that she did not follow.¹⁸⁸ The plaintiff had been heavy before her accident, but she gained a significant amount of weight after her accident. In this situation, the court considered weight to be within the claimant's control, as she exhibited the ability to lose weight when she did stick to her diet.¹⁸⁹ Because the court observed that her weight gain could aggravate the severity of her injury, it found that her weight was not a pre-existing condition and denied her receipt of benefits.¹⁹⁰

Finally, *Lewis v. Insurance Company of North America*¹⁹¹ exemplifies both obesity and another pre-existing condition within the same plaintiff. In this case, Lewis was injured while working at her job as a cook when she slipped on a piece of lettuce.¹⁹² Lewis was tremendously overweight when the accident happened, and the

¹⁸¹Nat'l Dairy Prod. Corp. v. Grant, 241 N.E.2d 275 (Ind. Ct. App. 1968).

¹⁸²Leak v. United States Rubber Co., 511 P.2d 88 (Wash. Ct. App. 1973).

¹⁸³Sansonni v. Jefferson Parish Sch. Bd., 344 So. 2d 42 (La. Ct. App. 1977).

¹⁸⁴Close v. New York, 456 N.Y.S.2d 437 (N.Y. App. Div. 1982).

¹⁸⁵*Id.*

¹⁸⁶*See id.* at 439.

¹⁸⁷Moctezuma v. Indus. Comm'n of Ariz., 509 P.2d 227 (Ariz. Ct. App. 1973).

¹⁸⁸*Id.* at 229.

¹⁸⁹*Id.* at 228-29.

¹⁹⁰*Id.* at 229.

¹⁹¹Lewis v. Ins. Co. of N. Am., 322 So. 2d 429 (La. Ct. App. 1975).

¹⁹²*Id.* at 430.

defense argued that she continued to gain weight afterwards.¹⁹³ Physicians who examined her injuries “noted that she had a degenerative osteoarthritic condition which was most likely dormant before the accident.”¹⁹⁴

While Lewis argued that her injury triggered her previously dormant arthritic condition to the extent that she was unable to perform her former duties without “substantial pain,” the defendants argued that her increase in weight should bar her from recovery under the mitigation of damages doctrine.¹⁹⁵ The court found that although Lewis's doctor advised her to lose weight, he had never actually prescribed her a weight-loss plan.¹⁹⁶ In addition, the court was not convinced that weight loss of 100 pounds, which doctors estimated to be the amount Lewis would have to lose to return to her prior health, would be reasonable treatment.¹⁹⁷ The court concluded that she had “suffered total and permanent disability” and would not be able to return to her position as a cook.¹⁹⁸ Accordingly, although it did not say so explicitly, the court considered both Lewis's weight and her dormant arthritic condition as pre-existing condition because the defendant had to take Lewis as it found her. As a result, she was not required to mitigate her injury by changing her weight.

These cases did not involve plaintiffs who could not lose weight because of a medical condition; instead, they involved plaintiffs who would not lose weight by their own inclination. Although the plaintiffs in *Close* and *Lewis* made the voluntary choice not to lose weight, the courts in those cases still required the defendant to take the plaintiff as it found them. *Moctezuma* can be distinguished from these two cases because the plaintiff's significant weight gain after her injury was not a pre-existing condition.

3. Combination and Other Conditions

Although courts have normally limited the thin-skull doctrine to cases involving mental or physical pre-existing conditions, there are other instances when a defendant must take his victim as he finds him. This concept was put most poignantly by the trial court when deciding *Williams*.¹⁹⁹ “The disability of a chief executive of a major corporation will call for more damages than that of a minimum-wage hamburger flipper.”²⁰⁰

*Schafer v. Hoffman*²⁰¹ exemplifies the concept of financial value as an inseparable part of the plaintiff. In this case, Hoffman struck the plaintiff, a pedestrian, with her

¹⁹³See *id.* at 430-31. At the time of the trial, plaintiff weighed approximately 250 pounds. *Id.*

¹⁹⁴*Id.* at 430.

¹⁹⁵See *id.* at 431.

¹⁹⁶*Id.*

¹⁹⁷*Id.* at 431.

¹⁹⁸*Id.*

¹⁹⁹See *Williams v. Bright*, 632 N.Y.S.2d 760, 764-67 (N.Y. Sup. Ct. 1995).

²⁰⁰*Id.* at 769.

²⁰¹*Schafer v. Hoffman*, 831 P.2d 897, 898 (Colo. 1992).

car while driving under the influence of drugs and alcohol.²⁰² Schafer was seriously injured, and in her suit for damages, the Colorado Supreme Court had to address whether the trial court correctly gave a thin-skull instruction to the jury.²⁰³

The jury instruction in this case actually reflected two pre-existing condition scenarios in the facts. First, the court ruled that Schafer presented testimony at her trial that supported the jury finding that pre-existing physical maladies she suffered from were aggravated by the accident.²⁰⁴ Second, the court examined Schafer's employment situation and found the trial court's thin-skull jury instruction again acceptable because it encompassed the disadvantage the plaintiff now had in her particular job market given her injuries.²⁰⁵ The court reasoned that a defendant must take his victim as he finds him, including the chance that his victim, now disadvantaged in her specific job market because of her injuries, costs more than an unskilled person would to be made whole.²⁰⁶

Alcoholism poses another challenging examination for courts when a plaintiff asserts thin-skull protections for damage awards. In *Pierce v. General Motors Co.*,²⁰⁷ the Michigan Supreme Court struggled with the issue of alcoholism as a pre-existing condition. Pierce argued that harassment at work caused him to drink more than he did before his employment, and that stress caused him to develop a debilitating nervous disorder.²⁰⁸ The court ultimately decided against the majority of jurisdictions²⁰⁹ by ruling that it should not consider alcoholism a pre-existing condition.²¹⁰ In its analysis, the court reasoned that the plaintiff's alcoholism was

²⁰²*Id.*

²⁰³*Id.* at 899.

²⁰⁴*Id.* at 901.

²⁰⁵*Id.* at 902; *see also* KEETON ET AL., *supra* note 150, at 292 (stating that "the defendant who kills another must take the chances, as to damages for the death, that the other has a large income, although the defendant had no reason to expect it").

²⁰⁶*Schafer v. Hoffman*, 815 P.2d 971, 973 (Colo. Ct. App. 1991), *aff'd*, 831 P.2d 897 (Colo. 1992). It is not clear from the facts in either opinion *why* Schafer would be disadvantaged in the job market. The Court of Appeals of Colorado found that she was disadvantaged after the accident because of her age and gender; so, it seems likely that she lost her former position or had to quit as a result of her injuries and finding a new, comparable position would now be difficult for her because of her age and gender. *Id.* at 973.

²⁰⁷*Pierce v. Gen. Motors Corp.*, 504 N.W.2d 648 (Mich. 1993).

²⁰⁸*Id.* at 649.

²⁰⁹*See Proyer v. Monsanto Co.*, 606 So. 2d 1307 (La. Ct. App. 1992) (finding that although plaintiff suffered from paranoia, depression, and alcoholic hallucinosis, work stress was the primary problem); *Hansen v. Weyerhaeuser*, 749 P.2d 1183, 1184 (Or. Ct. App. 1988) (stating that "[t]reatment for alcoholism would be more compensable if the injury caused it to become symptomatic, or caused a preexisting psychological condition to become symptomatic in the form of alcoholism"); *Adsitt v. Clairmont Water Dist.*, 717 P.2d 1231, 234 (Or. Ct. App. 1986) (finding that alcoholism not caused by work stress but "an exacerbation of an underlying condition caused by work activities is itself a compensable occupational disease"); *see, e.g., Elliott v. Midlands Animal Prod.*, 428 N.W.2d 920 (Neb. 1988); *Globe Mach. v. Yock*, 717 P.2d 1235 (Or. Ct. App. 1986).

²¹⁰*Pierce*, 504 N.W.2d at 653.

what triggered the nervous disorder,²¹¹ and work stress could not be found to be the reason that his alcoholism worsened because “it is not a job or occupation that compels alcoholics to consume alcohol; it is the disease from which they suffer.”²¹²

Vehemently dissenting, Judge Cavanagh pointed out that while the majority opinion placed fault for the disease on the plaintiff, the worker’s compensation statute under which he brought his case allowed recovery even if the plaintiff was at fault or the work stress was not the only cause.²¹³ He was incredulous that the majority could ignore the legitimate controversy over “whether alcoholism may be caused by hereditary or environmental factors,” and professed that the court should refrain from taking sides before there is “overwhelming scientific evidence tending to support one view in preference to another.”²¹⁴ Furthermore, Judge Cavanagh explained how the majority opinion ignored the established rule of pre-existing conditions: because alcoholism is a disease and if the defendant’s negligent conduct aggravates the disease, the defendant is liable if the plaintiff’s condition worsens.²¹⁵ Because the Worker’s Compensation Review Board made such a finding, he concluded that the defendant was clearly not responsible for the entire disease, but that it was responsible to the extent that work stress aggravated the disease to the point of disability.²¹⁶

As these cases exemplify, pre-existing conditions can take on a variety of forms. They may manifest themselves through the mind of the plaintiff or through some outward physical sign, or both. In addition, although some conditions may be somewhat under the plaintiff’s control, courts will take into consideration the surrounding circumstances when deciding whether they exist as a pre-existing condition that requires the defendant to take his victim as he finds him.

B. *Religion as a Pre-Existing Condition: The Body and Belief*

The main purpose of tort damages is to make the plaintiff whole, and the doctrine of pre-existing conditions is necessary if the law is to achieve this goal. Accordingly, courts recognize all of the discussed conditions as part of the plaintiff and require the defendant to take his victim as he finds him. If courts are willing to recognize such conditions as depression, alcoholism, obesity, and profitability as part of the plaintiff, all of which are arguably somewhat voluntary, it seems odd that the law would not include specific religious beliefs as part of the plaintiff as well.

While much is still unknown about the brain and how it processes information, scientists have made remarkable discoveries in recent years when studying brain activity. Research reveals that the center for religious thoughts can be pinpointed in

²¹¹*Id.* at 652. The court stated, “[i]t is not work and its attendant stresses that aggravate alcoholism; it is alcohol,” and went on to cite a quote in a footnote: “Alcoholics can always give a reason why they drink.” *Id.* (citing JAMES E. ROYCE, *ALCOHOL PROBLEMS AND ALCOHOLISM: A COMPREHENSIVE SURVEY* 98 (Free Press 1989) (1981).

²¹²*Id.*

²¹³*Id.* at 654.

²¹⁴*Id.* at 657 n.15.

²¹⁵*Id.* at 655.

²¹⁶*Id.* at 658-60.

the brain, and the study of this subject has only scratched the tip of the iceberg of the phenomenal machine that is the human brain.

At Columbia University's Center for the Study of Science and Religion, Dr. Michael Baime, who practices Tibetan Buddhist meditation, worked with Andrew Newberg in conducting one of the most interesting studies in this field of "neurotheology."²¹⁷ Using a SPECT machine²¹⁸ while Dr. Baime was in a deep meditative state, Newberg examined Dr. Baime's brain activity.²¹⁹ When Dr. Baime felt he was at "the peak of spiritual intensity," the SPECT image of his brain was recorded.²²⁰ It revealed a vibrant area of activity in the prefrontal cortex and a lack of activity in the superior parietal lobe. This lobe is responsible for body orientation, and without the sensory input necessary for this region to do its job, "the left orientation area cannot find any boundary between the self and the world."²²¹

Upon repetition with volunteers from another religion, Newberg achieved the same results. Franciscan nuns volunteered for the study, and while in intense prayer, the SPECT image showed the same result as Dr. Baime's brain had shown.²²² This "biologically based event[] in the brain"²²³ . . . gives the experience a reality that psychologists and neuroscientists had long denied it and explains why people experience ineffable transcendent events as equally real as seeing a wondrous sunset or stubbing their toes."²²⁴

A researcher at Laurentian University, Michael Persinger, has used electromagnets on volunteers to trigger activity in certain regions of the brain.²²⁵ By creating a weak magnetic field, the temporal lobe can be induced into creating sensations in the volunteer that are described as "supernatural or spiritual."²²⁶ Persinger theorizes that such "mini electrical storms in the temporal lobes" can be "triggered by anxiety, personal crisis, lack of oxygen, low blood sugar, and simple

²¹⁷Sharon Begley & Anne Underwood, *Religion and the Brain: In the New Field of "Neurotheology," Scientists Seek the Biological Basis of Spirituality. Is God All in Our Heads?* NEWSWEEK, May 7, 2001, at 50, available at <http://www.templeton.org/brainmind/mergence/press-newsweek20010507.asp>.

²¹⁸*Id.* SPECT stands for a single photon emission computed tomography machine. *Id.* It tracks blood flow in the brain and produces an image of the brain's activity. *Id.*

²¹⁹*Id.*

²²⁰*Id.*

²²¹*Id.*

²²²*Id.*

²²³Author's note: this in no way answers the question of whether God exists, much as, which came first—the chicken or the egg? There is obviously no evidence that God is made up in the minds of believers or conversely that God makes this event happen in the minds of believers.

²²⁴Begley & Underwood, *supra* note 219 (quoting Andrew Newberg).

²²⁵*Id.*

²²⁶*Id.*

fatigue.”²²⁷ The obvious connection to human experience is that during such times many individuals find themselves turning to God.

Another pioneer in this field, Vilayanur Ramachandran also conducted experiments in this area and concluded that one’s religiosity could depend on the amount of activity in the temporal lobes, just as the previously described experiments did.²²⁸ He asserts that because the speech processing area of the brain is in this area, significantly increased electrical activity could cause these areas to activate.²²⁹ Because sensory information is suppressed during intense prayer or meditation, as Newberg’s experiments revealed, Ramachandran believes one could perceive to hear the “voice of God,” as the brain is “more likely to misattribute internally generated thoughts to an external source” during this time.²³⁰

Even the physical manifestations of decision-making have been subject to study. By recording drastic changes in core personality components of people who suffered brain damage, neurologist Dr. Bruce Miller could track the location in the right frontal lobe of one’s characteristics such as preferences in food and clothing, as well as an individual’s “most basic views, values, beliefs, and principles.”²³¹ Furthermore, scientists have even been able to locate one’s ability to make decisions within “the limbic system including parts of the anterior cingulate gyrus.”²³² This phenomenal process occurs by the brain connecting “subjective experience with specific emotions or goals, enabling one to make choices.”²³³

Taking this research one step further, Matthew Alper reported his findings on the subject in his book, *The “God” Part of the Brain*.²³⁴ Given the evidence that there is a specific region in the brain designed to process spiritual impulses, Alper argues that humans are predisposed to develop their “own spiritual identity or what we call a religion.”²³⁵ With the brain “hardwired” for such development, scientists began to inquire into how such development actually occurs.²³⁶

Dean Hamer, a geneticist at the National Cancer Institute at the National Institutes of Health, addressed the intriguing issue of nature versus nurture for the answer.²³⁷ His genetic findings indicate that “spirituality . . . doesn’t result from

²²⁷*Id.*

²²⁸*Id.*

²²⁹*Id.* (explaining that this area of the brain is known as Broca’s area).

²³⁰*Id.* (quoting Richard Bentall).

²³¹MATTHEW ALPER, *THE “GOD” PART OF THE BRAIN: A SCIENTIFIC INTERPRETATION OF HUMAN SPIRITUALITY AND GOD* 120 (Rogue Press 5th ed. 2001).

²³²*Id.* This amazing discovery was also accomplished by studying those unfortunate individuals with brain damage, namely “when the[ir] amygdala and anterior cingulated gyrus [were] disconnected.” *Id.*

²³³*Id.*

²³⁴*Id.*

²³⁵*Id.* at 83.

²³⁶See DEAN HAMER, *THE GOD GENE: HOW FAITH IS HARDWIRED INTO OUR GENES* 39 (2004).

²³⁷*Id.*

outside influences.”²³⁸ By studying twins and siblings, Hamer demonstrated that among families where children were raised in the same family environment, each individual’s level of “spirituality” varied.²³⁹ His studies revealed that although twins and siblings raised in the same environment are more likely to be just as religious as the others in their family religiosity and spirituality were not the same.²⁴⁰ Religiosity is a learned behavior, but spirituality “comes from within.”²⁴¹ Hamer identified this specific genetic signature that predisposed its owner to have a greater level of spirituality.²⁴² He concluded that, “the content of religious ideas and traditions is cultural, whereas the predisposition to believe them may be at least partially genetic.”²⁴³

Hamer took this knowledge even further, trying to determine whether individuals affiliate with their specific religious group because of their genes or because of their environment.²⁴⁴ He studied groups of twins living together at home and groups living on their own.²⁴⁵ As the twins grew up and left home, separated from the imposition of their parents’ beliefs, Hamer noticed two changes in the twins’ religious beliefs.²⁴⁶ First, their environment obviously became more influential than when their parental role models closely guided them.²⁴⁷ Second, he observed that it was statistically significant in women that “genes seemed to play a role in their beliefs.”²⁴⁸ The specific gene somehow predisposes its holder to “radically throw off her past and embrace a new tenet of beliefs.”²⁴⁹ Similarly, when Hamer studied twins in the hopes of finding a genetic link to “adherence to doctrine and acceptance of traditional beliefs,” the evidence was undeniable that “genetic differences . . . [and] . . . one’s shared environment . . . both play a significant role.”²⁵⁰

All of these studies and research positively reflect that religious beliefs can at least have some literal “physical presence” in the body or that they can at least manifest themselves in the brain as any recoupable mental condition can. If a court would insist that the thin-skull plaintiff doctrine should only be applicable to pre-

²³⁸*Id.* at 49.

²³⁹*Id.* (stating that “[s]pirituality comes from within. The kernel must be there from the start. It must be part of their genes.”).

²⁴⁰*Id.* at 52.

²⁴¹*Id.*

²⁴²*Id.* at 74.

²⁴³*Id.* at 171.

²⁴⁴*Id.*

²⁴⁵*Id.* at 172.

²⁴⁶*Id.* at 172-73.

²⁴⁷HAMER, *supra* note 236, at 172.

²⁴⁸*Id.* at 173.

²⁴⁹*Id.* Hamer points out that there is probably not a “Catholic gene” or a “Muslim gene,” but rather that “their decision as to maintain or reject the religion of their parents was indirectly influenced by genetically mediated personality traits.” *Id.*

²⁵⁰*Id.* at 175.

existing physical conditions, science is clearly on its way to proving that such a link exists.

IV. POLICY CONSIDERATIONS FOR EXTENDING THE THIN-SKULL DOCTRINE

Courts should begin to take a hard look at the public policy behind the mitigation of damages doctrine. With cases in our nation's history such as *Montgomery*, which asserted, "[w]hen considerations of conscience grounded upon religious beliefs are involved, the state interest in preserving health pales into insignificance,"²⁵¹ why insist on the public policy considerations behind mitigation of damages that prevent constitutional protections from being extended into the private realm? Religious freedom and prevention of waste do not mix under the same heading—it is equivalent to trying to patch a round hole with a square peg.

Religious beliefs should serve as a pre-existing mental state of mind or "condition" that qualify believers for exemption from certain medical treatment that would otherwise be considered "reasonable," just as conscientious objectors to war are exempt from combat service for their country because of their religious beliefs. The United States Supreme Court has already had to address the delicate problem of religious beliefs as part of the plaintiff in these decisions, so it has proven it is capable of doing so. Furthermore, criminal law doctrine has never permitted a defendant to escape conviction simply because the victim has certain beliefs.²⁵² Discrimination against plaintiffs in tort actions needs to cease.

A. Pre-Existing Condition Debate

Without much elaboration, in *Williams*, the Supreme Court of New York tossed aside the trial court's eloquent opinion on the applicability of the thin-skull doctrine as simply, "error."²⁵³ The only thought it gave to this subject was that the doctrine was "traditionally limited to a plaintiff's pre-existing physical condition, mental illness, or psychological disability."²⁵⁴ Similarly, *Munn* stated that the doctrine did not apply because "the principle has been applied only to pre-existing *physical* injuries."²⁵⁵ The court also opted to "decline the invitation to extends its scope," even though there was convincing evidence that the plaintiff's state courts would.²⁵⁶

²⁵¹See *supra* Part II.B.2. See also *Montgomery v. Bd. of Ret.*, 109 Cal. Rptr. 181 (Cal. Ct. App. 1973).

²⁵²See Beth Linea Carlson, *Blood and Judgment: Inconsistencies Between Criminal and Civil Courts When Victims Refuse Blood Transfusions*, 33 STETSON L. REV. 1067 (2004); see also *Klinger v. Florida*, 816 So. 2d 697, 699 (Fla. Dist. Ct. App. 2002) (stating that "[t]he fact that [plaintiff] refused a blood transfusion which might have saved his life does not absolve [defendant] from criminal liability"); *Ford v. Indiana*, 521 N.E.2d 1309, 1310 (Ind. 1988) (stating that "[t]he fact that other causes contribute to the death does not relieve the actor from responsibility" when charged with a homicide); *North Carolina v. Welch*, 521 S.E.2d 266, 268 (N.C. Ct. App. 1999) (explaining that "[t]o escape responsibility based on an intervening cause, the defendant must show that the intervening act was 'the sole cause of death'" (citation omitted)).

²⁵³*Williams v. Bright*, 658 N.Y.S.2d 910, 913 (N.Y. App. Div. 1997).

²⁵⁴*Id.*

²⁵⁵*Munn v. Algee*, 924 F.2d 568, 576 (5th Cir. 1991) (emphasis in original). The court cites to *Prosser & Keeton on Torts*, but this source does not support the court's assertion that

These courts did not fully consider the purpose or the true extent of the pre-existing condition doctrine. Instead, the courts waived the plaintiff's religious beliefs aside as a voluntary decision as mundane as what to have for dinner tonight. Had the court in *Munn* or *Williams* looked to cases like *Pierce*, the court in either case would have seen that the doctrine has been extended to other quasi-voluntary actions of a plaintiff. Even though brain research concludes that we are genetically predisposed to make some religious decisions the way we do, there is no doubt that all of the brain research in the world will not erase the concept of free will anytime soon. But these courts failed to see how "voluntary" one's actions are does not act as an absolute bar to recovery when thoroughly examining the pre-existing condition doctrine.

Either court would look foolish if it turned its nose at the pre-existing condition doctrine in ways it did not recognize. For example, is it not free will that engages a person to spend three grueling years in law school and most of their personal life to build a successful partnership in a law firm? Suppose the landlord of the law firm's office negligently operated the elevator and the doors opened without the preoccupied lawyer noticing the shaft gaping before him. Would these courts decrease the lawyer's damages for lost wages when he falls to a career-ending injury, simply because the lawyer could have settled for a life as a bartender? By concluding that pre-existing conditions should only be *physical*, the courts in *Munn* and *Williams* would seemingly preclude this lawyer from recovering an award from the negligent party that would make him whole because his choice to become a lawyer required an award for lost wages to be higher than it would have been otherwise. It seems highly unlikely these courts would not take the lawyer as it finds him.

Furthermore, if the courts in *Munn* and *Williams* are unwavering in their "physical condition" requirement, the scientific research on genetics is a thin rope to hold on with, but it is there, nonetheless. Future research will most likely strengthen this "golden thread."

B. Government Recognition of the Conscientious Objector

Government can recognize that individuals hold religious beliefs that prevent them from engaging in certain activities, and it even attempts to discern which of our citizens do so. The Universal Military Training and Service Act "exempts from combatant training and service in the armed forces of the United States those persons who by reason of their religious training and belief are conscientiously opposed to participation in war in any form."²⁵⁷ It allows courts to consider religious beliefs part of the individual—inseparable. Essentially, the examiner in such a situation considers the individual in just the same way a court does when dealing with a person with a pre-existing condition.

United States v. Seeger gave instruction to the examiner that finds himself in the unenviable position of determining whether the objector's belief was "sincere,

the "eggshell skull" doctrine only applies to pre-existing *physical* injuries. See KEETON ET AL., *supra* note 150, at 291.

²⁵⁶*Munn*, 924 F.2d at 576. Ignoring state law raises a potential civil procedure issue as well, but I prefer to leave that topic for another student.

²⁵⁷*United States v. Seeger*, 380 U.S. 164, 165 (1965).

honest, and made in good faith.”²⁵⁸ Just as the honesty of any witness in any case must be discerned, the Court directed the examiner to look to the circumstances at hand to determine if the beliefs a registrant professed were sincerely held.²⁵⁹ In this particular case, the sincerity of the applicant was not in question; his record as a Roman Catholic, his humanitarian community service activities, and his studies provided sufficient evidence.²⁶⁰ The *Williams* Court balked at the prospect of having to make such a decision, claiming that to do so would be impermissible.²⁶¹ This court clearly missed the point that the only inquiry it should have made was into whether the plaintiff sincerely held the beliefs upon which she based her acts and omissions.

To illustrate how a court could make such an inquiry, consider a plaintiff like Munn. The plaintiff claims to hold beliefs typical of the Jehovah’s Witness faith. The tenets of the Jehovah’s Witness faith are readily discernable from the group’s official website, so this plaintiff would have it easy showing a court what he believed—it is conveniently available in pre-printed form. Church membership records would likely offer supporting evidence that the plaintiff adhered to these beliefs. Furthermore, as a Jehovah’s Witness, he could present his medical emergency card that explains that he does not wish to partake in blood products. A fact-finder could easily take into consideration all of this information to determine whether the plaintiff sincerely held the beliefs. Taking this plaintiff as it finds him, with these personal beliefs, the court would hold the defendant liable for the plaintiff’s injury because of this pre-existing state.²⁶²

C. Treating Religion as a Pre-Existing Condition Passes Constitutional Muster

As in *Munn* and *Williams*, future cases will inevitably bring a constitutional challenge from the defense for violations of the Establishment Clause. Plaintiffs should rest assured that considering religious beliefs as a pre-existing condition will pass constitutional muster.

²⁵⁸*Id.* at 166-67.

²⁵⁹*See id.* at 184-85.

²⁶⁰*Id.* at 186-87.

²⁶¹*See supra* Part II.B.1.

²⁶²The case of *Friedman v. New York*, 282 N.Y.S.2d 858 (N.Y. Ct. Cl. 1967), is a perfect example of how a court should address the situation. In this case, a Jewish girl who was raised in a very strict orthodox family found herself trapped with a man on a ski-lift, with no reason to expect rescuers. *Id.* at 861-62. Having been raised to believe that it was an “overwhelming moral sin which would not only absolutely ruin [her] reputation but also the reputation of her parents” if she were to remain with the man in a place where other persons could not get them, she jumped from the lift. *Id.* at 862. In affirming her award for damages, the court ruled that regardless of whether her interpretation of the religious tenet was correct, she sincerely believed it, so the defendant had to take her as he found her. *Id.* The United States Supreme Court reiterated this position in *Thomas v. Review Bd. of the Indep. Employment Sec. Div.*, 450 U.S. 707 (1981), where one Jehovah’s Witness found working in armaments violated his religious beliefs even though other Witnesses did not. *See supra* text accompanying note 143.

1. The *Ballard* Test Met

By considering religious beliefs as part and parcel of the plaintiff, courts will avoid the danger of conflicting testimony about the “correctness” of beliefs. As in *Seeger*, the proper inquiry will only be into whether the plaintiff is acting in compliance with his own personal beliefs and interpretation of religion.

This investigation is certainly not a question of reasonableness of the plaintiff’s beliefs, as *Ballard* plainly prohibits.²⁶³ It is clearly reasonable that one takes actions to avoid a loss one sincerely believes to be the greater evil. The plaintiff still acts reasonably, as mitigation of damages requires: he acts given his “condition,” the same standard anyone else with a pre-existing condition is held to.²⁶⁴ This rule is in accordance with the current rule that what is reasonable is judged by the particular circumstances of each case.²⁶⁵

2. The *Smith* and *Sherbert* Tests Met

In *Smith*, the United States Supreme Court determined that the *Sherbert* test is reserved for situations that call for individualized assessment of a plaintiff’s conduct.²⁶⁶ Allowing courts to recognize a plaintiff’s religious beliefs as a pre-existing condition satisfies this mandate. By providing this protection for all religions, even those that are unperceivable to the majority, the pre-existing condition doctrine does not offend the Establishment Clause.

This approach also respects the Free Exercise Clause. When a court considers a plaintiff’s religious beliefs as a pre-existing condition, it must confront whether forcing the plaintiff to be responsible for what it normally considers a reasonable mitigation tactic imposes a burden on the free exercise of the plaintiff’s rights. *Montgomery* already clearly held that the government’s interest in “preserving the life and health of [its] citizens” pales in comparison to its infringement upon First Amendment Rights.²⁶⁷ Therefore, considering a plaintiff’s religious beliefs as a pre-existing condition fits easily in line with *Sherbert*.

Considering religious beliefs to be a pre-existing state of the plaintiff poses an acceptable solution to the current inconsistencies in the law regarding judgment on factually similar cases regardless of the forum in which they are brought—criminal or civil, state action or private. Courts already have the ability to discern the sincerity of a person’s beliefs. Moreover, they also have the tools to do so in a fashion that does not offend the Constitution.

V. CONCLUSION

The hallowed rights of the First Amendment define America and have made this country what it is today. The current approach to tort damage cases is offensive to these rights, for it forces plaintiffs into a situation where they must choose between

²⁶³See *United States v. Ballard*, 322 U.S. 78, 87 (1944).

²⁶⁴RESTATEMENT (SECOND) OF TORTS § 918 cmt. c (1979).

²⁶⁵3 DAMAGES IN TORT ACTIONS § 16.02 (2005).

²⁶⁶See *supra* Part II.B. See also *Employment Div. Dep’t of Human Res. v. Smith*, 494 U.S. 872, 884 (1990).

²⁶⁷*Montgomery v. Bd. of Ret.*, 109 Cal. Rptr. 181, 184 (Cal. Ct. App. 1973).

their freedom to exercise or coercion into conformity with the majority's beliefs to receive just compensation for their injuries. Courts have the cases before them. They can continue to ignore the tools in their chambers of justice that would end religious discrimination in this matter, or they can pick these tools up and put them to good use protecting these invaluable rights.

Considering religious beliefs as a pre-existing condition is not a foolproof solution to the discrimination that is evident in the current state of the law, but a court faces a degree of uncertainty whenever there are issues of fact to be decided. To err on the side that promotes the most protection of religious beliefs is what the First Amendment demands of courts because of the importance of the freedoms protected therein.

Because there can be an infinite variety of religious beliefs professed, a system must be in place that can handle all possibilities, as not all cases presented to a fact-finder will entail easily recognizable religions with well-established beliefs. The position asserted by this note merely requires courts to continue doing what they have already done in cases like *Seeger* and *Ballard* where the Supreme Court had to determine whether the defendant sincerely held his religious beliefs. Moreover, the large majority of cases that will continue to present themselves will undoubtedly be very similar to those addressed earlier in this note. Most future cases will not involve some obscure religion where the plaintiff represents the entire membership. Rather, these cases will involve members of religious sects that profess clear, well-known beliefs that courts can easily evaluate for their sincerity. Furthermore, it seems unlikely that a plaintiff would allow himself to suffer or even die unless he is firmly convicted in his beliefs. Accordingly, the potential for abuse in these situations is very slim.

Americans highly regard their freedom but "freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order."²⁶⁸

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²⁶⁸*Williams v. Bright*, 658 N.Y.S.2d 910, 918 (N.Y. App. Div. 1997) (Rosenberger J., dissenting) (quoting *Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)).

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