Tort Law

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NEGLIGENCE

Negligence is an important tort classification for insurance professionals to understand because it is the basis of many property-casualty insurance claims.

Torts are civil (or private) wrongs, as distinguished from crimes, which are public wrongs. Torts are either unintentional or intentional.

Negligence is the broad term used for unintentional torts. All other torts are intentional. A tort results from a **tortfeasor's** breach of duty that results in injury or loss. Describing negligence involves an understanding of two of its aspects:

- The elements of negligence
- The required proof of negligence

Tort

A wrongful act or an omission, other than a crime or a breach of contract, that invades a legally protected right.

Tortfeasor

A person or organization that has committed a tort.

Elements of Negligence

A **plaintiff** in a negligence claim against a **defendant** must establish each of the four essential elements of negligence:

- The defendant owed a legal duty of care to the plaintiff.
- The defendant breached the duty of care owed to the plaintiff.
- The defendant's negligent act was the proximate cause of the plaintiff's injury or damage.
- The plaintiff suffered actual injury or damage.

Defendant

The party in a lawsuit against whom a complaint is filed.

Plaintiff

The person or entity who files a lawsuit and is named as a party.

Legal Duty

The first essential element of negligence is a **legal duty** of care owed by a defendant to a plaintiff. In establishing the existence of a legal duty, the courts ask whether the plaintiff's interests are entitled to legal protection against the defendant's conduct.

Legal duties of care are created by **statutes**, contracts, and the **common law**.

Consider that many automobile hit-and-run laws impose a duty on drivers involved in accidents to stop and assist injured persons. Failure to obey the statute generally constitutes negligence, and the violator is liable for any damages directly caused by failing to give assistance.

Legal duty

An obligation imposed by law for the preservation of the legally protected rights of others.

Statute

A written law passed by a legislative body, at either the federal or state level.

Common law (case law)

Laws that develop out of court decisions in particular cases and establish precedents for future cases.

Failure to perform a contract or performing a contract improperly can violate a legal duty. For example, the subcontractor did not use the concrete formula specified in the contract and the parking garage collapsed. Damage to the garage would be related to a breach of contract. If persons or third-party property were injured or damaged in the collapse, then the subcontractor could also be held liable because of negligence.

Most legal duties arise from the common law. Many such duties are well established; others are defined based on the facts of new cases that raise new legal issues. In response, courts may develop new rules that form compromises between the conflicting positions of plaintiffs demanding protection and defendants claiming they owe no legal duty of care.

For a negligence lawsuit to be successful, the defendant must have owed a duty to the plaintiff. However, the duty need not be owed to a specific person. That the defendant could foresee that harm would occur to someone because of the negligent act or omission is sufficient. Duty extends to all persons and property within the zone of hazard, or area of danger. For example, the duty might extend to an unforeseen plaintiff, such as a guest of the purchaser of a defective product.

A moral obligation to act is not the same as a legal duty. For example, a person who fails to attempt to rescue a drowning child may not be liable for the child's death because he owed her no legal duty, even though he might have had a moral duty to save her.

However, a person who voluntarily undertakes a moral duty has a legal duty to exercise reasonable care in carrying it out. When one volunteers to undertake an act or to perform a service necessary to another's safety, and that person suffers harm in reasonable reliance on the volunteer's performance, the volunteer is liable. Having undertaken a task, the volunteer must act as an ordinary, reasonable person would act in performing it.

Breach of Duty

The second essential element of negligence is the defendant's breach of the duty of care owed to the plaintiff; that is, the failure to conform to the standard of care required in the situation. The courts usually apply a **reasonable person test** to determine the standard of care. The question is whether the person's conduct would be the conduct of a reasonable person under the circumstances.

Reasonable person test

A standard for the degree of care exercised in a situation that is measured by what a reasonably cautious person would or would not do under similar circumstances.

The reasonable person test is an external, objective test under which the defendant's individual or personal judgment, or that of other parties involved (subjective factors), is not considered. The test is not based on how jury members would have acted under like circumstances, but only on how the jury perceives that a reasonable person would have acted.

Circumstances further qualify the reasonable person test. For example, if applied to a person with disabilities, the general legal rule would be to

consider how a reasonable person with a disability would act under the circumstances. However, the rule varies according to mental incapacity. Courts hold people who are not sane to the same standards as reasonable, sane people and hold people who are intoxicated to the same standards as those who are sober.

The standard applied in cases of professional negligence is the skill and knowledge of reasonably competent members of that profession applied with reasonable care. Professionals are not liable for mere errors in judgment, provided that they have used reasonable care in reaching a judgment. This standard applies to practically all professions and skilled trades, such as lawyers, engineers, accountants, and airline pilots.

The legal standard applied to professionals is usually the standard of professionals in the local community. For example, a rural doctor may not be expected to know about diagnostic machines used only in metropolitan teaching hospitals. The duty is not based on the particular community in which the tort occurred, but on that general type of community in the same geographic area. Doctors coming to the aid of an injured person in a volunteer, or "Good Samaritan," situation are subjected to the standard of care for the doctors in their own community.

The standard or degree of care varies with the nature of the activity. Therefore, the care required of a reasonable person varies according to the possibility of harm involved. As the possibility of harm increases, the party must exercise greater caution, commensurate with the risk. Many courts have established different degrees of care, such as ordinary care or a high degree of care.

A high degree of care is legally necessary in two situations:

- **Common carriers**, those who operate buses, trains, and taxicabs, for example, must exercise the utmost caution characteristic of a very careful person, which is the highest possible care commensurate with the risk or nature of the undertaking.
- People who handle or store dangerous materials, such as explosives, must exercise care commensurate with the risk associated with the materials' dangerous character.

Common carriers

Airlines, railroads, or trucking companies that furnish transportation to any member of the public seeking their offered services.

Proximate Cause

The third essential element of negligence is **proximate cause**. Proof of a wrongful act and harm are not sufficient to prove negligence. The wrongful act must also have been the proximate, or direct, cause of the harm.

Proximate cause

A cause that, in a natural and continuous sequence unbroken by any new and independent cause, produces an event and without which the event would not have happened.

For example, a guest in a hotel is severely injured in a fire and sues the hotelkeeper. At the trial, the plaintiff proves that the hotel did not have legally required sprinklers. This violation of law is not enough to create liability on the hotelkeeper's part. The plaintiff also must prove that the absence of the sprinklers was the proximate cause of the injuries. To illustrate further, the

plaintiff might have been at the other end of the hotel with an easy escape route that the plaintiff failed to use.

In determining tort liability, courts have always attempted to place the burden of loss on the person responsible, at the same time recognizing that some limit of liability should exist when the act was so remote as not to be chargeable to the actor. An early case, *Scott v. Shepherd*,[1] known as the "lighted squib" case, illustrates this concept.

In the lighted squib case, the defendant, Shepherd, threw a lighted squib, a type of firecracker, into a crowd. It fell near Y, who picked it up and threw it near Z, who in turn threw it near Scott, where it exploded, injuring Scott. The issue was whether the injury was the result of Shepherd's original act of throwing the squib into the crowd or whether Y or Z, who actually threw the squib near Scott, caused the injury. The court held that Shepherd had set the cause of loss, the squib, in motion and was liable for the resulting injury.

The question in the case was whether, if the squib had been thrown successively by, say, five persons, or had landed in a powder keg rather than near a person in a crowd, Shepherd still would be liable. The controlling doctrine is that one who commits a wrongful act is responsible for the ordinary consequences that can foreseeably flow from the act. The person is not liable for results that could not have been reasonably foreseen, or if an independent intervening cause breaks the chain of causation. Some courts deem proximate cause as a substantial, direct cause, one that would have caused all or at least a substantial part of the injury on its own.

Distance between the act and the injury is not in itself sufficient to make the cause remote. Remoteness is a matter of degree, as the squib case indicates. Likewise, passage of time does not necessarily create remoteness. For example, when a fire damaged a building, and a wall of the building collapsed thirty-eight days later, the fire was still considered the proximate cause of the collapse.

In tort law, rules have evolved to determine proximate cause:

"But for" rule

A rule used to determine whether a defendant's act was the proximate cause of a plaintiff's harm based on the determination that the plaintiff's harm could not have occurred but for the defendant's act.

Substantial factor rule

A rule used to determine proximate cause of a loss by determining which of the acts are significant factors in causing the harm.

- **"But for" rule**—To illustrate the "but for" rule, if Al drove his car onto a sidewalk and injured Bob, it is readily apparent that, but for Al's action, Bob would not have been injured. The act is the proximate cause of Bob's injury.
- **Substantial factor rule**—Sometimes two parties' acts coincide to cause a loss, and the "but for" rule does not produce a satisfactory result. In these situations the substantial factor rule applies. Assume that cars driven by Al and Bob collide at an intersection, and Al's car then swerves onto a sidewalk, injuring Carol. Evidence shows that both Al and Bob are at fault in the collision. If the "but for" rule is applied, the loss would not have occurred "but for" both drivers' negligence; and neither could be held liable. To avoid this unsatisfactory result, the courts have developed the substantial factor rule.

- Proof of defendant's responsibility—An injured person cannot succeed in a lawsuit merely by proving that harm resulted from another person's act. The plaintiff still must prove by a preponderance of the evidence that the defendant caused the harm. When the evidence is clear that it is at least as probable that the act was a third person's responsibility, the plaintiff has failed to win the case.
- **Foreseeability rule**—Under the foreseeability rule, the plaintiff's harm must be the natural and probable consequence of the defendant's wrongful act and such that an ordinarily reasonable person would have foreseen it. However, the defendant need not have foreseen the particular result that followed.

Foreseeability rule

A rule used to determine proximate cause when a plaintiff's harm is the natural and probable consequence of the defendant's wrongful act and when an ordinarily reasonable person would have foreseen the harm.

The defendant is not liable if the harm is caused by an independent, intervening agency, or **intervening act**. The intervening agency, rather than the original cause, then becomes the proximate cause. The intervening agency must be independent of the original act and not readily foreseeable as one that would arise from the original act.

Intervening act

An act, independent of an original act and not readily foreseeable, that breaks the chain of causation and sets a new chain of events in motion that causes harm.

For example, a speeding motorist's negligent driving knocks down a tree on the side of the road. An enterprising motorist the next day stops to cut branches for firewood and injures himself with a hand saw. The act of the enterprising motorist is not connected with the car accident, and it is unlikely that speeding motorist who knocked down the tree could foresee that an enterprising motorist would cut up the tree for firewood. A court might find differently if the local municipal worker tasked to remove the accident's debris was injured cutting up the same tree.

Concurrent causation arises when each of two or more defendants is liable for the entire harm, even though the act of either would not have produced the harm. For example, on a cold, icy day, Jane and Martha, each driving cars at excessive speeds, slide on the ice, collide, go up on the sidewalk, and injure a pedestrian, Kelly. In this case, both Jane and Martha are liable. Their individual acts combined to produce Kelly's injury.

Concurrent causation (concurrent causation doctrine)

A legal doctrine stating that if a loss can be attributed to two or more independent concurrent causes—one or more excluded by the policy and one covered—then the policy covers the loss.

Actual Injury or Damage

The fourth essential element of negligence is actual injury or damage to the plaintiff. For a person to sue successfully for negligence, the negligent act must result in actual injury or damage, or quantifiable harm for which the plaintiff seeks damages. The harm could be bodily injury or financial loss, such as property loss.

Required Proof of Negligence

In a negligence lawsuit, the plaintiff has the burden to prove all the elements of negligence, and the defendant has the burden of proving any defense. The defendant is presumed at the outset of a lawsuit to have used due care until the plaintiff proves otherwise. In some kinds of cases, presumptions favor the

plaintiff. For example, a bailee, such as a dry cleaner, who returns the plaintiff's property in a damaged condition is presumed to be negligent and has the burden of proving otherwise.

If the facts are undisputed and point to only one presumption, the court must decide whether, as a matter of law, negligence occurred. If the facts are in dispute or uncertain, or if they are undisputed but are such that fair-minded people might reasonably reach different conclusions, then the court must make findings of fact (supported by the evidence) and may also have to make findings of law (the applicability of a rule of law to the facts of the case) to determine whether negligence occurred.

Negligence Per Se

Negligence per se

An act that is considered inherently negligent because of a violation of a law or an ordinance.

The law treats certain actions as **negligence per se**, which a court can determine without submitting the question to the jury.

Although not all statutes create standards of care for negligence suits, often failure to comply with a statutory standard is negligence *per se*, and proof that the defendant violated the statute is sufficient to establish liability. For example, a victim is killed when his vehicle collides with a disabled truck parked in the fast lane of a divided interstate highway. The truck's location violates traffic regulations requiring that disabled vehicles move immediately from the traveled portion of the highway and provide adequate warning devices to other motorists. Proof that the truck driver neither moved the truck nor provided the warning devices might be sufficient to establish negligence *per se*.

Res Ipsa Loquitur

Res ipsa loquitur

A legal doctrine that provides that, in some circumstances, negligence is inferred simply by an accident occurring.

Res ipsa loquitur, Latin for "the thing speaks for itself," permits an inference of negligence if the action or event causing injury was under the defendant's exclusive control and the accident ordinarily would not have happened if the defendant had exercised appropriate care. The doctrine is based on the conclusion that, in the absence of proof to the contrary, such an accident would likely arise from lack of due care. Although negligence is not actually presumed, the circumstances provide evidence from which a jury might presume negligence.

The *res ipsa loquitur* doctrine involves two factors:

- The probability that, under the given circumstances, the defendant was negligent
- The defendant's duty to rebut the inference of negligence as the party who had **exclusive control** and superior knowledge of the causative circumstances

Exclusive control

The control of only one person or entity; in tort law the control by the defendant alone of an instrument that caused harm.

The exclusive control concept is a flexible one that the courts have adapted to modern manufacturing, packing, shipping, and marketing practices. For example, a plaintiff injured by an exploding carbonated beverage bottle can use the doctrine of *res ipsa loquitur* against the bottler even though the bottle

was not in the bottler's physical possession. The bottler could challenge application of the doctrine with evidence that either the plaintiff had mishandled the bottle or that other parties did so after the bottle left the bottler's control. *Res ipsa loquitur* also can apply to airplane crashes because the airlines have control over the equipment and airplane operation.

Courts frequently apply *res ipsa loquitur* in lawsuits by passengers against common carriers. The doctrine also can apply in instances such as bricks that have fallen off buildings, poisonous drugs sold as harmless medicine, and sponges or surgical instruments left inside patients during surgery.

An unexplained injury alone does not mean that *res ipsa loquitur* can be applied. For example, the discovery of a dead person near railroad tracks does not imply in and of itself that the railroad was involved. Several explanations are conceivable other than the railroad's failure to act with due care. See the exhibit "Practice Exercise: Elements of Negligence."

Practice Exercise: Elements of Negligence

Coal Company conducts mountaintop mining operations in the mountains on both sides of a creek. Joseph's house is in the creek valley. Studies have shown that this kind of mountaintop mining can cause flooding in creek valleys if appropriate precautions are not taken, although this valley had a history of flooding caused by spring rains before Coal Company's operations began. In the spring, the valley flooded after unusually heavy rains, destroying Joseph's home in the valley. Joseph sues Coal Company, claiming that its negligence caused the destruction of his home. Describe how the elements of negligence might apply to Joseph's case.

Answer

Joseph must establish that Coal Company owed a legal duty of care to him, and its coal operation in that area probably involves a legal duty to all valley landowners to conduct mining operations so as not to damage their property. Joseph also must establish that Coal Company breached its duty of care by not taking appropriate precautions, and he would need to introduce evidence proving that element. Joseph should have no problem proving that he suffered damage because his home was destroyed. However, proximate cause might be the most difficult negligence element for Joseph to prove if the spring rains would have flooded the valley even without Coal Company's mountaintop mining.

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DEFENSES AGAINST NEGLIGENCE CLAIMS

A defendant has several available defenses against a negligence action. Some defenses can prevent recovery of damages, or reduce the amount, even when the defendant is found negligent.

The burden is on a defendant to prove any of these available defenses against a plaintiff's negligence action:

- Comparative negligence
- Releases and exculpatory clauses
- Immunity
- Statutes of limitations and repose
- Tortfeasor's capacity

Comparative Negligence

Contributory negligence

A common-law principle that prevents a person who has been harmed from recovering damages if that person's own negligence contributed in any way to the harm.

Comparative negligence

A common-law principle that requires both parties to a loss to share the financial burden of the bodily injury or property damage according to their respective degrees of fault.

Last clear chance doctrine

A defense to negligence that holds the party who has the last clear chance to avoid harm and fails to do so solely responsible for the harm.

Assumption-of-risk defense

A defense to negligence that bars a plaintiff's recovery for harm caused by the defendant's negligence if the plaintiff voluntarily incurred the risk of harm.

Pure comparative negligence rule

A comparative negligence rule that permits a plaintiff to recover damages discounted by his or her own percentage of negligence, as long as the plaintiff is not 100 percent at fault.

Comparative negligence evolved from the common-law principle of **contributory negligence**, which completely prevented a plaintiff who was also at fault in a situation from recovering damages even though the defendant's negligence caused the plaintiff's injury. The contributory negligence defense often caused extremely harsh results for plaintiffs, and today almost all jurisdictions have abandoned contributory negligence in favor of a comparative negligence approach.

The concept of **last clear chance** was an attempt by courts to alleviate the harsh results of contributory negligence on plaintiffs by placing responsibility for harm on the party who had the "last clear chance" to avoid harm but failed to do so. Similarly, the **assumption-of-risk defense** meant that a plaintiff could not recover for harm caused by the defendant's negligence if the plaintiff voluntarily assumed the risk of harm even though the defendant was negligent. The assumption-of-risk defense is generally used for hazardous activities. For example, a spectator at a hockey game assumes the risk of being hit by a puck. Use of these two concepts is jurisdiction-specific, so checking statutes is essential to determining the use and applicability of both the last-clear-chance and assumption-of-risk defenses.

The specific rules for the application of comparative negligence vary by jurisdiction but have four variations:

- The pure comparative negligence rule
- The 50 percent rule
- The 49 percent rule
- The slight versus gross rule

The **pure comparative negligence rule** is the maximum departure from the contributory negligence rule. Under this rule, a plaintiff who is 99 percent at fault can still recover 1 percent of the claimed damages.

A principal objection to the pure rule is that it does not base recovery on apportionment of fault, but on the relative amount of loss. It allows a party whose negligence was a major factor in the incident to recover damages from a party who was less at fault. No matter how great the degree of the claimant's own negligence, as long as it is not 100 percent, a claimant may still recover

for an amount discounted by his or her own negligence. Under pure comparative negligence, a claimant who is 90 percent at fault for an accident still collects 10 percent of his or her damages from the defendant.

The **50 percent comparative negligence rule** permits a plaintiff to recover reduced damages up to and including the point at which the plaintiff's negligence constitutes not more than 50 percent of the total in a case involving two parties.

50 percent comparative negligence rule

A comparative negligence rule that permits a plaintiff to recover reduced damages so long as the plaintiff's negligence is not greater than 50 percent of the total negligence leading to harm.

A plaintiff whose negligence is 51 percent or more than the other party's negligence can recover no damages. Accordingly, if the plaintiff is 30 percent at fault and the damages are $100,000, a court would reduce damages to $70,000. If the plaintiff is 49 percent at fault, a court would reduce the damages in the example to $51,000. If the plaintiff is 50 percent at fault, a court would reduce the damages to $50,000. A plaintiff 51 percent at fault could not recover.

The **49 percent comparative negligence rule** is a slight variation of the 50 percent rule, but the proportion of the total negligence at which the plaintiff can collect no damages is one percentage point lower, 50 percent rather than 51 percent. See the exhibit "Example: Multiple-Parties' Degrees of Fault."

49 percent comparative negligence rule

A comparative negligence rule that permits a plaintiff to recover reduced damages so long as the plaintiff's negligence is less than the other party's negligence.

Example: Multiple-Parties' Degrees of Fault

Al, Barry, and Connie were all negligent in causing an accident, but not equally so. They contributed to the accident in the following degrees:

Party	Degree of Fault
Al (plaintiff)	30 percent
Barry	30 percent
Connie	40 percent

If Al is the plaintiff, and if the court follows the 50 percent rule, Al would recover against both Barry and Connie because his negligence is not greater than that of either Barry or Connie. Under the 49 percent rule, Al would not recover against Barry because his negligence is not less than Barry's. However, he could recover against Connie, who would have to pay 70 percent of the total.

Party	Degree of Fault
Al	30 percent
Barry	30 percent
Connie (plaintiff)	40 percent

Assume that Connie is the plaintiff in this case. Under the straight application of either modified rule, Connie could recover nothing, although her negligence is less than half the total. To deal with this situation, many states have modified the rule to provide that the comparison of negligence must be against the combined fault of those against whom recovery is sought.

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Slight versus gross rule

A rule of comparative negligence that permits the plaintiff to recover only when the plaintiff's negligence is slight in comparison with the gross negligence of the other party.

Under the **slight versus gross rule** of negligence, a court reduces the plaintiff's damages by an amount proportional to his or her contribution. Unlike the percentage rules, which provide strict guidelines, the slight versus gross rule leaves the decision on assigning proportional damage with the court.

Releases and Exculpatory Clauses

Release

A legally binding contract between the parties to a dispute that embodies their agreement, obligates each to fulfill the agreement, and releases both parties from further obligation to one another that relates to the dispute.

A written general **release** of liability, agreed to by both parties, can be a defense to a tort lawsuit if a court recognizes the release as a valid release in settlement of a claim.

Releases can be voided by mutual mistake, a misunderstanding shared by all parties to the release. To void a release, the mutual mistake must relate to a past or present fact and not to an opinion about a future condition based on a present fact. A misconception of the extent of the injuries the plaintiff suffered is not a mutual mistake that voids a release.

Parties to contracts also frequently use exculpatory clauses, or exculpatory agreements, in their contracts to avoid liability for negligence. For example, under an exculpatory clause, Lyle agrees not to sue Tim for any injuries that Lyle might sustain as a result of Tim's negligence.

Courts tend to view exculpatory agreements unfavorably. To make such agreements more legally acceptable, parties sometimes set them up as liquidated damages provisions. If liquidated damages in a contract are so low as to be considered nominal, a court will probably find that the liquidated damages clause is actually an exculpatory clause. However, a court will uphold an exculpatory clause under certain circumstances:

- If the exculpatory clause is not adverse to a public interest and is not against public policy
- If the party excused from liability is not under a duty to perform, as is a public utility or common carrier, for example
- If the contract does not arise from the parties' unequal bargaining power or is not otherwise unconscionable

Gross negligence

An act or omission that completely disregards the safety or rights of others and is exaggerated or aggravated in nature.

Exculpatory agreements can excuse or limit liability expressly for negligent contract performance, including **gross negligence**, but they are void if they exclude willful or wanton misconduct. Some jurisdictions have enacted laws that limit or prohibit the use of exculpatory clauses in a variety of situations.

Immunity

Immunity

A defense that, in certain instances, shields organizations or persons from liability.

Primarily for reasons of public policy, the common law granted **immunity** from liability for torts to certain classes of people under certain conditions. Court decisions and legislatures have followed a steady trend towards restricting or eliminating these immunities. The trend varies by jurisdiction and also by the type of immunity involved.

Four possible major classes of immunities may be available as defenses:

- Sovereign, or governmental, immunity
- Public official immunity
- Charitable immunity
- Intrafamilial immunity

Sovereign, or Governmental, Immunity

The doctrine of **sovereign immunity (governmental immunity)** derived its name from the English system in which the sovereign rulers exercised all powers of government and theoretically could do no wrong.

Sovereign immunity (governmental immunity)

A defense to negligence that protects the government against lawsuits for tort without its consent.

Courts created the doctrine of governmental immunity, and some jurisdictions have held that they have the power to change or eliminate it. Several courts, in fact, have eliminated state governments' immunity from tort liability. Other courts have held that the immunity is so firmly embedded in the law that only legislation can change it. In fact, some jurisdictions virtually remove tort immunity, and others impose liability on cities for governmental functions such as controlling riots or other violence, street and sidewalk repair, and removal of ice and snow.

The Federal Tort Claims Act (FTCA) of 1946[2] provides a limited waiver of governmental immunity for claims against the federal government. This law provides the only means for suing for damages and collecting them from the United States government in any cause in which the government, if it were a private person, would be liable. Many local jurisdictions have enacted similar tort claim acts.

Municipal corporations have an unusual status with regard to governmental immunity. As political subdivisions they should have the same immunity as the state. Conversely, they perform many functions performed by private enterprise. From this situation came the common-law application of governmental immunity to municipal bodies only when functioning in a governmental capacity—that is, performing a function that only government can perform.

Today, governments frequently engage in ordinary business pursuits that any private enterprise could perform. A city might supply gas or electricity or maintain a swimming pool or a theater. These functions, when performed by a local government, are termed **proprietary functions**, in contrast with **governmental functions**. A political body performing proprietary functions is subject to suit just as any private entity is. The legislature, however, can by statute confer immunity on certain of these proprietary activities, such as those performed by a municipal transit authority.

Proprietary function

A local government's act that is not considered part of the business of government and that could be performed by a private enterprise.

Governmental function

An act that can be performed only by government.

Public Official Immunity

Public official immunity also extends to local governmental officials. Judges and legislators have absolute immunity for acts performed in their official capacity. Other officials have only a qualified immunity in limited situations, such as civil rights cases.

Administrative act (discretionary act)

An act, a decision, a recommendation, or an omission made by a government official or agency within the authority of that office or agency.

Ministerial act

An act that is directed by law or other authority and that requires no individual judgment or discretion about whether or how to perform it.

The extent of the immunity depends on whether the acts are **administrative, or discretionary, acts** or **ministerial acts**. For example, a district attorney has discretion to decide whether to prosecute an alleged criminal. Public officials generally have full immunity in carrying out discretionary acts, as long as those acts are within the scope of their authority and performed with no malice or bad faith.

An official is liable for damages for ministerial acts performed improperly, even if performed in good faith and without malice. Most tort claim acts grant immunity to public officials while they are acting within the scope of their duties, to the same extent as they would grant immunity to a governmental body. However, these laws frequently do not grant immunity for certain acts, such as operation of cars, assault and battery, and malicious or fraudulent acts.

Charitable Immunity

Charitable immunity

A defense that shields charitable organizations from liability.

Under common law, all charitable organizations enjoyed immunity from suit in tort. A majority of states have rejected the doctrine of **charitable immunity**, particularly as applied to hospitals, and treat such cases under the general rules of negligence, specifically vicarious liability.

Intrafamilial Immunity

Under common law, one family member cannot sue another in tort. The reasons for intrafamilial immunity vary, including the belief that such suits would disrupt family peace and harmony, deplete family financial resources, and lead to collusion and fraud, particularly when insurance is involved. These immunities can be divided into two principal categories:

- Interspousal immunity
- Other family relationship immunities

Interspousal immunity

A defense to negligence that grants immunity to one spouse from the other spouse's lawsuit for torts committed before, during, and after the marriage.

Parent-child immunity

A defense to negligence that grants immunity to parents from their children's lawsuits for torts.

All jurisdictions have abolished, in whole or in part, **interspousal immunity**. Although most jurisdictions have also abolished **parent-child immunity** wholly or in part, those that still recognize it in some form do not apply the immunity if a child has been released from parental control (emancipated), or if a child is injured in a parent's business activity. The parent-child immunity rule has never extended to other family relationships. For example, siblings cannot claim immunity against each other.

Where parent-child immunity has been abolished, many insurers now insert an intrafamilial exclusion in liability policies. Courts vary as to whether such an exclusion is void because it violates public policy.

Statutes of Limitations and Repose

Statutes of limitations and **statutes of repose** both limit the time periods within which plaintiffs can file suits.A statute of repose is designed to bar action after a specific period of time has run from an event, such as the sale of a product. Thus, the time limit of a statute of repose may expire before a cause of action such as an accident with injuries has even accrued.

Statute of limitations

A statute that requires a plaintiff to file a lawsuit within a specific time period after the cause of action has accrued, which is often when the injury occurred or was discovered.

Statute of repose

A statute that requires a plaintiff to file a lawsuit within a specific time period after a wrongful act by a defendant, such as improper construction of a building, regardless of when the injury occurred or was discovered.

For example, a jurisdiction has a two-year statute of limitations that begins to run when the cause of action accrues. The jurisdiction also has a six-year statute of repose that begins to run when a merchant first sells a product.Carla purchases a product seven years after the initial sale to the original owner and sustains an injury from using the product six months after purchase. The statute of limitations has not run because the cause of action accrued within two years (six months after purchase), but the statute of repose has expired and bars her from suing because she was injured seven and a half years after the original sale—a year and a half beyond the statute of repose period.

Today, courts are more liberal so as not to deny plaintiffs their day in court. Statutory time periods vary by jurisdiction and also within the same jurisdiction for different torts. In most jurisdictions, the statute begins to run from the time the cause of action accrues. A major problem is establishing when all elements of the cause of action exist, or when material facts have been discovered, in order to determine when the statutory period begins.

In many cases, such as in an automobile accident, fixing the time of the accident and the time the cause of action accrued is simple. In some torts, the right to sue is complete upon the commission of the wrongful act, regardless of consequences, such as injury or damage. For example, the right to sue for trespass begins when the trespass occurs; damages are implied, and a plaintiff need not prove them. In such a case, the cause of action accrues and the statute begins to run when the wrongful act is committed.

In other torts, the right to sue is not complete unless harm results. In these cases, the cause of action accrues and the statute begins to run from the date the plaintiff sustains injury or damage. For example, the defendant negligently installs lightning rods on the plaintiff's house. Six years later, lightning strikes the house and destroys it. Did the cause of action accrue when the defendant negligently installed the lightning rods or when the house burned? Some courts would say it accrued at the time of installation, but others at the time the house burned.

Statutes of limitations for torts, unless otherwise indicated, also apply to products liability and medical malpractice suits. Because of the unique problems these suits present, most jurisdictions have enacted special statutes of limitations for medical malpractice, usually ranging from one to three years. Many jurisdictions also have a statute of repose for medical malpractice, usually ranging from three to ten years.

The statutes of limitations for damage to real or personal property are usually longer and can run up to ten years. Suits for breach of warranty usually fall under the state statute applying to contracts, and the applicable statutes of limitations can range from four to six years. For example, an injured party could lose the right to file a suit in tort by the running of the statute and still be able to recover under a breach of warranty suit (although the types of damages recoverable may differ according to whether suit is filed in contract or in tort). Many states have statutes of repose for architects and builders, limiting suits to four to fifteen years after a building's completion, with the average length of time being about eight years.

The law does not penalize a minor or an incompetent for failing to file suit. For example, a child injured as a result of a tort should not suffer from the parents' failure to file suit within the statute of limitations period.For minors and incompetents, the time period of the statute of limitations begins to run from the date they come of age or the date the incompetence is removed (such as by court order). This rule applies only if the incompetence existed before the statute began to run. Once the statutory period begins to run, it is not tolled (stopped) by the occurrence of a subsequent disability or another event.

When a plaintiff dies before the expiration of the time within which a suit must be filed, the plaintiff's personal representative usually has one year after the plaintiff's death within which to sue.

If a defendant is not in the jurisdiction and a plaintiff cannot, therefore, serve a complaint on the defendant, the running of the statute is tolled until service of the complaint is possible.

Tortfeasor's Capacity

All people are liable for their tortious acts regardless of mental capacity. This rule applies to acts of minors and of insane or intoxicated persons. However, if the tort requires intent, the defendant can establish lack of capacity to form intent as a defense. Under common law, minors were generally liable for torts if they were over the age of seven. See the exhibit "Practice Exercise: Defenses Against Negligence Claims."

Practice Exercise: Defenses Against Negligence Claims

Ashley was talking on her cell phone after stopping at a four-way stop sign and failed to see Kelsey, who was driving over the speed limit and who had failed to stop at one of the other stop signs. Because Ashley was distracted, her car drifted toward the middle of the road and hit Kelsey's car. Kelsey was injured and sued Ashley for $10,000 in damages for negligence. Ashley suffered no injury, and her very old car was only minimally damaged. How might a court decide this case with regard to Kelsey's recovery under comparative negligence principles?

Answer

If the court finds Ashley 60 percent at fault for being distracted and failing to see Kelsey and finds Kelsey 40 percent at fault because she was speeding and disregarded the stop sign, under comparative negligence principles, Kelsey would receive $6,000. The amount of her damages is reduced according to her degree of fault (40 percent).

If Kelsey were found to be 50 percent at fault, and Ashley also 50 percent at fault, some comparative negligence states would still allow Kelsey to recover $5,000 (50 percent rule), while other states would not allow her any recovery because she and Ashley would be equally at fault (49 percent rule).

[DA06000]

LIABILITY OF LANDOWNERS OR OCCUPIERS OF LAND

A landowner or occupier of land owes certain duties to the public and to adjoining landowners. A breach of these duties can result in a tort lawsuit for damages.

In a lawsuit for damages involving injury suffered on land, a plaintiff usually sues the party in possession of the land. However, sometimes ownership, rather than possession, determines liability; therefore, the owner of land that has tenants can be the defendant in a lawsuit.

A plaintiff can sue for harm caused by either natural or artificial conditions on the land. The nature of a landowner's or occupier's duty can vary, depending on the injured party's status. For example, the plaintiff may be a trespasser or may have an express or implied license to be on the land as either a public or business invitee.

Natural Conditions

In general, a landowner is not liable for natural conditions on the land that cause injury either on or off the land. For example, if a rock falls down a hillside and injures someone on a highway below, the landowner of the hillside is not liable. However, some courts have rejected the traditional rule and have adopted a reasonableness standard. For example, if a defendant's sloping

land is known to have frequent landslides, and a landslide pushes debris onto neighboring property, the landowner can be liable for negligent failure to correct or control the landslide condition.

Trespasser

A person who intentionally enters onto the property of another without permission or any legal right to do so.

The possessor of land is under no duty to correct natural conditions on the land even though they can create a danger to a **trespasser**. For example, if a trespasser sleds on a hillside, the owner of the hillside has no duty to warn the trespasser of dangerous rocks on the hillside hidden by the snow.

The natural conditions rule is modified for trees. When a tree falls and causes damage on an adjacent premises or a highway, the landowner might be liable for negligence if he or she knew that the tree might fall and failed to take reasonable steps to remove it. In rural areas, the rule usually is that the landowner or occupier has no affirmative duty to inspect trees to discover whether they are prone to collapse or dropping branches. However, the owner or occupier of land with trees in urban areas has a duty to use reasonable care to inspect the trees.

Artificial Conditions

Nuisance

Anything interfering with another person's use or enjoyment of property.

An owner who alters land in any manner can be liable either for negligence or for creating a **nuisance** because of those alterations. Examples of such alterations include these:

- Concentrating the flow of water discharges on adjoining land
- Permitting artificial devices, such as downspouts, to discharge over public ways
- Creating any other artificial condition that discharges water or snow on adjoining premises or roads

A landowner who creates an artificial condition on land that could cause severe injury or death has a duty to warn of the hazard if a trespasser probably would not discover it without warning. Posting signs, for instance, could constitute adequate warning. Therefore, an owner who had strung a potentially dangerous wire one or two feet off the ground across a hill where sledding occurred would have a duty to warn others.

Attractive nuisance doctrine

A doctrine treating a child as a licensee, or guest, rather than a trespasser on land containing an artificial and harmful condition that is certain to attract children.

While in general the same rules apply to children as to adults, an exception is the **attractive nuisance doctrine**, which states that when an implied invitation exists for a child to enter on land, the possessor must keep the premises in a suitable and safe condition and use ordinary care to protect trespassing children from harm.

An occupier of land abutting a sidewalk or street has a duty to avoid placing an unguarded excavation or ditch on the land that might endanger a traveler using the premises. The distance from the sidewalk or street to the excavation is not crucial, but is relevant to whether the owner could foresee that a traveler might be injured. This duty extends only to travelers and is not applicable to trespassers.

In most jurisdictions, landowners are not liable for defects in adjoining sidewalks or streets. However, some jurisdictions impose a duty on landlords and tenants of commercial properties to keep adjoining sidewalks and streets in repair because they benefit from these thoroughfares.

Duties to Those Who Enter the Land or Premises

The permission to use or enter another's land is called a license. The party who receives the permission is either a licensee or an invitee. The owner or occupier owes different duties to **licensees** than to **invitees.** In contrast, a landowner or occupier owes trespassers a very minimal duty of care not to cause intentional harm to the trespasser.

Invitee

Person who enters a premises for the financial benefit of the owner or occupant.

Licensee

A person who has permission to enter onto another's property for his or her own purposes.

A license to use or enter another's land may be either an **express license** or an **implied license**. The person granted a license must conform to the conditions on which it was granted or risk becoming a trespasser. For example, entering a store and then going into a stockroom not open to the public without permission is a trespass.

Express license

The oral or written permission to enter onto another's land to do a certain act, but not the granting of any interest in the land itself.

An express or implied license is revocable at any time, even if the licensee has paid for it. For example, a person who causes a disturbance in a theater can be ejected even though he paid for his admission ticket (license). An act of the landowner showing an intention to revoke the license may terminate it.

Implied license

The permission to enter onto another's land arising out of a relationship between the party who enters the land and the owner.

Licensees

The person granted a license is generally a licensee. A social guest, even though on the premises at the landowner's express invitation, is usually considered a licensee. A volunteer helper is also a licensee, as is a lodge member visiting another's house on lodge business. Firefighters and police officers are licensees when they enter property to perform their duties.

A licensee takes the property in the condition in which it exists. A landowner owes an affirmative duty to a licensee to refrain from willfully or wantonly injuring the person or acting in a way that would increase that person's peril. The landowner has a duty to warn of hidden defects. Usually, the occupier is not liable for the acts of third persons on the premises.

Invitees

An invitee is a special type of licensee. An invitee may be either a **public invitee** or a **business invitee**. Attendees at public meetings, visitors to national parks, and people entering amusement parks on free passes are all public invitees. A business benefit necessary to convert a licensee to a business invitee is ordinarily economic. A shopper, a restaurant guest, and a theater patron are examples of business invitees.

Public invitee

A person invited to enter onto premises as a member of the general public for a purpose for which the land is open to the public.

Business invitee

An individual who has express or implied permission to be on the premises of another for the purpose of doing business.

For invitees, the land occupier owes a duty to exercise reasonable care to keep the premises reasonably safe and to warn of concealed dangerous conditions. The occupier need not warn of dangers of which the invitee is aware.

Trespassers

A landowner or occupier owes a trespasser a very minimal duty of care not to cause intentional harm to the trespasser. For example, a landowner who sets a trap for animals that injures a trespasser would not be liable for that harm. However, a landowner or occupier could not escape liability for intentional harm to a trespasser, except in situations where appropriate force might be necessary to remove a trespasser. For example, rigging a shotgun to go off when the door is opened by a trespasser would probably be considered excessive force.

Hotel Guests and Tenants

Under common law, a landlord or hotel operator was under no duty to protect tenants from intruders. However, this area of the law is changing. Many courts now impose a duty on landlords, hotel operators, and public entities to take reasonable precautions to secure their premises against foreseeable risks of harm by intruders. Failure to do so can result in liability.

What is reasonable involves an analysis of several factors, including prevailing practices in the type of occupancy, such as motels, the extent of crime in the area, and the kinds of security that are reasonable to provide under the circumstances. For example, a hotel that fails to provide proper security measures can be liable to a guest who is a victim of an intruder's actions. Likewise, a landlord can be liable to a tenant for injuries received during an attack in an unlighted parking lot. This concept also applies to public parking garages, college campuses, condominium common areas, and automated teller machine (ATM) premises.

Under common law, hotel operators or innkeepers had to furnish lodgings to anyone who could pay for them, provided prospective guests were not objectionable for a valid reason, such as intoxication. If the innkeeper improperly refused lodgings, the person could sue the innkeeper. This common-law rule did not apply to those furnishing services at other public places, such as restaurants and theaters, although later anti-discrimination laws developed that applied similar statutory rules.

A property owner who leased the property to another was not liable under common law for injuries resulting from the disrepair of the property or from other dangerous conditions, whether the condition resulted in injury to the tenant or to a third person. Today an owner or landlord is liable when injury results from negligently made repairs or from a concealed danger on the premises that the owner knows about but that the tenant cannot know or easily discover by the use of ordinary care. See the exhibit "Practice Exercise: Liability of Landowners or Land Occupiers."

Practice Exercise: Liability of Landowners or Land Occupiers

James owns a small, two-acre orchard that is situated about 300 yards behind his house. He operates a produce stand by the road in front of his house to sell the fruit his orchard produces. The orchard is fenced off from the public, except for an opening in the fence that he and his family use to access the orchard. Donna and her six-year-old daughter, Wendy, stop at James's stand to buy some peaches. While Donna is talking with James, Wendy runs behind James's house, then through the opening in the fence into the orchard, where James has hung a swing for his own children from one of the trees. The public cannot see the swing from either the road or the produce stand. Wendy subsequently falls out of the swing and breaks her arm. Is James responsible for Wendy's injury?

Answer

Donna and Wendy are business invitees at James's produce stand. James has not invited them into the orchard and actually has a fence to dissuade anyone but his family from entering the orchard. Because the swing is not visible to the public, and because James has the orchard fenced off, the swing probably would not be considered an attractive nuisance for children. James is probably not responsible for Wendy's injury.

[DA06002]

INTENTIONAL TORTS: PART 1 OF 2

Torts are civil (or private) wrongs, as distinguished from crimes, which are either unintentional or intentional public wrongs. Negligence is the term used for unintentional torts, and all other torts are intentional.

An **intentional tort** requires the tortfeasor's intent to harm or to act to cause harm, and intent differs from motive. For example, one person could shoot at another with the intent to kill but with the motive of self-defense, jealousy, or rage. Generally, intent and motive have no relationship, but motive can influence damages. An act done in self-defense might justify lower damages than an act done in rage, while tortfeasor's malice might warrant higher damages.

Intentional tort

A tort committed by a person who foresees (or should be able to foresee) that his or her act will harm another person.

These torts are among the most common types of intentional torts:

- Battery
- Assault
- False imprisonment and false arrest
- Intentional infliction of emotional distress
- Defamation (libel and slander)
- Invasion of the right of privacy

Intentional torts, as distinguished from unintentional torts (collectively termed negligence) include a variety of civil wrongs.

Battery

Battery

Intentional harmful or offensive physical contact with another person without legal justification.

Battery involves bodily contact, no matter how slight. Throwing a stone that hits another person, snatching a paper from another person's hand, or brushing against another person's clothing, for example, may all constitute battery. For such an act to constitute battery, the person need not be in fear of bodily harm or even be aware of the contact. For example, a doctor can commit a battery on a patient who is under anesthesia by performing an act the patient has not consented to beforehand.

A battery can be a crime as well as a tort.

To be classified as a tort, an act must be intentional and hostile or offensive. Merely blocking passage by standing in front of a person or lightly touching a person to gain attention is not battery. Similarly, the naturally occurring and inevitable touching of people in a crowd is not battery.

A person sued for battery may have one of several defenses:

- The plaintiff consented to the act—To consent to an act is to permit it. Consent can be actual or implied. For example, participation in a contact sport, such as football, can constitute implied consent to be touched.
- The act was in self-defense or defense of others—One can use reasonable force to repel an attack on one's own self or on another person. What constitutes reasonable force depends on the circumstances.
- The act was one of physical discipline—Physical discipline as a defense involves the parent-child relationship or contact with persons who have the legal authority to discipline others. The defense is successful only if the force used is reasonable, and the use of force must be in good faith.

Assault

Assault

The threat of force against another person that creates a well-founded fear of imminent harmful or offensive contact.

In contrast to battery, **assault** does not involve physical contact, but the other person must anticipate, or expect, contact and fear harm. Pointing a knife at another or swinging a fist close to another person's face are examples of assault.

False Imprisonment and False Arrest

False imprisonment

The restraint or confinement of a person without consent or legal authority.

False arrest

The seizure or forcible restraint of a person without legal authority.

False imprisonment and **false arrest** are similar torts. False imprisonment entails unlawful nonphysical restraint, such as blocking a door out of a room. False arrest involves unlawful physical restraint or threats of physical restraint.

Defenses to false imprisonment and false arrest relate to whether the acts occurred in connection with a crime, the nature of the crime, and the capacity of the individual involved. For situations involving felonies (serious crimes), a police officer has almost complete immunity from charges of false imprisonment or false arrest when making an arrest under a warrant issued by a competent judicial authority. Police officers can make arrests without

warrants for felonies committed in their presence and for felonies committed outside their presence if they have reasonable grounds to believe that those arrested have committed felonies. Under these conditions, police officers are not liable even if no felonies were committed and even if those arrested did not commit them.

Citizens who make arrests without warrants to prevent commission of felonies in their presence usually can defend successfully against charges of false imprisonment or false arrest. Like police officers, citizens can make arrests for felonies committed out of their presence, provided they have reasonable grounds to believe that those arrested did commit felonies. However, private citizens can be liable if the particular felonies were not, in fact, committed, or if they had no reasonable grounds to believe that those arrested committed the felonies.

When false imprisonment or false arrests are made in connection with a misdemeanor (minor crime), different rules apply. A police officer can make an arrest for a misdemeanor under a valid warrant and can make an arrest without a warrant for such misdemeanors as forcible breaches of the peace, like riots or civil commotions, and also for peace-disturbing activities such as vagrancy and public drunkenness. However, mere impudence or argument does not constitute a breach of the peace that would justify arrest.

Warrantless arrest is justifiable only when the misdemeanor is committed in the presence of the officer who makes the arrest. An officer cannot arrest a person for a misdemeanor committed elsewhere, or for a past misdemeanor, without a warrant. As a general rule, private citizens cannot make arrests for misdemeanors except when they constitute breaches of the peace.

People detained by store personnel on suspicion of shoplifting have sued for false imprisonment. Many state laws now permit detention for a reasonable time so that stores can investigate suspected shoplifting without facing unreasonable litigation. A reasonable time usually is relatively short, such as an hour or less.

Intentional Infliction of Emotional Distress

An essential element of the tort of **intentional infliction of emotional distress** (or, in Canada, the intentional infliction of mental suffering) is its effect on the plaintiff—mental distress that may result in physical symptoms. An example would be an intentionally false report that a person's spouse is having an affair, resulting in that person's feelings of distress and a physical reaction, such as vomiting. A defense for intentional infliction of emotional distress is that the act was not intentional.

Intentional infliction of emotional distress

An intentional act causing mental anguish that results in physical injury.

Plaintiffs can also allege **negligent infliction of emotional distress**, a similar, but unintentional, tort. The defense for negligent infliction of emotional distress is that the act was not negligent.

Negligent infliction of emotional distress

An unintentional act causing mental anguish that results in physical injury.

Common law required proof of physical injury resulting from emotional distress. A plaintiff could not recover for emotional distress alone, such as fear, anxiety, or sorrow. For example, a mother who witnessed a car hit her child and who suffered only emotional distress had no right to sue the driver for infliction of emotional distress unless she also suffered physical injury or harm. This rule is no longer prevalent.

Some courts now interpret the term "physical injury" (also called "physical manifestation") to mean any condition or illness capable of objective determination. A few courts have eliminated the physical injury requirement and permit a suit for pure emotional injury on the grounds that emotional injury alone can be as severe as physical harm.

A defense for intentional infliction of emotional distress is that no intent was involved. For negligent infliction of emotional distress, the defense would be that negligence was lacking. Additionally, a defendant might defend on the basis that no actual physical injury or manifestation occurred, except in states where pure emotional injury is sufficient ground for a plaintiff's recovery.

Defamation (Slander and Libel)

Libel
A defamatory statement expressed in a writing.

Slander
A defamatory statement expressed by speech.

Defamation
A false written or oral statement that harms another's reputation.

Defamation includes **slander** and **libel.** The law recognizes a difference between written and spoken defamatory words and treats them differently. Spoken defamatory words are slander, and written defamatory words are libel. Courts differ as to whether defamation occurring through broadcast media or on the Internet constitutes slander or liable.

To be defamatory, a statement must concern the complaining party personally. For example, Joe publicly calls Fred a liar or a tax cheat in a town meeting hall filled to capacity.

Slander

Because defamatory statements constituting slander are oral, they usually are heard only once. Unless spoken statements are repeated, the chance that a large audience will hear them is remote. Therefore, the law requires substantial proof of injury to a plaintiff's reputation.

Publication
In tort law, the communication of a defamatory statement to another person.

For a statement to be slanderous, a **publication** to a third person other than the party slandered must occur. Publication, for slander, is only oral—neither written nor recorded in any other way. For example, If Al accuses Sarah of committing murder when the two are alone, no publication and no harm to Sarah's reputation have occurred. However, if Al tells Carol that Sarah committed murder, Al's communication to Carol constitutes publication.

Libel

Because libel is written or printed, it has wider circulation and is more permanent than slander; therefore the potential for damage to a person's reputation by libel is much greater than that associated with slander.

As with slander, publication of the libelous statement to a third person or persons is necessary for a successful lawsuit. If a person receives a letter containing false statements about him or her and destroys it, the letter is not libelous.

News media have a special status in defamation law. Until 1964, the same common-law principles that apply to all other persons applied to the media. However, in the landmark case *Sullivan v. New York Times*,[3] the United States Supreme Court held that public officials suing news media for libel must prove that the statement was false and, further, that the defendant made it with knowledge of its falsity or with reckless disregard for its truth or falsity.

Reckless disregard means a high degree of certainty of a statement's probable falsity, approaching the level of a knowing, calculated falsehood. The *Sullivan* decision balanced the importance of public, open debate, as embodied in the First Amendment, against the individual's right of privacy. Later, the rule expanded to include statements made about public figures, that is, people who have voluntarily assumed positions that place them in the public eye, such as politicians, entertainers, and sports figures.

Many articles about public figures, if written about ordinary people, would be libelous. However, the law holds that accepting this form of communication is part of the price public figures pay for being famous. Therefore, a public figure must prove actual malice to recover damages in a libel suit, and malice can be very difficult to prove.

The defenses for slander and libel are essentially the same:

- The statement was the truth.
- The defendant made or printed a retraction—not a complete defense, but it can reduce damages.
- The statement had absolute privilege—applies to statements made in judicial and legislative proceedings, executive officers' communications, and spousal communications, and when consent was given by the injured party.
- The statement had conditional or qualified privilege—applies to statements made without malice as a matter of public interest, in petitions concerning appointments, in common interest communications, as fair comment on matters of public concern, and by credit reporting agencies.

Commercial Speech

Commercial speech, which can involve libel, has much less protection than speech concerning public issues. Commercial speech is solely in the speaker's

individual interest and concerns the speaker's specific business activity. These statements have much less constitutional protection than speech concerning public issues. Such speech might involve injurious falsehoods that are not personally defamatory. The major types of commercial speech that might be defamatory are comparative advertising and product disparagement.

Comparative advertising is advertising in which a party marketing Product A makes a direct comparison with Product B by name. Advertisers used to avoid direct comparison, but they now use it frequently. If the comparison is truthful and fair, advertisers are not liable for defamation.

Generally, the usual defamation rules apply to comparative advertising. To be grounds for a lawsuit, the claims of Product A's superiority over Product B must be specific and not just general "puffing" that the product is better or superior. The defendant must have made specific claims about product performance or must have described objective tests. Comparisons that are false, misleading, or incomplete can be libelous.

Product disparagement, or trade libel

An intentional false and misleading statement about a characteristic of a plaintiff's product, resulting in financial damage to the plaintiff.

Product disparagement, or trade libel, involves intentionally false or misleading statements about the quality of the plaintiff's product, resulting in financial damage to the plaintiff. Examples are false statements denying the plaintiff's title to property and false statements regarding the quality of the plaintiff's property or the plaintiff's conduct of business.

The plaintiff must prove that the publication played a material part in loss of customers or prospective customers. The statement can be either intentional or negligent, and truth is a complete defense.

Invasion of the Right of Privacy

Invasion of privacy

An encroachment on another person's right to be left alone.

Invasion of privacy includes several different common-law torts, as well as the statutory offense of invasion of rights.

The common-law tort invasion of privacy is based on an individual's right to be left alone and to be protected from unauthorized publicity in essentially private matters. Acts that constitute invasion of privacy include intrusion on solitude or seclusion; physical invasion; and torts that involve use or disclosure of information. The information used or disclosed must be by printed matter, writing, pictures, or other permanent records, not merely word of mouth.

Intrusion on Solitude or Seclusion

Intrusion on physical or mental solitude or seclusion is an invasion of something personal, secluded, or private pertaining to the plaintiff. This intrusion is not confined to a physical invasion of the person or premises. Placing a hidden microphone, eavesdropping, tapping of telephone lines, using telephoto lenses, and using similar types of surveillance can constitute unlawful invasion if the intrusion would be highly offensive to a reasonable person.

Physical Invasion

Physical invasion is a separate version of the tort of invasion of privacy. For example, searching a shopping bag in a store or the unauthorized taking of a blood sample can constitute a physical invasion. Ordinarily, a defendant has no liability for taking photographs in a public place. However, photographs of a person in a compromising or embarrassing position can give rise to suit.

Torts Involving Use or Disclosure of Information

Several torts involving invasion of privacy relate to the use or disclosure of information. Unlike the similar torts of libel and slander, which are based on the falsity of the information, these torts are based on interference with privacy:

- Public disclosure of private facts—This tort usually involves gossip columns or similar disseminations of stories about a plaintiff's private life. To a certain extent, a right to sue depends on the plaintiff's public prominence. An entertainer or politician, for example, is not entitled to privacy to the same degree as an ordinary citizen.
- Publicity placing plaintiff in a false light—This tort usually involves using a statement that has been taken out of context or is based on information that is not true. The defendant has presented the publicity in such a way that the plaintiff has good cause to be offended, even if the plaintiff's reputation is not damaged.
- Unauthorized release of confidential information—Sometimes courts treat unauthorized release of confidential information as a tort separate from invasion of the right of privacy, although it contains many of the same elements.
- Appropriation of plaintiff's name or likeness—The tort is based on one's rights to one's own name and likeness. Anyone who makes unauthorized use of another's name or likeness for publicity or commercial gain may be liable, but most courts base the tort on the defendant's commercial benefit.

Defenses to Invasion of Privacy

In an action for any form of invasion of the right of privacy, one or several of these defenses may apply:

- The plaintiff previously published the information.
- The plaintiff consented to publication.
- The plaintiff is a public figure, or the information is public knowledge.
- The information was part of a news event.
- The publication would not offend an individual of ordinary sensibility.
- Matters were disclosed in judicial proceedings.
- The information is of public interest, such as the public's right to know.

INTENTIONAL TORTS: PART 2 OF 2

Torts are civil (or private) wrongs, as distinguished from crimes, which are either unintentional or intentional public wrongs. Negligence is the term used for unintentional torts, and all other torts are intentional.

An intentional tort requires the tortfeasor's intent to harm or to act to cause harm, and intent differs from motive. For example, one person could shoot at another with the intent to kill but with the motive of self-defense, jealousy, or rage. Generally, intent and motive have no relationship, but motive can influence damages. An act done in self-defense might justify lower damages than an act done in rage, while a tortfeasor's malice might warrant higher damages.

Among common forms of intentional torts are these:

- Fraud
- Bad faith, or outrage
- Interference with relationships between others
- Misuse of legal process
- Trespass
- Nuisance
- Conversion

Fraud

The terms fraud, deceit, and misrepresentation are often interchangeable, but fraud is the generic term. Proof of fraud requires proof of six elements:

- A false representation has been made.
- The misrepresentation is material (important) and concerns a past or an existing fact.
- The misrepresentation was knowingly made, that is, made with the knowledge of its falsity, in reckless disregard of the truth or without knowledge or concern as to whether it was true or false.
- The misrepresentation was made with intent to influence or deceive.
- The party to which the misrepresentation was made places reasonable reliance on its truth. The misrepresentation must be a reasonable inducement to the other party to act. If the party would act regardless of the representation, no fraud occurs. The reliance must be justified. Relying on a layperson for a medical opinion, for example, would not be justified.
- The complaining party must suffer a detriment, or actual damage.

Defenses to fraud focus on disproving one or more of the elements of fraud:

- The statement was not false.
- The statement did not relate to a material fact.
- The defendant did not know the statement was false.

- The defendant did not intend to deceive.
- The plaintiff did not rely on the statement.
- The plaintiff suffered no harm or loss because of relying on the statement.

Bad Faith, or Outrage

Bad faith, or outrage, is a tort of intentionally or recklessly causing another person severe emotional distress through one's extreme or outrageous acts.

Bad faith (outrage)
A breach of the duty of good faith and fair dealing.

Bad faith is similar to intentional infliction of emotional distress but has been a separate cause of action, principally in suits for breach of insurance contracts. It is based on the theory that, in certain cases, the plaintiff is entitled to damages above those typically awarded for breach of contract. These cases involve alleged outrageous or extreme conduct or the defendant's breach of an implied duty of good faith and fair dealings. Bad faith applies to several situations, including breach of employment contracts involving wrongful discharge or discrimination.

Damages

Traditionally, courts award only contractual damages for breach of contract. Contractual damages include compensatory damages and foreseeable consequential damages, but do not include damages for mental anguish or punitive damages.

A plaintiff can seek to recover additional, punitive damages in a breach of contract action by alleging that the defendant has acted in bad faith, resulting in an additional injury. Many jurisdictions recognize the independent tort of bad faith or outrage to provide the injured party with an additional recovery in breach of contract actions.

Insurance Cases

In insurance cases, the tort of bad faith is based on an insurer's implied duty to act fairly and in good faith in discharging its duties under an insurance contract. Usually, insureds allege negligent or intentional denial of a claim or failure to process or to pay a claim without reasonable cause. Such allegations might include failure or delay in pursuing claim investigation and settlement or the delay of claim payment to coerce insureds into settling for less than the full amount due. Most jurisdictions hold that, if the defendant has a reasonable cause to delay payment, no bad faith has occurred.

In addition to claim practices, courts also have recognized causes of action for retaliatory cancellation of policies and unfair increases in premiums after the filing of claims.

An insurer's duty to an insured in a case in which a third party has sued the insured for damages is well established. The insurer must act in good faith and without negligence in defending the case because the insured has relinquished

the valuable right to settle or defend the action. Some courts hold that failure to protect the insured's rights makes the insurer liable for the full amount of the loss, even if the loss exceeds the policy limit.

Not all courts recognize the tort of bad faith or outrage in connection with breach of contract suits. Further, many states now have laws imposing various penalties for failure to settle insurance claims properly. Many states and provinces also have adopted unfair claim settlement practice acts or unfair and deceptive acts and practice laws or regulations, which can preempt any private lawsuits for bad faith.

Defenses

Several defenses are possible in suits alleging bad faith:

- No intent or recklessness was involved.
- No outrageous or extreme conduct occurred.
- The defendant did not breach any implied duty of good faith and fair dealings.
- If contract damages are involved, the defendant owned no contractual duty to the plaintiff.
- In an insurance case, no valid insurance contract existed; therefore, the defendant owed the plaintiff no duty to act fairly and in good faith.

Interference With Relationships Between Others

Another category of intentional tort relates to interference with relationships between others. Many torts involve interference with either personal or business relationships of other parties. These torts are not mutually exclusive in that one court might recognize an act as a violation of one right, and another might recognize the same act as a violation of another right.

Interference with relationships between others includes these torts:

- Injurious falsehood
- Malicious interference with prospective economic advantage
- Unfair competition
- Interference with employment
- Interference with copyright, patent, or trademark
- Interference with right to use one's own name in business
- Interference with family relationships

Injurious falsehood

A group of torts involving disparagement that causes harm to any kind of legally protected intangible property right.

Injurious Falsehood

Legally protected property rights grouped under torts constituting **injurious falsehood** include almost any intangible property right, such as an interest in a title, lease, or trademark.

Injurious falsehood can include disparaging statements referring to the quality of merchandise or the validity of a person's title to property. The tort is similar to defamation, and both torts apply in some cases. Injurious falsehood differs from defamation primarily in that the plaintiff must prove both the falsity of the statement and the actual damage or loss, while defamation might not result in actual damages.

The essence of the tort of injurious falsehood is interference with an economically advantageous relationship resulting in monetary loss. Therefore, it primarily concerns damage to a property right, while defamation usually involves damage to a person's reputation. Examples of injurious falsehood are allegations of improper business conduct or poor quality of goods.

The defenses for this tort are essentially the same as those for defamation (slander and libel):

- The statement was the truth.
- The defendant made or printed a retraction—not a complete defense, but it can reduce damages.
- The statement had absolute privilege—applies to statements made in judicial and legislative proceedings, executive officers' communications, and spousal communications, and when consent was given by the injured party.
- The statement had conditional or qualified privilege—applies to statements made without malice as a matter of public interest, in petitions concerning appointments, in common interest communications, as fair comment on matters of public concern, and by credit reporting agencies.

Malicious Interference With Prospective Economic Advantage

Malicious interference with prospective economic advantage involves interference with commercial dealings, such as interfering with one's obtaining a job or purchasing property. However, the concept has expanded to cases involving interference with an expected gift or legacy under a will and expectations of economic advantage other than those arising out of business.

Malicious interference with prospective economic advantage

A tort involving intentional interference with another's business, or with another's expected economic advantage.

The usual defense in a suit for malicious interference with prospective economic advantage is that the defendant was making a lawful effort, without **malice**, to promote his or her own welfare and not to injure the plaintiff.

Malice

The intent to do a wrongful act without justification or excuse.

Unfair Competition

Unfair competition is a counterpart of malicious interference with prospective economic advantage. The essence of unfair competition is deception, and it starts when one party deceives the public into buying its product in the mistaken belief that it is another party's product.

Unfair competition

Use of wrongful or fraudulent practices by a business to gain an unfair advantage over competitors.

The common law prohibited people or organizations from pretending that their goods were competitors' goods by using similar trademarks, labels, or wrappers. If such an action deprived the competitor of the value of the goodwill in the business, the competitor could sue for unfair competition.

No unfair competition exists without competition. Conversely, no injury results unless the two parties are competing directly with the same product or service. However, one party cannot legally make or label goods in any manner that leads the public to believe those goods are the product of a manufacturer in another field, thereby obtaining the benefit of the other party's goodwill and reputation. It does not matter that the two parties are not in direct competition.

Unfair competition applies to literary and artistic properties as well as to merchandise. To illustrate, reproducing photographs or copying paintings and passing them off as the works of another photographer or artist creates a right to sue.

A defense to a lawsuit for unfair competition might include the assertion that the defendant did not perform one or more of these acts:

- Compete
- Compete directly
- Harm the plaintiff
- Mislead the public
- Deceive anyone

Interference With Employment

Interference with employment

An unjustified intentional act that interferes with another's valid or expected business relationship.

The tort of **interference with employment** can take many forms and in certain instances overlaps with other torts involving interference with relationships. An example of this tort is spreading negative information about a person applying for a job. The same act also can be defamation, either libel or slander, depending on the means of publication, if the information is false.

A defense to a lawsuit for interference with employment might include the defendant's allegations that he or she did not do any of these things:

- Interfere with or prevent employment
- Induce a breach of contract
- Harm the plaintiff
- Act in furtherance of an unlawful object
- Use unlawful means to procure discharge
- Blacklist

Interference With Copyright, Patent, or Trademark

Copyright, patent, and trademark rights are property rights, and interference with any of these rights has historically been a tort. Today, federal legislation preempts the common law and governs most matters concerning these rights. As defenses to a lawsuit for interference with copyright, patent, or trademark, the defendant might assert that he or she did not interfere with the copyright, patent, or trademark or that the plaintiff did not own the intellectual property in question.

Interference With Right to Use One's Own Name in Business

A person has a right to use his or her own name in business even though a similar business is conducted under the same or a similar name. This right applies both to individuals and to corporations. In the case of corporations, businesses must register names, and most states will not grant a charter if a name is too similar to a name already registered.

Courts give the original user of a personal name some protection, and they require a notice that no connection exists with the original. For example, John Doe Co. might be required to put a notice on its products reading "Not connected with the Mary Doe Co." to distinguish its products from Mary Doe's.

Interference With Family Relationships

The family has no collective legal rights. However, individuals have rights as members of a family. Under common law, neither spouse could sue a third party for personal injury against the other spouse. Most jurisdictions have abandoned this rule. Additionally, in most jurisdictions, a spouse can now sue for assault and battery or false imprisonment. Many spousal rights were only for the husband's benefit at common law. Today, laws favoring husbands over wives either have been eliminated totally or apply equally to wives. Spouses' rights against third persons fall into three general categories:

- Alienation of affection—A third party's interference with the husband-wife relationship is commonly called alienation of affection. A spouse has a right to sue a person who persuades the other spouse to leave the marriage. Some states, either by statute or court decision, have eliminated alienation of affection actions.
- Personal injury—A spouse, or both spouses together, can sue a third person for causing personal physical injury to one spouse. In addition, the spouse of an injured person can also sue for loss of consortium.
- Loss of consortium—Loss of the husband-wife relationship is commonly called loss of consortium and involves loss of services, companionship, and comfort. The amount of damages is based on the spouses' existing relationship.

Parents also have family relationship rights. Under common law, parents could sue third persons for injury to children based on loss of services because children helped families economically. On farms, for example, children performed essential duties. Under modern law, it is not necessary to show an actual loss of services, even though that loss remains the underlying theory of the suit. Enticing a child away or kidnapping, negligently injuring, or seducing a child can give rise to a right to sue regardless of economic deprivation.

Under common law, children had no right to sue their parents for injuries or failure to provide support. Children also had no right of action against third persons who injured their parents, thus depriving them of their source of support. Today, a child can recover for injuries that third persons cause to parents. Also, although under common law a child had no right to sue parents for cruel or abusive treatment, children now can allege that the force used was unreasonable or was used in bad faith.

Other torts relating to family relationships—wrongful life and wrongful pregnancy—are of recent origin and are not frequent bases for lawsuits.

Wrongful-life action

A lawsuit by or on behalf of a child with birth defects, alleging that, but for the doctor-defendant's negligent advice, the parents would not have conceived the child or would have terminated the pregnancy so as to avoid the pain and suffering resulting from the child's defects.

Wrongful-pregnancy action (wrongful-conception action)

A lawsuit by a parent for damages resulting from a pregnancy following a failed sterilization.

Most jurisdictions have rejected **wrongful-life actions**. A child born with a physical disability can be the plaintiff in a suit for wrongful life, based on an allegation that the defendant, usually a doctor, negligently failed to diagnose a disability or warn the parents of the probability that the child would be born with the disability. As a result, the parents were deprived of the ability to make an informed judgment about whether to carry the child to term. Recovery in such cases is limited to special damages and does not include pain and suffering or other general damages.

The companion tort to wrongful life is a **wrongful-pregnancy action**, also called a wrongful conception action in some jurisdictions. This claim is frequently alleged by the parents in wrongful life cases and can arise in two situations:

- When an unplanned birth of a healthy baby follows a failed sterilization
- When parents give birth to a child with disabilities after a doctor misdiagnosed or failed to detect a condition ("wrongful birth")

In these cases, the parents can recover the extraordinary expenses involved in taking care of the child. Some courts limit recovery to the period before the child reaches majority; others impose no such limit. Many jurisdictions recognize the wrongful death cause of action, including those in several states that have rejected the wrongful life cause of action.

Misuse of Legal Process

Misuse of legal process takes two forms: malicious prosecution and malicious abuse of process. Courts discourage lawsuits alleging these torts because of public policy, which favors use of the courts to resolve disputes. However, misuse of legal process can sometimes be appropriate grounds for suit.

Malicious Prosecution

Historically, **malicious prosecution** related only to criminal cases. For example, Al files a groundless criminal complaint against Bob to harass him. Bob is acquitted as defendant in the criminal action. Bob, as plaintiff in a civil action, can sue Al for malicious prosecution. Today some jurisdictions apply malicious prosecution to certain civil proceedings, such as bankruptcy and actions to have a person declared incompetent.

Malicious prosecution
The improper institution of legal proceedings against another.

The plaintiff's inability to prove any of the elements of the tort is a defense. In addition, these acts can also bar a lawsuit for malicious prosecution:

- Defendant's action on advice of counsel—Lack of **probable cause** is an essential element of this tort. Showing that the defendant fully disclosed all facts to an impartial attorney and, with a genuine belief in the plaintiff's guilt, acted on the attorney's advice, strongly indicates the presence of probable cause.
- Plaintiff's guilt of the crime—If the defendant proves the plaintiff was guilty, and the plaintiff is convicted, no cause of action remains. The plaintiff's acquittal, however, is not conclusive evidence of lack of probable cause. Acquittal does not prove conclusively that a person is innocent but merely indicates that a jury was not convinced beyond a reasonable doubt of the defendant's guilt (in a criminal case).
- Probable cause—Proof of probable cause for an arrest completely prevents a malicious prosecution action.

Probable cause
The grounds that would lead a reasonable person to believe that the plaintiff committed the act for which the defendant is suing.

Malicious Abuse of Process

Malicious abuse of process is distinguished from malicious prosecution, or maliciously causing process to issue. Abuse of process relates to improper use of process after it has issued. An example of malicious abuse of process is bringing a person into a jurisdiction, supposedly as a party or witness in one action, but in reality to serve process in the form of a complaint in connection with another action.

Malicious abuse of process
The use of civil or criminal procedures for a purpose for which they were not designed.

The plaintiff's inability to prove an ulterior motive is the usual defense to a claim of malicious abuse of process. Therefore, if the defendant can show that the use of the process was regular and legitimate, even though the process was initiated with a bad intention, it is not a malicious abuse of process.

Trespass

A **trespass** can be against either real property or **personal property**, and the elements are essentially the same for both. Trespass is an act against possession and not against ownership. That is, the plaintiff must be in possession of the property. An owner not in possession has no right to sue. A tenant in possession can sue only for injury to his or her interest. Entry upon another's land is justified if the owner or occupant either expressly or impliedly permits it.

Trespass
Unauthorized entry to another person's real property or forcible interference with another person's personal property.

Personal property
All tangible or intangible property that is not real property.

The law presumes at least nominal damages merely because an unauthorized entry onto another's land has occurred. The defendant is liable even if the entry is accidental. The magnitude of the entry is not important. Merely walking on the property is sufficient to constitute trespass. In fact, actual entry is not required. For example, throwing debris onto a neighbor's land or cutting a tree that falls on another's land are both trespasses.

Trespass to personal property is the forcible interference with another's possession of the property. Any type of property, including animals, can be the subject of a trespass. For example, if a person unjustifiably kills another person's dog, the killing would be a trespass to personal property.

Defenses to the claim of trespass to real or personal property are these:

- The plaintiff did not own or possess the property.
- The plaintiff consented to the defendant's entry.
- The defendant did not enter onto or take control of the property.

Nuisance

A court will decide what constitutes a nuisance by considering the discomfort the act would inflict on a normal person under normal conditions and not its effect on persons who are too sensitive or who are ill, either physically or mentally.

Private nuisance

An unreasonable and unlawful interference with another's use or enjoyment of his or her real property.

A nuisance can be either private or public. To constitute a **private nuisance**, the interference must be substantial enough to be unreasonable and can take almost any form, such as producing undue noise, causing dust to fall on adjoining property, blasting, or interfering in any other material way with the enjoyment of property.

Public nuisance

An act, occupation, or structure that affects the public at large or a substantial segment of the public, interfering with public enjoyment or rights regarding property.

A **public nuisance**, as contrasted with a private nuisance, affects the public. For example, a person who operates a plant that pollutes a river with poisonous waste commits a public nuisance. Only a person who has suffered personal damage can recover damages for injury resulting from a public nuisance. The injury must be particular to the individual plaintiff. The remedies for public nuisance include a civil tort suit for damages and criminal charges and usually include a court order demanding curtailment of the nuisance.

Intentional nuisance

Purposeful interference with another party's enjoyment of his or her property.

The invasion of others' rights can be either intentional or unintentional. Examples of **intentional nuisance** (sometimes called an absolute nuisance) are erection of a fence whose height interferes with an adjoining landowner's enjoyment of property and spraying of chemicals with the knowledge that they are damaging a neighbor's land. Defendants are liable for unintentional nuisances when their conduct is negligent, reckless, or ultrahazardous.

Nuisance per se

An act, occupation, or structure that is a nuisance at all times and under any conditions, regardless of location or surroundings.

Nuisance per se is a nuisance at all times, and a lawfully built structure generally cannot be a nuisance *per se*. However, a leaky hazardous-waste storage facility is a nuisance *per se*.

A common defense to a nuisance lawsuit is that the act complained of was a reasonable and legal use of the property by the defendant. Historically, people have been entitled to use their property in any way as long as the uses do not interfere unreasonably with others' enjoyment of their own property.

Conversion

Conversion applies to chattel and does not apply to land. The party must be deprived of possession of chattel by a wrongful taking, wrongful disposal, wrongful detention, or severe damage or destruction. The interference with possession must be major and not just temporary or fleeting. Conversion is founded on the legal wrong of deprivation of one's right to property. Any person with a legal right to possession, including a finder or bailee, can sue for conversion.

Conversion
The unlawful exercise of control over another person's personal property to the detriment of the owner.

These defenses are valid against conversion:

- A plaintiff's failure to establish the right to possession of the property
- A plaintiff's refusal to demand return, followed by the defendant's consequent refusal to deliver

A bailee can defend by showing that the property is not in his or her possession because it was lost or destroyed without the bailee's fault, such as by an act of nature.

LIABILITY IN EXTRAORDINARY CIRCUMSTANCES

In addition to liability based on intention or on negligence, sometimes liability is imposed even when a defendant has acted reasonably and would ordinarily not be at fault. A person who commits certain acts is liable for injury to another regardless of whether the act was willful or negligent.

An activity that exposes others or their property to the risk of substantial damage may cause the person who conducts the activity to be held liable for any harm that results even though he or she is not negligent. This liability may attach as a result of **strict liability (absolute liability)** or liability imposed by a statute when the liable party is performing an **ultrahazardous activity (abnormally dangerous activity)**, owns and/or possesses an animal, or allows escape of a toxic substance.

Strict liability (absolute liability)
Liability imposed by a court or by a statute in the absence of fault when harm results from activities or conditions that are extremely dangerous, unnatural, ultrahazardous, extraordinary, abnormal, or inappropriate.

Ultrahazardous activity (abnormally dangerous activity)
An activity that is inherently dangerous; if harm results, the performer may be held strictly liable.

Ultrahazardous Activities

Generally, people can use their property in any way they see fit as long as the use does not harm others. Some uses are considered untrahazardous. A

use or an activity is ultrahazardous or abnormally dangerous under these circumstances:

- It has a high degree of risk of serious harm.
- It cannot be performed without the high degree of risk.
- It does not normally occur in the area in which it is conducted.

In the landmark English tort case of *Rylands v. Fletcher*,[4] which dealt with the escape of water onto neighboring land, the court extended the doctrine of strict liability to certain activities on real property. The court held that people who bring anything onto their land that, if it escapes, is likely to result in injury, are strictly liable for all damages that are the natural consequence of the escape. The decision applies only to things artificially brought onto the land and not to natural things such as trees and weeds. It also does not apply when the cause is natural, such as an unprecedented rainfall that causes a reservoir to overflow.

The justification for imposing strict liability on those who carry on ultrahazardous activities is that they have, for their own purposes, created an unusual risk in the community. If the activity causes an injury or damage, then another person's or animal's unexpected action, or a force of nature, is immaterial to the defendant's liability.

The storage and transportation of explosive substances is an ultrahazardous activity. Aviation is also an ultrahazardous activity, although many states take the position that it is now so commonplace as to present no unusual danger.

The occupiers of adjacent property are not required to refrain from using their property as they please merely because of an ultrahazardous activity taking place nearby. For example, owners of property adjacent to a blasting operation are under no obligation to vacate their premises, construct explosion-proof shelters, or take other protective steps to mitigate any damage that occurs.

Ownership and/or Possession of Animals

For liability for animals, the law differentiates between domestic and wild animals, based on local custom. At common law, an owner was strictly liable for damages caused by the trespass of any domestic animal. If, for example, a cow broke out of a fenced field onto a neighbor's land and caused damage, strict liability applied, and proof of negligence was not necessary.

In most cases, the rule of strict liability does not apply to dogs and cats, because they are domestic animals that seldom cause serious damage. However, the rule may apply to a dog or a cat if the owner knows the animal has a vicious propensity to cause injury. In most jurisdictions, an owner who knows of a dog's propensity to be vicious is liable.

Owners of wild animals are absolutely liable for all acts of and damage caused by the animals. Wild animals are animals that, by local custom, are not devoted to people's use.

Escape of Toxic Substances

The related concepts of **toxic torts** and **environmental law** represent a rapidly expanding and changing area of the law. Toxic torts suits are similar in many respects to products liability suits. The name "toxic tort" does not refer to a specific tort, but to several types of tort suits that can arise from the use of toxic substances.

Environmental law
The body of law that deals with the environment's maintenance and protection.

Toxic tort
A civil wrong arising from exposure to a toxic substance.

The additional factor present in toxic torts is that, in many instances, liability is established by statute rather than by common law. Further, in many of these lawsuits, a governmental agency is a party and a private-party plaintiff may be involved.

Toxic tort lawsuits seek compensation for damages to individuals caused by toxic substances. As in all tort cases, a plaintiff in a toxic tort case must prove that the defendant breached a duty, that the breach caused injury or loss to the plaintiff, and that the loss resulted in actual damages.

Environmental law includes measures to prevent environmental damage, such as requirements for environmental-impact statements, and measures to assign liability and provide cleanup for incidents resulting in environmental damage. Because most environmental suits involve governmental agencies as enforcers, environmental law is intertwined with administrative law.

Environmental suits arise from laws to protect the general public, for example, a suit brought to clean up a waste site. In these suits, an administrative agency first determines whether a party is liable for damages, such as cleanup costs under a statutory regulation. Findings in those lawsuits relate more to whether the defendant violated a law than to whether the defendant actually has caused damage to someone. Both administrative agencies and courts may at times equate violation of regulatory statutes with proof of failure to discharge a duty of care that is the basis of tort liability.

PRODUCTS LIABILITY

Under common law, contractors, manufacturers, and sellers of products were not liable for negligence to third parties with whom they had no contractual relationships. Today, products liability is a rapidly expanding area of tort law.

Most **products liability** suits are based on one or more of these legal principles:

Products liability
A manufacturer's or seller's liability for harm suffered by a buyer, user, or bystander as a result of a product that has a dangerous manufacturing defect or design defect or that is not accompanied by a warning of an inherent hidden danger.

- Misrepresentation
- Breach of warranty
- Strict liability and negligence

Although negligence and strict liability are dissimilar in many respects, considering them together provides comparisons of how each applies in products liability cases.

Misrepresentation

Manufacturers make representations to the public through advertisements, brochures, labels on goods, and instructions for use. These representations extend beyond mere sales promotion by providing safety information on which consumers rely. For example, an automobile manufacturer's brochure described the windshield glass as shatterproof. The owner, injured when a pebble struck and shattered the glass, sued the manufacturer and recovered damages. Many lawsuits for misrepresentation in relation to products or services are based on the assertion that the misrepresentation constitutes an **express warranty**. However, in the windshield case, the court determined the liability on the basis of innocent misrepresentation, a form of deceit.

Express warranty

An explicit statement about a product by the seller that the buyer or other user may rely on and that provides a remedy in the event the product does not perform as claimed.

Breach of Warranty

A breach of warranty lawsuit can involve either an express warranty or an **implied warranty**. In a significant United States case, *Henningsen v. Bloomfield Motors, Inc.*,[5] the wife of a new car buyer was injured while driving the allegedly defective car. In the contract of sale, the manufacturer had attempted to disclaim any liability relating to the quality or condition of the car. The court held that the car was subject to a nonwaivable implied warranty of merchantability, that no privity (contractual relationship) was required, and that the warranty ran to any person who might reasonably be expected to use the car.

Implied warranty

An obligation that the courts impose on a seller to warrant certain facts about a product even though not expressly stated by the seller.

Examples of cases based on the concept of implied warranty include an employee's lawsuit for injury caused by a defective machine sold to the employer and to a tenant's lawsuit against a faucet manufacturer for burns to the tenant's child caused by excessively hot water from a bathroom faucet with no mixer valve.

In the U.S., the Uniform Commercial Code (UCC)[6] applies the implied warranty of merchantability to a merchant-seller's sales of goods. Generally, the merchant-seller warrants that the goods meet the standards of the trade, are fit for the ordinary purposes for which such goods are used, and conform to representations made on the container or label, if any. The seller concept now includes suppliers, or those who supply products for value (consideration).

Strict Liability and Negligence

Products liability cases can be based on negligence, on strict liability, or on both. Products liability lawsuits may involve both liability for harm caused by a product and liability for harm resulting from a service or process. Generally, if only a service or process is involved, the suit must be based on negligence. If the suit concerns a product, or a combination of product and service or process, then the suit can be based on either negligence or strict liability. Courts define products to include advertising materials, labels, computer software, instruction manuals, and aircraft instrument landing charts.

In a general negligence case involving products liability, the plaintiff must prove that the manufacturer failed to use reasonable care in designing or manufacturing the product that caused the injury. Negligence focuses on the reasonableness of the manufacturer's conduct.

In contrast, strict liability constitutes the breach of an absolute duty of safety, and it applies most often to products or ultrahazardous activities (such as transportation, storage and use of explosives or radioactive substances, and keeping wild animals or dangerous dogs). Proof of either negligence or an intent to harm is not required. The manufacturer's conduct is irrelevant, and the focus is on the product itself. In a products liability lawsuit based on strict liability, the plaintiff must prove five elements:

- The seller was in the business of selling products.
- The product had a defect that made it unreasonably dangerous, meaning dangerous to an extent beyond that which would be contemplated by the ordinary user who has common knowledge about the product. (Not all courts require this element.)
- The product was dangerously defective when it left the manufacturer's or seller's custody or control.
- The defect was the proximate cause of the plaintiff's injury.
- The product was expected to and did reach the consumer without substantial change in condition.

In such cases, a manufacturer may have used the utmost care in making the product. However, if, in fact, the product is unsafe, the manufacturer may nevertheless be liable under the doctrine of strict liability.

As in negligence cases, proximate cause is a necessary element of a products liability suit based on strict liability. A plaintiff must establish not only that the defective product caused the injury, but also that it was the specific defect that caused the injury. A manufacturer is not liable for injury caused by defect that occurred after the product has left the manufacturer's possession.

Types of Product Defects

Generally speaking, three major types of product defects can lead to liability suits:

- Defect in manufacture or assembly—The product does not correspond to the original design.
- Defect in design—The product corresponds to the design, and the manufacturer built the product exactly as intended, but the design itself is faulty, and the injury has resulted from the design defect. The defendant

is liable because of a design flaw that affects all products of the same kind and not because of a defect in the single item that injured the plaintiff.

- Failure to warn—The product is defective in neither design nor manufacture, but it poses some inherent danger about which the manufacturer has failed to provide adequate warning.

Defects in manufacture include the use of poor-quality materials or shoddy assembly work. Examples include the use of grades of steel that quickly corrode during assembly and failure to install key engine bolts.

Defect in manufacture is the simplest type of strict liability to prove because improper manufacture or assembly of the product, in itself, is a defect. Whether the product is unreasonably dangerous is not an issue because its having caused injury demonstrates that it was dangerous or defective.

Courts vary considerably in decisions about defective design cases. Generally, a seller is liable for injuries caused by a product if, at the time of sale, it is not fit and safe for its intended or reasonably foreseeable use and is unreasonably dangerous. If the defect is not open and obvious, some courts do not consider the product unreasonably dangerous, and strict liability does not apply.

Several jurisdictions have eliminated the unreasonably dangerous requirement and replaced it with one of these rules:

- A product is defective if it does not meet the consumer's reasonable expectations.
- A product is defective if it lacks any element that would make it safe.

A manufacturer must consider a product's safety within the constraints of cost, efficiency, weight, and style. For example, a lawnmower could incorporate so many safety features that it could not cut grass adequately, or a fully crash-resistant auto could end up being extremely heavy. Many courts now compare the practicality of selling a product with a certain level of safety features against the magnitude of the risk associated with that level of safety features.

Many design defect cases arise out of defective safety devices or failure to install safety devices. The manufacturer is strictly liable only if the defects or failure made the product unreasonably dangerous in normal use. Common defects include lack of guards or defective guards on machines such as punch presses, metal shears, or pizza dough rollers.

Even if a product is has no assembly or design defects, it can still be the basis for liability if the manufacturer has failed to warn of the product's dangers. A manufacturer has a duty to warn when it would be unreasonably dangerous to

market a product without a warning. A manufacturer should consider three factors in this regard:

- Degree of the danger
- Knowledge of the danger
- Foreseeability of dangerous use

The degree of danger varies with products. A gun, for example, has a higher degree of danger than an automobile.

In failure-to-warn cases, the standard for manufacturers' liability is the same under both negligence and strict liability. The manufacturer must provide warnings about all dangers associated with the product about which the manufacturer knows, or should know; that is, all foreseeable dangers.

Potentially Liable Parties

Strict liability generally applies to entities that engage in the business of selling products. In addition to manufacturers, most courts also include distributors, wholesalers, and retailers. Those who make an occasional sale of a product outside the regular course of business are not usually subject to strict liability. Many courts have expanded the application of strict liability in sales to include bailors and lessors.

One significant extension of strict liability in many jurisdictions has been to builders and contractors. For example, courts have held contractors strictly liable for installing a faulty hot water heater that caused a fire; for installing a defective heating system that required replacement; and even for failing to compact dirt in a filled lot on which a builder constructed a house, which later caused building damage.

Parties Protected

Strict liability for products protects certain classes of people. Protection can extend to the ultimate user or consumer, which can include the ultimate buyer; however, the ultimate buyer may be different from the ultimate user or consumer. For example, the ultimate user or consumer may have received the product as a gift or may be a buyer's family member, for example. Most courts also hold that any nonuser, such as a bystander, may assert a strict liability claim. For example, a person injured by the explosion of a companion's defective shotgun can assert strict liability.

In determining who has legal standing to sue, either in negligence or in strict liability, most courts use the traditional foreseeability test. Anyone who could foreseeably have been injured by the product has standing to sue. Because a plaintiff must allege specific injuries, courts generally do not permit class action suits in products liability cases.

The public policy supporting strict liability is to protect the individual consumer and to allocate the loss to the party best able to bear the loss.

Defenses

Several defenses are available in products liability lawsuits, for both negligence and strict liability for products. Some are complete defenses that, if successful, totally defeat plaintiffs' claims, while others merely reduce damages:

- State-of-the-art defense—The defendant claims that its product was safe according to the state of the art at the time the product was made. State of the art is the highest level of pertinent product scientific knowability, development, and technical knowledge existing at the time of a product's manufacture. This standard is more concise than the standard of a product's conformity with traditional industry customs and practices. Scientific knowability means the technological feasibility of producing a safer product based on existing scientific knowledge. If no indication of danger or no technique for obtaining knowledge of such danger exists, the manufacturer has no reason to prevent manufacture of the product. The state-of-the-art defense is not a complete defense. Additional evidence must be introduced to justify placing the product on the market.
- Compliance with statutes and regulations defense—The defendant's compliance with statutes and regulations (such as industrial safety codes) is not a conclusive defense against negligence or product defect. A plaintiff may introduce evidence to show that a reasonable manufacturer could have taken additional precautions.
- Compliance with product specifications defense—Manufacturers frequently make products to conform to specifications established by buyers or others. In negligence suits, a manufacturer is generally not liable for products built to someone else's specifications unless the defect is sufficiently obvious to alert the manufacturer to the potential for harm. Third parties in such cases should sue the one who prepared the specifications.
- Open and obvious danger defense—A manufacturer has no duty to warn or take other precautions regarding a common, open, and obvious propensity of the product. Hazards connected with knives, guns, and gasoline, for example, are well known, so warnings would be superfluous.
- Plaintiff's knowledge defense—If the person who uses the product has knowledge of the product that is equal to the manufacturer's knowledge, the manufacturer has no duty to warn.
- Comparative negligence versus the assumption-of-risk defense—Most states and provinces allow a comparative negligence defense in strict liability suits, and the assumption-of-risk defense no longer applies in those jurisdictions. However, for some other jurisdictions, **active negligence**, or **assumption of risk**, is a defense to a strict liability suit. The defendant asserts that the product's user took on the risk of loss, injury, or damage. In considering this defense, most courts distinguish between active negligence and **passive negligence** and hold that passive negligence does not bar recovery. Assumption of risk applies when a person knows of the potential danger resulting from a product defect but voluntarily and

Active negligence

A plaintiff's voluntary use of a defective product with knowledge of the potential danger resulting from the defect.

Assumption of risk

A defense to negligence that bars a plaintiff's recovery for harm caused by the defendant's negligence if the plaintiff voluntarily incurred the risk of harm.

Passive negligence

A plaintiff's failure to discover a product defect or to guard against a possible defect.

unreasonably proceeds to use the product. For example, a worker who knows that a substance can burn skin but does not use protective gloves may not prevail in a lawsuit because of the defense of assumption of risk. The defendant has the burden of proving that the plaintiff knew of the defect or danger.

- Misuse of product defense—Closely akin to active negligence is product misuse or abnormal use. For example, failing to follow directions on a container or attempting to open a glass container by tapping it against a sink may constitute sufficient misuse or abnormal use sufficient to bar recovery for any resulting injury. Because the defendant's liability in such cases is based on the assertion that the product is defective, the plaintiff must prove that the product was used in an appropriate and foreseeable manner in order to establish the defect.
- Alteration of product defense—The manufacturer is usually not liable for modifications made to a product after it is sold. Liability is based on conditions as of the time of sale. Any post-sale modifications can be considered independent, intervening acts that break the chain of causation. Therefore, most courts hold that third-party alterations, no matter how foreseeable, do not create liability.

Damages

A plaintiff can recover damages for bodily injury in lawsuits based on strict liability. Several jurisdictions apply strict liability in wrongful death suits. Plaintiffs may also recover punitive damages in strict liability suits.

Most jurisdictions also permit recovery for property damage in cases of strict liability for physical damage from such causes as fires or explosions arising out of product defects. An example is recovery for fire damage to a dwelling caused by a defective television set.

In some jurisdictions, plaintiffs may recover consequential damages for commercial loss in strict liability lawsuits; that is damages for loss of the product's use for business purposes or loss of profits. However, most jurisdictions deny recovery for pure consequential economic loss in strict liability suits. For example, if Martha buys a truck but cannot use it in her business because of a defect, she cannot sue for economic loss under strict liability.

DAMAGES IN TORT SUITS

One of the elements a plaintiff in a tort suit must prove is a resulting injury or loss sufficient for a court to impose damages. The purpose of awarding damages is to recompense the injured party and not to punish the tortfeasor, although a court may decide that punitive damages are appropriate.

When a plaintiff proves damages in a tort suit, a court can award various kinds of damages, which are usually monetary. Courts determine the amount of damages based on the facts of cases. A plaintiff is usually entitled to tort dam-

ages that the injury proximately caused, whether or not the defendant could reasonably have foreseen the damage, unlike contract damages, which are limited to damages the parties could reasonably foresee.

In tort suits, courts typically award two broad categories of damages:

- Compensatory damages
- Punitive damages (exemplary damages)

Courts also award damages for wrongful death.

Compensatory Damages

Special damages

A form of compensatory damages that awards a sum of money for specific, identifiable expenses associated with the injured person's loss, such as medical expenses or lost wages.

Loss of wages and earnings

The compensatory damages to compensate a plaintiff for any loss of income directly related to a tort.

General damages

A monetary award to compensate a victim for losses, such as pain and suffering, that do not involve specific measurable expenses.

Pain and suffering

Compensable injuries that are difficult to measure, such as physical and mental distress and inconvenience associated with a physical injury.

Emotional distress

A highly unpleasant mental reaction resulting from another person's conduct, for which a court can award damages.

In the usual tort suit, the award is for compensatory damages. Compensatory damages include both special and general damages.

Special damages (also called particular damages, or out-of-pocket losses) can include the amount expended to restore lost property. For bodily injury, they include hospital and doctor bills and related expenses. **Loss of wages and earnings** is another form of special damages.

General damages (also called direct damages or necessary damages) are often presumed when special damages are proven and may include compensation for **pain and suffering**; disfigurement; and loss of a limb, sight, or hearing; as well as **emotional distress** or other noneconomic intangible loss. Many physical injuries leave some permanent effect such as scar tissue, torn muscles, and limited use of limbs. The injured person is entitled to have any future effect of permanent injuries considered in evaluating damages.

Jury awards for general damages have grown so large that legislatures have made a concentrated effort to limit them, usually by placing a dollar limit, or cap, on some types of general damages. Many state statutes limiting damages apply only to medical malpractice, but several now apply more broadly.

Courts originally awarded damages for bad faith in suits for other, underlying torts. Damages for bad faith can arise in connection with the independent tort of outrage, and bad faith can result in punitive damages.

Punitive Damages

In certain cases, courts may assess punitive, or exemplary damages. These damages punish and make an example of the defendant, thereby deterring the defendant and others from committing similar acts. Even though a court can award punitive damages to a plaintiff, the law does not intend or categorize these damages as compensation.

Ordinary negligence does not support a claim for punitive damages. A court can award punitive damages only in certain situations:

- The defendant actually intended to cause harm.
- The defendant acted oppressively, maliciously, or fraudulently.

These situations collectively fall under the term "outrageous conduct," which can consist of fraud, malice, gross negligence, or oppression. A court can find it when a defendant commits a wrongful act with a motive to harm or so recklessly as to imply a disregard for social obligations; or if the defendant shows such willful misconduct or lack of care as to raise a presumption of the defendant's conscious indifference to the consequences.

To assess punitive damages, courts usually consider three factors:

- Nature of the defendant's actions
- Size of the defendant's assets
- Purpose of punitive damages

Generally, the wealthier the defendant, the larger the punitive damage award. Also generally, employers, or principals, are liable for punitive damages if they directed or ratified acts of employees or agents with knowledge of malice, fraud or oppression.

Damages for Wrongful Death

A **wrongful death action** is in a different category from the ordinary claim for bodily injury. Damages can vary depending on the relationship of the deceased to the claimant. Damages can compensate for lost earnings or for mental anguish, or they can be punitive. Under common law, when an injured person died, any right to sue ended upon the person's death. For example, a person might live for several months after sustaining an injury, incurring large expenses and suffering much pain from the injury; but, upon death, the right to sue ends. Likewise, if the tortfeasor died, the right to sue also ended. This inequity led to the enactment of **survival statutes**, under which a cause of action for an injury can survive after an injured person's death.

Wrongful death action
A legal cause of action that exists for the survivor of the deceased.

Survival statute
A statute that preserves the right of a person's estate to recover damages that person sustained between the time of injury and death.

A typical survival statute might read: "All causes of action or proceedings, real or personal, except suits for slander or libel, shall survive the death of one or more joint plaintiffs or defendants."

Survival statutes preserve the right of a person's estate to recover damages that person sustained between the time of injury and death. They permit recovery of compensatory damages, including general damages. They do not include any damages for shortening the person's life. If death is instantaneous, then a court will not award survival damages. However, if the person lives even a second or a minute after an injury, the estate can allege sufficient pain and suffering to support the suit. Any damages recovered pass onto the person's estate.

LIABILITY CONCEPTS AFFECTING TORT CLAIMS

To obtain relief from a court, an injured person not only must be ready to prove damage suffered, but also must, among other tasks, choose whom to sue and develop a theory of liability to present to the court.

Liability concepts affecting tort claims focus primarily on the parties who can sue and those parties who are potentially liable in lawsuits:

- Joint tortfeasors
- Expanded liability concepts
- Vicarious liability
- Good Samaritan issues
- Class actions and mass tort litigation

Joint Tortfeasors

When an act of negligence involves more than one person, issues of joint liability arise. Generally, all people participating in the act of committing a tort are jointly (together) and severally (individually) liable. An individual participates by being an active contributor, either in person or through an agent or employee; by acting; by ratifying or permitting the act; or by advising about the act.

When two or more persons owe a common duty to a third party and, by a common act of neglect of this duty, cause injury to the third party, a joint tort has occurred. Additionally, when the separate negligent acts of two or more people come together to produce a single indivisible injury, a joint tort has occurred. For example, if the drivers of two cars racing on a highway collide and injure a third person, the result is a joint tort.

Tortious acts that are sequential or that involve some aspect of vicarious liability can complicate determination of liability. Also, certain relationships can create a joint tort. For example, employers are liable for the torts of their employees committed while in the scope of their employment; the employees are also liable. Similarly, each partner is jointly liable for the torts of all other partners.

Joint tortfeasors

Two or more parties who commit a tort together in circumstances that can make it difficult to distinguish the fault or harm caused by one wrongdoer from that caused by another.

Under common law, **joint tortfeasors** were jointly and severally liable for the full amount of the damages. Therefore, the plaintiff could proceed against all tortfeasors jointly or against any number of them. If a plaintiff sued only one tortfeasor, that defendant could not use as a defense the fact that the plaintiff did not include the others in the suit. Each tortfeasor was responsible for the whole tort regardless of degree of participation in the tort. About half the jurisdictions have abolished this rule and today do not hold a joint tortfeasor automatically liable for all of a plaintiff's damages. This change came in response to increased litigation against "deep-pocket" defendants who often

had little role in causing plaintiffs' injuries but had to pay entire damage awards.

Under common law, a release of one joint tortfeasor released all joint tortfeasors, even if the release specifically prohibited release of the other tortfeasors. Although this rule still applies in several jurisdictions, it has fallen into disfavor. Most jurisdictions, either by court decision or legislation, have provided that, when a plaintiff settles with one joint tortfeasor, a pro rata credit goes to the other joint tortfeasor if the intent of the agreement was to release only one tortfeasor and not to operate as a full release.

Many jurisdictions have adopted the Uniform Contribution Among Joint Tortfeasors Act (UCAJTFA). UCAJTFA provides that, when two or more persons become jointly or severally liable in tort for the same injury or damage, or for the same wrongful death, they have a right of **contribution** among them even though the plaintiff has not recovered judgment against all or any of them. The act creates rights in favor of tortfeasors who have paid more than their pro rata share of their joint liability for the amount of the excess. It provides that, in assessing pro rata liability, the relative degree of fault is not a consideration.

Contribution

The right of a tortfeasor who has paid more than his or her proportionate share of the damages to collect from other tortfeasors responsible for the same tort.

Under the UCAJTFA, the plaintiff can release one or more defendants without releasing the others if it is a good-faith release that indicates intent only to release part, not all, of the liability and if the payment is full compensation. What constitutes good faith, particularly if the released defendant's payment appears nominal, is a matter of frequent dispute in these cases. The harshness of the UCAJTFA has led to legal maneuvers to mitigate its effects.

Several jurisdictions have abolished the concept of joint liability entirely and have adopted several liability only. Other jurisdictions have adopted modifications, such as applying that joint liability only when the plaintiff's fault is less than the respective defendant's, or only when the defendant is at least a certain percent at fault, for example, 25 or 50 percent at fault. Several of these laws still retain the concept of joint liability for certain areas, such as product liability, toxic torts, or auto liability.

Expanded Liability Concepts

A basic tort law principle is that the plaintiff must prove not only injury but also that a specific defendant caused the injury. For example, a person hit by an unidentifiable object from the sky cannot sue all the airlines that have flown in the area because one of them probably caused the injury. The injured person must prove which airline dropped the object. Because of mass production, many goods are not traceable to specific producers, and the problem is even more acute because it is usually impossible to identify which manufacturer produced the product that harmed an individual. To help injured parties sue successfully, some courts have adopted expanded liability concepts. While these concepts have generally applied to products liability situations, they also

Enterprise liability (industry-wide liability)

An expanded liability concept requiring each member of an industry responsible for manufacturing a harmful or defective product to share liability, when a manufacturer at fault cannot be identified.

Alternative liability

An expanded liability concept that shifts the burden of proof to each of several defendants in a tort case when there is uncertainty regarding which defendant's action was the proximate cause of the harm.

Market share liability

An expanded liability concept that applies when a product that has harmed a consumer cannot be traced to a single manufacturer; all manufacturers responsible for a substantial share of the market are named in the lawsuit and are liable for their proportional share of the judgment.

Concert of action

An expanded liability concept that applies when all defendants acted together or cooperatively.

Conspiracy

An expanded liability concept that applies when two or more parties worked together to commit an unlawful act.

Joint venture

A business association formed by an express or implied agreement of two or more persons (including corporations) to accomplish a particular project, such as the construction of a building.

can apply to other situations. Types of expanded liability concepts include these:

- In **enterprise liability (industry-wide liability)**, probably the first expanded liability concept, a limited number of businesses engage in similar business, following industry-wide standards. If those standards result in a defective product causing harm, a court can treat these businesses as a single enterprise to prove causation, with an entire industry liable for harm to a plaintiff. For example, if several producers manufacture a defective product under industry standards, resulting in injuries, each producer can be held liable based on its market share.
- **Alternative liability** involves shifting the burden of proof to each of several defendants when it is uncertain which one caused the injury. Each defendant has the burden of proof of causation and must prove either that he or she did not cause the harm or that someone else did. Under this concept, a plaintiff can sue one or more defendants, but not necessarily all of them.
- **Market share liability** resembles the alternative liability concept in that it can create a situation in which one defendant is liable for the damages of an entire industry. The plaintiff must sue all manufacturers responsible for a substantial share of the market. Defendants are not liable individually for the entire amount, but only for their pro rata share of the judgment based on their respective shares of the market unless they can prove that they could not have made the product involved.
- Under **concert of action**, probably the most commonly recognized expanded liability concept, a plaintiff must prove either (1) that the defendants consciously parallel each other, as the result of an actual agreement or an implied understanding to do or not to do a given act, or that (2) even though the defendants acted independently, the effect of their acts was to encourage or assist others' wrongful conduct. A plaintiff need not sue all potential defendants. For example, tire manufacturers, following industry standards, might have manufactured defective tires independently; but their close connections in the automotive industry might have encouraged each to manufacture defective tires.
- **Conspiracy** requires a plaintiff to establish the responsibility of defendants involved by proving an agreement existed among all defendants either to commit a wrongful act or to carry out a legal act by illegal means, resulting in the plaintiff's harm.
- A **joint venture** is a group of people or entities working together toward a common goal. To establish a joint venture to prove causation, a plaintiff' must prove four facts: (1) an agreement by the parties to associate for a business activity, (2) profits and losses shared by each party, (3) joint control of the venture by the parties, and (4) contribution to the venture's assets by each party.

Vicarious Liability

A person can become liable for others' tortious acts under the concept of **vicarious liability**. This liability can result from contractual relationships and from partnerships. Vicarious liability also can arise out of three types of relationships:

Vicarious liability

A legal responsibility that occurs when one party is held liable for the actions of a subordinate or associate because of the relationship between the two parties.

- Principal and agent—The term "agency" describes the relationship in which the principal, authorizes another, the agent, to act on the principal's behalf. Principals are vicariously liable for the torts their agents commit in the course of the agents' employment and within the scope of their actual or apparent authority. This liability applies even though the act directly contravened the principal's orders. The agent is also individually liable for the same act.
- Employer and employee—Employers are vicariously liable for torts their employees commit while acting within the scope of their employment. Courts use several methods to determine the scope of employment, and determination of liability must meet certain criteria.
- Parent and child—Generally, a parent is not liable for a minor child's torts merely because of the family relationship. However, several well-established exceptions exist. For example, if the child is acting as the parent's agent or employee at the time the tort occurs, the parent is liable just as any other principal or employer would be liable. The parent is also liable for a child's torts when the tort involves a dangerous instrumentality, such as a gun or even a vehicle that the parent has given to the child under such circumstances that the parent should expect the child to cause harm. Parents may also be liable for a child's torts resulting from the parents' **negligent entrustment** or **negligent supervision**. Some jurisdictions have also adopted the **family purpose doctrine**, which applies only to torts caused by a family-owned automobile. Finally, several jurisdictions make parents liable for certain torts of their children under statutes, which apply to theft or vandalism. Jurisdictions adopted them to control and reduce acts children commit on certain properties such as schools. Under parental responsibility statutes, a parent can be liable without proof of negligence.

Negligent entrustment

The act of leaving a dangerous article with a person who the lender knows, or should know, is likely to use it in an unreasonably risky manner.

Negligent supervision

A parent's failure to exercise reasonable control and supervision over his or her child to prevent harm to others.

Family purpose doctrine

A liability concept that holds the owner of an automobile kept for the family's use vicariously liable for damages incurred by a family member while using the automobile.

Good Samaritan Issues

Historically, helping a person one has no duty to help has been called a Good Samaritan situation. If a person owes no duty to another person, the refusal to act does not create grounds for a suit. For example, Luke becomes ill in Bob's presence. If Bob owes no duty to Luke, Bob can let Luke become worse, or even die, and incur no liability. However, if Bob voluntarily undertakes to save Luke by some act and performs the act negligently, Bob can incur liability.

A common example of a Good Samaritan is a physician who stops to give first aid to an accident victim. If the victim later claims the physician was negligent, the victim may be able to sue the physician successfully.

The result of the example demonstrates an inequity: A person who does not volunteer to help another has no liability, even if the other dies; but a person who does help can be liable for negligence. In response to this inequity, all jurisdictions have adopted some form of **Good Samaritan laws**, which protect any person who gives emergency assistance. However, some jurisdictions protect only medical personnel. Generally, Good Samaritan laws apply to gratuitous emergency services performed at the scene of an emergency and exempt one who provides such services from liability for ordinary negligence but not gross negligence.

Good Samaritan law

A statute providing that a person will not be liable for damages as a result of rendering aid to an injured person, without compensation, at the scene of an accident.

Class Actions and Mass Tort Litigation

When a single tort has many victims, a **class action (class action lawsuit)** permits one person, or a small group of people, to file suit on behalf of all of the harmed members of the group. Courts allow class actions when individual cases present common questions and the amount of damages in each claim is too small to warrant individual suits.

Class action (class action lawsuit)

A lawsuit in which one person or a small group of people represent the interests of an entire class of people in litigation.

Traditionally, class actions seldom involved torts because each person harmed had different liability issues. However, courts began accepting dissimilar tort victims in **mass tort litigation** for claims involving such products as tobacco, asbestos, birth control pills and devices, prescription drugs, and pollutants; in suits against insurers for their use of aftermarket auto parts in auto repairs; and the misuse of medical managed-care techniques.

Mass tort litigation

A class-action suit based on tort law rather than on contract law.

Class action suits provide access to the courts for a large group of people interested in a single issue, and one or more of them can sue or be sued as a representative of the class. To illustrate, fumes that escape a malfunctioning chemical plant cause lung injuries throughout the local community. A single member of the community who suffered an injury to her lungs can bring a class action suit.

A trial court must consider four features to certify a suit as a class action:

- Numerosity—The plaintiffs are so numerous that it would be impractical to bring all of them separately into court.
- Commonality—An ascertainable class with a well-defined common interest in the questions of law and fact affecting the parties is necessary for class-action certification.
- Typicality—The representative parties' claims or defenses must be typical of all the class members.
- Adequacy of representation—The named parties must fairly and adequately protect the interests of unnamed class members.

Courts also consider the extent to which individual class members would have interests in controlling the prosecution of their claims in a separate suit, the extent and nature of any litigation already started, the desirability of concentrating the litigation in one forum, and the difficulties of managing a class proceeding. See the exhibit "Practice Exercise: Liability Concepts Affecting Tort Claims."

Practice Exercise: Liability Concepts Affecting Tort Claims

Three drivers were all speeding during the evening rush hour, between fifty and sixty miles per hour. They were on a two-lane road with a thirty-five-mile per hour speed limit, in sleet that was causing icing on the road. The first driver in front of the line of drivers, Annie, slammed on her brakes when she saw a runner in front of her on the edge of the road. She could have missed hitting the runner, but the second driver in line, Burt, slid into Annie's car; and the third car, driven by Charlie, slid into Burt's car, so that Annie hit the runner, pushed by the impact of the other cars behind her. The runner suffered serious injuries, totaling $100,000 in damages, and sued all three drivers. The court determined that each driver was one-third at fault (for $33,333) for this accident and further determined that, had the three drivers not been speeding, they could have avoided this accident because the runner was not at fault. How might the concept of joint and several liability affect the outcome of the runner's lawsuit?

Answer

First, the court has determined that all three drivers were equally at fault and apparently found no fault on the runner's part. Additionally, the runner sued all three drivers and has not excused any one of them from fault. If joint and several liability exists in the state where the accident happened, then one driver could theoretically be liable for the full amount of damages, or $100,000, and not just for a proportionate share of $33,333. This possible outcome would be the same for all three drivers, each of whom would be responsible for the full award of $100,000. However, the runner has sued all three drivers, the court has determined equal fault on the part of each driver, and the runner would collect one-third of the $100,000 from each driver. If Annie proves to be insolvent and uninsured, and Charlie and Burt have sufficient assets or insurance, the runner could collect $50,000 each from Charlie and Burt.

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SUMMARY

Negligence is a broad term used for unintentional torts. Describing negligence involves an understanding of two of its aspects: the elements of negligence (including duty, breach of duty, proximate cause, and actual injury or damage) and the required proof of negligence.

A defendant in a negligence lawsuit has the burden to prove any defenses, including comparative negligence, releases and exculpatory clauses, immunity, statutes of limitations and repose, and tortfeasor's capacity.

A plaintiff can sue for harm caused by either natural or artificial conditions on land and can have had an express or implied license to be on the land as either a public or business invitee. Landlords occupying land have legally determined responsibilities with regard to others on the premises.

These torts are among the most common forms of intentional torts: battery, assault, false imprisonment and false arrest, intentional infliction of emotional distress, defamation (libel and slander), and invasion of the right of privacy.

These torts are among the most common forms of intentional torts: fraud, bad faith or outrage, interference with relationships between others, misuse of legal process, trespass, nuisance, and conversion.

Strict liability or liability imposed by a statute can attach, regardless of intent or negligence, if the liable party is engaged in an ultrahazardous activity, owns or possesses animals, or allows escape of a toxic substance.

Most products liability suits are based on one or more of these principles of law: misrepresentation, breach of warranty, and strict liability and negligence.

Courts award nominal damages only to establish a right. However, when a plaintiff proves tort damages, courts award two broad categories of monetary damages: compensatory and punitive damages. Courts also award damages for wrongful death.

These liability concepts affecting tort claims focus on the parties who can sue and those parties who are potentially liable in lawsuits: joint tortfeasors, expanded liability concepts, vicarious liability, Good Samaritan issues, and class actions and mass tort litigation.

ASSIGNMENT NOTES

1. *Scott v. Shepherd*, 96 Eng. Rep. 525 (1773).
2. 28 U.S.C., §§ 2671–2680.
3. Sullivan v. New York Times, 376 U.S. 254 (1964).
4. *Rylands v. Fletcher*, 1 Eng. Rul. Case 235 (1868).
5. *Henningsen v. Bloomfield Motors Inc.*, 32 N.J. 358 (1960).
6. UCC, § 2-314.