

UNIT 3

Torts

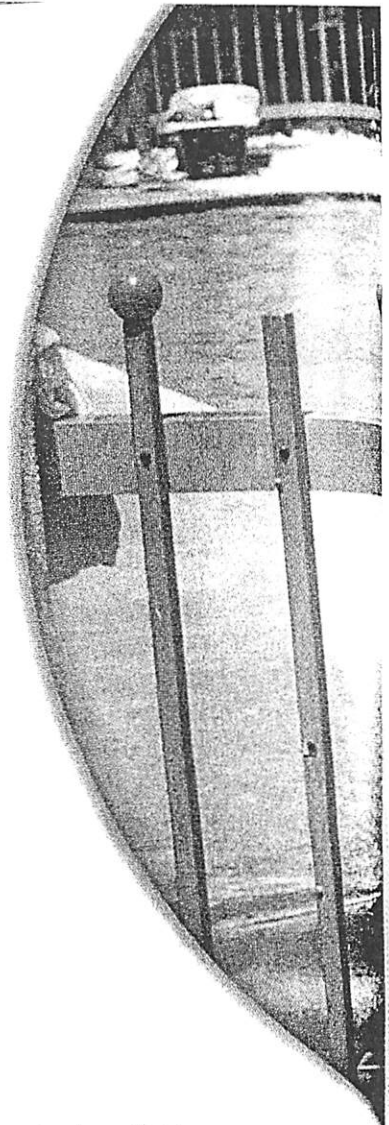


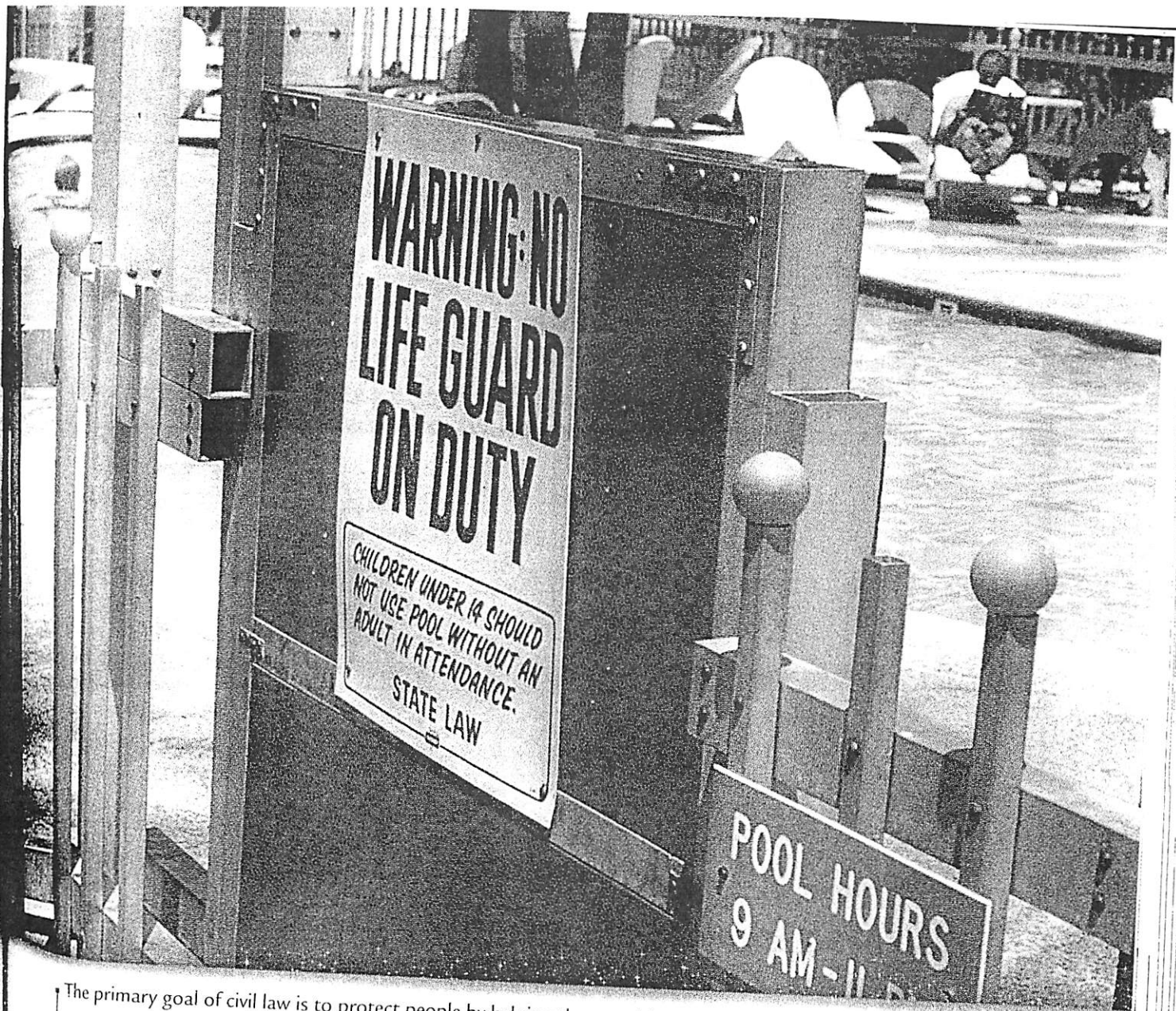
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When people think about the law, they often think about the police and about criminal law in general. As you already know, criminal law tells people what they cannot do and what punishment will be given out by the state if they are convicted of breaking the law. Most law, however, is not criminal law but civil law. The primary goal of civil law is not to punish but to protect people by helping them avoid problems and resolve disputes.

In this unit, you will study torts—the largest area of civil law. Tort law encourages people to act responsibly by awarding money or damages to victims who are harmed by wrongdoers. While tort law cases can be resolved by lawsuits, far more are settled without going to court. The mediation, negotiation, and arbitration skills you learned in Chapter 4 are frequently used to settle tort cases. Studies have consistently found that more than 90 percent of tort cases are settled without going to trial.





The primary goal of civil law is to protect people by helping them avoid problems and resolve disputes.

Tort law will help you learn about:

- your obligations as a babysitter;
- whether your younger brother or sister can be sued for pulling a chair out from under a friend and causing injury;
- what kind of insurance you need;
- your rights if you are injured on the job;
- whether you can recover money damages if you fall into a neighbor's unfenced swimming pool and are hurt;
- what steps you can take to protect your rights regarding an invention;

- whether you can recover money damages if you are bitten by a neighbor's dog; and
- your rights if you are injured by a consumer product.

Tort law also deals with some of society's most controversial issues. For example, should cigarette manufacturers who place a warning on cigarette packages be required to pay damages to a smoker who develops lung cancer as a result of smoking? Should gun manufacturers be required to pay damages to a youngster injured by a gun that did not have a safety lock?

CHAPTER 18

Torts: A Civil Wrong

"Torts are concerned with the allocation of losses resulting from the activities of people. It is an attempt to balance the utility of a particular type of conduct against the harm which it may cause, judged by the prevailing social and economic attitudes of the time."

— Legalines

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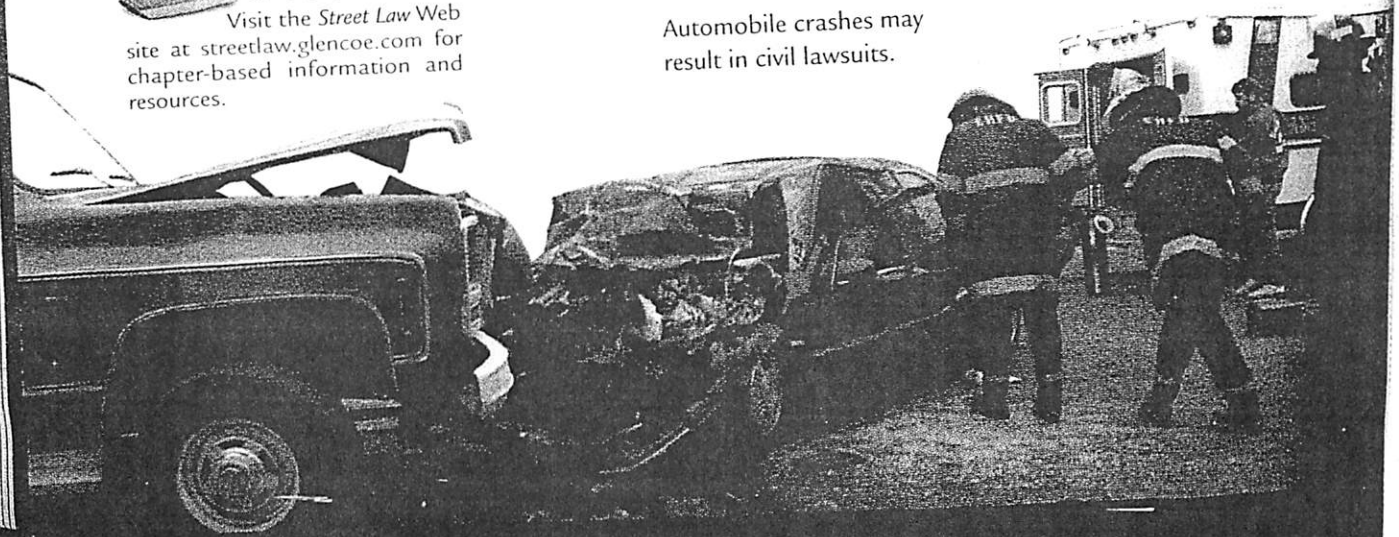
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In criminal law, when someone commits a wrong, we call it a crime. In civil law, when a person commits a wrong, it is called a **tort**.

A crime is considered a wrong against all of society, even though there is usually a specific victim. The criminal is prosecuted and punished by the state. By contrast, civil law deals with wrongs against individuals. A harmed individual becomes the **plaintiff** in a civil lawsuit. The plaintiff seeks to win a **judgment** against the **defendant**, or accused wrongdoer. A defendant who loses the judgment in a civil case will not be punished with jail or other penalties associated with criminal law. Instead he or she will be ordered to compensate the plaintiff for injuries, usually by paying monetary **damages**.

Although a tort and a crime are two different legal issues, the same illegal activity can be both a crime and a tort. For example, a person who breaks into a house has committed a crime and can be prosecuted by the state. If the same person causes damage to the house or steals property, a tort has also been committed, and the victim may sue to recover monetary damages.

Automobile crashes may result in civil lawsuits.



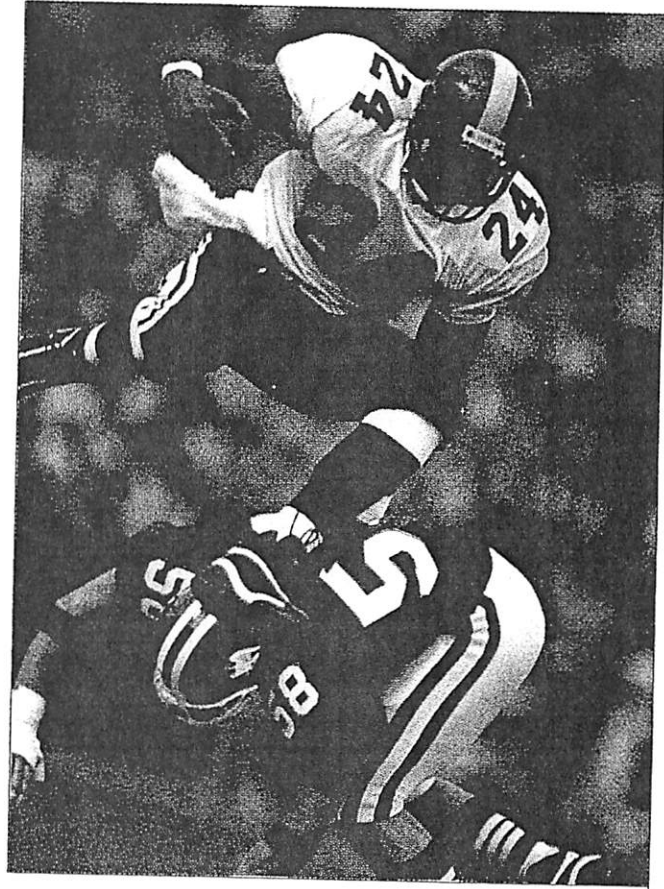
The Idea of Liability

The rules that govern civil wrongs are called tort law. Tort law deals with basic questions such as (1) who should be responsible, or **liable**, for harm caused by human activities, and (2) how much should the responsible person have to pay. Almost any activity—driving a car, operating a business, speaking, writing, or using property—can be a source of harm and therefore of tort liability. Knowledge of torts can help people resolve their conflicts, often without going to court.

For practical purposes, a tort occurs when one person causes injury to another person or to another's property or reputation. The injured party, the plaintiff, can take the alleged wrongdoer, the defendant, to court. Tort law provides the injured party with a **remedy**, something to make up for the harm done. This usually takes the form of monetary damages. For example, a person injured in an auto crash might receive \$5,000 for physical injuries and damage to his or her vehicle. So, one purpose of tort law is to compensate people for what was lost. However, not all injuries result in compensation. A person may be injured in an accident through no fault of another person. In such cases, tort law generally provides no remedy.

Tort law also establishes standards of care that society expects from people. Simply put, the law requires us to act with reasonable care toward people and their property. Failure to exercise reasonable care may result in legal liability. The person harmed may sue the person who acted unreasonably for damages. Requiring payment of damages is intended to prevent future injuries and losses and to encourage more reasonable behavior.

Whenever a person is injured, *someone* will bear the cost of the harm. Broken bones will create medical bills that must be paid. A hospitalized person will miss work and lose earnings. Damaged property will cost money to repair. Less tangible costs, such as emotional suffering, may also be a cost of an injury. Tort law is concerned with determining who will pay. When a person either purposely or through carelessness causes injury to another, society usually thinks that the wrongdoer, rather than the victim, should bear the cost of the harm. However, sometimes an injury is partially or entirely the fault of the victim or nobody is at fault, as in the case of true accidents. In such cases, the victim will usually have to bear the costs of the injury.



The question of liability is not always clear when athletes are injured during participation in a sports event. *Why does tort law provide no remedy for this type of situation?*

Problem 18.1

Read the following descriptions. Each case involves an injury. Assume that a civil suit is brought by the injured person. For each case (1) identify the plaintiff and the defendant or defendants, and (2) determine whether the defendant should pay for the plaintiff's damages. Explain your answers.

- a. Sixteen-year-old Carrie is babysitting for four-year-old Jill. Carrie leaves Jill in the living room and goes into the kitchen to call her boyfriend. From the kitchen she can hear but not see Jill. While Carrie is away, Jill falls off a chair and is hurt.
- b. Ben, a high school football player, tackles a teammate in practice. When the teammate hits the ground, his shoulder is dislocated.
- c. Mr. Ghosh owns a large apartment building. When his janitors wax the lobby floor, they place near the front door a 12-inch-square sign that reads: "Caution. Wet Floors." Mrs. Gonzalez is hurrying home from shopping carrying two large bags of groceries. She does not see the sign and slips and falls on the freshly waxed floor, injuring her knee and arm.
- d. Corina leaves a sharp knife on the kitchen table after making a sandwich. A three-year-old neighbor who has been invited over to play with Corina's daughter climbs up on a chair, grabs the knife, and seriously cuts his finger.
- e. Jamal, a school bus driver, has a heart attack while driving the bus. The bus slams into a wall, injuring several students. One month earlier Jamal's doctor had warned him of his heart condition.
- f. Matt and Emily are sitting in the upper deck behind first base at a major league baseball game. A foul ball hit by their team's star player bounces off a railing, smacking Matt in the head and giving him a concussion.
- g. Jess, an expert auto mechanic, continues to drive her car even though she knows that the brake linings are badly worn. Driving on a rain-slick road at night, she skids into a bicyclist who is riding one foot away from the right curb.

Liability—legal responsibility for harm—is not the same as moral responsibility. A person may be morally at fault for harming someone, but not civilly liable for the injuries. For example, assume you lie to a friend about the correct time, causing her to miss a job interview. As a result, she does not get the job. The lie would be morally wrong and would cause harm, but would not usually result in civil liability. In contrast, someone may be civilly liable for injuries to another without being morally at fault. For example, in strict liability cases the law makes certain parties bear the cost of injuries even though there is no proof of fault. (Strict liability is discussed in detail in Chapter 21.) However, moral fault is one of the many considerations that courts often look at in developing the law of torts and drawing up the rules of who will pay for injuries people suffer.

Tort law provides a legal process for injured persons to recover monetary damages from wrongdoers who cause them harm. The two parties can simply meet and discuss how to compensate the injured person. The agreement they reach is called a **settlement**. If, however, they cannot agree on compensation, or if the wrongdoer insists that he or she was acting reasonably when the injury occurred, then the injured party may decide to sue. In such instances, a trial may be conducted to decide the rights and liabilities of both parties.

Settlements are much more common than trials. Approximately 90 percent of tort cases filed in court are settled without a trial. For cases that do go to trial, there can be delays of a year or more between the time the case is filed in court and the trial.

The following example illustrates the tort law process. Evan claims that Martha shoved him, causing him to fall down a flight of stairs and break his leg. Evan wants \$5,000 from Martha to compensate for his injury. This dispute can be resolved in at least three different ways.

First, Martha could acknowledge that she acted unreasonably and agree to pay a settlement of \$5,000. However, a settlement does not have to be for the full amount demanded, and usually the amount is a result of a compromise between the two parties. Besides negotiating a settlement, other forms of dispute resolution could allow Martha and Evan to avoid a civil trial. (Methods for settling disputes are discussed in Chapter 4.)

Second, Martha could argue that she did not act unreasonably—that Evan did not act unreasonably—that Evan ran past her, bumped into her, and then tripped down the stairs—and refuse to pay any monetary damages. If Evan wanted to recover the money, he would have to sue Martha in court.

In a third scenario, Martha might admit nudging Evan a bit but claim that she should only have to pay \$4,000, because the \$5,000 Evan wants includes money for a subscription to cable television, a DVD player, and three DVDs that Evan bought when he was home in bed for two weeks. Here, the dispute is not about liability, but about the amount of damages. In this situation, Evan might accept Martha's \$4,000 offer, or he might sue Martha for \$5,000. However, there is risk in not accepting the \$4,000. If a court decides that Martha did not act unreasonably, then Evan might recover no damages at all!

Injured persons can be compensated by negotiating a settlement with the wrongdoer. What other methods could help the parties involved avoid a civil trial?



The Idea of Torts: Yesterday, Today, and Tomorrow

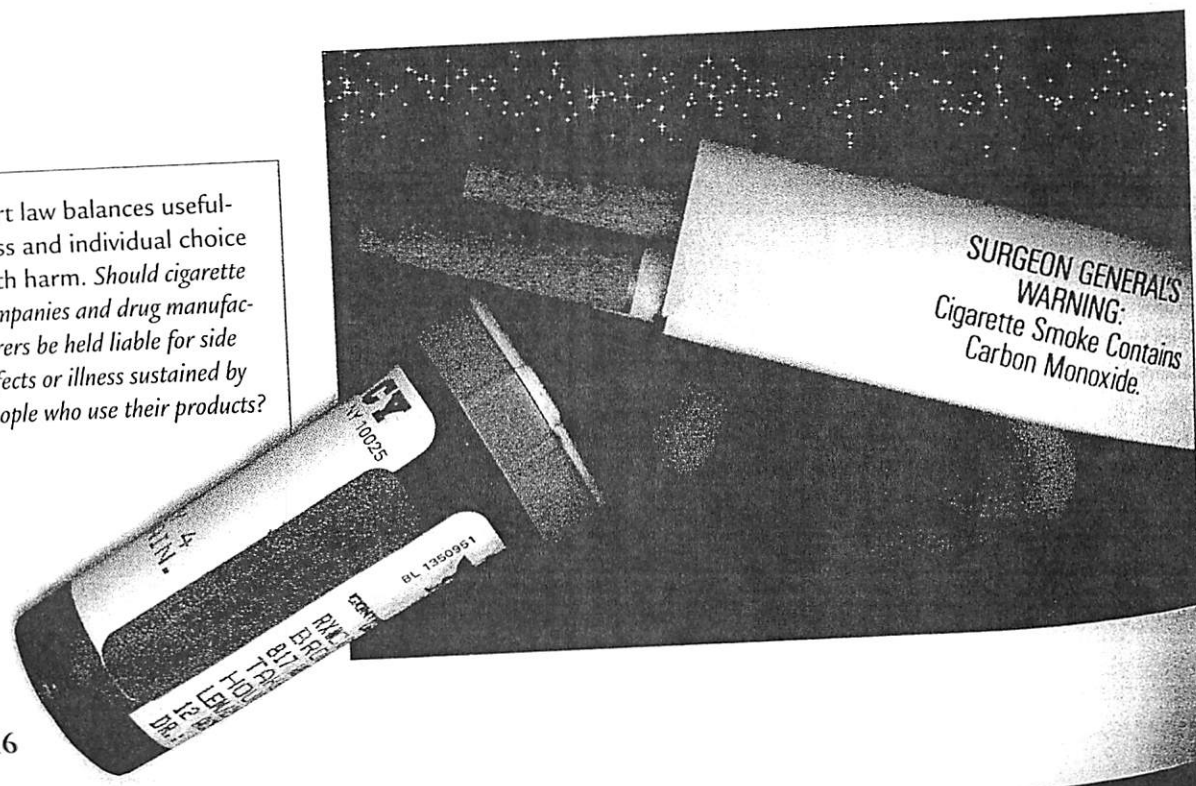
The concept of a tort is not new. Judges in England were deciding tort cases as far back as the fifteenth century. Tort law has always tried to weigh the usefulness of certain conduct against the harm that conduct might cause.

Tort law is generally based on **common law**. This is law made by judges through court decisions, generally in state appellate courts. These decisions are written down, and appellate decisions become precedents used to decide future cases. Tort law may also be based on **statutes**, or written laws. For example, in some states there is a law specifically providing that a person who is injured as a result of someone furnishing alcohol to a minor may be awarded damages in civil court. The damages are paid by the person who served the alcohol to the minor. In other states, this same law exists as a result of an appellate court decision, rather than the passage of a statute.

There are a number of specific torts, which are described later in this chapter. There is also a saying that "for every interference with a recognized legal right, the law will provide a remedy." If you can convince a judge that you deserve compensation for some injury, you may occasionally be able to recover damages without fitting your case into an existing category of tort protection.

Tort law balances usefulness and harm. For example, how safe must a drug be before the manufacturer is not considered legally responsible if the drug harms somebody? If a drug is discovered that saves the lives of many cancer patients but causes the deaths of others, should the drug manufacturer be liable for the deaths?

Tort law balances usefulness and individual choice with harm. Should cigarette companies and drug manufacturers be held liable for side effects or illness sustained by people who use their products?



The Lung Cancer Death

Mrs. Garrett dies of lung cancer at the age of 42. Her family brings a civil suit against ABC Tobacco Company, the manufacturer of the cigarettes she had smoked daily for the previous 20 years. Her doctors say that cigarette smoking was the major factor leading to her death.

Problem 18.2

a. If you were the Garrett family's attorney, what arguments would you make at the

trial? What evidence would you want to introduce?

b. If you were the attorney for the ABC Tobacco Company, what arguments would you make for the company? What evidence would you want to introduce to support your arguments?

c. If you were the Garrett family's attorney, would you want a judge or a jury to decide this case? Why?

d. Assume that each package of ABC cigarettes carries the following warning: "Caution: Cigarette smoking can be harmful to your health." How should this case be decided? Give reasons for your decision.

Tort law also tries to preserve individual choice. When the mandatory government warning about the dangers of smoking is prominently displayed on the package, adults are permitted to purchase cigarettes. This product may be more harmful than useful. However, some people argue that letting adults purchase cigarettes preserves their individual choice and that the warning allows the individual to make an informed choice. Others criticize this government decision and argue that the sale of cigarettes should be restricted or banned.

Tort law is often at the forefront of public controversy in the United States. It is closely related to economic and political policy decisions, as well as legal policy decisions. As you will see throughout this unit, tort cases often involve a clash of values and interests. Arriving at fair solutions is rarely easy.

Types of Torts

Tort liability exists for three major categories of conduct: intentional wrongs, acts of negligence, and activities for which strict liability is imposed. An **intentional wrong** occurs when a person acts with the intent of injuring a person, his or her property, or both. For example, Ali is angry at Tom, so he intentionally smashes the windshield of Tom's car. Tom may sue Ali to recover the cost of the damage to his windshield. In another example, Lucy writes a letter telling her friends

that Andrew is an alcoholic and a drug addict, even though she knows this is not true. Andrew may recover damages from Lucy for harm to his reputation caused by her intentional lie.

Intentional torts may also be crimes. In these cases, the defendant can be prosecuted by the state as well as sued by the plaintiff. However, punishing a criminal does not usually make up for the harm to the victim. A civil tort action is used to recover monetary damages.

The most common tort is negligence. **Negligence** is an unintentional tort. It occurs when a person's failure to use reasonable care causes harm. If a drunk driver accidentally hits a pedestrian, the driver is negligent. Although the driver did not intend to hurt the pedestrian, he acted unreasonably in driving drunk and will be liable for the harm caused to the pedestrian.

Strict liability differs from both negligence and intentional wrongs. It applies when the defendant is engaged in an activity so dangerous that there is a serious risk of harm even if he or she acts with utmost care. In a strict liability case, a plaintiff is not required to prove that the defendant was either negligent or intended to cause harm in order to recover damages. For example, suppose you are hit by a brick falling from a building being demolished. In this case, you do not have to prove that the contractor was careless in order to recover damages. Demolishing buildings is so dangerous that contractors are automatically responsible if a passerby is injured. Three groups of people face strict liability: (1) owners of dangerous animals, (2) people who engage in highly dangerous activities, and (3) manufacturers and sellers of defective consumer products.

Not all injuries to you or your property will lead to a recovery under tort law. In some instances, harmful behavior may not be a tort. In other cases, the person causing the harm may have a legal defense to a tort action. In still other cases, the defendant may be liable, but may simply be unable to pay for the harm caused to the plaintiff.

Problem 18.3

Carefully examine each of the following situations and determine whether a tort has been committed. If there is a tort, do you think it is an intentional wrong, an act of negligence, or an activity for which strict liability should be imposed? Give your reasons.

- a. José trips over his untied shoelace while running to catch a bus, breaking his ankle.
- b. Mr. Slifko buys a strong painkiller at the drugstore and takes the capsules according to the directions on the package. He has an extremely bad reaction to the drug and has to be taken to the hospital.
- c. Chen drinks too much alcohol at the office Christmas party. His supervisor, Ruth, advises him to take a taxi home, but he thinks he will be okay if he drives slowly. Not noticing a stop sign, he strikes and kills a pedestrian crossing the street.



Raking and burning leaves are common chores during the autumn months. *Suppose a gust of wind blows flaming leaves onto a neighbor's garage and sets it on fire. Has a tort been committed? Explain.*

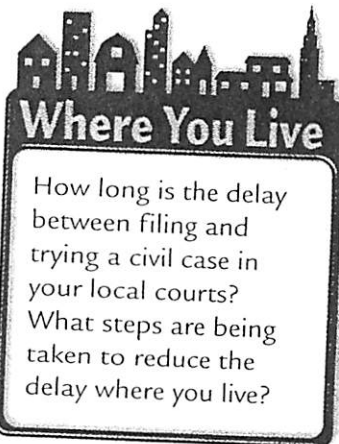
Taking Your Case to Court

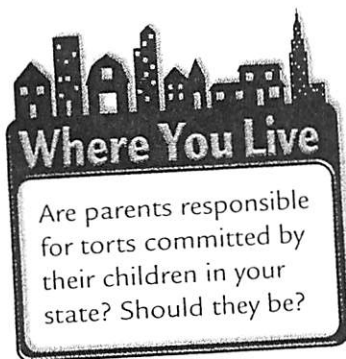
Tort law is **civil law**. Civil law deals with disputes between individuals or groups of individuals. In a civil case, the injured party may sue the party who caused the damage. This differs from criminal law, in which the state brings charges against the accused. Criminal law deals with actions that are defined as crimes against the general public, even if there is an individual victim.

In some situations, an act can be both a tort and a crime. This may lead to two separate actions—civil and criminal—against the defendant. For example, Chen (Problem 18.3 on the previous page) may be sued for driving while intoxicated and killing a pedestrian. Chen may also be charged with the crime of negligent homicide or manslaughter for his actions.

The criminal case will be brought by the state, which must prove beyond a reasonable doubt that Chen was guilty. This is called the **standard of proof**. It is the amount of evidence the prosecutor must present in order to win the case.

The victim's family may also sue Chen in civil court. In the civil case, the victim's family will attempt to recover damages for the wrongful death. The civil court will use **preponderance of the evidence** as the standard of proof. This standard requires that to win, more than 50 percent of the weight of the evidence be in the plaintiff's favor. The civil standard is easier to meet than the criminal standard. This is appropriate, because the penalties for those found liable in a civil action are less severe than the penalties for those found guilty of a crime. A person does not go to jail for committing a tort, but instead pays damages to those injured.





Who Can Be Sued?

Almost anyone can be sued, including individuals, groups of individuals, organizations, businesses, and even units of government. Plaintiffs sometimes sue several different defendants at once. Typically, plaintiffs try to sue a defendant who has enough money to pay for the damages. This is called looking for a defendant with “deep pockets.” For example, suppose you slip on a wet rag that the janitor left on the floor of a local restaurant. You break your leg as a result of the fall. You will probably sue the restaurant owner rather than the janitor because the owner will usually have deeper pockets—more money—from which to pay monetary damages.

People can sue employers for torts committed by employees in the course of their employment. The reason for this rule is that the employer is usually in a better position than the employee to handle the cost of the suit. The employer may purchase liability insurance or raise prices, for example. In addition, imposing financial responsibility on the employer encourages employers to be very careful when hiring, training, and supervising employees.

Children who commit torts may also be sued for damages. To recover damages from a **minor**, you have to prove that the child acted unreasonably for a person of that age and experience. Because most children do not have very deep pockets, plaintiffs also often sue the

The Case of . . .

The Spilled Peanut Butter

Mr. Grant is in Foodland Supermarket doing the weekly grocery shopping. His four-year-old daughter Jenny is seated in the shopping cart. As they pass a large peanut butter display, Jenny reaches out and pulls a jar off the shelf. The display collapses, and a dozen jars come tumbling down. Some of the jars break, spreading peanut butter and glass all over the floor. Mr. Grant scolds Jenny severely as he wheels her down the aisle.

Ten minutes later, Mrs. Hightower slips and falls on the peanut butter. She breaks her hip in the fall and suffers several deep cuts from

the broken glass. Because she is elderly, the hip injury develops complications and may never heal properly.

Problem 18.4

- Whom should Mrs. Hightower sue for damages? Why?
- Which possible defendant is likely to have the deepest pockets?
- Who, if anyone, was at fault in this case? Give your reasons.
- What methods other than a civil trial could the plaintiff use to deal with this situation? How would these methods work? (Refer to Chapter 4 and the information on settling disputes.)

child's parents. For example, assume a child leaves toys on the front step, injuring a visitor who trips on them. The visitor may sue the parents and try to prove that they were negligent in failing to supervise their child.

Certain defendants are **immune**, or protected, from some kinds of tort suits. In some situations, society has decided that for public policy reasons certain groups of people should not be sued, even though their conduct may have been improper. These immunities involve suits within families and against governments and certain government officials. Generally, courts do not allow children to sue their parents or vice versa. Historically, courts have also refused to allow husbands and wives to sue each other in tort actions. This was because of the traditional idea that the husband and wife were one legal entity! Times change and so do tort laws. Today many states allow husbands and wives to sue each other for certain torts. Even where these intrafamily immunities remain, brothers and sisters may be able to sue each other in civil actions.

The federal and state governments are also immune from tort liability unless they **waive**, or give up, this immunity. The notion of government immunity comes from England, where there was a tradition that "the king can do no wrong." Today the federal government, through the *Federal Tort Claims Act*, has agreed to be held liable in civil actions for negligent acts or omissions by government employees. While the *Federal Tort Claims Act* does not allow citizens to sue the federal government for most intentional torts, other laws may allow citizens to recover damages from the federal government for intentional violations of their rights.

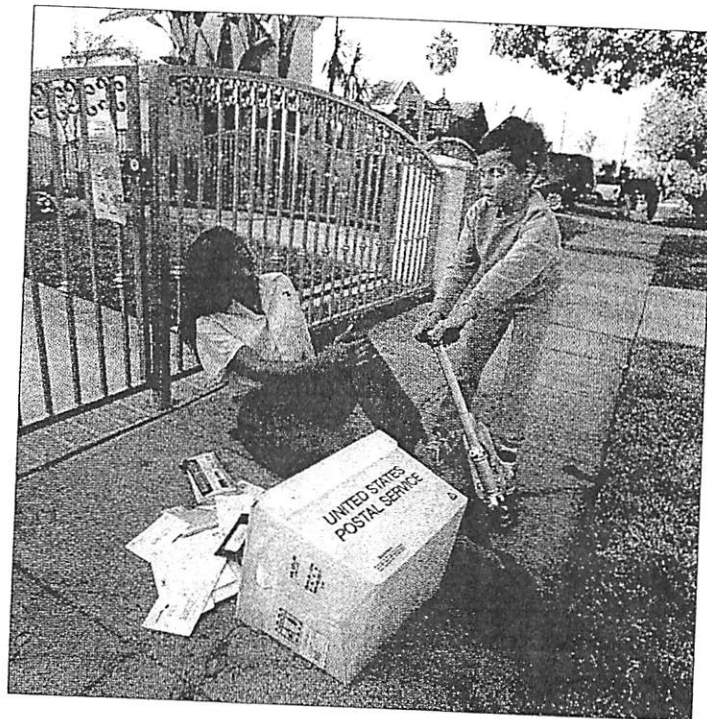
The president, federal judges, and members of Congress are completely immune from tort liability for acts carried out within the scope of their duties. However, in the 1997 case of *Clinton v. Jones*, the U.S. Supreme Court found that the president was not immune from being sued while in office for a tort he allegedly committed before he was president. Other high-ranking officials, including members of the cabinet and presidential aides, have qualified immunity, meaning that they can be sued only if they knew or should have known that their acts were violating the legal rights of another person.

Sometimes there can be more than one plaintiff or injured party. In some cases, hundreds of people may be injured by one action. When this happens, the injured parties may be able to

Where You Live

Can a minor child sue a parent in your state? Can spouses sue each other for torts? Should any of these laws be changed in your state? If so, how?

Children who commit torts may be sued for damages. How are parents often involved when their child commits a tort?



form a “class” and bring their lawsuit together. This is called a **class action**. For example, if an entire town gets its drinking water from the same source and a company pollutes the water, the townspeople may get together and file a class action suit against the company. The settlement or damage award will be divided among the townspeople who bring the suit.

A class action lawsuit can also be filed to recover damages from an economic injury. For instance, in 2003 music CD distributors and retailers settled a lawsuit in which they were accused of agreeing to inflate and fix the price of CDs above what was fair to consumers. Consumers who paid too much for music CDs were entitled to collect a rebate for the amount they overpaid.

Individuals wishing to file a tort action should hire an attorney to file the legal papers, negotiate with the other side, and, if necessary, represent them at the trial. Some plaintiffs’ lawyers will work for a **contingency fee**. This means the lawyer does not charge the client an hourly fee. Rather, the lawyer receives a portion of the recovery—typically between 30 and 40 percent—if the plaintiff wins. If the plaintiff loses, the attorney does not receive a fee. This arrangement allows a person who might otherwise be unable to afford an attorney to be represented by counsel in a tort action. The contingency fee is, of course, something of a gamble for the attorney. Lawyers rarely agree to this arrangement unless the plaintiff has a very strong case.

The Case of . . .

The Airline Explosion

On December 21, 1988, a bomb was smuggled onto an international flight from Frankfurt, Germany, to New York City. The flight carried 259 passengers, many of them students returning from a European trip, along with a crew of 11. The bomb exploded over Lockerbie, Scotland, killing everyone on board.

Problem 18.5

- Could the families of those who died bring a class action? Explain.
- Who are the possible defendants in this case?
- Which defendant, if any, should be held liable for the deaths?



Surveying the wreckage

- How much should a family receive in damages for the wrongful death of a loved one? Explain your answer.

The Steering Wheel Failure

Sarah buys a new car at Town and Country Motors. Just before her first scheduled maintenance visit (at 3,000 miles), she hears an odd noise coming from her steering wheel. She tells the service manager about the sound, and he notes it on the work order. After picking up the car the next day, she has a serious accident when the steering suddenly fails. The car is totaled, and her medical bills from the accident come to more than \$30,000.

Problem 18.6

- a. Could Sarah bring a civil action? Who are the potential defendants in this case?
- b. Who do you think would win? Why?
- c. Should Sarah hire a lawyer on a contingency-fee, hourly, or fixed-fee basis? Explain your reasoning.
- d. What methods other than a civil trial could the plaintiff use to deal with this situation? How would these methods work? (Refer to Chapter 4 and the information on settling disputes.)

The contingency fee may not always be a good arrangement for the plaintiff. For example, a lawyer may be able to negotiate a large settlement with an insurance company without even filing a case in court. In such a case, it may be better for the plaintiff to hire a lawyer on an hourly basis or for an agreed-upon, overall fixed fee.

Insurance

Americans buy billions of dollars of liability insurance every year so that when an accident occurs, the injured party can recover money from the wrongdoer's insurance company, not from the wrongdoer. While insured persons must sometimes go to court, most tort cases between insurance companies and injured persons are settled without resorting to a trial.

Liability insurance is a **contract**, or agreement. The insured person agrees to make payments—known as **premiums**—to the insurance company, and the company agrees to pay for damages caused by the insured persons for the length of the contract. Insurance companies set a limit on how much they will pay. Usually the contract also requires the insurance company to provide an attorney to defend the insured person in court.

Most doctors, lawyers, and other professionals carry liability insurance to protect themselves against **malpractice** suits. These are lawsuits brought by clients or patients who claim that a professional person provided services in a negligent manner. Plaintiffs in malpractice cases sometimes win verdicts or settle for large sums of money—sometimes millions of dollars. Without liability insurance, doctors and lawyers would be personally liable for these verdicts.

Manufacturers often carry liability insurance to protect against lawsuits brought by customers injured when using the manufacturers' products. For manufacturers and professionals alike, the cost of insurance is usually added into the price of their products or services. This allows them to spread the costs of insurance among all of their customers or clients.

Home owners and renters may also carry liability insurance. These policies typically provide coverage for loss and damage to the insured person's property. For example, if your property is taken during a burglary, you can ask the insurance company for money to replace the stolen items. This is usually more practical than trying to sue the burglar for the value of the items.

While many different types of liability insurance exist, very few insurance policies cover intentional harm caused by the insured person. Therefore, a home owner's insurance policy will not pay damages if the home owner assaults a guest.

Insuring a Car

Auto insurance is the most important liability insurance for young people. In 2001, approximately 6.3 million automobile accidents resulted in more than 42,000 deaths—41 percent of which involved alcohol—and over 3 million injuries. These accidents caused more than \$230 billion in losses. So it is not surprising that most states require drivers to carry insurance and that many drivers purchase more insurance than their state requires.

Auto insurance protects you by promising to pay for certain possible losses. Insurance can pay for the cost of repairing your car, medical bills, lost wages, and pain and suffering arising from injury.

Health insurance is an important financial issue for some people. Why do people purchase insurance?

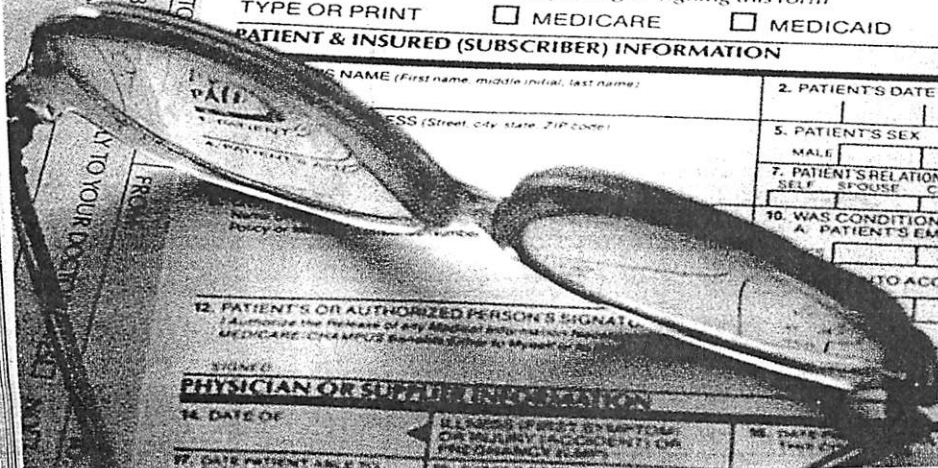
MEDICARE SUPPLEMENT CLAIM FORM

HEALTH INSURANCE CLAIM FORM

Read instructions before completing or signing this form
 TYPE OR PRINT MEDICARE MEDICAID CHAMPUS OTHER

PATIENT & INSURED (SUBSCRIBER) INFORMATION

1. LIST ALL NO. INSURE		2. PATIENT'S DATE OF BIRTH		3. INSURED'S NAME (First name)	
4. ADDRESS STREET		5. PATIENT'S SEX MALE <input type="checkbox"/> FEMALE <input type="checkbox"/>		6. INSURED'S I.D. MEDICARE AND/OR	
7. DATE OF MONTH		7. PATIENT'S RELATIONSHIP TO INSURED SELF <input type="checkbox"/> SPOUSE <input type="checkbox"/> CHILD <input type="checkbox"/> OTHER <input type="checkbox"/>		8. INSURED'S GROUP NO. TO	
9. IN/HOSP NAME		10. WAS CONDITION RELATED TO A. PATIENT'S EMPLOYMENT NO <input type="checkbox"/> YES <input type="checkbox"/>		11. INSURED'S ADDRESS/ST	
11. DID MEDICARE PAY B IF YES, DOCTOR'S NA		12. PATIENT'S OR AUTHORIZED PERSON'S SIGNATURE		13. I AUTHORIZE PAYMENT OF PHYSICIAN OR SUPPLIER	
14. DATE OF		15. I AGREE TO RELEASE OF LIABILITY FOR ACCIDENTS OR PRE-EMERGENCY CARE		16. HAS PATIENT EVER	

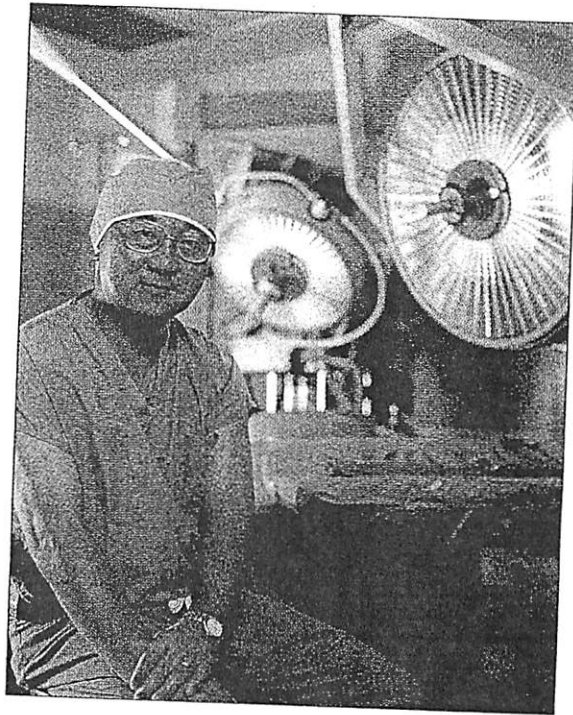


The Expensive Insurance Premium

Dr. Sam Akiba, a surgeon, complains that he must pay \$100,000 each year in premiums for adequate malpractice insurance. This insurance protects him against having to pay claims made by a patient or a patient's family in the event that the patient suffers injury or death due to a medical error during surgery.

Problem 18.7

- What might happen to Dr. Akiba if he did not carry malpractice insurance?
- Why do you think Dr. Akiba's insurance premium is so high?
- Who pays the cost of Dr. Akiba's insurance?
- What action or actions can be taken to lower these premiums?



A doctor at work

When you buy insurance, you can choose various coverage combinations. Coverage depends on the kind of protection you want and how much you can afford to pay. Common kinds of coverage include liability, medical, collision, comprehensive, uninsured motorist, and no-fault.

Your liability insurance pays for injuries to other people and property if you are responsible for the accident. It may also include representation in court by the insurance company's attorneys or payment of your legal fees. Liability coverage pays for damages up to, but not more than, the limits listed in your policy. If injuries and property damage are greater than the policy limits, you will have to pay the difference.

Liability policies generally have three limits on how much a person can collect: (1) a limit on injuries per person, (2) a limit on total injuries to all persons involved in the accident, and (3) a limit on property damage per accident. For example, a "100/300/50" policy would pay up to \$100,000 per person for personal injury, \$300,000 per accident for all personal injuries, and \$50,000 per accident for property damage. Sometimes an injured person brings a lawsuit against the driver or car owner responsible for the injuries. Because the

damages in these cases can be very high, you should give careful consideration to how much insurance you want to carry. For example, a \$50,000 limit on injuries per person might be far less than the damage incurred in a serious accident. If you were negligent, you would be liable for the amount in excess of your insurance policy limit.

Your **medical coverage** pays for your own medical expenses resulting from accidents involving your car or the car you are driving. It also pays for the medical expenses of any passengers in your car, no matter who is at fault. The amount of medical benefits and the kind of medical costs covered, such as hospital bills and office visits, are limited in the policy. For example, medical coverage may be limited to \$100,000 per person injured. This amount is usually in addition to the coverage you receive through your health insurance.

Your **collision coverage** pays for damage to your own car, even if the accident was your fault. Collision coverage usually pays up to the actual value of the car, but not for its replacement with a new car. You can lower the cost of collision insurance by including a **deductible**. This is an amount that you agree to pay toward repairs before the insurance company pays anything. For example, a \$100 deductible means that if your car has \$250 in damages, you will pay \$100 and the insurance company will pay the remaining \$150. The higher the amount of the deductible, the less expensive the collision insurance.

Problem 18.8

You have an eight-year-old car with a market value of only \$4,000. The annual cost of collision insurance is \$500. If your state does not require collision insurance, should you continue to purchase it? Give your reasons. Should you carry liability insurance? Explain.

The Case of . . .

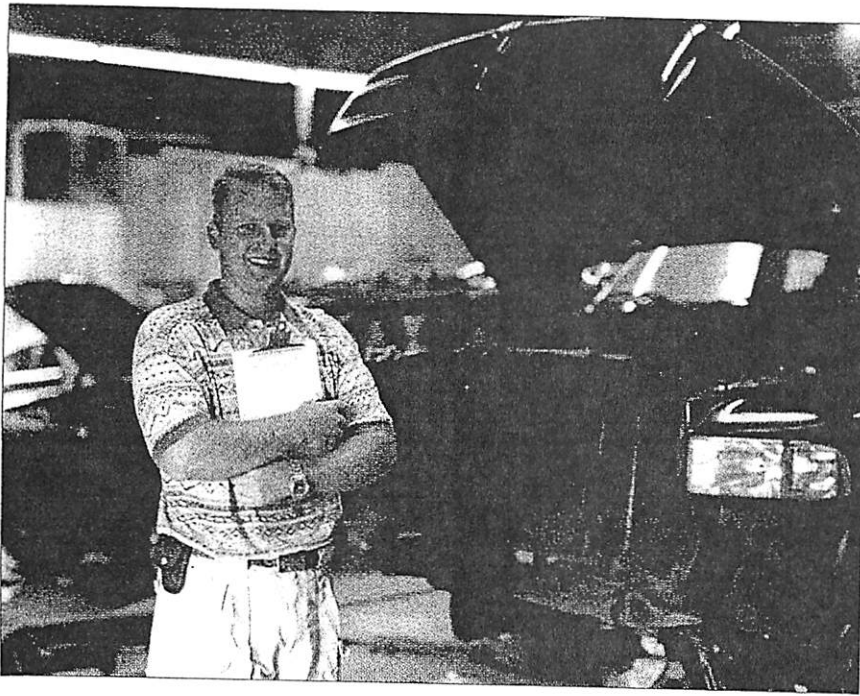
The Nonstop Car

Pulling left into the outside lane to pass a slow-moving truck, Terrell saw the traffic light ahead turn yellow. "If I step on it, I'll make this light," he thought. He speeded up, exceeding the limit slightly. Just then an oncoming car made a left turn in front of him. Terrell hit the brakes, but it was too late. A few seconds later, pinned against the steering

wheel, he saw the other driver, Candace, stagger out of the car, bleeding and holding her shoulder in pain.

Problem 18.9

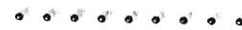
- Who should be responsible for the medical and car repair bills resulting from this accident?
- In most cases, who pays for repairs resulting from auto accidents?



Some auto insurance companies have a preferred list of authorized repair shops they want their policyholders to use. *What is a deductible? How does it work?*

Where You Live

❶ What type and amount of auto insurance does your state require? Is there a law dealing with uninsured motorists? What does it provide? How much does auto insurance cost for high-school-age drivers in your state? Is there a discount for taking driver's education? Does the rate differ depending on the driver's age, the driver's gender, and the type and home location of the car? Are there criminal penalties in your state for failing to have insurance?



❷ Is there a no-fault insurance law in your state? If so, how does it work?

Your **comprehensive coverage** protects you against damage or loss to your car from causes other than collisions. For example, comprehensive coverage includes damages due to vandalism, fire, or theft. Read your policy carefully to determine whether valuables in your car, such as a CD player, are covered in case of theft. Insurance policies sometimes include—usually at an extra charge—coverage for towing or car rental costs.

Your **uninsured motorist coverage** protects you from other drivers who do not have insurance or do not have enough insurance. It does this by paying you for the personal injuries or damage they cause. Be sure to find out how much your policy pays for personal injuries caused by uninsured motorists and whether it pays for damages to your car. Uninsured motorist coverage is usually an inexpensive and worthwhile addition to your policy.

Only a few states have **no-fault insurance**. If you have no-fault insurance, your own insurance company will pay up to a certain amount for injuries you receive in an accident, regardless of who is at fault. In exchange for this payment, you typically have to waive your right to sue the other party to recover any damages. Notice the difference between no-fault and liability insurance. With liability insurance, your company pays the other driver only if you were at fault, whereas no-fault laws may allow settlement of such claims without the delay and expense of determining fault in a court case. Some people criticize no-fault benefits because they are limited to a certain amount of money and usually cover only personal injuries but not damages to your car. However, when damages are higher than the no-fault limits, the injured person may be able to sue the other party.

Problem 18.10

Reread The Case of the Nonstop Car on page 226. Assume that the accident happened in a state without no-fault insurance and that both Terrell and Candace had insurance coverage. Each had a policy covering all types of losses and including a \$250 deductible for collision insurance. Also assume that Terrell was at fault.

- a. Whose insurance company would pay for Candace's hospital and car repair bills?
- b. Whose insurance company would pay for Terrell's hospital and car repair bills?
- c. What do you think would happen if the damages to Candace and her car were greater than the limits of Terrell's policy?
- d. If the damages were less than the policy's limits, would Terrell have to pay any money to get his car fixed?

Workers' compensation systems can restrict the recovery of damages if the accident is the result of an employee's refusal to follow safety rules. *Should workers' compensation pay for the injury if the worker without the hard hat is injured?*

Workers' Compensation

Every state has a workers' compensation system that operates to automatically compensate, or pay, employees who are injured on the job. Employers make regular contributions to a state fund or buy insurance for this purpose. Workers are compensated for injuries that occur in the course of their employment. However, they do not have to go to court to prove that their employer was at fault. Workers also receive a portion of their salary while they are recovering and unable to work. Many states provide employees with two-thirds of their regular salary. In exchange, the injured employee usually gives up the right to sue his or her employer. Accidents that occur while the employee is commuting to or from work are rarely covered.



NOTICE

**HARD HATS
MUST BE WORN
IN THIS AREA**

Unlike the plaintiffs in typical tort cases, workers can usually recover monetary damages for their injuries even if they were negligent. However, workers' compensation statutes generally deny recovery when the accident was caused by the employee's intoxication. In addition, nearly half of the states either reduce or prohibit recovery when a worker's refusal to follow safety rules caused the accident. For example, a welder who is blinded on the job after ignoring repeated warnings to wear safety goggles would not be able to recover money under workers' compensation statutes in some states.

The amount of money awarded for a specific injury is limited according to a schedule the state determines. The schedule sets the amount a worker can recover based on the seriousness of the injury, the amount of time the worker is expected to be out of work, and the worker's average weekly wage. Workers cannot usually recover additional damages from the employer through a civil tort action. This means that workers' compensation is the **exclusive remedy** for on-the-job injuries.

A worker who is injured on the job must notify the employer. Often the employer will ask a doctor to certify the injury. Then either the employer or the injured employee will file a claim. Once the claim is filed, the injured employee will regularly receive a workers' compensation payment, just like a paycheck. The payments will continue until the employee can return to work or recovers from the injury.

Many states have a workers' compensation commission that hears claims and decides how much money will be given to injured workers. If the commission decides that little or no money should be given, the injured person may appeal to a court.



Where You Live

Are all jobs covered by your state's workers' compensation system? What are the principal provisions of your state's law? How effectively and fairly does the system work?

The Case of . . .

The School Slip and Fall

Mrs. Braun is the art teacher at Central High School. Dale is a tenth-grade student. One afternoon the maintenance staff forgot to display a warning notice that the floors had been mopped and were wet. The stairway leading to the art studio was so slippery that Dale fell down the stairs, breaking his arm. Mrs. Braun was teaching an art class at the time. When she heard the noise of his fall, she ran out to see what was wrong. She, too, slipped on the wet floor and broke her ankle.

Problem 18.11

- Who is responsible for Dale's injury? For Mrs. Braun's injury?
- From whom can Dale recover damages? Is there a limit to the amount he can recover?
- From whom can Mrs. Braun recover damages? How will she recover these damages? Is there a limit to the amount she can recover?
- Why does the law treat these two injured people differently? Is this fair? Explain.

CHAPTER 19

Intentional Torts

“Torts’ more or less means ‘wrongs’ ... One of my friends [in law school] said that Torts is the course which proves that your mother was right.”

— Scott Turow, 1949
(American lawyer and author)

Small children have a natural understanding of what it means to act **intentionally**. When a mother scolds her child for breaking something, the child may plead, “But it was an accident. I didn’t do it on purpose!”

A person who plans to perform a certain act, and then does so, is said to have acted with intent. For example, a child who knocks a glass off the table on purpose does it intentionally. This is true even if the child genuinely hoped the glass would land softly on the rug unharmed, rather than shattering into many pieces.

Actions taken to deliberately harm another person or their property are called **intentional torts**. There are two general types of intentional torts: those causing injury to persons and those causing harm to property. In the law of torts, the required intent is to *do* the forbidden act—knocking the glass off the table—not a bad motive or a desire to cause harm.

 **Street Law**
online

Visit the *Street Law* Web site at streetlaw.glencoe.com for chapter-based information and resources.

Intentional torts are deliberate acts.



Types of Damages

A person who proves that someone else committed an intentional tort against him or her can recover damages to make up for the harm caused. These are called **compensatory damages** because the award compensates for harm caused by the defendant. For example, when Gus is punched and hit by Seth, he receives damages of \$6,000 to cover his hospital bills.

Compensatory damages can also include lost wages and pain and suffering. The plaintiff has to prove any future losses—such as medical bills, reduced or lost wages, and pain and suffering—with reasonable certainty. Juries decide how much money will fully compensate the injured person for pain and suffering.

In some cases, the plaintiff recovers only **nominal damages**, or a token amount of money awarded by the court to show that the claim was justified. These are symbolic awards of money that are paid even if the plaintiff is unable to prove economic harm. Nominal damages are awarded to recognize that the defendant acted wrongfully even though he or she did not cause substantial injury or loss. For example, suppose Juan slapped Matthew in a heated argument. In court, it is shown that even though Juan wrongfully slapped Matthew, Matthew suffered no serious injury. The court might award \$1 in nominal damages to Matthew.

The Case of . . .

The Mischievous Child

Jeremy, a five-year-old child, was playing in the backyard when his neighbor, an elderly woman named Helen, went outside to sit down. Jeremy pulled the lawn chair away just before Helen sat down. Helen was unable to catch herself and fell to the ground. As a result, she fractured her hip.

Although Jeremy did not intend to hurt Helen and did not believe she would be hurt, the child was aware that if he pulled the chair away as Helen was sitting down she would almost certainly land on the ground.

Problem 19.1

- a. Did Jeremy act intentionally? Is a five-year-old too young to act intentionally or to understand the significance of his actions?
- b. Did Jeremy cause Helen's fall? Explain your answer.
- c. Can Helen sue Jeremy and force him to pay for her injuries? Can she sue Jeremy's parents?
- d. Should it matter that Jeremy did not mean to hurt the woman?
- e. Would the legal outcome be different if the child had been running in the yard and tripped over the chair just as Helen was sitting down, resulting in the same injury to her? Explain your answer.

Punitive damages are amounts of money awarded to the plaintiff to punish the defendant for malicious, willful, or outrageous acts. Punitive damages serve as a warning to others not to engage in such conduct.

It is possible for both nominal and punitive damages to be awarded even where there is little or no actual harm that would justify compensatory damages. Suppose that Kate shoots a gun at Mark and misses him. This is an intentional tort. The court could award nominal damages (because there was no actual harm inflicted) and punitive damages (because Kate's act was so outrageous).

Sometimes people sued for intentional torts do not have to pay any damages at all, even though they did exactly what the plaintiff claims. In these instances, the defendant may have a legal defense.

Torts That Injure Persons

There are several acts that are classified as intentional torts causing injury to a person or persons. The following sections explain the five most common types of these intentional torts.

Battery

A **battery** occurs when a person intentionally causes a harmful or offensive contact with another person. The perpetrator is liable for all resulting damages, regardless of whether he or she wanted or expected the contact to cause injury. For example, Elaine became angry at Ravi and shoved him toward an open window. Although the shove was not hard, he fell backward through the window and suffered serious injuries. While Elaine did not want him to suffer such serious injury, she will be liable for damages if Ravi sues her for battery.

What is a harmful or offensive contact? Certainly a punch in the nose or a gunshot through the chest are harmful and offensive contacts. But what about an unwanted kiss on the cheek? The law considers offensive to be whatever would offend an average person in society. For example, most people would not be offended by a light tap on the shoulder accompanied by a pleasant "Excuse me, sir, do you have the time?" Such a touch would not be considered a battery, even if it somehow led to an injury.

Battery is one of the most common intentional torts. In what ways does the definition of battery help protect people's dignity from being violated?



Assault

The tort of **assault** occurs when a person goes beyond mere words and intentionally makes someone fear an immediate harmful or offensive contact. An assault can be an intentional threat, show of force, or movement that causes a reasonable fear. For example, if Jeb throws a rotten tomato at Colin's head, Jeb has committed the tort of assault, even if Colin ducks at the last instant and does not get hit. If Colin fails to duck and the tomato hits him, there has been both an assault and a battery. While battery requires a harmful or offensive contact, assault merely requires *fear* that a harmful or offensive contact is about to occur.

For assault to occur, the fear of harmful or offensive contact must be reasonable or well-founded. For example, assume Simon is sitting at a traffic light and Monica is crossing the street in the intersection in front of Simon's car. Monica suddenly becomes overwhelmed by a terrible feeling that Simon is going to step on the gas and run her over. As a result of this fear, she has a heart attack. There is no assault in this case, because Monica's fear was not reasonable. Also, Simon did not intend to make her fear an immediate harmful or offensive contact.

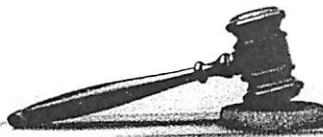
As the result of an assault, the plaintiff can recover compensation for mental disturbance, such as fright or embarrassment, along with any physical injury that directly results from the assault.

Problem 19.2

- a. Lenny is a successful—and very rich—bank robber. He is also careful not to harm bank tellers. In fact, he always uses weapons without bullets. Unfortunately for Lenny, he holds up one bank too many, and the police catch him. The day before he is caught he sticks an unloaded gun into the face of Cynthia, the teller at the Last National Bank. Cynthia wants to bring a civil suit against Lenny for assault. Will she be successful?
- b. The tort of battery can be committed against someone who is asleep or unconscious, but the tort of assault cannot. Explain.

Infliction of Emotional Distress

A relatively new tort is known as intentional **infliction of emotional distress**; courts have only recognized it since about 1940. A person commits this tort by intentionally using words or actions that are meant to scare someone or cause them extreme anxiety or emotional distress. Actual physical injury is not required for the plaintiff to recover damages. However, courts do require that the defendant's conduct be quite outrageous and that the plaintiff prove extreme distress. Mere insults are not enough to form the basis of a lawsuit for emotional distress.

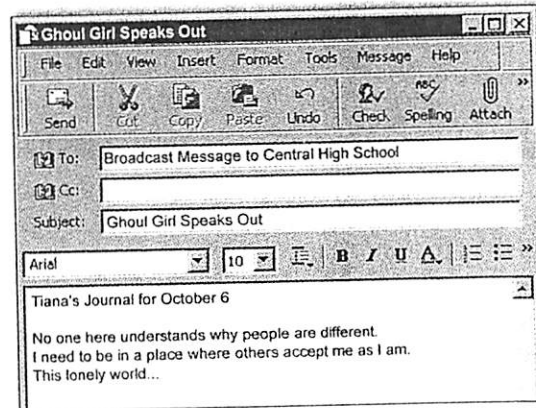


YOU BE THE JUDGE

Bullying: When Do You Cross the Line?

Read the following cases. Can a successful claim of infliction of emotional distress be brought against any of these defendants? If so, decide on a fair remedy. Remember that remedies are not always monetary damages. Have other torts been committed? Consider whether you think it is a good policy to allow students who are picked on at school to sue their bullies.

- a. Evan's family just moved from Metropolis, where he attended a large urban school, to Smallville, which has just one high school of 500 students. Evan is a quiet, wiry boy with braces and purple spiked hair. He obviously stands out from the crowd at his new school. There is a group of students, led by Shawn and Jason, who constantly make fun of Evan by calling him names like "freak boy" and "grape head." Four times in the last month, these two boys have waited for him after school and thrown him into the garbage dumpster. The last time this happened, Evan broke his arm. He has become withdrawn from his family and is scared to go to school, for fear of what might happen next.
- b. Tiana is a very shy high school sophomore who always wears black. She is not performing well in her classes, does not have many friends, and has thought a lot about dropping out of school. Some of her classmates have started calling her "witch" and "ghoul girl." Tiana wants to be a poet and spends her free time writing in her journal, which she keeps in her locker when she is at school. Most of her entries are her private thoughts and poems about how lonely the world seems and how mean the others at school can be. One morning when Tiana checks her e-mail, she finds an anonymous broadcast message that has been sent to the entire student body. The subject is



The anonymous e-mail

"Ghoul Girl Speaks Out" and the message contains an entry from her journal and several of her most private poems. Not willing to endure any more teasing, Tiana leaves school before her classes begin and never comes back.

- c. Ramon is a senior on his high school's varsity football team. He suffers from a speech impediment that causes him to stutter when he is upset or nervous. Although several years of speech therapy have taught him how to keep it under control, he is still very sensitive about his condition.

The football team had a chance to advance to the state finals. In the remaining seconds of their last game, Ramon fumbled the ball and the team lost the game, ending their hopes of advancing to the finals. Two of his teammates, Diego and Kyle, took the loss especially hard. For the past three days, they have been harassing Ramon by booing, taunting, and stuttering insults. Ramon tries to defend himself, but in his nervousness, he stutters severely, causing Diego and Kyle to taunt him even more. Despite all of his hard work in therapy, his stuttering has gotten worse.

When the actions of bill collectors, insurance adjusters, and landlords have been truly outrageous and excessive, courts have sometimes allowed plaintiffs to recover damages. For example, in one case a young man owed a store money. The store tried to collect the debt from the youth's father by falsely accusing him of guaranteeing the son's debt, making late-night calls to the father, and sending letters telling the father that his credit had been revoked. In this case, the court found that the store had intentionally caused the father severe emotional distress.

Extremely outrageous conduct by restaurants, hotels, or transportation companies can also sometimes form the basis for the tort of emotional distress. These businesses, and certain others, have a special obligation to deal with the public in a courteous manner.

Recovery for this tort is sharply limited in order to keep the legal system from being flooded with lawsuits brought by persons suffering from unkind, inconsiderate acts. In addition, there is some value for a free society in letting angry people express their anger without fear of being sued. Among the legal defenses that can be used are that the defendant's conduct was not outrageous, that the plaintiff is overly sensitive, and that a reasonable person would not suffer extreme distress as a result of the defendant's conduct.

Problem 19.3

Give a specific example of a situation in which you believe someone should be able to recover damages for infliction of emotional distress. Write the dialogue, showing exactly what each party said and did. Determine the amount of damages that should be awarded.

False Imprisonment

Being able to sue for **false imprisonment** protects a person's right to be free from unreasonable restraint. False imprisonment does not mean being kept in jail or even arrested by police. It occurs when someone intentionally and wrongfully confines another person against his or her will.

For example, assume that a restaurant manager tells an employee to get out of the walk-in refrigerator so she can lock up and go home. When the employee takes too long, the manager shuts the refrigerator door with the employee still inside and leaves for the night. The restaurant manager has committed the tort of false imprisonment.

Suspected shoplifters sometimes sue shopkeepers who detain them. In balancing an individual's right to be free from confinement and a shopkeeper's right to protect his or her property from theft, the law recognizes a shopkeeper's privilege to temporarily detain a person suspected of shoplifting. However, shopkeepers must act reasonably, using no more restraint than is necessary to protect their property.

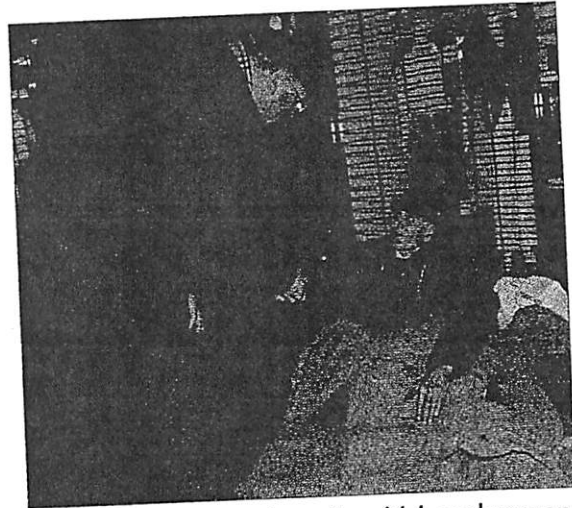
Shelter for Street People

In order to prevent homeless citizens from freezing during the winter, Big Town passes an ordinance. It requires its social services workers to pick up homeless street people whenever the nighttime temperature is predicted to fall below 32° F (0° C). The homeless people are then taken to a city shelter and provided with food, clothing, and a bed. They are not allowed to leave until the next morning.

Mr. Stobbs, a homeless person, believes the shelter is dangerous and unsanitary. He also believes he has a right to live on the street. One night, he is taken to the shelter against his will. He later convinces a public-interest law firm in Big Town to help him sue the city for false imprisonment.

Problem 19.4

a. What arguments can Mr. Stobbs make?



Social services worker talks with homeless man.

- b. What arguments can Big Town make?
- c. How would you decide this case? Explain how your decision best serves the public interest.
- d. Would your answer be different if Mr. Stobbs were mentally disturbed? What should happen then?

Torts Related to Defamation

A person's reputation is protected by laws prohibiting defamation. Defamation includes acts that harm a person's reputation and can be classified as oral or written. Oral statements that harm reputation are called **slander**; written defamation is called **libel**. Damages are often more difficult to prove for slander than for libel.

Defamation occurs when someone makes a false statement about another person that is communicated to a third party, causing harm to the person's reputation. If a patient yells, "You're a drunken butcher!" to his surgeon, it is not slander if no one else hears the statement. However, if the patient yells this false statement in the hospital hallway where others can hear it and the doctor's reputation is harmed, a tort has been committed.

Proving that the offensive statement is *true* is a complete defense in a defamation lawsuit. For example, Sid brings his car to a garage and yells at the mechanic, "You ruined my transmission!" in front of other

customers. This statement might be harmful to the mechanic and his business. But if Sid can prove that the mechanic did ruin his transmission, he has a good defense to slander charges.

The law also protects opinion. Assume a movie critic watches a new movie and, in her review, is particularly critical of one actor's performance. The review may harm the actor's reputation and economic interests, but such statements are usually protected as opinion.

In the United States, freedom of speech and freedom of the press are very important. Therefore, courts balance a person's right to protect his or her reputation against the public's interest in receiving a wide range of information. For this reason, the U.S. Supreme Court has established rules making it difficult for public figures to win damage awards against the media. To win a defamation suit against the media, a public figure must prove not only that a statement was false and caused harm, but also that the statement was made with actual malice. This means that the statement was made with knowledge of its falsity or with a reckless disregard for whether the statement was true. These rules make it difficult for famous people to sue the media and win. In a sense, famous people sacrifice some protection of their reputations.

The Case of . . .

The Captured Shoplifter

Kathleen, 17, is in a music store. As she passes a rack of CDs, she slips one under her jacket. Thinking that no one has noticed, she turns to leave the store. The store manager, however, has been watching her on a closed-circuit television. As she passes the cash register, he stops her before she leaves the store.

Problem 19.5

a. The store manager has several options. Rank the following in order of most reasonable to least reasonable:

1. The manager calls the police and keeps Kathleen in his office until they come.
2. The manager tells an assistant manager to keep Kathleen in the back room until the police arrive. The assistant

manager is called away on another task, and he ties Kathleen's hands and feet together so she cannot run away.

3. The manager yells, "Stop, you thief!" as he runs after Kathleen in the store. He also shouts at her as he walks her back to his office. Then he calls her parents and tells them he is taking her to the police station immediately.
 4. The manager locks Kathleen in the storage room for seven hours, until he is ready to close the shop. Then he takes her to the police station.
 5. The store manager tells his security guard to arrest Kathleen. The guard pulls a gun, takes her to the back of the store, and calls the police.
- b.** Would any of these alternatives qualify as false imprisonment? If so, which ones and why? What should a shopkeeper do if he or she catches a shoplifter?

Torts That Harm Property

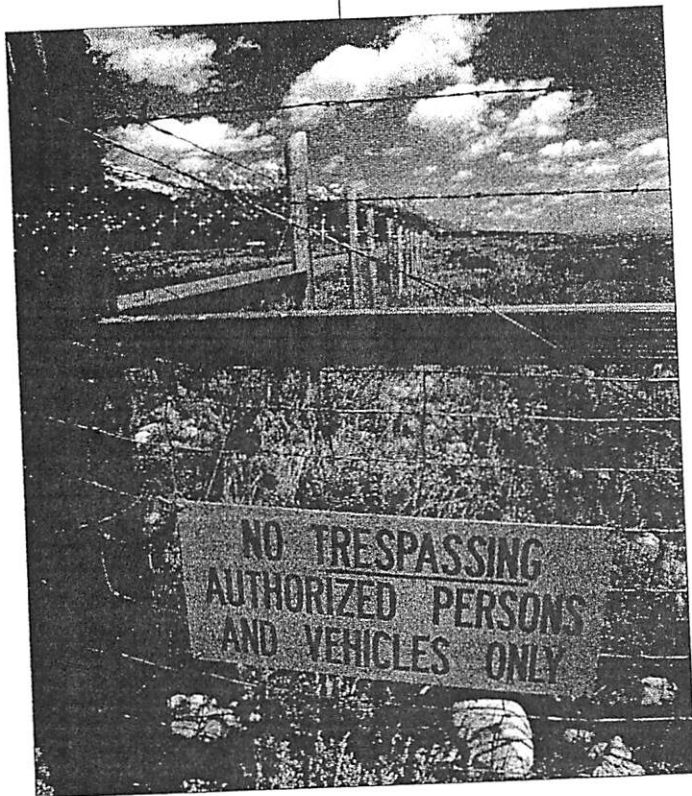
Tort law protects your property in two ways: (1) it protects against interference with the owner's exclusive use of the property, and (2) it protects against the property being taken or damaged. Three kinds of property are protected: **real property** (land and the items attached to it, such as houses, crops, and fences), **personal property** (property that can be moved, such as cars, clothing, and appliances), and **intellectual property** (the ownership interest in creations of a person's mind). The U.S. legal system is very protective of private property rights.

Real Property

Everyone has seen signs that read "Private Property—Keep Out" or "No Trespassing." The tort of **trespass** occurs when a person enters another person's property without permission. The owner can recover damages from the trespasser even if there is no harm to the property because the law protects the owner's *exclusive* right to the property.

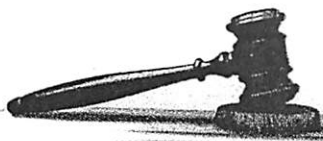
In a technical sense, a trespass occurs every time you cut across a neighbor's lawn on the way to the store. Obviously, landowners rarely sue people who merely walk across their property. But what would you do if someone committed a continuing trespass by going onto your property without permission and erecting a sign advertising a nearby restaurant?

Posting "No Trespassing" signs can help protect property. In what other ways does tort law protect property?



Tort law protects you when others damage your property. In some instances, tort law also requires that you use reasonable care to protect other persons from harm when they are on your property. In general, though, you are not liable if a trespasser is injured on your property. For example, if a trespasser walks across your lawn, trips on a sprinkler, and sprains her ankle, she will not be able to recover damages from you.

An exception to the general rule occurs when the trespasser is a child too young to appreciate a dangerous condition on your property. The law requires landowners to use reasonable care to eliminate a dangerous condition on their land, or to otherwise protect children when the condition presents an unreasonable risk of serious injury where children are likely to trespass. Because of this law, sometimes called the **attractive nuisance** doctrine, construction companies generally fence in excavation sites.



YOU BE THE JUDGE

Real Property and Reasonable Interference

Read each case carefully. Decide whether a nuisance exists. Does an unreasonable interference exist? If a nuisance does exist, decide on a fair remedy. Explain the reasons for your answers.

- a. Mr. Iwamoto works the 11 P.M. to 7 A.M. shift at the factory and then comes home to sleep. On his way to school, Darrell walks by Mr. Iwamoto's house every weekday at about 8 A.M. with his boom box blaring heavy metal music. The loud music awakens Mr. Iwamoto.
- b. A passenger on a commuter train uses his cell phone to make and receive business and personal calls each day during his one-hour ride to work.
- c. Morgan owns a restaurant next to High Penn's oil refinery. The refinery occasionally emits gases and odors that make people feel sick. Morgan, believing that this hurts her restaurant business, brings a suit against the oil refinery. High Penn argues that (1) the refinery was properly constructed, (2) there is no way to operate the refinery without these occasional odors, and (3) the refinery was in operation before Morgan opened her restaurant.
- d. Commercial advertisements constantly appear in the inbox of your personal e-mail account. The ads are for products that do not interest you. You did not request information about these products.
- e. In order to earn the extra money they need to send their two children to college, Larry and Meg operate a small auto repair and body shop in their garage. After returning from their day jobs, they work on cars until about 10 P.M. The noise produced when they rev up car engines disturbs their neighbors.

- f. Adriana Stein is a successful musician who travels extensively to give concerts. To enjoy some peace and relaxation when she is not traveling, she buys a house in the countryside only five miles from the nearest airport. As the surrounding metropolitan area grows, air traffic at the airport increases. Eventually, the airport needs to build another runway to accommodate the increased traffic. Experts report that the runway can be built in only one location at the airport. Airplanes using this runway would descend directly over Adriana's house, creating loud noise and disrupting the quiet of the countryside. In response to the airport's plan to build the runway, Adriana organizes her neighbors into a citizen action group called RAMP (Residents Against More Planes). The group sues the airport, seeking an injunction to stop the planning and construction of the new runway.



A jet approaches the airport.

The Unfenced Swimming Pool

The Garcia family built a large swimming pool in their backyard. The pool was two feet deep in the shallow end and nine feet deep near the diving board. They placed lights around the pool that turned on automatically at dusk. They also placed four large “Danger—Deep Water” signs around all sides of the pool.

One day, a four-year-old who lived a block away wandered onto their property, entered the pool, and drowned. The child’s parents sued the Garcia family for not fencing in the pool.

Problem 19.6

- a. How should this case be decided?
- b. Suppose the Garcias had fenced in the pool and the child had climbed the fence and drowned. Should the child’s parents be able to recover damages in that situation?

Most people who enter your property are probably not trespassers. Generally, they are either guests in your home, or businesspeople and customers visiting your workplace. In most states, you have a legal duty to warn guests of any known danger on your property. For example, if your front porch is being repaired, you have a duty to warn your guests to avoid this dangerous situation.

If you own a store or other business establishment and the public enters your property for a business purpose, the law imposes an even higher duty. Business owners have a duty to use reasonable care to inspect their property to make it safe for business visitors. For this reason, a restaurant owner is not merely required to warn customers of a slippery sidewalk on a snowy day, but is obligated to use reasonable care to make the sidewalk safe. This may be done by shoveling the snow or spreading salt or sand.

In some cases, tort law protects against harm caused by someone who never *physically* enters your property. A **nuisance** occurs when there is an unreasonable interference with your ability to use and enjoy your property. Courts will balance the usefulness of the activity complained of against the harm caused.

You do not have a right to be free from all interference with your property, only unreasonable interference. For example, Ari and Brenda are neighbors. One Sunday, Ari has a large barbecue in his backyard, and Brenda is unable to listen to the baseball game on the radio while lying on her hammock. This one-time event is not a nuisance. If Ari were to cut his lawn at six o’clock every Sunday morning, however, that would probably be a nuisance.

You can recover damages if you win a nuisance suit. In some cases, you may also be able to get a court order requiring the defendant to stop the activity. This court order is called an **injunction**. An injunction requires that a person do, or not do, a specific act.

Personal Property

Tort law also provides compensation to someone whose personal property is taken, damaged, or interfered with. Suppose a burglar breaks into Laura's house and steals her television set and DVD player. If the person is arrested, there will be a criminal prosecution for burglary. Laura could also sue the thief in civil court for a tort called **conversion**. Conversion occurs when someone unlawfully exercises control over the personal property of another person.

A series of privileges has developed for protecting property. You can always use nonviolent means to protect real property ("Please get off my land . . . you are trespassing") or to recover personal property. However, you must use careful judgment in these cases. Telling your locker mate that she has taken the wrong lunch bag may work well; yelling at a fleeing thief to put down your possessions is likely to fail!

Law in Action

Make My Day Laws

Some states have passed Make My Day laws. These laws allow the occupant of a dwelling to use any degree of force, including deadly force, if the occupant reasonably believes that an intruder might use any force at all against any occupant of the dwelling. These state laws protect the occupant using the force against both criminal prosecutions as well as civil suits or damages filed by an injured intruder.

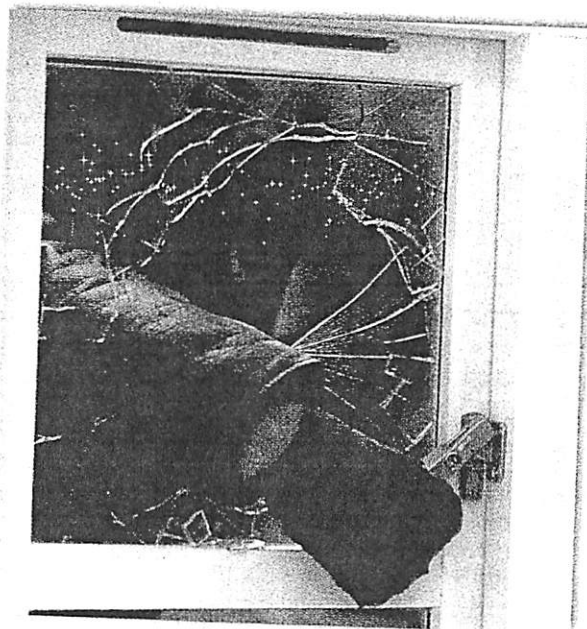
Problem 19.7

Why do you think a state would pass a Make My Day law?

What are the possible benefits of such a law? The possible costs?

Does your state have such a law?

Do you support or oppose Make My Day laws? Explain your reasons.



Make My Day laws are controversial.

The Burglar Who Was Bitten

The Kings own a small store in a crime-ridden section of town. They have been the victims of break-ins in the past. To protect their family and store, they purchase a guard dog. The dog is trained to attack on command. The dog

also stays in the store from 11 P.M. to 7 A.M., while the store is closed. One night, a person breaks into the store and is attacked by the dog. The police catch the person, and he is convicted of burglary. After the judge gives him a suspended sentence, the burglar sues the Kings for the injuries caused by the guard dog. How would you decide this case? Give your reasons.

Reasonable force can also be used to protect property. Precisely how much force is reasonable depends on the circumstances. Generally, deadly force cannot be used to protect property, although the rules of self-defense allow the use of deadly force to protect a person if serious bodily harm is threatened.

Intellectual Property

Imagine that you have created a brilliant, action-packed computer game with dazzling 3-D graphics. You are sure that everybody will love it, so you begin to sell copies of your program to people over the Internet. A large software company buys your program and begins to market your game on a much larger scale and for a much cheaper price. The company makes millions of dollars by taking credit for and selling the game that you created. Unable to compete with the large company, you have to discontinue your business.

Or perhaps you are a musician and you perform original songs at your school's dances. What if one day you saw a celebrity musician on television performing a song that you wrote? What if this musician falsely took credit for writing the song, performed it on a hit CD, and made a fortune from it without giving you a cent?

If people knew that they could not protect their work from being stolen, there would be little reason or incentive to create anything, or to show new creations to others. This is why the law protects the creations of people's minds as a form of property that can be owned, and thus may not be stolen. Another word for the mind is intellect, so property in the form of creations of the mind is called intellectual property.

If the intellectual property is something you have invented, a **patent** recognizes your ownership of the invention. If the intellectual property is in some form of creative expression such as a book, movie, computer program, or song, a **copyright** recognizes ownership of the

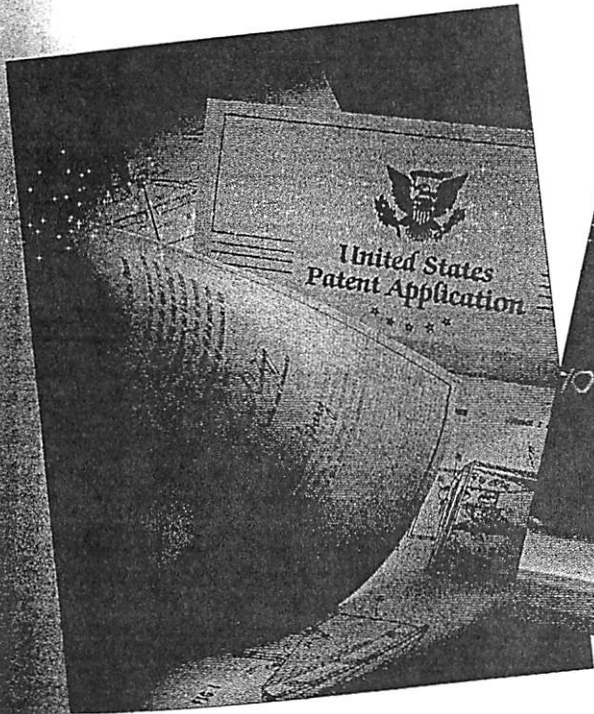
expression. When a person has a patent or a copyright indicating ownership over some invention or expression, any other person who uses the patented or copyrighted work commits a tort called **infringement**.

Intellectual property law promotes progress because it provides an incentive, or a reward, for engaging in creative pursuits. Also, most people think it is fair that creators profit from their creations. However, advancements are often made by building on the work of others. If people cannot use the work of others, it might hinder technology and progress, so intellectual property rights (especially patents) are kept somewhat limited.

Patents

Patents protect useful inventions such as processes, machines, and new products. However, patents are only given to inventors who have thought of something that has never been invented before. That is, the idea must truly be new or **novel**. For example, notebooks are usually sold with space for either three or five subjects. You would not be able to get a patent for a four-subject notebook, however, because there is nothing truly new or novel about the idea. It is an obvious extension of an existing idea. On the other hand, if you invented a notebook with a clipping mechanism that allowed it to be attached to the desk to prevent it from slipping, you would have a better chance of getting a patent for your novel idea.

Dr. Gertrude Elion and Dr. George Hitchings invented and received patents for several drugs, including a leukemia-fighting drug. *What characteristic must an idea have before it can receive a patent?*



Getting a patent requires a lengthy—and sometimes expensive—legal process. An inventor who gets a patent has a complete **monopoly** over the product for 20 years. If anyone else tries to sell the product or profit from the idea, the patent-holder can sue for infringement. After 20 years the patent expires, and the invention becomes public domain. Anyone may then use or profit from the invention.

Copyrights

Copyrights protect any expression that is somehow fixed (written down, recorded on tape, stored on a computer disk, painted on a canvas, etc.). Unlike a patent, you do not have to go through any legal process in order to obtain a copyright. As soon as you make your expression permanent (for example, by writing it down), you automatically have a legal copyright without doing anything else. If you keep a diary or take notes during class, then you hold copyrights.

In 1998, Congress provided further protection for creative endeavors, extending the life of a copyright to the lifetime of the holder plus 70 years. The existing law had protected copyrights for the lifetime of the holder plus 50 years. In 2003, the U.S. Supreme Court agreed that Congress had the power to make such an extension, thus providing significant protection to those who want to safeguard their expressions. The Court's decision was based on an analysis of Article 1, Section 8, of the Constitution that gave Congress the power to promote progress in science and the arts by "securing for limited times to authors and inventors the exclusive right to their writings and discoveries." In fact, copyright protections were extended numerous times during the twentieth century. However, the policy debate about this case dealt with whether it was in the public's interest to allow people to copy and distribute old movies, music, or



For Your Information . . .

Protecting Your Creations

The federal government makes information available online to help you protect your intellectual property and creations. Visit the U.S. Copyright Office online at www.copyright.gov and learn how to search copyright records, register a work, and record a document. Then follow the links to visit the

U.S. Patent and Trademark Office—www.uspto.gov—to check the status of patents and trademarks. You can also learn how to search and apply for patents. This site also has an award-winning kid's page as well as a link to the online National Inventors' Hall of Fame.

books on the Internet rather than continue protecting the interests of those in the entertainment industry for an additional period of years. At some point old works enter the public domain; the question is, when?

Although copyrights exist as soon as expression is fixed, there are legal benefits to registering the copyright and putting a copyright notice on your work. Registering is easy and does not require a lawyer. You merely fill out a simple form and send it to the U.S. Copyright Office. You should also submit two copies of the work to the Library of Congress. Placing the copyright notice on your work serves to warn others that a work is copyrighted. Notice consists of the © symbol, the year the work was created, and the author's name.

Unlike patents, copyrights do not require novelty. Copyrightable expression need only have some slight "spark of creativity." For example, the arrangement of legal cases in a textbook and the written label on a shampoo bottle have been held to be creative enough for a copyright. While copyrights protect the form of expression, they do not protect ideas or facts. A network news anchorperson who writes a script for the evening news owns the copyright for that expression, and nobody else may report the news in the same way. But anybody may report the same facts (the news) using his or her own expression. Anyone may create a mischievous son and a father who love to eat (ideas), but copying Bart and Homer Simpson (expression) would infringe on the author's copyright.

Copyrights give the owner the exclusive right to copy the work, to make **derivative works** (works very similar to a copyrighted work), to sell copies of the work, to display copies of the work in public, and to perform the work. To prove infringement, the infringing work must be "substantially similar" to the copyrighted work. If you copy your next report from the encyclopedia but change a few words around, you are infringing on a copyright!

Exceptions to the exclusive rights of a copyright holder include first sale and fair use. **First sale** means that once the copyright owner sells a copy of the work, the lawful owner of the particular copy may resell that particular copy. First sale does *not* mean the owner of a copy can make further copies and sell them. If you purchase a copy of a popular video, you are free to sell that tape to your friend without infringing on the copyright (under first sale). You may *not*, however, make fifty copies of it and open up your own video store.

Downloading music files from the Internet raises ethical and legal issues. How might downloading files or copying songs from a CD be a copyright infringement?



The fair use clause of the copyright statute allows limited legal reproduction of copyrighted works for certain noncommercial purposes, such as for criticism, news reporting, scholarship, or research. For example, if you copy a video clip of the movie *Titanic* to show during an oral presentation for your history class, this would be fair use and not a copyright infringement. This is because the material is being used to help educate your classmates, you are not showing the entire three-hour movie, and you are not charging your friends to watch the clip. These are all relevant factors in determining whether your use of the copied video is fair to the creator of the movie.

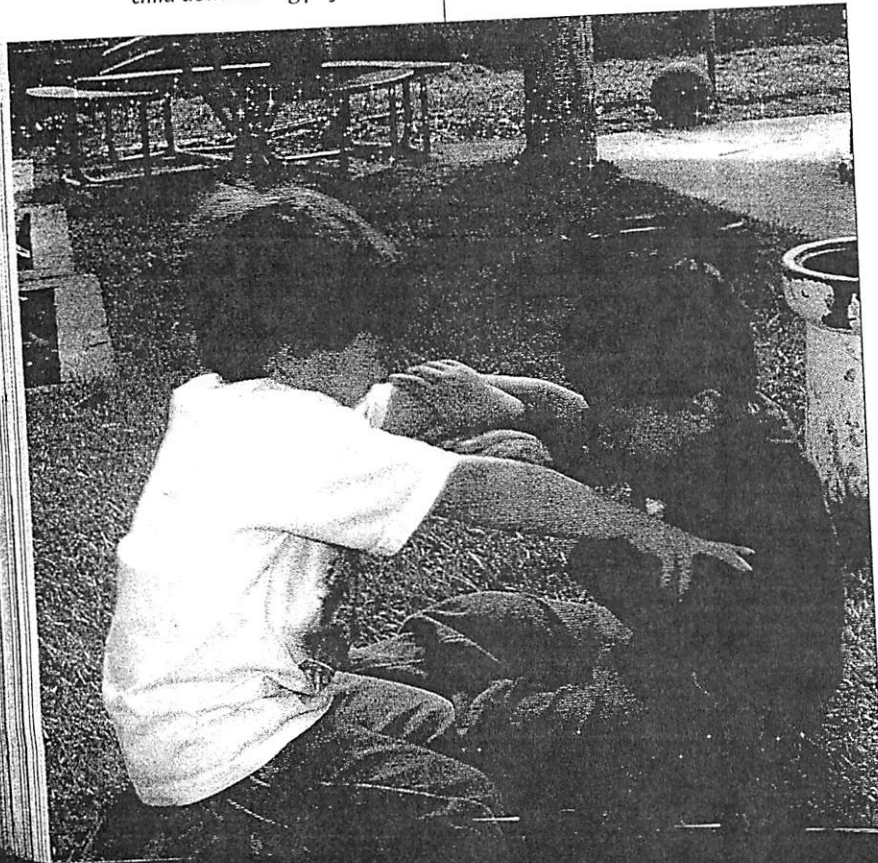
In recent years technology, principally computers and the ability to download materials from the Internet, has raised ethical and legal issues. For example, one software company used the slogan "Rip, mix and burn" to describe how a buyer could produce his or her own music CDs by "ripping" songs from other CDs they owned, mixing them in the order they liked, and burning them onto another CD which they might give to a friend. The question arose: If people copy songs or other materials from CDs, are they infringing on copyrights?

The general rule is that copying songs from CDs is a copyright violation, as is making additional copies of music, movies, books, or computer software that you buy. However, you may legally copy free over-the-air broadcast television shows to watch later.

The courts have also ruled that the copyright law prohibits the copying of copyrighted music using the digital technology known as MP3, which stores songs on computers or personal MP3 players. In the famous Napster case, a court shut down the Napster Web site because it enabled users to download MP3 files without the permission of the copyright owner. The court found that the sharing of music files among Napster users was really unauthorized copying and distribution of the music, which directly violated federal copyright laws.

What is the bottom line? There are some general rules of thumb to use when deciding whether the law would consider your copying "fair use." However, as technology advances, these questions become more difficult. The most reliable guide may be to imagine that you are a songwriter, a movie director, an author, or a computer programmer. Then ask yourself whether it would be fair for people to copy your work without paying you or getting your permission.

Consent can be implied based on the situation. Can a child be charged with battery if he knocks another child down during play?



Problem 19.8

Gloria has a computer at home that she uses for schoolwork and entertainment. In some situations, she must decide what to do with certain content she finds on the Internet. Consider the law and ethics involved and advise her on what she should do in each of the following situations:

- a. She sees a Web site that advertises unlimited downloading of top 50 songs for \$9.95 a month.
- b. Gloria's friend Janet sends her a copy of a DVD of a new movie on which Janet worked.
- c. Gloria's friend Alex wants her to help him start a business in which the two would buy music CDs, copy them, and sell the copies for \$5.
- d. Gloria is doing a homework assignment and wishes to download a photograph from a television network's Web site to use in her report.

The rules of unauthorized copying and distribution should be enforced on the Internet in much the same way as they are enforced in stores that sell physical goods that have intellectual property: books, DVDs, CDs. I don't think anyone advocates the right to shoplift these. Even if you think they are overpriced, you've got to buy them.

— David Kendall, Partner,
Williams & Connolly
Attorney for Recording
Industry Association
of America

Defenses to Intentional Torts

Even if a plaintiff proves that the defendant has committed a tort, the defendant can still escape liability if the plaintiff has a valid defense. **Consent** is the most common defense to intentional torts. This defense means that the plaintiff consented, or agreed, to the harmful conduct and thus gave up the right to sue later. In boxing, punches are thrown that in almost any other situation would be serious batteries. However, boxers sign a contract consenting to be punched during a match. Of course, if one boxer tries to stab another with a knife, this would be an assault, as the consent was limited to punches.

Consent can be written, spoken, or simply assumed based on the situation. For example, children often knock each other down while playing, but this conduct does not constitute a battery. In another example, suppose you were seriously injured in an auto accident and taken to the hospital for emergency surgery. Ordinarily, you would sign a consent form before the operation, but in an emergency, when it is impossible to sign a form, the law assumes that you consent to lifesaving surgery.

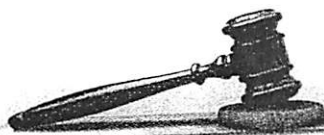
Privilege is another defense to intentional torts. Privilege justifies conduct that would otherwise be a tort, because the defendant's interests (or those of the public) require it. Privilege also often justifies conduct that would otherwise be a tort because public policy is best served by permitting such behavior.

Legal authority is one such privilege. For example, a police officer has legal authority to restrain a person's liberty while carrying out an arrest warrant, and therefore has a valid defense to a false imprisonment suit. Parents have legal authority to use reasonable force to discipline their children. Owners have legal authority over their property and may use reasonable force to recover their property

from a thief, even though they would otherwise be committing false imprisonment, battery, or assault.

Perhaps the best-known privilege is **self-defense**. If Julie attacks Amanda, then Amanda can use reasonable force to protect or defend herself. If Julie later sues Amanda for battery, Amanda will be able to use self-defense to justify her actions, as long as the force she used was not excessive. Deadly force—force that may cause life-threatening harm—would be considered excessive unless Amanda's life was in danger. Also, defenders who take control of a situation and become aggressors commit battery and have no self-defense claim. For example, while self-defense allows Amanda to defend herself against Julie, it does not allow her to teach Julie a lesson or seek revenge. Self-defense also allows someone to come to the rescue of another person and to use the same amount of force the victim could have used to repel the attacker.

Defense of property is another privilege that allows people to use reasonable force to defend their homes or property. Except in states with Make My Day laws (see page 241), deadly force is not considered reasonable when defending property.



YOU BE THE JUDGE

Intentional Torts and Legal Defenses

Determine whether any intentional torts have been committed. Is there a legal defense in each situation? Give reasons for your answer.

- a. A pitcher in a high-school baseball game loses control of an inside pitch. The ball hits the batter, shattering a bone in his arm.
- b. Josh arranges to have an oral surgeon remove a tooth that has been causing him discomfort. While Josh is under anesthesia, the surgeon notices that two other teeth are emerging in a crooked position. She believes the crooked teeth are likely to cause Josh pain in the future, so she removes them as well.
- c. Sandy, 17, throws a snowball at a friend on a crowded street corner. The snowball misses the friend but hits an elderly man, who falls to the ground and is injured.
- d. Maya, a prison guard, is attacked by an inmate. The inmate knocks Maya down and kicks her in the head and ribs. Maya responds to the inmate in a similar fashion.
- e. Wendy breaks into the first floor of Amy's house and begins to steal valuable property. Hearing the intruder, Amy comes downstairs wielding a baseball bat. Seeing this, Wendy drops the property and runs toward the front door of the house. Amy runs after her and hits her on the head with the bat, knocking her unconscious. She then calls the police.
- f. Kemal borrows money from the bank to purchase a car. After he fails to make the required payments, the bank sends somebody to Kemal's house. This person drives Kemal's car away while he is not at home.

Human Rights USA

The essence of human rights involves the responsibility of all human beings to treat each other with dignity. When people commit intentional torts, such as assault or battery, they are not treating each other with dignity. They are also violating internationally accepted human rights, such as those listed in the following articles of the Universal Declaration of Human Rights:

Article 3: Everyone has the right to life, liberty and personal security.

Article 17: (1) Everyone has the right to own property, alone as well as in association with others.
(2) No one shall be arbitrarily deprived of his (or her) property.

Consider how these human rights may relate to the facts in the following case study:

The Case of the Fraternity Hazing

Wade is a first-year student at Everett College. The social life at Everett primarily revolves around fraternities, so Wade is very interested in joining a fraternity. He visits the Sigma Tau house and decides this is the best place for him. He must go through a two-week pledge period to join. He has heard it is pretty difficult, but is willing to endure it to be initiated. If he does not fulfill all of the requirements during the pledge period, Wade will not be allowed to join the fraternity.

During the pledge period he is required and agrees to do the following things:

- Bow to all fraternity members when they enter the room.
- Stand outside the sorority house and yell out a rating of each woman based on her looks as she leaves for class.
- Make breakfast to order for the 70 fraternity members every morning.

- Streak naked across campus at midnight on a designated night.
- Allow any fraternity member to enter his room and use his computer and stereo, and listen to his CDs whenever they want.
- Sleep only from the hours of 3:00 A.M. to 5:00 A.M. each night for a week, and then only on an individual step in the stairwell of the fraternity house.
- Run through a line of fraternity members as they hit him with the traditional fraternity paddles.

Problem 19.9

- Are any of the pledge requirements described above violations of human rights? If so, which ones and why? Do any of the requirements violate the rights of anyone besides Wade? Why or why not?
- Do any of the requirements involve intentional torts? If so, which ones and why?
- Should Wade be able to sue anyone for any injuries he might sustain from the hazing activities? Why or why not?
- If Wade does file a suit, who should be held liable and why? Should the fraternity or its individual members be held liable for his injuries? What about the college? Explain your reasons.
- Are there defenses that can be successfully raised against these tort claims?
- Why do people join fraternities? Do you think that all fraternities engage in activities such as those listed here? Suggest some possible requirements and activities that neither violate human rights nor constitute torts.

Negligence

"In all civil acts the law doth not so much regard the intent of the actor, as the loss and damage of the party suffering."

— *Lambert v. Bessey* (1681)



Street Law online

Visit the *Street Law* Web site at streetlaw.glencoe.com for chapter-based information and resources.

Public works projects can create risks of harm through negligence.

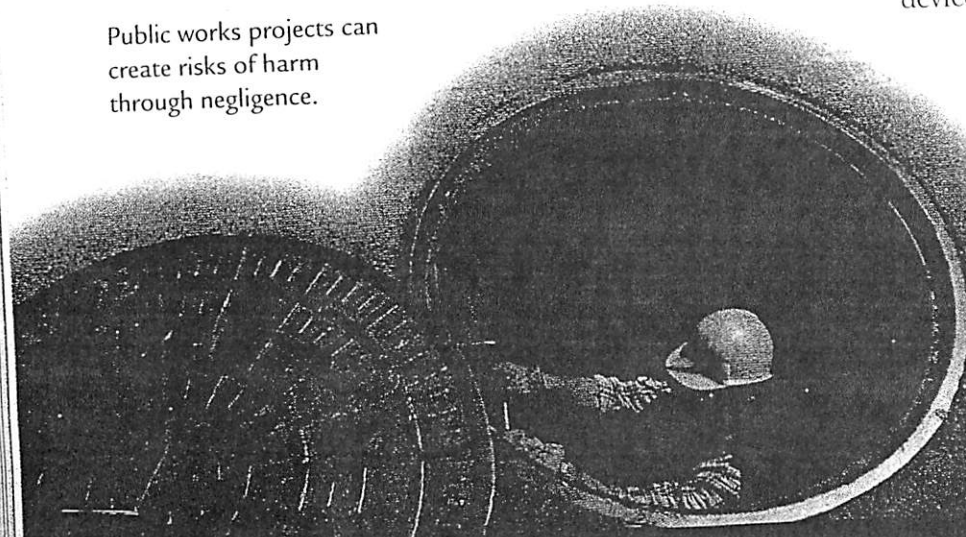
We have already examined intentional torts and their defenses. Now we move on to another type of tort called **negligence**. Tort law establishes standards of care that society expects from people. Negligence is conduct that falls below the standard established by law for protecting others against unreasonable risks of harm. But what does this mean?

The word *negligence* comes from the root word *neglect*. This may lead us to think of negligence as forgetfulness, inattentiveness, or lack of care about others. But tort law requires us to analyze negligence as it relates to a person's conduct. Even a person who cares a great deal about the welfare of others may be negligent if his or her conduct creates an unreasonable risk of harm. On the other hand, a person who is totally unconcerned about the safety of others may not be negligent if his or her conduct does not subject another person to an unreasonable risk of harm.

These are some examples of negligent conduct:

- Dr. D'Angelo, a surgeon, forgets to remove a clamp from a patient's body while operating and stitches the patient up.
- Monica leaves a loaded rifle on the floor where her younger brothers and sisters usually play. A child is shot.
- A city employee working in a manhole forgets to replace the cover when he goes to lunch and a pedestrian falls in and is injured.
- A drug company markets a birth control device for women without conducting adequate medical testing. It assumes the device is safe because people have used similar devices for years.

A woman develops a serious illness from using the device.



Elements of Negligence

Unlike intentional torts—many of which have specific names—negligence is a very broad term that deals with many kinds of wrongful conduct. While the different types of wrongful conduct may not have separate names, they do have something in common. For a plaintiff to win a negligence action against the defendant, each of the following **elements** must be proven by a preponderance of the evidence:

1. **Duty:** The defendant, or accused wrongdoer, owed a duty of care to the plaintiff, or injured person.
2. **Breach of duty:** The defendant's conduct breached or violated that duty.
3. **Causation:** The defendant's conduct caused the plaintiff's harm.
4. **Damages:** The plaintiff suffered actual injuries or losses.

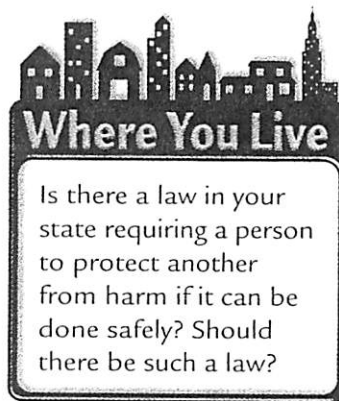
All of these elements must be proven or the plaintiff will not prevail. For example, in the case of the drug company described on the previous page, the woman bringing the lawsuit would have to prove each of the elements of negligence by a preponderance of the evidence against the company. Specifically, she would have to prove that the company had a duty of care to its customers to adequately test any new birth control product before selling it, that the company breached this duty through its failure to adequately test the device, and that this breach resulted in a defective product that caused actual damage (ill health, hospital bills, and so on) to her.

As in intentional torts, defendants in negligence cases sometimes have legal defenses. These defenses, which are explained below, are different from those used in intentional torts.

Duty and Breach

Everyone has a general **duty**, or legal obligation, to exercise reasonable care toward other persons and their property. Negligence law is primarily concerned with compensating victims who are harmed by a wrongdoer's action or inaction that **breaches**, or violates, this standard of reasonable care. If a mechanic fixes the brakes on your car without using reasonable care and skill, and this faulty repair causes you to have an accident, you can recover damages from the mechanic as the result of his or her negligence.

What if someone is harmed by another person's inaction? For example, Brian is drowning in a lake and Jennifer, an expert swimmer, passes by in a boat. Does she have a legal duty to rescue Brian? While she may have a moral obligation to help, she generally does not have a legal duty to act unless there is some special relationship between them. For example, Jennifer is a lifeguard and Brian is drowning in an area she is supervising.



The Spilled Coffee

In 1994, 79-year-old Stella Liebeck bought a cup of coffee from the drive-thru window at a fast-food restaurant. While the car in which she was a passenger was stopped to allow her to put cream and sugar in her coffee, she balanced the cup between her knees and attempted to remove the lid. The coffee spilled, causing third-degree burns to over six percent of Liebeck's body and causing her to spend eight days in the hospital and undergo skin graft operations. Liebeck sued the restaurant for damages.

The restaurant was part of a large national chain that served its coffee at approximately 180°F (82°C), despite the fact that coffee at such a high temperature is too hot to drink. At the trial, the chain's quality control manager testified that the sale of any food over 140°F (60°C) would create a burn hazard.

The restaurant argued that, according to its surveys, many of its customers take coffee back home or to work with them and consume

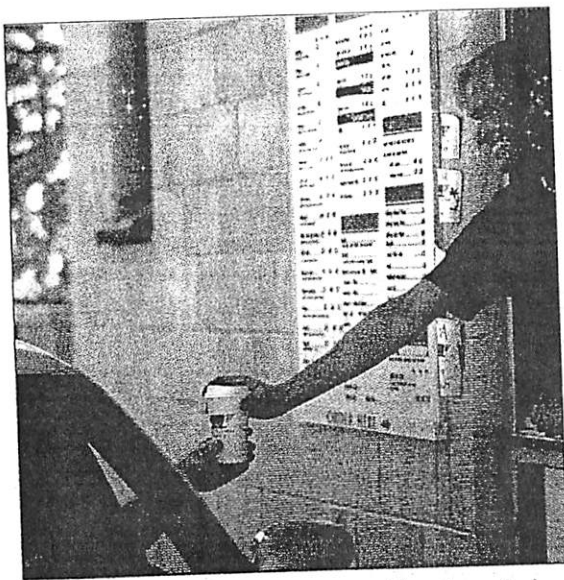
it there, so the higher temperature is necessary to assure that it will still be hot when consumed. They also claimed that many customers choose this particular chain specifically because they do serve their coffee so hot. However, the chain was also aware that, between 1982 and 1992, approximately 700 claims had been filed by people burned by their coffee.

The jury awarded Liebeck \$160,000 in compensatory damages (finding her 20 percent at fault for her own negligence) and \$2.7 million in punitive damages (the equivalent of two days of the chain's coffee sales). The trial judge reduced the amount of punitive damages to \$480,000, and the parties eventually came to a secret settlement agreement for an undisclosed amount.

The case launched a public debate about the appropriateness of lawsuits with high damage awards in situations such as this one.

Problem 20.1

- Who is the plaintiff in this case? Who is the defendant?
- What, if anything, did the defendant do wrong? What, if anything, did the plaintiff do wrong?
- Did the defendant cause the plaintiff harm on purpose? Did the defendant's conduct in some way cause the harm suffered by the plaintiff?
- What duty, if any, did the defendant have toward its customers? Did the defendant uphold or breach that duty?
- Do you agree or disagree with the outcome of this trial? Give your reasons.
- What are the arguments for and against the award of punitive damages in a case like this one?



Buying coffee from a drive-thru window

The Reasonable Person Standard

Everyone has a duty toward everyone else in society: the duty to act reasonably. If you act unreasonably, then you have breached this duty. If the breach causes damage, then you will be liable for damages.

To help judge whether certain conduct is negligent, the law has developed an imaginary creature—"the reasonable person of ordinary prudence or carefulness." The reasonably prudent person does not represent the typical, average individual. Rather, this is an idealized version of such a person. This person acts the way a community expects its members to act, not exactly as they do in fact act.

How does the reasonable person behave? The reasonable person considers how likely a certain harm is to occur, how serious the harm would be if it did occur, and the burden involved in avoiding the harm. The likelihood and seriousness of the harm are balanced against the burden of avoiding the harm.

For example, assume a pedestrian is about to cross a road where there is very little automobile traffic. The harm to be avoided, of course, is being hit by a vehicle. Our imaginary person asks: How likely is it that such an accident will occur? Not very likely. How serious would the harm be if it did occur? Very serious. How difficult would it be to avoid this harm? Not difficult at all; simply look both ways before crossing. Our reasonably prudent person looks both ways before crossing such a street.

In a second example, the walkway to a secluded home in the woods has a crack in it. The crack is large enough to cause a person to trip and fall. This is the harm the homeowner needs to avoid. In this instance, the likelihood of the harm is small, the harm would probably not be very serious, and the cost of avoiding it (fixing the walkway) may be substantial. Even our reasonably prudent person may decide not to fix this crack in the walk. However, it may be reasonable to post a sign warning of the danger, because the burden (cost) of the sign would be less than the burden of making the repair.

The law assumes that reasonable people do not break the law. Therefore, if somebody violates a law, then they are automatically considered to have breached the duty to act reasonably. If the breach causes injury, then the wrongdoer is negligent. For example, most states have laws prohibiting you from leaving your vehicle running while unattended. Such laws were established because of the risk that cars in this situation can easily be stolen. What would happen if you borrow your friend's car to run an errand, leave it running while you run into a gas station to buy a soda, and it is stolen? Have you breached your duty to act responsibly? Can your friend sue you for the value of the car?

Certain professionals, such as doctors, plumbers, and pilots, are considered to have the abilities of reasonably skilled persons qualified to be members of their professions. For this reason, a plumber who repairs a kitchen sink that later leaks and damages the floor cannot defend against a tort action by claiming that he completed the job as

skillfully as the ordinarily prudent person. The work must be at the level of the ordinarily prudent plumber.

As you know, minors are liable for torts they commit. However, the standard used in negligence cases involving minors is not the same as it is for adults. Instead, the law compares the minor's conduct with reasonable conduct for others of the same age, intelligence, and experience. When a minor reaches the age of majority, the adult standard of care applies. There is one important exception to this rule: when minors engage in what is ordinarily considered an adult activity, such as driving a car, they are held to the adult standard of care.

The Case of . . .

Bartender Liability

Lance is a 16-year-old high school junior. He gathers the alcohol left over from his parents' New Year's party and decides to throw a party at his house on a Saturday night when his parents are out of town. He knows that some of his friends have driven to his house, but doesn't pay much attention to whether or not they are drinking. He sees his friend Abby finish a beer, grab her car keys, and walk out the door to go home. Stefan, another friend, leaves with Abby to get a ride home. Lance does not know whether Stefan has been drinking, but watches as Abby drives the car away with Stefan in the passenger seat. As Abby pulls her car onto the highway, she swerves and hits another car head-on. Stefan and the driver of the other car are seriously injured.

Problem 20.2

- a. Who can sue whom in this situation?
 - b. What duty did Lance have in this situation? Did he violate that duty?
 - c. What duty, if any, do Lance's parents have in this situation? Did they violate that duty? Would it make a difference if his parents had been at home?
-
- d. Now assume that Lance is a 25-year-old bartender who serves Abby and Stefan, who are both over 21, although he knows that they are intoxicated. The rest of the facts remain the same. Answer questions **a.** and **b.** using this scenario.
 - e. Is it fair to hold Lance responsible in either situation? Give your reasons.
 - f. If you were at the underage drinking party described, what would you do? What if you were at the bar in the second scenario?
 - g. Some bars have "designated driver" programs. Why have they done this? Should people who hold private parties in their homes do anything special to protect their guests from drinking and driving? What, if anything, could be done?



Police investigate a party.

AIDS Liability

T Tyler is infected with HIV, the virus that causes AIDS. He is new in town and wants to meet people and make friends. So he does not want anyone to know about his HIV status. He meets and becomes romantically involved with Audrey. He has unprotected sex with her, but he does not disclose his HIV status to her. Audrey contracts the virus as a result of her relationship with Tyler.

Problem 20.3

- a. Did Tyler have a duty to tell Audrey about his condition? Explain.
- b. Would it make a difference if AIDS were curable?
- c. What, if anything, should Audrey be able to recover in damages from Tyler? Explain.
- d. Could Audrey sue Tyler if she did not contract the virus but was very upset when she learned that he had not told her about it?

Causation

Once a plaintiff proves that the defendant owes him or her a duty and that this duty was violated, there must be proof that the defendant's acts caused the harm to the plaintiff. While it seems like common sense to require a causal connection between the act complained of and the plaintiff's injury, the concept is sometimes troublesome to apply. See The Case of the Great Chicago Fire on page 256 for an example.

When you think about the element of **causation**, you must consider two separate issues: **cause in fact** and **proximate cause**. Cause in fact is easy to understand. If the harm would not have occurred without the wrongful act, the act is the cause in fact. If Mrs. O'Leary had not placed the lantern too close to the cow, it would not have been kicked over, and the Great Chicago Fire would not have occurred. Her act was the cause in fact of the fire.

It is often hard to draw the line in proximate cause situations. The basic idea behind proximate cause is that there must be a close connection between the wrongful act and the harm caused. The harm caused must have been a foreseeable result of the act or acts. Negligence law does not hold people responsible for harm that was completely unforeseeable.

The more difficult part of causation is establishing proximate cause. Would it have been fair to make Mrs. O'Leary pay for all the damage caused in the Chicago fire? A certain amount of damage from her wrongful act was **foreseeable harm**. At some point, however, the damage to the city of Chicago was greater than what could have been foreseen when she negligently placed the lantern near the cow.

Assume, for example, that your car wrongfully crosses the center line and collides with a truck. It turns out that the truck is carrying dynamite, which explodes and kills a person two blocks away. Your

negligent crossing of the yellow line is the cause in fact of the harm to the person two blocks away. However, most courts would say that your negligence was not the proximate cause of this death. Crossing a yellow line does not usually result in harm two blocks away. That harm was not foreseeable. This case would be decided differently, though, if the person who died was a pedestrian on the sidewalk close to the collision.

Sometimes the negligence of more than one person harms someone. For example, suppose two cars, each negligently driven, collide and injure a pedestrian on a nearby sidewalk. Each driver is responsible for the pedestrian's injuries. If one driver is unable to pay, the other driver may have to pay the entire amount of the damages.

Damages

A plaintiff who proves duty, breach, and both forms of causation still must prove actual **damages** to recover in a negligence action. The basic idea behind damages is that the plaintiff should be restored to his or her pre-injury condition, to the extent that this can be achieved with money.

Courts allow plaintiffs to recover for hospital bills, lost wages, damage to property, reduced future earnings, and other economic harm. Plaintiffs may also recover for noneconomic harm such as pain

The Case of . . .

The Great Chicago Fire

In 1871, a major fire destroyed much of the city of Chicago. After a thorough investigation, the cause of the fire was determined. It began in Mrs. O'Leary's shed when a cow she had been milking kicked over a kerosene lantern she had placed too close to the cow's rear leg.

Problem 20.4

- Was Mrs. O'Leary negligent in placing the lantern so close to the cow's leg?
- Should she have had to pay for all the damage caused by the fire? Give reasons for your answer.



Aftermath of the fire

and suffering, emotional distress, and permanent physical losses (for example, loss of a limb or blindness). However, in some states, a plaintiff must first prove economic harm—even if only one dollar—before a judge or jury can make an award for noneconomic harm like pain and suffering.

Problem 20.5

As a freshman college prank, Carolyn decides to remove a stop sign from an intersection and put it in her dormitory room. To avoid being noticed, she chooses a stop sign at the intersection of a little-used country road and a two-lane state highway several miles out of town. The night after her prank, a motorist from out of state drives through this intersection and is struck by a car traveling at 50 miles per hour along the state highway. Both motorists are seriously injured, and their cars are totally demolished. They recover from their injuries after several months. The police suspect a college prank, and after some investigating, are able to find out who removed the sign. The injured motorists bring a civil action against Carolyn, claiming extensive damages.

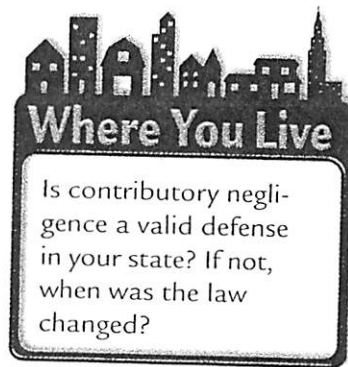
- a. Can the injured motorists prove that Carolyn's act caused their harm? Explain your answer.
- b. Assume that the plaintiffs can prove duty, breach, and causation. List all the types of damages each plaintiff might have suffered. Could they recover all of these damages? Explain your answer.

Defenses to Negligence Suits

People can recover for injuries when they are able to prove each of the elements of negligence by a preponderance of the evidence. However, even when all the elements can be proven, the defendant may be able to raise a valid legal defense. One group of legal defenses in negligence cases is based on the plaintiff's conduct.

One traditional legal defense is **contributory negligence**. This means that as a plaintiff, you cannot recover damages from the defendant if your own negligence contributed in any way to the harm suffered. For example, suppose a train station attendant warns a passenger not to walk in an area where ice has formed on the platform. The passenger walks there anyway, falls, and is hurt. The passenger might sue the railroad for allowing ice to remain on the platform. However, by ignoring the warning and stepping on the ice, the passenger breached the duty to act reasonably. The breach was the cause—both cause in fact and proximate cause—of her injury. The passenger and the railroad were negligent, so the passenger cannot recover damages.

When both parties are equally at fault, the contributory negligence defense perhaps provides a fair result. Neither party can recover damages from the other. However, the contributory negligence defense also allows for a very slight amount of negligence on the part of the plaintiff



Cigarettes and the Law

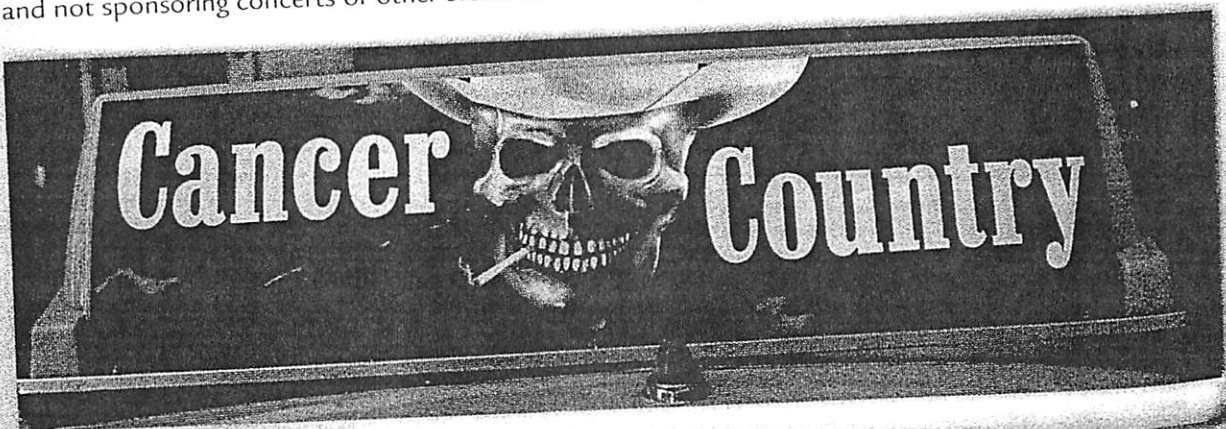
Prior to the mid-1990s, tobacco companies were usually able to defend against lawsuits brought by smokers harmed from cigarettes. They did so by claiming that the smokers had assumed the risks—based on the warning printed on cigarette packages—related to smoking. In 1994, despite testimony earlier that year before Congress that smoking was not addictive, documents surfaced showing that tobacco company executives actually had a great deal of information about the addictiveness of nicotine and the harm caused by smoking. Not surprisingly, in the next few years, many class action lawsuits were filed in state courts to recover damages from cigarette companies.

In 1998, the leading cigarette manufacturers settled these lawsuits. Not only did they promise to pay an estimated \$246 billion to the states over 25 years, but they also agreed to restrict the way they market cigarettes and make them available to the public. The cigarette companies also agreed to pay special attention to restricting young people's access to cigarettes. Some of these restrictions include not advertising on billboards or within public transportation systems, not using cartoon characters to sell tobacco products, and not sponsoring concerts or other events at

which young people will be present. In addition, the cigarette companies agreed to dedicate \$300 million toward public education efforts to reduce underage tobacco use and to educate consumers about causes and prevention of diseases associated with the use of tobacco products.

Problem 20.6

- a. Is it fair to the cigarette companies to subject them to liability when they had been manufacturing a legal product that contained a health notice printed on cigarette packages?
- b. Should it make a difference that the product, although legal, caused great harm?
- c. Should the federal government regulate such a product?
- d. Should it make a difference that the companies withheld information about the harmful effects of their products?
- e. A bartender who never smoked develops lung cancer as a result of inhaling secondhand smoke during her many years of work at the bar. Should the bartender be able to recover damages against cigarette manufacturers? Explain.



to give the defendant a complete legal defense. This is true even when the damage to the plaintiff is great and the defendant has been very negligent. Many people think this produces an unfair result. Therefore, this defense has been eliminated in most states by either state law or judicial decision.

Most states now allow a defense called **comparative negligence**. This means dividing the loss according to the degree to which each person is at fault. For example, Paul and Javier are in a car crash and Paul sues Javier for the \$20,000 in damages that he suffers. If the jury finds that Paul was somewhat negligent himself—for example, by not wearing his seat belt—the damages will be reduced. If Paul was 10 percent at fault and Javier was 90 percent at fault, Paul will receive \$18,000 (\$20,000 reduced by 10 percent, the amount that was Paul's fault). If Paul was 30 percent at fault, he will receive only \$14,000. But if he was more than 50 percent at fault, he will receive no damages in many states, and Javier might be able to sue Paul for some damages. Javier's action against Paul is called a **counterclaim**.

Sometimes several people commit a negligent act against a third person. If Paul and Javier in the example above had negligently collided and injured Charles, who was in another car and was not at fault, Charles could recover damages from both Paul and Javier. Paul and Javier might be able to divide their liability to Charles between themselves, according to each one's degree of fault. However, if one of the defendants was unable to pay because he had no money, the other defendant might have to pay all the damages awarded to Charles.

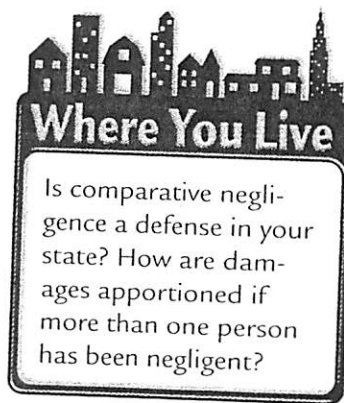
Another legal defense in negligence cases is **assumption of risk**. This defense is used when a person voluntarily encounters a known danger and decides to accept the risk of that danger. For example, a hockey fan knows that on rare occasions a hockey puck can be deflected off a player's stick, over the glass that surrounds the rink, and into the seats. A fan who buys a seat knows the risk and agrees to accept the danger. If a fan is hit by the puck, assumption of risk will be a complete defense for the team or the players involved should the injured fan try to sue.

This defense is also used when a warning is posted that gives notice of a certain danger. For example, many hotels operate swimming pools without hiring lifeguards. The hotels post large "Swim at Your Own Risk" signs near the pools.

Even without a warning notice, everyone knows that knives are sharp and may cause injury. When someone accidentally slices off a finger while cutting cucumbers, the knife manufacturer will not be held liable. The injured party assumed the risk by picking up the knife.



Signs are often posted to give notice of a certain danger. *If someone is injured or drowns at this beach, can the property owner be held liable?*





Roller coasters are equipped with safety bars to prevent injury. What questions would you have to answer to determine liability if a rider is hurt on this ride?

Problem 20.7

Analyze each case below. Identify the plaintiff and defendant and decide whether the defendant has a legal defense. Assume the state has a comparative negligence law.

- a. Olivia and her friends go to an amusement park, and she decides to ride the scariest roller coaster. After each rider is seated, the attendant secures that rider with a safety bar. Olivia tells her friends that she does not need the safety bar. After the first large hill, she detaches it. Later in the ride, Olivia is thrown from the roller coaster and is badly hurt.
- b. A large sign posted at the foot of the lifeguard station warns of a very dangerous undertow beyond the first sandbar. There are buoys floating around the sandbar. Howard swims out beyond the sandbar and drowns before the lifeguard is able to reach him.
- c. Joel's car runs out of gas on a railway crossing in a rural area. He puts on his flashers to warn approaching cars and begins walking to the nearest gas station, which is a mile away. A freight train approaches, and the engineer sounds his horn several times, thinking the driver will move off the tracks. By the time the engineer realizes that the car is abandoned, it is too late to stop the train. The car is totally demolished.

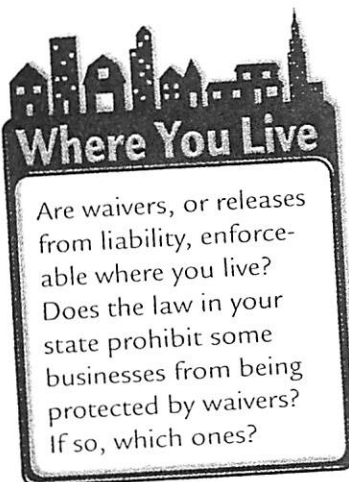


For Your Information . . .

Waivers

You may have been asked to sign a waiver, or a release from liability, before participating in certain potentially dangerous activities. A waiver is designed to release the person sponsoring the activity from liability if you are injured through his or her negligence. In most states such waivers, or releases, are enforceable as long as they are clear and understandable to a layperson. However, if

the conduct of the party asking you to sign the waiver is worse than negligent and this causes you damage, then the waiver will not protect them from liability. In addition, in some states certain other businesses—typically those regulated by government and those providing essential services—may not use waivers to protect themselves from liability for their negligence.



Are waivers, or releases from liability, enforceable where you live? Does the law in your state prohibit some businesses from being protected by waivers? If so, which ones?

CHAPTER 21

Strict Liability

"Law is experience developed by reason and applied continually to further experience."

— Roscoe Pound,
Dean Emeritus,
Harvard Law
School

Street Law *online*

Visit the *Street Law* Web site at streetlaw.glencoe.com for chapter-based information and resources.

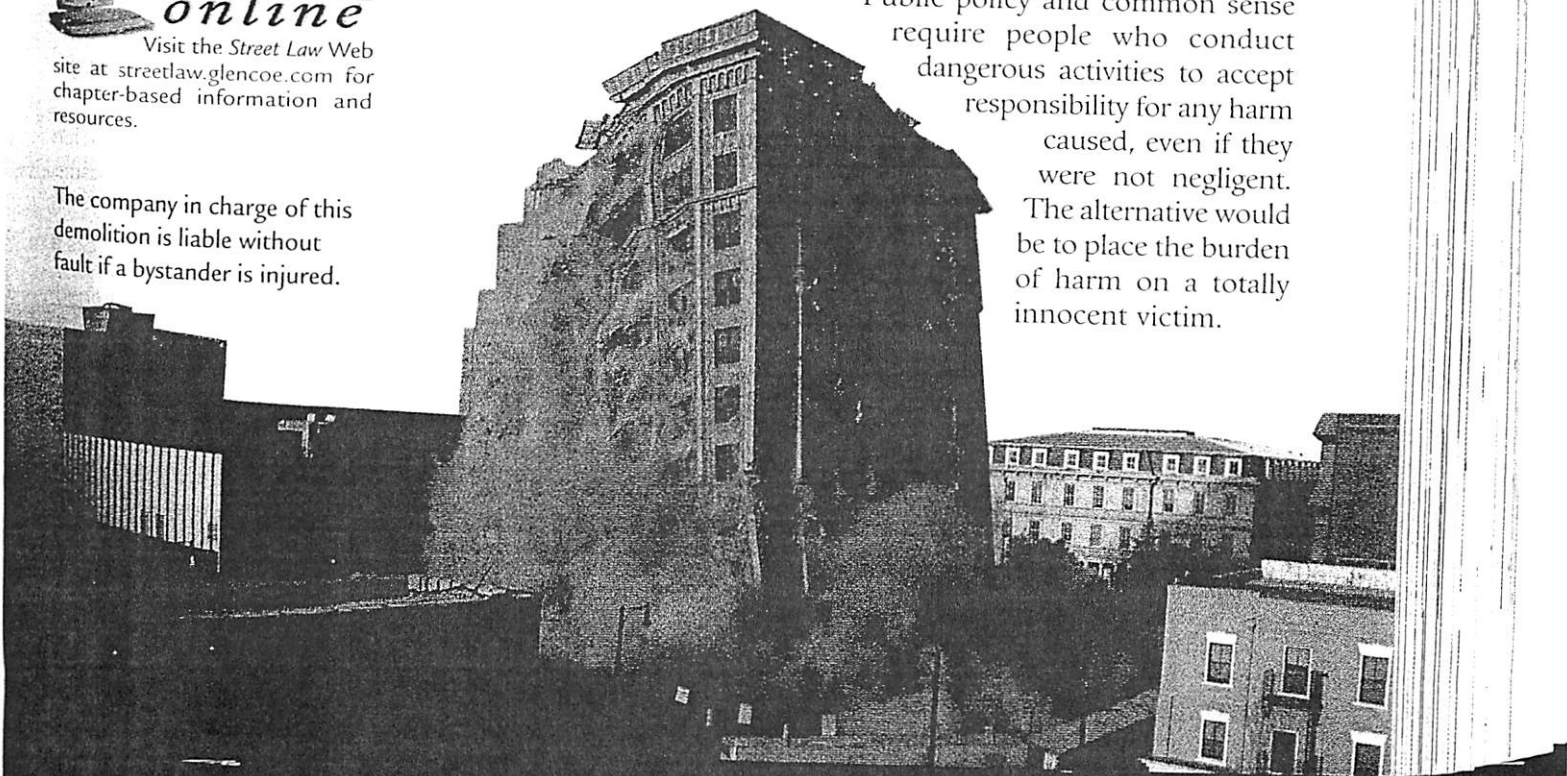
The company in charge of this demolition is liable without fault if a bystander is injured.

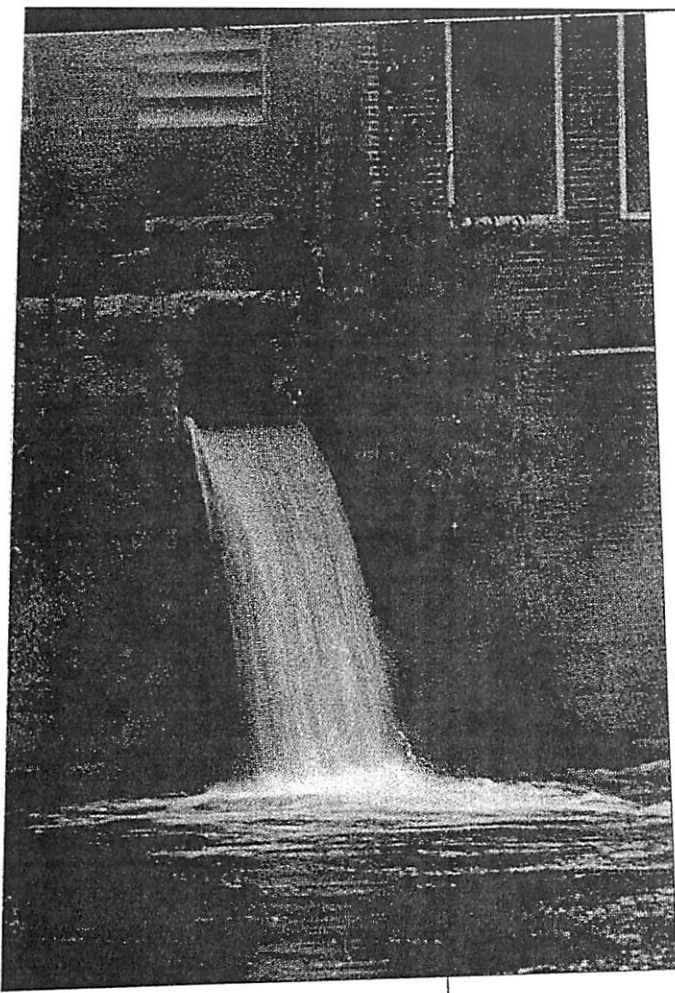
Until now we have examined tort cases in which the defendant was, to some degree, at fault and therefore liable to the plaintiff. In tort law, one exception to this requirement of fault is **strict liability**, also known as liability without fault.

Strict liability means that the defendant is liable to the plaintiff regardless of fault. In some situations, even if the defendant acted in a reasonable and prudent manner and took all the precautions necessary, liability is imposed without proof of fault. Strict liability is applied to ultrahazardous activities such as storing or transporting dangerous substances, or using explosives. It is also applied to harm caused by dangerous animals and to harm caused by the manufacture and sale of defective products.

Remember that proving negligence involves establishing four elements: duty, breach, causation, and damages. To prove strict liability, you must only prove causation and damages. However, you must also convince the court that the activity that caused the harm is the type of unreasonably dangerous activity to which strict liability is applied.

Public policy and common sense require people who conduct dangerous activities to accept responsibility for any harm caused, even if they were not negligent. The alternative would be to place the burden of harm on a totally innocent victim.





The concept of toxic torts was developed in response to companies guilty of industrial pollution. *What must the injured parties do before they can recover damages from an industrial polluter?*

Dangerous Activities

Strict liability applies to activities that are unreasonably dangerous. Activities are considered unreasonably dangerous when they involve a risk of harm that cannot be eliminated even by reasonable care. These activities may be socially useful or necessary, but because of their potential for harm, those who conduct them are held to the strict liability standard. For example, assume that a demolition company has been hired to dynamite an old downtown building. While demolition may be necessary, it is dangerous to use dynamite in a populated area. No amount of care by the demolition team can totally eliminate the risk. Therefore, the law imposes strict liability. This means that the demolition company must assume the risk of any foreseeable harm caused, even if the company is careful and not negligent.

Companies conducting dangerous activities know that they are strictly liable for any harm they cause. Therefore, they include this cost in the price they charge for the work. In the example above, the company using the dynamite has a financial incentive to be as careful as possible because of strict liability.

Problem 21.1

In which of the following situations should the plaintiff be able to recover damages based on strict liability? Explain your reasons.

- a. Anytown's waste treatment plant develops a leak, and harmful bacteria are released into the water supply. Hundreds of families become sick.
- b. Anita takes her car to a mechanic for repairs. As she enters the garage, she slips on spilled motor oil and breaks her ankle.
- c. Donna drives by a construction site in a downtown shopping district. Following a sudden blast from the site, a piece of cement crashes through her windshield and injures her.
- d. Kyung Lee is eating lunch at a cafeteria. A waiter races by and knocks a pot of coffee on Kyung Lee's arm, badly burning him.

In recent years, a concept called **toxic torts** has been introduced to address harm resulting from the use of toxic chemicals and other hazardous materials. Historically, some industrial manufacturers disposed of their wastes by dumping them into the nearest river or other convenient location. It was not until the 1960s that the public began to understand that prolonged exposure to toxic chemicals could cause illness and even death.

The toxic torts concept was developed to allow injured parties to recover damages from industrial polluters if the injured parties could establish causation—that is, if they could establish that the harm resulted from the manufacture or disposal of hazardous materials. For example, when a Massachusetts mother found that her son and a dozen other neighborhood children had leukemia, she successfully sued a chemical company that had contaminated local drinking water by dumping its waste products into a nearby stream.

Problem 21.2

Mr. Mattingly, a well-to-do farmer, has a legal right to apply pesticides to his fruit trees. One year, he decided to hire a crop-dusting airplane to spread a pesticide on his orchard. An unexpected gust of wind blew the chemical onto a neighbor's beehives, killing all the bees. The neighbor sued Mattingly for the value of the 60 beehives. Mattingly argued that a good fruit farmer has to apply pesticides and that the crop duster had exercised extreme caution in applying the chemicals.

- a. Was Mr. Mattingly negligent? Should strict liability apply to this case? Give your reasons.
- b. How should Mr. Mattingly defend this case?
- c. How would you decide this case? Explain your answer.

Animals

The law has traditionally held owners strictly liable for any harm caused by their untamed animals: Even the owner of a tamed wild animal such as a lion may be held strictly liable for any harm it causes because of the nature of the animal itself. The situation differs, however, for household pets. In most states, an owner of a pet is strictly liable only if he or she knew, or should have known, that the pet was dangerous or destructive. There is a saying that "Every dog is entitled to one free bite." However, an owner who knows his dog is vicious may be liable for the first bite. There may also be liability if "near misses" have put the owner on notice of the dog's viciousness.

Even the first bite by a pet with no history of violent behavior can result in liability if the owner is negligent. For example, some states and localities have leash laws requiring that pets be kept under the owner's control and on a leash in public places. If you violate the duty to keep your pet under control, you can be sued based on your negligence. In extreme situations, a pet owner might even be held criminally responsible for the harm caused by a pet if the owner knows that the pet is dangerous or cannot be controlled.

Leash laws require pet owners to keep their pets restrained and under control. *Would a dog owner be liable if his or her dog attacked and injured someone in a public place?*



The Case of . . .

The Dangerous Dog

Five-year-old Matthew opens a gate and walks into his neighbors' yard to play with their dog, a pit bull terrier. The dog—which had never attacked anyone before—attacks Matthew, badly mauling his hand. Matthew's parents sue the dog's owners for not keeping the animal inside or in a pen in the yard. The owners defend themselves by saying that even though there have been reports of attacks by other pit bull terriers, their dog had been affectionate with family members and had never shown any dangerous or destructive tendencies.

Problem 21.3

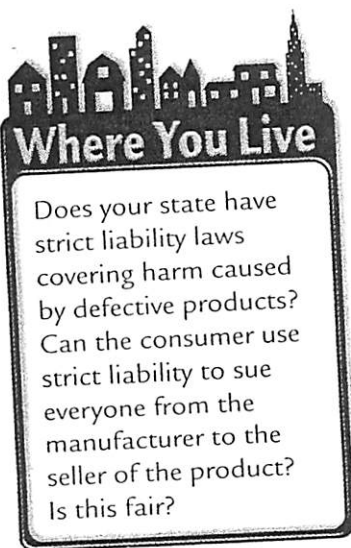
- What arguments can you make for Matthew's parents?
- What arguments can you make for the dog's owners?
- How should this case be decided? Explain your answer.
- Would you have decided this case differently if Matthew had been 15? What if he had been 35? What arguments could you make for each situation? How would they differ?

Defective Products

Harm caused by defective products is a significant social problem. **Product liability**—the legal responsibility of manufacturers for injuries caused by defective products—is an important legal issue. In fact, some lawyers specialize in product liability law. In a typical year, more than one million consumers suffer product-related injuries and nearly half of them sue to recover damages. In many cases, the manufacturer is held strictly liable for harm caused by the defective product. In some instances, injured consumers bring cases together as a class action against a manufacturer.

The U.S. Consumer Product Safety Commission (CPSC), created in 1972, is the federal agency that deals with consumer product safety. It protects the public by issuing and enforcing mandatory product standards or banning consumer products. The commission has the power to force many dangerous products off the market and advises consumers on product safety.

As a matter of public policy, manufacturers and sellers are frequently held strictly liable for harm caused by their products. Strict liability is meant to create a strong incentive for companies to design safe products, test products thoroughly before placing them on the market, and include clear directions and warnings on products. Strict liability causes companies to spend more money on research and development, safety features, and insurance. This increase in spending usually results in higher prices for consumers. Some people criticize these higher prices, while others say that safer products are worth the extra cost.



Problem 21.4

- a. Make a list of five items that are or can be dangerous to use.
 - b. For each item, decide whether the government should ban it, regulate it (for example, require warnings), or take no action at all.
 - c. Explain why you treated each item as you did. Consider in your explanation both the danger(s) and the benefit(s) of each item.
-

An unsafe product that causes many injuries and subsequent lawsuits may become too expensive to compete successfully with safer products in the marketplace. For example, in the 1990s, more than 5.8 million Americans began taking weight loss drugs, including a product called fen-phen. About 20 percent of those taking fen-phen developed serious heart problems, and some of them lost normal heart function. In a successful class action, several people recovered damages from the pharmaceutical company. As a result, fen-phen is no longer on the market in the United States.

The fear of expensive lawsuits may also discourage the production of new and useful—but unavoidably dangerous—products such as vaccines. Some people argue that this is a reasonable restraint on development. Others argue that the government should provide some type of insurance or immunity from lawsuits as an incentive for companies to develop new products in the spirit of progress.

The Case of . . .

The First Responders

Gabriella, a doctor, is a member of the team her city established to be the first to respond in case of a bioterrorist attack. As part of her preparation for such an event, Gabriella and her colleagues are each required to be vaccinated for smallpox, a highly infectious and deadly disease that kills 30 percent of those who contract it. The government believes that the smallpox virus could be used in a terrorist attack. Even though Gabriella does not want to receive the vaccination because she knows there is a minor risk (1 in 1,000,000) that she could contract smallpox, she is forced to do so in order to keep her job.

Problem 21.5

- a. If Gabriella becomes sick after having the vaccination, should the drug company that manufactures the vaccine be held strictly liable for Gabriella's injury?
 - b. Is the risk of getting sick from the vaccine unreasonable? Do the benefits outweigh the dangers?
 - c. What arguments can the drug company make to defend itself? Identify the public policy issues that the company might use in its defense.
 - d. Should Gabriella be able to sue the government for forcing her to take a drug she doesn't want to take? Why or why not?
-

Law in Action

Should Gun Manufacturers Be Held Liable?

After a particularly horrible shooting spree that killed eight and wounded six others in California, a bill was introduced in the state legislature that would have removed (for future cases) the state's existing law (passed in 1983) that protected gun manufacturers from liability. In the shooting spree case, the shooter used a semiautomatic weapon produced by a company that listed the following statements in its advertising literature: "Excellent resistance to fingerprints" and "Tough as your toughest customers."

In the floor debate on the bill, the author of the 1983 law argued that the new law would not be effective. He stated, "A crazy person who wants to commit murder won't have any problem getting a weapon [after gun makers are no longer immune from suit]." Another state senator argued, "It's the nut behind the trigger, not the gun, that does the damage." Yet another said, "Automobiles are as dangerous as a gun, yet automakers are not held liable on the basis that their product is inherently harmful."

Problem 21.6

- If you were a lawmaker, would you vote for a law that allowed gun makers to be held liable for damages, or would you support a law that protected gun makers from tort suits? Explain your answer and your reasoning.
- Are gun manufacturers able to be sued in your state? Is this a current legislative issue where you live? Should it be?



A controversial issue

Courts have been reluctant to apply strict liability to unavoidably unsafe products whose benefits outweigh the dangers. Certain vaccines are unavoidably risky to use. For example, even if the rabies vaccine is properly tested, prepared, and labeled, some people who receive it may become sick. However, if untreated, rabies leads to death. Because the benefits of the vaccine outweigh the danger, strict liability does not apply. This does not mean that drug manufacturers are automatically protected from any liability. If a drug that causes harm has not been properly tested, prepared, or labeled, the plaintiff may be able to recover damages based on negligence (rather than on strict liability).

Defenses to Strict Liability

There are very few defenses in strict liability cases. The defendant's best strategy may be to argue that the plaintiff should have to prove negligence in a particular case and that sound public policy does not require the use of a strict liability standard. It is almost always more difficult for the plaintiff to win a negligence suit, because there must be proof of the defendant's fault, or breach of duty.

While you do not have to prove fault in a strict liability case, you do have to prove both causation and damages. Therefore, a defendant could try to show that there is no causation or that there are no damages. For example, assume that a person has a heart attack and dies instantly while driving a car with faulty brakes. That person's family might argue that the car manufacturer is strictly liable. However, if the defect (the faulty brakes) did not cause the damage (the heart attack), the manufacturer would not be liable for the driver's death.

In product liability cases, manufacturers or sellers may have a defense if the consumer misuses a product or ignores clear safety warnings. Many courts, however, require manufacturers to anticipate some misuse and to make products safe against any foreseeable misuse. For example, a manufacturer should assume that a stool meant for seating at a kitchen counter might also be used as a step ladder. The stool should be built to hold a person whether seated or standing.

Problem 21.7

In each of the following cases, the injured person sues the manufacturer for damages based on strict liability. Does the defendant have a good defense? Give your reasons.

- a. Hannah's parents give her a teddy bear on her sixth birthday. While playing with the teddy bear, she pulls out one of the toy's eyes. The sharp pin that held the eye in place punctures her skin, causing an injury.
- b. Marilyn is rushing to complete her housework so she can go out on a date with Andy. To speed up the defrosting of the freezer, she uses a hair dryer. A melting piece of ice hits the hair dryer, and Marilyn receives a serious electric shock. The warning on the dryer says, "Electrocution possible if used or dropped in bathtub. Unplug after using."