

FIFTH EDITION

Torts and Personal Injury Law



Cathy J. Okrent

TORTS AND PERSONAL INJURY LAW



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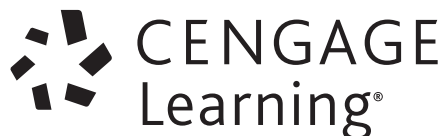
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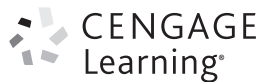


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Cathy J. Okrent



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Dedication

*This book is dedicated to my dad, Charles I. Okrent, who inspired me to be an attorney just like him,
always helping others with a logical plan to solve their problems.*

Cathy J. Okrent



Brief Contents

Chapter 1	Introduction to Torts and Legal Analysis	1
Chapter 2	Negligence	19
Chapter 3	Proving Breach of Duty, Medical and Legal Malpractice	60
Chapter 4	Special Negligence Actions	89
Chapter 5	Defense to Negligence	123
Chapter 6	Intentional Torts: Injuries to Persons	145
Chapter 7	Intentional Torts: More Injuries to Persons	176
Chapter 8	Intentional Torts: Injuries to Property	219
Chapter 9	Defenses to Intentional Torts	256
Chapter 10	Strict, or Absolute, Liability	294
Chapter 11	Products Liability	322
Chapter 12	Special Tort Actions	359
Chapter 13	Tort Immunities	395
Chapter 14	Tort Investigation	419



Contents

Preface xv

Acknowledgements xx

Table of Cases xxii

Chapter 1

Introduction to Torts and Legal Analysis

1

The Biggest Mistakes Paralegals Make and How to Avoid Them 1

■ Introduction 2

■ Torts Defined 2

Sources of Tort Law 3

Broad Categories of Tort Law 3

■ History of Tort Law 5

The King's Writs 5

Evolution of Modern Tort Law 5

■ Public Policy Objectives in Tort Law 6

Protecting Persons and Property: Accountability 6

Compensating the Victim 6

Minimum Standards of Social Conduct: Deterrence 6

Deterring Violations of Those Standards 6

Allocating Losses among Different Individuals or Groups 7

■ Analyzing Hypothetical Problems 8

Analytical Framework for Hypotheticals: IRAC 8

Factual Distinctions Result in Different

Conclusions 8

■ Solving Tort Problems 9

Tort Analysis: From General to Specific 9
Hypothetical 9

■ Overview of a Civil Case 11

Complaint 11

Answer 11

Discovery 12

Pretrial Procedures 12

Trial 13

Post-Trial Procedures 13

■ Case Resolution 13

Alternative Dispute Resolution (ADR) 13

Arbitration 14

Mediation 14

Minitrial 14

Rent-a-Judge 14

Summary Jury Trial 15

■ Summary 15

■ Key Terms 16

■ Problems 16

■ Review Questions 17

■ Helpful Websites 17

Chapter 2

Negligence

19

The Biggest Mistakes Paralegals Make and How to Avoid Them 19

■ Introduction 20

■ Negligence 20

vii

- Negligence Defined: Reasonable Care 20
- Acts or Omissions 21
- **Elements of Negligence 21**
- **Element 1: Duty of Reasonable Care 22**
 - Scope of Duty 22
 - Foreseeable Plaintiffs Theory 23
 - Unforeseeable Plaintiffs 23
 - Special Duty Based upon Special Relationship 23
 - Duty Rule for Good Samaritans 27
 - Trained versus Untrained Volunteers 27
- **Element 2: Breach of Duty 31**
 - Standard of Reasonable Care 34
 - Professional Community Standard of Care 36
 - Children 37
 - Emergencies 37
 - Disabilities 37
 - Mental Illness 37
 - Professional Malpractice 38
- **Element 3: Causation of Injury 39**
 - Cause-in-Fact 40
 - Substantial Factor Analysis 40
 - Joint and Several Liability 41
 - Contribution 45
 - Indemnity 45
 - Courts and Causation 45
 - Proximate Cause 47
 - Foreseeability of Injury 47
 - Proximate Cause and Scope of Duty Combined 48
 - Intervening Causes 49
- **Element 4: Damages 53**
 - Compensatory Damages 53
 - Nominal Damages 55
 - Punitive Damages 55
 - “Taking the Victim as You Find Him” 55
- **Summary 56**
- **Key Terms 57**
- **Problems 58**
- **Review Questions 59**
- **Helpful Websites 59**

Chapter 3

Proving Breach of Duty, Medical and Legal Malpractice

60

-
- The Biggest Mistakes Paralegals Make and How to Avoid Them 60**
 - **Introduction 61**
 - **Proving Breach of Duty 61**
 - **Burden of Proof and Rejoinder 62**
 - **Res Ipsa Loquitur 63**
 - Elements of Res Ipsa Loquitur 63
 - **Violation of a Statute 66**
 - Defendant’s Response to Plaintiff’s Claim of Negligence 68
 - **Malpractice 68**
 - **Medical Malpractice 68**
 - Malpractice Insurance 69
 - Deciding Whether to Proceed with a Malpractice Case 69
 - Elements of Medical Malpractice 70
 - Tort Reform 73
 - **Legal Malpractice 79**
 - Statute of Limitations 79
 - Consequences of a Malpractice Action 79
 - Examples of Legal Malpractice 79
 - Refusal of Case and Disengagement 80
 - Judging Attorney Conduct 80
 - Suing a Colleague 80
 - Experts Are Not Always Needed to Prove Legal Malpractice 80
 - Elements in a Legal Malpractice Claim 82
 - **Summary 85**
 - **Key Terms 87**
 - **Problems 87**
 - **Review Questions 88**
 - **Helpful Websites 88**

Chapter 4 Special Negligence Actions

89

The Biggest Mistakes Paralegals Make and How to Avoid Them 89

■ Introduction 90

■ Vicarious Liability 91

Vicarious Liability Defined 91

Respondeat Superior 91

Frolic and Detour Rule 92

Coming and Going Rule 92

Independent Contractors 92

Motor Vehicle Vicarious Liability 93

■ Premises Liability 96

Landowner's Different Duties of Reasonable Care 96

Victim's Status on Land Defines Scope of Duty 96

Modern Judicial Trends 96

Tier 1. Landowner's "Zero Duty" toward Trespassers 97

The Restatement (Second) of Torts 100

Tier 2. Landowner's Duty of Reasonable Care toward Licensees 101

Tier 3. Landowner's Highest Duty of Reasonable Care toward Invitees 102

Using Traditional Negligence Theory in Landowner Cases 105

■ Negligent Infliction of Emotional Distress 109

Extra Elements in the Common Law 109

Impact Rule 109

Physical Manifestations Rule 110

Zone of Danger Rule 110

Family Relationships Rule 112

Sensory Perception Rule 112

California Approach 112

Negligence Per Se 114

Defenses to Negligence Per Se 115

Plaintiff within Class of Persons Protected by Statute 117

Absolute Liability Mislabeled as Negligence Per Se 118

Toxic Torts as Negligence Per Se 118

■ Summary 119

■ Key Terms 120

■ Problems 120

■ Review Questions 121

■ Helpful Websites 122

Chapter 5 Defense to Negligence

123

The Biggest Mistakes Paralegals Make and How to Avoid Them 123

■ Introduction 124

■ How Negligence Defenses are Used 125

■ Statutes of Limitations 125

■ Contributory Negligence and Last Clear Chance 128

Contributory Negligence Defined 129

Last Clear Chance 129

■ Comparative Negligence 132

Elements of Comparative Negligence 132

The Balancing Act 133

Criticism of Comparative Negligence 134

■ Assumption of Risk 137

Voluntary Assumption of Known Risk 137

Full Appreciation of Danger 138

Proof of Assumption of Risk 139

The Complete Defense 139

■ Summary 142

■ Key Terms 142

■ Problems 143

■ Review Questions 144

■ Helpful Websites 144

Chapter 6

Intentional Torts: Injuries to Persons 145

The Biggest Mistakes Paralegals Make and How to Avoid Them 145

■ Introduction 146

■ Intentional Torts in General 146

Intent and Action Together 147

Crimes Versus Torts 147

■ Assault and Battery 148

Assault Defined 149

Battery Defined 153

■ False Imprisonment 157

Confinement 158

■ Sexual Harassment 164

■ Tortious Interference with Reasonable Expectations of Inheritance 167

■ Patient Dumping 170

■ Spoliation of Evidence 170

■ Summary 172

■ Key Terms 173

■ Problems 174

■ Review Questions 175

■ Helpful Websites 175

Chapter 7

Intentional Torts: More Injuries to Persons 176

The Biggest Mistakes Paralegals Make and How to Avoid Them 176

■ Introduction 177

■ Infliction of Emotional Distress 177

Intentional Infliction 178

Reckless Infliction 181

■ Fraud and Misrepresentation 185

Definitions and Distinctions 185

False Statements Intended to Deceive 186

Knowledge of Falsity of Information 186

Tortfeasor's Profit from Deception 186

Justifiable Reliance 186

Innocent Party's Injury 187

■ Malicious Prosecution and Abuse of Process 190

Malicious Prosecution 190

Abuse of Process 191

■ Invasion of Privacy 195

Appropriation 195

Unreasonable Intrusion 198

Public Disclosure of Private Facts 199

False Light in the Public Eye 201

■ Defamation: Libel and Slander 204

Nature of the Statement 205

Publication 208

Harm to Reputation in the Community 209

Public Figures 209

Slander Per Se 209

Truth and Privilege as Absolute Defenses 210

■ Summary 216

■ Key Terms 217

■ Problems 217

■ Review Questions 218

■ Helpful Websites 218

Chapter 8

Intentional Torts: Injuries to Property 219

The Biggest Mistakes Paralegals Make and How to Avoid Them 219

■ Introduction 220

■ Trespass to Land 220

- Elements of Trespass to Land 220
- Entry Defined 221
- No Actual Harm Required 221
- Unauthorized Entry 221
- Intentional Interference 222
- Possession: Landowner's Exclusive Right to Use 222
- **Toxic Tort Actions 224**
 - Nature of the Problem 224
 - Toxic Trespass 227
 - Importance of Environmental Statutes 230
- **Trespass to Chattel 230**
 - Unauthorized Possession of Another's Chattel 231
 - Unauthorized Interference with Use 231
 - Intent to Deprive or Interfere 232
- **Conversion 233**
 - History 233
 - Elements of Conversion 234
 - Depriving of Possession 234
 - Conversion as a Crime 238
- **Slander of Title, Commercial Disparagement, and Defamation by Computer 239**
 - Slander of Title 240
 - Commercial Disparagement 242
 - Defamation by Computer 245
 - Creation of a New Tort 248
- **Summary 252**
- **Key Terms 253**
- **Problems 253**
- **Review Questions 254**
- **Helpful Websites 255**

Chapter 9

Defenses to Intentional Torts

256

-
- The Biggest Mistakes Paralegals Make and How to Avoid Them 256**
 - **Introduction 257**
 - **Consent 258**
 - Informed Consent: Voluntary Acceptance 258
 - Implied Consent 259
 - **Self-Defense 261**
 - Reasonable Force 262
 - Countering an Attacking or Offensive Force 263
 - Force Necessary to Prevent Injury, Offensive Contact, or Confinement 263
 - **Defense of Persons or Property 264**
 - Defense of Persons: Elements 264
 - Defense of Property: Elements 265
 - **Rightful Repossession 268**
 - Retaking Possession of Personal Property 268
 - Prompt Repossession Efforts 269
 - Wrongful Denial of Possession 269
 - Wrongful Dispossession 269
 - **Mistake 273**
 - The *Restatement (Second) of Torts* 273
 - **Privilege 274**
 - Motives and Socially Desirable Goals 275
 - Less Injurious Alternatives 275
 - Similarity between Privilege and Other Defenses 276
 - The *Restatement (Second)* Position 276
 - **Necessity 278**
 - Thwarting a More Substantial Harm 278
 - External Forces 278
 - Reasonably Necessary Action 278
 - The *Restatement (Second)* Position 279
 - **Public Officer's Immunity for Legal Process Enforcement 280**
 - Service of Process 281
 - Execution Sales 281
 - Attachment or Replevin 281
 - Arrest by Warrant 281
 - Prosecutors and Judges 282
 - **Warrantless Arrest by Law Enforcement Officials or Citizens 285**
 - **Statutes of Limitations 286**
 - **Workers' Compensation 286**
 - **Summary 289**
 - **Key Terms 290**
 - **Problems 291**
 - **Review Questions 292**
 - **Helpful Websites 293**

Chapter 10 Strict, or Absolute, Liability

294

The Biggest Mistakes Paralegals Make and How to Avoid Them 294

- **Introduction** 295
- **An Overview of Strict Liability** 295
 - Fault Is Irrelevant 295
 - Limitations to Absolute Liability 295
 - Public Policy Objectives behind Strict Liability 296
 - Insurance Analogy 296
 - Historical Development 296
- **Animal Owners' Liability** 296
 - Wild Animals Defined 297
 - Ownership of Wildlife 297
 - Importance of Wildlife Ownership 297
 - Comparison with Domesticated Animals 298
 - Vicious Propensity Rule 298
 - Defenses in Cases Involving Animal Owners' Absolute Liability 298

- Dog-Bite Statutes 300
- **Abnormally Dangerous Activities** 302
 - The *Restatement (Second)* Rule 302
 - Defenses 304
 - Public Policy Objectives behind Statutory Immunity 306
- **Scope of Liability: Proximate Cause** 312
 - No Duty of Reasonable Care 312
- **Mass Torts and Class Actions** 312
 - Class Action 314
- **Summary** 319
- **Key Terms** 319
- **Problems** 320
- **Review Questions** 320
- **Helpful Websites** 321

Chapter 11 Products Liability

322

The Biggest Mistakes Paralegals Make and How to Avoid Them 322

- **Introduction** 323
- **Products Liability Theory and History** 323
 - Public Policy Objectives behind Products Liability 324
 - Historical Development of Products Liability 324
 - Types of Warranties 326
- **Parties** 328
 - Manufacturers and Sellers 329
 - The Ultimate User 329
- **Elements** 330
 - No Privity-of-Contract Requirement 330
 - Negligence Is Irrelevant 330
 - A Typical Products Liability Formula 331
 - The *Restatement (Second) of Torts* Rule 331
 - Unreasonably Dangerous Products 334
 - Business Requirement 336
 - Substantially Unchanged Condition Requirement 337

- Proximate Cause 337
- Proper Use Requirement 337
- Foreseeable Plaintiffs Theory 340
- **Defenses** 345
 - Contributory or Comparative Negligence is not a Defense 345
 - Ultimate User's Misuse of Product 346
 - Assumption of Risk 346
- **Comparison to Contract Law Warranties** 353
 - Express Warranties 353
 - Implied Warranties 353
- **Bad Faith** 354
- **Summary** 355
- **Key Terms** 356
- **Problems** 356
- **Review Questions** 357
- **Helpful Websites** 358

Chapter 12

Special Tort Actions

359

The Biggest Mistakes Paralegals Make and How to Avoid Them 359

- **Introduction** 360
- **Private Nuisances** 360
 - Private Nuisance Defined 361
 - Classic Examples 361
 - “Coming to the Nuisance” Defense 366
- **Public Nuisances** 371
 - Use and Enjoyment of Common Legal Rights 372
 - Governments as Plaintiffs 372
 - Types of Public Nuisances 373
 - Mixed Nuisances 373
 - Nuisances Per Se 373
 - “Coming to the Nuisance” Is Not a Defense 374
- **Remedies for Nuisances** 378
 - Abatement 379
 - Injunctions 380

Money Damages 380
Review of Hypotheticals 383

- **Survival Statutes and Wrongful Death Statutes** 383
 - Typical Facts in Wrongful Death Cases 383
 - Plaintiffs in Wrongful Death Actions 383
 - Damages 384
 - Defenses 384
- **Wrongful Birth** 388
 - Typical Fact Pattern: Genetic Counseling Gone Awry 388
 - Wrongful Life: The New Tort 389
- **Summary** 392
- **Key Terms** 393
- **Problems** 393
- **Review Questions** 394
- **Helpful Websites** 394

Chapter 13

Tort Immunities

395

The Biggest Mistakes Paralegals Make and How to Avoid Them 395

- **Introduction** 396
- **Sovereign, or Governmental, Immunity** 396
 - History 396
 - Modern Applications 397
 - Difficulty with the Governmental/Proprietary Distinction 398
 - Modern Steps to Eliminate the Distinction 398
 - Suits against States 398
 - Federal Tort Claims Act—Suits against the United States 398
- **Public Officers** 402
 - Exceptions 402
 - Who Is Protected 403
 - Rationale for Immunity 403
- **Children of Tender Years** 405
 - Definition 405
 - Absolute Immunity for Intentional Torts 405

Immunity from Negligence 405

- **Spousal/Family Immunity** 406
 - Spousal Immunity 406
 - Family Immunity (Parent/Child) 408
- **Workers’ Compensation (Employer Immunity)** 408
 - Types of Injuries 408
 - Benefits 409
 - Reporting and Filing Requirements 409
- **Tort Trends and Tort Reform** 412
 - Tort Trends 412
 - Tort Reform 412
- **Summary** 415
- **Key Terms** 415
- **Problems** 416
- **Review Questions** 416
- **Helpful Websites** 417

Chapter 14 Tort Investigation

418

The Biggest Mistakes Paralegals Make and How to Avoid Them 418

■ Introduction 419

■ Tort Investigation 419

■ The Importance of Tort Case Investigation 420

Paralegals and Investigators 420

Customizing the Investigation 421

Details, Details, Details! 421

Goals of Tort Case Investigation 421

■ Witness Interview Techniques and Questions 422

Narrative Questions 422

Closed-Ended Questions 422

Leading Questions 422

Pictures and Diagrams 425

Client Interview Techniques 425

■ Determining and Locating Defendants 426

Using Discovery to Locate Defendants 426

Study Documents Carefully 428

Use Caution When Naming Parties 429

Using the Telephone as a Research Tool 430

Internet Resources 430

Obtaining Information about Corporations 430

Obtaining Information about Partnerships 432

Obtaining the Names of Sole Proprietors
and Partners 432Ambulance Services and Fire Departments
as Defendants 432

Investigating Licensed or Regulated Businesses 434

Sample Defendant Search 434

■ Documenting the Scene 435

Obtaining Visual Documentation, Measurements,
and Other Details 435Knowing the Evidentiary Rules for One's
Jurisdiction 436

Using Proper Evidentiary Form 437

Hearsay Problems 437

Video and Computer Technologies 437

■ Public- and Private-Sector Resources 437

Local Governmental Agencies 438

Newspapers 438

Television and Radio News Reports 438

Computerized Databases 439

Information Regarding Criminal Acts 443

■ Additional Areas to Investigate 443

Employment and Lost Wages 443

Expenses Related to the Injury 445

Insurance Coverage and Other Benefits 445

Previous Claims or Lawsuits of Plaintiff 446

Previous Injuries to Plaintiff 448

The Parties' Criminal Histories 449

Driving Records 449

■ Investigating Different Types of Tort Cases 449

Automobile Accident Cases 449

Medical Negligence Cases 456

Obtaining Information about Health Care
Providers 458Health Care Facilities That Receive Governmental
Funding 461

■ Summary 464

■ Key Terms 465

■ Problems 465

■ Review Questions 466

■ Helpful Websites 466

Appendices

■ Appendix A Confidential Client Information Form 469

■ Appendix B Understanding Appellate Court Opinions 476

Glossary 480

Index 490



Preface

■ WHAT IS NEW IN THE FIFTH EDITION?

Introducing the third decade of a best-selling textbook, *Torts and Personal Injury Law*, is a milestone. In its latest reinvention, this is still the most informative text for explaining torts to students in a direct, uncomplicated manner and with an informal writing style. Students like the clarity of material, the organization of each chapter, the number of illustrations for each point, and the plethora of recent cases. Students enjoy the hypotheticals used to make torts memorable and love the chapter feature entitled “The Biggest Mistakes Paralegals Make and How to Avoid Them.” Mistakes range from inappropriate insider trading to interviewing blunders and a dozen more unfortunate situations that actually happened! So what else is new in the fifth edition?

Expanded Coverage

- ▮ A new chapter covers negligence and its elements in greater depth, bringing the total number of chapters to 14
- ▮ An expanded discussion of the court structure and system
- ▮ More in-depth coverage of alternative dispute resolution (ADR)
- ▮ Comparison of *Restatement (Second) of Torts* with *Restatement (Third) of Torts*
- ▮ Extensive material addressing medical malpractice actions
- ▮ A new, detailed section dedicated to tort reform, tort trends, and the impact these have for tort victims, the legal profession, and the health care field
- ▮ Increased coverage of workers’ compensation and ethical issues

Updated Topics

- ▮ Cyber torts, including cyber-bullying and cyber-stalking
- ▮ Tortious liability for criminal conduct
- ▮ Tortious interference with contracts and civil liability
- ▮ Tortious abuse of social media
- ▮ Wrongful birth and wrongful life causes of actions

- Genetic engineering and the unauthorized use of genetic material
- No-fault automobile insurance policies

Updated Features

- The vital role insurance coverage plays in bringing tort actions is demonstrated throughout the text.
- More practical and hands-on activities are available online.
- Additional legal references and websites are included for further legal research.
- More annotated cases are included—75 in total.

New Cases

More than two-thirds of the cases in this edition are new, ranging from a case where church leaders were “just plumb ugly” to congregants, to a landmark \$168 million sexual harassment verdict, to tortious interference with an expected inheritance, as well as cases covering the following, among others: a law firm that hired an attorney with the same last name as the attorney who was let go to give the impression the attorney was still there, a funeral services company that lost a son’s cremains, a knock-off product whose name varies from that of another product by one letter, and a disgruntled client who goes on a shooting rampage at a law office.

The logical organization of each of the 14 chapters remains as follows: chapter outline, introduction, definitions in a running glossary on each page where a term is first introduced, hypotheticals, chapter summary, key terms, problems, review questions, and helpful websites and activities.

■ OVERVIEW

This text provides an overview of tort law for the personal injury paralegal. Chapter 1 discusses tort law generally and historically; it also provides an overview of a civil case and alternative dispute resolution (ADR). Chapter 2 introduces the elements of negligence. Chapter 3 continues the discussion of negligence with proving breach of duty, burden of proof and rejoinder, *res ipsa loquitor*, violation of a statute, medical and legal malpractice, and tort reform. Chapter 4 discusses special negligence actions, including premises liability, vicarious liability, and negligent infliction of emotional distress. Chapter 5 focuses on the defenses to negligence actions. Chapters 6 and 7 consider intentional torts and injuries to persons. Chapter 8 is devoted to intentional torts and injuries to property. Chapter 9 addresses defenses to intentional torts. Chapter 10 covers strict, or absolute, liability. Chapter 11 illustrates product liability cases. Chapter 12 features special tort actions. Chapter 13 discusses tort immunities, tort trends, and tort reform. Chapter 14 focuses on tort investigation.

■ CHAPTER FEATURES

Of course, favorite elements have all been retained. Chapters begin with an outlined introduction. Chapters end with a summary, review questions, additional problems, and a list of key terms that were used throughout the chapter, in addition to chapter-specific Internet resources. Many recent cases have been added.

The running glossary features numerous definitions from *Legal Terminology with Flashcards*, © 2012, Cengage Learning, to help students learn or refresh their knowledge regarding these terms.

The text combines theoretical and practical applications. Accompanying each tort topic are hypothetical examples to illustrate how the abstract rules pertain to real life. Illustrative cases are included to portray the actual application of legal principles in appellate court opinions, legal encyclopedia summaries, and the *Restatement (Second) of Torts* and the *Restatement (Third) of Torts*.

All cases included are for educational purposes, as examples of court reasoning in relation to chapter topics. The cases have been heavily edited, and most citations omitted, so as to include as many cases in the text as possible. The reader should always refer to original sources and verify that there have been no recent changes in the law in a particular jurisdiction. Sample letters, forms, and reports are included for illustrative purposes. The people named in the exhibits and hypotheticals are all fictional; any resemblance to known people is purely coincidental.

■ SUPPLEMENTS FOR TEACHING AND LEARNING

Student Companion Website

The Student Companion Website contains supplementary cases, additional tutorials on ethics and understanding appellate court decisions, PowerPoint® presentations, and additional study materials.

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Thank you one and all.

■ ABOUT THE AUTHOR

Nobody is better suited to writing a textbook on the subject of torts than Cathy J. Okrent. Over 35 years ago she had her first torts course as a first-year law student in Massachusetts, and since then her legal career has evolved in several areas of civil litigation, especially tort law. First she embarked on defense work for a large Manhattan insurance company before accepting a position with the Nassau (New York) County of Social Services. At the former, she was a defense attorney in accident cases. At the latter, her people skills complimented her legal acumen in the service of the Commissioner's Office, working with the indigent and adjudicated incompetent residents of the county.

In the next phase of her career, Cathy demonstrated savvy trial technique in torts and medical malpractice cases in Albany, New York. After years of success as a plaintiff's attorney, both at trial and in negotiations, she became counsel at the New York State Workers' Compensation Appeals Board. As the last resort for any worker with such an appeal, Cathy defended the Board's decisions.

After the birth of her two daughters, Cathy began instructing paralegal students as a college professor. Subsequently, she began writing paralegal textbooks as follows:

Torts and Personal Injury

Legal Terminology

Legal Terminology for Court Reporting

Okrent's *Torts* consistently appears on lists of best sellers in the legal profession.

After moving to California, Cathy became a corporate legal consultant and pioneered commercial standards for implementing the Family and Medical Leave Act (FMLA). She lives in Ventura County with her family.



Table of Cases

A

AF Holdings, LLC v. Doe 246–248
Akers v. Prime Succession of Tennessee 181–183
Amrak Productions, Inc. v. Morton 201–203

B

Benzene Litigation, In re 314–317
Bridges v. Parrish 42–44
Britton v. Wal-Mart 170–172
Brumaghim v. Eckel 77–78
Burlington Insurance v. CHWC, Inc. 150–151
Burton v. Sanner 266–267
Brown v. Hearst Corp. 213–216

C

California Department of Toxic Substances Control v. Payless Cleaners 225–226
Chopourian v. Catholic Healthcare West 167
Colby v. Noah 30–31
Conti v. Spitzer Auto World Amherst, Inc. 165–166

D

Dampier v. Morgan Tire & Auto 32–34
Daniels v. Optek 306–308
Decker v. Princeton Packet, Inc. 211–212
Deuschle v. Jobe 179–180
Doe v. Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints 187–188

E

Estate of K. David Short v. Brookville Crossing 130–131
Evans v. Evans 206–208

G

Garrity v. Wal-Mart 106–108
Gordon v. Winston 300–301

H

Hartford Casualty Insurance Co. v. Swift Distribution 243–245
Hoyte v. Yum! Brands, Inc. 317–318

I

In re Bernard Madoff Investment Securities, LLC 236–238

J

Johnson v. Universal Acceptance Corp. 270–271, 282–284

K

Kristina D. (Anonymous) v. Nesaquake Middle School 259–260
Koester v. VCA Animal Hospital 231–232

L

Lacy v. Wal-Mart 64–66
Law v. Harris 180–181

Liebeck v. McDonald's 38–39
Lieberman v. Marino 404–405
Lineberry v. State Farm Fire & Casualty Co. 199–201
Lowe v. Hearst Communications 196–198

M

Main v. Gym X-Treme 140–141
Martino v. Miller 75–77
Matter of Disciplinary Proceeding against Weigel 81–82
Merrill v. Navegar 309–310
Murphy v. Lord Thompson Manor, Inc. 111–112

O

Otero v. Fazio 49

P

Palsgraf v. Long Island Railroad 24–26
Patterson v. City of Richmond 374–376
Penn Harris Madison School Corp. v. Howard 134–136
Perez v. VAS S.p.A. 348–351
Pollicino v. Roemer and Featherstonhaugh P.C. 126–127

R

Rash v. Workers' Compensation Appeals Board 287–289
Rogers v. T.J.X. Cos. 161–163
Rollinson v. Beresowsky 406–407
Routledge v. Lankford and Hargis 51–52
Russell Corporation v. Sullivan et al., Avondale Mills, Inc. 227–230

S

Saewitz v. Saewitz 168–170
Sahgal v. DMA Electric, Inc. 241–242
School Board of Miami-Dade County v. Trujillo 159

Scott v. Dutton-Lainson Co. 342–345
Shields v. Zuccarini 250–252
Shiddell v. The Bar Plan Mutual 193–195
Short v. Brookville Crossing 130–131
Silva v. Associated Building Wreckers 305–306
Silvester v. Spring Valley Country Club 365–366
Smith v. R.J. Reynolds Tobacco Co. 385–387
Smith v. Scripto-Tokai Corp. 338–340
Snolis v. Clare 84–85
Sobczak v. General Motors Corporation 328–329
State Compensation Insurance Fund v. Workers' Compensation Appeals Board 410–411
Stickdorn v. Zook 367–370
Stone v. The Regents of the University of California 399–401
Stoshak v. East Baton Rouge Parish School Board 155–156
Sweeney v. Aurora Casket Company, Inc. 332–333

T

Tonner v. Cirian 115–117
Torres v. Sarasota County Public Hospital 389–391

U

Uddin v. Embassy Suites Hotel et al., 98–99
United States Environmental Protection Agency v. The Port Authority of New York and New Jersey, et al., 381–382

V

Van Horn v. Watson 28–30

W

Winn v. Sunrise Hospital and Medical Center 71–73



Chapter 1

Introduction to Torts and Legal Analysis

CHAPTER OUTLINE

- The Biggest Mistakes Paralegals Make and How to Avoid Them
- Introduction
- Torts Defined
- History of Tort Law
- Public Policy Objectives in Tort Law
- Analyzing Hypothetical Problems
- Solving Tort Problems
- Overview of a Civil Case
- Case Resolution



THE BIGGEST MISTAKES PARALEGALS MAKE AND HOW TO AVOID THEM

A Damaged Career

Angela was an up-and-coming paralegal in the world of corporate law and intellectual property. On her LinkedIn profile, she described herself as “extremely driven, hardworking, and committed to take pride in each and every aspect of work and life.” She had over five years of experience in Security and Exchange Commission (SEC) reporting, stock management, and corporate business. An alumnus of Metropolitan

State College in Denver, Angela graduated magna cum laude. Among her many college activities and awards, she was captain of her basketball team, member of the All Academic Team, on the dean’s list all four years, and received the All-American Scholar Collegiate Award. Imagine everyone’s surprise when a 2012 *Wall Street Journal* headline screamed: “Ex-Paralegal, Father Settle Insider Trading Suit.”

(continues)

The SEC alleged that Angela, while working at a Montana semiconductor company, gained confidential information that the company was being acquired by another corporation. According to the SEC, Angela and her father improperly traded on the information to earn \$67,000 before the public announcement that Angela's employer was being acquired. Marc Fagel, director of the SEC's office in San Francisco, said, "Angela . . . exploited her access

to confidential merger and acquisition information to illicitly enrich herself and her family." Angela and her father were fined \$175,000 to settle a lawsuit filed by the SEC against them.

Lesson Learned: Although Angela settled the case with the SEC without admitting or denying wrongdoing, her judgment is forever in question and her once-promising career irrevocably damaged.

■ INTRODUCTION

This chapter covers the definition of a tort, the three broad categories of torts, the history of tort law, the public policy objectives behind tort law, and the analytical processes used both to understand appellate court opinions and to solve hypothetical problems.

This chapter includes:

- ▶ The definition of torts
- ▶ An initial description of negligence
- ▶ The elements of strict (absolute) liability
- ▶ The historical roots of tort law
- ▶ The public policy objectives of tort law, including compensating injured parties, holding wrongdoers liable, and allocating losses
- ▶ The development of an analytical framework to solve hypothetical problems by applying legal principles to the facts
- ▶ The application of an analytical formula (IRAC) that allows any tort law problem or question to be continuously narrowed to reveal the answer
- ▶ An overview of a civil case
- ▶ A discussion of alternative dispute resolution

tort | A civil (as opposed to a criminal) wrong, other than a breach of contract. For an act to be a tort, there must be: a legal duty owed by one person to another, a breach (breaking) of that duty, and harm done as a direct result of the action.

tortfeasor | A person who commits a tort.

■ TORTS DEFINED

A **tort** is a wrongful injury to a person or his or her property. For example, when you hurt a person or damage a person's property, these are considered torts. The person inflicting the harm is called the **tortfeasor** (*feasor* meaning "doer"). The word *tort* is French, taken from the Latin *torquere* (meaning "to twist"), and characterizes behavior that warps or bends society's rules about avoiding causing harm to others. The French phrase *de son tort demesne* (meaning "in his own wrong")

was used to describe grievous misconduct between individuals and to assign blame to the responsible party.

Sources of Tort Law

Tort law is derived from both **common law** and statutory law. Common law develops from the decisions following court trials. Legislatures often enact statutes to supplement, modify, or supersede common law tort principles. Courts may turn the tables on the legislature by issuing new common law rulings interpreting the meaning of statutes. In this way the law matures, with both courts and legislatures adjusting the law to meet the changing needs of society. A whole new body of law is developing to address torts arising from the use of the Internet, such as cyber-bullying and the downloading of music without permission or payment.

common law | Either all case law or the case law that is made by judges in the absence of relevant statutes.

Broad Categories of Tort Law

Tort law considers the rights and remedies available to persons injured through other people’s carelessness or intentional misconduct. Tort law also holds persons in certain circumstances responsible for other people’s injuries, regardless of blame. Torts are commonly subdivided into three broad categories: negligence, intentional torts, and strict (or absolute) liability (Table 1-1).

Negligence. **Negligence** is the failure of an ordinary, reasonable, and prudent person to exercise due care in a given set of circumstances. Negligence does not require an *intent* to commit a wrongful action. The wrongful action itself is sufficient to constitute negligence. What makes misconduct negligent is that the behavior was not reasonably careful and someone was injured as a result of this unreasonable carelessness—for example, failing to watch the road ahead when driving a car.

negligence | The failure to exercise a reasonable amount of care in a situation that causes harm to someone or something.

In a negligence case, one must always ask whether the following exist: duty, breach, causation, and damages. These elements are explained in greater detail in the chapters that follow.

Negligence	Failure to exercise ordinary care. Intent is not necessary. Someone is injured as a result of unreasonable care. (Most car accidents are examples of this.)
Intentional Torts	Deliberately intend to hurt someone or his or her property. (Assault and battery are examples.)
Strict Liability	Regardless of intent, negligence, or fault, if someone is injured by the product or activity, there is automatic or absolute liability. (Products liability is one example of this.)

TABLE 1-1
Broad categories
of tort law

intentional torts | An injury *designed* to injure a person or that person's property.

Intentional Torts. **Intentional torts** are actions expressly designed with the purpose of injuring or the intent to injure another person or that person's property, and not in the criminal sense. Intentional torts, as the name indicates, require the tortfeasor to intend to commit the wrongful act.

The tortfeasor intends a particular harm to result from the misconduct, or acts with intent that harm will occur. There are several different types of intentional torts: intentional, reckless, and negligent. Examples of specific intentional torts are assault and battery, both of which are discussed in detail in later chapters. These are in contrast to injuries caused by negligence. Intent is shown when a tortfeasor acts with a desire to bring about harmful consequences and is substantially certain that such consequences will occur. Although the elements may vary somewhat for each particular intentional tort, as a general rule, for an intentional tort case, one must look for three aspects: an act, the intent to cause harm, and actual harm, or damages.

strict (absolute) liability | The legal responsibility for damage or injury, even if you are not at fault or negligent.

Strict (Absolute) Liability. **Strict (absolute) liability** is the tortfeasor's responsibility for injuring another, regardless of intent, negligence, or fault. Even if a person took all the precautions possible to avoid injury, if an injury occurs, there is automatic liability. All that needs to be proved is that a tort occurred, and that the defendant was responsible. Strict liability is different from intentional torts in that intent to commit a strict-liability tort is irrelevant. Strict liability usually applies to activities that have a high probability of endangering the public, such as using fireworks. Strict liability is distinguishable from negligence, because the tortfeasor is responsible under strict liability regardless of how careful he or she might have been, and even if he or she did not intend harm to occur. The most important type of strict liability is products liability. Under products liability, the manufacturer or other seller of an unreasonably dangerous or defective product is held liable for injuries the product causes. For example, both the car manufacturer and car dealer would be held liable for injuries resulting from a defective car.

These concepts are presented here only to establish basic terminology. Subsequent chapters explore each of these topics in greater detail, and delve deeper into the elements of each.

The Unique Elements of Each Tort. Each type of tort contains its own unique elements, which are needed to bring a lawsuit. Although the elements of each are unique, tort analysis in general is the same.

The elements of negligence are different from strict liability's components, and those of intentional torts. The key to understanding tort law is to identify the type of broad tort category involved in the case. Ask whether the issue contains

intentional torts, and, if so, which particular one(s)—negligence or strict liability. Then look to the definition and rules that separate the particular tort in question from other torts in the broad category. For instance, if two people get into a fight and each one purposely hits the other, it must be determined which of the intentional torts definitions most closely fits what occurred. Did an assault or battery occur, or did both intentional torts occur? Next, apply the appropriate rules of law to the specific facts of the case.

Like all forms of law, tort law has undergone a long and interesting period of growth and development. The next section briefly examines the history of tort law.

■ HISTORY OF TORT LAW

Tort law, like all American law, traces its origins to English and Western European history. After the Norman conquest of England in 1066, William the Conqueror brought Norman law (which was heavily influenced by Roman law) to intermingle with Anglo-Saxon and Celtic legal traditions. The result was the common law, which at the time consisted of the underlying legal principles and social attitudes gleaned from generations of judicial decisions by local tribunals. Even today, the bulk of tort law has been derived from our common law heritage of court decisions.

The King's Writs

During the Middle Ages, much of this common law was passed on orally. As a result, common law often varied widely among localities. To unify these divergent ideas, the king established formal procedures (*king's writs*) by which Crown subjects could petition the king's courts for redress. There were originally only two types of actions permitted to be brought for torts: (1) the **writ for trespass** and (2) the **writ for trespass on the case**. The first action was for serious breaches of the peace, and the second action for minor breaches of the peace. No other actions were permitted.

writ for trespass | A tort action for a serious breach of the king's peace.

writ for trespass on the case | A tort action for a minor breach of the king's peace that was not direct or forceful.

Evolution of Modern Tort Law

During the eighteenth and nineteenth centuries, English tort law began to shift from the old writ system to torts involving intent and fault, known today as intentional torts and negligence. This evolution was copied in the United States. Gradually, the common law grew to include the modern torts discussed throughout this text. Today's tort law is a combination of English and American common law, plus statutory law.

What does tort law seek to accomplish? Next, we examine the social and economic purposes that influence, and are influenced by, tort law.

■ PUBLIC POLICY OBJECTIVES IN TORT LAW

Like every aspect of our legal system, there are several purposes underlying tort principles. These include (1) protecting persons and property from unjust injury by providing legally enforceable rights; (2) compensating victims by holding accountable those persons responsible for causing such harms; (3) encouraging minimum standards of social conduct among society's members; (4) deterring violations of those standards of conduct; and (5) allocating losses among different participants in the social arena.

Protecting Persons and Property: Accountability

Like the king's writs, modern tort law strives to prevent unjustified harm to innocent victims. Tort law enables private citizens to use the legal system to resolve disputes in which one party claims that the other has acted improperly, resulting in harm.

Compensating the Victim

The system compels the tortfeasor to compensate the injured party for his or her losses. This *accountability* (or *culpability*) factor is crucial to our legal sense of fair play and equity. People should be held responsible for their actions, especially when they wreak havoc on others. Redress should be available for innocent victims of carelessness, recklessness, or intentional injury.

Minimum Standards of Social Conduct: Deterrence

To function meaningfully in American society, citizens must understand society's norms and values. One extremely important norm encourages the public to behave in such a manner as to avoid hurting others or their belongings. Tort law is largely composed of *minimum standards of conduct*. Persons functioning below such thresholds are defined as tortfeasors; individuals acting at or above such criteria are acceptable to the community. However, the intent is not to ensure conformity; rather, the ideal is to inspire people to respect the dignity and integrity each individual possesses.

Deterring Violations of Those Standards

Persons should not infringe heedlessly upon others' activities unless society is willing to accept such interference with its members' lives. Tort law discourages

abuses by establishing a clear system of legal rights and remedies enforceable in court proceedings. We know that we can go to court when someone strikes us, invades our privacy, creates a nuisance, or acts negligently toward us. Likewise, we know that we might be hauled into court if we do these things to others. By establishing minimum standards of conduct, tort law sets the rules for living—those “rules of thumb” by which we try to get along with other people.

Allocating Losses among Different Individuals or Groups

It is easy to grasp the idea that an individual tortfeasor should compensate the victim for the tortfeasor’s wrongdoing. However, in modern society there are often many different participants in virtually any activity, making it less clear who should be labeled as tortfeasor or victim. For example, at the time of the American Revolution, most Americans were fairly self-sufficient and dealt directly with other individuals for goods or services. If a colonist bought a broken plow, or a poorly shod horse from the local blacksmith, he or she knew whom to hold responsible. However, as the United States became more industrialized, commercial transactions ceased to be one-on-one interactions. Today, people buy canned fruit from a local grocery that bought it from a wholesaler that bought it from a manufacturer that bought it from a grower. If the fruit is spoiled, perhaps the purchaser’s spouse or child, rather than the purchaser, will suffer the injury. The lines of culpability become less clear as the producer of the defective item becomes more removed from the ultimate user, and might even have its factory in another country.

Tort law has evolved *products liability* to determine who is in the best position to bear the costs of defective products—the innocent user or the sellers and manufacturers. It is an economic decision that courts and legislatures have made by stating that industry can best afford the costs of injuries caused by dangerously made goods. In other words, the burden of shouldering the economic loss is placed upon commercial business instead of the individual suffering the harm.

Likewise, workers’ compensation statutes have been enacted by state law to address whether the employee or employer will bear the cost of workplace accidents. In most instances, it is the employer and not the employee who bears this cost, regardless of fault. With automobile accidents, state insurance laws, called no-fault statutes, have been enacted setting out in which instances an insurance company will be responsible for a collision, regardless of fault. Insurance companies are sometimes referred to as “deep pockets,” as they are thought to have the most money when an injured person looks for someone to sue for his or her injuries.

Thus, tort law can be used to assign the expenses associated with misfortune, even when fault is hazy at best. More commonly, though, a single tortfeasor can be identified and saddled with the financial obligation.

■ ANALYZING HYPOTHETICAL PROBLEMS

This book poses many hypothetical fact problems (hypotheticals) to help develop analytical talents. Perhaps the most popular analytical framework is discussed here.

Analytical Framework for Hypotheticals: IRAC

The analytical framework for hypotheticals sequentially investigates four general elements of a problem: the issue, rules of law, application of the rules to the facts, and conclusions (IRAC). With this approach, legal principles are applied to specific factual scenarios. When analyzing a hypothetical, first decide which *issues* are presented. To accomplish this, one must identify the general area of law involved in the problem. For instance, if John takes José's bicycle without permission, then John has committed some type of tort. This identifies the broad area of law (torts).

Next, the different parts of the general legal area must be explored to see which specific tort applies. The particular tort John appears to have engaged in is called conversion. So the issue would be whether or not John converted José's property. This question can be answered by referring to the appropriate *rule of law*. To generalize, the rule of law for conversion defines it as the wrongful deprivation of another's property without consent.

This rule must now be *applied* to the facts. John took José's property without permission. This means John wrongfully deprived José of the use and enjoyment of his property. This constitutes conversion.

The *conclusion* would be that José may successfully sue John to recover possession of the bicycle, plus damages, because these legal remedies are appropriate for conversion (as Chapter 8 explains).

This analytical formula is a useful tool in applying abstract legal principles to different factual situations.

Factual Distinctions Result in Different Conclusions

A rule of law may be applied to various factual situations to reach different results. This is exactly what appellate courts do when deciding cases dealing with similar legal issues. It is also what attorneys and paralegals do when applying rules of law to the particular facts of a client's case. In the following hypothetical, if the puddle of water was there for just two minutes, instead of two hours, Raj's lawsuit would probably not be successful. A single variation in a factual situation can change the legal outcome.

HYPOTHETICAL

Raj visited the Gym Dandy Fitness Center to use its weight and steam rooms. As he walked from the locker room into the weight room, he slipped on a puddle of water on the floor and fell. The puddle was caused by leaking water pipes along the wall leading to the steam room. Raj broke his left arm as a result of the fall. Mary Perrington, another patron, mentioned that she had seen the puddle when she first arrived at the center approximately two hours before Raj's accident.

LEGAL ANALYSIS IN ACTION

Issue: Would Raj's negligence lawsuit against Gym Dandy Fitness Center succeed?

Rule: Applying the rules of law established in other negligence cases, Raj (the plaintiff) must prove that Gym Dandy (the defendant) either created the hazardous condition or had actual or constructive notice of the danger.

Application: The puddle was caused by Gym Dandy's leaking water pipes, so Gym Dandy created the danger that hurt Raj. Further, Mary testified that the puddle had been visible on the floor for two hours. That was sufficient time for Gym Dandy's employees to observe and correct the problem. Thus, Gym Dandy had constructive notice of the puddle and the danger it posed to customers.

Conclusion: Gym Dandy was negligent in creating the puddle that caused Raj to fall and become injured. Accordingly, Raj's negligence lawsuit against Gym Dandy should be successful.

■ SOLVING TORT PROBLEMS

Another approach to tort problem solving is moving from broad subject areas to specific types of torts. This method identifies the exact issues, rules of law, and conclusions in a problem by helping the reader to narrow the analytical focus.

Tort Analysis: From General to Specific

Tort analysis should go from the general to the specific, as depicted in Exhibit 1-1. For example, how can one tell if infliction of emotional distress has occurred unless one is aware that some type of tort law was involved in the problem? An experienced paralegal may appear to readily know the answer. In reality, that paralegal has streamlined the analytical process, but still has moved from the general to the specific. The paralegal recognized a general negligence problem and then narrowed it to the specific defense—assumption of risk—necessary to excuse the negligent conduct.

Hypothetical

The following hypothetical should more clearly illustrate tort analysis.

HYPOTHETICAL

Jerry lives next to a vacant lot owned by Steven. Jerry dumps his grass clippings onto Steven’s lot after mowing his lawn. Eventually, these grass clippings begin to smell and attract rats. Steven never gave Jerry permission to dump grass (or anything else) on Steven’s lot. What legal rights does Steven have, if any?

Jerry’s actions appear to fall within the intentional torts category, as Jerry is deliberately discarding his grass clippings on Steven’s lot.

LEGAL ANALYSIS IN ACTION

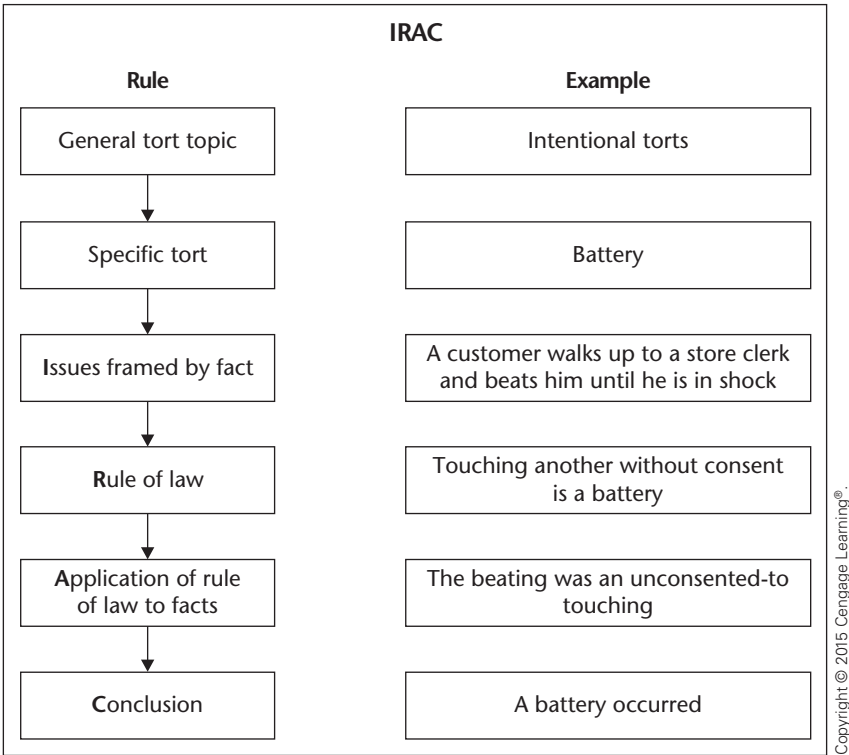
Issue: Did Jerry trespass against Steven by dumping grass on Steven’s lot without permission?

Rule: The elements of trespass are, generally, unlawful interference with another person’s use of his or her property.

Application: Jerry’s actions (1) were unlawful, in that he did not have Steven’s permission to dump grass onto Steven’s lot, and (2) interfered with Steven’s use of his property, because Steven could not use his lot freely without having to contend with the grass and vermin.

Conclusion: Jerry is liable to Steven for the intentional tort of trespass.

EXHIBIT 1-1
Sequence of tort analysis
from general to specific



OVERVIEW OF A CIVIL CASE

Several basic steps occur in civil cases. However, it is important to note that at any point in the litigation process a plaintiff may decide to drop his or her lawsuit or settle with the defendant out of court. In some instances a plaintiff may not even need to institute a lawsuit to recover damages. Sometimes a simple telephone call or letter from a law office can promote the necessary exchange, thus settling the claim. However, a civil case generally proceeds in the following manner:

- ▶ Complaint
- ▶ Answer
- ▶ Discovery
- ▶ Pretrial procedures
- ▶ Trial
- ▶ Post-trial procedures

Complaint

After being injured or harmed in some manner, a plaintiff might seek out legal representation. The attorney will have the client sign a *retainer*, a written agreement authorizing the attorney to represent him or her. The paralegal and/or attorney will conduct an interview of the client. As the interview progresses, the facts must be compared with the particular elements needed for the specific type of action alleged. Even though the facts might seem similar to those of a prior case, each case will have slightly different details that could change the results of the case. Accordingly, it is important to get *all* the facts.

One method of obtaining all the applicable facts is to conduct an investigation. During an investigation, the attorney and/or the paralegal might visit the scene of the occurrence, take photographs, gather evidence, and interview witnesses. It is important to be as thorough as possible while the facts are all fresh for the witnesses, and the scene of the accident or item causing the injury has not been changed or lost.

Either the paralegal or the attorney will then draft a written **complaint** based upon the information gathered and provided. The exact procedural steps as to when the complaint must be filed with the court vary by jurisdiction, as do the precise form and content of the complaint and the time limits and rules for the **service of process**. Accordingly, it is very important to consult local court rules.

Answer

The defendant's response (**answer**) to the complaint must be filed with the court and served upon the opposing party. The defendant's response must either admit to or deny the allegations and, if denying, must explain the reason for the denial. The defendant might also assert affirmative defenses, which if true might relieve the defendant of liability. One example of an affirmative defense is to claim that

complaint | The first pleading filed in a civil lawsuit. It includes a statement of the wrong or harm done to the plaintiff by the defendant.

service of process | The delivery (or its legal equivalent, such as publication in a newspaper in some cases) of a legal paper by an authorized person.

answer | The first pleading by the defendant in a lawsuit. This pleading responds to the charges and demands of the plaintiff's complaint.

discovery | The formal and informal exchange of information between two sides in a lawsuit. Two types of discovery are interrogatories and depositions.

the statute of limitations, or the time for filing a suit, has elapsed. This is also the opportunity for a defendant to bring counterclaims against the plaintiff.

Discovery

Discovery—the exchange of information and narrowing of the issues in dispute in a case—can be either a simple process or a long and drawn-out one that takes years and involves millions of documents. The nature of discovery depends on the type of claim involved. If a case is clear cut and there are witness statements and photographs of the scene, it is possible that not much discovery will be needed. In a complex case involving, for example, exposure to toxic chemicals, the discovery of information can go on for years and involve electronic searches of millions of documents. This is just one of the tasks during discovery that might be assigned to paralegals.

Paralegals are typically involved in preparing discovery requests or gathering information to respond to discovery requests. This might involve the request for documents, setting up a time to question witnesses and parties in a case, or summarizing the contents of documents received in response to a request. Discovery is the point in the case at which a paralegal's communication skills come into play. Clients can become frustrated or confused, for example, by not understanding why a court date has not been scheduled immediately after the complaint was filed. The paralegal will need to explain the discovery required for the particular case and the anticipated time frame. It may be that the defendant has asked for additional time to respond to requests, thus delaying the progress of a case.

Pretrial Procedures

pretrial procedures | Any procedure that immediately precedes trial, for example, the settlement conference.

Depending on the kind of case and your local jurisdiction, various **pretrial procedures** might be scheduled. At any time from the informal telephone call to the defendant or his or her representative to the very trial itself, either party can bring motions before the court. One of the parties might seek to have the case dismissed through a motion. Alternatively, one of the parties might seek relief from oppressive discovery demands, or wish to compel the other party to reply to demands. Before trial, a party might seek an order preventing the other party from introducing prejudicial evidence to the jury.

Generally, there is a pretrial conference after the initial summons and complaint are served. During the conference, the judge will set up a schedule to complete discovery, and encourage the parties to settle the case before trial. In some instances, a court date is set, and the parties must commence final preparation for trial. Increasingly, the parties are required, by the judge or by local rules, to select a means other than trial to attempt to settle their dispute. This is called *alternative dispute resolution* and is addressed later in the chapter. Then, only if the parties are still unsuccessful in resolving a dispute will a court date be scheduled.

Trial

The **trial** is your client's "day in court." This is the client's chance to be heard and explain his or her side of an incident. Few cases actually go to trial; most are settled at some point in the litigation proceedings. Because of the time and expense usually required to wait for and actually go to trial, other methods have been sought by attorneys to streamline or avoid this process.

trial | The process of deciding a case (giving evidence, making arguments, deciding by a judge and jury, etc.).

Release-Settlement Agreement. If the case should settle, the client will need to sign a settlement agreement, outlining the terms of the settlement. In addition, the parties will need to file a stipulation discontinuing action with the court. This document is to advise that a case has been settled, and that there is no need for a trial.

Post-Trial Procedures

Post-trial procedures are those that occur after a trial, such as an appeal or the steps necessary to collect on an award. These can be quite expensive and timely, as there are additional attorney fees and court costs, to name a few.

post-trial procedures | The procedures that occur after a trial, such as an appeal or the steps taken to collect on an award.

CASE RESOLUTION

Not all lawsuits go to trial; in fact, as noted, most cases are informally settled by the parties out of court. A very tiny percentage of cases is actually tried before a judge or jury, approximately 5%. When you are initially analyzing a case, you should consider whether the particular case can be resolved early on through **alternative dispute resolution**.

alternative dispute resolution | Method to resolve a legal problem without a court decision.

Alternative Dispute Resolution (ADR)

Alternative dispute resolution is a method to resolve a legal problem without a court decision. This avenue of case resolution is becoming increasingly popular as parties wish to avoid costly public court proceedings. Alternative dispute resolution is also a means of avoiding lengthy waits for a case to reach trial—in some jurisdictions the wait can be as long as three to five years. Many plaintiffs, particularly businesses, would prefer to have a lawsuit resolved privately and quickly, rather than waiting years for closure. Less time is lost from work for ADR than the weeks that employees might spend to attend a trial. ADR also avoids the possibility of negative publicity, and is usually much less stressful on the parties. One negative to alternative dispute resolution is that the parties might lose some of their legal protections, such as their right to have a judge or jury hear the case, and for an appellate court to review the decision. Additionally, if the parties are unsuccessful with alternative dispute resolution, they will have expended additional costs for a mediator or arbitrator, and then still have the costs of trial.

There are various ways to resolve a legal dispute without the formality of a trial—for example, arbitration, mediation, minitrial, rent-a-judge, and a summary jury trial.

arbitration | Resolution of a dispute by a person whose decision is binding. This person is called an *arbitrator*. Submission of the dispute for decision is often the result of an agreement (an *arbitration clause*) in a contract.

mediation | Outside help in settling a dispute. The person who does this is called a *mediator*. This is different from arbitration in that a mediator can only persuade people into a settlement.

minitrial | Alternate dispute resolution by a panel of executives from two companies engaged in a complex dispute. A neutral moderator helps the two sides reach a settlement.

rent-a-judge | Alternate dispute resolution in which two sides in a dispute choose a person to decide the dispute. The two sides may agree to make the procedure informal or formal.

Arbitration

Arbitration is the resolution of a dispute by a person other than a judge. This person's decision is binding and not a matter of public record. The person deciding the case is called the *arbitrator*. Sometimes parties agree through a written contract that, in the event of a potential dispute, they will resort to arbitration. Most doctors are now requiring patients to sign arbitration agreements before they will provide medical services. Some companies, such as credit card services, routinely include an arbitration clause in their contracts. Arbitration was frequently used in the past for labor and construction disputes.

Mediation

In **mediation**, the parties use outside help in settling a dispute. Mediation differs from arbitration in that the mediator can only persuade the parties to reach a settlement. The mediator does not dictate an actual decision. Through a mediator's intervention and assistance, the parties reach a mutually agreeable resolution. In this manner, the parties are involved in the process, and all participants might feel victorious. There is not a "winner" and a "loser" per se as would result from a court trial. Mediation is less formal than arbitration, but like arbitration, it is not a matter of public record.

Minitrial

A **minitrial** is a means of alternative dispute resolution by a panel of executives from two companies engaged in a complex dispute. A neutral moderator helps the two sides sort out factual and legal issues to reach a settlement. This is intended to help the decision makers of the companies to see the merits and weaknesses of their cases and aid in settlement. A minitrial is not as formal as a traditional court trial. Ideally, the parties will maintain their business relationship after the dispute, and continue to conduct business together.

Rent-a-Judge

Rent-a-judge allows the parties to choose a person to decide their dispute, as opposed to having no choice in the judge assigned to the court case. Retired judges often are willing to act in this capacity and preside over these cases. The parties can decide the degree of formality of the procedure and whether the decision will be binding or merely advisory.

Summary Jury Trial

In complex cases, the two sides may present important facts and evidence to a small jury, an action referred to as a **summary jury trial**. Either the parties will agree in advance to be bound by the decision or, based on their interview with the jury, to use the jury's advice to aid in settlement negotiations. The attorneys are not required to follow the strict rules of evidence and procedure that are followed in a court trial.

Parties can save a lot of time and money if they are willing to consider and abide by one of the many forms of alternative dispute resolution. However, it is to be noted that, despite the many advantages, some claimants will insist on their day in court and their right to be heard by a jury. Accordingly, when alternative dispute resolution is elected, it is very important to obtain the client's consent in writing, having him or her acknowledge that this choice has been knowingly and freely made.

summary jury trial | Alternate dispute resolution in which the judge orders the two sides in a complex case to present their cases to a small jury. The parties may agree in advance not to be bound by the verdict.

SUMMARY

Tort law involves the study of wrongful conduct. Torts consist of wrongful injury to another's person or property. The wrongdoer is called the tortfeasor, and tort law provides the injured party with legal rights and remedies that may be enforced in a court of law. Torts may be divided into three general categories: negligence, intentional torts, and strict (absolute) liability. Negligence is the failure to exercise reasonable care to avoid injuring others. Intentional torts consist of misconduct designed to injure another person or that person's property. Strict (absolute) liability holds the tortfeasor liable for injuring another, regardless of intent, negligence, or fault.

Much of tort law comes from ancient English and early American court decisions. In medieval England, there were primarily two torts. Both involved breaches of the king's peace. Today, there are many more tort actions because society is much more complicated than it was during the Middle Ages. Tort law has become correspondingly more sophisticated so as to deal with modern legal problems.

Tort law seeks to accomplish several goals. It serves to protect innocent persons and their property

from careless or intentional injury at the hands of tortfeasors. It also attempts to hold tortfeasors responsible for their misconduct. Tort law encourages minimum standards of conduct among the public to avoid injuring others through heedless, reckless, or intentional behavior. It also deters persons from injuring other people and their property by holding tortfeasors liable for such mischief. Tort law allocates losses among different groups or individuals, based upon society's decision (as expressed through its legislatures and courts) as to who is best able to bear such losses.

To apply the rules of law to different hypothetical problems, one method (IRAC) breaks down the factual scenario in terms of the issues, the rules of law that must then be applied to each case's specific facts, and the conclusions regarding the probable outcome of the hypothetical case. When analyzing tort law problems, one decides on the general tort topic area, the specific tort involved, the issues framed by the facts, the rules of law for the particular tort involved, and how to apply those rules of law to the facts. Finally, one draws conclusions regarding the hypothetical or problem.

A civil case generally proceeds in the following manner: complaint, answer, discovery, pretrial procedures, trial, and post-trial procedures. Additionally, at any point during a case, the parties may bring motions seeking a court order to resolve certain issues. Parties often look for alternative means to resolve a dispute. These alternatives to trial are referred to as *alternative*

dispute resolution. A few of the means of resolving a case without a trial are the use of arbitration, mediation, a minitrial, rent-a-judge, and summary jury trials.

In this chapter, a brief introduction and overview of torts and personal injury was covered. The next chapter will focus on negligence, one of the three broad categories of torts.

KEY TERMS

alternative dispute resolution
answer
arbitration
common law
complaint
discovery
intentional tort

mediation
minitrial
negligence
post-trial procedures
pretrial procedures
rent-a-judge
service of process

strict (absolute) liability
summary jury trial
tort
tortfeasor
trial
writ for trespass
writ for trespass on the case

PROBLEMS

Using the definitions of specific torts discussed in this chapter, answer the following hypotheticals using the analytical approaches discussed earlier.

1. Tom Caster is a 12-year-old boy who enjoys climbing trees. The Caster family just moved into a new house. The electrical wires to Tom's house run from an electrical pole through the high branches of an oak tree in his backyard. While the rest of the family was moving into the home, Tom ran to the backyard to climb the tree. As he neared the top, he grabbed the electrical wires with his right hand. The wires were not insulated and Tom was severely burned from the resulting electrical shock. He also broke both his legs when he fell, unconscious, from the tree. Tom's father wishes to know if he might successfully sue the utility company for negligence.
2. Shady Acres is a subdivision being developed by Bartholomew Real Estate Management, Inc. (BREM). While bulldozing the lots and streets,

BREM's crews created huge piles of dirt. BREM did not erect any barriers to keep these dirt piles in place. Pamela Jovanco owns a house at the bottom of a hill upon which BREM placed several earth piles. During heavy rains, mud would slide down the hill and cover Pamela's entire yard. Some mud even seeped through her basement windows, damaging her basement carpet and furniture. Pamela wonders if trespass has occurred.

3. Samantha Billingsly stood outside her downtown hotel hailing a cab. The driver screeched to a halt alongside the curb. Samantha opened the rear door of the automobile and began to climb inside. In doing so, she placed her right hand on the roof of the car where the top of the door would close. Suddenly, the cab driver accelerated the automobile, causing the rear door to slam shut onto Samantha's hand. Samantha suffered lacerations and several broken bones in her right

hand and wrist. She also suffered a neck injury as she was thrown against the back seat as the taxi lurched forward. The cab driver later explained that he had accelerated suddenly to avoid being struck by a shuttle bus, which he thought was about to collide with his taxi when he saw it approaching very rapidly in his rearview mirror. Using negligence theory, Samantha would like to sue the cab driver who owns the taxi.

4. Ed Peterson owned a coyote, which he captured while hunting the previous summer in the mountains. The coyote had become quite tame, and at parties, to entertain guests, Ed would routinely

allow the animal to eat out of his hand. One day Ed's next-door neighbor, Angela Starlight, a seven-year-old girl, visited Ed's backyard to play with the coyote. Angela's parents had warned her several times to avoid approaching the coyote, although neither they nor Angela had ever seen the animal bite or growl at anyone. When Angela reached out to pet the coyote, it bared its teeth and snapped at her hand, biting and cutting her severely. Angela's parents sued Ed under a theory of absolute liability. Under most states' common law, owners are strictly liable for injuries caused by wild animals kept as pets.

REVIEW QUESTIONS

1. How is a tort best defined? What are the three broad categories of torts? How might you define each variety?
2. What is negligence? How might you distinguish it from intentional torts?
3. What are intentional torts? What are examples of intentional torts?
4. How might you define strict (absolute) liability? What is the most important type of strict liability?
5. Discuss the historical roots of tort law. From what country or countries did torts originate? How have torts changed since their inception?
6. What are the purposes that tort law attempts to accomplish? Do these objectives sometimes conflict? Do they sometimes complement one another?
7. Suggest an analytical formula you might use to answer a hypothetical fact problem. In what order are these steps taken? Why do you think this order is appropriate? Is each step of the technique necessary to reach the next phase?
8. Tort analysis moves from the general to the specific. Why is this best suited to answering tort hypotheticals?
9. Describe the stages of a civil lawsuit.
10. What is the difference between arbitration and mediation?

HELPFUL WEBSITES

This chapter provides an introduction to torts and legal analysis. To learn more about torts, the following sites can be accessed:

General Legal Information

www.fjc.gov

www.law.emory.edu

www.law.cornell.edu

www.findlaw.com

www.law.harvard.edu

www.kentlaw.edu

www.law.indiana.edu

www.camlaw.rutgers.edu

www.lectlaw.com

www.usa.gov

Links to State Courts

www.courts.net

www.lawidea.com

Links to Federal Courts

www.uscourts.gov

www.lawsources.com

www.fjc.gov

Information for Paralegals

www.nala.org

www.paralegals.org

www.paralegalgateway.com

www.paralegal.laws.com

Links to Legal Newspapers

www.netlawlibrary.com

www.law.com

www.americanlawyer.com



STUDENT COMPANION WEBSITE

For additional cases and study materials, please go to www.cengagebrain.com



Chapter 2

Negligence

CHAPTER OUTLINE

- The Biggest Mistakes Paralegals Make and How to Avoid Them
- Introduction
- Negligence
- Elements of Negligence
- Element 1: Duty of Reasonable Care
- Element 2: Breach of Duty
- Element 3: Causation of Injury
- Element 4: Damages



THE BIGGEST MISTAKES PARALEGALS MAKE AND HOW TO AVOID THEM

Fed Up during and after Lunch

Garnetta was having her usual lunch break at a favorite diner, taking her place at the end of the counter next to a row of booths. After she ordered her food, an attorney Garnetta recognized chose the booth next to her stool. The attorney was accompanied by another person. The attorney was speaking nonstop to the other person (who evidently was a client) or receiving and making cell calls. The issue of his loud

conversations was an automobile accident involving the client. While Garnetta tried to read her newspaper, she overheard an hour's worth of details regarding the client's examination before trial from that morning. When Garnetta returned to her office, she was asked to replace another paralegal who became ill that afternoon. When Garnetta entered the conference room, there sat the attorney and his client from the diner.

(continues)

Unbeknownst to her, Garnetta's firm was defending the insurance company. Garnetta excused herself from the examination before trial, leaving the firm scrambling to find another paralegal. An hour passed before another paralegal returned from lunch and took Garnetta's place. Neither Garnetta's firm nor the plaintiff's attorney appreciated the loss of valuable time.

Lesson Learned: This is really a matter of the lawyer violating client confidentiality, and both he and his client should know that there is no

expectation of privacy in a public eatery. Although Garnetta should not have had to move her seat, a paralegal with any experience could have turned to the attorney she recognized and said, "It sounds like you are having an important conversation, and I can hear everything you are discussing from my seat." Garnetta's polite message would have given the attorney an opportunity to move or speak more quietly. As a professional, Garnetta's comment may also have served to stop the attorney from behaving in that manner with other clients in the future.

elements | The essential parts or components of something.

■ INTRODUCTION

The field of negligence is the most complex of the torts. What makes negligence challenging is its conceptual ambiguity. The **elements** of negligence appear to be so broadly defined that it is difficult to discern clear lines for negligent behavior. Negligence is not a mathematical equation. Instead, negligence resembles probability theory, in which specific conduct is more likely than not to be considered negligent under a particular set of circumstances. In this chapter, the following aspects of negligence are discussed:

- The elements of negligence
- The tortfeasor's scope of duty and standard of reasonable care
- Breach of duty, the reasonable person standard, and foreseeability
- Special duty based upon special relationship
- Causation and substantial factor analysis
- Joint and several liability
- Proximate cause
- Damages available in negligence actions

■ NEGLIGENCE

Most people equate negligence with carelessness. The phrase conjures up images of actions that are slovenly, haphazard, heedless, or foolhardy. As a legal concept, negligence is much more precise, but it embodies all of these characteristics.

Negligence Defined: Reasonable Care

Negligence may be broadly defined as the failure to exercise reasonable care to avoid injuring others or their property. Reasonable care depends upon the exact circumstances of each case. This is the "shifting sands" aspect of negligence with

negligence | The failure to exercise a reasonable amount of care in a situation that causes harm to someone or something. It can involve doing something carelessly or failing to do something that should have been done.

which legal students—and the legal system—struggle. The key term is *reasonableness*. In any tort case in which negligence might exist, ask the threshold question: Did the tortfeasor act unreasonably under the circumstances? This is essentially all that negligence entails.

Acts or Omissions

A tortfeasor can be negligent either by doing or by not doing something. When courts speak of *negligent acts* or *omissions* by the tortfeasor, they mean that the tortfeasor behaved unreasonably either by doing a specific careless activity or by failing to do something that the tortfeasor should have done.

Negligent actions are positive events; something is done. For instance, if Nick lit a fire in high winds that carried sparks onto a neighbor's roof and set the house ablaze, Nick's action (careless burning) would be deemed unreasonable. Negligent omissions are usually phrased negatively; the tortfeasor failed to do a reasonable act. For example, suppose Briana's front porch has a rotten step that she has failed to repair. A salesperson visiting her home falls through the step and breaks a leg. Briana's omission (failure to repair the step) would be considered unreasonable.

Like all areas of law, negligence has developed discernible elements that can be enumerated and outlined more clearly. The next section outlines the four elements of negligence.

■ ELEMENTS OF NEGLIGENCE

Negligence can be specifically defined as a tortfeasor's failure to exercise reasonable care, thus causing a **foreseeable injury** to another person or that person's property. Negligence includes the following elements:

1. Duty of care
2. Breach of the duty by the tortfeasor (unreasonable conduct)
3. Causation of injury to the victim
4. Damages to the victim (actual harm)

Each of these elements is required for negligence to exist, so each element is a threshold question. If “no” answers any single element, negligence does not exist. For example, the first question is: Did the tortfeasor owe a duty of reasonable care to the injured party? If not, then the analysis stops, with the conclusion that no negligence has occurred. If yes, then one must ask: Did the tortfeasor breach the duty of reasonable care? If not, the inquiry is finished, and once again the analyst concludes that there was no negligence. If yes, then one continues querying through the questions of causation and damages. Each element must be satisfied for negligence to exist, and each receives detailed treatment in the following sections.

foreseeable injury | An injury that a reasonably prudent person should have anticipated.

duty | 1. An obligation to obey a law. 2. A legal obligation to another person, who has a corresponding right.

due (reasonable) care | That degree of care a person of ordinary prudence (the so-called *reasonable person*) would exercise in similar circumstances.

scope of duty | In negligence law, defined in terms of those individuals who might foreseeably be injured as a result of the tortfeasor's actions.

foreseeability | The notion that a specific action, under particular circumstances, would produce an anticipated result.

■ ELEMENT 1: DUTY OF REASONABLE CARE

Negligence analysis begins with determining who is owed a duty of reasonable care.

In tort law, **duty** is the obligation either to do or not to do something. In negligence, the duty of **due (reasonable) care** is the responsibility to act reasonably so as to avoid injuring others. This may also be stated negatively: the duty of reasonable care is the obligation *not* to behave *unreasonably* so as to avoid injuring others.

For example, motor vehicle operators owe a duty of reasonable care to drive carefully and avoid injuring other drivers, their vehicles, or pedestrians.

HYPOTHETICAL

Suppose Parker is driving on a four-lane highway and chooses to pass the truck in front of him. He fails to look in the rearview mirror before pulling into the left lane. Unbeknownst to Parker, another vehicle is attempting to pass him, and he pulls directly in front of that driver. This action forces that driver to swerve and collide with a telephone pole. Did Parker violate any duty of reasonable care?

In analyzing this duty hypothetical, the first question is: Did Parker owe the other driver a duty of reasonable care? Parker owed anyone driving or walking upon the street a duty to drive safely. By failing to check his rearview mirror to see if any traffic was approaching from behind in the left lane, Parker breached his duty to the other driver. He acted imprudently by not looking for other traffic before he switched lanes. He failed to see that which was there to be seen.

Scope of Duty

Clearly, one does not owe a duty of reasonable care to everyone else in the universe.

Scope of duty is a limitation on the persons to whom one owes the duty. First, the scope of the duty must be determined. This focuses on the **foreseeability** of the victim.

For example, while driving on the highway in his city, Parker owes no duty of reasonable care to someone driving in another city hundreds of miles away. Parker's actions (i.e., driving his car) could not possibly have any effect on such a person. Parker's scope of duty does not extend to individuals who cannot directly be affected by his carelessness. Scope of duty is often described in terms of reasonable foreseeability.

Foreseeable Plaintiffs Theory

Foreseeability limits the scope (extent) of the duty owed to others. One asks the threshold question: Was it reasonably foreseeable that the person injured would be harmed as a consequence of the tortfeasor’s actions? If so, the scope of the duty of reasonable care includes the individual hurt. This is sometimes called the **foreseeable plaintiffs theory**, because it was reasonably foreseeable that the **plaintiff** (who is suing the tortfeasor [**defendant**] for negligence) would be damaged because of the tortious conduct. It is the foreseeability of injury or damage that is of concern, not the degree or amount of injury or damage involved.

Unforeseeable Plaintiffs

Persons outside this range of duty are considered **unforeseeable plaintiffs**, because the tortfeasor could not reasonably have anticipated that they would be harmed by the tortfeasor’s actions. People driving several streets in front of Parker would not likely be influenced by either Parker or the swerving other driver. They would be beyond Parker’s scope of duty, and so he would not be required to exercise reasonable care toward them. However, persons driving close behind Parker and the swerving driver could reasonably be expected to become involved in the accident. These individuals would be within Parker’s scope of duty. His failure to use reasonable care (by not looking in the rearview mirror, which caused him to cut off the swerving driver) violated his duty to them as well as to the swerving driver. Table 2-1 outlines scope of duty and the foreseeable plaintiffs theory.

Special Duty Based upon Special Relationship

Most negligence actions are based upon an affirmative duty or act owed to another that is improperly performed. In contrast, if a person fails to act, there generally is no liability in negligence, except under certain limited exceptions.

foreseeable plaintiffs theory | Under this theory, if it were reasonably foreseeable that the injured victim would be harmed as a consequence of the tortfeasor’s actions, then the tortfeasor’s scope of duty includes the victim.

plaintiff | A person who brings a lawsuit.

defendant | A person against whom an action is brought.

unforeseeable plaintiffs | Persons whose injuries the tortfeasor could not reasonably have anticipated as a result of the tortfeasor’s actions.

SCOPE OF DUTY	FORESEEABLE PLAINTIFFS THEORY
The tortfeasor owes a duty of reasonable care to avoid injuring others or their property.	The plaintiff may recover from the defendant only if it was reasonably foreseeable that the defendant’s actions would injure the plaintiff.
Duty includes persons for whom it is reasonably foreseeable that injury will occur as a result of the torfeasor’s actions.	Persons outside the defendant’s scope of duty are considered unforeseeable plaintiffs.

TABLE 2-1
Scope of duty of reasonable care and foreseeable plaintiffs theory

THE CASE OF THE SCALE THAT SHOOK TORT LAW

In this landmark appellate case, heard by the highest court in New York, a man waiting for a train was carrying a package wrapped in newspaper with fireworks inside. The railroad guards were unaware of the contents of the parcel and helped the man board the moving train. As the guards tried to help, the package was dislodged, fell to the tracks, and exploded. This caused the platform to shake, which in turn caused a scale to fall. The scale seriously injured the plaintiff, Helen Palsgraf, who was waiting on the platform. Carefully read the court's reasoning concerning to whom a duty is owed in this situation. Note that the decision was written by Chief Justice Cardozo, who later became a justice of the U.S. Supreme Court. This case gives attorneys direction in interpreting the scope of duty owed to others.

PALSGRAF

v.

LONG ISLAND RAILROAD

Court of Appeals of New York
162 N.E. 99 (N.Y. Ct. App. 1928)
May 29, 1928
Cardozo, C. J.

Plaintiff, Helen Palsgraf was standing on a platform of defendant's railroad after buying a ticket to go to Rockaway Beach. A train stopped at the station, bound for another place. Two men ran forward to catch the train. One of the men reached the platform of the car without mishap, though the train was already moving. The other man, carrying a package, jumped aboard the car, but seemed unsteady as if about to fall. A guard on the car, who had held the door open, reached forward to help him in, and another guard on the platform pushed him from behind. In this act, the package was dislodged, and fell upon the rails. It was a package of small size, about 15 inches long, and was covered by a newspaper. In fact it contained fireworks, but there was nothing in its appearance to give notice of its contents. The fireworks when they fell exploded. The shock of the explosion threw down some scales at the other end of the platform many feet away. The scales struck the plaintiff, causing injuries for which she sues.

The conduct of the defendant's guard, if a wrong in its relation to the holder of the package, was not a wrong in its relation to the plaintiff, standing far away. Relatively to her it was not negligence at all.

Nothing in the situation gave notice that the falling package had in it the potency of peril to persons thus removed. Negligence is not actionable unless it involves the invasion of a legally protected interest, the violation of a right. "Proof of negligence in the air, so to speak, will not do." "Negligence is the absence of care, according to the circumstances." . . . If no hazard was apparent to the eye of ordinary vigilance, an act innocent and harmless, at least to outward seeming, with reference to her, did not take to itself the quality of a tort because it happened to be a wrong, though apparently not one involving the risk of bodily insecurity, with reference to someone else.

One who jostles one's neighbor in a crowd does not invade the rights of others standing at the outer fringe when the unintended contact casts a bomb upon the ground. The wrongdoer as to them is the man who carries the bomb, not the one who explodes it without suspicion of the danger. . . . What the plaintiff must show is "a wrong" to herself; that is, a violation of her own right, and not merely a wrong to someone else, nor conduct "wrongful" because unsocial, but not "a wrong" to anyone. . . . The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension. This does not mean, of course, that one who launches a destructive force is always relieved of liability, if the force, though known to be destructive, pursues an unexpected path. "It was not necessary that the defendant should have had notice of the particular method in which an accident would occur, if the possibility of

an accident was clear to the ordinarily prudent eye.” Some acts, such as shooting, are so imminently dangerous to anyone who may come within reach of the missile, however unexpectedly, as to impose a duty of prevision not far from that of an insurer. Even today, and much oftener in earlier stages of the law, one acts sometimes at one’s peril. Under this head, it may be, fall certain cases of what is known as transferred intent, an act willfully dangerous to A resulting in injury to B. These cases aside, wrong is defined in terms of the natural or probable, at least when unintentional. The range of reasonable apprehension is at times a question for the court, and at times, if varying inferences are possible, a question for the jury. Here, by concession, there was nothing in the situation to suggest to the most cautious mind that the parcel wrapped in newspaper would spread wreckage through the station. If the guard had thrown it down knowingly and willfully, he would not have threatened the plaintiff’s safety, so far as appearances could warn him. His conduct would not have involved, even then, an unreasonable probability of invasion of her bodily security. Liability can be no greater where the act is inadvertent.

One who seeks redress at law does not make out a cause of action by showing without more that there has been damage to his person. If the harm was not willful, he must show that the act as to him had possibilities of danger so many and apparent as to entitle him to be protected against the doing of it though the harm was unintended.

The law of causation, remote or proximate, is thus foreign to the case before us. The question of liability is always anterior to the question of the measure of the consequences that go with liability. If there is no tort to be redressed, there is no occasion to consider what damage might be recovered if there were a finding of a tort. We may assume, without deciding, that negligence, not at large or in the abstract, but in relation to the plaintiff, would entail liability for any and all consequences, however novel or extraordinary. There is room for argument that a distinction is to be drawn according to the diversity of interests invaded

by the act, as where conduct negligent in that it threatens an insignificant invasion of an interest in property results in an unforeseeable invasion of an interest of another order, as, for example, one of bodily security. Perhaps other distinctions may be necessary. We do not go into the question now. The consequences to be followed must first be rooted in a wrong.

The judgment of the Appellate Division for the Plaintiff *Palsgraf* and that of the Trial Term should be reversed, and the complaint dismissed, with costs in all courts.

Andrews, J. (dissenting). Assisting a passenger to board a train, the defendant’s servant negligently knocked a package from his arms. It fell between the platform and the cars. Of its contents the servant knew and could know nothing. A violent explosion followed. The concussion broke some scales standing a considerable distance away. In falling, they injured the plaintiff, an intending passenger.

Upon these facts, may she recover the damages she has suffered in an action brought against the master? The result we shall reach depends upon our theory as to the nature of negligence. Is it a relative concept—the breach of some duty owing to a particular person or to particular persons? Or, where there is an act which unreasonably threatens the safety of others, is the doer liable for all its proximate consequences, even where they result in injury to one who would generally be thought to be outside the radius of danger?

Negligence may be defined roughly as an act or omission which unreasonably does or may affect the rights of others, or which unreasonably fails to protect one’s self from the dangers resulting from such acts.

Where there is the unreasonable act, and some right that may be affected there is negligence whether damage does or does not result. That is immaterial.

The proposition is this: Every one owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others. Such an act occurs. Not only is he wronged to whom harm might reasonably be expected to result, but he also who is in fact injured, even if he be outside what would generally be thought the danger zone.

(continues)

But, when injuries do result from our unlawful act, we are liable for the consequences. It does not matter that they are unusual, unexpected, unforeseen, and unforeseeable. But there is one limitation. The damages must be so connected with the negligence that the latter may be said to be the proximate cause of the former.

The proximate cause, involved as it may be with many other causes, must be, at the least, something without which the event would not happen. The court must ask itself whether there was a natural and continuous sequence between cause and effect. Was the one a substantial factor in producing the other?

Was there a direct connection between them, without too many intervening causes?

When a lantern is overturned, the firing of a shed is a fairly direct consequence. Many things contribute to the spread of the conflagration—the force of the wind, the direction and width of streets, the character of intervening structures, other factors. We draw an uncertain and wavering line, but draw it we must as best we can.

The act upon which defendant's liability rests is knocking an apparently harmless package onto the platform. The act was negligent. For its proximate consequences the defendant is liable.

CASE QUESTIONS

1. Was a duty owed to the passenger with the package?
2. Was Helen Palsgraf owed a duty? Explain.
3. How does the dissenting opinion concerning duty differ from the majority opinion?

An example of a failure to act would be when you are walking down the street and see a stranger about to trip and do not try to prevent the accident. In this example, you would have no duty to stop and warn the stranger. Only if the plaintiff and the defendant have a special relationship between them will the defendant's failure to act lead to a cause of action in negligence.

Special Relationships. Just a few of the many special relationships that might create a duty to act are those between an employer and employee, a parent and child, a teacher and student, an innkeeper and guest, a hospital and patient, and a common carrier and passenger (Table 2-2). The law imposes a special relationship between these parties and also a duty to act based upon their relationship. For example, if one student injures another student or is about to hurt another student, their teacher has an obligation to intervene and try to help, even though the teacher was not negligent and did not cause the incident. Likewise, employers may be responsible for workers injured on the job even if the employer did not harm the employee (see Chapters 9 and 13 for more information on workplace injuries). The duty a landowner owes to trespassers and people on the land is discussed in Chapter 8.

Employer/Employee
Parent/Child
Teacher/Student
Innkeeper/Guest
Hospital/Patient
Common Carrier/Passenger

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TABLE 2-2
Special relationships that
create a duty to act

There is no obligation to aid or assist others.
Once assistance is started, it must continue.
Some states have laws protecting Good Samaritans from suit.

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TABLE 2-3
Duty rule for good
samaritans

Duty Rule for Good Samaritans

There is no duty to come to the assistance of those in need. A **Good Samaritan** is a person who comes to the assistance of another person without being required to act. The **Good Samaritan Doctrine** provides that although a person is not obligated to come to the aid of another, once assistance is attempted, the Good Samaritan has the obligation to do no harm. The rationale for this is that once a person stops to help, others who might have assisted may not stop to help, thinking the injured person is being aided. This doctrine prevents some good-natured people from helping others due to the fear that they will be sued for negligence if the standard of reasonable care is violated. In order to encourage people to help others, some states have enacted laws to protect Good Samaritans from suit. Table 2-3 summarizes the duty rule for Good Samaritans.

good samaritan | A person who comes to the assistance of another person without being required to act.

good samaritan doctrine | Although a person is not obligated to come to the aid of another, once assistance is attempted, the good samaritan has the obligation to do no harm.

Trained versus Untrained Volunteers

A distinction may be drawn between trained and untrained volunteers. Trained people, such as emergency medical technicians (EMTs), who are paid for their services are held to a higher standard; they must exercise reasonable care, and can be sued in negligence for failing to exercise reasonable care. Laws vary as to whether they address the acts of trained paid workers or untrained volunteers. Some examples of state laws are provided in Table 2-4 to show the wide range of different laws.

TABLE 2-4
State laws concerning
volunteers

Alabama	Only trained workers are protected from suit, unless a heart attack is involved.
California	Only people who provide “medical care” are protected. For example, if a person is moved from a scene to protect him because the car might catch fire, and it is not judged as “medical care,” the rescuer would be liable.
Minnesota, Vermont	These states have laws that actually <i>compel</i> people to help. There is no liability unless there is gross negligence.
Oklahoma	Only untrained workers are protected for controlling bleeding or providing cardiopulmonary resuscitation (CPR).
New York	There is no liability for medical and nonmedical personnel so long as there is no gross negligence and no expectation of compensation. In addition, New York has a new law: If people call for emergency services for drug or alcohol overdoses, no arrests or prosecution will result for personal possession of drugs, paraphernalia, or underage drinking.
Connecticut, New Mexico, Washington	These states of have laws similar to those of New York.

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THE CASE OF THE GOOD DEED GONE BAD

The results of this appellate decision from California created fear in the public and potential Good Samaritans, making them think twice before helping others. The determination of the appeal rests on the meaning of just a few words.

**Alexandra VAN HORN, Plaintiff
and Respondent**

v.

**Anthony Glen WATSON, Defendant
and Appellant**

and

Lisa Torti, Defendant and Respondent

v.

**Anthony Glen Watson, et al., Defendants
and Respondents**

**Court of Appeal, Second District, Division 3,
California**

Nos. B188076, B189254
March 21, 2007

The injured plaintiff, Alexandria Van Horn (Plaintiff) now brings this appeal claiming that she is a paraplegic as a result of her friend defendant Lisa Torti (Defendant) pulling her out of a car following a one car accident, rather than from the accident itself. The court below granted defendant summary judgment dismissing her from the case, on the grounds that she acted as a Good Samaritan when aiding her friend, the plaintiff.

The accident happened when defendant Watson, the driver of the car, lost control of his vehicle and crashed into a curb and light post at about 45 miles per hour. The police concluded that it was the speed at which defendant Watson was traveling that had caused the accident.

Plaintiff was in the front passenger seat of defendant Watson's car. When defendant Watson's vehicle crashed, another car which contained plaintiff's friends stopped. The driver and passenger, defendant Torti exited the other vehicle to provide assistance.

Plaintiff sued the driver who caused the accident, defendant Watson, and the Good Samaritan passenger from the other vehicle, defendant Torti. The cause of action against defendant Torti alleged that even though plaintiff was not in need of assistance, and had only sustained injury to her vertebrae, defendant Torti dragged plaintiff out of the vehicle using one arm, pulling plaintiff's arm like a "rag doll," causing permanent damage to her spinal cord. Defendant moved for summary judgment.

Defendant Torti claims she removed plaintiff from the vehicle because she feared the car would catch fire or "blow up." Defendant Torti testified at the deposition that she saw smoke coming from the top of the other vehicle, and also saw liquid coming from the vehicle, these facts were subject to dispute. Defendant Torti alleged that she placed one arm under plaintiff's legs and the other behind plaintiff's back to lift her out of the car.

There is a dispute whether the accident itself caused plaintiff's paraplegia. The trial court, relying exclusively on California's Good Samaritan Law, section 1799.102, concluded that defendant Torti was immune from liability, and granted her motion for summary judgment.

The question presented is whether the trial court correctly applied the law for Good Samaritans, to find that defendant Torti is entitled to summary judgment, or whether it is Civil Code section 1714 which states that people are responsible for their willful and negligent acts, that applies.

Our primary duty when interpreting a statute is to determine and effectuate the Legislature's intent. "When

the language of a statute is clear, there is no need for interpretation and we must apply the statute as written." (Lafayette Morehouse, Inc. v. Chronicle Publishing Co. Cal.App.4th at p. 1382, 46 Cal.Rptr.2d 542.)

Good Samaritan Law Section 1799.102 states: "No person who in good faith, and not for compensation, renders emergency care at the scene of an emergency shall be liable for any civil damages. The scene of an emergency shall not include "emergency departments and other places where medical care is usually offered." The issue is whether section 1799.102 applies to any emergency care rendered at the scene of any emergency, or whether it applies only to emergency medical care rendered at the scene of a medical emergency.

A definitional section defines "emergency" to mean "a situation in which an individual has a need for immediate medical attention." Since section 1799.102 provides immunity for the rendition of "emergency care at the scene of an emergency" (italics added), it only applies to emergency medical care rendered at the scene of a medical emergency. Additionally, Health and Safety Code section 1797.5 provides the legislative intent of the act as follows: "It is the intent to promote emergency medical services. People shall be encouraged and trained to assist others at the scene of a medical emergency in cardiopulmonary resuscitation and lifesaving first aid techniques."

We conclude the immunity provided by section 1799.102 applies only to the rendition of emergency medical care at the scene of a medical emergency. Defendant Torti did not provide emergency medical care to plaintiff at the scene of a medical emergency. Even if Torti believed plaintiff had to be immediately removed from the car due to a risk of fire or explosion, this was not a medical risk to plaintiff's health, and was therefore not emergency medical care.

A dispute of facts exists as to whether Torti's removal of plaintiff from the car was negligent, and whether that negligence increased the risk of harm to plaintiff. The judgments in favor of defendant Torti and against plaintiff and Watson are reversed, and the matter is remanded for further proceedings. Costs on appeal to plaintiff and Watson.

(continues)