

Emily Lynch Morissette

PERSONAL INJURY AND THE LAW OF TORTS FOR PARALEGALS

FIFTH EDITION

Emily Lynch Morissette

Personal Injury and the Law of Torts for Paralegals, Fifth Edition, balances complete coverage of substantive torts topics with essential paralegal skills. Emily Lynch Morissette provides consistently clear writing and realistic examples that convey a working understanding of the role of the paralegal in tort cases. Teaching basic torts and skill development, the text features a logical organization, introducing substantive topics with an overview of the concepts then moving through each element of negligence, followed by medical malpractice as a type of negligence, intentional torts, and workers' compensation.

Classroom tested and widely respected, *Personal Injury and the Law of Torts for Paralegals* features:

- A wealth of clear and accessible examples
- Fact-based exercises that use real-life scenarios
- Integrated treatment of ethics
- Practice-based topics on medical record discovery, tort discovery, and litigation

- A consistent emphasis on medical information related to personal injury, such as how to obtain and understand medical records, including an introduction to medicine in the appendix
- Helpful pedagogy, including chapter objectives, marginal definitions, visual aids, case summaries, chapter summaries, and review questions

Updates and highlights in the revised Fifth Edition:

- New examples throughout the text
- Additional exercises in every chapter
- New section in introductory chapter on how torts relates to other areas of the law
- Expanded coverage of emerging topics, such as
 - Role of insurance companies in medical damages
 - Caps on punitive damages
 - *Kim v. Toyota Motor Corp.* (2018) and its affect on the risk-benefit test

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FOR PARALEGALS

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 Wolters Kluwer

Personal Injury and the Law of Torts for Paralegals

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Fifth Edition

Emily Lynch Morissette, J.D.



Wolters Kluwer

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*To my mom,
who supported and encouraged me in realizing this dream:
without you, this book would not have been possible*

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Foreword

How to Be a Successful Paralegal Student By Michael Frazier, Paralegal

In order to be a successful paralegal student, there are a variety of factors that must be considered. While there is no single right way to approach an education, the factors that determine a student's level of success can generally be categorized as attendance, attention, participation, and studying. Every student has his own methods and learning curves, which makes determining the right formula for any one student quite difficult. The following are my suggestions on the aforementioned categories of success.

Attendance is the first and most obvious step toward being a successful student; in order to be successful you have to attend class. However, there is more to attendance than just showing up. A successful student will arrive early and be prepared for the day's lecture or activity. This not only shows a desire to learn but also allows time to get organized before the start of the lecture. Though it should go without saying, it is worth mentioning the importance of attending every class session, as there is vital information discussed in every lecture. Missing one class could make a noticeable difference. If it is necessary to miss a class, arrange to copy the notes of another success-oriented student.

Once class starts, pay attention. For many students, it has been quite some time since they were last in school. Remembering how to stay attentive for a long time can be a daunting task at first. The best way to maintain focus is through taking notes. Even if printed notes are provided by the instructor, taking down notes of what is discussed in the lecture may provide added information

that is not in the handouts or textbooks. Additionally, since learning is such an individualized process, taking down personally significant notes will increase the likelihood of being successful.

Another way to maintain focus, other than note taking, is to participate in class discussions and activities. Contributing to class discussions is a litmus test for both the student and professor to gauge whether the material is being absorbed and retained. Participation can also bolster confidence and help students to understand the material more thoroughly. Also, learn from other students' participation. Most of the time students will have the same questions and struggle in the same areas of the material. The instructor's interaction with each student then becomes quite valuable to the class as a whole, whether as a clarification for similar confusion or as a reinforcement of the fundamentals.

The most important tool for success is to study. There is much to be done outside of class in order to be a successful student. Assignments and required readings should be completed *before* the start of class. Being punctual with assignments is a fundamental aspect of being successful in school as well as in the workforce. Having required readings done is necessary in order to participate in class discussions, to take accurate and meaningful notes, and to stay current with lectures and activities. Most course material builds from beginning to end with the fundamentals being taught first, then more difficult concepts coming later. As the concepts

become more complex, students who have not kept up with the assignments and readings will find themselves slipping further behind. It is recommended to spend at least two hours studying and reviewing outside of class for every one hour spent in class. While this is not a hard and fast rule, it serves to show the dedication and commitment that is required to be a successful student.

There is no specific model for being a successful paralegal student. Nevertheless, all successful students share many of the same practices. They all attend class, take meaningful notes, participate in class discussions and activities, and spend a good amount of time outside of class studying and preparing. Using these fundamental categories will put any student on the path to success!

Preface

Focus

Personal Injury and the Law of Torts for Paralegals meets the growing need for a personal injury textbook with an emphasis on medical information useful in litigating all types of tort cases. Included in the book is a guide on how to obtain medical records and how to understand those records. Paralegals are provided with a sample medical authorization to assist them in obtaining medical records in compliance with the Health Insurance Portability and Accountability Act (HIPAA). The textbook gives tips on what to look for in the medical records and gives an example of a medical summary. Students are provided with medical records that they must review and summarize. An appendix with basic medical information is provided, including medical terms, basic anatomy, common prescription drug types, and medical tests that may be encountered when reviewing personal injury medical records.

This information is of benefit to many of the subjects included in the book, such as premises liability, medical malpractice, intentional torts to persons, strict liability, products liability, and workers' compensation. In addition, the book provides a comprehensive overview of the remaining torts outlined in the American Association for Paralegal Education's Model Tort Law Syllabus.

- Negligence
- Defenses to Negligence
- Defenses to Intentional Torts
- Immunities
- Vicarious Liability
- Nuisance

The final section of the book goes through the litigation process, beginning with complaints, then discovery, and ending with the trial itself. Insurance is discussed in detail due to its importance in tort litigation. Samples of the discussed pleadings and discovery are included, such as a complaint, affirmative defenses, an answer, interrogatories, requests for production of documents, and requests for admissions. A deposition of a plaintiff in a torts case is provided, and the students are given a sample summary of the deposition so they can learn how to prepare deposition

summaries. In addition, this chapter instructs the paralegal on how to produce a trial notebook, which is one of the major functions of paralegals in the field of tort litigation.

Overview

The book starts by introducing the concept of torts and then moving into each element of negligence. Although intentional torts might be an easier concept to understand for paralegals, the majority of the paralegal's work experience will be negligence-related. Thus, negligence is placed in the beginning of the book to give it greater emphasis, and each element of negligence has its own separate chapter. After discussing each element of negligence, issues related to negligence, and the defenses to negligence, the book tackles medical malpractice as a type of negligence.

Next, intentional torts are covered. Intentional torts to persons and intentional torts to property are divided into two chapters for easier learning. Strict liability and products liability also receive separate chapters.

Workers' compensation is discussed close to the end of the book. While workers' compensation is an area of law many beginning paralegals go into, it does not fit nicely into the above categories and thus merits its own chapter.

Chapter 15 discusses how to discover medical records, especially with the issues raised by HIPAA. In addition, paralegal students will learn how to review and summarize medical records.

The last chapters address the litigation process from a torts standpoint. Chapter 16 starts with complaints, answers, and affirmative defenses. The chapter also covers discovery. Students learn how to summarize a deposition and examples of each type of discovery are provided. In Chapter 17, students learn how to prepare a trial notebook.

Appendix A, An Introduction to Medicine, presents a short introduction to medical terms, basic anatomy, common prescription drug types, and medical tests that may be encountered when reviewing personal injury medical records. This appendix is a jumping-off point for the paralegal, who will have to learn much more about medicine if he decides to work in personal injury.

Chapter Format and Features

- Chapter Outline
- Chapter Objectives: Every chapter begins with the objectives of the chapter, so a student will know precisely what he should be learning as he reads the chapter.
- Introduction
- Body of Chapter
 - Marginal definitions: Legal terminology is defined in the text and in the margins to assist with reading comprehension. Marginal definitions are included

even for the cases, as cases often have words a beginning paralegal would not know.

- Examples and answers within the text: Difficult concepts are discussed and then shown through examples. The examples within the text are substantial and often provide the answer with the example.
- Tables: The elements of several of the torts are placed into a table, at the beginning of the discussion for the tort, for easier reference.
- Plain English: The textbook uses plain English to describe complex legal terms and concepts.
- Case Summaries: Cases have been redacted for the key facts, discussion, and the holding so the paralegal student, who is very busy, does not have to wade through irrelevant material. Each case is directly on point and provides the paralegal student with a variety of old standards and new cases to give the student a well-rounded view of torts.
- Legal Documents: The textbook provides many of the forms, pleadings, and complaints a beginning paralegal will use in his employment.
- Professional Contributor Essay: Each chapter has a professional contributor who discusses various topics, such as how to study torts, a career as a paralegal, becoming a paralegal as a second career, networking, life as a new paralegal, document review, or the steps in a lawsuit.
- Ethics Section: Each chapter also has a section on ethics as it pertains specifically to paralegals.
- Chapter Summary: At the end of each chapter is a concise chapter summary, along with key words, so students will know the legal language they should be learning.
- Key Terms: Key words from the chapter are placed together at the end of the chapter.
- Review Questions: The review questions are basic questions to determine whether the student read the chapter, and the exercises are more in-depth applications of the concepts of the chapter, so the student can apply what he has learned.
- Web Links: Every chapter has web links related to the subject matter in the chapter or to tort law in general.
- Exercises: The exercises are in-depth fact scenarios where the student must apply what he has learned. Exercises also include the use of the Internet and whenever possible tie the concepts of torts law to real life. For instance, the Consumer Product Safety Commission (CPSC) is discussed in the context of products liability. The CPSC has regulations for pacifiers, which are included in this book, and which the student is required to read and apply.

Supplemental Teaching Material

- Sample Syllabus
- Additional Websites/Using the Internet for Legal Research
- Each Chapter:

- *Summary*
- *Outline*
- *Further Exercises*
- *Answers to Review Questions*
- *Answers to Exercises*

One of the best features of this book is the combination of so many examples, with answers, along with further, more-detailed exercises at the end of the chapter. The answers to these exercises are included in the Instructor's Manual.

- Using the Appendices
 - Additional Medical Information
- Test Bank with sample test questions for Chapters 1-17
- Sample Exams
 - Mid-Term: true-false, multiple choice, short answer, and essay questions
 - Answer Key to Mid-Term
 - Final: true-false, multiple choice, short answer, and essay questions
 - Answer Key to Final
- Further Reading List and Bibliography

Emily Lynch Morissette
November 2019

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Introduction to Torts and Negligence

“The precepts of the law are these: to live honestly, to injure no one, and to give everyone his due.”¹

Chapter Outline

- 1.1** Introduction
- 1.2** Definition of a Tort
- 1.3** Sources of Tort Law
 - a.** Constitutional Law
 - b.** Statutory Law
 - c.** Administrative Law
 - d.** Common Law
 - e.** Restatements of Torts
- 1.4** The Public Policy Objectives Behind the Law of Torts
- 1.5** Categories of Torts
- 1.6** How Does Tort Law Relate to Other Areas of Law?
- 1.7** Prima Facie Case of Negligence
- 1.8** Unavoidable Accidents
- 1.9** Gross Negligence

Chapter Objectives

- Define a tort
- Explain the difference between a criminal cause of action and a tort cause of action
- Identify the major sources of tort law
- Discuss the public policy behind tort law
- Discuss how negligence is different from other types of torts
- Define negligence
- Introduce the four elements of negligence
- Explain why unavoidable accidents are not negligence
- Contrast gross negligence with normal negligence

1. Justinian I, *Justinian Code*, A.D. 533.

1.1 Introduction

Defining a tort is not easy because the definition of a tort keeps growing to include new types of lawsuits. When reading the definition in the following section, pay attention to what types of law a tort is not (for example, a crime). This will help you determine what a tort is. There are several different sources of tort law: common law, statutes, Restatements of Torts, constitutional law, and administrative law. Public policy shapes the laws that make up tort law, especially since torts affect such a wide proportion of the public (which makes more sense once you realize that car accidents can be a type of tort). Therefore, it is important to understand some of the public policy objectives behind tort law.

This chapter defines negligence, a tort, and compares negligence to intentional and strict liability torts. Negligence is the most likely type of tort you, as a paralegal, will work on. Thus, negligence is covered at the beginning of this book.

To understand negligence better, you need to learn what a *prima facie* case of negligence is. A *prima facie* case is the bare minimum needed to present a lawsuit. Thus, a *prima facie* case of negligence is required for the plaintiff to bring a negligence lawsuit. This chapter lays out a *prima facie* case of negligence, which consists of four elements: duty, breach, causation, and damages. Each of these elements is then discussed more fully in its own chapter.

Unavoidable accidents are also addressed in this chapter to compare them with negligence. A defendant will not be found negligent for unavoidable accidents. In contrast to negligence, gross negligence is a particularly egregious, or severe, type of negligence.

1.2 Definition of a Tort

Tort

a wrong done by one person (A) to another (B) that results in injury to B or his property, and often involves obtaining monetary compensation for the injury or damage.

Tortfeasor

the person who causes the harm, also known as the defendant.

Defendant

the party from whom compensation is sought for the injury or damage.

Defining exactly what a tort *is*, is difficult in part because the definition of a tort constantly changes as society evolves.

New and nameless torts are being recognized constantly . . . the court has struck out boldly to create a new cause of action, where none had been recognized before. . . . The law of torts is anything but static, and the limits of its development are never set.²

The word **tort** has Latin and French roots. In Latin, *tortus* means twisted, and in French, the word translates into English as “wrong.” A tort is a wrong done by one person (A) to another (B) that results in injury to B or his property, and often involves obtaining monetary compensation for the injury or damage. A **tortfeasor** is the person who causes the harm. A tortfeasor is also referred to as the defendant. A **defendant** is the party from whom compensation is sought for the injury or damage.

In defining a tort, it is almost easier to define what a tort is not. A tort is not a criminally addressed wrong, but a civilly addressed wrong. Nor is a tort a contract. Typically, a tort must be an injury that can be compensated for monetarily, although

2. *Prosser and Keeton on the Law of Torts* §§1, 3 (W. Page Keeton et al. eds., 5th ed., West 1984).

Injunction
an order from a court telling the defendant to refrain from or stop performing certain act(s).

there are some nonmonetary remedies as well, such as an injunction. An **injunction** is an order from a court telling the defendant to refrain from or to stop performing certain act(s). Injunctions are normally granted when money will not adequately solve a problem, such as a person building a home addition that crosses from his property onto his neighbor's property. This is another example of a tort, because torts can be to property as well as to a person.

What Is the Standard of Proof in a:

Tort Case?	Criminal Case?
Preponderance of the evidence*	
*(also known as "more likely than not")	Beyond a reasonable doubt

Contrasting a tort case to a criminal case can help in defining a tort. For instance, the standard of proof in a tort case is less stringent than in a criminal case. In a tort case, the jury has to believe only that it is more likely than not that the civil defendant did commit the tort, in order to find him liable. Who brings the lawsuit is another way in which torts and crimes are different. In general, the wronged individual brings the tort lawsuit and is called the **plaintiff**. A plaintiff is the person who files the lawsuit. A crime harms the public at large and is prosecuted by the government in criminal court. Thus, the government would be the plaintiff. It is a common misconception that the crime victim is the plaintiff in a criminal case. With a criminal case, a **prosecutor**, as a representative of the government, brings the case against the defendant. The prosecutor actually works for the government, not the victim of the crime. Thus, an individual brings a tort case, but the "People," represented by the prosecutor, bring a criminal case.

Plaintiff
the person who files the lawsuit.

Prosecutor
the person who brings and pursues a criminal action against a criminal defendant on behalf of the government.

Who Is the Plaintiff in a:

Tort Case?	Criminal Case?
An individual	The People, represented by the prosecutor

Assault
an act committed with the intent to cause another person to be apprehensive he is going to be harmfully or offensively touched, which does cause the other person to be apprehensive.

Battery
a harmful or offensive contact with a person, caused by the defendant's intent to cause the harmful or offensive contact.

However, some acts can be both a crime and a tort, such as in the cause of assault and battery. As you will learn in Chapter 9, an **assault** is an act committed with the intent to cause another person to be apprehensive he is going to be harmfully or offensively touched, which does cause the other person to be apprehensive. **Battery** is harmful or offensive contact with a person, caused by the defendant's intent to cause the harmful or offensive contact. Though similar, there must be contact with battery. The government might prosecute the defendant in criminal court for an assault and battery, and the victim of the assault and battery might sue the defendant in civil court for monetary damages. The victim would probably want both, because in a criminal case, the victim often does not receive any money as compensation.

What Is the Purpose of a:

Tort Case?	Criminal Case?
Compensation to the plaintiff	Punishing the defendant
Justice	Justice
Deterrence	Deterrence

Torts include negligence, personal injury, medical malpractice, products liability, nuisance, and workers’ compensation along with other areas addressed by this book. In a tort case, the injured party is typically looking for monetary damages to make him whole again.

1.3 Sources of Tort Law

There are several sources of tort law, such as the Constitution, statutes, administrative law, common law, and Restatements of Torts. (See Figure 1.1.)

Figure 1.1

Sources of Tort Law

Source of Tort Law	Definition
Constitution	Body of law creating the judicial, executive, and legislative branches of government, as well as providing for basic rights of citizens.
Statute	A law passed by a legislature, typically prohibiting conduct.
Administrative law	Law handed down from administrative agencies, such as workers’ compensation boards.
Common law	Hundreds of years of courts’ written decisions, applying the law to the facts.
Restatement of Torts	A secondary authority which, while not technically law, is often relied upon by courts to reach decisions.

Constitutional law
law consisting of the Constitution, the amendments to the Constitution, and all the cases interpreting the Constitution.

a. Constitutional Law

Constitutional law consists of the Constitution, the amendments to the Constitution, and all the cases interpreting the Constitution. Constitutional law is the highest source of law in the United States of America. If the Constitution does not

address a particular issue, then the individual states may address those particular issues. Constitutional law has an impact on tort law, in particular through the First Amendment regarding free speech. Freedom of speech has a big impact on whether a plaintiff can sue for defamation.

b. Statutory Law

Statutory law
law made by politicians.

Legislatures pass statutes on behalf of the people. Thus, **statutory law** is law made by politicians and is influenced by public policy. Statutes include state constitutions, Acts of Congress, state laws, and county or city ordinances. The vehicle code in your state is statutory law. An example of a statute is the following California Vehicle Code statute. The statute states that a person who operates a motor vehicle must have proof of insurance in the amount of \$15,000.00 per person, \$30,000.00 per accident.

“Proof of financial responsibility,” when required by this code, means proof of financial responsibility resulting from the ownership or operation of a motor vehicle and arising by reason of personal injury to, or death of, any one person, of at least fifteen thousand dollars (\$15,000), and, subject to the limit of fifteen thousand dollars (\$15,000) for each person injured or killed, of at least thirty thousand dollars (\$30,000) for the injury to, or the death of, two or more persons in any one accident, and for damages to property in excess of one thousand dollars (\$1,000), of at least five thousand dollars (\$5,000) resulting from any one accident. Proof of financial responsibility may be given in any manner authorized in this chapter.³

Primary authority
the most persuasive type of legal authority; includes statutes and is the first place a paralegal should look to answer a legal question.

Annotated statutes
statutes along with references to cases that interpret the statutes.

Statutes of limitations
the time frame in which a tort lawsuit can be brought.

Statutes are primary authority. **Primary authority** is the first place a paralegal should look to answer a legal question, though there may not be a statute on a particular issue. Primary authority is the most persuasive type of legal authority, so if there is a statute on a particular issue, it is best to start research with that. Sometimes a statute will be interpreted by a court. **Annotated statutes** are statutes along with references to cases interpreting the statutes. Annotated statutes are a great way to research the meaning behind a statute. Annotated statutes are available using Westlaw or LexisNexis.

Many tort statutes are related to products liability and medical malpractice statutes. **Statutes of limitations**, or the time frames in which different tort lawsuits can be brought, are also statutes. An example of a statute of limitation is that a plaintiff might have only have one year from the date of injury to file a certain type of lawsuit.

c. Administrative Law

Administrative law
law handed down from the administrative agencies that are part of the executive branch (e.g., presidential branch) of our government.

Administrative law is law handed down from the administrative agencies that are part of the executive branch (presidential branch) of our government. Administrative law influences only certain parts of tort law, in particular workers' compensation. Most states have a workers' compensation board that hears workers' compensation cases. Workers' compensation is discussed in Chapter 14. If the board does not adjudicate a workers' compensation case to the parties' satisfaction, there are provisions so that it can be appealed and reviewed by a court. This arrangement is similar for many types of administrative law.

3. Cal. Veh. Code Ann. §16430 (2017).

Administrative agencies at a state or national level can make rules, which are administrative law. They obtain this power through the legislative branch of government, such as by statutes written by Congress. Examples of federal administrative agencies are the Environmental Protection Agency (“EPA”), the Internal Revenue Service (“IRS”), and the Social Security Administration (“SSA”). A state example would be the workers’ compensation board, discussed above; thus, each state’s workers’ compensation laws differ from each other’s. Administrative law governs conflicts arising between people or business entities and an administrative agency. The rules govern administrative hearings and are particular to each administrative agency. In addition, the rules usually differ somewhat from civil court personal injury litigation.

d. Common Law

Common law

hundreds of years of judicial law making; started in England and then carried over to the United States of America.

Common law is derived from hundreds of years of judicial law making. Common law is law made by judges through cases. Case law is essentially the same thing as common law. In general, common law started in England and then carried over to the United States of America, with one state as an exception: Louisiana. Louisiana was settled by both the French and the Spanish, so its common law differs from the rest of the United States. This exception illustrates why it is always important to research the specific law of the state a case is located in. Each state has its own courts, and thus, each state’s laws will differ from each other. Each of the fifty states has at least slightly differing views on tort law. This text is a general guideline to tort law, and additional research may be necessary to determine the specific law in a particular state.

Courts are supposed to follow statutes where there are statutes on certain topic matters, but even when there are statutes, unanswered questions may remain. The courts must step in and answer those questions through case law. Much of tort law is derived from case law, and this text includes major cases affecting the law of torts.

e. Restatements of Torts

Restatement of Torts

a set of reference books on the principles of tort law, which many courts refer to when formulating decisions.

The **Restatements of Torts** are a reference set of books outlining the different principles of torts. The Restatements of Torts are published by the American Law Institute (“ALI”), which is made up of judges, attorneys, and legal scholars. While this restatement is not binding on a court of law, many courts refer to the Restatement (Second) of Torts when formulating their decisions. Therefore, the Restatements, while not law themselves, have an important impact on tort law.

The Restatement (Second) of Torts is still the most widely used restatement, though the Restatement (Third) of Torts is gaining popularity. In fact, several sections of the Second have been superseded by the Third. The “Second” in the Restatement (Second) of Torts stands for the second edition. The “Third” in the Restatement (Third) of Torts stands for the third edition. The Restatement (Third) of Torts addresses products liability, which is broad and complex enough to warrant several volumes in and of itself. In this textbook, products liability is discussed more generally in Chapter 12.

1.4 The Public Policy Objectives Behind the Law of Torts

One purpose of tort law is to impose liability on people who commit wrongs. The motivation for this purpose is fairness. Who should fairly pay for the plaintiff's injury? Fairness demands the plaintiff be restored, as closely as possible, to the position she was in before she was injured. The law is somewhat limited in whether it can achieve this, though; money and injunctions to stop certain behavior can do only so much. A person cannot become uninjured, though his medical expenses can be compensated, and he can receive money for his pain and suffering.

A purpose of tort law is to allocate or distribute losses. Who is in the better position to bear the cost—the plaintiff who was injured or the defendant who injured the plaintiff? Take the example of a defective product. Typically, the cost is placed upon the manufacturer or seller of the defective product, rather than upon the user of the defective product. Part of this analysis looks at whether the cost of taking precautions to avoid the accident was cheaper than the cost of the accident. If it was cheaper for the defendant to take a precaution, then the defendant may be in the better position to have prevented the accident and should thus be responsible for the accident. This goes to the concept of legal justice.

Society does not want injured persons to have to rely on the government to support them while recovering, because this imposes the costs of the plaintiff's injury on taxpayers. Thus, the goal of tort law is, in part, to make a defendant pay for the cost rather than have the plaintiff resort to governmental assistance. An example of governmental assistance might be social security disability.

Another purpose of tort law is to act as a deterrent to wrongdoers. Our society is safer if it deters people from taking injurious action. If a potential defendant knows he could face paying money for his wrongful actions, this may discourage him from taking those wrongful actions. This is one of the biggest reasons behind punitive, or punishment, damages. Large corporations would not be deterred from wrongful behavior if they did not have to pay a large amount of money. Opponents of punitive damages argue that large jury verdicts increase the cost of doing business.

Finally, tort law helps establish minimum standards of conduct among society. It holds people responsible for their actions, even negligent actions, such as an automobile accident. One characteristic almost all torts share is that they involve behavior that is not a benefit to society.

1.5 Categories of Torts

Negligence

actions that cause unreasonable risks of harm to another person.

The three main types of torts are negligence, intentional torts, and strict liability. (See Figure 1.2.) This chapter introduces negligence and the following chapters discuss each element of negligence in detail. **Negligence** involves actions that cause unreasonable risks of harm to another person.

The law dictates that individuals need to use reasonable care to avoid injury to another. With negligence, the defendant failed to use reasonable care to avoid causing injury to another person. Negligence is different from intentional torts because negligence does not require intent to commit a wrong. Negligence equates to carelessness. An example of negligence is a car accident.

Intentional tort

the defendant acts with the intent to cause the injury or with substantial certainty the injury will occur.

Strict liability

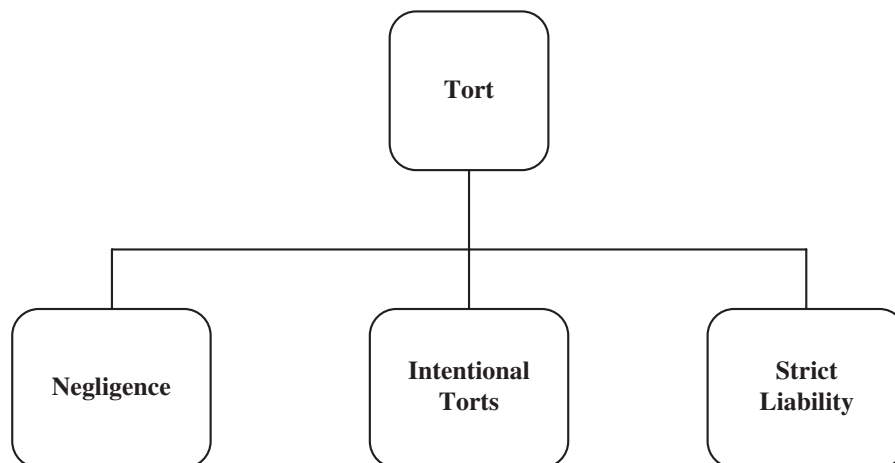
a tort where fault is not the issue; conduct that has liability imposed upon it even when there was no intent or negligence in committing the conduct.

In an **intentional tort**, the defendant wants to cause an injury. The defendant acts with the intent to cause the injury or with substantial certainty the injury will occur. An example of substantial certainty would be when the defendant was allegedly reading text messages while crossing an intersection on a bicycle. He might not have intended to hit the frail, elderly man also crossing the street, but it was substantially certain, per the law, that he would cause an accident by not looking where he was going. Intentional torts to persons include assault, battery, false imprisonment, intentional infliction of emotional distress, fraud, misrepresentation, invasion of privacy, defamation, and malicious prosecution. Intentional torts to persons are discussed in Chapter 9. Intentional torts to property include conversion (defined in Chapter 10), trespass to land, and trespass to chattels/personal property. Intentional torts to property are discussed in Chapter 10.

With **strict liability**, fault is not the issue. Some types of conduct have liability imposed even when there was no intent or negligence in committing the conduct. Some types of activities are unreasonably dangerous to undertake no matter how much care is exercised in undertaking them, such as using explosives. Hence, many municipalities have laws about the types and size of fireworks civilians may detonate within city limits. Sometimes this is due to the inherent risks of the fireworks themselves, and sometimes this is combined with outside influences, such as a very dry climate. Strict liability is different from negligence, because no matter how careful the tortfeasor was, the tortfeasor will still be responsible under strict liability. Strict liability is discussed in Chapter 12.

Figure 1.2

Types of Torts

**1.6 How Does Tort Law Relate to Other Areas of Law?**

Tort law bleeds over into many other areas of law, a few of which will be discussed here. We have already discussed how tort and criminal law overlap. Another area of overlap is tort law and constitutional law. Defamation is a tort, but someone's right to free speech (constitutional law) or the right to speak the truth plays a role

in whether something counts as defamation. Real property law also covers torts that involve real property, including premises liability, trespass, negligence, strict liability in some cases, and nuisance. Governmental law converges with tort law, as a government can injure someone, and there are specific rules as to whether a plaintiff can sue the government, whether it be city, state, or federal government. Insurance law plays a big role in torts, as insurance is frequently what pays for tort injuries.

1.7 Prima Facie Case of Negligence

Prima facie
Latin term meaning “on its face.”

To make a negligence claim (or any tort claim), a plaintiff must have a prima facie case. **Prima facie** is a Latin term meaning “on its face.” On its face, the case looks like negligence. The four separate prima facie elements of negligence, each of which will be addressed in its own chapter, are duty (Chapter 2), breach of duty (Chapter 3), causation (Chapter 4), and damages (Chapter 5). (See Figure 1.3.)

Figure 1.3

The Elements of Negligence

Element	Explanation
Duty	The defendant must owe a duty to the plaintiff.
Breach	The defendant must have breached the duty to the plaintiff.
Causation	Causation is the connection between the defendant’s act and the resulting injury to the plaintiff.
Damages	Damages are the plaintiff’s monetary damages, which can include missing time from work and medical expenses.

Each tort has elements, whether the tort is a negligent, intentional, or strict liability tort. In order to win a tort case, each element must be proven. To see if the plaintiff can meet each element, the facts of the case must be applied to each element. For negligence, the plaintiff must show duty, breach, causation, and damages, as each one of these is an element of negligence. The plaintiff will draft a cause of action, or claim, alleging those elements, as in the following example.

Example: General Cause of Action for Negligence from a Complaint

- Defendant owed a duty of due care to the Plaintiff.
- Defendant breached that duty to the Plaintiff.
- Plaintiff was injured by said breach.

- The detriment caused to the Plaintiff was caused by the Defendant's breach of duty.
- Plaintiff has suffered damages, due to the Defendant's breach, in \$ _____ amount.

This is a general cause of action for negligence; most causes of action would have facts specific to the individual case added to them.

Example: Cause of Action for Negligence with Facts

- Defendant Marquez owed Plaintiff Rubin a duty of due care as a fellow driver.
- Defendant Marquez breached that duty of due care to Plaintiff Rubin by not following behind Plaintiff Rubin at least three car lengths.
- Plaintiff Rubin was injured by Defendant Marquez rear-ending her.
- Defendant Marquez not following three car lengths behind and rear-ending Plaintiff Rubin is the cause of her injuries.
- Plaintiff Rubin has suffered damages, due to the Defendant's breach, in the amount of fifty-six thousand (\$56,000.00) dollars.

This cause of action for negligence has facts applied to each element.

1.8 Unavoidable Accidents

Proximate cause

an uninterrupted sequence which causes an injury and without this cause, the injury to the plaintiff could not have happened.

Unavoidable accident

a freak accident, not caused by the defendant.

An unavoidable accident is not negligence, and a defendant will not be liable for an unavoidable accident. An unavoidable accident is "an event not proximately caused by the negligence of any party to it."⁴ **Proximate cause** is an uninterrupted sequence that creates an injury. Without proximate cause, the injury to the plaintiff could not have happened. The **unavoidable accident** must be caused by a physical condition, such as sudden and unexpected weather (perhaps a tornado), and not by the people involved in the accident being careless. Another unavoidable accident could occur if the driver had a sudden and unexpected health problem that caused the driver to lose control of the car. An unavoidable accident is a freak accident, not caused by the defendant. An unavoidable accident occurs despite precautions taken to prevent it. Some accidents are simply no one's fault, and thus there will be no liability for them.

1.9 Gross Negligence

Gross negligence

the failure to exercise care, or acting with so little care as to show indifference to the safety of others.

Gross negligence is much greater type of negligence than regular negligence. Regular negligence is normally caused by careless behavior. Gross negligence occurs when a person acts recklessly or with a willful disregard for another person's safety. **Gross negligence** is the failure to exercise care or to act with so little care so as to show indifference to the safety of others. Gross negligence raises the presumption that the defendant acted with a conscious disregard of the safety of others.

4. *Dallas Ry. & Terminal Co. v. Bailey*, 151 Tex. 359, 370, 250 S.W.2d 379, 385 (1952).

An example of gross negligence is flying a plane when intoxicated. If a defendant flies a plane while intoxicated, the defendant is consciously disregarding the safety of others. A parent not feeding a young child could be another example of gross negligence. Still another example would be if a surgeon left a surgical instrument in a patient and then closed the surgical wound. Gross negligence can also lead to criminal charges, depending upon the behavior. Society's (and the law's) view of what constitutes gross negligence evolves over time.

Working in Criminal Law,⁵ by Irene Ainza, Paralegal

My career at the District Attorney's ("DA") Office resulted from a chance meeting with a county recruiter while accompanying my husband to a job fair. I took the opportunity to work for the DA to satisfy my curiosity. I was intrigued to find out more about the process and people whose decisions define the rules that govern our society's behavior.

I have seen firsthand the challenges on prosecutors and judges to effect change in the life of a criminal

through rehabilitation, but we cannot forget the innocent victims whose lives have been affected. Their stories are tragic and often heartbreaking. Through the collective efforts of prosecutors, investigators, paralegals, and support staff, we make a difference. It is our duty, as public servants, to see justice served and we have a huge responsibility to our citizens to make sure the guilty are held accountable for their actions.

I am proud to tell people that I work for the DA's Office.

E T H I C S

Per the Model Rules of Professional Conduct, attorneys are responsible for the work product of paralegals. Attorneys who supervise paralegals are required to ensure that a paralegal is fulfilling the attorney's ethical obligations. A paralegal must review the ethical obligations of attorneys under the Model Rules of Professional Conduct, because these ethical duties apply to paralegals as well. These legal ethical obligations are not necessarily the same as moral ethics. The legal ethical obligations are not

always commonsensical; therefore, a paralegal must review the rules to assure compliance with them. Ensuing chapters will discuss specific aspects of ethics. For now, you can find the table of contents for the Model Rules of Professional Conduct at: https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents/. It is recommended that you familiarize yourself with the table of contents.

Chapter Summary

A tort is a civil wrong wherein the victim of the tort is compensated, usually in the form of monetary damages. The person committing the wrong is known as the tortfeasor or defendant. Major sources of tort law include statutory law and common

5. Though personal injury law is not criminal law, the two are often related as discussed previously in this chapter. For example, an assault can be both prosecuted criminally and litigated civilly.

law. Statutory law is written by legislators. Common law is made up of cases rendered by judges. Although not technically law, the Restatements of Torts help guide judges in making decisions.

There are many different purposes behind tort law, perhaps the most important of which is determining who should pay for an injury. One public policy is that the government should not have to pay for the injury caused by a private defendant. The law holds the injurer is typically in a better position than the injured to pay for the costs of the injury.

The three major areas of tort law are negligence, intentional torts, and strict liability. Negligence is the failure to utilize reasonable care so as to avoid causing injury to other people. In essence, negligence is an accident. Negligence consists of four elements: duty, breach, causation, and damages. Each of these elements must be proven by the plaintiff for the plaintiff to win his case. Intentional torts occur when a tortfeasor has the intent to injure another person or another person's property. Strict liability is imposed without regard to fault.

Unavoidable accidents are accidents caused by sudden and extreme natural events and are freak accidents. The defendant will not be held liable for these accidents. In contrast to unavoidable accidents is a defendant's gross negligence. Gross negligence is worse than regular negligence. Gross negligence is acting with a high disregard for another person's or people's safety.

Key Terms

- Administrative law
- Annotated statutes
- Assault
- Battery
- Case law
- Civil law
- Common law
- Constitutional law
- Conversion
- Criminal law
- Defamation
- Defendant
- False imprisonment
- Fraud
- Gross negligence
- Injunction
- Intentional infliction of emotional distress
- Intentional tort
- Invasion of privacy
- Libel
- Malicious prosecution
- Medical malpractice
- Misrepresentation
- Monetary damages
- Negligence
- The "People"
- Personal injury
- Plaintiff
- Prima facie
- Primary authority
- Products liability
- Proximate cause
- Prosecutor
- Restatement of Torts
- Statute
- Statute of limitations
- Statutory law
- Strict liability
- Tort
- Tortfeasor
- Trespass to chattels
- Trespass to land
- Unavoidable accidents

Review Questions

1. What is a tort?
2. Why is it so difficult to define a tort?
3. Who is the plaintiff in a tort case? Who is the plaintiff in a criminal case?
4. What are the differences between the burden of proof in a tort case and the burden of proof in a criminal case?
5. What are the major purposes of tort law?
6. How is tort law made?
7. What are the differences between tort and criminal law?
8. How are Restatements related to tort law?
9. What are the major categories of torts? Differentiate between them.
10. What are the elements that comprise negligence?
11. How is an unavoidable accident different from typical negligence?
12. How is gross negligence more extreme than regular negligence?

Web Links

- Go to the National Highway Traffic Safety Administration's website at <https://www.nhtsa.gov/>. Research crash statistics nationwide for car accident fatalities for the most recent year that data is available for.
- In general, the Cornell University's website is excellent for researching legal issues. The website, <http://www.law.cornell.edu/>, has the United States Code, Federal Rules of Civil Procedure, U.S. Supreme Court opinions, and other Federal Court opinions, and also includes state laws by topic. It is currently one of the best free sites for obtaining legal information, but depending upon future donations, it may or may not stay free. Take an opportunity to familiarize yourself with this excellent free legal resource.
- Another great location for free case law is Goggle Scholar at scholar.google.com. You can select state and federal cases. If you choose a state case, you are given further delineations to choose from, such as the State Court of Appeals or the State Supreme Court. Federal cases are broken down by circuit, supreme court, patent court, and tax court.
- The United States Government Printing Office's website is located at <http://www.gpo.gov/>. Congressional bills are cataloged here from 1993 on. The Supreme Court's website is actually hosted by GPO Access. The Code of Federal Regulations and United States Code can be accessed from this website.

Exercises

1. Find out where your local county courthouse is physically located and whether the courthouse has a website. If the courthouse has a website, research the records you can obtain from the website. In addition, determine whether that courthouse has a physical library.

2. The First Amendment states: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.” However, this Amendment does not provide much guidance on what free speech is, especially in the context of the Internet, social networking sites, and texting. Look up a current case that discusses what constitutes freedom of speech. For example, an interesting read about cyberbullying and free speech can be found at *Kowalski v. Berkeley*, 652 F.3d 565 (2011). One student used social media to state another student had herpes and was a “whore.” School officials were allowed to suspend the cyberbullying student as it furthered educational objectives.
3. Research more examples of gross negligence.

First Element of Negligence: Duty

“[L]et us dare do our duty as we understand it.”¹

Chapter Outline

- 2.1** Introduction to Duty
- 2.2** The First Element of Negligence: Duty
- 2.3** Scope of Duty
- 2.4** Duty to Act or Failure to Act
 - a.** Families
 - b.** Jobs
 - c.** Other Instances Where a Duty Is Owed
 - d.** Examples in Which a Higher Duty Is Owed
- 2.5** Negligence Per Se

Chapter Objectives

- Define the general rule on duty
- Discuss the unforeseeable plaintiff
- Determine when a duty arises
- Provide the legal ramification of when a duty arises
- Explain why some relationships create a higher standard of care

1. Abraham Lincoln, *Address at Cooper Union*, New York (February 27, 1860).

2.1 Introduction to Duty

The first element of negligence is duty. The duty people normally owe each other is a duty of reasonable care to avoid injuring one another. Determining whether the defendant owed the plaintiff a duty of care is necessary to determine whether the defendant is negligent. If the plaintiff cannot prove the defendant owed him a duty, then there is no need to assess the other elements of negligence.

Reasonable care is discussed further in Chapter 3. The duty of reasonable care is not owed to all people; it is owed just to those people within the scope of duty. Chapter 3 will discuss what the scope of duty is. Next, in order for a defendant to have a duty, the injury must also be foreseeable.

The general rule is, people are *not* legally required to help others. In fact, people can be held negligent if they do help another and place that person into a worse situation. This is an example of how morals can differ from legal ethics, which was mentioned in Chapter 1. Once a person has started helping another, a duty is owed to that other not to place that person into a worse position. Good Samaritan laws were enacted to help protect some types of people who help others while off duty, such as doctors or nurses. Good Samaritan laws, depending upon the state, do not usually protect the “average Joe” who attempts to help, despite the common perception that they do. If there is a special relationship, such as the parent-child or employer-employee relationship, then the parent or employer has a legal duty to help the child or employee.

Finally, negligence per se is an act that is obviously negligence on its face or an act in violation of a statute. In understanding negligence per se, it is important to read examples of negligence per se, some of which are provided in this chapter.

2.2 The First Element of Negligence: Duty

Duty

an obligation for a person to meet a certain standard of care.

Duty of reasonable care

the duty to exercise the same care a reasonably prudent person under similar circumstances would exercise to avoid or lessen the risk of harm to others caused by the defendant.

In order for negligence to exist, the defendant must have owed the plaintiff a duty. A **duty** is an obligation for a person to meet a certain standard of care. Every person is under a duty to use reasonable care not to act to injure other people, particularly strangers. A person who is not acting does not generally owe a duty to strangers. It is typically action that can give rise to a duty. As a result of this legal principle, in general, people are not held to have a legal duty to help one another. While this may be against your personal morals, it is, in general, the law. There are some exceptions.

The **duty of reasonable care** is the duty to exercise the same care a reasonably prudent person under similar circumstances would exercise to avoid or lessen the risk of harm to others caused by the defendant. Reasonable care, and what this type of care constitutes, will be discussed in more detail in Chapter 3. In general, the duty to act with reasonable care applies to people at all times.

Example of Failing to Use Reasonable Care

If a pedestrian is walking on the sidewalk, she is under a duty to look around and make sure she does not bump into another pedestrian. Doing so would meet her

duty of care. She has a duty to the other pedestrians because she is acting, by walking. If, due to reading e-mails on her cell phone, the pedestrian bumped another pedestrian into traffic, then she would not be exercising her duty of reasonable care.

The duty of reasonable care is the minimum duty owed to other people. A defendant could assume a higher level of duty than reasonable care. People in a special relationship may have a higher duty of care, depending upon the circumstances, such as a husband and wife or father and child. However, some classes of people (such as children) have lesser levels of duty than reasonable care. States may break up the differing levels of standard of care that children owe others based upon age. Other ways of referring to duty of reasonable care are “the standard of ordinary care,” “the standard of due care,” and/or “the reasonably prudent person standard.”

2.3 Scope of Duty

Scope of duty
the people to whom one has
a duty.

Scope of duty refers to the people to whom one has a duty. A person does not owe everyone in the world a duty to act reasonably. If Janet is skiing down an Aspen, Colorado, mountainside, she has a duty to the people below her not to run into them, even though she may not know them. She has this duty because she has chosen to perform a risky sport. Her acting, and doing something that involves some risk, has created the duty she now owes others. However, Janet does not owe a duty to skiers in Switzerland, as she is not skiing in Switzerland. Her movements while skiing in Aspen should not affect skiers in Switzerland. The question of whom a duty is owed to is determined by looking at foreseeability.

Example of Changing Scope of Duty

Dockless and shareable electronic bikes and scooters are gaining popularity around the world, and you may see them in your town. There has been plenty of speculation about an increase in traffic accidents as a result of the presence of these bikes and scooters. There are many first-time riders driving alongside cars at a speed of around 15 miles per hour. Not all users wear helmets; not all users are over 18 years of age; and not all users follow vehicle and municipal codes regarding the safe operation of these devices. Does a motorist's scope of duty change now that there are users of scooters and bikes who do not follow the traffic laws and may unexpectedly and unlawfully cut motorists off? What if a rider crosses a four-way traffic signal diagonally on a red light? Are motorists expected to anticipate and avoid reckless riders that appear suddenly as part of the scope of their duty? Or are motorists only required to act with a duty of care to those riders who follow traffic safety rules? Motorists are required to follow vehicle safety laws and to not speed, make unsafe lane changes, or follow other drivers too closely. A study by Austin Public Health and the Centers for Disease Control studied e-scooter accidents for three months and found that there were 190 injuries on scooters after nearly 1 million rides taken, or there was a crash rate of .02. Notably, the majority of accidents in this study included first-time

riders. Thirty-nine percent of the accidents occurred at night and 29 percent involved an intoxicated rider.²

Foreseeability
how much something can be known before it occurs.

Foreseeability
how much something can be known before it occurs.

Foreseeability is the question of how much something can be known before it occurs. The issue of foreseeability is assessed prior to—not after—the injury. The defendant owes the plaintiff a duty to act reasonably if the defendant’s conduct creates a foreseeable risk to the plaintiff. A **foreseeable risk** is one a reasonable person could have anticipated.

Using the skiing example from above, if Janet suddenly swerved on the Aspen, Colorado hillside without checking behind or beside herself to make sure she was not cutting someone off, it is foreseeable she could cut off another skier and cause a collision. However, a defendant is not expected to avoid risks that cannot be foreseen (see example below). Thus, foreseeability limits the scope of the duty owed to other people. The foreseeability of a potential injury is considered a fair factor to use in imposing a duty upon a defendant.

This theory is also called the foreseeable plaintiffs theory. Was it reasonably foreseeable the plaintiff would be injured as a result of the defendant’s conduct? If yes, then the defendant may be found negligent if the other elements of negligence are met. An unforeseeable plaintiff would therefore be someone who a defendant could not have reasonably anticipated would be harmed by her actions. In that case, a defendant would not be found negligent.

Example of an Unforeseeable Plaintiff

Janet is skiing and cuts off another skier. The skier is injured, and Anton, a volunteer paramedic, is called in to work to help the skier off the mountain. Anton was eating lunch before he was called in to work. He left his lunch on the kitchen counter, uneaten. Anton’s roommate comes home eight hours later and sees the food on the kitchen counter, but no Anton. Anton is still working on getting the skier off the mountain. Anton’s roommate thinks Anton left the food for him, so he eats it. The roommate develops food poisoning, probably because the food was left out too long without being refrigerated. The injury to the roommate was not a foreseeable injury; therefore, Janet will not be legally responsible for the roommate’s food poisoning. This is not to say that roommates might not owe each other different duties, such as the duty not to let someone into the apartment who is a known rapist. Note: The injury might have been foreseeable if an injury had happened to Anton while rescuing the skier. This is one of the reasons people who knowingly place themselves in danger are often required to pay for the cost of their rescue.

2. https://www.austintexas.gov/sites/default/files/files/Health/Epidemiology/APH_Dockless_Electric_Scooter_Study_5-2-19.pdf (last accessed May 21, 2019).

2.4 Duty to Act or Failure to Act

Commission
an act.

Omission
a failure to act.

A defendant can usually only be found negligent for his **commissions** or acts, rather than his omissions or inactions. If a person acts, the person has a duty to use reasonable care to avoid injuring anyone else. An example of a commission is driving at dangerous speeds. If the driving caused an accident, then the defendant may be found liable for his commission. Typically, however, a person is not responsible for a failure to act, also known as an **omission**. In general, a person does not have a legal duty to help another person. Whether a person has a moral duty to help another person is another issue. This general legal rule holds true even when a person can render help without causing injury to himself. “The fact that the actor realizes or should realize that action on his part is necessary for another’s aid or protection does not of itself impose upon him a duty to take such action.”³

One of the justifications given for this rule of law is if a bystander were to attempt to help a victim, then the victim might actually be placed into a worse situation. For example, a bystander might attempt to help a choking victim by pounding on the victim’s back. The pounding might cause the item to become further lodged in the victim’s throat. However, an individual does not have to help someone else even when it does not appear that by helping that individual, the individual might be placed into a worse position. For instance, suppose a deaf person does not hear a cop screaming at him to stop or he will shoot. Frank, who is in front of the deaf person, could hold up his hand as a signal for the deaf person to stop. It does not appear that there is a detriment either to the deaf person or to Frank for Frank to do so. However, Frank is not legally obligated to do so.

Example of Failing to Act

Charlene is standing in line at the cafeteria when she notices someone in front of her dropping his tray, spilling food all over the floor. Charlene walks around the food but does nothing to pick the food up. Cynthia, who was standing behind Charlene, does not see the spilled food and slips on it. Did Charlene owe Cynthia a duty of care? No. Charlene does not have a duty to act, so she does not owe Cynthia a duty of care. The person who spilled the food did owe the people behind him a duty of care.

However, if a special relationship with the victim exists, then a defendant can be found responsible for failing to act to protect another against the negligent and/or intentional actions of third parties. Some of these special relationships include the relationship among family members, the relationship between a common carrier

3. Restatement (Second) of Torts §314 (1965).

(someone who transports goods or people) and passenger, the relationship between a correctional institute and a prisoner, and the relationship between an employer and employee. For example, if an airline stewardess saw a passenger's belongings being stolen by another passenger, then the airline stewardess should come to the passenger's aid. If a prisoner becomes ill, it is the responsibility of the prison to make sure the prisoner receives medical care, as the prisoner is unable to do so herself. Finally, if an employer knew that the stairs in the stairwell at the place of business were extremely slick, then he would be under a duty to make the stairs less slick, perhaps by placing a non-skid substance on the stairs. Jobs and the employment relationship are discussed further in the chapter.

In addition, a psychiatrist whose patient specifically makes a physical threat toward someone else has a duty to warn the potential victim. This is the subject matter of the *Munstermann* case.

Pay particular attention, in the following case, to the discussion regarding when a legal duty arises. A court decides whether there is a legal duty based upon “(1) the magnitude of the risk, (2) the relationship of the parties, (3) the nature of the attendant risk, (4) the opportunity and ability to exercise care, (5) the foreseeability of the harm, and (6) the policy interest in the proposed solution.” Please note that the symbol § stands for “section” and §§ stands for “sections.” The full case name of the *Munstermann* case is:

Carol K. Munstermann, Personal Representative of the Estate of Jodi Sue Rowe, Deceased, appellee, v. Alegent Health—Immanuel Medical Center, a not-for-profit corporation, and Hudson Hsieh, M.D., appellants.

The short case name for the *Munstermann* case is: *Munstermann v. Alegent Health*.

The formula for deriving the short case name is to take the last names of the first plaintiff and defendant

or

Short case name = first plaintiff's last name [here Munstermann] + first defendant's last name [here it is a business, so the shortened business name, Alegent Health]

Case Reporters

Case Reporters are bound volumes of cases. In the example below, there are two.

Reporter

271 Neb. 834 ; 716 N.W.2d 73.

Let's look at each one separately.

1. 271 Neb. 834. This is the 271th volume of the Neb. reporter. The page the case starts on is 834. Thus, 271 Neb. 834 is an address for where to physically find that case.
2. 716 N.W.2d 73. This is the 716th volume of the N.W.2d [second] reporter. The case starts on page 73. Thus, 716 N.W.2d 73 is an address for where to physically find that case.

Carol K. Munstermann, Representative of Jodi Sue Rowe, Deceased v. Alegent Health—Immanuel Medical Center and Hudson Hsieh, M.D.

Supreme Court of Nebraska
 271 Neb. 834, 716
 N.W.2d 73 (2006)

Marty Nuzum murdered his estranged girl friend, Jodi Sue Rowe. . . . The question presented . . . is whether Nuzum communicated a serious threat of physical violence against Rowe to the defendants, Nuzum's treating psychiatrist and health care facility, such that the defendants were under a duty to take reasonable precautions to prevent the murder. . . .

Nuzum was admitted to inpatient care at Alegent on February 4, 2002, when he checked himself in, suffering from depression and suicidal ideations. Nuzum was treated by Hsieh. Nuzum had been treated as an inpatient at Alegent in January 2002, following a suicide attempt. Nuzum had attempted suicide in 1990, 2000, and 2002.

When Nuzum was admitted in January 2002, he was not found to exhibit any homicidal tendencies. Nuzum was examined and observed for homicidal risk factors during his week as an inpatient, and none were found. When Nuzum checked himself back in on February 4, he again denied having homicidal ideations or assaultive behavior.

Nuzum was seen by Hsieh on February 5, 2002, with several medical students present, and one of those students, Rebecca Gurney (who is now a medical doctor), transcribed notes for Hsieh.

Pt was last here . . . 1 mo ago. . . . Pt is having problems with girlfriend—she doesn't understand depression. . . . Pt was thinking of hurting girlfriend also since she is hurting him. Girlfriend doesn't want to talk about his depression. She won't participate here. . . .
 Pt doesn't trust himself. . . .

Nuzum was discharged from Alegent on February 7, 2002. His discharge summary indicated that he had recovered from this instance of severe depression and that his suicidal ideations had subsided. Nuzum had been consistently assessed during his stay for homicidal risk factors, and none were present. . . .

On February 12, 2002, Nuzum murdered Rowe after she came to his apartment to retrieve a set of car keys. Neither Hsieh nor any employee of Alegent acted to warn Rowe or law enforcement that Nuzum might be dangerous.

The primary issue at trial was how to interpret the indication in Gurney's February 5, 2002, notes that Nuzum "was thinking of hurting girlfriend also since she is hurting him." Gurney testified that she never thought that Nuzum was a threat to Rowe. Gurney said that Nuzum had been consistently worried about losing Rowe, because he thought Rowe would leave him because of his depression. Gurney testified that after Nuzum said he was thinking of hurting Rowe, the medical students

and Hsieh went into more detail with Nuzum to find out what he meant by the remark. Gurney recalled that Nuzum was asked why he would want to do that, what he meant by it, and [Nuzum] kind of said that he was saddened and frustrated that his girlfriend was not more supportive of him while he was depressed. Kind of wanted him to snap out of it, just be happy, and that really made him feel bad. And because of that, [Nuzum] wanted her to feel the same pain that he was feeling.

Gurney said that when she wrote that Nuzum was thinking of hurting Rowe, it indicated “an emotional hurt. . . .”

Hsieh explained that Nuzum’s statement that he was “thinking of hurting girlfriend” was actually in response to direct questioning from Hsieh.

[W]e also talk about—well, now, would it hurt when you injure yourself, and we talk about that he has overdosed on the antifreeze two years before, a month ago. Why would you do that? That was my question. And what were you thinking about when you were injecting the—ingesting the antifreeze? And that’s when he said I was thinking about hurting her because she hurt me so much.

Hsieh further explained that this was a common question asked of a suicidal patient—what the patient was thinking when making a suicide attempt. According to Hsieh, Nuzum said that Rowe had hurt him, “[s]o when he took an overdose, it’s a way to say—see what you are doing to me? You’re hurting me.” Hsieh explained that when Nuzum said Rowe was hurting him, Nuzum meant that she had hurt him in an emotional way, [a]nd so this is how [Nuzum] presented to let her know and get back at her by his taking an overdose. And we did also talk about it on different occasions. And not why would anybody go that far to do it, and his response was it worked. Every time he attempted suicide, she came back to him. . . .

The threshold inquiry in this appeal is whether the defendants owed the plaintiff a legal duty. . . . This is our first opportunity to address the issues most closely associated with the California Supreme Court’s decision in *Tarasoff v. Regents of University of California*. . . . In *Tarasoff*, the plaintiffs alleged that the defendant therapist had a duty to warn their daughter of the danger posed to her by one of the therapist’s patients. The court recognized the general rule that a person owes no duty to control the acts of another. But the court adopted Restatement (Second) of Torts §315 at 122 (1965), which provides:

There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless

(a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person’s conduct, or

(b) a special relation exists between the actor and the other which gives to the other a right to protection. [Emphasis added.]

Applying this exception, the *Tarasoff* court held that the relationship between the patient and her therapist was sufficient to support the imposition of an affirmative duty on the defendant for the benefit of third persons. The *Tarasoff* court further held that a therapist’s duty to act arises when the therapist determines, or pursuant

to the standards of the profession should determine, that the patient presents a serious danger of violence to another. . . .

In the wake of *Tarasoff*, however, the California Legislature restricted the scope of *Tarasoff* liability. See Cal. Civ. Code §43.92. . . . Under §43.92(a), a duty to warn of and protect from a patient's threatened violent behavior arises only "where the patient has communicated to the psychotherapist a serious threat of physical violence against a reasonably identifiable victim or victims." Several states have enacted similar statutes based upon California's example, including Nebraska. . . .

Neb. Rev. Stat. §71-1,336 (Reissue 2003) provides, in relevant part:

(1) There shall be no monetary liability on the part of, and no cause of action shall arise against, any person who is licensed or certified [as a mental health practitioner] for failing to warn of and protect from a patient's threatened violent behavior or failing to predict and warn of and protect from a patient's violent behavior except when the patient has communicated to the mental health practitioner a serious threat of physical violence against himself, herself, or a reasonably identifiable victim or victims. (2) The duty to warn of or to take reasonable precautions to provide protection from violent behavior shall arise only under the limited circumstances specified in subsection (1) of this section. The duty shall be discharged by the mental health practitioner if reasonable efforts are made to communicate the threat to the victim or victims and to a law enforcement agency.

. . . [T]he defendant in this case, Hsieh, is a psychiatrist—a physician. . . . The Nebraska statutes specify the scope of *Tarasoff* liability for psychologists and "mental health practitioners," but do not provide corresponding statutory language for psychiatrists. . . .

The defendants now assert that in the absence of a specifically applicable statute, they owed no duty at all to warn and protect Rowe. The plaintiff insists that in the absence of a statute, the case should have been tried as an ordinary medical malpractice action. We do not accept either of these contentions. . . .

The threshold inquiry in any negligence action, including those involving a duty to warn and protect, is whether the defendant owed the plaintiff a duty. . . . A duty is defined as an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another. . . . Whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation. . . . When making that determination a court considers (1) the magnitude of the risk, (2) the relationship of the parties, (3) the nature of the attendant risk, (4) the opportunity and ability to exercise care, (5) the foreseeability of the harm, and (6) the policy interest in the proposed solution. . . .

Given our prior endorsement of Restatement (Second) of Torts . . . we conclude that in some circumstances, a special relation may exist between a psychiatrist and patient which imposes a duty upon the psychiatrist to warn or protect a reasonably identifiable victim when a patient has communicated a serious threat of physical violence against that potential victim. However, given the Legislature's decision to limit *Tarasoff* by enacting §§71-1,206.30(1) and 71-1,336, we find that the limitations set forth in those sections should also be applied to psychiatrists. . . .

Risk-utility test

a formula used to weigh the risk versus the utility of conduct, to determine whether the conduct was negligent.

Moreover, the analysis of California's identical statutory language, from which the Nebraska statutes were derived, has revealed that the statute is based upon public policy concerns to which our familiar **risk-utility test** is applicable. . . . The intent of limiting a *Tarasoff* duty to situations in which the patient communicates a serious threat of physical violence was not to overrule *Tarasoff*, but, rather, to preempt an expansive ruling that a therapist can be held liable for the mere failure to predict potential violence by his or her patient. . . . The statutory language represents an effort to strike an appropriate balance between conflicting policy interests. . . .

On the one hand, the need to preserve a patient confidence recognizes that effective diagnosis and treatment of a mental illness or an emotional problem is severely undermined when a patient cannot be assured that a statement made in the privacy of his or her therapist's office will not be revealed. . . . On the other hand is the recognition that under limited circumstances, preserving a confidence is less important than protecting the safety of someone the patient intends to harm. . . . In other words, the statutory language is the result of balancing risk and utility, considering the magnitude of the risk, relationship of the parties, nature of the risk, opportunity and ability to exercise care, foreseeability of the harm, and public policy interest in the proposed solution. . . .

Considering our risk-utility test, and the relevant public policy determinations made by the Legislature, we conclude the same duty should be required of psychiatrists as is required of psychologists and other mental health practitioners. We hold . . . that a psychiatrist is liable for failing to warn of and protect from a patient's threatened violent behavior, or failing to predict and warn of and protect from a patient's violent behavior, when the patient has communicated to the psychiatrist a serious threat of physical violence against himself, herself, or a reasonably identifiable victim or victims. The duty to warn of or to take reasonable precautions to provide protection from violent behavior shall arise only under those limited circumstances, and shall be discharged by the psychiatrist if reasonable efforts are made to communicate the threat to the victim or victims and to a law enforcement agency. . . .

The court held in the *Munstermann* case that it was not clear whether the patient had effectively communicated a serious threat of a physically violent nature so that the doctor should have warned the girlfriend. The case was remanded for a new trial. Note in the above case that the mental health patient has to communicate a serious threat of physical violence to "a reasonably identifiable victim or victims." If the mental health patient communicated that he wanted to kill all the Martians, this would not constitute reasonably identifiable victims.

a. Families

The law holds that parents and children have a special relationship. If a child is being injured, then a parent has a duty to exercise reasonable care to help the child. The law requires the parent to act. This is true no matter who caused the injury to the child. If a parent sees his child start to drown, the parent has a duty to attempt to rescue the child. In addition, a parent has a duty to his child to protect her from

foreseeable harm. For example, a parent should not leave a young child unattended at a swimming pool, as it is foreseeable that the child could drown. This relationship changes the general rule of not having to act.

b. Jobs

The law holds there are special relationships between employers and employees. Employers have a duty to protect their employees from dangers the employees are not able to protect themselves from while working. If an employee is injured on the job, then the employer has a duty to exercise reasonable care to aid the employee. This is true no matter who caused the injury to the employee. However, if the special relationship did not exist, the employer would not have to aid the employee so long as the employer did not injure the employee.

c. Other Instances Where a Duty Is Owed

Motorists owe a duty to other motorists to drive as reasonably prudent motorists would under similar circumstances. This is an exception to the rule that there is no legal duty to act. In addition, manufacturers owe consumers a duty to manufacture a product as a normally prudent manufacturer would, under similar circumstances. Finally, rescuers are owed a duty by the person being rescued, as it is reasonably foreseeable that rescue would be attempted. Thus, if a person is walking along bluffs, sees a sign warning her not to climb down the cliff as the cliffs are unstable, and does so anyway, then she may be responsible for any injury that arises as a result of her rescue. The emergency response team may also send her a bill for their services.

d. Examples in Which a Higher Duty Is Owed

There are some professions that require a higher standard of duty from the professional to the client than that of the reasonable person standard of duty. These professions include attorneys, doctors, real estate agents, and some accountants. Instead of ascertaining what a reasonable person would do under similar circumstances, an attorney, for example, would be held to the standard of a reasonable attorney under similar circumstances.

2.5 Negligence Per Se

Negligence per se means negligence in and of itself; conduct which is inarguably negligence because either it is a violation of a statute or it is obvious that reasonable care was not used.

Negligence per se means negligence in and of itself. Negligence per se is often a violation of a statute. (See Figure 2.1.) Frequently, state legislatures write statutes prescribing the appropriate standard of care in certain instances. The legal assumption is that a reasonable person would obey those standards of care unless there was a legally compelling excuse not to obey the standard of care set by statute.

Negligence per se by statute is particularly applicable when discussing standards of care while driving. Most states have vehicle codes, which are statutes. For instance, in some states, the person who rear-ends another is presumed to be at

Figure 2.1

Elements of Negligence Per Se

Elements of Negligence Per Se	Criminal Case?
There was a viable safety statute at the time the plaintiff was injured.	"Viable statute" means the statute has to apply to the facts of the case.
The defendant violated the statute.	Did the defendant violate the statute? The answer should be a simple yes or no.
The defendant's violation was the cause of the plaintiff's injuries.	Causation is discussed in Chapter 4.
The statute was created for safety reasons.	The harm that occurred as a result of the accident must be the same type of harm that was supposed to be prevented by the statute.
The statute was designed for a certain class of people, and the plaintiff falls into the class.	To show a breach of duty, the statute violated must have been enacted to protect the class of people the plaintiff falls into.

fault for the accident. Per those statutes, a driver has a duty of care not to rear-end another driver. Certain statutes are designed to provide safety standards. In the above example, the vehicle code section promotes drivers' safety.

Other Examples of Safety Statutes

Speed limits are other examples of safety statutes. However, speeding does not necessarily establish negligence, although it could. If Marie was driving on a highway, going 100 miles per hour in a 65-mile-per-hour zone, and she lost control of her car, causing an accident, then her negligence in causing the accident may be presumed, because her speed caused her to lose control of the car. Her negligence is negligence per se. Police reports help establish negligence per se by indicating a violation of a vehicle code section and by stating the violation was the cause of the accident. This is one reason is it normally important for the paralegal to request the police report.

If a tortfeasor violates one of these statutes, then this is negligence in and of itself, or negligence per se. The concept of negligence per se allows plaintiffs to establish a prima facie case of negligence. Negligence per se carries the presumption of the defendant's duty and breach. A **presumption** is an inference tending to prove the truth or falsehood of a fact. Presumptions can be rebutted to show a person acted as she should have, even if she acted in violation of statute. If a defendant cannot rebut the presumption or show a valid excuse for not complying with the statute, then the defendant may be found negligent.

Violations of a statute can be excused. The Restatement (Second) of Torts describes the situations in which a violation of statute might be excused. Section

Presumption
an inference tending to prove the truth or falsehood of a fact.