

# Torts and Strict Liability

## AUTOMOBILE ACCIDENT

Motor vehicle accidents are a primary cause of injury and death in the United States. Most accidents are the result of negligence. Each year, over 6 million motor vehicle accidents occur that result in over 3 million injuries and approximately 40,000 fatalities of passenger car and truck occupants, pedestrians, motorcyclists, and bicyclists. Thus, approximately 110 people die every day in motor vehicle accidents in this country.



## Learning Objectives

After studying this chapter, you should be able to:

1. List and describe intentional torts against persons.
2. List and explain the elements necessary to prove negligence.
3. List and describe business-related torts.
4. Define the doctrine of *strict liability*.
5. Apply the doctrine of strict liability to product defects.

## Chapter Outline

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#### Unintentional Torts (Negligence)

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“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.”

—Chief Judge Cardozo

*Palsgraf v. Long Island Railroad Co.*

248 N.Y. 339, 162 N.E. 99, 1928 N.Y. Lexis 1269 (1928)

## Introduction to Torts and Strict Liability

Tort is the French word for “a wrong.” The law provides remedies to persons and businesses that are injured by the tortious actions of others. Most torts are either intentional torts or unintentional torts, such as negligence. These are based on the concept of *fault*. Under tort law, an injured party can bring a *civil lawsuit* to seek compensation for a wrong done to the party or to the party’s property. Many torts have their origin in common law. The courts and legislatures have extended tort law to reflect changes in modern society.

*Tort damages* are monetary damages that are sought from the offending party. They are intended to compensate the injured party for the injury suffered. Such injury may consist of past and future medical expenses, loss of wages, pain and suffering, mental distress, and other damages caused by the defendant’s tortious conduct. If the victim of a tort dies, his or her beneficiaries can bring a *wrongful death action* to recover damages from the defendant.

If a product defect causes injury or death to purchasers, lessees, users, or bystanders, the injured party or the heirs of a deceased person may bring legal actions and recover damages under certain tort doctrines. These tort doctrines include negligence, misrepresentation, and the modern theory of *strict liability*. Under the doctrine of strict liability, defendants may be held liable *without fault*. The liability of manufacturers, sellers, lessors, and others for injuries caused by defective products is commonly referred to as *product liability*. If a violation of strict liability has been found, the plaintiff may also recover *punitive damages* if the defendant’s conduct has been reckless or intentional.

This chapter discusses intentional torts, negligence, strict liability, and product liability.

## Intentional Torts

The law protects a person from unauthorized touching, restraint, or other contact. In addition, the law protects a person’s reputation and privacy. Violations of these rights are actionable as torts. **Intentional torts** against persons are discussed in the paragraphs that follow.

### Assault

Assault is (1) the threat of immediate harm or offensive contact or (2) any action that arouses reasonable apprehension of imminent harm. Actual physical contact is unnecessary. Threats of future harm are not actionable.

**Examples** Suppose a 6-foot-5-inch, 250-pound person makes a fist and threatens to punch a 5-foot, 100-pound person. If the threatened person is afraid that he or she will be physically harmed, that person can sue the threatening person to recover damages for the assault.

### Battery

**Battery** is unauthorized and harmful or offensive physical contact with another person that causes injury. Basically, the interest protected here is each person’s

### tort

A wrong. There are three categories of torts: (1) intentional torts, (2) unintentional torts (negligence), and (3) strict liability.

*Thoughts much too deep for tears subdue the Court. When I assumpsit bring, and God-like waive a tort.*

J. L. Adolphus  
*The Circuiters (1885)*

### intentional tort

A category of torts that requires that the defendant possessed the intent to do the act that caused the plaintiff’s injuries.

### assault

(1) The threat of immediate harm or offensive contact or (2) any action that arouses reasonable apprehension of imminent harm. Actual physical contact is unnecessary.

### battery

Unauthorized and harmful or offensive direct or indirect physical contact with another person that causes injury.

reasonable sense of dignity and safety. Direct physical contact, such as intentionally hitting someone with a fist, is battery.

Indirect physical contact between the victim and the perpetrator is also battery, as long as injury results.

**Examples** Throwing a rock, shooting an arrow or a bullet, knocking off a hat, pulling a chair out from under someone, and poisoning a drink are all instances of actionable battery. The victim need not be aware of the harmful or offensive contact (e.g., it may take place while the victim is asleep).

Assault and battery often occur together, although they do not have to (e.g., the perpetrator hits the victim on the back of the head without any warning).

### False Imprisonment

The intentional confinement or restraint of another person without authority or justification and without that person's consent constitutes **false imprisonment**. The victim may be restrained or confined by physical force, barriers, threats of physical harm, or the perpetrator's false assertion of legal authority (i.e., false arrest). A threat of future harm or moral pressure is not considered false imprisonment. The false imprisonment must be complete.

**Example** A person who locks the doors in a house or automobile and does not let another person leave is liable for false imprisonment.

### Shoplifting and Merchant Protection Statutes

Shoplifting causes substantial losses to retail and other merchants each year. Suspected shoplifters are often stopped by the store employees, and their suspected shoplifting is investigated. These stops sometimes lead to the merchant being sued for false imprisonment because the merchant detained the suspect.

Almost all states have enacted **merchant protection statutes**, also known as the **shopkeeper's privilege**. These statutes allow merchants to stop, detain, and investigate suspected shoplifters without being held liable for false imprisonment if:

1. There are *reasonable grounds* for the suspicion.
2. Suspects are detained for only a *reasonable time*.
3. Investigations are conducted in a *reasonable manner*.

Proving these elements is sometimes difficult. The following case applies the merchant's protection statute.



#### CASE 6.1 STATE COURT CASE *False Imprisonment*

### Wal-Mart Stores, Inc. v. Cockrell

61 S.W.3d 774, 2001 Tex. App. Lexis 7992  
Court of Appeals of Texas

"He made me feel like I was scum. That I had no say-so in the matter, that just made me feel like a little kid on the block, like the bully beating the kid up."

—Karl Cockrell

#### Facts

Karl Cockrell and his parents went to the layaway department at a store owned by Wal-Mart Stores, Inc.

(Walmart). Cockrell stayed for about five minutes and decided to leave. As he was going out the front door, Raymond Navarro, a Walmart loss-prevention officer, stopped him and requested that Cockrell follow him to the manager's office. Once in the office, Navarro told him to pull his pants down. Cockrell put his hands between his shorts and underwear, pulled them out, and shook them. Nothing fell out.

Next, Navarro told him to take off his shirt. Cockrell raised his shirt, revealing a large bandage that covered a surgical wound on the right side of his abdomen. Cockrell had recently had a liver transplant. Navarro asked him to take off the bandage, despite Cockrell's explanation that the bandage maintained a sterile environment around his surgical wound. On Navarro's insistence, Cockrell took down the bandage, revealing the wound. Navarro let Cockrell go. Cockrell sued Walmart to recover damages for false imprisonment. Walmart defended, alleging that the shopkeeper's privilege protected the store from liability. The trial court found in favor of Cockrell and awarded Cockrell \$300,000 for his mental anguish. Walmart appealed.

#### Issue

Does the shopkeeper's privilege protect Walmart from liability under the circumstances of the case?

#### Language of the Court

*Navarro claimed he had reasons to suspect Cockrell of shoplifting. He said that Cockrell was acting suspiciously, because he saw him*

*in the women's department standing very close to a rack of clothes and looking around. We conclude that a rational jury could have found that Navarro did not "reasonably believe" a theft had occurred and therefore lacked authority to detain Cockrell. Navarro's search was unreasonable in scope, because he had no probable cause to believe that Cockrell had hidden any merchandise under the bandage. Removal of the bandage compromised the sterile environment surrounding the wound.*

#### Decision

The court of appeals upheld the trial court's finding that Walmart had falsely imprisoned Cockrell and had not proved the shopkeeper's privilege. The court of appeals upheld the trial court's judgment that awarded Cockrell \$300,000 for mental anguish.

#### Ethics Questions

Did Navarro, the Walmart employee, act responsibly in this case? Did Walmart act ethically in denying liability in this case?

### Misappropriation of the Right to Publicity

Each person has the exclusive legal right to control and profit from the commercial use of his or her name and identity during his or her lifetime. This is a valuable right, particularly to well-known persons such as sports figures and movie stars. Any attempt by another person to appropriate a living person's name or identity for commercial purposes is actionable. The wrongdoer is liable for the tort of **misappropriation of the right to publicity** (also called the **tort of appropriation**).

**Example** A company that uses a likeness of a famous actress in its advertising without the actress's permission is liable for this tort.

### Invasion of the Right to Privacy

The law recognizes each person's right to live his or her life without being subjected to unwarranted and undesired publicity. A violation of this right constitutes the tort of **invasion of the right to privacy**. If a fact is public information, there is no claim to privacy.

**Examples** Secretly taking photos of another person with a cell phone camera in a men's or women's locker room constitutes invasion of the right to privacy. Reading someone else's mail, wiretapping someone's telephone, and reading someone else's e-mail without authorization to do so are also examples of invasion of the right to privacy.

### Defamation of Character

A person's reputation is a valuable asset. Therefore, every person is protected from false statements made by others during his or her lifetime. This protection

#### misappropriation of the right to publicity (tort of appropriation)

An attempt by another person to appropriate a living person's name or identity for commercial purposes.

#### invasion of the right to privacy

The unwarranted and undesired publicity of a private fact about a person. The fact does not have to be untrue.

**defamation of character**

False statement(s) made by one person about another. In court, the plaintiff must prove that (1) the defendant made an untrue statement of fact about the plaintiff and (2) the statement was intentionally or accidentally published to a third party.

**libel**

A false statement that appears in a letter, newspaper, magazine, book, photograph, movie, video, and so on.

**slander**

Oral defamation of character.

*Hard cases make bad law.*

Legal maxim

**disparagement**

False statements about a competitor's products, services, property, or business reputation.

**intentional misrepresentation (fraud or deceit)**

The intentional defrauding of a person out of money, property, or something else of value.

*He that's cheated twice by the same man, is an accomplice with the Cheater.*

Thomas Fuller  
*Gnomologia* (1732)

ends upon a person's death. The tort of **defamation of character** requires a plaintiff to prove that:

1. The defendant made an *untrue statement of fact* about the plaintiff.
2. The statement was intentionally or accidentally *published* to a third party. In this context, *publication* simply means that a third person heard or saw the untrue statement. It does not require appearance in newspapers, magazines, or books.

A false statement that appears in writing or other fixed medium is **libel**. An oral defamatory statement is **slander**.

**Examples** False statements that appear in a letter, newspaper, magazine, book, photograph, movie, video, and the like, are libel. If a person verbally makes an untrue statement of fact about another person to a third person, such oral statement constitutes slander.

The publication of an untrue statement of fact is not the same as the publication of an *opinion*. The publication of opinions is usually not actionable. Because defamation is defined as an untrue statement of fact, truth is an absolute defense to a charge of defamation.

**Examples** The statement "My lawyer is lousy" is an opinion and is not defamation. The statement "My lawyer has been disbarred from the practice of law," when she has not been disbarred, is an untrue statement of fact and is actionable as defamation.

**Public Figures as Plaintiffs** In *New York Times Co. v. Sullivan*,<sup>1</sup> the U.S. Supreme Court held that *public officials* cannot recover for defamation unless they can prove that the defendant acted with "actual malice." Actual malice means that the defendant made the false statement knowingly or with reckless disregard of its falsity. This requirement has since been extended to **public figure** plaintiffs such as movie stars, sports personalities, and other celebrities.

**Disparagement**

Business firms rely on their reputation and the quality of their products and services to attract and keep customers. That is why state unfair-competition laws protect businesses from disparaging statements made by competitors or others. A disparaging statement is an untrue statement made by one person or business about the products, services, property, or reputation of another business. This is called the tort of **disparagement**.

**Example** If a competitor of John Deere tractors told a prospective customer that "John Deere tractors often break down" when in fact they rarely do, that would be product disparagement.

**Intentional Misrepresentation (Fraud)**

One of the most pervasive business torts is **intentional misrepresentation**. This tort is also known as **fraud** or **deceit**. It occurs when a wrongdoer deceives another person out of money, property, or something else of value. A person who has been injured by intentional misrepresentation can recover damages from the wrongdoer. Four elements are required to find fraud:

1. The wrongdoer made a false representation of a material fact.
2. The wrongdoer had knowledge that the representation was false and intended to deceive the innocent party.
3. The innocent party justifiably relied on the misrepresentation.
4. The innocent party was injured.

Item 2, which is called *scienter*, refers to intentional conduct. It also includes situations in which the wrongdoer recklessly disregards the truth in making a representation that is false. Intent or recklessness can be inferred from the circumstances.

**Example** Matt, a person claiming to be a minerals expert, convinces 100 people to invest \$10,000 each with him so that he can purchase, on their behalf, a gold mine he claims is located in the state of North Dakota. Matt shows the prospective investors photographs of a gold mine to substantiate his story. The investors give Matt their money. There is no gold mine. Instead, Matt runs off with the investors' money. Matt intended to steal the money from the investors. This is an example of fraud: (1) Matt made a false representation of fact (there was no gold mine and he did not intend to invest their money to purchase the gold mine), (2) Matt knew that his statements were false and intended to steal the investors' money, (3) the investors relied on Matt's statements, and (4) the investors were injured by losing their money.

**Intentional Infliction of Emotional Distress**

In some situations, a victim may suffer mental or emotional distress without first being physically harmed. The *Restatement (Second) of Torts* provides that a person whose *extreme and outrageous* conduct intentionally or recklessly causes severe emotional distress to another is liable for that emotional distress.<sup>2</sup> This is called the tort of **intentional infliction of emotional distress**, or the **tort of outrage**.

The plaintiff must prove that the defendant's conduct was "so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized society."<sup>3</sup> The tort does not require any publication to a third party or physical contact between the plaintiff and defendant.

**Example** A credit collection agency intrusively berating a debtor for being a "dead-beat debtor" in front of his family as he is exiting religious services is outrageous conduct that constitutes intentional infliction of emotional distress.

**Malicious Prosecution**

Businesses and individuals often believe they have a reason to sue someone to recover damages or other remedies. If the plaintiff has a legitimate reason to bring the lawsuit and does so, but the plaintiff does not win the lawsuit, he or she does not have to worry about being sued by the person whom he or she sued. But a losing plaintiff does have to worry about being sued by the defendant in a second lawsuit for **malicious prosecution** if certain elements are met. In a lawsuit for malicious prosecution, the original defendant sues the original plaintiff. In this second lawsuit, which is a *civil* action for damages, the original defendant is the plaintiff and the original plaintiff the defendant. To succeed in a malicious prosecution lawsuit, the courts require the plaintiff to prove all of the following:

1. The plaintiff in the original lawsuit (now the defendant) instituted or was responsible for instituting the original lawsuit.
2. There was no *probable cause* for the first lawsuit (i.e., it was a frivolous lawsuit).
3. The plaintiff in the original action brought it with *malice*. (*Caution*: This is a very difficult element to prove.)
4. The original lawsuit was terminated in favor of the original defendant (now the plaintiff).
5. The current plaintiff suffered injury as a result of the original lawsuit.

The courts do not look favorably on malicious prosecution lawsuits because they feel that such lawsuits inhibit the original plaintiff's incentive to sue.

**intentional infliction of emotional distress (tort of outrage)**

A tort that says a person whose extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another person is liable for that emotional distress.

**malicious prosecution**

A lawsuit in which the original defendant sues the original plaintiff. In the second lawsuit, the defendant becomes the plaintiff, and vice versa.

**Critical Legal Thinking**

Should defendants that lose cases and plaintiffs that do not win cases have to pay the other side's legal expenses? What would be the consequences of such a rule?

**CHILDREN'S THRILL RIDE**

In this children's thrill ride, the children are strapped in with their feet left dangling. The car goes up a 100-foot tower and then free-falls down, giving the riders a feeling of weightlessness. Operators of thrill rides carry liability insurance to cover any possible accidents that may occur.



**Example** One student actor wins a part in a play over another student actor. To get back at the winning student, the rejected student files a lawsuit against the winning student, alleging intentional infliction of emotional distress, defamation, and negligence. The lawsuit is unfounded, but the winning student must defend the lawsuit. The jury returns a verdict exonerating the defendant. The defendant now can sue the plaintiff for malicious prosecution and has a very good chance of winning the lawsuit.

**Unintentional Torts (Negligence)****unintentional tort (negligence)**

A doctrine that says a person is liable for harm that is the foreseeable consequence of his or her actions.

Under the doctrine of **unintentional tort**, commonly referred to as **ordinary negligence** or **negligence**, a person is liable for harm that is the *foreseeable consequence* of his or her actions. *Negligence* is defined as “the omission to do something which a reasonable man would do, or doing something which a prudent and reasonable man would not do.”<sup>4</sup>

To be successful in a negligence lawsuit, the plaintiff must prove that (1) the defendant owed a *duty of care* to the plaintiff, (2) the defendant *breached* this duty of care, (3) the plaintiff suffered *injury*, (4) the defendant's negligent act was the *actual cause* of the plaintiff's injury, and (5) the defendant's negligent act was the *proximate cause* of the plaintiff's injuries. Each of these elements is discussed in the paragraphs that follow.

**1. Duty of Care**

To determine whether a defendant is liable for negligence, it must first be ascertained whether the defendant owed a **duty of care** to the plaintiff. *Duty of care* refers to the obligation people owe each other—that is, the duty not to cause any unreasonable harm or risk of harm.

**Examples** Each person owes a duty to drive his or her car carefully, not to push or shove on escalators, not to leave skateboards on the sidewalk, and the like. Businesses owe a duty to make safe products, not to cause accidents, and so on.

**duty of care**

The obligation people owe each other not to cause any unreasonable harm or risk of harm.

The courts decide whether a duty of care is owed in specific cases by applying a **reasonable person standard**. Under this test, the courts attempt to determine how an *objective, careful, and conscientious person would have acted in the same circumstances* and then measure the defendant's conduct against that standard. The defendant's subjective intent (“I did not mean to do it”) is immaterial in assessing liability.

Defendants with a particular expertise or competence are measured against a **reasonable professional standard**. Applying this test, the courts attempt to determine how an objective, careful, and conscientious equivalent professional would have acted in the same circumstances and then measure the defendant professional's conduct against that standard.

**Examples** A brain surgeon is measured against a reasonable brain surgeon standard. A general practitioner doctor who is the only doctor who serves a small community is measured against a reasonable small-town general practitioner standard.

**2. Breach of the Duty of Care**

Once a court finds that the defendant actually owed the plaintiff a duty of care, it must determine whether the defendant breached that duty. A **breach of the duty of care** is the failure to exercise care. In other words, it is the failure to act as a reasonable person would act. A breach of this duty may consist of an action.

**Example** Throwing a lit match on the ground in the forest and causing a fire is a breach of a duty of care.

A breach of duty may also consist of a failure to act when there is a duty to act.

**Example** A firefighter who refuses to put out a fire when her safety is not at stake breaches her duty of care for failing to act when she has a duty to act.

Passersby are generally not expected to rescue others gratuitously to save them from harm. However, most states require certain relatives—parents to children or children to parents if the children are old enough—to try to save their relatives from harm.

The following ethics feature discusses a classic case involving the issue of negligence.

## Ethics

Ethical

**Ouch! McDonald's Coffee Is Too Hot!**

McDonald's Corporation found itself embroiled in one of the most famous negligence cases of modern times. Stella Liebeck, a 79-year-old resident of Albuquerque, New Mexico, visited a drive-through window of a McDonald's restaurant with her grandson Chris. Her grandson, the driver of the vehicle, placed the order for breakfast. When breakfast came at the drive-through window, Chris handed a hot cup of coffee to Stella. Chris pulled over so that Stella could put cream and sugar in her coffee. Stella took the lid off the coffee cup she held in her lap and the hot coffee spilled in her lap. The coffee spilled all over Stella, who suffered third-degree burns on her legs, thighs, groin, and buttocks. Stella was driven to the emergency room and was hospitalized for seven days. She required medical treatment and later returned to the hospital to

have skin grafts. She suffered permanent scars from the incident.

Stella's medical costs were \$11,000. Stella asked McDonald's to pay her \$20,000 to settle the case, but McDonald's offered only \$800. Stella refused this settlement and sued McDonald's in court for negligence for selling coffee that was too hot and for failing to warn her of the danger of the hot coffee it served. At trial, McDonald's denied that it had been negligent and asserted that Stella's own negligence—opening a hot coffee cup on her lap—had caused her injuries. The jury heard the following evidence:

- McDonald's enforces a quality-control rule that requires its restaurants and franchises to serve coffee at 180 to 190 degrees Fahrenheit.

**reasonable person standard**

A test used to determine whether a defendant owes a duty of care. This test measures the defendant's conduct against how an objective, careful, and conscientious person would have acted in the same circumstances.

*No court has ever given, nor do we think ever can give, a definition of what constitutes a reasonable or an average man.*

Lord Goddard C.J.R.  
*Regina v. McCarthy, 2 Q.B. 105 (1954)*

**breach of the duty of care**

A failure to exercise care or to act as a reasonable person would act.

(continued)

- Third-degree burns occur on skin in just two to five seconds when coffee is served at 185 degrees.
- McDonald's coffee temperature was 20 degrees hotter than coffee served by competing restaurant chains.
- McDonald's coffee temperature was approximately 40 to 50 degrees hotter than normal house-brewed coffee.
- McDonald's had received more than 700 prior complaints of people who had been scalded by McDonald's coffee.
- McDonald's did not place a warning on its coffee cups to alert patrons that the coffee it served was exceptionally hot.

Based on this evidence, the jury concluded that McDonald's acted recklessly and awarded Stella \$200,000 in compensatory damages, which was then

reduced by \$40,000 because of her own negligence, and \$2.7 million in punitive damages. The trial court judge reduced the amount of punitive damages to \$480,000, which was three times the amount of compensatory damages. McDonald's now places a warning on its coffee cups that its coffee is hot. *Liebeck v. McDonald's Restaurants, P.T.S., Inc.* (New Mexico District Court, Bernalillo County, New Mexico, 1994)

**Ethics Questions** Do you think that McDonald's properly warned Stella Liebeck of the dangers of drinking McDonald's hot coffee? Do you think McDonald's acted ethically in offering Stella an \$800 settlement? Was the award of punitive damages justified in this case? Why or why not?

### 3. Injury to Plaintiff

Even though a defendant's negligent act may have breached a duty of care owed to the plaintiff, this breach is not actionable unless the plaintiff suffers **injury** or injury to his or her property. That is, the plaintiff must have suffered some injury before he or she can recover any damages. The damages recoverable depend on the effect of the injury on the plaintiff's life or profession.

**Examples** Suppose that a man injures his hand when a train door malfunctions. The train company is found negligent. If the injured man is a star professional basketball player who makes \$5 million per year, with an expected seven years of good playing time left, this plaintiff can recover multiple millions of dollars because he can no longer play professional basketball. If the injured man is a college professor with 15 years until retirement who is making only one-fortieth per year of what the basketball player makes, he can recover some money for his injuries. However, because he makes a lot less per year than the professional basketball player and because he can continue working, albeit with more difficulty, the professor can recover much less for the same injury.

The following case involves the issues of injury and damages.

#### injury

A plaintiff's personal injury or damage to his or her property that enables him or her to recover monetary damages for the defendant's negligence.

*Negligence is the omission to do something which a reasonable man would do, or doing something which a prudent and reasonable man would not do.*

B. Alderson  
*Blyth v. Birmingham Waterworks Co.* (1856)



### CASE 6.2 STATE COURT CASE Negligence

#### Jones v. City of Seattle, Washington

314 P.3d 380, 2013 Wash. Lexis 955 (2013)  
Supreme Court of Washington

"The trial judge characterized the city's motion as an attempt to get a 'second bite of the apple.'"

—McCloud, Justice

#### Facts

Mark Jones was a firefighter for the city of Seattle, Washington. He was assigned to Station 33 firehouse, where he remained on duty for long shifts, including

staying overnight. Mark slept in quarters on the second floor of the firehouse. One of the common features of many firehouses, including the one Mark worked in, is the pole hole in the second floor with a pole leading to the first floor. When called to action, firefighters slide down the pole to reach the first floor and their firefighting equipment and vehicles. One night, around 3:00 A.M., Mark fell 15 feet through the

fire station's pole hole. Mark told a responding medic that he had awoken to use the bathroom, which was next to the pole hole. Mark sustained both serious physical and cognitive impairments as a result of his fall. Because of his permanent impaired mental and physical injuries, Mark's sister Meg was appointed his guardian. Meg, on behalf of Mark, sued the city of Seattle for injuries caused to Mark by the accident, alleging that the city had been negligent in failing to block accidental access to the pole hole. The jury found that the city's negligence was the sole cause of Mark's injuries and awarded Mark \$12.75 million in damages. Seattle made a motion for a new trial, which the trial court denied. The court of appeals upheld the verdict and damages. Seattle appealed to the supreme court of Washington, seeking a new trial regarding damages.

#### Issue

Is the award of damages proper?

#### Language of the Court

*The first two weeks of trial were devoted to testimony by Mark's treating physicians, various*

*witnesses who spoke to the general condition and layout of Station 33, to the city's ability to prevent accidents like Mark's, and to Mark's demeanor, habits, and capabilities since the accident. The various physicians and therapists who took the stand uniformly testified that Mark had significant and permanent cognitive impairments. Further, the judge permitted the city to cross-examine Meg and Mark on Mark's ability to perform physical tasks. The trial judge characterized the city's motion as an attempt to get a "second bite of the apple" after its strategic choices proved unwise.*

#### Decision

The supreme court of Washington upheld the damage award to the plaintiff against the city of Seattle.

#### Ethics Questions

Do traditional pole holes in fire stations pose a risk to firefighters? Should pole holes be eliminated? Was the award in this case warranted?

### 4. Actual Cause

A defendant's negligent act must be the **actual cause** (also called **causation in fact**) of the plaintiff's injuries. The test is this: "But for" the defendant's conduct, would the accident have happened? If the defendant's act caused the plaintiff's injuries, there is causation in fact.

**Example** Suppose a corporation negligently pollutes the plaintiff's drinking water. The plaintiff dies of a heart attack unrelated to the polluted water. Although the corporation has acted negligently, it is not liable for the plaintiff's death. There were a negligent act and an injury, but there was no cause-and-effect relationship between them. If, instead, the plaintiff had died from the polluted drinking water, there would have been causation in fact, and the polluting corporation would have been liable.

#### actual cause (causation in fact)

The actual cause of negligence. A person who commits a negligent act is not liable unless actual cause can be proven.

### 5. Proximate Cause

Under the law, a negligent party is not necessarily liable for all damages set in motion by his or her negligent act. Based on public policy, the law establishes a point along the damage chain after which the negligent party is no longer responsible for the consequences of his or her actions. This limitation on liability is referred to as **proximate cause** (also called **legal cause**). The general test of proximate cause is *foreseeability*. A negligent party who is found to be the actual cause—but not the proximate cause—of the plaintiff's injuries is not liable to the plaintiff. Situations are examined on a case-by-case basis.

**Example** A person is walking on a public sidewalk. When he finishes smoking a cigarette, which is still lit, he negligently tosses it and it lands close to a house. The

#### proximate cause (legal cause)

A point along a chain of events caused by a negligent party after which this party is no longer legally responsible for the consequences of his or her actions.

cigarette causes a fire that burns down the house. In this instance, the smoker is the proximate cause of the damage because it is reasonably foreseeable that his action could burn down the house. If the fire jumps and burns down the adjacent house, the smoker is still the proximate cause. If the third house in the row burns, he is probably still the proximate cause. However, if the fire spreads and burns down 100 houses before it is put out (the smoker is the *actual cause* of the damage under the “but for” test), the smoker would not be the *proximate cause* of burning the one hundredth house because it would not be reasonably foreseeable that his action of throwing a lit cigarette would burn down so many houses. Where does one draw the line of liability? At the fourth house? The 20 house? The 40 house? This decision is left up to the jury.

The following critical legal thinking case discusses the issue of proximate cause.



## Critical Legal Thinking Case

### Proximate Cause

“Proof of negligence in the air, so to speak, will not do.”

—Cardozo, Justice

The landmark case establishing the doctrine of proximate cause is ***Palsgraf v. The Long Island Railroad Company***, a New York case decided in 1928. Helen Palsgraf was standing on a platform waiting for a passenger train. The Long Island Railroad Company owned and operated the trains and employed the station guards. As a man carrying a package wrapped in a newspaper tried to board the moving train, railroad guards tried to help him. In doing so, the package was dislodged from the man’s arm, fell to the railroad tracks, and exploded. The package contained hidden fireworks. The explosion shook the railroad platform, causing a scale located on the platform to fall on Helen Palsgraf, injuring her. Palsgraf sued the railroad for negligence.

Justice Benjamin Cardozo denied Palsgraf’s recovery, finding that the railroad was not the proximate cause of her injuries and was therefore not liable to Palsgraf for

negligence. In his decision, Justice Cardozo eloquently addressed the issue of proximate cause:

*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.*

*Palsgraf v. The Long Island Railroad Company*, 248 N.Y. 339, 162 N.E. 99, 1928 N.Y. Lexis 1269 (Court of Appeals of New York, 1928).

#### Critical Legal Thinking Questions

How does *actual cause* differ from *proximate cause*? Why does the law recognize the doctrine of proximate cause?

## CONCEPT SUMMARY

### ELEMENTS OF NEGLIGENCE

1. The defendant owed a *duty of care* to the plaintiff.
2. The defendant *breached this duty*.
3. The plaintiff suffered *injury*.
4. The defendant’s negligent act was the *actual cause* (or *causation in fact*) of the plaintiff’s injuries.
5. The defendant’s negligent act was the *proximate cause* (or *legal cause*) of the plaintiff’s injuries. The defendant is liable only for the *foreseeable* consequences of his or her negligent act.

## Special Negligence Doctrines

The courts have developed many *special negligence doctrines*. The most important of these are discussed in the paragraphs that follow.

### Professional Malpractice

Professionals, such as doctors, lawyers, architects, accountants, and others, owe a duty of ordinary care in providing their services. This duty is known as the *reasonable professional standard*. A professional who breaches this duty of care is liable for the injury his or her negligence causes. This liability is commonly referred to as **professional malpractice**.

**Examples** A doctor who accidentally leaves a medical instrument in a patient after an operation has been completed is liable for *medical malpractice*. A lawyer who fails to file a document with the court on time, thus causing the client’s case to be dismissed, is liable for *legal malpractice*.

#### professional malpractice

The liability of a professional who breaches his or her duty of ordinary care.

### Negligent Infliction of Emotional Distress

Some jurisdictions have extended the tort of emotional distress to include the **negligent infliction of emotional distress**. Here, a person who is not physically injured by the defendant’s negligence suffers emotional distress because of the defendant’s action and can recover damages from the defendant for emotional distress.

The most common example of negligent infliction of emotional distress involves bystanders who witness the injury or death of a relative that is caused by another’s negligent conduct. Under this tort, the bystander, even though not physically injured personally, may be able to recover damages against the negligent party for his or her own mental suffering. Many states require that the following elements are proved in bystander cases:

1. A close relative was killed or injured by the defendant.
2. The plaintiff suffered severe emotional distress.
3. The plaintiff’s mental distress resulted from a sensory and contemporaneous observance of the accident.

Some states require that the plaintiff’s mental distress be manifested by some physical injury; other states have eliminated this requirement.

**Example** A father is walking his young daughter to school when a driver of an automobile negligently runs off the road and onto the sidewalk, hitting the girl but not her father. Suppose that the young daughter dies from her injuries. The father suffers severe emotional distress by seeing his daughter die and manifests his distress by suffering physically. The father can recover damages for negligent infliction of emotional distress for the severe distress he suffered by seeing his daughter die.

#### negligent infliction of emotional distress

A tort that permits a person to recover for emotional distress caused by the defendant’s negligent conduct.

### Negligence Per Se

Statutes often establish duties owed by one person to another. The violation of a statute that proximately causes an injury is **negligence per se**.

**Example** Most cities have an ordinance that places the responsibility for fixing public sidewalks in residential areas on the homeowners whose homes front the sidewalks. A homeowner is liable if he or she fails to repair a damaged sidewalk in front of his or her home if a pedestrian trips and is injured because of the unrepaired sidewalk. The injured party does not have to prove that the homeowner owed the duty because the statute establishes that.

#### negligence per se

A tort in which the violation of a statute or an ordinance constitutes the breach of the duty of care.

### Res Ipsa Loquitur

If a defendant is in control of a situation in which a plaintiff has been injured and has superior knowledge of the circumstances surrounding the injury, the plaintiff might have difficulty proving the defendant's negligence. In such a situation, the law applies the doctrine of *res ipsa loquitur* (Latin for "the thing speaks for itself"). This doctrine raises a presumption of negligence and switches the burden to the defendant to prove that he or she was not negligent. *Res ipsa loquitur* applies in cases where the following elements are met:

1. The defendant had exclusive control of the instrumentality or situation that caused the plaintiff's injury.
2. The injury would not have occurred ordinarily but for someone's negligence.

**Examples** Haeran goes in for major surgery and is given anesthesia to put her to sleep during the operation. Sometime after the operation, it is discovered that a surgical instrument was left in Haeran during the operation. She suffers severe injury because of the instrument left in her body. Haeran has no way to identify which doctor or nurse carelessly left the instrument. In this case, the court can apply the doctrine of *res ipsa loquitur* and place the presumption of negligence on the defendants. Any defendant who can prove that he or she did not leave the instrument in Haeran escapes liability; any defendant who does not disprove his or her negligence is liable. Other typical *res ipsa loquitur* cases involve commercial airplane crashes, falling elevators, and the like.

### Gross Negligence

A person can be liable for injury and damage caused by their **gross negligence**. Gross negligence is extreme when compared with ordinary negligence. Gross negligence has often been defined as either a want of even scant care or an extreme departure from the ordinary standard of conduct. In most jurisdictions, gross negligence requires a finding that the defendant engaged in willful misconduct or reckless behavior. A person who engages in wanton and reckless conduct usually has no intent to cause harm to others. However, she or he performs an act that she or he knows or should have known is so unreasonable and dangerous that it is likely to cause harm. Because the definition of gross negligence is vague, a claim for gross negligence is often difficult to prove. The determination of whether a party's conduct is ordinary negligence or gross negligence depends on the unique circumstances of the case.

A person who injures someone by his or her gross negligence is liable for compensatory damages suffered by the injured party, including actual losses such as medical costs and also for pain and suffering. If gross negligence is found, *punitive damages* may also be awarded.

**Example** If an automobile driver runs a stop sign by mistake and hits another car, causing injury to its occupants, the driver is liable for ordinary negligence. If that driver had been drinking alcohol before running the stop sign and his alcohol levels are well above the legal limit, and he causes the same accident, the driver would be found liable for gross negligence because of his reckless disregard for the safety of others, which is caused by his excessive drinking and then driving.

**Example** If a person is texting while driving and causes an accident in which other persons are injured or killed, that person is most likely liable for gross negligence. It is well known that texting while driving causes the driver to take her or his eyes off the road to use an electronic texting device. Texting while driving is a conscious disregard for the safety of others.

The following case involves the issue of gross negligence.

#### res ipsa loquitur

A tort in which the presumption of negligence arises because (1) the defendant was in exclusive control of the situation and (2) the plaintiff would not have suffered injury but for someone's negligence. The burden switches to the defendant to prove that he or she was not negligent.

#### gross negligence

A doctrine that says a person is liable for harm that is caused by his or her willful misconduct or reckless behavior. Punitive damages may be assessed.

#### Critical Legal Thinking

How does gross negligence differ from ordinary negligence? What is the advantage for a plaintiff to try to prove gross negligence rather than ordinary negligence?



### CASE 6.3 STATE COURT CASE Gross Negligence

#### Aleo v. SLB Toys USA, Inc.

995 N.E.2d 740, 2013 Mass. Lexis 709 (2013)  
Supreme Judicial Court of Massachusetts

"We conclude that the circumstances of this case exhibit a substantial degree of reprehensibility."

—Lenk, Judge

#### Issue

Was Toys "R" Us grossly negligent?

#### Language of the Court

*Gross negligence is substantially and appreciably higher in magnitude than ordinary negligence, the element of culpability which characterizes all negligence magnified to a high degree. The judge instructed the jury that it was deemed admitted that the slide was not tested or certified prior to being imported and sold. On this evidence, the jury could have determined that Toys "R" Us's conduct evinced want of even scant care as to the safety of its customers. We conclude that the circumstances of this case exhibit a substantial degree of reprehensibility. Accordingly, the evidence was sufficient to support the jury's finding of gross negligence.*

#### Decision

The appellate court upheld the trial court's finding of gross negligence on the part of Toys "R" Us and the award of compensatory and punitive damages.

#### Ethics Questions

What is gross negligence? What distinguishes it from ordinary negligence? Was the award of \$18 million in punitive damages warranted in this case?

#### Facts

Toys "R" Us, a toy retailer, purchased Banzai Falls In-Ground Pool Slides from a vendor in China. The slide is made of a tent-like fabric with a rubber-coated sliding surface and is sold with an electric unit to inflate it. The slide is intended to be installed adjacent to an in-ground swimming pool, so that a person using the slide may descend the slide ramp into the pool. Sarah Letsky purchased a Banzai Pool Slide from Toys "R" Us using the Internet. She and her husband installed the slide beside the swimming pool at their home. One day the Letskys had family and friends over, including Robin and Michael Aleo. Robin, who weighed 140 pounds, climbed to the top of the slide and descended head first. The bottom part of the slide collapsed and Robin's head struck the pool ledge through the fabric of the slide. Robin died from the accident. The slide had not been tested to ensure that it complied with federal safety standards requiring pool slides be capable of supporting 350 pounds and be safe for head-first sliding. Michael, Robin's husband, sued Toys "R" Us to recover damages for gross negligence. The jury found Toys "R" Us liable for gross negligence and awarded \$2,640,000 in compensatory damages and \$18 million in punitive damages. Toys "R" Us appealed.

### Attractive Nuisance Doctrine

The **attractive nuisance doctrine** is a special tort rule that imposes liability on a landowner to children who have trespassed onto her or his property with the intent to play on the attractive nuisance and are killed or injured while doing so. The underlying reason for this doctrine is that children, due to their youth, do not understand the potential risk associated with the hazard. To find the landowner liable to the child, the attraction must pose an unreasonable risk of death or serious bodily harm.

**Examples** Attractive nuisances include machinery, abandoned refrigerators and freezers, junk yards, open pits, and unguarded pools.

#### attractive nuisance doctrine

A tort rule that imposes liability on a landowner to children who have been attracted onto the landowner's property by an attractive nuisance and who are killed or injured on the property.

The landowner owes a duty to remove the dangerous condition or take steps to prevent children from reaching the dangerous object.

**Example** A homeowner owes a duty to place a fence and locked gate around a swimming pool in his or her yard.

### Good Samaritan Laws

In the past, liability exposure made many doctors, nurses, and other medical professionals reluctant to stop and render aid to victims in emergency situations, such as highway accidents. Almost all states have enacted **Good Samaritan laws** that relieve medical professionals from liability for injury caused by their ordinary negligence in such circumstances. Good Samaritan laws protect medical professionals only from liability for their *ordinary negligence*, not for injuries caused by their gross negligence or reckless or intentional conduct. Most Good Samaritan laws protect licensed doctors, nurses, and laypersons certified in cardiopulmonary resuscitation (CPR). Laypersons not trained in CPR are not generally protected by Good Samaritan statutes—that is, they are liable for injuries caused by their ordinary negligence in rendering aid.

**Example** Sam is injured in an automobile accident and is unconscious in his automobile alongside the road. Doctor Pamela Heathcoat, who is driving by the scene of the accident, stops, pulls Sam from the burning wreckage, and administers first aid. In doing so, Pamela negligently breaks Sam's shoulder. If Pamela's negligence is *ordinary negligence*, she is not liable to Sam because the Good Samaritan law protects her from liability; if Pamela was *grossly negligent* or *reckless* in administering aid to Sam, she is liable to him for the injuries she caused. It is a question of fact for the jury to decide whether a doctor's conduct was ordinary negligence or gross negligence or recklessness.

**Example** If, in the prior example, Pamela was not a doctor or otherwise protected by the Good Samaritan law, she would be liable for any injuries caused to Sam by her *ordinary negligence* (or gross negligence or recklessness) while rendering aid to Sam.

Thus, there is some liability exposure when a person renders aid to another person.

## Defenses Against Negligence

A defendant in a negligence lawsuit may raise several defenses to the imposition of liability. These defenses are discussed in the following paragraphs.

### Assumption of the Risk

If a plaintiff knows of and voluntarily enters into or participates in a risky activity that results in injury, the law recognizes that the plaintiff assumed, or took on, the risk involved. Thus, the defendant can raise the defense of **assumption of the risk** against the plaintiff. This defense assumes that the plaintiff (1) had knowledge of the specific risk and (2) voluntarily assumed that risk.

**Example** Under assumption of the risk, a race-car driver assumes the risk of being injured or killed in a crash.

In the following case, the court had to decide whether there was an obvious danger.

#### Good Samaritan law

A statute that relieves medical professionals from liability for ordinary negligence when they stop and render aid to victims in emergency situations.

#### Critical Legal Thinking

What is the purpose of relieving medical personnel from liability for ordinary negligence when rendering aid? Do persons who do not qualify for protection under the Good Samaritan law run a risk of liability if they choose to render aid?

#### assumption of the risk

A defense that a defendant can use against a plaintiff who knowingly and voluntarily enters into or participates in a risky activity that results in injury.



### CASE 6.4 STATE COURT CASE *Obvious Danger*

#### Martinez v. Houston McLane Company, LLC

414 S.W.3d 219, 2013 Tex. App. Lexis 2420 (2013)  
Court of Appeals of Texas

“The risk of injury from a ball is considered an inherent risk of the game.”

—Brown, Justice

#### Facts

The Houston Astros is a professional baseball team that plays its games in Minute Maid Park, a baseball stadium in Houston, Texas. The Houston Astros is owned and operated by Houston McLane Company, LLC. Shirley and Richard Martinez, along with five young children they were caring for, attended a Houston Astros baseball game. Their seats were in the bleachers behind the right field wall, which is an area where a fly ball hit during the game would be a home run. The baseball field contains almost 41,000 seats, of which about 5,000 seats located behind home plate are shielded by a protective screen. The rest of the seats, including those in the right field bleachers where Martinez sat, were open and did not have a protective screen. Prior to the game, teams were practicing on the field, including taking batting practice. When Shirley Martinez was walking on the steps near her seats carrying a young child, she heard someone yell a warning that a fly ball was coming toward her. She shielded the child with her arms and was struck in the face by the ball. She suffered an orbital fracture and corneal laceration. Martinez sued Houston McLane Company, LLC, to recover damages for negligence. Houston asserted in defense the “baseball rule,” which holds that

spectators at baseball games attend at their own risk. The trial court granted Houston's motion for summary judgment. Martinez appealed.

#### Issue

Is the defendant baseball owner liable for negligence?

#### Language of the Court

*The baseball rule establishes a standard of care for injuries caused by errant balls at baseball stadiums by accounting for the open and obvious nature of the risk that batted balls pose to fans. The risk of injury from a ball is considered an inherent risk of the game. Fans who attend games are aware that objects may leave the playing field with the potential to cause injury. We conclude that the baseball rule applies to the facts presented here.*

#### Decision

The court of appeals upheld the trial court's decision that the owner of the Houston Astros was not negligent.

#### Ethics Questions

Was it ethical for the baseball team owners not to pay Martinez for her injuries? Do baseball spectators assume the risk of being hit by flying baseballs?

## Contributory and Comparative Negligence

Sometimes a plaintiff is partially liable for causing his own injuries. In such cases, the law usually penalizes the plaintiff for his negligence. States apply one of the two following standards:

- **Contributory negligence.** Some states apply the doctrine of **contributory negligence**, which holds that a plaintiff who is partially at fault for his or her own injury cannot recover against the negligent defendant.

**Example** Suppose a driver who is driving over the speed limit negligently hits and injures a pedestrian who is jaywalking against a red “Don't Walk” sign. Suppose the jury finds that the driver is 80 percent responsible for the accident and that the jaywalker is 20 percent responsible. The pedestrian suffered \$100,000 in injuries. Under the doctrine of contributory negligence, the pedestrian cannot recover any damages from the driver.

#### contributory negligence

A doctrine that says that a plaintiff who is partially at fault for his or her own injury cannot recover against the negligent defendant.

**comparative negligence (comparative fault)**

A doctrine under which damages are apportioned according to fault.

**Critical Legal Thinking**

What is the difference between contributory negligence and comparative negligence? Which rule is the fairest rule?

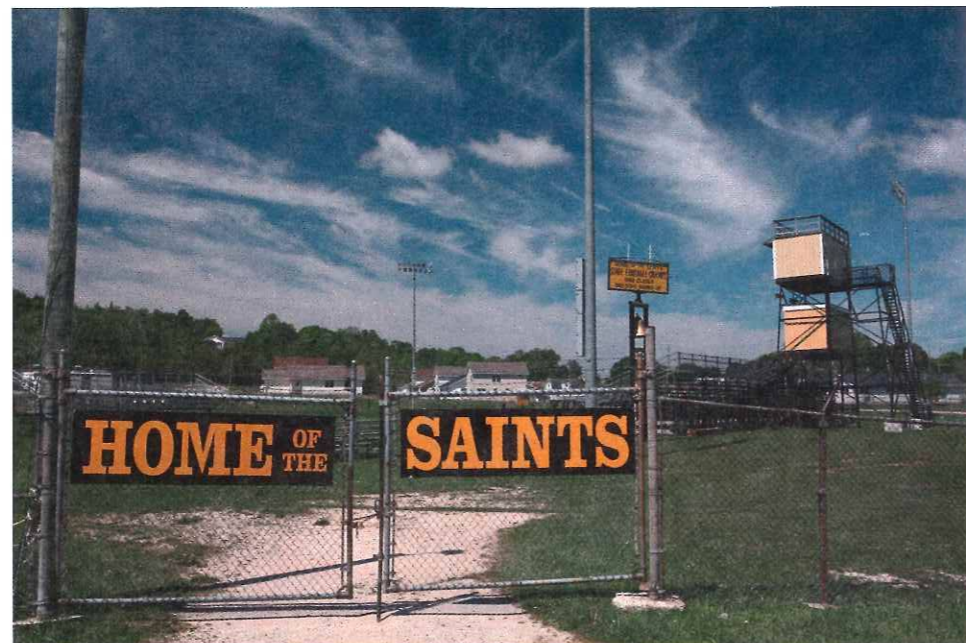
- **Comparative negligence.** Many states have replaced the doctrine of contributory negligence with the doctrine of **comparative negligence**, also called **comparative fault**. Under this doctrine, damages are apportioned according to fault.

**Example** When the comparative negligence rule is applied to the previous example in which the pedestrian suffered \$100,000 of injuries, the result is much fairer. The plaintiff-pedestrian, who was 20 percent at fault for causing his own injuries, can recover 80 percent of his damages (or \$80,000) from the negligent defendant-driver.

Several states have adopted **partial comparative negligence**, which provides that a plaintiff must be less than 50 percent responsible for causing his or her own injuries to recover under comparative negligence; otherwise, contributory negligence applies.

**FOOTBALL FIELD**

Football helmets and other sports equipment are usually designed to be as safe as possible. However, many manufacturers have discontinued making football helmets because of the exposure to product liability lawsuits.



**Strict Liability and Product Liability**

Defective products often cause a person's injuries. The injured party can sue a product manufacturer or seller for **product liability**. A plaintiff can sue a party—usually the manufacturer—for being *negligent* in producing a defective product that caused the victim's injuries.

Another tort doctrine, the *doctrine of strict liability*, has been developed that applies to product defect cases. **Strict liability** removes many of the difficulties for the plaintiff associated with negligence lawsuits. Most states have now adopted this doctrine as a basis for product liability actions.

**Liability Without Fault**

Unlike negligence, strict liability does not require the injured person to prove that the defendant breached a duty of care. Strict liability is **liability without fault**. A seller or lessor can be found strictly liable even though he or she has exercised all possible care in the preparation and sale or lease of his or her product.

The doctrine of strict liability applies to sellers and lessors of products who are engaged in the business of selling and leasing products. Casual sales and transactions by nonmerchants are not covered.

**strict liability**

A tort doctrine that makes manufacturers, distributors, wholesalers, retailers, and others in the chain of distribution of a defective product liable for the damages caused by the defect, *regardless of fault*.

**Example** If a person sells a defective product to a neighbor in a casual sale, he is not strictly liable if the product causes injury.

Strict liability applies only to products, not to services.

**All in the Chain of Distribution Are Liable**

All parties in the **chain of distribution** of a defective product are strictly liable for the injuries caused by that product. Thus, all manufacturers, distributors, wholesalers, retailers, lessors, and subcomponent manufacturers may be sued and assessed liability under the doctrine of strict liability. This view is based on public policy: Lawmakers presume that sellers and lessors insure against the risk of a strict liability lawsuit and spread the cost to their consumers by raising the price of products.

A defendant who has not been negligent but who is made to pay a strict liability judgment can bring a separate action against the negligent party in the chain of distribution to recover losses.

**Example** Suppose a subcomponent manufacturer produces a defective tire and sells it to a truck manufacturer. The truck manufacturer places the defective tire on one of its new-model trucks. The truck is sold to a retail car dealership. Ultimately, the car dealership sells the truck to a buyer. The defective tire causes an accident in which the buyer is injured. All the parties in the tire's chain of distribution can be sued by the injured party; in this case, the liable parties are the subcomponent manufacturer, the truck manufacturer, and the car dealership.

Exhibit 6.1 compares the doctrines of negligence and strict liability.

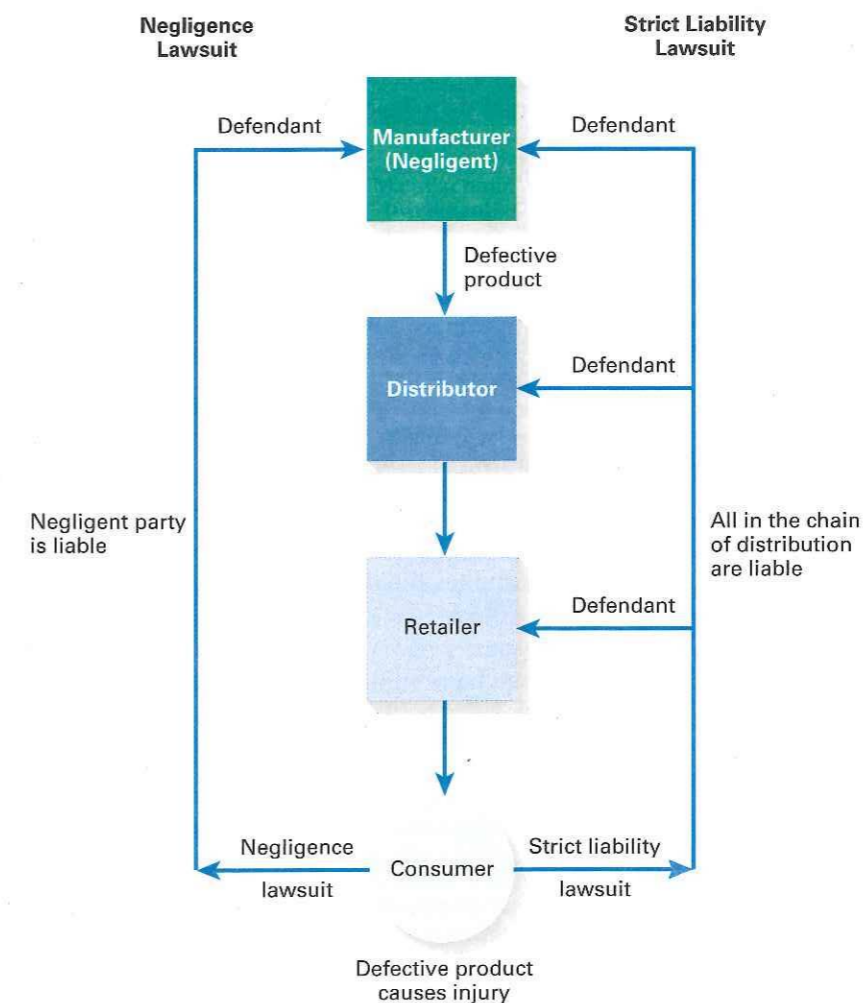
**chain of distribution**

All manufacturers, distributors, wholesalers, retailers, lessors, and subcomponent manufacturers involved in a transaction.

**Critical Legal Thinking**

What is the public policy for holding parties in the chain of distribution of a product strictly liable *without fault*? Can they protect against liability for some other party's negligence?

**Exhibit 6.1 NEGLIGENCE AND STRICT LIABILITY COMPARED**



*Nobody has a more sacred obligation to obey the law than those who make the law.*

Sophocles

#### punitive damages

Monetary damages that are awarded to punish a defendant who either intentionally or recklessly injured the plaintiff.

#### defect in manufacture

A defect that occurs when a manufacturer fails to (1) assemble a product properly, (2) test a product properly, or (3) check the quality of the product adequately.

#### defect in design

A defect that occurs when a product is designed improperly.

Under strict liability, manufacturers, distributors, sellers, and lessors of a defective product are liable to the consumer who purchased the product and any user of the product. Users include the purchaser or lessee, family members, guests, employees, customers, and persons who passively enjoy the benefits of the product (e.g., passengers in automobiles). Bystanders (e.g., pedestrians on a sidewalk) are also protected by the doctrine.

Damages for personal injuries are recoverable in all jurisdictions that have adopted the doctrine of strict liability. Property damage is recoverable in most jurisdictions. In product liability cases, a court can award **punitive damages** if it finds that the defendant's conduct was committed with intent or with reckless disregard for human life. Punitive damages are meant to punish the defendant and to send a message to the defendant (and other companies) that such behavior will not be tolerated.

To recover for strict liability, the injured party must first show that the product that caused the injury was somehow *defective*. The most common types of defects are (1) *defect in manufacture*, (2) *defect in design*, (3) *failure to warn*, and (4) *defect in packaging*. These defects are discussed in the following paragraphs.

### Defect in Manufacture

A **defect in manufacture** occurs when the manufacturer fails to (1) assemble a product properly, (2) test a product properly, or (3) check the quality of a product adequately.

**Example** American Ladder Company designs, manufactures, and sells ladders. While manufacturing a ladder, a worker at the company fails to insert one of the screws that would support one of the steps of the ladder. The ladder is sold to Weingard Distributor, a wholesaler, which sells it to Reynolds Hardware Store, which sells the ladder to Heather, a consumer. When Heather is on the ladder painting her house, the step of the ladder breaks because of the missing screw, and Heather falls and is injured. The missing screw is an example of a defect in manufacture. Under the doctrine of strict liability, American Ladder Company, Weingard Distributor, and Reynolds Hardware Store are liable for Heather's injury.

### Defect in Design

A **defect in design** occurs when a product is designed incorrectly. In this case, not just one item has a defect but all of the products are defectively designed and can cause injury.

**Examples** Design defects that have supported strict liability awards include toys designed with removable parts that could be swallowed by children, machines and appliances designed without proper safeguards, and trucks and other vehicles designed with defective parts.

In the following case, the court applies the doctrine of strict liability.



## Business Environment

### Strict Liability: Defect in Design

"Evidence of the blind spot was clear and showed that a person of the decedent's height could not be seen by the driver from head to toe until he was standing over fifty-two feet in front of the truck."

—Decuir, Judge

Russel Domingue, Charles Judice, and Brent Gonsoulin, who were employed by M. Matt Durand, Inc. (MMD), were stockpiling barite ore at a mine site. Judice and Gonsoulin were operating Cameco 405-B articulating dump trucks (ADTs) that were manufactured by Cameco Industries, Inc.

Each of the trucks weighed over 25 tons and could carry a load of more than 20 metric tons. Domingue was using a bulldozer to push the barite onto a growing pile of ore.

Gonsoulin, who was new to the job, had trouble dumping a large load of barite. Domingue, who was an experienced ADT operator, got off the bulldozer and walked to Gonsoulin's ADT to give his coworker advice on how to dump a heavy load. Meanwhile, Judice made another trip to dump ore and turned his ADT around to return to the barge. At the same time, Domingue was walking back to his bulldozer. Judice testified that he then saw "a pair of sunglasses and cigarettes fly." Judice immediately stopped his ADT and discovered Domingue's body, which he had run over. Domingue died from the accident. Domingue's widow, on behalf of herself and her children,

filed a strict liability lawsuit against Cameco, alleging that a design defect in the ADT caused a forward blind spot for anyone operating an ADT. Cameco could have spent \$5,000 to reduce greatly or eliminate the blind spot.

The trial court found that the forward blind spot on Cameco's 405-B dump truck was a design defect and held Cameco responsible for causing Domingue's death. Damages were set at \$1,101,050. Cameco appealed. The court of appeals upheld the trial court judgment. The court of appeals stated, "Evidence of the blind spot was clear and showed that a person of the decedent's height could not be seen by the driver from head to toe until he was standing over fifty-two feet in front of the truck." *Domingue v. Cameco Industries, Inc.*, 936 So.2d 282, 2006 La. App. Lexis 1593 (Court of Appeal of Louisiana)

### Failure to Warn

Certain products are inherently dangerous and cannot be made any safer and still accomplish the purpose for which they are designed. Many such products have risks and side effects caused by their use. Manufacturers and sellers owe a duty to warn consumers and users about the dangers of using these products. A proper and conspicuous warning placed on the product insulates the manufacturer and others in the chain of distribution from strict liability. **Failure to warn** of these dangerous propensities is a defect that supports a strict liability action.

**Example** Prescription medicine must contain warnings of its side effects. That way, a person can make an informed decision about whether to use the medicine. If a manufacturer produces a prescription medicine but fails to warn about its known side effects, any person who uses the medicine and suffers from the side effects can sue and recover damages based on failure to warn.

### Defect in Packaging

Manufacturers owe a duty to design and provide safe packages for their products. This duty requires manufacturers to provide packages and containers that are tamperproof or that clearly indicate whether they have been tampered with. Certain manufacturers, such as drug manufacturers, owe a duty to place their products in containers that cannot be opened by children. A manufacturer's failure to meet this duty—a **defect in packaging**—subjects the manufacturer and others in the chain of distribution of the product to strict liability.

**Example** A manufacturer of salad dressing fails to put a tamperproof seal on its salad dressings (i.e., caps that have a seal that shows whether or not they have been opened). A person purchases several bottles of the salad dressing from a grocery store, opens the caps, places the poison cyanide in the dressings, replaces the caps, and places the bottles back on the grocery store shelves. Consumers who purchase and use the salad dressing suffer injuries and death. Here, the salad dressing manufacturer would be strictly liable for failing to place a tamperproof seal on its products.

### Defenses to Product Liability

Defendant manufacturers and sellers in negligence and strict liability actions may raise certain defenses to the imposition of liability. Some of the most common defenses are:

- **Generally known danger.** Certain products are inherently dangerous and are known to the general population to be so. Manufacturers and sellers are not strictly liable for failing to warn of **generally known dangers**.

#### failure to warn

A defect that occurs when a manufacturer does not place a warning on the packaging of products that could cause injury if the danger is unknown.

#### defect in packaging

A defect that occurs when a product has been placed in packaging that is insufficiently tamperproof.

#### generally known dangers

A defense that acknowledges that certain products are inherently dangerous and are known to the general population to be so.

**abnormal misuse of a product**

A defense that relieves a seller of product liability if the user misused a product *abnormally*.

**supervening event**

An alteration or a modification of a product by a party in the chain of distribution that absolves all prior sellers from strict liability.

**Example** Because it is a known fact that guns shoot bullets, manufacturers and sellers of guns do not have to place a warning on the barrel of a gun warning of this generally known danger.

- **Abnormal misuse of a product.** A manufacturer or seller is relieved of product liability if the plaintiff has abnormally misused the product.

**Example** A manufacturer or seller of a power lawn mower is not liable if a consumer lifts a power lawn mower on its side to cut a hedge and is injured when the lawn mower falls and cuts him.

- **Supervening event.** The manufacturer or seller is not liable if a product is materially altered or modified after it leaves the seller's possession and the alteration or modification causes an injury.

**Example** A seller is not liable if a consumer purchases a truck and then replaces the tires with large off-road tires that cause the truck to roll over, injuring the driver or another person.

The following case illustrates a claim of supervening event.

**CASE 6.5 FEDERAL COURT CASE Supervening Event****Cummins v. BIC USA, Inc.**

727 F.3d 506, 2013 U.S. App. Lexis 16800 (2013)  
United States Court of Appeals for the Sixth Circuit

**“But [the lawyer’s] various comments were neither inaccurate nor inflammatory.”**

—Keague, Circuit Judge

**Facts**

The minor victim, referred to simply as “CAP,” sustained serious burns when he was three years old. CAP had just returned to his mother Amy Cowles’s home after an overnight visit with his father Thor Polley. CAP found a cigarette lighter on the floor in his father’s truck as he returned to his mother’s home. After arriving home, CAP lit the lighter, his shirt caught on fire, and he was burned from the waist up. CAP was taken to the hospital, where he received treatment for second- and third-degree burns to his face and chest and underwent several skin graft surgeries. A black BIC cigarette lighter was found at the scene of the fire and delivered to Police Chief John Brady. The lighter was admitted into evidence at trial, where Chief Brady testified that the lighter was worn and that the legally required child safety guard had been removed from the lighter when it was given to him. CAP’s father Thor acknowledged that he usually bought BIC lighters and customarily removed the child-resistant guards from them to make them easier to use. He later denied that he had removed the child-resistant guard from the lighter in question.

The conservator for CAP sued BIC USA, Inc., the manufacturer of the lighter, to recover damages for the injuries suffered by CAP. BIC defended, alleging that the BIC lighter was not defective because of a supervening event, namely, that someone had removed the child safety guard from the lighter. In closing arguments to the jury, BIC’s lawyer Edward H. Stopher made the following remarks:

*Presumably, if this was the lighter, presumably that lighter was disabled by Thor Polley. He made an intentional adult choice to disable that lighter. And by his testimony, he disabled it not because it is easy to deactivate it or override it, he disabled it because he said it made it easier to light. It is undisputed that no one can make a fool-proof lighter. No one based on the evidence that we have heard can make a Thorproof lighter.*

The trial court judge admonished the jury to disregard this last remark as inappropriate. The jury found that the lighter was not defective because the child-resistant guard had been removed from the lighter before the accident and held that BIC was not liable for CAP’s injuries. The plaintiff appealed for a new trial, alleging that BIC’s lawyer’s remarks prejudiced the jury.

**Issue**

Did the BIC’s lawyer’s remarks in the closing statement prejudice the jury?

**Decision**

The U.S. court of appeals affirmed the judgment in favor of defendant BIC.

**Language of the Court**

*Granted, implying that CAP’s father was “foolish” for presumably removing the child resistant guard from the lighter that presumably caused the fire was unnecessary and inappropriate. But Stopher’s various comments were neither inaccurate nor inflammatory.*

**Ethics Questions**

Was it ethical for the BIC’s lawyer to make the comments he did? Was the use of the term “Thorproof” effective?

**Statute of Repose**

Some states have enacted **statutes of repose**, which limit a manufacturer’s and seller’s liability to a certain number of years from the date when the product was first sold. The period of repose varies from state to state.

**Example** Assume that a state statute of repose for strict liability is seven years. If a purchaser purchases a product on May 1, 2016, the statute of repose expires May 1, 2023. If the product is defective but does not cause injury until after that date, the manufacturer and sellers are relieved of liability.

**statute of repose**

A statute that limits the seller’s liability to a certain number of years from the date when the product was first sold.

**Key Terms and Concepts**

Abnormal misuse (134)	Defect in packaging (133)	Libel (118)	Product liability (130)
Actual cause (causation in fact) (123)	Disparagement (118)	Malicious prosecution (119)	Professional malpractice (125)
Assault (115)	Duty of care (120)	Merchant protection statute (shopkeeper’s privilege) (116)	Proximate cause (legal cause) (123)
Assumption of the risk (128)	Failure to warn (133)	Misappropriation of the right to publicity (tort of appropriation) (117)	Public figure (118)
Attractive nuisance doctrine (127)	False imprisonment (116)	Negligence <i>per se</i> (125)	Punitive damages (132)
Battery (115)	Generally known danger (133)	Negligent infliction of emotional distress (125)	Reasonable person standard (121)
Breach of the duty of care (121)	Good Samaritan law (128)	<i>New York Times Co. v. Sullivan</i> (118)	Reasonable professional standard (121)
Chain of distribution (131)	Gross negligence (126)	Ordinary negligence (negligence) (120)	Res ipsa loquitur (126)
Comparative negligence (comparative fault) (130)	Injury (122)	<i>Palsgraf v. The Long Island Railroad Company</i> (124)	Scienter (119)
Contributory negligence (129)	Intentional infliction of emotional distress (tort of outrage) (119)	Partial comparative negligence (130)	Slander (118)
Defamation of character (118)	Intentional misrepresentation (fraud or deceit) (118)		Statutes of repose (135)
Defect (132)	Intentional tort (115)		Strict liability (130)
Defect in design (132)	Invasion of the right to privacy (117)		Supervening event (134)
Defect in manufacture (132)	Liability without fault (130)		Tort (115)
			Unintentional tort (ordinary negligence) (120)