Introduction to Negligence and Strict Liability

In the previous chapter, we discussed intentional torts, wrongs in which an individual took an action that he or she should have known would harm another person. In this chapter, we consider two other types of torts: negligent and strict-liability torts. These torts generally do not involve the same purposeful action required of intentional torts.

Suppose Ross uses a piece of wood to smack Joey, the mailman, on the face. Ross has committed battery. If Ross is building a tree house in his yard, however, and accidentally drops a piece of wood on Joey, who is delivering Ross's mail, Ross's action lacks intent, so there is no battery. Yet there might be negligence.

Allegations of negligence are made in a wide variety of circumstances. For example, people have alleged negligence when incidents of teenage violence occurred. The parents of Marcos Delgado Jr. filed a claim of negligence against a movie theater when it admitted 13-year-old Raymond Aiolentuna without an adult to the R-rated movie *Dead Presidents.* After the movie, Aiolentuna emerged from the theater, walked one block, and shot Delgado. Delgado's parents argued that the movie theater was negligent because it did not enforce the movie ratings system. The court, however, ruled in favor of the movie theater.[2] In another instance, the families of the victims of the 1999 Columbine school shootings in Colorado sued the two alleged shooters and the gun manufacturer for negligence. What exactly is required to establish a successful negligence claim?

In this chapter, we begin by examining the elements of negligence. Then we consider the methods that courts have adopted to help plaintiffs make successful negligence claims. Next, we examine the defenses that defendants to negligence claims can raise. Finally, we consider strict-liability torts.

Negligence is behavior that creates an unreasonable risk of harm to others. In contrast to intentional torts, which result from a person's willfully taking actions that are likely to cause injury, negligent torts involve the failure to exercise reasonable care to protect another's person or property.

Sometimes, however, harm occurs because an individual suffers an **unfortunate accident**, an incident that simply could not be avoided, even with reasonable care. For example, suppose Jonathan suffers a stroke while driving on the highway, and because of the stroke, crashes into two other vehicles. Johnathon is not, however, liable for damages caused by the accident. Yet if Jonathan had some type of warning that the stroke was going to occur, he might be liable for the accident.

To win a negligence case, the plaintiff must prove four elements: (1) duty, (2) breach of duty, (3) causation, and (4) damages. (See **Exhibit 9-1**.) A plaintiff who cannot establish all four of these elements will be denied recovery.

Exhibit 9-1 Elements of Negligence

To prove negligence, a plaintiff must demonstrate

1. *Duty:* The standard of care a reasonable person owes another.
2. *Breach of duty:* Failure to live up to the standard of care.
3. *Causation:* (a) Actual cause (cause in fact)—the determination that the plaintiff's harm was a direct result of the defendant's breach of duty; and (b) proximate cause (legal cause)—the extent to which, as a matter of policy, the defendant will be held liable for the consequences of his actions.
4. *Damages:* A compensable loss suffered by the plaintiff.

DUTY

The plaintiff must first establish that the defendant owes a *duty* to the plaintiff. In some particular situations, the law specifies the duty of care one individual owes to another. In most cases, however, the courts use the reasonable person standard to determine the defendant's duty of care. The **reasonable person standard** is a measurement of the way members of society expect an individual to act in a given situation. To determine the defendant's duty of care, the judge or jury must determine the degree of care and skill that a reasonable person would exercise under similar circumstances. The judge or jury then uses this standard to evaluate the actions of the individual in the case.

Let's return to the personal injury case in the opening scenario. What duty of care do you think a reasonable person in the position of the farm owners would owe Curtis?

When courts attempt to determine whether a reasonable person would have owed a duty to others, they consider four questions:

1. How likely was it that the harm would occur?
2. How serious was the harm?
3. How socially beneficial was the defendant's conduct that posed the risk of harm?
4. What costs would have been necessary to reduce the risk of harm?

In many situations, it is far from clear what a reasonable person would do. For example, if a reasonable person saw an infant drowning in a shallow swimming pool, what would she do? In most situations like this one, the law holds that individuals have no duty to rescue strangers from perilous situations.

In some cases, however, the courts hold that individuals have a duty to aid strangers in certain types of peril. For example, if Sam negligently hits Janice with his car and, as a result, Janice is lying in the street, Sam has a duty to remove her from that dangerous position. Similarly, employers have a special duty to protect their employees from dangerous situations.

The courts generally hold that landowners have a duty of care to protect individuals on their property. Similarly, businesses have a duty of care to customers who enter business property. It is important, therefore, for future business managers to be knowledgeable about this duty. Businesses should warn customers about risks they may encounter on business property. Some risks, however, are obvious, and businesses need not warn customers about them. For example, a business need not inform customers that they could get a paper cut from the pages of a book.

The courts generally hold that businesses have a duty of care to protect their customers against foreseeable risks about which the owner knew or reasonably should have known. For example, in *Haywood v. Baseline Construction Company,* a woman who tripped over lumber on the front porch of the House of Blues restaurant in Los Angeles sued for negligence. The business's attempt to warn customers by marking the lumber with yellow construction tape was insufficient to avoid the determination of negligence; the woman was awarded $91,366 in damages. Similar to *Haywood,* the Case Opener at the beginning of this chapter raises the question of the duty of care that landowners owe to individuals who are on their property with their permission.

Businesses and corporations are also obligated to provide products to consumers that are safe from foreseeable harm or injury. Failure to care for customers' safety can mean serious legal and financial repercussions for business owners and CEOs, especially if a company knowingly offers products or services that contain defects. For example, in early 2009, the Centers for Disease Control and Prevention (CDC) traced hundreds of reported cases of salmonella-related sickness back to food products containing peanut substances manufactured by Peanut Corporation of America. Upon further investigation by the Food and Drug Administration (FDA), documents revealed that Peanut Corporation knew that its products tested positive for salmonella on multiple occasions over a time period of nearly two years. Rather than taking preventive measures to guarantee that its tainted peanut products didn't reach the public, Peanut Corporation instead decided to ship the contaminated goods.

Peanut Corporation of America's bad judgment resulted in nine deaths and over 600 reported cases of illness. Many families of those who died or fell ill from the salmonella outbreak caused by Peanut Corporation filed suit, claiming negligence on the part of the company for turning a blind eye to laboratory results that confirmed salmonella's existence in its products. Other companies, such as Kellogg's and King Nut, which manufactured products using peanut substances provided by Peanut Corporation, found themselves included in the lawsuits. Peanut Corporation has since shut down all its manufacturing plants and has filed for **Chapter 7** bankruptcy. A federal judge recommended the approval of a $12 million settlement to compensate those sickened and the families of people killed in the salmonella outbreak.[3] The former Peanut Corporation of America Owner Stewart Parnell was sentenced to 28 years in prison for crimes related to the outbreak, and his brother, a broker who provided food manufacturing giant Kellogg's with peanut paste from his brother's company, received a 20-year prison term. A former quality control manager at the now-defunct peanut firm, received a five-year prison term for her conviction on obstruction.[4]

Sometimes it can be difficult to tell when there is a duty of care between a business and its customers. For example, a man brought a negligence suit against AT&T, his cellular phone provider, for not providing information about the cell phone's calls when he was searching for his missing mother. Ernest Frey had bought the cell phone for his mother after seeing an advertisement about the enhanced safety brought about by carrying a cell phone. When his mother went missing, he contacted the police and then AT&T to find out the location of any recent calls made from her phone. A call had been made, but AT&T refused to give Ernest Frey the location of the call without a subpoena. By the time Ernest's mother was found, after a subpoena had been issued for the cellular tower location, she was dead from a fatal injury. The US district court refused to dismiss the case and found that there might be both a contractual duty of care to Ernest and his mother and a common law duty of care because the representative from AT&T was made aware of the urgency of the situation and the danger to Ernest's mother. Although previous cases involving landline telephone companies were found to lack a duty of care, the district court decided that there were enough important differences between landline and cellular telephones, as well as between the specifics of this case and the previous cases, to merit review by a trial court.[5]

Professionals have more training than ordinary people. Thus, when professionals are serving in their professional capacity, courts generally hold that they have a higher duty of care to clients than does the ordinary person. A professional cannot defend against a negligence suit by claiming ignorance of generally accepted principles in the professional's field of expertise. Clients who feel that they have suffered damages as a result of a professional's breach of her duty of care can bring a negligence case against that person. These actions are referred to as *malpractice cases,* and they are discussed in greater detail in **Chapter 11**.

BREACH OF DUTY

Once the plaintiff has established that the defendant owes a duty of care, the plaintiff must prove that the defendant's conduct violated that duty. This violation is called a *breach of duty.* For example, the driver of an automobile owes the other passengers in the car a duty of care to obey traffic signs. If the driver fails to stop at a stop sign, the driver's duty to follow traffic signs has been violated, and the driver therefore breached the duty of care. Once a duty of care has been established, it seems as if determining whether a breach of that duty occurred would be a simple task. Kathleen Turner believed that when she was hit by a foul ball at a baseball game there had been a clear breach of duty by the stadium. The Nevada Supreme Court found that Mandalay Sports Entertainment and the Las Vegas 51s had a limited duty of care to their patrons, which they fulfilled by putting up barriers in areas of high risks and providing written and audio announcements about the danger of foul balls. So, although there was a duty of care, that duty of care was fulfilled and the defendants were not negligent.[6] Looking back at the Case Opener, one can see the challenges of proving breach of duty when evidence of the breach is lacking. Because the defendants in the Case Opener destroyed the wooden dock that allegedly caused the plaintiff's personal injury, the plaintiff had to invoke the doctrine of *res ipsa loquitur* to try to prove breach of duty. The doctrine of *res ipsa loquitur* is discussed later in this chapter.

CAUSATION

Causation is the third element of a successful negligence claim, and it has two separate elements: actual cause and proximate cause. The plaintiff must prove both elements of causation to be able to recover damages.

The first element, **actual cause** (also known as *cause in fact*), is the determination that the defendant's breach of duty resulted directly in the plaintiff's injury. The courts commonly determine whether a breach of duty actually caused the plaintiff's injury by asking whether the plaintiff would have been injured if the defendant had fulfilled his or her duty. If the answer is no, then the actual cause of the plaintiff's injury was the defendant's breach. Actual cause is sometimes referred to as "but-for" causation because the plaintiff argues that the damages she suffered would not have occurred *but for* (except because of) the actions of the defendant. For example, in the personal injury case in the opening scenario, Curtis argued that *but for* the flawed construction and maintenance of the wooden dock, she would not have injured her tibia.

Proximate cause, sometimes referred to as *legal cause,* refers to the extent to which, as a matter of policy, a defendant may be held liable for the consequences of his actions. In most states, proximate cause is determined by foreseeability. Proximate cause is said to exist only when both the plaintiff and the plaintiff's damages were reasonably foreseeable at the time of the defendant's breach of duty to the plaintiff. Thus, if the defendant could not reasonably foresee the damages that the plaintiff suffered as a result of his action, the plaintiff's negligence claim will not be sustained because it lacks the element of proximate causation.

For example, if a defective tire on a vehicle blows out, it is foreseeable that the driver may lose control and hit a pedestrian. It is not foreseeable, however, that the pedestrian may be a scientist carrying a briefcase full of chemicals that may explode on impact, causing a third-floor window to shatter and injuring an accountant at a desk by the window. In most states, the accountant would not be able to successfully sue the tire manufacturer for negligence. The tire failure is not considered a proximate cause of the accountant's injury because the contents of the pedestrian's briefcase were highly unusual. The pedestrian, however, would be eligible to recover damages from the tire manufacturer because hitting a pedestrian is a foreseeable consequence of tire failure. Thus, the defect in the tire is a proximate cause of the pedestrian's injury.

Palsgraf v. Long Island Railroad Company is one of the most well-known cases addressing the issue of proximate cause (see **Case 9-1**).

BUT WHAT IF ...

WHAT IF THE FACTS OF THE CASE OPENER WERE DIFFERENT?

Let's say, in the Case Opener, that the dock looked extremely rickety and looked as if it hadn't been touched for years. Would this alone have been enough for Curtis to foreseeably know that the dock was unsafe and would most likely collapse?

The decision in *Palsgraf* set out the rule of foreseeability that is followed by most states today. However, a different definition of proximate cause is followed in a small minority of states. Courts in a few states do not distinguish actual cause from proximate cause. In these states, if the defendant's action constitutes an actual cause, it is also considered the proximate cause. Therefore, in these few states, both the pedestrian-scientist and the third-floor accountant would be able to recover damages from the tire manufacturer in the previous example.

Legal Principle: **Proximate cause is defined in the majority of states as foreseeability of both the plaintiff and his or her injury, whereas in the minority of states proximate cause is the same as actual cause.**

DAMAGES

Damages are the final required element of a negligence action. The plaintiff must have sustained compensable injury as a result of the defendant's actions. Because the purpose of tort law is to compensate individuals who suffer injuries as a result of another's action or inaction, a person cannot bring an action in negligence seeking only nominal damages. Rather, a person must seek **compensatory damages,** or damages intended to reimburse a plaintiff for her or his losses. In the opening case scenario, Curtis sought compensatory damages for her personal injury.

In typical negligence cases, courts rarely award **punitive damages,** or *exemplary damages,* which are imposed to punish the offender and deter others from committing similar offenses. Instead, courts usually award punitive damages in cases in which the offender has committed **gross negligence,** an action committed with extreme reckless disregard for the property or life of another person.

Agency Relationships

LO 33-4 Identify the different types of agency relationships.

Agency laws are relevant to three types of business relationships: the principal-agent relationship, the employer-employee relationship, and the employer–independent contractor relationship (see **Exhibit 33-3**). We discuss all three in the following sections.

PRINCIPAL-AGENT RELATIONSHIP

The *principal-agent relationship* typically exists when an employer hires an employee to enter into contracts on its behalf. This is the most basic type of agency relationship. Suppose a salesclerk at Abercrombie sells Amanda a shirt. The clerk is acting on behalf of Abercrombie's owner; consequently, any sales the clerk makes are binding on it. Think of all the advertisements you've seen in which a professional athlete speaks on behalf of a product. The athlete usually hires an agent to find and make agreements on the athlete's behalf to promote products.

EMPLOYER-EMPLOYEE RELATIONSHIP

Whenever an employer hires an employee to perform some sort of physical service, the parties have created an *employer-employee relationship* in which the employee is subject to the employer's control.[5] Generally, all employees are considered agents of the employer, even those not legally authorized to enter into contracts binding their employer or to interact with third parties. However, not all agents are employees.

Legal Principle: Employees are agents of an employer.

EMPLOYER–INDEPENDENT CONTRACTOR RELATIONSHIP

The Restatement of Agency defines an *independent contractor* as "a person who contracts with another to do something for another person but who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking."[6] Building contractors, doctors, stockbrokers, and lawyers are types of independent contractors. They are also agents, but not employees. However, not all independent contractors are agents. They cannot enter into contracts on behalf of the principal unless the principal authorizes them to do so.

Legal Principle: Independent contractors cannot enter into contracts on behalf of the principal unless the contractor possesses authority from the principal.

Employee or Independent Contractor?

The question of whether a worker is an employee or an independent contractor has important implications because the employer-employee relationship is subject to the workers' compensation, workplace safety, employment discrimination, and unemployment statutes, while the employer–independent contractor relationship is not. Employers are also generally liable in tort for the actions of their employees, while they are generally not liable for the actions of independent contractors (see **Chapter 34**).

The ride-sharing company Uber is currently appealing decisions in California and Florida that classify Uber drivers as employees instead of independent contractors. Uber is a service presented in the form of a smart phone application that connects drivers, who sign a contract with Uber and provide a portion of their earnings to Uber as a commission, with users seeking transportation. In the California case, *Uber v. Berwick,* the court decided that Uber driver Barbara Berwick was an employee of Uber and not an independent contractor as Uber asserts its drivers to be. Thus, Berwick was entitled to overtime pay and to be reimbursed for on-the-job expenses, which she would not receive as an independent contractor. While Uber argues that it does not have enough control over its drivers for them to be considered employees, the court argued that Uber (referred to as "Defendants" in the case),

> ... [Defendants] are involved in every aspect of the operation. Defendants vet perspective drivers, who must provide to Defendants their personal banking and residence information, as well as their Social Security Number ... Defendants control the tools the drivers use; for example, drivers must register their cars with Defendants, and none of their cars can be more than ten years old .... Defendants monitor the Transportation Drivers' approval ratings and terminate their access to the application if the rating falls below a specific level.[7]

These factors led the court to decide that Uber does indeed have sufficient control over its drivers for them to be considered employees.

BUT WHAT IF . . .

WHAT IF THE FACTS OF THE CASE OPENER WERE DIFFERENT?

Let's say, in the Case Opener, that a single-route driver named Rick was an independent contractor for FedEx. He delivered a package to a person named Sarah, but Sarah's package had been damaged at a FedEx center. Rick formed a contract for Sarah, saying that FedEx would award Sarah the cost of the item that was shipped. Is Rick legally correct in this scenario? Why or why not?

When courts are deciding whether a worker is an employee or an independent contractor, perhaps the most important consideration is employer control.[8] If the employer has the right to substantially control the worker's day-to-day operations, the worker is generally considered an employee. Employers will sometimes have some control over the operations of a contractor; however, this control does not always mean that the contractor is an employee. In the Case Opener, the main issue for the court to determine was whether the FedEx drivers were employees or contractors. To do so, the court relied on the standard agency principle of determining how much control the employer exerted over the agent drivers. (See **Exhibit 33-4** for more criteria that distinguish employees and independent contractors.)

E-COMMERCE AND THE LAW

PROPOSITION 22

The historic 2020 election was seen by many as a referendum on then-President Trump. However, in California, it was also a referendum on the future of the driver-based gig economy—and potentially the future of American labor. Proposition 22 is a ballot measure that (re)classified app-based transportation and delivery drivers as independent contractors. App-based companies like DoorDash, Postmates, Uber, and Lyft spent over $200 million in election spending to support it. Proposition 22 was approved by 58 percent of Californians.

Under Proposition 22, app-based drivers are no longer protected by California's minimum wage, unemployment insurance, or other regular labor laws. Falling outside the aegis of labor laws means "increased efficiency" for employers—in other words, lower labor costs. On the other hand, Proposition 22 requires companies to provide health care subsidies and minimum payments for every "engaged" unit of time and "engaged mile."

While some companies have been quick to take advantage of Proposition 22's passage, with Albertsons, a grocery chain, replacing delivery drivers with DoorDash workers, many app-based drivers have yet to feel the benefits. Indeed, Proposition 22's minimum payments only apply to "engaged time"—time spent fulfilling a request—and excludes time spent waiting for a request. Some gig drivers report making $5 an hour after expenses since Proposition 22 was passed.

The passage of Proposition 22 has tech companies setting their sights on other states and even federal legislation. Unions and other labor organizations must now contend with the fact that tech companies may simply bypass negotiation through a ballot measure. Moreover, Proposition 22's passage opens the way to classifying other app-based workers as independent contractors.

Today, drivers are not the only kind of app-based workers. You can hire a dog walker, a lawn service, and even therapists and lawyers using apps. Critics of the gig economy believe Proposition 22 portends a future where labor laws protect no one. Proponents advocate for the gig economy by stating it provides flexibility for workers to pick and choose their employers, truly allowing the invisible hand to shape the market.

Sources: "California Proposition 22, App-Based Drivers as Contractors and Labor Policies Initiative," Ballotpedia, 2020; "Uber and Lyft Drivers in California Will Remain Contractors," The New York Times, *nytimes.com; "Gig Economy Coming for Millions of U.S. Jobs after California's Uber, Lyft Vote," Bloomberg.*

The IRS also must decide who is an employee and who is an independent contractor to ensure that the employer is not simply trying to lower its tax burden. The IRS has outlined 20 different criteria for its auditors to consider in determining whether someone is an independent contractor. In 1997, under advisement of the court, the IRS changed its criteria to focus on one element: how much control the employer exerts over the agent. The IRS needs to determine when people are employees and when they are independent contractors because of different tax liabilities employers face. When the IRS determines an independent contractor is really an employee, the employer becomes liable for all applicable taxes, such as Social Security and unemployment taxes.

Case 33-2 provides an illustration of the court's consideration of the criteria that establish whether a worker is an employee or an independent contractor.

CASE 33-2 GLENN v. GIBBS

COURT OF APPEALS OF GEORGIA
746 S.E. 2D 658, 2013 GA. APP. LEXIS 639 (2013)

Frankie and Trena Gibbs and Joel and Madeira Glenn were members of the Creek Baptist Church. On Saturday, May 31, 2008, the Gatlin Creek Baptist Church, which both couples had attended, held a fundraiser whereby volunteers from the church helped others with yardwork and other small jobs in exchange for monetary contributions to the church youth ministry. Frankie Gibbs (hereinafter Gibbs), who had no experience using a chainsaw, recalled that Joel Glenn (hereinafter Glenn) had "done chainsaw work with the Georgia Disaster Relief, so he asked Glenn whether he would be interested in trimming some limbs on his property. Gibbs claims that he and Glenn had not discussed any details at the time, however, and that he (Gibbs) had forgotten that he had asked Glenn about trimming the limbs until the week of the fundraiser. That week, he had seen Glenn, and Glenn asked him whether he still wanted some limbs trimmed. According to Gibbs, Glenn said that Saturday he would "have ... boys from the youth group," and he could trim the limbs if Gibbs still wanted them trimmed. Gibbs accepted the offer, understanding that the work was being performed in exchange for a monetary donation to the youth ministry.

On Friday, Glenn went to the Gibbses' home and Gibbs showed Glenn which limbs he wanted trimmed. The next morning (Saturday), Glenn went back to the Gibbses' home with his own chainsaw and ladder, and with two youths from the church. He proceeded to trim the biggest limb Gibbs wanted trimmed. According to Gibbs, Glenn climbed the ladder and began cutting the limb with the chainsaw, and the chainsaw became lodged in the tree. Gibbs commented, "Joel, you done messed up now ... the saw has gotten jammed." Gibbs retrieved a pitchfork, which he used to lift the limb to dislodge the chainsaw from the tree. Afterward, Gibbs turned around and walked away to a shed to put away the pitchfork. Glenn resumed trimming the limb. As Gibbs turned back around, he saw the tree limb "flying off" and Glenn falling head first to the ground.

Glenn was taken to a hospital by ambulance. He never regained consciousness and died four days later. On May 28, 2010, Madeira Glenn filed a complaint against the Gibbses for damages she alleged were the "direct, substantial and proximate result of the negligent acts and omissions by [the Gibbses] resulting in injuries to Joel Lewis Glenn on May 31, 2008, at the home of [the Gibbses]." The Gibbses asserted that Glenn was an independent contractor, tasked with a duty of his own to make certain his work area was safe, take all necessary precautions, and exercise ordinary care for his own safety. Madeira Glenn contends that the trial court erred in its order granting summary judgment to the Gibbses by holding that Glenn was an independent contractor, finding that Glenn possessed superior knowledge and proficiency to that of Gibbs.

CHIEF JUDGE PHIPPS

We first address Madeira Glenn's contention that the trial court erred by holding that Glenn was an independent contractor. She claims that Glenn was an invitee, and that by ruling that he was an independent contractor, the trial court placed a higher burden on Glenn, as an independent contractor is expected to determine for himself whether his place of employment is safe or unsafe. Madeira Glenn argues that the general rule regarding the duty owed to an invitee was applicable to this case.

(a) In support of her argument that Glenn was an invitee and not an independent contractor, Madeira Glenn points out that the evidence showed that Glenn was a volunteer, that he was solicited by Gibbs, that he never received any payment for the work performed, that there is a question as to whether the Gibbses made a donation to the church for the work performed, and that Glenn did not receive any benefit from trimming the tree. These facts, she argues, show that Glenn was working at the direction of and for the benefit of the Gibbses, and was, thus, not an independent contractor. We disagree.

The test for determining whether a person employed is an employee or an independent contractor is whether the employer, under the contract, whether oral or written, has the right to direct the time, the manner, the methods, and the means of the execution of the work, as contradistinguished from the right to insist upon the contractor producing results according to the contract, or whether the contractor in the performance of the work contracted for is free from any control by the employer of the time, manner, and method in the performance of the work.

Where one is employed generally to perform certain services for another, and there is no specific contract to do a certain piece of work according to specifications for a stipulated sum, it is inferable that the employer has retained the right to control the manner, method and means of the performance of the contract, and that the employee is not an independent contractor.

After Gibbs had approached Glenn and asked him to trim limbs on his property, Glenn, two months later, offered to trim the limbs on one particular Saturday. Glenn decided what time he would trim the limbs that day. Glenn decided where to place the ladder, and never asked for Gibbs's assistance in operating the chainsaw. Gibbs had no training or experience in operating a chainsaw and did not direct Glenn in the use of the chainsaw or in positioning the ladder. Gibbs did not tell Glenn how to cut the limbs. Glenn brought his own chainsaw and ladder to trim the limbs. Aside from assisting in dislodging the chainsaw from the tree, Gibbs merely pointed out to Glenn which limbs he wanted trimmed.

The evidence showed that Glenn decided when he would trim the limbs, and the manner, method, and means of trimming the limbs; there was no evidence that Gibbs retained the right to control these factors. Under the test provided above, the evidence demanded a finding that Glenn was an independent contractor.

AFFIRMED.

CRITICAL THINKING

Suggest some possible facts that would have altered this decision. What knowledge or behavior would have caused the court to rule that Glenn was *not* an independent contractor?

ETHICAL DECISION MAKING

By making the argument that she makes, what values is the defendant emphasizing?

The classification as an employee or independent contractor is also important in determining who owns the output of a work project. According to the Copyright Act of 1976,[9] when an employee completes work at the request of the employer, the product is considered a "work for hire" and the employer owns the copyright. Conversely, an independent contractor normally maintains ownership of copyrights for the work product. Only by an agreement of both parties that a specific work is a work for hire may an employer gain copyright ownership of the work of an independent contractor.

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BUT WHAT IF . . .

WHAT IF THE FACTS OF THE CASE OPENER WERE DIFFERENT?

Let's say, in the Case Opener, that single-route drivers did have agency relationships with FedEx. Although Jim, a FedEx driver, was not driving a FedEx vehicle, he had to travel to another city to perform a FedEx duty. He asked FedEx for gas money to travel, but FedEx declined. Which party is correct in this situation?

Legal Principle: **As a general rule, when an agent commits an unauthorized act, the principal is neither bound to the contract nor liable.**

COMPARING THE LAW OF OTHER COUNTRIES

RESPONDEAT SUPERIOR IN IRAQ

Unlike the United States' broad employment of the *respondeat superior* doctrine, the Iraqi Civil Code generally rejects the idea of *respondeat superior*. Iraq's Civil Code is partially influenced by classical Islamic law, in which there is no separate concept of tort and which suggests that those who cause harm should repair it. Thus, classical Islamic legal systems tend to follow a rule of strict and "specific" liability for torts. This notion of specific liability rejects the idea of vicarious liability of superiors and custodians and constrains liability to the actual wrongdoer. However, Iraqi law does contain some limited exceptions in which *respondeat superior* principles are permitted. These include the liability of owners of animals for damage caused by the animals, the liability of a parent of a minor who causes injury, the liability of owners of buildings that collapse, and the liability of government municipalities and commercial entities for injuries caused by their employees during the course of their service.

Sources: Dan E. Stiggal, "A Closer Look at Iraqi Property and Tort Law," *Louisiana Law Review* 68 (2008), p. 765; and Dan E. Stiggal, "Refugees and Legal Reform in Iraq: The Iraqi Civil Code, International Standards for the Treatment of Displaced Persons, and the Art of Attainable Solutions," *Rutgers Law Record* 34 (2009), p. 1.

BUT WHAT IF . . .

WHAT IF THE FACTS OF THE CASE OPENER WERE DIFFERENT?

Let's say, in the Case Opener, that Burchett decided to take his crew to a bar before transporting them to the bunkhouses. In other words, his actions were not authorized by Amerimex. What would Burchett be liable for concerning his employer?

An agent who commits a tort that injures a third party is personally liable for his or her actions, regardless of both the classification and the liability of the principal.[7] The principal may also be held liable for the agent's authorized or unauthorized acts. Furthermore, tortious liability of the principal can be established directly or indirectly. Finally, if an agent is an employee and the principal/employer controls the employee's behavior, the principal can be found liable. The next section introduces these methods of establishing tortious liability.

PRINCIPAL'S TORTIOUS CONDUCT

The law holds a principal directly responsible for their own tortious conduct on two conditions. First, a principal who directs the agent to commit a tort is authorizing the agent's unlawful behavior and thus is liable for any damages caused by the tort.[8] Similarly, the principal who ratifies an agent's tortious act knowing that the agent acted illegally is liable, even if the principal does not condone the agent's conduct.[9]

Second, if the principal fails to provide proper instruments or tools or gives inadequate instructions to the agent concerning the necessity to employ competent agents, the law holds the principal liable to a third party for negligent hiring of an agent. If an agent commits a tort against a customer, the customer often argues that the principal is liable because she should have taken more care in hiring the agent.

Respondeat Superior. The doctrine of **respondeat superior** (a Latin phrase meaning "let the superior speak") applies in the context of the principal/employer–agent/employee relationship. The principal/employer holds **vicarious liability**, which is liability assigned without fault for any harm the agent/employee causes while working for the principal. In other words, the principal/employer is liable not because he was personally at fault but because he negligently hired an agent. The rationale is that if the employer is benefiting by the work of the employee, the employer should also be responsible for the harms the employee caused.

Thus, a third party injured through the negligence of an employee can sue either the employee or the employer.[10] To establish employer liability, the third party must show that the wrongful act occurred within the scope of the employment. The courts consider the following in determining this element:[11]

1. Did the employer authorize the employee's act?
2. Did the act occur within the time and space limits of employment?
3. Was the act performed, at least in part, on behalf of the employer?
4. To what extent were the employer's interests advanced by the act?
5. To what extent were the private interests of the employee involved?
6. Did the employer provide the means (tools) by which the act occurred?
7. Did the employee use force not expected by the employer?
8. Did the employer know that the act would include the commission of a serious crime?

If a delivery driver negligently injures a third party while making deliveries on behalf of the employer, both the employee and the employer will be held liable. Suppose the driver is using the company vehicle when he stops at a drive-through to get coffee. Could the employer be liable to a third party for an accident caused by the driver? If an agent makes a substantial departure from the course of the employer's business, the employer is not liable.

Courts often refer to an employee's substantial departure as a "frolic of his own." However, if the deviation from the employer's business is *not* substantial, the employer can be held liable. In **Case 34-2**, the court considers the scope of the employment relationship.

Legal Principle: As a general rule, a principal is vicariously liable for the actions of their agent.

If the third party is able to establish employee negligence such that the employer is liable, the employer has the right to recover from the employee any damages paid to the third party as a result of the employee's negligence. The right to recover damages is referred to as the *right of indemnification.* However, if the employee is innocent of negligence, the employer is also free of liability.

When thinking about agent liability, it is important to consider not only harm done by an agent to a customer or to a person outside of the business but harm between employees as well. An example of this is harassment in the workplace. As attitudes and ideas about workplace harassment change, so too do the laws that affect workplace harassment.

The New Jersey Supreme Court has adopted the approach of the US Supreme Court's decision on *Burlington Industries, Inc. v. Ellerth,* 524 U.S. 742 (1998). This case set forth two ways in which an employer can be held liable for the torts of its employees acting outside the scope of employment. The first way an employer can be held liable is if an employer knew or should have known about the harassment and failed to stop it. The second way an employer can be held liable is if the employee committing the harassment appeared to be speaking or acting on behalf of the employer and there was reliance on the apparent authority, or an employee was aided in accomplishing the tort through an agency relation with a second employee. These two conditions seem to consider events at the time of the harassment, but new cases show that the New Jersey courts may be considering other details as well.

In *Aguas v. State of New Jersey* (072467) (2014), corrections officer Ilda Aguas claimed she was sexually harassed on several occasions by her supervisor and sued her employer on the grounds of a hostile work environment. The court dismissed Aguas's suit against her employer because the employer had instituted an antidiscrimination policy and engaged in a thorough investigation of the claims, and because there was "no factual evidence showing that the harassment of which plaintiff complains derived from a supervisory relationship." In other words, the case was dismissed not only because the court determined the harassment did not derive from Aguas's relationship with her supervisor, but also because the employer had standing antidiscrimination policies and had responded to the claims with an investigation. The court was not only contemplating the events surrounding the harassment but also what was being done by the employer before and after the harassment had occurred.

Similarly, in *Dunkley, v. S. Coraluzzo Petroleum Transporters,* 437 N.J.Super. 366 (Sept. 16, 2014), a New Jersey court concluded that, because the employer maintained a handbook of antidiscrimination policies and complaint methods, provided it to new employees upon hire, directed said employees to read and become familiar with the information provided, and took action to prevent the plaintiff from further harassment, the employer was not vicariously liable for the harassing conduct of its supervisor.

Intentional Torts and *Respondeat Superior*

The agent is liable for any torts the agent commits. In the same way the principal is responsible for the negligent acts of the employee under the doctrine of *respondeat superior,* the principal may also be liable for any intentional torts of the employee. Furthermore, an employer may be responsible for any tortious acts of the employee if the employer knew or should have known that the employee had a tendency to commit such acts. Hence, a principal may be liable for negligent hiring who fails to do a background check to learn about the tendencies of potential employees.

The principal of an employee with a criminal background may be held liable for tortious acts committed by her hired agent even though the employee may not recognize the wrongfulness of his act. Therefore, employers will most likely purchase liability insurance in case particular employees engage in tortious activities.

AGENT MISREPRESENTATION

Unlike tort liability, which is based on whether the agent/employee was acting in the scope of employment, *misrepresentation liability* depends on whether the principal authorized the agent's act. If the principal authorizes the agent to engage in an act and the agent misrepresents herself intentionally or unintentionally, the principal is always liable in tort to someone who relied on the agent's misrepresentation.

If an agent has misrepresented herself, the third party has two options:

1. Cancel the contract with the principal and be compensated for any money lost.

2. Affirm the contract and sue the principal to recover damages.

Legal Principle: As a general rule, if a principal authorizes an agent to misrepresent the principal, the principal is always liable.

CASE: NUGGET

DID THE EXCLUSIVE RIGHT TO SELL DIE WITH THE AGENT?

Newton Centre Realty, Inc. v. Jaffe
Appeals Court of Massachusetts, Middlesex, 150 N.E.3d 811 (2020)

In 2017, Shirley Jaffe entered into three "exclusive right to sell" agreements with Newton Centre Realty, Inc., doing business as Centre Realty Group. Under the agreement, the broker, Newton Centre, was entitled to a 4 percent commission if a property was sold under three different conditions. Under one of the conditions, the broker could earn the commission if the subject property was sold through *anyone's* efforts, including the seller's. The terms of the agreements lasted until September 1, 2018.

Shirley died several months later. Shirley's son, David Jaffe, as the personal representative of Shirley's estate, sold the three properties independently of the brokers. Two properties were sold on June 26, 2018, and the third was sold on August 21, 2018. Altogether, the three properties sold for $5,685,000.

Newton Centre promptly sued David seeking the 4 percent commission, which would amount to $227,400, and claiming breach of contract. However, the trial court determined that because Shirley and Newton Centre's agreement created an agency relationship, it had terminated upon Shirley's death. Therefore, there was no breach of contract.

On appeal, the court first stated that under the common law, the death of a principal automatically terminates the agent's actual and apparent authority "because it negates the existence of the person on whose behalf the agent acts." The court noted that an exception to the rule exists where the agency is coupled with an interest in the property. Here, while there was an agency relationship between Shirley and Newton Centre, Newton Centre did not have an interest in any of the three properties. Consequently, Shirley's death terminated the relationship under the common law rule, and the recognized exception did not apply. The trial court's decision was affirmed.

Source: Newton Ctr. Realty, Inc. v. Jaffe, 97 Mass. App. Ct. 726, 150 N.E.3d 811 (2020).

Crime and Agency Relationships

If an agent commits a crime, clearly the agent is liable for the crime. If the agent commits the crime in the scope of employment for a principal without the principal's authorization, the principal is not liable for the agent's crime. Remember, one of the elements establishing that a crime has been committed is *intent*. If a principal is unaware of or had no intent for the agent to commit a crime, there is no rationale for the principal's criminal liability. The only time the principal can be liable for the crime of an agent is when the principal has authorized the criminal act.

Legal Principle: **If an agent commits a crime in the scope of his or her employment without authorization from the principal, the principal is not liable for the crime.**

Termination of the Agency Relationship

LO 34-3 Outline the ways an agency relationship can be terminated.

The parties may choose to terminate an agency relationship, or it may terminate automatically by the lapse of time, fulfillment of purpose, or operation of law. (Exhibit 34-2 lists the ways that agency relationships can be terminated.) If the relationship has ended, the agent no longer has authority to make agreements on behalf of the principal. However, the agent's apparent authority continues until the principal notifies third parties that the relationship has ended.

Exhibit 34-2 Ways That an Agency Relationship Can Be Terminated

TERMINATION BY ACTS OF PARTIES	TERMINATION BY OPERATION OF LAW
1. Lapse of time	1. Death
2. Fulfillment of purpose	2. Insanity
3. Occurrence of specific event	3. Bankruptcy
4. Mutual agreement by the parties	4. Changed circumstances
5. Revocation of authority	5. Change in law
6. Renunciation by the agent	6. Impossibility
7. Agency coupled with an interest	7. Disloyalty of agent
	8. War

Notice of the termination can be actual or constructive. **Actual notice** must be given to third parties who have had business interactions with the agent; it directly informs them, orally or in writing, that the agency agreement has terminated.[13] When the agent's authority was granted in writing, actual notice also must be given in writing. Parties not directly related to an agency agreement may receive **constructive notice**, which is how the termination of an agency agreement is generally announced.[14] Constructive notice usually consists of publication in a generally circulating newspaper for the area where the agency agreement existed.

Parties forming a contract of agency in a foreign jurisdiction should include the conditions of termination within the contract. A US manager conducting business in the European Union needs access to the intricacies of Chapter IV of the Agency Relationship Law that focuses on termination. Released agents in the EU receive compensation if they have brought the principal new customers from whom the principal continues to profit, if they are unable to otherwise recover costs incurred through the performance of the contract, or upon their death.