

5.3: Negligence

Everyone has the duty to act reasonably and to exercise a reasonable amount of care in their dealings and interactions with others. Breach of that duty, which causes injury, is negligence. Negligence is distinguished from intentional torts because there is a lack of intent to cause harm.

The definition of negligence is purposefully broad. **Negligence** is the failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation. This legal standard is to protect people against unreasonable risk of harm.

To succeed on a negligence claim, a plaintiff must prove five elements:

1. The defendant owed a duty of care to the plaintiff;
2. The defendant breached that duty;
3. The defendant's conduct was the actual cause of the plaintiff's injuries;
4. The defendant's conduct was the proximate cause of the plaintiff's injuries; and
5. The plaintiff was damaged.

Duty of Care

First, the plaintiff has to demonstrate that the defendant owed it a duty of care. The general rule is that people are free to act any way they want, as long as they do not harm others. This means strangers are generally not responsible for caring for each other unless a special relationship exists. For example, parents owe their children a duty of care and doctors owe their patients a duty of care because of their underlying relationship. In a business context, businesses owe a duty of care to their customers and managers owe a duty of care to their employees. Some business relationships involve a **fiduciary duty**, which is a duty to act with the utmost faith, trust, and candor towards another. Doctors, lawyers, accountants, and corporate officers all have fiduciary duties towards their patients, clients, and shareholders.

It is important to understand that businesses and individuals owe a general duty to the community as a whole. Drivers owe other drivers and pedestrians a duty of care not to cause accidents. However, drivers are not required to report accidents or to stop and help others when they are not involved because they do not owe a duty of care to strangers.

Businesses have a duty to warn and protect customers from crimes committed by other customers. When a business knows about, or should know about, a high likelihood of crime occurring, then the business must warn or take steps to protect its customers. These businesses include bars frequented by biker gangs, hotels where frequent sexual assaults occur, and any business with escalating violence on their premises.

Businesses also owe a duty to exercise a reasonable degree of care to protect the public from foreseeable risks that the owner knew or should have known about. There are many foreseeable ways for customers to be injured in retail stores, including objects falling from shelves, spilled liquids, and icy entryways. If a store knows about a hazardous condition, or should have known about it, then the store must quickly warn customers and remedy the situation.

Breach of Duty of Care

Once a duty has been established, plaintiffs have to prove that the defendant breached that duty. A breach is demonstrated by showing the defendant failed to act reasonably. It is important to keep in mind that the reasonable person is an objective standard. The reasonable person is never sleep-deprived, angry, or intoxicated. He or she is reasonably careful and considers consequences carefully before acting. A jury does not put themselves in the shoes of the defendant to determine what they would have done in that situation. Nor do they take into account the defendant's subjective situation, such as being intoxicated or sleep-deprived at the time.

In practical terms, the presence of injury or harm is usually enough to satisfy the "breach of duty" requirement. Often the harm is the evidence of the breach because it would not have occurred if the defendant had acted as they should.

Breach of the duty of care can be both an action (such as causing a car accident) or it can be a failure to act (such as not clearing ice from the sidewalk). These are fact-specific determinations because what a reasonable person would do in a given situation varies.

There are two special doctrines that establish breach of duty of care in limited circumstances. The first, **res ipsa loquitur**, means "the thing speaks for itself" in Latin and holds that a breach of a party's duty of care may be inferred from the events that occurred. It is used in cases where:

1. The injury would not have occurred unless someone was negligent;
2. The defendant had exclusive control over the property causing injury; and
3. The plaintiff had no role in causing the harm.

For example, if a patient discovers surgical equipment inside his or her body after surgery, the patient does not have to prove which person in the operating room negligently left the equipment. Instead, the plaintiff can sue the surgeon under the *res ipsa loquitur* doctrine because the surgeon is in charge of the surgery room. When *res ipsa loquitur* is raised, the burden shifts to the defendant to prove that he or she did not cause the harm.

Figure 9.2 X-Ray Image of Scissors Left Inside a Patient



The second doctrine is **negligence per se**. Legislatures sometimes pass laws defining negligence under certain circumstances. If a defendant violates the statute or ordinance, then the defendant is legally negligent. To recover under this theory, a plaintiff has to prove:

1. The defendant broke the law;
2. The plaintiff is in the class of people intended to be protected by the law; and
3. The violation of the law caused plaintiff's injuries.

Negligence per se is often argued in car accidents where the defendant is ticketed for reckless driving by the police, as well as dog bite cases where the victim has physical injuries. When defending against negligence per se claims, defendants may argue:

1. They were unable to comply with the law through reasonable care;
2. It was an emergency situation not caused by them; or
3. Complying with the law would have presented a greater risk of harm.

Actual Cause

The third element of negligence is actual causation, which is also known as but-for causation. This form of causation is fairly easy to prove. But for the defendant's actions, would the plaintiff have been injured? If yes, then but-for causation is proven. For example, if a customer slips on ice on a store's property, would the plaintiff been injured but for the store's failure to remove the ice? This is the form of causation that most people describe in their daily interactions. Because the store did not remove the ice, the customer slipped and was injured.

Proximate Cause

The second form of causation asks whether the defendant's actions were the proximate cause of the plaintiff's injury. Sometimes the chain of events results in the injury being too remote from the defendant's conduct to be legally recoverable. In other words, proximate cause means that the act or omission must be related closely enough to the injury to justify imposing legal liability. Proximate cause places a limit on a defendant's responsibility to immediate (or foreseeable) harm. This ensures that no intervening causes of the plaintiff's injuries exist.

A customer slips on ice on a store's property and breaks a leg. On the way to the hospital in an ambulance, there is a car accident and the customer is killed. Although the customer would not have been in the ambulance if she had not fallen on the store's property, the store would not be responsible in a wrongful death claim. The car accident is an intervening event that breaks the causal chain. Put another way, the car accident was not a foreseeable consequence of the store's failure to remove ice on its premises.

Proximate cause prevents actual causation to be taken to a logical but extreme conclusion. At some point, the law has to break the chain of causation to hold parties to a reasonable amount of liability for their actions.

Damages

The final element in negligence is legally recognizable injuries, or damages. If someone walks on a discarded banana peel and does not slip, then no tort occurs. Only when someone has been injured are damages awarded.

There are two types of damages awarded in tort law. The first, **compensatory damages**, seek to compensate the plaintiff for his or her injuries. Compensatory damages can be awarded for medical injuries, economic injuries (such as loss of property or income), and pain and suffering. They can also be awarded for past, present, and future losses. While medical and economic damages can be calculated using available standards, it is far more difficult to assign a monetary value to pain and suffering. Juries often use the severity and duration of the injury and its impact on the plaintiff's life to calculate damages.

The second type of damages is **punitive damages**, which are intended to deter the defendant from engaging in similar conduct in the future. The idea behind punitive damages is that compensatory damages may be inadequate to deter future bad conduct, so additional damages are necessary to ensure the defendant corrects its ways. Punitive damages are available in cases where the defendant acted with willful and wanton negligence, a higher level of negligence than ordinary negligence. There are constitutional limits to the award of punitive damages.

Defenses to Negligence Claims

A defendant being sued for negligence has two main defenses: (1) assumption of risk by the plaintiff; and (2) comparative negligence.

Assumption of Risk

The first defense is assumption of risk. If the plaintiff knowingly and voluntarily assumes the risk of participating in a dangerous activity, then the defendant is not liable for injuries incurred. However, a plaintiff can only assume known risks. A skier assumes the known risks of downhill skiing, including falling, avalanches, and skiing in poor conditions. However, a skier who is injured from a defective chair lift does not assume the risk of injury as a result of a manufacturing defect.

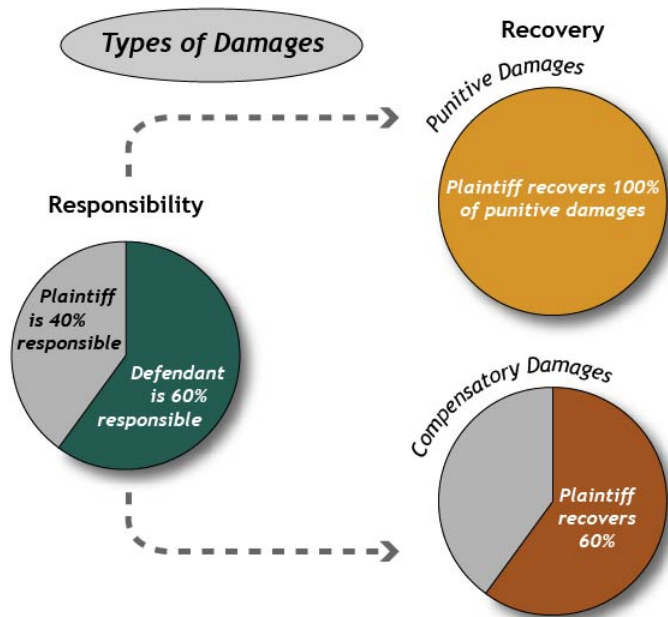
A related doctrine, the **open and obvious doctrine**, is used to defend against lawsuits by persons injured while on someone else's property. For example, if there is a spill on a store's floor and the store owner has put up a sign that says "Caution—Slippery Floor," yet someone decides to run through the spill anyway, then that person would lose a negligence lawsuit because the spill was open and obvious.

Both the assumption of risk and open and obvious defenses are not available to the defendant who caused a dangerous situation in the first place.

Comparative Negligence

The second defense to negligence is when the plaintiff's own negligence contributed to his or her injuries. Most jurisdictions, including Colorado, follow the comparative negligence rule. Under this rule, the jury determines the percentage of fault of all the parties for the plaintiff's injuries. If the jury finds the plaintiff responsible for some of his or her own injuries, then any compensatory damages are reduced by that percentage. For example, if a customer is 40 percent at fault for his injuries, then the compensatory damage award will be reduced by 40 percent. The reasoning for this rule is to hold people and businesses accountable for their own negligence.

Figure 9.3 Recovery of Damages under Comparative Negligence



This rule applies only to compensatory damages, and not punitive damages. Because punitive damages are meant to deter the defendant from committing future bad acts, the purpose would be undercut if the amount of punitive damages was reduced, too.

This page titled [5.3: Negligence](#) is shared under a [CC BY 4.0](#) license and was authored, remixed, and/or curated by [Matthew L. Mac Kelly](#) via [source content](#) that was edited to the style and standards of the LibreTexts platform.

- **9: Torts** by [Melissa Randall and Community College of Denver Students](#) is licensed [CC BY 4.0](#). Original source: <https://introductiontobusinesslaw.pressbooks.com>.