

## 8.3: Negligence

### Learning Objectives

- Learn about whom we owe duties to under the tort of negligence.
- Explore how those duties can be legally breached.
- Discuss how causation, both actual and proximate, can affect liability.
- Examine the requirement to demonstrate damages to win a negligence suit.
- Understand various defenses to negligence.

### Video Clip: The Crash of Continental Flight 3407

[\(click to see video\)](#)

Ordinarily, we don't expect perfectly good airplanes to fall out of the sky for no reason. When it happens, and it turns out that the reason was carelessness or a failure to act reasonably, then the tort of negligence may apply. All persons, as established by state tort law, have 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. If a pilot intentionally crashed an airplane and harmed others, for example, the tort committed may be assault or battery. When there is no intent to harm, then negligence may nonetheless apply and hold the pilot or the airline liable, for being careless or failure to exercise due care.

Note that the definition of negligence is purposefully broad. Negligence is about breaching the duty we owe others, as determined by state tort law. This duty is often broader than the duties imposed by law. Colgan Air, for example, may have been fully compliant with applicable laws passed by Congress while still being negligent. In a way, the law of negligence is an expression of democracy at the community and local level, because ultimately, citizen juries (as opposed to legislatures) decide what conduct leads to liability.

To prove negligence, plaintiffs have to demonstrate four elements are present. First, they have to establish that the defendant owed a duty to the plaintiff. Second, the plaintiff has to demonstrate that the defendant breached that duty. Third, the plaintiff has to prove that the defendant's conduct caused the injury. Finally, the plaintiff has to demonstrate legally recognizable injuries. We'll address each of these elements in turn.

First, the plaintiff has to demonstrate that the defendant owed it a duty of care. The general rule in our society is that people are free to act any way they want to, as long as they don't infringe on the freedoms or interests of others. That means that you don't owe anyone a special duty to help them in any way. For example, if you're driving along a deserted rural highway at night in a snowstorm, and you see a car ahead of you fishtail and drive into a ditch, you are entitled to keep driving and do nothing, not even report the accident, because you don't owe that driver any special duty. On the other hand, if you ran a stop sign, which then caused the other driver to drive into a ditch, you would owe that driver a duty of care.

Another way to look at duty is to consider whether or not the plaintiff is a foreseeable plaintiff. In other words, if the risk of harm is foreseeable, then the duty exists. Take, for instance, the act of littering with a banana peel. If you carelessly throw away a banana peel, then it is foreseeable that someone walking along may slip on it and fall, causing injuries. Under tort law, by throwing away the banana peel you now owe a duty to anyone who may be walking nearby who might walk on that banana peel, because any of those persons might foreseeably step on the peel and slip.

An emerging area in tort law is whether or not businesses have a duty to warn or protect customers for random crimes committed by other customers. By definition, crimes are random and therefore not foreseeable. However, some cases have determined that if a business knows about, or should know about, a high likelihood of crime occurring, then that business must warn or take steps to protect its customers. For example, in one case a state supreme court held that when a worker at Burger King ignored a group of boisterous and loud teenagers, Burger King was liable when those teenagers then assaulted other customers. *Iannelli v. Burger King Corp.*, 145 N.H. 190 (2000). In another case, the Las Vegas Hilton was held liable for sexual assault committed by a group of naval aviators because evidence at trial revealed that the hotel was aware of a history of sexual misconduct by the group involved.

The concept of duty is broad and extends beyond those in immediate physical proximity. In a famous case from California, for example, a radio station with a large teenage audience held a contest with a mobile DJ announcing clues to his locations as he moved around the city. The first listener to figure out his location and reach him earned a cash prize. One particular listener, a

minor, was rushing toward the DJ when the listener negligently caused a car accident, killing the other driver. During a negligence trial, the radio station argued that hindsight is not foreseeability and that the station, therefore, did not owe the dead driver a duty of care. The California Supreme Court held that when the radio station started the contest, it was foreseeable that a young and inexperienced driver may drive negligently to claim the prize and that therefore a duty of care existed. *Weirum v. RKO General*, 15 Cal.3d 40 (1975). Radio stations should, therefore, be very careful when running promotional contests to ensure that foreseeable deaths or injuries are prevented. This lesson apparently eluded Sacramento station KDND, which in 2007 held a contest titled “Hold Your Wee for a Wii” where contestants were asked to drink a large amount of water without going to the bathroom for the chance of winning a game console. An otherwise healthy twenty-eight-year-old mother died of water intoxication hours after the contest, which led to a lawsuit and a \$16 million jury verdict.

The general rules surrounding when a duty exists can be modified in special situations. For example, landowners owe a duty to exercise reasonable care to protect persons on their property from foreseeable harm, even if those persons are trespassers. If you are aware of a weak step or a faucet that dispenses only scalding hot water, for example, you must take steps to warn guests about those known dangers.

Businesses 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, from falling objects improperly placed on high shelves, to light fixtures exploding or falling due to improper installation, to customers being injured by forklifts in so-called warehouse stores. One particular area of concern for businesses is liquid on walking surfaces, which can be very dangerous. Spilled product (milk, orange juice, wine, etc.), melted ice or snow, or rain can cause slick situations, and if a store knows about such a condition, or should have known about it, then the store must quickly warn customers and remedy the situation.

Business professionals such as doctors, accountants, dentists, architects, and lawyers owe a special duty to act as a reasonable person in their profession. Professional negligence by these professionals is known as malpractice. The government estimates that between forty-four thousand and ninety-eight thousand people die each year in hospitals due to medical mistakes, the vast majority of them preventable. U.S. Department of Health and Human Services, Agency for Healthcare Research and Quality, “Reducing Errors in Health Care: Translating Research Into Practice,” April 2000, <http://www.ahrq.gov/qual/errors.htm> (accessed September 27, 2010).

Once duty has been established, negligence plaintiffs have to demonstrate that the defendant breached that duty. A breach is demonstrated by showing the defendant failed to act reasonably, when compared with a reasonable person. It’s important to keep in mind that this reasonable person is hypothetical and does not actually exist. This reasonable person is never tired, sleepy, angry, or intoxicated. He or she is reasonably careful—not taking every single precaution to prevent accidents but considering his or her actions and consequences carefully before proceeding. In reality, once a duty has been established, the presence of injury or harm is usually enough to satisfy the “breach of duty” requirement.

The third element of negligence is causation. In deciding whether there is causation, courts have to consider two questions. First, courts query as to whether there is causation in fact, 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 you are texting while driving and you hit a pedestrian because your attention was diverted, then but-for causation is easily met, because “but for” your actions of texting while driving, you would not have hit the pedestrian.

The second question is tougher to establish. It asks whether the defendant’s actions were the proximate cause of the plaintiff’s injury. In asking this question, courts are expressing a concern that causation-in-fact can be taken to a logical but extreme conclusion. For example, if a speeding truck driver crashes his or her rig and causes the interstate highway to be shut down for several hours, causing you to become stuck in traffic and miss an important interview, you could argue that but for the truck driver’s negligence, you may have landed a new job. It would not be fair, however, to hold the truck driver liable for all the missed appointments and meetings caused by a subsequent traffic jam after the crash. At some point, the law has to break the chain of causation. The truck driver may be liable for injuries caused in the crash, but not beyond the crash. This is proximate causation.

### Video Clip: *Palsgraf v. Long Island Railroad Company*

([click to see video](#))

In determining whether proximate cause exists, we once again use the foreseeability test, already used for determining whether duty exists. If an injury is foreseeable, then proximate cause exists. If it is unforeseeable, then it does not.

In some cases, it can be difficult to pinpoint a particular source for a product, which then makes proving causation difficult. This is particularly true in mass tort cases where victims may have been exposed to dangerous substances from multiple sources over a number of years. For example, assume that you have been taking a vitamin supplement for a number of years, buying the supplement from different companies that sell it. After a while, the government announces that this supplement can be harmful to health and orders sales to stop. You find out that your health has been affected by this supplement and decide to file a tort lawsuit. The problem is that you don't know which manufacturer's supplement caused you to fall ill, so you cannot prove any specific manufacturer caused your illness. Under the doctrine of joint and several liability, however, you don't have to identify the specific manufacturer that sold you the drug that made you ill. You can simply sue one, two, or all manufacturers of the supplement, and any of the defendants are then liable for the entirety of your damages if they are found liable. This doctrine has been used in cases involving asbestos production and distribution.

The final element in negligence is legally recognizable injuries. If someone walks on a discarded banana peel and doesn't slip or fall, for example, then there is no tort. If someone has been injured, then damages may be awarded to compensate for those injuries. These damages take the form of money, as there is nothing tort law can do to bring back the dead or regrow lost limbs, and tort law does not allow for incarceration. Money is therefore the only appropriate measure of damages, and it is left to the jury to decide how much money a plaintiff should be awarded.

There are two types of award damages in tort law. The first, compensatory damages, seeks to compensate the plaintiff for his or her injuries. Compensatory damages can be awarded for medical injuries, economic injuries (such as loss of a car, 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, pain and suffering is a far more nebulous concept. Juries are often left to their conscience to decide what amount of money can compensate for pain and suffering, based on the severity and duration of the pain as well as its impacts on the plaintiff's life.

The second type of damage award is known as punitive damages. Here, the jury is awarded a sum of money not to compensate the plaintiff but to deter the defendant from ever engaging in similar conduct. 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 to prevent future injuries. Punitive damages are available in cases where the defendant acted with willful and wanton negligence, a higher level of negligence than ordinary negligence. Bear in mind, however, that there are constitutional limits to the award of punitive damages.

A defendant being sued for negligence has three basic affirmative defenses. An affirmative defense is one that is raised by the defendant essentially admitting that the four elements for negligence are present, but that the defendant is nonetheless not liable for the tort. 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. For example, if you decide to bungee jump, you assume the risk that you might be injured during the jump. It's common for bungee jumpers to experience burst blood vessels in the eye, soreness in the back and neck region, and twisted ankles, so these injuries are not compensable. On the other hand, you can only assume risks that you know about. When a person bungee jumps, one of the first steps is for the jump operator to weigh the jumper, so that the length of the bungee can be adjusted accordingly. If this is not done properly, the jumper may overshoot or undershoot the expected bottom of the jump. While you can assume known risks from bungee jumping, you cannot assume unknown risks, such as the risk that a jump operator may negligently calculate the length of the bungee rope.

A related doctrine, the open and obvious doctrine, is used to defend against suits 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 if he or she slips and falls because the spill was open and obvious. Use of the open and obvious doctrine varies widely by state, with some states allowing it to be used in a wide variety of premises liability cases and other states circumventing its usefulness.

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. For example, if you negligently start a house fire while playing with matches and evacuate the house with your roommates, if one of your roommates decides to reenter the burning house to rescue someone else, you cannot rely on assumption of risk as a defense since you started the fire.

The second defense to negligence is to allege that the plaintiff's own negligence contributed to his or her injuries. In a state that follows the contributory negligence rule, a plaintiff's own negligence, no matter how minor, bars the plaintiff from any recovery. This is a fairly harsh rule, so most states follow the comparative negligence rule instead. Under this rule, the jury is asked to determine to what extent the plaintiff is at fault, and the plaintiff's total recovery is then reduced by that percentage. For example, if

you jaywalk across the street during a torrential thunderstorm and a speeding car strikes you, a jury may determine that you are 20 percent at fault for your injuries. If the jury decides that your total compensatory damage award is \$1 million, then the award will be reduced by \$200,000 to account for your own negligence.

Finally, in some situations, the Good Samaritan law may be a defense in a negligence suit. Good Samaritan statutes are designed to remove any hesitation a bystander in an accident may have to providing first aid or other assistance. They vary widely by state, but most provide immunity from negligent acts that take place while the defendant is rendering emergency medical assistance. Most states limit Good Samaritan laws to laypersons (i.e., police, emergency medical service providers, and other first responders are still liable if they act negligently) and to medical actions only.

## Key Takeaways

Negligence imposes a duty on all persons to act reasonably and to exercise due care in dealing and interacting with others. There are four elements to the tort of negligence. First, the plaintiff must demonstrate the defendant owed the plaintiff a duty. If the risk of injury is foreseeable, then the defendant owes the plaintiff a duty. Second, there must be a breach of that duty. A breach occurs when the defendant fails to act like a reasonable person. Professional negligence is known as malpractice. Third, the plaintiff must demonstrate that the defendant caused the plaintiff's injuries. Both causation-in-fact and proximate causation must be proven. Finally, the plaintiff must demonstrate legally recognizable injuries, which include past, present, and future economic, medical, and pain and suffering damages. Defendants can raise several affirmative defenses to negligence, including assumption of risk, comparative or contributory negligence, and in some cases, Good Samaritan statutes.

### ? Exercise 8.3.1

1. Does a private investigator owe a duty of care to potential victims of crime if their clients use information obtained by the investigator to commit the crime? In 2003 a court held the answer is yes. In that case, an Internet-based investigative firm charged fees to a client to find out the Social Security number, place of employment, and home and work addresses of a third party. The client then used the information to stalk and kill the third party. The court held that since the risk of harm is foreseeable, the company owed the third party a duty of care. See *Remsburg v. Docusearch, Inc.*, 816 A.2d 1001 (N.H. 2003).
2. In January 2001 a New York man attended a family birthday party at a Benihana restaurant, where chefs, while cooking at the table, routinely throw pieces of food for diners to catch with their mouths. The man wrenched his neck while ducking a piece of flying shrimp, requiring treatment by several doctors. By that summer, doctors determined surgery was necessary to treat numbness in his arm. Five months after surgery, he checked into the hospital with a high fever and died. The family sued Benihana for \$10 million in damages, claiming that the fever was the result of surgery, which in turn was the result of the chef's actions in throwing food at diners. Do you believe that Benihana should be liable for the man's death? Why or why not?
3. What kind of duty of care do cities that own and operate public transportation systems owe to the paying and traveling public? On February 4, 2010, Shaun Mills was traveling home on a public bus in Jacksonville Beach, Florida. He missed his regular stop, so he got off at the next stop. The sidewalk at this bus stop was closed, so he crossed the street and was hit by a car. The remarkable accident was captured on video. See <http://today.msnbc.msn.com/id/36310494>. Mills survived and is suing the bus company. In this case, what defenses are available to the defendant bus company?
4. Medical malpractice claims tens of thousands of lives per year, leaving victims and their families little recourse except through the tort system. Most doctors purchase medical malpractice insurance policies to pay a claim in case they are sued, but in some cases, these premiums can be exorbitantly high. The fear of medical malpractice suits also drives some doctors to practice "defensive medicine," which further increases the price of health care for everyone. How do you think the legal system can best balance these two competing interests?

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