

## 8.2: GENERAL LAW OF TORTS

### WHAT IS A TORT?

A tort is an act or omission, other than a breach of contract, which gives rise to injury or harm to another, and amounts to a civil wrong for which courts impose liability. In other words, a wrong has been committed and the remedy is money damages to the person wronged.

There are three types of tort actions; negligence, intentional torts, and strict liability. The elements of each are slightly different. However, the process of litigating each of them is basically the same.

### WHAT IS THE STANDARD OF PROOF IN A CIVIL TORT CASE?

As discussed in Chapter 2, there are different standards of proof for criminal and civil cases. Within civil cases there are also two different standards of proof. For civil tort cases, the standard of proof is preponderance of the evidence. Preponderance of the evidence means that it is more likely than not that the defendant is legally responsible for the plaintiff's injuries. If the plaintiff proves their case by more than 50 percent of the evidence, the jury must come back with a verdict in favor of the plaintiff.

### NEGLIGENCE:

Negligence is the most common of tort cases. At its core negligence occurs when a tortfeasor, the person responsible for committing a wrong, is careless and therefore responsible for the harm this carelessness caused to another.

There are four elements of a negligence case that must be proven for a lawsuit to be successful. All four elements must exist and be proven by a plaintiff. The failure to prove any one of these four elements makes a lawsuit in negligence deficient. The four elements are:

- Duty
- Breach
- Causation
- Harm

A basic negligence lawsuit would require a person owing a duty to another person, then breaching that duty, with that breach being the cause of the harm to the other person.

### DUTY:

The first element of negligence is duty, also referred to as duty of care. What is a duty? In its most simplistic terms, it is an obligation to either do or not do something that will harm someone else. Think of duty as an obligation. We all have a duty or an obligation to act reasonably or reasonably refrain from certain actions, in such a way as to not cause injury or harm to another person. For example, as drivers of automobiles on public roads, we all have a duty to follow the rules of the road. It is our obligation as a licensed driver to do so. We understand that rules like speed limits are imposed to protect others. A reasonable person understands that the failure to follow the rules of the road may result in harm to another person.

### S cope of one's duty :

The relationship between parties creates the existence or nonexistence of your duty to them. Depending on what our relationship is to others changes our obligations. For example, a manufacturer's duty of care is to make sure that products they sell are reasonably safe and to provide warnings of any potential dangers that the use of the product may cause. Therefore, the scope of a manufacturer's duty of care is to a consumer who uses the product as intended and properly. The manufacturer may have no duty of care to a consumer who uses the product for a different purpose than intended or if the product is used improperly. Here is another example. A property owner has a duty of care to make sure that her/his property is reasonable safe to those that may enter onto the property. That level of duty of care may be different depending on the relationship of the property owner to those entering the property. The duty of care owed a visitor may be different than one owed a trespasser.

### The reasonable person standard :

A duty of care is based on what a reasonable person, in the same or similar circumstance, would do. A reasonable person is a legal fiction. It is an objective test on not what a person honestly thought was the right thing to do, but what that person should have done based on what a reasonable person would have done in the same or similar circumstance. Note that while the standard of

reasonableness does not change, the “same or similar circumstance” usually does change. The trier of fact, in other words a jury (or judge in a bench trial) decides what a reasonable person would have done based on the circumstances presented to them. Who the members of a jury are matters. That is the point of voir dire as previously discussed in Chapter 5. Voir dire is also part of the civil jury selection process. What is considered reasonable to a jury in NYC may not be so to a jury in Batavia, N.Y., and yet both juries can be right.

### Good Samaritan Laws :

Unless a person has a particular relationship with another person, such as a doctor/patient relationship, a person is not legally responsible to help someone who is in need. A person cannot be sued or arrested for failing to do so. The law does not force people to make moral decisions to help others. There can be many reasons why a person may not volunteer to help someone who is in need. One of them may be the fear that they will be sued by the person in need if they make things worse. To alleviate that concern and thereby encourage people to help others in need, we have what are called “Good Samaritan” laws. These laws provide immunity to those who choose to help others who are injured in the event they unintentionally make matters worse.

### BREACH :

Once a plaintiff has established and proven that a defendant owed a duty of care to the plaintiff, the second element of negligence a plaintiff must prove is a breach of that duty of care. This is when a person or company has a duty of care to another and fails to live up to that standard of care. A plaintiff must prove that the defendant’s act or omission caused the plaintiff to be exposed to unreasonable risk of injury and/or harm. In other words, the defendant failed to meet their obligation to the plaintiff and therefore put the plaintiff in harm’s way.

### Res Ipsa Loquitur :

Bad things happen all the time to people that shouldn’t. In some circumstances, a defendant may be in the best, or only, position to prove why this bad thing happened to someone. This is the legal theory of *res ipsa loquitur*, which is Latin for “the thing speaks for itself.” Just the fact that a certain event occurred and caused harm to someone establishes the defendant’s breach of duty of care. Airplane crashes would be an example of this. To establish *res ipsa loquitur*, three requirements must be met which are:

This event is not something that normally happens without negligence.

This negligence would be attributed to the defendant since this is an event they are responsible for preventing.

Neither the plaintiff nor any other third party is responsible for the harm to the plaintiff.

Taking our example of an airplane crash, we can answer all three requirements. First, airplane crashes do not normally occur without negligence. They are rare events. Second, the negligence of an airplane crash would be with the airline since they are responsible for preventing them. Third, the passengers are not responsible for the harm caused them when a plane crashes. We therefore have *res ipsa loquitur*, the negligence of an airline when a plane crashes speaks for itself. The burden would then be on the airline to show they did not breach their duty of care to its passengers.

### Negligence per se :

We have numerous criminal and civil statutes that prohibit certain acts or omissions that are safety related. The violation of such a statute may establish the breach of a duty of care. This is the legal theory called *negligence per se*. For example, we mentioned above that there are rules of the road such as speed limits that all drivers are expected to obey. If a defendant is therefore speeding while involved in an accident with a plaintiff, the defendant’s violation of the speed limit statute may be *negligence per se*, and therefore established the breach of a duty of care to the plaintiff by the defendant.

### CAUSATION:

The third element of negligence is causation. There are two types of negligent causation, actual cause and proximate cause. Actual cause is sometimes referred to as cause in fact. It means that “but for” the negligent act or omission of the defendant, the plaintiff would not have been harmed. This is known as the “but for” test. For example, driver A is passing through an intersection with a green light. Driver B runs the red light and strikes driver A’s vehicle and injures driver A. Clearly, “but for” the running of the red light by driver B, driver A’s vehicle would not have been struck by driver B, and driver A would not have been harmed.

The second type of negligent causation is proximate cause. Proximate cause requires the natural, direct, and uninterrupted consequence of a negligent act or omission to be the cause of a plaintiff’s injury. Proximate cause also requires foreseeability. It

must be foreseeable as to the result, and also as to the plaintiff. If the result is too remote, too far removed, or too unusual from the defendant's act or omission so as to make them unforeseeable, then the defendant is not the proximate cause of the plaintiff's harm.

For example, driver A is speeding. A squirrel runs in front of driver A's car so driver A swerves, and because of the high rate of speed of which he is traveling, loses control of his vehicle and hits a mailbox. The mailbox flies so violently up in the air from the impact that it hits an overhead powerline. The force of the mailbox hitting the powerline forces the powerline to break off the utility pole onto the sidewalk where it is still electrified. A pedestrian approaching the scene steps on the powerline and is injured by the live powerline. A jury may find that driver A's actions are not the proximate cause of the pedestrian's injuries, because the resulting harm is so remote and so unusual as to render them unforeseeable.

### Eggshell theory :

The "eggshell theory" is the legal doctrine regarding causation that a tortfeasor takes their victim as they find them. So, if a plaintiff is more severely harmed than a normal person because of a preexisting condition, the defendant will still be held as the cause of the harm. For example, let's say our plaintiff has a blood disorder that causes her to bleed and bruise more easily than most people. The plaintiff's injuries due to an automobile accident caused by the defendant are far more severe than would be expected from the low impact of the accident. In fact, most normal people would have been able to just walk away from the accident with no harm. However, the plaintiff was required to receive blood transfusions and remain in the hospital for two weeks as a result of this accident. Under the eggshell theory, the defendant's actions would still be the cause of the harm to the plaintiff even though the results were not foreseeable.

### HARM :

Harm can come in many forms. It can be economic, like medical costs and loss wages. It can be non-economic, like pain and suffering or extreme emotional distress. It can be harm to a person's body, to a family member, or to property. However, if one is not harmed in some way, the fourth element of negligence is not met and the lawsuit in negligence will not prevail.

Harm and causation in some ways are like the chicken and the egg. Which came first? Without harm there is really no causation, just a duty and breach of that duty. However, without causation there is no harm since again, we just have the duty and its breach. Just know this, if there is a duty and breach of that duty, and a subsequent harm or injury, it must be caused by that breach of duty.

If there is a harm or injury, then the law allows for compensation to the person harmed or injured in the form of damages. Damages are typically monetary in nature. In other words, we pay someone money when we injure them due to our negligence. There is in most situations no other way to make a person "whole" again. If you lose your leg in an automobile accident caused by someone's negligence, they cannot get you your leg back. They can however, pay you money to allow you to buy a prosthetic leg, reimburse you for your medical expenditures and loss wages, pay you for future medical expenses, and pay you for all the pain and suffering associated with the injury. These are known as compensatory damages.

### Compensatory Damages:

Compensatory damages are categorized as either general damages or special damages. General damages are non-economic while special damages are economic.

### General Damages:

Below are some examples of general damages.

- Pain and suffering
- Disfigurement
- Severe emotional Distress
- Loss of consortium

### Pain and suffering:

Some damages are quantifiable. You can do the math and figure them out like loss earnings. However, some damages are based on the experience, common sense, and judgment of the jury like pain and suffering. Pain and suffering damages not only include what has already happened, but will likely happen in the future because of the injury. If a person loses their arm, there is pain and suffering associated with the initial injury and recovery. There will also be future pain and suffering as that individual copes with the everyday difficulties, i.e. suffering, of not having that arm.

### Disfigurement:

Disfigurement includes any scarring on the body or loss of a body part. It includes scarring caused by surgery that is a result of the injury. The damages are not quantifiable. Damages are again determined by the experience, common sense, and judgment of the jury.

### Severe emotional distress:

Physical injury is not necessary to prove a person has suffered severe emotional distress. However, physical injury can also cause severe emotional distress. As is the case with pain and suffering and disfigurement, severe emotional distress is not quantifiable.

### Loss of consortium:

The spouse of a person that is injured can sue for damages based on the loss of consortium. This includes the loss of a sexual relationship between the injured person and their spouse. However, it is important to remember that the loss of consortium is the loss of any and all services provided by one's spouse, not just those that are sexual in nature. For example, if the spouse that is injured was the one that typically took care of the household duties but can no longer do so because of their injuries, the cost of hiring someone to do so for the life expectancy of the injured person could be considered as loss of consortium damages.

### Special Damages:

Below are some examples of special damages.

- Medical bills
- Loss of income
- Loss of future earnings
- Custodial care

### Medical bills:

Medical expenses both current and future are recoverable damages. However, they must be reasonable and necessary. Overtreatment is not recoverable and is something that a jury may be asked to scrutinize by the defendant. Regarding future medical expenses, those that can be reasonably ascertained as required in the future can be calculated.

### Loss of income:

The loss of income is a calculation. What income did the plaintiff lose due to the injury suffered? If a person works on commission this may be more difficult to calculate than the loss of income of a person who receives a salary. In those situations, looking at historical earnings can be obtained and used to calculate a reasonable estimate of loss.

### Loss of future earnings:

The loss of future earnings can be calculated based on injury suffered, how it will reasonably impact the ability of the injured person to work in the future, what those earnings would reasonably be, and the life expectancy of the person injured.

### Custodial care:

Custodial care necessary due to the injury can also be calculated based on the reasonable and necessary past and future custodial care required.

### Punitive Damages:

The purpose of punitive damages is to a) punish a tortfeasor and b) discourage further such acts by the tortfeasor and others. Punitive damages are appropriate when the actions of a tortfeasor are deemed by a jury to be intentional, malicious, fraudulent, violent, or otherwise outrageous in nature. They are over and above compensatory damages.

A good example of when punitive damages are awarded would be the *Liebeck v McDonald's* case. In that case, in 1992, the plaintiff, a 79-year-old grandmother, ordered coffee at a drive-thru McDonald's window. She was a passenger in her grandson's vehicle. While the vehicle was still parked in the parking lot of McDonald's, she attempted to take the cover off the cup of coffee when it spilled in her lap. The coffee was so hot that it caused her third degree burns on six percent of her body. She was rushed to emergency. Like many burn victims, she had to endure surgical skin grafts due to her injuries. She was hospitalized for 3 weeks.

She sued McDonald's and won. She was awarded compensatory damages, but the jury also awarded her \$2.7 million dollars in punitive damages. The evidence presented to that jury showed that McDonald's sold its coffee at 180-190 degrees Fahrenheit. That

coffee at that temperature on a person's skin could cause third degree burns in two to seven seconds. The evidence presented also showed that McDonald's knew about this risk for more than 10 years based on the fact that there were more than 700 other claims or reports from other customers that were also burned by McDonald's coffee being too hot. At that time, McDonald's was generating revenues of about \$1.3 million daily from the sale of coffee. After the verdict, the parties agreed to a final settlement which included a non-disclosure agreement. Therefore, the exact amount of damages McDonald's paid to Mrs. Liebeck is unknown. After this verdict, McDonald's decided to lower the temperature of its coffee.

### Nominal Damages:

There are situations where a plaintiff proves their tort case, but a jury finds they have suffered little if any harm. When a jury verdict reaches such a result, they will award nominal damages. Nominal damages are a very small or token award of money to a plaintiff who has proven his/her legal case, but has little in the way of an injury or harm.

## DEFENSES TO NEGLIGENCE:

Often in a negligence lawsuit, the defense will raise what are called "affirmative defenses." This could mean that even if a plaintiff's claims of negligence are true, the defendant may not be responsible if the affirmative defenses can be proven.

### Comparative Negligence:

Sometimes, there is negligence on the part of both parties involved in a negligence lawsuit. When this happens, the jury will be asked by the defendant to consider the comparative negligence of the plaintiff and reduce the percentage of the plaintiff's recovery of damages by that percentage. New York is a pure comparative negligence state pursuant to CPLR §1411.

### Assumption of Risk :

The assumption of risk defense means the plaintiff, either expressly or by implication, understands that the risk of injury is inherent with the situation or plaintiff's conduct and therefore waives the right to recover damages if injured. Sometimes, this is by contract. You want to go skydiving and sign a waiver with the company providing that service assuming the risk of injury if things don't go as planned. Jumping out of an airplane by its very nature is risky.

Another example would be playing high school sports. There are inherent risks associated with playing sports in general, and students who participate in those activities assume the risk of injury.

### Statutes of Limitations:

The law puts deadlines on when most legal actions can be commenced, both civil and criminal. These limits are called "statutes of limitations." They are set by statute. In NYS, most, not all can be found in either the CPLR for civil cases or the CPL for criminal cases. There are numerous reasons for having statutes of limitations. For example, over time memories of witnesses diminish, evidence gets more difficult to obtain or may be lost, and people move. In NYS, a general personal injury negligence case has, pursuant to CPLR § 214(5), a three-year statute of limitations Medical malpractice on the other hand, even though it is based on negligence, has a two-year six-month statute of limitations pursuant to CPLR § 214-a.

### Tolling of the Statute of Limitations:

In some instances, the statute of limitations may be extended or tolled. Under NYS law, a minor usually has three years from the date of their eighteenth birthday to commence their lawsuit. However, if the minor's lawsuit is a medical malpractice claim, the statute of limitations cannot be extended for more than ten years from the date of the act or omission giving rise to the injury. In some situations, such as mental incapacity, the statute of limitations may be tolled three years.

## INTENTIONAL TORTS:

Intentional torts require an intended act by a wrongdoer against another. Some intentional torts can also be criminal. For example, if a person batters someone and causes them harm, this is also a criminal act and the person can be arrested and sued at the same time.

Common intentional torts include:

- Assault
- Battery
- Trespass to Land
- Conversion

- Defamation
- Intentional Infliction of Emotional Distress
- False Imprisonment

#### Assault:

Civil assault is an intentional act by the defendant that causes reasonable apprehension or fear of harmful or offensive contact of the plaintiff. Actual contact is not required. This is a bit different than its counterpart in criminal law where contact is usually required. Assault is an intentional tort to a person.

#### Battery:

Battery is an intentional act by the defendant that causes harmful or offensive contact of the plaintiff. The tort of battery often accompanies the tort of assault where it is referred to as assault and battery. Battery is most similar to criminal assault. Battery is an intentional tort to a person.

#### Trespass to Land:

Trespass to land requires an intentional act by the defendant which causes the defendant to enter or intrude on the plaintiff's land. Trespass to land is most similar to criminal trespass. It is an intentional tort to property.

#### Conversion:

Conversion is an intentional act by the defendant that causes either the substantial invasion thereof or the outright possession by the defendant of the plaintiff's personal property without the plaintiff's consent. Conversion is an intentional tort to property. It is most similar to the criminal statutes of larceny.

#### Defamation :

Defamation is the intentional communication (sometimes referred to as publication) by the defendant to a third person of a false statement about the plaintiff that causes harm to the reputation of the plaintiff resulting in damages. The communication can be in writing, which is called libel, or verbally, which is called slander. The communication or publication must be false. It must also cause damage to plaintiff by either lowering the plaintiff's reputation or exposing the plaintiff to some form of hate, contempt, or ridicule. Defamation is an intentional tort to a person. There is no criminal statute that directly correlates to this tort.

There are First Amendment constitutional restrictions to the tort of defamation. The landmark U.S. Supreme Court case of *New York Times Co. v. Sullivan*, 376 U.S. 254, (1964) established the standard that for a public official to recover damages for defamation, there must be "actual malice" on the part of the defendant publishing the defamatory statement. The Court defined actual malice as either the actual knowledge that the statement the defendant is publishing is false or that the defendant acted with reckless disregard for the truth.

In the *New York Times Co. v. Sullivan*, the plaintiff, Mr. Sullivan, was the Commissioner of Public Safety which included his duty to supervise the police in Montgomery Alabama. He sued the New York Times for a full-page advertisement they published titled "Heed Their Rising Voices" that was paid for by the Committee to Defend Martin Luther King and Struggle for Freedom in the South. The advertisement contained several inaccurate accusations against the police that were defamatory. While the plaintiff won a judgment of \$500,000 in an Alabama state court, the Supreme Court in a 9-0 decision, held that news publications could not be sued for libel by public officials unless the plaintiff was able to establish actual malice in the false reporting of a news story. The Court found that the law applied by the Alabama courts was constitutionally deficient in its failure to protect the First Amendment rights of freedom of speech and of the press. The Court therefore held that the evidence presented in the case was insufficient to support a judgment for Sullivan and ruled that the First Amendment protects the publication of all statements about public officials, even those found to be false, unless the statements are made with actual malice.

Case law has also established the standard of actual malice also applies to public figures. Public figures have been defined as people that have achieved great publicity, fame, or notoriety.

#### Intentional Infliction of Emotional Distress:

Intentional infliction of emotional distress is an intentional act by words or actions of extreme or outrageous conduct by the defendant that causes severe emotional distress of the plaintiff. The extreme and outrageous conduct must exceed all bounds of decent behavior. The emotional distress of the plaintiff must also be severe and far outside that which is ordinary. Intentional infliction of emotional distress is an intentional tort to a person.

The U.S. Supreme court case of *Snyder v. Phelps*, 562 U.S. 443 (2011) illustrates how difficult it is to prove a case intentional infliction of emotional distress. The facts of the case are that on March 3, 2006, Matthew A. Snyder was killed while serving as a Marine in Iraq. On March 10, the Westboro Baptist Church picketed Matthew Snyder's funeral. They did so while on public property, but in view of those attending the funeral service. This was not new to the Westboro Baptist Church as they had picketed a large number of military funerals throughout the country in protest of what they considered an increase in tolerance of homosexuality in the United States. The picketers displayed posters such as "America is doomed", "You're going to hell", "and God hates you", "Fag troops", and "Thank God for dead soldiers."

The Snyder family sued the Westboro Baptist Church for invasion of privacy and intentional infliction of emotional distress. The jury found in their favor and awarded the Snyder family \$2.9 million in compensatory damages, \$6 million in punitive damages for invasion of privacy, and an additional \$2 million for causing emotional distress for a total of \$10.9 million. The case was reversed on appeal by the Fourth Circuit Court of Appeals in favor of the Westboro Baptist Church finding the trial court had erred in its instructions to the jury and that the actions by the church was protected speech. The Snyder family appealed that decision to the U.S. Supreme Court. In an 8-1 decision, the Supreme Court agreed with the Fourth Circuit Court of Appeals determining that the Westboro Baptist Church's speech was related to a public issue and therefore was protected speech that could not be prevented as it was on public property. Intentional infliction of emotional distress is an intentional tort to a person. There is no criminal statute that directly correlates to this intentional tort.

#### False Imprisonment:

False imprisonment is an intentional act by the defendant that causes the confinement of the plaintiff without the plaintiff's consent. The plaintiff must have no known reasonable means of escape. The confinement can be in the form of fixed barriers like a room or just a corner. False imprisonment is an intentional tort to a person. It often involves store security who detains people suspected with shoplifting. It is most similar to criminal statutes of false imprisonment.

### DEFENSES TO INTENTIONAL TORTS:

#### Consent:

The consent by a plaintiff to a defendant's intentional tort, whether orally or in writing, is a legitimate defense. For example, being a participant in fight club would be considered giving your consent. (It should be noted that we have just broken the first rule of fight club.) Consent can also be implied. By being in the middle of a crowd as you try to enter a concert, you have giving your implied consent that you will be touched to some extent by others in the crowd. Your action for battery in such a situation would probably fail by the fact that you gave your implied consent to the unwanted touching.

#### Self-Defense:

A defendant in certain situations may have a claim of self-defense to an intentional tort. The law recognizes that we have the right to defend ourselves by using physical force when we reasonably believe that we are going to suffer imminent harm or offensive contact. There are limits to self-defense. A person can only use the amount of force necessary to protect themselves or protect a third person. In NYS, a person has the duty to leave a situation if possible rather than use physical force in self-defense. The only situation that this does not apply to is the defense of one's home. A homeowner has no duty to retreat or leave their home. When a person is in their home, they may use physical force to defend their person and/or property.

#### Immunity:

Under both the state and federal constitutions, government officials may be immune for certain lawsuits. This is called sovereign immunity. The Eleventh Amendment of the U.S. Constitution grants the states sovereign immunity from being sued in federal courts unless they give their consent. For example, in NYS, government officials are entitled to qualified immunity when they act in their governmental capacity and owe no special duty to a plaintiff. Actions by the police, firefighters, and EMTs fall into this category. If government official actions are more a proprietary function, they can be sued like anyone else. Proprietary functions are generally when the government is doing much the same thing a private enterprise would traditionally do.

#### Statutes of Limitations:

As discussed in the negligence section above, there are statutes of limitations for intentional torts. Assault, Battery, Defamation, False Imprisonment, and Intentional Infliction of Emotional Distress all have one-year statute of limitations under CPLR §215 (3).



## STRICT LIABILITY:

Strict Liability is a very limited theory of tort liability. It has nothing to do with negligence or intent. It applies to situations that are abnormally dangerous. This would include those who work with explosives, fireworks, radioactive materials, or own or control certain dangerous animals. If a person is injured by a defendant while engaged in these activities, liability is imposed regardless of a defendant's intentions or lack of negligence. The law imposes liability as a matter of public policy. In NYS, strict liability even applies to products liability cases.

The New York's Pattern Jury Instruction that defines strict products liability is Section 2:120 which states: "A (manufacturer, wholesaler, distributor, retailer, processor of materials, maker of a component part) that sells a product in a defective condition is liable for injury that results from use of the product when the product is used for its intended or reasonably foreseeable purpose. A product is defective if it is not reasonably safe — that is, if the product is so likely to be harmful to (persons, property) that a reasonable person who had actual knowledge of its potential for producing injury would conclude that it should not have been marketed in that condition."

## PRODUCTS LIABILITY:

Depending on the situation, a products liability claim in NYS may be based in negligence, intentional tort, strict liability, and even contract law for breach of warranties. It includes defects in condition, in manufacturing, in design, and for insufficient or inadequate warnings. The *Liebeck v McDonald's* discussed above in the punitive damages section was a products liability case. One of the claims by the plaintiff Mrs. Liebeck was that the product, coffee, was defective and unreasonably dangerous because it was too hot, which was direct factor in causing her substantial injuries. The *Liebeck v McDonald's* case was under the state of New Mexico law.

New York is a strict products liability state holding the seller, manufacturer, and others in the line of distribution of a defective consumer product, strictly liable when said defective product is a substantial factor in causing a plaintiff harm or injury because the product is not reasonably safe. While most courts throughout the country use the standard of an unreasonably dangerous product as set forth in the Restatement of Torts, Section 402A, New York does not.

The NY Court of Appeals in the *Voss v. Black & Decker Manufacturing Company* 59 N.Y.2d 102 (1983) established a lower standard for strict products liability ruling "In order to establish a prima facie case in strict products liability for design defects, the plaintiff must show that the manufacturer breached its duty to market safe products when it marketed a product designed so that it was not reasonably safe and that the defective design was a substantial factor in causing plaintiff's injury." [59 N.Y.2d 108] The NYS standard is an advantage to a plaintiff because requiring that a jury find a product must be unreasonable safe implies to a jury that a product must somehow be extra hazardous. The standard of not being reasonable safe does not.

## DOG BITE LAWSUITS AND STRICT LIABILITY:

According to a study by the Insurance Information Institute and State Farm in 2015, dog bites accounted for one third of all homeowner claims. The study found 880 claims for dog bites in NYS with the average damages award being about \$44,000.

NYS does have strict liability for plaintiffs who are injured when bitten by a dog. However, plaintiffs in dog bite cases in NYS must prove that an owner had prior knowledge before the dog bit the plaintiff, of the dog's vicious propensity. The New York Court of Appeals in the case of *Collier v Zambito*, 1 NY3d 444 (2004) ruled that a jury is entitled to consider any evidence of vicious propensity with a prior bite being only one type of such evidence. The Court pointed out that vicious propensity can be proven by something less than an actual prior bite. The court gave examples such as a dog that growls, snaps, or bares its teeth could be evidence of vicious propensity. Other actions like jumping up on people and/or knocking people off their bicycles could be interpreted by a jury as vicious propensity.

The New York Pattern Jury Instruction 2:220 defines vicious propensity as "a natural inclination or usual habit to act in a way that endangers people or property". The plaintiff also has to prove the dog owner knew, or should have known, of the vicious propensities. A dog owner is responsible for any injury on a strict liability basis if the owner continues to harbor the dog with knowledge of the dog's vicious propensities. The requirement of vicious propensity applies to other animals besides dogs. In NYS, there is no claim in negligence for dog bites.

There is also strict liability under the Section 121 of the Agricultural & Markets statute which makes the "owner or lawful custodian" of a "dangerous dog" "strictly liable" for medical costs resulting from "injury" caused by such dog to a person, "companion animal," farm animal, or "domestic animal."



## THE PATH OF A NEGLIGENCE CASE:

While similar in some ways to the path of criminal case, there are significant differences. First, the attorneys are not working for the government like a district attorney in a criminal case. The path of a typically negligence case is as follows:

- Summons & Complaint
- Service of the Summons and Complaint
- Answer
- Discovery
- Deposition/Examination Before Trial
- Request for Judicial Intervention
- Motion for Summary Judgment
- Note of Issue
- Settlement
- Trial

### Summons & Complaint:

In NYS, the filing of a summons and complaint is the start of a civil action. A summons is a document that states a lawsuit against a defendant has been started against her/him. It also states that the defendant must answer the complaint. The complaint is a document that sets for the grounds, facts, and damages required to establish a lawsuit against the named defendant. It is known as a pleading. A plaintiff must file a summons and complaint with the county clerk where the lawsuit will be brought. The venue, or place the lawsuit is brought, must be proper. The proper venue is set out by statute in the CPLR. Once the summons is filed, and the fees paid, the county clerk will issue an Index Number that will be added to the summons and all pleadings of the lawsuit.

### Service of the Summons & Complaint:

Once the index number is purchased and the lawsuit has been started by filing the summons and complaint with the county clerk, the summons and complaint must be properly served on the defendant. Proper service is set out by statute in the CPLR. Depending on the situation, the statute may require personal service on a defendant or allow service by mail. A plaintiff cannot serve a summons and complaint on a defendant themselves. The CPLR establishes who is allowed to serve these pleadings. Most plaintiffs use a professional process service person or company.

### Answer

Once a defendant is served with a summons and complaint, they will have either twenty or thirty days, depending on how they were served, to provide their answer to the complaint. The answer is a document that is a response to the complaint. It is a pleading. The failure to serve this answer in timely manner could result in a default against the defendant, which means the plaintiff will be granted by a court the relief they are demanding against the defendant.

### Discovery:

Discovery is the process by which both parties are required upon demand by the other, to provide information that relates to the lawsuit. The law allows and demands that the parties cooperate with each other in this process. There are many forms of discovery, and the process is extremely important to both parties in a lawsuit. Both parties need access to information that only the other party has control over to either prove their case or properly defend against. For example, in an automobile negligence case, the plaintiff may be claiming that the defendant was distracted while driving because he was texting on his cell phone. The records that could prove whether this assertion is accurate are under the control of the cell service provider of the defendant. The plaintiff may demand upon the defendant a discovery demand that the defendant obtain and forward said records to the plaintiff. In the same lawsuit, the defendant may assert that the plaintiff is not as injured as he claims. and serve a discovery demand on the plaintiff requiring the plaintiff to submit to a medical examination by the defendant's doctor.

### Deposition/Examination Before Trial:

The taking of a deposition or examination before trial (EBT) is one of the most significant parts of a lawsuit and discovery. This is typically the first time in the process that the parties and their attorneys will see each other. The party being deposed will be put under oath and will be asked questions by the opposing counsel. Lying at a deposition is subject to perjury penalties. The proceeding will be before a stenographer. The stenographer will record precisely word for word what is being asked, answered, and

said at the EBT. The stenographer will then create a written transcript that can be used at trial by either party. EBTs are an extremely important part of the process of a civil lawsuit.

#### Request for Judicial Intervention:

The Request for Judicial Intervention is a formal legal document filed with the county clerk, usually by the plaintiff, asking the court assigned to the lawsuit to now get involved. The court will set up times for the parties to meet with the court to determine where the parties are in the process, and whether the court needs to get involved in moving the process along. At some point, the court will inquire from the parties whether there is a possibility of settlement. If so, the court may get involved in getting the parties together to move the settlement along to a mutually agreeable conclusion.

#### Motion for Summary Judgment:

A motion for a summary judgment is an application before the court by either party. The parties in a motion for summary judgment are asking the court to find that there is no question of fact for a jury to decide and that as a matter of law the judge should therefore rule in their favor thus ending the case. The plaintiff would be asking for a judgment against the defendant without the need to go to trial, while the defendant would be asking for a judgment against the plaintiff dismissing the case.

#### Note of Issue:

Once the entire discovery phase of the lawsuit is completed and the parties feel they are ready for trial, the plaintiff will file a formal document known as a Note of Issue with the county clerk. This will put the case on the court's trial calendar. It would not be unusual for it to take up to eighteen months or more for a case to get to trial once the Note of Issue is filed.

#### Settlement:

Settlement is the process where the parties agree to a result between themselves. It can occur anywhere in the path of a lawsuit, even after a jury verdict. The strength or weakness of a case determines whether a lawsuit will settle or not. It also determines the amount of a settlement. The funds available also greatly influence the settlement process. Is there insurance coverage involved and if so, what are the limits of said insurance policy? For example, a serious injury suffered by a plaintiff without the ability to collect the money damages that would be appropriate for such an injury because the defendant is not adequately insured and financially incapable, may affect the settlement process. Just as it is the case that most criminal defendants will take a plea bargain instead of going to trial, so too will the vast majority of parties in civil lawsuits agree to a settlement before trial.

#### Trial:

A civil negligence trial will be similar in format to a criminal trial. There will be a jury selection which is the same as that of a criminal trial. For a civil case, there are six jurors. The judge will speak to the jury at the start of the trial to explain to them what their role is, the rules they must follow, and how the trial will proceed. The attorneys will have the opportunity to make opening statements to the jury. Since the plaintiff has the burden of proof, the plaintiff's attorney will go first, followed by the defense attorney. The plaintiff will then present evidence through various witnesses with the defense attorney having the opportunity to cross exam said witnesses. Once the plaintiff is done with their side of the case, the defense has the opportunity to present their witnesses and evidence in their defense. There will then be closing statements to the jury with the plaintiff going first. The judge will then charge the jury with the law. They jury will then deliberate and deliver a verdict. The standard of proof for a civil negligence case is preponderance of the evidence. The jury verdict does not have to be unanimous, just five of the six jurors are needed to decide a case and deliver a verdict. The verdict will include the remedy. If the plaintiff wins, the amount of damages will be decided by jury. If the defendant wins, the case is dismissed.

There are situations in civil trials where both parties are suing each other. It makes the trial more complicated, but the process and format are basically the same.

### WHAT ARE THE THREE MOST COMMON CIVIL REMEDIES?

The most common remedy in civil cases is money damages. However, there are two other types of remedies available to plaintiffs and civil courts; injunctions and specific performance orders.

#### Injunction:

An injunction is a court order telling a defendant to stop doing something. For example, a plaintiff may sue a defendant developer asking the court to issue an injunction to stop the developer from cutting down trees on land the developer owns because the plaintiff thinks the developer is hurting wildlife, and therefore violating the law by doing so. Sometimes, judges will issue a

preliminary injunction to stop certain actions until the judge can make final more informed decision. When this happens, the judge will give the parties' time to present evidence to support their respective positions before the judge decides on whether to issue a permanent injunction.

### Specific Performance:

Specific performance is an order from the court telling a defendant to actually do something. While rare, specific performance is appropriate when money damages just won't cut it. For example, if the object of the lawsuit is a unique antique which the defendant now refuses to sell to the plaintiff pursuant to a valid contract between the parties, the court would order the turning over of that specific antique to the plaintiff pursuant to the terms of the contract by issuing a specific performance order.

## WORKERS' COMPENSATION:

What happens when an employee is injured on the job? For these types of cases, New York State (and most other states) has adopted a no-fault system called workers' compensation. In workers' compensation cases, an administrative board decides if the injury was sustained in the course of employment, and, if it was, the worker will receive a fixed award, predetermined by a regulated schedule, for both wage replacement and medical expenses. A worker is not required to hire an attorney, although many do.

## THE ROLE OF INSURANCE IN TORT LAW :

Lawsuits can be expensive and stressful. Insurance protection can often be purchased to protect a person or business from potential monetary damages from some tort lawsuits. It should be noted that there is no insurance available for intentional torts.

Common examples of insurance coverage include:

### Homeowners Insurance

Most homeowners have insurance not only to protect them from fire damage, but from lawsuits such as a guest who trips and falls on their property or is bitten by their pet dog.

### Malpractice Insurance

Most doctors and hospitals have insurance to protect and defend them from lawsuits brought by patients who sue for inadequate or improper medical care. Lawyers and other professionals also carry malpractice insurance.

### Business Liability Insurance

Businesses usually have insurance to protect them from lawsuits brought by customers for slip and fall cases, false arrest claims, or product liability.

### Workers' Compensation Insurance

Employers in NYS are required to have this insurance to provide coverage for their employees that are injured while on the job.

### Automobile Insurance

In NYS, all registered vehicles are required by law to have insurance. Automobile accident lawsuits are regulated by the NYS no-fault insurance statute.

## NO-FAULT AUTOMOBILE INSURANCE

In 1974, NYS passed Article 51 of the New York State Insurance Law, formally titled "Motor Vehicle Reparations Act", and commonly known as "no-fault."

Under this law, anyone registering a motor vehicle in New York State is required to have at least the minimal amount of automobile insurance coverage for that vehicle. If that vehicle is involved in any kind of an auto accident, whether they are the driver or someone else with their permission is, their insurance carrier will be responsible up to \$50,000 of the medical expenses and economic losses caused by the accident to the driver and occupants of that vehicle regardless of who is at fault. Thus, we get the name no-fault insurance.

Under this statute, lawsuits for automobile accident cases are only allowed when a plaintiff is seriously injured, as defined by the statute. Insurance Law § 5104(a), (b) provides that a plaintiff in a personal injury action arising out of negligence in the use or

operation of a motor vehicle must establish that he/she has incurred a basic economic loss exceeding \$50,000 or must establish that he/she has suffered “serious injury”.

Insurance Law § 5102(d) defines serious injury as personal injury which results in one of the following:

- Death
- Dismemberment
- Significant disfigurement
- Fracture
- Loss of a fetus
- Permanent loss of use of a body organ, member, function, or system
- Permanent consequential limitation of a body organ or member
- Significant limitation of use of a body function or system

Medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person’s usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment.

The minimal amount of liability coverage you can purchase in NYS is:

- \$10,000 for property damage for a single accident
- \$25,000 for bodily injury and \$50,000 for death for a person involved in an accident
- \$50,000 for bodily injury and \$100,000 for death for two or more people in an accident

There are three objectives of this law:

- (1) Reduce automobile accident litigation to only the most serious injured plaintiffs.
- (2) Provide automobile accident victims with more prompt compensation for their economic losses caused by the accident.
- (3) Lower the cost of automobile insurance, since there would be less litigation.

## DO ALL DRIVERS CARRY THE MINIMUM INSURANCE?

No. Many drivers purchase more insurance than the minimal insurance required by law. They do so in case they are responsible for an accident and the injured plaintiff is seriously injured or killed. In those situations, the damages can easily exceed the minimum insurance amounts. If this happens, the injured plaintiff can sue and obtain a judgment for more than the insurance amount. The defendant is responsible for damages that exceed their insurance coverage.

This could place the defendant in financial jeopardy if they have to pay such judgment out of their own assets. If cash and assets are insufficient to cover the judgment, a long-term wage garnishment could be placed on the insured wages as a collection tool.

## DOES NEW YORK MANDATE COVERAGE TO PROTECT YOUR OWN VEHICLE?

No. NYS does not require what is called collision insurance. However, most lenders and lease agreements do require the owner or person registering the vehicle to purchase said insurance. Collision insurance pays for damage to your vehicle caused by an accident. It does not take into consideration fault in providing payment or repairs to the vehicle. However, fault could affect future premiums or cost of your insurance. Most collision insurance requires what is called a deductible amount. This is the amount you as the insured must pay first for damages to your vehicle before the carrier. Typical deductible amounts are \$500 to \$1,000. Collision insurance will cover the repairs to your vehicle even in situations where you may accidentally hit a tree or post, and no other vehicle is involved.

There are also other coverages a consumer can purchase as part of an automobile insurance policy. Typically, glass coverage, car rental costs, and comprehensive coverage for damages caused by fire, theft, and vandalism are available.

All NYS automobile insurance policies have uninsured coverage provisions. In the event you are seriously injured by a vehicle that is uninsured, your insurance carrier will reimburse you up to the amount of uninsured coverage provided in your policy. There is also underinsured coverage available for purchase in the event the defendant you are suing has coverage that does not meet the amount of your damages.

## WHAT IS NOT COVERED BY NEW YORK'S NO-FAULT INSURANCE?

While NYS's no-fault insurance covers the majority of every-day insurance claims, there several exclusions.

- a) Injuries to a driver or passenger of an uninsured vehicle.
- b) Injuries to a driver or passenger who acts intentionally causing his/her own personal injury.
- c) Injuries to an intoxicated driver or a driver who is impaired by drug use.
- d) Injuries to the driver of a stolen car.
- e) Injuries to a driver operating a car in a race or speed test.
- f) Injuries sustained by a driver who is committing a felony or fleeing from pursuing law enforcement officer.
- g) Injuries to a driver or passenger of a motorcycle.

Where a policy limits the insurer's liability to certain designated uses of the insured vehicle, like personal use, then damages will not be paid by the insurer if, at the time of the accident, the vehicle is being used for other purposes like delivering pizzas or as an Uber driver.

## MOTORCYCLE INSURANCE:

Motorcycle insurance and liability rules in New York are very different than that for cars. A motorcycle is not a motor vehicle as defined under the no-fault insurance law. Therefore, a motorcyclist is not a covered person under the no-fault insurance law which also means they are not entitled to the medical and lost wage benefits of said law. However, motorcyclists injured in motor vehicle accidents are also not subject to the serious injury threshold that motor vehicle drivers are subject to. So, a person injured on a motorcycle can bring a claim against the defendant driver even for minor injuries that would not pass the no-faulty insurance threshold.

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