



“Each problem that I solved became a rule which served afterwards to solve other problems.”

– René Descartes

Civil (vs. Criminal) Wrongs

A *tort* is the violation of a legal responsibility when that violation directly causes injury to a person’s body, property or rights. Both the law of torts and criminal law deal with socially unacceptable conduct, but torts and crimes are brought to court for different purposes, by different people, and are handled by the courts using different rules. The same conduct can be both a crime and a tort, simultaneously, but each is treated independently and is analyzed and resolved by applying different rules.

Although a criminal act usually has an individual victim, the act is a crime because it is also a serious offense against a public interest: the peace and safety of the community. The alleged wrongdoer is brought to court by a prosecutor on behalf of the public, and if the defendant is found guilty, he or she is punished by the state.

On the other hand, a tort is a civil wrong that has injured a victim. That victim, not the state, brings the claim to court, and if the defendant is found responsible, he or she may be ordered to pay money damages to the victim to compensate for the injury or wrong. In a tort case, the chief goal is not to punish the wrongdoer but to “make the victim whole” to the extent that money can do so.

In tort cases (and other types of civil lawsuits) the victim claiming to be injured and seeking compensation for alleged damages is called the *plaintiff*, and the party from whom the compensation for damages is sought is called the *defendant*.

What Makes a Tort?

Four things together make a tort, and a tort lawsuit will succeed only if the plaintiff who brings the suit against the defendant proves all four:

- the defendant owed a duty to the plaintiff;
- the defendant violated (or breached) that duty;
- the plaintiff suffered an injury or other loss; and
- the defendant’s breach of duty directly and proximately caused the plaintiff’s loss.

A Legal Duty Owed to the Plaintiff

First, there is no tort unless the defendant owed a legal duty to the plaintiff. For example, the owner of a ballpark ordinarily has no duty to prevent a spectator from being struck by a batted ball because such a risk is inherent in the sport.

Even where there is a duty, the scope of the duty varies according to the relationship of the parties and other circumstances. For example, when broadcasting damaging information about an ordinary citizen, a television station has a duty to use reasonable care that the information is accurate. When airing the same sort of story about a public figure such as a politician, however, the station’s duty is diminished: a public figure can recover damages for defamation only if he or she can prove that the television station acted with *actual malice* (real and deliberate cruelty) in broadcasting the false, damaging information.

Sometimes the duty is created and defined by a statute or ordinance (such as the traffic laws that require drivers to stop at red lights and maintain a safe following distance), but many legal duties are defined by case (*common*) law. The duties recognized in case law have grown out of previous court decisions or other legal customs, and some of them have been used for decades, or even centuries. One of these common law standards is

the broad rule that a person must act with reasonable care for the safety of others.

Violating the Duty

Second, there is no tort unless the defendant breached his or her legal duty. If the material or controlling facts in a case are not disputed, a judge can decide whether the defendant's actions (or failure to act) under the given circumstances violated a legal duty. If the facts are in dispute, usually a jury decides whether a breach of duty has occurred.

Injury or Loss to the Plaintiff

Third, there is no tort unless the plaintiff suffered an injury. A breach of duty without an injury is wrong without harm, so it is not a tort. The injury may be physical damage to a person or property, or injury to (or loss of) a valuable right or interest. The injury need not be great, but it cannot be insignificant. The legal rule dismissing non-significant losses is *de minimus non curat lex* (literally, "The law does not cure trifles").

Violation of the Duty is the Direct Cause of the Injury or Loss

Fourth and finally, there is no tort unless the defendant's breach of duty directly and proximately caused the plaintiff's injury. If the breach did not result in the injury, or if the same injury would have happened even without the breach, then the breach did not cause the injury.

How Tort Rules Apply

The examples provided below may help to clarify how the four elements of tort apply.

Owing a Duty

Suppose a trespassing woman is injured when she sneaks into a man's yard after dark and falls into a ditch. Neighborhood children have often played on the property with the man's permission. If the property owner had been reasonably careful,

he would have put a fence around the ditch to prevent accidents. Still, the man had no reason to expect the presence of a trespasser. The man has not committed a tort because a landowner ordinarily does not owe the duty of reasonable care to an adult trespasser. In this context, the property owner's duty is simply to not intentionally injure the trespasser. Legally, it does not matter that the landowner did not use reasonable care to keep his yard safe, or that someone was injured because of his failure to do so.

Violating the Duty

Suppose a doctor performs surgery on a heart patient, and she completes the operation exactly the way a good heart surgeon is supposed to do. Nevertheless, as even the most careful surgery involves the risk of infection, this patient is infected during surgery and his heart is damaged further. Assuming she informed the patient of the risks before surgery, the doctor has not committed a tort. She had a duty to so advise the patient and treat the patient with the degree of reasonable care used by competent heart surgeons, but because she performed the surgery according to reasonable professional standards, she did not breach or violate that duty. The patient was injured as a result of the surgery, but not as a result of anything the doctor did wrong.

Injury to the Plaintiff

Suppose a barber sees a spot of grease just inside his shop's front door, but turns away to answer his telephone and forgets to clean up the spot. Five minutes later, a customer walks in the door and slips on the grease. He is able to keep from falling by grabbing onto a railing, but he is embarrassed that people have seen him lurch so clumsily because he is well known locally as an athlete. The barber has not committed a tort. Even though he owed the customer a duty of reasonable care and breached that duty by failing to take steps promptly to eliminate the danger caused by the grease, the customer was not injured. His embarrassment, without any physical harm, is

not enough to count as an injury for purposes of the law.

Violation of the Duty is the Direct Cause of the Injury or Loss

Suppose a taxi driver races across town while his passenger sleeps, then slows down to the speed limit when the passenger awakens. After he has been driving with reasonable care for five minutes, a truck suddenly pulls out in front of him, and his passenger is injured in the resulting accident. The cabby had a duty to his passenger to use reasonable care while driving and he violated that duty by speeding, and his passenger was later injured. Nevertheless, the cabby has not committed a tort because the passenger's injury was not directly and proximately caused by his speeding. The cabby's breach of duty was long over and done with by the time of the accident. If the passenger has a tort claim, it is against the truck driver.

Torts That Are Crimes

Sometimes an act, or the failure to act when action is legally required, is both a tort and a crime. For example, a man who shakes his girlfriend's crying baby so recklessly that the baby dies may be prosecuted for the crime of *involuntary manslaughter*—meaning that he did not intend to kill the baby, but his criminal violence caused the death just the same. Because the man's gross (or extreme) lack of reasonable care directly caused serious injury, he committed a tort as well as a crime, so he may be prosecuted. Also, the baby's mother may sue him for the damages he caused. In some criminal cases, the court can order the defendant to pay *restitution* (that is, to compensate the victim for his or her loss). Usually, however, in order to recover money damages for such a tort, the victim must sue the wrongdoer in a civil case separate from the criminal prosecution. (Often, no suit is pursued because, although the victim can prove a legal right to compensation, the defendant has no

money to pay the amount a court would order him or her to pay).

Once in a great while—as in the O.J. Simpson cases—a victim can recover compensation in a tort suit even though the wrongdoer was not convicted of the crime. That is possible because proof of a crime requires more convincing evidence than what is needed to prove a tort. Although the prosecutors had been unable to prove *beyond a reasonable doubt* (the criminal standard) that Simpson had committed murder, the families of the victims won a separate tort suit for financial damages against Simpson because they proved by a *preponderance*, or greater weight, of the evidence (the civil standard), that Simpson had killed their loved ones.

Tort Cases: Negligence

Most lawsuits in tort are based on *negligence*, and more negligence cases arise from traffic accidents than from any other cause. As described in the last section, negligence cases involve conduct that falls short of the legal standards established to protect others from harm. Negligence is proven by showing that the defendant owed a duty to the plaintiff to exercise reasonable care and violated that duty. In many negligence cases, the standard of reasonable care is defined by common law as the sort of conduct that a “reasonably” careful person would use in the same circumstances. In some cases, however, a higher or lower standard of reasonable care is applied. For example, the professional conduct of a person with special skills such as a doctor or a lawyer is evaluated by comparing that person's conduct with the standards normally maintained by other such professionals in the same circumstances, unless the standards maintained by the profession are not themselves reasonable. In other words, reasonable care for a lawyer is not merely doing what any reasonably careful person would

do, but doing what a person trained and skilled in the practice of law would normally do.

Similarly, the conduct of the very young must be judged according to what would be reasonable to expect of persons of similar age, intelligence, capacity and experience. The conduct of persons acting in emergencies is judged according to what would be reasonable to expect of others under similar conditions.

Proof of Negligence

In some types of cases, a plaintiff can prove that the defendant violated his or her duty simply by showing that he or she broke a law that defines specific conduct as negligent. For example, running a red light or blindly shooting a gun on a crowded playground is negligence *per se* (as such).

Where it is impossible for the plaintiff to prove that it was the defendant instead of another person who breached a duty, in some cases the law allows the plaintiff to make that proof using the rule of *res ipsa loquitur* (“The thing speaks for itself”). This rule applies only when the incident that injured the plaintiff would not happen unless someone were negligent and the cause of the injury were completely under the defendant’s control. For example, if a surgical sponge is left inside a patient after an operation, the patient does not need testimony from someone who is willing to admit he or she actually saw what happened during the surgery. It is enough to show that surgical sponges do not end up in patients unless someone violated the duty of reasonable care and that the person in charge of the surgery was the only one in a position to do so.

Typical negligence cases arise out of:

- traffic accidents (which are considered in detail later in this section);
- hazards on property controlled by the defendant (such as a restaurant’s broken porch step or a dangerously placed electrical line at a construction site); and
- the failure of some person with special knowledge and skill (such as an engineer or an accountant) to do what would have been

reasonable for someone knowledgeable and skilled in that sort of work.

Other Tort Lawsuits

Negligence is the most common basis of liability used in tort law, but there are others. Some of these are: intentional interference with individuals or property; misuse of the legal process; defamation of character; and product liability.

Intentional Interference with Property or Persons

Trespass is an unauthorized entry onto real property, such as land or buildings. Trespass also can be an invasion of another’s personal property, such as tampering with his or her car. Another example is *conversion* (the civil aspect of property theft), which occurs when one person improperly assumes control of another’s property for his or her own use or benefit. Stealing another person’s watch and pawning it is an example of the tort of conversion.

Assault, battery, false arrest and false imprisonment are examples of torts dealing with intentional interference with a person’s liberty. *Assault* is a threat of violence; it may or may not include a physical attack. Assault, even without a physical attack, may be enough to give rise to a tort action. If an individual is physically attacked, the tort becomes *battery*.

False arrest and false imprisonment are similar; both involve the unlawful detention of one person by another. For example, a police officer who arrests a person without probable cause to do so may be liable for *false arrest*. A store owner who refuses to allow a customer to leave the premises without a valid reason to believe the customer had done something wrong may be liable for wrongful detention.

In torts based on intentional interference with people or property, defendants can avoid legal liability if they prove that:

- the defendant's conduct was permitted (*privileged*) in the circumstances;
- the plaintiff consented to the conduct;
- the defendant was acting in self-defense or protecting his or her property; or
- the defendant was driven by necessity.

Misuse of Legal Procedure

Individuals sometimes commit torts by misusing the legal system. Suppose neighbor A brings about criminal or civil proceedings against neighbor B simply out of spite or hatred, without a reasonable basis to believe that B committed the wrong alleged by A. In such a case, A may be liable to B for malicious prosecution. *Abuse of process* may occur when a person who has initiated a proper legal proceeding improperly causes a warrant, summons or subpoena to be issued against another.

Even some misuses of legal process that are not torts can result in penalties. For example, a court can sanction people involved in lawsuits who will not "play by the rules" of procedure, especially when that failure harms another party, and particularly when harming another party seems to have been the reason for the misconduct. Also, those who habitually file frivolous legal claims may be prohibited from filing new cases without the judge's permission.

Defamation of Character

Defamation is a false and derogatory statement made by one person about another. Writing that defames someone is called *libel*; speaking that defames someone is called *slander*. Plaintiffs in defamation cases typically allege that the defendant wrote or said something that caused people to believe: 1) that the plaintiff is of low character and morals; 2) that, as a result, the plaintiff's good reputation and community standing were damaged; and 3) sometimes, that the plaintiff lost business or sustained some other financial loss as a result of the defamation.

In defamation cases, truth is an *absolute defense*. In other words, if a newspaper accuses a businessman of accepting bribes, the businessman

cannot recover for the injury done to his reputation if the evidence shows that he actually did take bribes.

Strict Liability/Product Liability

In cases of *strict liability*, the plaintiff does not need to prove that the defendant acted intentionally, recklessly or negligently, but only that the defendant's conduct caused the plaintiff's injury or loss.

Strict liability applies where the plaintiff's injury was caused by a dangerous substance (such as explosives, poison, or radioactive materials) that was under the defendant's control. Strict liability also applies in product-liability cases, where the plaintiff's injury was caused by a defective product created or sold by the defendant. A well-publicized example of strict liability is the class-action lawsuit filed against Firestone in the late 1990s. In that case, the plaintiffs claimed that many people had been killed or seriously injured when the company's tires blew out, and that the blowouts were a result of a defective tire design.

A product may be defective in several ways: in its design or formulation; in its manufacture or construction; because the instructions or warnings as to its use were inadequate; or because it did not work as advertised or intended.

Traffic Accidents

A person who operates or is responsible for a motor vehicle may be involved in an injury accident that results in a lawsuit. In such cases, the injured person bringing suit (the *plaintiff*) usually claims that the injury was caused because the defendant failed to exercise reasonable care in operating a motor vehicle. Even though the person operating the vehicle may have been directly responsible for the accident, others also may be liable for the plaintiff's injury. For example, the driver as well as the driver's employer may be held liable if the driver was driving the vehicle in the course and scope of the employment.

(See “*Responsibility for Employees and Agents*” on page 53.)

Because traffic accidents are the most common form of tort suit, Ohio law requires persons applying for a vehicle registration or an operator’s license to prove their ability to pay for damages caused in an accident—no matter whose conduct causes the accident. The most common way to show financial responsibility is proof of a valid insurance policy with liability coverage.

The minimum amount of coverage required by Ohio law is:

- \$12,500 for personal injury or death of one person in any one accident;
- \$25,000 for personal injury or death of two or more persons in any one accident; and
- \$7,500 for damages to another’s property in any one accident.

Ohio law requires any person who obtains a driver’s license or registers a vehicle to sign a statement indicating that he or she will not operate any motor vehicle unless covered by an acceptable and valid insurance policy that compensates accident victims. Vehicle owners who fail to maintain appropriate financial responsibility face license suspension, the impounding of their registration papers and license plates, plus court costs and additional fees. Also, a person whose license has been suspended for any reason, or who is placed on probation for any traffic offense, must sign a proof-of-financial-responsibility statement stating that he or she can pay for the personal injuries or property damage of others caused by his or her operation of a motor vehicle.

In addition to these legal problems, the possibility of having to defend a lawsuit and pay a large amount of money out of one’s own pocket in the absence of insurance should encourage people to maintain adequate coverage. Finally, where a driver’s momentary lapse of attention or judgment has caused serious injury to an innocent person, there is some moral satisfaction in being able to reimburse that person for his or her injury and loss.

Financial Responsibility Accident Report

Aside from any accident report that may be filed with the police, and providing both parties are insured, neither party is required to file a report with the Bureau of Motor Vehicles (BMV). However, if a motorist involved in an accident has reason to believe the other party was not insured at the time of the accident, that motorist has six months to file a BMV accident report (Form 3303) and to allege that the other party was not financially responsible. After the report has been filed, the BMV contacts the other party, who must prove that he or she had insurance coverage or some other means of assuming financial responsibility. Form 3303 is available from the BMV, insurance companies and independent insurance agents, and can be downloaded from the Internet through http://bmv.ohio.gov/pdf_forms/3303.pdf.

Stopping and Exchanging Information at an Accident

Ohio law requires a driver who is involved in a motor-vehicle accident to stop the vehicle immediately and provide information to the owner, driver or person in charge of the other vehicle, anyone injured in the accident, or to a law-enforcement officer at the scene. That information is: the driver’s name and address; the vehicle registration number; and, if the driver is not the owner of the vehicle, the name and address of the owner. Here are some other rules about traffic accidents:

- If an injured individual cannot understand or write down pertinent information, the other driver must notify the police department and wait until a police officer arrives at the scene, unless the other driver is transported to a hospital by an ambulance or other emergency vehicle.
- If an accident occurs on public or private property other than a public road (in a shopping center parking lot, for example), all drivers involved in the accident must give the required

information, on request, to any injured person, and to the owner of the damaged property. Drivers must also show their operator's license upon request. If drivers do not provide the information at the time of the accident, it must be reported to the police within 24 hours of the accident.

- If an accident causes damage to land, or to property attached to the land, such as a building or utility pole, the driver must stop and take reasonable steps to locate the owner of the property. If the owner cannot be located, the driver must report the accident and supply personal information to local law-enforcement authorities within 24 hours.
- If an accident damages an unattended vehicle, the driver must leave a written note—normally placed under the windshield wiper—providing personal contact information.
- Leaving the scene of an accident or failing to provide the necessary personal information is a serious offense, and people who do so are liable for a maximum fine of \$1,000, or a six-month jail term, or both. In some cases of leaving the scene of an accident, a court can impose a license suspension of at least six months and up to three years. Also, because leaving the scene may be interpreted as an admission of fault, fleeing may be used as evidence against the driver if a lawsuit is filed.

What to do at accident scenes

- Do not move the car until the police arrive unless the car is a traffic hazard.
- Cooperate with law-enforcement officers.
- Warn other drivers of any danger. It is a good idea to carry flares, reflectors, or warning lights in an emergency kit.
- Get names, addresses and license plate numbers of other drivers, their insurance carriers, passengers and witnesses. If it is not possible to get all this information, the driver should at least get license plate numbers of the other drivers involved in the accident.
- Take notes and make sketches concerning the accident and its circumstances. If a camera is available, the driver should take pictures of the scene and make notes about the location of the camera in relation to the subject of each picture.
- Attempt to make anyone seriously injured more comfortable until emergency medical personnel arrive. Although Ohio's Good Samaritan statute (*Ohio Revised Code*, Section 2305.23) protects those who, without willful or malicious misconduct, offer assistance to an injured person, an injured person should not be moved by anyone but medically trained personnel except in an extreme emergency.
- Report the accident to your insurance company immediately. Most insurance policies require such a report, and any delay can jeopardize coverage.
- Do not make any payment in a personal-injury or property-damage accident without consulting an attorney. No settlement offer should be accepted without legal advice.

Liability for the Acts of Others

Under certain circumstances, individuals, employers and parents may be responsible for the acts or omissions of others.

Responsibility for Employees and Agents

An employer is responsible for employees or agents when they are actually working for the employer (the law uses the phrase, “acting in the course and scope of employment”). For example, a construction company may be held liable for damages if an employee negligently allows debris to fall from a jobsite and injure a pedestrian. Liability in these cases is based on the ancient common-law rule of *respondeat superior*, or, “The master must answer.”

However, an employer is not responsible for the wrongful conduct of an employee or agent acting outside his or her employment. For example, an employer generally is not liable for damages caused by the negligent driving of an employee traveling between home and the workplace. Again, a shoe salesman who punches an irritating customer is probably outside his employment at the time; he is not doing his job carelessly, but is, instead, doing something that is not his job. Usually, the employer won’t be responsible for the salesman’s violent acts unless he or she had reason to know that the employee was inclined to act that way.

Because an employer is usually not liable for the acts of independent contractors, it is necessary in some cases to determine whether a person is an *independent contractor*, on one hand, or an *employee or agent*, on the other. Such cases often turn on the degree of control that the employer exercised over the person in question. If the worker has agreed to accomplish a particular task,

but is free to decide how and when to do the work, the worker is probably an independent contractor. It is fair for the employer to be free from liability for such a worker’s negligence because the employer has little or no right to control what the worker does. For example, suppose a publisher hires a woman to deliver newspapers door-to-door. They agree that the worker will provide her own transportation, will deliver to certain addresses, will finish the work before a particular time, and that payment will be based on the number of papers delivered. The worker is free to decide what transportation to use, the order in which deliveries are made, the time of the deliveries (that is, any time before the deadline) and exactly where and how the papers are placed when delivered. If the worker, in crossing a subscriber’s yard before sunrise, stumbles through a garden and uproots an expensive ornamental bush, the employer probably will not be responsible for the damage caused by the worker’s lack of reasonable care.

Responsibility for Children and Minors

With some exceptions, parents or guardians are responsible for the acts of their child *only* if they knew the child would commit the act but failed to take reasonable steps to prevent the act.

According to Ohio law, parents are strictly liable for up to \$10,000 for damages caused by a child under age 18 who willfully and maliciously injures another person. Likewise, parents are held liable for as much as \$10,000 for injury or loss to a person and property as the result of their child’s criminal acts.

Similarly, when a minor applies for a driver’s license, his or her parent or guardian, or another adult willing to assume responsibility, also must sign the application. By signing, the parent or guardian agrees to be liable for damages resulting from the minor’s negligence, recklessness or willful misconduct while driving.

Defenses in Tort Actions

Comparative Negligence and Assumption of Risk

When a suit is filed in which the plaintiff claims injury as a result of the defendant's negligence, it is not unusual for the defendant to claim that the negligence of the plaintiff himself (or herself) caused, or helped to cause, the loss. For example, where the plaintiff might say that the defendant's negligent speeding caused a traffic accident, the defendant might claim that the plaintiff caused the accident, or increased the force of impact and the severity of the resulting injuries, by suddenly, negligently, changing lanes in front of him.

Ohio uses the rule of *comparative negligence* when determining the degree to which a party is responsible for an accident. Applying the comparative negligence rule, the negligence of the plaintiff is compared to the negligence of the defendant (or defendants); the plaintiff is not barred from recovering damages even if he or she was negligent, so long as that negligence was no more than the combined negligence of all the other parties involved. However, the compensation due a negligent plaintiff will be reduced in proportion to his or her negligence.

For example, suppose a three-car accident results in the injury of driver X, and the combined negligence of drivers X, Y and Z caused the accident. If X's negligence was 10 percent of the total negligence, and Y's and Z's negligence combined was 90 percent, X will be able to recover damages totaling 90 percent of the proven loss. Driver X will have to pay for that 10 percent of the loss that he or she fairly can be said to have caused. However, if X's share of the total negligence was more than 50 percent, he or she will not be able to recover at all; if the accident was 51 percent the fault of X and 49 percent the fault of Y and Z combined, X will go away empty-handed.

Assumption of risk is another defense to negligence claims. In the broadest terms, this rule of law provides that an adult who knows that he or she is voluntarily taking a specific, high, risk by engaging in particular conduct (say, playing Russian Roulette with a loaded pistol), will not be allowed to recover compensation for his or her injuries from someone whose negligence helped to create the dangerous situation (perhaps, the gun's owner, who negligently failed to lock it away). Evidence of assumption of risk is considered by the judge or jury as part of its comparative negligence analysis. That is, the conduct of the injured person in voluntarily taking a high risk is compared to whatever the defendant did that helped bring about the injury. In two types of cases, assumption of risk can still be a complete bar to recovery. First, where one party has expressly agreed to assume the risk of injuries arising from certain conduct (by signing a waiver of liability, for example), the agreement may be enforced by the court if the parties had equal bargaining power and the release does not violate some other law or public policy. Second, a recreation provider ordinarily owes no duty to protect a participant or spectator against risks so inherent in the activity that they cannot be eliminated. This rule of primary assumption of risk therefore bars recovery where a baseball player or fan is injured by a batted ball, for example.

Statutes of Limitations

A person who has been injured by the tortious conduct of another cannot wait forever to make a claim for compensation. As with nearly every other sort of legal proceeding, suits on tort claims are subject to *statutes of limitations*. For example, negligence claims for personal injury usually must be brought within two years after the defendant's negligent conduct first caused injury to the plaintiff. Malpractice claims against professionals such as medical doctors or attorneys are usually covered by a one-year limitation, as are cases against those accused of assault offenses.

Determining the proper statute of limitations is, however, sometimes very complicated.

Depending on the type of the claim, the limit may be calculated from the date of the injury, or the date the plaintiff discovered the injury, or the date the plaintiff identified the defendant's conduct as a possible cause of the injury, or the last day of the professional relationship between the plaintiff and the defendant.

Further, in some cases the operation of the statute of limitations is postponed, or its running is interrupted. For example, if a girl is injured on her 17th birthday by a careless driver, she will have three years to bring suit against the driver because the two-year limitation won't begin to run until she turns 18.

Because so many variables affect the time allotted to bring a legal action, it is important to consult with an attorney promptly if you believe that you might have a tort claim against someone. The attorney can determine how the relevant statute of limitations applies in your particular case, and can bring a lawsuit or make a claim, if necessary, before the time expires.

Remedies for Tort

Compensatory Damages

The basic remedy used by courts in successful tort cases is an order requiring the defendant to pay a certain amount of money to the plaintiff. The money is intended to compensate the plaintiffs for their losses or injuries suffered. *Compensatory damages* may include reimbursement for actual expenses, such as medical bills, repair bills or lost wages, as well as compensation for intangibles such as pain, suffering and mental anguish. If an injury is permanent, the jury may include damages for disability and loss of future earning power.

Punitive Damages

A court can order a party to pay *punitive damages*, also called *exemplary damages*, in the case of certain intentional torts such as assault or defamation, and in negligence cases where the party's acts or omissions are especially

outrageous. Punitive damages are used both to punish such conduct and to warn other members of the community not to follow that example. They can be likened to a fine in a criminal case, except that the plaintiff collects the money instead of the state. When punitive damages are assessed, the court also may order the wrongdoer to pay the attorney fees and other expenses incurred by the innocent party.

Workplace Torts

Some types of tort cases arise as a result of legally wrongful conduct in the workplace. For example, claims based on sexual harassment are sometimes called *workplace torts*, and certain cases of workplace injury—arising out of certain dangerous conditions known to the employer—are called *intentional torts* and may form the basis of a tort claim even though injury lawsuits against employers are generally prohibited by the law that provides workers' compensation to injured employees. (*For more information on workplace torts, see Part XI, "Workplace Law."*)

Resolving Disputes Without a Trial

Some tort claims are resolved by a trial in which a judge or jury decides whether the defendant is liable to the plaintiff and, if so, the amount of compensation required. However, because such litigation is often a long, stressful and expensive process, lawyers and other interested persons have developed several additional ways of resolving disputes. Generally, these methods or techniques are grouped under the name *dispute resolution*.

Dispute resolution techniques include negotiation, mediation, arbitration, the mini-trial and the summary jury trial, and private judge trials. The method used depends upon the nature of the dispute, the people involved, the amount of

money at risk and many other factors. Some conflicts are not well-suited to dispute resolution, such as where the plaintiff wants to convince a court to change an existing law so that people in later cases will also be able to recover damages, or where one party previously used violence against the other. In many cases, however, dispute resolution helps the plaintiff and defendant resolve the conflict in a way both can accept, with more speed and creativity, and less stress and expense, than full-blown litigation would require. (*Dispute resolution is also discussed in Part III at “Pre-trial Conference.”*)

Negotiation

Nearly all attempts to resolve (or settle) claims without a trial involve *negotiation*. Before the negotiation, the attorney and client talk about what the client wants or needs in order to resolve the case. Also, based on his or her knowledge and experience, the lawyer discusses with the client the advantages and disadvantages of settlement, and what the terms of a reasonable settlement might be. The lawyer then discusses the possible settlement of the case with the lawyer for the opposing party. Offers and counteroffers are usually part of these discussions. Whether or not the client is present during a negotiation session, the lawyer must use that opportunity to advance the client's interest and may agree to a final settlement only with the client's permission.

Mediation

Mediation is a formal process for discussing settlement. The disputing persons, with or without their lawyers, meet with a neutral third party called a *mediator* who has nothing to gain or lose from the outcome of the dispute. The mediator carefully leads the parties through a discussion of all aspects of the conflict and helps each of the parties evaluate realistically the advantages and disadvantages of a settlement.

The mediator is not a judge and cannot require the parties to agree to anything, but often can help create an atmosphere in which the parties

themselves can develop a reasonable, mutually acceptable resolution of the dispute.

Arbitration

One or more neutral third parties (called *arbitrators*) may be used to resolve disputes through a process known as *arbitration*. Arbitration may result from an agreement or a contractual provision between the parties, or it may be ordered by a court. The parties present their cases to the arbitrator, offering evidence and legal arguments to support the position of their clients. The parties will have agreed in advance what issues the arbitrator will decide (often, the entire case) and whether the arbitration decision is final and binding (often, it is). The arbitrator does not necessarily need to enforce the rules of evidence that apply in trials, or to follow existing law in making a decision. Rather, the arbitrator reaches a solution that he or she believes is fair and reasonable. Clearly, then, the arbitrator has much more power than a mediator, and sometimes disputes are submitted to arbitration after the parties could not agree to a mediated settlement. For example, a major league baseball player who cannot reach a salary agreement with the owner of his team may choose to submit the dispute to an arbitrator, who will consider the matter using rules that the owners and players adopted years ago. At the end of that process, the arbitrator decides what the player will be paid.

Mini-Trials/Summary-Jury Trials

Although usually more complicated than arbitration, mini-trials and summary-jury trials are also ways of resolving disputes without the investment in time and expense of a full trial.

In a *mini-trial*, attorneys for the parties present a shortened version of their cases to a panel of persons they have agreed upon. The panel usually consists of representatives of the parties (sometimes including the insurance companies of the parties). After the presentations, a neutral third party encourages discussion among the representatives and their attorneys. Because they have gained a clearer understanding of both sides of the

case during this process, often the parties are able to evaluate their positions more realistically and so can agree to a settlement.

In a *summary-jury trial*, lawyers present shortened versions of their cases to a panel of jurors—that is, people who do not have a stake in the outcome of the dispute. Afterwards, the jurors talk among themselves about the issues and reach a non-binding or advisory verdict. They then discuss the reasons for the verdict with the parties and attorneys. This information also often helps parties reach settlement because it helps them see their cases the way an unbiased group of ordinary people do.

Private Judging

Disputes also may be resolved by adversary proceedings that take place privately, outside the regular court system. Private judges, who may be former judges or similarly trained individuals, are sometimes hired by the parties to hear a dispute. There are two types of proceedings in which private judges may be used. In one type, a private judge is retained and will hear the case and render a binding decision that the parties may or may not appeal, depending upon their agreement. The other type of private judging is conducted like a regular case and according to statute. While costly, private judging helps to ease the overloaded dockets of many Ohio courts, especially in complex and expensive cases (e.g., medical malpractice cases).

Chapter Summary

- A *tort* is a violation of a legal responsibility when that violation directly causes injury or loss to a person's body, property or rights.
- Four things together make a tort, and a tort lawsuit will succeed only if the plaintiff proves all four: the defendant owed a legal duty to the plaintiff; the defendant violated (or breached) that duty; the plaintiff suffered an injury or other loss; and the defendant's breach of duty *directly and proximately* caused the plaintiff's loss.
- Most lawsuits in tort are based on negligence, and more negligence cases arise from traffic accidents than from any other cause.
- *Negligence* is the most common basis of liability used in tort law, but there are others. Some of these are: intentional interference with individuals or property; misuse of the legal process; defamation of character; and strict liability.
- Under certain circumstances, individuals, employers and parents may be responsible for the acts or omissions of others.
- Where a person's own negligence caused, or combined with the negligence of other(s) to cause, his or her own injury, the amount of money the person can recover as compensation may be diminished or, in certain cases, recovery may be completely denied.
- The basic remedy used by courts in successful tort cases is an order requiring the defendant to pay a certain amount of money to the plaintiff.
- *Dispute resolution* is a phrase used to describe the development and use of various methods or techniques to settle tort claims and other conflicts.

Web Links:

From the OSBA's "Law You Can Use" column:

<http://www.ohiobar.org/pub/lycu/> (search by title or topic)

- “Auto Accidents: Do You Know Your Legal Responsibilities?”
- “Business Owners Shoulder Responsibility for Employed Drivers”
- “Consumers Use Arbitration To Settle Lemon Law Disputes”
- “Employers Should Know Extent of Responsibility for Employees’ Injuries”
- “How Do I Choose Representation in My Personal Injury Case?”
- “Law Allows Citizens To Help Heart Attack Victims”
- “Legislation Changes the Landscape for the Average Fender-Bender”
- “Ohio’s Lemon Law Protects Consumers”
- “Parents May Be Liable for Child’s Actions”
- “Settlement Week Encourages Mediation”
- “What You Should Know about Auto Insurance Law”
- “What You Should Know about Loaning Your Car to Others”

From the OSBA's LawFacts pamphlet series:

<http://www.ohiobar.org/pub/lawfacts/> (search by title)

- “Court Mediation”
- “Traffic Accidents”

From Cornell Law School Legal Information Institute (topic discernible from Web address):

<http://www.law.cornell.edu/wex/index.php/Damages>

http://www.law.cornell.edu/wex/index.php/Products_liability

Hieros Gamos's general torts page:

<http://www.hg.org/torts.html>