



Section V

torts

“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.

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.

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.

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.

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,

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.

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, 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 do.

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.

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. *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.

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*. 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.

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.

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"). However, an

employer is not responsible for the wrongful conduct of an employee or agent acting outside his or her employment.

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.

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.

Ohio uses the rule of *comparative negligence* when determining the degree to which a party is responsible for an accident. According to the rule, the plaintiff's negligence is compared with the defendant's negligence.

The plaintiff may recover 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 accordingly.

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.

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.

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 Section 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.

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.

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 over-loaded dockets of many Ohio courts, especially in complex and expensive cases (e.g., medical malpractice cases).

Covering Torts

Just as when covering criminal trials, journalists covering tort cases are advised to spend time understanding the law and the process of tort law. Especially because journalists are usually assigned to cover criminal cases, more study and research may be required for the journalist who has more experience covering criminal cases than tort cases. Much of the same advice about covering criminal trials can apply here (*see "Covering Criminal Trials" in Section IV, "Criminal Law"*).

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>



Section VI

contracts

“The business of the law is to make sense of the confusion of what we call human life—to reduce it to order but at the same time to give it possibility, scope, even dignity.”

– Archibald MacLeish

The law defines a contract as nothing more than “a promise the law will enforce.” However, this simple definition is deceptive, because the law will enforce some promises but not others. As will be seen, the law of contracts imposes numerous limitations on the types of promises that are enforceable and on the circumstances in which they will be enforced.

Basic Requirements for a Contract

The basic requirements for a contract are *mutual agreement*, usually made through a process of *offer* and *acceptance*, and *consideration*, or one of its substitutes. In addition, the parties must be 18 years of age, and otherwise mentally competent, the terms of the agreement must be defined in enough detail that a court (and the parties) can determine their obligations, and the subject matter of the agreement must not be illegal.

The Offer

An offer is the outward expression of a willingness to enter into an agreement. Offers can be written or even implied from conduct.

An offer might impose time limits on the acceptance. If so, the offer expires if it is not accepted within that time period. If there is no specific time limit, the offer must be accepted within a “reasonable” time.

Also, if the other person has paid you to keep the offer open, thus creating an *option contract*, then you do not have the right to revoke or withdraw the offer before it is accepted.

The Acceptance

Like an offer, an acceptance consists of some outward expression of agreement. The acceptance can be express or implied, written or oral. It might consist of a signature on a written offer, a simple “okay” or even a nod of the head. When an offer specifies terms of a particular method of acceptance, it may not be satisfactory to accept it any other way.

Generally, accepting an offer requires an affirmative act by an individual. Silence does not usually imply acceptance.

An individual does not have to accept an offer as proposed. The individual can reject it outright or make a counteroffer, which may include its own terms and conditions. If a counteroffer is made, all previous offers are void. If an offer is “accepted” with conditions, it is not actually an acceptance at all, but, rather, a counteroffer.

Consideration and Reliance

Remember, for a contract to be valid, *each* party must make a promise or give or receive some benefit in return for the promise. A contract’s consideration may be either an act or a promise. Without this element of exchange, a promise lacks consideration and usually cannot be enforced as a contract. As a result, a promise to make a gift to someone generally is not regarded as a contract, because usually only one party benefits and the necessary element of consideration is lacking.

Consideration can take many forms. It might be money, property, rights, services or simply a promise to do something in return or even a promise not to do something that you would otherwise have the right to do. Consideration can be present even though no money changes