



“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; however, torts and crimes are brought to court for different purposes, by different people, and they 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. An individual cannot choose whether a person is prosecuted. Rather, the state decides whether a crime has been committed and whether there is enough evidence to prosecute the person alleged to have committed the crime.

On the other hand, a tort is a civil wrong that has resulted in an injury to a person. The injured person, not the state, brings the claim to court, and the defendant may be an individual, multiple individuals or even a company.

In tort cases (and other types of civil lawsuits), the person claiming to be injured and seeking compensation for alleged damages is called the *plaintiff*. The party from whom compensation is sought is called the *defendant*. If a defendant is found responsible for an injury, he or she may be ordered to pay money damages to the injured person to compensate for the injury

or wrong. In a tort case, the chief goal is not to punish the wrongdoer but to “make the plaintiff whole” to the extent that money can do so. However, sometimes a defendant will be assessed a penalty for conduct leading to injury. When it is determined that the conduct of the defendant deserves a penalty, the injured person will be awarded *punitive damages*.

## What Is Negligence?

Torts may be *intentional*, such as when someone’s reputation is purposely damaged (defamed), or they may have to do with negligence. People are most likely to encounter torts involving *negligence* following a traffic accident.

Negligence is essentially the failure to use reasonable care, and may be the legal cause of damage in a tort case. Four things together determine negligence, 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.

However, even when a plaintiff proves these four elements, a defendant still may allege that the plaintiff “contributed to” or helped cause the injury. When this occurs, the damages assessed against a defendant may be reduced.

## A Legal Duty Owed to the Plaintiff

First, there is no tort unless the defendant owed a legal duty to the plaintiff. For example, a storeowner is legally obligated to make sure that spills are cleaned up so that shoppers do not fall, but 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 information that might damage the reputation of 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. In that situation, the public figure can recover damages for damage to reputation (or defamation of character) 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, or laws that require that children must ride in child-safe seats), 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. Some of them have been used for decades, or even centuries.

One common law standard is the broad rule that a person must act with reasonable care for the safety of others. This does not mean that every person must ensure the safety of every other person in all circumstances. It *does* mean that, when dealing with others, an individual must act reasonably to prevent "foreseeable" injuries. This might mean telling a cable repair person that a family pet bites strangers or ensuring that everyone in a car is wearing a seat belt.

### **Violating the Duty**

Second, there is no tort unless the defendant breached his or her legal duty. If the material 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. The injury may be physical damage to a person or property, or injury to (or loss of) a valuable right or interest. For example, if the defendant's actions caused the plaintiff to miss the opportunity to make a purchase that would have become profitable, then the defendant might be found liable for a tort. A tort injury may also be psychological, although it is often difficult to prove the extent of psychological damages.

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. *Direct* causation is demonstrated when a defendant's action is the most obvious cause of the plaintiff's injury. For example, the defendant may have caused an injury to the plaintiff by way of a car accident.

*Proximate* cause is demonstrated when the action of the defendant indirectly caused the injury to the plaintiff. For example, a bartender might be found to have committed a tort by serving alcohol to a drunken patron who, while drunk, later causes an injury to the plaintiff by way of a car accident. For the bartender to be found to have committed a tort in such a situation, a court must find that the accident likely would not have occurred if the bartender had not contributed to the defendant's drunken state.

On the other hand, no tort occurs if the breach did not result in the injury, or if the same injury would have happened even without the breach. For example, if it is later discovered that the cause

of the drunken patron's car accident was actually caused by the mechanical failure of the car, the bartender may not be found to have committed a tort.

## 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. When dealing with a child, however, the duty of reasonable care may be different, since children cannot be expected to exercise the judgment expected of an adult. Thus, a homeowner is expected to undertake certain measures to make sure that his backyard pool is not easily accessible to a trespassing child.

### 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 may have been 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 because he is well known locally as an athlete, he is embarrassed that people have seen him lurch so clumsily. 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 cab driver 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 cab driver has not committed a tort because the passenger's injury was not directly and proximately caused by his speeding. The cab driver'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*. This means that he did not intend to kill the baby, but his criminal violence caused the death just the same. Because the man's gross (extreme) lack of reasonable care directly caused serious injury, he committed a tort as well as a crime. Thus, 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 injured person for his or her loss). Usually, however, in order to recover money damages for such a tort, the injured person must sue the wrongdoer in a civil case separate from the criminal prosecution. Often, no suit is pursued because, although the injured 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—such as in the O.J. Simpson cases—an injured or aggrieved person 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

The elements of a tort case that have been discussed so far relate to the tort of negligence, since most tort lawsuits 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, 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 was negligent and the cause of the injury was 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 violate this duty.

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.

## 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” later in this chapter.*)

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 person’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 persons injured in accidents. 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**

As long as both parties are insured, neither party is required to file an accident 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/bmv\\_forms.stm](http://bmv.ohio.gov/bmv_forms.stm) (choose BMV 3303 – Crash Report).

### **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 certain 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 also injured and is transported to a hospital by an ambulance or other emergency vehicle.
- If an accident occurs on private or public 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 who is 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.

## Other Tort Lawsuits

Negligence is the most common basis of liability used in tort law, but there are others types of torts. Some of these are: intentional interference with individuals or property (which encompasses

commonly known torts of assault, battery and trespass); misuse of the legal process; defamation of character; and product liability.

## Intentional Interference with Property or Persons

One example of a tort involving intentional interference with property or persons is *trespass*, which is 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 tort of this type is *conversion*, the civil aspect of property theft. Conversion 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 has done something wrong, may be liable for wrongful detention.

In torts based on intentional interference with property or persons, 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 was protecting his or her property; or
- the defendant was driven by necessity.

However, many defenses have legal limitations. For instance, although a person may “consent” to being hit by participating in a fight, the person would not be considered to have consented to being hit over the head with a baseball bat. Additionally, even though people are entitled to protect their property from trespassers, they are not entitled to purposely set up traps that might seriously injure or kill a trespasser.

### **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 person. For example, 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.

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 a desire to purposely harm 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: 1) caused people to believe that the plaintiff is of low character and morals; 2) damaged the plaintiff’s good reputation and community standing; and 3) caused the plaintiff to lose business or sustain some other financial loss.

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.

As mentioned previously, there is a different standard of proof for public figures and private citizens. Public figures must prove that an individual is spreading untruthful information in order to maliciously cause an injury. Private citizens need not meet this standard. In addition, as in negligence cases, there must be some damage that relates to the alleged defamation. It is not enough that a person feels badly about what has been said or written.

### **Product Liability/Strict Liability**

A product liability action is similar to a negligence action. In a product liability action, the plaintiff brings suit against a company, alleging that the defective nature of a product has caused an injury. 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.

A product liability case differs from a negligence action in that the plaintiff need not prove all of the elements of negligence. Some of the elements are assumed (such as the duty to produce a product that is safe for consumers). If, therefore, the plaintiff is able to prove that the product caused the injury, the defendant is said to be “strictly liable” for the injury.

A well-publicized example of strict liability in a product liability case 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 blow-outs were a result of a defective tire design.

Strict liability is not only applicable in a product liability action. Strict liability also may apply 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. Sometimes the dangerous substance is in "control" of a company, such as where a company sells a chemical that explodes if handled improperly by a consumer. However, sometimes a private citizen may "control" a dangerous substance, such as when setting off fireworks for a Fourth of July celebration.

## 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," to describe this relationship. 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 the scope of 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 the scope of 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.

An employer is usually not responsible for the actions of an independent contractor. An independent contractor is an individual who may do work at times for an employer, but is not necessarily consistently employed with an employer from day to day. An independent contractor might, for example, be a painter who is hired by a construction company to finish some painting work on a job or employees of a yard service who are hired by a corporation to do landscaping work.

Because an employer is usually not liable for the acts of independent contractors, it is necessary in some cases to determine how much control the employer had over the independent contractor. If it is determined that the employer had a high degree of control over the independent contractor, then the employer may become liable for the independent contractor's actions. If the worker has agreed to accomplish a particular task, but is free to decide how and when to do the work, the worker probably will be considered an independent contractor and the employer would not be liable for any acts committed by the independent contractor.

### **Negligence of Children, and Parental Responsibility for Children and Minors**

The law in Ohio is that children under the age of seven are incapable of negligence. The law also "presumes" that children aged 7 to 14 are likely incapable of negligence, but negligence can be demonstrated if the child is shown to be mature enough to make intelligent decisions about the activity in which that child is engaged. For example, a 12-year-old child with babysitting experience who allows a toddler to bathe without supervision might be found negligent if the toddler drowns. Children over 14 years of age may be held liable in the same way that an adult may be held liable, but a jury in such a case would determine whether negligence has occurred. Parents or guardians may be responsible for the acts of a minor child if they knew the child would commit an injurious act (or was very likely to commit the

act), but failed to take reasonable steps to prevent the act.

Additionally, 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 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 and negligently changing lanes in front of him or her.

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 combined negligence was 90 percent of the total negligence, 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 and 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 waiver 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. For instance, if a patient is unaware that a surgical instrument has been left in his or her body, the statute of limitations will not begin until the person discovers that this mistake has occurred. Other dates that might determine when the statute of limitations begins may include 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.

# 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 plaintiff for 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

As previously mentioned, 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 or discrimination are sometimes called *workplace torts*. Additionally, certain cases of workplace injury—those arising out of certain dangerous conditions known to the employer—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

A trial determines whether a defendant is liable (responsible) for the plaintiff’s damages and, if the plaintiff is liable, the amount of money required to compensate the plaintiff. Getting a case to trial (litigation) is often a long, stressful and expensive process. Lawyers, courts and other professionals use other ways to resolve civil disputes that do not require a trial.

These *dispute resolution* processes include the following: negotiation, mediation, arbitration, mini-trial, summary-jury trial, and trial to a private judge. The method used depends on the nature of the dispute, the people involved, the amount of money at risk and many other factors. In many cases, dispute resolution helps the parties reach an agreement that is satisfactory to all and helps the parties save time and money. It can also be more creative and less stressful than litigation. Although some disputes are not good candidates for dispute resolution, many will benefit from the process even if the parties do not reach a complete agreement. (*Dispute resolution is also discussed in Part III at “Stage 5: Pre-trial conferences.”*)

There are two types of dispute resolution processes: binding and non-binding. If parties use a process like arbitration or a private judge, they may agree to have the decision be binding (final). Negotiation and mediation are both non-binding, meaning that any party who is not satisfied with the result may leave the process and continue to litigate.

### Arbitration

In *arbitration*, the parties present facts and legal arguments to an arbitrator or panel of arbitrators. The arbitrator is impartial and makes a decision. A contract may require arbitration, or a court may order arbitration. Parties also may

agree to arbitration. They may agree that the arbitrator will decide all of the issues or only selected issues in their dispute. The arbitrator will strive to reach a fair and reasonable solution. 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

Disputes may also be resolved without trial through mini-trials or 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 people they have jointly selected. Panel members usually represent the parties and/or the insurance companies for the parties. After the presentations, a neutral third party helps the parties, representatives and attorneys discuss the issues of the case. Because they have gained a clearer understanding of both sides of the case during this process, the parties often are able to evaluate their positions more realistically and can agree to a settlement.

In a *summary-jury trial*, lawyers present shortened versions of their cases to a panel of jurors. The jurors do not have a stake in the outcome of the dispute. After the presentations, the jurors discuss the issues and reach an advisory verdict. They then discuss the reasons for the verdict with the parties and attorneys. This information can help parties reach settlement because it helps them see their cases the way an unbiased group of ordinary people would see them.

### Private Judging

Sometimes the parties choose to use a private method to resolve their dispute. Ohio law allows parties to engage a retired judge to hear a case.

Such a “private” judge can hear a case and provide a binding decision that parties may or may not appeal. A trial to a private judge may help resolve a case more quickly and help to ease the overloaded dockets of many Ohio courts, especially in complex and expensive cases, such as malpractice cases.

## 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. Even if a client is not present during these discussions, the lawyer must use negotiation sessions to advance the client’s interest. An attorney may agree to a final settlement only with the client’s permission.

## Mediation

*Mediation* helps people reach an agreement (settlement) about some or all of the issues in

a dispute. Mediation is private; the mediator is impartial. This means that the mediator has nothing to gain or lose from the outcome of the dispute. The mediator is not a judge and will not decide the case. In mediation, the parties make their own decisions. During mediation, the mediator leads the parties and/or their lawyers through a discussion of all aspects of the dispute and helps them learn about the other side’s issues and interests. The mediator helps the parties assess the advantages and disadvantages of settlement and can also help look at different options for settlement.

### **For Journalists: 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. Since journalists are usually assigned to cover criminal cases, more study and research may be required for the journalist when covering a tort case. Much of the same advice about covering criminal trials can apply here (*see “For Journalists: Covering Criminal Trials” in Part IV, “Criminal Law”*).

## 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.
- *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. Four things together determine negligence, 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.
- 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:**

[www.ohioabar.org/lawyoucanuse](http://www.ohioabar.org/lawyoucanuse) (search by title or topic)

- "Are Schools Legally Responsible for Your Child's Sports Injuries?"
- "Auto Accidents: Do You Know Your Legal Responsibilities?"
- "Business Owners Shoulder Responsibility for Employed Drivers"
- "Consumers Use Arbitration to Settle Lemon Law Disputes"
- "Harm Caused by Defective Products Can Lead to Liability Claims"
- "Know about Varieties of Ohio Automobile Insurance Coverage"
- "Landowner or Tenant Could Be Responsible for Harm to Trespassing Children"
- "Law Allows Citizens to Help Heart Attack Victims"
- "Mediation Can Resolve Disputes"
- "Ohio Law Protects Property Owners from 'Recreational User' Liability"
- "Ohio's 'Good Samaritan' Law Protects Volunteers"
- "Ohio's Lemon Law Protects Consumers"
- "Ohio's Social Host Law: Parents Serving Teens"
- "Parents May Be Liable for Child's Actions"
- "Uninsured Motorist Coverage Protects Drivers from Lawbreakers"
- "Underinsured Motorist Coverage: When Auto Liability Coverage Is Not Enough"
- "What Is a Wrongful Death Claim?"
- "What You Should Know about Auto Insurance Law"
- "What You Should Know about Loaning Your Car to Others"

### **From the OSBA's Law Facts pamphlet series:**

[www.ohioabar.org/lawfacts](http://www.ohioabar.org/lawfacts) (search by title)

- "Court Mediation"
- "Traffic Accidents"

### **From Cornell Law School Legal Information Institute**

[www.law.cornell.edu/wex](http://www.law.cornell.edu/wex) (search by keyword: "tort")

### **Hieros Gamos's general torts page:**

[www.hg.org/torts.html](http://www.hg.org/torts.html)