

Tort Law for Paralegals: Chapter 2

Chapter Outline

The screenshot shows a digital course interface. At the top, a black header bar contains the text "Tort Law for Paralegals: Chapter 2" in white. Below the header, on the left side, is a vertical navigation menu with seven blue buttons: "Lecture Hints", "Answers to Case Questions", "Problems", "Problem Answers", "Projects", "Project Answers", and "Chapter Quiz". The main content area on the right is titled "Chapter Outline" and contains the following text:

Chapter 2
Negligence

I. INTRODUCTION TO NEGLIGENCE

A. Average person's view: Negligence = carelessness.

B. Broad definition:

1. Negligence is failure to exercise reasonable care to avoid injuring others or their property.
2. The key is the reasonableness of the tortfeasor's behavior.
3. Did the defendant act unreasonably under the circumstances?

A vertical scrollbar is visible on the right side of the main content area.

Step Text

Chapter 2

Negligence

I. INTRODUCTION TO NEGLIGENCE

A. Average person's view: Negligence = carelessness.

B. Broad definition:

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2. The key is the reasonableness of the tortfeasor's behavior.

3. Did the defendant act unreasonably under the circumstances?

C. Acts or omissions:

1. Negligence includes tortfeasor's actions and his or her failures to act (omissions).

2. Acts are negligent if they were unreasonable.

3. Omissions are negligent if it was unreasonable for tortfeasor not to have done something. Example: After a homeowner fails to repair the porch step, someone falls through it and is injured.

D. No negligence exists unless all elements are satisfied.

II. NEGLIGENCE

A. Elements: The essential parts or components of something.

B. Elements of negligence:

1. Defendant's duty of reasonable care and scope of duty (foreseeability of victim)

2. Defendant's breach of duty

3. Defendant's actions cause injury to plaintiff (causation)

4. Damages to plaintiff

III. SCOPE OF DUTY

A. Duty: Obligation either to do or not to do something.

B. Duty of reasonable care: Responsibility to act reasonably so as to avoid injuring others.

C. Scope of duty:

1. Limitation on the persons to whom tortfeasor owes duty

2. Scope of duty extends to persons who reasonably and foreseeably could be injured by tortfeasor's actions.

3. Foreseeability: Specific action, under particular circumstances, will produce anticipated result. If the plaintiff's injuries were reasonably foreseeable, then the defendant could have taken precautions to avoid causing harm.

4. Foreseeable injury: An injury that a reasonably prudent person should have anticipated.

5. Foreseeable plaintiffs theory:

a. Reasonable foreseeability: Could the defendant reasonably have anticipated that his or her conduct would directly harm the plaintiff? If yes, then the defendant's scope of duty included the plaintiff.

b. Persons outside scope of duty are unforeseeable plaintiffs, because their injuries could not reasonably have been anticipated by the tortfeasor. If the plaintiff is considered an unforeseeable plaintiff, then the plaintiff cannot recover under negligence against the defendant, because the plaintiff's injuries were unforeseeable.

IV. SPECIAL DUTY BASED ON RELATIONSHIP

A. Parent/child

B. Employer/employee

C. Hospital/patient

D. Physician/patient

E. Innkeeper/guest

F. Common carrier/passenger

G. Emergency rule:

1. Good Samaritan
 - a. No duty to render assistance
 - b. Once assistance is commenced, the help must continue.

V. STANDARDS OF REASONABLE CARE TO DETERMINE IF BREACH OCCURRED

A. Reasonable person standard:

1. Reasonable person = imaginary individual expected to behave reasonably under given set of circumstances to avoid harming others.
2. The tortfeasor's behavior is compared to a reasonable person's behavior to determine if it was reasonable.
3. Ask: Under same or similar circumstances, would a reasonable person have acted the way the tortfeasor did? If so, then the tortfeasor's actions were reasonable (i.e., no breach of duty). If not, then the tortfeasor's behavior was unreasonable (i.e., violated duty of reasonable care).
4. Trier-of-fact decides reasonable person standard.

B. Matching skills and handicaps:

1. Reasonable person standard adjusts to match defendant's special skills or limitations.
 2. Professional standards of care:
 - a. Profession: An occupation that requires specialized and advanced education, training, and knowledge. The skill involved is mostly intellectual rather than manual.
 - b. If the defendant had special skills (e.g., physician, attorney, electrician, etc.), and the defendant is alleged to have been negligent in exercising such talents, then the professional national standard of care is compared to the defendant's conduct. (1) National standard: A standard applied throughout the nation.
 - c. The professional community standard is defined by expert testimony from the local area in which the defendant worked. Other professionals testify as
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to the proper standard of care for their profession, under the same or similar circumstances as those under which the defendant acted.

3. Defendant's limitations: Reasonable person standard is adjusted to reflect defendant's physical or mental limitations, such as physical or mental disabilities. In this way, the trier-of-fact adjusts the standard to fit more closely what the defendant could or could not have done under the circumstances.

VI. CAUSATION OF INJURY

A. The tortfeasor's actions result in harm to the injured party.

B. Cause-in-fact:

1. The defendant's misconduct produced the plaintiff's injuries.

C. Substantial factor analysis:

1. The defendant is liable for the plaintiff's injuries when the defendant's actions were a substantial factor in causing harm.

2. Most often used in cases in which multiple tortfeasors combined to cause injuries and in which it is difficult to determine which defendant produced what harm (joint and several liability cases).

D. Contribution: Means that one tortfeasor pays all or part of the liability for a wrong, and is then allowed to get back all or part of this amount from the other tortfeasors.

E. Indemnification: A contract to reimburse another for actual loss suffered.

VII. FORESEEABLE INJURY A. Was the victim's injury reasonably a foreseeable result of what the tortfeasor did?

1. If yes, then the tortfeasor's conduct proximately caused the victim's injuries.

2. If no, then no proximate cause exists, and therefore no negligence or liability exists.

B. This foreseeability is different from the foreseeable plaintiffs theory.

1. In proximate cause analysis, foreseeability focuses upon the foreseeability of the injury itself.

2. Scope of duty focuses upon the foreseeability that the plaintiff would be hurt.

C. Zone of foreseeability:

1. Area within which the plaintiff's injuries were reasonably foreseeable as consequence of the defendant's behavior.

2. If the plaintiff's injuries fall outside zone (i.e., were not reasonably foreseeable), then the defendant did not proximately cause the plaintiff's harm.

D. "Taking the victim as you find him": The plaintiff's peculiar health conditions are reasonably foreseeable, and the defendant "takes the victim as he or she finds the victim" (e.g., "eggshell-skull" cases, in which the plaintiff is more severely hurt than an ordinary person would be, because of fragile-skull condition). Many courts hold that the defendant should anticipate that persons like the plaintiff are "out there," waiting to be victimized by the defendant's misconduct.

VIII. DAMAGES

A. Damages = injury the plaintiff suffers as a result of the defendant's actions.

B. Normally, injury is quantified in terms of monetary loss (e.g., plaintiff's medical expenses, property repair, or replacement costs, etc.).

C. The plaintiff must prove actual injury (damages) to recover in negligence litigation, unlike for certain intentional torts (such as trespass to land, with technical trespass).

D. Damages also = judgment that judge or jury awards the plaintiff against the defendant as compensation in a lawsuit.

1. Compensatory damages: Most common award. The purpose is to compensate the plaintiff for losses incurred because of the defendant's actions.

a. Loss of consortium: Loss of a spouse's services, such as companionship or ability to have sexual relations.

b. Hedonic damages: Damages for loss of enjoyment of life or value of life.

2. General damages: Compensatory damages resulting from the harm caused by the defendant's actions.

3. Special damages: Damages that are unique to a particular plaintiff.

4. Economic/non-economic damages:

a. Economic/out-of-pocket expenses

b. Non-economic: Pain or humiliation (no economic value).

5. Nominal damages: Awarded in situations in which no actual damages occurred.

6. Punitive damages:

a. Rarely awarded in negligence cases; much more common in intentional torts cases

b. Available in gross negligence cases

c. Gross negligence occurs when the tortfeasor's actions fall well below the reasonable care standard, approaching willful and wanton misconduct standard. Carelessness is so extreme that negligence is almost obvious.

E. Verdict: Award by a jury.

Lecture Hints

5 seconds

Tort Law for Paralegals: Chapter 2

Lecture Hints

Answers to Case Questions

Problems

Problem Answers

Projects

Project Answers

Chapter Quiz

Lecture Hints

1. Students struggle with negligence perhaps more than with any other tort. You may wish to spend extra lecture time dissecting the elements and discussing hypotheticals to illustrate negligence concepts.
2. You may wish to provide students with the negligence elements from your state in lieu of the textbook's formula.

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Answers to Case Questions

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Answers to Case Questions

Palsgraf v. Long Island Railroad

1. Yes, a duty was owed to the passenger with the package.
2. No, Helen Palsgraf was not owed a duty. It was not foreseeable that she would be injured.
3. When injuries result from an unlawful act, you should be responsible for the consequences, whether or not they are foreseeable.

Van Horn v. Watson

1. Most likely, if it was safe to stop your vehicle, most people would have done the same thing as Torti did, and try to help the accident victim.

Step Text

Palsgraf v. Long Island Railroad

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Van Horn v. Watson

1. Most likely, if it was safe to stop your vehicle, most people would have done the same thing as Torti did, and try to help the accident victim.
2. Defendant Watson would join in the appeal because he caused the accident and would be looking for another defendant such as Torti to share liability.
3. The plaintiff was severely injured. Defendant Watson's insurance policy may not have been sufficient to cover the injuries. Also, if defendant Torti was not brought into the action, defendant Watson could have blamed everything on defendant Torti.

Colby v. Noah

1. The statute only precludes direct sales to minors. There was no sale to a minor.
2. Yes, then the result would have been different. This would have been a direct sale to a minor with an injury resulting from the sale. The defendant owner of the bar would have been liable.

Dampier v. Morgan Tire

1. Yes, probably most people would have behaved just as the injured plaintiff did. People tend to seek out the closest path to get somewhere.
2. No, Tires Plus had no duty to make the planting garden safe. It was not meant for walking across, and the danger was open and obvious.

Liebeck v. McDonald's Restaurants

1. There are several possible reasons that McDonald's might have wanted to sell such hot coffee. McDonald's has a policy of giving free refills for beverages. If coffee is sold extremely hot, customers will have to wait to drink their coffee, and most likely won't have time to sit and drink a refill. Also, McDonald's has a huge takeout business. Although some customers attempt to eat and drink while driving, perhaps a greater number bring the food back home or to an office. People would not want to order coffee for takeout if it was cold by the time they took it home, hence the need for super-hot coffee.
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2. It is most disturbing to hear that a company is not willing to change its policy even after being put on notice that so many people were injured. For a good deal of products, including the sale of automobiles, the makers have found that it is cheaper to pay for the occasional injury than to spend more money and change a product or manufacturing process. In some of the automobile cases, known defects in vehicles could have been fixed for as little as \$20 per car, yet the manufacturers found it cheaper to pay for insurance and only incur additional expenses as injuries or deaths were claimed.

Bridges v. Parrish

1. The court disagreed with all three alleged theories. None of the theories was sufficient enough to survive dismissal.

2. The negligent entrustment theory might have been the strongest argument if the plaintiff had alleged that the defendants both, expressly or impliedly, entrusted the handgun's "operation" to Bernie and that they gave him permission to use the handgun.

Otero v. Fazio

1. Fazio could have provided more outside lighting, given that he required everyone to remain outside.

2. Wright backed up her car without seeing that which was there to be seen, when people were outside socializing; this broke the chain of causation.

Routledge v. Lankford and Hargis

1. The court stated that: "Since a party is liable if his negligence, combined with the negligence of others, results in injury, the first driver ... is liable."

2. If there was an oil slick or a deep hole in the pavement that Lankford encountered, this might have been considered an independent and intervening cause of the second collision, and thus break the chain of liability.

Problems

5 seconds

Tort Law for Paralegals: Chapter 2

Lecture Hints

Answers to Case Questions

Problems

Problem Answers

Projects

Project Answers

Chapter Quiz

Problems

In the following hypotheticals, determine if negligence exists and if the tortfeasor will be liable to the injured party. Identify the plaintiff(s) and the defendant(s).

1. Carl operates a tanning salon. Meg is one of his customers. The salon uses tanning beds that are equipped with ultraviolet lights above and below the customer. These lights are automatically regulated to control radiation exposure. Meg visited the salon and, while lying upon one of the tanning beds, fell asleep. The automatic regulator became stuck at maximum intensity. Meg was severely burned by the radiation.
2. Dan operates a backhoe for a construction company. Houge hired the company to excavate a swimming pool in his backyard. Dan dug the hole using the backhoe. Unbeknownst to Houge, Dan, or

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2. Dan operates a backhoe for a construction company. Houge hired the company to excavate a swimming pool in his backyard. Dan dug the hole

using the backhoe. Unbeknownst to Houge, Dan, or the neighbors, the U.S. Army had used the area during World War II as an undercover training facility for minesweepers, and several unexploded land mines remained buried in the ground. Dan hit one with the backhoe shovel, which detonated the explosive. The shovel was blasted away from the machine, flew several feet into the air, and crashed into Houge's new truck. The impact pushed the truck into the street, causing Leyla, a neighbor who was driving a van down the street, to swerve into Houge's front yard, hitting and felling an oak tree (that had been weakened by termites), which crashed into Mia Farlow's house next door to Houge's home.

3. Brad is a professional painter. He bought exterior latex paint to apply to Matt's barn. The paint store incorrectly labeled the paint as oil-based paint when in fact it was water-based paint. Brad painted the barn without noticing the difference. After several severe summer thunderstorms, the paint wore off.

4. Sam is a chemical dependency counselor. One of her clients, Trevor, has been addicted to alcohol and tobacco for years. He has suffered severe liver damage. Sam recommended hypnotherapy as a possible cure. Hypnosis is frequently used to treat chemical addiction, and Sam is a state-certified hypnotherapist. After hypnotizing Trevor, she discovered through regression that he had experienced a traumatic event involving alcohol at age seven. She felt certain that this memory was the key to his current addiction. When Sam attempted to bring Trevor out of his hypnotized state, however, she discovered, much to her dismay, that he had fixated and would not return to consciousness. As a result, Trevor remained regressed at seven years of age. Psychiatrists indicate that this condition occurs in only 1 in every 10,000 hypnosis cases.

5. Dwanita plays guitar and sings in a rock-and-roll band at a local tavern, The Whiskey Slick. One of her songs, "Death to Phone Solicitors," contains certain explicit and graphically descriptive details. Josie, a bartender at the Slick, suffers from paranoid delusions. She found Dwanita's lyrics overwhelmingly absorbing, and she took them literally. After hearing Dwanita's "Death" song at work one night, Josie returned to her apartment, loaded her revolver, drove downtown to a local telephone solicitation business, entered, and shot six operators.

Problem Answers

5 seconds

Tort Law for Paralegals: Chapter 2

- Lecture Hints
- Answers to Case Questions
- Problems
- Problem Answers**
- Projects
- Project Answers
- Chapter Quiz

Problem Answers

1. Carl was negligent in maintaining a faulty tanning bed regulator that injured Meg (however, see the later discussion of factual gaps, which could reverse this conclusion). Proceed through the negligence elements sequentially. First, did Carl owe Meg a duty of reasonable care? Because Meg was one of Carl's customers, Carl owed her a duty to provide reasonably safe tanning equipment. Did the scope of duty include Meg? Yes. It was reasonably foreseeable that Meg would be injured by radiation overdose if the tanning bed's regulator failed to function properly. Thus, Meg was a reasonably foreseeable plaintiff. Second, did Carl breach his duty to Meg? Yes. By failing to maintain a properly operating tanning bed, Carl failed to exercise reasonable care to avoid injuring Meg. Apply the reasonable person test: Would a reasonable person have operated a tanning bed with a defective regulator that could produce serious burns upon customers like Meg? The simple answer is no. Reasonable persons would have inspected the equipment to discover faults

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the equipment to discover faults such as the broken regulator. Further, the reasonable person standard should be adjusted to reflect Carl's expertise in tanning services. Expert testimony could be used to establish the professional community standard for inspecting tanning equipment among tanning salon businesspersons. Factual gaps: This case raises certain "factual gaps" purposely omitted from the text summary. Namely, one needs to know how often Carl inspected the tanning beds to determine if they were functioning correctly. If Carl made inspections reasonably often (such as daily or three times weekly, etc.), then, arguably, Carl satisfied his duty of care to Meg by maintaining reasonably safe tanning equipment. The regulator may have gotten stuck without giving any prior indication problems. Carl could have inspected the bed immediately before Meg used it, and he might not have been able to detect any regulator problems. Assuming that you decide that Carl failed to conduct timely or sufficiently thorough inspections, proceed to causation. Was Carl's breach of duty the cause-in-fact of Meg's injuries? Yes. But for Carl's failure to maintain a properly functioning tanning bed, Meg would not have been injured. Next consider proximate cause. Were Meg's injuries the natural and probable consequences of Carl's providing a tanning bed with a defective regulator? Were Meg's injuries (severe burns from radiation overdose) reasonably foreseeable results, when the regulator stuck on maximum power? Yes. It was also reasonably foreseeable that Meg would fall asleep under the lights' warming and soothing effect. Finally, Meg suffered significant physical injuries, so her damages are easily proven. Meg would have to prove that Carl breached his duty by failing to conduct timely inspections, a question that, for purposes of this problem, has been left open for you to decide (as a trier-of-fact).

2. The key to this hypothetical is proximate cause (reasonable foreseeability of the injuries). In this problem, foreseeability of injury and scope of duty combine. Was it reasonably foreseeable that the injured parties' property would have been harmed as a result of the backhoe's detonation of buried, unknown U.S. Army land mines? There are several possible plaintiffs here (Houge, Leyla, and Mia), and so, ordinarily, there would be many duties of reasonable care and foreseeabilities of injuries to define. Here, though, the zone of foreseeability stops the negligence analysis for all plaintiffs at the same point. A single inquiry disposes of the case: Was it reasonably foreseeable that Dan's backhoe would detonate unknown, buried land mines that would explode and produce the destructive sequence of events? No. Nobody involved in this case knew (or reasonably could have known) about the U.S. Army testing facility, which presumably had been secretly used nearly 50 years ago. Therefore, nobody involved in the case could reasonably have anticipated the presence of buried land mines and the resulting catastrophic events. Thus, all the plaintiffs were unforeseeable plaintiffs. Dan did not breach any duty to them vis-à-vis the land mines and his excavation. (There is a factual improbability in this hypothetical,

though: namely, how could the houses in this subdivision have been built without somebody coming across these land mines sooner?)

3. The key to this hypothetical is Brad's professional standard of care. Clearly, Brad owed his customer, Matt, a duty of reasonable care to properly apply the correct paint to Matt's barn. Obviously, the scope of duty included Matt's barn, as it was the object directly associated with Brad's negligence. Did Brad breach his duty by failing to notice that the paint was water-based instead of oil-based paint? Yes. Expert testimony would establish painters' professional community standard. Any reasonable professional painter can immediately distinguish between water-based and oil-based paint. Water-based paint is thinner and does not have the same texture or smell as oil-based paint, which (not surprisingly) has an oily, pungent, petroleum-like odor. By failing to notice this difference, Brad plainly breached his professional duty of care. All the remaining negligence elements fall neatly into place. But for Brad's application of the wrong paint, the paint would not have worn off the barn after the thunderstorms; thus, cause-in-fact is established. Furthermore, proximate cause exists: it was reasonably foreseeable that water-based paint would not withstand severe summer rains, as expert testimony would confirm. Matt's barn was damaged, so compensable injury exists. Brad was negligent and hence is liable for Matt's damages.

4. This hypothetical concentrates on professional standard of care and the foreseeability of injury relating to proximate cause. Did Sam violate her professional duty of reasonable care in hypnotizing Trevor, who remained in a fixated regression state? Expert testimony would probably indicate that Sam had not breached the duty, as fixation occurs in only 1 out of every 10,000 hypnosis cases. Thus, the injury (fixation) was not reasonably foreseeable as a result of routine regression hypnotherapy. Accordingly, Sam's treatment did not proximately cause Trevor's injuries, and so no negligence liability would exist. If one works sequentially through the negligence formula, the proximate cause question would not be reached. The analysis would end with the "no breach of duty" conclusion. However, for purposes of understanding the concepts, it is worth discussing proximate cause and foreseeability of injury.

5. The six telephone solicitation operators (or their estates) might try to sue Dwanita for negligence, but they would lose. The key here is scope of duty-specifically, foreseeable plaintiffs theory. Was it reasonably foreseeable that Dwanita's song would prompt a mentally ill individual (Josie) to gun down these six plaintiffs? No. These operators are unforeseeable plaintiffs. A reasonable person would not anticipate that a mentally unbalanced listener would act out song lyrics in this manner. Thus, Dwanita did not owe the operators a duty of

reasonable care in singing her songs publicly, and, accordingly, Dwanita is not liable to these plaintiffs for negligence.



Projects

5 seconds

Tort Law for Paralegals: Chapter 2

- Lecture Hints
- Answers to Case Questions
- Problems
- Problem Answers
- Projects**
- Project Answers
- Chapter Quiz

Projects

1. Find a recent court opinion in your state that defines the elements of negligence. Do these elements differ from those discussed in this chapter? If so, in what ways?
2. As a class or in study groups, create your own hypotheticals using the negligence formula in this chapter. Then change the facts to alter the outcomes of the cases.
3. An argument has been made that large malpractice awards are driving up the price of health care. Should all jurisdictions impose a cap or ceiling limiting the amount awarded in malpractice cases for pain and suffering, as some jurisdictions already do? Explain.
4. Read the case of *Summers v. Tice* in Appendix C at the student companion website. Why do you think this case is studied in so many law schools?

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Project Answers

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Tort Law for Paralegals: Chapter 2

- Lecture Hints
- Answers to Case Questions
- Problems
- Problem Answers
- Projects
- Project Answers
- Chapter Quiz

Project Answers

1. State-specific
2. Hypothetical
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4. It is an old case that clearly describes the doctrine of joint and several liability.

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Chapter Quiz

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- Lecture Hints
- Answers to Case Questions
- Problems
- Problem Answers
- Projects
- Project Answers

Chapter Quiz

Chapter Quiz

[Click here for the Chapter Quiz.](#)

Step Text

[Click here for the Chapter Quiz.](#)
