

# Negligence and Other Torts

## Focus Questions

- What is the difference between an intentional and an unintentional tort?
- What is negligence, and why is it the most important part of tort law?
- What are a “reasonable person,” foreseeability, and causation in negligence?
- What are the legally acceptable defences for negligence?
- What are some special types of negligence?
- What are the most common examples of intentional torts?
- What are the main legal remedies and defences for intentional torts?
- How can individuals protect themselves against civil liability?

## Chapter at a Glance

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**Figure 12-1**

Linda Hunt and her lawyer, Roger Oatley, break from court proceedings in Barrie, Ontario, in October 2000. Hunt sued her former employer and a local pub, claiming they were partly responsible for serving her alcohol and not physically stopping her from driving home following a Christmas party. She was later involved in an accident. How do you think this case turned out?



## 12.1 Introduction

In Chapter 11 you learned that a tort means “a wrong,” which can be either intentional or unintentional. Tort law entitles you to sue for damages in a civil court of law. Tort law involves many aspects of your daily life—your personal property, your pets, the sports you play, even your personal freedom and reputation.

Like criminal law, tort law changes with society. For example, people used to drive without seat belts and ride on motorcycles and bicycles without wearing helmets. However, accident prevention research showed that using seat belts and helmets reduced injuries. As a result, provincial governments made such safety devices compulsory. Failure to comply with these laws can reduce or even eliminate compensation to the injured. Although tort law may differ slightly from province to province, the principles are similar. Modern tort law is largely the result of decisions made by judges over many years.

## 12.2 Negligence and Intent

The tort of negligence is one of the most important areas of tort law. **Negligence** has three key characteristics:

- The action is unintentional.
- It is unplanned.
- An injury results.

Anyone who carelessly injures a person or a person’s property should compensate the victim for that injury. But carelessness alone does not make someone liable for negligence; someone must actually be injured by the careless conduct.

For instance, if Liam does not clear his slippery sidewalk after a winter storm, he will not be liable for negligence unless somebody actually falls and is injured. If Alden does slip and fall, Liam might be liable in any legal action that occurs. Other examples of negligence include car accidents, injuries to consumers caused by defective products, and medical and legal malpractice (misconduct).

There are also intentional torts. When a person deliberately causes harm or loss to another person by assault and battery or false imprisonment, it is an intentional tort. Trespassing, causing a nuisance, and defaming (damaging) a person’s reputation are other intentional torts. Intentional torts are the oldest wrongs recognized by the courts.

If one person hits another, is it an intentional tort? The answer depends upon a number of factors. The most important element of an intentional tort is intent. **Intent** is the true purpose of an act, a person’s hope or desire for a result of an action. If Matt punches Josh squarely in the jaw, harm is clearly intended. But foreseeability (see page 342) is also a factor. If your friend Renu throws a snowball at you and it hits you in the face causing damage to your eye, that is an intentional tort. Renu should have realized that the snowball could hit you *and* that injury could result. She would be responsible for the damage to your eye. Renu was in control of her actions. Thus, the tort would

be considered intentional. The result would be the same if Renu hit a passerby, even if she did not intend to hit that person.

However, many acts do not result in torts. A certain amount of interference with individuals' rights occurs on a daily basis and is considered acceptable in a busy society. Brushing against bodies on a crowded bus or subway, touching someone lightly to get his or her attention, or taking a shortcut across someone's property are actions that are accepted as a normal part of life. Unless they are done in a hostile manner and cause serious harm or fear of harm, they are not considered torts.



**Figure 12-2**

Beware the consequences of throwing an icy snowball.

**Review Your Understanding** (Pages 338 to 339)

1. Why should all Canadians know something about tort law?
2. What is negligence, and why is it the most common form of tort law?

**You Be the JUDGE**

“Law must be stable, and yet it cannot stand still.”  
—Roscoe Pound, lawyer and dean of Harvard Law School, 1922

- What does this quotation mean? How does it apply to tort law?

**12.3 The Elements of Negligence**

The elements of negligence are shown in Figure 12-3 and are described in more detail on the following pages.

**The Potential for a Negligence Action**

Elements	Examples in ...			
	a car	a store	a hospital	a law office
Plaintiff is owed a duty of care.	Duty to avoid accidents	Duty to ensure store is safe	Duty to provide competent treatment	Duty to provide competent legal advice
Defendant breached duty of care.	Drove unsafely; went through a red light	Failed to clean up jam spilled on floor	Amputated the wrong limb	Gave faulty legal advice; client lost right to sue
Plaintiff suffered resulting harm or loss.	Plaintiff and/or plaintiff's car suffered damage.	Plaintiff slipped on mess and broke hip.	Plaintiff endured unnecessary pain and suffering.	Plaintiff lost money arising from potentially successful lawsuit.

**Figure 12-3**

When someone unintentionally harms or injures you, a negligence action may arise. Do you know what is needed to prove negligence?

## You Be the JUDGE

In a 9 to 0 ruling in April 2001, the Supreme Court of Canada ruled that the Canadian Red Cross Society was negligent in supplying blood products containing the HIV virus to two patients. Both patients contracted AIDS and died. Their estates received awards of close to \$1 million.

- Why do you think the court found the Red Cross negligent?

## Duty of Care

In a negligence suit, the plaintiff must show that the defendant owed the plaintiff a **duty of care**. You have a duty of care to people when a legal duty has been placed upon you. Your actions must not cause harm to people or to their property. This principle is central to the study of the laws governing negligence. In our earlier example, the municipality placed upon Liam a duty of care owed to pedestrians—he must keep his sidewalk clear of ice and safe for anyone walking by his home.

## Breach of Duty of Care

Once a duty of care has been established, the court must determine if the defendant breached it. This happens when the defendant fails to meet the expected **standard of care** of a “reasonable person.”

## The Reasonable Person

The **reasonable person** is an image of someone who has neither physical nor developmental disabilities and who people agree is careful, thoughtful, and considerate of other people in all dealings. The reasonable person is never expected to be perfect. Are all reasonable people exactly the same? No. What is reasonable for a person in downtown Vancouver, for example, may not necessarily be reasonable for a person in Milk River, Alberta, or in Iqaluit, Nunavut. In addition, what was “reasonable” 50 years ago is often not reasonable today. If the defendant was repairing car brakes, the “reasonable person” would be a reasonably competent mechanic. If the defendant was performing surgery, the standard would be that of a reasonably competent surgeon.

A person or company whose conduct falls below the expected standard of care is liable for the results of the negligence, even if the party was acting within the law. For example, Anya drives at the posted speed limit during a snowstorm and hits a pedestrian. If a “reasonable person” would have driven slower, Anya is liable.

## Minors and a Duty of Care

A child cannot be judged by the standards of an adult “reasonable person.” You learned in Chapter 10 that minors under the age of 12 cannot be charged with a criminal offence under the *Youth Criminal Justice Act*. However, there is no legislation that clearly outlines the

**Figure 12-4**

According to Canadian law, children below the age of six or seven do not understand the consequences of their actions.



tort liability of minors. In each case, the court must determine liability on the basis of the facts and the minor's background. The older the minor, the greater his or her responsibility.

A child under the age of six or seven is seldom held liable for negligence. Children below this age are not equipped to understand the consequences of their actions. In any incident involving an older child, the courts will consider what a child of similar age, experience, and intelligence might have done. Children must provide the duty of care expected from reasonable children of a similar age. But minors involved in adult activities, such as driving a car or riding a trail bike, are expected to meet the adult standards of care. The potential danger from the activity makes it unfair to society to apply a lower standard of care.

## Agents of Change

In 1997, Manitoba Justice Minister Rosemary Vodrey introduced Bill 58, the *Parental Responsibility Act*. It allows the victim of a child's vandalism or another crime to sue the child's parents or legal guardians in Small Claims Court for damages up to \$7500. The bill covers children who live at home and are under age 18.

After Manitoba passed its legislation, other provinces followed suit. British Columbia introduced similar legislation in August 2001, and Ontario's *Parental Responsibility Act* became law on August 15, 2000. Under Ontario law, victims can sue for damages up to \$10 000 in Small Claims Court against parents of minors who intentionally take, damage, or destroy property.

Punishing parents was not the intent of Manitoba's legislation, says Vodrey. "But parents must become involved and aware of their young people's activities, and I hope this legislation accomplishes that."

In all three provinces, victims need prove only the amount of the damage; that the child caused the property loss or damage; and that the

## The Parental Responsibility Act

defendants are the child's parents. The defendant's parents are liable for damages unless they can prove that the damage was not intentional, or that they exercised reasonable supervision over the child and made reasonable efforts to prevent the damage from occurring.

By 2001, the *Parental Responsibility Act* has been used successfully only once.

### For Discussion

1. What can victims do if the amount of the property loss or damage exceeds the Small Claims Court limit of \$10 000?
2. "This new legislation will create new business for lawyers in defending Small Claims Court actions on behalf of families." Discuss with a partner the extent to which you agree or disagree with this statement.
3. Should all provinces have a *Parental Responsibility Act*? Why or why not?



Figure 12-5  
Rosemary Vodrey

## Foreseeability

The concept of **foreseeability** is related to the concept of a reasonable person. Asking the question: “Would a reasonable person in similar circumstances have foreseen the injury to the victim as a result of his or her action?” determines to a large extent tort liability. If the answer is “yes,” fault and liability exist; if the answer is “no,” there is no liability. If the defendant has not met the reasonable person’s standard of care, then the defendant has breached his or her duty of care. In our earlier example, Liam should have foreseen that somebody might slip and fall and be injured because of the ice on the sidewalk.

Foreseeability is a difficult standard to apply. The courts have tended to follow the principle that defendants should not be held responsible for any results of actions that could not reasonably be expected. For example, if Alden carries a gun that discharges as he falls, shooting a neighbour, Liam is not liable for the neighbour’s injuries.

## Causation

Once it is established that the defendant has breached the required standard of care, the plaintiff must prove that the defendant’s negligent conduct caused the plaintiff’s harm. There must be a direct causal connection between the defendant’s negligent act and the plaintiff’s claim; for example, Liam’s failure to shovel and Alden’s injury. This relationship is called **causation**; without it, liability for negligence does not exist.

Once it has been established that the defendant’s action was a cause of the plaintiff’s injury, the court must decide how direct a connection there was between the action and the injury. In our example, the connection is very direct. There is no doubt that Liam’s actions caused Alden’s injury.

Now suppose that, as Alden slips on the ice, Chandra is driving by and is startled to see the pedestrian falling toward her car. To avoid an accident, Chandra swerves and loses control of her car on the slippery road. She hits a telephone pole, knocking out service to the subdivision and damaging her car. Because the telephone lines are out of order as a result of the accident, Lisa is unable to call an ambulance for her husband, who is having a heart attack. Since she cannot drive and is unable to get an ambulance, Lisa’s husband dies. Is Liam responsible for this man’s death, or for the damage to Chandra’s car?

To answer this question, the court must examine the connection between Liam’s actions and the various losses. Even if his negligence ultimately caused the damage to Chandra’s car and the death of Lisa’s husband, Liam would not be held liable if the court decides that these losses are too far removed to be recoverable in damages. Causation depends on the facts of each case, judged on its own merits.

## Actual Harm or Loss

Finally, in a negligence suit, the plaintiff must prove that real harm occurred because of the defendant's negligence. If nobody had been injured as a result of Liam's actions, no loss would have been suffered by anyone, and legal action would not succeed.

### Case

#### ***Prevost (Committee of) v. Vetter***

(2001) 197 D.L.R. (4th) 292  
British Columbia Supreme Court

On June 19, 1998, at around 11 P.M., the 18-year-old defendant, Desiree Vetter, and about 15 other teenagers arrived at the home of her aunt and uncle, Shari and Gregory Vetter, in Enderby, British Columbia. The aunt and uncle had gone upstairs and were asleep when the group arrived, but their 17-year-old son Scott was there with a few friends. He did not see his cousin Desiree or any of her friends bring alcohol or consume it on the premises, but Desiree admitted to drinking in the backyard. No liquor was supplied by Scott. At about 11:30 P.M., the 17-year-old plaintiff, Adam Prevost, arrived with a group of intoxicated young adults. By then, there were about 30 people in the Vettters' yard.

Around 1:00 A.M., the police arrived in response to neighbours' complaints. They told Scott to quiet the group and clear everyone out. Scott woke his mother to advise her of this; she asked if he needed help in breaking up the party. He said no, and she went back to sleep. Evidence indicated that Shari and Gregory regularly permitted Scott to host such parties, and they were aware that minors sometimes brought their own liquor and drank it there. In the past, but not this evening, Shari was protective of

drinking minors, offering to have them sleep over, taking away their car keys, or driving them home.

Everyone had left by about 1:30 A.M. Desiree was one of the last to leave, and the plaintiff asked her for a lift. Desiree drove with five passengers in her car. She lost control of the vehicle, and Adam was thrown through the sunroof, leaving him with a severe brain injury. Desiree underwent a breath test and registered a blood-alcohol level of 120.

Prevost and his parents brought an action for negligence against Desiree and her aunt and uncle. His action succeeded, and the court awarded \$2.5 million in damages, but a new trial was ordered on appeal.

#### For Discussion

1. Did Shari and Gregory Vetter owe the plaintiff any duty of care and, if so, was it breached?
2. Why would Shari and Gregory be held liable when they were unaware of the party and were asleep upstairs?
3. Is there anything that Shari could have done as a "reasonable person" to have prevented this accident?
4. Was the accident foreseeable? Why?

## Looking Back

### The Snail in the Bottle

Negligence was not recognized as a tort until the landmark judgment in *Donaghue v. Stevenson* (1932) from England's highest court. A friend bought May Donaghue a ginger beer in a dark bottle. Pouring the drink into a glass, Donaghue found a dead snail in the bottle. The sight of the snail caused Donaghue nervous shock, requiring medical treatment. She sued David Stevenson, the drink manufacturer, claiming he

was negligent. He claimed that she couldn't sue him or his company. There was no contract between them because Donaghue's friend bought her the drink. Donaghue lost at trial but won at appeal.

England's highest court ruled that every person has a duty to take reasonable care for the safety of anyone who might foreseeably be harmed by the person's actions. Since the manufacturer allowed a harmful or

continued ►



**Figure 12-6**

How would you react if you found a snail in your drink?

defective product to be sold, it was only reasonable to hold the company responsible for consumers' safety. The manufacturer should have been able to foresee that its products would be used by people other than the actual purchasers.

In its judgment, the court stated: "The rule that you are to love your neighbour becomes in law, you must not injure your neighbour. You must take reasonable

care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour."

This ruling on duty of care marked the beginning of negligence law. Even today, many lawyers claim this decision is the common law's best-known and most important precedent. Today, anyone involved in producing consumer goods may be held liable for negligence if consumers are injured by products when using them routinely. This is the legacy of this landmark case.

### For Discussion

1. Why would Donoghue claim the manufacturer was negligent?
2. What must a manufacturer be able to prove to avoid liability?
3. Why do many lawyers feel this case is a most important precedent?
4. Explain the meaning of the quotation from the judgment.

## The Burden of Proof

As you learned in Chapter 11, the burden of proof is on the plaintiff, who must prove all the required negligence elements. If the plaintiff fails to prove any of the elements, the action fails. The defendant does not have to prove anything, but many defendants do present evidence to show that the plaintiff did not suffer any harm or that the harm was not reasonably foreseeable. Proof exists on a balance of probabilities, and the plaintiff's version of the incident must be viewed as "more likely than not" to succeed.

## Case

### McQueen v. Alberta

2001 ABQB 220

Alberta Court of Queen's Bench

The 32-year-old plaintiff, David McQueen, went to Sikome Lake Provincial Park with his three children and some friends in June 1994. Sikome Lake, near Calgary, is one of two artificial swimming lakes in Alberta. Carrying his two- and three-year-old sons, McQueen waded into the lake a distance of 3 to 5 m toward a skimmer platform (a water-intake mechanism to recycle and clean the water). On reaching the platform, he put each child on the

edge of the platform and stepped up to the top. He then dove in headfirst, breaking his neck, which rendered him a paraplegic.

The plaintiff sued the province and the city of Calgary for damages for his injuries. Evidence at trial indicated that McQueen and his children had been at Sikome Lake on previous occasions. Several lifeguards were on duty at the time of the accident, and No Diving signs were posted.

McQueen testified that he did not know how deep the water was, and he thought it was safe to dive when he looked down and couldn't see the bottom of the lake. He also admitted that he had

**continued** ▶



consumed about 750 mL of rum the night before, had finally gone to bed at 4:30 A.M., and was up at 7:00 A.M. with his sons. McQueen's blood-alcohol level was 148 when he was treated in hospital for his accident. McQueen claimed the province and the city were negligent and he sued for damages for his injuries. His action was dismissed.



### For Discussion

1. What duty of care did the defendants owe McQueen, and was there a breach of it? Explain.
2. What was the cause of this accident? Was it reasonably foreseeable?
3. The trial judge stated: "Although this Court is very sympathetic to Mr. McQueen in relation to the tragedy that has befallen him and his family, there is no basis at law upon which this Court can attribute any responsibility to the defendant for that loss." Why do you think the action was dismissed?

Figure 12-7

The beach at Sikome Lake, outside Calgary, Alberta. Should lifeguards bear any responsibility for accidents?

### Review Your Understanding (Pages 339 to 345)

1. Identify the key elements that a plaintiff must prove to succeed in a negligence action.
2. What is an intentional tort? Provide three examples.
3. Why do many potential tort actions not result in legal action?
4. Distinguish between a duty of care and a standard of care in a negligence action.
5. When is a minor expected to meet an adult standard of care?
6. What is the connection between foreseeability and a reasonable person?
7. Why is proof of causation so important in a negligence action?
8. Why was "the snail in the bottle" case so important in the development of negligence law?

## 12.4 Defences for Negligence

People sued for negligence have a number of available defences. The best defences are that negligence did not exist or that the defendant did not owe the plaintiff any duty of care. Even a plaintiff who is able to prove that negligence exists may not be able to recover as much as expected. If the plaintiff has also been negligent in the incident or has assumed a risk voluntarily, then damages may be reduced or not awarded at all.

## Contributory Negligence

At one time, under common law, a plaintiff found to be in any way at fault for an accident was denied the right to claim damages. Society's attitude was that the law should not protect people who do not look after their own safety. However, such treatment seemed harsh for plaintiffs who were only slightly at fault for their loss or injury.

Today, if both the plaintiff and the defendant are negligent to some degree, damages are divided between them, according to the principle of **contributory negligence**. The court must determine which party was more negligent, or whether both parties were equally at fault. In making this decision, the judge considers the elements of negligence discussed earlier in this chapter. The burden is on the defendant to prove the plaintiff's contributory negligence. Each province has a Contributory Negligence Act or a Negligence Act that allows courts to divide responsibility between the parties.

For example, a motor vehicle accident results in damages of \$80 000. The court finds the defendant 75 percent at fault for driving well above the speed limit and through a red light. The plaintiff, however, is found 25 percent at fault for driving through the intersection on an amber light and not wearing a seat belt. As a result of this finding of contributory negligence, the plaintiff will receive \$60 000 from the defendant. The plaintiff is liable for the remaining \$20 000 and will not receive it. The damages calculated are those that the judge or jury believe are required to fully compensate the injured

## Case

### *Jordan v. Poirier*

(2000) 231 N.B.R. (2d) 170

New Brunswick Court of Queen's Bench

In July, 1998, the plaintiff, James Jordan, and the defendant, Ulysse Poirier, each headed to a corner store to buy cigarettes at around 11:30 P.M. Jordan was on his bike and was wearing a brown leather jacket, jeans, and a baseball cap because it was raining heavily. Poirier drove his parents' car. The young men went to the same corner store but did not see each other there.

On their way home, the parties were travelling in the same direction on parallel streets. They both stopped at the stop signs at the intersection with a through street. As Jordan entered the intersection, Poirier made a left turn into the intersection, proceeded along the through street, and struck Jordan, severely injuring him. Evidence indicated that Poirier's car windows were fogged up and he had trouble seeing. It was raining so hard that he had his wipers on full speed and his headlights on high beams. There was no evidence that Poirier was

speeding, although Jordan thought he was driving fast. Jordan was wearing dark clothing, and his bike didn't have the required headlight or bell. There were no other vehicles on the roadway, and there were streetlights illuminating both streets and the intersection.

Jordan sued Poirier for damages for negligence, but the Court of Queen's Bench held that both parties were equally negligent as either party could and should have been seen by the other.

### For Discussion

1. What arguments could the plaintiff use to establish negligence on the part of the defendant?
2. How did each of the parties contribute to the negligence for this accident?
3. Under New Brunswick's *Contributory Negligence Act*, the judge found the parties equally at fault. Why do you think the judge found equal fault?