

Chapter 1

Tort Law: An Introduction

CHAPTER OBJECTIVES

Upon completion of this chapter, you will be able to:

- Understand and define a tort.
- Identify what constitutes reasonable conduct.
- Explain the difference between a tort and a crime or a contract.
- Identify the elements of a tort.
- Discuss the major categories of torts.

Tort law can be overwhelming. Numerous situations and injuries can be categorized as torts, and the court system is constantly changing its view of what constitutes a tort. Who is responsible for damages caused to a piece of property by a trespasser? Who is responsible for the dog bite suffered by a little girl? Who is responsible for the damages that a celebrity suffers for untrue remarks made about his or her character? All of these situations, as well as many others, fall into various areas of tort law. This chapter gives an introduction to and an overview of the major aspects of tort law and provides a foundation on which to build discussions on specific areas of tort law in later chapters.

tort

A civil wrongful act, committed against a person or property, either intentional or negligent.

WHAT IS A TORT?

One of the most frequently asked questions when beginning the study of tort law is: What is a tort? It is not a dessert or a breakfast Danish. Nor is it a sour taste. So what is a tort? A **tort** is defined as a private or **civil** wrong or injury for which the

civil

Relating to private rights and remedies sought in an action brought to enforce, redress, or protect private rights.

CASE FACT PATTERN



A man was using a public telephone booth to make a telephone call. While he was in the booth, an alleged drunk driver sped down the street, lost control of his vehicle, and crashed into the man in the telephone booth, severing his leg. The door to the telephone booth had jammed and the man could not open it in time to retreat once he noticed the speeding car careening out of control. The accident left the injured man unable to walk or work. The injured man sued the telephone company for placing the booth near a

known hazardous intersection and because the door to the booth had jammed, trapping the man inside the booth.

- Who should the man sue and why? Is the telephone company the right party to sue or the drunk driver? Why?
- Are there public policy issues present?
- If so, might the public policy issues have an impact on the trial? Why or why not?

remedy

The means by which a right is enforced or the violation of a right is prevented, redressed, or compensated.

damages

Money paid to compensate for loss or injury.

reasonable care

Conduct that an ordinary person would exhibit under the same or similar circumstances.

court will provide a **remedy** in the form of an action for **damages**. If a tort occurs, the law permits the injured party to seek to recover damages equal to the value of the injury. Damages are awarded in an effort to make the injured party whole again.

Money, the usual form of damages awarded in a tort case, can assist to rectify many things, but it cannot always make the injured party whole again; nevertheless, it is the best remedy that the law affords for the situation. The underlying theory in tort law is that socially unreasonable conduct should be penalized. Public policy becomes a prime focus in tort law. What is just and fair and promotes equality is the underlying theme that permeates this area of the law.

Reasonable Care

The concept of reasonable care underlies tort law. The court tries to compensate a victim for harm suffered from another person who did not take **reasonable care**. The reasonableness of a person's conduct is objective. Therefore, to understand what constitutes unreasonable conduct, one must first examine what constitutes reasonable care. Reasonable care generally means any type of conduct that might be exhibited by an ordinary person under the same or similar circumstances. Another way of looking at what is *reasonable* is to determine "what a reasonable person would do under the circumstances."

The concept of reasonable care does not mean that a person must act *perfectly*; it means an individual must act *appropriately*, as any other ordinary person might in the same or similar circumstances. A person violates the premise of reasonable care if he or she acts intentionally toward another person. The concept of reasonable conduct is used to determine whether or not a person's conduct complied with how others might behave or act under similar circumstances.

For example, suppose a corporate executive is running late for a business deal. The business deal could be worth a substantial amount of money to his corporation should he consummate the deal. He decides to speed through a residential area where a school is located in order to save time on his drive to the office. He is traveling 70 mph in a 30 mph zone. The executive is drinking coffee and placing a CD into the CD player of the car. A short distance up the street, a little boy is crossing the road on his way to school. The corporate executive notices the little boy at the last minute, but cannot stop his vehicle in time. His vehicle strikes the little boy and kills him. Is the corporate executive's conduct reasonable? Would an ordinary person in the same or similar circumstances have acted in the same manner? The answer is no. Speeding laws are enacted to protect the public. Traveling at excessively high rates of speed in a residential area is not conduct that would be exhibited by an ordinary or average person under those circumstances. It would be assumed that an ordinary person would obey speed limits and call the office to say he would be late. Therefore, the executive's conduct violates social utility or public policy, and he will be held responsible for the death of the little boy.

**A DAY IN THE LIFE OF A REAL PARALEGAL**

Tort law is a very important area of law in the legal industry and, as such, many paralegals are employed at firms and companies that work in this area. A paralegal may work for a personal injury law firm helping injured people obtain compensation for their injuries and damages. On the other hand, an insurance company may employ paralegals to work in defending the people who are insured by the insurance company from false claims of damages and injuries made by individuals for money. A paralegal working in this field can expect to become very familiar with court rules and regulations as well as state statutes. Deadlines are commonplace and the atmosphere can be fast paced at times. Many paralegals employed in this area of the law like the fact that they can help people who are in need.

In the preceding example, the unreasonable conduct of the executive can be called the **tortious conduct** in a case involving tort law. The executive is called the **tortfeasor**, and the lawsuit for the death of the boy would be a **cause of action** against the executive. If the executive is found **liable** for the death of the little boy, the court will award damages in favor of the little boy's family and against the executive.

TORTS: NOT CRIMINAL AND NOT CONTRACTUAL

When a person sues another under tort law, the purpose is not to punish the person who committed the act, but rather to compensate the victim for his or her loss, injury, or damages. When a tort case is initiated, the rules of civil procedure dictate how the case will proceed. The burden of proof is a **preponderance of the evidence**. A tort is different from a crime and different from a contract. Those differences are discussed next.

Crimes

A tort is not a **crime**. A crime is considered an offense against society as a whole. When people are punished for committing crimes, they are punished for committing wrongs against society. For example, a person is being tried in state court for committing a murder. The prosecutor works for the state. The state represents the people or the public at large, not an individual. The interests of society are served when the offending person is punished for committing the crime. When a criminal case is being prosecuted, the rules of criminal procedure dictate how the case is to proceed. The **burden of proof** in a criminal case is **beyond a reasonable doubt**. In a tort action, the burden of proof is the responsibility of the plaintiff. That is, it is the responsibility of the plaintiff or plaintiff's attorney to prove the defendant is liable for the plaintiff's damages or injury. (See Figure 1.1.)

A single action can be both a crime against society and a tort against a person. For example, take the infamous O.J. Simpson case. O.J. Simpson, a former professional football player, was accused of killing his ex-wife, Nicole, and a male friend in front of her home. Simpson was tried in a criminal court in the state of California for the murder of both people. The case was entitled *People of the State of California v. Orenthal J. Simpson*. The prosecutors prosecuted O.J. Simpson on behalf of the public because a crime of **murder** is viewed as a crime against society. Simpson was found not guilty of the murders. However, in a later civil action brought by the families of the victims, he was sued for the **wrongful deaths** of both people. In the civil case, O.J. Simpson was found liable for the wrongful deaths of his ex-wife and her friend, and a monetary award of millions of dollars was awarded to the families in an effort to compensate them for their loss. As already indicated, although no amount of money can make up for the lives of those two people, it is the best way that the courts have to compensate the victims for their loss. O.J. Simpson was tried

tortious conduct

The intentional or unintentional behavior or conduct that results in harm to another person.

tortfeasor

Actor committing the wrong, whether intentional, negligent, or strict liability.

cause of action

A personal, financial, or other injury for which the law gives a person the right to receive compensation.

liable

A determination of financial responsibility of the tortfeasor for tortious conduct that has resulted in some form of injury to an individual's property or person.

preponderance of the evidence

The weight or level of persuasion of evidence needed to find the defendant liable as alleged by the plaintiff in a civil matter.

crime

An act that violates the penal law of the local, state, or federal government.

burden of proof

Standard for assessing the weight of the evidence.

beyond a

reasonable doubt

The requirement for the level of proof in a criminal matter in order to convict or find the defendant guilty. It is a substantially higher and more-difficult-to-prove criminal matter standard.

murder

The killing of a human being with intent.

wrongful death

A death attributable to the willful or negligent act of another.

	Torts	Crimes
Purpose	Compensation	Punishment
Theory of Offense	Offense to individual	Offense to society
Initiating Party	The victim	The state
Verb/Noun	Sue/suit	Try/trial
Category of Responsibility	Liability	Guilt
Standard of Proof	Preponderance of evidence	Beyond a reasonable doubt
Procedural Rules	Civil rules	Criminal rules
Domain of Law	Civil	Criminal

FIGURE 1.1 Torts Versus Crimes



SPOT THE ISSUE

A woman is walking down the sidewalk in front of City Hall. The concrete of the sidewalk is chipped, and in many areas the roots of the trees that line Main Street have raised the sidewalk. The woman trips over one of the raised areas of concrete, falls, and breaks her arm. What is the tort? Who can the woman sue?

both for a crime (murder) and a tort (wrongful death) from the commission of one act. In the murder trial, Simpson was held to the standard of beyond a reasonable doubt. Defense attorneys argued that since the infamous glove found at the scene of the crime did not fit Simpson when he tried to put it on that reasonable doubt existed as to whether or not Simpson committed the murders. Simpson was found not guilty of the murders. In the civil case, the standard of a preponderance of the evidence was used to find Simpson liable for the murders.

A tort does have some similarities to crimes. For example, both are considered to be actions against societal utility or public policy. The intention of the perpetrator is at the heart of an action for both crimes and torts. In a crime, the question is whether the intent was malicious. In a tort, the intent is looked at slightly differently to determine if it is blameworthy.

Contracts

An action in contracts, like a tort, is a civil action; however, a tort action is not based on a **contract**. A tort differs from a contract in that the action of contracting involves a voluntary action wherein each party agrees to be bound to certain duties and obligations. There is a **mutual agreement** between the parties. In tort law, obligations and duties are imposed by law and are not agreed to by the parties. Those involved do not voluntarily assume the duties and obligations. In contract law, the duties and obligations are specific to the contracting individuals. In tort law, the obligations and duties are to society. They are those duties and obligations that are imposed by society as to what conduct is considered fair and ethical. For example, David agrees to pay Ernie \$2,000 for painting his house. The two sign a contract that defines the terms of their agreement. If Ernie paints David's house and then David refuses to pay him, then David has violated the contract with Ernie. Ernie can sue David for breach of contract. In contrast, suppose that David knocked the ladder by walking under it while Ernie was painting, causing Ernie to fall and break his arm. Ernie could sue David for causing his injury. In contracts, money damages are paid for violating the agreement. In tort law, money damages are paid for the injury. (See Figure 1.2.)

contract

A legally binding agreement between two or more parties.

mutual agreement

A meeting of the minds on a specific subject, and a manifestation of intent of the parties to do or refrain from doing some specific act or acts.

FIGURE 1.2
Torts Versus Contracts

	Torts	Contracts
Duties Assigned	Imposed by law	By parties' consent
Injuries Arise From	Injuries are not the result of a breach of an agreement	Injuries are the result of a breach of an agreement
Obligations Made To	Specific individuals Society in general	Specific individuals
Compensation	Monetary	Monetary Court-imposed specific performance
Procedural Rules	Civil rules	Civil rules
Domain of Law	Civil	Civil

ELEMENTS OF ALL TORTS

Tort law has evolved over time through Anglo-Saxon societies. The concept of paying monetary compensation for damages sustained was a product of Anglo-Saxon society and was based primarily on a person's rank in the society. People learned over time which decisions when rendered consistently were most advantageous to the society as a whole. Eventually, those decisions became local rules, and these local rules developed into what is now called **common law**.

Tort law comes into existence either by the court making a ruling in a case, which makes it common law, or by the legislature enacting a law, which makes it **statutory law**. Common law is judge-made law in the absence of any other controlling type of law. However, if a legislative statute exists, the court must follow the statute because statutory law takes priority over common law. When a court, such as a supreme court or an appellate court, makes a ruling or a decision in a case, that ruling is to be bound and adhered to and establishes **precedent**. Adhering to and abiding by decisions and rulings that have gone before is known as the doctrine of *stare decisis*. The doctrine of *stare decisis* does not mean that court rulings should never be overturned. In fact, over time, many are due to changes in circumstances or statutory law. However, *stare decisis* provides for the principle that a court should not overturn its own precedents unless there is a strong reason to do so and should be guided by principles from lateral and lower courts.

Every tort is a cause of action, which means that the injured party has a legally acceptable reason for bringing a lawsuit. To bring a lawsuit, a party must allege facts that support every element of the cause of action in torts. The components of a cause of action in torts are called **elements**. When a party has alleged facts that satisfy every element of the tort cause of action, then that party has presented a **prima facie** case.

The person who brings the lawsuit and who sustained the injury is called the **plaintiff**. If a case involves more than one person who sustained injuries or damages, they may bring suit together as **co-plaintiffs**. The wrongdoer is the tortfeasor and is called the **defendant**. If more than one defendant is involved in an action, a lawsuit can be brought against both of them as **co-defendants**. The law of torts provides remedies under the law for those plaintiffs who can prove that the basic elements of a cause of action for torts exists. If the plaintiff fails to prove the elements that make a prima facie case for the tort, the plaintiff has failed to prove that there is a cause of action in tort; as such, he is not entitled to avail himself to the court on a lawsuit for that tort. During the course of the lawsuit, while the plaintiff alleges facts to state a prima facie case against the defendant, the defendant is able to provide evidence or defenses that dispute the plaintiff's allegations.

A cause of action for torts has four basic elements. These elements are as follows:

- A *legal right* resides with the plaintiff.
- A *duty* resides in the defendant.
- There is a *violation of the duty* by the defendant.
- The plaintiff *sustained damages* as a result of the defendant's violation of his or her duty.

When analyzing a tort issue, three major questions should be considered for each possible tort that may be involved. These questions are:

1. Are the basic elements for the tort satisfied? Is the prima facie case established?
If any of the basic elements are missing, then the plaintiff will probably not have a tort cause of action against the plaintiff.

common law

Judge-made law, the ruling in a judicial opinion.

statutory law

Derived from the Constitution in statutes enacted by the legislative branch of state or federal government; primary source of law consisting of the body of legislative law.

precedent

The holding of past court decisions that are followed in future judicial cases where similar facts and legal issues are present.

stare decisis

(Latin) "Stand by the decision." Decisions from a court with substantially the same set of facts should be followed by that court and all lower courts under it; the judicial process of adhering to prior case decisions; the doctrine of precedent whereby once a court has decided a specific issue one way in the past, it and other courts in the same jurisdiction are obligated to follow that earlier decision in deciding cases with similar issues in the future.

elements

A constituent part of a claim that must be proved for the claim to succeed.

prima facie

(Latin) "At first sight." A case with the required proof of elements in a tort cause of action; the elements of the plaintiff's (or prosecutor's) cause of action; what the plaintiff must prove; accepted on its face, but not indisputable.

plaintiff

The party initiating legal action.

co-plaintiff

More than one plaintiff who is involved in the same lawsuit.

defendant

The party against whom a lawsuit is brought.

co-defendant

More than one defendant who is being sued in the same lawsuit.

2. Are there any reasons or justifications or defenses that the defendant can offer that would negate any presumed liability by the defendant? For example, did the defendant act in self-defense, or did the plaintiff’s actions help contribute to the alleged tort?
3. If the prima facie case has been established and the defendant can offer no defenses to his conduct, then what type of damages may the plaintiff recover from the defendant?

CATEGORIES OF TORTS

There are three main categories of torts:

- Intentional torts
- Negligence
- Strict liability torts

(See Figure 1.3.)

Intentional Torts

An **intentional tort** is just that—intentional. It is a tort that is committed on purpose by the defendant. The **intent** of the defendant drives this cause of action. The defendant intended for her actions to happen and to cause the result to the plaintiff. The defendant must either desire to bring the result or knew with substantial certainty that the result would follow from what she did or failed to do. A failure to act by the defendant is known as an **omission**. Intentional torts are differentiated from other torts because they involve the state of mind of the defendant at the time that the person performed the action or failed to act.

The causes of action that fall under the category of intentional torts are:

- Assault and battery
- False imprisonment
- False arrest
- Infliction of emotional distress
- Conversion
- Trespass to land and/or chattels
- Invasion of privacy
- Defamation
- Malicious prosecution
- Abuse of process

Intentional torts will be discussed in more detail in later chapters in this book.

intentional tort

An intentional civil wrong that injures another person or property.

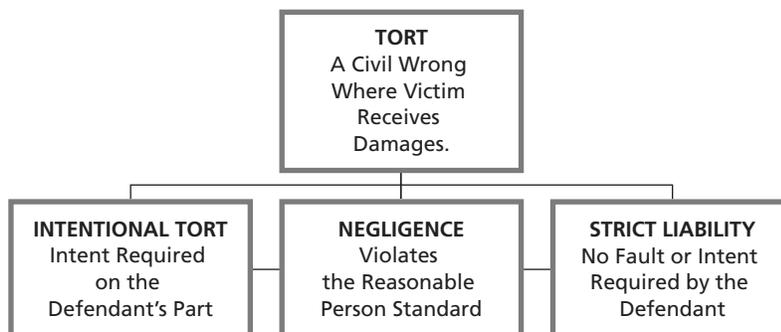
intent

Having the knowledge and desire that a specific consequence will result from an action.

omission

The failure to act when there exists a legal duty to do so.

FIGURE 1.3
Categories of Torts



YOU BE THE JUDGE



Joey and Sarah are dating each other. Joey is obsessed with Sarah and becomes very jealous whenever she speaks with anyone of the opposite sex. Sarah has a good friend, Tom. Tom and Sarah have been friends since their childhood. Joey is jealous of Sarah's relationship with

Tom. One day, Joey sees Tom speaking to Sarah. Joey becomes angry that Tom would speak to his girlfriend. Joey walks up to Tom and punches him in the face, breaking Tom's nose. Is Joey liable for a tort? Does Tom have any recourse?

Negligence

Some torts are caused by the **negligence** of the defendant. The defendant's intent to cause the injury to the plaintiff is not involved. This is distinguishable from the intentional torts that center on the intent of the defendant. Negligence covers harm due to actions or inactions that were unreasonable under the circumstances. It is the blameworthy conduct of the defendant that was the direct cause of the plaintiff's injuries. In an action for negligence, in order for there to be a cause of action against the defendant, there must have been harm to the plaintiff. For example, suppose that Keith spills some water on a hardwood floor and fails to clean it up. A short time later, Dan enters the room, slips on the water, and falls to the ground breaking his arm. As a result of Keith's failure to wipe up the water on the floor, Dan was injured. Keith's actions were considered negligent and were the cause of Dan's injury.

negligence

The failure to use reasonable care to avoid harm to another person or to do that which a reasonable person might do in similar circumstances.

Strict Liability

The general meaning of **strict liability** is liability without fault. If the defendant engages in a certain kind of conduct that causes harm to the plaintiff, then liability will result, irrespective of intent, negligence, or innocence. Certain types of conduct are inherently dangerous; therefore, any harm that results from these types of activities will result in liability being assessed to the defendant. Activities that fall into this category include blasting to clear land for development or transporting hazardous waste.

strict liability

The defendant is liable without the plaintiff having to prove fault.

Other Torts

There are other torts that do not fit neatly into the three categories of intentional tort, negligence, and strict liability. These torts are premises liability, nuisance, vicarious liability, and product liability. These torts will be discussed in more detail in later chapters.



LEGAL RESEARCH MAXIM

Various texts exist that explain the law created by statutes or judicial opinions. One source that is particularly helpful in understanding tort law is the *Restatement of Torts*. This text is not a source of law but will provide detailed explanations and sources of law for the various areas and concepts that are found in torts.

MAJOR TYPES OF PERSONAL INJURY TORT LITIGATION

Tort litigation in state and federal courts in this country is estimated to be between \$30 billion and \$40 billion per year. The litigation falls into three types:

- Routine personal injury—Automobile accidents, slips and falls, and so on.
- High-stakes personal injury—Products liability, medical malpractice, business torts, and so on.
- Mass latent injury—Products liability but on a broader scale because the injury is not discovered right away.

tort litigation

Legal action that involves an injury that falls under the definition of a tort.

**SURF'S UP**

Court decisions in tort law are being rendered all the time at the local, state, and federal levels. To learn about recent federal decisions in tort law, try visiting the website for the Cornell Law School Legal Information Institute. Go to

www.law.cornell.edu and click on "Recent Tort Law Decisions" for the United States Supreme Court. Read the recent cases that are listed and how they were decided using tort law.

YOU BE THE JUDGE

Bryan likes to play jokes on people. One day, Bryan and his mom, Marci, go to meet their friends, David and David's mom, Brenda, at a restaurant. Just as Brenda is about to take a seat in the restaurant, Bryan decides to play a joke on her. Bryan pulls Brenda's chair out from

under her just as she is about to sit down. Brenda falls on the hard floor and injures her back. Has Bryan committed a tort? If so, which category of torts does his action fall into? Last, do you think that Marci is liable for Brenda's injuries?

**EYE ON ETHICS**

Remember that each state has its own laws. It is always important to stay abreast of all cur-

rent local, state, and federal laws when dealing with any type of legal theory.

Although there are numerous other types of tort litigation, the types in the preceding list constitute a large majority of the common types found in most law firms.

**RESEARCH THIS**

Although numerous resources are available for information on tort law, the principal resource for **black letter** rules of tort law comes from the *Restatement (Second) of Torts* that was

drafted by the American Law Institute. The *Restatement* is an excellent source of information and should be referred to frequently when studying this area of the law.

black letter

An informal term indicating the basic principles of law generally accepted by the courts and/or embodied in the statutes of a particular jurisdiction.

Summary

A tort is defined as a private or civil wrong or injury for which the court will provide a remedy in the form of an action for damages. If a violation of a tort occurs, the law permits the injured party to seek to recover damages equal to the value of the injury. Damages are awarded in an effort to make the injured party whole again.

Money is the usual form of damages awarded in a tort case. While money can assist to rectify many things, it cannot always make the injured party whole again, but it is the best remedy that the law affords for the situation. The underlying theory in tort law is that socially unreasonable conduct should be penalized. Public policy becomes a prime focus in tort law. What is just and fair and promotes equality is the underlying theme of this area of the law.

Reasonable care generally means any type of conduct that might be exhibited by an ordinary person under the same or similar circumstances. Individuals can violate the premise of reasonable care if they act intentionally toward another person. The definition of a reasonable person can be interpreted as "what a reasonable person would do under the circumstances."

A tort is different from a crime. A crime is considered an offense against society as a whole. When people are punished for committing a crime, they are punished for committing a wrong against society. For example, a person being tried in state court for committing a murder.

A tort is different from a contract. An action in contracts, like a tort, is a civil action, but a tort action is not based on a contract. The action of contracting involves a voluntary action wherein each party agrees to be bound to certain duties and obligations. There is a mutual agreement between the parties. In tort law, obligations and duties are imposed by law and are not agreed to by the parties. Those involved do not voluntarily assume the duties and obligations. In contract law, the duties and obligations are specific to the contracting individuals. In tort law, the obligations and duties are to society. They are those duties and obligations that are imposed by society as to what conduct is considered fair and ethical.

Tort law comes into existence either by the court making a ruling in a case, which makes it common law, or by the legislature enacting a law, which makes it statutory law. If a statute exists, the court must follow the statute because statutory law takes priority over common law.

Every tort is a cause of action, which means that the injured party has a legally acceptable reason for bringing a lawsuit. To bring a lawsuit, a party must allege facts that support every element of the cause of action in torts. The components of a cause of action in torts are called elements. When a party has alleged facts that satisfy every element of the tort cause of action, then that party has presented a prima facie case.

A cause of action for torts has four basic elements. These elements are as follows: a legal right resides with the plaintiff; a duty resides in the defendant; there is a violation of the duty by the defendant; and the plaintiff sustained damages as a result of the defendant's violation of his or her duty.

An intentional tort is just that—intentional. It is a tort that is committed on purpose by the defendant. The defendant intended for his actions to happen and to cause the result to the plaintiff. The defendant must either desire to bring the result or know with substantial certainty that the result will follow from what she did, or failed to do. A failure to act by the defendant is known as an omission. Intentional torts are differentiated from other torts because they involve the state of mind of defendants at the time that they performed the action or failed to act.

Torts that are caused by the negligence of the defendant involve the lack of intent to cause the injury to the plaintiff. This is distinguishable from the intentional torts that center on the defendant's intent. Negligence covers harm due to actions or inactions that were unreasonable under the circumstances. It is the blameworthy conduct of the defendant that was the direct cause of the plaintiff's injuries. In an action for negligence, in order for there to be a cause of action against the defendant there must have been harm to the plaintiff.

The general meaning of strict liability is liability without fault. If the defendant engages in a certain kind of conduct that causes harm to the plaintiff, then liability will result, irrespective of intent, negligence, or innocence. It is thought that certain types of conduct are inherently dangerous; therefore, any harm that results from these types of activities will result in liability being assessed to the defendant.

Beyond a reasonable doubt
Black letter
Burden of proof
Cause of action

Civil
Co-defendant
Common law
Contract

Key Terms

Co-plaintiff	Precedent
Crime	Preponderance of the evidence
Damages	Prima facie
Defendant	Reasonable care
Elements	Remedy
Intent	<i>Stare decisis</i>
Intentional tort	Statutory law
Liable	Strict liability
Murder	Tort
Mutual agreement	Tortfeasor
Negligence	Tort litigation
Omission	Tortious conduct
Plaintiff	Wrongful death

Review Questions

1. What is a tort?
2. What is tortious conduct?
3. What is a tortfeasor?
4. How is reasonable care measured?
5. What distinguishes intentional torts from negligence?
6. What are the elements of a tort?
7. What is the similarity between torts and crimes?
8. What is the similarity between torts and contracts?
9. What is a plaintiff?
10. What is the difference between preponderance of the evidence and beyond a reasonable doubt?
11. What is common law?
12. What is statutory law?
13. What is a prima facie case?
14. Can a tort be both a crime and a civil wrong? Explain.
15. What does “liable” mean?

Exercises

1. Look in your local telephone directory. Identify 25 attorney’s offices that practice in the area of torts. List the firm name and identify the different types of torts that they practice.
2. Bill and Jenny are wrestling. Bill pushes Jenny and she falls into Sara. Sara is injured. Write an essay describing whether or not a tort was committed by Bill, Jenny, Sara, or all of them and, if so, into which category the tort falls.
3. Has a tort ever been committed against you, a family member, or one of your friends? Write an essay about the tort, making sure you cover the following items:
 - a. the facts surrounding the tort;
 - b. into what category the tort falls;
 - c. who the plaintiff and defendant were;
 - d. what the cause of action was; and
 - e. what the injury was that was sustained.
4. Interview a neighborhood/community attorney working in personal injury. What are the different types of payment attorneys may receive as compensation?
5. The terms *assault* and *battery* are heard frequently not only in criminal settings but tort settings as well. Are there different elements to each? What is different?

6. Can a person be successful in a lawsuit claiming *assault* if the victim never saw the perpetrator? Research and list your discoveries about that issue.
7. Explain in laypeople’s terms what the difference is between the two very different standards for criminal law and torts, “beyond a reasonable doubt” versus “by a preponderance of the evidence,” respectively.
8. Why does society make room for, *allow*, people to seek reimbursement for injuries sustained when society may hold the perpetrator responsible by arresting and incarcerating the guilty party?

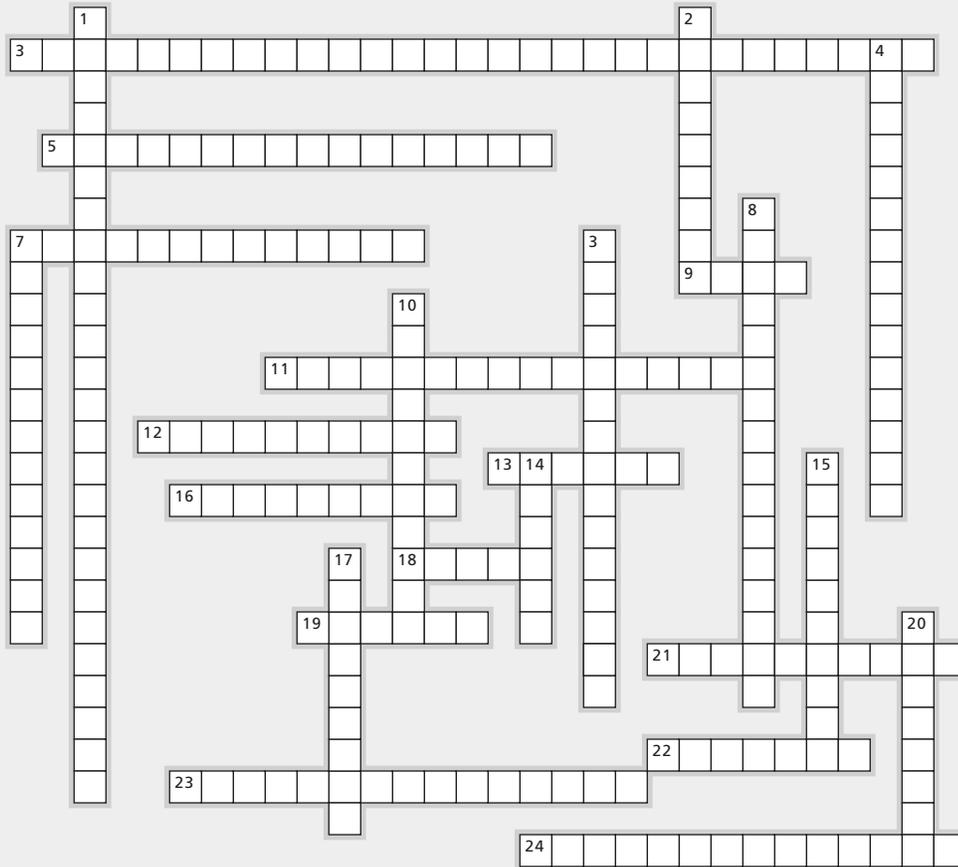


PORTFOLIO ASSIGNMENT

Write a memorandum about an episode in your life in which you believe a tort was committed. Explain the facts of the scenario and tell why you believe that the action of the defendant rises to the level of a tort.



Vocabulary Builders



Instructions

Use the key terms from this chapter to fill in the answers to the crossword puzzle.
 NOTE: When the answer is more than one word, leave a blank space between the words.

ACROSS

3. The weight or level of persuasion of evidence needed to find the defendant liable as alleged by the plaintiff in a civil matter.
5. An intentional civil wrong that injures another person or property.

DOWN

1. The requirement for the level of proof in a criminal matter in order to convict or find the defendant guilty. It is a substantially higher and more-difficult-to-prove criminal matter standard.
2. The party against whom a lawsuit is brought.



Vocabulary Builders

7. Derived from the Constitution in statutes enacted by the legislative branch of state or federal government; primary source of law consisting of the body of legislative law.
9. A civil wrongful act, committed against a person or property, either intentional or negligent.
11. Intentional or unintentional behavior or conduct that results in harm to another person.
12. Judge-made law, the ruling in a judicial opinion.
13. Determination of financial responsibility of the tortfeasor for tortious conduct that has resulted in some form of injury to an individual's property or person.
16. The party initiating legal action.
18. Act that violates the penal law of the local, state, or federal government.
19. Means by which a right is enforced or the violation of a right is prevented, redressed, or compensated.
21. Actor committing the wrong, whether intentional, negligent, or strict liability.
22. Money paid to compensate for loss or injury.
23. Standard for assessing the weight of the evidence.
24. Death attributable to the willful or negligent act of another.
4. A personal, financial, or other injury for which the law gives a person the right to receive compensation.
6. The defendant is liable without the plaintiff having to prove fault.
7. (Latin) "Stand by the decision." Decisions from a court with substantially the same set of facts should be followed by that court and all lower courts under it; the judicial process of adhering to prior case decisions; the doctrine of precedent whereby once a court has decided a specific issue one way in the past, it and other courts in the same jurisdiction are obligated to follow that earlier decision in deciding cases with similar issues in the future.
8. Conduct that an ordinary person would do under the same or similar circumstances.
10. (Latin) "At first sight." A case with required proof of elements in a tort cause of action; the elements of the plaintiff's (or prosecutor's) cause of action; what the plaintiff must prove; accepted on its face, but not indisputable.
14. Having the knowledge and desire that a specific consequence will result from an action.
15. The failure to use reasonable care to avoid harm to another person or to do that which a reasonable person might do in similar circumstances.
17. The holding of past court decisions that are followed in future judicial cases where similar facts and legal issues are present.
20. A legally binding agreement between two or more parties.



Getchell v. Lodge
65 P.3d 50
February 28, 2003
Alaska

I. INTRODUCTION

When Barbara Lodge saw a moose in her lane of traffic, she braked and skidded on ice into the oncoming lane of traffic, causing a collision with Joyce Getchell's car. Getchell sued Lodge, and the case proceeded to a jury trial. The jury found that Lodge was not negligent. Getchell appeals the superior court's denial of her motions for judgment notwithstanding the verdict (JNOV) and new trial. She also appeals the trial court's admission of the investigating state trooper's testimony. Because we conclude that the trial court did not err in denying Getchell's motions for JNOV or new trial, or in admitting the trooper's testimony, we affirm.

II. FACTS AND PROCEEDINGS

On the morning of January 16, 1998, Joyce Getchell and Barbara Lodge drove to work on the Kenai Spur Highway. Getchell headed south on the highway towards Kenai. Lodge headed north towards Nikiski. A thin layer of ice covered the unsanded road; the morning was dark. There was a dispute at trial about what happened next. However, because we draw all factual inferences in favor of the non-moving party when reviewing motions for JNOV and new trial, what follows is Lodge's account.

Because of the darkness, the icy road conditions, and the possibility of moose crossing the highway, Lodge was driving at about forty-five miles per hour, even though the speed limit was fifty-five. A moose emerged out of the darkness from Lodge's right and tried to cross the road as Lodge neared Mile 20 of the highway. Lodge hit her brakes as hard as she could. She testified that her car skidded immediately and began to rotate in a counterclockwise direction. Lodge lost control of her car as it continued to rotate and slide. Ultimately, the car crossed the center line of the road. The car finished rotating and came to a stop in the southbound lane. As Getchell headed south towards Mile 20, driving between forty-five and fifty-five miles per hour, she saw a car in her lane. Getchell hit the passenger side of Lodge's car. The impact injured Getchell's ankle, requiring surgery. State Trooper Harold Leichliter investigated the accident and completed an accident report based upon his observations of the scene and witness interviews.

Getchell brought a personal injury negligence action against Lodge. Before trial, Getchell objected to the introduction of portions of Trooper Leichliter's videotaped deposition. Getchell argued that the objectionable portions of the deposition should be excluded as impermissible opinion testimony under Alaska Rules of Evidence 701 and 702. Additionally, she argued that Trooper Leichliter's testimony was irrelevant and more prejudicial than probative, and therefore excludable under Alaska

Rules of Evidence 402 and 403. The superior court admitted Trooper Leichliter's testimony over Getchell's objections.

Superior Court Judge Harold M. Brown conducted a three-day jury trial in July 2001. Getchell moved for a directed verdict, which the trial court denied. The jury found Lodge not negligent. After hearing the verdict, Getchell orally moved for a judgment in her favor notwithstanding the verdict or, alternatively, a new trial. The court entered judgment in favor of Lodge and against Getchell in September 2001, for \$17,042.50 in attorney's fees and \$5,473.18 in costs, a total of \$22,515.68. Shortly thereafter, Getchell filed a motion for judgment notwithstanding the verdict and a motion for new trial. Judge Brown heard arguments on Getchell's motions in November 2001. Judge Brown denied Getchell's motions.

Getchell appeals Judge Brown's denial of her motions for JNOV and new trial. She also appeals the trial court's admission of Trooper Leichliter's testimony.

[Text omitted]

III. DISCUSSION

A. The Trial Court Did Not Err in Denying Getchell's Motions for Judgment Notwithstanding the Verdict and New Trial.

Getchell argues that the trial court erred in denying her motions for JNOV and new trial, contending that reasonable jurors could have only concluded that Lodge acted negligently. Getchell structures her argument around the tort consequences of Lodge's alleged violation of two Alaska traffic regulations. Getchell contends that because Lodge crossed the center lane of traffic into Getchell's lane she violated 13 AAC 02.085 and 13 AAC 02.050. Because Lodge violated these traffic regulations, Getchell argues, the burden of proof shifted to Lodge to show by a preponderance of the evidence that her conduct was excused. To prove excuse in the instant case, Getchell asserts that Lodge had to demonstrate that she exercised reasonable care in two ways: "first, that she refrained from steering into oncoming traffic, and second, that she exercised reasonable care in handling her sliding vehicle." Getchell contends that Lodge steered into oncoming traffic, took no steps to control her skidding car, and that therefore "reasonable persons could only have concluded that Lodge failed to meet her burden of proving excuse by a preponderance of the evidence."

Getchell is correct that Lodge can only claim excuse if she handled her moose-avoidance maneuver and the resulting skid in a non-negligent manner. However, contrary to Getchell's argument, there is evidence in the record that Lodge did not purposefully steer into the oncoming lane and that the skid was not caused by her negligence. We will affirm a trial court's denial of a motion for judgment notwithstanding the verdict "unless

the evidence, viewed in the light most favorable to the non-moving party, is such that reasonable persons could not differ in their judgment as to the facts." A factual dispute exists here. Similarly, we affirm a trial court's denial of a motion for a new trial unless the court abused its discretion. We will find an abuse of discretion when no evidence supported the verdict or when the evidence was "so slight and unconvincing as to make the verdict plainly unreasonable and unjust." Ample evidence supports the verdict in this case.

Both Getchell and Lodge agree that it would have been negligent to steer into the oncoming lane of traffic on purpose under the circumstances of this case. However, Lodge testified that she did not steer into the other lane.

Q But you deny that you attempted to turn, correct?

A Yes.

Q Okay. And when asked in your deposition if you swerved to the right or to the left, you said: I did not turn and I did not swerve to the right or left, true?

A That's what I said, yes.

Q And you maintain that today?

A Yes, mmm-hmm.

James Stirling, Lodge's accident reconstruction expert, testified similarly:

Q Mr. Lewis testified that tire marks in the trooper photos indicate that Ms. Lodge's vehicle was sideslipping and rotating as it crossed the center line in the roadway. Do you agree with that position?

A Yes I do.

Q What's the significance of that information?

A The rotation started in her lane.

Q Are you aware of any evidence in this case that

Ms. Lodge intended to steer into or swerve into the oncoming lane of traffic?

A No, I'm not.

In addition to the evidence that Lodge did not steer into the oncoming lane of traffic, Lodge testified that she slammed on her brakes to avoid a moose in her lane. According to Lodge, her brakes locked and she skidded into Getchell's lane. Reasonable jurors could have concluded that the presence of the moose in the road excused Lodge's skid into the oncoming lane of traffic. Skidding to avoid a moose is the type of excuse contemplated by 288A of the *Restatement (Second) of Torts*, adopted by this court in *Ferrell v. Baxter*. Comment h of this section aptly describes this situation:

Emergency. As in other cases of negligence (see 296), the violation of an enactment or regulation will ordinarily be excused when the actor is confronted with an emergency which is not caused by his own misconduct.

It is plausible that the jury concluded that the moose created an emergency situation for Lodge and that they therefore excused the unfortunate consequences of her attempt to avoid the moose.

The jury also heard other evidence from which it could have reasonably concluded that Lodge was not negligent. Lodge points out that she had very little time to react after she saw the moose in the road. Lodge's accident reconstruction expert, James Stirling, expressed his opinion that Lodge had approximately "three-point-some seconds before" she would have collided with the

moose. According to Stirling, Lodge's perception of the danger, before she took any evasive action, would have consumed one-and-a-quarter to one-and-a-half seconds. Thus, Lodge argues, she had one-and-a-half seconds at most to slow the car down and correct the slide. Stirling testified that "[g]iven the surface and how slick it was, and given the speed of 45 miles an hour, [Lodge's attempts to correct her car's rotation] would have had to have been almost instantaneous to stop. . . . I would think she would have to perform higher than the average driver to do it." Based upon this testimony, reasonable jurors could have concluded that "Lodge was unable after reasonable care to comply with [13 AAC 02.085 and 13 AAC 02.050]." The trial court did not abuse its discretion in denying Getchell's motions for JNOV or new trial.

B. The Trial Court Did Not Err in Admitting Trooper Leichliter's Testimony.

1. Trooper Leichliter testified as a hybrid witness.

Trooper Leichliter responded to the accident in this case and wrote an accident report. Before trial, Getchell objected to Trooper Leichliter's proposed testimony about causation and fault. She argued in a motion in limine that Trooper Leichliter should not be able to offer expert opinions because Lodge listed him as a fact witness rather than an expert witness in her witness list. Getchell asserted that because Trooper Leichliter was a fact witness, his testimony should be excluded as improper lay opinion evidence under Alaska Rule of Evidence 701 because, contrary to Rule 701's requirements, he did not see the accident. Alternatively, Getchell argued that if the court considered Trooper Leichliter an expert, his testimony should be barred because it did not satisfy Rule 702's helpfulness requirement. Although Lodge listed Trooper Leichliter as a fact witness, rather than an expert, the trial court apparently considered his testimony to be expert testimony. Judge Brown permitted Trooper Leichliter to testify regarding causation based upon his investigation of the accident.

In his testimony, Trooper Leichliter focused on the accident report that he prepared when he arrived at the accident scene. He testified that the moose was the only contributing factor and that no human factors contributed to the accident. Trooper Leichliter gave the opinion that drivers generally react to the sight of a moose in the road in front of them by braking, which could lead to skidding and loss of control in icy road conditions. He testified that he found no evidence indicating any improper conduct by Lodge. Lodge's defense attorney used this testimony in his closing statement as opinion evidence that Lodge was not negligent in responding as she did to the sighting of the moose. Trooper Leichliter's testimony incorporated both his observations as a percipient witness investigating the scene and his conclusions about causation based on over twenty-two years as a state trooper investigating accidents. Thus, we find that the label "expert" or "fact" witness lacks significance in this situation because Trooper Leichliter provided hybrid testimony.

We discussed the concept of hybrid witnesses in *Miller v. Phillips*. In *Miller*, parents of an injured newborn sued their midwife for negligence. The jury found for the midwife. On appeal, the parents argued that the trial court erred in allowing the midwife's supervising physician to testify as an expert because the midwife called him as a fact witness. The trial court allowed the doctor to testify as a hybrid witness; he could not testify "in general terms about the appropriate standard of care," but he could testify to "his expert observations [and] his own opinions as to what he observed," as well as his "expert

opinions based on his review of hospital records.” We held that the physician could express expert opinions formed as a supervisory participant, reasoning that “[w]hen physicians are called to testify about matters pertaining to the treatment of their patients, the distinction between an expert witness and a fact witness inevitably becomes blurred.” Like the treating physician in *Miller*, Trooper Leichliter, the investigating officer, was “intimately involved in the underlying facts giving rise to the litigation and . . . would reasonably be expected to form an opinion through that involvement.” Thus, despite Lodge’s choice to list Trooper Leichliter as a fact witness, it was not error to permit him to base his opinions on his expertise. Moreover, Getchell was fully aware of the content of Trooper Leichliter’s proposed testimony. She was able to depose Trooper Leichliter and thus suffered no prejudice from Lodge’s decision to list him as a fact witness.

2. The trial court did not err in admitting Trooper Leichliter’s testimony under Rule 702.

Getchell also argues that the trial court abused its discretion by admitting Trooper Leichliter’s testimony as an expert witness because his testimony did not comply with Alaska Rule of Evidence 702. She contends primarily that Trooper Leichliter’s testimony did not help the jury because the jury was at least as capable as Trooper Leichliter of determining whether Lodge acted reasonably.

Alaska Rule of Evidence 702(a) allows a witness to give opinion testimony if the witness is qualified “by knowledge, skill, experience, training or education,” and if “scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue.” To be admissible, then, expert opinion testimony must be helpful to the jury. This helpfulness standard requires experts to “stop short of stating their own conclusions” on points that the jury is at least equally capable of determining. In *Spenard Action Committee*, we relied on this rationale in holding that the superior court had erred in permitting police officers to express their opinion that a massage parlor was operating as a house of prostitution. On the other hand, in cases such as *Adkins v. Lester* and *State v. Phillips*, we have approved of the admission of police officers’ opinions as to the cause of particular traffic accidents that they have investigated.

Trooper Leichliter’s testimony satisfies Rule 702’s requirements. First, his knowledge and experience qualified him as an expert. He served as a state trooper in Kenai for twenty years, and, as Lodge points out, Trooper Leichliter “routinely determined whether there were any human factors contributing to [accidents involving moose], such as speeding, or whether the accident was simply the result of a moose interfering with motor vehicle traffic.” Second, Trooper Leichliter’s testimony was at least of arguable assistance to the jury. His implied opinion that Lodge had not been negligent was not different in kind than the police testimony permitted in *Adkins v. Lester* and *State v. Phillips*. Finally, it is analogous to the type of testimony given by the accident reconstruction experts who testified at the trial without objection. The trial court did not abuse its discretion in admitting Trooper Leichliter’s testimony under Rule 702.

3. The trial court did not err in declining to exclude Trooper Leichliter’s testimony under Alaska Rule of Evidence 403.

Getchell finally argues that the trial court should have barred Leichliter’s testimony under Alaska Rule of Evidence 403 because it was more prejudicial than probative.

Alaska Rule of Evidence 403 provides that the trial court may exclude relevant evidence “if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” The commentary to the rule explains that “[s]ituations in this area call for balancing the probative value of and need for the evidence against the harm likely to result from its admission. . . . [T]here is a slight presumption in favor of admitting relevant evidence. . . . [T]o overcome this minimal presumption, the prejudicial effect must be demonstrably greater than the probative value of the evidence.”

It is true that Trooper Leichliter’s testimony was prejudicial to Getchell in the sense that it bolstered Lodge’s argument that her conduct was excused because she skidded to avoid a moose. However, “undue prejudice connotes not merely evidence that is harmful to the other party, but evidence that will result in a decision being reached by the trier of facts on an improper basis.” We recognize that there is a danger that a police investigator’s conclusion will be given undue weight by a jury. In any particular case this may be a real danger. The officer may be focusing on whether the evidence will support a quasi-criminal traffic citation that must be proven beyond a reasonable doubt, rather than whether there is civil negligence that need only be proven by a preponderance of the evidence. Nonetheless, this possibility may be ignored by a jury, and because of the neutrality and prestige of an investigating officer, the officer’s testimony may be given decisive weight. There is case law in other jurisdictions holding that a police officer’s decision whether to issue a traffic citation is inadmissible on the question of negligence. These authorities are based in part on the rationale that such testimony amounts to an opinion on an ultimate issue that is for the trier of fact to decide, an exclusionary rationale that our rules reject, and in part on the undue weight concerns. The answer we have accepted in response to these legitimate concerns is not a rule of blanket exclusion. Instead, vigorous advocacy including cross-examination is expected to serve as a safeguard against undue weight being given to police testimony. A second safeguard is the discretionary power of the trial court under Rule 403 to exclude testimony when, on balance, its probative force is outweighed by the danger of unfair prejudice. In the present case the record does not suffice to persuade us that the trial court abused its discretion in striking the balance mandated by Evidence Rule 403 in favor of the admission of Trooper Leichliter’s implied opinion testimony.

IV. CONCLUSION

Because we find that there was evidence from which reasonable jurors could have differed in their judgment of the facts as to whether Lodge acted negligently, we AFFIRM the trial court’s denial of Getchell’s motions for JNOV and new trial. Because the trial court did not abuse its discretion in admitting Trooper Leichliter’s testimony, we AFFIRM the decision to admit the testimony.

Matthews, Eastaugh, Bryner, and Carpeneti, Justices.
FABE, Chief Justice.
[Footnotes omitted]

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