

## **Chapter 7**

### Tort Law and Product Liability

#### **Chapter Outline**

1. Introduction
2. The Basis of Tort Law
3. Intentional Torts
4. Negligence
5. Cyber Torts: Defamation Online
6. Strict Liability
7. Product Liability
8. Defenses to Product Liability
9. Tort Law and the Paralegal

#### **Chapter Objectives**

After completing this chapter, you will know:

- What a tort is, the purpose of tort law, and the three basic categories of torts.
- The four elements of negligence.
- What is meant by strict liability and under what circumstances strict liability is applied.
- The meaning of strict product liability and the underlying policy for imposing strict product liability.
- What defenses can be raised in product liability actions.

## Chapter 7 Tort Law and Product Liability

### Chapter Outline

- I. INTRODUCTION
  - A. Torts are wrongful actions.
  - B. The word *tort* is French for “wrong.”
  
- II. THE BASIS OF TORT LAW
  - A. Two notions serve as the basis of all torts.
    - i. Wrongs
    - ii. Compensation
  - B. In a tort action, one person or group brings a personal-injury suit against another person or group to obtain compensation or other relief for the harm suffered.
  - C. Tort suits involve “private” wrongs, distinguishable from criminal actions that involve “public” wrongs.
  - D. The purpose of tort law is to provide remedies for the invasion of various interests.
  - E. There are three broad classifications of torts.
    - i. Intentional Torts
    - ii. Negligence
    - iii. Strict Liability
  - F. The classification of a particular tort depends largely on how the tort occurs (intentionally or unintentionally) and the surrounding circumstances.

#### **Intentional Intentions**

An intentional tort requires only that the tortfeasor, the actor/wrongdoer, intended, or knew with substantial certainty, that certain consequences would result from the action. When reviewing a fact pattern, consider what an ordinary, reasonable individual would know or intend by the action.

- III. INTENTIONAL TORTS
  - A. An *intentional tort*, requires *intent*.
  - B. “Intent” does not necessarily mean that the actor (referred to as the *tortfeasor*) intended to harm someone; rather, it means that the actor intended the consequences of his or her act or knew with substantial certainty that certain consequences would result from the act.
  - C. Intentional Torts Against Persons
    - i. Assault and Battery
      - 1. *Assault* is any intentional act that causes another to reasonably fear immediate harmful or offensive contact.

2. *Battery* is harmful or offensive physical contact, intentionally performed.
  3. Compensation for assault and battery can include compensation for the emotional harm or loss of reputation resulting from a battery, as well as for physical harm.
  4. Defenses to assault and battery include:
    - a. Consent
    - b. Self-defense
    - c. Defense of others
    - d. Defense of property
- ii. False Imprisonment
1. *False Imprisonment* is defined as the intentional confinement or restraint of another person's activities without justification.
- iii. Intentional Infliction of Emotional Distress
1. *Intentional Infliction of Emotional Distress* is an intentional act that amounts to extreme and outrageous conduct resulting in severe emotional distress to another.
- iv. Defamation
1. Wrongfully hurting a person's good reputation constitutes the tort of *defamation*.
  2. The law imposes a general duty on all persons to refrain from making false, defamatory statements about others.
    - a. Breaching this duty **orally** involves the tort of *slander*.
    - b. Breaching this duty **in writing** involves the tort of *libel*.
  3. *Slander Per Se* requires no proof of injury or harm for these false utterances to be actionable.
  4. The Publication Requirement
    - a. *Publication* means that the defamatory statements are communicated to persons other than the defamed party.
  5. Defenses Against Defamation
    - a. Truth is normally an absolute defense against a defamation charge.
    - b. Another defense is that the statements were *privileged* communications and thus the defendant is immune from liability.
    - c. False and defamatory statements made about a *public figure* and that are published in the press are privileged if they are made without *actual malice*.

- v. Invasion of the Right to Privacy
    1. A person has a right to solitude and freedom from prying public eyes, or *privacy*.
    2. Some state constitutions, and a number of federal and state statutes, explicitly provide for privacy rights.
  - vi. Appropriation
    1. The use by one person of another person's name, likeness, or other identifying characteristic, without permission and for the benefit of the user, constitutes the tort of *appropriation*.
  - vii. Misrepresentation (Fraud)
    1. A *misrepresentation* leads another to believe in a condition that is different from the condition that actually exists. This is often accomplished through a false or an incorrect statement.
    2. The tort of *fraudulent misrepresentation*, or fraud, involves intentional deceit for personal gain.
  - viii. Wrongful Interference
    1. Many lawsuit involve situations in which an individual or business is accused of wrongfully interfering with the business of another.
      - a. Wrongful Interference with a Contractual Relationship
      - b. Wrongful Interference with a Business Relationship
    2. Defenses to Wrongful Interference
      - a. If the interference was justified, or permissible, a person will not be liable for this tort.
- D. Intentional Torts Against Property
- i. Trespass to Land
    1. A *trespass to land* occurs whenever a person, without permission, enters onto land that is owned by another, causes anything to enter onto the land, remains on the land, or permits anything to remain on it.
    2. Trespass Criteria, Rights, and Duties
      - a. The owner must show that a person is a trespasser, not a guest.
    3. Defenses Against Trespass to Land
      - a. The trespass was warranted, for example, to assist someone in danger.
  - ii. Trespass to Personal Property
    1. Whenever any individual unlawfully harms the personal property of another or otherwise interferes with the owner's right to exclusively possess that

personal property, *trespass to personal property* occurs.

iii. Conversion

1. Whenever personal property is wrongfully taken from its rightful owner, the act of *conversion* occurs.

**Oops ... It Wasn't Me**

A negligence action requires analysis of the following:

1. Did defendant owe a duty of care to plaintiff?
2. Did defendant breach that duty?
3. Did plaintiff suffer a legally recognizable injury?
4. Did defendant's breach cause plaintiff's injury?

An additional mnemonic aid could be "ABCD":

- A** A duty of care
- B** Breach of the duty of care
- C** Causation (the breach must cause an injury)
- D** Damage (injury or harm)

IV. NEGLIGENCE

- A. The tort of *negligence* occurs when someone suffers injury because of another's failure to live up to a required *duty of care*.
- B. To succeed in a negligence action, the plaintiff must prove that:
  - i. The defendant owed a *duty of care* to the plaintiff
  - ii. The defendant *breached that duty*
  - iii. The plaintiff suffered a *legally recognizable injury*
  - iv. Defendant's breach *caused* the plaintiff's injury.
- C. The Duty of Care and Its Breach
  - i. Central to the tort of negligence is the concept of a *duty of care*.
  - ii. The duty of care is defined and measured by the *reasonable person standard*, or how a reasonable person would have acted in the same circumstances.
    1. The Duty of Landowners
      - a. Duty to Business Invitees. Retailers and other firms that explicitly or implicitly invite persons to come onto their premises are charged with a duty to exercise reasonable care to protect those persons, considered *business invitees*.
      - b. Open and Obvious Risks. Some risks are so obvious that the owner need not warn of them.
    2. The Duty of Professionals
      - a. If an individual has knowledge, skill, or intelligence superior to that of an ordinary

person, the individual's conduct must be consistent with that status.

#### D. The Injury Requirement and Damages

- i. To recover damages (receive compensation), the plaintiff in a tort lawsuit must prove that she suffered a *legally recognizable* injury.
- ii. The purpose of tort law is not to punish people for the torts that they commit but to compensate injured parties for damages suffered.
  1. *Compensatory damages* are intended to compensate, or reimburse, a plaintiff for actual losses—to make the plaintiff whole.
  2. Occasionally, *punitive damages* are awarded to punish the wrongdoer and deter others from similar wrongdoing.

#### E. Causation

- i. Another element necessary to a tort is *causation*. Two questions must be answered in the affirmative for liability in tort to arise.
  1. *Causation in fact* (the “but-for” test). Did the injury occur because of the defendant's act, or would it have occurred anyway?
  2. *Proximate cause* (legal cause). Was the connection between the act and an injury strong enough to justify imposing liability?

#### F. Defenses to Negligence

- i. Assumption of Risk
  1. *Assumption of the risk* is when the plaintiff voluntarily enters into a risky situation, knowing the risk involved. The plaintiff will not be allowed to recover.
- ii. Superseding Cause
  1. A *superseding cause* is an unforeseeable intervening event that breaks the connection between a wrongful act and an injury to another.
- iii. Contributory Negligence
  1. In some jurisdictions, if the plaintiff was also negligent, the defendant may raise the defense of *contributory negligence*.
  2. Under the common-law doctrine of contributory negligence, no matter how insignificant the plaintiff's negligence is relative to the defendant's negligence, the plaintiff will be precluded from recovering any damages.
- iv. Comparative Negligence
  1. The majority of states now allow recovery based on the doctrine of *comparative negligence*.

2. This doctrine enables both the plaintiff's and the defendant's negligence to be computed and the liability for damages distributed accordingly.
  - a. *Pure comparative* negligence states allow the plaintiff to recover, even if the extent of his fault is greater than that of the defendant.
  - b. The *50-percent rule* in many states prevents the plaintiff from recovering if he was more than 50 percent at fault.
- v. Special Negligence Doctrines and Statutes
  1. Negligence *Per Se*
    - a. Certain conduct, whether it consists of an action or a failure to act, may be treated as *negligence per se*.
    - b. Negligence *per se* may occur if an individual violates a statute or an ordinance providing for a criminal penalty and that violation causes another to be injured.
  2. Special Negligence Statutes
    - a. Most states now have *Good Samaritan statutes* where persons who are aided voluntarily by others cannot turn around and sue the "Good Samaritans" for negligence.
    - b. Many states have passed *Dram Shop Acts*, under which a tavern owner or bartender may be held liable for injuries caused by a person who became intoxicated while drinking at the bar or who was already intoxicated when served by the bartender.

## V. CYBER TORTS: DEFAMATION ONLINE

### A. Liability of Internet Service Providers (ISPs)

- i. Newspapers, magazines, and television and radio stations may be held liable for defamatory remarks that they disseminate.
- ii. Under the Communications Decency Act of 1996, Internet service providers are not liable for such material.

### B. Piercing the Veil of Anonymity

- i. A problem in bringing an action for online defamation is discovering the identify of the person who posted the defamatory message online.
- ii. ISPs can disclose personal information about their customers only when ordered to do so by a court.
- iii. Plaintiffs are increasingly filing lawsuits against unidentified "John Does." Then, using the authority of the courts, they

can obtain from the ISPs the identities of the persons responsible for the messages.

## VI. STRICT LIABILITY

A. Under the doctrine of *strict liability*, liability for injury is imposed for reasons other than fault. Strict liability for damages proximately caused by an abnormally dangerous or exceptional activity is one application of this doctrine.

### i. Abnormally Dangerous Activities

1. An *abnormally dangerous activity* has three characteristics:

- a. The activity involves potential harm, of a serious nature, to persons or property.
- b. The activity involves a high degree of risk that cannot be completely guarded against by the exercise of reasonable care.
- c. The activity is not commonly performed in the community or area.

### ii. Other Applications of Strict Liability

1. Strict liability may also apply to harm caused by animals.
2. Persons who keep wild animals are strictly liable for any harm inflicted by the animals.

## V. PRODUCT LIABILITY

### A. Product Liability Based on Negligence

i. If a manufacturer fails to exercise due care to make a product safe, **any person** who is injured by the product can sue the manufacturer for *negligence*.

### B. Product Liability Based on Misrepresentation

i. When a manufacturer or seller misrepresents the quality, nature, or appropriate use of the product, and the user is injured as a result, the basis of liability may be the *tort of fraud*.

### C. Strict Product Liability

i. A manufacturer that has exercised a reasonable degree of care can still be held liable in *strict liability* if a product is defective and injures someone and if the product was dangerous and unsafe.

#### 1. Manufacturing Defects

- a. A product that departs from its intended design, even though all possible care was exercised in the preparation and marketing of the product, has a manufacturing defect
- b. Liability is imposed on the manufacturer regardless of whether they acted “reasonably.”

## 2. Design Defects

- a. A product has a design defect if the foreseeable risks of harm posed by the product could have been reduced or avoided by adopting a reasonable, alternative design.

## 3. Warning Defects

- a. A product may be deemed defective because inadequate instructions or warnings in situations where the risk of harm was foreseeable and could have been avoided if a proper warning had been given.

# VII. DEFENSES TO PRODUCT LIABILITY

## A. Assumption of Risk

- i. *Assumption of the risk* is when the risk is obvious and the user proceeded in the face of that risk.

## B. Product Misuse

- i. This is the defendant's claim that the plaintiff misused the product. However, the injured party could claim he did not know that the product was dangerous for a particular use.

## C. Comparative Negligence

- i. Previously, the plaintiff's conduct was not a defense to strict liability.
- ii. Today, many jurisdictions consider the negligent or intentional actions of both the plaintiff and the defendant when apportioning liability and damages.

## D. Commonly-Known Dangers

- i. The dangers associated with certain products are so commonly known that manufacturers need not warn users of those dangers.
- ii. If a plaintiff's injury resulted from a *commonly-known danger*, the defendant normally will not be liable.

# VIII. TORT LAW AND THE PARALEGAL

## A. Many paralegals become involved in tasks relating to tort lawsuits.

## B. Paralegals working in tort law may be asked to interview clients to obtain information, obtain relevant documents, and locate and interview witnesses to a tortuous act.