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Negligence Basics

What is “negligence?”

Negligence is conduct which breaches (violates) your duty to exercise reasonable care to prevent harm or injury to another person. If, for instance, you like to imitate movie car chase scenes and you drive your Camaro at seventy-five miles an hour down a one-way street, causing a four-car pileup, you have breached your duty to drive safely and can be held liable (responsible) to the injured persons for their property damage and personal injuries.

Of course, most cases aren’t so simple and often the issue of the breach of duty is more cloudy. In such cases, the court will use the “reasonable person” standard to determine whether the driver acted negligently.

What is “proximate cause,” and is it contagious?

Proximate cause is a legal concept so complex it has become a favorite of law professors, who enjoy constructing elaborate exam questions based upon its intricacies.

For our purposes, you can simply think of proximate cause as a connection—the connection between negligent conduct (e.g., running a red light) and the damages or injury suffered as a result of that conduct. These injuries must be reasonably caused by, or proximate to, the negligent conduct. For instance, if a person in the car you struck when you ran a red light suffered a broken arm, that injury was proximately caused by your negligence. But what if an office worker in a nearby building, startled by the sound of the crash, spills his coffee on his computer, shorting out the computer network, giving a co-worker a nasty shock and losing a day's worth of work? The damage is related to the car accident—there's a direct causal connection—but it's not proximate cause, as the law defines it. The first incident of damage—the broken arm—is a foreseeable result of running a red light; the second incident—an electric shock in a nearby building—is not reasonably foreseeable.

An Example of Forseeability

The following is a copy of an actual answer filed by a railroad company in the 1930's to a complaint for damages against it:

> "The defendant [the railroad] further specially excepts to said petition [the complaint filed by the plaintiff] where it is alleged that the plaintiff, upon discovering that the wooden stool was wet, raised the same and squatted with his feet poised on the porcelain bowl of the commode, from which roosting position he says his foot slipped causing him to fall to the great detriment of his left testicle, for the reason that it is obvious that the said commode with its full moon contours was rightfully and property designed for the comfort of sitters only, being equipped with neither spurs, stirrups nor toeholds for boots or shoes: this defendant, therefore, was not legally required to foresee that the plaintiff, traveling on its modern, air-conditioned deluxe passenger train would so persist in his barnyard

predilections as to trample upon its elegant toilet fixture in the barbaric style of horse and buggy days."

"For further answer, if needed, this defendant enters its general denial and specially pleads that the plaintiff should not be allowed to recover any sum against it for the reason that the plaintiff is, in truth and fact, a chronic squatter, born and bred to the custom of the corn crib, and, although a comparatively young man, is unable to adapt himself to the cultural refinements of a New Deal civilization, and should have, therefore, in the exercise of due care deferred taking the Crazy Water Crystals until such time when he could be at home secure and sure-footed on his own dunghill or with his feet planted solidly on the flat board of his own old fashioned two-holer."

My car was struck by a truck carrying a load of pulp wood. The truck driver was at fault, and the truck is owned by a large lumber company. Can I sue the lumber company as well as the driver?

Yes. Under the doctrine known as *vicarious liability* (taking pleasure from torts), the owner of the truck is responsible for the negligence of its employee if the employee was authorized to use the truck (state law may differ on this). This doctrine applies to any situation where an employee, agent or servant is performing duties on behalf of an employer.

My child was injured on the swing set at the public playground. Can I sue the county for negligence in maintaining its playground equipment?

That depends on the law of your state. We have to go back to England for a minute. In feudal times, all public facilities were owned by the King. Since the King could do no wrong (the Queen, however, would often lose her head in a crisis), the King could not be sued unless he consented: thus was born the

legal doctrine known as *sovereign immunity*. Unfortunately, despite American rejection of monarchy, our Congress and state legislatures adopted this ancient doctrine and applied it to our federal and state governments. Under its pure form, you could not sue the County. However, because of the doctrine's harshness, many state and local governments have either eliminated it for certain types of torts or allowed themselves to be sued up to the limit of their liability insurance policy.

Defenses

There are, of course, two sides to every lawsuit. Lawyers and judges have created some interesting defensive doctrines.

I was in a car accident which was partly my fault. Does this mean I can't sue the other driver, who I think was more at fault than me?

That depends upon whether the state where the accident happened still maintains the defensive doctrine known as *contributory negligence.* Under this defense, if your own negligence contributed in any part to the damages you suffered, you are completely barred from recovering anything from the defendant. Once prevalent in all states, this doctrine now has been replaced by the more sensible *comparative negligence*. This doctrine has several forms: in the "pure" form, you can receive compensation from the other driver based upon your degree of fault. For instance, if your own conduct was responsible for 40% of your injuries, you would be entitled to recover 60% of your damages from the other driver. (If you had $20,000 in medical bills and the jury found that you had pain and suffering worth $80,000, for a total of $100,000 in damages, you would be awarded $60,000). Many states have "modified" comparative negligence, where the other driver's fault percentage must exceed a certain percentage of the total before you can

recover; if you and the other driver are equally at fault, you cannot recover anything.

I was at a baseball game, sitting between first and third, and got hit by a foul ball. I had to be hospitalized for three days. Do I have a claim?

No. Baseball games are the primary example of a situation where you have *assumed the risk* of harm from a particular activity. It is common knowledge that, except for the protected areas behind home plate, anyone can be hit by a foul ball. The baseball team could use the legal defense of *assumption of the risk* as a defense to your claim. This also applies to all activities where there is an inherent, known risk, and injury occurs from that known risk. There are exceptions, however for certain classes of people (children and rock stars) who are incapable of understanding these risks.

What exactly are "damages?"

The term is often—and wrongly—used to refer to the injury suffered in an incident (a broken leg, a loss of income, a knee in the groin). Properly, however, it refers to the monetary amount awarded by the court to the winning party. There are basically two kinds of damages: *compensatory* and *punitive. Compensatory damages* are an amount of money that a judge or jury decides will compensate the injured party for the injury. Compensation is given in money, since it's the best form we know; a sincere apology by the defendant is seldom sufficient.

In order to support an award of compensatory damages, the plaintiff must present testimony or evidence to prove the amount of damages—hospital and medical bills, statements of lost earnings, testimony regarding the amount of pain suffered. A jury must reasonably base its award upon this testimony; its award of damages may not be "speculative" or

the damage award will be rejected by the judge.

What is a "statute of imitations," and will it look good in my front hallway?

Almost every type of lawsuit, including personal lawsuits, have time limits within which the lawsuit must be brought, or *filed*. These time limits vary from state to state, and also vary depending on the type of lawsuit; for personal injury lawsuits, the range is generally one to three years. If your lawsuit is not brought within this time limit, it will be forever barred—so it is important that you consult with a lawyer as soon as possible after you realize you have a claim.

Professional Negligence

In a typical personal injury case involving negligence —such as an automobile accident or a "slip and fall"— the jury is capable of deciding whether negligence exists based upon its application of the "reasonable person" standard. A juror's own life experience gives the juror the background to make this judgment. For example, every juror knows that excessive speed can cause a car accident, and that a "reasonable person" would not drive at high speed down a one-way street (again, with exceptions for professional athletes).

But how can a juror decide whether a doctor (or lawyer, architect, engineer or other professional) acted reasonably? Unless the juror is also a professional in the same field, the juror has no background upon which to make such a determination.

Enter the world of *expert testimony*. In order for jurors to decide these types of cases, courts have traditionally allowed other professionals to testify regarding the *standard of care*. The standard of care is the benchmark against which the defendant's conduct will be judged: if the defendant violated that standard, then he or she is negligent, and—assuming

proximate cause exists—damages can be awarded.

Unfortunately, cases can become a "war of experts." It is now possible for either side to obtain an expert to support almost any position. Lawyers often complain about "plaintiff's whores" or "defense whores" – expert witnesses who always seem to testify for one side, and who inevitably find either a breach of the standard of care, or that the standard of care was met.

> "There are three kinds of witnesses: liars, damned liars, and experts."
>
> —ANONYMOUS

Faced with persuasive testimony from both sides involving highly technical or esoteric fields, jurors in these cases often decide in favor of the party with who they sympathize. This may be the injured plaintiff, but often is the defendant if he or she appears otherwise competent and caring.

What is "informed consent," and does it mean I have to watch more network news?

Informed consent is a negligence doctrine with a long tradition. Briefly, informed consent requires a doctor to advise you fully of all the material risks and consequences to a proposed treatment—surgical or medical. For instance, gall bladder surgery always carries the risk of infection (morbidity) and, like all operations involving anesthesia, a small risk of death (mortality). Your doctor should advise you of these risks so that you make an informed decision as to whether to have the operation. Informed consent does not require your doctor to detail every single possible outcome, even the most remote, but he or she should cover all of the common possibilities *and* all of the possibilities that are serious.

If your physician (or dentist, or chiropractor, etc.) fails to advise you of all the risks, and one of these results occur (without negligence on the part of the physician) *and* you can convince a jury that you would not have had the operation or taken the drug if you had known about the risk—then you can recover damages from the physician.

I'm not satisfied with the results of my treatment. Can I sue my doctor? Also, I'm unhappy with the settlement I got in my divorce case. Can I sue my lawyer?

You haven't been listening. A bad result is not the equivalent of malpractice. Medicine is still an art, not a science, and law *certainly* isn't a science. Bad results—in medicine, law, engineering, or whatever—can occur without any negligence on the part of the professional.

My doctor removed a mole and left a big scar. Another doctor told me that the surgeon cut too deeply, and that I will have to have further surgery to correct the scar. Can I sue?

Assuming that the second doctor will testify on your behalf (or that another doctor will), you certainly *can* sue. But *should* you? Malpractice cases are extremely costly and time-consuming; the cost of expert witnesses alone can be astronomical. Unless your damages are large, a suit cannot be justified. If for instance, the mole was on the end of your nose, and the scar was large, it might be worthwhile. But if the mole was on your inner thigh…

Many states, in an attempt to curb what were perceived as an excess of malpractice cases (rather than an excess of malpractice) have instituted *mediation* or *arbitration* panels which take the place of the courts. In most cases, this cure is worse than the disease; the panels only add an extra layer to the system, and the arbitrators are unqualified. The panels, however, have proved useful when then are designed to allow the

meritorious, “low damage” case to be heard. It all depends on the law of the state where the alleged malpractice occurred.

Strict Liability

As we’ve seen, *liability* for damages is usually imposed by courts as a result of a finding of *negligence* on the part of the defendant. Sometimes liability will be imposed, however, even in the absence of proof of negligence or intentional misconduct. This kind of liability, or liability without fault, is usually called *strict liability*.

It’s not a new concept: the ancient English common law (law made by judge’s decisions, rather than statutes), provided that landowners would be strictly liable for damages caused by wandering animals or storage of dangerous substances. For instance, if an English farmer’s bull jumped over a properly maintained fence, galloped three miles through the nearby town, terrorized the inhabitants, and gored the parson’s jackass, the farmer would be required to compensate the parson for his jackass.

The philosophy behind this is simple: where no one is at fault, the person who created the risk of the damage—the farmer who owned the bull, in the example above—should be held responsible. The bull’s owner is the logical person—in medieval vernacular—to “pay through the ass.”

Personal injury cases often involve items or products that the plaintiff had no reason to fear—a vacuum cleaner, a tampon, a lawnmower, or a termite spray. These kinds of products, however, have been responsible for horrible injuries, and lawsuits by the injured people have led to design changes in the products.

Until the 1960’s, injured consumers had an almost impossible task to win a case against a manufacturer: they had to prove negligence in the manufacturing process. In the last thirty

years, thanks to the efforts of plaintiff's lawyers, courts began imposing strict liability in a whole new range of human activities, but primarily in manufacturing—a doctrine of law known as *products liability*. Under this doctrine, if a defective product causes injury to you, the manufacturer will be liable even if you cannot show any negligence in its manufacture, or that the manufacturer knew the product was defective. In some cases, a manufacturer may be held liable for damages caused by a non-defective product because it failed to provide adequate warnings of hazards or risks resulting from the product's use.

There were pieces of glass in the barbecue-beef sandwich I bought at a fast-food restaurant. I cut my gums badly, and had to have dental work. Do I have a case?

In those states which apply strict liability, you would only have to prove that there was glass in the sandwich and that you were injured by the glass. Otherwise, you would have to prove that someone in the restaurant either was negligent or was trying to build the practice of the local oral surgeon.

I was injured in an automobile accident when my airbag failed. The manufacturer says the airbag was fine when it left the factory, and the dealer says they didn't touch it. How do I prove who's at fault?

Not your problem. Under strict liability, both the dealer and manufacturer would be liable for your injuries.

Our neighbor's dog is a vicious poodle. We're worried it will bite someone. What can we do?

Unfortunately, state law varies wildly on this one. Some states still maintain the old "every dog is entitled to one bite" doctrine: until a dog has bitten someone, the owner has no notice of its propensity to bite, and thus is not liable for that "first bite." Many states and localities, however, have modified this defense and have made dog owners liable for

their animal's first unprovoked attack.

Intentional Torts

Until now, we've been looking at negligent torts. The damage caused by these torts, although foreseeable, isn't intentional. You may have known that driving at 105 mph is dangerous, but you didn't *mean* to run over that poodle.

Suppose, however, you're in a restaurant and get into an argument with another patron over who should be seated first. When you turn your back, she picks up a dish of strawberry flambe¢ and flings it at your head, setting your hair afire. In addition to being guilty of a crime, the disgruntled patron has committed an *intentional tort*—battery—and is liable for your medical bills, as well as your pain and suffering.

What's the difference between assault and battery, and how come they're always said together?

An *assault* occurs when you have a reasonable expectation that someone is going to harm you. If Sylvester Stallone picked up a tire iron and waved it at you in a menacing manner, he could be guilty of civil assault, and you could collect damages from him. The fear must be reasonable, however; if Woody Allen picked up the same tire iron, you would have a tough time convincing a jury of your fright. And words alone—"I'm gonna get you, sucka," for instance, are generally not considered to be an assault, although quite rude.

Battery is any unpermitted or unauthorized touching of one person by another, even if doesn't cause you any harm, and even if no harm was intended. For example, a physician may be guilty of battery if he performs an operation upon you without your consent, although the operation helped you. Even a kiss—if unauthorized—can be a battery.

Since an assault usually accompanies or precedes a battery,

the term “assault and battery” has achieved wide use. In criminal law, however, the terms have a different meaning.

Workers Compensation

Until the early twentieth century, if a worker was injured on the job because of unsafe working conditions, he would have to sue his employer for damages—never a good career move. In addition, prior to the rise of the personal injury lawyer, a typical factory worker had little chance of obtaining competent representation.

Worker’s compensation laws, both federal and state, were enacted to remedy this situation. These laws provide a specific amount of compensation (usually far less than what a jury might award) to workers who suffer work-related injury, death, or disease. Each state has different laws, but in general a worker only need prove the fact of the injury or the disease, and that it is work-related; whether the employer was negligent or not doesn’t make any difference. Of course, employers and their insurance companies have found that by contesting the validity of the injury or its relation to work, they can often defeat or minimize the claim. And some employees have found that they can fake an injury and “go out on comp” for long periods.

I was injured at work. What kind of benefits do I get?

In most states, you will get one or all of the following benefits, assuming you qualify: a percentage of your salary while you are unable to work (usually 2/3); a sum for any permanent disability you have suffered (which may or may not be paid in a lump sum); and vocational rehabilitation benefits if you are unable to return to your old job.

What about my pain and suffering?

If you’re a worker, you don’t have any. Seriously.

Worker's compensation benefits have no provision for payment of such "subjective" losses—even if very severe—nor can you sue the employer for such damages. Your state worker's compensation benefits are your sole remedy. You may, however—depending upon your state—sue a coworker who caused your injury, and/or the manufacturer of a machine that caused the injury. Damages for pain and suffering would be available from these parties.

The Collateral Source Rule, or How to Collect Twice

You're in your neighbor's driveway when you're struck on the head by the genuine SHAQATTACK Breakaway Basketball Backboard, installed negligently by your neighbor. You lose two weeks from work, but your employer pays you sick leave and your hospital and medical bills are paid by your health insurance company. Can you still claim two week's salary and the medical bills from your neighbor?

In most states, the answer is yes—due to the collateral source rule. If the case went to court, your neighbor would be prohibited from introducing into evidence the payments from your employer and health insurance company. Although this seems unfair, the law deems it better for the injured party to get a windfall than for the responsible party to escape responsibility for his actions. Otherwise, people might act more carelessly toward fully insured individuals. Unfortunately, the rule doesn't always apply. Many states have adopted "no-fault" legislation for automobile accidents which specifically abrogate the rule. Even if the rule does apply, in many situations where insurance has paid your bill, the insurance policy will have a subrogation clause which will require you to repay the money to the insurer.