

CHAPTER 20

Negligence

“In all civil acts the law doth not so much regard the intent of the actor, as the loss and damage of the party suffering.”

— *Lambert v. Bessey* (1681)



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Public works projects can create risks of harm through negligence.

We have already examined intentional torts and their defenses. Now we move on to another type of tort called **negligence**. Tort law establishes standards of care that society expects from people. Negligence is conduct that falls below the standard established by law for protecting others against unreasonable risks of harm. But what does this mean?

The word *negligence* comes from the root word *neglect*. This may lead us to think of negligence as forgetfulness, inattentiveness, or lack of care about others. But tort law requires us to analyze negligence as it relates to a person's conduct. Even a person who cares a great deal about the welfare of others may be negligent if his or her conduct creates an unreasonable risk of harm. On the other hand, a person who is totally unconcerned about the safety of others may not be negligent if his or her conduct does not subject another person to an unreasonable risk of harm.

These are some examples of negligent conduct:

- Dr. D'Angelo, a surgeon, forgets to remove a clamp from a patient's body while operating and stitches the patient up.
- Monica leaves a loaded rifle on the floor where her younger brothers and sisters usually play. A child is shot.
- A city employee working in a manhole forgets to replace the cover when he goes to lunch and a pedestrian falls in and is injured.
- A drug company markets a birth control device for women without conducting adequate medical testing. It assumes the device is safe because people have used similar devices for years. A woman develops a serious illness from using the device.



Elements of Negligence

Unlike intentional torts—many of which have specific names—negligence is a very broad term that deals with many kinds of wrongful conduct. While the different types of wrongful conduct may not have separate names, they do have something in common. For a plaintiff to win a negligence action against the defendant, each of the following **elements** must be proven by a preponderance of the evidence:

1. **Duty:** The defendant, or accused wrongdoer, owed a duty of care to the plaintiff, or injured person.
2. **Breach of duty:** The defendant's conduct breached or violated that duty.
3. **Causation:** The defendant's conduct caused the plaintiff's harm.
4. **Damages:** The plaintiff suffered actual injuries or losses.

All of these elements must be proven or the plaintiff will not prevail. For example, in the case of the drug company described on the previous page, the woman bringing the lawsuit would have to prove each of the elements of negligence by a preponderance of the evidence against the company. Specifically, she would have to prove that the company had a duty of care to its customers to adequately test any new birth control product before selling it, that the company breached this duty through its failure to adequately test the device, and that this breach resulted in a defective product that caused actual damage (ill health, hospital bills, and so on) to her.

As in intentional torts, defendants in negligence cases sometimes have legal defenses. These defenses, which are explained below, are different from those used in intentional torts.

Duty and Breach

Everyone has a general **duty**, or legal obligation, to exercise reasonable care toward other persons and their property. Negligence law is primarily concerned with compensating victims who are harmed by a wrongdoer's action or inaction that **breaches**, or violates, this standard of reasonable care. If a mechanic fixes the brakes on your car without using reasonable care and skill, and this faulty repair causes you to have an accident, you can recover damages from the mechanic as the result of his or her negligence.

What if someone is harmed by another person's inaction? For example, Brian is drowning in a lake and Jennifer, an expert swimmer, passes by in a boat. Does she have a legal duty to rescue Brian? While she may have a moral obligation to help, she generally does not have a legal duty to act unless there is some special relationship between them. For example, Jennifer is a lifeguard and Brian is drowning in an area she is supervising.



Where You Live

Is there a law in your state requiring a person to protect another from harm if it can be done safely? Should there be such a law?

The Spilled Coffee

In 1994, 79-year-old Stella Liebeck bought a cup of coffee from the drive-thru window at a fast-food restaurant. While the car in which she was a passenger was stopped to allow her to put cream and sugar in her coffee, she balanced the cup between her knees and attempted to remove the lid. The coffee spilled, causing third-degree burns to over six percent of Liebeck's body and causing her to spend eight days in the hospital and undergo skin graft operations. Liebeck sued the restaurant for damages.

The restaurant was part of a large national chain that served its coffee at approximately 180°F (82°C), despite the fact that coffee at such a high temperature is too hot to drink. At the trial, the chain's quality control manager testified that the sale of any food over 140°F (60°C) would create a burn hazard.

The restaurant argued that, according to its surveys, many of its customers take coffee back home or to work with them and consume

it there, so the higher temperature is necessary to assure that it will still be hot when consumed. They also claimed that many customers choose this particular chain specifically because they do serve their coffee so hot. However, the chain was also aware that, between 1982 and 1992, approximately 700 claims had been filed by people burned by their coffee.

The jury awarded Liebeck \$160,000 in compensatory damages (finding her 20 percent at fault for her own negligence) and \$2.7 million in punitive damages (the equivalent of two days of the chain's coffee sales). The trial judge reduced the amount of punitive damages to \$480,000, and the parties eventually came to a secret settlement agreement for an undisclosed amount.

The case launched a public debate about the appropriateness of lawsuits with high damage awards in situations such as this one.

Problem 20.1

- Who is the plaintiff in this case? Who is the defendant?
- What, if anything, did the defendant do wrong? What, if anything, did the plaintiff do wrong?
- Did the defendant cause the plaintiff harm on purpose? Did the defendant's conduct in some way cause the harm suffered by the plaintiff?
- What duty, if any, did the defendant have toward its customers? Did the defendant uphold or breach that duty?
- Do you agree or disagree with the outcome of this trial? Give your reasons.
- What are the arguments for and against the award of punitive damages in a case like this one?



Buying coffee from a drive-thru window

The Reasonable Person Standard

Everyone has a duty toward everyone else in society: the duty to act reasonably. If you act unreasonably, then you have breached this duty. If the breach causes damage, then you will be liable for damages.

To help judge whether certain conduct is negligent, the law has developed an imaginary creature—"the reasonable person of ordinary prudence or carefulness." The reasonably prudent person does not represent the typical, average individual. Rather, this is an idealized version of such a person. This person acts the way a community expects its members to act, not exactly as they do in fact act.

How does the reasonable person behave? The reasonable person considers how likely a certain harm is to occur, how serious the harm would be if it did occur, and the burden involved in avoiding the harm. The likelihood and seriousness of the harm are balanced against the burden of avoiding the harm.

For example, assume a pedestrian is about to cross a road where there is very little automobile traffic. The harm to be avoided, of course, is being hit by a vehicle. Our imaginary person asks: How likely is it that such an accident will occur? Not very likely. How serious would the harm be if it did occur? Very serious. How difficult would it be to avoid this harm? Not difficult at all; simply look both ways before crossing. Our reasonably prudent person looks both ways before crossing such a street.

In a second example, the walkway to a secluded home in the woods has a crack in it. The crack is large enough to cause a person to trip and fall. This is the harm the homeowner needs to avoid. In this instance, the likelihood of the harm is small, the harm would probably not be very serious, and the cost of avoiding it (fixing the walkway) may be substantial. Even our reasonably prudent person may decide not to fix this crack in the walk. However, it may be reasonable to post a sign warning of the danger, because the burden (cost) of the sign would be less than the burden of making the repair.

The law assumes that reasonable people do not break the law. Therefore, if somebody violates a law, then they are automatically considered to have breached the duty to act reasonably. If the breach causes injury, then the wrongdoer is negligent. For example, most states have laws prohibiting you from leaving your vehicle running while unattended. Such laws were established because of the risk that cars in this situation can easily be stolen. What would happen if you borrow your friend's car to run an errand, leave it running while you run into a gas station to buy a soda, and it is stolen? Have you breached your duty to act responsibly? Can your friend sue you for the value of the car?

Certain professionals, such as doctors, plumbers, and pilots, are considered to have the abilities of reasonably skilled persons qualified to be members of their professions. For this reason, a plumber who repairs a kitchen sink that later leaks and damages the floor cannot defend against a tort action by claiming that he completed the job as

skillfully as the ordinarily prudent person. The work must be at the level of the ordinarily prudent plumber.

As you know, minors are liable for torts they commit. However, the standard used in negligence cases involving minors is not the same as it is for adults. Instead, the law compares the minor's conduct with reasonable conduct for others of the same age, intelligence, and experience. When a minor reaches the age of majority, the adult standard of care applies. There is one important exception to this rule: when minors engage in what is ordinarily considered an adult activity, such as driving a car, they are held to the adult standard of care.

The Case of . . .

Bartender Liability

Lance is a 16-year-old high school junior. He gathers the alcohol left over from his parents' New Year's party and decides to throw a party at his house on a Saturday night when his parents are out of town. He knows that some of his friends have driven to his house, but doesn't pay much attention to whether or not they are drinking. He sees his friend Abby finish a beer, grab her car keys, and walk out the door to go home. Stefan, another friend, leaves with Abby to get a ride home. Lance does not know whether Stefan has been drinking, but watches as Abby drives the car away with Stefan in the passenger seat. As Abby pulls her car onto the highway, she swerves and hits another car head-on. Stefan and the driver of the other car are seriously injured.

Problem 20.2

- Who can sue whom in this situation?
- What duty did Lance have in this situation? Did he violate that duty?
- What duty, if any, do Lance's parents have in this situation? Did they violate that duty? Would it make a difference if his parents had been at home?



Police investigate a party.

- Now assume that Lance is a 25-year-old bartender who serves Abby and Stefan, who are both over 21, although he knows that they are intoxicated. The rest of the facts remain the same. Answer questions **a.** and **b.** using this scenario.
- Is it fair to hold Lance responsible in either situation? Give your reasons.
- If you were at the underage drinking party described, what would you do? What if you were at the bar in the second scenario?
- Some bars have "designated driver" programs. Why have they done this? Should people who hold private parties in their homes do anything special to protect their guests from drinking and driving? What, if anything, could be done?

AIDS Liability

Tyler is infected with HIV, the virus that causes AIDS. He is new in town and wants to meet people and make friends. So he does not want anyone to know about his HIV status. He meets and becomes romantically involved with Audrey. He has unprotected sex with her, but he does not disclose his HIV status to her. Audrey contracts the virus as a result of her relationship with Tyler.

Problem 20.3

- a. Did Tyler have a duty to tell Audrey about his condition? Explain.
- b. Would it make a difference if AIDS were curable?
- c. What, if anything, should Audrey be able to recover in damages from Tyler? Explain.
- d. Could Audrey sue Tyler if she did not contract the virus but was very upset when she learned that he had not told her about it?

Causation

Once a plaintiff proves that the defendant owes him or her a duty and that this duty was violated, there must be proof that the defendant's acts caused the harm to the plaintiff. While it seems like common sense to require a causal connection between the act complained of and the plaintiff's injury, the concept is sometimes troublesome to apply. See The Case of the Great Chicago Fire on page 256 for an example.

When you think about the element of **causation**, you must consider two separate issues: **cause in fact** and **proximate cause**. Cause in fact is easy to understand. If the harm would not have occurred without the wrongful act, the act is the cause in fact. If Mrs. O'Leary had not placed the lantern too close to the cow, it would not have been kicked over, and the Great Chicago Fire would not have occurred. Her act was the cause in fact of the fire.

It is often hard to draw the line in proximate cause situations. The basic idea behind proximate cause is that there must be a close connection between the wrongful act and the harm caused. The harm caused must have been a foreseeable result of the act or acts. Negligence law does not hold people responsible for harm that was completely unforeseeable.

The more difficult part of causation is establishing proximate cause. Would it have been fair to make Mrs. O'Leary pay for all the damage caused in the Chicago fire? A certain amount of damage from her wrongful act was **foreseeable harm**. At some point, however, the damage to the city of Chicago was greater than what could have been foreseen when she negligently placed the lantern near the cow.

Assume, for example, that your car wrongfully crosses the center line and collides with a truck. It turns out that the truck is carrying dynamite, which explodes and kills a person two blocks away. Your

negligent crossing of the yellow line is the cause in fact of the harm to the person two blocks away. However, most courts would say that your negligence was not the proximate cause of this death. Crossing a yellow line does not usually result in harm two blocks away. That harm was not foreseeable. This case would be decided differently, though, if the person who died was a pedestrian on the sidewalk close to the collision.

Sometimes the negligence of more than one person harms someone. For example, suppose two cars, each negligently driven, collide and injure a pedestrian on a nearby sidewalk. Each driver is responsible for the pedestrian's injuries. If one driver is unable to pay, the other driver may have to pay the entire amount of the damages.

Damages

A plaintiff who proves duty, breach, and both forms of causation still must prove actual **damages** to recover in a negligence action. The basic idea behind damages is that the plaintiff should be restored to his or her pre-injury condition, to the extent that this can be achieved with money.

Courts allow plaintiffs to recover for hospital bills, lost wages, damage to property, reduced future earnings, and other economic harm. Plaintiffs may also recover for noneconomic harm such as pain

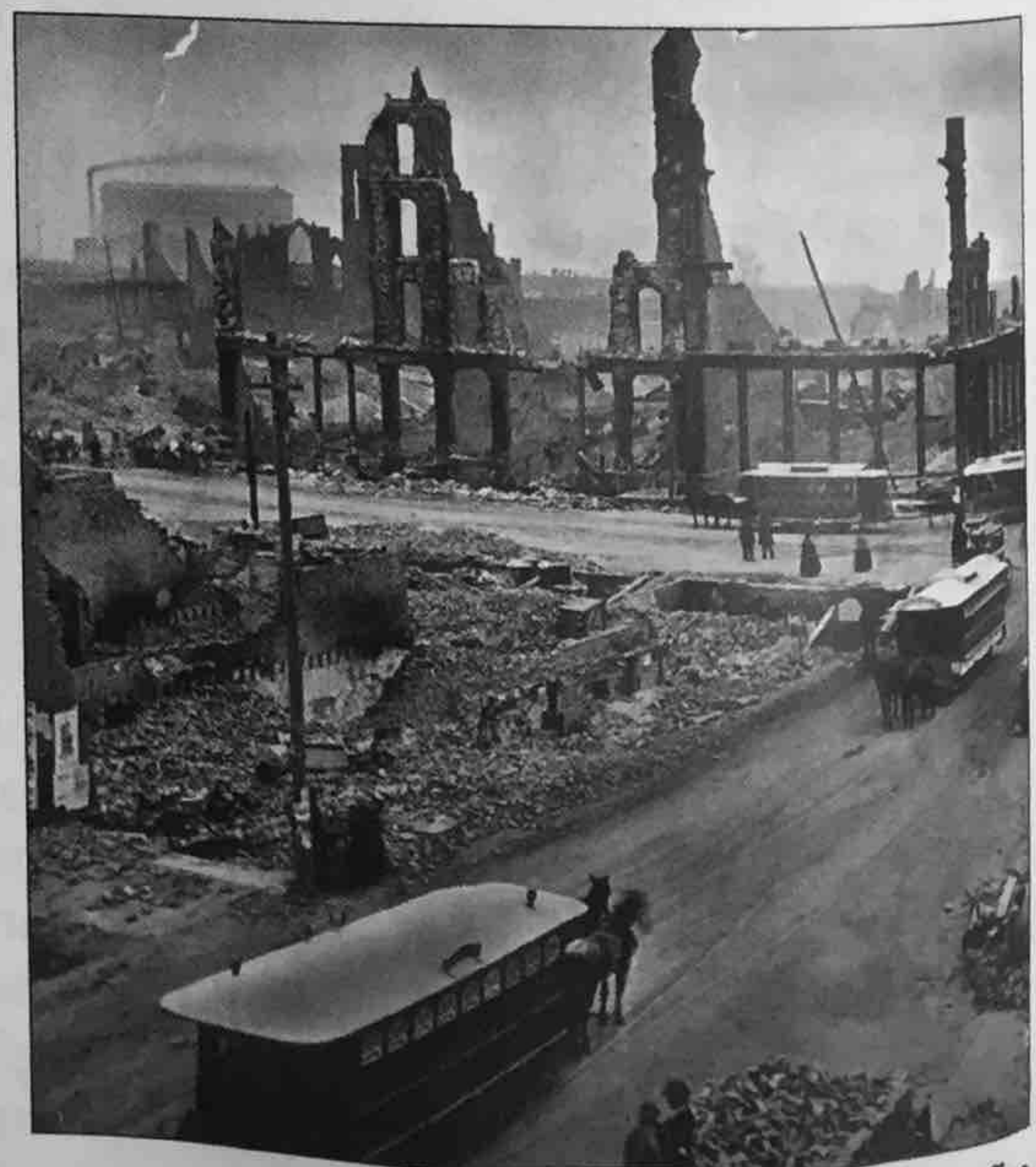
The Case of . . .

The Great Chicago Fire

In 1871, a major fire destroyed much of the city of Chicago. After a thorough investigation, the cause of the fire was determined. It began in Mrs. O'Leary's shed when a cow she had been milking kicked over a kerosene lantern she had placed too close to the cow's rear leg.

Problem 20.4

- Was Mrs. O'Leary negligent in placing the lantern so close to the cow's leg?
- Should she have had to pay for all the damage caused by the fire? Give reasons for your answer.



Aftermath of the fire

and suffering, emotional distress, and permanent physical losses (for example, loss of a limb or blindness). However, in some states, a plaintiff must first prove economic harm—even if only one dollar—before a judge or jury can make an award for noneconomic harm like pain and suffering.

Problem 20.5

As a freshman college prank, Carolyn decides to remove a stop sign from an intersection and put it in her dormitory room. To avoid being noticed, she chooses a stop sign at the intersection of a little-used country road and a two-lane state highway several miles out of town. The night after her prank, a motorist from out of state drives through this intersection and is struck by a car traveling at 50 miles per hour along the state highway. Both motorists are seriously injured, and their cars are totally demolished. They recover from their injuries after several months. The police suspect a college prank, and after some investigating, are able to find out who removed the sign. The injured motorists bring a civil action against Carolyn, claiming extensive damages.

- a. Can the injured motorists prove that Carolyn's act caused their harm? Explain your answer.
- b. Assume that the plaintiffs can prove duty, breach, and causation. List all the types of damages each plaintiff might have suffered. Could they recover all of these damages? Explain your answer.

Defenses to Negligence Suits

People can recover for injuries when they are able to prove each of the elements of negligence by a preponderance of the evidence. However, even when all the elements can be proven, the defendant may be able to raise a valid legal defense. One group of legal defenses in negligence cases is based on the plaintiff's conduct.

One traditional legal defense is **contributory negligence**. This means that as a plaintiff, you cannot recover damages from the defendant if your own negligence contributed in any way to the harm suffered. For example, suppose a train station attendant warns a passenger not to walk in an area where ice has formed on the platform. The passenger walks there anyway, falls, and is hurt. The passenger might sue the railroad for allowing ice to remain on the platform. However, by ignoring the warning and stepping on the ice, the passenger breached the duty to act reasonably. The breach was the cause—both cause in fact and proximate cause—of her injury. The passenger and the railroad were negligent, so the passenger cannot recover damages.

When both parties are equally at fault, the contributory negligence rule perhaps provides a fair result. Neither party can recover damages from the other. However, the contributory negligence defense also allows for a very slight amount of negligence on the part of the plaintiff



Where You Live

Is contributory negligence a valid defense in your state? If not, when was the law changed?

Law in Action

Cigarettes and the Law

Prior to the mid-1990s, tobacco companies were usually able to defend against lawsuits brought by smokers harmed from cigarettes. They did so by claiming that the smokers had assumed the risks—based on the warning printed on cigarette packages—related to smoking. In 1994, despite testimony earlier that year before Congress that smoking was not addictive, documents surfaced showing that tobacco company executives actually had a great deal of information about the addictiveness of nicotine and the harm caused by smoking. Not surprisingly, in the next few years, many class action lawsuits were filed in state courts to recover damages from cigarette companies.

In 1998, the leading cigarette manufacturers settled these lawsuits. Not only did they promise to pay an estimated \$246 billion to the states over 25 years, but they also agreed to restrict the way they market cigarettes and make them available to the public. The cigarette companies also agreed to pay special attention to restricting young people's access to cigarettes. Some of these restrictions include not advertising on billboards or within public transportation systems, not using cartoon characters to sell tobacco products, and not sponsoring concerts or other events at

which young people will be present. In addition, the cigarette companies agreed to dedicate \$300 million toward public education efforts to reduce underage tobacco use and to educate consumers about causes and prevention of diseases associated with the use of tobacco products.

Problem 20.6

- Is it fair to the cigarette companies to subject them to liability when they had been manufacturing a legal product that contained a health notice printed on cigarette packages?
- Should it make a difference that the product, although legal, caused great harm?
- Should the federal government regulate such a product?
- Should it make a difference that the companies withheld information about the harmful effects of their products?
- A bartender who never smoked develops lung cancer as a result of inhaling secondhand smoke during her many years of work at the bar. Should the bartender be able to recover damages against cigarette manufacturers? Explain.



to give the defendant a complete legal defense. This is true even when the damage to the plaintiff is great and the defendant has been very negligent. Many people think this produces an unfair result. Therefore, this defense has been eliminated in most states by either state law or judicial decision.

Most states now allow a defense called **comparative negligence**. This means dividing the loss according to the degree to which each person is at fault. For example, Paul and Javier are in a car crash and Paul sues Javier for the \$20,000 in damages that he suffers. If the jury finds that Paul was somewhat negligent himself—for example, by not wearing his seat belt—the damages will be reduced. If Paul was 10 percent at fault and Javier was 90 percent at fault, Paul will receive \$18,000 (\$20,000 reduced by 10 percent, the amount that was Paul's fault). If Paul was 30 percent at fault, he will receive only \$14,000. But if he was more than 50 percent at fault, he will receive no damages in many states, and Javier might be able to sue Paul for some damages. Javier's action against Paul is called a **counterclaim**.

Sometimes several people commit a negligent act against a third person. If Paul and Javier in the example above had negligently collided and injured Charles, who was in another car and was not at fault, Charles could recover damages from both Paul and Javier. Paul and Javier might be able to divide their liability to Charles between themselves, according to each one's degree of fault. However, if one of the defendants was unable to pay because he had no money, the other defendant might have to pay all the damages awarded to Charles.

Another legal defense in negligence cases is **assumption of risk**. This defense is used when a person voluntarily encounters a known danger and decides to accept the risk of that danger. For example, a hockey fan knows that on rare occasions a hockey puck can be deflected off a player's stick, over the glass that surrounds the rink, and into the seats. A fan who buys a seat knows the risk and agrees to accept the danger. If a fan is hit by the puck, assumption of risk will be a complete defense for the team or the players involved should the injured fan try to sue.

This defense is also used when a warning is posted that gives notice of a certain danger. For example, many hotels operate swimming pools without hiring lifeguards. The hotels post large "Swim at Your Own Risk" signs near the pools.

Even without a warning notice, everyone knows that knives are sharp and may cause injury. When someone accidentally slices off a finger while cutting cucumbers, the knife manufacturer will not be held liable. The injured party assumed the risk by picking up the knife.



Signs are often posted to give notice of a certain danger. *If someone is injured or drowns at this beach, can the property owner be held liable?*



Where You Live

Is comparative negligence a defense in your state? How are damages apportioned if more than one person has been negligent?



Roller coasters are equipped with safety bars to prevent injury. *What questions would you have to answer to determine liability if a rider is hurt on this ride?*

Problem 20.7

Analyze each case below. Identify the plaintiff and defendant and decide whether the defendant has a legal defense. Assume the state has a comparative negligence law.

- a. Olivia and her friends go to an amusement park, and she decides to ride the scariest roller coaster. After each rider is seated, the attendant secures that rider with a safety bar. Olivia tells her friends that she does not need the safety bar. After the first large hill, she detaches it. Later in the ride, Olivia is thrown from the roller coaster and is badly hurt.
- b. A large sign posted at the foot of the lifeguard station warns of a very dangerous undertow beyond the first sandbar. There are buoys floating around the sandbar. Howard swims out beyond the sandbar and drowns before the lifeguard is able to reach him.
- c. Joel's car runs out of gas on a railway crossing in a rural area. He puts on his flashers to warn approaching cars and begins walking to the nearest gas station, which is a mile away. A freight train approaches, and the engineer sounds his horn several times, thinking the driver will move off the tracks. By the time the engineer realizes that the car is abandoned, it is too late to stop the train. The car is totally demolished.



For Your Information . . .

Waivers

You may have been asked to sign a waiver, or a release from liability, before participating in certain potentially dangerous activities. A waiver is designed to release the person sponsoring the activity from liability if you are injured through his or her negligence. In most states such waivers, or releases, are enforceable as long as they are clear and understandable to a layperson. However, if

the conduct of the party asking you to sign the waiver is worse than negligent and this causes you damage, then the waiver will not protect them from liability. In addition, in some states certain other businesses—typically those regulated by government and those providing essential services—may not use waivers to protect themselves from liability for their negligence.



Where You Live

Are waivers, or releases from liability, enforceable where you live? Does the law in your state prohibit some businesses from being protected by waivers? If so, which ones?