PART II – BASIC LAW

**CHAPTER 6 – TORTS AND PRODUCT LIABILITY**

# A. Chapter Introduction

Chapter 6 is the first chapter of Unit II of *Introduction to Law*, which covers certain basic substantive areas of the law that many paralegals will be practicing. Chapter 6 discusses the area of tort law, which includes intentional torts and negligence. This chapter also discusses strict liability and product liability.

After completion of this chapter, students should be able to:

* List and describe intentional torts against persons.
* List and describe intentional torts against property.
* Define the tort of false imprisonment and apply merchant-protection statutes.
* Describe the torts of invasion of privacy and misappropriation of the right to publicity.
* Define the tort of defamation.
* List and explain the elements necessary to prove negligence.
* Apply special negligence doctrines such as negligence per se, negligent infliction of emotional distress, and *res ipsa loquitur*.
* Describe the tort of professional malpractice.
* Describe and apply the doctrine of strict liability.
* Explain when punitive damages are awarded in strict liability actions.

B. Instructional Ideas

1. Discuss the Ozzy Osbourne case mentioned in the chapter. Ask for student opinion on whether a musician should be liable for what he or she puts on a CD. What is the distinction between Ozzy’s case and the Soldier of Fortune case at the end of the chapter?

2. Discuss the Howard Stern case mentioned in the chapter. Perhaps, if you dare, show a clip of the Howard Stern show on E!, and ask whether this type of conduct should be actionable.

3. Explain what is required of an intentional tort, namely that the defendant intended the harm caused or was aware that harm likely to result from the defendant’s conduct.

4. Ask students what they think should make a lawsuit frivolous? Take the McDonalds coffee spill case or the “your fast food made me fat” case. Get student opinion on whether those are frivolous.

5. Explain the distinction between compensatory and punitive damages.

6. Explain the elements of a negligence action in detail. Further, distinguish between causation in fact and proximate causation. Explain the concept of superseding events, asking the class for examples.

7. For extra reading—students just love extra reading—pull the *Palsgraf* case from a case reporter or Westlaw. Have the students read and brief the most famous case in tort law history.

8. Explain how professional malpractice is different from traditional negligence.

9. Ask for examples of what might qualify as negligence per se, or *res ipsa loquitur*.

10. Bring in a weed eater, but I wouldn’t recommend starting it. Ask the class how there is any way that a product such as this could appeal to consumers without it being inherently dangerous. Use this illustration to get into the subject of product liability and strict liability.

**C. Video Recommendation(s)**

The recommendations from Chapter 3—*The Rainmaker* and *A Civil Action*—are repeated for this chapter, for the same reasons given earlier.

One might also want to consider showing *The Verdict* (Paul Newman) and *Erin Brockovich* (Julia Roberts). Both are excellent movies about tort litigation.

Court TV has produced some excellent documentaries, and one of them, *Fentress vs. Eli Lilly & Co: Prozac on Trial*, would work well with this chapter. It can be ordered on courttv.com, and concerns a product liability case against Eli Lilly, the maker of Prozac, by victims and relatives of those murdered by a coworker on Prozac.

**D. Chapter Outline**

**I. Intentional Torts Against Persons**

A. **Assault**: Threat of immediate harm or offensive contact, or any action that arouses reasonable apprehension of imminent harm.

B. **Battery**: The unauthorized and harmful or offensive physical contact with another person.

1. **Transferred intent doctrine**. If a person intends to injure oneperson but actually harms another person, the law transfers the perpetrator’s intent from the target to the actual victim.

C. **False Imprisonment**: Intentional confinement or restraint of another person without authority or justification and without that person’s consent.

D. **Merchant Protection**: These statutes permit businesses to stop, detain, and investigate suspected shoplifters (and not be held liable for false imprisonment) if the following requirements are met:

1. There are reasonable grounds for the suspicion.

2. Suspects are detained for only a reasonable time.

3. Investigations are conducted in a reasonable manner.

E. **Defamation of Character**: The defendant makes an untrue statement of fact about the plaintiff that is published to a third party. Truth is an absolute defense. Types of defamations:

1. **Slander**: oral defamation

2. **Libel**: written defamation

F. **Public Figure Plaintiffs**: Must prove the additional element of malice.

G. **Misappropriation of the Right to Publicity**: Appropriating another person’s name or identity for commercial purposes without that person’s consent. Also called tort of appropriation.

H. **Invasion of Privacy**: Unwarranted and undesired publicity of a private fact about a person. The fact does not have to be untrue. Truth is not a defense.

I. **Intentional Infliction of Emotional Distress**: Extreme and outrageous conduct intentionally or recklessly done that causes severe emotional distress. Some states require that the mental distress be manifested by physical injury. Also known as tort of outrage.

J. **Malicious Prosecution**: A successful defendant in a prior lawsuit can sue the plaintiff if the first lawsuit is found to be frivolous.

**II. Intentional Torts Against Property**

A. **Trespass to Land**: Interference with a landowner’s right to exclusive possession of his or her land.

B. **Trespass to Personal Property**: A person injures another person’spersonal property or interferes with that person’s enjoyment of his or her property.

C. **Conversion of Personal Property**: Taking over another person’s personal property and depriving him or her of use and enjoyment of the property.

**III. Unintentional Torts (Negligence)**

A. **Definition of Negligence**: The omission to do something that a reasonable person would do, or doing something which a prudent and reasonable person would not do.

B. **Elements of Negligence**: To establish negligence, the plaintiff must prove:

1. The defendant **owed a duty** of care to the plaintiff.

2. The defendant **breached this duty**.

3. The plaintiff suffered **injury**.

4. The defendant’s negligent act **caused** the plaintiff’s injury. Two types of causation must be shown:

a. **Causation in fact (or actual cause)**. The defendant’s negligent act was the actual cause of the plaintiff’s injury.

b. **Proximate cause (or legal cause)**. the defendant is liable only for the foreseeable consequences of his or her negligent act.

**IV. Special Negligence Doctrines**

A. **Negligent Infliction of Emotional Distress**: A person who witnesses a close relative’s injury or death may sue the negligent party who caused the accident to recover damages for any emotional distress suffered by the bystander. To recover for negligent infliction of emotional distress, the plaintiff must prove:

1. A relative was killed or injured by the defendant.

2. The plaintiff suffered severe emotional distress.

3. The plaintiff’s mental distress resulted from a sensory and contemporaneous observance of the accident.

B. **Professional Malpractice**: Doctors, lawyers, architects, accountants, and other professionals owe a duty of ordinary care in providing their services. They are judged by a reasonable professional standard. Professionals who breach this duty are liable to clients and some third parties for professional malpractice.

C. **Negligence *Per Se***: A statute or ordinance establishes the duty of care. A violation of the statute or ordinance constitutes a breach of this duty of care.

D. ***Res Ipsa Loquitur***: A presumption of negligence is established if the defendant had exclusive control of the instrumentality or situation that caused the plaintiff’s injury and the injury and the injury would not have ordinarily occurred but for someone’s negligence. The defendant may rebut this presumption.

E. **Good Samaritan Laws**: Relieve doctors and other medical professionals from liability for ordinary negligence when rendering medical aid in emergency situations.

F. **Dram Shop Acts**: State statutes that make taverns and bartenders liable for injuries caused to or by patrons who are served too much alcohol and cause injury to themselves or others.

G. **Guest Statutes**: Provide that a driver of a vehicle is not liable for ordinary negligence to passengers he or she gratuitously transports. The driver is liable for gross negligence.

H. **Fireman’s Rule**: Firefighters, police officers, and other government employees who are injured in the performance of their duties cannot sue the person who negligently caused the dangerous situation that caused the injury.

I. **“Danger Invites Rescue Doctrine”**: A person who is injured while going to someone’s rescue may sue the person who caused the dangerous situation.

J. **Social Host Liability**: Some states make social hosts liable for injuries caused by guests who are served alcohol at a social function and later cause injury because they are intoxicated.

K. **Liability of Landowners**: Landowners (and tenants) owe the following duties to persons who come upon their property:

1. **Invitees**: Duty of ordinary care

2. **Licensees**: Duty of ordinary care

3. **Trespassers**: Duty not to willfully and wantonly injure trespassers

L. **Liability of Common Carriers and Innkeepers**: Owe a duty of utmost care rather than the duty of ordinary care, to protect their passengers and patrons from injury.

## V. Defenses Against Negligence

A. **Superseding Event**: An intervening event caused by another person that caused the plaintiff’s injuries that relieves the defendant from liability.

B. **Assumption of the Risk**: A defendant is not liable for the plaintiff’s injuries if the plaintiff had knowledge of a specific risk and voluntarily assumed the risk.

C. **Plaintiff Partially at Fault**: States have adopted one of the following two rules that affect a defendant’s liability if the plaintiff had been partially at fault for causing his or her own injuries.

1. **Contributory negligence**. A plaintiff cannot recover anything from the defendant.

2. **Comparative negligence**. Damages are apportioned according to the parties’ fault. Also called comparative fault.

## VI. Product Liability

A. **Strict Liability in Tort**: a manufacturer or seller who sells a defective product is liable to the ultimate user who is injured thereby. All in the chain of distribution are liable irrespective of fault. Sometimes called vertical liability.

**E. Critical Legal Thinking Questions**

**1. What is the legal purpose for allowing a person to sue for defamation of character?**

 A person is allowed to sue for defamation because one’s reputation is a valuable asset. Therefore, every person is protected during his or her lifetime from false statements made and published by others.

**2. Should the right to publicity be a protected right? Why or why not?**

 This is an opinion question, designed to stimulate class discussion. Hence, the word, “should.” However, every person has the exclusive right to control and profit from the commercial use of his or her name and personality during his or her lifetime. Another’s attempt to appropriate a living person’s name or identity is actionable.

**3. Should the tort of intentional infliction of emotional distress be recognized by the law? What difficulties arise in trying to apply this tort?**

 This is another opinion question. Such a tort is recognized by the law, and owes its genesis to *The Restatement (Second) of Torts*. The principal difficulty in applying this tort is determining what type of conduct qualifies as, “so outrageous in character and so extreme in degree as to go beyond all possible bound of decency, and to be regarded as atrocious and utterly intolerable in a civilized society.” And since the tort doesn’t require publication, it could become a “he said, she said” case of determining how offended the plaintiff was at the defendant’s conduct.

**4. What are the elements necessary to prove negligence? Describe each element.**

 There are four elements to a negligence action: (1) The defendant owed a duty of care to the plaintiff, which means that the defendant’s conduct is such that it is within the scope of the plaintiff’s right not to be harmed; (2) The defendant breached this duty of care, which means that the defendant’s conduct was “negligent” (a failure to exercise reasonable care); (3) The plaintiff suffers an injury, recognized as actionable; and (4) The defendant is the factual and proximate cause of the plaintiff’s injuries, which means that the defendant’s negligent conduct led to the foreseeable result of the plaintiff being injured.

**5. Explain the doctrine of proximate cause. Give an example of this doctrine’s application.**

 As opposed to causation in fact, proximate cause is a legal version of a judgment call. Based upon public policy, the law establishes a point along the damage chain after which the negligent party is no longer responsible for the consequences of his or her actions. This limitation on liability is referred to as proximate cause, or legal cause. The general test of proximate cause is foreseeability.

**6. Should the law recognize the doctrine of negligent infliction of emotional distress? Are the elements easy to meet?**

 This is an opinion question. The law, at least in some jurisdictions, does recognize negligent infliction of emotional distress. The elements usually involve the plaintiff witnessing the defendant negligently injuring or killing by the plaintiff’s loved one, resulting in the plaintiff suffering severe emotional distress. In some jurisdictions the plaintiff is required to show that the mental distress manifested itself in some physical injury.

**7. Compare the doctrine of contributory negligence to the doctrine of comparative negligence.**

 Both doctrines are affirmative defenses in negligence actions, and both involve blaming the plaintiff’s injuries, in part, on the plaintiff’s negligent conduct. Contributory negligence results in an outright victory for the defendant, even though the defendant was negligent. Comparative negligence, however, apportions the damages according to fault. Under this scheme, if the defendant was 70% at fault, and the plaintiff is 30% at fault, the plaintiff will recover 70% of the damages.

**8. What does the Good Samaritan law provide? Do you think this law serves a good purpose?**

 Good Samaritan laws provide protection against ordinary negligence committed by doctors, nurses, and laypersons trained in CPR who render emergency assistance. The purpose of the law is to promote emergency assistance, which is a good purpose.

**9. What does the doctrine of strict liability provide? Do you think this doctrine is fair?**

 Strict liability is liability without fault and makes producers and sellers of defective products liable for damage cause by the product that has reached the consumer without substantial change in the condition in which it was sold. Strict liability is imposed on the defendant irrespective of fault. All parties in the chain of distribution of a defective product are strictly liable for the injuries caused by that product. Whether the doctrine is fair is an opinion question. It is premised on the belief that manufacturers and sellers are in a better position than the plaintiffs to deal with the losses suffered by the products—even though fault does not lie with the defendants—presumably through insurance.

**10. What are punitive damages? What public policies are served by an award of punitive damages?**

 Punitive damages are damages designed to punish the defendant for extremely atrocious misconduct. Historically, punitive damages were approximately three times the compensatory damages. More recently, however, punitive damages have become outlandishly high and unrelated to the compensatory damages, which calls into question the public policy of punitive damages, which is to punish the defendant in the only way the civil law can: money. If the punitives get so high, then the employees and shareholders of those defendants get punished.

**F. Cases for Discussion**

***Roach v. Stern***, 675 N.Y.S.2d 133 (1998), concerns siblings of a dead woman who sued radio shock jock Howard Stern for intentional infliction of emotional distress. Deborah Roach was a topless dancer and frequent guest on the Howard Stern show who died of an overdose and was then cremated. Part of her remains were given to one of her friends, allegedly to “preserve and honor” her remains. The friend then took the cremated remains with him to the Stern show, whereupon those on the show played with her ashes and made rude comments about the remains. The radio show was also broadcast on a national cable show. The siblings sued Stern, the friend, and Infinity Broadcasting Co. for intentional infliction of emotional distress. New York’s Supreme Court, Appellate Division held that the complaint stated a cause of action. Even though Stern’s conduct wasn’t particularly shocking in light of his radio reputation, the court concluded that a jury could reasonably conclude that the activity with the cremated remains, against the express wishes of her family, went beyond the bounds of decent behavior.

QUESTIONS

 1. *Should the tort of intentional infliction of emotional distress be recognized by the law? What difficulties arise in trying to apply this tort?*

 This is an opinion question. Such a tort is recognized by the law, and owes its genesis to the The Restatement (Second) of Torts. The principal difficulty in applying this tort is determining what type of conduct qualifies as, “so outrageous in character and so extreme in degree as to go beyond all possible bound of decency, and to be regarded as atrocious and utterly intolerable in a civilized society.” And since the tort doesn’t require publication, it could become a “he said, she said” case of determining how offended the plaintiff was at the defendant’s conduct.

2. *Was Stern’s and the other participants’ conduct on the radio show tasteless? Did it amount to “outrageous conduct” for which legal damages should be awarded?*

 Taste depends upon one’s taste buds. And even if it was tasteless (safe assumption), that doesn’t necessarily make it so outrageous as to warrant liability for this type of tort. The court didn’t say that it was so outrageous that damages could be awarded; it said that a jury could make such a finding.

3. *If Stern and Infinity are found liable, will a chilling effect on future broadcast result?*

if Stern and Infinity are found liable, perhaps radio and TV shockers might think twice before engaging in the shenanigans that bring ratings, but that is an opinion.

***Cheong v. Antablin***, 16 Cal.4th 1063 (1997), concerns two longtime friends who went skiing together. While skiing, Antablin accidentally collided with Cheong, causing injury. Cheong sued Antablin for negligence, and the trial court granted a motion for summary judgment based on the doctrine of assumption of risk. The court of appeals affirmed. So did the California Supreme Court, following the traditional line of reasoning that courts should not hold a sports participant liable to a coparticipant for ordinary careless conduct committed during the sport because in the heat of an active sporting event a participant’s normal energetic conduct often includes accidentally careless behavior. Only intentional or extremely reckless conduct is actionable from sporting accidents.

QUESTIONS

1. *Do you think the law should recognize the assumption of risk? Why or why not?*

 This is a personal opinion question, designed to stimulate class discussion. Assumption of risk has been recognized for quite some time, and is a doctrine that acknowledges that not every injury can be blamed on someone else. Sports or sporting activity can be dangerous—that’s part of the fun—and sometimes “accidents happen.”

2. *Should Cheong have sued Antablin? Discuss?*

This is another personal opinion question. Although there might have been insurance reasons why Cheong sued Antablin, it seems quite unfriendly that Cheong sued Antablin over a skiing accident.

3. *Should the doctrine of assumption of risk be applied as a defense when spectators are injured at professional sports events? Explain.*

 This is another personal opinion question, but a little more interesting to think about. Here, the spectators aren’t engaging in the activity, but simply watching it, which makes their risk less assumed than if they were actually facing the pitcher, for instance. But there is still some inherent risk of injury when one attends professional sports events. The big question is how much risk should be assumed to be so ordinary that its occurrence would protect the team or stadium management from liability.

***Shashone Coca-Cola Bottling Co. v. Dolinski***, 420 P.2d 855 (1967), concerns a plaintiff who got quite a jolt when he drank a bottle of Squirt, manufactured and distributed by the Shoshone Bottling Co., which contained a dead mouse and all the goodies inside of it. The plaintiff sued Shashone, arguing strict liability, which had not yet been recognized in Nevada. The trial court adopted the doctrine and the jury found in favor of Dolinski. Shashone appealed, arguing that strict liability had to be created by the legislature, not the courts. The Supreme Court of Nevada adopted the doctrine of strict liability and held that the evidence supported the trial court’s finding of liability. The court concluded that public policy demands that one who places upon the market a bottled beverage in condition dangerous for use must be held strictly liable to the ultimate user for injuries resulting from such use, although the seller has exercised all reasonable care.

QUESTIONS

1. *Should the courts adopt the theory of strict liability? Why or why not?*

 This is an opinion question, designed to get the student to think about whether such a policy should come from the legislature or the judiciary. Generally, if a legislature has failed to act (for whatever reason), an appellate court can exercise its power to make legal policy.

2. *Was it ethical for Shoshone to argue that it was not liable to Dolinski?*

 Shoshone has every right to defend itself in any legal way against a negligence action, particularly since the burden of proof rests with the plaintiff.

3. *Should all in the chain of distribution of a defective product—even those parties who are not responsible for the defect—be held liable under the doctrine of strict liability? Or should liability be based only on fault?*

 This is another personal opinion question, designed to get the student to think about the policy of making every party in the chain of distribution liable for product defects. Strict liability is quite a large exception to the general rule that liability is based on fault.

**6.1**

***Manning v. Grimsley***, 643 F.2d 20 (1st Cir. 1981), concerned a pitcher for the Baltimore Orioles who was warming up in the bullpen at Boston’s Fenway Park. The pitcher was being heckled by Boston fans behind the wire fence in the bullpen, and he threw an 80 mph pitch at one of the hecklers behind the fence. The ball passed through the wire fence and hit another spectator, who was injured and sued the pitcher and the Orioles.

ISSE: *Are the defendants liable?*

Yes. The court found that a battery had been committed by the pitcher, even though he was only intending to put the heckler in fear of a battery. The Baltimore Orioles were also subject to liability (the trial judge having refused to submit the claim against the Orioles to the jury) because the Court concluded that the pitcher’s conduct was in response to conduct that presently interfered with his ability to perform his duties successfully.

**6.2**

***Johnson v. Kmart Enterprises, Inc.***, 297 N.W.2d 74 (Wis.App. 1980), concerned a woman who was stopped by Kmart security because they thought she may have stolen a baby seat in which she was carrying her baby while shopping in Kmart. The baby seat still had the price tag on it. She demanded to see the manager and explained how the crumbs, etc., proved that she had previously bought the seat. The manager apologized to her, letting her leave. She then sued Kmart for false imprisonment.

ISSUE: *Is Kmart liable?*

No. The appellate court concluded that the security guard’s and store manager’s actions were reasonable, particularly in light of the statute that gives storekeepers limited rights to stop and detain those suspected of shoplifting. The security guard did have probable cause to stop the woman, and the 20-minute detention was reasonable as a matter of law. The fact that Kmart’s employees’ suspicions were wrong doesn’t automatically make them liable.

**6.3**

***Karns v. Emerson Electric Co.***, 817 F.2d 1452 (1987), concerned a child whose arm was cut off at the elbow by the circular saw blade attached to an Emerson weed eater. The instructions for the Emerson weed eater warned users to keep children away, and that a distance of 30 feet was advised when the saw blade was attached and being used. The child was between 6 to 10 feet away from the saw blade when the injury occurred. The accident was caused by the child’s uncle using the weed eater when it struck the ground causing it to kick back to the left. The child, through his mother, sued Emerson under strict liability.

ISSUE: Is Emerson liable?

Yes. Emerson is liable, despite the fact that the owner’s manual had warning about the danger of the product and the appropriate distance for bystanders. Specifically, the court found that the warnings were inadequate to apprise the consumer about the inherent danger of the kickback occurring when the saw blade comes in contact with something too large for it to cut. Furthermore, the bystander has no access to the warnings, so any warnings about bystanders are diminished.

**6.4**

***Luque v. McLean, Trustee***, 8 Cal.3d 136 (Cal. 1972), concerned a child whose hand was severely injured when he fell. His hand went into the unguarded hole of a running lawn mower he was using, when he stopped to pick up a carton in the path of the mower. The lawsuit was a strict liability case against the seller, manufacturer, and distributor of the lawn mower. The defendants argued that strict liability does not apply to patent (obvious) defects.

ISSUE: *Was it ethical for the defendants to argue that they were not liable for patent defects? Would patent defects ever be corrected if the defendants’ contention were accepted by the court? Who wins?*

It would seem that the defendants acted ethically in putting forth a legitimate defense to a liability action even if, as was the case, it is ultimately an unsuccessful defense. The court ruled in favor of the plaintiff, finding that the plaintiff doesn’t have to prove that he was unaware of the defect that caused injury. Furthermore, the court concluded that the policy underlying the doctrine of strict liability compels the conclusion that recovery should not be limited to cases involving latent defects.

**G. Case for Briefing**

**1. Case Name**

*Braun v.* Soldier of Fortune *Magazine, Inc.*, 968 F.2d 1110 (1992)

**2. Key Facts**

A. *Soldier of Fortune* (SOF) magazine ran an ad in its SOF magazine for almost a year that was placed by Michael Savage (presumably not the radio talker). The ad offered Savage’s services as a “Gun for Hire.”

B. The ad stated “Discrete, and very private, body guard, courier, and other special skills, all jobs considered.” Savage’s contact information was also given.

C. Many people responded to the ad, seeking Savage’s help in criminal activity, including murder.

D. Responding to the ad, two Atlanta businessmen contacted Savage, asking for his help in murdering their business partner, Braun.

E. Savage and an associate met with Braun’s partner and associate. Eventually, Braun was murdered in front of his son while driving in his car. His son was also injured.

F. Braun’s sons sued SOF in federal court, seeking damages for the wrongful death of their father.

G. Plaintiffs’ theory was that SOF was liable for negligently publishing an ad that created an unreasonable risk of the solicitation and commission of violent criminal activity, including murder.

H. Plaintiffs presented evidence at trial that SOF was aware at the time of Savage’s ad that there was a link between such ads and criminal activity. In fact, law enforcement personnel had contacted SOF twice in connection with investigations of crimes.

I. SOF’s president, former managing editor, and advertising manager denied knowledge of other crimes connected with SOF ads prior to the Savage ad. There was testimony by them that “Gun for Hire” referred to body guard-like activity, not illegal activity.

J. The jury found for plaintiffs, awarding them damages totaling $12,375,000, of which $10,000,000 was punitive damages.

**3. Issue**

Does a publisher owe a duty of care to the public when it accepts an advertisement that expresses or implies on its face a danger to the public through the availability of criminals for hire?

**4. Holding**

The Eleventh Circuit Court of Appeals held that SOF had a legal duty to refrain from publishing the Savage ad since it so clearly invited criminal activity. The court did not reduce the punitive damages award.

**5. Court’s Reasoning**

A. The Court found that it was not a First Amendment violation to make a publisher liable for negligently accepting an ad that constituted a substantial danger of harm to the public.

B. Even though the defendants claimed no knowledge of criminality associated with their ads, the Court concluded that the ad’s language, specifically its sinister terms, made it clear that the ad was dangerous, which made SOF the proximate cause of Braun’s death.

C. Specifically, the ad described Savage as a professional mercenary, stressed his willingness to keep his assignments very private, referenced Savage’s “other skills,” and concluded that Savage would consider “all jobs.”

D. The publisher should have recognized that the ad was offering criminal activity as easily as its readers recognized it.