# Negligence and tort law

By Aaron Larson Law Offices of Aaron Larson October, 2003 Contents Proximate Cause The Elements of a Negligence Action Gross Negligence Children and Negligence Comparative Negligence Contributory Negligence Mixed Comparative and Contributory Negligence Vicarious Liability In general terms, negligence is " the failure to use ordinary care" through either an act or omission. That is, negligence occurs when: somebody does not exercise the amount of care that a reasonably careful person would use under the circumstances; or somebody does something that a reasonably careful person would not do under the circumstances. Negligence is often claimed in personal injury lawsuits. For example, a personal injury lawsuit arising out of an automobile accident case or premises liability action is frequently based on the theory that the defendant was negligent.

Please note that negligence law varies between jurisdictions, sometimes significantly, and you should check with a local legal professional if you wish to know the specific negligence laws of your jurisdiction. Proximate Cause Proximate cause exists where the plaintiff is injured as the result of negligent conduct, and plaintiff's injury must have been a natural and probable result of the negligent conduct. In order for a defendant to be liable, the plaintiff must establish both negligence and proximate cause. Please note that the law speaks of the defendant's conduct as being " a proximate cause" of an accident, as opposed to " the proximate cause".

Many accidents have more than one proximate cause. It is typically not necessary for liability that the defendant's negligence be either the only proximate cause of an injury, or the last proximate cause. A defendant may be liable even where an injury has multiple proximate causes, and whether

those causes occur at the same time or in combination. A plaintiff may be able to bring a cause of action against two or more defendants by proving that the acts of each were proximate causes of the plaintiff's injury, even where the defendants' negligent acts were distinct. Imagine a situation where a plaintiff is driving down the road, and is suddenly cut off by a person who runs through a stop sign on a side street.

The plaintiff slams on her brakes, and is able to avoid striking that car. However, the plaintiff is rear-ended by another driver who was not paying attention to the events in front of his car. The plaintiff may be able to bring an action against both drivers – the one who cut her off and the one who rear-ended her – on the basis that their negligent acts, although independent, were both proximate causes of her injuries. The Elements of a Negligence Action A typical formula for evaluating negligence requires that a plaintiff prove the following four factors by a " preponderance of the evidence": The defendant owed a duty to the plaintiff (or a duty to the general public, including the plaintiff); The defendant violated that duty; As a result of the defendant's violation of that duty, the plaintiff suffered injury; and The injury was a reasonably foreseeable consequence of the defendant's action or inaction.

For example, a person driving a car has a general duty to conduct the car in a safe and responsible manner. If a driver runs through a red light, the driver violates that duty. As it is foreseeable that running a red light can result in a car crash, and that people are likely to be injured in such a collision, the driver will be liable in negligence for any injuries that in fact result to others in a collision resulting from the running of the red light. Gross Negligence

Gross negligence means conduct or a failure to act that is so reckless that it demonstrates a substantial lack of concern for whether an injury will result.

It is sometimes necessary to establish “ gross negligence” as opposed to “ ordinary negligence” in order to overcome a legal impediment to a lawsuit. For example, a government employee who is on the job may be immune from liability for ordinary negligence, but may remain liable for gross negligence. Similarly, where a plaintiff signs a release (as may be required, for example, before entering a sports competition), for public policy reasons many jurisdictions will apply the release only to conduct which constitutes “ ordinary negligence” and not to acts of “ gross negligence”. The reason for this is quite simple: It is not good public policy to allow a defendant to escape liability for reckless indifference to the safety of others, particularly in contexts where the defendant is responsible for creating unsafe conditions, or is profiting from their existence. Consider, for example, a commercial venture engaged in a high risk recreational activity, such as a company that offers rock climbing tours. If a tour member is injured when safety equipment provided by the company unexpectedly fails, a valid release may protect the company from a lawsuit.

However, if the company knows up front that the equipment is defective and uses it anyway, it would not be protected by the release. Children and Negligence Minors are typically held to a different standard of care than adults. For example, a minor’s negligence may be evaluated against what reasonably careful person of the same age, mental capacity and experience would exercise under the same or similar circumstances. Very young minors (e.

g. , minors under the age of seven) are typically presumed to be incapable of negligence. Most jurisdictions also consider the fact that minors act upon childish instincts and impulses when considering injuries to minors. As a consequence, a defendant knew or should have known that a child (or children) were present, or were likely to be present, in the vicinity, the defendant may required to exercise greater vigilance. By way of example, a person driving by an unfenced playground where children often play baseball should be on alert that a child may impulsively chase a ball into the street. Comparative Negligence When comparative negligence applies, the damages a plaintiff is awarded will be reduced in proportion with the plaintiff's fault for his own injuries.

(e. g. , a jury determines a plaintiff's damages to be $100, 000. 00, and finds that the plaintiff is 40% at fault.

The plaintiff would thus be awarded $60, 000 against the defendant. ) Contributory NegligenceWhere " contributory negligence" principles are applied, if the plaintiff in any way contributed to his or her own injury, the plaintiff is barred from recovering damages. The extreme consequence of this approach has led to its being limited or abandoned in many jurisdictions. One historic limitation has been to examine the context of an accident to determine who had the " last clear chance" to avoid its occurrence, and to excuse a plaintiff's contributory negligence where the defendant is found to have had and to have failed to exercise that " last clear chance".

Mixed Comparative and Contributory Negligence Some states follow a mixture of comparative and contributory negligence, whereby a plaintiff who

is less than fifty percent at fault may recover damages reduced by the plaintiff’s proportion of fault, but a plaintiff who is more than fifty percent at fault may not recover damages, or may recover only a percentage of economic damages, against the defendants. (For more explanation of damages, please see this associated article. ) Vicarious Liability Vicarious liability occurs when one person is held responsible for the negligence of another. Typically, this applies in an employment context, where the employer (master) is responsible for the negligent acts of the employee (servant) which occur within the context of the employment relationship.

For example, an employer may be liable for an accident caused by an employee as the result of the negligent operation of a delivery vehicle. (For more information on liability in agency relationships, please see this associated article. ) Often, parents may be held vicariously liable for the negligent acts of their children. However, many jurisdictions have limited the vicarious liability of parents, and some have eliminated it.