Negligence and Unintentional Torts

14

CHAPTER OUTLINE

FOCUS YOUR LEARNING

When can a person sue for the negligent actions of others?

What are the different types of liability?

What defences can be offered in a lawsuit for negligence?

Weird Tort Claims

Bill Smith has filed a lawsuit against the estate of Elvis Presley charging that the estate has been "perpetrating a fraud" that Elvis died in 1977. He said the fraud interferes with his attempts to sell his books on Elvis's current whereabouts.

Prison inmates Paul Goist and Craig Anthony filed a lawsuit against General Foods, claiming their coffee was addictive and gave them headaches and insomnia.

David Mattatall was awarded $632 in medical expenses. He sued his mother for closing her car door on the paw of his cat Daisy. His mother lost her safe driver discount. Unfortunately, poor Daisy didn't receive anything because she was later run over by another car.

Ernesto Mota suffered brain damage from swallowing a bag of cocaine in a police station so that it could not be used against him as evidence. He is suing the police department for $7 million, claiming that the police should have stopped him.

WHAT DO YOU THINK?

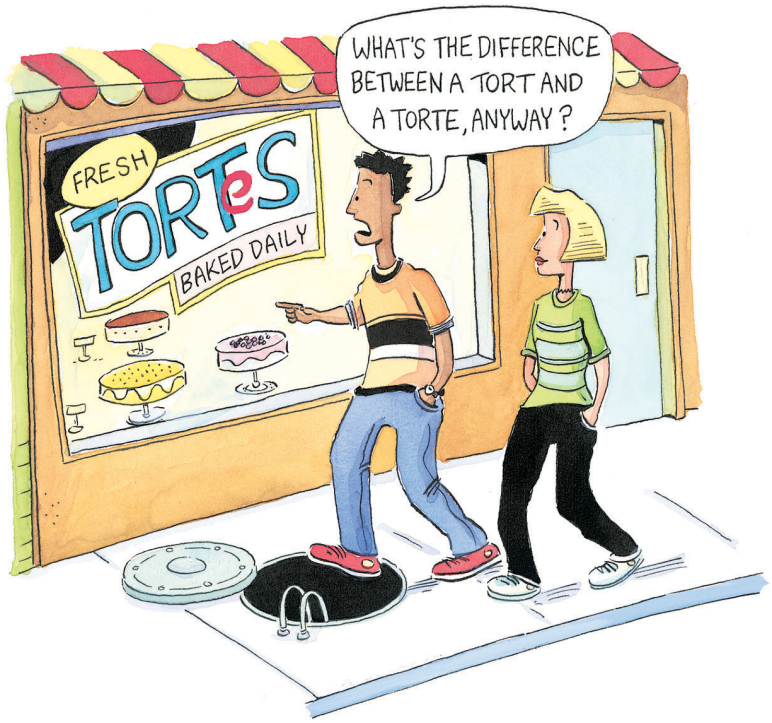
- Do any of these claims have merit?
- What kind of injury did the plaintiffs suffer?
- How should they be compensated for their loss or injury?

While some of the claims on the previous page may seem bizarre, individuals often face the possibility that they may be injured by someone's negligence, or, in a moment of carelessness, that they may injure someone else. What happens to people who are injured through no fault of their own? People usually assume they will be able to sue and get compensated for their injuries, loss of wages, or damage to their property.

tort: harm caused to a person or property for which the law provides a civil remedy

unintentional torts: injuries caused by an accident or an action that was not intended to cause harm

Damage to property or a personal injury caused by another person is a civil wrong called a **tort.** As you learned in Chapter 2, the branch of law that holds persons, private organizations, and governments responsible for damages and injuries is known as tort law. In this chapter, you will learn about **unintentional torts**—injuries that are the result of an accident or an action that was not intended to cause harm. You will also learn about the various defences that a person being sued can offer.



Fast Fact
The word *tort* originally comes from the Latin words *tortum* meaning "wrong" and *torquere* meaning "to twist."

NEGLIGENCE

negligence: careless conduct that causes harm to another

The most common unintentional tort is **negligence.** You are negligent when you unintentionally cause injury to someone in a situation where you should have known your action could cause harm. Suppose you decide to push your friend into a swimming pool for fun. Your friend resists and in the scuffle, you accidentally push someone else who falls and hits his head on the side of the pool. He suffers a concussion and misses two weeks of work. Your actions were negligent. You did not intend to give anyone a concussion, but you should have foreseen that your actions, especially in a crowded area such as a swimming pool, could cause injury to someone else.

Every day we hear about different claims for negligence. A woman sues a manufacturer because the bindings on her skis broke during a downhill race, causing her to fall and break her arm. A bar is sued because the bartender served drinks to a person who subsequently killed someone in a car accident. Parents sue a hospital because a nurse gave their child the wrong medication resulting in brain damage. In each of these cases, people sued for what they perceived as the careless or negligent conduct of others. In order for a defendant to be found negligent, each of the factors shown in Figure 14.1 must be proven by the plaintiff.

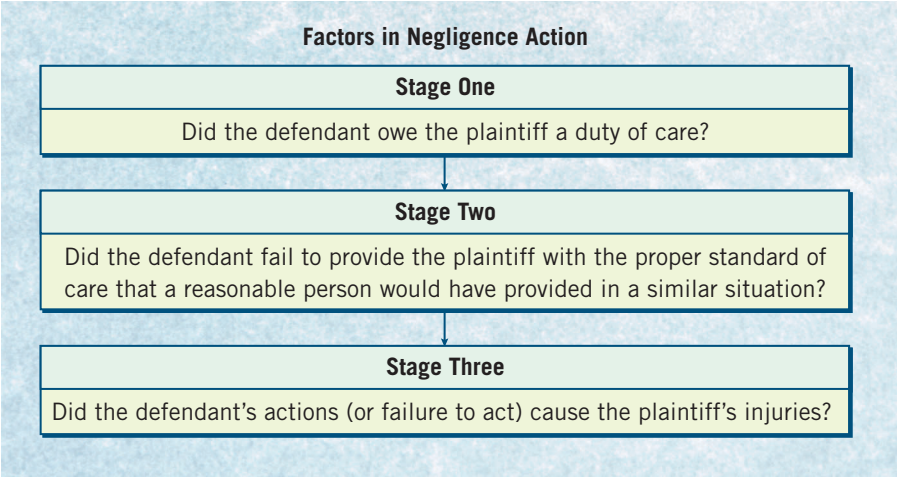


Figure 14.1 **If the answer to the question is "no" at any stage of the process, the action will not succeed.**

Stage One: Duty of Care

In a negligence case, the plaintiff must prove that the defendant owed the plaintiff a **duty of care**—the obligation to avoid careless actions that could cause harm to one or more persons. For example, if Caroline were hitting golf balls, she *should* foresee that her actions might harm Stewart, who is walking by; she would owe Stewart a duty of care. At one time, Caroline would only owe Stewart a duty of care if she had a contract or a special relationship with him. If such a relationship could be proven, then Caroline had a legal duty to look out for Stewart's safety. Without a contract, Stewart could not sue for negligence. This need for a contract changed as a result of a landmark decision in Scotland in *Donoghue* v. *Stevenson,* [1932].

duty of care: the obligation to foresee and avoid careless actions that might cause harm to others

The **neighbour principle** is significant because it means that in law everyone owes a duty of care not to harm his or her neighbour by being careless or negligent. According to *Donoghue* v. *Stevenson,* your neighbour is anyone who you can reasonably foresee being injured by your actions. If you leave your bike on the sidewalk, someone might trip over it and break a leg. That person might sue you, claiming that in law anyone using the sidewalk is your neighbour and that you owe such persons a duty of care. A court would probably decide that when you left your bike on the sidewalk, you should have foreseen that someone walking by could trip over it; therefore, anyone

neighbour principle: the legal responsibility to owe a duty of care not to harm one's neighbour by being careless or negligent

CASE

Donoghue v. Stevenson, [1932] A.C. 562 (H.L.)

1. In your own words, define the neighbour principle, using an example from your personal experience.
2. Do you agree with the House of Lord's ruling to retry the case? Why or why not?

One day Mrs. Donoghue and a friend stopped at a café for a drink. The friend purchased a bottle of ginger beer for Mrs. Donoghue. After drinking some of the ginger beer, Mrs. Donoghue found the remains of a decomposed snail in the bottle, and she became physically ill. She sued the beer manufacturer for being negligent by not having a proper system for inspecting the bottles.

The manufacturer of the ginger beer argued that it did not owe Mrs. Donoghue a duty of care because it did not have a contract with her; she had not purchased the ginger beer. The manufacturer agreed that it had a contract with the friend who had purchased the ginger beer, but the friend did not drink the ginger beer and did not get sick. Based on the existing legal principle that the manufacturer was responsible only to those with whom it had a contract, the trial judge dismissed the case. Donoghue appealed. The House of Lords reversed the decision and ordered the case to be tried. In the majority decision, Lord Atkin wrote the following:

> A person who engages in the manufacture of articles of food and drink intended for consumption by the public has a duty of care to those whom he intends to consume his products.... The rule that you are to love your neighbour becomes in law, you must not injure your neighbour.... Who, then, is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

The parties settled the action out of court, but a legal principle known as the neighbour principle was formulated.

foreseeability: the ability of a reasonable person to anticipate the consequence of an action

who might use the sidewalk would be your neighbour. Being aware that your actions could cause injury to someone is known as **foreseeability**—an important principle in determining duty of care in tort law.

In some situations you cannot possibly foresee that your actions could injure another person. In other words, your neighbour is not the world at large. Suppose you are running to catch a bus just as its doors are closing. You bang on the door. The driver opens the door to let you in, and in doing so knocks the bag of groceries out of your hand. A large bottle of pop you are carrying smashes on the ground, seriously injuring the little boy standing behind you. His family sues the bus driver for negligence. The courts would probably find that the defendant (the bus driver) could not have foreseen how the action of opening the door for you could have injured the little boy standing behind you.

Fast Fact

People who own houses or commercial establishments have a duty to keep their sidewalks safe for passers by.

Family Sues Over Fatal Crash

LAW IN ACTION

In November 2000, 14-year-old Amanda Peat and Robert Fulbrook were killed when the all-terrain vehicle they were driving slammed into a tractor-trailer at the John Deere Plant in Welland, Ontario. The students were participating in a popular job-shadowing program. Although a coroner's inquest ruled that the students' deaths were accidental, the family of one of the students filed a lawsuit alleging negligence against the manufacturer, John Deere, and the two organizations that sponsored the program. The Peat family claimed that the defendants failed to ensure that the students were not placed in a dangerous situation. The family also alleged that the defendants should have known that Amanda had had no experience or training and that she and Robert were not supervised while they were on the vehicle.

1. Who were the defendants in this case?
2. What three factors will the Peat family have to prove?
3. How would you apply the principle of foreseeability in this case?

Stage Two: Standard of Care

If a court decides that the defendant owed the plaintiff a duty of care, it must then decide *how much* care the defendant owed the plaintiff. Under common law, the courts came up with a standard for measuring the amount of care or caution someone should exercise to avoid harming others. In determining this **standard of care,** the courts decided to look at what a reasonable person would have done under similar circumstances. A **reasonable person** is regarded as an ordinary person of normal intelligence. A court will compare the defendant's actions with what a careful person of ordinary intelligence would do in a similar situation. For example, a reasonable person would know that driving 120 kilometres per hour on an icy road could cause an accident. If the courts decide that the defendant failed to meet the standard of caution that a reasonable person would have used, the defendant is said to have breached (failed to provide) the standard of care he or she owed the plaintiff.

standard of care: the degree of caution or level of conduct expected of a reasonable person

reasonable person: an ordinary person of normal intelligence

Consider This

In the early 1980s, tainted blood and blood products supplied by the Canadian Red Cross infected thousands of Canadians with HIV. What was the standard of care owed to people who received blood? Could the agency have reasonably foreseen the consequences of its collection methods?

Professional Liability

Individuals with special skills, expertise, and training, such as engineers, or lawyers, have a higher standard of care toward others than that of the reasonable person. This standard is called a specialized standard of care. The test for a **specialized standard of care** is what a "reasonable person with the same specialized training" would have done in that situation. For example, a doctor would be considered negligent if he or she did not provide the same level of care as other doctors in the same area of practice. Also, a heart specialist must meet a higher standard of care than a general practitioner.

specialized standard of care: the degree of caution or level of conduct considered necessary by a reasonable person with the same specialized training

Medical Negligence

In most situations, a medical practitioner cannot touch a patient, perform an operation, or administer treatment unless the patient has given consent.

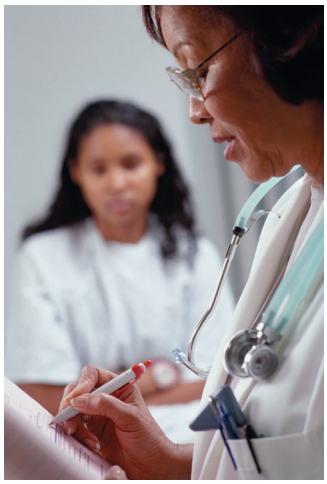


Figure 14.2 **What must a doctor disclose to a patient?**

Consent must be voluntary—the patient cannot be pressured. The patient's consent must also be informed, which means that the doctor has a duty to explain the medical procedure the patient is going to receive, any significant or unusual risks involved, length of recovery, potential side effects, and any alternatives to the procedure. Serious risks must be disclosed, even if their chances of occurrence are slight. If the doctor fails to share any of this information with the patient, duty of care toward the patient will be breached, and the doctor may be liable for the consequences. Should damage occur, the plaintiff must prove that it was caused by the doctor's failure to adequately inform the patient of the risk. To do this, the patient must prove that he or she would not have had the treatment if this risk had been disclosed.

Suppose David suffers from severe back pain. His doctor informs him that he needs surgery to repair a ruptured disc. The doctor explains the procedure and tells David the surgery is serious but no more than any operation. She does not mention that there is a 1 percent risk of paralysis. David agrees to the operation and subsequently suffers paralysis as a result of the operation. David's doctor could be liable for negligence.

CASE

Thibault v. *Fewer,* [2001] M.B.Q.B. 231

1. What did the plaintiff have to prove for the neurosurgeon to be liable?
2. Why did the trial judge dismiss the case? Do you agree with his decision?
3. If you were the plaintiff, would you appeal? Explain.

In 1992, Norma Thibault was suffering from a painful illness that affected the muscles in her face. She was on a high dose of an anti-convulsive drug that helped her control the pain. She also underwent root-canal work, had several teeth removed, and even had her dentist anaesthetize the right side of her face so that she could go out socially. The pain continued, and she confided in her doctor that she was considering suicide. Her doctor arranged to send her to a neurosurgeon, Dr. Fewer, who suggested a procedure that could block the pain.

Rather than using an outdated (and dangerous) procedure to permanently block the pain, the neurosurgeon suggested an injection that would kill the pain fibres, while still maintaining the patient's sense of touch. The neurosurgeon wrote that this procedure "has very little in the way of side effects...." After the procedure, Mrs. Thibault began experiencing reduced vision in her right eye and soon permanently lost most of her vision in that eye. She complained that she was never informed of the possible effect the procedure could have on her eyesight. She sued the neurosurgeon.

During the trial, the Court learned that only 1 out of 110 of the defendant's patients had suffered complications from this procedure, and that there was no evidence the procedure had caused the problem.

The Queen's Bench of Manitoba dismissed the plaintiff's action. The Court determined that the less than 1 percent risk of complication was not a material or unusual risk that the defendant should have disclosed to the plaintiff. The Court also decided that because the plaintiff would have had the procedure anyway, the plaintiff's failure to disclose the risk was not the cause of the damage.

Children

Children have a special status under the law. While they can be held responsible for damages they cause, the court recognizes that children may not have the experience and wisdom to foresee how something they do could cause injury. Therefore, the court places a different standard of care on children than it does on adults. Very young children, usually under the age of six, are rarely found liable for their actions because they are too young to understand the notion of danger or how one action can cause another. If a child over the age of six does something that injures someone, the courts will consider the child's age, intelligence, life experience, and what a child of similar age and intelligence would have done under similar circumstances.

However, if a child performs an "adult" activity, such as driving a motorboat, this child is expected to meet the same standard of care in that activity that an adult would have to meet. Suppose that 14-year-old Carmen drives the family powerboat, fails to pay attention, and crashes into someone's dock. A court will likely apply the same standard of care to Carmen that it would to her parents because she has the same obligation to drive carefully, regardless of her age.

Figure 14.3 Young children do not understand how dangerous guns can be. If this child injures a playmate, it is quite likely that she would not be liable for damages.

Parental Responsibility

Although parents are not automatically liable for damages caused by their children, they can be held liable for negligence if they fail to train their children or supervise their activities. If an unsupervised child starts playing with matches and sets the neighbour's garage on fire, a court would likely find the parents liable for damages because they failed to properly supervise their child. The main reason plaintiffs sue parents is that the children cannot pay damages if they are found liable. Parents generally have the ability to pay and often have **liability insurance** that covers the damages.

liability insurance: insurance that covers part or all of the damages awarded in a tort case

Ontario and Manitoba have enacted legislation that holds parents responsible for torts committed by their children. A child is defined as someone under the age of 18. Under the *Manitoba Parental Responsibility Act,* the plaintiff can recover damages up to $7500 from the parents of a child who commits a tort. If parents can demonstrate that they exercised reasonable supervision over the child or that the damage was not caused intentionally, they may not be held liable for the child's actions. (You will learn about intentional torts in Chapter 15.) Provinces that do not have parental responsibility legislation decide such cases under common law, on a case-by-case basis.

Fast Fact

Under s. 2(1) of Ontario's *Parental Responsibility Act, 2000,* a person who has property destroyed or damaged may bring an action against the parent of the child in Small Claims Court up to the maximum allowed by that court.

If children are injured because of their parents' negligence, they can sue their parents. For example, if a father fails to put a seat belt on his daughter and she is injured in a car accident, the child may sue her father for negligence. As explained in Chapter 13, the child must be represented in court by an adult. Parents usually have liability insurance that would cover some or all of the medical expenses that would have to be paid due to the child's injuries. In cases involving motor vehicle accidents, usually the insurance company, not the parent, pays the damages.

CASE

Dobson v. *Dobson,* [1999] 2 S.C.R.

BACKGROUND On March 4, 1993, Cynthia Dobson, who was 27 weeks pregnant, was on her way to Moncton in a snowstorm when she lost control of her car and hit an oncoming vehicle. In the accident her fetus was injured, and later that day the baby was delivered prematurely by caesarian section. As a result of the premature birth, the child, Ryan Dobson, suffers permanent mental and physical impairment, including cerebral palsy. Acting on the child's behalf, Ryan's grandfather sued Ryan's mother for negligence.

LEGAL QUESTION Does a woman owe a duty of care to her fetus?

DECISION A New Brunswick court found that at the time of the injuries, the infant did not exist as a "person" in law. Therefore, Ryan Dobson could not sue his mother for damages. Ryan Dobson (through his grandfather) appealed the decision. The New Brunswick Court of Appeal held that Cynthia Dobson had a duty of care to the fetus and that Ryan's injuries were the result of her negligent driving while she was pregnant.

This decision was appealed to the Supreme Court of Canada. The Court held that a fetus cannot sue its mother for injuries that result from her negligence, stating that "the imposition of a legal duty of care upon a pregnant woman towards her fetus … constitutes a severe intrusion into the lives of pregnant women." Cynthia Dobson was found not liable for Ryan's injuries.

LEGAL SIGNIFICANCE This case raised important issues about the relationship between a pregnant woman and her fetus. The Supreme Court recognized that although a pregnant woman usually does everything possible to protect the health of the fetus, she is an individual whose rights need to be protected.

Six-year-old Ryan Dobson

ANALYSIS

1. What is the legal term for Ryan's grandfather in his role as the child's representative in court?
2. Keeping in mind the three stages of a tort action, why is a person not able to sue his or her mother for injuries caused before birth?
3. If a duty had been owed to Ryan before his birth, what standard of care would his mother have had to meet? Did she, in fact, have two standards to meet? Explain.

Consider This

If you knew that you could be sued for negligence, would you stop to help at the scene of an accident? Explain.

Rescuers

In most cases, you do not have a duty of care to help others in need. However, because society believes that people should be encouraged to be Good Samaritans—people who help others in need of assistance—the courts are more lenient in cases where someone steps in to help another person but actually causes that person harm. The standard of care required of a rescuer, particularly in an emergency, is quite low.

Figure 14.4 Quebec has a *Good Samaritan Act* that imposes a duty to assist others by making it illegal to fail to assist someone in need of help. Does your province have a *Good Samaritan Act*? If not, do you think it should? Explain.

To further protect rescuers, the courts have held that the person who was negligent owes a duty of care to both the injured person and the rescuer. The court takes the view that you should have foreseen not only that your actions could cause injury, but that someone else might try to save the injured party and be harmed as well. Suppose Igor pretends to push his friend Josh into a deep lake and accidentally knocks three-year-old Ricky into the water instead. Ricky's mother jumps in to save her son, but she can't swim. In the panic, both Ricky and his mother drown. The court would likely find that Igor owed a duty of care to Ricky because he should have foreseen how his actions could have caused injury. He also owed Ricky's mother a duty of care because he should have foreseen that she would try to rescue her son.

Stage Three: Causation

The third factor a plaintiff must prove in a case of negligence is that the actions of the defendant actually caused the plaintiff's injuries. In this third stage, there are two aspects to prove: cause-in-fact and remoteness of damage.

Cause-in-Fact

Cause-in-fact is usually determined by the "but for" test. If an injury would not have happened "but for" the defendant's actions, then those actions were a cause-in-fact of the injury. Suppose a teacher took a group of students on a canoe trip and failed to supply life jackets. In a storm the canoe capsized, tossing a student into the lake. If the student drowned, a court would likely say that she would not have drowned "but for" the teacher's failure to provide a life jacket. Therefore, this negligence was the cause-in-fact of the injury.

cause-in-fact: the factual "cause and effect" connection between one person's actions and another person's injuries

Suppose the student fell in the water because another person accidently pushed her, and she only drowned after a careless boat driver hit her, knocking her unconscious. "But for" not having a life jacket, she would not have drowned. However, "but for" being pushed in, she would not have drowned. She might have been saved "but for" the boat driver who hit her, causing her to

lose consciousness. What was the cause-in-fact of the student drowning? Who should be liable for the drowning—the teacher, the person who pushed the student into the water, or the boat driver? Should they all be liable?

To deal with the difficult issue of who should be liable in such cases, all provinces have statutes that allow the court to hold each of the negligent parties liable to a certain degree. The concept of dividing up the fault among a number of wrongdoers is known as **apportionment.**

apportionment: the division of fault among different wrongdoers

Remoteness of Damage

Even if the plaintiff can prove that the defendant's actions were a cause-in-fact of the injury, the plaintiff also has to show a *direct connection* between the wrong and the injury. In some cases, the court may decide that the defendant's actions were too far removed from the plaintiff's loss for the defendant to be held liable. If the defendant could not have *foreseen* that his or her actions could cause the type of injury that resulted, then the defendant would not be held liable. This principle is referred to as **remoteness of damage.**

remoteness of damage: harm that could not have been foreseen by the defendant due to the lack of a close connection between the wrong and the injury

Imagine that Meena is speeding on a country road. She swerves to avoid hitting a dog, goes off the road, and hits a barbed wire fence. Staples holding the wire to the fence posts pop off the posts. Later, cows grazing in the field accidentally eat the staples; as a result, some cows get sick and die. The owner of the cows sues Meena for the loss. Is Meena liable? The court would probably find that Meena's speeding was a cause-in-fact of the damage. But for her speeding, there would have been no accident, no loose staples for the cows to eat, and the cows would not have died. But was the loss of the cows a foreseeable result of Meena's speeding? Should Meena be liable for the loss of the cows, or was such a loss too *remote*? Should she be liable for the damage to the fence? Should the dog owner be liable for the loss of the cows because he let his dog run loose, and the dog caused Meena to go off the road?

The actions of the defendant can also be seen as too remote from the plaintiff's injuries if, in the chain of events leading up to the injury, some unforeseeable event occurs that becomes the legal cause of the injury. This new act is known as an **intervening act.** In the earlier example of the student who drowned on the canoe trip, the question was raised: Would the teacher be liable if a negligent boat driver hit the student, and the student drowned as a result? The teacher's failure to provide life jackets was certainly a cause-in-fact of the drowning, but was the act of the boat driver an intervening act? Should the teacher have foreseen that such a thing could happen? It could be argued that the act of the boat driver was an intervening act, and only the boat driver should be liable for the drowning.

intervening act: an unforeseeable event that interrupts the chain of events started by the defendant

In certain cases, a defendant may be liable for an injury that under normal circumstances would be too remote from the defendant's actions. This principle is called the **thin-skull rule.** Under this rule, a defendant can be found liable for *all* damages a plaintiff suffers, even if the plaintiff had a pre-existing condition that makes the injury worse than it would have been without this condition. Suppose Aldo leaves his bike on the sidewalk, and Kathryn trips over

thin-skull rule: the principle that a defendant is liable for all damages caused by negligence despite any pre-existing condition that makes the plaintiff more prone to injury

it. Instead of bruising her arm, Kathryn breaks several bones because she suffers from osteoporosis. In law, Aldo must "take his victim as he finds her," which means that he will be responsible for all the injuries suffered by the plaintiff through his neglect.

The thin-skull rule can be harsh on the defendant. In *Smith* v. *Leech Brain & Co. Ltd.,* [1962], an employee at work suffered a burn on his lip. The wound became malignant and the employee died of cancer. His family sued the employer for negligence. Because the plaintiff was predisposed to cancer, the burn had a more serious effect than it would have had on someone who did not have this predisposition. The court applied the thin-skull rule and found the employer liable.

Building Your Understanding

1. What is an unintentional tort?
2. Describe the three factors that must be proven in an action for negligence.
3. In law, who is considered your neighbour? How was this principle established?
4. Define the principle of foreseeability, and explain why it is so important in determining duty of care.
5. Distinguish between duty of care and standard of care, and provide an example of each.
6. How does the law define a "reasonable person"?
7. What must a plaintiff prove to be successful in a suit for medical negligence?
8. Explain the principles of cause-in-fact and remoteness of damage, providing your own examples of each.
9. In tort law, what is an intervening act?
10. Identify the name of the process used to divide fault among several negligent parties.
11. Define the thin-skull rule. Does this rule increase or decrease the standard of care? Explain.

SPECIAL TYPES OF LIABILITY

Under the law of negligence, there are several special types of liability. For instance, each of the following groups are subject to slightly different rules: manufacturers, property owners (or those who occupy property), people who serve alcohol, car and pet owners, and those who work with materials that could pollute the environment. These groups may have a higher standard of care or be subject to a wider duty of care than the average person.

Product Liability

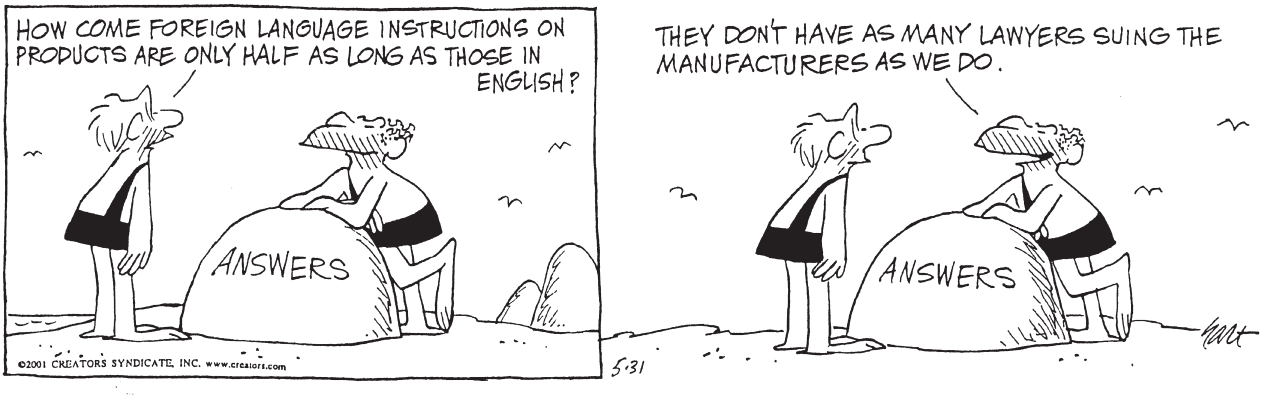
Since the 1932 decision in *Donoghue* v. *Stevenson,* manufacturers have had to meet a high standard of care in order to prevent injury to consumers who use their products. To meet that standard, manufacturers have to make sure that

- the design of the product is free from harmful defects;
- the product is properly manufactured;
- the consumer is informed about how to use the product safely; and
- the consumer is warned of risks associated with using the product.

Consider This

An Ontario court ordered Bacardi to pay $80 000 in damages to a woman who was seriously injured when the bottle of Bacardi liquor she dropped on a cement floor exploded and a piece of glass flew into her eye. Why do you think the judge found the company liable for damages?

B.C. by Johnny Hart



Consumers can sue manufacturers who fail to meet this standard. The area of law that deals with negligence on the part of manufacturers is called **product liability.** Consider the case of *Lambert* v. *Lastoplex,* [1972] S.C.R. 569, which illustrates how high the standard of care owed by a manufacturer can be. Lambert used a highly flammable sealer on his floor while working close to a pilot light. The open flame caused the sealer to explode and Lambert was burned. The product was not defective, and the label contained a warning not to use the product close to an open flame. Even so, the Supreme Court of Canada found the company liable because the warning did not direct the user to extinguish all flames when using the product.

product liability: the area of law that deals with negligence on the part of manufacturers

Occupiers' Liability

People who own or occupy property have a duty to maintain their property so that no one entering the premises is injured. This legal responsibility is called **occupiers' liability.** Renters are considered occupiers and they, too, owe a duty of care to people entering their premises.

occupiers' liability: the responsibility of owners or renters to ensure that no one entering their premises is injured

The courts make a distinction between the purpose of someone's presence on your property and the standard of care you owe that person. There are three kinds of visitors you can have on your property. An **invitee** is a person who has been invited onto the premises for a business purpose. For example, the person who delivers new furniture is an invitee; under common law, you owe this person the highest standard of care. A **licensee** is someone, such as a friend, who may or may not have been invited to your home for a particular occasion but has your express or implied permission to visit socially. A **trespasser** is someone who has no legal right or permission to be on your property. Burglars, stalkers, and vandals are examples of trespassers.

invitee: a person invited onto a property for a business purpose

licensee: a person with express or implied permission to pay a social visit

trespasser: a person who enters another's property without permission or legal right

The courts often have difficulty distinguishing among these categories, especially invitees and licensees. Consequently, many provinces, including Prince Edward Island, Nova Scotia, Ontario, Manitoba, Alberta, and British Columbia, have simplified the law by enacting occupiers' liability legislation. Under such legislation, the standard of care owed an invitee and a licensee is

Figure 14.5 **Swimming pools are popular allurements. Do you think that marking the shallow end of a pool is a form of protection or enticement? Why? What precautions could be taken at a pool to protect children from harm?**

the same: the occupier has a duty to see that such visitors are reasonably safe and are warned of danger or possible dangers that could cause injury. A lower standard of care is owed to trespassers; however, occupiers cannot purposely injure someone who trespasses onto their property.

Law in Your Life
List the people who have come to your home during the last week and classify them using these legal terms: invitee, licensee, and trespasser.

Children Who Trespass

The law treats children who trespass differently from adults who trespass. The courts acknowledge that children are easily attracted to sites such as swimming pools or playgrounds. Any item or site that might entice a child is known as an **allurement.** Occupiers must take all reasonable precautions to protect children who could be lured to their premises. Owners of swimming pools, for example, must surround their pools with high fences.

allurement: a site or an object that might attract children and cause them harm

Hosts

People who serve alcohol to their guests are legally known as **hosts.** They may be commercial hosts, such as owners of bars or restaurants, or social hosts, who serve alcohol to guests in their home. Commercial hosts have a statutory duty of care to their patrons and to anyone who may be injured by their patrons' negligent driving. For example, if a bar owner serves alcohol to a patron whose negligence causes an accident while driving home, the bar owner may be liable for the injuries suffered by the patron as well as those suffered by other victims of the accident.

host: someone who serves alcohol to guests or paying customers

In Canada, the law with respect to social hosts is still developing. As of 2001, no social hosts had been found liable for the negligence of their intoxicated guests. However, the following case illustrates that it may just be a matter of time before liability is imposed on social hosts in Canada.

CASE *Prevost v. Vetter et al.,* [2001] B.C.S.C. 312

1. Why did the Vetters believe that the case should be dismissed?
2. Why did the British Columbia Supreme Court rule that the Vetters owed a duty to Adam Prevost?
3. If the case goes to trial, what standard of care might be imposed on the Vetters?

Eighteen-year-old Desiree Vetter arrived with several friends at the home of her aunt and uncle, Gregory and Shari Vetter. On past occasions, the Vetters had supervised gatherings, discouraged the use of alcohol by minors, and looked after anyone who appeared to be intoxicated. On the night in question, the Vetters went to sleep before Desiree arrived. The Vetter's 17-year-old son, Scott, was present with some friends.

Desiree and her friends brought their own alcohol, which they consumed on the Vetter's property. After a complaint about noise that led to a visit from the police, Scott woke his mother and told her the police wanted everybody to leave. His mother asked if he needed help. He said he could handle it, and his mother went back to sleep.

Adam Prevost and six other teenage passengers left with Desiree in her car. Desiree was intoxicated and, while driving, lost control of the car. Adam suffered severe injuries and sued Desiree and the Vetters.

The Vetters applied to have the claim against them dismissed without a trial on the basis that it did not raise a cause of action known to Canadian law. They argued that as social hosts, they did not owe the plaintiff a duty of care to prevent him from coming to harm, even though he was in the hands of an intoxicated person who had been on their property.

The British Columbia Supreme Court refused to dismiss the case without a trial. It found that minors often brought alcohol to the Vetters' property and consumed it there. The court found that the Vetters' past actions had "established a 'paternalistic relationship' with intoxicated teenagers," and they had "created a dangerous situation by permitting minors to drink at their home and drive from it." Further, "the Vetters recognized they had a duty to prevent minors from the potential danger of driving under the influence of alcohol and to protect those who might drive with them." Consequently, the Vetters owed a duty of care to Adam Prevost. According to the Court, they had a duty to exercise control, and it was foreseeable that harm could result from their failure to do so. Because Shari Vetter did not exercise any control after she was woken by her son and knew there was a party in progress, she breached that duty.

As of December 2001, the trial ordered by the British Columbia Supreme Court was still pending. The circumstances surrounding this case indicate that the law may be moving toward imposing liability on social hosts in Canada.

Vicarious Liability

vicarious liability: legal responsibility for the negligence of another person

There are times when the courts will find one person liable for damages in tort law even though that person did not cause the plaintiff's injury. This kind of liability is known as **vicarious liability.** It usually applies in the workplace where employers can be held responsible for the actions of their employees. For example, if a mechanic fails to properly repair the brakes on a car, and the

F.S.M. v. Clarke, [1999] B.C.J. No. 1973

CASE

When he was eight years old, F.S.M. was sent to St. George's Indian Residential School in British Columbia. The federal government funded the school, while members of the Anglican Church instructed the students in various subjects. Residence at the school was mandatory for children from Aboriginal communities. Prior to F.S.M.'s entry to the school, his mother signed a form that gave the government guardianship of F.S.M. until his return.

Between 1970 and 1973, a dormitory supervisor, Derek Clarke, sexually assaulted several students repeatedly, including F.S.M. In 1973, word of Clarke's activities reached the principal of the school. F.S.M. was summoned to the principal's office and asked about Clarke's behaviour. F.S.M. hinted at sexual assaults, but was too frightened to give details. The principal subsequently informed Clarke that he could either resign or "the police would call." The government (Department of Indian Affairs) was informed of Clarke's resignation, but it was not informed about Clarke's sexual misconduct.

Eventually, Clarke was charged with sexual assault; he pleaded guilty and was imprisoned. In 1998, F.S.M. sued the Anglican Church and the Canadian government for negligence. The British Columbia Supreme Court held that both the Canadian government and the Anglican Church were Clarke's employers, and both were vicariously liable for his actions. The Court ruled that the government and the Church owed F.S.M. a duty of care because they assumed a parental role in caring for F.S.M. while he was in their charge. The Court found both the government and the Church in breach of this duty of care because they put Clarke in a position where he could commit sexual assaults; then they failed to adequately supervise him to ensure that these assaults did not occur.

1. Why did the government and the Church owe F.S.M. a duty of care?
2. What standard of care did the defendants have to meet? What could they have done to meet that standard?

car is subsequently involved in an accident because of its faulty brakes, the mechanic is responsible for damages. The mechanic's employer could also be held liable because the employer has a responsibility to third parties for the negligence of employees acting within the normal course of their duties.

Automobile Negligence

Many tort actions result from car accidents, and many branches of law may be involved in a single accident. For instance, the driver responsible may be charged with a criminal act, fined for an infraction of provincial motor-vehicle legislation, and then sued in civil court.

Every province and territory has legislation that sets out numerous regulations for owners of motor vehicles. This legislation imposes vicarious liability in that the owner is liable for damages that result from the negligent behaviour of anyone who drives the owner's car. As you learned in Chapter 13, vehicle owners are required to carry substantial liability insurance; a defendant may still have to pay for any damages that exceed this insurance coverage.

Driving without insurance is a provincial offence that carries hefty penalties. In Ontario, a first offence could bring a fine of up to $25 000. In addition, uninsured owners or drivers could be liable for large damage awards.

Strict Liability

strict liability: the defendant is automatically liable for an injury caused by a dangerous substance or activity even if the defendant was not negligent

Certain activities or situations are so dangerous that in the case of injury, the plaintiff does not have to prove the defendant was negligent; the defendant is automatically liable. This principle is called **strict liability.** In common law, strict liability pertained to fires or vicious animals that might cause harm. It also applied in cases involving leaking toxic waste or the escape of dangerous fumes. Today, strict liability can be built into specific legislation. Environmental protection acts, for example, often impose strict liability on the part of persons or municipalities whose actions result in pollution or damage to the natural environment.

Several provinces have introduced legislation that attempts to impose strict liability on dog owners. In some cases, owners may be liable even if their dogs have never bitten anyone before. In fact, the plaintiff may not have to prove that the defendant owed him or her a duty of care. On the other hand, under some statutes, being strictly liable for a dog's behaviour does not mean that the owner will be found 100 percent liable. Dog owners may be able to argue certain defences; for example, the plaintiff could have been teasing the dog, or the dog may have been protecting the owner's property. Having a credible defence could lessen the owner's liability.

Figure 14.6 Do you think the principle of strict liability should apply to companies that destroy buildings with dynamite? If so, why? Who could be endangered by this activity?

Building Your Understanding

1. Use an example to explain the concept of product liability.
2. Why have many provinces introduced occupiers' liability legislation? Under such legislation, what standard of care do occupiers owe trespassers?
3. Why are children who trespass treated differently by law from adult trespassers?
4. When might an employer or a car owner become vicariously liable for damages in the event of an accident?
5. What is strict liability? Provide two examples of situations in which strict liability would apply.

DEFENCES TO NEGLIGENCE

In most cases, if you are being sued for negligence, the plaintiff must prove that you owed a duty, breached the standard of care, and caused the injuries. In your defence, you can provide evidence to show you did not owe a duty, you met the standard of care, or your acts did not cause the damage. In addition, you may be able to prove that the plaintiff contributed to the cause of injury, knowingly accepted the risk of harm, or waited too long to sue you.

Contributory Negligence

The defence known as **contributory negligence** states that the plaintiff contributed to the injury by displaying unreasonable conduct. Contributory negligence is a partial defence, which means that the defendant will still bear a portion of the blame. Suppose while skiing, you stop to rest just under a rise on the hill. Another skier sees you at the last minute and is unable to stop. The skier crashes into you, breaking your leg and ruining your skis. You sue the skier for damages. The court may apportion the liability between you and the defendant because it determined that by stopping where it was difficult for other skiers to see you, you failed to act safely. Therefore, your actions contributed to the accident. The court could decide that you were 25 percent responsible for the accident and the defendant was 75 percent responsible for skiing too fast in an area with limited visibility.

contributory negligence: negligent acts by the plaintiff that helped cause the plaintiff's injuries

Law in Your Life

Suppose you are not wearing a seat belt when you are injured in an automobile accident caused by the negligence of the other driver. If you sustain injuries that you would not have suffered if you had been wearing a seat belt, the court may find you partly liable for your injuries and lower the amount of damages you can recover.

Voluntary Assumption of Risk

Another defence to negligence, called **voluntary assumption of risk (or *volenti*),** claims that the plaintiff knowingly and willingly assumed the potential risks normally associated with a particular activity. Activities such as bungee jumping or paragliding, or contact sports such as football or boxing carry a certain level of risk. For example, as willing participants, hockey players cannot sue other players for causing harm because they have already accepted the risk that during the game they may be injured. Voluntary assumption of risk is a complete defence, which means that even though the defendant may have been negligent, the plaintiff will not be awarded anything if the defence is successful.

voluntary assumption of risk (or *volenti*): the defence that no liability exists because the plaintiff agreed to accept the risk normally associated with the activity

Figure 14.7 **Rides like the "Giant Swing" are common in amusement parks. If someone falls, who will be liable? What will the plaintiff have to prove? What defence could the defendant use?**

waiver: a document signed by the plaintiff, releasing the defendant from liability in the event of an injury

A person can also assume risk if he or she signs a waiver before the activity begins. A **waiver** is a contract that exempts or frees the defendant from liability in the case of injury. Having someone sign a waiver, however, does not automatically release a defendant from liability, as you will learn in the case of *Crocker* v. *Sundance Northwest Resorts Ltd.* at the end of the chapter.

CASE

Laws v. *Wright*, [2000] A.B.Q.B. 49

1. What claims did Laws use in trying to prove negligence?
2. Why did the judge dismiss the case?
3. How would you decide this case? Why?

Jane Laws boarded her horse, Snort, at Trakehner Glen Stables. Snort was put in a stable beside Salish, a very nervous and temperamental horse owned by Linda Howard. Linda told Jane not to feed Salish because the horse had once bitten her and was too unpredictable. Jane ignored this advice and fed Salish carrots. On February 24, 1998, Salish bit Jane, causing the loss of the tip of Jane's right thumb. Jane sued the stables for negligence in failing to protect the users of the barn from Salish and for failing to warn her of the potential and real danger Salish posed.

The defendants claimed that the plaintiff had been warned not to feed Salish and to stay away from the horse because sometimes it behaved aggressively. They also pointed out that the stables had large warning signs: "Caution … Be advised that all equine activities involve inherent risks—proceed at your own risk."

The judge dismissed the case on a number of grounds, one of which was the defence of *volenti*. He found that Jane Laws was very experienced when it came to dealing with horses. She was aware that horses sometimes behaved unpredictably, and she had been warned not to feed this particular horse. By continuing to do so, the plaintiff had "knowingly assumed the risk" of injury.

Other Defences

There are three other defences in negligence actions that are closely related: inevitable accident, act of God, and explanation. Because the circumstances that support these defences rarely occur, the courts are often suspicious of such claims.

An **inevitable accident** is caused by something the plaintiff had no control over and could not have prevented by any amount of reasonable care. Suppose Jessica is driving along a country road when a bee flies through the open window and stings her. She loses control and hits an oncoming car. If Jessica is sued for negligence, she could argue that the accident was the inevitable result of being stung by the bee. An **act of God** is similar to an inevitable accident, but the event that caused the accident must be a natural event that is both extraordinary and unexpected, such as violent windstorms or torrential rains.

inevitable accident: a defence that claims an accident was unavoidable due to an uncontrollable event

act of God: a defence that claims an accident was caused by an extraordinary, unexpected natural event

If the accident was not caused by an uncontrollable event, Jessica may still have a defence if the accident happened even though she took every precaution. In other words, there might be a valid **explanation** for the accident other than an event or any carelessness on her part. Suppose Jessica is driving slowly on a snow-covered road because she knows there may be ice under the snow. She sees a stop sign ahead and gently starts to brake well in advance. Nevertheless, she hits some black ice under the snow and goes off the road, damaging someone's fence. She might be able to explain that the accident occurred even though she took as much care as she possibly could.

explanation: a defence that claims the accident occurred for a valid reason even though the defendant took every precaution

Statute of Limitations

People are expected to sue for damages within a reasonable time. After all, memories fade and witnesses may move or die. Every province has a law, known as a **statute of limitations,** specifying the period in which a person must sue for damages. Expiry of that time period is another defence in tort law. The plaintiff's failure to bring an action to court in time may mean the case is dismissed and the plaintiff receives no compensation, even if the plaintiff suffered serious injuries or would likely have won the case.

statute of limitations: a law that specifies the time within which legal action must be taken

Some legislation includes the limitation period within the act itself as in the following example from the *Highway Traffic Act* of Ontario:

> 206(1) No proceeding shall be brought against a person for the recovery of damages occasioned by a motor vehicle after the expiration of two years from the time when damages were sustained.

This section means that anyone who intends to sue the operator or owner of a motor vehicle for damages must commence a court action within two years of the accident.

Limitation periods differ depending on the law of the province and on the type of defendant. To sue certain defendants such as doctors, dentists, or municipal corporations, the law requires a court action to be commenced within a fairly short period of time or the plaintiff loses the opportunity to sue.

CASE *Smith v. McGillivary,* [2001] N.S.S.C. 17

1. Why did the Court dismiss Smith's case?
2. If the case had gone to court, what defences would you have used?

In August 1989, Richard Smith went to his dentist, Dr. Ron McGillivary, who removed two gold inlays (a type of crown). Later, Smith developed severe tooth decay in the same two teeth. Eventually, he had to have the two teeth extracted. In July 1998, Smith served notice that he was suing his dentist for negligence. The Supreme Court of Nova Scotia found that under the *Limitations of Actions Act,* a plaintiff had two years to begin legal action. Because Smith had not commenced his action within the two-year period, the Court dismissed the case.

Building Your Understanding

1. What is meant by contributory negligence? Use an example to illustrate your answer.
2. Identify three defences, other than contributory negligence, that a defendant may use in a tort action.
3. Kurt Jones was seriously injured in a professional hockey game when Tom Harris gave Jones a particularly hard check. Do you think Jones would be successful if he sued Harris for damages? Why or why not?
4. In which of the following situations do you think the defence of voluntary assumption of risk would apply? Explain your choice.
   a) A passenger who refused to wear a seat belt is injured in an accident.
   b) Dmitri accepts a ride even thought he knows that the driver is intoxicated. He is injured in a car accident.
   c) Kirsten, who has peanut allergies, falls ill after eating a candy bar. No warning about peanuts appeared on the wrapper.
   d) Nurul has never watched or played football. He is just beginning to learn English and did not understand the rules of the game. The first time he is on the field he is seriously injured.
5. Distinguish between an inevitable accident and an act of God, and provide an example of each.

LOOKING BACK

Reviewing Your Vocabulary

act of God *(p. 349)*
allurement *(p. 343)*
apportionment *(p. 340)*
cause-in-fact *(p. 339)*
contributory negligence *(p. 347)*
duty of care *(p. 333)*
explanation *(p. 349)*
foreseeability *(p. 334)*
hosts *(p. 343)*
inevitable accident *(p. 349)*
intervening act *(p. 340)*
invitee *(p. 342)*
liability insurance *(p. 337)*
licensee *(p. 342)*
neighbour principle *(p. 333)*
negligence *(p. 332)*
occupiers' liability *(p. 342)*
product liability *(p. 342)*
reasonable person *(p. 335)*
remoteness of damage *(p. 340)*
specialized standard of care *(p. 335)*
standard of care *(p. 335)*
statute of limitations *(p. 349)*
strict liability *(p. 346)*
thin-skull rule *(p. 340)*
tort *(p. 332)*
trespasser *(p. 342)*
unintentional torts *(p. 332)*
vicarious liability *(p. 344)*
voluntary assumption of risk (or *volenti*) *(p. 347)*
waiver *(p. 348)*

Quick Quiz

1. Match the vocabulary terms above with these clues:

a) the plaintiff participated in the activity knowing it was dangerous
b) the actions of the plaintiff helped cause his or her injuries
c) a playground, park, or swimming pool that may attract children
d) waiting too long to sue your doctor may prevent you from suing at all
e) although one person caused the injuries, someone else is liable for the damages
f) the manufacturer is liable if its product harms anyone
g) the responsibility to avoid injuring someone
h) the injury suffered by the plaintiff was the result of the defendant's actions
i) the principle that you must take your victim as you find him or her
j) the ability of a reasonable person to anticipate the consequences of an action
k) a civil wrong
l) harming another person through carelessness

Checking Your Knowledge

2. Why are some individuals held to a higher standard of care than others?

3. What standard of care is generally required of rescuers? Why?

4. Describe the two aspects of causation that must be proven to show that the defendant's actions caused the plaintiff's injuries. Provide an example to illustrate each aspect.

5. What steps do manufacturers have to take to ensure their products are safe for consumers?

6. Give an example of an invitee, a licensee, and a trespasser.

7. Create two imaginary cases that involve unintentional torts. For one case, use the defence of negligence that a duty was not owed, the defendant met the standard of care, **or** the defendant's action was not the cause of the injury. For the other case, use the defence of inevitable accident, act of God, **or** explanation to argue the case.

Developing Your Thinking and Inquiry Skills

8. List three situations in your home or school that could lead to a tort liability. Identify the tort by name and describe how the risk of injury could be avoided.

9. Alex wanted to try bungee jumping, so he went to a company that operated bungee-jumping equipment at the local exhibition centre. Alex was warned that the activity was dangerous, so he signed a waiver acknowledging the risk. However, unknown to Alex, the operator that day was a new employee who did not know that the jump had to be adjusted for someone of Alex's weight. The bungee cord ripped apart. Alex fell and suffered severe injuries.

a) You are Alex's lawyer. List the important facts of this case. What are the grounds for Alex's case against the defendant?
b) What defence would the company likely use in this case?

10. At lunchtime Rafay was lifting weights in the school weight room. Rafay asked the teacher on duty to "spot" him while he tried to increase his normal lifting level. The teacher came over and was standing near Rafay when the fire alarm went off. The teacher immediately moved away to get the rest of the students out of the building. The noise startled Rafay, and he dropped the weight on his chest causing serious injuries. Rafay sued the teacher and the school board.

a) What kind of tort would this be?
b) Apply the three tests of negligence to this case and explain whether you believe Rafay would be successful in his lawsuit.

Communicating Your Ideas

11. Work in groups of three and, using examples and information from this chapter, create a storyboard for a television program involving a case of negligence. The storyboard should include an incident, people involved in the incident, and damages or injuries suffered. It should conclude with the judge's decision and reasons for the decision. Present your storyboard to the class.

12. Prepare and present a class debate on the following statement: Tobacco companies knowingly manufacture a dangerous product and sell it to an unsuspecting public. Therefore, these companies are negligent.

Putting It All Together

13. Watch a movie or TV program dealing with tort law. Your teacher will give you some suggestions based on real cases. Prepare an analysis of the case using the following outline:

- Background
- Legal question
- Decision
- Legal, social, historical, or political significance
- Analysis

Use the case of *Crocker* v. *Sundance Northwest Resorts* as a guide (see page 354).

14. Select a recent and controversial Supreme Court decision dealing with the tort of negligence. Divide into three groups with each group representing one of the following: the appellant, the respondent, and the justices of the court. The groups representing the appellant and the respondent will present written briefs and oral arguments to the court. The group representing the court will prepare questions after reviewing the written briefs. The court will then use the oral argument session to probe for weaknesses in each side's case. Justices may also ask the litigants questions from the bench. To find out more about cases from the Supreme Court of Canada, visit **www.pearsoned.ca/law**.

Cempel v. Harrison Hot Springs Hotel Ltd., [1998] 6 W.W.R. 233 (B.C.C.A.)

One night in May 1993, 16-year-old Cassandra Cempel and her friends went camping at Harrison Hot Springs, near Chilliwack, British Columbia. It was late when they arrived, but they decided to go to the hot pool. Instead, by mistake they went to the source pool, which contained scalding hot water. The pool was obviously closed, but Cassandra started to climb over a fence that surrounded the pool. As she was climbing the fence, part of it gave way and bent over. Cassandra fell into the water, which was 60°C. She was badly burned and spent 51 days in hospital. Cassandra sued Harrison Hot Springs Hotel Ltd. for damages.

The trial court found that the fencing around the source pool was inadequate, and the hotel was in breach of its duty to take care that persons on the premises were reasonably safe. It also found the plaintiff's actions "foolhardy and imprudent," and that she was "primarily the author of her own misfortune." The court apportioned fault 75 percent to the plaintiff and 25 percent to the hotel. The plaintiff appealed on the basis that she could not have anticipated the kind of damage she suffered and that the trial court had attributed too much fault to the plaintiff and too little to the defendant.

The British Columbia Court of Appeal agreed with the trial judge as to the law, but altered the apportionment of damages. In the opinion of the Court, apportionment should be assessed on the extent of departure from the respective standards of care. The court apportioned 60 percent to the defendant and 40 percent to the plaintiff.

1. Was Cempel an invitee or a trespasser? Should this determination have any bearing on the duty of care owed and the damages awarded? Explain.
2. Do you agree that both plaintiff and defendant should share liability? Support your view.
3. Explain the significance of the altered apportionment regarding the "the extent of departure from the respective standards of care."

Empire Co. v. Sheppard, [2001] N.F.C.A. 10

Joan Sheppard was shopping in a mall in Corner Brook, Newfoundland. At one point she stepped on the escalator, placing her left hand on the rail. As she turned to speak to her husband, her coat hooked onto the seam of the escalator wall. The snagging of her coat caused her head to jerk back suddenly. The woman behind her reacted quickly and managed to free Joan's coat, preventing a more serious injury. As a result of the accident, Joan suffered back and neck injuries. She sued the mall.

The trial judge found that because Joan was an invitee of the mall, the mall owner owed her a duty to use reasonable care to prevent injury. He further found that the mall owner failed to meet the standard of care required and was liable for Joan's injuries. The Newfoundland Court of Appeal reversed this decision. It found that because the owner of the mall had the elevators examined regularly by professionals, and because a security person had examined the escalator the day of the accident, the mall owner had used reasonable care in maintaining its escalator. It had met the standard of care required and was not liable for Joan's injuries.

1. What was the cause of Joan's injury?
2. Identify the appellant and the respondent in this appeal.
3. Do you think the Court of Appeal would have rendered the same decision if Joan had suffered a more serious injury? Explain.