

property, the possessor could sue in trespass charging that the odors, which consist of molecules of the odor-producing substance, constitute a physical entry. If there is any doubt that the court will consider the odor a physical entry, the plaintiff will also sue for a private nuisance, charging that the odors constitute an invasion of his rights to the use and enjoyment of the land.

Negligence

Negligence is perhaps the most important common law action in use today. Any act or omission that creates an unreasonable risk of harm to another constitutes negligence. In order to establish a cause of action for negligence, three elements must be demonstrated. First, the defendant must have a duty of care toward the plaintiff. A duty of care exists whenever it is foreseeable that there is a risk of harm to the plaintiff. Thus if a reasonable person could foresee that pesticide usage could result in harm to anyone, then the defendant has a duty to avoid the risk. Second, if a duty of care does exist, the defendant must breach his duty by acting unreasonably in light of the foreseeable risk. The test to determine whether the defendant's actions were a breach of duty is to ask what a reasonable, prudent person would have done under the same circumstances. This determination is made by a jury. In the above example, if a reasonable person would have acted to prevent the risk in the pesticide's use, then the defendant breached his duty by failing to do so.²⁶

In order to recover damages from the defendant, the plaintiff must have suffered some actual injury to person or property that was caused by the defendant's breach. Causation need not be direct. The breach may be the indirect cause of the injury as long as the chain of causation is not so attenuated that it is unforeseeable that the injury would result. This principal of liability for indirect but foreseeable injury is known as "proximate cause". These concepts of duty of care, breach of duty, causation, injury and damages will be developed further in examples used throughout the text.

Strict Liability

The common law doctrine of strict liability was briefly addressed above in the discussion of ultra-hazardous activities. Certain activities are considered so exceptional, non-natural or abnormally dangerous that the actors must be held strictly liable for any resulting injury, regardless of whether the actors were negligent or exercised due care.²⁷ Examples of activities that have incurred strict liability are keeping of wild animals, carrying or storing explosives or dangerous chemicals, and conducting certain types of mining or industrial activity that, because of the circumstances of location or methods, are abnormal.

An important limitation to the doctrine of strict liability is that the defendant is liable only for injury caused by those aspects of his activity that make the activity ultra-hazardous. Therefore, an operator of an abnormal activity will not be strictly liable for any and all harm resulting from his operation, but only those injuries caused by the inherent danger in the activity.

The common law of the various states varies with respect to which activities are considered abnormally dangerous and subject to strict liability. Generally, generators, storers, and transporters of hazardous waste are strictly liable for injury resulting from handling the waste. In some states, pesticide use is subject to strict liability.