

A Primer on Liability for Plumbing Professionals

Part 2: Tort Claims and Damages

By Steven Nudelman

Admit it: When you saw the title of this article, you thought I would be sharing my grandmother's classic pastry recipe, right? Okay, here it is: Add a few eggs, some flour, chopped hazelnuts, some bittersweet chocolate, and a tablespoon of sugar into the food processor, blend the mixture thoroughly, and pour it into a cake pan. Put the pan in a 375-degree oven for 35 to 40 minutes, and you have an outstanding chocolate hazelnut *torte*. Torts in the law are not quite the same (and definitely not as delicious).

In fact, there really is no precise definition of tort. The late Dean Prosser, one of the most widely recognized tort law scholars, wrote, "[A] really satisfactory definition of a tort is yet to be found ... Broadly speaking, a tort is a civil wrong, other than breach of contract, for which the court will provide a remedy in the form of an action for damages." This definition is helpful because it narrows the focus of this article, which will discuss civil (non-criminal) claims facing plumbing professionals that are not contractual in nature.

Torts fall into two general categories: negligent torts and intentional torts. I will review possible claims for negligence (or malpractice) and intentional claims such as fraud (including consumer fraud or deceptive practices statutes) and tortious interference. (I will not be discussing a third category of torts, strict products liability, in which a claimant is not required to prove fault but is required to prove that a product is defective. This claim is more likely to concern manufacturers than plumbing professionals.) Our discussion will conclude with a look at the damages (compensatory and punitive) that accompany tort claims. The purpose of this article, like Part 1 in the March/April 2005 issue, is to alert you to potential legal issues, not to provide legal advice. If the subject matter of this article sounds familiar to you, consult your attorney and talk about your specific (potential) tort liability in detail.

For this discussion, consider the same hypothetical example of Paul Plumber used in Part 1. As a subcontractor to HAH Housebuilders Unlimited, a general contractor, Paul was hired to supply and install six high-powered Flusher-oo 6500 china toilets (each with 1.6-gallon-per-flush capacity and polished brass levers) for the \$1.5 million custom-built home of Mary Moviestar. In its advertising literature, Flusher-oo touts the 6500 as one of the "best toilet fixtures money can buy," complete with a "no-plunger-ever-needed" guarantee and 15-year warranty. Two months after Paul installed the toilets, one of them exploded, causing minor physical injuries and mental anguish to an 85-year-old woman (Gertrude Guest). As a result of this incident, Gertrude files a lawsuit against Mary, who in turn brings a claim against HAH (a third-party claim), which in turn brings a claim against Paul (a fourth-party claim). We are, of course, concerned with defending Paul. In all likelihood, HAH will assert a claim against Paul for contribution, essentially saying that if HAH

is liable to Mary, then it is Paul's fault, and he (not HAH) should pay the damages for Gertrude's injuries. Through this claim for contribution, Paul faces a number of underlying tort claims.

Before we analyze these claims, it is important to remember the insurance discussion from Part 1. As soon as Paul receives notice of the claim, it is imperative that he notifies his broker and insurance carrier immediately. (I recommend sending notice by certified mail, return receipt requested, *and* regular U.S. mail. That is a total of four notice letters—two to the carrier and two to the broker—assuming only one broker and one insurance carrier are involved.)

Negligence/Malpractice

The most likely tort claim to be brought against Paul is negligence, or malpractice. The two essentially mean the same thing; however, the term *malpractice* frequently is used when a licensed professional is the allegedly negligent party (or, to use a more technical term for any person who commits a tort, a tortfeasor).

To prevail on a claim of negligence, a party must prove three things:

1. the existence of a legal duty of care;
2. a breach of that duty; and
3. that the breach proximately caused the party's damages.

In this case, Paul owes HAH a duty of care as a licensed plumbing subcontractor, so HAH should be able to satisfy the first element. To satisfy the second, HAH will need to demonstrate that Paul's actions in supplying and installing the exploding Flusher-oo somehow fell below the standard of care of licensed plumbing subcontractors in the professional community. (If Paul was a master plumber, then he would be held to an even higher standard of care: that of other master plumbers in the professional community.) Did Paul follow the manufacturer's installation instructions? Did he install the part in accordance with good standards and practices? As you can see by these questions, this element is not so easy to satisfy. Indeed, the fixture itself may be deficient, in which case Paul could bring his own claim against Flusher-oo (a fifth-party claim). For purposes of this example, assume that Paul did *not* install the toilet according to Flusher-oo's installation instructions, which would satisfy the second element. (In such a case, a plumbing engineer would be held liable only if he did not state in the specifications that the fixture should be installed in accordance with manufacturer's written instructions.)

Finally, HAH would have to demonstrate that Paul's breach of the duty of care actually resulted in the injuries or damages to Gertrude. This is known as *proximate causation* in tort law. For example, if it is found that Gertrude slipped in the bathroom and hit her head on the vanity, Paul is not liable for that injury merely because his toilet

fixture happened to explode at or about the same time. There is no proximate cause in this case. On the other hand, if Gertrude was hit with flying porcelain from the exploding toilet, or she slipped on the wet tiled floor as a result of the exploding toilet, then HAH is likely to satisfy proximate cause, and Paul will be liable for damages.

Paul does have some potential defenses to negligence claims, but these concepts (two of which are the affidavit of merit and economic loss doctrine) are complicated and will be discussed in Part 3 of this series, along with other ways for Paul to limit his damages. For now, let's consider other tort woes that could befall Paul.

The tort of negligent misrepresentation requires an incorrect statement, negligently made and justifiably relied upon, resulting in economic damages sustained as a consequence of that reliance. To examine Paul's potential liability, we need to examine any statements (oral or written) he made. For example, did Paul misrepresent the toilets' quality or flushing capacity or the number of flushes each toilet can perform before certain parts need to be replaced? Even if he did, were any or all of these misrepresentations the cause of the damages in this case? These are just some of the types of issues that need to be examined to determine whether a viable claim for negligent misrepresentation exists.

Common Law Fraud and Misrepresentation

In addition to negligence, Paul needs to be alert to possible intentional tort claims. Common law fraud and misrepresentation are two of the most common intentional business torts. These claims are unlike negligence because the plaintiff (or party asserting the claim) bears the burden of proving the defendant's intent. A cause of action for common law fraud has five elements:

1. a material misrepresentation of a presently existing or past fact;
2. knowledge or belief by the defendant of its falsity;
3. an intention that the other person rely on it;
4. reasonable reliance thereon by the other person; and
5. resulting damages.

Under the facts of our hypothetical, HAH will have a difficult time proving common law fraud. While it may be able to satisfy the first, third, fourth, and fifth elements, there is no evidence that Paul knew that he was making false statements or representations about the toilet fixtures when he made them to HAH. At best, Paul's misrepresentations (if any) were negligently made.

Consumer Fraud or Deceptive Practices Statutes

Most states have enacted unfair trade practices or consumer fraud statutes that are designed to afford consumers an additional remedy in certain, specific circumstances of fraudulent conduct. These statutes go by similar names: the Consumer Fraud Act in New Jersey, the Consumer Protection Act in Kansas, and the Consumer Fraud and Deceptive Business Practices Act in Illinois, to name a few. These statutes promote consumer protection and, in certain cases, allow the aggrieved consumer to recover treble damages (three times the actual damages) and attorneys' fees. These additional damages and the potential to recover attorneys' fees make consumer protection statute claims attractive to plaintiffs.

As an example, New Jersey's Consumer Fraud Act prohibits, in pertinent part:

"The act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of such person as aforesaid, whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice." N.J.S.A. 56:8-2.

New Jersey's statute draws a distinction between an affirmative misrepresentation and an omission. As the New Jersey Supreme Court explained in the seminal case *Gennari v. Weichert Co. Realtors*, a party who makes an affirmative misrepresentation is liable "even in the absence of knowledge of

the falsity of the misrepresentation, negligence, or the intent to deceive." However, for a defendant to be liable for an omission or failure to disclose, the plaintiff must show that the defendant acted with knowledge. Other states also require proof of an intent to deceive or knowledge that a statement was false.

While consumer protection statutes are complex and very state-specific, claims under them are increasingly common by consumers such as Mary. Unlike many other claims, a consumer fraud statute claim is a direct claim brought by a consumer. (The statutory definition of *consumer* needs to be consulted to determine whether a party has standing to assert such a claim.) In this case, a court is likely to look at any representations made to Mary either orally or in writing (possibly through brochures) regarding the Flusher-oo 6500. Such representations may include the toilet's stated flushing capacity and the advertising literature's claim that the 6500 is one of the "best toilet fixtures money can buy," complete with a "no-plunger-ever-needed" guarantee. Whether any or all of these representations are actionable under a state consumer fraud statute depends on the particular facts and circumstances (and the requirements of the particular state statute). Consumer fraud statutes have rigorous proof requirements because the stakes are high, including in certain cases treble damages and attorneys' fees. I mention such statutes in this article to raise your awareness of them and the ramifications of claims brought under them.

Tortious Interference

Tortious interference is a well-defined business tort that comes in two flavors: tortious interference with contract and tortious interference with a prospective economic relationship. Some states recognize one or the other; some such as New Jersey recognize both. To establish a cause of action for tortious interference, a plaintiff must demonstrate the following:

1. He had some reasonable expectation of economic advantage.
2. The defendant's actions were malicious in the sense that harm was inflicted.

3. The interference caused the loss of the prospective gain or there was a reasonable probability that the plaintiff would have obtained the anticipated economic benefit.
4. The injury caused the plaintiff damage.

The facts of our hypothetical do not lend themselves to this tort, so let's change them a little. Assume that Chuck Competitor learned that Paul was in negotiations with HAH to supply and install Mary's toilet fixtures and that Chuck sent HAH a letter warning the company to not do business with Paul because Paul's fixtures are "shoddy" and his workmanship is "poor." This scenario could lend itself to a claim for tortious interference with a prospective economic relationship if Paul could demonstrate the above four elements. This is by no means an easy task, since Paul would have to show, among other things, that HAH would have awarded him the contract if Chuck hadn't sent the letter. Moreover, in states that require the existence of a contract between HAH and Paul, Paul would need to demonstrate that Chuck somehow interfered with that contractual relationship and caused Paul to sustain damages (HAH terminated the contract upon receipt of Chuck's letter).

Damages

Damages are an important element of all the torts discussed in this article. It may sound obvious, but it bears repeating: If a party has not suffered damages, regardless of whatever other circumstances exist, then he or she does *not* have a claim for negligence, fraud, misrepresentation, and/or tortious interference.

Black's Law Dictionary defines damage broadly as "loss or injury to person or property." Damages can be broken into two categories: compensatory damages and punitive damages. As the name suggests, compensatory damages compensate an aggrieved party for his or her actual or real monetary loss. This type of damages is recoverable on contract-type claims (discussed in Part 1) as well as tort-based claims, although a party only is entitled to recover once, regardless of the number of claims he or she asserts. (The obvious exception to this is a consumer fraud statute

claim, for which—at least under New Jersey law—a party may be entitled to recover treble damages.)

An added allure to tort claim plaintiffs is the possibility of punitive damages. Punitive damages are awarded in addition to compensatory damages, and they are typically recoverable only when the defendant acted with recklessness, malice, or deceit. As the name implies, punitive damages are intended to punish a defendant for his wrongful conduct and to deter the defendant from acting a similar way in the future. They oftentimes (although not necessarily) are based on actual damages (some multiple of actual damages sustained). Punitive damages, while often sought, are less frequently recovered due to the high burden of proof required to be met by the plaintiff.

States such as New Jersey and Colorado have enacted statutes that describe the limited circumstances under which a party may recover punitive damages. Colorado's punitive damages statute allows the assessment of punitive damages "for a wrong done to the person or to personal or real property, and the injury complained of is attended by circumstances of fraud, malice, or willful and wanton conduct." In New Jersey, a party may recover punitive damages only if he proves "by clear and convincing evidence, that the harm suffered was the result of the defendant's acts or omissions, and such acts or omissions were actuated by actual malice or accompanied by a wanton and willful disregard of persons who foreseeably might be harmed by those acts or omissions." Both statutes set forth similar limitations that illustrate the difficult hurdles facing plaintiffs trying to recover punitive damages.

Under the facts of our hypothetical, Mary is not likely to recover punitive damages. The circumstances might be different if Paul were perpetually reckless, frequently ignoring manufacturers' installation instructions in the course of his work and installing exploding toilets at various projects. This kind of reckless conduct *might* expose Paul to a punitive damages claim, but this would depend on the applicable state law (and punitive damage requirements) governing Mary's claim.

As you can see from much of our discussion, there rarely is a clear-cut answer in the law. However, the purpose of this article (as well as the first article on contract claims and the next article on defenses, limitations on damages, and mechanic's liens) is not to provide you with answers. (Remember, attorneys give legal advice; magazine articles do not.) Rather, the purpose of this three-part series on liability for plumbing professionals is to provide you with a broad overview of claims issues you might face. This information will help you to understand the pertinent legal issues in your business and assist your lawyer in analyzing your case. ■

Suggested Reading

- W. Page Keeton *et al.*, *Prosser & Keeton on Torts* 1-2 (5th ed. 1984).
- N.J.S.A. 56:8-1 to -48 (New Jersey Consumer Fraud Act).
- Kan. Stat. Ann.* 50-623 *et seq.* (Kansas Consumer Protection Act).
- 815 *Ill. Comp. Stat.* 505/1 *et seq.* (Illinois Consumer Fraud and Deceptive Business Practices Act).
- Gennari v. Weichert Co. Realtors*, 148 N.J. 582 (1997).
- Black's Law Dictionary* 393 (7th ed. 1999).
- N.J.S.A. 2A:15-5.9 to -5.17 (New Jersey Punitive Damages Act).
- Colo. Rev. Stat.* § 13-21-102 (Colorado Punitive Damages statute).



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