

LEGAL LIABILITY BASICS---DAMAGES, TORTS, NEGLIGENCE, AND DEFENSES (66-1)

[A legal **right** is a legally protected interest. A legal **wrong** invades a right. In a lawsuit, the **plaintiff** brings suit against the **defendant** (accused wrongdoer). The law's primary function is to protect rights.]

EO 1. CRIMINAL LAW ADDRESSES WRONGS AGAINST THE PUBLIC OR THE STATE.

Criminal wrongs violate **statutory law** (written laws of legislative bodies) and are prosecuted by the state. **Punishments** include fines, imprisonment, and death. The prosecution must prove **beyond a reasonable doubt to a moral certainty** that the accused violated a statute. Crimes and their punishments are **not** insurable.

CIVIL LAW ADDRESSES WRONGS AGAINST INDIVIDUALS. Civil wrongs are prosecuted by the injured citizen. **Civil wrongs violate either**

1. **contract law** (governing voluntarily assumed obligations) **or**
2. **tort law** (governing **torts**, which are wrongful acts other than breaches of contracts that give rise to the right to sue the **tortfeasors** (wrongdoers)).

Civil law is based on **common law**, the body of unwritten principles based on court decisions upholding custom and tradition. The same act can be tried twice, as both a tort and a criminal wrong.

Torts and their punishments **are** insurable.

[**Case law**, court interpretations of statutes and common law principles, affects both civil and criminal law. Each court decision sets a **precedent** on which to base similar future cases. **The doctrine of stare decisis** (L. "stand by the decision") encourages courts to follow precedent, thereby providing stability to case law.]

EO 2. COURT DAMAGES AND THEIR INSURABILITY: **Damages** are monies assessed against the defendant to compensate the plaintiff's personal injury or property damage. Damages are **not** subject to income tax. Under **the doctrine of mitigation of damages**, the defendant is **not** liable for additional injury or damage following the harmful act **if** the plaintiff does not take reasonable actions to prevent the further harm. A plaintiff who prevents further damage may recover the costs of those preventive actions. In cases of contract dispute, the court can impose other remedies, such as **specific performance** (which requires the defendant to perform the contract) and **injunction** (which requires the defendant to do or not do something).

THE THREE TYPES OF DAMAGES (all insurable):

1. **Nominal damages**--compensate violated tort rights without financial loss. The usual assessment is \$1.
2. **Compensatory damages**--
 - a. **Special damages**--compensate for money-quantifiable, out-of-pocket losses such as medical bills, lost wages, and damaged property.
 - b. **General damages**--compensate for money-nonquantifiable losses such as pain and suffering and loss of **consortium** (spousal sex, society, and services).
3. **Punitive damages**--punish the defendant's gross negligence. Punitive damages reflect the defendant's financial strength and are designed to hurt but **not** to bankrupt. Some states do **not** allow insurance to cover punitive damages because that would allow the defendant to avoid punishment.

EO 3. HOW TORT LIABILITY ASSIGNS RESPONSIBILITY FOR ACTS THAT CAUSE DAMAGES:

A. **TYPES OF TORTS: There are three types of torts:**

1. **Intentional action torts**--involve intentional acts but not necessarily intentional injury. **Intentional torts** include trespass, property conversion, assault, battery, false arrest, defamation, malicious prosecution, abuse of legal process, invasion of privacy, **and** nuisance. Liability insurance generally excludes intentional harm from intentional torts.

2. **Negligent action torts**--involve unintentional harm caused by failure to exercise reasonable care. **The reasonable, prudent person standard** determines when negligence has occurred. The person who commits a negligence tort bears primary responsibility.
 3. **Absolute liability torts**--hold the plaintiff liable for all harm caused by his inherently dangerous, but socially acceptable, activities. The plaintiff's care and lack of negligence are irrelevant. Owning a wild animal or a dangerous domestic animal, blasting, and acting as a common carrier all impose absolute liability for any resulting injuries.
- B. **VICARIOUS LIABILITY: Vicarious liability** imposes liability on one person for the torts of another. **Five relationships impose vicarious liability:**
1. **Employer-employee--Under the doctrine of respondeat superior** (L. "Let the higher one respond."), an employer is liable for his employee's acts while the employee is performing his employer's work. The employer bears vicarious liability even if the tort was done against the employer's explicit instructions.
 2. **Principal-agent--An agent** acts on behalf of a **principal** in creating and serving contractual relationships between the principal and third parties. The principal is liable for his agent's actions if the agent acted within the scope of his authority. Since the agent bears primary responsibility, the injured third party may recover from either the principal or the agent.
 3. **Parent-child--Parents are liable for their children's actions if**
 - a. the child acts as the parent's agent or employee. **The family purpose doctrine** holds the parent liable for torts committed by a family member operating the family car.
 - b. the parent is guilty of **negligent supervision** (failure to exercise reasonable control of the child).
 - c. the child violates specific statutes (which vary by state). Some states hold a person acting **in loco parentis** (L. "in place of a parent") liable for the child's torts.
 4. **Contractual relationship**--Vicarious liability exists when the first party (the **indemnitor**) agrees to assume the legal liability of the second party (the **indemnitee**).
Two common liability agreements:
 - a. **Hold harmless agreement**--One party agrees to absolve and/or indemnify the other party for specific kinds of losses, as a contractor often holds the owner harmless for liability related to the construction site. Courts sometimes find these agreements invalid.
 - b. **Exculpatory agreement**--relieves one contracting party from the consequences of its own negligence. Many states prohibit or limit use of such agreements, especially in **contracts of adhesion**, which are written by one party and offered to the other party on a 'take it or leave it' basis.
 5. **Independent contractor--An independent contractor** is hired to accomplish a goal and works when and as he chooses (not under his principal's control).
Employers are *not* liable for the torts of their independent contractors *except* in situations involving
 - a. **employer negligence**--The employer must use reasonable care in selecting and directing the independent contractor and must stop the contractor's unnecessarily dangerous practices.
 - b. **nondelegable duties**--The employer can *not* delegate certain acts as set by statute, contract, or common law (voting, marrying, executing his will).
 - c. **inherently dangerous work**--The employer is liable for the contractor's negligence in performing work that is inherently dangerous to others (blasting, excavating near public highways).

- C. **IMMUNITY:** Immunity protects certain entities from lawsuits following their tort violations. **There are four types of immunity:**
1. **Governmental immunity**--arises from the doctrine of **sovereign immunity** ('The king can do **no** wrong.'). [*This fundamental concept, 'might makes right', has slowly fallen out of favor. At one time, the king could sentence anyone to death for any reason, the lord could deflower any bride-to-be the night before her wedding, and government could conscript any serf. Now, all are moral outrages. In time, theft and enslavement by government (taxation and regulation) will be considered moral outrages as our morals develop further.*] **Governmental functions** (activities necessary to government business) are subject to governmental immunity; **proprietary functions** (activities that generate profit or involve private businesses) are not. **Governmental immunity is steadily weakening:** Most states now allow suits against state governments and the Federal Tort Claim Act allows the federal government to be sued, but **not** for punitive damages. As a liability underwriter, you must develop the skills to properly price coverage for government units as they continue to request higher liability limits.
 2. **Public official immunity**--**Public officials** serve the state or the municipality. Judges and legislators have absolute immunity; other officials have qualified immunity. **Administrative (discretionary) acts** are under the official's authority. Public officials performing administrative acts have full immunity. **Ministerial acts** are directed by law or other authority. Public officials are liable for errors in ministerial acts, even if performed in good faith and without malice.
 3. **Charitable immunity**--is now very limited. Charitable immunity is based on various theories protecting the donors of charitable funds and the beneficiaries of charities. Adjust your premiums to accommodate rising claims, especially for malpractice suits against hospitals.
 4. **Intrafamilial immunity**--**Both interspousal immunity** (one spouse can't sue the other) **and parental immunity** (a child can't sue its parents) are very limited now and apply only to personal injury cases. Weakening family immunity increases the chance of family members colluding against their insurer. You should evaluate family moral hazards and raise premiums in jurisdictions prohibiting family immunity.
- D. **STATUTES OF LIMITATIONS AND REPOSE:** **Statutes of limitation** set time limits after the cause of action beyond which the injured party may not bring suit (eg, malpractice suits limited to two years after an operation). Statutes of limitations exist to protect the rights of defendants in civil actions, who might have difficulty defending against lawsuits concerning events they cannot remember accurately or for which evidence no longer exists. **Statutes of repose** set time limits after some stated event beyond which the injured party may **not** bring suit (eg, product liability limited to four years after product sale). Time periods for both types of statutes differ among states and torts. All statutes are subject to court cancellation. Since many tort violations go unnoticed for years, some states have adopted a rule of discovery which sets the cause of action at the time the plaintiff first notices (or should have noticed) the tortious act.
- E. **PROVING NEGLIGENCE:** **Negligence** involves the failure to use the standard of care required by society in the given situation. Statutes rarely specify standards of care and the judicial system's standards vary according to the situation, jury, and jurisdiction. To keep up with new and changing liabilities, you must understand the concept of negligence and keep abreast of court interpretations in your own and neighboring states. **Negligence classifications** include slight negligence, ordinary negligence, gross negligence, willful misconduct, and intentional misconduct. **Most negligence is defined by the reasonable person standard:** Any person acting without reasonable care and caution is negligent. To bring a successful suit, the plaintiff must prove the defendant's negligence.

THE FOUR REQUIREMENTS NEEDED TO PROVE NEGLIGENCE: (Breached duty caused damage.)

- A. **DUTY**--A legal duty is imposed by law and requires a stated standard of care.
In some states, a real estate owner's duty depends on the status of the injured person:
1. **Invitees** are on the premises for the insured's benefit (clients, customers, armed IRS agents) and deserve the highest standard of care. Owners are *not* liable for conditions that could *not* be discovered by a reasonable inspection.
 2. **Licenseses** are permitted on the premises for their own benefit (salesmen, meter readers, firemen putting out a fire, police capturing a burglar) and deserve an ordinary standard of care. Owners must warn licenseses of known dangers (slippery floors, watchdogs).
 3. **Trespassers** are on the premises without permission and require the lowest standard of care. Owners can *not* deliberately harm trespassers.
Some states hold that a trespasser whose presence is known becomes a licensee.
The attractive nuisance doctrine treats trespassing children as licenseses when they are enticed onto the property by attractive nuisances (pools, swing sets, construction equipment--*anything* non-natural on the property).
- B. **BREACH OF DUTY**--failure to exercise the required standard of care.
C. **PROOF OF DAMAGES OR INJURY**--injury to the plaintiff or damage to his property.
D. **PROXIMATE CAUSE**--a direct chain of causality from the breach to the injury.

Seven conditions help to determine proximate cause:

1. **Time**--The accident is proximate if injury occurs soon after the breach.
2. **Foreseeability**--The accident is proximate if a reasonable person could foresee or expect an accident to result from the action.
3. **Exposure to hazard**--The accident is proximate if the defendant exposed the plaintiff to the hazard that causes the accident.
If the event that 'triggers' the hazard is totally unexpected, the chain of causality is broken.
4. **Intervening act**--If the negligent act does not cause harm but a following act, unexpected and unforeseeable, does cause harm, the chain of events is broken.
5. **Intervening criminal act**--Some courts hold that an accident is not proximate if the chain of causality includes a third party's criminal act.
A driver who leaves his keys in his car (a negligent act) may not be responsible for accidents caused by the third party who steals his car.
6. **Substantial factor**--The accident is proximate even if it's not the only cause of injury.
If two trucks hit a car at the same time, both truckers are liable for the resulting injury and damage.
7. **Conduct of third persons**--The accident is proximate if the negligence of third persons is foreseeable. [*In other words, manufacturers must make products that are safe and can not be dangerously misused.*] **Concurrency** occurs when the independently negligent acts of two or more persons combine to produce an injury.
Joint and several liability allows the plaintiff to pursue one or all tortfeasors who caused damage.

Three special situations modify negligence principles:

1. **Children**--A child's unpredictability makes some accidents unavoidable. Many courts release a defendant from negligence if the child helped cause the accident. Children are responsible for their own torts, but are held to the standard of 'a reasonable child of like age and intelligence'.
2. **Professionals**--Professionals are subject to higher standards of care for torts involving their field of expertise. Some states have **Good Samaritan laws** that cancel or limit a physician's professional liability when helping at the scene of an accident.
The standard of care required by physicians varies by state.
Medical malpractice is a physician's act that causes injury to a patient.

3. **The mentally impaired**--Defendants are subject to higher standards of care when they knowingly deal with mentally impaired individuals.
Mentally impaired individuals are held to lower standards of care for their own torts.

In cases involving **negligence per se**, the plaintiff need not prove negligence.

The judge rules negligence without debate (by the jury) or proof (from the plaintiff).

Negligence per se often involves violation of a protective statute.

Res ipsa loquitur (L. "the thing speaks for itself") establishes the presumption of the defendant's negligence in cases where the plaintiff cannot prove negligence.

Essentially, the plaintiff raising res ipsa loquitur argues "The defendant must have been negligent, else how did that sponge get left in my stomach cavity?"

A res ipsa loquitur argument requires

1. the accident to be of a type that normally shows negligence,
2. the defendant had exclusive control of the instrument causing injury,
3. no voluntary action of the plaintiff contributed to the injury, **and**
4. knowledge of the facts of the case were significantly more accessible to the defendant than to the plaintiff.

EO 4. **THE DEFENSES AGAINST NEGLIGENCE CLAIMS:**

1. **Contributory negligence**--The defendant proves the plaintiff was at least partially to blame, so the defendant owes nothing. Contributory negligence is based on the common law duty to use ordinary care for one's own safety. Most cases of contributory negligence involve mutually negligent automobile drivers. [*I've heard contributory negligence does not now apply anywhere in the US. I've also heard it applies in some cases in Maryland.*]
2. **Comparative negligence**--The defendant claims the plaintiff was at least partially to blame, so the plaintiff shares the loss proportionately.

There are four variations of comparative negligence:

- a. **The 'pure type' rule**--The plaintiff may recover damages inversely proportional to his share of the total negligence.
In other words, a plaintiff 80% at fault may recover 20% of his damages.
 - b. **The '50% type' rule**--The plaintiff may recover reduced damages as long as his negligence does not exceed that of the other party.
 - c. **The '49% type' rule**--The plaintiff may recover reduced damages as long as his negligence is less than that of the other party.
 - d. **The 'slight versus gross type' rule**--The plaintiff may recover reduced damages only when his negligence is slight compared to the 'grossness' of the other party's negligence.
3. **Assumption of risk**--The defendant claims the plaintiff voluntarily accepted a situation he knew was dangerous. This defense **only** applies when the plaintiff had alternatives to accepting the risk. This defense is based on the maxim *volenti non fit injuria* (L. "No legal wrong is done to him who consents.").
 4. **Act of God**--The defendant claims the plaintiff's injuries and damages were caused by an unforeseeable act of God (tornado, tidal wave).
 - [5. **Lack of negligence**--*The defendant claims one of the four elements of negligence was missing.*]

EO 5. **ESTABLISH RESPONSIBILITY FOR NEGLIGENCE AND LIST POSSIBLE DEFENSES FOR A CASE STUDY** by applying what you learned in EOs 1 - 4.

EO 6. **KEY WORDS** are defined both in context in my responses to the educational objectives and in a separate section of The Burnham System.