Chapter 7
The Liability Risk

Overview

This chapter begins a block of material on property and liability risks, and the personal and business insurance coverages designed to address these risks. In this first chapter, we consider the liability risk. The number of lawsuits and the magnitude of settlements have increased significantly over time. In this chapter we examine the basis for most of these lawsuits, negligence. The elements of a negligent act are discussed as well as legal defenses in cases where negligence is alleged. Next, applications of the law of negligence are presented; and several problem related to liability are discussed. Finally, defects in the present civil justice system and tort reform ideas are discussed.

Learning Objectives

After studying this chapter, you should be able to:

- Define negligence and explain the elements of negligence.
- Explain the following legal defenses that can be used in a lawsuit: contributory negligence, comparative negligence, assumption of the risk, and the last clear chance rule.
- Apply the law of negligence to specific liability situations.
- Explain the defects in the current tort liability system and the proposals for tort reform.
- Explain the following tort liability problems: defective tort liability system, medical malpractice, and corporate fraud and lax corporate governance.
- Define the following:
  - Alternative dispute resolution (ADR)
  - Arbitration
  - Assumption of risk
  - Attractive nuisance
  - Collateral source rule
  - Combined ratio
  - Comparative negligence law
  - Compensatory damages
  - Contributory negligence law
  - Dram shop law
  - Elements of negligence
  - Family purpose doctrine
  - General damages
  - Governmental function
  - Imputed negligence
  - Invitee
  - Joint and several liability rule
  - Joint underwriting association (JUA)
  - Last clear chance rule
  - Legal wrong
  - Licensee
  - Mediation
  - Negligence
  - Plaintiff
  - Proprietary function
  - Proximate cause
  - Punitive damages
  - Res ipsa loquitur
  - Respondeat superior
  - Sovereign immunity
  - Special damages
  - Strict (absolute) liability
  - Tort
  - Tortfeasor
  - Trespasser
  - Vicarious liability law

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Outline

I. Basis of Legal Liability
   A. Intentional Torts
   B. Strict Liability
   C. Negligence

II. Law of Negligence
   A. Elements of Negligence
      1. Existence of a Legal Duty
      2. Failure to Perform that Duty
      3. Damage or Injury to the Claimant
      4. Proximate Cause Relationship between the Negligent Act and the Infliction of Damages
   B. Defenses Against Negligence
      1. Contributory Negligence
      2. Comparative Negligence
      3. Last Clear Chance Rule
      4. Assumption of Risk

III. Imputed Negligence

IV. Res Ipsi Loquitur

V. Specific Applications of the Law of Negligence
   A. Property Owners
   B. Attractive Nuisance Doctrine
   C. Owners and Operators of Automobiles
   D. Government Entities
   E. Charitable Institutions
   F. Employer and Employee Relationships
   G. Parents and Children
   H. Animals

VI. Current Tort Liability Problems
   A. Defective Tort Liability System
   B. Medical Malpractice
   C. Corporate Fraud and Lax Corporate Governance
Short Answer Questions

1. What are the three categories of torts?

2. A claimant (plaintiff) alleging negligence on the part of a defendant (tortfeasor) must establish that the tortfeasor was negligent. What are the four essential elements of a negligent act?

3. What types of damages may be awarded in negligence cases?
4. What defenses could a defendant use to defeat the plaintiff’s claim that the defendant was negligent?

5. In what situations may the negligence of one person be attributed (transferred) to another person?

6. What requirements must be satisfied in order for the doctrine of res ipsa loquitur to be applied?
7. What duty of care does a property owner owe to a trespasser, to a licensee, and to an invitee?

8. Critics of the present tort liability system in the United States cite a number of defects with the system. What are these major defects?

9. Most states have enacted or are considering enacting some tort reform measures. What are some important tort reforms?
10. In addition to medical errors by physicians, what are the other reasons why patients sue physicians?

11. Boards of directors of corporations have been charged with lax corporate governance, leading to financial fraud. What specific charges have been made against corporate boards with respect to lax corporate governance?

## Multiple Choice Questions

*Circle the letter that corresponds to the BEST answer.*

1. All of the following are elements of a negligent act EXCEPT:
   (a) existence of a legal duty
   (b) failure to perform that duty
   (c) damages or injury to the claimant
   (d) inability of the tortfeasor to pay the damages
2. One tort reform proposal calls for modifying a rule under which a defendant cannot introduce evidence that shows the injured party has received other forms of compensation for the injury. This rule is called the:
   (a) attractive nuisance rule
   (b) collateral source rule
   (c) joint and several liability rule
   (d) last clear chance rule

3. Which statement(s) is(are) true with regard to defenses against liability claims?
   I. Under contributory negligence, if you contribute to your injury, you cannot recover damages.
   II. Under comparative negligence, if you contribute to your injury, you cannot recover damages.
   (a) I only
   (b) II only
   (c) both I and II
   (d) neither I nor II

4. Jenny needed surgery on her right knee. When the anesthesia wore off after the operation, she noticed surgical wrapping around both knees. When she asked the nurse why both knees were wrapped, the nurse replied that the surgeon made an incision on her left knee, discovered the mistake, and proceeded with the operation on the right knee. What modification of the law of negligence will Jenny be able to invoke to recover damages from the surgeon?
   (a) contributory negligence
   (b) privity of contract
   (c) res ipsa loquitur
   (d) absolute liability

5. All of the following are legal defenses to liability claims EXCEPT:
   (a) contributory negligence
   (b) assumption of the risk
   (c) vicarious liability
   (d) comparative negligence

6. An insurance company was found guilty of illegal sales and claims practices and ordered to pay compensatory damages to a group of plaintiffs. To “make an example” of the insurer, the court also ordered the insurer to pay an additional $10 million to deter other insurers from engaging in the same wrongful acts. The $10 million award is an example of:
   (a) punitive damages
   (b) special damages
   (c) collateral source payments
   (d) general damages

7. In the past, federal, state, and local governments could not be sued unless they agreed to the suit. Upon what doctrine was this freedom from litigation based?
   (a) philosophy of entitlement
   (b) joint and several liability rule
   (c) assumption of the risk doctrine
   (d) sovereign immunity
8. Because of potential harm to individuals or society, some persons may be held liable for harm or injury to others even though negligence cannot be proven. These types of torts are called:
   (a) intentional torts
   (b) negligence
   (c) strict (absolute) liability
   (d) breach of contract

9. All of the following are torts EXCEPT:
   (a) In a case of mistaken identity, Diane locked a customer she suspected was a shoplifter in a dressing room until the police arrived. The customer was innocent.
   (b) Bob punched another bar patron who made disparaging comments about Bob’s wife.
   (c) Nicole called the high school principal “an ignorant moron” at the PTA meeting.
   (d) While robbing a bank, Art shot and killed a bank employee.

10. All of the following are conditions under which negligence can be imputed to another party EXCEPT:
    (a) family purpose doctrine
    (b) collateral source rule
    (c) employer-employee relationships
    (d) vicarious liability

11. A property owner owes the highest degree of care to a(n):
    (a) trespasser
    (b) invitee
    (c) licensee
    (d) an equal degree of care is owed to all of these

12. John was involved in an accident in a state that uses a pure comparative negligence rule. John was found to be 75 percent responsible for the accident and his actual damages were $20,000. How much will John be able to recover?
    (a) $5000
    (b) $10,000
    (c) $15,000
    (d) $20,000

**True/False**

Circle the T if the statement is true, the F if the statement is false. Explain to yourself why a statement is false.

T  F  1. Alternative dispute resolution involves formal jury trials.

T  F  2. The person who was injured as a result of a negligent act is called the tortfeasor.

T  F  3. Corporate officers and board members are immune from liability claims under provisions of the Sarbanes-Oxley Act.
4. A property owner owes a higher degree of care to children than to adults.

5. A government unit can be held liable if it is negligent in the performance of a proprietary function.

6. Under the joint and several liability rule, a defendant who is only slightly responsible may be required to pay the full amount of damages.

7. General damages are awarded for losses that can be determined and documented, such as loss of work earnings and the cost of medical care.

8. Many medical malpractice suits are due to medical errors by health care providers.

9. The last clear chance rule bars recovery by the plaintiff.

10. A licensee is someone who is invited on to the premises for the benefit of the occupant.

11. Under the doctrine of respondeat superior, an employer may be held liable for negligent acts of employees who are acting on the employer’s behalf.

12. One current problem with the tort liability system in the United States is long delays.

### Case Applications

#### Case 1

Brendan was late for an important meeting. He was driving 75 miles an hour on a narrow highway. He caught up to the car ahead of him and attempted to pass the car while driving up a steep hill. About that time, a delivery truck heading in the opposite direction came over the top of the hill. Brendan swerved to miss the truck. He hit the car he was passing and the driver lost control of the car and hit a tree. Brendan was not injured and his car sustained only slight damage. The other car was a total loss and the driver was severely injured. A lawsuit alleging that Brendan was negligent has been filed by the other driver. Was Brendan negligent?
Case 2

Last Saturday, Janet and her daughter had lunch at the local franchise of a national fast-food chain. As they were returning to their car, a driver who had just picked up his order at the drive-through window sped around the corner of the restaurant and hit Janet and her daughter. Janet received multiple lacerations and five broken bones. Her daughter was not physically injured, but since witnessing the accident she has been traumatized. In filing her lawsuit, why did Janet name the car driver, the franchise owner, and the national fast-food chain as defendants? What types of damages may be awarded to Janet and her daughter as a result of this incident?

Solutions to Chapter 7

Short Answer Questions

1. The three categories of torts are intentional torts, strict (absolute) liability, and the tort of negligence.

2. There is a four-part test to determine if an act is negligent. First, there must be a legal duty to use reasonable care. Second, there must be a failure to perform that duty. Third, damages or injury must be suffered by the plaintiff. Finally, there must be a proximate cause relationship between the negligent act and the infliction of injury.

3. Three types of damages may be awarded in negligence cases. Special damages are paid for losses that can be determined and documented, such as lost earnings and medical bills. General damages are paid for losses that cannot be specifically measured or itemized, such as pain and suffering or disfigurement. Punitive damages are awarded to punish the negligent party and to deter others from committing similar acts.

4. The defendant could claim that the injured party contributed to his or her injury. Under contributory negligence, any fault of the plaintiff will prevent recovery of damages. Under a comparative negligence law, any fault of the plaintiff will reduce the damage award. The last clear chance rule could be used, as well as the assumption of risk doctrine.
5. Several situations give rise to the transfer of liability from one person to another person. One example is the employer-employee relationship. When acting on behalf of the employer, the negligent acts of the employee may be imputed to the employer. Another situation in which liability can be imputed from one person to another involves use of an automobile by someone other than the owner. Through vicarious liability laws and the family purpose doctrine, liability for negligent acts may be imputed to the owner of the auto. In a joint business venture, one partner may be responsible for another partner’s acts. Finally, under dramshop laws a business that sells alcoholic beverages may be responsible if an impaired customer injures someone.

6. To apply the doctrine of *res ipsa loquitur*, a number of requirements must be met. The loss causing event must not normally occur unless there is negligence. The defendant must have superior knowledge of the cause of the accident, and the injured party cannot prove negligence. The defendant must have control over the instrumentality causing the accident. Finally, the injured party must not have contributed to the loss/event.

7. The degree of care owed varies with the classification of the person who comes on to the owner’s property. Trespassers are owed the least care. The property owner is under no obligation to keep the land safe and the trespasser accepts the land “as is.” This duty is called “slight care.” Greater care is owed to a licensee. Licensees enter or remain on the property with the occupant’s permission. The property owner is required to warn the licensee of unsafe conditions or activities on the premises. The last class of individuals who can come on to property is invitees. Invitees are asked on to the property to benefit the occupant. A higher degree of care is required. The owner has the obligation to inspect the premises and correct any dangerous conditions.

8. The alleged defects include: rising tort liability costs, inefficiency in compensating injured victims, uncertainty of legal outcomes, higher liability awards, and long delays in settling lawsuits.

9. Some important tort reforms measures include: capping noneconomic damages, reinstating the state-of-the-art defense in product liability cases, restricting punitive damages awards, modifying the collateral source rule, modifying the joint and several liability rule, and making greater use of alternative dispute resolution (ADR) techniques.

10. The reasons for lawsuits against physicians, in addition to medical errors, include: the intimate relationship between patients and physicians that existed in the past has been lost, people are more litigious than in the past, physicians are now more willing to testify against other physicians in malpractice actions, the media have made more people aware of the vulnerability of physicians to malpractice claims, attorneys may file malpractice actions because of high fees they collect if they are successful, and growing resentment against large for-profit health care firms and managed care plans.

11. Boards of directors are attacked for lax corporate governance and inadequate oversight. Boards are criticized because of disconnect with the audit committee, poor internal control and accountability, excessive executive salaries and loans, undisclosed CEO and board financial arrangements, compromising of auditors and lawyers, and unclear disclosure of complex financial transactions. It is also alleged that some board members are figureheads who serve on board for notoriety and compensation, some board members lack the ability to understand complex financial arrangements, and some board members serve on multiples boards and are not able to devote the necessary time and effort necessary to scrutinize the actions of management.
Multiple Choice Questions

1. (d) The ability of the tortfeasor to pay damage awards is independent of whether the act is negligent. The first three choices are elements of a negligent act. The fourth element is proximate cause between the failure to perform the legal duty and the injury to the claimant.

2. (b) Under the collateral source rule, evidence of other sources of recovery cannot be introduced in court.

3. (a) Under contributory negligence, even slight guilt on the part of the claimant will prevent the claimant from recovering damages. Under comparative negligence, any fault on the part of the claimant will simply reduce the damages awarded. States have adopted comparative negligence laws due to the harshness of contributory negligence.

4. (c) The fact that an incision was made on her “good knee” is grounds for recovery under *res ipsa loquitur*. The operation was performed by a skilled surgeon who had exclusive control over the surgical procedure. Jenny did not contribute in any way to the negligent act, and such an act normally does not occur unless negligence is involved.

5. (c) Vicarious liability is not a defense against a claim of liability. Vicarious liability shifts liability from one party to another party.

6. (a) Punitive damages are awarded to punish the tortfeasor for negligent acts and to deter others from committing the same act.

7. (d) This freedom from litigation was based on sovereign immunity. This doctrine has been modified over the years.

8. (c) Such torts involve strict (absolute) liability. Employers are held absolutely liable for injuries to their employees under workers compensation statutes. This doctrine is also applied in situations involving activities where great harm may result if there is negligence (e.g. blasting operations, crop dusting, owning dangerous animals, etc.).

9. (d) The first three choices involve legal wrongs for which the law allows a remedy through money damages. Armed robbery and murder are crimes. Crimes are punishable by fines, imprisonment, and in some jurisdictions, death if the offense is severe.

10. (b) The collateral source rule has nothing to do with imputing the negligent acts of one person to another person. Under the collateral source rule, the defendant cannot introduce evidence that shows the injured party has received compensation from other sources.

11. (b) The highest degree of care is owned an invitee. In addition to warning the invitee of dangerous conditions, the owner is also required to inspect the premises and eliminate any unsafe conditions.

12. (a) Under a pure comparative negligence law, the liability award is reduced proportionately. So if John is 75 percent responsible, his recovery will be reduced by 75 percent. He will only collect $5000.
True/False

1. F Alternative dispute resolution attempts to avoid costly legal proceedings, such as jury trials. Parties to the action may agree to arbitration or mediation of the conflict.

2. F The tortfeasor is the person who caused the harm. In a legal proceeding, a plaintiff (also called the claimant) would bring legal action against the tortfeasor (also called the defendant).

3. F The Sarbanes-Oxley Act was passed in response to corrupt business practices. Corporate officers and directors can be held responsible for fraud and other illegal business practices under the Act.

4. T

5. T

6. T

7. F Special damages are awarded for losses that can be determined and documented, such as lost work earnings and the cost of medical care. General damages are awarded for losses that cannot be itemized, such as pain and disfigurement.

8. T

9. F Under the last clear chance rule, a plaintiff who is endangered by his or her own negligence can still recover damages if the defendant had a last clear chance to avoid the accident and failed to do so.

10. F A licensee is someone who enters or remains on the premises with the occupant’s expressed or implied permission. An invitee is someone invited to come on to the premises for the benefit of the occupant.

11. T

12. T

Case Applications

Case 1
To determine if Brendan was negligent, the four-part test of negligence must be examined in relation to the facts of the case. First, there is a legal duty to obey the speed limit and not to pass other vehicles in an unsafe manner. Second, there must be a failure to meet the duty. Brendan clearly failed to perform this duty because he was speeding and he tried to pass another vehicle while going up a steep hill. The third requirement is injury. The party bringing the lawsuit against Brendan clearly suffered damages—his property was destroyed and he suffered severe bodily injuries. Finally, there is proximate cause in this scenario. In the absence of Brendan’s violation of his legal duty, no accident would have occurred. There is an unbroken chain of events between Brendan’s speeding and unsafe passing, the motorist’s collision with the tree, and the resulting injuries. Therefore, Brendan was negligent.
Case 2

Janet named all three parties because each party may bear some responsibility. Also, she wants to make sure all of the damages are paid and/or that she collects the largest award possible. If her state permits joint and several liability, any plaintiff that is responsible may have to pay a disproportionate share of the damages. The driver of the vehicle that hit Janet and her child was directly involved in the accident. As an individual, however, the driver might not have enough financial resources to pay the damages. The local restaurant franchise might be responsible from a safety and design perspective. The exit from the drive-through window may not be easily visible to patrons leaving the restaurant. Perhaps a speed bump in this lane would force drivers to reduce their speed. The franchise owner may be in a better financial position to pay for the damages than the driver of the car. Naming the national restaurant chain as a defendant brings the “deepest pockets” of all to the claim. If local franchises are required to use a specific building design, the national chain may bear some responsibility for the accident.

Janet and her child may be awarded special damages for losses that can be determined and documented; general damages for pain, suffering, and mental anguish; and punitive damages to punish the tortfeasor and deter similar negligent acts.