

PROFESSIONAL PRACTICE 544

NEGLIGENCE AND TORT LAW; INDEMNITY AND CONTRIBUTION;
CONSTRUCTION AND DESIGN PROFESSIONAL INSURANCE

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NEGLIGENCE AND TORT LAW

WHAT IS A TORT?

Definition of a Tort

- ▶ A tort is an act or omission that gives rise to injury or harm to another and amounts to a civil wrong for which courts impose liability
- ▶ Includes a duty owed to society and imposed by law to act in an acceptable manner

What is the difference between a loss from a breach of contract and a loss due to a tort?

- ▶ Loss due to breach of contract is defined by the obligations agreed to between two parties
- ▶ Loss due to a tort is not contractually based
 - Did you act negligently
- ▶ Overlap between negligence in contract and tort
 - The Economic Loss Rule

WHAT IS A TORT?

Purposes of Tort Law

- ▶ To promote safety
- ▶ To promote predictability of behavior
- ▶ To allocate the risk of loss or injury

WHAT IS A TORT?

Types of Torts – Negligence and Intentional Torts

Intentional Torts – May be Civil or Criminal

- ▶ Battery – e.g., striking another person
- ▶ Assault – e.g., putting another person in fear of immediate harmful contact
- ▶ Trespass – e.g., invasion of someone's real property
- ▶ Conversion – e.g., taking or destroying another's personal property
- ▶ Others
 - False Imprisonment
 - Intentional infliction of emotional distress
 - Defamation and libel

WHAT IS NEGLIGENCE?

Negligence – What is it?

- ▶ Causing a loss or injury by failing to act in accordance with the applicable level of care and caution
 - Different standards for different people/professions
 - Society driven in many respects
 - Case law also at times has helped to establish the standard of care
 - Often the question of whether there is negligence is left to the “trier of fact,” which may be a judge or jury (Different from the “trier of law” which is the judge.)

WHAT IS NEGLIGENCE?

Situations in which negligence is automatically found

- ▶ Violation of a law or valid regulation is considered to be automatically negligent
 - Purpose: to ensure compliance with the law
 - Relevant in court of law
- ▶ Negligent acts of an agent automatically tied to the principal.
 - If an agent acts negligently toward a third party in the scope of his authority, that negligence is automatically attributed to the principal
 - Agency and apparent authority – in either instance

ELEMENTS OF NEGLIGENCE

Elements for a negligence claim

- ▶ DUTY - Existence of a standard of care or a duty of care owed to others
- ▶ BREACH - Breach of the standard of care (breach of that duty)
- ▶ CAUSATION - Causal link between the breach and specific consequences (the “injury”) – this is also sometimes referred to as the “proximate cause”
- ▶ DAMAGES - The claimant suffered an injury (typically monetary damages) from the consequences of the breach

NEGLIGENCE AND TORT LAW



DUTY – STANDARD OF CARE

1. Duty - The Standard of Care in General

- ▶ A legal duty to act as an ordinary, prudent and reasonable person would
 - Applicable to everyone
 - Different standards for different people and different professions
- ▶ People with mental or physical handicaps are still required to act in accordance with the standard of care which a reasonable person who is not handicapped would observe
 - Purpose: so that society can rely on people adhering to a certain minimal level of skill and care
- ▶ People with greater than average levels of ability or skill are held to a higher standard of care, that possessed by the reasonable person with that level of ability or skill
 - Purpose: society relies on highly skilled people acting in accordance with their level of skill

DUTY – STANDARD OF CARE

The reasonableness of a person's actions is a matter of proof, usually determined by a jury

- ▶ Jury or a judge (“trier of fact”) determines how the ordinary reasonable person should behave and if the defendant lived up to that standard of care
- ▶ Jurors may not be aware of the appropriate standard of care
 - Juror may need to be educated on what is the applicable standard of care
 - The standard of care often is often established using proof from “expert” witnesses in the subject matter of the case, who then testify about how the defendant should operate in comparison to others practicing the same profession (e.g., a civil engineer, an accountant, a farmer, professor, or other knowledgeable party)

DUTY – STANDARD OF CARE

The reasonableness of a person's actions is a matter of proof, usually determined by a jury

- ▶ Sometimes a plaintiff can avoid proving which defendants were negligent through the doctrine of res ipsa loquitur (“the thing speaks for itself”)
 - Generally, a plaintiff must prove all elements of negligence – but not with R.I.L.
 - Duty, breach and causation are all inferred from the injury that would not ordinarily occur without negligence
 - Must show defendant had exclusive control over the situation that caused the injury, and the injury was more likely than not to have been caused by negligence
 - The plaintiff must show that something happened which ordinarily does not happen unless one of the defendants were negligent – (the scalpel was left behind, or the hammer fell on my head)

PROFESSIONAL STANDARD OF CARE

The Professional Standard of Care

- ▶ A professional is a person whose occupation requires sufficient skill and judgment that it would not be fair to require him to guarantee results
 - Doctor, lawyer, architect
 - Doctors cannot guarantee cures; lawyers cannot guarantee acquittals, architect does not guarantee its design is 100% perfect
 - Contrast the situation to a contractor, who warrant the performance of the building to the owner
- ▶ The professional standard of care is the level of skill and care which an ordinary person of the profession would observe under similar circumstances at the same time and location

PROFESSIONAL STANDARD OF CARE

The Professional Standard of Care

- ▶ Typically, the expert witnesses are from the same profession and are required to prove the applicable standard of care
 - A professional's appropriate standard of care is generally beyond the ken of the jury
 - Occasionally, however, even laymen can determine that certain professional conduct violates appropriate standards, such as a doctor accidentally injecting poison into a patient's vein
 - Qualification of the "expert" is an issue to determine whether she/he may opine on the relevant standard of care

BREACH OF DUTY

2. Breach or Dereliction of the Duty

- ▶ Defendant's conduct violated his/her duty
 - Conduct fell short of, or falls below the standard of care
 - "Reasonable Person Test" Conduct was such that the individual/defendant did not act as a reasonable person would have / should have acted
 - Conduct was in dereliction of the duty imposed on the individual/defendant

- ▶ If the Defendant is an expert or professional, the standard of care that was breached by the Defendant is related to what is expected from such an expert or professional
 - This requires a different level of the standard of care to which the expert/professional (the "reasonable architect" or the "reasonable engineer") is held, and whether that standard was breached

CAUSATION

3. Causation

- ▶ Plaintiff must prove defendant's breach of the standard of care was a "proximate cause" of his injuries
 - Proximate cause is both an actual cause and not too distant in the casual chain
 - A plaintiff does not have to show that the defendant's conduct was the only cause of his injuries
 - The plaintiff's claim is sufficient if one of the causes results in the injury
 - Remember – "a" proximate cause and not "the only" proximate cause – more than one person/entity may be liable
- ▶ The test of whether or not a cause is proximate is whether the results were "reasonably foreseeable"
 - The courts interpret the requirement of reasonable foreseeability quite broadly
 - What is "reasonably foreseeable" is based on many factors taken into consideration

CAUSATION

3. Causation

- ▶ The “but for” test
 - “But for” the defendant’s negligent act, would the plaintiff have suffered injury/damage/loss?
- ▶ The causal chain may be broken by a superseding or intervening cause of the injury
 - Act by someone else, after the defendant’s breach, which is so extraordinary or unforeseeable as to break the causal chain
 - Criminal acts or intentional tort of third persons will break the chain, unless they are reasonably foreseeable to occur as a result of the defendant’s actions
 - Unforeseeable acts of God

DAMAGES

4. Damages

- ▶ Damages are intended to compensate an injured party for all injuries suffered
- ▶ Examples of categories of damage in traditional tort claim
 - Lost wages
 - Cost of repair or replacement of damage to property
 - Pain and suffering
- ▶ Particularly in personal injury cases, damages can be many millions of dollars
- ▶ Similarly, design defects in major buildings can cost hundreds of thousands or millions of dollars to repair
 - Cannot recover “betterment” (e.g. – design missed code requirements – cannot get the additional \$ to cover what you always were required to provide, only the costs to “correct” the situation)

DEFENSE AND SHARING OF FAULT

The Plaintiff's Own Negligence – Possible Defense

- ▶ Contributory or comparative negligence occurs when the plaintiff's own negligence is also a proximate cause of his injuries – Allocation of responsibility
- ▶ The old rule: Contributory Negligence
 - A plaintiff used to be (and still is in some states) barred from recovery on a negligence claim if the plaintiff also negligently contributed to his own injuries – by any percentage or amount – even just 1% (AL, MD, NC, VA, and D.C.)
 - Harsh rule, but several exceptions to allow recovery even if the plaintiff “contributed” to his/her injuries. (last clear chance rule – defendant could have avoided causing injury; gross negligence)
- ▶ Modern rule: Comparative Negligence
 - Under comparative negligence, the plaintiff's recovery in a negligence claim is reduced by the percentage by which her/his own negligence contributed to his injuries
 - This is the modern rule employed in most states today
 - Pure comparative or the 50% (or 51% HI, IA) Rule



CONTRIBUTION AND INDEMNITY

INDEMNITY

Definition of Indemnity

- ▶ Indemnity is a contractual obligation of one party (the indemnitor or indemnifier) to compensate the loss incurred to the other party (the indemnitee) due to acts of the indemnitor or another party
 - Security against hurt, loss, or damage
 - Compensation for damage or loss sustained
 - Deals with third-party claims and not first-party claims
 - In construction, is a hold harmless clause defining the responsibility of losses or damages during the project
 - A risk-allocation or risk shifting tool

INDEMNITY AND CONTRIBUTION

Indemnity and Contribution

- ▶ Contribution is a method by which a defendant brings a third party into the trial to reimburse the defendant for that percentage of the plaintiff's damages which were really the fault of the third party
 - Generally, contribution obligation arises out of a statute
- ▶ Indemnity is the same as contribution, except that the third party becomes liable to reimburse the defendant for all of the plaintiff's damages
 - Generally, indemnity obligation arises out of a contractual obligation, but there is common law indemnity
 - Example - Owner (plaintiff) sues architect for construction defects based upon the architect's negligent inspection of the construction. The architect brings the contractor who actually built the defective work into the trial to indemnify the architect against the plaintiff's losses
 - Example- Owner sues a contractor for a construction defect, and the contractor seeks contribution from the architect for vagueness in the plans

INDEMNITY AND CONTRIBUTION

Contractual Indemnity

- ▶ Any party can make a promise in a contract to indemnify another party from certain specified consequences
 - Subcontractors ordinarily promise to indemnify general contractors if a claim arises resulting from the subcontractor's work
 - Contractors often promise to indemnify owners and architects against any claims filed against owners and architects arising out of the general contractor's work
- ▶ Some states, including Illinois, have passed statutes which forbid one party from promising to indemnify another party for the consequences of the second party's own negligence

INDEMNITY AND CONTRIBUTION

Indemnity ordinarily is only available when liability is derivative

- ▶ When the only reason that one party is negligent is the negligent acts of another party for whom the first party was responsible, the first party can obtain indemnity from the second party
 - Employer/employee
 - Contractor/subcontractor
 - Inspecting architect/contractor

The background features a gradient from dark purple on the left to bright red on the right. Overlaid on this are several overlapping circles of varying sizes and opacities, some solid and some dotted, creating a layered, geometric effect.

INSURANCE

Insurance

▶ Professional Liability Insurance (Errors & Omissions)

- ▶ Coverage for claims of negligent errors or omissions by Architect
- ▶ Key terms and concepts
 - ▶ Coverage Limit - The maximum that the policy will pay on account of a claim
 - ▶ The policy pays any loss and pays an attorney to defend the Architect
 - ▶ E&O policies (and others) are “declining balance” policies, so costs paid for defense diminish the amount available to pay or settle a claim
 - ▶ Deductible - The amount that Architect must pay from its own pocket before the insurance proceeds apply
 - ▶ Retroactive Date – The earliest date of Architect's error or omission for which coverage will apply
 - ▶ Premium - Annual payment an Architect makes to the insurer to “buy” the policy

Insurance

▶ Professional Liability Insurance (errors & omissions)

- ▶ The policy is a “claims made” policy, which means that it covers all claims made within the policy year
 - ▶ Because a claim may be made after a project is completed, the insurance only provides protection if it is kept in place
 - ▶ Architects who are retiring or going out of business may purchase “tail policies” which protect against claims made arising out of prior projects even though no further insurance is being purchased
- ▶ Deductibles are quite large, particularly for Architects with large practices who have been in business for a long time
- ▶ Premium a function of coverage limits, deductible, and claims history – similar to how your auto policy may be figured

Insurance

▶ Professional Liability Insurance

- ▶ Claims must be reported promptly
 - ▶ Claims made to the insurance broker
 - ▶ Claims made to the carrier
- ▶ The lawyer hired by the insurance company to defend the claim owes his duties of loyalty to Architect, not the insurance company
 - ▶ The lawyer is probably retained frequently by the insurance company and will have strong business ties to it
 - ▶ If a conflict of interests with the insurance company, Architect may have two lawyers
 - ▶ One looks out for Architect's interests, while the other looking out for the insurer's interests

Insurance

▶ Professional Liability Insurance

▶ Practice v. project policies

- ▶ The typical professional liability insurance is a practice policy. It covers all claims for professional errors or omissions made against Architect during the course of the policy year arising out of Architect's practice
- ▶ Alternative insurance is a "project policy." This provides insurance for all professional liability claims against the design professional arising out of a particular project
- ▶ One reason for the popularity of project policies is that the premiums for them can often be directly passed through to Owner as a cost of the project
- ▶ Practice policy costs needs to be factored into the overhead numbers when bidding a project
- ▶ Contractors and their policies, including pass-through costs are a bit different

Insurance

▶ **Commercial General Liability Insurance - The Architect**

- ▶ When purchased by Architect, it covers claims of liability not arising out of professional services
 - ▶ These claims are rare on the typical construction project. Some examples might be:
 - ▶ A client trips and falls on a rug in Architect's office
 - ▶ Architect's construction site observer accidentally bumps into someone and injures him
 - ▶ Because this insurance responds to very few risks, it is not very expensive
 - ▶ It is written on an “occurrence” basis, rather than a “claims made” basis, so it covers all claims arising out of actions that occurred during the policy year

Insurance

▶ **Commercial General Liability Insurance - The Contractor**

- ▶ When purchased by contractor, it is the major source of protection against claims by injured workers or for calamitous property damage
 - ▶ The general contractor names Owner and Architect as additional insured parties under the insurance
 - ▶ This provides important coverage for Owner, but its coverage for Architect is illusory
 - ▶ When a claim for a construction worker injury or property damage is made against Architect, it is generally deemed to be a claim for professional liability
 - ▶ An exclusion exists in the commercial general liability policy for claims alleging professional liability, so Architect has no coverage under the policy
- ▶ Policies cover claims alleging sudden and dangerous occurrences resulting in property damage or bodily injuries, but not solely economic loss or repair/replacement costs due to bad workmanship

Insurance

▶ **Automobile Liability Insurance**

- ▶ Very similar to general liability policies except they cover accidents arising out of the use of a car
- ▶ These policies are simply commercial versions of the automobile insurance policies that virtually every individual has on his or her own automobile
- ▶ Anyone who drives to the construction site, including both Architect and Contractor, purchase these policies and keep them in place essentially constantly

Insurance

▶ **Builder's Risk Insurance**

- ▶ This is a policy that covers the actual construction work being performed on the site: The work in place, materials stored on site, etc.
- ▶ It may be purchased either by Owner or by Contractor, but the policy names both as insured parties
- ▶ Unlike the liability policies described above, builder's risk insurance is no-fault property damage insurance
 - ▶ Covers damage to the work in place regardless of whether anyone was at fault in causing it
- ▶ The danger to an Architect is that the builder's risk insurer may pay off a loss, and then turn around and sue Architect for having negligently contributed to the problem

Insurance

▶ **Builder's Risk Insurance**

- ▶ Danger to an Architect is that the builder's risk insurer may pay off a loss, and then turn around and sue Architect for having negligently contributed to the problem
 - ▶ The insurer is "subrogated" to Owner's (and possibly the contractor's) rights against Architect after paying a loss. Essentially, the courts deem that the insurer "steps into the shoes" of the insured parties to the extent of the payment
 - ▶ This appears to be fundamentally unfair, as the basis for calculating coverage costs is a "no-fault" assumption
 - ▶ Architect can ensure that the builder's risk insurer cannot sue Architect by being named as an additional insured party under the policy or else by having Owner (and possibly the contractor) waive their rights of subrogation in their contracts

Insurance

▶ Workers' Compensation Insurance

- ▶ Employers customarily purchase this insurance to protect against a bodily injury claim by the employer's own employees
- ▶ Several statutes passed by the state that require this insurance and that set minimum levels of coverage
- ▶ Worker's compensation laws are the exclusive remedy that an injured employee has against its own employer – but not against 3rd parties
 - ▶ Damages that an employee receives through this process is usually far smaller than what it would receive from a jury in court
 - ▶ Common for the employee to sue everyone for negligently causing the injury except his employer – as that is the workers' comp claim
 - ▶ Workers' compensation laws make it difficult for the parties who have been sued by the employee to bring the employer into court to bear its fair share of the loss

Insurance

▶ Certificates of Insurance

- ▶ To prove that the insurance policies were purchased and coverage is in place
- ▶ Prepared by insurance brokers describing the basic terms of the insurance coverage
- ▶ Often is Architect's responsibility to collect, examine, and forward the insurance certificates provided by the construction team
- ▶ Often Architect's responsibility to collect, examine, and forward the insurance certificates provided by the construction team
- ▶ If complex issues regarding coverage arise, you must examine the actual policies



QUESTIONS