

March 27, 2017

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# Professional Practice 544

## Tort Law and Insurance

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# TORT LAW AND INSURANCE

# NEGLIGENCE AND TORT LAW

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**Definition of a Tort – a duty owed to society and imposed by law to act in an acceptable manner**

**What is the difference between 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

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## Purposes of Tort Law

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

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## Types of Torts – Intentional Torts and Negligence

### 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

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## 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.)

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## Elements of a claim for negligence

- 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

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## Duty - The Standard of Care - Generally

- 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



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## Situations in which negligence is automatically found

- Violation of a law or valid regulation is considered to be automatically negligent
  - Purpose: to insure 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

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## 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
- 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 who testifies about how the defendant was suppose to operate (e.g., a civil engineer, an accountant, a farmer, professor, or other knowledgeable party)
- Sometimes a plaintiff can avoid proving which defendants were negligent through the doctrine of res ipsa loquitur
  - Exclusive control over the situation where there was a failure
  - The plaintiff must show that something happened which ordinarily does not happen unless one of the defendants were negligent – (*sprinkler example*)

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## 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 warranty 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

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## The Professional Standard of Care

- Typically expert witnesses from the same profession 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

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## 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
- 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 "reasonable foreseeable" is based on many factors taken into consideration

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## Causation

- 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

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## 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
- 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 (AL, MD, NC, VA)
  - Harsh rule, but several exceptions existed to allow recovery even if the plaintiff “contributed” to his/her injuries.
- Modern rule: Comparative Negligence
  - Under comparative negligence, the plaintiff's recovery in a negligence claim is reduced by the percentage by which his (own negligence contributed to his injuries
  - This is the modern rule employed in most states today
  - 50% rule can be an issue

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## 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)



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## Contribution and Indemnity

- Contribution 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 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
  - Example - Owner 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

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## 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

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## 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

# INSURANCE

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## Professional Liability (Errors & Omissions) Insurance

- Provides coverage for claims alleging negligent errors or omissions by the 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 also 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 the Architect must pay from its own pocket before the insurance proceeds apply
  - Retroactive date: The earliest date of the Architect’s error or omission for which coverage will apply
  - Premium: The annual payment that the Architect makes to the insurer to “buy” the policy

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## Professional Liability Insurance

- The policy is a “claims made” policy, which means that it covers all claims made within the policy year
  - Since a claim can be made after a project is completed, the insurance only provides protection if it is kept in place essentially constantly
  - 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

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## Professional Liability Insurance

- Claims must be reported promptly
  - To the insurance broker
  - To the carrier
- The lawyer hired by the insurance company to defend the claim owes his duties of loyalty to the 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, the Architect may have two lawyers
    - One looks out for the Architect's interests, while the other looking out for the insurer's interests

# INSURANCE

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## 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 the Architect during the course of the policy year arising out of the Architect's practice
  - An alternative insurance is a "project policy." This insures all professional liability claims against the Architect 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 the 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

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## Commercial General Liability Policies – The Architect

- When purchased by the 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 the Architect’s office
    - The 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



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## Commercial General Liability Policies – The Contractor

- When purchased by the contractor, it is the major source of protection against claims by injured workers or for calamitous property damage
  - The general contractor names the Owner and the Architect as additional insured parties under the insurance
  - This provides important coverage for the Owner, but its coverage for the Architect is illusory
    - When a claim for a construction worker injury or property damage is made against the 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 the 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

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## Automobile Liability Policies

- 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 the Architect and the contractor, purchase these policies and keep them in place essentially constantly

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## 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 the Owner or by the contractor, but the policy names both of them 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 the Architect for having negligently contributed to the problem

# INSURANCE

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## 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 the Architect for having negligently contributed to the problem
  - The insurer is “subrogated” to the Owner's (and possibly the contractor's) rights against the 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
  - The Architect can insure that the builder's risk insurer cannot sue the Architect by being named as an additional insured party under the policy or else by having the Owner (and possibly the contractor) waive their rights of subrogation in their contracts

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## 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 3<sup>rd</sup> 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

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## Certificates of Insurance

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

# QUESTIONS