Understand what a tort is law general essay

Law

after studying this chapter, you should be able to –Describe basic legal liability rules and procedures. Understand what a tort is. Distinguish between criminal acts and torts and define negligence, giving the requirements to support a claim of negligence. Describe negligence and the characteristics of negligence act. Identify and describe the types of damages that may be awarded to an injured party and explain how each is determined. Explain some of the defenses against a claim of negligence. Explain what is meant by vicarious liability. Apply the law of negligence to specific fact situations. Explain special tort liability problems and identify the proposals for change. Distinguish between civil law and criminal law. Intentional TortsAbsolute LiabilityLaw of NegligenceSpecial tort liability problemsCivil justice system

BASIS OF LEGAL LIABILITY

Legal liability is the liability of a party imposed by a court for its actions or omissions for which the courts will award financial damages as a form of compensation. Legal wrong is either a violation of a person's rights or the failure to perform a legal duty for a party. It arises from three general classes of legal wrongs : CrimeBreach of Contract andTort‘ Crime’ is a legal wrong in which a person intentionally inflicts injury or takes something from another, such as murder, robbery, rape, theft and so on and is punishable by fines, imprisonment or death sentence i. e breach of public rights and duties which affects the whole community. The criminal (who commits crime) is punished by the state.‘ Breach of contract’ is the lack of performance by a party to another to satisfy a contract that the parties agreed to.‘ Torts’ comes from a Latin word meaning " twisted" or " turned aside," so a tort is an act that is turned aside from the standard of proper conduct—a wrongful act. Tort is

actually an infringement of the private/ civil rights belonging to individuals. These acts can be either intentional or negligent. Sometimes, even if they are unintentional, the tort liability arises. A punch in the nose, careless driving that causes an accident, defective design of a product that injures a consumer or a fraud are all wrongful acts for which the victim can sue for an award of money damages and the wrongdoer has to compensate the injured party. In simple terms, a conduct that troubles other people or their property is generally known as tort, it may also be a referred to as crime for which the wrongdoer can be sued and damages can be recovered. For example; libel, slander, assault and negligence. The result of a tort is often a ‘ civil lawsuit’. The person who commits the tort is called the ‘ defendant’ or ‘ tortfeasor’ and the person who is injured or harmed by the actions of another person is called the ‘ plaintiff’ or ‘ claimant’ who can sue for damages. Torts are generally classified into three major categories : Intentional Torts; the person causing the harm meant to do so. Absolute or Strict Liability; holds the performer responsible even though he did not mean to harm the victim, and exercised care in trying to avoid the harm. Negligence; involves carelessness. We are mainly concerned here with protection against the financial consequences of civil action arising from only one of these torts, negligence which arises from the omission or commission of an act. Insurance against intentional torts such as false arrest, libel, slander, trespass, battery and assault is also available.

INTENTIONAL TORTS

Intentional torts are those willful acts which harm another purposefully. They include acts with an intention or design, though it is not always necessary

that the consequence be also intended. For example; trespassing into somebody else’s property without permission, assault on the person, false imprisonment or unlawful confinement, defamation of character via libel (oral) and slander (written). Unintentional torts typically involve a failure to act or action in a manner that is not characteristic of a reasonably prudent person under similar circumstances; in other words negligence. There may be several such wrongs for which the firm may be held responsible, such as private nuisance and industrial accidents. Intentional acts may be a battery (assault is the imminent apprehension of a battery) or a slander such as hitting someone knowingly or spreading a malicious, harmful rumor aware that it is untrue. Crime is a specific type of intentional tort that causes physical harm or loss such as murder, rape or theft. Other types of intentional torts include slander and libel, patent infringement and false imprisonment. False imprisonment protects a person’s freedom of movement in the same way that battery protects freedom from bodily invasion, by making it wrongful to restrain a person through force or threats. Harm is not physical injury but the threat that such injury might occur and the line the law must draw is what constitutes a sufficient threat to be legally actionable. Intentional infliction of emotional distress protects emotional security just as battery protects physical security. Extremely outrageous conduct that causes emotional harm such as unwarranted, threatening visits from a bill collector, are actionable. Here the difficulties are defining which conduct is too outrageous and making sure that the tort does not infringe on free speech protected by the Constitution. Business Tort – These are generally referred to the intentional and offensive intervention with the business interests of another (competitor). Some examples of business torts :‘ Unfair

competition’ refers to fraudulent rivalry in trade and commerce. For example; imitating the signs, store fronts, advertisements, name title, size, color scheme, patterns, shape or distinctive peculiarities of the article, or by imitating the shape, color, label, wrapper or general appearance of the package in such as way as to mislead the general public or deceive an unwary purchaser.‘ Product Disparagement’ refers to discrediting a competitor's product. For example; advertisers comparing the quality of two products and trying to defame the competitor’s product or making a false statement about a product that huts its maker.‘ Wrongful Interference’ refers to wrongful interference in a business relationship with a person’s contract or with his right to earn a living. For example; making the employee appear undesirable to the employer or giving negative reviews of the employee's work performance to the management.‘ Wrongful Discharge’ refers to a situation when the employer terminates the contract of employment of an employee at any time without stipulating any valid reason in circumstances where the termination breaches one or more terms of the contract of employment. In these circumstances, the employees adopt ‘ whistle-blower’ route as their defense and protects themselves against illegal conduct of the organization. There are a number of defenses to intentional torts, the most common of which is consent. A victim consents to a contact. For example; no battery has been committed. Issues arise in determining whether consent has been manifested and what is the scope of the consent. Silent acquiescence can, but does not always, indicate consent, particularly in ambiguous settings such as sexual contact. Consent to a degree of bodily invasion is not consent to any bodily invasion. For example; in a sports contest, the participants have consented to a certain degree of violence,

perhaps even violence that violates the rules of the game, but not to conduct far outside the scope of the contest.

ABSOLUTE LIABILITY

Absolute liability is sometimes also called as strict liability. It is a type of liability which refers to the legal accountability of a person for causing damages/ injury, even if he/ she was not at fault or negligent i. e. one is considered liable regardless of fault. For example; holding an employer absolutely liable for the torts of his/ her employees. Now-a-days strict liability is most commonly associated with defectively manufactured products. There is a marginal difference between absolute and strict liability. In case of absolute liability, offences do not require evidence but once it is proved that the offence has happened then the defendant will be completely liable. For example; not obeying traffic rules like failure to stop at a red light, over speeding etc. even if that does not caused an accident, is considered an absolute liability offense. Similar to absolute liability, in the case of strict liability as well, offences do not require evidence but the burden of proof is placed on the defendant where he can use different defense techniques. First, ‘ due diligence’ defense i. e. he should prove that he took every possible precaution to prevent the offence from happening. For example; if the driver is driving with a broken rear light, he can prove that it was working when they started with the trip. This method of defense will be neither easily determined nor easily disputed. Some more examples of strict liability include driving while suspended, without insurance or careless driving, not wearing a seatbelt etc. Secondly, the’ defense of necessity’ can also be used by the defendant. For example; in case of speeding, proving that he was

driving so but he had no intentions to drive faster than permitted, the offense was committed to avoid immediate risk or hazard; the harm caused by the defendant was less than the harm avoided and no other reasonable alternative was available. This is to be noted that absolute liability is either not covered by the insurance companies or at the least very limited coverage is provided. This is so because absolute liability is usually associated with extremely hazardous situations or activities. For example; keeping a dangerous animal as a pet. In this case even if the pet gets wild by teasing or mistreating then also the owner would be held absolutely liable and the insurance companies would not cover any liability associated with the dangerous pet. In case of pets, either domesticated or wild, strict liability usually applies for damages caused by animals. Those who keep pets have a duty to restrain them because the animals possess great capacity to do mischief as they are not governed by any principles or ethics. In most jurisdictions, the rule is that the animal (including domestic) keepers, are strictly liable for damages resulting from the trespassing of their animals on the property of another. Exception to this rule is; owners of dogs and cats are not liable for trespassing of their pets unless they have been negligent enough or any strict liability is imposed by statute or ordinance. However, if the keeper knows that the domestic animals which include dogs, cats, cattle, sheep and horses has a particular trait or the propensity that can cause the harm, then he/ she is strictly liable for the same. The law distinguishes between domesticated and wild animals where the keepers of wild animals are strictly liable for the harm these pets cause if they escape, whether or not the animal in question is known to be dangerous. The wild animals are known to revert to their natural tendencies, no matter how well trained or

domesticated. Let us see one more example of absolute liability. Insurance Companies generally provide limited liability coverage to pool owners. This is because maximum number of times, if someone is sued due to an accident in their pool, the pool owner usually carries most of the blame just because the law considers one who owns a pool is inherently liable. Let’s say, if someone is using the pool without the owner’s permission and gets hurt, the owner still could carry a lot of the liability for this accident. Therefore, the insurance company knows that a pool owner could potentially cause the insurer to pay out comparatively large amount of money than a non-pool owner. Hence, we have seen that absolute liability deals with dangerous situations and activities, therefore, more the risky situation for the insurance company, higher will be the premium charged from the insured. However, certain things can be done by the insureds to limit their absolute liability exposure like extra precautions to be taken for the things which are exposed to high risk. For example; dangerous pets (using special cages), owning a pool (putting a double fence), unlocked firearms (keeping it locked), storing explosives (locked storage area). Now the insured can try if the insurance company agrees to reduce the premium but a suggestion falls that even if the insurer doesn’t agrees to reduce the premium then also its always better to be extra cautious in case of absolute liability.

LAW OF NEGLIGENCE

Before going into the details of law of negligence, let us understand first the term negligence. Negligence means if the injury or damage was unintentional, then the wrong is called an unintentional tort. It is a tort which arises when one party fails to exercise due care, causing another to be

injured. Negligent torts are generally not criminal, since they are actions or omissions that result in harm, but causing harm was not the actor’s intent. Harm, however, was the result. In the case of either an intentional tort or a negligent tort, the proper manner to seek a remedy is through a civil lawsuit for monetary damages. Negligence is

failure to exercise the degree of care expected of a person of ordinary prudence in like

circumstances in protecting others from aforeseeable and unreasonable risk of harm in a particular situation. Not only are people responsible for the intentional harm they cause (called intentional torts), but their failure to act as a reasonable person would be expected to act in similar circumstances (i. e. " negligence") will also give rise to damages. Everyone has an ongoing duty to conduct themselves and manage things under their control, with care as towards other persons. Everybody has a duty to ensure that their actions do not cause harm to others. Negligence is very important actionable tort in liability insurance; hence, it demands special attention. Now, let us understand the Law of Negligence at length. Originally, negligence was recognized by the courts as part of the common law. Over time, as causes of action became more numerous and as damages became larger, various efforts were undertaken to limit the appeal of negligence lawsuits. Generally, the term negligence means when a person fails to use ordinary care either through an act or an omission. It occurs when a person : does not take adequate amount of care that a reasonable ordinary person would do. does something which a reasonable ordinary person would not do in similar circumstances. Now, negligence is assessed against an objective standard and the law looks at having regards to the circumstances and to the ‘

standard of care’ which would reasonably be expected of a reasonable person in similar circumstances. Here, the term ‘ standard of care’ is the degree of prudence and caution required of an individual who is under a duty of care. Your actions are then compared with the actions of a reasonably prudent person under the same circumstances. If a person found guilty of negligence or his conduct and behavior are below the standard of care required of a reasonably prudent person, he need to have breached the standard of care owed by him to others, therefore, he may be found negligent.

The standard of care required by law is not the same for each wrongful act. Its meaning is complex and depends on the age and knowledge of the parties involved; court interpretations over time; skill knowledge and the judgment of the claimant and tortfeasor; seriousness of the harm and a host of additional factors.

Elements of Negligent Act

Negligence is the failure to exercise the degree of care required by law. What is required by law is understood to be the conduct that a reasonably prudent individual would exercise to prevent harm. " Negligence" is not the same as " carelessness", since a person might employ as much care as they are capable of yet still fall below society’s standards. It is possible that someone is very careful about their conduct and yet harm occurs. For someone to be found guilty of a crime, the prosecutor must prove all elements of the criminal activity to the satisfaction of the court. For a defendant in a lawsuit to be awarded damages based upon negligence, the plaintiff must prove all elements of negligence. These elements are :

Existence of a Legal DutyBreach of Legal DutyInjury, Harm or Damage to the PlaintiffProximate Cause RelationshipThe above mentioned elements make a typical formula for evaluating negligence which requires that a plaintiff must prove them as the " predominance of the evidence". The formula runs like that; the defendant has certain amount of legal duty to the general public (the plaintiff) and he violates that duty (breach) due to which the plaintiff suffered an injury, so it is but obvious that due to the defendant’s breach of duty, the plaintiff suffered harm. For example; if a driver over speeds and crosses a red light (breach of duty), which resulted in an accident and public on road got hurt. Hence, the driver will be liable for negligence. Now, let us understand these elements in detail.

Existence of a Legal duty

A duty of care is the obligation to avoid careless actions that could cause harm to one or more persons. The presence of a legal duty of care rule must be satisfied - this duty is imposed by law and is determined by the behavior and care for others that a reasonably prudent individual is expected to have. For example; a property owner owes the greatest degree of care to the people who are on his premises with his permission and for his benefit. However, a trespasser gets hurt while moving in owner’s property. The trespassers stand little chance of getting compensation for their injury since they have walked into another person's property uninvited. Plenty of examples we see all around towards the performance of duty; may it be product liability or medical malpractice. For example; an FMCG manufacturer has the responsibility to take adequate care that the product does not harms on usage or in service industry like, civil engineer has the legal duty towards

the normal public while constructing the bridges. For example; due to negligence of duty, 23 people were injured due to collapse of footbridge near the Commonwealth Games Stadium in Delhi in 2010. Similarly, a doctor has legal duty not to cheat his patients.

Breach of Legal duty

Once it has been recognized that the duty existed, then, it must be determined whether that duty was in any case breached. A duty has been said to be breached when a defendant has knowingly exposed another to severe damage. As in the case of a civil engineer (see above, existence of a legal duty) who was aware of his fraud while making the bridge, put the lives of innocent public in danger. While construction of the bridge he did not realize that he was exposing others to harm, whereby in this circumstance a normal reasonable man could have foresighted the danger. Later the public allegated him and charged for failing to provide the adequate ‘ standard of care’. The standard of care is a means of measuring as to how much care one persons owes to another ? For some people the standard of care is higher than others. In case of doctors, they owe higher standard of care towards their patients in comparison to others. Let us take a live case of a pregnant woman who died due to medical negligence of two doctors in Andhra Pradesh. Finally, the apex consumer commission asked them to pay a compensation of Rs. 5. 5. lacs to the victim's husband and her three minor children. Breach of duty is not only limited to professionals, manufacturers or the service companies persons under any written or oral contract, instead, all the members of society have a legal duty to exercise reasonable care towards others and their property.

Injury, Harm or Damage to the Plaintiff

The next step in a negligence case, after establishment and breach of that duty is that the plaintiff must express a loss or injury to recover. For example; refer the case of a pregnant woman above, where the doctors had to pay the compensation for their breach of duty. Loss can be in terms of physical injury, emotional distress or damage to the plaintiff's property. The end result is compensation either it can be in the form of payment of medical bills, repair bills, cost of replacement of property, loss of income from missed employment or acknowledgment as to the pain and suffering caused to the plaintiff by the defendant. However, it is notable precondition here is that, if the defendant is ready to accept his negligence, but, the plaintiff has not suffered any injury or loss, then the defendant will not be liable.

Proximate Cause Relationship

The last and most interesting element in the negligence case is that even after the existence and breach of duty and even if the plaintiff is suffering from injury, until the source of damage is not identified in reality there will be no compensation to the loss. The plaintiff in any case must prove that the defendant's act or omission were the cause of the plaintiff's injuries. After determining the cause of the loss which is known as ' cause-in-fact' or ' proximate cause', is often done by applying the ' but-for test'. The plaintiff has to prove that an injury would not have happened but for the defendant's actions. Let us see the case of a negligent driver. Indian Express on June 29, 2012 reported that a 12-year-old boy named Tayyani was getting into the school bus in Andheri (West) to return home. He rushed towards the school bus when he was pushed by another student and fell down. As he was

getting up, the bus started and his bag got caught in the rear wheel. Before the boy could pull his bag, the bus had dragged him for a few metres and his limbs had got crushed under the rear wheel. The D N Nagar police arrested the driver for causing death due to his negligence where it was proved that the student would not have died ‘ but for’ the driver had not behaved negligently. Therefore, this negligence was the cause-in-fact of the big loss to Tayyani’s parents and loved ones. However, there is a difference between legal causation (for which there is liability) and factual causation (for which there may not be any liability). An act may sometimes cause injury to a plaintiff, but, it was not reasonably anticipated that the plaintiff would be injured. Also sometimes when an act sets off a chain of events that ultimately injures the plaintiff, but, the plaintiff is very far removed from the original act, the act is the factual cause and not the legal cause needed to impose liability on the defendant.

CASE APPLICATION

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http://www. thelockeinstitute. org/journals/tortliability8. htmlThe proximate cause doctrine was discussed in the Negligence section of this Commentary. To illustrate the impact of the proximate cause doctrine when combined with contributory negligence, it is useful to turn to the modern case of Gyerman v. U. S. Lines Co., (1972). In this California case, the plaintiff was a longshoreman working in a warehouse to break down sacks of fishmeal. Fishmeal was a difficult cargo to maneuver, and it was standard practices to stack the bags in a special manner and tie them in. In this instance, the bags were not stacked correctly. A longshoreman is supposed to report unsafe

conditions to his supervisor and to stop working immediately. Although complaints were made to the warehouse manager, who worked independently from the longshoreman, the facts are disputed as to any complaints made to the supervisor. After three days the longshoreman was involved in an accident. The court held that the defendant had not met the burden of proving that the plaintiff's contributory negligence was the proximate cause of his injuries. The record did not establish that failure to report the dangerous condition was a substantial factor in bringing about the fall of the sacks. Indeed, the court speculated that it was not possible to break the stacks into safer lots. The judges believed that all factors should be taken into account when deciding due care standards. These factors included such vague concerns as one: the longshoreman might have felt powerless just to stop working through fear of danger. Two, the longshoreman was unsure who to complain to about the conditions of the warehouse, and three: the longshoreman may have felt baffled by the obligation to make a determination of imminent harm. These paternalistic concerns influenced the court in the longshoreman's favor despite the fact that the custom was to report hazards to one's own supervisor and to continue work only after permission was received, and that this standard of care was part of the union's collective bargaining agreement.

DEFENSES TO NEGLIGENCE LIABILITY

Even if the plaintiff has sued the defendant for breach of duty and has proved the proximate cause, certain defenses can still be raised by the defendant that can help him in reducing or eliminating his liability. These defense techniques include : Contributory NegligenceComparative

NegligenceLast clear chance RuleAssumption of RiskContributory Negligence – In this type of defense technique the defendant can prove his negligence by providing an evidence which shows that he had taken adequate ‘ standard of care’ and his actions did not contributed to the plaintiff’s damage. Additionally, the defendant may be able to prove that the plaintiff has contributed to his own injury. If both parties are to blame in a given accident, each is guilty of contributory negligence and may not collect against the other, even if the defendant was 90 percent to blame and the plaintiff was only 10 percent to blame. For example; the driver of a car ‘ A’ negligently enters the one way of the road and the driver of car ‘ B’ is coming from the same side with excessive speed, which has resulted in the collision. Thus, both driver’s negligence contributed to the accident. The collision could have been avoided if the driver of car ‘ B’ was driving at the slow speed. Hence, under this contributory technique no one is liable to claim damages from the other party. Comparative Negligence – In this type of defense technique if more than one negligent party is found at fault, the liability amongst them will be distributed according to the evidence percentage of their faults. The liability of defendant is reduced by the extent to which the plaintiff was contributively negligent. If the plaintiff was 20 percent negligent, the defendant is liable for only 80 percent of the plaintiff’s damages. For example; in a car accident, the plaintiff is bodily injured and is demanding Rs. 50, 000 as compensation. The court after listening to both the parties and looking at the evidences comes to a conclusion that the plaintiff was 20 percent responsible and then the defendant will be liable to only Rs. 40000 of damages. However, in some states, the plaintiff recovers nothing if he or she is more than 50 percent at fault.

Exhibit 1 : Contributory Negligence vs. Comparative Negligence

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http://www. the-injury-lawyer-directory. com/negligence. html

When a claim for damages caused by an accident is filed with a court, the fact-finder (judge or jury, depending on the proceeding) must determine who caused the accident. The person whose negligence caused the accident typically pays for the resulting damage. If more than one person caused the damage, then negligence is distributed between the parties based on state apportionment laws. The fact-finder may determine that actions of the defendant, the plaintiff, or both, caused the accident. Based on the evidence submitted, the judge or jury will then allocate the amount or percentage that each party was negligent. Depending on the jurisdiction, this allocation will directly impact the damages awarded. Throughout the United States, there are four systems used in establishing damage awards: pure contributory negligence, pure comparative negligence, modified comparative negligence – 50% bar rule, and modified comparative negligence – 51% bar rule.

Contributory Negligence

Historically, contributory negligence was a common law defense available in tort actions. In the past, if two people were in an accident, the injured person could only recover for his/her injuries and damages if they did not contribute to the accident in any way. This approach was based on a policy originally established in England that stated a person who negligently causes harm to another cannot be held liable if that injured individual contributed to his own

suffering and injury, even if it was only a very slight factor. For example, if Dave and Debbie were in an accident where Jane was injured, and Jane was only 5% at fault, she would recover nothing. This method of calculating damages is still followed in states with a pure contributory negligence system. In light of the potentially harsh result, most states have moved from the strict nature of a pure contributory negligence system to some form of a comparative negligence system. Currently, only five (5) states, including the District of Columbia, follow the pure contributory negligence rule.

Comparative Negligence

In a comparative negligence system, the injured party may still recover some of his or her damages even if he or she was partially to blame for causing the accident. Plaintiff's financial recovery may be reduced, or even prohibited, depending how plaintiff's actions caused or contributed to the accident. In states using a comparative negligence system, a jury or judge determines the proportion of fault to be assigned to each responsible party. Jurisdictions following a comparative negligence system will typically apportion the damages using one of three variations of comparative negligence: pure comparative negligence, modified comparative negligence – 51% rule, or modified comparative negligence – 50% rule. Presently, thirteen (13) states follow a pure comparative negligence system: Alaska, Arizona, California, Florida, Kentucky, Louisiana, Mississippi, Missouri, New Mexico, New York, Rhode Island, South Dakota, and Washington. In a pure comparative negligence system, a judge or jury assigns a percentage of fault to each responsible party and then apportions the damage award accordingly. Using this system, an injured person may recover his or her damages even if the

injured person was 99% at fault in causing the injury, with those damages reduced by his or her portion of the fault. For example, in a car accident between Dave and Debbie where Debbie was found to be 99% responsible, and the jury found that Debbie suffered $10, 000 in damages, that award would be reduced by Debbie's 99% fault in causing the injury. In the end, Dave would only have to pay 1% of Debbie's damages, or $100 in this case. Thirty-three (33) states follow a modified comparative fault system. Similar to a pure comparative negligence system, a judge or jury assigns a percentage of fault to each responsible party and then apportions the damage award accordingly. From that point, depending on how the system is applied, if a plaintiff's apportioned fault reaches a particular level, he or she may be completely prohibited from recovering a damage award. Of the thirty-three states following a modified comparative fault system, twelve (12) states follow a 50% rule. In states following a modified comparative fault – 50% rule, an injured party can only recover if it is determined that his or her fault in causing the injury is 49% or less. If the injured party's fault level reaches 50%, he or she cannot recover any damages resulting from the accident. Arkansas, Colorado, Georgia, Idaho, Kansas, Maine, Nebraska, North Dakota, Oklahoma, Tennessee, Utah, and West Virginia follow the 50% rule. Of the thirty-three states following a modified comparative fault system, the remaining twenty-one (21) states follow a 51% rule. In states following a modified comparative fault – 51% rule, an injured party can only recover if it is determined that his or her fault does not reach 51%. If the injured party was 50% or less at fault, he or she may still recover damages. In other words, a plaintiff may have caused half of the accident and still recover damages from the court, but if it is found that the plaintiff's fault was

responsible for more than half of the accident, that plaintiff is barred from receiving any damages determined by the court. Here, as in a pure comparative negligence state, a plaintiff’s recovery is reduced by the degree of his or her fault. Connecticut, Delaware, Hawaii, Illinois, Indiana, Iowa, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Jersey, Ohio, Oregon, Pennsylvania, South Carolina, Texas, Vermont, Wisconsin, and Wyoming follow the 51% rule. Remember that many exceptions to the standard negligence systems are present in several states. Additionally, some states limit the types of cases to which these negligence systems may apply. The information present in this article and following table should only be used as a guide. Specific questions should be directed to a qualified attorney licensed in your state. Nothing in this summary should be construed as legal advice. Last Clear Chance Rule - the last clear chance rule is a possible defense against the contributory negligence rule. Under the technique of defense, the plaintiff whose actions contributed to an accident may still succeed in his claim against the defendant if he can prove that even though he might have been negligent by putting himself in a position of danger, the defendant was aware of the situation and failed to take steps to avoid the accident. For example; The required elements of this defense are : The plaintiff negligently placed himself in danger. The plaintiff is then physically unable to get himself out of the position of danger. The defendant knows that the plaintiff is in a position of danger. The defendant knows or should know that the plaintiff cannot get himself out of the position of danger. The defendant has the last clear chance to take reasonable action to avoid the accident, yet fails to do so.

CASE APPLICATION

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The courts developed several theories to try to soften the impact of the contributory negligence rule. The Mississippi case of Fuller v. Illinois Central R. R., (1911) is an example of the last clear chance doctrine. In this case the plaintiff used a dirt track which crossed a railway line to get to his home. At the time of the accident the train was half an hour late, and so was running much faster than usual. The train gave its usual signal nine hundred feet from the crossing that alerted the train station further down the track of its imminent arrival. Almost immediately afterwards, the plaintiff, over seventy years old, began to cross the tracks in his horse and cart. He had looked neither left nor right and was killed instantly. Although the court believed the plaintiff was contributorily negligent, it found for the plaintiff. The court believed that the circumstances of the case showed the defendant acted in a willful, wanton, reckless manner with gross misconduct. If the defendant had exercised reasonable care and prudence, the railroad could have avoided the accident. The defendants had the last clear chance to avoid the accident but did not act upon it. The last clear chance doctrine was examined again in Kumkumian v. City of New York, (1953) when a man was killed on the New York subway railroad tracks. Kumkumian walked into a restricted access tunnel and was lying on the railroad tracks when a train hit him. The train came to an emergency stop. The driver reset the brakes and started off again. This procedure was repeated again. After the third stop, the driver

and conductor inspected the tracks and found Kumkumian's body. The evidence showed that if they had inspected underneath the train earlier, Kumkumian would have lived. Despite Kumkumian's contributory negligence in walking down the tunnel and lying on the train tracks, the doctrine of last clear chance applied. The motorman and conductor were negligent in twice disregarding the emergency equipment. The court reasoned that the defendant does not need to have precise knowledge of an impending danger. If there is proof to support an inference that someone is in peril then the defendant should act upon that inference. The conductor and driver had sufficient experience to understand the implications of the activation of the automatic brake system but they did not take the precautions of a reasonable man. This indifference to life constituted negligence that negated the effect of Kumkumian's initial act of contributory negligence. Assumption of Risk – Under this defense technique, the defendant can escape from the liability raised by the plaintiff for his negligence by establishing the fact that the plaintiff voluntarily agreed to accept the danger created by the defendant's negligence which was known to him/ her beforehand. Assumption of risk can be of two types : Express Assumption of Risk andImplied Assumption of Risk‘ Express assumption of risk’ specifies that the plaintiff agrees in advance that he is agreeing to assume the risk of the defendant’s negligence. For example; for skydiving at haridwar, a skier purchases a ticket and expressly agrees to assume the risk of any injury that might occur while skiing. The authorities negligently fail to mark a hazard on a trail resulting in an injury to a skier. Here, the skydiving authorities may invoke the express assumption of risk defense against the suit filed by the skier.‘ Implied assumption of risk’ is very similar to contributory negligence

where the defendant’s conduct of negligence is very much clear and is seen in advance by the plaintiff and thereby agrees voluntarily to accept the risk with a full understanding of the possible harm to himself. For example; the tourist agrees to take the old boat with a small hole at its keel for boating at Sukhna Lake, Chandigarh. As a result the boat started sinking in the mid of the lake resulting into drowning of the tourist who eventually did not know swimming and died. Here, the boater who is the defendant can raise the implied assumption of risk defense. This defense looks similar to the contributory negligence defense where the defendant can also argue that the plaintiff (tourist) was contributorily negligent for using the old boat when he knew the boat had a small hole at the keel. As the implied assumption of risk defense is very similar to contributory negligence, it always creates confusion amongst people and the courts as to whose negligence resulted into a loss, as a result this defense has diminished its importance.

IMPUTED NEGLIGENCE

In certain situations, you may be held liable for an injury even if you are not directly at fault. Liability for a negligent act may be imputed from another person. Thus, you may be held liable not only for your own act but also for the negligent acts of others. Imputed negligence means that the law will hold you responsible for the negligence of someone else. Under certain conditions, the negligence of one person can be attributed to another. Several examples can illustrate this principle : Employer-employee relationship; a negligent act by an employee, conducted in the scope of his employment, will be imputed to the employer. For example; if you ask your secretary to pick up some sandwiches for lunch, she is acting within the

scope of her employment when she drives to the shop. If she is at fault in an automobile accident, her negligence is imputed to you. You are responsible for the damages caused by her acts. Vicarious liability; which is a ‘ legal law’ under which the liability for the negligence of another can rest on a contract to assume that liability like a motorist’s negligence is imputed to the vehicle’s owner. For example; Mr. John has taken the car of Mr. Smith for a day as both are friends. If while driving the car, Mr. John meets with an accident and injures somebody, Mr. Smith will be legally liable for the same. Legal relationships that can lead to imputed negligence include the relationship between : parent and child, husband and wife, owner of a vehicle & driver andemployer and employee. Else otherwise, the independent negligence of one person is not imputable to another person. Under the family purpose doctrine, the owner of an auto can be held liable for negligent acts committed by immediate family members. For example; Richa aged 16, negligently injures another motorist while driving her father’s car and is sued for Rs. 50, 000, her father could be held liable. Imputed negligence may arise out of a joint business venture also. For example; two sisters may be partners in a textile business. One sister may negligently injure a customer with a company vehicle, and the injured customer sues for damages. Both partners could be held liable for the injury. Under a dram shop law, a business that sells liquor can be held liable for damages that may result from the sale of liquor. For example; if a bar owner continues to serve a customer who is drunk and if after the bar closes, the drunken customer injures two people while driving back home. The bar owner could be held legally liable for the injuries.

RES IPSA LOQUITUR

An important modification of the law of negligence is the doctrine of res ipsa loquitur, meaning " the thing speaks for itself", refers to situations when it's assumed that a person's injury was caused by the negligent action of another party because the accident was the sort that wouldn't occur unless someone was negligent. Res Ipsa Loquitur is the name of a doctrine that permits a trier of fact to infer the existence of negligence in the absence of direct evidence of negligence.

Necessary Conditions for Application - To apply the doctrine of res ipsa loquitur, the following requirements must be met :

The event is one that normally does not occur in the absence of negligence.

The defendant has exclusive control over the instrumentality causing the accident. The injured a not contributed to the accident in any way.

Presumption of Negligence - If the foregoing circumstances are established, the trier of fact must find from the happening of the accident or incident involved that a cause of the occurrence was some negligent conduct on the part of the defendant.

As may be guessed, this doctrine has been used frequently in aircraft and medical malpractice liability cases.

TYPES OF LIABILITY EXPOSURES OF THE LAW OF NEGLIGENCE

Risk managers, must be concerned with numerous types of liability exposures. These exposures arise out of different functions performed and standards of care required of persons or organizations. The specific

applications of law of negligence include : Ownership of PropertyOwnership and Operation of AutomobilesGovernment LiabilityCharitable InstitutionsEmployer and Employee RelationshipsParents and ChildrenAnimalsOwnership of Property – In situations that involve the use of real property, the tenant or owner owes a certain degree of care to those who enter the premises. Common law recognizes three classes of individuals who enter the premises; invitees, licensees and trespasser. Invitees – are individuals who are invited on the premises for their own benefit as well as for that of landlord or tenant. They can be public invitees (called for meeting), business visitors (customers in retail stores) or social guests (marriage party). Just to warn the invitee for social dangers is not enough, positive steps have to be taken to protect them. Licensees – are those who are on the premises for a legitimate purpose with the permission of the occupier. For example; milk delivery men, messengers, meter readers, plumbers, electricians, door-to-door salesperson and fire fighters. The duty of a landowner is to warn the licensee of danger and to refrain from causing deliberate harm or willful misconduct. Trespassers - are those who intentionally enter another’s property without the landowner’s consent. The landowner has no liability for any injury caused to the trespasser but he should not deliberately harm the trespasser. If the trespasser is injured by some unknown, hidden hazard, the landlord or tenant is not liable. Exception to this rule is ‘ Attractive Nuisance Doctrine’; which says that a different rule applies where trespassing children are involved. The children who wander and enter into a property without authorization, the landowners have a duty to exercise ordinary care to avoid reasonably anticipated risk from harm to these children. For example; a contractor of a building during construction on

the site leaves the keys in his car and a child gets injured while he entered the car and tried to drive it. For children this exception of trespassing has been made because they are unaware of this trespassing logic and also are unaware of the unseen dangers onto the property to which they are entering. Therefore, the first and foremost duty of the property owner is to inspect his/ her property and find out all those dangerous places and things which might attract the children’s attention which can harm them. Secondly, act immediately to correct the unsafe condition for children. Ownership and Operation of Automobiles - Under the common law, an automobile owner or operator is required to exercise reasonable care in the handling of the automobiles. Three situations may be distinguished in this important area of negligence : Liability of the operator; in the field of automobile industry, the common damage suit is one that charges the operator with carelessness that is the proximate cause of either bodily injury or property damage to an injured third party. As in the other areas of liability, it is impossible to lay down a single rule of law statement as to what constitutes negligence in the operation of an automobile. The legal liability has been modified overtime by court decisions, comparative negligence laws, the last clear chance rule (explained as above) and a host of additional factors. Liability of the owner for the negligence of others operating the automobile; as the courts have agreed that the automobile is not the " dangerous instrumentality" in itself and one is justified in assuming that the borrower of an automobile is competent to handle it, unless, there is obvious evidence of incapacity or known recklessness, the owner of the automobile if not held liable. However, several exceptions to this general rule that an owner is not liable for the acts of operators of automobiles. In many states, vicarious liability laws have the

effect of making the parent of a minor child liable for damage done by negligent operation of the car by a minor. An agency relationship in establishing liability of an owner for negligence of an operator. For example; if your friend drives your car for a business duty for you and injures someone, you can be held liable. Under family purpose doctrine, the owner of an automobile can be held liable for the negligent operation of the vehicle by an immediate family member because this member is actually the agent of the family head and is carrying out a family function. Liability of employers for the negligence of their servants or agents using automobiles in their employer's business, even when the employer is not the owner; those who do not own automobiles may be liable for damages through their negligent operation if by some legal construction the non-owner can be shown to be responsible. The legal construction normally employed is respondeat superior (let the master answer/ let the superior respond). The employer is liable for the negligent actions of employees whether their acts are in or out of an automobile. The ownership of the automobile is immaterial in such cases. However, the laws in all states clearly require the owner of an automobile to exercise ' reasonable care' while handling the automobiles to others for operating. Government Liability - The question arises whether the government liable for anybody's personal injury ? The statement supports the doctrine of ' sovereign immunity' which says ' King can do no wrong', the concept originated from English common law. For example; in the United States, an individual is not allowed to sue any government body, based on the grounds of personal injury, without the permission of the government, unless the government employee was negligent in causing that injury. This doctrine, however, has been

significantly modified over time by both statutory law and court decisions for governmental and proprietary functions. ‘ Proprietary function’ is one that a private entity can perform and is not uniquely for the benefit of the general public like operation of water plants, electrical, transportation and telephone systems, municipal auditoriums and similar money-making activities. ‘ Governmental function’ includes services that only the government does, such as restaurant inspection, planning of a sewer system, animal control, health and safety permits & licenses, sanitation, vital statistics and related functions. A governmental unit can be held liable if it is negligent in the performance of proprietary functions. For particularly governmental functions immunity from lawsuits has also been eroded. Today, governmental entities can be sued in almost every aspect of governmental activity, including false arrest, failure to meet certain standards of care and failure to arrest. Charitable Institutions - Charitable institutions are non-profit organizations which are designated as nonprofit when created and may only pursue purposes permitted by statutes for non-profit organizations. These include churches, public schools, public charities, public clinics and hospitals, political organizations, legal aid societies, volunteer services organizations, labor unions, professional associations, research institutes, museums and some governmental agencies. The tort liabilities of the charitable hospitals are imposed to the same as to the private hospitals whereby the doctors and nurses are liable for their negligence of duties (the rule is however different from the past when the doctors and nurses were not held liable). The Indian Express on Sept 29th 2012 reported a twin-infant death case in Banga (nawanshahr) due to negligence of the doctors at the hospital (private) of Dr. Javed Alam. The two male children were declared dead at the time of their

birth, but one was found alive in the mortuary (Guru Nanak Mission Hospital, Dhahan Kaleran-charitable hospital) after spending for the whole night (10 hrs) at nearly zero temperatures. The infant later died despite desperate efforts of three hours at the Mission Hospital. The community was shocked over the attitude of staff members of the hospital for not checking the infants before sending them to the mortuary. Employer and Employee Relationships - An employer can be held liable for the negligent acts of employees while they are acting on the employer's behalf. For example; a departmental store person while showing some heavy items to the customer, drops those items on the customer's feet and the leg is broken, the employer will be held liable. Employers are still subject to the law of negligence with respect to employment not covered by worker's compensation laws. In fact, workers compensation laws do not cover all classes of employees. For example; farm workers and employees of a firm that hires less than a specified number of people are often exclude from coverage. Railroad employees and sailors are also exempt from workers' compensation laws. For an employer to be held liable for the negligent acts of employees, two requirements must be fulfilled : Worker's legal status must be of an employee. Employee must be acting within the scope of employment when the negligent act occurs. The duties owed by an employer to employees, breach of which may give rise to liability, are the following : The employer must provide a safe place to work. The employer must employ individuals reasonably competent to carry out their tasks. The employer must warn of danger. He employer must furnish appropriate and safe tools. The employer must set up and enforce proper rules of conduct of employees, as they relate to safe working procedures. For example; if a garage provides a jack to raise

automobiles but does not take steps to see that it is in good working condition and the employee using the jack is injured because the jack breaks, employer will be held liable for breach of common-law duty to the employee. Parents and Children - Parental liability is the term used to refer to a parent's obligation to pay for damage done by negligent, intentional or criminal acts of that parent's child. In most states, parents are responsible for all malicious or willful property damage done by their children. Parental liability usually ends when the child reaches the ‘ age of majority’ and does not begin until the child reaches an age of between eight and ten. Laws vary from state to state regarding the monetary thresholds on damages collected, the age limit of the child, and the inclusion of ‘ personal injury’ in the tort claim. Under the common law, it is generally agreed that the mere relation of parent and child imposes upon the parent no liability for the torts of the child, whether or not the child is living in the same house with the parents is generally regarded as immaterial. But, the parent in these cases thereby becomes liable only where he is accountable according to some general principle of tort. Numerous exceptions to the doctrine of no parental liability have developed : A parent can be held liable if a child uses a dangerous weapon, such as a gun or knife, to injure some. The cases may, with some justification, be divided into two types: Where the parent has instructed the child with an instrument, which is either dangerous per se, or which the parent should have reason to know will be used dangerously by the child ; When the parent has failed to exercise reasonable diligence to restrain the child, despite knowledge of the child's vicious or violent conduct. For example; if an 8 years old child is permitted to play with knife and someone is injured or killed. The parents can be held responsible. The parent can be

held liable if the child is acting as an agent for the parent. For example; is the children are involved in the family business, the parents can be held liable for any injury to a customer caused by the child’s actions. Under the " family purpose doctrine," parents in some jurisdictions have can be held liable for torts committed by their minor children. For example; is a family car is operated by a minor child. As per most state laws, parents are liable for willful and malicious acts of children that result in property damage to others. For example; if the child willfully damages property or commits acts which would be considered theft. Animals – explained above in absolute negligence. As per ‘ The Scienter Rule’(The term scienter refers to a state of mind often required to hold a person legally accountable for his/her acts);

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http://www. lexuniverse. com/torts/india/Liabilities-For-Animals-and-Tresspass-to-Land. htmlMischievous animals; must be kept secured by their controller from doing damage. Mischievous animals are categorised as :‘ Ferae naturae’ (animals dangerous by nature). In the words of justice devlin, " a person who keeps an animal with knowledge of its tendency to do harm is strictly liable for damage that it does if it escapes. He is under an absolute duty to confine or control it so that it shall not do injury to others." In order to make the defendant liable by any act done by an animal ‘ mansuetae nature’ (animals harmless in nature) it has to be proved that the animal had a ferocious tendency, which is not usual to animals of that particular species, and the defendant also had the knowledge of such ferocity. Liability for cattle trespass; The cause of action in case of cattle trespass arises when cattle (it may be cow, bull, sheep, horse, pig, donkey, goat, poultry) belonging to the

defendant are either intentionally driven or stray into the plaintiff’s land. The owner of an animal is duty bound to take care that such animal does not stray into other person’s land and the owner is thus liable for any trespass committed by that animal. The liability for cattle trespass is strict and hence negligence on part of the owner is not required to be proved. Other liabilities; Activities of animals can lead to other liabilities as well. The owner of an animal may invite legal responsibility for the tort of nuisance if he keeps the animal in such a manner that it unreasonably interferes with his neighbor’s enjoyment of his property. The occupier of premises may be liable if injury is caused to a legal entrant by the occupier's dog and liability may also arise in cases where the stench of animals creates nuisance for the plaintiff. A tort of negligence may arise in the absence of proper control of animals on the highway.

SPECIAL TORT LIABILITY PROBLEMS

Certain tort liability problems have emerged that create serious problems for risk managers, business firms, physicians and liability insurers. Tort law in India is a comparatively new in terms of common law development where some additions and modifications have been pronounced which include principles governing damages. While India generally follows the United Kingdom (UK) approach, there are certain differences which create controversy mainly in lines of judicial activism.

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http://www. policyalmanac. org/economic/archive/tort_liability. shtml

Many controversies and policy issues surround the U. S. tort system, which holds parties liable for injuries to people or property. Critics charge that the system is costly and inefficient, arbitrary and open to abuse, and indirectly harmful through its adverse effects on economic vitality and consumers' choices. In contrast, defenders argue that the tort system serves important social objectives, such as compensating injury victims, improving product safety, and punishing egregious behavior. Several bills now before the Congress propose to change the rules that govern tort claims for medical malpractice and asbestos exposure and claims litigated as class actions.

The Economics of US Tort Liability

A " tort" is an injury to someone's person, reputation, or feelings or damage to real or personal property. (Bryan A. Garner, ed., Black's Law Dictionary, 7th ed. (St. Paul, Minn.: West Group, 1999), pp. 1496-1497). Under the U. S. system of tort liability, courts can hold injurers liable for many different types of torts, such as automobile accidents, contract fraud, trespass, medical malpractice and injuries associated with defective products. Several bills now before the Congress seek to address concerns that critics have raised about the tort system or about certain types of tort cases. Among those concerns are that : The " transaction costs" of the system, particularly attorneys' fees, are too high; Punitive damages and compensatory damages for pain and suffering are often awarded arbitrarily, with no beneficial effect on safety; The class-action mechanism (whereby many claims that cover similar factual

ground are combined into a single larger case) is easily abused by plaintiffs' attorneys; Medical malpractice lawsuits are driving up the costs of liability insurance for physicians to the point that some of them are restricting their practices or retiring; andIn suits over exposure to asbestos, too much money and court time are being devoted to people who do not yet show any signs of physical impairment. Conversely, supporters of the existing tort system argue that it serves important policy goals, such as compensating victims, holding injurers responsible for their actions and improving safety. Supporters say that critics overstate the extent and severity of the perceived problems with the system. They further argue that many of the proposed changes are too broad and that major problems can be addressed by the courts or through more narrowly targeted legislation, perhaps at the state level, where the vast majority of tort lawsuits are filed. This section looks at the current tort system and various options for changing it, from an economic perspective, focusing on the goals of efficiency (minimizing the system's total cost to the economy) and equity (treating all parties fairly). Data about the overall costs and benefits of tort liability are too scarce to allow economists to judge the efficiency of the current system. However, those data suggest that the system is a relatively expensive way to compensate victims and thus, that any justifications for it must be based on its effects on deterring injuries, promoting equity, or both. The economic perspective leads to some other general conclusions about tort liability : Using the tort system to supplement market forces may improve or reduce efficiency, depending on what incentives the system creates for potential injurers and potential victims and on the interactions between those incentives, government regulations, and private insurance policies; Altering

the tort system generally involves some trade-offs in particular, changes that seem likely to improve efficiency may be problematic in terms of equity, or vice versa; Federal involvement in what is now mainly a matter of state law might yield more-efficient interstate commerce, but it could limit innovation at the state level (as well as restrict the states' ability to offer contrasting liability regimes to appeal to different residents); andThe same policies may not be appropriate for all types of tort cases, because efficiency requires minimizing the sum of several kinds of costs, which may vary in their relative importance from one category of tort to another.

Tort Liability in the United States

The U. S. tort system is not centralized, which makes collecting comprehensive data about it difficult. Roughly 95 percent of lawsuits over torts are filed in state courts, rather than federal courts, the Congressional Budget Office (CBO) estimates. Moreover, in the vast majority of cases, plaintiffs and defendants reach out-of-court settlements, whose terms typically remain private. (For example, 97 percent of tort cases that " terminated" in federal district courts in fiscal year 2000 were disposed of before a verdict was reached.)Data from the Bureau of Justice Statistics that cover 45 of the nation's 75 largest counties indicate that plaintiffs won 48 percent of the cases that reached a verdict in state courts in 1996 (the latest year for which that information is available; Department of Justice, Bureau of Justice Statistics, Tort Trials and Verdicts in Large Counties, 1996, NCJ 179769; August 2000). In those cases, the average time between filing and completion was 22 months. Automobile-related torts accounted for 49 percent of the cases, followed by premises liability (22 percent) and medical

malpractice (12 percent). The median award to successful plaintiffs was $31, 000 for all cases, but it varied widely for different categories of torts : from $18, 000 in automobile-related cases to $286, 000 for medical malpractice and $309, 000 in asbestos cases. Looking at trends over time, data from 16 states tracked consistently by the National Center for State Courts show that the number of tort cases filed each year rose by 70 percent between 1975 and 1990 (its peak) and then fell by 19 percent by 2000. Relative to population, the rate of filings was 8 percent lower in 2000 than in 1975--212 cases per 100, 000 residents compared with 230 cases (see Brian J. Ostrom, Neal B. Kauder, and Robert C. LaFountain, eds., Examining the Work of State Courts, 2001: A National Perspective from the Court Statistics Project (Williamsburg, Va.: National Center for State Courts, 2001), with accompanying spreadsheets available at www. ncsconline. org/D_Research/csp/2001_Files/2001_Tort-Contract_Tables. xls).

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Figures that suggest an overall decline in tort cases, however, mask continuing growth in the number or impact of some important categories of torts. For example, the Physician Insurers Association of America reports that median court judgments for medical malpractice rose from $100, 000 in 1990 to more than $300, 000 in 2001, an increase of 138 percent after correcting for inflation. And researchers at RAND report that the number of claims filed for asbestos exposure nearly tripled in just two years, between 1999 and 2001.

The Basic Economics of Tort Liability

From the economic point of view, the efficiency of the tort system is measured by how well it minimizes the sum of several types of costs: The costs of injuries (including medical costs, lost productivity, and pain and suffering); The costs of efforts to prevent or avoid injuries (including efforts to make products safer, which tend to raise consumer prices) and the opportunity costs of goods and services that are not provided (such as potential medical drugs that do not reach the market or municipal pools that are closed for fear of lawsuits) or goods and services that are provided but forgone by some risk-averse consumers (such as air travel); The costs of administration and implementation (particularly attorneys' fees and the administrative costs of insurance that potential injurers and victims buy to redistribute the risks they face); andIndirect costs to the economy (such as the disruption costs of plant closings and bankruptcies). What constitutes equity in relation to the tort system is ultimately subjective, but there is consensus that compensating victims for their injuries, at least in some cases and to some degree is equitable. Tort liability is only one means by which society addresses the efficiency and equity issues posed by injuries; other means include market forces, regulation and public insurance funds. Market forces can help control injury costs in several ways. Under conditions of competition and good information, producers of goods and services respond to consumers' desires for safer products, employers respond to employees' desires for safer workplaces, and insurance companies offer policies to respond to potential victims' desires to reduce the uncertainty they face. One efficiency rationale for supplementing market forces with some form of government involvement is simply that many injuries--

automobile accidents, releases of toxic chemicals, and so forth, are unrelated to any economic transaction. Indeed, some academic economists favor restricting the scope of tort liability to such " stranger" injuries. For other types of injuries, making an efficiency argument for government intervention requires the existence of some market imperfection: perhaps potential victims lack good information about the risks they face, suffer from biases that limit their ability to use the information, or have few choices because of monopoly or collusion in the market (there is no presumption that market forces tend to produce equitable outcomes; hence, arguments for government intervention can also be made on equity grounds). Of course, government actions have their own weaknesses and thus may not improve efficiency in practice. For example, regulation requires centralized information about costs and benefits, and regulators may be co-opted by the parties they regulate. Tort liability supplements the market in a more decentralized way. The basic idea is that making injurers pay for the harm they cause not only compensates victims but also gives injurers (if not victims) appropriate incentives to reduce the frequency and severity of that harm. The different liability standards used by the courts aim to achieve those goals in different ways: in particular, under the doctrine of strict liability, injurers are responsible regardless of how much care they exercise in trying to minimize injuries, whereas under the doctrine of negligence, they are responsible only if their actions fail to meet a standard of due care (even in a case judged under strict liability, the injurer may not be held responsible if the victim's own behavior contributed too much to the occurrence of the harm). The tort system is no panacea, however, even in principle, it is difficult if not impossible to craft liability rules that can consistently achieve

the desired levels of both efficiency (taking into account all of the relevant costs) and equity. For example, because the expected level of compensation may affect the degree of care that potential victims exercise, the efficiency objective of cost-effective deterrence can conflict with the equity objective of compensation. Moreover, because the terms of that trade-off can vary, a single rule may not achieve the desired balance between efficiency and equity in all cases. In practice, tort liability is further limited because information, particularly the information needed to determine the cause of an injury, is incomplete and costly. The transaction costs of the tort system derive from information problems: lack of complete information is what allows plaintiffs and defendants to hold divergent views and encourages them to devote resources to proving their respective cases. Information problems are also the root cause of courtroom errors and they can make it hard to set standards for due care at efficient levels.

The Costs and Benefits of Tort Liability

Analyzing the policy questions that surround tort liability is difficult because of incomplete data not only on tort cases themselves but also on the indirect costs and benefits of the tort system. Indeed, from the standpoint of economic efficiency, the actions that the system encourages potential injurers and victims to take (or refrain from taking) to avoid injuries can be more important than some of the direct " costs" associated with individual cases. In efficiency terms, the primary benefits of the tort system are measured not by payments to victims, which represent transfers of wealth but not gains or losses to society as a whole, but by reductions in injury costs. Those benefits arise indirectly, through precautions taken by potential

injurers. For example; efforts to design safer products or reduce production defects (some indirect benefits may also arise from better distribution of risk. In principle, risk-averse consumers who expect to be compensated for injuries more fully through the liability system than they would be through their own insurance may be more willing to buy certain goods or services, space heaters, perhaps). Thus, they are not observable in data on trials or settlements. Several important types of costs are also indirect, including the costs of specific actions that firms take to reduce the injury risks associated with their products (such as including air bags in automobiles), the opportunity costs of goods and services not offered because of liability concerns or not purchased because of liability-related price increases, and the disruption costs of layoffs and bankruptcies.

Arguments about the Effectiveness of Tort Liability's Incentives

Indirect benefits and costs are very difficult to measure. In general, data do not exist to show how liability affects the degree of care that potential injurers take--let alone how injury costs change as a result of that care. Moreover, theoretical analysis alone cannot answer the key questions, because the extent to which the potential efficiency benefits of tort liability are realized depends on the relationship between the true costs of injuries and the expected costs to injurers. If potential injurers expect to pay one dollar more for each additional dollar of injuries they cause, they will have the optimal incentive to take all (and only) cost-effective precautionary actions. But they might anticipate paying more than one dollar per dollar of additional injury (for example, because of excessive punitive damages) or

less than that (for example; if some of their torts go undetected or if their liability costs are insured and their premiums do not rise commensurately). For potential injurers whose actions are thought at the time to be harmless--such as the firms that manufactured or used asbestos before its health risks were identified--there is no expectation of increased liability costs and hence no specific incentive for precaution (however, the mere possibility that seemingly harmless activity may later produce tort claims increases uncertainty and gives potential injurers general incentives to buy insurance, investigate possible risks, and take generic prevention or avoidance measures (such as not researching or developing new products), which may be efficient or inefficient). Controversy over both the efficiency and equity effects of liability has particularly focused on non-pecuniary damages (punitive damages and compensatory damages for pain and suffering). Critics argue that large non-pecuniary damages are awarded arbitrarily and unpredictably, with little connection to the actual harm or to the character of the injurer's conduct. In that view, such damages are not only inequitable but also inefficient: arbitrary and unpredictable awards do not provide incentives for precaution but do raise costs, thereby distorting price signals. Critics further argue that non-pecuniary damages, whether arbitrary or not, have a separate adverse effect on the distribution of risk--in particular, that liability for pain and suffering implicitly provides consumers with a form of inefficient over-insurance (the argument is that consumers benefit by insuring themselves against pecuniary losses, such as lost income or increased medical costs, but not against pain and suffering (as illustrated by the fact that people generally do not purchase life insurance policies for their young children). Thus, when producers expect to pay non-pecuniary

damages and build the costs of those damages into the prices they charge for goods and services, consumers implicitly pay a kind of insurance premium for coverage they would not otherwise choose to buy. The effect of that implicit premium and coverage is to shift wealth inefficiently--raising it in the event of an injury, but not by enough to justify the reduction in wealth in the case of no injury). In contrast, supporters of the liability system argue that large punitive damages can serve equity by expressing society's disapproval of behavior that reflects wanton disregard or contempt for potential victims. Such damages can also promote efficiency, they say, by providing proper incentives for the prevention of injuries that have a significant probability of going undetected. (For example; if bolt manufacturers expect the role of defective bolts to go unrecognized in four out of five accidents that their products cause, they will have inefficiently low incentives to prevent defects unless they expect to pay five times the actual damage on those occasions when they are penalized.) Supporters further argue that pain and suffering represent real losses that should be reflected in the prices of products (to send consumers efficient signals) and that limiting awards for such losses might under compensate some injury victims.