Torts: Liability for Civil Wrongs

Week 5: Defenses

Even if a plaintiff is able to establish that a defendant acted negligently, the defendant may still be able to avoid liability by relying on one of the defenses to negligence liability. This week, we will look at the two main defenses that are available in negligence cases—those based on the plaintiff's own negligent conduct, and those based on the plaintiff's assumption of risk.

Let's start with cases in which the defendant claims that the plaintiff acted negligently. We have already seen many examples of this over the past several weeks. For example, in Goodman and Pokora, the defendant railroad companies argued that the plaintiffs were negligent when they drove across the track without stopping and looking. Likewise, in Martin and Tedla, the issue of negligence per se was raised with respect to the plaintiff's behavior—in Martin, the plaintiff was driving after dark without any lights on, and in Tedla, that the plaintiffs were walking on the wrong side of the road. In all of these cases, the defendants were not necessarily denying their own wrongdoing, but they were instead seeking to show that the plaintiff also acted unreasonably. And, at the time these cases were brought, this was an extremely valuable defense, since the rule in all jurisdictions was that any amount of negligence by a plaintiff was a complete bar to recovery.

This rule was known as the doctrine of "contributory negligence." Beginning in the 1960's, most states abandoned the doctrine of contributory negligence in favor of the concept of "comparative fault." The problem with contributory negligence, these states concluded, was that any amount of unreasonable conduct by the victim of the accident allowed defendants to escape all liability for their own negligent conduct. This system undermined the two primary goals of tort law: deterring negligent behavior by forcing those who negligently cause injuries to pay for the damages, and compensating victims for losses caused by another person's fault.

The concept of comparative fault is similar to contributory negligence in that it allows negligent defendants to avoid paying damages if they can show that the accident was caused, at least in part, by the plaintiff's own negligent conduct. But it differs from contributory negligence because, instead of providing an absolute bar to the plaintiff's recovery, it results only in a reduction of the amount of damages the plaintiff can receive.

There are three basic systems of comparative fault. The first, known as the "pure" system, provides that a negligent defendant's liability will be reduced by whatever percentage of the injury was attributable to the plaintiff's own negligence, as determined by the jury's allocation of responsibility between the parties. Under the pure system, it doesn't matter which party is considered more blameworthy than the other. So, for example, if the jury finds that 90% of the accident was attributable to the plaintiff's negligence, and only 10% to the defendant's, the plaintiff can still recover 10% of her damages.

There are also two types of "modified" comparative fault systems. In one type of modified system, a negligent plaintiff can recover damages from a negligent defendant, but only if the plaintiff's fault is "not as great" as the defendant's—that is, the plaintiff's share of fault must be less than 50%. In the other type of modified system, negligent plaintiffs can recover if their fault is "no greater than" the defendant's—meaning that the plaintiff's share of fault must be 50% or less. In either of the two modified systems, assuming the plaintiff's percentage of fault is below the applicable threshold, the amount of the recovery will be reduced as it would be in the pure comparative fault system. For

example, if the jury concludes that the plaintiff was 40% at fault, the defendant would be responsible for paying 60% of the damages.

Given how subjective jury determinations of fault are, it may seem that the difference between the two types of modified systems is not very important. In fact, however, it can make a big difference in the outcome. The reason is that there are many cases in which juries are likely to conclude that the plaintiff and defendant are equally responsible for the accident—in other words, that their respective shares of responsibility are exactly 50%. In the first type of modified jurisdiction, plaintiffs in those circumstances would not be entitled to recover, since their fault would be "as great" as that of the defendant. But in the second type of modified jurisdiction, they would get 50% of their damages. 13 states have adopted the "pure" form of comparative fault, 22 have adopted the first type of modified system, and 11 have adopted the second type of modified system. 4 states, as well as the District of Columbia, retain the traditional system of contributory negligence, in which any amount of negligence by the plaintiff is a complete bar to recovery.

One of the consequences of the shift from contributory negligence to comparative fault was that defendants began to question the justification for the traditional system of apportioning liability among multiple defendants, known as "joint and several liability." As we discussed last week, under traditional joint and several liability, if multiple defendants are responsible for the plaintiff's injury, the plaintiff is entitled to recover damages from any of them in any combination she chooses. For example, if there are two negligent defendants, the plaintiff can collect 50% from each of them—or, if one of the defendants is rich and the other one is insolvent, she can recover everything from the rich defendant and leave the other one alone. Under this system, even a defendant whose role in the accident was relatively insignificant could end up having to pay the entire judgment.

Today, joint and several liability still exists, but in most jurisdictions it has been limited considerably. For example, in some states, joint and several liability is limited to situations in which multiple defendants act "in concert," as opposed to situations in which defendants engage in separate acts of negligence. Other jurisdictions allow joint and several liability only for defendants whose negligence exceeds a certain minimum threshold of responsibility. Moreover, even when joint and several liability applies, it is now softened by defendants' ability to seek "contribution" from other responsible parties. So, for example, if one defendant ends up paying the entire damage award when the jury found him, say, only 30% at fault, he can sue the other defendants for their proportionate share of the damages. Of course, if the other defendants are insolvent, the right of contribution won't do him much good.

The second type of defense is based on the concept of "assumption of risk." Assumption of risk refers to situations in which a plaintiff voluntarily engages in a dangerous activity agreeing to accept the foreseeable harms. Assumption of risk can be either express or implied. Express assumption of risk usually involves a formal written agreement, although theoretically express assumption of risk can also be oral. For example, if you go skydiving and sign a form acknowledging the dangers and agreeing not to hold the company responsible, that would be an express assumption of risk. Documents like this are sometimes referred to as "releases" or "waivers" of liability. Implied assumption of risk involves situations where, despite the absence of an explicit agreement, the facts indicate that the plaintiff was aware of the risk and voluntarily agreed to accept it.

The Dalury case involved a very clear example of an express assumption of risk. The form the plaintiff signed unambiguously released the ski resort from any and all liability, regardless of whether the injuries were due to the ski resort's negligence. So, for example, if the plaintiff had been injured because an

improperly maintained ski lift fell apart midway through his ride up the mountain, the release would bar him from suing the ski resort for any injuries sustained. Despite the document's clarity, the Supreme Court of Vermont refused to enforce it. The court reasoned that, if the defendants were able to obtain broad releases of liability, "an important incentive for ski areas to manage risk would be removed with the public bearing the cost of the resulting injuries."

Note that Dalury does not stand for the principle that releases of negligence liability are never enforceable. On the contrary: the court recognized that, in most cases, the enforceability of a release turns on "whether the language of the agreement was sufficiently clear to reflect the parties' intent." In fact, the court cites prior cases in which it upheld releases of liability for negligent conduct. What Dalury stands for is the more narrow principle that releases of liability are valid only to the extent they do not violate public policy. The hard question, of course, is determining when courts will uphold releases and when they will strike not. Unfortunately, there is no clear answer to this question. Certainly, it is hard toimagine any court upholding a release in which an individual agrees to absolve a doctor or lawyer for professional malpractice. Individuals who seek professional medical or legal services are in a particularly vulnerable position and depend on the law to set and enforce minimum quality standards. But beyond these situations, states vary widely in their approaches. Not all state courts would agree with the Vermont Supreme Court that an agreement to release a ski resort from liability is against public policy. After all, skiing is not an essential activity, and people who engage in it are not especially vulnerable. Remember: a decision of the Vermont Supreme Court constitutes binding precedent only within the state of Vermont.

Think for a moment about the practical implications of the court's decision in Dalury. If ski resorts cannot enforce waivers of negligence liability, they will be required to take out liability insurance, and the cost of this insurance will be passed on to customers in the form of higher prices. Skiers who are injured due to negligence will fare better in this system, since they will not be forced to bear the costs of their injuries themselves. But if the prices go up, some people may not be afford to go skiing at all. The policy question, then, is whether the public interest is better served by requiring all skiers to pay higher prices so that persons who are injured due to negligence are able to receive compensation, or by freeing resorts from the burden of purchasing liability insurance and therefore keeping the costs of skiing low. Think about how you would go about answering this policy question. Would your answer be the same for a ski resort as it would be for another type of public accommodation? Should a release of liability by a skier be treated the same as a release of liability by a hospital patient?

Unlike express assumption of risk, with implied assumption of risk there is no formal agreement in which the plaintiff affirmatively accepts to release the defendant from liability. Instead, the doctrine applies when the facts suggest that the plaintiff was aware of a risk and voluntarily agreed to take it. Implied assumption of risk is commonly divided into two different categories. The first, known as "primary implied assumption of risk," involves activities that are unavoidably dangerous by their very nature, such as driving a race car or playing certain sports. Under the doctrine of primary implied assumption of risk, a person who voluntarily engages in an activity like this, with full knowledge of its dangers, cannot recover tort damages if one of the inherent risks of the activity happens to occur. For example, if you twist your ankle when you're tackled playing a game of football, you wouldn't be entitled to compensation from the person who tackled you, since the risk of being tackled was an inherent part of the game you voluntarily chose to play.

Technically, primary implied assumption of risk is not actually a defense to negligence liability, as defenses arise only after the plaintiff has established that the defendant acted negligently. Instead, with primary implied assumption of risk, the point is that the plaintiff's willingness to encounter the risk is evidence that the defendant's behavior wasn't negligent in the first place. Going back to the tackling example, it might be considered unreasonably dangerous to attempt to wrestle someone to the ground during a casual conversation, but that same conduct in the context of a consensual game of football is not unreasonable at all. "Secondary implied assumption of risk," by contrast, is a true defense, in that it arises only after the defendant's negligence has already been established. The Davenport case is an example of secondary implied assumption of risk. In that case, the plaintiff was injured when he tripped on an unlighted stairway. He had reported the lack of lights to the building's management—demonstrating his knowledge of the risk—but he continued to use the stairway anyway, even though other stairways, with lights, were available. The legal issue in the case was whether the plaintiff's assumption of risk should continue to be treated as a complete defense now that the state had abandoned the traditional doctrine of contributory negligence. The plaintiff's argument was that, if his negligent conduct would only reduce his damages, as opposed to completely eliminating his right to recovery, why should his assumption of risk be treated any differently? The court agreed. As a result, secondary implied assumption of risk in South Carolina is now subsumed within the larger framework of comparative fault.

Most other jurisdictions have reached the same conclusion, but as with everything in tort law there are always exceptions. The Rhode Island Supreme Court, for example, has held that, while the plaintiff's negligence must be compared to the defendant's under the principle of comparative responsibility, the plaintiff's assumption of risk is an absolute bar to recovery. The court reasoned that a plaintiff has no right to seek damages for a risk he knowingly and voluntarily assumed. However, putting aside Rhode Island and a few other states that have reached similar conclusions, in most jurisdictions secondary implied assumption of risk is now treated no differently than defenses based on the plaintiff's negligence. It is compared against the defendant's negligence under whatever approach to comparative fault the jurisdiction has adopted—either the pure approach or one of the two modified versions—and no longer constitutes an absolute defense. But even in these jurisdictions, express assumption of risk—that is, a formal release of liability—is still a complete defense unless the court rejects it on public policy grounds.