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*Editor's note: From April 2001 to March 2004, the Journal featured a Legal Briefs column that presented short case studies about legal issues important to environmental health professionals. Vincent Sikora, the author of Legal Briefs during that time, passed away in December 2003. Because his columns were well received by many of our readers and provided practical and relevant legal information, we decided to search for a committed columnist with the appropriate knowledge and experience to restore Legal Briefs. We are happy to announce that we found several insightful and dedicated columnists: Bill Marler, Denis Stearns, Drew Falkenstein, and Patti Waller, all of the law firm Marler Clark. Their columns will appear in every other issue of the Journal.*

*The attorneys at Seattle-based Marler Clark, LLP, PS ([www.marlerclark.com](http://www.marlerclark.com)) have developed a nationally known practice in the field of food safety. Marler Clark represents people who have been seriously injured, or the families of those who have died, after becoming ill with foodborne illness during outbreaks traced to restaurants, grocery chains, and other food suppliers. The attorneys have litigated thousands of food contamination cases throughout the United States, many of them high-profile, including the Jack in the Box and Odwalla E. coli outbreaks; the Malt-O-Meal, Sun Orchard, and Chili's Salmonella outbreaks; the Senor Felix Shigella outbreak; and the Subway and Chi-Chi's hepatitis A outbreaks.*

*R. Drew Falkenstein, the author of this month's installment of our newly restored Legal Briefs column, provides Journal readers with an introduction to liability and negligence. Mr. Falkenstein joined Marler Clark as an associate attorney in 2003. His practice focuses on multiple-party complex litigation, most commonly related to foodborne-illness outbreaks.*

## An Introduction to Liability, Negligence, and All Things in Between: Part I

**I** must start with an admonition: The information in this first installment of Legal Briefs will all be for naught if you do not stay tuned for the next installment, in which the principles laid out here will be given less abstract application. The converse is also true: Without the primer given below, the next installment, which will address the liability of environmental health professionals for negligent inspections, will be tough sledding. Thus, you can use the outline of basic concepts given below as a 10-minute summary of law school, or, more precisely, of liability.

### Liability

There are various reasons for it—for example, breach of contract, medical negligence, or an intentional assault—but one concept predominates. Liability means that the party in the wrong must do something—most of the time, pay money—to return the injured party to his pre-injury state. Like many things in this article, however, this definition is merely a generalization and is not intended as an exhaustive discussion on the concept of liability.

### Tort

My torts professor, a grandfatherly sort who taught in the old-school, unabashedly direct manner, saw his as the most important job of any professor teaching first-year courses: teaching the basics of tort liability. What, you may ask, is a tort? When stripped of its contentiously political stripes, a tort is merely a civil wrong. And what is a civil wrong? Well, it bears certain resemblances to a crime—at least in the sense that both

address conduct that our legislatures and courts have deemed improper—but without the threat of criminal sanction. It is what you mean when you say that so-and-so was driving negligently, slammed into the back of my car causing severe injury to my neck, and now owes me a certain amount of money as compensation—that is, to return me to my pre-injury state.

Now to the task at hand: breaking down the concept of tort liability—more specifically, liability for negligence—into its constituent parts, or “elements.” The basic elements of a negligence claim are 1) duty, 2) breach, 3) causation, and 4) damages. (To poach a bit from the next installment: These are the elements that must be established by any plaintiff who sues you, or any environmental health professional, for negligent inspection). You may already be able to give these elements abstract definition; my advice is not to forgo those pre-existing ideas altogether, because legal concepts should be grounded in common sense, but to allow the following discussion to focus, broaden, or refine those ideas as necessary.

### Duty

In simplest terms, a “duty” is a legal obligation to act for somebody else's benefit. For the sake of clarity, let's think, first, about what is meant by “acting for somebody else's benefit.” This could mean any number of things. A parent acts for her child's benefit when she rescues her struggling toddler from the deep end of a swimming pool, a fireman acts for another's benefit when he rushes into a blazing inferno to save somebody, and a friend acts for your benefit when he shows up to

your birthday party bearing gifts. The trick, obviously, is not deciding when somebody has acted for another's benefit, but deciding when somebody has a legal duty to so act.

A legal duty to act for somebody's benefit may arise from 1) statute, ordinance, or other legislative enactment; 2) contract; or 3) the common law. As will be explained in Part II of this article, most of your legal duties as an environmental health professional derive from statutes, ordinances, and other legislative enactments. As for contractual duties, which will not be further discussed, these are generally not something an environmental health professional has to worry about, unless you or your agency contracts out your inspection services. Finally, there is also the common law, which is the judge-made body of precedents and rules that, just as much as any legislative enactment, define when a person must act for another's benefit.

One example of an environmental health professional's statutory duty could be seen at former Washington Administrative Code (WAC) § 246-215-230(1)(a), enacted May 2, 1992,<sup>1</sup> which stated that "Inspections or investigations of a food service establishment shall be performed by the health officer as often as necessary for the enforcement of these regulations." Not only did this code section create a mandatory duty—note the use of "shall" rather than "may"—it was also clear in its statement of what the duty entailed. Food and health codes in every state are replete with similar examples, and every environmental health professional should consult all applicable codes for a thorough assessment of his or her duties.

Common-law duties are disclosed, at least in written form, in judicial opinions, various treatises, and other legal texts. Lucky for those averse to boredom, though, common-law duties may also be thought of as commonsense duties. These are the duties that our courts have deemed of so much social utility that they exist regardless of whether the legislature has given its official—that is, statutory—sanction. For instance, the common law tells us, as does common sense, that the mother in the example above had a legal duty to act for the benefit of her drowning child; it also tells us that an airline, taxicab, or railroad company owes a legal duty to act for the benefit and safety of its passengers. Most importantly, however, the common law tells us that each of us, when doing an act that creates a risk of harm to another, must do that act with ordinary care and pru-

dence. This last concept will become clearer after a discussion of the second element of tort liability, "breach" of duty.

### **Breach**

A person breaches his duty when he does not act as his duty required. As shown above, duties can be very specific—see, for instance, former WAC § 246-215-230(1)(a)—or they can be more nebulous. It is relatively easy to know when a person has breached a specific, statutorily prescribed duty; the question is simply whether he did what the words of the statute said. The more nebulous duties, typically those established by common law, generally require that an act be done reasonably. Thus, the question in these instances is whether the person acted as a "reasonable person" would have.

The "reasonable person" is that nonexistent, asexual being who does every act with ordinary care and prudence. Please note that "ordinary" means just that: ordinary, not extraordinary. Thus, when walking down the hall with an open-bladed knife, the reasonable person would not flail about, but he also may not encase the knife in concrete and peak around every corner to ensure the safety of others. In other words, the reasonable person acts with ordinary care in light of the risks created by his conduct. And—this is perhaps the most important point in this article—the duty to act as the reasonable person would attends each and every one of our acts, including driving a car, mowing the lawn, and selling food to the public.

### **Causation**

No area of the law has received more attention, and, I'm happy to say, no area of the law is more uncertain. For present purposes, however, let's simplify as much as possible. In a bare-bones sense, causation means that the defendant's negligent act must have *caused* the plaintiff's injury. Admittedly, this definition is a bit circular, using as it does a root of the defined term in the definition, but it helps narrow the focus to those factors, whether physical, temporal, or spatial, that frame the inquiry the best. The question is whether the relationship between the defendant's negligent act and the plaintiff's injury is one that the courts will deem sufficient to support liability.<sup>2</sup>

### **Damages**

The "damages" element is merely a requirement that the plaintiff have suffered an

injury for which the law provides redress, typically in the form of monetary compensation. This is, perhaps, the simplest element conceptually, but in practice it receives the greatest attention because it addresses the bottom line—how much the plaintiff's injuries are worth. Please note that, as the above definition implies, there are some "injuries" for which the law will not provide redress. For instance, many states follow the "physical injury" rule, or some variation thereof, which requires that the plaintiff have suffered an actual, physical injury before he can recover for his mental or emotional distress.

### **Final Words for Now**

These are the basics. As mentioned at the outset, stay tuned for Part II to learn about possible "immunities" for government-employed environmental health professionals and other defenses to a plaintiff's lawsuit. For now you have, in nutshell form at least, the tools to assess virtually any situation in which a plaintiff files a negligence lawsuit against a defendant. ■

<sup>1</sup>Former WAC § 246-215-230 was repealed on May 2, 2005.

<sup>2</sup>Another caveat: Questions of causation can be simple, mind-numbingly complex, or anything in between. In all cases, however, courts use a two-pronged approach to determine whether something called "proximate cause" exists. First, they ask whether the plaintiff's injury would not have occurred but for the defendant's negligence. Second—but only if the answer to the first question was yes—they ask whether the defendant's negligence was the "legal cause" of the plaintiff's injury. Not much will be said about the concept of "proximate cause," other than that it embodies that conglomeration of subjects, from physical relationship to common sense to public policy, that courts rely on in determining whether a defendant's negligent act should render him liable to the plaintiff.

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