Estate Planning FAQ

Why should I pay a lawyer a lot of money for some simple documents?

You can buy software that produces most of the estate planning documents an attorney will prepare for you. Using such documents could turn out all right for you and your heirs, but things could go horribly wrong as well, and you'll never know if you did it right until it's too late. You could end up paying a nursing home unnecessarily or your heirs could pay unnecessary taxes or expend legal fees fighting each other.

Only a qualified attorney can educate clients on what issues they should be aware of in their individual circumstances and then recommend appropriate language to deal with the client's specific situation. Do you have a taxable estate? Do you own significant amounts of tax-deferred retirement plans? Do you know how to fund the revocable trust provided on the computer program? Is there anything about your estate that is unusual, such as having a disabled child? In short, if there's anything about your situation that's not plain vanilla, you need to see a lawyer. And only a lawyer can determine whether your situation qualifies as "plain vanilla." As with joint accounts, the problems you may create by not getting competent legal advice probably won't be yours, but may well be your children's. Do you want to risk leaving that legacy?

For more on this subject, see my article, "Should You Do It Yourself?"

Can the attorney-in-fact be

compensated for his or her work?

Yes, if the principal has agreed to pay the attorney-in-fact. In general, the attorney-in-fact is entitled to “reasonable” compensation for his or her services. However, in most cases, the attorney-in-fact is a family member and does not expect to be paid. If an attorney-in-fact would like to be paid, it is best that he or she discuss this with the principal, agree on a reasonable rate of payment, and put that agreement in writing. That is the only way to avoid misunderstandings in the future.

How does one draw up a health care power of attorney or advance directive?

People should contact an attorney who is skilled and experienced in this area. Although many hospitals and nursing homes also provide forms, as do some public agencies, these forms are often inadequate.

Can I move my Individual Retirement Account (IRA) from one financial institution to another?

You may withdraw the funds tax-free if you roll them over into a new IRA within 60 days. If you fail to complete the rollover in time, you will have to pay income taxes on the amount withdrawn and, if you are under 59 ½, a 10 percent penalty. But you may only do this once a year unless the transfer is effected from institution to institution without the funds passing through your hands. If the transaction is purely between institutions, you may move your IRA as often as you like without incurring any penalty. The 60-day rollover offers

an opportunity for people who want to consolidate accounts, are moving, or expect to get a better return with a new institution. It can also be used in the event of a short-term cash shortage. But be careful to complete the rollover. If you do not, taxes and a penalty will be due on the amount withdrawn.

How do I find a good financial planner?

The best way (as with any professional) is to ask your friends, colleagues and relatives if they have worked with anyone they can recommend. Also, ask your lawyer or accountant, since they often work with financial planners. If these inquiries don't turn up someone appropriate for you, check the Yellow Pages, call your Chamber of Commerce, or call 800-282-PLAN (7526) for the name of a Certified Financial Planner (CFP) in your area. Some planners charge a fee, while others provide the service without charge, hoping to make commissions on your investments. You may be able to find a fee-only financial planner by calling 888-FEE-ONLY (333-6659), which lists members of the National Association of Personal Financial Advisors. Interview your candidates over the phone to learn their approach to planning and investments. Ask for references, and make sure you follow up and call the references. After you have narrowed your field of prospects, meet at least two in person before you make your final selection.

Does it matter whether the financial planner has any particular credentials?

Many financial planners have initials after their names, such as CFP (Certified Financial Planner), CLU (Certified Life

Underwriter), or PFS (Personal Financial Specialist). There are about 300,000 people in the United States who call themselves financial planners. Of these, about 32,000 are CFPs and about 1,600 PFSs. The fact that a planner is certified indicates that he or she has enough interest and training in the field to take the required courses and pass the appropriate tests for certification. That's important. But it's no guarantee that the financial planner will do a good job for you, or that someone without the certification will not.

Can a person object to a proposed guardianship for him- or herself or for someone else?

While the rules differ from state to state, someone who is the object of a proposed guardianship has the right to object to the appointment of a guardian. Generally, next-of-kin also has the right to object. In many states, the proposed ward has the right to a court-appointed attorney if she cannot afford one on her own.

How does the SSA calculate a retired worker's monthly benefit?

The Social Security Administration (SSA) bases its benefit calculation on the retiree's highest 35 years of earnings up to the amount subject to Social Security withholding each year. If necessary, it will use years in which the retiree has low earnings or no earnings to bring the total years of earnings up to 35. The SSA then calculates the retiree's average monthly earnings over those 35 years adjusted for inflation. The retiree's monthly Social Security check is arrived at by adding together 90 percent of the first $627 of the average monthly earnings, 32 percent of the next $3,152

and 15 percent of any average monthly earnings above $3,779. (These are the figures for 2005; they are adjusted each year to reflect inflation.) As you can see, the formula is weighted to favor those who earned less during their working lives, giving them a 90 percent retirement benefit on most of their earnings, while giving the highest earners only a 15 percent benefit on a large portion of their working income (and no benefit on earnings above what was subject to tax, which in 2005 is $90,000). You can calculate your future Social Security benefit based on your current and projected earnings by using the SSA's online Benefits Calculator.

Why You Need A Will

Contrary to a widely-held belief, dying without a will doesn't mean your property passes to the State, which then uses the money to buy new park benches. Instead, local laws determine your estate's beneficiaries; these are the laws of "intestacy." In most states, one half of non-jointly owned property (titled in your name alone) passes to your spouse, the other half to your child or children. If you are single and have children, your assets generally pass to your children and/or your parents, if alive. If you don't have children, typically your assets pass to your parents and/or siblings.

Having a will allows you to name the individuals you wish to inherit your assets, and the manner they will do so, regardless of state law. In addition, if you do not have a will, the local court will appoint your "personal representative" – an executor to administer your estate, based on statutory rules of priority. Again, this might not be the

person you would prefer. You also may wish to specify funeral arrangements,.

If you are married with children, and you and your spouse die together in an accident, your child or children would receive your entire estate, but a court would have to choose the child's legal guardian. Judges usually appoint the nearest relatives of the child, often causing titanic court battles between sets of grandparents. Even worse are those situations where the child's closest living relative is Uncle Harold, a tambourine player with the Hare Krishnas. A properly drafted will names your beneficiaries, your child's guardian and a trustee for his or her estate while a minor. (The guardian and trustee you select need not be a relative).

Both husband and wife should have their own wills. Although joint wills are legal, it's generally undesirable to tie yourself together in this way; you run the risk of being unable to deal with changed circumstances arising from the death of one spouse

Perhaps you're interested in going online, buying a book or computer program that tells you how to write your own will. These can be informative tools, but in some cases might cause you to miss an essential requirement or have less than the best plan. Making the best plan and the best usually takes knowledge and expert advice. For example, do you know that property held jointly with another may not be distributed by will? Or that life insurance may or may not be distributed by will, depending who is named as beneficiary? Or that the same can be said of individual retirement accounts, pension plans and other assets? That the beneficiary designation on retirement plans can have major tax consequences? That a spouse has a right to a large share of your property no matter what your will may say? The best plan recognizes that the best will is only part of the total plan for the distribution of your property.

When choosing a lawyer, seek references from friends and co-workers. Lawyers generally charge a flat fee for routine wills and estate planning. Preparation of a detailed estate plan and tax-saving wills, however, is done on an hourly fee basis.

©2011 Daniel N. Steven

What Lawyers Do

Or, Big Words Sound The Same In Any Language.

Contrary to what you were taught in school, the true religion of most of the population of the United States is litigation. The word "litigation," by the way, is derived from the Latin word *litis*, meaning "ritual," and *agere*, meaning "screwing."

It is said that litigation touches everyone all the time, occasionally in very intimate places. Before you can achieve an understanding of litigation, you must understand lawyers. Although millions of words have been written on the subject, people are genuinely mystified by what happens behind the sacred doors of the Conference Room.

Here are the things that lawyers do, in general:

1. **Produce Paper**. Obviously.
2. **Resolve Conflicts**. Some commentators have pointed out that this is a vital function, necessary to any advanced civilization, such as ours, without any cultural inhibitions against violence. These commentators point out that lawyers are a necessary social lubricant. You should probably visualize lawyers as the K-Y jelly of

society, easing the friction between… well, you get the idea.

3. **Serve As Butts of Jokes**. With the rise of political correctness, Polish jokes are no longer acceptable. Lawyer jokes have taken their place, thus providing a safety valve without which much of American humor would back up and blow itself out through Mexico.

Big firm, little firm. Despite the prevalent image of lawyers in large law firms, most American lawyers still practice in small firms or as sole practitioners. They are small businessmen, no different than the local dry cleaner, shoe store owner, car mechanic, or accountant, except they wear natural fiber suits and are more honest than the car mechanic. Lawyers work long hours, and – outside of the big firms – generally don't make more than the average Joe, if the average Joe happens to have seven years of post-high school education. Anyway, they certainly make less than a specialist physician.

In fact, most lawyers are solidly middle class, with spouses and families and mortgages and tuition bills and orthodontist bills and staff problems and stop this is getting depressing.

© 2001 Daniel Steven

Negligence Primer

[Negligence Basics]

[Defenses]

[Professional Negligence]

[Strict Liability]

[Intentional Torts]

[Workers Compensation]

Negligence Basics

What is “negligence?”

Negligence is conduct which breaches (violates) your duty to exercise reasonable care to prevent harm or injury to another person. If, for instance, you like to imitate movie car chase scenes and you drive your Camaro at seventy-five miles an hour down a one-way street, causing a four-car pileup, you have breached your duty to drive safely and can be held liable (responsible) to the injured persons for their property damage and personal injuries.

Of course, most cases aren’t so simple and often the issue of the breach of duty is more cloudy. In such cases, the court will use the “reasonable person” standard to determine whether the driver acted negligently.

What is “proximate cause,” and is it contagious?

Proximate cause is a legal concept so complex it has become a favorite of law professors, who enjoy constructing elaborate exam questions based upon its intricacies.

For our purposes, you can simply think of proximate cause as a connection—the connection between negligent conduct (e.g., running a red light) and the damages or injury suffered as a result of that conduct. These injuries must be reasonably caused by, or proximate to, the negligent conduct. For instance, if a person in the car you struck when you ran a red light suffered a broken arm, that injury was proximately caused by your negligence. But what if an office worker in a

nearby building, startled by the sound of the crash, spills his coffee on his computer, shorting out the computer network, giving a co-worker a nasty shock and losing a day's worth of work? The damage is related to the car accident—there's a direct causal connection—but it's not proximate cause, as the law defines it. The first incident of damage—the broken arm—is a foreseeable result of running a red light; the second incident—an electric shock in a nearby building—is not reasonably foreseeable.

An Example of Forseeability

The following is a copy of an actual answer filed by a railroad company in the 1930's to a complaint for damages against it:

> "The defendant [the railroad] further specially excepts to said petition [the complaint filed by the plaintiff] where it is alleged that the plaintiff, upon discovering that the wooden stool was wet, raised the same and squatted with his feet poised on the porcelain bowl of the commode, from which roosting position he says his foot slipped causing him to fall to the great detriment of his left testicle, for the reason that it is obvious that the said commode with its full moon contours was rightfully and property designed for the comfort of sitters only, being equipped with neither spurs, stirrups nor toeholds for boots or shoes: this defendant, therefore, was not legally required to foresee that the plaintiff, traveling on its modern, air-conditioned deluxe passenger train would so persist in his barnyard predilections as to trample upon its elegant toilet fixture in the barbaric style of horse and buggy days."
>
> "For further answer, if needed, this defendant enters its general denial and specially pleads that the plaintiff should not be allowed to recover any sum against it for the reason that the plaintiff is, in truth and fact, a chronic squatter, born and bred to the custom of the corn crib, and,

> although a comparatively young man, is unable to adapt himself to the cultural refinements of a New Deal civilization, and should have, therefore, in the exercise of due care deferred taking the Crazy Water Crystals until such time when he could be at home secure and sure-footed on his own dunghill or with his feet planted solidly on the flat board of his own old fashioned two-holer."

My car was struck by a truck carrying a load of pulp wood. The truck driver was at fault, and the truck is owned by a large lumber company. Can I sue the lumber company as well as the driver?

Yes. Under the doctrine known as *vicarious liability* (taking pleasure from torts), the owner of the truck is responsible for the negligence of its employee if the employee was authorized to use the truck (state law may differ on this). This doctrine applies to any situation where an employee, agent or servant is performing duties on behalf of an employer.

My child was injured on the swing set at the public playground. Can I sue the county for negligence in maintaining its playground equipment?

That depends on the law of your state. We have to go back to England for a minute. In feudal times, all public facilities were owned by the King. Since the King could do no wrong (the Queen, however, would often lose her head in a crisis), the King could not be sued unless he consented: thus was born the legal doctrine known as *sovereign immunity*. Unfortunately, despite American rejection of monarchy, our Congress and state legislatures adopted this ancient doctrine and applied it to our federal and state governments. Under its pure form, you could not sue the County. However, because of the doctrine's harshness, many state and local governments have either eliminated it for certain types of torts or allowed themselves to be sued up to the limit of their liability

insurance policy.

Defenses

There are, of course, two sides to every lawsuit. Lawyers and judges have created some interesting defensive doctrines.

I was in a car accident which was partly my fault. Does this mean I can't sue the other driver, who I think was more at fault than me?

That depends upon whether the state where the accident happened still maintains the defensive doctrine known as *contributory negligence.* Under this defense, if your own negligence contributed in any part to the damages you suffered, you are completely barred from recovering anything from the defendant. Once prevalent in all states, this doctrine now has been replaced by the more sensible *comparative negligence*. This doctrine has several forms: in the "pure" form, you can receive compensation from the other driver based upon your degree of fault. For instance, if your own conduct was responsible for 40% of your injuries, you would be entitled to recover 60% of your damages from the other driver. (If you had $20,000 in medical bills and the jury found that you had pain and suffering worth $80,000, for a total of $100,000 in damages, you would be awarded $60,000). Many states have "modified" comparative negligence, where the other driver's fault percentage must exceed a certain percentage of the total before you can recover; if you and the other driver are equally at fault, you cannot recover anything.

I was at a baseball game, sitting between first and third, and got hit by a foul ball. I had to be hospitalized for three days. Do I have a claim?

No. Baseball games are the primary example of a situation where you have *assumed the risk* of harm from a particular

activity. It is common knowledge that, except for the protected areas behind home plate, anyone can be hit by a foul ball. The baseball team could use the legal defense of *assumption of the risk* as a defense to your claim. This also applies to all activities where there is an inherent, known risk, and injury occurs from that known risk. There are exceptions, however for certain classes of people (children and rock stars) who are incapable of understanding these risks.

What exactly are "damages?"

The term is often—and wrongly—used to refer to the injury suffered in an incident (a broken leg, a loss of income, a knee in the groin). Properly, however, it refers to the monetary amount awarded by the court to the winning party. There are basically two kinds of damages: *compensatory* and *punitive. Compensatory damages* are an amount of money that a judge or jury decides will compensate the injured party for the injury. Compensation is given in money, since it's the best form we know; a sincere apology by the defendant is seldom sufficient.

In order to support an award of compensatory damages, the plaintiff must present testimony or evidence to prove the amount of damages—hospital and medical bills, statements of lost earnings, testimony regarding the amount of pain suffered. A jury must reasonably base its award upon this testimony; its award of damages may not be "speculative" or the damage award will be rejected by the judge.

What is a "statute of imitations," and will it look good in my front hallway?

Almost every type of lawsuit, including personal lawsuits, have time limits within which the lawsuit must be brought, or *filed*. These time limits vary from state to state, and also vary depending on the type of lawsuit; for personal injury

lawsuits, the range is generally one to three years. If your lawsuit is not brought within this time limit, it will be forever barred—so it is important that you consult with a lawyer as soon as possible after you realize you have a claim.

Professional Negligence

In a typical personal injury case involving negligence –such as an automobile accident or a "slip and fall"– the jury is capable of deciding whether negligence exists based upon its application of the "reasonable person" standard. A juror's own life experience gives the juror the background to make this judgment. For example, every juror knows that excessive speed can cause a car accident, and that a "reasonable person" would not drive at high speed down a one-way street (again, with exceptions for professional athletes).

But how can a juror decide whether a doctor (or lawyer, architect, engineer or other professional) acted reasonably? Unless the juror is also a professional in the same field, the juror has no background upon which to make such a determination.

Enter the world of *expert testimony*. In order for jurors to decide these types of cases, courts have traditionally allowed other professionals to testify regarding the *standard of care*. The standard of care is the benchmark against which the defendant's conduct will be judged: if the defendant violated that standard, then he or she is negligent, and—assuming proximate cause exists—damages can be awarded.

Unfortunately, cases can become a "war of experts." It is now possible for either side to obtain an expert to support almost any position. Lawyers often complain about "plaintiff's whores" or "defense whores" – expert witnesses who always seem to testify for one side, and who inevitably find either a breach of the standard of care, or that the standard of care was met.

> “There are three kinds of witnesses: liars, damned liars, and experts.”
>
> —ANONYMOUS

Faced with persuasive testimony from both sides involving highly technical or esoteric fields, jurors in these cases often decide in favor of the party with who they sympathize. This may be the injured plaintiff, but often is the defendant if he or she appears otherwise competent and caring.

What is “informed consent,” and does it mean I have to watch more network news?

Informed consent is a negligence doctrine with a long tradition. Briefly, informed consent requires a doctor to advise you fully of all the material risks and consequences to a proposed treatment—surgical or medical. For instance, gall bladder surgery always carries the risk of infection (morbidity) and, like all operations involving anesthesia, a small risk of death (mortality). Your doctor should advise you of these risks so that you make an informed decision as to whether to have the operation. Informed consent does not require your doctor to detail every single possible outcome, even the most remote, but he or she should cover all of the common possibilities *and* all of the possibilities that are serious.

If your physician (or dentist, or chiropractor, etc.) fails to advise you of all the risks, and one of these results occur (without negligence on the part of the physician) *and* you can convince a jury that you would not have had the operation or taken the drug if you had known about the risk—then you can recover damages from the physician.

I’m not satisfied with the results of my treatment. Can I sue my doctor? Also, I’m unhappy with the settlement I got in my divorce case. Can I sue my lawyer?

You haven't been listening. A bad result is not the equivalent of malpractice. Medicine is still an art, not a science, and law *certainly* isn't a science. Bad results—in medicine, law, engineering, or whatever—can occur without any negligence on the part of the professional.

My doctor removed a mole and left a big scar. Another doctor told me that the surgeon cut too deeply, and that I will have to have further surgery to correct the scar. Can I sue?

Assuming that the second doctor will testify on your behalf (or that another doctor will), you certainly *can* sue. But *should* you? Malpractice cases are extremely costly and time-consuming; the cost of expert witnesses alone can be astronomical. Unless your damages are large, a suit cannot be justified. If for instance, the mole was on the end of your nose, and the scar was large, it might be worthwhile. But if the mole was on your inner thigh…

Many states, in an attempt to curb what were perceived as an excess of malpractice cases (rather than an excess of malpractice) have instituted *mediation* or *arbitration* panels which take the place of the courts. In most cases, this cure is worse than the disease; the panels only add an extra layer to the system, and the arbitrators are unqualified. The panels, however, have proved useful when then are designed to allow the meritorious, "low damage" case to be heard. It all depends on the law of the state where the alleged malpractice occurred.

Strict Liability

As we've seen, *liability* for damages is usually imposed by courts as a result of a finding of *negligence* on the part of the defendant. Sometimes liability will be imposed, however, even in the absence of proof of negligence or intentional misconduct. This kind of liability, or liability without fault, is usually called *strict liability*.

It’s not a new concept: the ancient English common law (law made by judge’s decisions, rather than statutes), provided that landowners would be strictly liable for damages caused by wandering animals or storage of dangerous substances. For instance, if an English farmer’s bull jumped over a properly maintained fence, galloped three miles through the nearby town, terrorized the inhabitants, and gored the parson’s jackass, the farmer would be required to compensate the parson for his jackass.

The philosophy behind this is simple: where no one is at fault, the person who created the risk of the damage—the farmer who owned the bull, in the example above—should be held responsible. The bull’s owner is the logical person—in medieval vernacular—to “pay through the ass.”

Personal injury cases often involve items or products that the plaintiff had no reason to fear—a vacuum cleaner, a tampon, a lawnmower, or a termite spray. These kinds of products, however, have been responsible for horrible injuries, and lawsuits by the injured people have led to design changes in the products.

Until the 1960’s, injured consumers had an almost impossible task to win a case against a manufacturer: they had to prove negligence in the manufacturing process. In the last thirty years, thanks to the efforts of plaintiff’s lawyers, courts began imposing strict liability in a whole new range of human activities, but primarily in manufacturing—a doctrine of law known as *products liability*. Under this doctrine, if a defective product causes injury to you, the manufacturer will be liable even if you cannot show any negligence in its manufacture, or that the manufacturer knew the product was defective. In some cases, a manufacturer may be held liable for damages caused by a non-defective product because it failed to provide adequate warnings of hazards or risks resulting from the product’s use.

There were pieces of glass in the barbecue-beef sandwich I bought at a fast-food restaurant. I cut my gums badly, and had to have dental work. Do I have a case?

In those states which apply strict liability, you would only have to prove that there was glass in the sandwich and that you were injured by the glass. Otherwise, you would have to prove that someone in the restaurant either was negligent or was trying to build the practice of the local oral surgeon.

I was injured in an automobile accident when my airbag failed. The manufacturer says the airbag was fine when it left the factory, and the dealer says they didn't touch it. How do I prove who's at fault?

Not your problem. Under strict liability, both the dealer and manufacturer would be liable for your injuries.

Our neighbor's dog is a vicious poodle. We're worried it will bite someone. What can we do?

Unfortunately, state law varies wildly on this one. Some states still maintain the old "every dog is entitled to one bite" doctrine: until a dog has bitten someone, the owner has no notice of its propensity to bite, and thus is not liable for that "first bite." Many states and localities, however, have modified this defense and have made dog owners liable for their animal's first unprovoked attack.

Intentional Torts

Until now, we've been looking at negligent torts. The damage caused by these torts, although foreseeable, isn't intentional. You may have known that driving at 105 mph is dangerous, but you didn't *mean* to run over that poodle.

Suppose, however, you're in a restaurant and get into an argument with another patron over who should be seated first. When you turn your back, she picks up a dish of strawberry

flambe¢ and flings it at your head, setting your hair afire. In addition to being guilty of a crime, the disgruntled patron has committed an *intentional tort*—battery—and is liable for your medical bills, as well as your pain and suffering.

What's the difference between assault and battery, and how come they're always said together?

An *assault* occurs when you have a reasonable expectation that someone is going to harm you. If Sylvester Stallone picked up a tire iron and waved it at you in a menacing manner, he could be guilty of civil assault, and you could collect damages from him. The fear must be reasonable, however; if Woody Allen picked up the same tire iron, you would have a tough time convincing a jury of your fright. And words alone—"I'm gonna get you, sucka," for instance, are generally not considered to be an assault, although quite rude.

Battery is any unpermitted or unauthorized touching of one person by another, even if doesn't cause you any harm, and even if no harm was intended. For example, a physician may be guilty of battery if he performs an operation upon you without your consent, although the operation helped you. Even a kiss—if unauthorized—can be a battery.

Since an assault usually accompanies or precedes a battery, the term "assault and battery" has achieved wide use. In criminal law, however, the terms have a different meaning.

Workers Compensation

Until the early twentieth century, if a worker was injured on the job because of unsafe working conditions, he would have to sue his employer for damages—never a good career move. In addition, prior to the rise of the personal injury lawyer, a typical factory worker had little chance of obtaining competent representation.

Worker's compensation laws, both federal and state, were enacted to remedy this situation. These laws provide a specific amount of compensation (usually far less than what a jury might award) to workers who suffer work-related injury, death, or disease. Each state has different laws, but in general a worker only need prove the fact of the injury or the disease, and that it is work-related; whether the employer was negligent or not doesn't make any difference. Of course, employers and their insurance companies have found that by contesting the validity of the injury or its relation to work, they can often defeat or minimize the claim. And some employees have found that they can fake an injury and "go out on comp" for long periods.

I was injured at work. What kind of benefits do I get?

In most states, you will get one or all of the following benefits, assuming you qualify: a percentage of your salary while you are unable to work (usually 2/3); a sum for any permanent disability you have suffered (which may or may not be paid in a lump sum); and vocational rehabilitation benefits if you are unable to return to your old job.

What about my pain and suffering?

If you're a worker, you don't have any. Seriously. Worker's compensation benefits have no provision for payment of such "subjective" losses—even if very severe—nor can you sue the employer for such damages. Your state worker's compensation benefits are your sole remedy. You may, however—depending upon your state—sue a coworker who caused your injury, and/or the manufacturer of a machine that caused the injury. Damages for pain and suffering would be available from these parties.

The Collateral Source Rule, or How to Collect Twice

You're in your neighbor's driveway when you're struck on the head by the genuine SHAQATTACK Breakaway Basketball Backboard,

installed negligently by your neighbor. You lose two weeks from work, but your employer pays you sick leave and your hospital and medical bills are paid by your health insurance company. Can you still claim two week's salary and the medical bills from your neighbor?

In most states, the answer is yes—due to the collateral source rule. If the case went to court, your neighbor would be prohibited from introducing into evidence the payments from your employer and health insurance company. Although this seems unfair, the law deems it better for the injured party to get a windfall than for the responsible party to escape responsibility for his actions. Otherwise, people might act more carelessly toward fully insured individuals. Unfortunately, the rule doesn't always apply. Many states have adopted "no-fault" legislation for automobile accidents which specifically abrogate the rule. Even if the rule does apply, in many situations where insurance has paid your bill, the insurance policy will have a subrogation clause which will require you to repay the money to the insurer.

© 2001 Daniel Steven