



# Multiple Tortfeasors

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## Vicarious Liability

- Respondeat Superior
- Acting in Concert
- Statute-based vicarious liability

Keep in mind: vicarious liability only expands the scope of liability. It never contracts it.

## Respondeat Superior

- Masters are responsible for the torts of their servants.
  - (But not the other way around.)
- Works for torts committed in the course of employment. Note that it's not about what the employer permitted.
  - Example of saxophone player and security guard

## Respondeat Superior

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- Works for torts committed in the course of employment. Note that it's not about what the employer permitted.
  - Example of saxophone player and security guard:
    - For an unjustified, unauthorized tazer-gun discharge into plaintiff, you can have respondeat superior through the employment of the security guard, but not the sax player.

- The realities of shallow-pocketed defendants
  - Insolvency vs. judgment proof
  - Bankruptcy
  - State exemption statutes
- Practical reasons some co-tortfeasors don't become defendants
  - Difficulty of service and discovery
  - Sharing of defense costs and settlement dynamics

## **Joint and Several Liability, and its Alternatives**

- Joint and several liability
  - Every defendant is liable for the full amount, even if other defendants could also be liable.
  - Plaintiff can collect from anyone against whom all elements of a claim can be proved.
  - But plaintiff cannot double-collect.
  - Fewer than 10 states follow this in its pure form.
- Pure several liability
  - Each co-tortfeasor can only be held liable for the portion of the damages “attributable” to their fault
- Hybrid systems

## Contribution and Indemnification

- Contribution
  - A defendant can get a portion of a settlement or judgment reimbursed by a co-tortfeasor.
  - Makes joint and several liability more intuitively fair.
  - The details differ greatly by jurisdiction.
  - Generally, this process is irrelevant for the plaintiff.
    - The plaintiff gets paid by defendant, and it's then that defendant's burden to seek contribution.
- Indemnification
  - Allows shifting of whole burden of settlement, judgment, and/or legal defense to someone else.
  - Makes strict liability and vicarious liability more intuitively fair.

## Contribution and Indemnification

- Indemnification
  - Two kinds:
    - Common-law or equitable indemnification (that is, indemnification from the background law)
    - Contractual indemnification
  - No defendant can escape liability to a plaintiff by way of an indemnification provision with a third party.

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**Example: The Whirler** – Suppose that General Amusement Industries wants to sell a ride called The Whirler to a small, family-owned theme park, Wonder Cove. Wonder Cove is worried that operator error could lead to injuries on The Whirler. So, to close the deal, General Amusement Industries agrees to indemnify and hold harmless Wonder Cove for any and all injuries sustained in connection with The Whirler. Plaintiff Gene Gbaj is injured on The Whirler because of operator negligence. Can Gbaj successfully sue Wonder Cove? You bet. The indemnification agreement does not affect Gbaj's rights. What Wonder Cove can do is demand General Amusement Industries reimburse Wonder Cove, and if General Amusement Industries refuses, Wonder Cove can sue them for breach of contract.

## Contribution and Indemnification

- Settlements in circumstances involving contribution
  - To what extent can a hold-out litigating and eventually losing defendant get contribution from an early settling defendant? Or vice versa?
  - A huge amount of money is riding on this question, and it differs by jurisdiction.
  - In general, there is a requirement of showing the settlement was in good faith.
  - In general, the courts understand there is a policy of encouraging settlements.

# Hypotheticals

Lara is an employee of Hexetron Inc., working as a truck driver. She is instructed not to disobey the speed limit. Nonetheless, while driving a Hexetron truck in a 55 mph zone, she is traveling 62 mph and, because of her negligence, hits a family of four in a minivan. Is Hexetron liable?

- A. Yes, because of vicarious liability via the doctrine of respondeat superior.
- B. Yes, because of vicarious liability arising from the fact that Hexetron owns the truck.
- C. No, because Hexetron instructed Lara not to disobey the speed limit.
- D. No, because employers cannot be liable via respondeat superior.
- E. No, for some other reason.

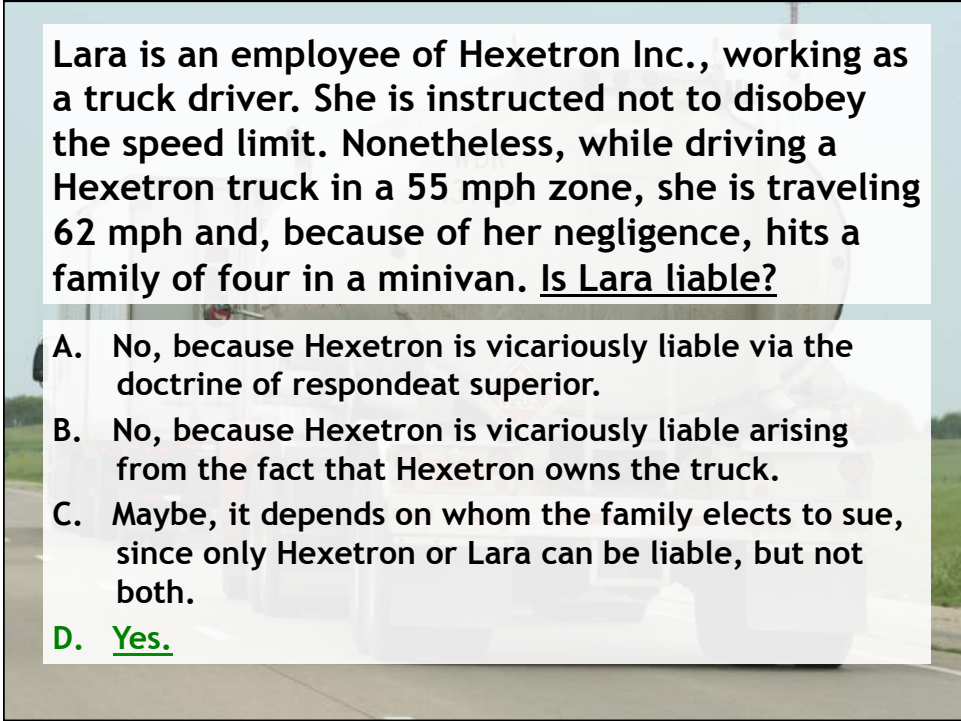
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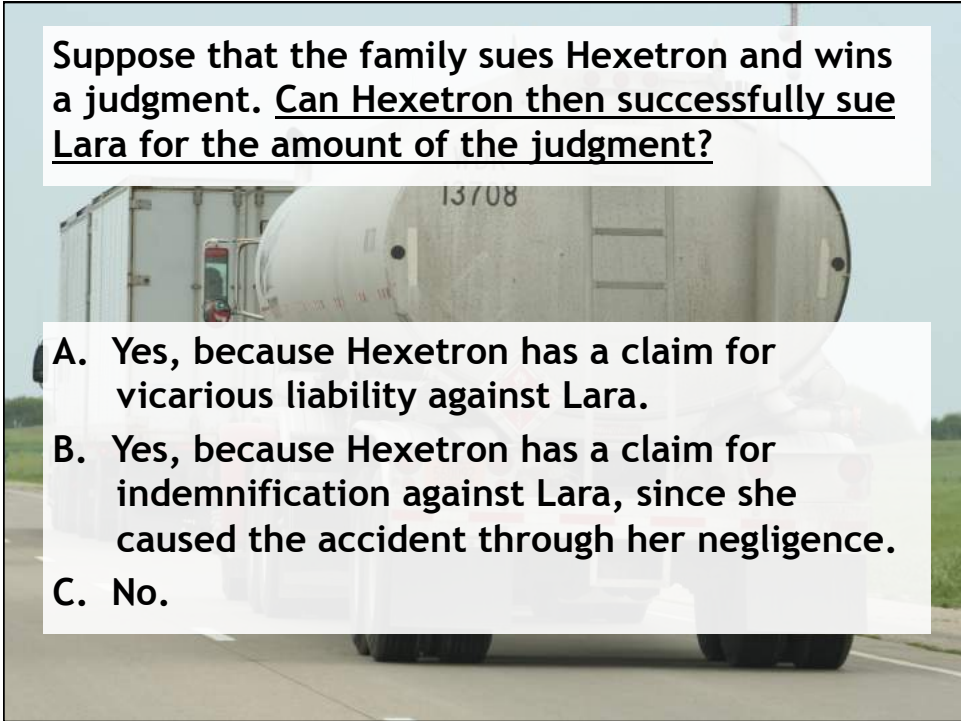
- A. No, because Hexetron is vicariously liable via the doctrine of respondeat superior.
- B. No, because Hexetron is vicariously liable arising from the fact that Hexetron owns the truck.
- C. Maybe, it depends on whom the family elects to sue, since only Hexetron or Lara can be liable, but not both.
- D. Yes.





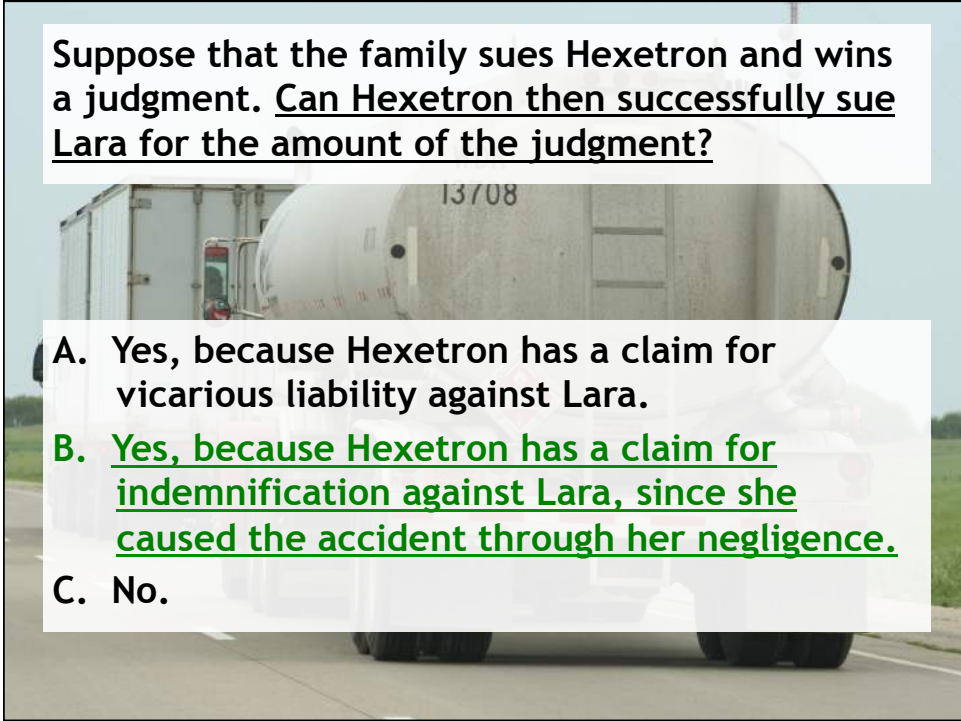
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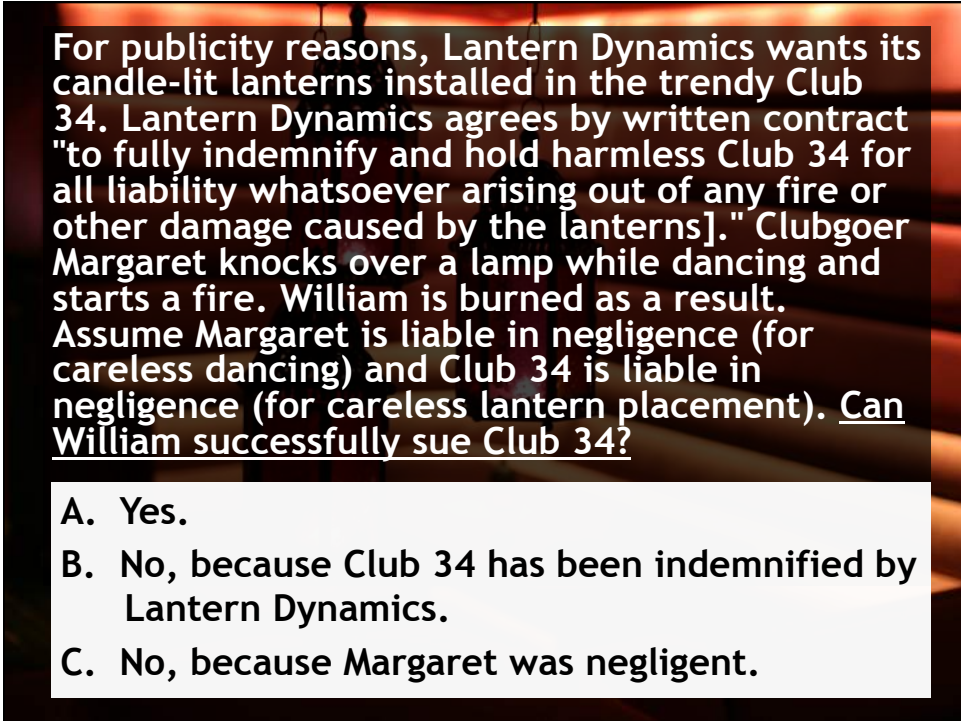
Suppose that the family sues Hexetron and wins a judgment. Can Hexetron then successfully sue Lara for the amount of the judgment?

- A. Yes, because Hexetron has a claim for vicarious liability against Lara.
- B. Yes, because Hexetron has a claim for indemnification against Lara, since she caused the accident through her negligence.
- C. No.



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For publicity reasons, Lantern Dynamics wants its candle-lit lanterns installed in the trendy Club 34. Lantern Dynamics agrees by written contract "to fully indemnify and hold harmless Club 34 for all liability whatsoever arising out of any fire or other damage caused by the lanterns]." Clubgoer Margaret knocks over a lamp while dancing and starts a fire. William is burned as a result. Assume Margaret is liable in negligence (for careless dancing) and Club 34 is liable in negligence (for careless lantern placement). Can William successfully sue Club 34?

- A. Yes.
- B. No, because Club 34 has been indemnified by Lantern Dynamics.
- C. No, because Margaret was negligent.

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From the casebook ... p, 436-437

**Problem: A Lucky Break for Bad Brakes?**

Omar was driving on a divided mountain highway consisting of two lanes of traffic in each direction separated by the familiar 42-inch-high concrete wall that is known "K-rail" or "Jersey wall." On a downhill section, Omar's brakes failed, and, after travelling for one mile, he finally careened off the road to avoid a jackknifed tractor-trailer. Omar's car somersaulted down the mountainside.

At the resulting trial, the jury calculated total damages at \$1 million and, using a special verdict form, assigned fault as follows: 60% of the responsibility to the brake manufacturer; 20% to the operator of the tractor-trailer; 5% to the civil engineering firm that decided no guardrail was needed on the right shoulder; and 15% to Omar, for failing to slow down with lower gears or the hand brake and for choosing to steer the car into the void rather than nudge it into the K-rail.

Omar would like to collect \$850,000 from the civil engineering firm. What might be some reasons he would want to do this? And will he be permitted under the law? How could doctrinal differences among jurisdictions affect Omar's ability to collect?