

A hotel employed a carefully selected independent contractor to rebuild its swimming pool. The hotel continued to operate while the pool was being rebuilt. The contract between the hotel and the contractor required the contractor to indemnify the hotel for any liability arising from the contractor's negligent acts. A guest of the hotel fell into the excavation, which the contractor had negligently left unguarded.

In an action by the guest against the hotel to recover for his injuries, what would be the most likely outcome?

- A. Liability, because the contract between the hotel and the contractor required the contractor to indemnify the hotel for any liability arising from the contractor's negligent acts.
- B. Liability, because the hotel had a nondelegable duty to the guest to keep a safe premises.
- C. No liability, because the contractor was the actively negligent party.
- D. No liability, because the hotel exercised reasonable care in employing the contractor.

### Explanation:

A principal is generally **not vicariously liable** for torts committed by its **independent contractor**. However, **vicarious liability will be imposed** if the independent contractor's work breaches a **nondelegable duty** owed by the principal—ie, a duty retained by the principal even when the performance of that duty is assigned to an independent contractor. This includes the **duty of a land possessor** that holds its land open to the public to **keep the premises safe for business visitors**.

Here, the hotel hired an independent contractor to rebuild its swimming pool. While performing that work, the contractor negligently left the excavation unguarded. A guest then fell into the excavation and sustained injuries. And since the hotel had a nondelegable duty to keep the premises safe for its guests, the hotel is vicariously liable for the guest's injuries caused by the contractor's negligence.

**(Choice A)** The contractor's agreement to indemnify (ie, reimburse) the hotel for any liability arising from the contractor's negligent acts does not affect the hotel's liability to its guests. Instead, the indemnity agreement provides a basis for the hotel to seek reimbursement from the contractor if the guest's suit is successful.

**(Choice C)** Active negligence is negligence resulting from an affirmative act (eg, rebuilding the swimming pool), while passive negligence is negligence resulting from inaction (eg, failing to maintain safe premises). However, these distinctions are outdated and, even if they applied, merely address the apportionment of damages between multiple defendants—not one defendant's liability to the plaintiff.

**(Choice D)** The fact that the hotel exercised reasonable care in employing the contractor shows that the hotel is not *directly* liable for its own negligence in hiring an incompetent worker. But the hotel is still *vicariously* liable for the contractor's negligence since the hotel owed its guests a nondelegable duty to maintain safe premises.

### Educational objective:

A principal is generally not vicariously liable for its independent contractor's torts. However, vicarious liability will be imposed when the independent contractor breaches a nondelegable duty of care owed by the principal—eg, a land possessor's duty to keep the premises safe for business visitors.

### References

Restatement (Third) of Torts: Liab. for Physical & Emotional Harm § 57 (Am. Law Inst. 2012) (no vicarious liability generally for independent contractor's torts).

Restatement (Second) of Torts § 344 (nondelegable duty to keep business premises safe).

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