

## Liability Loss Exposures (Lecture 8)

### *Overview of Lecture 8 (chapter 1 CPCU 4)*

- I. Liability Risk Management*
- II. Distinguishing Characteristics of Liability Risk Management*
- III. Nature of Liability Exposures*
- IV. Tort Liability*
- V. Premises Liability Exposures*
- VI. Liability Arising Out of Operations*
- VII. Products Liability*
- VIII. Contractual Liability Exposures*

### **I. Liability Risk Management**

#### **A. Terminology**

- liability loss exposure - possibility of experiencing a liability loss
- liability loss - money paid due to a legal claim or suit

#### **B. Organizations facing liability**

- private and public firms
- governmental bodies
- nonprofit organizations

**C. Litigation exposure**

- defense costs, impaired operations (injunctions), loss to reputation

**II. Distinguishing Characteristics of Liability Risk Management  
(Compared to Property)**

**A. Involvement of a third party**

- first party (insured defendant)
- second party (insurer, has duty to defend insured)
- third party (claimant, plaintiff)

**B. Loss difficult to measure**

- maximum possible loss (MPL) unlimited
- forecasting uncertainty  
(lower frequency and higher severity of liability loss exposures)

**C. Legal environment**

- changing rules of law  
(rules of evidence, statutes of limitation, theories of responsibility)
- changing sympathies  
(judges and juries)
- liability governed by tort law

**D. "Long-tail" problem**

- length of time from injury to loss settlement (claim development)

**E. Noninsurance contractual transfers of liability**

- **hold-harmless provision**  
**(leases, sales contracts, construction contracts)**
- **indemnity provision**  
**(in hold-harmless provisions)**
- **enforcement of contractual transfers**  
**(public policy considerations)**

**III. Nature of Liability Exposures**

**A. Two sources of legal liability**

1. **criminal**
2. **civil**

**B. Criminal liability**

- **offenses against society (the common good)**
- **beyond a reasonable doubt**
- **commercial entities**  
**(criminal fines may apply, employees or officers may be convicted of any crime)**
- **insurance covers resulting civil liability**  
**(no coverage for the criminal liability)**

**C. Civil liability**

- protects rights and provides remedies for breaches of duties owed to others
- preponderance of evidence

**IV. Tort Liability**

- civil wrong other than breach of contract
- law allows remedy in form of money damages

**A. Three types of torts**

1. intentional torts
2. negligence
3. strict liability

**B. Intentional torts**

- intentional act or failure to act that injures another person or damages property

**C. Types of intentional torts**

1. defamation-libel and slander
2. invasion of privacy
  - unauthorized release of confidential information
  - illegal surveillance
  - public disclosure of private facts

3. assault and battery
  - assault: threat of bodily harm
  - battery: unprivileged touching
4. false imprisonment and false arrest
5. malicious prosecution
6. trespass
  - real or personal property
  - on premises without legal right or permission
  - liable for damages caused by trespass
7. conversion
  - appropriating the property of another
  - common in the context of bailed property
8. nuisance
  - disturbing the owner's or renter's right to enjoy premises
  - loud noise, smell, etc.
9. interference with relationships between others
  - ex. interference with copyrights, trademarks, patents
10. bad faith
  - virtually unique to insurers
  - ex. unreasonable delay in claim payment

## D. Negligence

- **definition**: unintentional tort involving the failure of a person to exercise the degree of care that a reasonably prudent person would have exercised, under similar circumstances, to avoid harming another person
- 1. elements of negligence
  - a. legal duty owed
  - b. breach of legal duty owed
  - c. actual damages result
  - d. damages as a proximate result
- 2. types of damages
  - compensatory
    - special (economic)
    - general (noneconomic)
  - punitive
- 3. defenses
  - contributory negligence
  - comparative negligence
  - assumption of risk  
(knowingly and voluntarily exposed themselves to danger)
  - statute of limitations

4. immunities
  - sovereign (governmental)
  - charitable

**E. Strict liability (absolute liability) torts**  
(liability without proof of negligence, applied when potential harm is great)

1. abnormally dangerous instrumentalities  
(ex., dynamite, wild animals)
2. ultrahazardous activities  
(ex., blasting, dangerous chemicals)
3. dangerously defective products
4. workers compensation laws

**F. Vicarious liability**  
(liability for the actions of another, imputed negligence)

- partnerships and joint ventures
- principal for agent  
(employer for employee)
- parents for acts of children
- negligent entrustment

**G. Res Ipsa Loquitur (the thing speaks for itself, negligence presumed)**

- defendant must prove he was not negligent

## V. Premises Liability Exposures

### A. Duties to persons on the premises

#### 1. trespassers

- on premises without permission or legal right
- reasonable force to expel
- cannot intentionally harm or trap
- no duty to make premises safe

#### 2. licensees

- on premises with occupant's permission or legal right
- warn of known dangerous conditions that are not readily apparent
- ex. solicitors, police, fire fighters

#### 3. invitees

- invited on premises for benefit of occupant
- warn of dangers and inspect and eliminate unsafe conditions

#### 4. children

- attractive nuisance: a dangerous condition that can attract and injure children
- higher degree of care owed to children

## B. Landlords and tenants

### 1. duties to third parties

- duty depends on class of person (trespasser, licensee, invitee and children)
- landlord has greater duty in meeting building safety regulations and in supervising public areas

### 2. landlord to tenant

- reasonable care for protection of tenant
- repair or eliminate known dangerous conditions
- privacy rights

### 3. tenant to landlord

- reasonable care for protection of landlord
- landlord's property major liability loss exposure

## VI. Liability Arising Out of Operations

- all activities except those for which separate, insurable categories exist (ex. auto, workers compensation)
- operations on premises is premises exposure
- duty to exercise reasonable care to avoid bodily injury or property damage to others

### A. Operations

- on-going activities away from insured's premises
- repair and maintenance persons, contractors

**B. Completed operations**

- work has been completed
- away from insured's premises
- treated in insurance like products
- architects, contractors, engineers

**C. Independent contractors**

- employer not vicariously liable except for nondelegable duties (ex. liability for common areas)
- employer may be liable for selecting incompetent contractor

**VII. Products Liability**

- legal responsibility of manufacturer, distributor or retailer to the user or consumer of a product
- product liability lawsuits based on negligence and/or strict liability in tort

**A. Negligence action**

- plaintiff must prove that the manufacturer, distributor, or retailer was not reasonably prudent in the design, manufacture, distribution, or selling of the article that caused the injury.

**B. Strict liability in tort  
(do not need to prove negligence)**

1. definition of seller (an occasional sale does not apply)
2. definition of user or consumer  
(those who ultimately benefit from the product - not just purchaser)
3. defective condition unreasonably dangerous  
(not contemplated by average consumer)

**C. Products liability defenses**

1. contributory negligence, or assumption of risk
2. product misuse (manufacturer has the burden to foresee certain misuses of the product)
3. alteration or modification
4. state-of-the-art defense
5. disclaimers
6. statutes of limitation

**VIII. Contractual Liability Exposures**

**A. Limitations**

- breach of contract is not insured in standard insurance policies
- contractual assumption of the tort liability of another is covered in standard insurance policies (ex. CGL)
- cannot transfer responsibility for gross and willful negligence or criminal acts
- public policy, bargaining power considerations

**B. Agreements commonly involving tort liability transfers**

- construction contracts, purchase orders and sales agreements, leases