

LIABILITY LOSS EXPOSURES: Tort, Contractual, and Statutory Liability (552-1)

[A **loss exposure** is the possibility of experiencing a loss.

A **liability loss** is the money paid by a person or organization as a result of a legal claim against that person or organization.

Damages are money paid by one party to another as compensation for a loss or injury.

A **remedy** enforces a right or privilege **or** prevents or redresses the violation of a right or privilege.

Commercial liability insurance is a risk financing technique for business and professional liability losses.]

EOs 1 - 3. **THE ELEMENTS OF LEGAL LIABILITY UNDER CIVIL LAW: Liabilities** are legal obligations arising from legal wrongs. Legal liabilities are criminal, civil, or both.

Criminal law applies to acts that injure the state or society. **Civil law** applies to acts that injure citizens.

Criminal liability exposures, which are **not** insurable, can prevent a business from achieving its goals.

Risk managers are therefore concerned with controlling a business's criminal liability exposures **and** its civil liability exposures.

CIVIL LEGAL LIABILITY IS BASED ON TORT, CONTRACTUAL, OR STATUTORY LAW.

I. TORT LIABILITY--The four elements of a tort: (Breached duty caused damage.)

- A. **wrongful invasion of** (Breached)
- B. **a legally protected right** (duty),
- C. **resulting in** (caused)
- D. **proximate or direct damages** (damage.).

The three types of tort:

- A. **Negligence tort**--is an unintentional tort in which the **defendant** (aka the **tortfeasor** aka the **negligent person**) failed to exercise the standard of care he owed the **plaintiff** (aka the **claimant**).

A defendant may be held liable for negligence *only if* the plaintiff can prove all four elements of a tort:

1. **a legal duty owed--The duty arises under either**
 - a. **common law**--the unwritten codification of society's rules of conduct as rendered by judicial (court) decisions **or**
 - b. **statutes and ordinances--Statutes** are written dictates of legislative bodies. **Ordinances** are statutes at the local or municipal level.
2. **a breach of that duty**--The defendant failed to exercise reasonable care to observe the duty owed. **The reasonably prudent person test [still known by most older attorneys as the reasonable man test]** evaluates the defendant's conduct by asking if he behaved the way a reasonable person of ordinary prudence would have behaved under the same circumstances.
3. **damages**--The plaintiff suffered damages recognized by law.
Compensatory damages compensate the plaintiff for
 - a. **special damages**--money-quantifiable, out-of-pocket losses such as for medical bills and lost wages **and**
 - b. **general damages**--money-nonquantifiable damages such as for pain and suffering and **loss of consortium** (loss of spousal sex, society, and services).
Punitive, aka exemplary, damages--punish the defendant and set an example to others by awarding the plaintiff money in addition to compensatory damages.
Injunctions (**not** technically damages, rather compulsions) are court orders for defendants either to stop doing something (unfair employment discrimination) **or** to do something (clean up a toxic landfill).
4. **causal connection**--The plaintiff must prove **proximate cause** (The breached duty must directly cause the damages by a reasonably foreseeable chain of events.).

The six defenses against negligence:

1. **contributory negligence**--The plaintiff was negligent in caring for his own self-interest--barring *any* recovery. Comparative negligence, in some form, has replaced contributory negligence throughout virtually the entire US.
 2. **comparative negligence**--The plaintiff was negligent in caring for his own self-interest--barring recovery for that proportion of damages equal to the plaintiff's proportion of negligence.
 3. **assumption of risk**--The plaintiff intentionally and voluntarily accepted or entered a situation he knew was dangerous.
 4. **statute of limitations**--State statutes set deadlines after which the plaintiff loses his right to sue the defendant.
Time periods vary from state to state and from cause of action to cause of action.
 5. **tort immunities**--A person or organization (government, charity, family member under certain circumstances) with tort immunity can *not* be held accountable or liable for torts committed within the scope of the immunity.
 6. **lack of negligence**--The plaintiff failed to establish at least one of the four elements of negligence.
- B. **Intentional tort**--*must* involve intentional activity, but need *not* involve intentional injury. Every person has the legally protected right to be free of injury or harm to his reputation, privacy, person, movement, and property.

Eight intentional torts:

1. **intentional torts against the person--include**
 - a. **assault**--intentionally causing fear of battery,
 - b. **battery**--injurious or offensive touching of another without permission or privilege,
 - c. **false imprisonment**--detaining another without permission or privilege, *and*
 - d. **false arrest**--physical restraint of another without permission or privilege.
2. **defamation**--false public statements resulting in the plaintiff's loss of (damaged) reputation or esteem.
Slander is oral defamation.
Libel is written defamation.
3. **invasion of the right of privacy**--involves violation of a person's right to seclusion or to freedom from publicity.
4. **fraud**--is deception to induce another to part with property *or* to surrender a legal right.
5. **interference with relationships between others--include**
 - a. **Trade disparagement**--belittles another's business, products, or services with lies or misleading statements.
 - b. **Unfair competition**--imitates a competitor's goods to fool customers into mistaking the imitation for the original.
 - c. **Interference with employment**--uses unlawful means to prevent a person's employment *or* to procure his discharge.
6. **misuse of legal process--includes**
 - a. **Malicious prosecution** is malicious criminal proceedings without probable cause terminated in favor of the defendant.
 - b. **Malicious abuse of process** uses civil or criminal procedures for a purpose for which they were *not* designed.
7. **interference with property rights--includes**
 - a. **Trespass** includes unauthorized entry upon another's land or interference with another's possession of personal property.
 - b. **Conversion** is the intentional and unlawful control of another's personal property, ie, theft.

8. **nuisance--includes**

- a. **Private nuisance** interferes with another's quiet enjoyment of his real property.
- b. **Public nuisance** affects a substantial segment of the public rather than just an individual or family.

C. **Strict (or absolute) liability tort--Strict (absolute) liability** is imposed on inherently dangerous, but socially acceptable, activities.

Strict or absolute liability represents the compromise between illegality and moral fault.

Under strict liability, the defendant's extreme care and lack of moral fault are *not* defenses.

The defendant is held responsible if the plaintiff can show injury.

Strict liability is imposed for

- 1. engaging in **abnormally dangerous activities** (blasting, mining), *and*
- 2. the sale of **dangerously defective products** [See EO 4, B.].

*[Vicarious liability (substitutionary liability) imposes responsibility on one person (a **principal**) for the torts of another (his **agent**).*

*Employers are subject to vicarious liability for their **employees** (persons hired by the employer to perform work under the employer's control).*

*Employers are **not** subject to vicarious liability for their **contractors** (persons hired by others but who retain the right to control their own work) **unless** the contracted work involves nondelegable duties or inherently dangerous activities.]*

II. **CONTRACTUAL LIABILITY--arises from**

A. **breach of contract**--involves failure to perform as voluntarily promised.

The plaintiff can sue for damages or seek the remedy of specific performance (have the court order the defendant to do what the defendant failed to do).

Liability insurance usually does *not* cover breach of contract.

B. **hold harmless (indemnity) agreements**--obligate one party (the **indemnitor**) to pay certain losses (contractually assumed) sustained by another party (the **indemnitee**).

The indemnitor voluntarily assumes another's liability, usually negligence liability, hence assumes a **contractual liability**.

Insurance *is* available for contractual liability.

State statutes make certain hold harmless agreements unenforceable.

*[C. **wrongful interference**--such as contracting with a competitor's employee.]*

III. **STATUTORY LIABILITY--arises from**

A. **workers' compensation laws**--State WC laws require employers to pay prescribed benefits for occupational illness or injury of employees.

They also provide death benefits for employee death due to covered illness or injury.

Workers' compensation insurance is available.

B. **statutes imposing strict liability**--Various laws, such as dram shop laws, impose absolute legal obligations to compensate others if certain events occur.

EO 4. **THE LEGAL FOUNDATIONS AND GENERAL SCOPE OF**

A. **PREMISES AND OPERATIONS LIABILITY EXPOSURES--Premises and operations liability is liability for bodily injury (BI) or property damage (PD) caused by**

- 1. an accident occurring on the premises owned, leased, or rented by the person or organization (**premises liability**) *or*
- 2. an accident away from the premises but arising from the person's or organization's ongoing operations (**operations liability**).

Premises and operations liability is *usually* based on negligence, but *may* be based on strict liability or contractual liability.

Liabilities arising from autos, watercraft, aircraft, and employee illness and injury are distinct from premises and operations liabilities.

B. **PRODUCTS AND COMPLETED OPERATIONS LIABILITY EXPOSURES--Products liability** is the legal responsibility of the manufacturer, distributor, *and/or* retailer of a product to the product consumer.

Products liability is usually based on

1. **negligence**--The plaintiff must prove the manufacturer, distributor, *and/or* retailer was *not* reasonably prudent in product design, manufacture, distribution, *and/or* sale.
2. **strict liability in tort--The plaintiff must prove**
 - a. the product was defective when it left the defendant's custody or control,
 - b. the defect made the product unreasonably dangerous, *and*
 - c. the product was the proximate cause of injury.

Completed operations liability is the legal responsibility of a contractor, repairer, or similar artisan for BI or PD arising out of his, her, or its completed work, including use of defective parts and materials.

Completed operations liability is *usually* based on negligence, *sometimes* on strict liability.

C. **AUTOMOBILE LIABILITY EXPOSURES--Auto liability** is liability for BI and PD arising from the ownership, maintenance, or use of autos (but *not* of mobile equipment, which is an operations exposure).

Auto "use" includes more than just auto operation:

Auto "use" includes loading and unloading the auto and use of the auto as a portable office, warehouse, store, library, museum, clinic, or other use.

Some states hold the owner liable for negligent auto use by another party, *if* the other party had the owner's permission to use the vehicle.

In such cases, ownership alone is the basis for incurring auto liability.

Auto liability is based on negligence.

Employers are vicariously liable for their employees' or volunteer workers' negligence within the scope of their employment or volunteer work.

Auto lessees and auto lessors are held liable for the negligence of drivers based on which had control of the driver.

The furnisher of a defective vehicle is responsible for injuries caused by the defect, although some courts make an exception for vehicles sold 'as is'.

Auto owners are liable for **negligent entrustment** (loaning a vehicle to someone who is *not* fit to drive, as a child, an unlicensed person, or a drunk would be unfit).

To establish negligent entrustment, the plaintiff must show that the defendant knew of the driver's incompetence, inexperience, or reckless tendency as an operator; or that a reasonably prudent person would have known of the driver's deficiency.

No-fault laws provide benefits for persons injured in auto accidents *without* the need to prove fault.

Some no-fault laws preserve the injured party's right to sue when injuries exceed a verbal threshold of seriousness (loss of a body member or function, permanent disability, death). Other no-fault laws preserve the right to sue when damages exceed a monetary threshold (\$2,000, \$3,000, \$5,000).

D. **WORKERS' COMPENSATION AND EMPLOYER'S LIABILITY EXPOSURES--In addition to statutory obligations, employers may also be held liable for employee injuries and illnesses as a result of**

1. **tort suits**--An injured employee may sue his employer when the applicable WC statute does *not* bar tort suits *or* when the injury is *not* covered by a WC statute.

Examples: A factory worker who is hurt while using a product his employer manufactures has a product liability claim.

A worker's widow has a claim for loss of consortium.

Employers' liability coverage applies to both those examples.

2. **hold harmless agreements**--An employer may agree to indemnify another party against third-party claims brought by the employer's own employees for illness or injury.