

PRINCIPLES OF RISK MANAGEMENT AND INSURANCE

CLASS NOTES

Chapter 7 The Liability Risk

Topics

- Basis of legal liability
- Law of Negligence
- Current tort liability problems

Basis of Legal Liability

- A legal wrong is a violation of a person's legal rights, or a failure to perform a legal duty owed to a certain person or to society as a whole
- Legal wrongs include:
 - Crime
 - Breach of contract
 - Tort
- A tort is a legal wrong for which the court allows a remedy in the form of money damages
- The person who is injured (plaintiff) by the action of another (tortfeasor) can sue for damages
- Torts fall into three categories:
 - Intentional, e.g., fraud, assault
 - Strict liability: liability is imposed regardless of negligence or fault
 - Negligence

Law of Negligence

- Negligence is the failure to exercise the standard of care required by law to protect others from an unreasonable risk of harm
 - The standard of care is not the same for each wrongful act. It is based on the care required of a reasonably prudent person
- Elements Negligence
 - Existence of a legal duty to use reasonable care
 - Failure to perform that duty
 - Damage or injury to the claimant
 - Proximate cause relationship between the negligent act and the infliction of damages

- A proximate cause relationship requires an unbroken chain of events
- The law allows for the following types of damages:
 - Compensatory damages compensate the victim for losses actually incurred. They include:
 - Special damages, e.g., medical expenses
 - General damages, e.g., pain and suffering
 - Punitive damages are designed to punish people and organizations so that others are deterred from committing the same wrongful act
- The ability to collect damages for negligence depends on state law
- Under a contributory negligence law, the injured person cannot collect damages if his or her care falls below the standard of care required for his or her protection
 - Under strict application of common law, the injured cannot collect damages if his or her conduct contributed in any way to the injury
- Under a comparative negligence law, the financial burden of the injury is shared by both parties according to their respective degrees of fault
 - Under the pure rule, you can collect damages even if you are negligent, but your reward is reduced in proportion to your fault
 - Under the 49 percent rule, you can collect damages only if your negligence is less than the negligence of the other party
 - Under the 50 percent rule, you can recover reduced damages only if your negligence is not greater than the negligence of the other party
- Some legal defenses can defeat a claim for damages:
 - The last clear chance rule states that a plaintiff who is endangered by his or her own negligence can still recover damages from the defendant if the defendant has a last clear chance to avoid the accident but fails to do so
 - Under the assumption of risk doctrine, a person who understands and recognizes the danger inherent in a particular activity cannot recover damages in the event of an injury

Imputed Negligence

- Under certain conditions, the negligence of one person can be attributed to another
 - e.g., the negligent act of an employee can be imputed to the employer
- Under a vicarious liability law, a motorist's negligence is imputed to the vehicle's owner
- Under the family purpose doctrine, the owner of an auto can be held liable for negligent acts committed by family members
- Under a dram shop law, a business that sells liquor can be held liable for damages that may result from the sale of liquor

Res Ipsa Loquitur

- Under this doctrine, the very fact that the injury or damage occurs establishes a presumption of negligence on behalf of the defendant
 - Means, "the thing speaks for itself"
 - e.g., a dentist extracts the wrong tooth

- Three requirements must be met for *res ipsa loquitur* to apply:
 - The event is one that normally does not occur in the absence of negligence
 - The defendant has exclusive control over the instrumentality causing the accident
 - The injured party has not contributed to the accident in any way

Applications of Negligence Law

- The standard of care owed to others depends upon the situation
 - A trespasser is a person who enters or remains on the owner's property without the owner's consent
 - The duty to refrain from injuring a trespasser is sometimes referred to as the *duty of slight care*
 - A licensee is a person who enters the premises with the occupant's expressed or implied permission
 - E.g., a door-to-door salesperson
 - The property owner must warn the licensee of unsafe conditions or activities which are apparent
 - An invitee is a person who is invited onto the premises for the benefit of the occupant
 - The occupant has an obligation to inspect the premises and eliminate any dangerous conditions
- An attractive nuisance is a hazardous condition that can attract and injure children
 - The occupants of land are liable for the injuries of children who may be attracted by some dangerous condition, feature or article
 - e.g., a building contractor leaves the keys in a tractor, and a child is injured while driving it
- Today, governmental entities can be sued in almost every aspect of governmental activity
 - The doctrine of sovereign immunity has been modified over time
 - A governmental unit can be held liable if it is negligent in the performance of a proprietary function, e.g., the operation of water plants
 - Immunity from lawsuits for governmental functions, such as the planning of a sewer system, has been eroded
- Charitable institutions are no longer immune from lawsuits, especially with respect to commercial activities
- Under the doctrine of *respondent superior*, an employer can be held liable for the negligent acts of employees while they are acting on the employer's behalf
 - The worker must be an employee
 - The employee must be acting within the scope of employment when the negligent act occurred
- A parent can be held liable if a child uses a dangerous weapon to injure someone
- Most states have laws that hold parents liable for willful and malicious acts of children that result in property damage to others
- Owners of wild animals are held strictly liable for injuries to others

Current Tort Liability Problems

- Recently, risk managers, business firms, physicians and liability insurers have been troubled by:
 - A defective tort liability system
 - A medical malpractice crisis
 - Corporate fraud and lax corporate governance
 - An increase in asbestos law suits
- Defects in the present tort liability system include:
 - Rising tort liability costs
 - Inefficiency in compensating injured victims
 - Uncertainty of legal outcomes
 - Higher jury awards
 - Long delays in settling lawsuits

Tort Reform in the States

- State tort reforms include:
 - Capping noneconomic damages, such as pain and suffering
 - Reinstating the state-of-the-art defense for product liability cases
 - Restricting punitive damages awards
 - Modifying the collateral source rule
 - Under the collateral source rule, the defendant cannot introduce any evidence that shows the injured party has received compensation from other collateral sources
 - Modifying the joint and several liability rule
 - Under this rule, several people may be responsible for the injury, but a defendant who is only slightly responsible may be required to pay the full amount of damages
 - Alternative dispute resolution (ADR), a technique for resolving a legal dispute without litigation
 - In arbitration, the parties to a dispute agree to be bound by the decision of an independent third party
 - In mediation, a neutral third party tries to arrange a settlement without resorting to litigation
 - Restrictions on obesity lawsuits

Medical Malpractice Crisis

- Medical malpractice occurs when a negligent act or omission by a physician or other health care professional results in injury or harm to the patient
- Indicators of the crisis include:
 - Malpractice insurance premiums have soared
 - Many physicians have abandoned high-risk areas, such as neurosurgery
 - Malpractice insurers have incurred heavy underwriting losses; some have withdrawn from the market

- Some physicians have formed physician-owned insurance companies
- The crisis is due to many factors, including:
 - Many malpractice suits are due to medical errors by health care providers, especially errors in hospitals that result in the death of patients
 - Insurers have experienced significant underwriting losses
 - The medical malpractice combined ratio was 109.2 in 2004, indicating an underwriting loss
 - The combined ratio is the percentage of each premium dollar an insurer spends on claims and expenses
 - People are more litigious than in the past
- Measures taken to help solve the crisis include:
 - Caps on noneconomic damages
 - Arbitration panels to resolve disputes between physicians and patients
 - Limitations on attorney fees
 - Shorter period for filing suits
 - More effective medical review boards
 - Training programs to reduce medical errors
 - Emphasis on risk management, e.g., through practice standards

-END OF CHAPTER 7-