

Understanding Liability

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Introduction

This course has TWO main objectives: first, to help you understand the relationship between liability and tort law, and second, to help you understand how liability insurance coverage addresses this relationship. These objectives will be met by an examination of the concepts of liability and risk, tort law, and by a presentation and

discussion of major areas of liability coverage.

To understand insurance liability coverage, one must first grasp risk and liability as a concept.

Risk

Risk is the uncertainty or chance of loss which can result in social as well as individual costs. Therefore, society and individuals are interested in how it is assumed and handled. **Insurance is considered the "first line of defense" in shifting the burden of risk.**

Risk may be assumed by written agreement, e.g., leases signed by apartment renters where the lease waives the tenants right of action against the landlord and require the tenant to assume liability for others that might ordinarily be the landlord's responsibility.

Risk may also be presumed, e.g., a spectator at a hockey match is hit with a puck. Does he have cause of action? No, the presumption is that spectators assume this risk.

It can be said, that a majority of effort is spent by business and individuals finding legal methods to shift risks.

Hedging is a risk shifting technique that is accomplished by making commitments on BOTH sides of a transaction so the risks offset each other. An example might be a grain elevator operator. He buys grain from farmers for shipment to a central market. The farmer receives the prevailing price for grain the day it is purchased although it will not be shipped for sometime. No one knows what the price of grain will be until it arrives at the central market. The grain operator stands a chance it may be up or down. To "hedge" this, the operator shifts his risk to a grain speculator who buys and sells futures.

Subcontracting is another method of shifting risk. A building contractor shifts his risk by hiring subcontractors. Although the general contractor still has residual liability for losses, portions of the risk have been shifted to the subcontractors.

Hold harmless agreements allow liability risks to be shifted. One party agrees to assume the legal obligations of the other in a lawsuit for damages to a third party.

Incorporation is another method of shifting risk. Stockholders, if their shares of stock are fully paid, have no liability. Their losses are limited to their investment in the stock.

Liability

The legal basis for liability exposures are torts.

A **tort is a wrongful act** committed by one person against another that may result in civil action. The **wrongful act must cause bodily injury, property damage or personal injury.** Personal injuries may include a number of wrongs: defamation, false arrest, mental distress.

Tort claims result from three main actions: intentional interference, liability without fault and negligence. By far, most tort claims are based on negligence.

How liability and tort law effects liability insurance is discussed further in Section 2. First, let's try to understand some basics about liability coverage.

1 Understanding liability coverage

In a breach of contract, the parties to the contract create, in the very wording of the contract, the conditions which, if not met, will result in one party being liable to the other for damages. For example, John contracts with Bill to build Bill's house. The contract specifies the amount of money Bill will pay, and also specifies that John will build the house according to plan, using specific materials, and so on. Should John use another set of plans, or substitute inferior materials for the ones designated in the contract, or raise his price, he may be found guilty of breach of contract, and will have to pay Bill whatever damages the court decrees.

And should an insurer fail to pay the amount of money an insured is owed by the terms of the contract, the insurer will be found guilty of breach of contract and ordered to make the payments due. Of course, an insured can also be guilty of breach of contract if he or she does not follow the specific duties of an insured, or if he or she falsifies information or in some other way misrepresents the situation in order to obtain insurance. In such a case, the contract would be declared null and void.

A breach of contract, then, arises when one or more parties to a contract, the contents of which ARE KNOWN TO ALL PARTIES CONCERNED, and to which all have agreed, does not, in fact, act as the contract requires. In other words, a person who legally signs a contract and is aware of its terms is legally bound to fulfill all specific duties the contract defines.

Torts, however, are civil wrongs that result from violation of a legally determined and defined duty, a duty which applies to everyone in the jurisdiction covered by the law. For example, in order to regulate vehicular traffic, a governmental unit, whether it be a city, a county, a state, or the federal government, imposes certain duties on drivers on the roads within their jurisdiction. Such things as speed limits, stop signs, traffic lights, no pass zones, and so forth, are examples of legally-defined duties which all drivers in or through that jurisdiction must observe. A driver who fails to observe a duty, and causes harm to another person and/or to his/her property, is liable for damages to the victim.

In most areas of modern life, there are laws that define the duties citizens must observe. Crowded cities with many apartment dwellers have rules regarding the playing of musical instruments, radios and televisions during certain hours. Leash laws for pets are common. Landlords and tenants alike must observe rules regulating their behavior toward one another and toward other tenants. Park commissions bar vehicular traffic in certain areas, and post signs prohibiting swimming or fishing in ponds and lakes not intended for these uses. Billboard companies must obey rules concerning the distance a billboard must be from a roadway, or, indeed, if there will be billboards allowed at all.

All of these rules and regulations come from a recognition that when more than one human being inhabits a shelter, or works in a particular place, problems arise. Dog lovers wish to allow their animals to roam freely in parks or on beaches. Others consider dogs not on a leash as anything from a nuisance to a threat. Some people can be in a room with a radio or television set blaring at top volume and not be aware of the sound. Others cannot sleep if they can hear their neighbor's television. And as more and more people congregate in congested urban areas, more and more regulations are put into place in an effort to afford the most people the most personal freedom while at the same time curtailing behavior which invades the rights of others. The old adage, "Your rights end where my nose begins," is a good description of tort law.

The purpose of this course is to help you understand tort law as it applies to liability coverage. Note that torts can be of several types, and can be remedied in various ways. For example, NUISANCE LAWS are part of tort law, and the remedy for nuisances is normally an injunction prohibiting the guilty party from continuing the behavior. A neighbor can take a neighbor with a dog that barks constantly to court, if necessary, and, if the court finds in the plaintiff's favor, an injunction will be issued which prohibits the dog owner from allowing the dog to disturb others.

Some crimes are also considered torts: a burglar, for instance, is also guilty of trespass, one of the earliest defined torts. In fact, Anglo-American tort law began with efforts to prevent trespass to property or to a person. (Note that while most people define “trespass” as being illegal entry to another’s property, the first definition for trespass in WEBSTER’s is as follows: “to go beyond the limits of what is considered right; do wrong; transgress.”) Up until the late eighteenth century, anyone who committed trespass, whether intentionally or unintentionally, and was found guilty, was punished under the law. The first change was to divide injuries resulting from trespass into two types, those which were intentional (tortious) and those which were unintentional (nontortious.) Then, early in the nineteenth century, the concept of NEGLIGENCE was defined as a separate tort, and from that beginning came a enormous number of laws which use negligence as a basis for determining whether or not a defendant is guilty of a tort, and thus liable for damages to the plaintiff.

Why is this important? Because of the gray area it opened. Note that before negligence was considered a tort, a person could unintentionally inflict harm on someone else, and be found not guilty of a tort. But, when the concept of negligence is applied, the situation changes. Defendant A can have intended no harm at all, and yet, if he can be proved negligent in his duty to others, he can be found liable for any damages said negligence caused. In other words, applying the concept of negligence to tort law opened the door for the multitudinous lawsuits which are prevalent now in which plaintiffs go to court for everything from harm suffered when they spill hot coffee from a drive-through fast food restaurant to harm suffered when a car goes through a red light and crashes into them. Not that all these suits are frivolous. But the idea of negligence has been extended in recent times to cover so many activities that in some areas of our society, precautions taken to avoid lawsuits have greatly complicated our lives. For example, fear of malpractice suits makes many health caregivers order diagnostic tests which will support the opinion they already have, tests which add costs of both time and money to the diagnostic procedure. Yet another example of how fear of lawsuits affects decisions is the reaction of automobile dealers and service shops to the federal ruling that vehicle owners may have switches installed in their vehicles that will turn off air-bags. While in the majority of instances in which air-bags are inflated as a result of a collision, they do save drivers and passengers from serious injury and death, there have been cases in which an air-bag caused the death of a child riding in the front passenger seat, or even of the driver, if he/she happened to be a small adult who had pulled the driver’s seat very close to the steering wheel. Now, vehicle owners have been told by the federal government that they may turn off their air-bags, but automobile dealers and service shops do not want to install the switches. They fear that if someone is seriously injured or killed while a passenger/driver in an automobile in which the air-bag release mechanism has been turned off, they will be sued. As one dealer commented, “The car owner may tell me to install the switch, but if someone is hurt or killed as a result of the air-bag not inflating, I will be found liable, even if it wasn’t my decision.”

The current situation is for courts to rule that any breach of duty is a tort, instead of ruling that an alleged tort must fit into an already recognized category, such as assault, libel, and the like. There are courts which use the motive of the person accused of committing a tort to determine whether the act is indeed a tort, while other courts see the tort as the act itself, regardless of the perpetrator’s intentions. For example, if Mary erects a high wall on her property line and thus blocks both the light and the view from her neighbor’s windows, some courts would rule this action to be a tort if Mary INTENDED to cut off her neighbor’s light and view, while others would examine only the act itself, regardless of whether Mary had a malicious intent or not. Clearly, including negligence as a source of tortious conduct opened a very large and very twisted can of worms!

2 Liability & tort law

We have already seen how tort law evolved, beginning with rather clear definitions of what a tort was—initially, an act of trespass on the body or on the property of a person—and continuing to the present situation, where a harm does not have to fit into a prior, already established category to be ruled a tort. Now we will examine more closely the various types of torts, looking particularly at how these torts relate to liability coverage.

Intentional Torts

The first category of torts is Intentional Torts, and these are the ones with which we have the least concern. No liability policy will pay for damages that result from the deliberate, intentional act of an insured. Of course, there could be disagreement over the intention of the insured, with the insured arguing that he/she did not mean the harm to occur, and the insurer arguing that clearly, the harm was the result of an intended act.

Since such disputes are possible, we will look at the most common intentional torts committed against a person: battery, which is defined as the intentional infliction of a harmful or offensive bodily contact; assault, which is defined as the intentional causing of an apprehension of harmful or offensive contact; false imprisonment, which is defined as the intentional infliction of a confinement; and finally, intentional infliction of mental distress, which is defined as the intentional or reckless infliction, by extreme and outrageous conduct, of severe emotional or mental distress, even in the absence of physical harm.

Let us look at examples of these intentional torts. Mr. A. is in a restaurant and becomes highly displeased with the service. When the waiter finally returns with his order, Mr. A. stands up and hits the waiter. Mr. A. has committed battery. But perhaps when the waiter returns, Mr. A. does NOT hit him, but merely stands and spits in the waiter's face. This act, too, is classified as battery, because battery also includes damages which are offensive to a reasonable sense of dignity. (Note that numerous sexual harassment charges of battery arise from acts which are offensive to a reasonable sense of dignity.) Another interesting facet of battery is that the victim does not even have to be aware of the battery at the time it happens—for example, Miss B. is jealous of her room-mate's long blond hair. She waits until her room-mate is asleep, and then cuts her hair short. Even though the room-mate sleeps through this, Miss B. has committed a tort.

However, there are circumstances which are defenses against the charge of battery, and an insured might well make use of these to deny liability for harm. For example, Mr. C. agrees to allow his neighbor to use his outboard fishing boat, even though Mr. C. is aware that his neighbor is not an expert boatsman. The neighbor bashes the boat into a piling while attempting to dock it, smashing a hole in the bow. The neighbor could argue that since Mr. C. knew of his inexperience, and still allowed him to take the boat out, he is not liable for the damages. Or suppose that Mr. C. is working on his boat and a man comes up to him, demanding that Mr. C. give him the boat. Mr. C. attacks the man, hitting him and rendering him unconscious. In this instant, Mr. C. is defending his property—and, possibly, himself—so has no liability for the harm. Defending others is also a defense against battery.

While "assault" sounds like a violent act, as we have seen, it is not an act, but an intention. People commit assault when they make threats—bullies who intimidate others, threatening harm if people do not comply with their demands, are committing assault. However, unless the verbal threat is supported by some sort of physical gesture, assault could not be charged. Again, there are circumstances in which even a verbal threat unsupported by a physical gesture could be termed assault, if the person making the threat is known to be violent, or has a history of making good on his/her threats. Then, the person being threatened would in all probability believe that the verbal threat would be carried out.

False imprisonment sounds like the stuff of soap operas—but, unfortunately, this tort does occur in domestic situations, as a review of newspaper stories will reveal. Children are held prisoner in their homes, some kept in cages, others locked in their rooms. Wives are confined by husbands as part of a pattern of domestic violence. Even when there are no physical constraints, if a person is in fear of physical harm if he or she leaves the place where he/she has been told to stay, that is false imprisonment. Clearly, this would not be covered by any liability policy!

The last type of intentional tort against a person is the intentional infliction of mental distress, which, you will remember, is done by extreme and outrageous conduct which can and does cause severe emotional or mental distress. No physical harm need be present for a tort to have occurred. This tort formed the basis for presenting mental cruelty as grounds for divorce in states not yet passing no-fault divorce laws. It can also form the basis for claims against the estate of a person who committed suicide if the circumstances of the suicide were such that they caused severe emotional and mental distress. For example, Mrs. A's second

husband went into a guest room of the home which belonged to her, but which they had shared since their marriage, put a twelve gauge shotgun in his mouth, and pulled the trigger. Mrs. A was sitting in the next room when she heard the shot, and found her husband's body. She could recover from his estate, because he recklessly disregarded the high probability that his wife would indeed suffer severe emotional and mental distress. We might ask ourselves if cases such as the one cited occur often enough for us even to consider them. However, our discussion of intentional torts is not because these acts are covered by liability insurance. Our discussion lays the groundwork for an understanding of the kind of acts in which there is insurable liability, and, in a very litigious society, the fine line between intended and unintended acts is often difficult to draw.

Yet another tort is the intentional interference with property. The property may be land, in which case the interference can take one of several forms. A person can enter another's land without permission, can remain on that land without permission, or can place an object on or refuse to move an object from another's land. Nor does the trespasser have to physically place an object on another person's land: particles and gases, such as those cited in charges of pollution, are considered to trespass on another's land when they are carried there by air movement. Aircraft flying in the air space over property are held to certain limits regarding the height at which they must fly, and the amount of interference in terms of noise, sonic booms, pollution, and the like, they create within the airspace, interference which interferes with the landowners use of or enjoyment of his/her land.

The property may also be chattels—items of tangible property. A tort is committed if a person intentionally interferes with another person's use or possession of a chattel. Because even an honest error regarding ownership of property can make a person liable for the harm caused if the true owner has been deprived of use of his/her property, it is wise to require valid proof of ownership when purchasing an item from someone, no matter how good their reputation. The recent disputes over the ownership of valuable paintings and other objects that changed ownership during World War II give ample evidence of what a complex area this can be. (Title insurance can serve to protect a person who purchases property from later claims against his/her title to it.)

This somewhat cursory discussion of intentional torts serves as a background against which we can examine those acts which may be unintentional, but which cause harm to another person or to a person's property—harm which causes damages that liability insurance does cover.

Negligence

Negligence as it is understood from a legal viewpoint, occurs when a person's behavior/actions impose a risk upon another person which is both unreasonable, and which causes injury to the other person. Whether or not the negligent person intended harm does not matter: all that is necessary to establish liability is that negligence did indeed occur, and that the negligence did indeed cause harm to another person and/or to his/her property.

In order for an act to be termed negligent, FOUR factors must be present.

1)The act must fall into the area of a person's LEGAL DUTY to others and to their property to conform to a certain standard of behavior, one that prohibits behavior which could result in posing unreasonable risk to others. For example, public places such as offices and hospitals are frequented by visitors to patients, staff, delivery people, and the like. When these people enter public buildings during hours when they are open to the public, they have a right to expect safe conditions for their passage. Thus, when a floor has just been cleaned, for example, signs are posted warning that the floor is wet. Signs on doors warn of areas which are closed to all but professional staff or employees. Equipment that may be dangerous is kept behind closed doors, and is marked with warning notices. And, in today's climate, when the Office of Occupational Safety and Health has promulgated many, many procedures and practices which are designed to keep work-places both safe and healthy, those who are obligated to observe these procedures and practices ignore them at their peril.

2)The second factor is that a person or legal entity such as a corporation must have FAILED TO CONFORM

to the standard necessary to prevent unreasonable risk to others. For example, the escalator in a department store has mechanical problems which have been brought to the attention of the manager. Should the manager fail to take the escalator out of service until it is properly repaired, and should a customer using the escalator get hurt because it malfunctions, the manager would have failed to conform to his/her legal duty to see to it that nothing in or on the premises of the store posed unreasonable risk to those entering it.

3)The third factor is called PROXIMATE CAUSE, which simply means that there must be a close connection between the negligent act and the harm a person and/or his/her property suffers. For example, in the case of the malfunctioning escalator, if Mrs. B.'s foot is caught in the treads and is badly injured, there is clearly a close connection between the manager's negligence in not taking the escalator out of service and the injury Mrs. B. suffered. However, let us suppose that when Mrs. B. is taken to the hospital emergency room, she is given a pain-killer to which she has a bad reaction. While it may be true that Mrs. B. would not have been in the emergency room had she not been injured by the escalator, it is also true that her reaction to the pain-killer is due to another, closer cause—in this case, an allergic reaction which may or may not have been known/detectable before the drug was given.

4)The final factor is ACTUAL DAMAGE. Unless a person and/or his/her property suffers injury/harm as a result of a negligent act, there is no liability. For example, Miss D. has a brand new red convertible and takes it out for a drive. With radio blaring, Miss D. tests the car's capacity for quick turns and fast stops, alarming, but not harming, other drivers in vehicles around her. During this drive, Miss D. breaks no traffic rules, nor does she cause harm, even though many of the drivers who see her think—"There is an accident waiting to happen." She causes alarm, but no damage. She is not then legally negligent.

Unreasonable Risk

Crucial to the concept of negligence is the concept of UNREASONABLE RISK. For a person to be found negligent in the legal sense, it must be clear that the conduct could be seen as unreasonable at the time that it occurred, not when it is considered after the fact. For example, there are many incidents which result in harm that, when people involved look back upon them, evoke many "if only" statements. "If only Jack had left the house five minutes earlier, he would not have sped through that intersection and been hit by that truck." "If only we had known our child was coming down with measles, we would have kept her from that party." "If only Betty had told me she was allergic to mushrooms, I would never have put them in the sauce." Note that in each of these cases, the speaker feels a sense of obligation, and regrets not having urged Jack to be cautious, or wishes to have had foresight about a child's impending illness, or the powers to know a guest's allergies. But none of these cases remotely fits the four components for negligence to exist.

Jack, presumably, made his own decision to drive carelessly. It isn't possible to know an illness is present until symptoms appear. If guests do not tell their hosts they have certain allergies, the hosts cannot be considered negligent if they serve the guest a food which causes an allergic reaction. Most of the "if only" statements that come after an accident are based on a very human desire to prevent harm to those we care about. Legal negligence, however, is concerned only with our legal duty to others, and that duty includes people we do not know as well as people who are part of our daily lives.

Standard of the Reasonable Person

How, then, is the determination made that an act causing harm is unreasonable AT THE TIME it occurred? By applying a test, as follows: If the act would be recognized by a reasonable person as one that would present a risk of harm to another, then that risk is unreasonable, and the act which presents it is negligent, under certain conditions, one being that the risk presented is so great that it outweighs what the law terms the utility of the act, as well as the manner in which it is done. In other words, though an act may be useful, or may require a certain process/procedure to be performed, if the risk the act presents to others is greater than the achieved purpose of the act itself, it is negligent.

Let us look at an example of this concept. Contractor Jones hires a crew to paint a building he has just completed. The building is six stories high. Painting the building is useful for a number of reasons, primarily,

to protect the wood underneath. And, in order to paint the building, painters must be raised to the highest floor. Now, Contractor Jones has several options. He can use a scaffolding constructed of a board held by ropes. He could have the painters use ladders for the lower floors. He could build a scaffolding supported by struts resting on the ground, one that could be moved. Or he could rent a sky-lift. Each of these options will cost Contractor Jones a certain amount, and we may say that, generally speaking, the safer the support for the painters, the more money Jones will spend. A sky-lift, for example, rents for several hundred dollars a day. There is also a certain amount of risk attached to each of the methods Jones may choose, and again, speaking generally, we may say the cheaper the solution—the ladder—the greater the risk. Using the rule of thumb just stated, were Jones to choose the cheapest solution for the lower floors, and the next least expensive solution—the scaffolding made with a board supported by ropes—for the upper floors, the risk to the painters would be far greater than if he built a scaffolding or rented a sky-lift. If a painter is injured in the course of the job, Jones may well be charged with negligence, if a REASONABLE person would have recognized the risk as being present AND unreasonable.

Who, then, is this “reasonable” person upon whose shoulders rest so many cases of law? The OBJECTIVE STANDARD by which a reasonable person is measured in a court of law is one who has “ordinary prudence.” However, the circumstances surrounding the judgment call may and do affect what is expected of a particular defendant in a particular case.

For instance, the physical characteristics of a defendant are taken into account when determining negligence. (Note that plaintiffs may also be found negligent: we will examine this further in this section.) Physical disabilities of a person are taken into account, and the standard for negligence is then changed to what a reasonable person with that particular physical disability would have done in the same situation. For example, Mrs. Adams’ child runs out onto the sidewalk to chase a ball just as a neighbor in a motorized wheel-chair is arriving at the same spot. The sidewalk is on the side of a hill, and though the neighbor sees the child, he/she cannot stop in time to avoid hitting the child because the same accident that put him/her in a wheel-chair also slowed reactive response time. The physical condition of this person would be taken into account in determining whether the harm was caused through negligence. (Clearly, other factors would also be taken into account, such as whether he/she has the right to use the wheel-chair on a public thruway, etc., but all other things being equal, the person’s disability would affect the standard of negligence applied. Note, however, that the standard is still OBJECTIVE: it does not ask if this PARTICULAR person would have responded in such a way in ALL similar situations. It asks what OTHER persons with the same disability would have done in a similar situation, if they were exercising ordinary prudence.)

Mental characteristics such as a lower IQ or a history of carelessness are not a defense against the standard of the reasonable person when applied to negligence. Nor is being intoxicated an excuse. Intoxicated defendants are held to the same standard of a conduct as a reasonable sober person.

Children are, normally, held only to that level of conduct which could be expected from a reasonable person of the same age and the same experience. However, should a child be performing an activity of potential danger, such as operating a motorboat or a three-wheeled land vehicle, that child must operate it with the care used by a reasonable adult performing the same operation.

Although as a rule, courts consider the custom of use surrounding a particular activity, there are exceptions. Before we look at them, let us first look at what custom of use means. Very simply, it means that a greater majority of persons engaged in an activity, or using a process, do it in a certain way. The more widespread the knowledge of how an activity or process is performed, the stronger the custom of use defense. For example, although automobile models vary in styling and in certain optional accessories, the essential design of the dashboard is very much the same across the automotive industry. Further, accelerator and brake pedals are put in standard positions across models and makes. Obviously, if an auto manufacturer switched the brake and the accelerator, numerous accidents would result as drivers braked when they wanted to accelerate and accelerated when they wanted to brake. The manufacturer would have violated custom of use.

However, there are times when the custom of use is NOT to provide certain safety equipment or to use procedures which lessen risk. Any number of lawsuits against school districts in the wake of school bus accidents revolve around the fact that school buses do not have seat belts. And yet, strong cases can be made

against seat belts on school buses, because in case of an accident, the restraints make it difficult to get the children out quickly.

And, sometimes, even if a particular defendant has not followed the custom of his/her industry/occupation in a particular case which resulted in harm, he/she is not automatically determined negligent. For example, OSHA regulations apply to businesses/industries of a certain size. A smaller business to which OSHA regulations do not apply may not follow all the safety precautions outlined in the regulations. However, in many cases, the small number of employees and the particular circumstances of the work-place do not require some of the more stringent measures OSHA invokes. In such cases, industry-wide standards of care—or custom of use—may not apply.

Emergency situations also affect the applicable standard of care. For example, Bob is a taxi driver in a large city. He is stopped at a traffic light in front of a bank when the door on the passenger side is jerked open and a man with a gun jumps into the taxi, points the gun at Bob, and tells him to drive away as fast as he can. In his panic, Bob puts the taxi in reverse, thus hitting the vehicle behind him and injuring the driver. The standard of negligence then applied is not whether any taxi driver would have put the taxi into reverse, but whether any taxi driver with a gun at his/her head might have acted in panic.

Yet a further consideration is that a reasonable person does have the ability, even if it is to a limited degree, of foreseeing what others will do in a given circumstance. For example, automobile drivers can anticipate what drivers around them will do if there is a sudden stop: those “tail-gating” other vehicles will probably crash into them, those leaving appropriate space between vehicles probably will not. Most drivers who see a very elderly person driving below the speed limit can anticipate that the elderly driver has slow reactions, and may have difficulty seeing signage or hearing horns. Thus, a driver using reasonable care would drive defensively when in the path of such a driver.

In normal conditions, it is reasonable to think that other people we encounter in the course of our lives will not commit crimes or intentional torts. We do not expect a waitperson in a restaurant to bash us over the head with the tray, we do not anticipate that the person standing in line behind us at a bank will suddenly rob it. However, there are instances where one person, due to professional or personal circumstances, has particular and special knowledge about another person and his/her potential for harm. For example, a woman knows that her son has a history of child molestation within the family, but he has never been brought to court. She allows him to baby-sit with a neighbor’s children. Should the son molest the children, his mother could be charged with negligence in that she did not use her knowledge to protect innocent third parties. Indeed, the “Megan” laws which were passed in the aftermath of the killing of a young girl in New Jersey are a response to situations in which known sex offenders are released from prison and move into a communities that have no way of knowing their history. And, increasingly, health care personnel such as psychiatrists are coming under fire for not letting a third person know that a patient under their care had criminal designs on that person.

When a person with special knowledge about the possible harm one person may do to another and/or to his/her property must reveal that knowledge or be judged legally negligent is a significant issue, one which courts will be wrestling with for years to come. But a look at what is happening with suits against tobacco companies that charge deaths resulted from both smoking and from second-hand smoke are based, in large part, on the arguments that tobacco companies knew that nicotine is harmful, and not only concealed that knowledge, but actually increased the addictive components in the tobacco they sold.

Another special circumstance that affects the determination of legal liability is when a person possesses superior knowledge or a higher degree of ability than the ordinary “reasonable person.” For example, drivers familiar with the local terrain, and with how weather affects traffic conditions in their hometown, are held to a higher standard if they drive in a way that does not take this knowledge into account and cause an accident than would a stranger to the area, on the grounds that local drivers should know when they need to exercise particular care.

Another example might be that of a professional skier who, though his/her own skills are well up to more dangerous slopes, takes a group of friends who do not possess the same degree of skill skiing. When one of

the skiers is hurt, the professional skier could be found negligent on the grounds that he/she should have used his/her knowledge of both the slope and the skiing abilities of his/her friends to guide the decision as to where to ski.

Malpractice

Malpractice suits of course result from this basis. Clearly, people who offer themselves to the public as having professional expertise in a field must be held to a higher standard if they cause harm. Thus, members of health care professions, the legal profession, the engineering and architect professions, as well as accountants and any person whose occupation has been determined to be a profession are accountable for their acts according to the following standard: they will act from a level of skill and learning that is commonly possessed by the members of that profession who are in good standing with the boards or other bodies which certify membership and supervise it.

(One hallmark of a profession is that there is a self-policing procedure through which a member may be prevented from identifying himself/herself as a member in good standing in the profession. The American Bar Association and the American Medical Association both have such policing bodies, as do other professional groups. These bodies can act in coordination with or independently of court action.)

There are other factors to be considered in determining whether malpractice has occurred. First of all, professionals are not expected to be able to guarantee good results from their work. Lawsuits are lost, surgeries fail, etc. But professionals are expected to use the requisite minimum skill and competence. Second, in a case where there are conflicting schools of thought in a profession, the professional is judged by the school he or she follows. And, when it comes to specialists, they are held to the minimum standards of that specialty. Thus, surgeons are held to the minimum standards of skill and competence established for that specialty. Also, for a professional to be found legally liable for malpractice, the defendant must establish that the professional did not possess the skill level of a minimally qualified member in good standing in that profession. (Of course, even the minimum standards for a profession are intended to protect the public from harm.) In this same vein, there is no difference in the standard to which an experienced professional is held and the standard to which a newcomer to the profession is held. Formerly, the standards of the community in which a professional practiced were the ones to which he/she was held: a country lawyer was not expected to be as skilled or experienced as one with a large corporate practice. However, that situation is changing, and a national standard of professional competence is almost uniformly applied. A factor in malpractice which applies primarily to physicians is the concept of informed consent. This means that a patient must be told ahead of time what possible risks the proposed treatment or procedure will present. Normally, the risks the physician describes are those of sufficient significance that a reasonable person would take them into account when deciding whether to take the treatment or undergo the procedure.

Malpractice is, of course, a particular area of liability coverage, but this short overview gives you the basis for it.

Violation of Statute

A legal doctrine called "negligence per se" is used to determine negligence when a safety statute has been violated, and that violation has a close application to the facts of the case. For example, Jane drives 45 miles per hour in a school zone where the posted speed limit is 20 miles per hour. She hits a child who ran out into the street. Because Jane was in violation of a statute, her negligence is established. Note that the doctrine automatically applies in cases where a statute (law) has been violated. Courts do not always apply the doctrine of "negligence per se" in the case of a violation of an ordinance or regulation.

Another interesting facet of this doctrine is that it **MUST APPLY TO THE FACTS OF THE CASE**. By that we mean that the injured party must belong to the class of people the statute was designed to protect. The child Jane struck was a school student, and thus belonged to the class of people the school zone speed limits are designed to protect. If Jane had struck a construction worker who was working at the school, and who ran out in front of her car, the doctrine would not apply. This does not mean that Jane would not be found

negligent, and thus liable. But her negligence would not be determined by the negligence per se doctrine. Further, the harm caused must be a harm the statute was designed to prevent from happening. School zone speed limits are designed to prevent children from being injured by motorists, and so the injury to the child Jane struck does fit the requirements of the doctrine. If Jane had struck another car, the doctrine would not apply, because school zone laws are not designed to protect vehicles. Where there are ameliorating circumstances, such as a valid excuse for the violation, a court may find that the statutory violation is excused. Examples of such excuses are that the person was reasonably unaware that there was a statute, or that the person made a reasonable and diligent attempt to comply with the statute, or that the person had an emergency in which the lesser of two evils was to violate the statute.

Negligence per se can also be used in jurisdictions which recognize contributory negligence. For example, Jane strikes another car, but the driver of that car was speeding. Jane can invoke the doctrine of negligence per se, pointing out that the driver violated a law.

Finally, simply because a person has fully complied with all the safety statutes which are applicable in his/her particular case, this alone will not prevent him/her from being found negligent. There are many examples of times when a reasonable person would be even more careful than required by law. For instance, an interstate highway may have a 70 mile per hour speed limit. However, if weather conditions are such that visibility is minimal, a reasonable person will drive much more slowly than that.

3 Establishing negligence

Establishing negligence is extremely important when an injury has occurred, as any insurance claims adjuster knows. In every liability policy, there is a clause giving the insurer the right to sue a third party, even though the insurer might have settled a claim that results from an act of the insured. The third party may be the person insured, or it may be that person's insurer, or it may be yet another third party which may have liability for the injury. Thus, even though an insured might not wind up filing a suit, insurers can and do.

When attempting to establish negligence, the burden of proof is on the plaintiff. (Remember that our legal system is based upon the premise that a person is innocent until proved guilty. It is interesting to note that the Internal Revenue Service, long guilty of making the taxpayer prove innocence, will now be held to this same standard!) The burden of proof consists of two separate burdens, the first of which is called the burden of production. This means that the plaintiff in the case has to bring in evidence that the defendant in the case was indeed negligent, that the plaintiff did indeed sustain an injury, and that the defendant's negligent did indeed cause the injury. Of course, the defendant will also bring in evidence to establish that he/she was not negligent. Thus, both the plaintiff and the defendant have the burden of production, for unless the defendant can counter the plaintiff's evidence, the plaintiff will prevail.

The second burden is termed the burden of persuasion, which falls to the plaintiff. This means that the plaintiff, through his/her attorneys, must persuade the jury that it more probable than not that the defendant's negligence caused his/her injury/ies.

Both the judge and the jury have distinct roles in a jury trial. The judge's task is to decide questions of law. (Recent famous trials have given the American public ample opportunities to see judges doing just this, as when they rule what evidence is admissible, and what is not, etc.) The judge may direct the jury to find the defendant guilty if the facts of the case are such that no reasonable person would disagree that the defendant was indeed negligent. For example, when an intoxicated driver speeds down a highway, crashes head-on into another vehicle, immediately killing its occupants, there is no question of that driver's negligence.

The jury's task is to decide the facts of the case, measuring the evidence against the "reasonable person" standard. Thus, the jury listens to the evidence from both sides, then determines what it believes did happen, as well as whether or not the defendant breached a duty to the plaintiff, and thus caused the plaintiff's injury/ies.

Earlier, we discussed the doctrine of negligence per se, which declares the negligence of a person who violates a statute, and as a consequence, cause the kind of injury the statute was designed to prevent to a person covered by that law. Now let us look at the doctrine of res ipsa loquitur, which can be translated as “the thing speaks for itself.” This doctrine presents the premise that if the circumstances of the act causing harm are such that, clearly, the negligence of someone was behind them, then negligence is established. For example, Miss Brown is walking down a sidewalk when a garden cart loaded with dirt rolls down a sloping driveway and hits her, breaking her leg. Since garden carts do not roll of their own accord, clearly, someone has been negligent, even if that person is not even on the scene. Later, it is found that the homeowner had gone inside to answer the telephone, leaving the cart at the top of the slope with its front wheels on the slope. The homeowner is guilty of negligence.

There are several conditions which apply to the use of res ipsa loquitur. First of all, the circumstances surrounding the event must be in the exclusive control of the person being accused of negligence. In the case of the garden cart, the homeowner was alone, was using the cart, and left it in a perilous spot. No one else had control of the cart, thus the exclusive control condition is met.

In cases where several people were present when the circumstance causing the harm occurred, a plaintiff may use res ipsa loquitur, leaving it to the multiple defendants to prove that they were not negligent. For example, a patient emerges from a operation with an injury/condition that, because of its nature, must be a consequence of the procedure. Because a medical team was present, the patient does not know which member of the team is responsible for the harm. However, since the team acted in concert, and since the action of each member was necessary to the procedure, res ipsa loquitur does apply, and it will fall to each team member to vindicate his/herself.

Yet another condition in applying res ipsa loquitur is that the plaintiff must prove that the event/circumstance resulting in the harm was, in all probability, not due to any act of his/her.

In many instances where res ipsa loquitur applies, the defendant in the case actually has more evidence about what happened: for example, when the garden cart rolled down the driveway and struck Miss Brown, its owner has far more knowledge of how the cart got to the top of the driveway than does Miss Brown. And, in the case of a patient injured during surgery, the medical team certainly possesses more knowledge of what occurred than a patient who was either under an anesthetic or had limited vision at the time.

Res ipsa loquitur applies when, while there is no DIRECT evidence of negligence, there is sufficient CIRCUMSTANTIAL evidence to conclude that negligence did indeed occur.

Even after negligence has been established, more work must be done. The next step is to examine the CAUSE of the harm. The primary way in which a defendant establishes that the plaintiff’s conduct was the cause of the harm is to prove that “but for” the defendant’s negligence, the plaintiff would not have been injured. For example, there is a tree on Mr. Adams’ property that is rotten. A tree expert has told Mr. Adams that the tree is rotten, and that there is every possibility that it will fall. The tree does indeed fall, crushing the top of a neighbor’s car. Clearly, but for Mr. Adams’ negligence in not having the tree cut down, the accident would not have happened.

There are cases in which more than one events concur, and cause harm. So long as the defendant’s negligence is responsible for one of the events, then the negligence is the cause of the harm. For example, a neighbor leaves a pile of leaves and other debris burning. The wind carries burning bits onto the roof of a farmer’s barn. While this is happening, sparks from a train locomotive set the pasture across the road from the first farmer’s land on fire. The wind fans the flames, and the fire leaps across the road to the pasture around the barn. The pasture grasses catch on fire, and this fire spreads to the barn. The barn roof is already on fire. The two fires join, and the barn is destroyed. Either of these fires could have caused the damage: therefore, the “but for” test for cause doesn’t apply. However, since either fire could have destroyed the barn, an actual cause for the harm is determined.

In some instances, more than one defendant is at fault, but the acts of only one of them is responsible for the

injury. For example, Mr. Waters is entering an intersection on a green light when two teen-age drivers, engaged in a race, run the red light and simultaneously crash into Mr. Waters' car. He is killed as a result of a closed head injury received when the jolt thrust him against the windshield of his car. Since it is possible that either car could have struck his car hard enough to cause the fatal injury, each of the teen-agers has the burden of proving that it was the other one who caused Mr. Waters' death. If they cannot exonerate themselves, both will be found liable.

There are special cases which require special rules for determining the cause of a harm. For example, several growers provide salad greens to a restaurant chain. A customer eats a salad in the restaurant and becomes ill. The illness is traced to the salad greens. It cannot be determined which grower supplied the particular greens, since the restaurant uses greens from all the growers daily. The court thus applies a concept called the "market share" theory in determining how the penalty will be paid. Each of the growers pays that portion of the penalty which reflects his/her share of the greens bought by the restaurant.

In larger cases, for example, suits against tobacco companies which have proliferated of late, the national market share is the determiner in allocating the penalty. Thus, tobacco companies which have been required to pay billions of dollars to states to cover health costs determined to have resulted from the use of tobacco pay a share that reflects their share of the total national market. A further result of the market share theory is that plaintiffs may then collect from any defendant only that proportion reflecting the defendant's share of the harm caused.

There have been a number of class action suits in recent years which address a situation in which it is clear that a defendant has been negligent, and has caused harm, but it is not clear exactly who the harmed people are. For example, an industrial plant has been proved negligent in the way it disposes toxic wastes. A class action suit may be filed by people who have suffered a harm caused by the improper disposal of toxic wastes. Note that the class is formed of people who have sustained the harm: many of them may be unaware of the connection between the cause and their harm until they are notified through a media announcement.

An actual cause is an event or circumstance which probably caused the harm. But even if actual cause can be established, limitations will be put upon the amount of the consequences the defendant will be held responsible for. For example, many acts may have consequences which are not foreseeable, and which no reasonable person would or could consider before embarking on a particular act.

For example, Vehicle A and Vehicle B collide at an intersection when Vehicle A goes through a stop sign. The sound of the collision alarms Mrs. C, who runs to her window to see what has happened. She slips and falls, breaking her hip. Mrs. C has no claim against the driver of Vehicle A, because no one could reasonably foresee her fall. Thus, even though Mrs. C fell because she wanted to know the source of the sound she heard, the accident is not a proximate cause of her fall.

Liability normally is found only when the consequences of a negligent act could be reasonably foreseen at the time of the act. Furthermore, even if the negligence does result in harm, the person suffering the harm must be a foreseeable person—that is, someone the negligent person could reasonably foresee as suffering from the act. For example, let us say that Mr. G does nothing to alleviate the slipperiness of his sidewalk after an ice storm has laid a layer of ice over it. Mr. G can reasonably foresee that anyone walking on that sidewalk will slip, and, in all probability, fall. When Mrs. F does indeed slip and fall, he is liable for her injuries. However, let us also suppose that Mrs. F was carrying a bowling ball at the time of her fall. When she falls, the ball rolls down the sidewalk and strikes a person getting out of a car. Although the person is indeed injured, Mr. G cannot be held liable, as such a consequence cannot reasonably be foreseen, nor is the injured person a foreseeable person.

There are cases, however, when a person found liable for injuries/harm to another is found liable for any additional unforeseen physical consequences that may occur because of a physical condition in the injured person that is unknown to the liable party. For example, Mr. L likes to play pranks on unsuspecting people. One Halloween, he dons a costume and mask that make him look like a grotesque monster. He hides in the shrubbery at the front of his lawn, jumping out at passing neighbors and giving them a mild scare. Unknown to Mr. L is the fact that a new neighbor across the street has a history of heart trouble. When Mr. L jumps out at this person, the shock is so great that it precipitates a heart attack, and the person dies. Mr. L is liable

for that death, because the rule of law is that the defendant must “take the plaintiff as he finds him,” meaning that just because a person doesn’t know of physical frailties in another doesn’t excuse him/her from liability when a negligent act causes harm.

Sometimes the harm caused by a negligent act is real enough, but the person performing the act may not be held liable if, in the court’s opinion, the “extraordinary in hindsight” rule applies. This rule states that if, when looking back at the event that caused the harm, it appears that it is highly extraordinary that such an act should have caused the harm.

In a highly litigious society like our own, many efforts are made to connect certain events to certain consequences, in attempts to find “deep pockets” who can afford to pay large sums if injuries/harm can be attributed to their acts. The many suits against tobacco companies are one example, as are the suits against pharmaceutical companies and the like. This is not to say that all such suits are frivolous, but there is little question that far too many people try to push the consequences of their own acts/choices off on others. Just think of cases like the one in which parents of a ten year old girl got a restraining order against another child in her class at school, keeping the second child from speaking to or being near their daughter. Parents sue schools because their children can’t read, or sue teachers who attempt to discipline students for violating their children’s rights. In such an atmosphere, being able to establish cause becomes quite significant.

Many times, an intervening event—something that occurs between a person’s negligent act and the actual harm—is the true cause of the harm. In such cases, the intervening event becomes a superseding cause, meaning that the person committing the negligent act is not liable for the harm. For example, Miss W forgets to lock the gate in the fence around her swimming pool, although she knows that the neighborhood children like to use her pool when she is away. Sure enough, as soon as Miss W drives away, two children go through the unlocked gate and take a swim in the pool. Tiring of swimming, they get out of the pool. Just as one of the children is about to sit down in a chair, the other one pulls it out from under him. The first child falls, cracking his head against the rim of the pool, and suffering a severe concussion. This is not a foreseeable consequence of leaving a gate to a pool unlocked, and so even though the children would not have been within the pool fence had Miss W not forgotten to lock the gate, she is not liable for the injury. Note that if the child had drowned, Miss W’s negligence would have been a proximate cause, because the whole point of fencing a pool and keeping the gate locked is to prevent children free access to a potential danger.

The Host Laws on the books in many jurisdictions are examples of how third parties can be liable for harm caused by someone else. These laws hold bartenders and even private hosts responsible for the behavior of their clients/guests. Should a person leave a bar or a private party having had too much to drink, and should that person then cause harm to another, the bartender or party host will bear some liability.

Many people are unaware of the extent of the liability they are exposed to as they conduct their lives. Even a seemingly simple act as asking an employee to drop off a package at the post office on his/her way home can result in a lawsuit if the employee is somehow harmed in the course of performing the favor. Later in this course, we will offer a list of questions designed to make insurance clients more aware of the risks to which they are exposed, and for which they should be insured.

The concept of joint liability is one that is interesting to insurers, primarily because, in cases where more than one person is a proximate cause of a harm, the plaintiff normally selects the person/entity with the deepest pockets to go after. For example, Miss X slips and falls on the stairs at a friend’s home, fracturing her right leg. The friend rushes Miss X to the hospital, and Miss X is taken in for surgery. The surgeon botches the operation, and Miss X ends up losing her leg. The harm to Miss X’s leg is indivisible, and both Miss X’s friend and the surgeon are liable for the ENTIRE harm to her. Miss X can recover the entire damages from either her friend or the surgeon, but not from both. However, the insurer of the party who pays the claim may go after the insurer of the other negligent party to recover half of the amount paid.

How is a harm termed indivisible? By belonging to a class of harms so defined. These are death, or a single injury, such as Miss X’s fractured leg, or a fire. And when a harm is indivisible, if more than one person’s negligence was the proximate cause of the harm, then all parties to it are liable for the entire amount of damages, as we have just shown.

When a harm is divisible, and when more than one person/entity's negligence is the proximate cause of the harm, then the payment for damages can be apportioned among the parties. This apportionment is done in two ways, the first of which, where one defendant pays the entire claim and then recovers a pro rata reimbursement from the other defendants, we have already discussed. The second method of apportioning payment among liable parties is by determining the comparative negligence of all liable parties. Thus, a party found to be responsible for half of the harm would pay half of the damages.

An important doctrine in the study of liability is the doctrine of INDEMNITY. Simply put, this means that, in a case where more than one party can be presumed to be liable for a harm, a court may put the entire responsibility on one party only, thus indemnifying the other party/ies from making any payment.

One example of when this might occur is when an employee is responsible for harm to another. The injured party can hold the employer responsible for the actions of his/her employee, when those actions occurred at the employer's instruction, or in the course of the employee's duties. Although the employee actually caused the harm, the doctrine of indemnity applies, and the employer is responsible for paying the entire damages.

Yet another instance is that of a retailer who is sued because a product sold in his/her store has caused a harm. Since the manufacturer (as well as others in the marketing/distribution chain) also have liability for the product, this is a case where more than one party is a proximate cause of the harm. However, under the doctrine of indemnity, the retailer is relieved from liability for damages: that liability is passed to others higher in the chain.

4 Particular duties

We have already seen that negligence is considered a failure to observe the duty we owe to others to behave towards them as a reasonable person would. For people whose behavior is normally well within the limits of civility, observing this duty of care to others is almost automatic. Thus, civil people are careful not to intrude on the privacy of others when in a public place such as a restaurant, do not talk loudly in movies and theatres, do not push to the head of a line, and so on. In matters of interpersonal conduct, civil people know and observe

the boundaries that protect the person and property of others from, to use the legal term, trespass. Furthermore, there are laws, ordinances, and regulations which set and enforce boundaries in situations in which there is risk of harm.

Traffic laws, laws regulating the number of people who can be in a public facility at any one time, laws protecting private property, laws regulating cleanliness in food-service facilities—all of these are examples of how a society defines and enforces duty of care.

For a very long time in this country, when populations were neither as mobile or as transient as they are now, and when more people lived in rural areas or in small communities, much of the observance of this duty of care resulted from the close connections people had with their neighbors, and, indeed, with their entire community. Now, however, such community feeling is not as prevalent as it once was, and even "neighbors" living on the same street might not have much in common, or have much concern for each other's welfare. In such a society, the risk of being found negligent in some duty increases.

There are three important exceptions to the duty of care we owe to others. The first of these is that there is no general duty to ACT, in, for example, offering protection or giving aid to another. A passer-by can see a person floundering in water and calling for help, and ignore the cries without being found negligent, even if the person drowns. (Remember that "Good Samaritan" laws were passed so that physicians and other health care professionals who stop to aid strangers would not later be sued.) However, there are exceptions to this "no duty to act" rule. Those who operate premises where business is conducted must go to the aid of business visitor, and must also warn them of any risk. For example, if a patron of a restaurant falls, a restaurant employee must offer to help him/her up. And, as we have pointed out before, the CAREFUL—WET FLOOR

signs are intended to warn visitors of a potentially dangerous situation. Employers are also supposed to assist those who work for them, and universities must assist students. Again, if someone injures another person, even if no negligence was involved, that person has a duty to give reasonable assistance to the injured party. And there are cases where two people have entered into a venture together: this circumstance may impose on each of them a duty to help the other. For example, Miss B. and Miss A. have gone on a camping trip. Miss B. slips and falls into a steep ravine. Miss A., as her co-venturer, has a legal duty to go to Miss B's aid. Once a person has begun to give assistance to another of his/her own volition, then he/she has a duty to continue the assistance, always on the condition of using reasonable care. In a case where others do not offer help because someone is already aiding the injured party, the duty to continue the aid becomes even more onerous.

Contracts are, essentially, formal declarations of duty in which the responsibilities of all parties to the contract are clearly set forth. Contractual duties therefore go beyond the mere duty of care. Generally speaking, if a party to a contract does not perform his/her duties, then this is a breach of contract and a suit against him/her is based on that. However, if a party to a contract performs his/her duties, but in such a negligent manner that harm results, the injured party may be able to bring a tort suit against him/her.

With the rise of computer technology, more and more people are able to work from their homes, and so people who never had to consider their liability to business visitors must now consider it. Historically, common law supported the right of property owners to do with their land as they pleased. This view was far more workable in the agrarian societies of earlier centuries: when land is sparsely populated, clearly there are fewer people coming on to it. And remember that tort law had its origins in attempts to protect persons and their property from trespass.

Landowners traditionally have been held to a higher level of care for hazards his property creates beyond its boundaries than for those on it. These hazards may be natural, as, for example, trees, or artificial. For example, landowners have a duty to take down trees which may, because they are rotten/dead, fall into a public path or road, thereby injuring a person and/or a vehicle. Further, if a landowner places something on his/her property which creates a hazard for those passing it, he/she is liable if someone comes to harm. For example, Mr. W wished to construct a fence around his property. One wall of the fence bordered his neighbor's driveway. If Mr. W built the fence on the boundary of his lot, the corner of the fence would block the vision of his neighbor when he attempted to back out of his driveway. Mr. W therefore built a fence with three regular corners, but where his fence bordered his neighbor's drive, he used a slanted piece of fencing that allowed the neighbor to safely back out of his drive. Note that had Mr. W not done this, and had the neighbor had an accident as a result of not being able to see around the corner of the fence, Mr. W would be held liable.

Landowners are also responsible for the conduct of those on his/her property who are under his/her control. For example, Mrs. S's gardener is clipping the hedge that borders the line between Mrs. S's property and that of her neighbor. The gardener is intoxicated, and not only clips Mrs. S' hedge, but continues past it and clips a rare and valuable planting in the neighbor's yard. Mrs. S can be held liable for this damage, as the gardener is her employee, and thus under her control.

Nor does the responsibility for the conduct of others stop with employees: property owners are also held responsible for harm arising out of the activities of an independent contractor on the property, if such activities have the potential of causing harm to others who are not on the property. For example, Mr. V wants to destroy a dam across a small river running through his property. The dam has created a lake, which will run over the land once the dam is destroyed. Mr. V hires an independent contractor to blow the dam up. The contractor makes no provisions to keep the accumulated water in the lake from flooding the newly-planted fields of Mr. V's neighbors. When the fields are flooded, and the crop ruined, Mr. V can be held liable.

Broadly speaking, property owners have a duty to prevent activities on their property which they do know or should know could cause harm to people off the property. For example, Mrs. A's son invites a number of friends to a Fourth of July celebration. During the afternoon, the boys set off a large number of firecrackers and rockets, with Mrs. A's knowledge. They also set off bottle bombs. A passer-by is severely cut by a piece of exploding glass. Mrs. A is liable for this harm.

These rules are especially significant in regard to liability insurance. Most property owners are probably unaware of the many, many exposures they are vulnerable to. A wise agent will question clients closely to ascertain the particular exposures they have, and make recommendations for insuring against them.

We have just been discussing liabilities arising from harm caused by activities on a property to those off of it. Now we will take a look at injuries which occur on the premises. First of all, let us establish that rules governing determination of liability apply to the possessor of the land, whether that be the owner, or a tenant. These rules apply not only to the possessor/tenant, but to members of his/her household, and also to people serving as employees or independent contractors. However, if someone not connected to the owner/tenant through familial relationship or employment is permitted to come on to the property for their own benefit, then any harm they may cause is their responsibility. For example, a crew from a local water company asks and receives permission to come onto Mr. C's land to investigate a suspected cave-in in a main sewer line running through the servitude at the back of Mr. C's property. They make an excavation that is seven feet deep, part of which is on Mr. C's land. The boards they cover it with when they finish work are not fixed properly into place. A child, running after a ball, stands on a board that covers the part of the excavation on Mr. C's land, and when the board slips, falls into the hole, breaking an arm. The water company employees are responsible for this harm, even though it occurred on Mr. C's land.

According to liability law, owners/tenants have three levels of care to three categories of people who might be on their land. These three categories are: 1)trespasser; 2)licensee; and 3)invitee. First, let us define these terms. A trespasser is one who comes onto land having no right to be on it. A licensee is one who comes onto the property with the owner/tenant's consent for a social purpose—i.e., a licensee is a guest. An invitee is a person who comes onto the property with the owner/tenant's consent, and for a business purpose. The owner/tenant has the least duty of care to a trespasser, and the greatest duty of care to the invitee, or person who comes onto the property for a business purpose. Contemporary courts have modified these categories to a degree, but they are still the basis for determining the level of care an owner/tenant has to a person harmed while on his/her property.

As a rule, owner/tenants have no duty of care at all to a person who comes onto the property without the owner/tenant's consent, and with no right of access. There are circumstances, however, in which an owner/tenant must exercise reasonable care to protect trespassers from harm. For example, the back acre of the D's property is wooded. There is a school on one side of the woods, and an apartment complex where many of the children live on the other. Although there is public sidewalk that leads around the edge of the D's property from the school to the apartment complex, the children have found a path through the woods that is shorter, and use it on an almost constant basis. The D's are well aware that the children use this path, but do not wish to fence in the wooded area. They now have a duty of care to the trespassing children to make the path and the premises around it safe, or to put up signs warning the children of any danger. For example, if a tree whose branches stretch over the path is rotten, the D's should have it removed before it falls and injures a child. Or, if the central portion of the path floods in the springtime, making it difficult to tell where the path ends and a creek begins, the D's have a duty to put up a sign warning the children of this fact.

Essentially, once an owner/tenant discovers that there are trespassers on the property, the duty to exercise reasonable care kicks in. Note that we speak here of TRESPASSERS, people who come onto a property and do not cause harm. When a person comes onto property with the intention of vandalizing it, or stealing items from it, or committing assault, this is quite a different matter. However, there are any number of cases in which a person entering another's property with the intent of theft, and who is injured by the owner/tenant, has successfully sued that owner/tenant for the injury.

For a long time, child trespassers were owed a higher level of care than were adults. In fact, a doctrine called the "attractive nuisance" doctrine essentially imposed heavy liability on an owner/tenant who had on his/her property something that would entice children to come on to the property to play with/on it. Swimming pools long fell into this category, as did any item which a child would conceivably be attracted to and play with/upon. Injuries resulting when children trespassed onto property to play on/with an attractive nuisance were held to be responsibility of the owner/tenant.

This view has changed in recent years. Now, owner/tenants' liability for the harm to trespassing children depends upon certain conditions. (Note that in the example of the children using a path through the D's woods, the liability of the D's arose from the fact that there was "continued trespass upon a limited area.") The first condition is that it is reasonable to believe that the owner/tenant knows, or should know, that the condition which could cause harm is situated where children are likely to come onto the property. The second condition is that the owner/tenant should know that the condition in question—swimming pool, trampoline—does indeed pose an unreasonable risk of serious injury or death to children who play with/on it. The third condition is that the children are so young or so ignorant that they do not realize the danger they are in if they play with/on the condition, or do not know it is there. Fourth, the usefulness to the owner/tenant of keeping the condition where it is, in its potentially dangerous form, must be slight when the risk to trespassing children is considered. Finally, the owner/tenant is liable for harm caused to trespassing children if he/she has not used reasonable care in removing the danger, or in protecting the children from it. Thus, an owner/tenant can put a high fence around a swimming pool.

Traditionally, courts held that children under the age of twelve could benefit from the rules attaching liability for harm to trespassing children to the owner/tenant. Now courts tend to look more at the situation itself, and ask this question: Is it reasonable to suppose that the child could not, because of age or inexperience, have known the danger attached to a particular condition? For example, a child who has grown up on a horse farm should know better than to climb a fence and try to mount a strange horse. These special conditions for liability to child trespassers applies to "artificial"—that is, built or constructed—conditions on the land. For instance, a swimming pool or trampoline. It does not cover activities on the land. Children injured by any activity on the land while they are trespassing have no greater chance of recovery than would an adult, UNLESS the child meets one of the conditions listed above.

Where there are natural conditions on property, owners/tenants will have no liability for harm caused to children if the natural condition is one that the child should have recognized as a risk, or if the condition is such that to protect children from the potential for harm it creates would be unreasonably expensive. For example, Mr. K's land ends at a high cliff. Blackberries grow wild in the area near the cliff. Children sometimes trespass to pick blackberries. Any child old enough to pick blackberries should see the danger of standing on the edge of a high cliff. Further, the cost of grading the cliff is prohibitive. If a child falls from the cliff and is injured, Mr. K should have no liability.

Basically, an owner/tenant does not have to make property proof against any injury to a trespassing child, but is required to take reasonable steps to prevent harm—warning signs are one way to do this, and may be all that is necessary. However, it is always wise to check BEFORE an accident occurs rather than afterwards. This does not mean that an owner/tenant must go over his/her property in an attempt to discover where children are likely to trespass, and what harm they might meet. Still, discretion being, as the saying goes, the better part of wisdom, anyone owning or occupying property in an area/neighborhood frequented by children would be well advised to be aware of potential dangers to them. In a time when many children are left without adult supervision after school, the likelihood of having child trespassers increases.

Having examined the duty of care owner/tenants owe to trespassers, including children, let us now examine the care owed to licensees. (Remember that SOCIAL GUESTS, persons who have the owner/tenant's consent to be on the property, but who are not there for business purposes, are called LICENSEES. It is persons WITH a business person who are called INVITEES.) Social guests are those persons who are asked by the owner/tenant to come onto/into the property, or who, when they come onto/into the property, are allowed to stay, and who have no purpose that could be termed "business."

The proliferation of home offices, and the ordinary circumstance that people very often do business with their friends, or develop friendships from business contacts, can make the distinction between a licensee and an invitee ambiguous. For example, Mary sells cosmetics from her home. One of her clients is Carol, a friend who operates a pet supply store. Carol calls Mary one morning to say that the special dog food Mary wants for her dog is in, and that she will drop it off later that day. Mary suggests that Carol come at noon, and stay for lunch. While she and Carol are having lunch, Mary shows Carol a new line of cosmetics and ends up selling her some. Clearly, both Mary and Carol profit from this encounter. Both sell something, both reap an

economic benefit. But, just as clearly, there is also a social purpose to this visit. As we shall see, Mary's duty to Carol as an invitee is higher than it would be to Carol if she were only a licensee. And, should Carol be injured by some hazard on or in Mary's property, Mary would probably be held to the higher duty of care in regard to Carol's safety.

This is one of the risks people who establish offices/businesses at home run when their clients may have both a business and a social purpose for entering the property. Many times, as a result of membership in a cultural, educational, or fraternal organization, owner/tenants will have people in their home who are conducting the business of the organization, and, many times, the business involves money changing hands. For example, Harold is chairman of his children's school book fair. At a meeting after the fair, chairpeople of various booths turn in their receipts to Harold. On the way out, one person trips on a rug and falls, suffering a fractured arm. Later, the person claims that since she was there on a business person, Harold's duty of care to her has been violated, and he should be held liable for the harm. But Harold did not benefit personally from the business at the meeting. All monies went to the school. Thus, the injured person has the status of LICENSEE, not INVITEE, and so Harold's duty of care is lower. In fact, as a social guest, a person is supposed to be on the same footing as the owner/tenant himself/herself, in terms of the condition of the premises, and the host has no duty to inspect the premises for dangers that may not be known to him/her. However, the owner/tenant is required to take reasonable care in seeing to it that he/she himself/herself is, when in or on the property, in a relatively safe position. And, should the owner/tenant know of a hazard that the guest might not discover, he/she does have an obligation to warn the guest of the hazard. For example, if a lawn lounge chair has a tendency to collapse when someone sits on it, the owner/tenant has a responsibility to warn a guest of that fact so as to prevent possible injury to the guest. This duty to warn guests of possible risks extends to those presented by natural conditions. For example, brick steps, sidewalks, patios, etc. when grown over with moss become extremely slippery, even when they are not wet. While the moss is a natural condition, the risk of falling it presents is one that guests should be warned of.

Furthermore, owner/tenants do have a duty of care to licensees when potentially dangerous activities are carried out on/in the property. For example, Walter is a dog trainer who specializes in training guard dogs. Many of the dogs brought to Walter are highly aggressive and dangerous. Because a guest (licensee) approaching one of these dogs might be harmed, Walter has a duty to see to it that the dogs are not able to get near guests, and may even have a duty to watch guests so that they do not inadvertently—or purposely—go into the area where the dogs are.

Liability to guest passengers in vehicles is regulated by law in some jurisdictions, with specific conditions for liability clearly stated. In jurisdictions with no automobile guest passenger laws, courts often rule that if the guest is a social guest only, then the driver/owner does not have a duty to inspect the vehicle for any possible defect that could cause harm. For example, a tire on Mr. W's car has a slow leak. Mr. W fails to inspect the condition of the tires before he and a friend go on a fishing trip. The tire goes flat while Mr. W is traveling at sixty miles an hour. Mr. W loses control of the car and crashes into a guard rail, injuring his guest. Since there is no duty to licensees (social guests) to inspect premises for possible defects that may cause harm, Mr. W has no liability in this instance. (Remember that this situation pertains only in jurisdictions with no statutes relevant to the duty of care owed guest passengers.)

The highest duty of care is owed to invitees—that is, persons who come onto premises for business purposes, or who come onto premises which are open to the public for one of the purposes for which the land is open. The first category of invitees are termed “business visitors” and the second category of invitees are termed “public invitees.” Let us examine the difference in these two categories.

Business visitors are not required to actually conduct business with the owner/tenant of the premises they enter. All that is necessary is that they have a general business relationship with the owner/tenant. Thus, a person may enter a grocery store, browse along the aisles purchasing nothing, slip on a slick spot on his/her way out of the store, and claim liability against the owner of the store on the grounds that grocery stores are open to anyone who enters the store during business hours, with no caveat that all those entering must make a purchase.

As far as salespersons and those looking for jobs go, once again, the salesperson does not have to make a sale

to the owner/tenant of the premises, or the person seeking a job does not have to actually obtain it, so long as there was a reasonable possibility of making a sale, or a reasonable possibility of being hired. For example, Miss X is a detail person for a pharmaceutical firm. She calls upon a clinic of physicians, hoping to get them to agree to prescribe the particular products her employer sells. None of the physicians is interested in doing so. Miss X is injured when she trips over a mop a cleaning person left in the middle of the floor. Her status is that of an invitee, and she can attempt to hold the clinic liable. Yet again, Miss X answers an advertisement for a job at another pharmaceutical company. She is interviewed, but not hired. As she is walking through the reception area of the office, she is struck by book which has toppled off a high stack on the top of a filing cabinet. The blow startles her, and she falls back striking her head on the filing cabinet and sustaining a severe laceration of the scalp. Even though Miss X did not get the job, since she a reasonable expectation of being hired, she is, legally, an invitee, and can attempt to hold the firm liable for her injury. However, door-to-door salespersons who appear at the door of a private residence with no prior appointment/arrangement are not invitees unless the householder invites them in.

There is a condition that is pertinent to understanding the expanded liability owner/tenants have to invitees, and this condition is that, since the only relationship between the owner/tenant and the person with a business purpose IS business, it is not reasonable to expect that the person coming onto the premises would be familiar with them, and on the lookout for dangerous situations. A person interviewing for a job, when taken by the receptionist to the office of the person conducting the interview, has every reason to expect that the chair provided will not collapse, that the coffee offered with not be scaldingly hot, that the staircase leading to the rest rooms will be adequately lighted, and so on. Now, should this person, after the job interview, leave the part of the premises to which he/she was conducted, and roam into other areas, the person's legal status may be reduced to that of licensee, or even trespasser, levels at which lower duty of care is required.

More and more, public places have signs on doors that state EMPLOYEES ONLY, or DO NOT ENTER, or RESTRICTED AREA. These signs are a response to the varying levels of care required to people entering premises. Also, if a person who entered premises with the status of invitee concludes the business that brought him/her there, and then goes into, say, a reception area, picks up a magazine and reads it for an hour or so before leaving, if he/she is injured on the way out, it can be held that the owner/tenant does not have the higher duty of care owed an invitee, since, as far as the owner/tenant knew, the injured person had concluded the business and left the premises hours ago. Also, should an invitee remain on the premises for a purpose of sole benefit to himself/herself, the owner/tenant's duty of care is less. For example, Mr. P notices a collection of books on a subject he is interested in on a shelf in a small room off the hall that leads to the room where he will be interviewed for a job. After leaving the job interview, Mr. P goes into the room and peruses the books, making notes for a paper he is writing on the subject. One of the books falls to the floor and breaks Mr. P's toe. His status is no longer that of invitee, since his reason for remaining on the premises has nothing to do with his original business purpose, and is, in fact, of benefit only to himself.

Owner/tenants have a duty of due care to invitees, which includes a duty to inspect the property invitees will enter for any hidden defect/danger which may cause harm. Such an inspection should be performed using reasonable care: that is, the owner/tenant should pay attention to those areas which might be expected to have hidden defects, such as stairways, elevators and escalators, lighting in halls and interior rooms, etc. There are many cases where an owner has been held liable for construction defects that may have occurred before the owner ever took over the property. In recent years, we have seen court cases in which owners who occupied or constructed buildings on landfills later found to have been contaminated by toxic wastes have been taken to court on the charge that they should have tested the land, since sources of toxic waste were in the neighborhood.

The duty of due care can include a wide range of requirements. In some cases, the owner/tenant must correct the defect. In others, the owner/tenant may simply warn an invitee of the defect, as when airline personnel warn people to be careful in removing carry-on items from overhead luggage bins, as the contents may have shifted during the flight. The airlines are NOT required to have their personnel open and inspect each bin before allowing passengers to remove carry-on items.

Nor can owner/tenants of premises rely upon the fact that an invitee knows a certain risk is present to avoid liability for any harm the hazard causes. For example, a construction crew builds a temporary wooden

structure separating pedestrians along a busy sidewalk from the construction on the building. The wooden wall on both sides of the walkway impairs pedestrians' view of the street until they reach the intersection. Mr. M, rushing to an appointment, glances out into the street in front of him, but cannot see traffic coming from the right or left. He runs out into the street and is hit by a car. The construction company can be held liable because even if Mr. M knows that the walls obstruct his vision, still, he must use the passageway to get to his place of work.

As in other instances of liability to others, owners duty of care to invitees may extend to the conduct of those over whom he/she has control, such as employees or contractors. And, owners also have a duty to see to it that premises are secure against criminal acts. The increasing use of private security guards in businesses ranging from banks to supermarkets reflects this duty of care. Public figures, such as policemen/women and firefighters enter premises in emergency situations in most cases. It is not reasonable to expect that the owner/tenant could, in such circumstances, make the premises safe for these people, and thus, they are usually considered licensees. There is thus a lower duty of care to them. However, other public employees such as trash and garbage collectors, postpersons, employees of public utilities, etc. enter the premises for business purposes, and are thus considered invitees. An owner thus has a duty of care to keep premise reasonably safe.

Such care extends to a situation in which, for example, an owner/tenant has a mail slot in the front door through which the postal carrier is expected to deposit mail. The owner/tenant also has a dog who, when it hears the mail slot open, rushes up to the door, barking loudly. Since there have been instances when such a dog bit the postal carrier's hand as she/he put the mail through the slot—in one case, holding the carrier's fingers in it's mouth and not letting go—owner/tenants who do not restrain their dogs from such behavior will no longer have service at their home/place of business, but will have to pick up their mail.

While the majority of jurisdictions in the United States still use the three categories of trespasser, licensee, and invitee in establishing what level of care was owed by an owner/tenant to an injured party, some states apply a rule of reasonable care to protect any person entering premises from harm, while others apply the rule of reasonable care to all but trespassers, to whom the least duty of care still pertains.

Now let us look at the liability lessors and lessees have. To begin with, once a lessee—more commonly called tenant—occupies/possesses the premises, all rules of owner liability now apply to him/her, even so far as to having liability for a dangerous condition on the premises which the tenant does not discover, but which, if he/she had shown reasonable care, could have discovered. For example, Mr. U always uses the back door of his apartment, because he parks his car in the back. The middle step of the short flight leading up to his front door is rotten, and, after Mr. U has lived in his apartment for two weeks, a UPS man making a delivery falls and hits his head on the brick sidewalk when the step gives way under him. Mr. U could have discovered this defect had he used reasonable care in inspecting his premises, and so can be held liable.

However, if Mr. U lives in a multiple dwelling or rents in a multiple office building, then he is responsible only for those premises which he occupies, and which he controls. This would exclude common areas used by all tenants of the building, whose maintenance lies with the owner. Still, Mr. U has a duty of care under general liability principles to warn persons entering his premises of a defect in the premises through which they must pass, or which they must use.

Renter's liability insurance is designed to cover just such exposures.

While in general most of the liability a lessor/owner has to those entering premises he/she owns is passed on to the tenant leasing the premises, there are instances in which the lessor retains liability. For example, when there is a hazard on the premises which the owner should reasonably have known about, and which the tenant cannot reasonably be expected to know about, then, if harm results from that hazard, the lessor will be found liable. For example, Mr. H has not inspected the boiler of the furnace heating his twelve unit apartment building for many years, nor has he had his maintenance man inspect it. Since the tenants of his building have no control over the boiler, and indeed are prevented from entering the area where the boiler is, they cannot be expected to know of its dangerous condition. When the boiler blows up and causes extensive damage to the first floor apartments, the lessor is held liable for this.

Lessors must be particularly careful when property they rent will be open to the public, for then, if there is a dangerous condition which could cause harm, and the lessor is aware, not only of the hazard, but also that the property will be open to the public before there is time for the hazard to be remedied, then, if the lessor does not inform the lessee of the hazard, and warn him/her of the harm that could occur to a member of the public to whom the premises are open, then the lessor will be held liable for any resulting injury. The hazard must, however, have existed before the lease was signed. If a hazard occurs AFTER the lease is signed, and is due to the tenant's negligence in caring for the property, or in notifying the lessor of a new hazard, then any liability for injuries due to the hazard is the lessee's responsibility.

All common areas of a multi-unit structure remain the responsibility of the lessor, and so the lessor has a general duty of reasonable care to insure the safety of those entering the premises, whether tenant, member of tenant's household, licensee or invitee.

Many leases hold the lessor responsible for the status of the premises in terms of keeping it in good repair: if an injury occurs as a result of a lessor not living up to the terms of the lease, he/she can be found liable for the damages. And, if a lessor begins to make repairs, and then either doesn't finish the repairs, or does them badly, the lessor's liability is clear, as unfinished or poorly done repairs can make a hazard even more dangerous than before. There are cases when repairs may take a long period of time: in such a case, the lessor's responsibility is to take reasonable care that the persons entering the premises are not put at risk, and also warning them of danger. For example, a lessor is repainting a three-story apartment building. The contractor doing the painting has erected scaffolding which stretches over a sidewalk widely used by tenants and visitors to the premises. The lessor must see to it that the scaffolding is erected in such a manner that it does not pose harm to tenants/visitors. (Remember that owners/occupiers of land are responsible for the actions of employees/independent contractors on their premises. And since it is the owner, not the occupier, of rented property who is responsible for most repairs, the owner retains liability for the actions of employees/independent contractors on the premises.)

For many years, courts held that lessors had no duty to take security precautions that would make rented premises safer for tenants. However, that view is changing, and lessors may well be held liable if tenants' security is not attended to. The primary consideration in determining lessor liability here is the security situation at the time the tenant moved into the rented premises. If at that time, security precautions were in place, such as a doorman, or a latch system controlled by tenants, the lessor will be liable to exert reasonable care in seeing to it that this level of security is maintained.

Remember that owners/occupiers of land are liable not only for hazards to people on the premises, but also for hazards affecting people off the premises. This situation generally holds true in a lessor/lessee situation. Let us examine this further.

If there is a danger at the time of lease which can cause harm to people off the premises—for example, a weak support in a driveway over a culvert which presents the possibility of the drive caving in—then the lessor is responsible for any harm resulting from that support's collapse. But should the dangerous condition occur after the lease is signed and the term it covers has begun, usually the lessor would not have liability unless she/he has committed some breach of duty defined in the lease contract itself.

Again, should the tenant engage in activities which put persons off the premises in danger, the lessor would be held liable for resulting harm if she/he had reason to believe, when the premises were rented, that the tenant would engage in activities that would present such a risk.

A growing tendency is to impose a general standard of negligence on lessors, which extends the liability usual for owners/occupiers of land/premises. And there are occasions when courts will impose a strict liability on a lessor when a latent defect causes an injury. For example, the railing on the balcony of Miss A fourth floor apartment is made of a lightweight decorative metal, and is obscured by a heavy growth of vines a former tenant planted. Miss A, not aware that the railing will not support her weight, leans against it, and, when the railing gives, falls and breaks her leg. The lessor will be held liable for this harm.

Vendors and vendees fall into a particular class when we consider the liability owners/occupiers of

land/premises have. The vendor is, of course, the person who sells the land/premises, and the vendee is the buyer. Normally, once a seller has turned the land/premises over to the buyer, he/she has no liability for any injuries which occur as a result of a defect in/on the property. There are exceptions. If the seller knew of a dangerous condition or should have known of it, and does not reveal this to the buyer, he/she is guilty of concealment—failure to disclose—a condition which the buyer should have had full knowledge of. The liability holds until such time as the buyer finds out about the condition, and has time in which to correct it. There are cases in which the seller did not deliberately withhold information about a dangerous condition. In such cases, the seller will have liability for any harm this hidden defect causes, but only until such time as the buyer has a reasonable opportunity to find and correct it.

A builder/vendor—in other words, a developer or contractor who also sells the houses/buildings he/she builds—is generally held to the general principle of negligence, and can be held liable for injuries resulting from defects in the building. The reasoning behind this is of course that the person responsible for the construction of a building should know every defect in it. The same rule of negligence is applied to builder/vendors when defects on the property cause harm to persons off the property.

Fraudulent claims cost insurance companies billions of dollars annually: some of these claims arise from scams in which accidents are faked, and some of these claims come from people who have indeed suffered some injury, but who exaggerate its effects in an effort to get a larger payment. The proliferation of billboards advertising personal injury lawyers is a reflection of a litigious society in which every injury is seen as a possible source of instant wealth.

It is instructive for liability policyholders to be aware of the legal ramifications effecting damages, not only so that they may more fully understand the extent of the damages they may be held responsible for, but also that they might have a clearer understanding of what they might expect if they or a member of their household is injured in an accident caused by someone else.

The basis for all personal injury claims is that an ACTUAL INJURY must have occurred. This injury must be physical, but once the existence of a physical injury is established, then a plaintiff may be able to recover a number of other losses, such as economic loss, which includes direct out-of-pocket expenses such as medical expenses, lost earnings, and the cost of hiring people to do things for the injured person which he/she cannot do. Claimants may receive compensation for the pain and suffering the actual injury caused—this may be past pain as well as anticipated future pain. Physical injuries may also cause mental distress. Mental distress may manifest itself as fright and shock when the injury occurred; humiliation because the injury has disfigured the victim or caused a visible disability; depression when a victim realizes that he/she will not be able to have the same sort of life as he/she had before the injury—for example, cannot work, or engage in sports, or have sexual relationships; and finally, anxiety. For example, a pregnant woman may suffer great anxiety because of possible harm to her unborn child. Or again, the injury may be one that could possibly cause worse harm in the future, thus causing anxiety in the victim.

While the general rule is that a claimant can collect from only one source when damages have occurred, the collateral source rule states that a plaintiff may include in the suit a claim for out-of-pocket expenses, even if the victim's health insurance company has already paid for these. Note that this rule applies only to out-of-pocket expenses, not to an item such as loss of future income.

Courts do recognize the responsibility of an injured person to do whatever he or she can to keep an injury from becoming worse due to neglect or lack of care, and so a plaintiff must use reasonable care in getting medical attention, and in following treatment orders. Many times, a plaintiff is denied recovery for damages, or receives less than the amount requested if he/she did not take safety precautions that might have helped avoid the accident altogether, or, at the least, reduced the severity of the damages.

For example, Mr. P and his wife were driving to an airport in another city to catch a plane. A new highway between the two cities would cut travel time by some thirty minutes, but it had not yet been opened for travel. In fact, large signs were posted at every possible entrance to the highway, warning drivers not to use it. Mr. P, concerned that they might miss their plane, entered the highway. Some miles down the road, he struck a guard rail which stretched across the road. The steel rail cut through the vehicle, and amputated Mrs.

P's legs at the hip. When the P's sued the state, the damages they sought were significantly reduced due to the fact that Mr. P had no business being on that roadway.

The question of punitive damages—damages which punish the person who caused the harm—is one that has become a hot issue in recent years, with juries tending to award huge amounts to victims of accidents. Many jurisdictions have put a cap on punitive damages, and some have eliminated them.

Not only the person injured, but his/her spouse and/or children may also recover if they can establish that they, too, have suffered a loss. This loss may be loss of companionship, or loss of a sexual relationship with the injured spouse. In the case of children, the loss might be that of parental guidance.

When a person dies as a result of an accident caused by the negligence of someone else, that person's estate may sue for losses which the deceased person would have been able to sue for. Further, the deceased's spouse and/or children may sue for wrongful death in jurisdictions which have wrongful death statutes. These statutes allow survivors to sue for whatever losses they suffer because of the death of a spouse/parent.

The primary concern insurance companies selling liability policies have is the inflation of claims, and the tendency of juries to make decisions emotionally rather than rationally. The sight of a child in a wheelchair is sufficient to make any but the most hardened juror feel sympathetic, and that sympathy is all too often translated into awards which make no rational sense. For example, there was a case in which a nine year old boy darted across a busy highway and was struck by a car. The vehicle's driver had no insurance, and so the boy's parents sued the state in question on the grounds that the road had no shoulders, and that the vehicle's driver therefore could not prevent the accident. Other facts of the case showed that, since the boy lived in a house on the highway, he frequently crossed it, and should certainly have known how dangerous it was. Further, he was with two older brothers at the time, one twelve and one fourteen, and followed them as they crossed the road. The child was not a particularly good student, his family was far from well-off, and indeed, there was little in the FACTS of the case to impel a jury to make an eighteen million dollar award. But they did. The award was based, the foreman said, on the child's probable lost wages, as well as on mental distress. While there is no question the child would suffer mental distress, there seems little question that he would ever have earned anything approaching millions of dollars. And, the fact that he had darted out into traffic on a road he had been crossing since he could walk did not seem to enter into the jury's decision making process.

5 Defenses

This case brings us to a consideration of defenses in negligence actions, meaning the defenses the party being sued can use to demonstrate that the negligence was not all on one side.

First of all is the defense of contributory negligence. If the person suffering the injury was indeed negligent, and if that negligence was the proximate cause of the injuries suffered, then that person cannot recover anything. For

example, a mechanic at the garage Miss U uses told her that her brake fluid was low, but she failed to have any put in. Later, Miss U attempted to stop at an intersection where she had the red light. The brakes failed, and she collided with an automobile legitimately crossing the intersection. Miss U's negligence is sufficient to prevent her from recovering any damages from the other driver.

But suppose that the other driver saw Miss U entering the intersection, and had a clear lane into which he could turn, thus avoiding the accident? If he indeed could have prevented the accident, and did not, then the doctrine of Last Clear Chance applies, and Miss U's contributory negligence is no longer a factor in whether or not she may recover from him.

Since a universal application of the Last Clear Chance doctrine could result in the burden of an accident unfairly falling on a person who in truth was not negligent, courts have established general classes to which the Last Clear Chance doctrine is reasonably applied. First of all is a situation in which the victim is helpless to avoid the accident, and the defendant does discover the danger in time to avoid it. For example, Mr. J is trying out a new pair of skis. He has been told not to ski on a certain slope, because it has iced over and is risky for

amateur skiers. He goes onto that slope anyway. He loses control and falls, then slides down the slope. Miss N is driving a snow mobile across the bottom of the slope. She sees Mr. J sliding toward her, and instead of putting her vehicle into reverse and backing out of his way, she continues moving forward, striking him. Mr. J could not avoid hitting her snow mobile, but she could have avoided striking him.

Yet another instance where the Last Clear Chance doctrine may be applied is when the victim is helpless, and the defendant is inattentive. In the example above, for instance, if Miss N was gazing at the scenery above her rather than concentrating on her immediate surroundings as she drove her snow mobile across the slope, Mr. J would recover despite his negligence.

A third circumstance affecting the application of the doctrine of Last Clear Chance is when the victim is inattentive, and the defendant (person charged with negligence) is aware of the victim's danger and negligently does not go to the person's rescue. For example, Miss S does not notice the signs warning of dangerous surf before she enters the ocean, even though the signs are posted at close intervals along the beach. Miss S soon gets in trouble, and is in danger of drowning. Mr. H is aware of her danger, and could go to her rescue: there is a life preserver attached to a long rope nearby. Instead of throwing the life preserver to Miss S, Mr. H wades into the surf and stretches his arm out to her. She cannot reach his arm, and drowns. Since Mr. H, had he exercised reasonable care, would have used the life preserver, he is negligent according to the doctrine of Last Clear Chance.

Finally, there are cases in which both the victim and the person charged with negligence are inattentive and do not notice the peril the victim is in. In such cases, there is little possibility of applying the doctrine of Last Clear Chance, since neither party was aware of any hazard.

Except for the instances examined above, the concept of contributory negligence takes a black and white view of negligence. Considering the number of gray areas there are in many accidents, a more realistic approach is that of comparative negligence, which attempts to establish the degree of fault of those involved in an accident which causes harm. For example, Mr. F is intoxicated, but drives anyway. Mrs. W, knowing that he is intoxicated, gets in the car. Neither is wearing a seat belt. When Mr. F crashes the car into a culvert, Mrs. W's own negligence in getting into a vehicle driven by an intoxicated person, and in not wearing a seat-belt, will be taken into account when the facts of the accident are examined.

After all, Mrs. W assumed the risk that there would be an accident when she entered a vehicle driven by a drunk person, and this voluntary ASSUMPTION OF RISK was sufficient to establish negligence on her part. Remember that negligence arises when a person fails to exercise reasonable care. Reasonable care would suggest that a person avoid riding with drunk drivers.

Since a majority of states have laws requiring the use of seat belts, persons injured in vehicular accidents while not wearing seat belts have less chance of recovering: at the very least, their negligence will be a primary factor in determining liability and also responsibility for damages.

In order for a determination that a person has assumed the risk which caused the injury, several conditions must be present. First of all, the injured party must have known the risk existed. Second, the injured party must have voluntarily assumed the risk. Third, if there was a reasonable alternative to the course of action the injured party took, one that did not include a risk, and the injured party did not take the alternative, then he/she assumed the risk.

There are activities, such as many sports and other forms of recreation, which contain many risks which should be known to participants. When someone who voluntarily engages in such a sport or recreational activity, then he/she does indeed assume the risk involved. This is not to say that all injuries resulting from risky sports or recreational activities cannot be charged to the negligence of another party. It is to say that to establish negligence, the proximate cause of the injury must be something other than the normal conduct required by the sport or recreational activity.

For example, when a member of a celebrated family died on a ski slope recently, it was determined that he was not only skiing, but was also playing football and taking a video of the game. Clearly, playing football and

using a video camera while skiing are not within the normal conduct required by the sport.

A question that has long plagued personal injury claims is that of the statute of limitations applicable to the claim. Normally, of course, an insured has a duty to report an injury or property damage to his/her insurer as soon as it is discovered. But there are many cases in which a physical injury or harm is not discovered until long after the act which caused it.

Such instances often occur in medical malpractice suits: for example, an object may have been left in a patient's body, and the harm it causes may not occur for some time. While for a long time courts held that the statute of limitations began on the date treatment occurred, most jurisdictions have expanded that rule, and the time-of-discovery when the statute of limitations for a claim begins to run is, in most jurisdictions, that date on which the injured party not only discovers the harm, but also discovers that it was the physician's negligence which caused it. Such extensions are made in an effort to be fair to injured parties, since the damage is not always immediately discovered. Similar extensions may be made in other malpractice suits involving other types of professionals.

We have been examining several defenses which may be used by a party charged with negligence that resulted in a harm. Among these were the contributory negligence of the injured person, the comparative negligence of all parties to the incident, and the assumption of risk by the injured person. We now look at another type of defense, called an immunity.

This type defense is given to an entire group of people, and is based upon several factors. Formerly, husbands and wives had immunity from suits brought by their spouse for harm caused by their negligence, and parents and children shared the same type of immunity. However, this type of immunity has been weakened in recent years, and there are many instances in which spouses may sue for personal injury damages caused by the negligence of the other spouse, and where children may sue parents for the same reason.

Also, charitable organizations used to have immunity against being sued for damages caused by negligence, but this immunity, too, has eroded, and a majority of states have abolished this immunity.

Finally, governmental units/employees had a governmental immunity—this included the federal, state and local governments in this country, as well as diplomatic immunity for foreigners attached to their countries embassy. However, this immunity, too, has eroded, and is no longer generally applied. There are degrees of immunity for particular individuals, but it is not necessary to explore them in this course of study.

6 Vicarious liability

Thus far, we have been discussing the liability arising out of negligent acts of an entity or a person. Now we will look at VICARIOUS LIABILITY, which means the liability one person has for the act of another. Vicarious liability rises out of particular relationships between people. The most common instance is the relationship between an employer and an employee, but the relationship between an employer and an independent contractor, or the relationship among parties to a joint enterprise, or the relationship among family members engaged in a

common family purpose also create instances of vicarious liability.

Let us first look at the liability employers may have for the acts of their employees. This type of liability can be particularly onerous for small business owners, or for persons conducting businesses out of their homes if they do not understand the risks the conduct of employees can expose them to.

First of all, who is considered to be an employee under vicarious liability rules? The primary test is that the person is under the control of the party who hired him/her. An employee, then, is one who is told what to do and when to do it by the employer, without necessarily knowing what the end product will be. Contrast this definition to that of an independent contractor, who is engaged with a particular goal in mind. The independent contractor may choose how he/she will arrive at that goal—how many hours to spend, what

approach to take to the work, etc.—and thus is not under the control of the person hiring him/her. That person may of course reject the finished work as not what the agreement called for, but does not have control over how the work is done.

Naturally, ALL acts of an employee that cause harm to another are not the responsibility of the employer: only those which are committed during the scope of his/her employment. Defining scope of employment is not as simple as it might first appear, for this can extend beyond normal business hours, and off business premises. So long as the employee's activity had the intention of furthering the purpose of his/her employer's business, the activity may be determined to fall within his/her scope of employment.

There are many ramifications to the concept of an employer's vicarious liability for the negligent acts of an employee which result in harm to another. A thorough review of the risk exposures to small businesses and to people operating businesses out of their homes is an important factor in providing clients with the type of liability insurance they require, and also in educating them to the risks so that they may address them.

Normally, an employer has no vicarious liability for the acts of an independent contractor he/she hired. However, there are exceptions to this rule. For example, among the duties of care owed to others are some that are so significant that liability for negligence in fulfilling them cannot be given over to another. For example, owners of potentially dangerous pets have a duty of care to see to it that the animals are always properly restrained. Miss W is going away on a trip, and hires a house sitter who will also care for the dogs. The house sitter carelessly leaves the gate to the dog yard open, and the dogs get out. One of them bites the child of a neighbor, causing a severe laceration on the child's leg. Miss W has liability, because she cannot delegate her duty to restrain her pets to someone else.

Again, there are activities which are in themselves so dangerous that they should not be performed unless precautions are taken to prevent harm to others. For example, Mr. A hires a tree company to take down a large tree in his front yard which has been damaged by a storm. Unless precautions are taken, the tree, when it comes down, will fall on a neighbor's house. The tree company's people do not take the tree down with proper precautions, and it indeed crashes into the neighbor's roof. Mr. A will be found liable.

Many, many householders run this sort of risk when they hire independent contractors to do everything from plumbing repairs to electrical work. And in a society in which going to court has become almost a national past-time, it is necessary that people contract only those workers who are licensed and bonded, and who can produce a record of competent work.

Vicarious liability can also arise out of what are termed joint enterprises. Contrary to what the name seems to imply, a joint enterprise is not a long, complex undertaking, but one of relatively short duration, with a particular purpose in mind. Four conditions are necessary for a joint enterprise to exist. First, there must be an agreement among the parties to it; this agreement may be EXPRESSED—that is, it is communicated—or IMPLIED—that is, parties give every indication that they agree to the enterprise; second, the members have a common purpose; third, all members have a common pecuniary interest in that purpose; and fourth, each of the parties to the agreement has an equal voice and equal control.

Normally, joint enterprises must have a business purpose for vicarious liability issues to arise. Social trips are not usually considered joint enterprises unless there are particular circumstances which would make them so.

Vicarious liability is often found in cases where a non-owner uses an automobile with the owner's consent and through negligence, causes harm. Automobile policies are written to conform to the statutes of the particular jurisdiction in which the insured vehicle is garaged/domiciled, and so we need not examine this particular issue here.

7 Strict Liability

So far in this course, we have examined two general types of liability—that arising out of negligence, and that arising from particular relationships among parties which

make one party vicariously liable for the negligence of another. In this section, we will look at STRICT LIABILITY.

Strict liability applies to situations that are in themselves so filled with risk that to engage in them attaches liability, even if there is no negligence involved. The reasoning behind this is that when an activity is inherently dangerous, then those who persist in doing it do so at their own risk, and are therefore responsible for any damage which may result. There are three major areas in which strict liability applies. The first involves ownership of animals. The second involves abnormally dangerous activities. The third involves workers' compensation.

Let us look first at the strict liability attached to the ownership of animals. This concept has two sections. The first regards animals—excepting household pets—which trespass onto another's property and cause damage. Depending upon the statutes within a particular state, there may be laws requiring owners of livestock to fence them in. If animals break out of the fence and cause damage, the owner may not have strict liability, since he/she attempted to obey the law. However, if no effort at fencing was made, strict liability for the damage exists.

There is also non-trespass liability. For example, people who keep dangerous animals are strictly liable for any harm they cause. The animals may be "wild," in which case the owner is strictly liable for ALL DAMAGES the animals cause when it results from the hazard particular to that species. For example, a tiger gets out of its cage and devours three sheep in an adjoining field.

In the case of domestic animals, strict liability exists when the owner knows, or should certainly have reason to know, that the animal is dangerous. Thus, owners of breeds of dogs known to be particularly aggressive, such as pit bulls, have strict liability for the damage they cause.

The definition of a domestic animal rests upon its social use. Thus, though a bull may be quite dangerous, he also serves a social use, and is thus considered a domestic animal.

The second category to which strict liability is attached is abnormally dangerous activities. Even when someone engaged in an activity known to be abnormally dangerous uses due care, still, if harm results, that person is held strictly liable. Six factors help determine whether or not an activity is abnormally dangerous.

First, that the activity presents a high degree of risk of some harm to the person, land or chattels of others. Second, that it is highly probable that the harm will be serious. Third, that even taking due care will not eliminate the risk attached to the activity. Fourth, that the activity is not one that is commonly performed/used. Fifth, that the activity is not appropriate to the place where it is being performed. Sixth, that the dangerous nature of the activity is greater than any possible benefit to the community it may yield.

Nuclear plants are examples of activities to which strict liability attaches, because by their very nature, they present a high degree of risk of harm to the people and land around them. Further, the harm they could cause is a serious one.

There are instances where the utility to the community of the activity in question is so great that even though it is dangerous, the activity may be carried out without strict liability being attached to it.

However, there are other instances in which strict liability is almost always imposed. For example, the use and storage of explosives, crop dusting, and damage done on the ground by an airplane crash are all cases where those responsible are held strictly liable for damage caused, though there is a trend in the case of ground damage by airplane crashes to impose a rule of general negligence before liability is determined. Usually, a person/entity storing and/or transporting toxic chemicals and flammable liquids have strict liability for any harm they cause, though if the court decides that this is not an uncommon activity, the rule of general negligence may apply.

Even when the cause of an injury falls within the category where strict liability applies, still, it is not a given that the injured party will prevail in a suit on that basis only. There are limitations in the application of strict liability.

First of all, the injury must result from that risk which made the activity abnormally dangerous to begin with. If Mr. H is transporting toxic waste, which could cause health problems to those inhaling the fumes should the fumes escape, and his truck collides with another vehicle, causing a whiplash injury, the concept of strict liability would not apply, because the injury is not one that the toxic waste would or could produce. Also, the abnormal sensitivity of an injured person to the activity would be an ameliorating circumstance should a harm result from an abnormally dangerous activity. For example, Corporation Y is conducting a blasting operation that will level a hill so that a road can be built. The sound of the explosions frighten Mrs. X, whose husband was killed by an armed robber. The explosions remind Mrs. X of that traumatic event: she hyperventilates and loses consciousness. Corporation Y could hardly have known that anyone within hearing range of the explosions would have such a reaction to them, or is Mrs. X's injury the sort normally produced by explosions. Strict liability would not apply.

Persons or entities charged with strict liability may not use the contributory negligence of the injured party as a defense, generally speaking. However, assumption of risk may well be a defense in cases involving strict liability, because if an injured person knew full well the risk he/she was taking, and still took it, strict liability won't apply.

The final category of in which strict liability applies is workers' compensation. In this instance, the strict liability is a legal construction: when an employee suffers an on-the-job injury, the employer is strictly liable for the resulting harm. Employers may take all necessary precautions to protect workers, including warnings, safety procedures, and safety training, and still be held strictly liable if an employee's injury rises out of and in the course of employment. Despite this, workers' compensation laws do protect employers from lawsuits in which negligence might be claimed and proved, and in which the sums settled on the injured employee might be far more than workers' compensation pays.

Several categories of activities by an employee are not covered under workers' compensation, and these are the source of much litigation. WC does not cover injuries which occur from purely personal activities of an employee. In most cases, if an employee is injured while going to and from work, those injuries are not covered. Attacks by third parties may be covered if the attack is related to the injured person's job in some way.

Usually, the employee's negligence or fault is not a factor in workers' compensation coverage, but there are exceptions in most jurisdictions. If an injured employee was drunk at the time of the injury, normally WC will not cover the injury. Further, employees injured while they are engaged in illegal activities are not covered by WC, UNLESS the employer knew about the illegal activities, and condoned them. Also, if employees willfully disregard safety regulations, and are injured because of that disregard, most jurisdictions will not allow them to recover from WC. Note that if an employee is merely negligent in observing safety standards, this usually will not prevent him/her from WC coverage.

WC benefits are strictly defined, and do not include any compensation for pain and suffering. Generally, WC benefits include medical expenses and loss of income, as well as rehabilitation and training if such will make the employee fit for work, either at the old job or in a new one. Permanent disabilities yield benefits also, and there are benefits for survivors should an employee die.

Of course, if an employee can establish that the injury came about because of an intentional act of the employer, then that employee would have the right to take court action against the employer with a lawsuit.

8 Products Liability

This cursory summary of workers' compensation is sufficient for the purposes of this course. Since all states have WC statutes, those companies to which the laws apply carry WC insurance, either through the state or through a private carrier, or through self-insurance.

Liability for harm caused by products a business owner

sells has become one of the fastest-growing branches in tort law. In the beginning of products liability law, the manufacturer of a product bore most of the responsibility if harm resulted from some defect in the product. Now, however, the person or business selling the product can also be found liable for harm caused to the buyer of the product, or to a bystander.

Unlike many other forms of liability, liability for harm caused by a product can rise from three causes: 1) negligence; 2) warranty; and 3) strict liability.

When negligence is the factor that gives rise to liability for the harm a product causes, the general rules apply. That is, the manufacturer of the product is liable for the harm, if he/she did not use reasonable care in the design, manufacture, or label of a product. Normally, of course, the manufacturer does not sell the product directly to the ultimate buyer. However, since products are designed with a market in mind—garden hoses are intended for those who have some use for an outdoor water supply—the connection between the manufacturer's negligence and the harm to the buyer/bystander is usually easily established.

Essential to understanding products liability is the concept that negligence can be established if an injured party can show that the product, if defective, will then pose an unreasonable danger. Conceivably, there are products which, even if defective, could not be called unreasonably dangerous. As the threat of danger from a defect grows, so too does the manufacturer's duty of care to the buying public.

A person may suffer both property damage and personal injury as a result of a defective product, and courts allow recovery for both where negligence has been established. It is also possible that a person might suffer economic loss because of a defective product, but recovery on these grounds is not as certain. For example, Mr. F purchases a pick-up truck to use in delivering produce from his truck farm to a farmer's market. The brakes on the truck are defective. Mr. F discovers this defect before any type of accident occurs: he suffers neither personal injury nor property damage as a result of the defect, although he does suffer an economic loss in that he cannot truck his produce into the market until the defect is corrected. Whether or not he could recover for this loss depends upon the particular court.

Bystanders may also recover for harm caused by a defective product so long as they belong to a class of people who can predictably be seen as possible victims of the defect. For example, if Mr. F had been driving his truck, and if the defective brakes had caused him to hit someone standing on the curb of the street, that person could recover because it is predictable that pedestrians may be injured by automobiles.

Manufacturers stand at the head of the line of those responsible for a product, but retailers, bailors, and other suppliers may also be found negligent and therefore liable for harm.

Let us look first at the manufacturer's duty of care to the buying public. First of all, the manufacturer must use reasonable care to see to it that the design of the product is reasonably safe. Second, the procedures used to manufacture the product must be set up in such a way that they are reasonably error-free. This means that the procedures must produce products that are accurate to the design, and that the manufacturing process itself does not increase the possibility of defects occurring.

Third, manufacturers have a duty to inspect and test finished products according to standards that insure reasonable safety. When the product is packaged, the packaging, too, must add to or insure the product's safety. For example, child-proof caps on drugs/medications were a response to the danger posed by easy access to these products.

Further, when the product is shipped, it must be shipped such a way as to preserve the integrity of the product, and prevent defects from occurring. For instance, today's food market includes many companies that ship perishable foods to consumers. If the packaging is such that the foods are not kept cold, the danger that they will spoil and make the customers ill is increased.

There are cases where a manufacturer uses parts made by another company in his/her company's products. In such cases, the manufacturer has a duty to exert reasonable care in selecting the source for the parts, and may be required to inspect the parts, or a representative sample of them, before using them in the finished

product. Of course, the company manufacturing a defective component can also be found negligent if that component is the cause of harm.

A gray line divides the respective liability of the manufacturer of a product and the retailer who sells it. While the manufacturer has the original responsibility to produce safe products, retailers may in certain instances have an obligation to inspect products coming into his/her establishment. If the retailer fails to make an inspect, or makes an inadequate one, and harm results from the defective product, in most instances the manufacturer is still held liable for the harm. BUT if the retailer's inspection did reveal the existence of a defect in the product, and the retailer did not then warn the consumer, the retailer could be found liable due to gross negligence, and the manufacturer could then be relieved of liability. For example, Company X has sent a shipment of household step-stool ladders to Y Hardware Store. The manager of the hardware store notices that the screws holding the steps to the sides of the step-stool ladders are loose, so loose that it can be predicted with reasonable certainty that they will fall out. The manager neither tightens the screws nor warns customers that they are loose. Mrs. H purchases a step-stool, uses it to climb up to reach a high shelf in her kitchen, and, when the screws fall out and the step on which she is standing collapses, falls and injures her back. The retailer showed gross negligence, and is held fully responsible for the harm caused.

However, it is normally difficult to prove negligence on the part of a retailer whose only connection with the product is that it is being sold from his/her store. Thus, when retailers are found liable, it is usually for other reasons.

Not only retailers, but others in the distribution chain may be found to have negligent liability for harm caused by defective products. Examples of such suppliers are companies which rent vehicles, real estate firms, and the like.

A second concept under which products liability may be established is that of warranty. A warranty is a guarantee that something is what it is supposed to be: if a customer in a grocery store purchases meat labeled "beef," the assumption is that the meat is indeed beef, and not ostrich.

There are two types of warranties, express and implied. An express warranty is one which clearly states that a product possesses certain characteristics. For example, a certain tire will not blow out, but will lose air gradually no matter how the tire material is penetrated. If the tire does indeed blow out, losing air so suddenly that the car goes out of control, liability is established on the basis that the warranty was not true.

An implied warranty is one that arises from a consumer's belief that a product has certain characteristics simply because it is being sold for a particular purpose which requires those characteristics. For example, Mrs. A purchases a bag of something which is labeled as a substitute for wheat flour. Mrs. A uses the substance when making a cake. The result is a gummy mass that will not cook. Since the substance was sold as a substitute for flour, Mrs. A had every reason to believe that it could be used in all cases where flour is used. This was an implied warranty.

It is interesting to note the cautionary warnings on the labels of many food substitutes which explain the instances in which the substitute will not perform just like the food it is meant to replace. For example, certain "light" butters or butter substitutes state clearly that they should not be used in baking.

In fact, a review of product labeling and packaging would reveal the increasing awareness of manufacturers to the buying public, and also their awareness that the public will hold them responsible for harm caused by products. The bubbles of plastic which surround so many products, the seals which take force to break, the list of instructions that come with even the simplest appliance—all of these are evidence of a society in which people try to place blame for events on someone else.

For example, there are numerous cases in which a person MISUSED a product, and then suffered a harm. But such people have prevailed often enough in courts of law so as to make manufacturers super-cautious in how they advertise, package, and represent their products. There are also cases in which consumers tampered with products, and then claimed that the resulting harm was due to a fault on the part of the manufacturer or retailer. People have claimed to have found the body of a mouse in some food product, or a roach in a bottle

of some soft drink, sometimes with truth and sometimes with falsehood.

Strict liability for harm resulting from defective products is applied to cases when the defective product or condition is unreasonably dangerous to the user/consumer or to his/her property. Certain conditions do apply. First, the seller is in the business of selling the product in question. Second, the product is such that it should and does reach the user/consumer with no substantial change to the condition in which it was bought. As you can see, this would apply to most products.

In recent years, there have been numerous cases in which people sued blood banks because they contracted hepatitis or the HIV virus after a transfusion. And we have seen a plethora of suits in which people sued tobacco companies for selling them cigarettes that later caused cancer or some other disease/condition. Also, drugs are sometimes found to have had serious side effects years after they were introduced. The standard that is usually applied in such cases is the question of whether, at the time the transfusion was performed, or the drug prescribed, available technology could have detected the defect. Where the answer is no, the manufacturer/provider is usually not held liable for the harm.

This discussion of products liability only scratches the surface of the field. However, products liability is an issue which affects many businesses: small manufacturers and retailers as well as large ones can find themselves held liable for harm arising from a defective product. Who would have thought that a hot cup of coffee purchased at a fast-food restaurant would produce a multi-million dollar lawsuit! In a society where many people are engaged in their own service businesses, products liability can become a real issue. Caterers, decorators, cleaning services—all of these can find themselves in a position where a product they supplied has caused harm. Thus, their liability coverage should reflect any such risk exposures.

9 Miscellaneous Liabilities

There are other risks which may result in a person being liable for an injury to another. Among these is NUISANCE, which refers to a type of injury which the victim has suffered. Nuisance may be either PUBLIC or PRIVATE in nature. A public nuisance is defined as the interference with a right common to the general public. Examples of public nuisances are the release of noxious odors or harmful chemicals into the air, blocking a public road, or maintaining a business in an area which precludes such a business. For example, an interior

decorator decides to operate her business out of her home, which happens to be in an area with strict regulations about what kind of traffic may come into the area, and also about the kind of visitors homeowners may have. There is a clear restriction written into the homeowners' association against businesses which will necessitate customers coming into the enclave. The homeowners' association may then consider the decorator's customers as a source of public nuisance, since their rules prohibit any such business being established. Zoning laws are a reflection of that fact that different sorts of establishments require different sorts of surroundings: areas zoned A-1, for single family residences, do not want to be near areas zoned C-1 or C-2, which allow commercial and light industrial use.

For anyone to seek relief from harm caused by a public nuisance, several factors are necessary. First, substantial harm must have occurred. Further, even if a person does sustain harm as a result of something he/she considers a public nuisance, unless it can be established that the public at large, not just this one person, was harmed, or was at risk of harm, then the injured person cannot claim that his/her injury resulted from a public nuisance.

In recent years, the number of lawsuits filed on behalf of persons who sustained harm as a result of a public nuisance has increased. For example, when a railroad car carrying harmful chemicals overturns, releasing toxic fumes into the air, people in surrounding areas file claims for injuries ranging from allergic reactions to respiratory ailments.

Harm resulting from a private nuisance can be of varying kinds. First of all, let us mark the difference between trespass and nuisance. Remember that trespass is an interference with a person's right to enjoy exclusive

possession of his/her property. Nuisance, on the other hand, is an interference with his/her right to use and enjoy it. Now, of course, what one person considers a nuisance another person may overlook. Thus, courts have established a rule that only if a person with normal sensitivity would have been seriously inconvenienced by the alleged nuisance can a private nuisance be deemed to have occurred.

Further, there are boundaries which help determine what is a nuisance, and what is not. The conduct of a person must be the result of negligence, intent, or an abnormally dangerous act or condition for another person to claim that act or condition a private nuisance, and thus claim recovery for harm caused by it.

For example, Mrs. B works at home as a free-lance textbook editor. Her work requires great concentration. A neighbor is in the habit of chaining her dog outside when she leaves for work in the morning. There is a fence around the neighbor's yard, but it is in poor repair, and if the dog were to be left unchained, it would get out of the yard. Still, being chained makes the dog bark continuously throughout the entire time its owner is away. Mrs. B has called the dog's owner and requested that she do something to stop this constant barking, which severely interferes with Mrs. B's ability to concentrate on her work. The neighbor refused, and Mrs. B filed a suit based on the dog's barking being a private nuisance. The court referred the case to an arbitrator. Mrs. B had tapes recording the dog's barking, establishing that a person of normal sensitivity would be affected by the noise. The arbitrator rules that the neighbor had to repair the fence so that the dog could be let off the chain. This solution worked, and the dog no longer barked.

If the private nuisance is to be established as the result of negligence, then the usual rules of negligence apply, and the usual proofs of unreasonable conduct must be met. However, as in the case of the barking dog, most nuisance claims concern acts or conditions which the injured party feels are intentionally caused by the other person. In the case of the barking dog, certainly, the dog's owner knew that her dog barked.

Private nuisances are defined as unreasonable and substantial interference with a person's use and enjoyment of his/her land. Thus, if a situation exists in which one neighbor is aware that his next door neighbors work at night and sleep during the day, rising in the early afternoon, and if the first neighbor chooses to use/run equipment which makes a great deal of noise during the hours his neighbors are sleeping, even though he could use/run the equipment at another time, the disturbed neighbors might be able to bring a charge against him of creating a private nuisance which disturbed their sleep. However, the disturbed neighbors will also have to establish that the noise was created unreasonably if they are to prevail.

Abnormally dangerous acts or conditions can also give rise to complaints that someone's behavior is a private nuisance. For example, before holidays, Mr. B buys and stores firecrackers, rockets, and other fireworks in a garage that lies on the lot line between his property and that of his neighbor. The neighbor's garage also abuts the property line. Mr. B's children are not well-supervised, and often go into the garage, get a rocket or other firework, and shoot it off before Mr. B. sees them. Since, if the fireworks in the garage catch on fire Mr. B's neighbor's garage will, in all probability, also catch on fire, the neighbor could charge Mr. B with being a private nuisance, due to the abnormally dangerous condition created by the storage of fireworks.

In former times, when it was the norm rather than otherwise for most people to live in stable communities, communities with, perhaps, the same national or ethnic origin, the behavior of neighbors was more likely to be resolved amicably, since people had the opportunity to come to know one another, and since they also expected to be living close to each other over a long period of time. Now, in a highly transient society, it is possible for people even in suburban areas not to know their neighbors, or to know them only slightly. Neighbors may now be seen, not as source of support, but as possible sources of annoyance. Children who play ball and break windows, or whose balls fall onto delicate plants in a neighbor's garden, may be regarded as nuisances. Pets who get out of a yard and destroy another's property, loud radios and stereos—all of these can be sources for ill will, and, possibly, lawsuits.

While it is difficult for many people to think of all the risks for liability for harm to others they may have, creative thinking in this regard has become a necessity. Recently, stories appeared in the media about the reluctance of high school counselors to talk or write freely to college admission committees about students from their high school. There have been cases where parents sued high school counselors for telling a college admission committee that their child was a drug user, or had been in trouble with the law. And yet, colleges

are increasingly concerned about the behavior records of their students, because they can be held liable for acts a student commits, if those acts were committed in a situation under the college's supervision or auspices. One of the reasons for parents' attitude is that today, a college degree is seen more as an economic tool than an intellectual achievement. If a high school counselor's report, even if it is true, harms a student's opportunity to be accepted by a top college, the parents claim that their child has suffered an economic harm. And, in too many instances, they have made this claim successfully. High school counselors and others who may be required to fill out reports for students applying for admission to colleges are thus taking out liability coverage to protect them from financial loss should they be sued.

Again, the more society allows people to blame others for their problems, the greater the risk that someone will be found legally liable for them. After all, should not the student who takes drugs or gets into trouble with the law pay the consequences? Apparently not, in the minds of many parents, and in many courts.

Yet another source of liability is that of misrepresentation. By misrepresentation is meant words or actions that lead someone to believe something which is not, in fact, true.

A misrepresentation may either be intentional or negligent. Deceit and fraud are examples of intentional misrepresentation. Certain conditions apply. First of all, a person must have said or done something which led another person or persons to believe something to their detriment when that something proved not to be true. Second, the person making the statement must either know that the statement is not true, or must be shown not to care whether the statement is true or not. Third, an attempt is made to secure the other party's reliance on the statement. Fourth, it is clear that the second party did indeed rely on the statement. And finally, the person relying on the statement must have suffered damage.

Misrepresentations commonly occur in sales transactions, when a salesperson makes claims which are not in fact true. And of course there are situations in which a salesperson takes actions which create a misrepresentation, as when the odometer on a used car is turned back, or when a car that has sustained damage in a wreck is repaired and offered as new. For example, Mr. X purchased a new car from a luxury car dealer. After driving the car for a few weeks, and examining it more carefully, Mr. X became convinced that the car had sustained damage which had been repaired before he purchased it. Diligent questions to the dealer gave him no satisfaction, and so he contacted the district manager for the car manufacturer. After much delay, and a threat of legal action, the truth came to light. The car in question had fallen off the truck bring it to the dealer, sustaining damage to its front end. Though the car had been repaired and repainted, still, signs of the damage remained. This is a clear case of misrepresentation. Mr. X recovered damages.

It is also possible that misrepresentation can occur because relevant and significant facts are not disclosed. Not disclosing such information is not always a legally-recognized case of misrepresentation, particularly in transactions between, for instance, a seller and a buyer in which the buyer should have and could have asked questions which would have elicited information relevant to the buyer's decision to buy.

But there are business situations in which the party controlling the situation has a legal obligation to disclose relevant and significant information. One such example is when there is a fiduciary relationship between the parties, as between a banking institution and a depositor. Further, if one party uses half-truths to convey information, these half-truths may be construed as misrepresentation if reliance upon them causes harm. Also, if new information is available, and if it is information that, if conveyed, would affect the transaction, then, if it is not conveyed, misrepresentation may have occurred. Lastly, there are certain facts which are basic to particular types of transactions, and any party who might suffer harm because he/she did not know those facts must be given them. For example, if a realtor knows that the land adjacent to the single-family residence he/she is selling has been rezoned for commercial use, not conveying that information to a potential buyer could be construed as misrepresentation, for certainly, commercial use of the property next door would affect the use and enjoyment of residential property.

Buyers, however, are not held to the same standard of disclosure. For example, a person visiting a flea market or antique store may find an object which he or she knows or believes to have a higher value than that placed on it by the seller. The buyer has no obligation to reveal this information to the seller. As with any situation, there could conceivably be cases where a buyer would have such an obligation, but, generally speaking, a buyer

does not.

Proving misrepresentation usually rests on a plaintiff demonstrating that the defendant did indeed know, or did believe, that the statements were not the truth. Again, if it can be proved that the defendant had no confidence in the accuracy of his/her statements, and yet either stated or implied that he/she did, that can be construed as misrepresentation. And finally, if a defendant can be proved not to have had grounds for the misleading statements, and had also either stated or implied that he/she did, that is misrepresentation.

Why are these three conditions so important when attempting to prove misrepresentation? First of all, because if a person made misrepresentations through negligence, that alone will not be sufficient for a victim to recover. As usual, there are exceptions. For instance, in the case of a contract which was obtained because the person making obtained it by making a misrepresentation, even if that misrepresentation was merely negligent—that is, even if the person drawing up the contract negligently did not provide significant information, or negligently did not disclose it, the contract will be rescinded. Indeed, some courts will allow recovery even in cases where the misrepresentation was innocent, when they can apply the principle of strict liability. Strict liability applies particularly in cases where there has been a sale, rental, or exchange of property, and when a material misrepresentation was made which affected the decision of the buyer. Further, some service transactions may also fall under strict liability, rather than negligence, rules. Lastly, strict liability applies when physical injury results from a product which had been misrepresented in the label, or in advertising about it, by the seller. This is the case even if the injured person bought the product from someone else—we have discussed this in the section on products liability.

An important point in misrepresentation involves the buyer. Should the buyer be required to investigate the claims made by the seller? Courts generally find that the buyer has no such obligation, unless the circumstances are such that it would be unreasonable not to investigate the claims. For example, Mrs. D hires a contractor to build a beach house to replace one lost in a hurricane. The new house will have to be built according to strict code, which includes a requirement that the house be built on pilings. Mrs. D does not know that building a house on pilings is quite different from building one on a more usual foundation. The contractor tells Mrs. D that he is building a house on pilings, and thus has knowledge of how to do this particular type of foundation. When it turns out that the house the contractor built was not on a beach, with the particular building code requirements, but on land which actually was stable enough to support any type foundation and in an area not threatened by tidal surges, Mrs. D may bring action against the contractor that he/she misrepresented his/her qualifications for the job, and thus get out of the contract.

Of course, salespeople have a tendency to talk up the best points of a product and ignore the less appealing ones. A salesperson may tell a customer that in a certain expensive dress, she looks twenty years younger. Or a salesperson may call a deal for a major appliance the best deal you'll ever get. Such statements are not termed misrepresentations, since they are considered "trade talk."

The opinion of another party, one who, to all appearances, has no interest in the transaction, may be a telling factor in a buyer's decision. If a buyer relies on information from this disinterested third party, and the item purchased turns out to have an undisclosed defect, which causes a harm, the third party can be found liable for the harm. For example, there are consumer associations which endorse products. Consumers rely on these endorsements as evidence that the item will do what it is supposed to. When such reliance turns out to have been erroneous, those associations must bear some or all of the liability for the fault, since without the endorsement, the buyer may very well not have relied on product information.

When deceit has been established, damages resulting from harm directly caused by the misrepresentations may be recovered.

One reason that the liability arising from misrepresentation is significant to both insurers and their insureds is that, increasingly, the workers of this country are, in many cases, under-educated and under-trained. Employees of all kinds of business may make statements which are, legally, misrepresentations, opening the employer to the risk of being sued for any harm which is caused by the misrepresentation. If a waitperson in a restaurant assures a diner that there is no MSG in a particular menu item, and it turns out that there is, and the diner suffers a severe allergic reaction, the owner of the restaurant will be liable for the harm. Many

businesses are not aware of the many risk exposures they have, and may not have liability insurance sufficient to protect them if they are found liable for a harm.

Sophisticated technology has made it possible to scientifically track the cause of many harms which in former years would have gone undetected. For example, the salmonella bacteria which caused an outbreak of severe illness among patrons of a particular health food store was eventually traced to one truck farm in a state many miles away. The media is constantly reporting incidences of food poisoning, and spokespersons for the food industry blame the fact that Americans enjoy having fresh produce of all sorts the year round, which means purchasing produce from countries whose food controls are not as strict as ours. Still, when food poisoning occurs, someone in the distribution chain will be found liable, probably on the grounds that he/she had a duty to inspect produce coming from sources known to have less strict regulations than we do.

The final source of liability we shall look at is defamation. Defamation may be written, in which case it is called libel, or oral, in which it is called slander. For defamation to be actionable, the statement must be both false and damaging to a person or entity's reputation. Further, the defamatory statement must be communicated to someone other than the person it talks or writes about. Finally, the fault for the defamatory statement must lie with the defendant; the fault may be negligence if the person making the statement is a member of the media, or it may be knowledge that the statement is false, or recklessly disregards the truth when the person attacked is a public official or public figure. Sometimes slander causes harm of a pecuniary nature: that is, the slandered person suffers monetary harm. Defamatory statements are those which cause harm to the target person/entity's reputation. The harm to the reputation need not actually occur. All that is necessary is that had the statement been believed, it would have caused harm to the target's reputation. Sometimes a statement would harm a reputation only in one segment of the public. For example, a professor accused of membership in extreme left-wing organizations would suffer harm if he/she were employed at an ultra-conservative college, even if most of his/her academic peers would not see such a statement as derogatory.

If the statement is not of a nature that its target would be disgraced if it were true, then it is not defamatory. For example, to say that a neighbor is a tightwad is not defamatory. To say that a neighbor has a history of never paying his/her bills, and in fact once had to declare bankruptcy could be defamatory, as it could result in the neighbor feeling disgraced, and could also have pecuniary results if the neighbor were denied credit.

We will not spend any more time discussing defamation, because, in the general run of things, such cases normally arise from certain types of media, such as the tabloid magazines which regularly come under fire. The political correctness movement, in which all sorts of terms and words have been deemed politically incorrect, has also affected defamation as a legal concept. Many more cases resting on such charges appear in court and in the media. For example, not too long ago a top administrator at a large university made a comment about his new boss at a private party in his own home. When the comment was leaked to the press, the university seriously considered discharging the man who made the comment: while he did retain his position, he was disciplined by the university.

We should all probably be aware of the possible consequences of carelessly made—or intentional—statements regarding another person which could be construed as affecting their reputation in a damaging way.

10 Liability coverage

General Liability

In the previous sections we have examined the various ways in which an insured/person may be held liable for harm to another. In this section, we will look at liability insurance, insurance designed to protect insureds from the financial results of any harm they are liable for to others.

We will look first at general liability policies for business owners. These began with specialized policies, each of

which covered a specific hazard. As you may imagine, such policies were difficult to administer and inefficient in the end. Thus, the Comprehensive Liability Policy, which has a blanket insuring agreement covering specific

perils, and also has agreements for unenumerated, unrecognized, or new risk exposures. Generally speaking, the Comprehensive Liability Policy covers liability exposures EXCEPT those associated with automobile ownership/maintenance/usage; aviation; worker's compensation; liability for damage caused by boilers and machinery; and marine coverages.

Normally, the CGL policy covers all losses except those which it specifically excludes. The insured may put together his/her own coverages from the following list. First is bodily injury liability coverage. This offers protection against liability for bodily injury the insured and/or a member of his/her household or property has caused. It does NOT offer protection for bodily injury that is covered by workers' compensation, unemployment compensation, or any disability benefits law or any similar law. It also does not offer protection for liability for bodily injury when the risk was assumed by the insured under a contract of a type covered by the policy, or when the bodily injury, sickness, disease or death came out of and in the course of the harmed person's employment by the insured.

A broader form of bodily injury liability coverage is personal injury coverage, which would cover some of the exposures we discussed in previous sections, such as libel, slander, invasion of privacy, undue familiarity, mental anguish, alienation of affections, discrimination, false arrest or imprisonment, and wrongful eviction.

A CGL policy also offers property damage liability, with exceptions. When an insured has one of the following listed situations, a direct damage policy may be purchased to cover the risk. The first general liability exception is for damage to property owned; occupied by; rented to; or in the care, custody, or control of the insured; or over which the insured is exercising physical control for any purpose.

The next exception is for damage to property of others caused by the discharge, leakage, or overflow of water; the blockage or backing up of sewers; the flooding or seepage of water occurring on or from premises owned by or rented by the named insured and which damages or destroys buildings/property therein. The last two exclusions deal with blasting operations and activities such as excavating and drilling which may cause the collapse of or structural damage to buildings/structures belonging to another.

A CGL policy provides medical payments for those damages for which the insured is LEGALLY LIABLE only, and include the reasonable medical expenses of the claimant. These medical payments are made regardless of fault, and are payable in addition to any sums the claimant may be entitled to recover by way of damages against the insured. This section covers medical payments for reasonable and necessary medical expenses incurred within one year from the date of the accident.

The term HAZARD GROUP is used in liability insurance to denote the exposures covered. Insureds may select hazard groups, excluding those to which they are not exposed, or for which they already have coverage, or which they will self-insure—that is, assume the risk themselves.

The first hazard group in general liability insurance is premise and operation. It covers liabilities arising out of ownership/use of/operation of premises, and also liability arising from the operation of equipment. It has a list of exclusions. Among these are all liability which arises out of the ownership, maintenance or use of an aircraft; liability from automobiles and watercraft if the accident occurs away from the premises; an elevator hazard; liability for damage to a building or to property within buildings caused by discharge, leakage, or overflow of water or steam from plumbing, heating, refrigerating or air conditioning systems, steam pipes, collapse of tanks, automatic sprinklers, or rain or snow coming through defective doors and windows; liability arising from products, completed operations, and the work of independent contractors.

Note that coverage for these exclusions may be purchased separately.

The elevator hazard is not totally excluded: there are instances where coverage is provided. These include the liability of a tenant in a building, including contractual liability under the lease, for the operation of elevators used jointly with other occupants. It also includes liability for the personal property of the insured and of others, while being transported in the elevator. If the insured rents the building, and the elevator he/she controls malfunctions and causes damages, there is no coverage. Elevator hazard coverage is sold only on policies which also cover property damage liability. Such coverage pays for damage caused by collision of the

elevator with any other object and thus covers damage to the elevator and to the insured's own property regardless of whether the property involved was on or off the elevator when the accident occurred.

Hazard insurance is not automatically provided under either the Owners, Landlords, and Tenants Forms nor under Manufacturers and Contractors contracts. A general liability policy does, however, cover normal maintenance and repairs when neither new construction nor demolition is involved, and where there are no structural alterations involving the changing of a building's size. The named insured automatically has this coverage once the endorsement is added to his/her liability policy, whether the work is performed by his/her employees or by independent contractors. The O.L. & T. Policy covers only the premises described in the declarations, while M & C coverage is for all the premises the insured has when the work done upon them is done by the insured's employees. If independent contractors do the work, there is no premises and operations hazard coverage.

Owners of property who contract with others to perform specific work at a specific price normally believe that any liability arising out of damages resulting from operations on the premises will be assigned to the contractor, or to the subcontractors he/she controls. However, the property owner may have liability for claims related to his/her ownership of the land, or for negligent acts. He/she may have legal obligations imposed by law which cannot be assumed by another. And, should litigation result from damages arising from events on his/her property, there will be legal costs to be considered. Thus, just because an owner contracts with a person who is neither an employee nor an agent does not mean that he/she has no liability for damages that occur on the property.

We have discussed the increase of products liability suits. Products liability coverage is usually obtained from the same company from which a company/person purchases premises-operations coverage, since it is often difficult to establish a line between products liability on the premises and off of the premises, and between operations hazard and a completed operations hazard.

Products liability coverage applies to containers in which a product is packaged as well as to the products themselves. Coverage in such policies applies only to those damages which arise from accidents occurring during the policy period.

According to the policy terms, the date of the accident is the date on which the damage was caused. Should products liability coverage lapse, and should it not be replaced, the insured will not be protected against accidents occurring from products produced during the policy term, but already sold and in the hands of distributors or the public when the policy expires. However, a new products liability policy does cover damages from accidents which may be caused by products sold and operations completed long before the coverage was purchased. Products liability insurance premiums are usually determined on the basis of sales or units or other measure of current volume.

The completed operation hazard and the premises-operations portion of the policy exclude damages arising from activities such as pickup and delivery, leaving of tools, uninstalled and/or abandoned equipment, and/or unused materials.

Bodily injury liability provides separate limits for each person and for each accident. Property damage liability sets a limit which is applicable to each accident.

Standard limits are the amount of coverage in the premium quotation of the rate manual.

Excess Limits may be purchased; these increase the sums available for damages.

The Each Person Limit is the maximum amount of the company's liability for all damages, including damages claimed by another person for care and loss of services arising out of injury, disease, or death sustained by one person as a result of any one accident.

The Each Accident Limit is subject to the each person limit, and states the total limit of the company's liability for all damages sustained by two or more persons as a result of any one accident. Under products hazard, all damages arising out of one lot of goods or products prepared or acquired by the insured shall be considered

as arising out of one accident regardless of the fact that injury may occur at such different places and times.

Aggregate Limit is the limit of the company's liability for the indicated hazard group during the policy period. In the case of a three year policy the aggregate limit is applied separately to each annual period.

There is no accumulation of limits of liability by reason of overlapping coverage of a specific accident among more than one hazard group. The highest "each person" and "each accident" limit applies. Several insureds covered in the same policy share the limits.

Where liability coverage not included in the general liability policy is needed, insured turn to schedule liability policies, which offer specific coverages for specific hazards. Owners, Landlords and Tenants insurance is a schedule liability policy, as is Manufacturers and Contractors Risk.

OL&T insurance covers a wide group of risks whose primary, but not only, exposure is that arising out of the occupancy of premises, including other exposures not strictly related to premises, but which are customarily rated in the OL&T section of the General Liability rate manual. Rates are based on area, frontage, admissions, sales or receipts, or some basis other than payroll. Coverage includes apartment hotels, office buildings, theaters, retail stores, wholesalers and storage warehouses.

M&C coverage is for risks associated with activities which might include not only premises exposure, abut also considerable exposures not directly related to any particular premises. This coverage is rated on the basis of payroll.

It is possible to purchase a combination of these two schedule liability coverages in a single jacket which provides all provisions found in both policies. Supplements are attached as necessary according to whether the risk falls into the OL&T or the M&C classification, and according to the hazard groups insured.

The insuring agreements in schedule liability policies are generally applicable to both OL&T and M&C contracts.

The bodily injury agreement states that the company agrees to pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by a person caused by accident and arising out of the hazards hereinafter defined. A supplemental insuring agreement states that the company will pay first aid expenses incurred by the insured for imperative medical attention to others at the time of the accident.

The property damage agreement states that the insurer will pay the insured's liability for losses due to the damage or destruction of property, including the loss of use thereof, when caused by accident.

Medical payments cover only those medical expenses for which the insured is found legally liable, and this may include the reasonable medical expenses of the injured party.

Schedule liability policies normally exclude liability an insured assumes by a contract. In such cases the insured may purchase a contractual liability policy. Circumstances under which an insured may assume liability by contract include liabilities in connection with leases, with permits or with contracts to supply services, do construction, or make installations.

Defense, Settlement, and Supplementary Payments are part of the coverage in liability policies. The insurer will defend the insured against any lawsuit alleging damages from an injury the policy covers, even when the suit is groundless, false, or fraudulent. The company agrees to pay the various expenses incidental to legal proceedings, such as the cost of appeal bonds, bonds to release attachments, expenses of litigation and investigation, costs, interest accruing after entry of judgment and reasonable expenses incurred by the insured at the insurer's request. These expenses are payable in addition to the policy limits. The company also reserves the right to make such investigation, negotiation, and settlement of any claim or suit as it deems expedient.

The Accident vs. Occurrence clause of a liability policy is concerned with certain types of injuries for which an insured may be liable which were not caused by accident. An accident is an undesigned, sudden, and unexpected

event. An accident is usually a single happening which can be traced to a definite time, place, and cause. Accidents are not considered to be deliberate, intended acts, even when such an act has an unexpected result. Except in Comprehensive Personal Liability policies, and Farmer's Comprehensive Personal Liability policies, the bodily injury and property damage liability clauses are based on damages caused by accident.

However, most companies providing liability insurance will delete the phrase "caused by accident" and substitute the word "occurrence," for an additional premium. An occurrence, in this situation, means an event or continuous or repeated exposure to conditions, which unexpectedly cause injury during the policy period. Exposure from a single source is deemed to be one occurrence, and thus subject to the applicable liability limit. Claims growing out of sickness, disease, inhalation of noxious fumes, noise, radiation damage, exposure to contagious diseases or harmful dusts are considered to be covered under the term "occurrence."

Risks excluded in liability policies are as follows:

War risks are excluded from the medical payments coverage, and from payments for first aid, as well as from contractual liability insurance.

Liquor control laws affect liability coverage. The relevant exclusion is called the "dram shop law exclusion." It states that bodily injury and medical payments coverages exclude liability upon the insured as a person engaged in the business of manufacturing, selling, or distributing liquor by reason of any statute or ordinance dealing with alcoholic beverages.

Liability policies also exclude any obligation under a worker's compensation, unemployment compensation, or disability benefits law and any bodily injury, sickness, disease or death of an employee of the insured arising out of and in the course of his employment.

The Care, Custody, and Control clause relates to the premise that liability insurance is intended as a protection against third party exposure, not as an instrument to take the place of fire, or other property damage coverages on property of others in the insured's possession. Property damage liability policies usually exclude damage to property owned, occupied by, or rented to the insured, property used by the insured, property in the care, custody or control of the insured, or property over which the insured for any purpose is exercising physical control. For example, a liability policy owned by a bailee does not cover his/her liability for damage to property he/she is holding for others. Generally speaking, this exclusion eliminates coverage on that part of a building or premises on which the insured was working, but may still protect him/her as to damages to other portions of the building/premises not within his/her control.

Property damage liability coverages also exclude damage to property resulting from blasting, explosion, collapse of property, and damage to underground property. These exclusions are added to the policy by special endorsement when the policy is written for risks that could result in damage from the excluded exposures. An insured may have these exclusions removed, subject to the insurer's underwriters' approval.

11 Comprehensive Liability

Private individuals also require comprehensive liability policies, and we will examine these now. First of these is the Comprehensive Automobile Liability policy. This policy provides the broadest scope of protection against liability claims arising from an accident involving an automobile, and is often purchased in conjunction with a general liability policy. Such a policy would protect a person against damages arising from injuries caused by an automobile he or she does not even own, but who is found liable because the automobile causing the injuries

was used in his/her behalf.

Comprehensive Liability covers the hazards covered by the CGL and the CAL, but uses only one bodily injury

insuring agreement, while separate insuring agreements are applicable to automotive hazards and to miscellaneous liability hazards.

The Comprehensive Personal Liability policy is for an individual what the Comprehensive General Liability policy is for the proprietor of a business. Every individual faces nonbusiness risk exposures, and the CPL is designed to protect the insured against such risks. In the CPL, the bodily injury and property damage features are incorporated into one insuring clause, and a single limit of liability applies to each occurrence. The full coverage of the policy extends not only to the named insured, but also to a member of the insured's household, to the insured's spouse, and to the relatives of either in control of the property, or to any other person or organization having custody or possession of the property with the owner's permission.

The CPL has a flat premium. It offers a wide variety of coverages which can be provided through a number of Homeowners Policy forms. It covers liability for personal acts, including sports activities. It covers premises in which the insured is temporarily residing, cemetery lots, vacant land, ownership of dogs or other animals on or off the premises, power lawnmowers, motorized golf carts, power boats, an employer's liability to caddies, guides, and residence employees. It also covers organizational activities, such as a trustee, member of a board or committee of charitable or civic organizations. Also, it covers physical damage to the property of others up to \$250.00, provided such damage is not intentionally caused by an insured over 12 years of age. The CPL also covers liability for fire, explosion, smoke or smudge damage to property of others while in the insured's care, custody, or control. This includes the temporary occupancy of hotel/motel rooms.

CPL coverage is framed on an occurrence basis, and is applicable to losses occurring anywhere in the world. Personal injury as distinguished from bodily injury is not extended.

Special Forms

Farmers Comprehensive Personal Liability coverage is very similar to CPL, with some changes designed for the particular needs of a farmer, particularly those relating to his business liability arising from his farming occupation. With respect to animals and watercraft owned by the insured farmer, the policy covers the liability of any person or organization legally responsible for it. The use of farm tractors and trailers and self-propelled or animal-drawn farm implements by employees is considered, and they are additional insureds while operating such equipment. The FCPL has a single limit which covers both bodily injury and property damage in one insuring clause. Product liability coverage is provided for farm products, including coverage on farm stands used to sell the farmer's produce.

Custom farm coverage can be obtained through an additional premium if the insured performs such work by contract for others, and for a fee. Employer's liability insurance for farm labor is not covered unless it is declared, and a premium for it paid. The basic FCPL does cover the employer's liability to casual employees or to domestic help.

Storekeeper's Liability is designed for retail merchants. It may be issued for many types of retailers, giving both bodily injury and property damage coverage in a single insuring agreement for accidents arising out of operation of a retail store. The premium, including that for the medical payments portion, is determined by the premises area.

The basic coverage includes parking areas for which no fee is charged; booths or exhibits at fairs or expositions; and premises not owned by the insured. Newly acquired store premises are automatically covered subject to the insured notifying the company within 30 days of purchase, and paying the additional premium. Contractual liability, products liability, and completed operations are insured except for the fact that this coverage does not apply to gas or equipment operated by gas for heat or power, or involving the installation and service of such. There is no provision for insuring elevators in Storekeeper's Liability policies.

The exclusions common to general liability policies normally apply to these specialized liability forms.

12 Summary

At the beginning of this course, its stated purpose was to help you understand tort law as it applies to liability insurance. Let us summarize how that purpose was achieved. First of all, we examined the relationship between liability and tort law. We pointed out that there is NO coverage for an intentional tort, which is defined as a civil wrong. From there we moved to an examination of the concept of negligence as it is legally

construed. We looked at the legal duty of one party to others, and how the failure to conform to that duty can result in the negligent party being found liable for the harm. We saw how the negligent act must clearly be the proximate, or direct, cause of the harm, and also that actual damage had to occur. Also, we looked at how the negligence of the injured party may be considered a contributory factor, and thus reduce the liability of the negligent party.

Further considerations in tort law affecting liability deal with whether or not the risk the act of or conditions created by the accused party was unreasonable. The standard of a reasonable person was introduced: this standard refers to the concept that reasonable persons take certain factors into account when making decisions or judgments, and when taking action or creating conditions which affect others.

Malpractice of professionals was examined, with particular attention to the fact that a professional in a field has a higher duty of care than does a layman.

We brought out the fact that when a person causes harm through the violation of a statute, negligence is a foregone conclusion, and that person is liable for the harm caused.

Citizens within our society have certain duties to others which are upheld by law. If someone fails to act to prevent a harm from occurring, depending upon the particular circumstances, that person may be found liable for the harm. There are duties acquired by contract, and these duties impose serious responsibilities upon those assuming them. Also, those who own and/or occupy land have particular duties, as do lessors/lessees, and vendors/vendees. Each of these duties, if abrogated, may result in liability for a harm.

There are defenses against charges of negligence, and we discussed those. Among these are the contributory negligence of the person injured, the comparative negligence of those involved, the assumption of risk by the person injured, and certain conditions which obtain immunity against charges of negligence, even if in truth, negligence did seem to occur.

We also examined vicarious liability, that liability which an employer has for an employee, or for an independent contractor he/she has hired. We looked at the vicarious liability bailee's have to bailors, and to how imputed contributory negligence affects this concept.

Our discussion of strict liability, which imputes liability to a party without negligence having to be proved, included a look at the strict liability those who own/maintain dangerous animals have, as well as the strict liability of those who engage in dangerous activities. We examined how workers' compensation imposes a strict liability on employers, as well.

Products liability was the next topic of discussion, followed by a look at miscellaneous liability exposures, including nuisance, misrepresentation, and defamation.

Finally, we discussed liability coverage itself, looking at the forms available for businesses as well as private individuals.

Throughout, we have attempted to make it clear how many liability exposures people today have. The transient nature of neighborhoods, the increase in the number of attorneys specializing in personal injury law, and a societal disposition to see accidents as a source of money make it all the more necessary for people to be aware of what their risk exposures are, and to be adequately insured against the financial consequences that can occur if they are found liable for a harm caused to someone else.

This is certainly not to say that everyone who files a claim for an injury is inflating the harm caused, or that there are no honorable personal injury attorneys. Certainly, people are negligent, acting in such a way or creating conditions that cause accidents which, in their turn, cause harm to others. Such harm should be paid for, which is the whole purpose of liability insurance. But we would be careless indeed if we did not examine the possible risk exposures we have, other than the obvious ones. And certainly, every insurance agent who sells liability insurance has an obligation to clients to help them identify their possible risk exposures, so that they may be insured against them.

For this reason, we are ending this course with a sample questionnaire which clients can use to help determine their risk exposures. We are also including sample liability policies in the Appendix.

SAMPLE QUESTIONNAIRE:

I. Vehicle / Watercraft Risk Exposures

- A. Number & type of vehicles/watercraft owned or leased
- B. Persons driving/using each
- C. Primary use for each vehicle
- D. Type of traffic/body of water where vehicle is driven
- E. Driving ability/record of each driver

II. Personal Risk Exposures

- A. Pets owned
 - 1. Rate each pet as to gentleness/aggressiveness
 - 2. Are these pets restrained from contact with people who enter the property
- B. Lawn equipment, tools, appliance, firearms
 - 1. Could any of these pose a risk of harm to someone using them
 - 2. If the answer is yes to above, how can this be reduced/eliminated
- C. Do you have a contentious relationship with any neighbor which could result in a confrontation?
 - 1. If so, how can this relationship be improved
 - 2. What steps can you take to reduce/eliminate any confrontation
- D. Visitors to the premises
 - 1. Do social visitors enter your property frequently, seldom, almost never?
 - 2. Do business visitors enter your premises frequently, seldom, never?
 - 3. Are you aware of any trespassers on your property?
 - 4. Are there any physical conditions on your property which might cause harm to a visitor?
- E. Are you involved in a business where a product you sell or serve might cause harm to others?
 - 1. If so, how can you reduce/eliminate risk of harm?
- F. Are there any circumstances in which you would have higher knowledge/experience than an ordinary reasonable person and thus be held to a higher standard of care?
- G. Do any of the above questions apply to a resident of your household or anyone covered by your liability insurance policy as an insured?
 - 1. If so, what degree of risk does each person pose?
 - 2. How can that risk be reduced/eliminated?

III. Miscellaneous Risk Exposures

- A. Dangerous activities
 - 1. Are you involved in a dangerous activity?
 - 2. Under what circumstances?
- B. Do you ever lend property, such as vehicles or a vacation home to others?
 - 1. Under what circumstances
 - 2. What possible risk exposures are present?
- C. Do you have employees for whose conduct you will be found liable?
- D. Do you work with independent contractors whose performance you can control?
- E. Are you a landlord?
 - 1. If so, what is your risk exposure?
 - 2. How can they be reduced/eliminated?
- F. Are you a tenant?
 - 1. What are your risk exposures?
 - 2. How can they be reduced/eliminated?
- G. Is it possible that you would be in a situation where your failure to act would result in your being found liable for harm that occurred because of that failure? (For example, if you are an expert swimmer who failed to attempt to save a drowning child, you might be found liable for that death).
- H. Are there any substance on or in your property such as prescription drugs, pest repellents, gasoline, etc which might cause harm? How can they be reduce/eliminated?

A FINAL THOUGHT

All agents should obtain from their carriers a specimen or sample policy for both Comprehensive General Liability policy for businesses, and a Comprehensive Personal Liability policy for individuals. You should take the time to read over the contents of these policies, applying the terms to the content of this course. Agents have a duty of care to clients to go over each and every section of an insurance contract, explaining it to the clients in ways that they clearly understand. If there is a dispute over a claim, and if it ends up in court, you should be aware that, in general, courts hold the party who drew up the contract to a higher degree of care. This means that if a client can successfully claim that an agent did not, in fact, go over the policy in such a way that both agent and client were certain that the client did indeed comprehend the coverage in the policy, then the insurer will be held liable for the claim, even if it arises from a condition excluded under the policy terms.

We have emphasized throughout this course the legal climate in our nation today, a climate in which court dockets are filled with suits based on the supposed negligence of a party or entity. These suits range from multi-million dollar class action suits against industrial corporations found liable for polluting ground water to suits of one individual against another for injuries arising from a fall in a grocery store, a foreign item found in a restaurant salad, or the bite of a neighbor's unrestrained dog.

Any agent dealing with liability coverage owes it to his/her clients to be as fully cognizant of the many ordinary and bizarre incidents that can give rise to expensive liability suits. In fact, we recommend that you have a file in which you put clippings from newspapers relating the circumstances surrounding some of these claims. Such a file could be most useful in helping a client understand the risk exposures he/she faces