Liability

PL/Products & PI

Efficacy

Financial Loss- Fact or Fiction?

Agenda

- Liability Definitions
- Where does PL/Products cover stop and PI cover start?
- Examples
- Efficacy
- Financial Loss – What is it?
- Fact or Fiction?
- “Question time”

Definitions

Liability may arise through: -

- Negligence
- Nuisance
- Trespass
- Strict Liability
- Breach of Statutory Duty
- Breach of Contract

Key policies include:-

- Employers Liability
- **Public Liability**
- **Products Liability**
- **Professional Indemnity**
- Directors& Officers

Negligence

1. A tort meaning ‘the omission to do something which a reasonable man, guided by the considerations which normally regulate conduct, would do, or do something which a prudent and reasonable man would not do.’ A claimant must show that: -

- The defendant owed him a duty of care
- He was in breach of that duty
- The breach caused him injury or damage that was not too remote

Nuisance

Nuisance is the wrong done to persons by unlawfully disturbing their enjoyment of their property or, in some cases, in the exercise of a common right. The fact that liability may attach even though reasonable care has been taken distinguishes this tort from negligence.

Two kinds of nuisance

- A private nuisance affects only the rights of an individual,
- A public nuisance affects the rights of the public generally.

Trespass

Trespass is an unlawful act committed with force and violence on the person or property of another. Some degree of violence is necessary, although the slightest degree will suffice.

Strict Liability

There are certain liabilities imposed by law which are said to be strict. In other words defendants will be liable even though they have exercised reasonable care. For example, the rule in Rylands v Fletcher (1868) LR3 HL 330 is that occupiers of land who bring and keep upon it anything likely to do damage if it escapes, are bound at their peril to prevent its escape and are liable for all the natural and probable consequences of its escape, even if they have not been guilty of negligence. The Consumer Protection Act 1987 introduced strict liability for injuries caused by defective products and many other statutes impose a form of strict liability within the limited area with which they are concerned.

Breach of Statutory Duty

Certain Acts of Parliament create statutory liabilities, eg Occupiers' Liability Act 1957. Some statutory liabilities are actionable without proof of negligence.

Breach of Contract

Failure to perform an obligation arising out of contract. A breach may give the aggrieved party the right to damages. It also entitles him to treat the contract as discharged if the other party renounces it or makes performance impossible.

Public Liability

Losses occurring policy, subject to a limit any one occurrence, indemnifying the insured in respect of legal liability for third party injury and property damage arising from the business. Insured’s own costs are covered. The policy has a number of extensions (ie. Motor Contingent Liability, Data Protection Act etc) and excludes risks normally covered under other policies (ie Employers’ Liability).

Products Liability

Insures legal liability for damages, claimants' costs and own costs for accidental injury or damage caused by products supplied by the insured. The policy is **losses occurring** with an annual aggregate limit of indemnity. Cover is worldwide in respect of products supplied from the UK. The **efficacy** risks can be included or excluded. The insurer is not liable to replace defective products or for product recall.

Product

Typically defined as ‘any commodities, goods (including packaging, containers and labels) or services sold, supplied, hired out, constructed, erected, installed, treated, repaired, serviced, handled or disposed of by or on behalf of the insured or any structure constructed, erected, installed etc or any contract work executed by or on behalf of the insured in the course of the insured’s business’.

Efficacy Risk

The risk that a product may fail to perform its intended function. The failure may cause physical injury or damage or a purely **financial loss**, ie. Loss of production time. The product liability policy does not pay to replace the product or guarantee its efficacy but liability for injury or damage consequent upon its inefficacy, is insured, subject to no efficacy exclusion. Pure financial loss due to inefficacy can be insured under a financial loss extension of a product liability policy or under a **product guarantee** policy.

Financial Loss Cover

Insures legal liability for (pure) financial loss by extending public and/or product liability cover as opposed to financial loss flowing from personal injury or damage to person or property. The extension is **claims-made**, subject to an excess or co-insurance and has a separate aggregate limit of indemnity. **Liquidated damages** are excluded.

Losses Occurring

An occurrence is generally an event that results in an insured loss. A 'losses occurring' liability policy covers injury or damage that occurs during the policy period even if the claim is brought after the policy has expired.

Claims Made

A liability policy covering all claims first notified during the policy year or any applicable **extended reporting period** regardless of when the injury or loss occurred. However, if the policy has a **retroactive date** the policy will not respond to events occurring before that date. Unlike the losses occurring policies, the policy ‘runs off’ at the end of the period (or extended reporting period).

Liquidated and Ascertained Damages

Damages specified in a contract representing a genuine pre-estimate of compensation due for an anticipated breach of contract (ie. Delay in completion). They are usually expressed in agreed sums per week. Liquidated damages are only levied when reasons for delay do not entitle the party concerned to an extension of time. Liability insurers normally specifically exclude any liability to pay liquidated damages or penalties.

Product Guarantee/ Efficacy

Covers the insured’s legal liability to replace, rework or recover products that have failed to perform their intended function after delivery to a customer. The policy is claims-made with co-insurance as standard, and product recall as an option. The policy may back up the insured’s written guarantee to his customer for a one-off product or be used to support a guarantee of all the company’s products.

Product Recall

An ‘extra expense’ cover indemnifying the insured for costs incurred in recalling a product suspected of being injurious to customers and users. Recall costs include communications, transport, warehousing, inspection, overtime, even destruction etc. Cover is triggered by the decision of the insured to recall the product because of its potentially harmful nature. Cover applies to accidental causes not design faults. Companies should maintain a product recall plan.

Professional Indemnity (PI)

- **Claims-made** cover protecting 'professionals' against civil liability arising from a breach of professional duty subject to an annual aggregate limit. Insured's own costs are covered in addition. The policy eliminates claims due to matters occurring before the **retroactive date** and occurrence and claims reporting after expiry unless reported within an **extended reporting period**. Extensions include loss of documents cover.

Retroactive Date

Date that defines the extent of cover in time under claims-made liability policies. Claims resulting from occurrences prior to the retroactive date are not covered. Retroactive dates are commonly stated to be the inception date of the first year of cover.

Extended Reporting Period

Period under a claims-made policy that provides a specific time ie 60 days, after the policy has expired during which claims can be notified in respect of matters that occurred during the policy period. In some circumstances, it is possible for the insured to purchase a longer period than that automatically included in the policy. The extended period does not respond in respect of claims otherwise insured.

Professional Negligence

The neglect of a professional duty of care by a professional. It is a negligent act, error or omission that, if it causes a loss, will make the professional liable in law to a client or third party to whom duty is owed.

So where does Products cover stop and PI cover start?

Professional Indemnity insurance is designed to cover businesses in the event that they are pursued by a third party who claims that they have suffered a loss as a result of their professional negligence.

If the business provides advice or consultancy, they have a responsibility to their clients and any breach of that responsibility could lead to a claim, causing serious damage to the business. PI insurance protects a business against having to pay damages and legal costs should a claim arise.

Many professionals HAVE to have PI cover – Lawyers, accountants and financial advisors. Others such as Architects, Consultants and designers often opt for the cover.

Typical PI cover would include: -

- Breach of professional duty
- Breach of contract
- Breach of copyright/ Trademark/ Patents
- Breach of confidentiality (trade secrets)
- Libel and Slander
- Loss of documents

Contractual Responsibilities

Legal liability may be incurred under contract and this may be greater than that which applies under general law. This can occur in 2 ways: -

- where a party agrees to accept responsibility for matters which he has no responsibility at common law.
- where a party agrees to waive certain right she may enjoy at common law (eg. A waiver of a rights of recovery)

Insurers will assess the extent to which the contract clauses may go beyond the normal position in tort. If the risk is acceptable, terms will need to be established to provide the additional cover. Alternatively, if they view the clauses as being too onerous, they may seek an amendment to the contract terms.

Intellectual Property Rights

IPR’s are a valuable intangible aspects of some businesses (software developers, ISP’s, Development companies etc) and consist of: -

Copyright

Copyright law protects against the unauthorised copying of any original work of expression (whether literary, musical, dramatic, choreographic, pictorial, sculptural or audio-visual) that is fixed in a tangible medium. Of all the IPR's, copyright tends to be the one most commonly and vigourously contested as new means of information storage, retrieval and transmission (most notably over the internet) have made it easier and faster to intentionally or unintentionally copy the protected work of others. (Limewire and Kazaa for downloading music)

Trademark

Copyright does not generally cover individual words or phrases. A trademark is any characteristic (word, symbol, picture, shape, colour and even sound or scent) which a person or company uses to identify specific goods or services. Examples of protected trademarks include: -

- The hour-glass shape of a Coca-cola bottle.
- The exhaust sound of a Harley Davidson motorcycle.
- The name BMW

To actually be protected as a trademark the word or symbol must fulfil three basic criteria: -

- It must be in actual use as an identifier of a good or service
- It must be in some way distinctive
- It must not be confusingly similar to another's trademark, which is already in use.

The main reason that companies care about, and carefully protect trademarks, is that the marks, if successful, take on a meaning in the market place which could be capitalised on by unscrupulous competitors.
Companies vigorously pursue potential infringers of their marks, as failure to do so would at law constitute abandonment of the mark.

Trade Secrets & Patents

- Trade Secrets – A trade secret may consist of any formula or compound, pattern, plan, manufacturing process, tool or even a list of customers which is used by a business and which gives the business a commercial advantage over competitors who do not use it.
- Patents – A grant of privilege, property or authority made by the government of a country to one or more individuals for a set period of time. This excludes others from making using or distributing the invention but may include the right to license others to make use or sell it.