Changing Landscape of Liability Risks & Insurance

Commercial General Liability
Presentation Flow

1. ISO 2013 Changes
2. Developing Jurisprudence
4. Global Risks & Solutions
5. Looking Ahead
The Policy

- A standard insurance policy issued to business organizations to protect them against liability claims for bodily injury (BI) and property damage (PD) arising out of premises, operations, products, and completed operations; and advertising and personal injury (PI) liability.

- International Risk Management Institute, Inc. (IRMI)
The Liquor Exclusion

The liquor exclusion will apply even if the allegations are negligence in supervising, hiring, employment, training, or monitoring of others, or failing to provide transportation for anyone who may be under the influence.

BYO Coverage will be available: Permitting alcohol to be brought on the premises for consumption on the premises will not be considered to be in the business of selling, serving, or furnishing alcoholic beverages, even if a fee is charged (such as a "corking fee") or a license is required for BYO.
Additional Insureds: Coverage will be provided to additional insureds:

- only to the extent permitted by law;
- not broader than the coverage required by contract or agreement;
- for no more than the limit required by the contract or agreement or the policy limit, whichever is less.
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Expanding Notion of Injury

- Psychological Injury
- Fear of Disease
Pure Psychological Injury

- A right to seek redress for negligently inflicted ‘pure’ psychological harm or damage.

- Common law jurisdictions slow to recognize such a right.
- Judicial bias in favour of physical injury cases.

- Psychological injury be shock-induced.
- Arise by virtue of a sudden fright or jolt, as opposed to a gradual onset of such injury by virtue of the cumulative effects of a particularly difficult set of circumstances.
Fear of Disease

- Suits seeking medical monitoring for exposure to potentially harmful substances, even though the person has not and may never develop an illness from that exposure.

- Courts have as of now kept tight safe guards against such claims:

  “Such “injury-less” lawsuits, if allowed, will undoubtedly flood courts with speculative, frivolous, and fraudulent claims because they abandon the basic linchpin of liability – that people can only seek compensation in tort law for actual, not theoretical, injuries.”
Expanding Notion of Injury

- Reputational Injury
- Violation of Privacy
- Infringement of Intellectual Property
Personal and Advertising Injury Coverage

- False Arrest, Detention or Imprisonment
- Malicious Prosecution
- Wrongful Eviction or Wrongful Entry
- Defamation, Libel or Slander
- Oral or Written Publication that Violates Person’s Right of Privacy
- Use of another's Advertising Idea in Your Advertisement
Personal and Advertising Injury Exclusions

- Knowing Violation of Rights
- Publication With Knowledge of Falsity
- Contractual Liability
- Breach of Contract
- False Statements About Price or Quality
- Intellectual Property Breach (except in your advertisement)
Coverage for Data Breach Claims

- October 7, 2013, federal district court in California
  ~ Hartford Casualty Insurance Company v. Corcino & Associates

- Held that the Advertising Injury coverage in a comprehensive general liability policy issued by Hartford Casualty Insurance Company covered two class action lawsuits arising out of the disclosure of confidential health information.

- Some courts have construed “publication” very broadly to include essentially any transfer of private information.
‘Wrongful birth’ occurs where an act of negligence causes the birth of an unplanned child. The child may be ‘healthy’ (non-disabled) or disabled.

‘Wrongful life’ occurs where an unplanned disabled child owes his very existence to medical negligence: had the negligence not occurred, the child would never have been born.
The Damages Debate

- Extra Compensatory Damages

The Insurability Inquiry

- Jurisdictions
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India: Statutory Jurisprudence

<table>
<thead>
<tr>
<th>Retributive Justice</th>
<th>Restorative Justice</th>
</tr>
</thead>
<tbody>
<tr>
<td>Crime is an act against the state, a violation of a law</td>
<td>Crime is an act against another person and the community</td>
</tr>
<tr>
<td>Victims are peripheral to the process</td>
<td>Victims are central to the process of resolving a crime.</td>
</tr>
<tr>
<td>Focus on establishing blame or guilt, on the past (did he/she do it?)</td>
<td>Focus on the problem solving, on liabilities/obligations, on the future (what should be done?)</td>
</tr>
<tr>
<td>Imposition of pain to punish and deter/prevent</td>
<td>Restitution as a means of restoring both parties; goal of reconciliation/restoration</td>
</tr>
<tr>
<td>Community on sideline, represented abstractly by state</td>
<td>Community as facilitator in restorative process</td>
</tr>
<tr>
<td>Response focused on offender’s past behavior</td>
<td>Response focused on harmful consequences of offender’s behavior; emphasis is on the future</td>
</tr>
</tbody>
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Tort Liability In India

- **Bhopal Gas Tragedy – 1984 / 1989**
  - US$ 350 Mn ~ INR 100,000 for death claims and Rs. 45,000 for personal injury

- **Upahaar Cinema Fire – 1997 / 2011**
  - Rs. 10 lacs for next of kin of those over 20, Rs. 7.5 lacs of those under 20

- **Medical Malpractice – 1998 / 2013**
  - Rs. 6 Crores
“We are entering a world where the old rules no longer apply.”

Philip Sanders

Environmental catastrophes are expensive to life and business.

Global Warning!
Emerging environmental risks for India Inc.
**Statute: Environment Protection Act**

- **Offences By Companies**

  - Where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.
Environmental Tort Law

Vellore Citizens Welfare Forum vs. Union of India

‘Polluter Pays Principle’

Absolute liability for harm to the environment extends not only to compensate the victims of pollution but also the cost of restoring the environmental degradation.

‘Precautionary Principle’

Required environmental measures should be taken by the State and statutory authorities and lack of scientific certainty cannot be a ground for postponing such measures where there are serious threats to ecology. The State and statutory authorities must anticipate, prevent and address the causes of environmental degradation and the ‘onus of proof’ is on the industry to show that its actions are environmentally benign.
There is no concept of vicarious liability in criminal law, except that if there is an abetment, the abettor may be joined with the principal offender.

If there is a common intention or a conspiracy, that is understandable. Otherwise there is no vicarious liability.

If my driver is driving and causes a fatal accident, I don't become liable to be prosecuted under Section 304(II).
Tort Liability In UK

- **Bogle and others v McDonald's Restaurants Ltd**

  - Dismissed: Group action for personal injuries caused by the spillage of hot drinks
  - Held: Although customers would expect basic precautions to be taken against risks, that was not to the point that they should be denied the basic utility of being able to buy hot drinks to be consumed from a cup with the lid off.
UK: Sources of Increased Product Liability Claims

Source: BLG Survey
Piercing The Corporate Veil

- **David Chandler v Cape Plc**

- Cape lost its appeal against the decision awarding David Chandler £120,000 compensation for his asbestosis after he was exposed to asbestos at a subsidiary company, Cape Building Products Limited.

- This long-awaited High Court appeal decision could have considerable implications especially concerning the long held belief that a parent company as a separate legal entity from its subsidiaries could not be held responsible for the subsidiaries’ failings or liability.
US – Tort Drivers

- **Food Class Action Litigation**

  - “The United States is experiencing substantial increases in overweight and obesity that cut across ages, racial and ethnic groups, and both genders, has been increasing in every State in the Nation [and] has reached epidemic proportions. . . left unabated, overweight and obesity may soon cause as much preventable disease and death as cigarette smoking.”
  
  ~ Surgeon General’s Call To Action To Prevent and Decrease Overweight and Obesity

- Obesity lawsuits against the fast food industry allege that fast food restaurants bear liability for their customers’ obesity and related health problems.
Buckyball Recall
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Controlled Master Program

Combines the best of both - global policy and local policies.

Key Features

- A single insurance covering multiple territories
- Consistent coverage and limits through Difference in Conditions/Difference in Limits coverage
- Local premium and claims servicing/payment
- Satisfies local laws and regulations
- Local insurance certificates
Tax Liability & Capital

Key Questions

- Will the claim need to be paid in-country?
- If the global policy cannot respond by paying the claim locally and must instead pay the parent company, will the parent incur tax liability in its home country?
- Will the parent need to make a capital contribution to the local subsidiary; if so, will the local subsidiary incur tax liability?
- Can the local operation survive if the parent does not infuse capital to make it whole for a loss?
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Coverage Certainty vs Arbitrary Arbitrage

Source: Conning Research and Consulting.