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Contractual Liability

Barry Blight, University Insurance Manager, La Trobe University

Universities are probably signing hundreds of contracts each year, but what liabilities are being assumed or waived in these contracts?

How many contracts do you see? What are the potential problems, or in other words what contracts **should** you see? You should see those with “hold harmless” clauses, indemnities and insurance provisions. What do these phrases mean?

- “Hold harmless” clauses mean one party can’t sue the other party for losses, irrespective of the fault of the other party (usually bodily injury, property damage and consequential loss claims, such as loss of income).
- Indemnities are where one party agrees to reimburse the other party for the other party’s losses, often irrespective of whether the first party was negligent or not.
- Insurance clauses usually require that one or both parties take out certain insurances.

Why do you need hold harmless and indemnity clauses as well as insurance cover? Well, a written agreement to hold someone harmless or indemnify them without that agreement being backed up by insurance is, except in cases involving very large companies, **just a piece of paper**.

Generally, there are three types of ‘hold harmless’ and indemnity clauses:-

- broadform - one party is responsible for all losses, regardless of which party is at fault
- intermediate - one party is responsible for all losses, unless the injury or damage was due to the other party’s sole negligence
- limited - each party is only liable for its own fault (ie as in common law).

Most public liability policies exclude liability assumed under a contract, unless the insured would have been liable irrespective of that contract. However, whether or not an organisation is insured for liabilities assumed under contract should not be the issue, because risk management principles should be adopted. These indicate that liabilities should be avoided or reduced as much as possible, **irrespective of insurance** - this therefore means that the Risk Management or Insurance Office should review most contracts entered into by the university.

Contracts I have seen recently which alter the common law position are:-

1. A clause in a building lease made the tenant liable for damage caused to third party property (a car) when a piece of concrete fell from the building (due to lack of maintenance by the building owner!).
2. The landlord was not liable for water damage to a tenant's property caused by rubbish in the gutter, as the lease provided that the landlord "shall not be responsible .. for any damage caused .. from a leakage of gutters, downpipes ..."
3. One agreement had such a wide indemnity that the university would have had to reimburse the other party for workers' compensation, fire, motor vehicle and other claims which were only very remotely connected with the project. The indemnity would have applied whether the university was negligent or not.
4. **Electricity suppliers** endeavoured to exclude liability at common law, and elsewhere in the contract endeavoured to limit claims for negligence to resupply of the equivalent amount of electricity. In addition, "if the customer requires a service which is not subject to interruptions or variations in voltages or frequency, the customer **will** provide its own back up generation capacity **or** install suitable protection devices".
5. **A pharmaceutical company** providing a University with elements, compounds and other substances at no cost would not accept liability for any claims which arose. Although initially this might have sounded reasonable, the contract provided that the pharmaceutical company would not have been liable even if they supplied the wrong chemicals or of a different strength than labelled.
6. **Property leases** The lease made the tenant liable to insure the 7th floor of the city building they were occupying, and the solicitor acting for the building owner refused to alter it.
7. **Leased equipment** - leases of computers, photocopiers and the like generally provide that the lessee (ie the university) has to insure. This is not uniform, however, and one lessor agreed to provide insurance, but at a rate approximately 100 times the university's insurance rate.

There is no such thing as a standard lease, and hold harmless, indemnity and insurance clauses need to be checked in every case.

The lack of an agreement may also create problems. If it is intended to provide insurance cover for property of others while on your premises, an agreement (even an exchange of correspondence) should make this clear - otherwise you would only be liable if the property was damaged as a result of the negligence of your employees.

Some issues need to be considered when the agreements are being drafted. Which party should be responsible in the event of certain events occurring? It is far easier to reach agreement before the event than after! Examples are:-

1. **Loans of University property to employees, students and others**, for business or private purposes, either at no cost or for a fee - who should be responsible for burglary, theft, fire, accident or malicious damage, and should this vary according to whether the borrower was negligent or not? Does your University have a standard agreement setting out these conditions?
2. **Artworks - loans “in and out”** - Which party should arrange transit insurance for the inwards and outwards trips and the static risk for artwork loans?
3. **Does your university make available electric scooters** for disabled students? If so, who pays if the scooter is damaged or third parties are injured as a result of careless “driving” by the student (or a carer or volunteer while collecting or returning the scooter)?
4. **Leases** - what does the lease agreement for your tenants say concerning provision of electricity, gas, water, etc? Do you guarantee supply? Could you be held liable for failure to supply?

Some leases are so wide that the tenant can be held liable for damage to the building due to fire, vandalism, earthquake and the like. To transfer this responsibility back to the landlord when the university is the tenant, prior to signing the lease add to the clause requiring the university to keep the premises in good order and condition the words “wear and tear, war and any insurable event excepted”.

Does the obligation to continue paying rent reduce or cease in the event of partial or total destruction of the building (or does the lease require the tenant to take out loss of rent insurance for the benefit of the landlord)? Should the lease be amended so that the continued payment of rent income becomes a problem of the landlord, rather than the tenant?

Many contracts incorporate insurance provisions, and as these can be very wide and varied, it is important to review them before contracts are signed. Examples are:

1. If a **building contractor** had adopted the standard approach of checking his sub- contractor’s insurances, the builders liability insurer might have avoided a \$500,000 fire claim caused by a negligent welding subcontractor who had no public liability insurance.

Incidentally, when checking the accuracy of insurance documentation provided for contractors and the like, is the contracting organisation the same name as shown on the insurance documentation? When do the insurances expire? Do you need a diary note to follow up renewal in the future? Has the contractor got workers’ compensation insurance?

2. **Mechanical snowboard** - because of the inherent dangers involved, when hiring this type of equipment the university required the contractors to have \$10,000,000 public liability insurance, which included the name of the university as an additional insured (and also a cross liability clause and an indemnity clause). As these were not all provided, the university did not proceed with the contract. The same situation occurred with a bucking bronco, an electro-mechanical

device made to resemble a bucking bull, the aim of which is to see how long the rider can stay on the bull. Many bodily injury claims have arisen over the years and it became almost impossible for the operators to buy liability insurance. Without liability insurance, needless to say the University chose not to rent the bull.

3. **An archery demonstration** by expert bowmen - which party accepts responsibility for injury caused by an inexperienced person who wanted to “have a go”?
4. **A Government Department** required a “host employer” to provide \$5,000,000 public liability insurance for the benefit of secondary school students while on work experience with the “host employer”. Following complaints by a number of potential host employers, the Department arranged such a policy themselves, for the benefit of the students.
5. **Twinning agreements, and agreements for outside placement** (or practicum or work experience) are generally relatively innocuous and most merely restate the position at common law (and also require the university to have adequate public liability insurance). Some outside placement agreements, however, require the university to arrange workers’ compensation insurance cover for students - whether this is possible depends upon the local workers’ compensation legislation.
6. **Should all of your maintenance contractors be pre-approved**, and their insurances checked annually? By adopting this approach, potential problems can be highlighted before they occur, such as the welder who had no had no public liability insurance.

While talking about contractors:-

- who takes your hazardous waste away?
 - what are the hold harmless, indemnity and insurance conditions in the contract?
7. **Caterers** - how much products liability insurance should you expect your outside caterers to have? It should be high enough to allow for a number of claims arising from one event, such as food poisoning. In addition, the policy should include your organisation as an additional insured (and a cross liability clause), and you should consider having the ‘care custody and control’ exclusion deleted.
 8. The standard contract of a Government department required the contractor to have \$10,000,000 professional indemnity insurance for ten years after the contract ended. In the hard market in the late 1980s, many companies in America could not buy any professional indemnity insurance at all, so it is not appropriate for a contract condition to say the contractor **must** maintain professional indemnity insurance for such a long period. After negotiation, the department agreed to say the University **shall use its best endeavours to maintain professional indemnity insurance for a period of five years after the conclusion of the contract.**

Examples of other contracts which had potential problems were:-

1. **Snow runway** - a university was contracting to apply untried and unproven technology which would enable very large aircraft to land in Antarctica. The Federal Government required a full indemnity from the university, which would have received a once off payment of \$25,000 and been faced with the potential of an additional professional indemnity-cum-aviation insurance premium of perhaps \$500,000 per annum for ten years or more. (After the university refused to provide the indemnity, the contract was altered so that the university **received** the indemnity.)
2. **Do any of your employees ever charter aircraft**, with or without a pilot, in the name of the university? Generally, under a dry charter agreement (ie without a pilot) the hirer is responsible for damage to the aircraft and also for claims arising in connection with death, bodily injury or property damage to passengers and third parties. If this occurs, do you have an Aviation Non-ownership Liability policy to cover these risks?
3. **If buying land and buildings**, consider including an indemnity requiring the vendor to reimburse your organisation for any losses and clean up costs if the property was later found to be polluted (eg farm land polluted by pesticides or commercial property polluted by leaking underground storage tanks).
4. **Building and similar contracts** - the liabilities accepted or transferred under building and similar contracts can be very large indeed. A building contract which was submitted for signing some months after the project commenced had the unusual condition that the principal was to arrange \$10,000,000 public liability insurance in the name of the principal **and contractor**. Ideally, from the principal's viewpoint, it would have been better if the **contractor** had been responsible to provide public liability insurance (in joint names, with a cross liability clause) and the principal's policy would then have been an excess cover. Further if the contract was for extensions, alterations and additions, the builders liability policy should have the "care custody and control" exclusion deleted.
5. **In maintenance agreements** (eg for maintenance of computers, plant, equipment, installations, lifts, burglar alarms and sprinkler installations), the contractor may seek to limit his liability to a very small amount, such as \$15,000. Are you breaching a condition of your own liability policy by waiving or agreeing to limit your rights in such a fashion? Is such a financial limitation reasonable, or should the university give the contract to a contractor who will provide a realistic liability insurance cover?
6. **Homestay** (ie where the University arranges with families to house students from overseas) - does the University wish to accept liability for sexual harassment, assault, etc by or to the homestay provider? A contract with the student could clarify this.

Most universities will unknowingly be accepting a wide range of liabilities under the many contracts being negotiated each year. Those responsible for insurance and risk management should, in

conjunction with internal or external legal advice, be reviewing the hold harmless, indemnity and insurance provisions before such contracts are signed.

How would you respond to your superiors in the event of:

1. A claim for which the university had accepted liability under contract, but which was not insured.
2. A claim which **morally** should have been paid by the university (or its insurers) to the third party but **due to the contract wording** was legally denied by your insurers.

This discussion has concentrated on the legal aspects but in some cases the moral situation or the “unconscionable conduct” legislation should also be considered. (The “unconscionable conduct” legislation is designed to protect those with little bargaining power against a much larger organisation exercising considerable and unreasonable power.)

The following insurance issues should be considered when looking at contracts:-

- * liability insurance
 - in joint names, or including unnamed principals (or principals indemnity) clause
 - include cross liability clause
 - consider deleting “care, custody and control” exclusion
- * ISR (property) -
 - add to the clause requiring the tenant to keep the premises in good order and condition the words “wear and tear, war and any insurable event excepted”
 - who owns (and insures!) tenants improvements?
- * All policies
 - alter the clause which requires the University to provide a separate policy and/or a copy of the policy and/or renewal certificate and/or receipt for premium payment to “Insurance must be placed with an insurer authorised under the Insurance Act, 1973, and evidence of such insurance will be provided upon request”.

Examples of some areas where risk management and/or insurance personnel should, in conjunction with legal advice, be endeavouring to minimise the university’s liability in contracts are:

1. Amend “any act or omission” to “any negligent or wilful act or omission”.
2. Delete “or indirectly” from the phrase “directly or indirectly caused by”.
3. Endeavour to delete contractors, licensees, invitees and students from the phrase “The university and its employees, servants, agents, contractors, licensees, invitees, students ...” (etc).
4. Contributory negligence - add the words “except to extent that such loss (etc) is attributable to the negligence of ..., its employees, servants, and agents” to any indemnity you are required to provide to others.

5. Don't accept responsibility for "wilful, unlawful and/or intentional acts by students" (unless you absolutely have to!)
5. When buying goods, don't have your employees limit or exclude your recovery rights against the Supplier (they will breach a provision of your liability insurance policy if they do so).
7. If the University is a tenant and obliged to reimburse the landlord for all or part of the landlord's building insurance premium, amend the lease so that the University will not be liable for loss or damage caused by its negligence (after all, as the University is paying the premium, they should get the full benefit of the policy).
8. If the University (as tenant) is obliged to insure the landlord's building, the University should insist the landlord nominates the building "sum insured" (to avoid any under-insurance implications for the University).

Finally, to practice what I have been preaching, neither La Trobe University nor I will accept any responsibility or liability for any direct or indirect loss or damage (including consequential losses) which may be sustained by any individual and/or firm and/or organisation (whether incorporated or not) as a result of acting on any of this advice!.

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