



GUIDE TO

COMMERCIAL
GENERAL LIABILITY

Guide to Commercial General Liability

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Foreword

How can we help our broker partners sell more liability policies?

People are usually more committed to selling products or services that they understand and with which they are familiar. Despite the trying economic conditions in the South African market, there is still a wealth of untapped opportunities. The key to unlocking those opportunities lies in developing brokers' technical skills to the point where selling those policies offers more opportunity than risk.

Since its inception in 2001 Camargue has maintained an unwavering commitment to educating the South African market on commercial liability insurance. That commitment has undoubtedly contributed toward making Camargue a market leader.

This course is a small part of that ongoing commitment and comes at a time when liability insurance, and commercial general liability (CGL) insurance in particular, is growing increasingly relevant. Camargue's statistics, and the losses of the industry in general, show that both the severity and frequency of CGL losses are on the rise. Now more than ever, it is important to understand the scope of cover offered by a CGL policy and to ensure that clients have the appropriate cover.

We trust that this course will help you to avoid many of the mistakes that people make when arranging general liability cover.

Gerhard de Bruin
Managing Director
September 2020



Prologue

This guide assumes that you are familiar with the material covered in the Liability 101 course developed for Camargue Underwriting Managers. Although some of the concepts, such as Injury and Damage will be explored in more detail, the assumption is that you are familiar with the basic concepts covered in that course.

The commercial general liability policy, sometimes referred to as a CGL or general liability policy, is possibly the most common form of liability cover and ought to be purchased by almost every commercial operation.

We will discuss various claims scenarios. Although they are mostly drawn from real life, some of the details have been changed to protect the parties' identities.

Remember that the agreement (the Policy) between the Insured and the insurers includes

- » the policy document (the wording),
- » the Policy Schedule
- » the proposal form and
- » other communication on which the contract is based.

There are a host of liability wordings in the South African market, each with subtle differences which could profoundly affect the scope of cover on offer. It would not be practical to try and analyse all these wordings. Fortunately, these wordings typically fit into one of three broad categories:

- » Multimark-type policies. These wordings generally offer the least cover and are often only suited to clients where there is not a complex liability exposure.
- » Broad form wordings. These offer a broader form of cover than the Multimark-type. This product is sometimes the most cost-effective option for SME businesses.

We use general liability policy, commercial general liability policy and CGL policy interchangeably in this guide.

Liability insurance is a complex topic. Although we have focused on making this material easy to read, it can still become overwhelming at times.

Depending on your liability insurance experience we suggest that you allow 12 to 15 hours to work through this material.

- » Corporate wordings. These typically offer the widest form of cover, and are often purpose designed, with amendments or extensions to address the unique exposures of the Insured.

Where terms such as Products Liability or Injury are capitalised it means that a Section of the policy wording or a specifically defined word is being referred to. If the word or term is not capitalised, the intention is that the ordinary meaning of the word or term is to be applied.

Topic Studies

Often policy wordings are studied sequentially. However, starting at one end and finishing at the other does not easily give a clear picture of how the various components work together.

As some of these components are found in more than one Section or Extension of the policy wording we will discuss some topics in relation to each other before we discuss the commercial general liability (CGL) policy in sequence. Exploring the policy wording on a topic by topic basis may provide a better insight into how the policy wording operates.

However, the first topics we study are those typically found in the Policy Schedule.

Topics such as 'Who is the Insured?' are sometimes not as self-explanatory as they seem.



1. Policy Schedule

The Policy Schedule (or Schedule or Schedule of Insurance) generally contains most of the details specific to the contract (with the Insured) including

- » the Insured,
- » the Period of Insurance (policy period),
- » the business description,
- » which Sections and Extensions of the wording are applicable,
- » the Limits of Indemnity and
- » the Excesses (also called First Amounts Payable or the Deductible).

The Policy Schedule could thus be said to contain the core terms of the agreement

1.1. Who is the Insured?

On the face of it this is a simple question that can be answered by looking at the person or company named on the Policy Schedule. As with most things in life, it is usually not that simple.

It is not unusual for the Schedule to name more than one person or company. Sometimes two or more businesses are closely related; possibly sharing the same shareholder, or one being a subsidiary of the other.

Apart from the administrative advantage of only administering one policy, there are other benefits to combining policies, such as the underwriters charging less for one large policy than for multiple small ones. There are, however, potential disadvantages.



We use these terms interchangeably in this guide.

Disadvantages for the Insured

If one company on the policy were to suffer adverse claims experience it could unfavourably affect not only the cover available to the others, but their loss history as well. Worse still, misrepresentation by one company may undermine the validity of the policy for all.

Also, if companies A and B, for example, share a policy with an annual indemnity limit of R1 000 000 and company A has an R800 000 loss, it might mean that company B only has R200 000 available for the remainder of the Period of Insurance.

The Cross Liabilities Clause on page 60 also discusses the disadvantages of shared indemnity limits. Limits of Indemnity are discussed in the Liability 101 course and revised on page 11.

Disadvantages for Underwriters

Here is a common insured name description:

XYZ (Pty) Ltd and controlled, managed and administered companies and companies for whom they act as consultants, subsidiary companies, joint ventures and companies, persons or entities for whom they have authority to insure all for their respective rights and interests.

This includes many more people than just **XYZ (Pty) Ltd**. Let's break it down:

... and controlled, managed and administered companies

Often a 'controlled' company would be a subsidiary but there are times when it is possible to control a company without being the majority shareholder. The most common example would be where the Insured has that control as a result of some contractual agreement. The owners of a property investment company could transfer control to a managing agent. A business rescue practitioner may have control over several companies.

and companies for whom they act as consultants

In one sense this means that all the clients of a consulting company would automatically also enjoy cover under this

policy. This clause may go far beyond what the underwriters had in mind. A small consulting engineer who does work for Eskom would not intend that Eskom start submitting all their liability claims under the engineer's policy.

subsidiary companies

One company is a subsidiary of another if that parent holds a controlling share (more than 50%) of the subsidiary or can control "*the appointment or election of directors ... who control a majority of the votes at a meeting of the board*" (bluntly, can control the Board of Directors).

Section 3 of the
Companies Act 71 of
2008

It is not uncommon for subsidiaries to be included under the parent's liability policy. It would be important to also note their business descriptions on the Policy Schedule. The parent company may be an investment company, but the subsidiary may be a fuel retailer.

Business descriptions
discussed next

joint ventures

A joint venture is defined as an association of persons, natural or juristic, who agree to engage in a common undertaking by combining selected property, expertise or resources without forming a formal partnership or corporation.

A joint venture is not a separate legal entity. It is simply an agreement between two or more parties that they will work together. Joint ventures are typically used where the parties concerned intend to only pursue a single venture. Outside of the joint venture the parties may well compete against each other.

Unlike a partnership (where partners are jointly and severally responsible for all the debts incurred), participants in a joint venture are only responsible for their own liabilities arising out of their activities. This policy covers the Insured Person while they are working in the joint venture on behalf of the Insured company.

Joint and several
liability is beyond the
scope of this guide.

and companies, persons or entities for whom they have authority to insure

Underwriters would do well to get a list of these companies together with salient underwriting information for each company, such as loss history and scope of activities.

all for their respective rights and interests.

It is common for various parties to have interests under an assets policy. Financiers, for example, would have an insurable interest in equipment they view as surety in terms of a finance agreement. The phrase “rights and interests” would make sense for those policies. However, some underwriters argue that under a liability policy “rights and liabilities” might be more appropriate since the “noting of interest” seldom makes sense on a liability policy.

Clearly, couching the Insured’s name in such broad terms exposes the underwriter to a host of additional risks.

Prudent underwriters would insist on a list of all these entities together with underwriting information such as their names, turnovers, business descriptions, loss histories, etc. In fact, some underwriters may insist that the name be restated to:

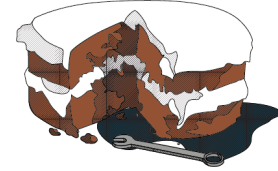
*XYZ (Pty) Ltd and controlled, managed and administered companies, subsidiary companies and joint ventures **as declared in the information presented in writing to the underwriters.***

1.2. Business Description

This is the list of the business activities that the Insured engages in. It is in *the Insured’s* interest that **all** business activities are listed as not doing so could be seen as material non-disclosure or misrepresentation.

Panel Beaters

If the Insured's Business is defined as "panel beater and related activities" it would be reasonable to expect that spray-painting would be covered as a related activity. It would, however, not be reasonable to expect the Insured's bakery to be covered by the policy: a bakery business is too remote to that of a panel beater.



Land Reclamation Specialists

The Insured's Business is defined as "land reclamation and related activities".

Land reclamation, the process of improving lands to make them suitable for a more intensive use. Reclamation efforts may be concerned with the improvement of rainfall-deficient areas by irrigation, the removal of detrimental constituents from salty or alkali lands, the diking and draining of tidal marshes, the smoothing and revegetation of strip-mine spoil areas, and similar activities. www.britannica.com/science/land-reclamation

From the above definition it would not be reasonable to suspect that the Insured operates a mercenary company that 'reclaims' land for their clients using military tactics.

Not: "including but not limited to"

Sometimes the Business description contains the words "including but not limited to". For example, "panel beater and other activities *including but not limited to* vehicle restoration." Clearly vehicle maintenance is covered but the disclosure could also include the Insured's bakery since "not limited to" does not limit the activities.

A prudent underwriter would not accept this and would substitute those words with “materially related to” as in “panel beater and other activities *materially related* to vehicle restoration.”

Absolutely Not: “All Activities of the Insured”

Perhaps the worst example of a poor business description is one that reads “all activities of the Insured”. No sensible general liability underwriter would accept such a business description as it shows that important material disclosures are not being made.

1.3. What is an Excess?

Many policies require the Insured to bear a portion of the liability to the claimant (third party). This is referred to as the *Deductible*, the *First Amount Payable* or the *Excess*. We use these terms interchangeably in this guide.

The Insured needs to pay the Excess for each claim (on an “each and every” basis). This is illustrated in the following example:

Each and Every Example

The Insured, a gym with secure lockers, submits claims for four separate incidents of locker theft. Four patrons inform the gym that expensive items went missing from their lockers.

The Insured would need to pay four Excesses since these would be considered as four separate losses.

Had the four losses occurred at the same time a broker might argue that there was probably one source (perpetrator) for the loss – thus one Excess.

How separate do the incidents need to be in order for the separate Excess to apply?

Since the policy wording seldom clarifies this, this sometimes leads to disputes between insurers and brokers.

Commercial general liability (CGL) underwriters such as Camargue will not reduce the indemnity limit by the amount of the Excess.

For example, where the indemnity limit is R1 million and the Excess is R100 000, the policy would pay a maximum of R1 million for a claim made against the policy.

Some underwriters reduce the indemnity limit by the First Amount Payable (Excess).

For example, where the indemnity limit is R1 million and the Excess is R100 000, the policy would pay a maximum of R900 000 for a claim made against the policy.

Does VAT apply to the First Amount Payable?

No, according to the South African Revenue Services the first amount payable is VAT neutral.

No Excess in Questions and Examples

We have not included the Excess in the examples and questions in this book as their purpose is to clarify the topic under discussion.

1.4. Limits of Indemnity

In the Liability 101 course we discussed the difference between a sum insured and a Limit of Indemnity. A sum insured is used on a property damage policy where the value of the goods is known. The extent of a liability loss can seldom be determined beforehand. The best we can do is choose a limit for which the policy will indemnify us.

We use the words indemnity limit(s) interchangeably with the defined term Limit(s) of Indemnity.

Things can get somewhat more complicated on a liability policy. We deal with a few of the commonly asked questions below.

Interlocking Clause

What happens when a loss is covered by more than one Section or Extension of the policy?

The Limits of Indemnity are not combined (aggregated). Only the largest indemnity limit is used, and that indemnity would be sub-limited as shown in the next example.

Interesting Aside
In such a case an Excess is not payable for each Section or Extension, only one Excess, the largest, will apply.

Shouldn't There Be More?

A loss of R2 500 000 is covered by both the Public Liability Section and the Statutory Defence Costs Extension. The Public Liability indemnity limit, the largest indemnity limit, is R1 000 000 and the Statutory Defence Costs sub-limit is R250 000.

The loss amounts to R500 000 for Public Liability and R2 000 000 for Statutory Defence Costs.

The policy only pays R750 000 of the R2 500 000 loss, instead of the full R1 000 000 Limit of Indemnity. Why?

A maximum of R250 000 could be used for Statutory Defence Costs. Thus R1 750 000 of these costs are not covered.

As the Public Liability loss is (only) R500 000, the policy would pay this plus the R250 000 sub-limit available for Statutory Defence Costs.

The table below illustrates this example.

	Public Liability	Statutory Defence Costs
Indemnity Limit	R1 000 000	R250 000
Loss Amount	R500 000	R2 000 000
Cover available for this claim	R750 000 (R1 000 000 – R250 000)	R250 000
Policy Pays	R500 000	R250 000

Table 1 – Shouldn't there be more?

More Than Enough

The indemnity limit on a policy is R10 000 000 (remember, combined losses cannot exceed this amount).

A loss of R800 000 is covered by both the Public Liability Section and the Statutory Defence Costs Extension. These have indemnity limits of R10 000 000 and R250 000 respectively.

The loss amounts to R750 000 for Public Liability and R50 000 for Statutory Defence Costs.

Again, a maximum of R250 000 could be used for Statutory Defence Costs. However, in this case these costs amount to R50 000, so the full Statutory Defence Costs loss would be covered, leaving R9 950 000 available for the Public Liability loss, which would then also be covered in full.

The table below illustrates the example: why the policy would pay the entire R800 000 loss.

	Public Liability	Statutory Defence Costs
Indemnity Limit	R10 000 000	R250 000
Loss Amount	R750 000	R50 000
Cover available for this claim	R9 950 000 (R10 000 000 – R50 000)	R250 000
Policy Pays	R750 000	R50 000

Table 2 – More Than Enough

Do the Limits of Indemnity include VAT?

This depends on the policy wording. Many of the Multimark wordings state that the indemnity limits include VAT. Many broad form policies will pay VAT in addition to the Limit of Indemnity.

Does the indemnity limit apply to each claim or does it apply to all the losses during the Period of Insurance?

The policy wording or Schedule will state whether the indemnity limit for each Section and Extension is on an *annual aggregate* basis or on an *each and every* basis. If the cover is on an annual aggregate basis then the Limit of Indemnity for that Section or Extension is cumulative.*

By contrast, if that cover is on an each and every basis then the full Limit of Indemnity is available for each claim under that Section or Extension, regardless of previous claims.

The Liability 101 course deals with this topic in more detail.

*In other words, the annual indemnity limit is decreased by every claim made until it is used up.

2. Custody and Control

It often happens that an Insured will have others' property in their possession.

Examples of this include:

- » A panel beater who would have his clients' cars in his possession for repairs
- » A logistics company who would transport and warehouse client's property
- » A house-sitter looking after a family's house while they are on holiday
- » A kennelling service looking after pets

The general liability policy provides custody and control cover in several parts of the policy wording, each of which provides slightly different cover. We are going to explore these options and examine the benefits and drawbacks of each.

2.1. Words and Their Meaning

Before looking at the scope of cover they provide, it is important to understand the intended meaning of the words care, custody and control. Many wordings draw on various combinations of these words to describe the scope of cover.

Here are some dictionary definitions from [lexico.com](https://www.lexico.com/):

- » Control – the ability to influence or direct behaviour or a course of events
- » Custody – the protective care or guardianship of someone or something
- » Care – the provision of what is necessary for the welfare, maintenance and protection of someone or something

Use of the conjunctions *or* and *and* makes the difference between providing cover if *either* criterion is met (custody *or* control) or only if *both* the custody *and* control criteria are met.

The following claim is based on a sad, but true story. The Insured provides a mobile bottling service on the premises of various wine farms. Wine became polluted by residue in the bottling machine which was not properly cleaned before use. The owner of the wine was standing close to the Insured at the time of the loss. Was the wine in the Insured's custody or control at the time it was damaged?

Control

There can be no doubt that the Insured had control over the wine at the time it was damaged. However, the owner of the wine also had control over the wine since the loss occurred on his premises while he was present. So, how much control does the Insured need to have over an item before the policy considers the item to be under the Insured's control?

Unfortunately, policy wordings seldom define the extent of *custody* or *control*. To make matters worse, South African law does not provide much by the way of additional clarity either. Various legal practitioners and specialist liability companies, such as Camargue, hold the view that an item is under the Insured's control when the Insured exerts more influence over the item than anyone else does.

In our wine example, although the owner was in the vicinity at the time the wine was damaged, the Insured had more control over the wine at the exact moment that it was being damaged. The wine was therefore considered to be under the Insured's control at the time of the loss.

Custody

We have defined *custody* as the protective care or guardianship of someone or something. The following example shows how the same principle that applied to *control* can also be applied to *custody*.

Watch out for the conjunctions used to join words or phrases. When grinding through the complexities of a policy wording it is all too easy to overlook the joining words *and* and *or*.

Don't fall into the trap of thinking that different underwriters apply conjunctions and other parts of speech consistently.

The owner of a vehicle leaves a petrol attendant to wash the windows of her vehicle while she buys a magazine at the petrol station's kiosk. While at the kiosk, the owner still has more influence over the vehicle than the petrol attendant. This is easily demonstrated by the owner's reaction should the attendant try to move the vehicle to another parking bay. Clearly the vehicle was not in the attendant's custody.

Contrast this to leaving the vehicle at a panel beater. While it is undergoing repairs, the panel beater would undoubtedly be able to move the vehicle to a more suitable location in the workshop without interference from the vehicle's owner. This illustrates that the panel beater has taken the vehicle into his custody.



The difference between 'custody' and 'control' may sometimes be confusing. To illustrate the difference, consider vehicles that have been left at a shopping centre's parking lot. The expectation is that the parking attendants will look after the cars despite them having no control over the vehicles. It can be argued that the vehicle is in the attendant's custody but not under the attendant's control.

Care

Sometimes underwriters believe that they can create a more legally robust clause by simply throwing more words at it. Often this has the opposite effect.

It is important to remember that when a court of law reads the policy wording, they will assume each word is intended to mean something different and serve a different purpose. Saying that there is cover for items in someone's custody or control is different to saying that there is cover for items in someone's *care*, custody or control. Introducing the word *care* means that the item no longer needs to be in someone's possession, they simply need to be looking after it. This significantly increases the insurers' risk.

Care in Time

InTimeFleet (Pty) Ltd is a company which ensures that their customers' vehicle fleets are regularly serviced. They do this by keeping track of the vehicles' mileages and then arranging for them to be serviced by reputable service providers when necessary. These vehicles are being cared for by InTimeFleet, despite InTimeFleet having no physical access to the vehicles. This means that the vehicles are neither under InTimeFleet's control nor in their custody, but they are in their care.

C&C Question

Car Wash

The Insured operates a car wash where the driver can park the car, take the keys and enjoy a cup of coffee at a neighbouring coffee shop while the car is washed. Is the vehicle under the Insured's

- » custody,
- » control, or
- » care?



The vehicle is in the Insured's *care* as they are attending to its wellbeing.

The Insured has no *control* over the vehicle as the customers remove their keys and would not respond well if the Insured's staff, for example, tried to move the vehicles.

To establish if the vehicle is in the Insured's *custody* we need to ask another question: Suppose a person walking past tried to steal the number plate off a vehicle while the Insured's staff were busy with it, would the Insured's staff be obligated to stop this theft? If they are, then the vehicle is in the Insured's custody.

2.2. Where the Cover is Found

Custody and Control cover is commonly provided under the Public Liability Section, the Warehousemen's Liability and Carriers' Liability Extensions, and the Custody and Control Extension.

Public Liability Section

The Public Liability Section does provide some cover for third party property in the Insured's custody or control (note the conjunction **or**). It is usually the cheapest place to find this cover but there are significant limitations. A Multimark-type policy is very restrictive in terms of custody and control cover under its Public Liability Section. The broad form and corporate wordings provide enough cover to meet many clients' custody and control cover needs.

The Public Liability Section cover would exclude warehousing and carrier's related risks and is usually limited to the following:

Vehicles temporarily in the Insured's custody for the purposes of parking

Note that the wording of this clause is intended to restrict cover so that only visitors' parking is covered (as opposed to parking for vehicles in for repairs, since that exposure is better suited to a motor trader's policy). There are some broad form policies, such as the Camargue broad form policy, that are wide enough to cover vehicles being stored for repairs.

Many policies do not specifically restrict the movement of those vehicles to licensed drivers. This is significant for an Insured such as a car wash where staff sometimes move the vehicles. It happens all too often that a vehicle is damaged by an unlicensed driver.

The clothing and personal effects of visitors and employees

One of the most common examples of this would be a gym where patrons store their valuables in lockers. Allegations of theft from lockers is an almost daily occurrence and the gym is often blamed for maintaining inadequate security.

Premises normally rented by the Insured

Most landlords insist that their tenants contractually accept liability for any harm that befalls the premises while being rented by the tenant. Usually the policy would exclude property that is in the Insured's custody or control as a result of a lease, rental, loan or hire-purchase agreement. This clause makes an exception and provides the cover.

Government property whilst on any premises permanently occupied by the Insured

Many state-owned entities (SOEs) require that their customers sign agreements stating that the customer will assume responsibility for harm to the SOE's property (when the loss occurs on the customer's premises) regardless of proof of fault. Typically, the policy would exclude such contractually assumed liability, but this clause removes the necessity for the Insured to prove that they would be liable, regardless of the agreement.

Premises (or the contents thereof) temporarily occupied by the Insured for work purposes

A scenario like this could easily arise where the Insured's normal premises are not in use following a disaster or during renovations. However, the most common example would be where the Insured is working at their customer's premises. This clause aids clarity by removing any debate as to whether the premises are in the custody or under the control of the Insured.

Property temporarily in the Insured's care for work thereon

This is an example where the cover offered by the broad form policy is significantly wider than that of Multimark-type policies. The Multimark policy states that

“the company will not indemnify the Insured in respect of ... damage to ... property in the custody or control of the Insured or any employee of the Insured.”

The broad form and corporate wordings typically state that there is cover for

“property temporarily in the Insured's possession for work thereon but no indemnity is granted in respect of Damage to that part of the property on which the Insured is working.”

Suppose the Insured runs a lawnmower repair centre. The Public Liability Section would typically cover a loss arising out of the Insured accidentally dropping a lawnmower. By contrast, there is no cover if the mechanic over-tightens a nut and strips the thread.

What is not covered?

Although there are a great many exclusions, here are some of the more noteworthy ones:

- » Employee dishonesty. There is no cover for loss to third party property in the Insured's care if that loss is as a result of the dishonesty of the Insured's employees or subcontractors.
- » Intentional wrongdoing by the Insured's management. This would include their failure to take reasonable precautions to prevent losses.
For example, allowing a mechanic to operate unsupervised despite a history of negligence.

Warehousemen's and Carriers' Liability Extensions

The Warehousemen's Liability Extension covers liability arising out of Damage to a third party's goods being stored in the Insured's warehouse.

See how the words custody and control are used in the Warehousemen's Liability Extension (take note of the conjunction **and**):

*“The Insurers will indemnify the Insured in accordance with the General Insuring Clause in respect of claims for and/or arising out of Damage to property in the Insured's Custody **and** Control whilst contained in any premises occupied by the Insured as a warehouse or storage facility.”*

The Carriers' Liability Extension provides similar cover to the Warehousemen's Liability Extension but does so when the loss arises outside of the Insured's property.

Exclusions Found on Warehousemen's Liability and Carriers' Liability Extensions

These Exclusions are commonly found on the Warehousemen's Liability and Carriers' Liability Extensions:

Mechanical or electrical derangement unless accompanied by other physical damage

If the customer places a consignment of lawnmowers in the Insured's warehouse, there would be no cover if, on their return, the lawnmowers were no longer working properly. However, this exclusion would not apply if the customer could, for example, show evidence of water damage sustained whilst in storage. In other words, the intention is to exclude claims where the stored goods simply stopped working without evidence of some physical damage.

Dishonesty of the people to whom the goods were entrusted

Exclusions relating to employee dishonesty are usually found in the policy's general exclusions which means that they would apply to the whole policy. Fidelity (employee honesty) guarantee cover for warehousing risks is generally difficult to obtain and very expensive because of the adverse claims experience in the South African market.

Delay in the return of the stored property

An example of an unexpected loss arose when the Insured made a series of clerical errors which caused them to ship the newest, instead of the oldest, stock of fresh milk. This meant that a stockpile of milk reserves soon passed the sell-by date and had to be destroyed.

The wilful illegal sale of the property

The Insured's customer agreement might state that once the agreement ends the goods must be collected immediately or the goods will be sold. Due to a system error the goods of the wrong customer are sold. The loss would not be covered since this was nonetheless an intentional act.

The Insured's activities as clearing and forwarding agents

Clearing and forwarding provides a service, on behalf of an importer or exporter, with the physical movement of goods from one country to another. Although this may appear to be an ordinary warehousing related service, it is excluded because the risk is far higher.

Specific policies, usually provided by marine insurers, provide for this risk.

Money or other high value items such as works of art, precious stones and jewellery

Underwriting this kind of high value item requires specialist skills. This is why those items are usually excluded from the ordinary general liability underwriting process.

Perishables and refrigerated goods

Some policies do cover this, but adverse claims experience has caused many underwriters to avoid giving this cover.

The Disclaimer Condition

The last exclusion deserves a detailed explanation as brokers often underestimate its significance. When goods are left in the care of a warehouse operator that operator has an obligation to return the goods unharmed. This is known as bailee's liability. The law does, however, allow for warehousemen to contract out of liability. This means that there are two alternatives,

- » either the warehousemen can accept the risk of damage to the goods (in which case they would need to increase the cost of their services to provide for that risk) or
- » they can get the customer to sign a disclaimer (which means that the owner of the goods would need to arrange their own cover).

Since the owner of the goods is usually in a better position to know what the goods are worth, it is best if the owner insures the goods. This is the thinking behind the "disclaimer of liability" clause that is often found on Warehousemen's Liability and Carriers' Liability Extensions.

Sometimes the Insured might question if there is any point in having the cover if they have contracted out of this liability. There are, however, several reasons why a disclaimer can fail. The Insured, for example, may have difficulty in defending a claim where they were shown to be grossly negligent.*

Cover for harm to the goods is limited to gross negligence. The legal costs of refuting the third party claim would only be covered if they allege gross negligence on the Insured's part.

The upshot of this is that the Warehousemen's Liability Extension is intended as contingency cover.

*One of the reviewers cautioned against using the term 'gross negligence' because it is a creature of statute and best avoided in this discussion.

Consequential Loss Only Cover

Usually the Warehousemen's Liability and Carriers' Liability Extensions provide cover for damage to customer's goods as well as loss arising from that damage. The Insured could, for example, be storing a customer's cement mixer worth R50 000. When the equipment is damaged as a result of a fire, the customer suffers a further R30 000 loss as a result of not being able to complete a project on time. The latter is known as a consequential loss. Alternative, more limited versions of the Warehousemen's Liability and Carriers' Liability Extensions would restrict the indemnity to loss arising (or preferably, loss directly arising) from loss of or damage to goods or merchandise being warehoused.

These Extensions specifically exclude the value of the goods themselves.

Custody and Control Extension

The Custody and Control Extension provides a wider form of cover than is found under either the Public Liability Section or the Warehousemen's Liability and Carriers' Liability Extensions. This Extension covers damage to third party property while it is temporarily in the Insured's possession for any reason (not just repair). The cover extends beyond the Insured's premises overlapping with the Carriers' Liability Extension.

This Extension typically excludes property more specifically insured elsewhere and sometimes also excludes vehicles. These are common exclusions which are intended to prevent dual insurance with other policies (such as a Motor Trader's Policy).

Warehousemen's and Custody and Control Compared

The following table summarises the similarity and differences between the Warehousemen's Liability and the Custody and Control Extensions.

Although 'consequential loss' and 'loss as a consequence' and 'consequences of ... Damage' are used interchangeably, it should be remembered that they do not necessarily have the same meanings. Their meaning could depend on both the policy wording and the context in which it is used. For the sake of simplicity, no distinction is made in this guide.

Warehousemen's Liability	Custody and Control
Both cover Damage to third party property in the Insured's custody	
Goods stored by the Insured as a <i>professional service</i>	Goods temporarily in the Insured's possession <i>for any reason</i>
Assumes stored goods' owners have their own insurance cover	Does not assume goods' owners have their own insurance cover
Contingency if the Insured's disclaimer fails	The Insured need not have a disclaimer
Excludes temperature sensitive goods	May include temperature sensitive goods
Excludes valuables such as money	May include valuables and money

Table 3 – Warehousemen's Liability v Custody and Control Extensions

Since the Custody and Control Extension provides much wider cover than the Warehousemen's Liability Extension, prudent underwriters charge a far higher rate for the Custody and Control Extension and also offer lower limits.

Store at Own Risk

The Insured operates a self-storage facility. In terms of these facilities, the Insured rents out a storage space the size of a single garage. Their customers are given a key and 24-hour access to the facility allowing them to manage the contents as they wish. The intention is that the Insured only accesses the storage space in emergencies.

Would Warehousemen's Liability cover be suitable for such an Insured?

Short answer: "No!"

Using the Warehousemen's Liability Extension to cover damage to customers' goods in storage could be problematic since the wording requires that the

goods are in the Insured's custody *and* control. It could be argued that the customer has more control over the goods than the Insured unless the Insured is responding to an emergency.

Consider a claim where rain damage to the goods is discovered a few days after a storm. The underwriters may argue that the goods were in the customer's control (and not the Insured's) at the time of the loss.

The Custody and Control Extension would provide more suitable cover for this Insured. Note how the following Custody and Control Extension's wording overcomes the problem by bypassing the words *custody* and *control*.

"The Insurers shall indemnify the Insured against liability for and/or arising out of Damage to property temporarily in the Insured's possession for storage or any other purpose insofar as such property is not the subject of any material damage insurance policy available to the Insured."

This is because the Insured would have no right to access the customer's goods under normal circumstances.

2.3. Rating Custody and Control Risks

When rating a liability policy, one needs to consider the frequency as well as the severity of potential losses. Underwriters should consider factors such as

Past loss experience

Past loss experience is often a good prediction of future claims.

Some people may argue that there is no basis for increasing the premium based on claims experience. Why charge extra when the risk is not materially different from what it was immediately before the claim?

However, that logic is in error because what changed was not the risk, but the underwriter's *understanding* of the risk.

Not all losses result in claims. This is because some losses are not insured. However, those uninsured losses are still an indication of what the future might hold.

Scope of cover

Since the cover in terms of the Custody and Control Extension is wider than the Warehousemen's Liability Extension, the likelihood of a claim is also greater: it is not uncommon to find that the rate on the Custody and Control Extension is more than double that of the Warehousemen's Liability Extension.

Indemnity limits

Provided that the Insured has not purchased additional (excess of loss) cover, the indemnity limit can be a reasonable indication of how severe the Insured perceives their risk to be. The indemnity limit also serves to limit the underwriter's exposure.

Risk mitigation measures

The underwriters might insist on mitigation measures to decrease potential risk.

Under Pressure

As the municipal water supply to the Insured's warehouse might be too weak to contain the spread of fire, the insurers require the Insured to install and maintain water reserve tanks to mitigate this risk.

The amount of economic activity

Factors such as the Insured's annual turnover are usually considered. Sometimes the Insured's wages are used instead. The benefit of wages is that they are less likely to be affected by market conditions such as a price war.

Basing premiums on the Insured's wage bill is growing less popular because those figures become distorted when the Insured uses subcontractors, instead of employees, to do the work. The cost of staff supplied through a labour broker, for example, would reflect as a supplier's invoice and not as wages on the payroll.

When rating risks such as warehousing, economic activity is unlikely to be the most suitable factor. It would be better to look at:

1. The monetary value of the goods being stored. This will provide an indication as to the *severity* of the loss. A company with a high annual turnover might churn through a lot of stock, but ultimately the risk exposure comes down to the value of the stock in the warehouse at any one time.
2. The nature of the goods being stored. The storage of highly flammable items, for example, is more likely to result in a claim than the storage of bricks and similar building supplies.

Carriers' Liability risks could be rated based on:

1. Estimated annual carry. The premium is calculated by multiplying a rate with the total value of goods transported over the year. That rate would be based on the nature of the goods, where the goods are being transported (cross border transport being a higher risk), etc.
2. The number of trips, the typical value of the cargo on each trip, etc.

2.4. Questions on Custody and Control

Washing Windows

The Insured washes the windows of their customer's high-rise commercial buildings. While doing so is the building

- a. in the Insured's custody or control, or
- b. in the Insured's care, custody or control?

Answer

- b. The building is in their care (but not custody *or* control).



Jim's Gym

Jim's Gym has a disclaimer which says that they "... accept no responsibility for harm to goods in the lockers unless the locker has been locked and the keys left with Jim." Suppose the customer complied with that but the locker was nonetheless broken into and the goods stolen.

Jim's Gym's liability policy states that for the goods to be covered they must be in the Insured's Custody *and* Control. For a few rand more, a competitor's policy can be purchased which requires that the goods be in the Insured's Custody *or* Control. Would the additional expense be worthwhile?

Answer

Yes, it would be worth paying extra for the wider policy wording. Why?

It is unlikely that the patrons would accept Jim rummaging through their clothing and other possessions while they are busy exercising. Therefore, the goods would be in the gym's custody but not control (**or** being the more expensive conjunction).

Drop the Load

The Insured offers a transport service. While offloading the client's heavy commercial electricity generator at the client's premises, the Insured drops and damages it.

Which Section or Extension of the broad form general liability policy would cover this loss?

- a. Public Liability Section
- b. Warehousemen's Liability Extension
- c. Carriers' Liability Extension
- d. Custody and Control Extension

Answer

- a. There is a clause under the Public Liability Section which covers losses arising while operating machinery attached to vehicles. This is intended to cover liability caused by the use of devices such as crane attachments. Here is an example of the wording:

This Section <covers> claims caused by the use of any tool or plant forming part of or attached to or used in connection with any Vehicle.

- b. There would not be cover in terms of the Warehousemen's Liability Extension. Although this Extension does provide cover for loading and offloading items, the loss would have to occur at the Insured's premises.
- c. The Carriers' Liability Extension would provide this cover. But don't forget that many liability policies require a disclaimer to be signed in terms of the Carriers' Liability Extension.
- d. The Custody and Control Extension would provide this cover.

3. Products and their Inefficacy Exposures

Almost all businesses provide either services or products, or a combination of both. Clients sometimes fall into the trap of thinking that if their company only offers professional services, there would be no products related exposures.

Whilst the Insured's products related exposures might, in some cases, not be large enough to justify the cost of purchasing products liability cover, it is important to identify and understand these exposures so that an informed decision can be made.

3.1. What is a Product?

The Multimark-type and broad form policies have different definitions for what a Product is. So, there is a very real possibility that an item would be considered a Product in terms of one policy but not another.

Multimark-Type

Here is a typical Multimark definition:

Goods or products (including containers and labels) sold or supplied (including wrongful delivery and delivery of incorrect goods) by the Insured in connection with the business.

The wording goes on, as an exception to the Products Liability Section, to exclude liability arising out of the Product's faulty design:

This ... does not cover liability ... arising from defective or faulty design, formula, plan or specification, but if the Insured is a retailer this specific exception does not apply if the Insured's activities are wholly restricted to sales, distribution and/or marketing (including any marketing

advisory service accompanying the products) of the product, and the Insured's activities do not include final preparation which means repackaging, packing, labelling, cleaning or provision of operating instructions prior to sale to the Insured's original customers, nor include any enhancement, amendment or alteration to the product

What is also significant is that a *Product* and *defective workmanship* are two separate concepts in terms of the Multimark policy. The policy provides [optional] cover for defective workmanship by removing the following specific exception (exclusion):

The company will not indemnify the Insured in respect of liability consequent upon injury or damage occurring after the completion and handing over of any work and caused by or through or in connection with any defect or error in or omission from such work.

The Defective Workmanship Extension goes on to specifically exclude claims arising out of “defective design”.

Broad Form

Here is a broad form definition:

Product shall mean any tangible property after it has left the Custody or Control of the Insured and which has been designed, specified, formulated, manufactured, constructed, installed, sold, supplied, distributed, treated, serviced, altered or repaired by or on behalf of the Insured, but shall not include food and drink supplied by or on behalf of the Insured primarily to the Insured's employees as a staff benefit.

What is significant about this definition are the words “*treated, serviced, altered or repaired*” as they provide defective workmanship cover. Consider a mechanic who services a customer's vehicle and forgets to replace the oil. After driving the vehicle for some time, the customer discovers damage to the

Remember that waste material can also be a Product (off-cuts, used oil, or containers and their labels).

engine and sues the mechanic. This defective work claim will fall within the definition of a Product because

1. the vehicle is tangible property which *has left the Custody or Control of the Insured* and
2. the vehicle was *serviced, altered or repaired by or on behalf of the Insured*.

The benefit of the broad form policy is significant. By combining products liability cover and defective workmanship cover into a single Extension there is less chance of the Insured having the wrong cover.

The last part of the broad form Product definition excludes food and drink served primarily as a benefit to the Insured's staff. This means that food poisoning claims, for example, would be a Public Liability claim and not a Products Liability claim if the loss arose at the Insured's canteen.

A restaurant would still need Products Liability cover. The Public Liability section will only cover food poisoning for the Insured's staff canteen.

Corporate Policy

In many cases the definition for a Product in a corporate policy is the same as that for a broad form policy.

3.2. Inefficacy

The Products Inefficacy Extension of the general liability (CGL) policy covers financial losses caused by a Product. The simplest way to describe the Products Inefficacy Extension is to say that it covers the loss caused when a Product does not perform as intended. But that description creates a problem: many Products Liability losses arise because the Product did not perform as intended.

For example, Damage and Injury were caused when the car's brake shoes did not perform as intended. This would be a Products Liability (and not a Products Inefficacy) claim if the supplier of the brake shoes was sued.

Injury, Damage and Pure Financial Losses - A Quick Recap

At this stage it would be appropriate to provide a quick recap on the differences between Injury, Damage and pure financial losses.

Although these details may differ from one underwriter to another, here is a general synopsis of how these terms are typically defined:

- » Injury means death, bodily injury, illness or disease, mental injury of or to any human.
- » Damage means *loss of possession or control of or detrimental alteration to tangible property*.
- » A consequential loss is a loss which follows indirectly as a result of Injury or Damage. For example, as a consequence of causing injury to someone they lost a month's income.
- » A pure financial loss is any loss that was not caused by Injury or Damage. It is rather like having a consequential loss without the underlying Injury or Damage to cause it. For example: a fertiliser missing an important ingredient may result in a pure financial loss because the farmers' crops did not grow as well as expected. Although the crops are healthy (no Damage) there is less produce to sell (a pure financial loss).



Where terms such as Products Liability or Injury are capitalised it means that a section of the policy wording or a specifically defined word is being referred to. If the word or term is not capitalised, the intention is that the ordinary meaning of the word or term is to be applied.

It is important to understand the difference between pure financial losses, Injury and Damage. If the recap above was not adequate, please refer to the Liability 101 course

So, about consequential loss ...

In this guide we use the idea of a consequential loss in its simplest form – it is the loss that arises indirectly as a result of something else. Having said that, you need to appreciate that the topic can get as complicated as a relationship between two hormonal teenagers.

Complexities

When using the term *consequential loss* remember that it is not only the legal meaning that must be taken into consideration; the perception of the client and other stakeholders, including brokers, may also lead to disputes.

Often *consequential loss* is used in the sense of indirect loss; however, whether loss is direct or indirect may depend on where the prejudiced party stands in relation to the loss.

Consequential Loss and Consequential Damage

These terms are sometimes used interchangeably but the following example illustrates their differences.

Fork it Over

The Insured's employee negligently drives a forklift into a customer's vehicle. Despite the Insured having paid the cost of repairs to the vehicle, the customer also demands compensation for the difference in the vehicle's second-hand market value. This would be a consequential loss.

A vehicle's resale value is often lower if it has been in an accident.

By contrast, damage to the vehicle's water pipe was unnoticed at the time the customer drove away from the accident scene. The leaking water caused the engine to overheat a few minutes later. Although the forklift did not cause heat damage to the engine, that heat damage was consequential damage following the forklift accident.

Usually a CGL policy would not draw a distinction between a third party's claim for consequential damage or for consequential loss or for the underlying Damage that caused them. They would all be treated as one claim and the policy would respond to them if the third party were able to show that the Insured was legally liable.

The Difference between Products Inefficacy and Products Liability

There are many exceptions to the rule of thumb shown in the table below, but the table provides a useful starting point when trying to establish which part of the policy will respond to the loss.

Root Cause	Injury or Damage	Pure Financial Loss
Product	Products Liability	Products Inefficacy
Service	Public Liability	Professional Indemnity
Neither Product nor Service	Public Liability	Pure Economic Loss Extension*

*Note: The Pure Economic Loss Extension is dealt with later in the guide.

Table 4 – Which Part Will Respond?

The first step is to ask whether the loss arose out of

1. the Insured's services. For example, when an electrician damages a water pipe while drilling into a wall.
2. the Insured's Products. For example, people get sick from the food served at the Insured's restaurant.
3. neither a service nor a Product. A restaurant neighbouring the Insured's property loses income when it is evacuated as a precaution because the Insured sprayed the wrong poison to eradicate ants.

The next step is to establish whether the loss arose from a pure financial loss or from Injury or Damage. If a pure financial loss was caused by the Insured's Product then it is most likely a Products Inefficacy claim. The best way to understand the differences between Products Inefficacy claims and other claims, such as Product Liability and Professional Indemnity claims is to work through a few examples.

Questions on Product Inefficacy Claims

When Farmers Whine

The Insured is a plant nursery that sells grapevines as small plants. The wine farmer purchases small plants and after spending considerable time and expense in growing them discovers that they have a genetic flaw. He sues the nursery for the cost of growing the plants and the loss of income while he waits for a new harvest to mature. What cover should the nursery have had?

First step: was the loss caused by a Product or a service? Since a Product is defined as a tangible item after it has been handed over by the Insured, the plants fit that definition.

The plants supplied by the Insured did not cause Injury to people nor did they damage people's property. They did, however, cause the farmer a pure financial loss because he missed a crop growing cycle that could have produced an income.

Thus the Insured should have had Products Inefficacy cover for this claim as their Product (the grapevines) caused the third party (the farmer) a pure financial loss.

Curb Your Enthusiasm

The Insured installs security equipment at their customer's warehouse. The system is designed to automatically shut down the warehouse when it detects an attempted robbery. When the system malfunctions it triggers a false alarm which results in lost income.

Where would the claim be covered if the warehouse operators sue the Insured for that lost income?

First, the security equipment is a product that did not perform as intended. Since nobody was hurt and nothing was lost or damaged, we are dealing with a pure financial loss making this a Products Inefficacy claim.

However, if the loss arose as a result of a service, then it would be a Professional Indemnity claim.

A Sticky Situation

The Insured provides a chemical that is used by plastic bag manufacturers. The bag manufacturers line the inside of their all-purpose domestic kitchen bags with the chemical. This makes it much easier to open the bag. The bag manufacturers sell these bags to retailers who supply the domestic market.

The loss arose when the Insured supplied a defective batch of chemicals. As a result, customers complained and demanded refunds because the bags were difficult to open. The retailers in turn demanded a refund from the bag manufacturers who then demanded compensation from the Insured. Where would this be covered?

This would be a Products Inefficacy claim as the chemical did not alter the bag for the worse, it just did nothing. It was as if the bag manufacturers had forgotten to add the chemical (which they could show was not the case).

Had the chemical discoloured the bags, for example, that would have been a Products Liability claim because it would have detrimentally altered the bags.

More Whining about Wine

The Insured produces and applies wine bottle labels for their customer. The wine is destined for a European market. Due to incorrect labelling the wine is rejected at the European port. The Insured reprints the labels and sends their staff to Europe to replace the labels. Unfortunately, the customer sues the Insured for the warehousing costs incurred while the bottles of wine are being relabelled. Where would this be covered?

This would be a pure financial loss because nobody got hurt and nothing was lost or damaged. Further, the loss was caused by a tangible item after the Insured handed it over – which falls within the definition of a Product. This means that this is a Products Inefficacy claim.

Mixing with the Wrong Crowd

The Insured is a building contractor. The Insured's employees do not use the specified concentration of ingredients to mix the concrete for a building. Once the building has been completed, the municipality tests the concrete and discovers the mistake. The municipality delays approval for the building. The building owner sues the Insured for their *loss of rental income*. What cover would the Insured need?



It is the Insured's Product (i.e. the concrete that they supplied) that caused the loss. The building did not fall down and there were no injuries: the loss sustained by the building owner is a purely financial loss. The building was simply worth less money because of the mixing error.

This makes it a Products Inefficacy claim because a Product caused a pure financial loss.

Stinky Paint

This example shows that a product “failing to perform as promised” is not necessarily a Products Inefficacy loss.

The Insured manufactures an anti-bacterial compound that is mixed into a customer's paint product. Due to a fault with the compound the paint started to stink and a large batch of paint had to be scrapped.

This might look like a Products Inefficacy claim. However, the Insured's Product failing to perform as intended caused Damage to the paint, making this a Products Liability claim.

This is a Damage claim as the customer's paint (a tangible item) was physically changed for the worse. This means that the root cause was Damage, not a pure financial loss, making this a Products Liability claim.

The relevant exclusion under Product's Liability says:

*This Section does not cover liability for claims arising out of the failure of any Product or part thereof to fulfil its intended function or to perform as specified, warranted or guaranteed unless **such failure shall result in Injury and/or Damage** which would not have occurred but for the failure of the Insured's Product.*

The intention of the highlighted words in the clause was to cover Injury and Damage consequent upon the Insured's Product not working properly. For example: brake shoes supplied by the Insured did not stop the vehicle as intended.

However, the way the clause is worded goes much further than the underwriters might have intended. It also covers losses which were not actually caused by the Insured's Product, but arose simply because the Insured's Product failed to prevent the loss. The next example illustrates how this could happen.

Crying About Milk

In this example of a Products Liability claim the Insured's product did not actually cause Damage, but simply failed to prevent Damage.

The Insured provides anti-microbials which are included in its customer's dairy products. Without the anti-microbials the product will spoil in 24 hours, but with the anti-microbials the product will last for 7 days. The claim arose when defective anti-microbials were added to the customer's dairy products and they spoiled after 48 hours. Although this was an improvement on having no anti-microbials, they did not live up to what was promised.

In the previous example, it may have looked like the insurers were underwriting marketing promises made by the Insured to their customer. Underwriters should be very careful about writing risks like this and the next claim provides an even more striking example of underwriting marketing promises.

Fuel Additive

The Insured provides a fuel additive which the Insured promises will reduce customers' fuel bills by 20% and that the use of the additive will not invalidate the warranty on the vehicles. The Insured's customer decides to fully embrace the Insured's product across their entire fleet of 100 new cars. After a month they discover that the use of the fuel additive does invalidate the warranty on the vehicles, despite there being no damage to the vehicles.

This would be an example of a Products Inefficacy claim because the Insured's Product (i.e. the additive) caused a financial loss.

Products such as fuel additives, rust inhibitors and even paint are sometimes promoted using a phrase such as 'insurance guaranteed'. This should give underwriters a warning signal.

Questions on Products

Mr Bean

The Insured manufactures tins. His customer (Mr Bean) manufactures baked beans and uses the Insured's tins as part of the "Full of Beans" line of tinned food products. After the tinned food is distributed to retailers is discovered that the Insured's employees did not use the correct disinfectant in the manufacturing process. As a result it is *possible* that some of the tins might contain contaminated baked beans which, if eaten, could result in Injury. Because of this concern the retailers are unwilling to sell Mr Bean's product.

Which part of the policy would cover the Insured if they were sued for Mr Bean's loss of income?

Answer

Since nobody was harmed and there is no evidence that the tins detrimentally altered the beans, this is a pure financial loss. The loss was caused by the Insured's Product which means it was a Products Inefficacy loss.



There would often be a product recall component to a loss like this. The Insured would be wise to also purchase Product Recall cover.

Arachnophobia

In order to gain an advantage over their competitors, the Insured, a pest control company, promises that their spider poison will eradicate spiders for a period of five years. After four years their customer, a hotel, discovers that the Insured's spider poison has stopped working.

Which part of the general liability policy will respond if, on discovering the spider infestation, the guests freak out and demand a refund?

This would be Products Inefficacy as the Product caused a pure financial loss.

Which part of the general liability policy will respond if a guest is bitten by a spider and sues for her injuries and medical bills?

This would be Products Liability as the Product failed to prevent an Injury.

Alien Invasion

A neighbour sues the Insured for allowing alien vegetation to spread from their property to the neighbour's property. Would this be a Products Liability claim or a Products Inefficacy claim or neither?

Assume that the definition of a Product is "... tangible property after it has been handed over ..."

Firstly, we need to establish if this is a pure financial loss. Since the alien vegetation would have detrimentally altered the neighbour's property, we are dealing with a Damage claim.

Next, we need to determine if the alien vegetation is the Insured's Product. The alien vegetation would not fall within the definition of a Product since the Insured never "handed it over" to the neighbour.

Answer

Neither the Products Liability nor the Products Inefficacy Section of the policy would cover this loss. The Public Liability Section may cover the loss.

Isn't this a Products Guarantee claim?
No. Although the name "Products Guarantee" suggests cover for losses caused by an under-performing Product, it only pays the costs of replacing the Insured's defective Product (i.e. the cost of applying new poison).

More about Products Guarantee on page 57

There will be times when none of the Sections and Extensions of the commercial general liability policy will provide the necessary cover.

The Products Inefficacy Wording

At this stage it would be beneficial to look at a typical wording for the Products Inefficacy Extension:

Notwithstanding that the General Insuring Clause only provides for liability arising out of Injury and/or Damage and subject otherwise to the terms, Conditions and Exclusions of the Policy, in the event of any claimant alleging that he has suffered financial loss by reason of tangible property (other than the Insured's Products) being

- 1. rendered of less value, or*
- 2. rendered incapable of full commercial benefit*

due or alleged (other than by the Insured) to be due to the failure of the Insured's Products to perform as specified, warranted or guaranteed and/or to fulfil their intended function, the Insurers hereby agree that they will not raise as a defence to granting indemnity by this Policy that no Damage (as envisaged by the General Insuring Clause of the Policy) has occurred.

The Insurers shall also indemnify the Insured in respect of all costs incurred with the consent of the Insurers, which consent shall not be unreasonably withheld, in avoiding or mitigating the effects of such failure of the Insured's Products to perform as specified, warranted or guaranteed and/or to fulfil their intended function provided that the Insured shall be liable for any additional First Amount Payable stated in the Schedule.

Let's dissect this wording

Notwithstanding that the Operative Clause only provides for liability arising out of Injury and/or Damage and subject otherwise to the terms, Conditions and Exclusions of the Policy ...
the Insurers hereby agree that they will not raise as a defence to granting indemnity by this Policy that no Damage (as envisaged by the Operative Clause of the Policy) has occurred.

This says that although the Operative Clause limits cover to Injury and Damage losses, this *and only this* part of the Operative Clause is overridden by the Products Inefficacy Extension.

In more words, the Insurers will not use *no Damage* as a reason to repudiate a claim against this Extension, thus pure financial losses are covered. Having done that, it would be important to specify that that is the *only* change and the insurers have not dispensed with the other policy provisions (such as there being no cover for employee dishonesty).

This part of the wording articulates the cover:

in the event of any claimant alleging that he has suffered financial loss by reason of tangible property (other than the Insured's Products) being

1. rendered of less value, or

2. rendered incapable of full commercial benefit

due or alleged (other than by the Insured) to be due to the failure of the Insured's Products to perform as specified, warranted or guaranteed and/or to fulfil their intended function

It is important to understand that the cover is limited to tangible items causing other tangible items to be less valuable. It also states quite clearly that the claim must be made by the third party (by using the phrases "*other than the Insured's*" and "*other than by the Insured*").

We have already explored several examples of the cover provided, but let us re-examine one of those examples and show what would not be covered.

Overcommunication

The Insured installs security equipment at their customer's warehouse which is designed to send a notification SMS to the customer if there is an attempted robbery. When the system malfunctions, it sends thousands of SMS messages to the customer causing them to incur a large phone bill.

Would the Products Inefficacy Extension cover the loss if the customer sued the Insured for the unnecessary phone bill?

Since nobody was hurt and nothing was lost or damaged, we are dealing with a pure financial loss. Further, the loss was caused by the Insured's Product failing to perform as promised. At this stage it would look like a Products Inefficacy claim. However, the Insured's Product did not cause the customer's *tangible* property to become less valuable. The customer's phone and SIM card are still as valuable as they were before the malfunction.

This loss would therefore *not* be covered by the Products Inefficacy Extension.*

*Although this scenario is not covered, in another example we will show how there would be cover if circumstances were to change slightly.

Getting All the Cover You Need

The Insured is a dog breeder who provides the breeding services of a pedigreed male dog. After covering several bitches the dog's pedigree comes into question. As a result, all the customer's puppies are disqualified from holding the pedigree and are unable to fetch the expected prices when sold. Would the Products Inefficacy Extension respond if the customer sued the Insured for their lost income?

This would be a pure financial loss because the bitches were not physically harmed by the dog's lack of pedigree. Further, the Insured *did* hand a tangible item over to the customer, and that tangible item did not perform as promised. The complexity arises from the fact that, at the time the dog was covering the bitches, the puppies had not yet come into existence. But we maintain that the claim should still be entertained because the wording does not specify that the puppies be tangible at the time the Insured's Product (the dog) was handed over to the customer.

This is a claims example where various underwriters are likely to hold different views on whether the loss is covered or not.

Mitigation Expenses

The Products Inefficacy Extension not only indemnifies the Insured for their losses, it also provides for loss mitigation costs.

The Insurers shall also indemnify the Insured in respect of all costs incurred with the consent of the Insurers, which consent shall not be unreasonably withheld, in avoiding or mitigating the effects of such failure of the Insured's Products to perform as specified, warranted or guaranteed and/or to fulfil their intended function provided that the Insured shall be liable for any additional First Amount Payable stated in the Schedule.

The Seeds of Failure

The Insured is an agricultural cooperative that sells seeds to farmers. After distributing batches of seeds to various customers, it is discovered that there was a miscommunication between the cooperative and the testing laboratory, and that the germination rate of the seeds is much lower than promised. In order to prevent the farmers from sowing the defective seeds, they incur costs in communicating with all the farmers and retailers and they also offer to replace the defective seed with new seeds. Would the Products Inefficacy Extension cover both the communication costs as well as the cost of replacing the seeds?

Whilst most underwriters would not hesitate to cover the communication costs, many would choke on the idea of replacing the defective seed since this amounts to a Products Guarantee claim. The Products Liability Section of the policy specifically excludes the cost of repairing or replacing the defective goods, but the wording above contains no such exclusion which means that the cost of replacing the seeds would be covered (unless there was an exclusion elsewhere in the policy that restricted the cover).

More Products Questions

Blind Faith

The Insured trains guide dogs which are paired with visually impaired customers. There are two stages to the process. During the first 12 months the dogs undergo intensive training and evaluation with the Insured's staff. After that the dog and their new owner undergo a further nine-month bonding program together.

After most of the bonding program was completed, it became apparent that the animal was unsuitable as a guide dog. An investigation revealed that the Insured had negligently overlooked a report which identified the problem before the bonding program started.

The customer, a highly paid lawyer, sued the Insured arguing that their negligence had wasted hundreds of hours of his billable time. Would this loss be covered by the Products Inefficacy Extension?



Answer

We start by establishing if this is a pure financial loss. It clearly is a pure financial loss because no one was hurt, and no property was damaged. Contrast this to an Injury claim that would have arisen had the dog caused Injury by biting the owner, or leading the owner into oncoming traffic.

The next step is to establish if the dog is a Product of the Insured. Since the dog is a tangible item which was handed over to the customer by the Insured, it clearly is a product.

On the face of it, this would be a Products Inefficacy claim. However, the Products Inefficacy Extension imposes a further requirement on the loss: it only covers losses where the Insured's Product causes the third party's *tangible property* to become of less valuable in some way.

This is not a Professional Indemnity claim because the loss was caused by the Insured's Product.

This loss would not be covered under any of the Sections and Extensions of most general liability policies. Some CGL policies do provide Mitigation Costs and that might cover the costs of mitigating anticipated losses.

Although the Insured's Product caused a pure financial loss, this would not be a Products Inefficacy claim because it destroyed the customer's billable time, not their tangible property.

Chop Chop

The Insured offers a vehicle tracking service that alerts owners when their vehicles have been stolen and sends the location of the stolen vehicle to the police. Due to an administrative error by the Insured's staff, some of these folk do not reflect as valid customers of the Insured. When their vehicles are stolen the Insured refuses to assist them. By the time the Insured realises their mistake the vehicles have been chopped up and are irrecoverable. Which part of the Insured's liability policy would respond to their being sued for this loss?

Answer

The first thing to establish is if this loss arose because of the Insured's Product or the Insured's service. There are two arguments here and some underwriters may see the answer differently:

1. One view is that the purpose of the Insured's product was to facilitate the recovery of the customer's vehicle. One way or another that product failed to do this. It is irrelevant whether the reason for the product's failure is faulty soldering or a back-office clerical error. The fact is that the Insured's product was supposed to do something, and it did not do it.
2. A different argument is that the Insured billed the customer for two different things. The first item on the invoice was for the supply and installation of the physical device and the second was for the monthly service of monitoring signals from that device. By separating these two, the Insured drew a distinction between the physical product and the service. Since it was the service and not the physical device that was unacceptable, the loss did not arise out of a fault in the Product.

If the Insured sold the services as part and parcel of the tracking device and not as a separate item, then the underwriters may argue for point 1, that the Insured's *Product* failed to perform as promised. But if the two were sold separately then there is a strong argument for point 2, that the loss arose out of a *service*. Ultimately, the basis of the loss might come down to how the invoice was crafted.

Next, we need to establish if this is a pure financial loss or a Damage claim. The customers are suing the Insured for physical harm to their property. This makes it a Damage claim. If the Insured's Product failed to protect their client's property from being damaged then it would be a Products Liability claim.

Mr Clean

The Insured cleans their customer's industrial equipment which is used to produce tinned food for export to Germany. The customer provides the Insured with a list of chemicals which they may use, and those which may not be used. Due to a miscommunication between the Insured's staff the wrong chemicals are used. The South African authorities do not consider the chemicals harmful and they are commonly found in locally produced food. Although the German authorities agree that the chemicals will not make people sick, they are banned for environmental reasons. Consequently, the German authorities condemn the shipment and require that it be destroyed. Given that the food would not have caused harm to those eating it, would this be a Damage claim?

Yes. The definition of Damage is the "detrimental alteration to tangible property". The Insured altered the customer's food in a way that detrimentally affected its suitability for the German market.

Sticking Together

The Insured supplies their customer with polyurethane which is used in an injection moulding process. Due to a fault with polyurethane it does not dry as quickly as it should. This causes it to stick to the customer's moulds. The customer suffers a loss of sales because of these production delays.

The customer sues the Insured for the increased cost of working related to these delays. Would this be a Products Liability claim or a Products Inefficacy claim?

Answer

This looks like a Products Inefficacy claim because the customer's claim is for the increased cost of working (an economic loss). However, the root cause is the detrimental alteration to the customer's injection moulding machine (Damage). It does not matter that the machine was easily cleaned, the fact remains that it is "tangible property" and that it was detrimentally altered. Since this was the root cause of the loss it would be a Products Liability claim.

Some may argue that the machine was not actually damaged. If the claim is large enough this might be left to the courts to decide

3.3. Product Recall

A Product Recall is the act of removing a batch or production run of products from the marketplace. It is usually done in response to discovering that those products pose an *unexpected* threat of harm to others. This means that a Products Recall policy would not respond to dangers that were known to the Insured at the time they distributed the goods.

For example, there would be no cover for the recall of kitchen knives just because they can cut people. A less obvious example would be knives that can hurt people because they are prone to shattering. There would be no cover if the Insured was aware of this shortcoming before the products were distributed.

Although Recall is found on a liability policy, it is not a true liability insurance. The cover is not triggered in response to a third party's demand for compensation. The intention of Recall is to prevent a liability claim.

The policy would pay for the cost of communicating with the market to let them know that the goods are defective and need to be returned. The next step would be to pay for the cost of identifying *which* goods out in the market need to be withdrawn. This may sound easy, but it is sometimes easier said than done. For example, the Insured might have distributed thousands of tins of tuna, but only one batch of about 100 tins is defective. It may be necessary to incur considerable cost to avoid inadvertently withdrawing the good tins.

Having isolated those products that need to be recalled, the policy would pay for the cost of transporting those goods back to the Insured's premises. As part of that process the goods might need to be warehoused pending collection. Those warehousing costs are usually covered as part of the transport costs. Another cost which is typically also covered is the cost of the extra staff the Insured needs to hire in order manage the recall. These staff could perform a variety of functions such as warehouse workers, security guards or even call centre agents.

In some cases, it may be cheaper and beneficial to destroy those goods where they are. The Insured, for example, distributes strawberry yoghurt. Having discovered pieces of shattered glass in the strawberries, the Insured issues a recall. Given the short shelf life of the product, and the high costs associated with returning the product, which is distributed throughout the country, it makes more sense to destroy the product where it is.

Underwriters will almost always insist that the Insured has the destruction process documented and audited in line with regulatory requirements.

Injury and Damage Losses

Whilst recall wordings can differ greatly, most would cover the cost of preventing physical harm, rather than preventing a pure financial loss. The following example will illustrate the subtle differences here.

Climbing the Corporate Ladder

The Insured imports ladders that are sold to retailers who, in turn sell them to the domestic market. The ladders are clearly labelled so that the users can see that

the ladder is unsuitable for use by persons who weigh more than 100kg. Despite this, regulatory authorities require that ladders be built to hold double their advertised weight. As part of a routine inspection the regulatory authorities test the Insured's ladders and find that they can only bear 150kg.



Despite being obliged to recall the ladders, the policy would not cover the loss because the ladders do not pose a risk to the intended users.

Who makes the call?

The example above easily shows how a recall could be made by someone other than the Insured. Product recalls can be voluntary, where the Insured decides to recall their product, or they can be mandatory. This happens when a regulatory authority or the Insured's customer decides the recall is necessary. This is an important distinction because many recall policies only cover voluntary recalls. In addition to specifically limiting the cover to voluntary recalls, the policy may go further to exclude cover for recalls where the consent of the underwriters was not obtained prior to initiating the recall. This would definitely limit the cover to voluntary recalls.

The next distinction is between first-party and third-party recalls. There may appear to be an overlap between a mandatory recall and a third-party recall. The concepts are, however, quite different. A third-party recall occurs when the Insured does not produce the final product, but provides a component that will form part of the item provided to the end user. Consider a previous example where the Insured provided the tins for Mr Bean's tinned food. If a flaw in the Insured's tins prompted Mr Bean to recall their tinned food then that would be a third-party recall.

Find the Mr Bean
example on page 42

Depending on the wording of the policy, third party recalls might form part of the cover provided by the Products Inefficacy Extension. Many wordings do not draw a distinction between recall costs and other costs that third parties incur as a result of a fault in the Insured's Product.

Does the Products Liability Section provide cover for third party recalls? Suppose in the Mr Bean example above, the recall was triggered when two people got sick from eating food contaminated by the Insured's tins. In this case the matter is somewhat more complex because the Products Liability Section contains the following exclusion:

This Section does not cover liability for claims arising out of any costs incurred in respect of the recall of any Product or part thereof.

This clause is clearly intended to exclude the costs associated with recalling the Insured's own product. However, it goes further and also intends to exclude cover for any third party recall where the Insured's product forms a part of another item being recalled. The intention is to make it abundantly clear that no matter who recalls the offending Product, Products Liability will not pay for it.

Other Considerations

Those policies which provide Products Guarantee cover sometimes also provide the following cover:

Extortion Costs

The policy would cover the ransom monies that need to be paid in order to extinguish the threat. Some recall policies would not respond to this as, at the time of making the threat, the product may not yet have been harmed and would not pose a risk to consumers.

Rehabilitation Costs

This would cover the marketing costs necessary to restore the product's market share to what it was before the loss.

Should the Insured argue that this Exclusion only applies to a Recall initiated by the Insured, the underwriters are likely to argue that, at most, only the cost of recalling the tins that actually caused Injury would be paid by the Product Liability Section .

Redistribution Costs

This would cover the costs necessary to transport the repaired/ replacement products out to the market.

Business Interruption

This would cover the loss of revenue and the increased cost of working because of the recall. Although recall policies commonly cover the expenses directly related to the recall, such as hiring security guards to protect the recalled items, some policies go beyond that and cover other costs such as the lost income that those products would have brought into the company. Some may even cover the increased cost of working when it becomes necessary to buy products from a competitor, if the Insured is no longer able to use their own.

Questions to Ask About the Recall Cover

Since there is a great deal of difference in the cover offered between various recall policies, there are several questions that a broker or a client would do well to ask. These include:

1. Does the policy cover mandatory recalls or only voluntary recalls? For example, would the policy respond to a government-imposed recall?
2. Does the policy cover third party recalls? This is important where the Insured does not produce the final product, but instead produces items that are incorporated into a third party's final product.
3. Does the cover include the cost of repairing or replacing the defective product? This is Products Guarantee cover.
4. Does the underwriter have the necessary risk management facilities to manage a recall? This may seem inconsequential, however, if the Insured is not familiar with the complexities of managing a recall, it is easy to make costly, brand damaging mistakes during the process.
5. What territories does the recall cover extend to? If the Insured exports their products to Canada, would the policy cover the costs of a recall in Canada?



6. Does the cover include extortion costs?
7. Does the cover include market-share rehabilitation costs?
8. Does the cover include the costs related to redistributing the repaired/replaced products?
9. Does the cover extend to losses that were caused by gradually operating causes? For example: distributing a consignment of tinned food that had passed its sell-by date due to a clerical error on the part of the Insured.
10. Does the cover include recall because a product is suspected to contain a carcinogen?
11. Does the cover include the lost income as a result of not being able to sell those products?
12. Does the cover include a recall that is necessary, not because of a fault in the Insured's product, but because of a fault in a similar product distributed by a competitor?
13. Is the recall limited to the threat of Injury or Damage or does it include losses where the product is simply unfit for purpose? An example of this would be ice-cream that contains too much salt. Although it tastes unpleasant, the salt levels are not enough to cause any significant illness.

Is recall cover necessary?

There is often a direct relationship between how well regulated a market is and how likely a recall will be. Europe has more regulatory oversight than South Africa which means that the chances of a recall increases if a South African Insured starts exporting to Europe.

Another important fact to remember is that regulatory authorities are constantly learning from losses. This means that the level of regulatory oversight is changing all the time and the risk of a recall is significantly higher now than it was in previous years.

Another complexity with international exports arises where various territories have different regulatory requirements. This makes it more likely that the Insured will inadvertently break the law.

All too often a recall is triggered by a completely unexpected source. A food manufacturer could take the greatest care in preparing the food, only to have to recall their products because the graphic designer who prepared the package labelling omitted an allergen that needed to be disclosed.

3.4. Products Guarantee

Products Guarantee Insurance covers the cost of fixing or replacing the Insured's defective products for which the Insured is liable after they have been handed over to the customer. These products could have failed to perform their intended function due to faulty design, manufacture or installation. Products Guarantee policies are usually sold by specialist underwriters, that is, Products Guarantee is hardly ever part of a commercial general liability policy.

Corporate wordings might occasionally include Products Guarantee.

The following example illustrates the difference between a Public Liability claim and a Products Guarantee claim.

Contaminated Fuel

The Insured operates a fleet of trucks that transport fuel from bulk suppliers to various fuel retailers around the country. The Insured unfortunately pumps 10 000 litres of the wrong fuel into the fuel retailer's underground fuel storage tank. As a result, the Insured contaminates not only the supplied fuel, but also the customer's reserve of 5000 litres already in the storage tank.

There are two components to this loss. The Damage done to the customer's existing 5 000 litre fuel supply would be a Pollution claim. However, since this Pollution was caused by the Insured's Product, the loss would be covered under the Products Liability Section of a broad form policy.

Cover for the contamination of the 10 000 litres that the Insured supplied would be a Products Guarantee* claim because it involves fixing the Insured's own product.

*Why Products Guarantee? Surely the fuel is owned by the oil company and not the Insured (who is simply transporting it)? Remember that the definition of a Product is any tangible item after the Insured has handed it over. This definition makes its ownership irrelevant.

Pistons

The Insured is a subcontractor working in an automotive piston manufacturing plant. The Insured's function is to ensure that the pistons are dipped in an anticorrosive chemical before they are distributed to various vehicle manufacturers around the world. Unfortunately, the Insured's employee is distracted and one batch of pistons is not properly coated. Sometime after being distributed the vehicle manufacturers return the pistons as they are showing signs of corrosion.

Where would the Insured be covered if the piston manufacturer sued them for this loss?

There are a few points to note about this example. The pistons were manufactured by the customer and were never owned by the Insured. They are, however, the Insured's Product. Why?

At one point during the manufacturing process they were handed to the Insured (so that the Insured could make sure they were properly coated). Once coated, the pistons were handed back to the customer.

A Product is defined as a tangible item after it has been handed over. This means that the pistons were the Insured's Product.

Public Liability Section: No

This claim is not covered under the Public Liability Section since the items were undamaged when they left the factory. The Damage only occurred sometime later.

Products Liability Section: No

It may be tempting to think of this as a Products Liability claim. It is not, because the Product did not cause harm to others.

Sometimes the smallest change to the claim could profoundly change how the policy responds. In this case, the third party could blame the Insured for not performing a professional service properly, or for causing physical damage to their product.

It does not matter that this exchange took place on the customer's premises

Products Guarantee: Arguable

The argument for saying it is a Product's Guarantee claim is that, having established that the pistons are the Insured's Product, they need to be repaired or replaced because they are defective.

Errors and Omissions Extension: Arguable

This might be an Errors and Omissions claim if the argument is that the Insured was negligent in performing their professional service.

Why not defective workmanship? There might be cover under defective workmanship if the pistons caused damage to other property (3rd party losses caused by the Product). In our example, the Product itself was damaged.

4. Minor Topics

4.1. Cross Liabilities Clause

This clause obliges the insurer to separately protect each Insured as if a separate contract of insurance had been issued to each party.

To explain it differently, if one entity covered by this policy sues another entity covered by this policy, then the policy will treat each party as though they were insured separately: the policy will not reject the claim because the Insured is suing itself.

The indemnity limit is not increased by this provision. In other words, if the indemnity limit is R1m and two parties covered by this policy are suing each other, then the limit does not increase to R2m, but stays at R1m. There are other limitations on the clause. Cross Liabilities do not apply to the Errors and Omissions Extension and the Pure Economic Loss Extension.

Suppose, for example, the Insured consists of a parent and several subsidiary companies. If one subsidiary were to sue another, the policy would treat each subsidiary as though it was insured separately.

Suppose the Insured is a body corporate and the policy also covers the people who live there. One of the residents might sue the body corporate because the security gate closed prematurely damaging the resident's car.

The policy would cover the body corporate even though it was being sued by another person covered by the policy.

4.2. Legal Costs and Out of Court Settlements

We will be exploring how the policy covers the amount that the court awards as damages against the Insured for a loss covered by the policy. Sometimes the parties reach an agreement before the matter goes to court. This is not unusual as both parties would want to avoid unnecessary legal expenses. This is known as an out of court settlement.

Do liability policies cover out of court settlements? Yes, the policy would cover these settlements provided that the underwriters agreed to the settlement amount. The underwriters would insist on being involved in the negotiations to ensure that the settlement is not unnecessarily generous or simply a 'good neighbour' settlement.

In addition to compensating the plaintiff for their loss, the court's damages award could also obligate the Insured (the losing party) to pay a portion of the other party's legal costs. The liability policy would normally also cover these costs.

In other words, the policy would pay the Insured's legal and related costs* incurred in defending the matter and, if they lose the court case, it would pay the damages award including a costs order made against the Insured.

*such as the cost of expert witnesses, loss adjusters and other investigators

4.3. Does the policy cover gradually operating causes?

Yes, the general liability (CGL) policy does cover gradually operating causes. There are, however, a few important exceptions:

- » The Pollution Liability Section,
- » Illness to employees in terms of the Employer's Liability Extension (e.g. asbestosis)
- » There would be no cover if the Insured was aware of the gradual operation and did not take reasonable measures to prevent the loss .

This does raise other questions, such as, how does the policy deal with causes where the date of loss is not known?

Three Different Insurers

Consider a policy that has been in force for three years. Each year was with a new underwriter with different Limits of Indemnity and Excesses.

Period of Insurance	Insurer	Indemnity Limit	Retro-active Date
1 Jan 2018 – 31 Dec 2018	Company A	R1 000 000	1 Jan 2018
1 Jan 2019 – 31 Dec 2019	Company B	R2 000 000	1 Jan 2018
1 Jan 2020 – 31 Dec 2020	Company C	R3 000 000	1 Jan 2020

Table 5 – Three Different Insurers

The company sells tinned baked beans and customers started developing illnesses which were traced back to the beans. The problem is that it cannot be determined in which year the loss arose. On the face of it, a claims-made policy would solve this problem because the liability would fall to the underwriter who was on risk at the time the claim was notified. However, if the retroactive date changes, the underwriter may still argue that the cover did not extend back to the years when the loss might have arisen.

Although a general liability (CGL) policy wording does not normally adequately resolve problems like this, using a claims-made policy wording often produces a much clearer answer than a losses-occurring policy wording.

4.4. Does the policy cover contractually assumed liability?

Many liability policies state that ‘liability arising out of contract is excluded’. This is not helpful because many business liabilities somehow start with a contract. Consider a plumber who contractually agrees to install a toilet for the business owner. In the process he accidentally sets fire to the premises. It could be argued that the whole loss started with the plumber contractually agreeing to install a toilet. But obviously it is not the policy’s intention to exclude that spread of fire liability.

As discussed in the Liability 101 course, there are various ways in which the Insured could become liable to a third party. These include liability arising out of delict (wrongdoing) and contractually assumed liabilities. In this case, the plumber is liable to his customer in terms of delict (irrespective of any

contract between them). The simple rule of thumb is that the policy only covers delictual liability and ignores liability arising out of a contract.

Exceptions Where Contractually Assumed Liability is Covered

There are some important exceptions to this in the general liability (CGL) policy.

If a security company caused Injury or Damage while protecting a client's property, they would expect their customer to pay those damages. The security company, to protect themselves, would require the customer (the Insured) to sign a contractual agreement that makes sure that the customer will assume (take over) the security company's liability. This is an example of how the principal (the Insured) assumes the liability of the contractor (the security company).

Sometimes, it could work the other way around - the Insured (who is the contractor) assumes the liability of their principal. An example of this would be an Insured who is a construction company working for shopping mall owners. During the construction process the builders injure one of the mall's customers. In response she sues the shopping mall. It would make sense for the Insured to immediately assume that liability rather than wait for the shopping mall to subrogate against the Insured (recover the cost from the Insured).

Another exception is Transnet property. When companies have private railway sidings they are required by Transnet to enter into agreements in which they undertake to indemnify Transnet for injury or damage arising out of the railways' presence on the company's property. This includes damage which Transnet causes to the Insured's property, third party property and also to Transnet's own property. The policy provides cover for damage to Transnet property as well as third party property damaged by Transnet while they are on the Insured's property.

4.5. Work Away Cover

What value is provided by a Work Away Extension?

The following table illustrates the typical difference between Multimark and broad form policies in terms of their territorial limits. Please refer to the Liability 101 course if you are unfamiliar with these terms.

	Multimark	Broad form
Territorial Limits	RSA, Namibia, Botswana, Lesotho, Swaziland, Zimbabwe and Malawi	Worldwide, but excludes operations domiciled in the USA and Canada
Jurisdiction	RSA, Namibia, Botswana, Lesotho, Swaziland, Zimbabwe and Malawi	Worldwide excluding the USA and Canada
Choice of Law	South Africa	South Africa

Table 6 - Jurisdiction

This means that a broad form policy would cover an injury in France, but a Multimark-type policy would not. Some policies go even further and limit the cover to losses arising at the Insured's premises. These policies would need the Work Away Extension if the Insured was performing work outside of their premises. Suppose the Insured is working in their client's computer room. While in the room the Insured spills a cup of coffee causing damage to some of the client's equipment in that room. Work Away refers to the cover provided for damage to the client's equipment while the Insured was working at the client's premises (away from the Insured's premises).

North America is often a defined term in a policy wording, referring to the USA and Canada and the territories under their jurisdiction. Geographically, North America contains all Caribbean and Central America countries, Bermuda, Canada, Mexico, the United States of America, as well as Greenland - the world's largest island (worldatlas.com).

Is a Work Away endorsement necessary?

What is a work away endorsement? This Extension covers the Insured's losses which arise when they are working away from their normal work premises.

The necessity of this cover would depend on which liability policy the Insured has. Unlike Multimark-type policies, broad form policies generally offer worldwide territorial limits. This means that a Work Away Extension would not be necessary. It would

also depend on where the Insured performs their work. It is very unlikely that the Insured would never leave their premises (not even for a meeting). This means that it is generally unwise to operate without some form of work away cover.

As mentioned above, it is important to watch out for policies that limit their cover to the Insured's premises. If the Insured is a labour broker, for example, the underwriters may want to exclude the harm done by the Insured's employees whilst they are deployed at their customer's premises. In the process those policies may exclude cover for any losses that happen away from the Insured's premises. Unless the cost of the additional 'Work Away' cover is prohibitive, the Insured would do well to purchase it.

4.6. Loss of Documents

Does the general liability (CGL) policy cover liability arising out of the loss of documents?

The broad form and corporate policies often include a specific Extension that covers liability arising out of the loss of documents. If the policy does not include that Extension, it becomes much harder to show that the policy covers it.



The Public Liability Section provides cover for liability arising out of Damage to "items temporarily in the Insured's possession for the purposes of work thereon". Most documents would be in the Insured's care for safe keeping rather than for the purposes of being worked on. The Public Liability Section is unlikely to provide suitable cover.

The Warehousemen's Liability Extension does provide cover for items left in the Insured's care for storage purposes, but that Extension requires that the customer signs the Insured's disclaimer. This makes the Warehousemen's Liability Extension an unsatisfactory alternative

The Custody and Control Extension provides much wider cover and could be a suitable option. In fact, on some policies, this

Extension is wide enough to cover money. Money poses a very high risk and is almost always excluded by the Loss of Documents Extension. For this reason, underwriters will often limit the scope of cover offered by this Extension.

4.7. Is liability arising out of the spread of disease covered?

Yes, many general liability (CGL) policies do not distinguish liability arising out of the spread of disease from other causes. In other words, if a third party suffers Injury or Damage as a result of the spread of disease then this would be covered in the same way that other causes of liability are covered.

Since this would be a significant exposure for some clients, such as cattle farmers, it would not be unusual for underwriters to endorse (alter) the scope of cover offered for the spread of disease.

Many underwriters would balk at the idea of covering the spread of disease under an ordinary general liability (CGL) policy and may dispute that there is cover.

Some underwriters specifically exclude COVID-19.

Other Spread-Type Losses

There are other examples of the 'spread' type of losses. One such example is 'spray-drift', wind shift causing herbicide damage to a neighbour's crop.

GMO

An extreme example arose in the USA where pollen from genetically modified maize (intended for non-human consumption) contaminated neighbouring maize crops. The irony behind this huge recall loss was that the contaminated maize was not actually injurious (when consumed by humans) but it did not pass FDA regulation regarding a limit for GMO content in maize. Downstream storage and distribution facilities and various processed food manufacturers including some big brand names were affected.

4.8. Criminal Acts

Is there cover if the Insured's liability arises out of the Insured committing a criminal act?

On the face of it, one might think that there would be no cover for liability arising out of criminal wrongdoing. This is certainly the case where the Insured deliberately breaks the law, or even fails to take reasonable precautions to prevent the claim. It is nonetheless possible to commit a criminal act despite reasonable precautions. With that in mind, the policy does not specifically exclude liability arising out of criminal action.

No Step

The Insured is held criminally liable in terms of the Occupational Health and Safety Act when a visitor is injured because the Insured's staircase collapsed. The legal costs incurred in defending the criminal charges would be covered under the Statutory Defence Costs Extension. There would be no cover for the fines should the Insured lose the case.

4.9. What is “rip and tear” cover?

If the Insured's Product is discovered to be defective after it has been sold, it may be necessary to recover the Product from the customer. These costs are sometimes covered by the Products Recall Extension under the General Liability policy.

A problem can arise when the customer has consumed the Insured's Product or has incorporated it into some other product. In that case it might be necessary to destroy the customer's property in order to recover the Insured's Product.

Wall Fall

Consider an example where the Insured provides concrete which a customer uses to build a wall. If the wall falls over and damages the neighbour's property,

that would be a Products Liability claim. However, suppose the Insured discovers the defect in the concrete before the wall falls. The problem with trying to recover the Insured's Product is that the concrete cannot be recovered without destroying other components of the wall. In other words, the 'transport costs' that the Recall Extension provides would be useless.

A more suitable option is known as "rip and tear" cover. This Extension covers cost of *"cutting or digging out and removal of the defective product and ... the cost of replacing property of third parties which is damaged during such cutting, digging or removal ..."*. In some ways the cover resembles the Products Inefficacy Extension and is mostly provided for construction related products such as concrete, bitumen, asphalt and cement additives. Underwriters are usually reluctant to provide rip and tear cover because the claims experience can easily become catastrophic.

4.10. Trade Risks

What is meant by a trade risk?

A trade risk is one which forms an ordinary part of the trading of the business. Examples include a loss of business due to increased competition in the market or even the risks associated with losing a major client.

Why are insurers reluctant to insure trade risks?

There are several reasons why insurers are reluctant to insure trade risks. Some of the more common reasons are:

- » For many businesses trade losses happen far more often than other 'ordinary' risks. This means that increasing the premium to accommodate those risks would make the

premium unattractive to the client. Many clients would respond by opting to just set money aside each month to provide for those risks.

- » Trade risks are typically more predictable than 'ordinary' risks. Because the client understands their core business better than the insurer, the client would be in a better position to figure out if the Insurer would win or lose out of the deal. The client would understandably only buy the cover if they thought they would win. This means that the Insurer's loss ratio would almost always perform poorly.

Policy Structure

Most liability policy wordings consist of the following:

1. Preamble
2. Attestation Clause
3. The Operative Clause
4. Policy Definitions
5. Policy Conditions
6. Sections and Extensions providing cover
7. Policy Exclusions

Although these parts of the policy wording were outlined in the Liability 101 course, we will explore them in more detail in the context of a typical commercial general liability policy wording.



1. Preamble

The preamble makes the policy conditional upon the payment of the premium, the truthfulness and completeness of the disclosure by the Insured. It deals with those fundamental issues that need to be in place before the scope of cover can be discussed. Often policies do not have a separate preamble, but deal with these issues as part of the Operative Clause.



2. Attestation Clause

This is where the underwriter signs on the dotted line saying that they agree to bind themselves to the agreement with the Insured.

3. Operative Clause

This clause states what losses the underwriters will pay for. It differs from other policy clauses in that the onus is on the Insured to prove that their claim falls within the Operative Clause. By contrast, if an exclusion is not in the Operative Clause, then the onus is on the underwriter (and not the Insured) to prove that an exclusion applies.



This distinction is easily illustrated using premium payment. The underwriters make the policy's cover subject to the Insured having paid the premium before a certain date *and* before finding out about a loss. The intention is to avoid a situation where the Insured only pays the premium if they have a loss.

If the Insured does incur a loss they would submit a claim for payment. Now suppose the underwriter rejects the claim as the premium was not received in time and the Insured disputes the rejection. If premium payment was included as part of the Operative Clause, the onus would be on *the Insured* to prove that they met its premium payment conditions.

By contrast, if the premium payment was a Policy Condition or a Policy Exclusion (i.e. not part of the Operative Clause), the onus would be on the *underwriters* to prove that the premium was not paid.

3.1. Accidental and Non-Accidental

Some operative clauses, such as those found in Multimark-type policies only cover losses that arise as a result of an accident. By contrast, the operative clauses in broad form liability policies cover non-accidental losses.

There are times when a non-accidental operative clause can make an important difference. A broad form policy, for example, usually covers intentional wrongdoing by the Insured's non-management staff. If the Insured is a security company, then a disgruntled guard might intentionally vandalise a customer's property. Since this was no accident the Insured might struggle to get this loss paid by a Multimark-type policy.

The difference between accidental and non-accidental operative clauses is arguably the most iconic difference between a Multimark-type and a broad form general liability policy. If, in the previous vandalism example, the Insured had a Multimark-type policy, the onus would be on the Insured to prove that the damage to the customer's property was as a result of an accident and not vandalism.

Pretend Police

Here is an example of how a non-accidental loss could arise without wilful wrongdoing on the part of the defendant. In the case of *Loureiro and Others v Imvula Quality Protection (Pty) Ltd (09/15228) [2011]*, thieves gained access to the Loureiro property when a security guard (working for Imvula Quality Protection) was tricked into opening a pedestrian gate. The guard was negligent in that he failed to follow the agreed process of first notifying the Loureiro family before opening the gate.

Mistaken identity

The thieves dressed up as police and said they were responding to a distress signal from inside the house.

Although the guard had intentionally opened the gate it was not his intention that the Loureiro family be harmed. It is unlikely that a Multimark-type policy would cover Imvula's liability. By contrast, a broad form liability policy is more likely to respond because it does not require that the loss-causing event be an accident.

3.2. Injury and Damage

Most of the general liability (CGL) policy covers losses arising only out of Injury or Damage. There are, however, some parts of the policy, such as the Breach of Copyright Extension, that only cover pure financial losses. This means that each Section or Extension needs to contain an Exclusion limiting the cover to either pure financial losses or to Injury and Damage losses.

Mostly operative clauses, especially those on corporate wordings, do not limit the scope of cover to losses arising out of Injury or Damage.

However

If most of the policy only covers losses which arise out of Injury or Damage, would it not make sense to use the Operative Clause to limit cover to Injury and Damage losses?

Those Extensions that do cover pure financial losses could be worded to say that, despite the Operative Clause, they offer pure financial loss cover instead of Injury or Damage cover.

This would mean that the wording is slightly simpler, but more significantly, it would mean that the onus is on the Insured, and not the underwriters, to prove that the loss arose out of Injury or Damage

The Products Inefficacy Wording discussion on page 44 is an example of this.

4. Policy Definitions

This part of the policy wording defines the meaning of frequently used terms to avoid repetition. Although that sounds obvious, what is less obvious is the way in which definitions are used to exclude cover in terms of the policy.

The definition of Injury in terms of a Multimark-type policy covers

accidental death of or bodily injury to or illness of any person

By contrast, a broad form wording would probably define it as

death, bodily injury, illness or disease or mental injury of or to any person

So without having to craft an Exclusion, the Multimark-type policy automatically excludes mental anguish simply by limiting the definition of Injury. Using definitions to exclude cover makes a policy wording more difficult to read. Noticing what is missing on a wording is harder than analysing explicit exclusions.

Apart from the definition of Injury, there are a few other definitions that are worth mentioning.

4.1. Business

When Business is used in the policy wording it refers to the business description (activities) in the Policy Schedule (hence the importance of listing all business-related activities in the Schedule).

4.2. Professional Services

Policies define professional services differently. Here are two broad form definition examples, the first is from a Camargue policy wording:

Professional Services shall mean advice given, work done or any actions taken by the Insured when functioning in any

Remember, as with many legal documents, words and terms used in the policy wording are usually defined so that their subsequent use in the wording is clear: how the word or term is defined can drastically affect the cover provided by the policy.

capacity involving special skill or knowledge related to the Insured's business activities.

The second is from a Lloyd's wording:

PROFESSIONAL SERVICES means advice (other than in connection with the supply or intended supply of the INSURED'S PRODUCTS), designs, specifications, plans, maps, surveys, inspections, computer programs, formulae, supervision, instructions, directions or opinions prepared or given by or on behalf of any INSURED in a professional capacity to others.

The Professional Services definition is useful for defining cover in the Errors and Omissions (E&O) extension and excluding cover in the Public Liability section.

Whilst the Lloyd's wording gives more examples of what a professional service would be, the Camargue wording describes it as activities that require some special skill or knowledge that the Insured has which is not commonly possessed by the rest of society. For example, almost everyone can explain how to cook a basic meal but teaching people how to avoid common mistakes in running a restaurant kitchen requires a specialist's skill.

4.3. Pollution

Unlike the broad form policy, Multimark does not define pollution but states that there is cover for

"seepage, pollution or contamination caused by a sudden, unintended and unforeseen occurrence"

The broad form policy defines Pollution as

"the emission, discharge, dispersal, disposal, seepage, release or escape of any liquid, solid, gaseous or thermal irritant, contaminant or pollutant into or upon land, the atmosphere or any watercourse or body of water or the generation of smells, noises, vibrations, light, electricity, radiation, changes in temperature or any other sensory phenomena but not fire or explosion."

Turbo Seepage

Ever wondered why the word "seepage" is used in a policy wording (Multimark-type) that only covers sudden (and not gradual) pollution? You are in good company! The court also thought that the word "seepage" infers a gradual process.

See St Paul Insurance Co SA Ltd v Eagle Ink System (Pty) Ltd (300/08) [2009] ZASCA 53 (27 May 2009).

These two might seem identical but consider more complex scenarios such as the spread of disease. In those cases it would be better to state the intended scope of cover in more detail.

5. Policy Conditions

The Policy Conditions are often overlooked but they contain some of the most important provisions of the policy. Below we have dealt with some of the most common reasons why underwriters reject the Insured's claims.

5.1. Late Notification

What is the timeframe for lodging a claim? Often an Insured will delay notifying the underwriters of a loss in the hope that nothing will come of it. This is a *really* bad idea: the policy requires that the Insured notify the underwriters as soon as they become aware of an event which *might* lead to a claim. By delaying notification they are breaching a Policy Condition and thus run the risk of having their claim rejected. How much of a delay will underwriters accept? Although this will vary from one underwriter to another, a delay of more than two months would cause many underwriters to reject the claim.

Late Notification: Renewal

Another really bad idea is to try and get better renewal terms by delaying claim notification until after policy renewal. In addition to the late notification condition, the policy wording might also contain a clause excluding cover for losses of which the Insured was aware, but did not disclose as part of the renewal process.

5.2. Non-Disclosure

Each policy will contain a condition insisting that the Insured disclose all the material facts. All too often clients fail to

Is the spread of disease a form of pollution? If it is not then this may be a Public Liability claim.



disclose all previous liability losses or misstate some material fact, such as turnover.

Although such misrepresentation is inexcusable, it can happen that the Insured is caught unaware when, between renewal anniversaries, there are material changes to their business, such as a rapid growth in the Insured's turnover.

5.3. Admission of Liability

If the Insured causes harm to their customer, they might want to confess, reach a settlement deal and put the loss behind them as quickly as possible for marketing reasons. Unfortunately, this is where the policy's requirements and the Insured's marketing needs might come into conflict.

The underwriters are anxious to ensure that the Insured does not do anything to increase their liability or unnecessarily accept any liability. So, if the Insurer's liability increases because the Insured admitted to being at fault, the policy would not pay for the increased liability, and the claim might be rejected altogether.

6. Policy Sections

The cover of most liability policies is provided in terms of Sections and Extensions.

6.1. Public Liability

The starting point of a general liability policy is the Public Liability Section because many, if not most, general liability claims are paid in terms of this Section. This is why it is sometimes referred to as the 'General and Tenants' Section.

The Public Liability Section covers the Insured's liability for Injury or Damage arising in the general course of business.

This very wide description of cover might leave you wondering why the other Sections and Extensions of the policy are necessary: despite the Public Liability Section's wide scope of cover, it does contain a number of significant Exclusions.

Some of that excluded cover is provided by the other Sections and Extensions: the Insured can structure their cover in terms of the policy to meet their needs in a cost-effective manner.

Examples of Public Liability claims include:

- » The Insured accidentally damages the premises that they are hiring. As a tenant they are obliged to pay for damage to the landlord's property.
- » A visitor to the Insured's premises is injured when the Insured does not draw her attention to soap on the floor.
- » A fire at the Insured's property spreads to a neighbour's property.
- » While repairing a pipe, a plumber causes an electric fire by accidentally flooding an electricity distribution box.

In some cases, the Public Liability Section describes the cover in more specific terms. A security company hired by the Insured, for example, is also covered if they cause harm to others while protecting the Insured. The following headings deal with other more specific cover provided by the Public Liability Section.

Exclusion: Cover for Vehicles and Boats

The Public Liability Section excludes most liability arising out of the possession or use of a vehicle, aircraft, hovercraft or watercraft. That said, it does provide some cover.

The intention is to exclude the cover provided under a motor policy: the use of vehicles on a public road is excluded unless the claim is for damage normally excluded under a motor policy.

For example, damage to weighbridges caused by a vehicle's excessive weight. The policy also covers damage caused by apparatus attached to the vehicle, such as a crane attachment on a truck dropping its load.

Since the Exclusion is focussed on vehicles used on a public road, there would typically be cover for vehicles such as golf carts, ride on lawnmowers, forklifts, yellow metal vehicles and the like – provided that they are not used on public roads.

Some policies also cover the use of small watercraft. The policy limits on the size of these craft varies from 5 meters to 15 meters. Their use would be limited to inland waterways, or in some cases, use at sea within 3 miles of the shore. Mostly, watercraft ought to be insured in terms of a marine policy. The intention behind offering limited cover under a general liability (CGL) policy is to cover those watercraft risks that are incidental to the Insured's business. A small paddle boat that is used by guests on a dam at the Insured's holiday resort would be an example of that.

There is no cover for liability arising out of the operation of aircraft, although there are some implied exceptions. Often there will be cover for airstrips not equipped with a control tower. So, there would be cover for damage to small aircraft landing on an airstrip at a farm or game reserve.

Yellow metal vehicles are special purpose vehicles such as bulldozers, graders and other industrial vehicles usually painted yellow.

Sometimes underwriters will exclude damage to aircraft at those airstrips, for example, damage to the undercarriage due to potholes.

Public Liability Cover for Custody and Control

It is common for an Insured to have customers' or other people's property in their possession. There are many reasons for this, such as storage or repairs. Harm to that property would mostly be excluded under the Public Liability Section but the *Custody and Control* topic explains how some policies do provide limited cover in terms of the Public Liability Section.

6.2. Pollution Liability

As society becomes more environmentally conscious, clients will need to be ever more mindful of the liability they face from a pollution event.

We have already explored the definition of Pollution. The Pollution Section is often included automatically when Public Liability is purchased and provides cover for harm to third parties caused by sudden and unforeseen pollution. The two types of pollution that are not covered by this Section are smoke (which is usually covered under the Public Liability Section) and pollution caused by the Insured's products (usually covered under Products Liability).

The Pollution Liability section would usually have all the Exclusions of the Public Liability section (except those relating to the cover provided by the Pollution section).

Food Polluted

Suppose the Insured sells a mixture of oils, chemicals and preservatives to food manufacturers. As a result of a defect in the Insured's product the customer's consignment of food is contaminated. Would this be a Pollution claim or a Products Liability claim? One could argue that food was polluted by the Insured's product, but there is also an argument to be made that the Insured's product simply damaged the customer's food. To avoid confusion, policies move this pollution cover to the Products Liability Section.

Noteworthy Points

No Retroactive Cover

This Section does not provide any retroactive cover. Even on a claims-made policy the loss would need to have occurred during the Period of Insurance. Coincidentally, another part of a claims-made policy that also typically has no retroactive cover is the Breach of Copyright Extension.

No Cover for Carriers and Warehousemen

Remember that the Pollution Liability Section would usually have the same Exclusions as the Public Liability Section which means that there is no cover for liability arising out of the use of vehicles on a public road. If a truck transporting hazardous goods such as fuel or acid were to crash and spill thousands of litres, those clean-up costs would not be covered. Similarly, pollution caused by third party property stored at the Insured's warehouse would not be covered.

This cover is provided in terms of an Environment Impairment Liability (EIL) policy.

No Cover for Gradual Pollution

The cover is limited to sudden and unforeseen pollution. Consider a fuel retailer who stores more than 100 000 litres of fuel in various underground storage tanks. Over a period of several weeks fuel could escape and pollute the surrounding properties. Those clean-up costs would not be covered as the pollution was not sudden.

How sudden is "sudden"? Does the pollution need to have occurred over a period of hours, weeks or years to be considered as gradual? Unfortunately, most policies do not define "sudden". One broad form policy defined it as "95% of the pollutants ... escaped in less than 48 hours".

Asian markets use a time and place definition to address this question – pollution that took place at an identified place during a period not exceeding 72 hours.

Insured Must Take Reasonable Precautions

This Section would also be governed by the policy's General Exclusions which invariably exclude losses where the Insured has failed to take reasonable precautions in preventing a loss.

The concept of "reasonable precautions" is very vague as it differs from one Insured to another.

Would the policy require that the Insured stores chemicals in a banded enclosure?

The answer may prove to be quite simple as the storage of hazardous goods is well regulated in South Africa. An underwriter could easily argue that those regulations establish a benchmark

What is a banded enclosure?
A secondary enclosure to contain spills if the primary container fails.

for reasonable precautions. In other words, if the Insured breaks the law then their claim could be rejected for failing to take reasonable precautions to prevent a loss.

Tenants Liability

Does the Pollution Liability Section cover pollution damage to premises tenanted by the Insured?

The broad form policies of many South African underwriters would cover this. However, it is not unusual for Lloyd's underwriters to exclude this cover. The Exclusion would extend beyond the Insured's current premises and would also exclude those which the Insured had occupied in the past.

EIL Policy vs CGL Pollution Liability Section

It is worth drawing a distinction between the cover provided by the Pollution Liability Section on a commercial general liability policy and the cover provided by an Environmental Impairment Liability policy (EIL policy). As discussed above, pollution cover for tenants is not always covered. This is because some EIL policies provide this cover.

An Environmental Impairment Liability (EIL) policy provides specialist pollution cover for the following areas.

Tenants

This would cover the Insured's costs associated with a pollution incident at the premises that they occupy. This would be an own-damage claim if the Insured were the owners of the premises at the time the loss was discovered.

A common example of this is leaking underground fuel storage tanks at a filling station. In another example, the Insured purchased some residential land on which to develop a townhouse complex. A spill of 2000 litres of diesel occurred when a bulldozer collided with an above ground storage tank.

The policy does not cover own damage losses. The policy would only cover this pollution if the Insured was a tenant on someone else's property.

Although it is uncommon, some EIL underwriters may provide retroactive cover for these pollution exposures.

Gradual Pollution

Since the Pollution Extension on a general liability (CGL) policy excludes gradually operating pollution, it would be necessary to purchase this cover on an EIL policy. Although most of the exposure here would be the cleaning up of the Insured's own premises, the pollutants could seep into the neighbour's property or spread much further were it to reach an underground water source. Normally the EIL policy would cover the clean-up costs on both the Insured's premises as well as the neighbour's premises.

Contractors

Sometimes a construction process carries an unusually high risk of pollution. A normal construction liability policy may, for example, decline to cover work on a pipeline. That cover would be provided by the EIL policy.

Transport of Hazardous Goods

The Environmental Impairment Liability (EIL) policy would provide cover for the road transport of hazardous goods. Some policies limit the cover to the cost of cleaning up the spill, but others also include the associated third-party liabilities.

To explain the difference between these two, consider the transport of oil. Although people can get sick if they breathe in the oil vapours, the bulk of the exposure would lie with the clean-up costs. By contrast, if the Insured were transporting medical waste the spill clean-up costs may be small compared to the liability arising out of people getting sick.

At this stage it would be worth looking at how hazardous goods are categorised. The South African National Standard SANS 10228 categorises hazardous goods into various classes and subdivisions.

Class/ Division	Description	Examples
1	Explosives	There are six divisions ranging from high explosives such as bombs and dynamite to flares and fireworks
2.1	Flammable gasses	These easily ignite when exposed to a flame
2.2	Non-flammable and non-toxic gasses	They are dangerous because they are compressed or for other reasons such as depriving the air of oxygen
2.3	Toxic gasses	These are poisonous, such as chlorine gas.
3	Flammable liquids	The most common examples are petrol and diesel
4.1	Flammable solids	Matches
4.2	Spontaneously combustible	These include cotton waste, fishmeal and sodium sulphide
4.3	Water reactive substances	Lithium and magnesium powder
5.1	Oxidisers	Although not necessarily combustible themselves they can contribute towards the combustion of other materials.
5.2	Organic peroxides	These are sensitive to heat and are thermally unstable
6.1	Toxic substances	Arsenic and some pesticides
6.2	Infectious substances	Medical waste and pathological specimens
7	Radioactive materials	Uranium, plutonium, radium and cobalt
8	Corrosives	Acids and alkalis
9	Miscellaneous	Asbestos and lithium batteries

Table 7 – Hazardous Goods

So, does this mean you need a special permit if you are transporting 5 litres of oil as part of your normal grocery shopping? What about the fuel in your vehicle's tank? No, there are weight limits for various substances. You may carry less than 50kg of pool chlorine without a special vehicle permit. If you intend carrying unusual amounts of these substances then be sure to find out what the legal limits are.

Pollution Clean-Up Costs Extension

This Extension is becoming more common in the South African market and, following a sudden and unforeseen Pollution event at the Insured's premises, would cover the Pollution clean-up costs. What makes this cover vastly different to Pollution cover normally offered by a CGL policy is that the policy will respond even if there has been no claim for damages from a third party.

Some may see this Extension as a scaled down version of the own-damage pollution cover provided by an EIL policy. There are some important differences; this Extension only covers sudden pollution and, depending on the underwriter, it might only respond if there is threat of polluting the neighbour's property. Lastly, general liability underwriters may decline to offer this cover where large amounts of hazardous liquids are stored.

Case Study

The Insured operates a paint factory which caught fire. The fire brigade responded and although their actions prevented the fire from spreading to the neighbouring properties, they caused thousands of litres of paints and oils to be washed onto the surrounding properties. Would those clean-up costs be covered by the Pollution Section of the Insured's broad form general liability (CGL) policy?

To be covered under a general liability (CGL) policy, the pollution would need to be sudden and not gradual. It clearly was sudden.

Note that a clean-up order from a regulatory authority is not a claim for damages.

The neighbours sued the Insured for the cost of cleaning up the mess.

The next requirement is that it was not as a result of the Insured's Product. If it was as a result of their Product, then it would be a Products Liability claim. Since this is a broad form policy, the definition of a Product is "a tangible item after it has been handed over". Although the Insured's stock of paint might look like a "product" it is not a Product as it had not yet been handed over to anyone.

Does this contamination fall within the definition of Pollution? The definition excludes fire and explosion. Although the loss was caused by a fire, it could be argued that the pollutants were separate from the fire and therefore fall within the definition of Pollution. If that argument is accepted, then this would be a Pollution Liability and not a Public Liability claim.

Once again this shows how different underwriters may interpret a wording.

Questions on Pollution

Airport Error

If the Insured operated an airport and, due to a control tower operator's error, several thousand litres of aviation fuel were released onto the neighbour's property, would the Pollution Liability Section of a broad form policy cover the clean-up cost?

Answer

There would be no cover because airports with control towers are excluded in the Public Liability Section and therefore also under the Pollution Liability Section.

Remember

The Pollution section is subject to all the Specific Exclusions under the Public Liability section.

Noisy Neighbours

The Insured operates a night club and the neighbours sue claiming noise pollution has caused them harm. Would this be covered under the Pollution Liability Section?

Answer

No, because the harm occurred gradually and the cover is limited to sudden and unforeseen losses.

6.3. Products Liability

Products Liability covers Injury and Damage caused by a Product, including the Pollution caused by a Product.

Cover provided for liability caused by a Product is explained by example in the *Products and their Inefficacy Exposures* topic.

Does the Policy cover design faults?

Some underwriters believe that Multimark excludes losses which are caused by a design fault in the Product. This would be a very serious limitation and the broad form policy specifically clarifies this by stating that losses which arise out of the design of the product are *not* excluded. This is particularly important in the context of the Consumer Protection Act.

This concept is easily confused with Errors and Omissions cover (discussed later under the Errors and Omissions Extension).

Toasted

Consider an engineer who designs toasters. He makes a mistake which causes the toasters to overheat and catch fire. As a result, there are two claims: the customer sues the manufacturer for her injuries and the manufacturer in turn sues the engineer for producing a faulty design. The Products Liability Section of the manufacturer's policy will respond to the Injury claim. The Errors and Omissions extension of the engineer's policy will respond to the bad design claim.

The manufacturer did not sue the engineer for Injury or Damage. The manufacturer sued the engineer for pure financial loss resulting out of a faulty design.

Higher Grade

Even if the manufacturer subrogates against (tries to make a recovery from) the engineer this would not be a Products Liability claim against the engineer, as the engineer did not hand a physical toaster (Product) over to anyone.

6.4. Negligent Advice

Sometimes the Insured's Product causes harm to others, not because there was anything wrong with the product, but simply because the wrong product was used.

Which is Which?

The Insured sells a variety of agricultural remedies. A farmer asks the inexperienced shop assistant which product should be used to fertilise his crops. Somewhat confused by the packaging, the assistant mistakenly recommends a herbicide instead of a fertiliser. As a result, the Insured is sued when most of the farmer's crop is destroyed.



Since this Section is so closely associated with the Products Liability Section, they are almost always sold together.

To some people Negligent Advice looks confusingly like Professional Indemnity cover, but there are three important differences.

Differences between Negligent Advice and Professional Indemnity

The First Difference: Injury and Damage

As with the Products Liability Section, the Negligent Advice Section covers Injury and Damage caused by the Insured's product. By contrast, the Professional Indemnity policy usually excludes liability arising out of Injury and Damage.

There are exceptions such as a medical malpractice policy, a form of professional indemnity cover, that does include Injury.

The following examples illustrate this difference.

Negligent Advice

The Insured is the local agent for a rust preventive paint product for cars and other vehicles. The customer asks how much paint would be needed to cover the vehicle. The Insured negligently underestimates the amount and sometime later is sued for rust damage to the vehicle. This would be a Negligent Advice claim.



Professional Indemnity

Suppose the customer's question in the previous example was "is applying rust protection a legal requirement in South Africa?"

The Insured mistakenly says "no" instead of "yes". As a result the customer is later fined by the authorities for non-compliance.

If the customer sues the Insured for this loss it would be a Professional Indemnity claim: nothing was damaged and nobody was injured, it was a pure financial loss.

The Second Difference: Products Advice

Negligent Advice covers inaccurate advice given to promote the Insured's *Products or services* and losses related to these products and services. Professional Indemnity covers the Insured's negligence in their professional capacity and specifically excludes losses arising out of products.

Free Advice

The third big difference is that, unlike Professional Indemnity, Negligent Advice must be given for free.

Saying that the advice must be given "for free" deserves further explanation. In one way or another, almost any advice given to a customer must be paid for.

Suppose Mary walks into a retail store and asks which washing powder will remove the stains from her clothing without bleaching them. Although the retailer is unlikely to send her a bill for the shop assistant’s time, that cost (together with all their other operating expenses) is nonetheless factored into the price of washing powder and other groceries.

When the policy wording states that the advice must be given for free, the intention is to exclude advice that is specifically charged for.



In other words, advice you receive from an agricultural specialist who analyses your soil and rainfall patterns and then sends you a bill together with his report, is not covered by the Negligent Advice Section.

By contrast, the advice given by a shop assistant who recommends which of their fertilisers are best suited to dry weather conditions would be covered.

Comparing Professional Indemnity with Negligent Advice

Professional Indemnity	Negligent Advice
Covers pure financial losses. Injury and physical damage are mostly excluded.	Only covers claims for Damage and Injury and does not cover pure financial loss
Covers negligence in the conduct of the Insured’s professional activities.	Covers inaccurate advice given in promoting the Insured’s products or services.
Excludes liability arising out of products.	Only covers losses related to the Insured’s products and services.
Covers advice which was specifically charged for.	Provides no cover for claims arising out of advice for which a fee was charged.
Example An accountant is sued for giving bad financial advice to a client.	Example A pharmacist gives free advice on which medicine to use. He is sued when a patient is harmed by the wrong medicine.

Table 8 – Professional Indemnity v Negligent Advice

6.5. Case Study

The Insured sprays paint onto valves that belong to their customers. Due to an incorrect application of this paint the customer suffers a loss. Consider the following scenarios:

1. *There is Damage to the valve.*

The policy would not* cover Damage to the valve if that Damage is caused as a result of work on the valve. For example: if the wrong paint is sprayed on the valve and it warps the plastic seals on the valve.

The Public Liability Section would cover Damage unrelated to the actual work. Example: after spraying the valve the worker accidentally drops the valve and breaks it.

2. *Because the valve does not work properly there is Damage to third party property.*

An example of this would be an explosion at the customer's factory caused by a pressure build up because the valve did not close properly due to the paint being too thick. This would be a Products Liability claim.

3. *There is pure financial loss.*

An example of this would be a loss caused to the customer because his factory construction project is taking longer due to the paint on the valves being too thick and taking too long to dry. This would most likely be a Products Inefficacy claim.

*The Custody and Control extension of some policies may cover the damage to the valve.

However, underwriters are usually reluctant to cover such trade risks.

Case Study Question

Why would point 2 above be a Products Liability claim if the Insured was working on a customer's product? Surely it is the customer's Product and not the Insured's?

Answer

On many policy wordings, including broad form, the definition of a Product (note capitalisation) is expanded to include any tangible item the Insured has handed over. In other words, an

item would be defined as being the Insured's Product even if the Insured never owned or manufactured the item. All that is necessary is that the Insured had the item in their possession and then handed it over to someone else.

7. Policy Extensions

In addition to the policy Sections there are several Extensions that also provide cover. The most common of these Extensions are Statutory Defence Costs, Wrongful Arrest and Defamation.

7.1. Statutory Defence Costs

Most liability policies exclude liability arising out of the Insured's criminal action. The general liability (CGL) policy is no exception, but it does recognise the need to cover the legal defence costs of the Insured. There are several reasons for this. The first being that the Insured may have been wrongly charged.

Unlike most Directors' and Officers' policies, the general liability (CGL) policy does not require that the defence costs be repaid if the Insured is subsequently found guilty, or even pleads guilty.

Another good reason to defend the Insured against criminal charges is that, should the criminal case be poorly defended, the resulting judgement might open the door to other liability claims which are covered by the general liability (CGL) policy.

Although the Extension covers the legal costs of defending a criminal action, the actual court award would not be covered. For an insurer to pay the Insured's fines would be *contra bonos mores* (against the public interest).

Interestingly, sometimes a Directors' and Officers' policy will cover the legal costs as well as the resultant fine for a criminal action. But the policy wording does go on to say that no fine will be paid if it is *contra bonos mores*. In other words, if the fine was



of an administrative nature, such as the additional costs incurred by government employees following a late licence application, it might be covered by a Directors' and Officers' policy. However, if the fine was intended to punish the Insured, as would a speeding fine, that would not be covered.

The general liability (CGL) policy provides *no* cover for the cost of fines.

In terms of this Extension there is a big difference between a broad form policy and a Multimark-type policy. The Multimark policy only covers litigation in terms of the Occupational Health and Safety Act, the Mines and Works Act and Electricity legislation. By contrast, the broad form policy covers all legislation except the Companies Act, labour legislation and legislation governing the use of vehicles, aircraft and watercraft.

The Statutory Defence Costs Extension only covers the legal defence costs in terms of a criminal action brought against the Insured. In the Liability 101 course we dealt with a difference between a criminal action and a civil action.



Quick Recap: Criminal vs. Civil

A *criminal* action is brought against the defendant by the State. The government would lay criminal charges against the defendant for breaching the country's legislation. Should the defendant lose, the court would award a fine against the defendant, or possibly sentence them to jail.

Criminal Example

If the health authorities were to bring criminal charges against the Insured in terms of the Occupational Health and Safety Act, those legal defence costs would be covered in terms of the Statutory Defence Costs Extension (and not the Public Liability Section).

A *civil* action is brought by a private person or entity against another.

Civil Example

A visitor sues the car wash because they damaged her car. This loss would fall under the Public Liability Section and that Section would cover her claim for damages, lost income as well as the Insured's legal costs in defending the matter.

Reminder

The court awards damages.

Damage is harm to people's property.

Defence Costs Compared

Table 9 provides a quick comparison of the legal defence costs cover in terms of the Statutory Defence Costs Extension and the legal defence costs offered elsewhere in the policy wording.

	Legal Defence Costs	Statutory Defence Costs
Legal costs in defending	a civil matter.	a criminal action.
Cover is	automatic with policy.	an optional Extension.
The court would	award damages to compensate the victim in civil matters.	impose fines and penalties to punish the offender in criminal matters.
The court award is	typically covered by the policy (subject to the Policy Conditions).	not covered by the policy (fines and penalties are excluded).
Policy indemnity limit	applies to the combined amount of the claim plus the legal defence costs.	is not increased by this Extension's separate limit. ¹
Example	A visitor's medical bills after being injured at the Insured's premises	A fine for an absent balustrade contravening the Occupational Health and Safety Act

¹Example in *Limits of Indemnity* topic study: *Interlocking Clause*

Table 9 – Legal Defence v Statutory Defence Costs

7.2. Wrongful Arrest

Entities such as security companies and shopping centres are vulnerable to allegations of wrongful arrest. Once a person has been arrested, they would be handed over to the court who might

return a not-guilty verdict. In that case the arrested person might bring a charge of wrongful arrest against those who performed the arrest.

The Wrongful Arrest Extension covers the Insured against liability arising out of false imprisonment, assault arising before being placed in police custody and the resulting defamation.

The Extension would not cover liability claims brought by parties other than the person actually arrested. So, there would be no cover were their employer to sue the Insured for lost productivity. Another Exclusion commonly found in general liability (CGL) policies is that of unfair labour practices. Such an arrest could easily lead to an employee being dismissed and should the court hold that the arrest was unjustified, then the employee would insist that their dismissal was unfair.

Cover for unfair labour practices can be purchased through a separate Employment Practices Liability (EPL) policy.

Question

Security Arrested

The Insured operates a security company which responds to their customer's distress call. On arriving at the customer's premises, they see two suspects fleeing. The suspects are captured, arrested and taken to the police station. However, the suspects are assaulted in the process as they strongly resist being arrested. On arriving at the police station the guards are arrested for assaulting the suspects.

Would the Wrongful Arrest Extension cover the Insured's costs associated with the arrest of its own staff?

Answer

No, this Extension only covers claims made by the arrested person. In this case it was the police and not the arrested person who brought the allegations of wrongdoing.



7.3. Defamation

Before launching into the cover provided under this Extension, it is worth looking at what defamation, libel and slander are.

Defamation is a false statement of fact made to someone other than the victim which harms the reputation of the victim. It includes any means of communication, including graphic, pictorial, electronic representations or even verbal statements.

Slander is an oral form of defamation and libel is its written form.

Is defamation a form of Injury and would it be covered under the Public Liability Section of the policy?

Although the definition of Injury includes mental injury, relying on this could get messy as there are likely to be components of pure financial loss, pain and suffering, as well as what is legally known as an 'injury to a personality interest'. The simplest solution is to specifically provide for these losses in terms of a Policy Extension.

The Defamation Extension provides cover for defamatory statements made by the Insured, whether written or verbal. Often general liability (CGL) policies will exclude claims arising out of any publication, radio or television broadcast. This is because that liability belongs under that publisher's Professional Indemnity policy.

7.4. Employer's Liability

This Extension provides cover for injury to employees arising in the course of their employment. In South Africa the employer's liability exposure is less significant than it is elsewhere in the world. This is because these claims are mostly covered by the Compensation for Occupational Injuries and Diseases Act No 130 of 1993 (COIDA Act or COIDA).

It is important to remember that every person participating in the publication of defamatory material could be held liable. This includes the editor, publisher, proprietor, broadcaster and seller.

What is the COID Act

Normally an employee would be able to sue his employer for injuries sustained while working. The employer would need Employer's Liability insurance for protection against such liability. The Compensation for Occupational Injuries and Diseases Act No 130 of 1993 (COID Act) has transferred that liability from the employer onto the government (it also places serious limits on how much an employee can claim). In other words, the COID Act has effectively eliminated the common law right of an employee to sue his employer for injury or diseases that arise in the workplace as a result of an accident.



The purpose of the Act is to “provide for compensation for disablement caused by occupational injuries or diseases sustained or contracted by employees in the course of their employment, or for death resulting from such injuries or diseases; and to provide for matters connected therewith.”

The COID Act applies even if the employee was acting contrary to any law applicable to his employment or to any instruction of his employer, as long as the employee was doing so in the course of business.



Although most employees fall under the COID Act, there are exceptions such as:

- » Domestic servants in private households
- » Members of the armed forces or the police force
- » The wilful misconduct of an employee unless that wilful misconduct causes serious disablement or death prejudicing a dependant who is completely financially dependent on the employee
- » Where a worker is employed outside of South Africa for a continuous period of 12 months or longer
- » Where a worker is ordinarily employed outside of South Africa and has an accident while temporarily working in South Africa
- » Employees who refuse or wilfully neglect medical treatment

Although domestic workers in private households are currently excluded from compensation under COID, this might change.

The COID Act does not apply outside of South Africa, nor does it apply to the State including local, provincial and national state authorities (these entities are referred to as ‘individually liable employers’). The Act does not cover workers who are partially disabled for less than three days.

Is the Employer’s Liability Extension necessary?

The COID Act has eliminated the common law right of an employee to sue his employer for injury or diseases that arise in the workplace as a result of an accident. However, this does not mean that there is no chance of an employer being sued. COIDA, for example, is intended to cover accidents. If an employee was injured as a result of the wilful act of another employee COIDA might not respond.

Further, it is also worth remembering that COIDA does not cover any worker who is employed outside of South Africa for a continuous period of 12 months or longer. Neither does it cover employees who are ordinarily employed outside of South Africa and who have an accident while temporarily working in South Africa, nor does it cover employees who refuse or wilfully neglect medical treatment.

The strongest argument for purchasing Employer’s Liability cover is that COIDA may yet be found to be a breach of a person’s constitutional right to fair compensation for a loss since COIDA’s compensation payments are very limited. Consider *Mankayi v AngloGold Ashanti Limited* [2011]. The Supreme Court of Appeal had upheld a June 2008 Johannesburg High Court decision that employees who qualified for benefits in respect of the Occupational Diseases in Mines and Works Act (ODMWA) could not lodge civil claims against their employers.

Mankayi took the matter to the Constitutional Court arguing that COIDA did not apply to him because he was compensated by the ODMWA. AngloGold’s counter argument was that COIDA precludes common law claims by employees against their employers (section 35(1)). Mankayi’s argument won. The Constitutional Court ruled

It is possible that some employees might refuse certain medical procedures for religious reasons.

As with the rest of this guide, this analysis is not intended as legal advice, but it does highlight a few points that are worth considering.

against AngloGold, paving the way for Mankayi’s R2.6m occupational injury/disease claim* against AngloGold.

*Posthumously awarded

Compared with Employment Practices Liability

The Employer’s Liability (EL) Extension on a general liability (CGL) policy is easily confused with an Employment Practices Liability (EPL) policy. The following table highlights the differences between them.

Employment Practices Liability	Employer’s Liability
Covers pure financial losses arising out of claims of unfair labour practice	Covers injury to employees at work
Damages usually awarded by the CCMA and the Labour Court	Damages typically awarded in the Magistrate’s Court or the High Court
The Insured will be liable to pay the full amount. The government provides no assistance.	In South Africa, these damages are normally paid by the government in terms of the Compensation for Occupational Injuries and Diseases Act. For that reason this Extension excludes cover provided by COID.

Table 10 – EPL v Employer’s Liability

Employer’s Liability Cover and its Limitations

The Employer’s Liability Extension also covers claims where the Insured is held liable as a result of one employee intentionally injuring another. There are some Exclusions to that, such as claims involving drunkenness, firearms or HIV/AIDS.

The Extension excludes claims arising from prolonged exposure to hazardous substances. This is important to remember when underwriting mining risks where employees are exposed to risks such as silicosis.

7.5. Errors and Omissions (E&O)

Professional Indemnity insurance is commonly referred to as Errors and Omissions insurance in countries such as the USA. It is also sometimes known by that name when offered as an Extension on general liability (CGL) policies.

The Liability 101 course explained that the root cause of liability losses can be grouped into three categories. They are either as a result of Injury or Damage, or, if the root cause of the loss is neither, a pure financial loss. An example of a pure financial loss is a tax consultant who causes his client to pay unnecessary taxes.

The Errors and Omissions Extension indemnifies the Insured for claims made against them in respect of pure financial losses suffered by third parties because of the Insured's bad advice or services. At this stage it would be opportune to provide a quick summary of the various types of cover that the general liability (CGL) policy provides for pure financial losses.

Remember these related concepts:
Bad advice or service
+ Pure financial loss =
Errors & Omissions

What caused the pure financial loss?	Type of Cover Required
Services or advice	Errors and Omissions (E&O) Extension
A product	Products Inefficacy Extension
Neither a service nor a product	Depending on the nature of the loss: <ul style="list-style-type: none"> • Pure Economic Loss Extension • Defamation Extension • Breach of Copyright Extension • Advertising Liability Extension

Table 11 – Summary of Cover for Pure Financial Losses

The Errors and Omissions Extension's obvious Exclusions are losses arising out of Injury or Damage or as a result of the Insured's products. There are other Exclusions that show that the intention of the Extension is not to replace a Professional Indemnity policy, but to provide cover for incidental exposures which are not significant enough to justify a separate policy.

Exclusions

There would be no cover for

- » losses arising out of the ownership or hiring out of property or vehicles (this Extension would not be suitable cover for an estate agent who manages property rentals),
- » fines, penalties taxes or other performance guarantees (for example, no cover for not meeting a deadline), and
- » financial advice, insurance, incorrect cost estimates and dishonesty.

There would be no cover for a graphic designer who put the wrong price on her customer's brochure.

Compared with Defective Workmanship

What is the difference between Errors and Omissions and Defective Workmanship? They sound like they could be synonyms but, in many respects, they are complete opposites. Defective workmanship is usually a part of Products Liability whilst Errors and Omissions excludes losses arising out of Products.

Defective Workmanship	Errors and Omissions
Both cover liability which arises when the Insured's work is not up to standard.	
Only covers liability arising out of, or in connection with, Products	Excludes liability arising out of Products
Covers Injury or Damage but excludes pure financial losses	Covers pure financial losses but usually excludes Injury and Damage
Excludes advice of a professional nature given for a fee	Covers advice of a professional nature given for a fee

Table 12 – Defective Workmanship v Errors and Omissions (E&O)

Defective Workmanship Example

The Insured makes a mistake with the wiring while installing an air conditioner at the customer's factory. A week later this causes a fire at the factory.

Errors and Omissions Example

The Insured is an electrical engineer who calculates the air conditioning requirements for the customer's factory. Due to a calculation error he recommends the wrong system. The customer sues the Insured for their wasted investment.

Delivering Goods to the Wrong Address

Suppose the Insured offers a courier service. Does the Errors and Omissions Extension cover liability arising out of the incorrect delivery of a customer's goods?

There would be no cover if those goods were stolen or damaged as a result of that negligent delivery. The Carriers' Liability Extension, discussed later, might provide that cover.

The matter becomes far more complex if the goods are recovered undamaged, but the customer nonetheless suffers a pure financial loss. Consider the following two examples:

1. An examination question paper must be reset when the courier company delivers exam papers to the wrong address. Although the papers are recovered undamaged, there is a risk that students may have obtained a copy.
2. The Insured's customer suffers a financial loss because the incorrect delivery caused a delay to their operations.

Although the Errors and Omissions Extension covers pure financial losses arising out of professional services, it contains an Exclusion for liability arising out of "any Product".

This Extension does not cover liability for or arising from ... any Product or the recall of any Product or part thereof.



A valid argument might be that it was not the Product *itself* that caused the loss, meaning the Errors and Omissions Extension would cover these losses. However, some underwriters might still interpret that Exclusion to mean that the Errors and Omissions Extension does not cover any loss which is in any way related to the Insured's Product.

7.6. Breach of Copyright

This Extension covers the legal costs in defending an alleged breach of copyright or patent. It does not cover the damages award made by the court; it only covers the Insured's legal costs in defending the matter.

As the name suggests, liability policies only cover the Insured's liability. The policy would not pay the costs necessary to enforce the Insured's rights. If the Insured discovered that someone was unlawfully copying the Insured's intellectual property, the cost of suing the offender, or legally forcing them to stop, would not be covered by the policy.

As with the Pollution Liability Section, this Extension does not provide retroactive cover. It only covers losses that occurred during the Period of Insurance. It would not be the policy's intention to cover the Insured if they knew they were breaking the rules. For that reason the Extension excludes acts not committed in good faith.

The intention is to grant the cover where an inadvertent breach occurs incidental to the Insured's activities.

Some clients, such as patent attorneys, work with intellectual property as an important part of their professional services. The Breach of Copyright Extension would not cover those clients since that exposure belongs under a Professional Indemnity policy.

There would, however, be cover for a manufacturer who gets sued for inadvertently using someone else's idea in their processes.



7.7. Advertising Liability

This Extension covers any unintentional defamation or breach of copyright made in the course of advertising or merchandising.

The Extension does not cover clients who offer advertising as a professional service to others. That cover should be provided in terms of a Professional Indemnity policy and not the Advertising Liability Extension on the general liability (CGL) policy.

The Extension does not cover the cost of replacing the adverts nor does it cover costs associated with incorrectly describing the goods, services or their price.

In many ways this Extension is the same as the Breach of Copyright Extension. It covers breach of copyright, there is no retroactive cover, and there is no cover for fines or penalties imposed on the Insured. It differs inasmuch as there is cover for compensation awards made to compensate the third party. Although defamation cover is provided, unlike the Defamation Extension, the cover does not exclude channels of mass communication such as magazines, radio or television.



7.8. Pure Economic Loss

As the name suggests, this Extension only covers pure economic losses where the loss was not caused by physical harm to people or their property. The Extension also has two other important Exclusions, namely that there is no cover for losses arising out of professional services or out of a Product.

We sometimes refer to a pure economic loss as a pure money loss or a pure financial loss. This is done where it can be confused with the Pure Economic Loss extension.

Let's revisit the pure financial losses summary table

What caused the pure financial loss?	Type of Cover Required
Services or advice	Errors and Omissions (E&O) Extension
A product	Products Inefficacy Extension
Neither a service nor a product	Depending on the nature of the loss: <ul style="list-style-type: none"> • Pure Economic Loss Extension • Defamation Extension • Breach of Copyright Extension • Advertising Liability Extension

Table 13 – Recap PureFinancial Losses Summary

Pure Economic Loss Examples

The following two examples show how pure economic losses could arise.

Problem Being Mary

Mary is the company's receptionist and has a strong dislike of bees. Unfortunately, there are many bees around the premises and one day Mary decides to put an end to the problem, once and for all.

She purchases a powerful poison and mixes it 50 times stronger than the manufacturer's recommendation and sprays it around the premises. The management team discover what she has done and notify the neighbours that they need to evacuate their premises due to the potential health and safety risk. The neighbours sue the Insured for their lost income as a result of the evacuation.

Had the poison spread to the neighbours this would have been a claim in terms of the Pollution Liability Section. However, in this example there was no pollution as the poison never spread to the neighbours' property: the neighbours were evacuated purely as a precaution. This claim would fall under the Pure Economic Loss Extension.

Wheat and Potatoes

A group of neighbouring farmers share a crop sprinkler system. The Insured is a wheat farmer who puts fertiliser into the sprinkler system. After he has finished using it, he negligently omits to clean the sprinkler system. Later a potato farmer uses the system, not realising that there is chemical residue in the system.

After a few weeks the potato farmer sues the Insured when it is discovered that these chemicals have caused the potatoes to not grow to their usual size.

This would not be a Products Liability claim because the chemicals did not physically harm the potatoes. The potatoes were neither deformed nor discoloured. There was no Damage to the potatoes, they simply were worth less money because they were smaller than normal potatoes.

This is also not a Products Inefficacy loss because neither the chemicals nor the sprinkler was the Insured's Product. In this case the Insured did not hand the sprinkler system over. He just left it there, intending to return to it later.

Suppose the chemical had deformed the potatoes. This would have been a Damage claim because the neighbour's tangible property had been detrimentally altered. This would make it a claim against the Public Liability Section instead of the Pure Economic Loss Extension.

Is not reaching full potential growth enough to constitute a detrimental alteration?

No, not improving as intended is not, of itself enough, to constitute a detrimental alteration.

In this case the policy wording defined a Product as a tangible item after it has been handed over.

You cannot detrimentally alter something that does not yet exist. However, some may argue that the chemical altered the DNA of the potato seedlings, which constitutes Damage.

Exclusions

A summary of the Exclusions usually found on this Extension.

Work requiring special skill or knowledge

Professional services should be covered under a Professional Indemnity policy or under the general liability (CGL) policy's Errors and Omissions Extension.

Injury or Damage

Losses arising out of Injury or Damage are covered elsewhere under the general liability (CGL) policy

Dishonesty or misrepresentation

Breach of contract, copyright, defamation

Anti-competitive behaviour

The insolvency of the Insured

Claims arising out of labour disputes

Although losses related to an unfair dismissal or employee strike action are examples of a pure economic loss, the Extension excludes labour disputes.

Cover provided in terms of a Directors' and Officers' Liability policy

The cover provided by a Directors' and Officers' (D&O) policy is similar to a Professional Indemnity policy in that it covers pure economic losses arising out of services. The difference is that a Director's and Officers' policy covers the manager in their personal capacity should they be sued for mismanagement.

*An association with the Insured***MaxiLoss**

MaxiCrèche operates a crèche and has a symbiotic branding relationship with MaxiToy, an independent retailer of children's toys. Both MaxiToy and MaxiCrèche are affected by bad publicity when a child is seriously injured at the crèche. The Pure Economic Loss (PEL) Extension would not cover MaxiCrèche if it was sued by MaxiToy for the resulting drop in toy sales.

Losses arising out of any Product

This Exclusion goes beyond harm caused by the Product. It also excludes losses arising out of the incorrect delivery of a product. The intention is to exclude all losses related to the Insured's Product.

*Liability assumed by agreement***Promise Not to Tell**

Sometimes people sign non-disclosure agreements (NDAs) in which they promise not to disclose certain facts to others. If they were to accidentally reveal that information to the wrong people, would they be covered if they were sued in terms of the NDA?

This is a pure financial loss which is caused neither by a Product nor a service. Although it looks like it might be covered under the PEL Extension, there is a specific Exclusion removing that cover.

Breach of Confidentiality

Is liability arising out of a breach of confidentiality covered? Often companies disclose information to each other subject to a confidentiality agreement. A breach of confidentiality is an example of a pure financial loss, since the loss arose without Injury or Damage being done to tangible property.



A breach of confidentiality is not normally covered because the Pure Economic Loss Extension excludes liability that arises entirely out of the Insured's contractual undertakings.

There is, however, a situation where the Pure Economic Loss Extension might cover a breach of confidentiality.

ITold

Suppose the Insured offers IT networking services to its customers, including a legal firm. While working on the legal firm's network, a technician notices a document discussing confidential plans to retrench staff from one of their clients (who happens to employ the technician's girlfriend). One thing leads to another and the Insured is sued for a breach of confidentiality.

This may be covered under the Pure Economic Loss Extension if the Insured can show that the liability would have arisen anyway, even in the absence of the confidentiality agreement, because they had a common law obligation not to steal their customer's secrets.

7.9. Products Inefficacy

The Products Inefficacy Extension is the second place where cover for Products is found in terms of the general liability (CGL) policy (the first being the Products Liability Section). The Products Inefficacy Extension also provides cover for harm caused to third parties by a Product, but that cover is limited to harm caused where there is no underlying Injury or Damage. In other words, it covers pure financial losses caused to third parties by the Insured's Product.

This is best illustrated by example.

Chicken Chow

Suppose the Insured manufactures chicken feed. Due to a manufacturing fault, the feed poisons the chickens. This would be Products Liability claim.

Now suppose the fault causes no harm to the chickens, they simply don't grow as fast as they should. As a result the farmer loses money and sues the Insured for his lost income. This would be a Products Inefficacy claim.

The following table summarises this cover and the examples.

	Products Liability Section	Products Inefficacy Extension
Covers liability to third parties where a Product	causes Injury or Damage.	does not cause Injury or Damage.
Example A fault in the Insured's chicken feed manufacturing process causes the farmer's chickens to	die (Damage).*	grow slower than necessary. There is no Damage, the loss arises out of the farmer's delayed income.

* Remember that Injury applies to humans. Damage applies to harm done to the property of others.

Table 14 – Example Products Inefficacy v Liability

In other words, Products Inefficacy covers pure financial losses caused when the Insured's Product does not perform as well as promised. Products Inefficacy is discussed in more detail under the *Products and their Inefficacy Exposures* topic.

7.10. Product Recall

Should a product's potential for harm be discovered after it has left the Insured's custody the Recall Extension will pay for the cost of recovering the product or paying for it to be destroyed, if that is the more practical solution.

Product Recall is covered in more detail under the *Products and their Inefficacy Exposures* topic.

7.11. Warehousemen's Liability

This Extension covers Damage to other people's (or companies') property while it is temporarily at the Insured's storage facilities. This includes Damage while the property is being loaded and unloaded at the storage facility.

It is very important to note that the owner of the property is required to have their own insurance on the property. The policy insists that there must be a disclaimer where the owner agrees not to hold the Insured liable for damage to their property in the Insured's care. In other words, this Extension is intended as contingency cover, just in case the disclaimer fails (as it typically would if the Insured has been grossly negligent).

One of the reasons behind this requirement is that it would be very difficult for the warehouseman to determine the value of all his customers' goods.

The other Exclusions under this Extension include:

- » Mechanical or electrical derangement unless accompanied by other physical damage. In other words, there is no cover if the thing just stops working and it does not look broken.
- » Theft of the property by the Insured's staff and contractors, or similar acts of dishonesty
- » Delay in the return of the stored property
- » The Insured's activities as clearing and forwarding agents
- » Money, jewellery or other high value items
- » Perishables and refrigerated goods

There is a similar Extension which does not cover the damage to the customer's property but, instead, only covers the consequences of the damage to that property: the Warehousemen's Liability – Consequential Loss Only Extension.

Policy wordings can differ significantly on intended scope of cover. Some may only cover Damage, others may cover pure financial losses such as lost market share.

Consequential Damage

A concrete structure deteriorates due to a delay in cement supply to the site. The Insured, a warehouseman, was unable to make the stored cement available as it was damaged by water leakage.

The deterioration of the structure was caused directly by the delay in cement supply, but indirectly by the inability of the warehouseman to make the stored cement available.

The Damage to the structure would be covered but not the cost of the cement.

Warehousemen's Liability is covered in more detail under the *Custody and Control* topic.

7.12. Carriers' Liability

This Extension covers the Insured's liability for Damage to third party property during transport, loading or off-loading.

As with the Warehousemen's Liability Extension, it is very important to note that the owner of the property is required to have their own insurance on the property. The policy insists that there must be a disclaimer where the owner agrees not to hold the Insured liable for damage to their property in the Insured's care. In other words, this Extension is intended as contingency cover, just in case the disclaimer fails (as it typically would if the Insured has been grossly negligent).

Although this is a common restriction, remember that policy wordings differ greatly. Some might not apply this restriction.

Exclusions

Some of Carriers' Liability Extensions exclude the carrying of vehicles. The intention is that this Extension should not be used as a substitute for a motor traders' external policy. The risk associated with insuring tow-truck operators, for example, is much higher than the ordinary transport of household goods.

Many of the Exclusions found in the Warehousemen's Liability Extension would also apply to this Extension. There would

typically be no cover for the transport of high value goods such as cash and jewellery. This limitation is intended to avoid covering cash-in-transit companies. Other significant Exclusions, such as no cover for cold storage and no cover for employee dishonesty, are also applied.

Lastly, in the same way that the Warehousemen’s Liability Extension provides for a consequential loss only option, the Carriers’ Liability Extension also offers this option.

Carriers’ Liability is covered in more detail under the *Custody and Control* topic.

Compared with GIT Policy

What are the differences and similarities between the Carriers’ Liability Extension on a general liability policy and a Goods in Transit policy?

This table is a very simplified overview.

Carriers’ Liability Extension	Goods in Transit Policy
Both cover damage to goods whilst in transit	
Only covers damage to third party property in the Insured’s control	Covers damage to the Insured’s own property as well as third party property in the Insured’s care
Not intended as primary insurance but only as a contingency if the Insured’s disclaimer fails	Acts as property damage insurance and is priced accordingly higher

Table 15 – Carriers’ v Goods in Transit cover

7.13. Custody and Control

The Custody and Control Extension provides a much wider form of cover than can be found in Warehousemen’s Liability and Carriers’ Liability Extensions. It does not insist on third party disclaimers nor does it apply their other Exclusions such as cold storage or high value items including cash and jewellery.

The Custody and Control Extension is covered in more detail under the *Custody and Control* topic.

Compared with Warehousemen’s Liability

What are the differences and similarities between the Warehousemen’s Liability Extension and the Custody and Control (C&C) Extension?

The cover offered by the Custody and Control Extension is much wider, so much so that underwriters will sometimes amend (endorse) the cover offered by the Custody and Control Extension to exclude cover for cash, jewellery and other items. If the Custody and Control cover has not been endorsed, then the following table provides an indication of what to expect.

This table is a very simplified overview.

Warehousemen’s Liability	Custody and Control
Both cover Damage to third party property in the Insured’s custody	
Goods stored by the Insured as a <i>professional service</i>	Goods temporarily in the Insured’s possession <i>for any reason</i>
Assumes stored goods’ owners have their own insurance cover	Does not assume goods’ owners have their own insurance cover
Contingency if the Insured’s disclaimer fails	The Insured need not have a disclaimer
Excludes temperature sensitive goods	May include temperature sensitive goods
Excludes valuables such as money	May include valuables and money

Table 16 – Recap Warehousemen’s Liability v Custody and Control

7.14. Contractor’s Liability

This Extension covers damage to third party property while the Insured is engaged in construction work. The Insured could, for example, be busy with renovations to their premises. Although damage to third party property is ordinarily covered by the policy, the policy does require that the Insured declares any change that materially increases the risk of a claim. Building alterations pose such a change because they would not be part of the Insured’s ordinary business activities.

This Extension is not necessary if the Insured is a builder, electrician, plumber, etc. If the Insured's normal business is construction related work, then this business description will be reflected on the Policy Schedule. In that case, damage to third party property arising out of the Insured's 'normal' business activities will be covered in terms of the rest of the policy.

Some policy wordings are more restrictive and would exclude construction related activities unless this extension has been purchased.

Lateral Support Extension

The Contractor's Liability Extension would normally exclude losses arising out of the removal of support structures. This cover is provided by the Lateral Support Extension. The risks associated with removing lateral support are far higher than they are with most other construction activities. This lateral support cover is subject to an additional premium, a higher Excess and, usually, far lower indemnity limits.

Contractors' All Risks (CAR) Policy

It is worth considering what liability cover is offered by a typical Contractors' All Risks policy. The cover offered by these policies can differ greatly, but the liability cover often resembles a Multimark-type policy where the Public, Pollution, Products Liability and Negligent Advice Sections have been combined.

Both Cover Third Party Damage

There are a few points to remember about these policies. To some extent there may appear to be an overlap between Contractors' All Risks (CAR) and commercial general liability (CGL) policies since both cover damage to third party property. When the Insured is working at a client's premises, that client would normally be a third party.

Both Exclude Part Being Worked On

A further similarity is that both policies exclude damage, arising from the work, to the actual part being worked on. If, for example, while painting the customer's roof the Insured accidentally breaks the customer's window, both the Contractors' All Risks



(CAR) policy and the general liability (CGL) policy could cover the broken window. Neither policy would cover the roof if the damage arose out of the work being done on it, for example, painting plastic roof panels with a paint which is too acidic, causing the panels to warp.

CAR Often Project or Site Specific

There are, however, several significant differences. The Contractors' All Risks (CAR) policy is often project specific and is limited to the premises being worked on and its surrounds. In other words, the Contractors' All Risks (CAR) policy covers harm to third parties done during the construction process and that would typically extend to cover surrounding property. This could be the neighbour's property, or it might simply be that part of the client's property which is not being worked on. By contrast, the general liability (CGL) policy would not normally be limited to a single site. In fact, policy wordings such as broad form and the corporate wording provide worldwide territorial limits.

Always remember that not all policy wordings are created equal. Even if the insurer claims to have a broad form policy, it would be wise to check its territorial limits.

GGL Excludes More Specific Insurance

The general liability (CGL) policy would often exclude cover which is "more specifically described" in terms of another policy. This means that if liability arises in terms of a construction project, it might be excluded by the general liability (CGL) policy since the Contractors' All Risks (CAR) policy would be the more specific insurance.

CAR Own Damage Loss

In addition to covering third party liability, Contractors' All Risks (CAR) policies can also cover own-damage losses. There may be times when a loss might be an own-damage loss instead of third-party liability simply because of who the Insured is.

To explain this, remember that where construction is done to an existing structure, the insurance is usually arranged by the principal. This is known as Principal Controlled Insurance or PCI. The principal is the person who owns the property (or who acts

on the owner's behalf). If that property is damaged, it would be the principal's own damage loss.

By contrast, where it is a new project, the insurance could be arranged by either the principal or the contractor.

Summary CGL v CAR

In summary, although Contractors' All Risks (CAR) policies vary greatly in terms of the cover they provide, a CAR policy would probably be the more suitable insurance to cover a construction project. However, the general liability (CGL) policy might offer wider cover for the Insured's liability in general.

7.15. Incidental Medical Malpractice

Medical malpractice provides a form of professional indemnity cover that includes Injury. Although the general liability (CGL) policy covers Injury there is an Exclusion for advice of a professional nature. The intention is that a general liability (CGL) policy would never be used as a substitute for a normal medical malpractice policy.

Although the Incidental Medical Malpractice Extension does provide medical malpractice cover, it usually does so with an important limitation; there is no cover if the medical services are offered in exchange for a fee from the patient.

Suppose the Insured operated a cricket stadium and their support staff included a doctor who would respond to visitors' medical emergencies. The Incidental Medical Malpractice Extension would cover the doctor's accidental wrongdoing while treating the visitor's medical emergency. So, the Extension does not insist that the doctor work for free, the requirement is simply that the patient is not the one billed for those services.

The Extension usually also specifically excludes

- » any intentional wrongdoing,
- » services rendered by a person who is under the influence of alcohol or drugs and
- » clinical trials or experimental tests.

7.16. Exhibitor's Liability

The Extension covers Injury or Damage to third parties arising out of the assembly, dismantling and operation of a stand at an exhibition venue. It also covers the transportation of materials and products for the exhibition. This Extension is often unnecessary because liability arising out of these activities is not excluded by the Public Liability and Products Liability Sections of the policy wording.

This is always assuming that the business description is wide enough to include these exhibitions.

7.17. African Territories

When companies expand into African countries outside of South Africa, they often purchase local policies in those countries. Usually this is done because those countries require local operations to be insured with local underwriters. This can pose a problem because it might mean that there is dual insurance for those risks since both the local policy and the international policy would cover the loss.

Although the name of this Extension makes it sound like additional cover is being given, this is not the case. The African Territories Extension reduces the policy's cover to the extent that cover is provided by locally purchased policies. Not only does this solve the problem of dual insurance, it also solves the problem of transgressing the local insurance law which prohibits foreigners from taking risks which the local underwriters want.

How does it work?

Where the Insured's activities in Africa (outside South Africa) are covered by locally purchased liability policies, the South African policy will only respond once the indemnity limit of the locally purchased policy has been exhausted. Further, the indemnity limit of the South African policy will be reduced by the amount paid by the local policy.

Suppose the South African policy has an indemnity limit of R5 000 000 and the local African policy has an indemnity limit of R1 000 000 and there is a R10 000 000 loss. This means that the South African policy will only pay R4 000 000.

	Indemnity Limit	Loss Amount	Money available for this claim
South African Policy	R5 000 000	R10 000 000	R4 000 000
			(R5 million - R1 million local cover)
Local Policy (African country)	R1 000 000		R1 000 000

Table 17 - African Territories

By contrast, if the scope of cover of the local policy differs from the South African policy then, if the local policy offers wider cover, then the South African policy will not respond to those claims in that wider scope of cover. However, if the local policy offers less cover than the South African policy, then the South African policy will act as primary insurance for those events not covered by the local policy.

If the South African policy includes Products Inefficacy and the local does not, then the South African policy will act as the primary policy for all inefficacy claims.

7.18. North America Jurisdiction

Commercial general liability policies do not normally provide cover for countries and territories under the jurisdiction of the USA and Canada. When North America is used in the context of this guide it refers to the USA and Canada.

At this stage it would be opportune to provide a quick recap of some key terms discussed in the Liability 101 course.

- » Territorial Limits define where in the world the loss can occur. If the territorial limits exclude North America (the USA and Canada) then a loss arising in the USA would not be covered. Many broad form policies provide worldwide territorial limits. They might exclude North America to the extent that the Insured has operations domiciled there, but if the Insured simply exports products there, that would be covered.
- » Jurisdiction defines where a legal action may be brought against the Insured. If the Jurisdiction excludes the USA and Canada then, even though the loss occurred in South Africa, there would be no cover if the matter was heard in a Canadian court. By contrast, if the loss occurred in Canada but the matter was heard in a South African court, then there would be a valid claim if territorial limits included Canada.
- » Choice of law defines which court will preside over any disputes between the Insured and the Insurers.

This is an over simplification for the purpose of this guide. Strictly speaking, Territorial Limits refer to the geographical locations where the underwriters will respond to losses.

The following table illustrates the difference between Multimark and broad form policies in terms of their territorial limits..

	Multimark	Broad form
Territorial Limits	RSA, Namibia, Botswana, Lesotho, Swaziland, Zimbabwe and Malawi	Worldwide, but excludes operations domiciled in the USA and Canada
Jurisdiction	RSA, Namibia, Botswana, Lesotho, Swaziland, Zimbabwe and Malawi	Worldwide excluding the USA and Canada
Choice of law	South Africa	South Africa

Table 18 – Jurisdiction Multimark v Broadform

Important Limitations

Although the North American Extension would expand the policy’s jurisdiction to North America, it might not do so for all the Sections and Extensions in the policy wording. This cover is seldom offered

in Multimark-type policies, but the broad form policies would often limit the cover the Public Liability, Products Liability and Negligent Advice Sections provide. In other words, there would be no North American jurisdiction cover for the Pollution Liability Section and various Extensions, such as Products Inefficacy and Employer's Liability.

The Corporate wordings can vary greatly in their scope of cover and may well extend the cover to include the Extensions and, in some cases, even Professional Indemnity.

Where are they?

Since the policy excludes liability arising out of judgements and settlements made within countries which operate under the laws of the United States of America or Canada, it is important to know what territories are being referred to. They are

- » the USA and its 51 states,
- » Canada,
- » American Samoa,
- » Guam,
- » Guantanamo Bay Naval Base (Cuba),
- » the Northern Mariana Islands,
- » Puerto Rico, and
- » the Virgin Islands, U.S.

Insurer's Reluctance

There are generally five reasons why insurers are reluctant to give worldwide cover. In the case of exposure to North America these concerns are often amplified because their society is more litigious.

1. The basis of the law in a foreign country might be very different, exposing the insurer to a greater risk. Some countries, for example, may place a greater focus on "no fault" liability.

2. The laws of the foreign country may include regulations limiting or controlling the cover that a non-local insurer may provide. Some countries may insist that liability policies be written on a losses-occurring and not a claims-made basis.
3. The exchange controls could pose a problem when settling claims.
4. It might be difficult to provide an adequate claims service in certain countries.
5. The risk of violating economic sanctions needs to be considered.

7.19. EEC Liability

This Extension provides a form of professional indemnity insurance for tour operators. It indemnifies them against travellers who allege that the Insured (or the Insured's suppliers) were guilty of misrepresentation during the sales and booking process.

The Extension specifically focuses on the Insured's exposure to legislation in the European Union. Some of that legislation operates on a strict (no fault) liability basis. The legislation further prevents the Insured from contracting out of liability.

Compared with EU Liability

People sometimes confuse the EEC Liability Extension with the EU Liability Extension. Although they are both Extensions to the general liability (CGL) policy, and they sound similar, they are completely different. The EU Liability Extension covers the Insured's liability arising out of Injury or Damage that their products cause in the European Union. This Extension is necessary on Multimark-type policies because, in contrast to broad form policies, neither their territorial limits nor their jurisdictions extend to losses arising in the European Union.

Remember to take note of the *cover* the policy wording provides despite the name(s) of the extension(s).

The European Economic Community (EEC) no longer exists having been, in a way, absorbed into the EU.

We have used EEC liability (for broad form) and EU liability (for Multimark-type) to differentiate between two different types of cover.

The following table summarises the differences between the two Extensions.

EU Liability	EEC Liability
Found on Multimark-type policies	Typically found on broad form policies
Applicable to products being exported to the European Union	Applicable to tour operators with travellers from the European Union
Extends the territorial limits of the Multimark policy to liability arising from exports to Europe	Extends the policy to provide a form of professional indemnity cover
Covers losses arising out of Injury and Damage	Covers pure financial losses

Table 19 – EU v EEC

7.20. Extended Reporting Option

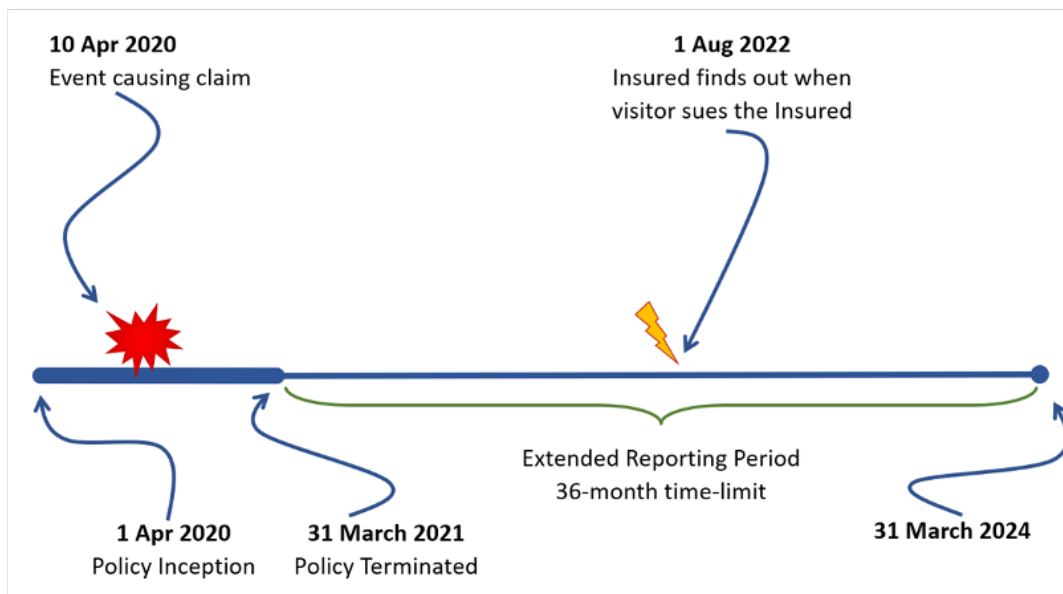
In terms of a claims-made policy all claims need to be notified to the insurers during the Period of Insurance. Please refer to the Liability 101 course for a refresher on the differences between claims-made and losses-occurring policies.

The Extended Reporting Option enables the Insured to continue lodging claims against a claims-made policy after the Period of Insurance has ended. The claims notified during the extended reporting period are treated as if they were made on the last day of the Period of Insurance.

A natural question that flows from this is “how does this Extension differ from simply renewing the policy?”

Although the Extension allows the Insured to continue notifying claims after the Period of Insurance has finished, the policy will only accept claims where the loss arose before the Period of Insurance ended. To illustrate this difference by way of example, consider the following diagram:

In this example the Period of Insurance runs from 1 April 2020 for one year and the Insured has purchased a 36-month extended reporting period. The policy was not renewed, and the Insured was unable to obtain insurance through another insurer.



Suppose that a visitor was injured as a result of the Insured's negligence on 10 April 2020 and, at the time, her injuries seemed insignificant. On 1 August 2022 she advised the Insured that she was suing them for that injury which has turned out to be serious.

Had the accident happened after 31 March 2021, there would have been no cover since the Extension only covers accidents that happened before the extended reporting period started.

If the Insured's Policy were renewed, instead of using the extended reporting period, they would also be covered for losses that happened after 31 March 2021.

Fun Facts

The extended reporting period is seldom longer than 36 months since this limitation is usually imposed on underwriters by their reinsurers.

An extended reporting period is usually offered at the start of the Period of Insurance. In exchange for an additional premium the Insured is given the option to force the insurers to extend the reporting period if the Insured is unable to obtain renewal terms for the policy from any underwriter (irrespective of the premium) due to the Insured's adverse claims experience.

Although the Extended Reporting Period Extension is usually sold as a solution to adverse claims experience, it is sometimes sold together with a short period policy. If the Insured needs cover for an event of, say, three days, they are unlikely to be able to notify the underwriters of a claim before the policy period ends. This would only be necessary for claims-made policies. An alternative would be to offer the policy on a losses-occurring basis.

If the extended reporting period is sold as part of a short period policy the extension would not be dependent on the Insured's claims experience.

7.21. Claims Preparation Costs

This Extension covers the cost incurred by the Insured in producing information required by the Insurers to investigate the claim.

Sometimes the insurers will include this cover at no additional cost as it is unlikely that the Insured will incur costs in proving the claim. The onus is on the third party, the party making the claim, to prove their claim. The Insured could use that 'proof' to substantiate the claim to the Insurers.

Some broad form policies also include a Professional Fees Extension. This Extension operates in the same way that the Claims Preparation Costs Extension works, except that its cover is limited to professional fees incurred by the Insured in substantiating their claim. Some have argued against the value of the Professional Fees Extension saying that it is simply a subset of the cover already offered by the Claims Preparation Costs Extension.

8. Policy Exclusions

In addition to the Exclusions found in each Section or Extension of the policy wording, there are a number of Exclusions which apply to the whole policy. Not every policy contains all these Exclusions, but most policies contain most of these Exclusions.

8.1. Fines and Penalties

There would be no cover for a fine imposed by the court on the Insured. There are times when the policy might cover fines and penalties, but this would be where they are imposed on the Insured's customer because of the Insured's negligence.

Do not get confused between a fine imposed on the Insured (never covered) and a fine imposed on the Insured's customer (which might be covered).

A Step Further

The Insured is a carpenter who builds a staircase for the Insured. As a result of the Insured's mistake the staircase collapses, injuring visitors. The court fines the customer for failing to comply with building regulations. The Insured's policy would respond if the customer, in turn, sued the Insured for the cost of settling that fine.

8.2. Deliberate Acts

Deliberate acts by the Insured are not covered. However, this Exclusion usually only applies to the Insured's management.

Love Taunt

The Insured operates a security company. A firearm was issued by the Insured to an employee before he was deployed as a guard to the Insured's customer (a filling station). One of the filling station's customers was in a love triangle with the guard's girlfriend and started harassing the guard. The outraged guard used the Insured's firearm to shoot this customer who then sued the Insured for his injuries.

The general liability (CGL) policy settled the claim since the Insured's management were not involved in this deliberate wrongdoing.

8.3. Employee Dishonesty

Although the deliberate acts Exclusion usually only applies to the Insured's management, there are some deliberate acts that are never covered. The most significant of these is employee dishonesty. There is no cover for losses when staff use their position of trust in the Insured's organisation to steal from the Insured or to steal from customers.

This is a high-risk exposure and that cover belongs under a commercial crime policy.

8.4. Performance Warranties

Failure to meet contractual obligations is not covered. For example, the Insured must pay a contractual penalty because they did not deliver the goods on time. This is a contractually assumed liability.

Performance warranties are usually seen as trade risk.

8.5. Liquidated Damages

What are liquidated damages? Sometimes it is difficult to quantify a loss in monetary terms. For that reason, the Insured and a third party may agree that if a loss were to occur, then the guilty party will pay a pre-agreed amount. A common example of this would be a breach of confidentiality. Such losses are notoriously difficult to quantify. For that reason, the parties may contractually agree on a predetermined amount should such a loss occur.

Liquidated damages are not covered by the policy. It would be worthwhile to take a moment to understand why liquidated damages are not covered.

Liquidated damages are a form of contractually assumed liability that could provide the third party with a bigger benefit than what they could claim in terms of delict. Since the liquidated damages award may be higher than the 'ordinary' damages award, two significant problems are created.

Firstly, the Insurer's liability is increased unnecessarily. Secondly, the liquidated damages would be punitive if they were more than what is necessary to simply compensate the third party.

The courts are unlikely to enforce a contract if its purpose is to punish the wrongdoer rather than to compensate the injured party. Since the courts would seek to provide a fair and equitable ruling when presiding over a matter, awarding more than what is needed as fair compensation would lead to the unjust enrichment of the third party. That is why South African courts would generally not allow it.

8.6. Reinsurance Exclusions

Some Exclusions are imposed on the underwriters in terms of their reinsurance treaties. These are intended to exclude losses where there could be a large aggregation of risk, such as claims arising out of war, terrorism, civil insurrection, nuclear materials or asbestos. Since the reinsurers seldom have an appetite for such risks the underwriters are prevented from covering them.

8.7. Directors and Officers

There are times when people will sue the Insured's management in their personal capacity instead of suing the Insured company. This could happen when those managers are accused of mismanaging the (Insured) company or of placing their personal interests ahead of the company's interest (where there is a conflict of interest).

The general liability (CGL) policy would exclude such a claim since that cover belongs under a Directors' and Officers' Liability policy.

8.8. Confiscation

Cover for losses arising out of the confiscation of property by government is not covered. Suppose the police raid the Insured's

premises and confiscate customers' property there for repairs, the loss of those items would not be covered by the policy.

8.9. Professional Advice

There is no cover for liability arising out of advice of a professional nature. Despite this Exclusion the cover can be found under the Errors and Omissions Extension.

8.10 Electrical Fields

Damage arising out of electrical or magnetic fields is excluded. Some policies go beyond this and exclude the corruption of data or wrongful disclosure of data.

8.11. Aircraft

The policy would aim to exclude losses arising out of damage to aircraft. Many general liability policies cover damage to aircraft caused by the Insured's landing strip (provided that the landing strip does not have a control tower).

8.12. North American Operations

The Insured's operations which are domiciled in the USA and Canada are excluded from cover. This would also exclude the jurisdiction of the USA and Canada.

8.13. New Exclusions

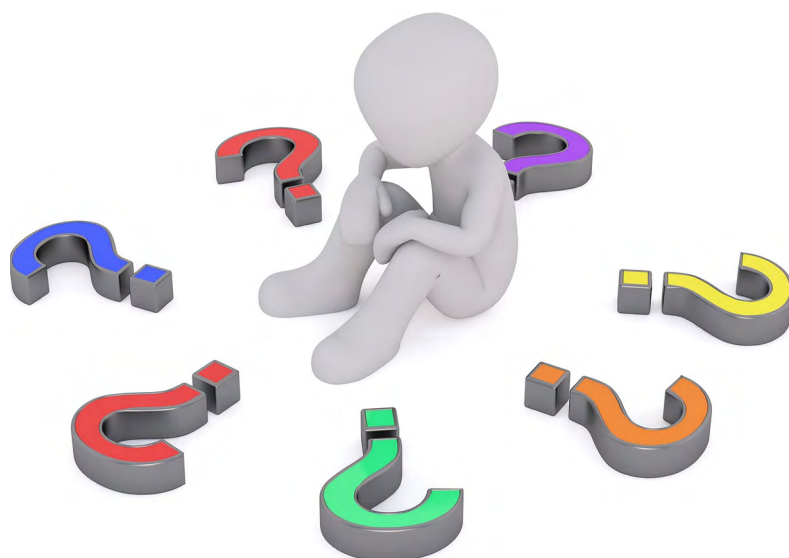
Some new exclusions are starting to appear on CGL policies. Two notable newcomers are:

- » Severe Acute Respiratory Syndrome Coronavirus 2 (SARS-CoV-2)
- » Tobacco Products including e-cigarettes

Although the general liability (CGL) policy provides professional indemnity cover under the Errors and Omission (E&O) Extension, this is intended to accommodate incidental exposures. The more significant PI exposures belong under a Professional Indemnity policy.

Some underwriters do provide cover for sales offices domiciled in North America. This is usually a far smaller risk than a factory or an installation service.

General Questions



1. Thread Bare

The Insured supplies cotton thread to a company that manufactures garments which are sold to the fashion industry. The customer could not sell the garments as the colour of the cotton supplied was not to the agreed specification

Which part of the policy would respond if the customer sues the Insured?

Answer

The Products Inefficacy Extension (a pure financial loss caused by a Product). The colour of the cotton did not of itself detrimentally alter the rest of the garment.

However, if the cotton thread dye had bled onto the garments, discolouring them (Damage), it would have been a Products Liability claim.

2. Bee a Problem

The Insured is a beekeeper who uses a traditional smoker to subdue his bees and collect the honey. Things go wrong, and he accidentally starts a fire: the bees swarm to a neighbour's property. Although no one is stung the property is evacuated and the neighbours sue for lost income.

Which Section/Extension of the general liability (CGL) policy will respond to this claim?

- a. Public Liability Section
- b. Products Liability Section
- c. Products Inefficacy Extension
- d. Errors and Omissions Extension
- e. Pure Economic Loss Extension

Reasoning

It is important to remember that the bees are not the Insured's Product because the bees were not "handed over" to the

neighbours, ruling out the Products Liability Section and the Products Inefficacy Extension.

The next question to ask is if the neighbour's "tangible property was detrimentally altered"? One might be tempted to think that the property was not detrimentally altered because the bees came and left without messing anything up. However, while they were there, their presence, of itself, detrimentally altered the neighbour's property. In other words, adding unwanted angry bees to a property is a detrimental alteration to the property. This means that the root cause of the loss was Damage. That rules out the Errors and Omissions and the Pure Economic Loss Extensions.

Answer

- a. This is a Public Liability loss because the neighbour's property was (temporarily) damaged and the thing that caused the Damage was not a Product.

3. Nursing Old Wounds

The Insured is a plant nursery that sells grape vines as small plants. The wine farmer asks for a specific type of grape, and the nursery's salesman identifies the relevant plant. After considerable time and expense the vine starts producing grapes. The farmer then discovers that the wrong type of grape was supplied and sues the nursery because this type of wine will only fetch half the market value of the intended wine.

What cover should the nursery have had if the loss arose out of the salesman identifying and selling the wrong plants?

- a. Negligent Advice Section
- b. Products Liability Section
- c. Products Inefficacy Extension
- d. Errors and Omissions Extension
- e. Pure Economic Loss Extension



Reasoning

This loss arose as a result of a Product not performing as expected. This rules out the Errors and Omissions and the Pure Economic Loss Extensions. Next, since there was no Injury or Damage we can rule out the Products Liability and Negligent Advice Sections.

Answer

- c. Therefore this would be a Products Inefficacy claim.

4. Nursing a Grudge

The Insured is a plant nursery that sells grape vines as small plants. The wine farmer asks for a specific type of grape, and the nursery's salesman identifies and supplies the relevant plant. After growing the vines the wine farmer discovers that he has the wrong type of grape when he mixes it with other wines. Instead of creating a valuable blend, the mix tastes awful and is discarded.

What cover should the nursery have if the farmer sues the nursery for the damage to his existing stock of wine?

- a. Negligent Advice Section
- b. Products Liability Section
- c. Products Inefficacy Extension
- d. Errors and Omissions Extension
- e. Pure Economic Loss Extension

Reasoning

This loss arose as a result of a Product not performing as expected. That rules out the Errors and Omissions and Pure Economic Loss Extensions. Next, since the root cause of the loss was Damage to the farmers existing wine stock, we can rule out the Products Inefficacy Extension. That leaves us with the Products Liability and Negligent Advice Sections. This is not a Products Liability claim because the Product was not defective,

the Damage was caused simply because the salesman has selected the wrong Product.

Answer

- a. This is thus a Negligent Advice claim.

5. The DNA of the Problem

The Insured is a plant nursery that sells avocado trees as small plants. The farmer purchases the small trees and after spending considerable time and expense in growing them discovers that they have a genetic flaw. He sues the nursery for the cost of growing the trees and the loss of income while he waits for a new harvest to mature.

What Section or Extension of the general liability policy should the nursery have had to cover this loss (in addition to the Public Liability Section)?

- a. Negligent Advice Section
- b. Products Liability Section
- c. Products Inefficacy Extension
- d. Errors and Omissions Extension
- e. Pure Economic Loss Extension

Answer

- c. The Products Inefficacy Extension provides cover for a pure financial loss which arises when the Insured's products fail to perform as reasonably expected.

6. The Pharmacist

The Insured operates a pharmacy that dispenses medicine. The pharmacy sometimes gives advice on which medicine a patient should use. It does not charge for that advice.



Which Section or Extension of the policy provides cover for injury arising out of the prescription of the wrong medicine?

- a. Negligent Advice Section
- b. Products Liability Section
- c. Products Inefficacy Extension
- d. Errors and Omissions Extension
- e. Pure Economic Loss Extension

Answer

- a. The Negligent Advice Section provides cover for incorrect ‘information of a technical nature given in the promotion of the Insured’s Products’.

7. The Warm Smell of Coffee

The Insured upgrades and maintains computer servers for their customers. While programming a customer’s server the Insured’s employee spills a cup of coffee resulting in damage to the server.

What part of the policy would cover the loss if the damage occurred while the server was being worked on at the client’s premises?

- a. Negligent Advice Section
- b. Products Liability Section
- c. Products Inefficacy Extension
- d. Errors and Omissions Extension
- e. Public Liability Section

Answer

- e. Public Liability Section
Why? The root cause was Damage and the server was not a Product (neither was the coffee).

8. Cable Break

The Insured installs power cables at customers' offices. As a result of negligent installation, one of the installed cables has a break in it. This is only noticed some time after the installation has been finished and signed off by the client. There is a short circuit due to this break in the cable and some of the customer's equipment is damaged.

As a result of that damage the client cannot meet an important deadline and loses money.

When the customer sues the Insured the policy provides cover for which of the following losses?

1. The cost of the damaged cable itself
2. The cost of the labour in repairing the damaged cable
3. The damage to the customer's equipment
4. The financial loss suffered by the customer

Losses:

- a. 1
- b. 1 and 2
- c. 1, 2 and 3
- d. 3 and 4
- e. 3

Answer:

- d. Losses 3 and 4: the policy can provide cover for the damage to the customer's equipment and the financial loss suffered by the customer since Products Liability includes defective workmanship.

The policy cannot provide cover for the cost of the damaged cable and the cost of the labour in repairing the damaged cable as these are Products Guarantee claims.



9. Flower Power

The Insured supplies and delivers flowers to companies. While making a delivery the Insured's employee negligently bumps a power switch which causes the customer to suffer a loss due to lost data.

Where would this loss be covered?

- a. Carriers' Liability Extension
- b. Products Liability Section
- c. Pure Economic Loss Extension
- d. Errors and Omissions Extension
- e. Public Liability Section

Hint: Data is not considered to be tangible property.

Reasoning

Since data is not considered to be tangible property, there is no Damage thus ruling out the Public Liability and Products Liability Sections, and the Carriers' Liability Extension. It would not be an Errors and Omissions loss since delivering flowers is not a professional service (it does not require any special skills).

Answer

- c. The loss would be covered in terms of the Pure Economic Loss Extension.

10. Oil and Water

The Insured is a petrol filling station that maintains fuel in an underground tank. As a result of heavy rains storm water seeped into the fuel tank. The Insured filled the customer's vehicle with 20 litres of the contaminated fuel. After a few kilometres the customer's vehicle ceased working. The customer sued the Insured for the damage to her vehicle's engine.

Which part of the policy would cover the loss?

- a. Carriers' Liability Extension
- b. Products Liability Section
- c. Products Inefficacy Extension
- d. Errors and Omissions Extension
- e. Public Liability Section

Answer

- b. Products Liability
Why? The fuel is a Product that caused Damage.

11. Bread Stales Relationships

The Insured provides preservatives which are included in its customer's baked goods (primarily bread and rolls). Without the preservatives the baked goods will go stale within twenty-four hours, the preservatives treble that to three days. The claim arises when defective preservatives are added to the baked goods.

If the claim arises because the bread and rolls grow stale (and mould) within 48 hours, which part of the policy will respond?

- a. Negligent Advice Section
- b. Products Liability Section
- c. Products Inefficacy Extension
- d. Errors and Omissions Extension
- e. Public Liability Section

Answer

- b. The root cause of the loss is Damage to the customer's property which is caused by the Insured's Product. It is therefore a Products Liability claim.



12. When Customers are Underfoot

The Insured's forklift driver reversed the vehicle over a customer's foot. The customer sued not only the Insured for her injuries but also the employee in his personal capacity.

Would the policy defend both the Insured and the Insured's employee?

- a. Yes
- b. No

Answer

Yes. The indemnity granted extends to officials of the Insured in their business capacity.

Why would this not be a Directors' and Officers' claim?
Because the driver is not being accused of mismanaging the Insured company.

13. Carpets

The Insured's business replaced a customer's wall to wall carpets. At the time, the customer's water was disconnected and one of the Insured's employees opened a tap. Sometime after the work was handed over the water was reconnected and this resulted in the customer's new carpets being damaged.

Would the Products Liability Section pay for the cost of replacing the carpets?

- a. Yes.
- b. No, this is a Products Guarantee claim.
- c. No, this is a Public Liability claim.

Reasoning

Is this an own-damage loss?

No, the loss arose after the carpet had changed ownership. If the loss occurred while the Insured still owned the carpet then this would be an 'own-damage' claim, which is not covered by a liability policy.

Did the loss arise because of the Insured's defective workmanship?

The tap does not fall within the definition of a Product so opening the tap would not constitute defective work. This is not a Products Liability claim.

Answer

c. This is a Public Liability claim.

The Public Liability Section would also cover the cost of replacing the carpets since they were installed correctly and the water damage was not as a result of the incorrect installation of the carpet.

14. Spice Girls

The Insured manufactures spices. Their customer manufactures frozen meals and uses the Insured's spices in their products. After the frozen meals are distributed to retailers the customer discovers that the Insured chemically treated their spices with banned chemicals. This means that some of the food might contain harmful allergens which, if eaten, could result in Injury.

Although it is not clear yet which (if any) of the food is contaminated, the customer decides to recall all the frozen meals before consumers eat the food and suffer Injury.

Would the Insured's Products Liability Section cover their customer's loss, given that there has been no Injury?

- a. Yes
- b. No

Answer

No, although the customer's food was detrimentally altered, Product Recall is not usually covered by a CGL policy.



15. Absolute Rubbish

The Insured produces solid waste as a by-product of his manufacturing process. He dumps this waste at a local rubbish dump believing that this is not a contravention of any municipal regulations. Over time these materials decay and become poisonous. A visitor to the dump is injured when he inhales the fumes.

Which part of the Insured's general liability policy is most likely to respond to a claim should the visitor sue the Insured?

- a. Negligent Advice Section
- b. Products Liability Section
- c. Pollution Liability Section
- d. No cover because the Pollution was gradual
- e. Public Liability Section

Answer

- b. Products Liability Section

Reasoning

This would fall under the Products Section of the policy because the policy wording defines a Product as "*any tangible property after it has left the ... control of the Insured which has been ... manufactured ..., treated, ... by or on behalf of the Insured.*"

The Pollution Liability Section would not respond. Although the dump was gradually polluted, it is the visitor (and not the dump) who is suing. The visitor was Injured (and not polluted).

16. Making a Pig of Themselves

The Insured produces pigments that are put into a customer's paint product. Due to a fault with the pigments the customer's unused paint starts to discolour after one month, and a large batch of paint is scrapped.

Which Section or Extension of the Insured's general liability policy would respond if the customer sued the Insured for this loss?

- a. Negligent Advice Section
- b. Products Liability Section
- c. Pollution Liability Section
- d. Products Inefficacy Extension
- e. Public Liability Section

Answer

- b. Since a defect in the Insured's Product caused Damage to the customer's property this would be a Products Liability claim.

17. Centrifugal Funeral Homes

The Insured operates a funeral home which has been tasked with transporting a body to a funeral it has arranged for a large crowd of mourners. Due to the Insured's negligence there is a delay in delivering the body and the body does not make it to the arranged funeral service. The deceased's family sue the Insured for the costs associated with postponing the funeral.

Which part of the Insured's policy would cover this loss?

- a. Carriers' Liability Extension
- b. Errors and Omissions Extension
- c. Pure Economic Loss Extension
- d. Products Inefficacy Extension
- e. Public Liability Section

Reasoning

The costs associated with the funeral's delay are a pure financial loss, ruling out the Carriers' Liability Extension, as well as the Public Liability Section. There was no Product that failed to perform due to defect, ruling out the Products Inefficacy Extension. The transport of a body is a professional service which was executed negligently, ruling out the Pure Economic Loss Extension.



Answer

- b. This reasoning places the loss in the Errors and Omissions Extension.

18. Harassment

The Insured is a tour operator who deploys students at shopping centres to promote their tours. One of the shoppers takes offence at the marketing approach and sues the Insured for harassment.

What part of the policy is most likely to respond to a harassment claim?

- a. Breach of Copyright Extension
- b. Errors and Omissions Extension
- c. Pure Economic Loss Extension
- d. Advertising Liability Extension
- e. Public Liability Section

Reasoning

The policy does not specifically cover harassment. However, the definition of Injury does include mental injury. So, if the third party alleges that the Insured caused them mental harm, Injury rules out options a, b, c and d since their root cause would be a pure financial loss.

Answer

- e. The Public Liability Section of the policy is most likely to respond to that claim.

19. Overcommunication 2

The Insured installs security equipment at their customer's call centre. The security equipment uses the customer's existing call centre telephony equipment to send messages to the customer's mobile phone.

The device malfunctions: instead of sending one notification to the customer, the device sends thousands of messages. As a result, the call centre stops functioning because the equipment is jammed by the faulty messaging equipment. The customer sues the Insured arguing that their entire telephony system was rendered useless causing a loss of income.

Which part of the policy is most likely to cover this loss:

- a. Employer's Liability Extension
- b. Errors and Omissions Extension
- c. Pure Economic Loss Extension
- d. Products Inefficacy Extension
- e. Public Liability Section

Reasoning

This is a pure financial loss since there were no injuries or physical damage. If the loss is as a result of a service then it would be a Professional Indemnity claim. However, in this case the root cause was a Product that did not perform as intended.

Answer

- d. This would make it a Products Inefficacy claim.

20. A Dry Spell

A claim arose when security guards misunderstood their brief. They doggedly refused to let any alcohol into the event. As a result, the event organisers lost money and are suing the security company.



Which part of the security company's policy would respond to this loss?

- a. Employer's Liability Extension
- b. Errors and Omissions Extension
- c. Pure Economic Loss Extension
- d. Products Inefficacy Extension
- e. Public Liability Section

Reasoning

This is a pure financial loss, which rules out the Employer's Liability Extension (a) and the Public Liability Section (e). There was no defect in the Insured's Product, which rules out the Products Inefficacy Extension (d).

Answer

- b. Providing a security service requires qualifications and skill that not all employees have, it is therefore a professional service making this an Errors and Omissions claim.

21. Slippery Problems

The Insured produces labels which they place on a customer's bottles of cooking oil which are distributed to various retailers around the country. The Insured used the wrong label: it did not list all the allergens. The customer sues the Insured for the costs associated with having the bottles relabelled.

Which part of the Insured's policy will respond?

- a. No cover because the label did not contain any untrue information.
- b. Errors and Omissions Extension
- c. Pure Economic Loss Extension
- d. Products Inefficacy Extension
- e. Public Liability Section

Reasoning

The first step is to establish whether this is a Damage claim or a pure financial loss. Since nothing was broken, damaged, stolen and no one was physically harmed, this is clearly a pure financial loss.

Having established that it is a pure financial loss, the next step is to figure out whether it is a Professional Indemnity claim (caused by bad service) or a Products Inefficacy claim (caused by a bad Product).

Lastly, we need to deal with the option of “No cover because the label did not contain any untrue information.” This is a nonsense argument because the customer suffered a loss as a result of the Insured not doing what they were supposed to do.

Answer

- d. This would be a Products Inefficacy claim because
 - i. the root cause is a pure financial loss,
 - ii. the harm is caused by the Insured’s Product and
 - iii. this causes a third party’s product to become of less value.

22. An Assortment of Problems

The Insured’s customer is a parcel delivery service. The Insured provided a sorting machine to assist with the sorting of parcels. According to the machine specifications, it was supposed to handle 20 000 parcels per month. The new machine was installed just before the Christmas season and replaced the customer’s older machine with similar specifications. Within days of the Insured’s machine being installed it became apparent that it could only sort at half the specified speed. The customer sued the Insured for the additional labour costs incurred while sourcing a machine that met the required specifications.



Would this loss be covered in terms of Products Inefficacy?

- a. Yes
- b. No

Answer

Yes. The Products Inefficacy Extension covers losses where the Insured's Product causes a third party's tangible property to be

- i. rendered of less value or
- ii. rendered incapable of full commercial benefit.

Reasoning

Not sorting the parcels fast enough would not render them of less value, but it would render them "incapable of full commercial benefit". So, this would be covered as a Products Inefficacy claim as someone was not able to make the expected monetary return out of those parcels. The Products Inefficacy clause also provides cover for the cost of mitigating the loss. In this case that would be the additional labour costs.

23. Stowaways

The Insured is a security company responsible for checking ships for stowaways. If they miss someone and the stowaway is only discovered once the ship has travelled a considerable distance from port, the customer may sue the Insured for those repatriation costs.

Where would that claim be covered?

- a. Employer's Liability Extension
- b. Errors and Omissions Extension
- c. Pure Economic Loss Extension
- d. Carriers' Liability Extension
- e. Warehousemen's Liability Extension

Answer

- b. Errors and Omissions Extension

This is a pure financial loss arising out of the Insured's professional services.

24. Pump that Fuel

The Insured distributes pumps that are used to dispense fuel at filling stations. After many months the fuel retailers discover that the Insured's pumps have been overly generous to the consumers. The retailers sue the Insured for their loss.

This would this typically be covered under the

- a. Products Liability Section
- b. Products Inefficacy Extension

Answer

It would be (a) Products Liability because the retailers suffered a loss of tangible property.

25. Colour Me Wrong

The third party, New Fashion (Pty) Ltd, contracted the Insured, a hair salon, to colour the hair of one of New Fashion's models. New Fashion explained that the shade was very important as hair colour would be key to the launch of their new clothing range at a fashion exhibition that evening. Due to the Insured's negligence, the wrong hair colour was used and New Fashion were compelled to withdraw from the exhibition.



What part of the Insured's liability policy would respond if New Fashion were to sue for their loss?

- a. Employer's Liability Extension
- b. Errors and Omissions Extension
- c. Pure Economic Loss Extension
- d. Products Inefficacy Extension
- e. Public Liability Section

Reasoning

It can't be Damage since Damage refers to property belonging to humans and not people themselves. That means this is either Injury or a pure financial loss.

The definition of Injury refers to "bodily injury". This creates a problem in that, would colouring someone's hair (the wrong shade) constitute bodily injury? Yes, it would. Altering a person's body without their permission would be an infringement of their personal rights and would constitute a form of bodily injury.

However, things become a bit more complicated as we need to ask who it is that is suing the Insured.

Had it been the model, claiming a violation to her body, then this would have been an Injury claim and the Public Liability Section would have responded.

In this case it is New Fashion suing the Insured. New Fashion have not suffered an Injury loss, but a pure financial loss. The Insured is being sued for negligence in their professional services.

Answer

- b. This is therefore an Errors and Omissions claim.



It would not be a Products Liability claim because the harm was done while the Insured was still busy, and not after the job was completed.

26. Biscuits With Bite

The Insured manufactured brown paper which was used to wrap expensive biscuits. The dye on the brown paper rubbed off onto the biscuits making them unsuitable for retail. The retailer successfully sued the biscuit manufacturer for the wasted marketing costs and the lost opportunity costs as valuable Christmas retail resources were wasted on the biscuits. The biscuit manufacturer then sued the Insured.

Where would the claim against the Insured be covered?

- a. Products Liability Section
- b. Defective Workmanship Extension
- c. Products Inefficacy Extension
- d. Pure Economic Loss Extension
- e. Advertising Liability Extension

Reasoning

First determine if this is Damage or a pure financial loss. It is Damage as tangible items were changed for the worse. The Insured's Product damaged a third party's product which caused a direct financial loss.

Answer

- a. This is a Products Liability claim.

One member of our review panel held a different view: *Damage to the biscuits is the subject of a Product Liability claim but the recovery of the lost opportunity costs suffered by the retailers is a pure economic loss. The recovery of those costs by the manufacturer (subrogation) does not change the nature of those costs - they remain pure economic loss. I would discount the insured's claim for the biscuit manufacturer's subrogated costs claim against the insured if the insured did not have PEL Cover.*

We have included different views to show how different underwriters may approach the claim.

27. Missing the Welding Wellness Test

The Insured was responsible for laying underground aviation fuel pipes at an airport. Unfortunately, the Insured omitted to carry out the necessary tests on the welding joints before encasing the pipes in 2 meters of reinforced concrete. As part of the pre-handover process, the Insured discovered their mistake and advised the airport operators.

Although the contract between the Insured and the airport does not provide for penalties, the airport operators sue the Insured for their lost income during this rework delay. Their argument is that, had the Insured exercised a reasonable level of care, the airport's lost income could have been avoided.

Which part of the Insured's policy would respond to such a loss?

- a. Public Liability Section
- b. Products Liability Section
- c. Errors and Omissions Extension
- d. Pure Economic Loss Extension
- e. Products Inefficacy Extension

Reasoning

Firstly we need to establish if the loss was caused as a result of the Insured's Product. At the time of the loss, the pipes were not yet a Product. Remember that an item only becomes a Product once it has been handed over to the customer, ruling out the Products Liability Section and the Products Inefficacy Extension.

Next we need to determine if we are dealing with a Damage claim, or a pure financial loss. The oversight did not Damage the airport's property. So, this is a pure financial loss which rules out the Public Liability Section.

Lastly, we need to establish if the loss arose out of the Insured's professional services. Providing construction services does require special skill so it is a professional service.

Answer

- c. This is thus an Errors and Omissions claim.

28. Promises Built on Manure

The Insured manufactures a fertiliser and promises that using it will produce double the crop yield that using no fertiliser would. The Insured negligently omits a vital ingredient and the farmer's crop is half the promised amount.

Where would the claim be covered?

- a. Public Liability Section
- b. Products Liability Section
- c. Products Inefficacy Extension
- d. Pure Economic Loss Extension
- e. Products Guarantee policy

Reasoning

There is no Damage, this is a pure financial loss since the fertiliser did not actually damage the crops, but simply did less than promised. Since there is no Damage, the Public Liability and Products Liability Sections are excluded. The Pure Economic Loss Extension excludes losses arising out of Products.

Answer

- c. This loss would fall under the Products Inefficacy Extension.

29. Painting Over Problems

The Insured manufactures paint. Due to a fault in the manufacturing process the pigment fails after one month and the original colour of the painted wall shows through. The Insured's customer successfully sues the Insured for the labour cost of repainting the building.



Where would the claim be covered?

- a. Public Liability Section
- b. Products Liability Section
- c. Products Inefficacy Extension
- d. Pure Economic Loss Extension
- e. Products Guarantee policy

Answer

- c. When the pigment failed, it did not actually damage the building. Therefore this would be a pure financial loss under the Products Inefficacy Extension.

30. Halal, Not

The Insured's supplier is secretly including pork in halal foods. After the food is consumed the Insured and the consumer discover that the food was not halal. The consumers bring an action against the Insured.

Where could this be covered?

- a. Public Liability Section
- b. Products Liability Section
- c. Products Inefficacy Extension
- d. Pure Economic Loss Extension
- e. Errors and Omissions (E&O) Extension

Reasoning

The Insured's customers suffered mental injury when they discovered they had been tricked into violating their religious beliefs. Mental anguish is covered in terms of Injury.

Answer

- b. This would be covered under the Products Liability Section.

What about that exclusion that says there is no cover for the cost of fixing the Insured's product?

That exclusion is found under the Products Liability section and not the Products Inefficacy extension. Also, in this example the Insured did not apply the paint, they merely supplied it.

31. Carcass Cooler Candour

The Insured operates an abattoir which slaughters animals belonging to their customers. When the Insured's employees negligently delayed moving the carcasses into a cooling room, the meat spoilt and became unsuitable for use.

Which Section or Extension of the general liability (CGL) policy would respond should the third party sue the Insured for their loss?

Reasoning

Firstly, note that this is a Damage claim (somebody's property was damaged). This rules out pure financial losses such as Professional Indemnity.

Next, we need to establish if this is a Products related claim. It is not a Products claim because the loss occurred *before* the item had been handed back to the third party. This could mean that the loss falls within the ambit of Public Liability.

However, this is where it gets tricky because the Public Liability Section contains the following clause:

This Section does not cover ... any claim arising out of damage to property ... in the Insured's care ... other than ... property temporarily in the Insured's possession for work thereon but no indemnity is granted in respect of Damage to that part of the property on which the Insured is working and which arises out of such work.

Would not putting the carcasses into the cool room be considered to be part of 'working on' the carcasses?

If not considered to be part of 'working on' the carcasses, then this would be Public Liability claim.

However, most underwriters are going to take the view that putting the carcasses into the cool room was part of the process of working on them.



In this case, the Public Liability Section would not cover the loss and the Custody and Control Extension would be the more suitable cover.

32. Hung Up

The Insured operates a cable-car which transports tourists up a mountain. The mechanism is powered by a generator which fails due to the Insured's negligence. As a result the tourists are stranded for several hours causing some to miss their flights.

Were the tourists to sue the Insured for the cost of booking new flights, which part of the policy will respond?

- a. Public Liability Section
- b. Products Liability Section
- c. Products Inefficacy Extension
- d. Errors and Omissions Extension
- e. Pure Economic Loss Extension

Reasoning

This is a pure financial loss. We can also rule out Products Inefficacy because the Insured did not hand the cable car over to the tourists: it is not a Product.

The question then is "did the loss arise out of the Insured's Professional Services?"

Answer

- d. The Errors and Omissions Extension would respond as providing entertainment would be seen as a professional service.

33. Statue Gravity

The Insured's employees are IT technicians at the client's premises to install a network cable. In order to do this they need to move some of the customer's furniture around. As part of that process they move a statue off a table and accidentally drop it.

Would this be a claim against the Public Liability Section?

Was the statue in the Insured's

1. Custody?

No, because the statue was still at the customer's premises and had not been handed over to the Insured for safekeeping.

2. Control?

This is a little more difficult. On the face of it the Insured seems to have more control of the item, but this is not the case: Suppose, while a technician had the statue in his hands, the customer demanded that the technician put the statue down. Would the technician be obliged to comply with this instruction? Yes, he would. So the customer still has more control over the statue even though the Insured is holding it.

Answer

As the statue was not in the Insured's custody or control this would not pose a barrier to processing the claim under the Public Liability Section.

34. International Exams

A school provides lessons, tutoring, marked assignments and feedback to prepare students to sit international school exams through an international organisation.

The school neither sets nor marks the final examination papers.

When many of the students achieve marks which are far lower than expected, causing many lower achieving students to fail and some to miss the tertiary education opportunities better

marks would have afforded them, it is discovered that the school accidentally omitted a portion of the syllabus.

Some of the students sue the school arguing that the school's negligence caused them to lose a year of their life.

Under which Section or Extension of the policy would this be covered?

- a. Public Liability Section
- b. Products Liability Section
- c. Products Inefficacy Extension
- d. Pure Economic Loss Extension
- e. None of these

Answer

- e. None of these. This loss would be a Professional Indemnity claim.

35. Product or No?

An auto glass company neglected to install the smash and grab product their client paid for.

Sometime later the customer sustained injuries during a smash and grab attack and sued the Insured for her injuries, which would have been avoided had the product been installed.

Under which Section or Extension of the policy would this be covered?

- a. Public Liability Section
- b. Products Liability Section
- c. Products Inefficacy Extension
- d. Errors and Omissions Extension
- e. None of these



Reasoning

Once again we need to follow a process of elimination. Since the customer is suing the Insured for her injuries, this is not a pure financial loss.

This rules out the Products Inefficacy (c) and Errors and Omissions (d) Extensions. The next question is “did the loss arise out of the Insured’s Product?”

Some underwriters may see this differently, but it is the consensus of our technical review team is that ‘the absence of a Product’ does not constitute a Product. In other words, the loss was not caused by a Product and is therefore not (b) a Products Liability claim.

Answer

- a. Public Liability Section

36. And Finally – a Trick Question

The Insured supplies and installs roof racks and sunroofs in customer’s vehicles. While installing the sun roof the Insured’s employee loses his footing and falls onto the sunroof cracking it.

Under which Section or Extension of the policy would the damage to the sunroof be covered?

- a. Public Liability Section
- b. Products Liability Section
- c. Products Inefficacy Extension
- d. Errors and Omissions Extension
- e. None of these

Answer

- e. None of these. At the time of the loss the sunroof still belonged to the Insured. This would be an own-damage loss which is not covered by a liability policy.

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