Module 4
ANATOMY OF PERSONAL INJURY, PRODUCTS LIABILITY, TOXIC TORT AND WORKERS’ COMPENSATION CASES

I. GENERAL PERSONAL INJURY AND MEDICAL MALPRACTICE

A. Theories of Liability

1. Intentional torts.
   a. Assault.
   b. Battery.
   c. False imprisonment.
   d. Intentional infliction of emotional distress.

2. Negligence or gross negligence.

3. Negligent infliction of emotional distress.

B. The Role of the CLNC® Consultant in Personal Injury and Medical Malpractice Cases

1. Traditional CLNC® services.

2. Emphasis is on damage and causation issues in general negligence cases.
II. PRODUCTS LIABILITY

A. Definition

1. All claims brought for personal injury, death or property damage caused by the manufacture, construction, design, formulation, preparation, assembly, installation, testing, warnings, instructions, marketing, packaging or labeling of any product.

B. Theories of Liability

1. Intentional torts – Defendant intended the consequences or knew that they were substantially certain to occur.

2. Negligence or gross negligence.
   a. Elements:
      (1) Duty – Duty to do what the reasonable and prudent manufacturer would do in the same or similar circumstances.
      (2) Breach of duty – Failure to do what the reasonable and prudent manufacturer would do in the same or similar circumstances.
         (a) Negligent conduct by the defendant leading to:
            i) Negligent design.
            ii) Negligent manufacturing or packaging.
            iii) Negligent failure to warn.
            iv) Negligent inspection or negligent testing.
      (3) Damages.
      (4) Causation.

   a. Elements:
      (1) Strict duty owed by a commercial supplier as well as the manufacturer of a product or its component parts, assembler, wholesaler, retailer or anyone who sells used or reconditioned parts.
(2) Breach of duty – Focuses on the safe or unsafe condition of the product.

(3) Damages.

(4) Causation.

b. Buyers, users and bystanders may have cause of action.

c. Certain claims that would normally be filed in state court may be preempted by federal statutes.
   (1) Federal law takes precedence over (preempts) conflicting state laws, if certain medical devices receive FDA approval.
   (2) The Medical Device Amendments Act of 1976 (MDA) gives the FDA regulatory authority over medical devices. Courts have held that this law preempts products liability claims for defective medical devices.

4. Implied warranties of merchantability and fitness for particular purpose.

5. Representation – Breach of express warranty.

6. Violation of a statute or regulation.

C. Resources

1. U.S. Food and Drug Administration
   FDA.gov

   a. FDA is the federal agency responsible for ensuring that foods are safe, wholesome and sanitary; human and veterinary drugs, biological products, and medical devices are safe and effective; cosmetics are safe; and electronic products that emit radiation are safe. FDA also ensures that these products are honestly, accurately and informatively represented to the public.
2. U.S. Consumer Product Safety Commission
cpsc.gov
  a. Charged with protecting the public from unreasonable risks of injury or death from consumer products.

3. U.S. Department of Transportation
transportation.gov
  a. Ensures safety and provides information, guidelines and regulations related to transportation. DOT includes numerous specific agencies.

4. American National Standards Institute (ANSI)
ansi.org
  a. Oversees creation, promulgation and use of voluntary norms, guidelines and standards that impact businesses in nearly every sector.

5. ECRI Institute
ecri.org
  a. Conducts patient safety research and investigates medical device incidents.

D. The Role of the CLNC® Consultant in Products Liability Cases

1. Traditional CLNC® services.

2. Heavy emphasis on damage and causation issues.

3. Research medical devices and drugs.
III. TOXIC TORT CASES

A. Plaintiffs in Toxic Tort Cases

1. Apply to buyers, users or consumers who suffer injuries or loss as a result of exposure to toxins and chemicals.

B. Theories of Liability

1. Intentional torts.

2. Negligence and gross negligence.
   a. The level of care required of a manufacturer, seller, supplier or contractor handling toxic substances is greater when:
      (1) The likelihood of harm is great.
      (2) Even if the likelihood of harm is small, the gravity of harm, if it occurs, is great.
      (3) Failure to warn of risk of injury and methods to avoid or reduce the risk to acceptable levels can cause harm.


4. Implied warranties of merchantability and fitness for particular purpose.

5. Representation.

6. Nuisance and trespass.
C. Unique Challenges for Plaintiffs in Toxic Tort Cases

1. Difficulty of establishing injuries and damages.

2. Defense argument that the expert’s opinion is not supported by accepted and authoritative research.
   a. Difficult to prove causation.

3. Difficulty of locating qualified testifying experts.

4. Many exposures involve a long latency period.

5. Cases involving exposure to multiple toxins and chemicals make it difficult to identify specific substances involved and to target defendants.

6. May be difficult to prove that exposure occurred, when exposure occurred or the level of exposure.

7. Many toxic substances cause only a slight increase in a particular pathology, which can be due to other causes.

D. Unique Challenges for Defendants in Toxic Tort Cases

1. Jurors are less sympathetic to profit-oriented companies than to individuals.
2. Adverse publicity may encourage the defendant to settle defensible cases.

3. Increased public awareness of harm of chemicals and toxins.

E. The Role of the CLNC® Consultant in Toxic Tort Cases

1. Traditional CLNC® services.

2. Heavy emphasis on damage and causation issues.

3. Research specific toxins and chemical issues.

IV. WORK-RELATED INJURIES

A. Definition

1. Workers’ compensation and workplace injury cases involve job-related injuries, i.e., injuries arising out of and in the course of employment.

2. What is compensable?
   a. Accidents and occupational diseases or injuries.
   b. Subsequent consequences of the injuries.

3. Workers’ compensation is a social contract between an employer and its employees that provides a no-fault solution for compensation for job-related injuries and illnesses.
   a. Exclusive remedy.
EXERCISE: COMPENSABLE OR NOT COMPENSABLE? Which of the following are generally compensable under workers’ compensation?

____ Slip and fall on a wet floor in the workplace.
____ Falling and injuring self while seizuring on a level floor in the workplace.
____ Motor vehicle accident while going to a business meeting.
____ Motor vehicle accident while driving to or from work.
____ Repetitive motion injury.
____ Accident while eating lunch in a restaurant with three friends.
____ Accident while attending a seminar required by employer.
____ Assault and battery of ED nurse by ED patient.

4. Each state has its own workers’ compensation statute.
   a. Each state specifies the benefits and how they are administered.
   b. Regulated by the insurance commission in most states.
   c. Additionally, Federal Employee Compensation Acts govern job-related injuries of federal government employees.
   d. General procedures.
      (a) The injured employee must give notice to the employer.
      (b) The employer reports the injury to the workers’ compensation agency.
      (c) The insurance company pays worker’s compensation benefits.
      (d) Disputed cases.
         i) Employee petitions for a hearing with the state agency.
         ii) Mediation hearing or informal conference.
         iii) Hearing before a workers’ compensation officer with a decision by an officer.
         iv) Appeal to a board or commission.
         v) Appeal to state court.
5. Damages are limited.
   a. Workers’ compensation provides for economic injuries only.
   b. Damages are defined by the state’s workers’ compensation statute.
   c. Some states provide recovery for psychiatric injuries provided that the injury is disabling and requires medical attention.
   d. The workers’ compensation carrier in most states has a statutory right to reimbursement of money paid to employees by a third-party tortfeasor, up to the amount of compensation paid.

B. What the Plaintiff Must Prove

1. A claimant must show that he suffered an impairment or incapacity that rendered him unable to earn the same wages he was being paid when he sustained the injury in the same or other employment.
   a. A plaintiff’s impairment and disability are evaluated at the time of maximum medical improvement to assess damages/injuries.
      (1) Impairment is an alteration of an individual’s health status that is assessed by medical means.
      (2) Disability is an alteration of an individual’s capacity to meet personal, social or occupational demands.
         (a) Impairment is what is wrong with the individual.
         (b) Disability is the gap between what an individual can do and what the individual needs or wants to do.
      (3) When a claimant has reached maximum medical improvement, he will generally not benefit from additional treatment.
         (a) At this time an impairment rating is applied.
         (b) Most states have adopted the use of the AMA Guides to the Evaluation of Permanent Impairment.
         (c) Impairment rating.
            i) Temporary or permanent.
            ii) Partial or total by percentages.
         (d) Impairment rating considers medical condition and ADL.
Factors that can influence recovery and return to the workplace include:
(a) Type and extent of injury.
(b) Medical management and quality of care.
(c) Individual claimant.
(d) Type of work.
(e) Time out of work due to disability.

b. Benefits:
   (1) Under a pure impairment system, the impairment rating is based solely on physical or functional limitations as a result of the injury.
   (2) Under a pure wage loss system, the benefits are based solely on the extent of the worker’s wage loss.
   (3) Some states have some combination of both impairment and wage loss.

2. An employee must prove causation, i.e., the damages and injuries did arise out of and in the course of employment.

   a. Evaluate preexisting conditions.
      (1) Past medical history.
      (2) Prior accidents, injuries and claims.

   b. Evaluate subsequent accidents, injuries, claims.

   c. Evaluate the incident.
      (1) What happened?
      (2) To whom did the employee report?
      (3) Date the employee returned to work.
      (4) Whether the employee sought medical treatment and, if so, the description of the treatment rendered.

   d. The claimant generally may recover damages where employment aggravates, accelerates or combines with a preexisting condition to cause injury but must segregate what condition was aggravated or accelerated.
C. Other Theories of Liability Asserted Against Employers in Work-Related Injury Cases

1. Intentional torts.

2. Gross negligence.

D. The Role of the CLNC® Consultant in Work-Related Injury Cases

1. Traditional CLNC® services.

2. Emphasis is on damage and causation issues.

3. Research the work-related injury.