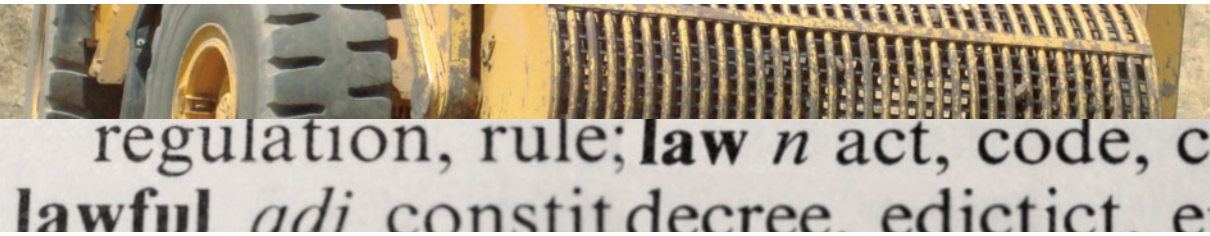
A Guide to

Liability and Insurance

in Mine Action



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The Geneva International Centre for Humanitarian Demining (GICHD) works for the elimination of anti-personnel mines, cluster munitions and explosive remnants of war. The Centre contributes to the social and economic well-being of people and communities in affected countries. The Centre respects the lead of the national mine action programmes and works closely with them, it cooperates with other mine action organisations, and follows the humanitarian principles of humanity, impartiality, neutrality and independence.

The GICHD provides advice and capacity building support, undertakes applied research, disseminates knowledge and best practices, and develops standards. The Centre aims to enhance performance and professionalism in mine action, and supports the implementation of the Anti-Personnel Mine Ban Convention, the Convention on Cluster Munitions and other relevant instruments of international law.

The GICHD is an international expert organisation, registered as a non-profit foundation in Switzerland.

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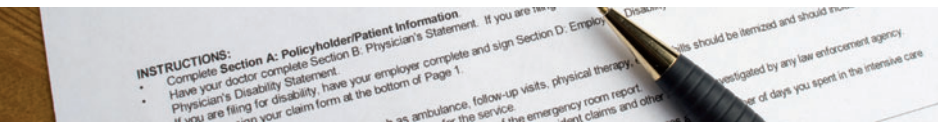

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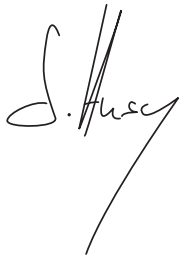
FOREWORD

Liability and insurance in mine action is not a new topic. It is, however, a relatively neglected area. Improvements in land release methodologies and more frequent contracting of demining capacity have increased interest in, and the importance of, both liability and insurance over recent years. Since 2009, the GICHD has offered training courses in mine action contracting to national mine action authorities. Liability and insurance have generated particular interest and discussion among participants in these courses, which resulted in the decision to develop the present Guide.

This Guide is divided into two parts, the first covering liability and the second addressing insurance in mine action. Part I includes an analysis of liability under different legal systems. Part II looks at the different aspects of insurance, including an explanation of the types of insurance available.

We trust you will find this publication interesting, useful, and informative. The topics of liability and insurance in mine action are also important components of the Centre's training activities.

Ambassador Stephan Husy
Director
Geneva International Centre for Humanitarian Demining



THE NEED FOR A GUIDE AND THE TARGET AUDIENCE

The International Mine Action Standards (IMAS) 10.10 states that employers should "ensure that adequate insurance cover exists for all employees against death, disablement and injury." Although most mine action operators have some insurance cover, little guidance has been published on how to choose the level and type of insurance. The GICHD *Guide to Insurance for Mine Action Operators*, which was first published in 2004 and has been recently updated, also addresses, albeit to a limited extent, liability in mine action.

The present Guide is mainly aimed at assisting national directors and national mine action programmes in decision-making, programme planning, and research, but will also be of benefit to commercial and non-profit demining operators. The first part of this publication covers the issue of liability in mine action while the second discusses the acquisition and maintenance of insurance cover for mine action operations and programmes.

METHODOLOGY

This Guide was developed in cooperation with the Swiss Institute of Comparative Law,[1] which provided expert input on liability, as well as with other individuals and organisations with experience in the insurance industry.

Information was also provided by the mine action programmes in Afghanistan, Cambodia, Croatia, and Lebanon, including through responses to a questionnaire sent out by the GICHD. The respective National Mine Action Authorities were asked to provide the following information:

1. Please describe how your mine action programme manages residual risk for cleared or released land. Please describe the process of releasing land, in brief, to provide a full explanation of how residual risk is dealt with.
2. Please provide a recent (last four years) practical example where your mine action programme has had to manage a case of residual liability, where an accident has occurred following the clearance and release of an area.
3. Please describe how your mine action programme manages liability of government authorities and how this is regulated in national standards. Please attach a copy of the national standards for public liability insurance coverage if possible.

4. Please describe what kind of personal accident insurance is in place in your mine action programme and how this is regulated in national standards.
5. Please list the liability issues your mine action programme is confronted with and also how these liabilities are covered from a programme perspective.

Limited research was also conducted on how liability has been addressed in different countries.

ENDNOTES

[1] The Swiss Institute of Comparative Law (www.isdc.ch) is a centre of expertise on foreign (i.e. not Swiss) and international law, attached to the Swiss Department of Justice and Police. It offers academics consultancy services on legal questions and provides government agencies, international organisations, courts and private individuals, in particular attorneys and notaries, with legal opinions on foreign law and international public and private law. Legal opinions either deal with individual cases or establish a broad comparative analysis of several legal systems, generally as guidelines in the legislative process.

CHAPTER 1 | AN OVERVIEW OF LIABILITY

WHAT IS LIABILITY?

Liability is legal responsibility for one's conduct: a person who commits a legal wrong or breaks a contract or trust is said to be liable or responsible for it. Liability is civil or criminal according to whether it is enforced by the civil or criminal courts.

In this Guide we are focusing on civil liability. Liability is generally part of the law of tort (droit de la responsabilité civile), which focuses on civil wrongs. In some countries, public liability is regulated in administrative law. Usually, an applicant (called a plaintiff in some legal systems) sues the respondent for damages, claiming negligent conduct on behalf of the respondent.

The "duty of care" that is owed to others in performing an action or activity is complex, but in basic terms it is the standard by which one would expect to be treated while in the care of another. If a breach of duty of care is established, an action brought in a common law court will most likely be successful. Based on the injuries and the losses of the applicant, the court will award financial compensation.

Figure 1 | What is liability?

LIABILITY IN MINE ACTION

Liability in mine action has become increasingly important because of the formalisation of land release methodology and procedures through technical and non-technical methods.[1]

The possibility of one or more mines or explosive remnants of war (ERW) remaining after the handover of a cleared area is always a risk, because an explosive item may have been missed during clearance. Or suspected land

may have been incorrectly released by survey when it was in fact contaminated and an injury may subsequently occur. The legal issue will then be: "Who bears the legal responsibility for the damage and/or injury this object could—or does—cause?" This Guide explores possible answers to this question by examining different legal systems and practices in the context of mine action.

LIABILITY AND MINE ACTION STANDARDS

IMAS 08.20 on land release (section 11) discusses risks and liability as follows.[2]

Risks and liability

A potential concern of the land release process is the issue of liability for the consequences of explosive hazards being found in areas that have been released. The IMAS cannot stipulate universally applicable conditions for liability; instead, they offer guidance based on experiences and available evidence. Resolving liability questions can be especially complex when non-technical survey and technical survey procedures are applied to release land. In the absence of physical verification of all released land, there is always a risk that explosive hazards remain. It is also true that conducting full clearance will still not guarantee that an area is completely free of explosive hazards. The following IMAS definition is relevant:

"Residual risk" is *"the risk remaining following the application of all reasonable efforts to discredit, remove, or destroy all mine or ERW hazards from a specified area to a specified depth."*

Liability is normally linked to non-compliance with an agreed policy or procedure.

It is important that the National Mine Action Authority (NMAA), on behalf of the government, develops a policy that details liability aspects, including the shift of liability from the demining operator to the government or the local community when certain criteria have been fulfilled. The following principles should apply:

a) Mines and ERW are primarily and ultimately a national responsibility and, as such, the State (or relevant national authority) has a general responsibility to accept accountability and liability for victims in all areas affected by landmines and ERW. This includes known as well as unknown hazardous areas, areas that have been cleared and handed over to the national authority or local population, as well as areas that have been handed over as a result of the land release process. Only when

an implementing agency is directly, and currently, responsible for an affected area could they be considered liable for injuries in that area. Even then the validity of this claim will need to be proved on a case-by-case basis.

b) An endorsed land release policy implies that all stakeholders agree on the definition of "all reasonable efforts". A process to identify and quantify these efforts during the design of the land release policy may prevent disputes related to liability issues.

c) If a land release policy has been approved by a government, appropriate application of the principles by operators and acceptance of handover by the national authority implies that the level of risk of mines or ERW in the area after survey or clearance is deemed tolerably low by the government.

d) If explosive hazards are found in areas that have been released, liability disputes should, generally, be settled based on how well demining operators have implemented the land release process that is normally enshrined in national standards. The appearance of an explosive hazard does not automatically imply that the operator should be held liable.

e) The demining organisation will not generally be liable for missed mines or accidents if an investigation shows that the agreed land release policy has been implemented appropriately and thus that the operator has made all reasonable efforts to ensure that the area was safe before release.

f) An operator will generally be liable in cases of accidents caused by missed mines or ERW if investigation shows that:

   1. the accident was caused by wilful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual(s) harmed;

   2. the organisation was not properly licensed, certified, or authorised to carry out acts leading to the erroneous land release decision;

   3. the organisation wilfully infringed prevailing national policy or standards; and

   4. the organisation has made gross procedural errors or grossly deviated from an agreed land release approach.

Liability for dealing with items found after land release should be clarified in the national land release policy.[3]

Post-land release actions

The residual risk referred to above can be mitigated to a large extent by monitoring released land and making survey and clearance resources available if any mines or ERW are subsequently discovered. If explosive hazards are encountered, a rapid response with appropriate assets and a transparent investigation process will limit the loss of public confidence in the land release process. The NMAA should provide clear guidelines about what actions should be undertaken. These may include:

a) monitoring released land after a reasonable period to confirm that local communities are using the land and that explosive hazards have not been discovered;

b) developing mechanisms to enable the reporting of any mines or ERW that are discovered on land that has been released;

c) regular control of the documentation and decision-making process leading to land release recommendations;

d) making mine action assets available to deal with unexpected explosive hazards and to undertake additional survey;

e) reclassifying previously released land to the status of confirmed hazardous area (CHA) or defined hazardous area (DHA) and updating relevant databases if evidence of explosive hazards is found;

f) initiating investigations into the process that led to the decision to release the land and, if necessary, adjusting the land release policy; and

g) imposing restrictions on any land that may be subject to special use (eg, schools, construction sites).

IMAS 08.30 (Post Clearance Documentation) notes that liability is a complex legal issue that should be explored by each demining operator with the NMAA during the contract negotiation stage. This IMAS also states that, in general, for demining operations, no residual risk should lie with the demining organisation once the NMAA has formally accepted the cleared land. The handover of the cleared land should be the point of mitigation of liability for the demining organisation. For commercial operations, the contract may insist that some degree of residual risk lies with the demining organisation. It is then up to the demining organisation to decide whether or not to accept such a contract.

IMAS 08.30 also stresses the importance of completion and handover of documentation. Information should be systematically collected and recorded during the clearance operation. The information should be kept in such a way to ensure that there is a paper track so the decision-making process behind any action taken can be traced.

FIGURE 2 | Liability and IMAS

Whenever possible, use should be made of standard and proven information management systems and Geographical (or Geospatial) Information Systems (GIS), such as the Information Management System for Mine Action (IMSMA). A completion report should include at least the following information:

- hazard area and task identification numbers
- clearance requirements (ie, specified area and depth)
- a copy of the non-technical and technical survey reports (if available)
- details of the clearance organisation, including references to its accreditation
- a summary of the procedures and the equipment used to clear the area
- Quality Assurance (QA), with details on the body which conducted monitoring of the methods used and the reports provided
- post-clearance inspection reports, with details on the body that conducted the inspections, as well as the methods used and the reports provided

- details of the cleared area(s) (coordinates of the turning points and intermediate points, and a list of the mines and ERW located and destroyed during clearance)
- details of areas addressed and released through non-technical survey and technical survey
- details of any incidents and accidents which occurred during clearance
- a formal recognition from the mine-affected population of community involvement, as well as an acknowledgement of the final status of the land
- a comparison with known minefield records
- a formal declaration indicating that the specified area has been cleared to the specified depth.

The text box below provides an example of wording regarding liability from the Lao PDR National UXO/Mine Action Standards.

Chapter Eleven | Released Land Handover Procedures

Residual Liability
Residual liability concerns the liability of a clearance organisation if a UXO incident occurs on an area of land released by the organisation. For the purposes of these national standards an 'incident' is "an event that gives rise to an accident or has the potential to lead to an accident". An accident does not have to occur for an event to be classified as an incident.

Authority of the National Regulatory Authority (NRA) in Determining Liability
The authority of the NRA to control and regulate UXO/mine action in Lao PDR is covered in Article 2 of the Lao PDR Prime Minister's decree 33/PM of 17/3/2004 on the establishment of the NRA for the UXO Programme in Lao PDR.

This decree gives the NRA the authority to carry out Quality Management (QM) on UXO/mine action organisations and activities. Implicit in this decree is the authority of the NRA to direct further clearance to be carried out on land released that does not meet quality requirements.

The decree does not give the NRA the authority to apportion any further liability in respect of UXO clearance, including the liability for compensation for injuries to persons or damage to property that may have occurred as a result of UXO clearance requirements not being met.

Chapter Eleven | Released Land Handover Procedures

Apportioning Residual Liability
In Lao PDR, no liability is to be apportioned to a clearance organisation unless an incident has been formally investigated in accordance with Chapter 23 of NS, 'Reporting and Investigation of UXO Clearance Incidents', and the investigation concluded that clearance requirements were not achieved.

Any further liability will only be determined by following the due legal processes in accordance with the applicable national legislation of Lao PDR.

For UXO clearance carried out under contract or some other formal agreement, the degree of residual liability should be specified in the contract or agreement.

When a formal investigation identifies that a clearance organisation failed to achieve clearance requirements the NRA may, under the provisions of these NS, conduct further external QM checks on the organisation concerned and if necessary, suspend an organization's accreditation agreement until any deficiencies are rectified.

EXAMPLES OF LEGAL LIABILITY FROM BOSNIA AND HERZEGOVINA

The following two examples of liability in mine action come from one civil and one criminal case in Bosnia and Herzegovina (BiH).

FIGURE 3 | Legal proceedings

Civil case

Plaintiff	The family of a mine victim: Šahman, Sabina and others.
Defendants	UNIPAK Demining Pale, Bosnia and Herzegovina Mine Action Centre (BHMAC), and the Office of the High Commissioner for Refugees (UNHCR).
Facts of the case	On 6 February 2000, near the village of Vlasinje, in Jajce municipality, a mine explosion caused the death of Mustafa Šahman. UNHCR conducted the demining together with the UNIPAK Demining Pale company. UNHCR also funded the demining operation in question. According to the UNIPAC statement, UNHCR had its demining teams, and was also responsible for the organization of works on the demining site, internal quality assurance and control, with weekly progress reports submitted to BHMAC. UNIPAC was the subcontractor providing mine detection dog (MDD) teams. The MDD teams were managed by a UNHCR supervisor who was also responsible for the use of the MDDs. The MDDs had been tested by the UNHCR although they had previously been accredited by BHMAC.
Claims	UNHCR and UNIPAK are responsible for failing to clear all the mines and BHMAC is responsible for negligently conducting quality control of the cleared area and issuing a clearance certificate.
Court's findings	> UNHCR has immunity from civil liability. > On 29 April 2004, the Court found in favour of the plaintiff against BHMAC. UNIPAK and UNHCR were excluded from the lawsuit. > An appeal was filed by BHMAC on 16 June 2004. > The final verdict on 22 June 2007 confirmed judgment in favour of the plaintiff. > The Court ordered BHMAC to pay the plaintiffs KM 43,700, as well as interest and legal costs of KM 13,264.

Criminal case

Plaintiff	Public prosecutor of Sarajevo Canton.
Defendants	BHMAC Director and the Chief of Civil Protection.
Facts of the case	On 10 April 2000, in Debelo Brdo district in Sarajevo, a mine explosion caused the death of three children.
Charges	The arguments for the prosecution were the following: Director of the MAC (at that time, it was Federal MAC) and the Chief of Civil Defence were charged with failure to organise urgent marking of the minefield in the city zone of Sarajevo which constituted a criminal offence against public safety of persons and property (Articles 304 (2) and 308 (2))[4] of the Criminal Code of the Federation of BiH.

Criminal case

Defendants' arguments	Huge and complex problem, impossible to control. Marking was done, but marking signs had been stolen.
Verdict	The court found, on the basis of produced evidence, the existence of a reasonable doubt as to the guilt of the accused. The criminal offence with which both accused had been charged was of a blanket nature and the blanket disposition refers to other relevant laws and regulations which regulate the conditions and ways of undertaking measures and procedures related to protection. The accused had been charged with failure to act which implied failure to act in accordance with the relevant laws and regulations or technical rules. Technical rules imply practical, experience based and generally accepted behaviour in a particular situation which may not be prescribed by the regulations. The prosecution charged the first defendant with non-compliance with Article 8, paragraph 1(3) of the Regulation on the Establishment of the Federal MAC (FMAC) which defines the responsibility of FMAC to conduct survey, marking and mine and UXO clearance in accordance with the technical standards approved by the BiH Demining Commission. The standards stipulate urgent marking as a responsibility of FMAC. It was noted that there had been a serious problem related to the lack of resources in terms of marking signs (witnesses confirmed that the signs had been borrowed from the UNHCR), there was also no international standard at that time which would define a procedure of placing the signs in a visible and reliable manner. Additionally, the minefield maps which had been handed over were only 60% reliable. Given all these circumstances, the accused were acquitted. The injured party was instructed that it might pursue the claim in civil action, but according to the available information, the civil suit has never been initiated. (Article 101(3) of the Criminal procedure Code states that, if the court renders a judgment acquitting the accused of the charge or rejecting the charge or if it renders a decision to dismiss criminal proceedings, it shall instruct the injured party that he may pursue his claim under property law in civil action. When a court is declared not to have competent jurisdiction for criminal proceedings, it shall instruct the injured party that he may present his claim under property law in criminal proceedings which the competent court will commence or continue).

ENDNOTES

[1] In the context of mine action, the term 'land release' describes the process of applying all reasonable effort to identify, or better define, confirmed hazardous areas, and remove all suspicion of mines/ERW through non-technical survey, technical survey and/or clearance. Non-technical survey does not include the use of technical equipment, such as metal detectors or other sensor systems, to intrusively search the ground.

[2] All the IMAS and many national mine action standards (NMAS) are available at www.mineactionstandards.org.

[3] Further information on the issue of risks, liability and insurance can be found in Part Two of this Guide.

[4] Article 304, Criminal Code of the Federation of BiH, provides as follows:

(1) Whoever endangers human life or property of substantial value by fire, flood, explosion, poison or poisonous gas, ionizing radiation, mechanical force, electricity or other form of energy, or by shooting from firearms, shall be punished by imprisonment for a term of between three months and three years.

(2) The punishment referred to in paragraph 1 of this Article shall also be pronounced on an official or any other competent person who fails to install proper devices for protection against fire, explosion, flooding, poison, poisonous gases or ionizing radiation, or fails to maintain the devices in a proper condition, or fails to put them to work, or generally fails to abide by the rules or technical regulations on protective measures, and who thus causes a danger to human life or to property of a large scale.

(3) If the acts referred to in paragraphs 1 and 2 of this Article have been committed in a place where a large number of people gathered, the perpetrator shall be punished by imprisonment for a term of between six months and five years.

(4) Whoever commits acts referred to in paragraphs 1 and 2 of this Article by negligence, shall be punished by imprisonment for a term not exceeding one year.

Article 308, Criminal Code of the Federation of BiH, provides as follows:

(1) If grievous bodily injury of a person or large-scale damage to property has taken place as a result of acts referred to under Article 304, paragraphs 1 to 3, Article 305, paragraph 1, Article 306, paragraphs 1 and 2, Article 307, paragraph 1 of this Code, the perpetrator shall be punished by imprisonment for a term of imprisonment between one year and ten years.

(2) If death of one or more persons has resulted from actions referred to under Article 304, paragraphs 1 to 3, Article 305, paragraph 1, Article 306, paragraphs 1 and 2, Article 307, paragraph 1 of this Code, the perpetrator shall be punished by imprisonment between one and twelve years.

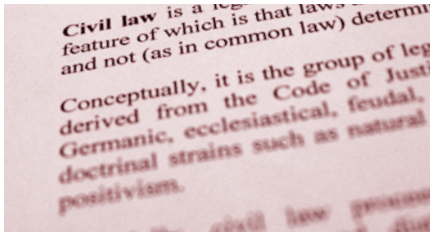
(3) If grievous bodily injury of a person or large-scale damage to property has taken place as a result of acts referred to under Article 304, paragraph 4, Article 305, paragraph 2, Article 306, paragraph 3, Article 307, paragraph 2 of this Code, the perpetrator shall be punished by imprisonment for a term not exceeding five years.

(4) If the death of one or more persons has occurred as a result of acts referred to under Article 304, paragraphs 4, Article 305, paragraph 2, Article 306, paragraph 3, Article 307, paragraph 2 of this Code, the perpetrator shall be punished by imprisonment for a term of between one year and eight years.

[5] Written and researched by the Swiss Institute of Comparative Law.


common law
England as


Sharia (Arabic
Muslims believe
divine revelations
Prophet Muhammad
the application


Civil law
feature of which
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Germanic, ecclesiastical, feudal,
doctrinal strains such as natural
positivism.

The world's legal systems differ considerably in their content, concepts, structure, and method. Legal systems are classified into several general categories. Two such categories are the **common law** systems (representing the legal systems of the English legal tradition), and the **civil law** systems, representing the legal systems that follow the Romano-Germanic traditions, the most influential examples being French and German law. A third category, also discussed in this Guide, is Islamic law.

COMMON LAW

Many of today's legal jurisdictions (eg, States/countries, provinces, and self-governing territories) were once colonies of the United Kingdom. The laws that were in force in England and Wales were also introduced in their colonies between the early 18th and early 20th centuries.

Insofar as those principles were developed by judicial decisions (jurisprudence[1], the rules of common law), subsequent developments introduced by English courts were also applied in the colonies. This common law approach largely continued even after the colonies attained independence, and was reinforced by further jurisprudence in the English courts.

FIGURE 5 | The Common Law

The rules of law originally introduced into the colonies by British statutes remain largely unchanged to the present day, except in certain colonies or countries where they have been modified by legislation subsequent to independence. Subsequent British legislation is considered, as a matter of principle, to be applicable only in the United Kingdom. It is left to the legislatures of individual colonies and successor States to determine whether or not similar statutory provisions should be introduced into their jurisdictions.[2] Some courts, such as those of India, take a different approach, and directly apply rules laid down by modern British statutes, which they consider as remedying shortcomings in the rules of the common law.

FIGURE 6 | Common Law

In the light of the systemic developments outlined above, it is clearly possible to promote across common law States legal principles that are relevant to the problems associated with mines and ERW, and to the process of demining. Such principles, as suggested below, constitute only a starting point for research into the possible legal implications of a particular demining operation or of injuries caused by particular mines. To obtain a clear picture of the relevant legal position in a specific jurisdiction, it would be necessary to, at least:

- survey all of the legislation in force in the relevant jurisdiction
- consider possibly relevant jurisprudence produced by the courts of that jurisdiction
- ask whether other sources of law need to be taken into account
- consider local conditions and administrative practices

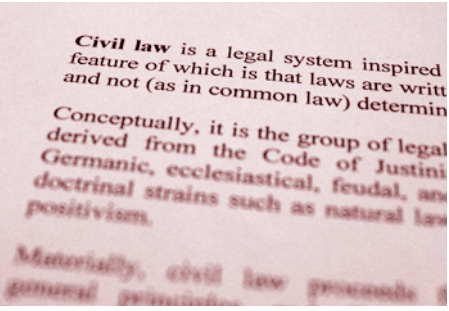
For the present context, only the main legal principles will be analysed.

FIGURE 7 | Common Law

CONTINENTAL (CIVIL) LAW

The core of the civil law tradition is the notion of "positive" law. This means that written rules are adopted by parliament, and all norms are ideally compiled into a rational, codified system. These legal rules are then expressed in short and general forms, and meant to be easily read and understood by non-jurists.

Another characteristic feature of legislation is its hierarchical structure within four main categories. These are: the constitution, international treaties, parliamentary statutes ("lois/Gesetze"), and Government regulations ("règlements/Verordnungen"). In this hierarchy, a regulation or legal norm in the legislation (ie, parliamentary statutes) is dominant, and any lower level legal norms must conform to it.


Civil law is a legal system inspired
feature of which is that laws are writt
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Conceptually, it is the group of legal
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positivism.

Materially, civil law presumes

FIGURE 8 | Civil Law

While the principle of source hierarchy is essential in all civil law systems, there are often differences regarding the place of international law, and how a court actually verifies conformity of international legislation with the Constitution. In France and Switzerland, for example, precedents are not recognised as authoritative, and the court's decision cannot override legislation. Judges are bound by the law, and bound also to a strict interpretation of legal texts.

In the civil-law tradition, case law has, in theory, a lesser role to play, as the rational interpretation of the written norm is considered to be enough in itself. However, when looking at the application of law, previous court decisions have become the main factor for both lawyers and courts.

In most civil law systems, the court system is divided into two different orders. These are administrative courts, which deal with public law matters (ie, disputes between a private party and a public authority), and judicial courts, which deal with dispute settlements between private parties as well as criminal cases. Sometimes, however, criminal cases may be decided in yet another court.

Each order has a pyramidal structure, with various courts at the base, and a single supreme court at the top. Supreme Courts ensure that lower courts interpret the law correctly and in the same way. Judges often have an administrative career and play an active role in leading the hearings.

This Guide focuses on French law as an example of a civil law system. This is because, due to colonialism and the wide use of the French language internationally, it has had a far-reaching influence.

ISLAMIC LAW

Complete Islamic law is known as the *ʃhari'a*, meaning "the path to follow, the right way". Islamic law is a tradition rooted in God's revelation to Muhammed, which was written down, word by word, in the Qur'an. Islamic law is, therefore, based on the *Qur'an*.[3]

The Qur'an is divided into 30 main parts, containing 114 chapters. These are divided into more than 6,200 verses. About 500 verses use similar terminology to certain Western laws.

FIGURE 9 | The Qur'an

Further sources have developed the law throughout the centuries, and are in a hierarchical order. After the Qur'an comes the *Sunna*.[4] This contains a description of the Prophet's pronouncements, deeds, and other behaviour, including silence on certain questions, which are found in *ħaðith*.

The third level of the pyramid and a more explicit source of Islamic law is the *ijma*. *Ijma* is the result of about two centuries of schools of law, which started to exist approximately 100 years after the death of the Prophet.

FIGURE 10 | Islamic Law

In general, *ijma'* views on the interpretation of the first two sources are accepted by followers of Islam, primarily legal scholars. There is, however, no consensus among Islamic lawyers as to precisely what level of agreement is required in order for a view to be part of *ijma*. Some (though often minor) differences exist in regard to the content of *ijma*.

A last source of Islamic law, which to Western minds rather resembles a method and is only accepted as source within the Sunni community, is that of *qyas*, or analogical reasoning. Through this, the principles of the other three sources can be applied to new situations. Here, the different schools of law, such as the Kufa/Hanafi school, the Medina/Maliki school, the Shafi school for Sunni Muslims, and the Djafari school for Shiite Muslims, are still essential.

In fact, because of *ijma*, by the end of the 13th century, many great works were completed, leaving little or no place for further human invention in the field of law. Therefore, since that time, the old legal methods and the laws put in place based on these methods (*taqlid*) are important reference points.

Today, the application and implementation of Islamic law varies. Many countries have adopted legislation based on Islamic principles, whereas in other countries, Islamic law according to a specific school has been directly applied. In this Guide, both traditional Islamic law and its implementation in national legislation is considered.

ENDNOTES

1 Jurisprudence is the theory and philosophy of law. Scholars of jurisprudence, or legal theorists (including legal philosophers and social theorists of law), hope to obtain a deeper understanding of the nature of law, of legal reasoning, legal systems and of legal institutions. Compare with Case law, which is the reported decisions of selected appellate and other courts (called courts of first impression) which make new interpretations of the law and, therefore, can be cited as precedents in a process known as stare decisis (a legal principle by which judges are obliged to respect the precedents established by prior decisions).

2 An overview of the process with respect to one of the areas of law dealt with in this report, namely that of the liability of occupiers of land to compensate people who are injured on their land, is provided by B.M.E. McMahon, "Conclusions on Judicial Behaviour from a Comparative Study of Occupiers' Liability", (1975) 38 Modern Law Review 39.

3 Sometimes also transliterated as the Quran, Kuran, Koran, Qur'ān, Coran, or al-Qur'ān.

4 Sunnah (سنّة ('sunna), plural سنن sunan ('sunan), Arabic; "habit", "custom" or "usual practice" refers in Muslim usage to the example of the sayings and living habits of Muhammad, the last prophet of Islam and his companions as recorded in a hadith.


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In the area of liability, especially looking at possible extra-contractual liabilities generated by the presence of mines on land, the relevant principles are those developed by the courts. They have been developed *ad hoc*, over centuries, as a result of procedural difficulties and material considerations.

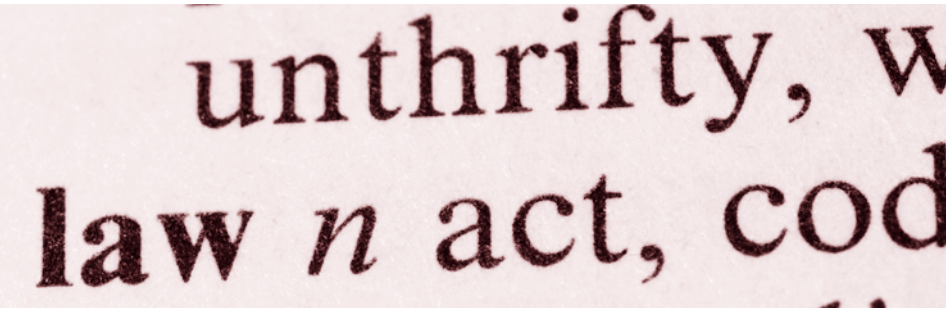
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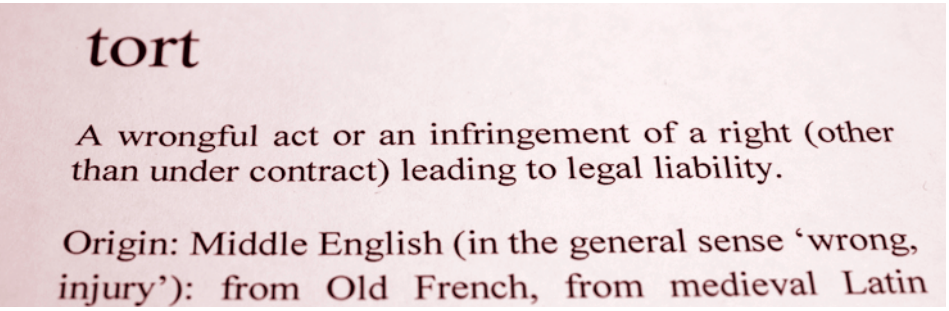
FIGURE 11 | Law

Although academic commentators do their best to organise common law principles into a single *law of tort*,[1] different *torts* continue to be governed by different rules. Therefore, it is important to identify exactly which tort is relevant to a particular issue.


tort

A wrongful act or an infringement of a right (other than under contract) leading to legal liability.

Origin: Middle English (in the general sense 'wrong, injury'): from Old French, from medieval Latin

FIGURE 12 | Tort

Unfortunately, the authors have been unable to find any published case law which considers landmines, unexploded ordnance, or demining operations. The two torts described below are therefore some examples that could be considered relevant as a matter of principle.

OCCUPIER'S LIABILITY

Common law principles

Under common law, "occupiers of premises" have certain duties towards others, regarding possible dangers that could happen on their premises[2] "Premises" is a term used to describe all kinds of private places. Delimited pieces of land qualify as "premises", whether or not buildings or other structures are present on the land. The "occupier" is essentially the person who has the right to exercise physical control over the premises, and who may or may not be the owner.[3]

FIGURE 13 | Legal

In this regard, it has been held that a construction company can be legally considered to be the occupier of the part of the premises on which it is carrying out works.[4] This raises the question of whether a demining organisation could qualify as the occupier of land while it is carrying out demining operations there. The answer will depend on the particular circumstances of each case, as well as the appreciation of the individual judge.

The nature of the occupier's duties depends on the legal characterisation of the person who puts in a claim in *tort*. Such persons may be known as "invitees", "licensees", or "trespassers." The first category, "invitee," includes only persons who come onto the land following a contract, or some other lawful business of economic interest, with the occupier. A "licensee" covers all persons, other than invitees, who have come onto the premises with the occupier's express or implied permission. A "trespasser" is a person who does not have any right or permission to be on the land. An occupier owes only one duty to a trespasser, which is of refraining from creating dangers intended to injure. Quite early in the history of common law, it was decided that the occupier has no right to set "man traps" (today, this would certainly include the emplacement of landmines) on his or her land.

In respect of licensees, the occupier is obliged to warn of any "unusual" or "concealed" dangers of which he is aware. The courts are adopting an increasingly broad understanding of the concepts of "unusualness" and "concealment". They effectively cover every danger a person coming onto the land would not expect, immediately see, or otherwise realise to be present. This concept should clearly include landmines, given that they are designed to have effects by virtue of their concealment, and that potential victims typically lack awareness of their presence. It could also be expected to include most ERW, except perhaps immediately after they fall onto the land, as certain licensees would immediately notice their presence.

Practical examples

The defendant in the Canadian case of *Sanders v. Frawley Lake Lumber Co. Ltd* [5] was the owner of an apartment building, which was surrounded by a lawn on which stood an ornamental tree. In order to keep the tree in a vertical position, the defendant installed a "guy wire" (a tightly-strung metal cord) which ran from the tree to an anchor point. In between, it crossed a pathway that had been informally beaten by pedestrians, running from a side street to the main entrance of the building. The cord was clearly visible to everyone during the daytime, but at night was only visible if all the outside lights around the building were turned on.

The plaintiff used to leave her young child in day-care with a tenant of one of the apartments in the building. On the night of the accident, about four months after the cord had been installed, the child ran down the informal pathway, and the plaintiff felt obliged to follow, in order to prevent the child from running onto the street. As most of the outside lighting had been turned off, the plaintiff did not notice the cord. She fell over it and was injured.

The court held that the defendant was the occupier of the lawn. Given that the plaintiff had come onto those premises in lawful pursuance of a contract, but that the contract was with one of the tenants rather than with the defendant owner, the court found it difficult to decide whether she should be classified as an invitee or as a licensee.

Without deciding that question, the court found in favour of the plaintiff, on the basis that the defendant had clearly failed to fulfil even its relatively low duty owed to licensees. The court held that the cord constituted an "unusual" danger on a pathway, that it was effectively "concealed" from the plaintiff under the circumstances in which she entered the premises, and that the defendant occupier had done nothing to warn her of the danger.

It should of course be noted, that the occupier in that example was quite obviously aware of the existence of the danger, which it had actively created. The legal position in regard to a danger that the occupier did not know about would have been different. Such a danger may not have created a duty towards a licensee.

Regarding invitees, on the other hand, the occupier has a higher duty to fulfil. The occupier is obliged to take reasonable care to prevent injury to an invitee, from an unusual danger, of which it was, or ought to have been, aware. In order for the danger that causes an injury to be considered unusual, there is an obligation for the invitee to take reasonable care of themselves. The occupier thus cannot be held liable for injuries caused by dangers that the invitee actually knew about, or which were so obvious they clearly should have been aware of them.

Implications of the case for mine action

This ruling was first included in the occupier's duty at a certain time in English legal history. At this time, the law referred to a case where negligence on the part of an injured person contributed to injury, and had the effect of preventing any financial recovery. This was based on the theory that such a person effectively accepted the risk of being injured.

Taking the elements of this duty in reverse order, it is clear that ignorance of the existence of a danger would not excuse an occupier, if hypothetically speaking, it was in respect of a danger that a "reasonable occupier" would have discovered.

Therefore, whether a reasonable occupier would discover the existence of landmines or ERW on his or her premises is essentially a question of fact, to be answered in light of the individual circumstances of each case. It is nevertheless difficult to imagine any circumstances in which an occupier could reasonably remain unaware of the presence of landmines on his or her premises if one had exploded and caused injury during his or her occupancy.

In the present context, this element would presumably exclude liability of occupiers towards any invitees who may decide to interfere with an item of explosive ordnance on the occupier's premises.

Finally, fulfilling this duty may require more than mere warning signs. The occupier's duty is to take measures, which according to the particular circumstances of each case appear to a reasonable person to be needed and effective, in order to protect invitees. Courts have held that dangers to invitees who are particularly vulnerable, such as children, may require quite extensive protection measures to be taken, such as fencing off the dangerous area.

A second practical example relevant to our discussion is offered by another Canadian case, *Whitecourt Transport Ltd. v. Canadian Kewanee Ltd.*[6] In this case, the defendant company owned land on which it had drilled and was operating an oil well. To permit vehicle access to the well, it had constructed an earthen road from the nearest public street. A pipeline, through which ran crude oil and pressurised gas from the well, passed underneath this road at a depth of about 25 centimetres. Near the junction of the road with the public street, the defendant company had placed two signs, which indicated that the road was dangerous, and that the defendant company should be contacted before heavy loads were transported along the road.

Later, the K Company began drilling a well nearby and obtained the permission of the defendant company to use the road in order to move drilling equipment and material closer to its own site. The K Company contracted with the plaintiff company to carry out the transport operation, which consisted of a caterpillar tractor pulling a very heavily laden trailer. During the operation, the weight of the vehicles fractured the pipeline, resulting in the escape of oil and gas, which immediately caught fire and destroyed the plaintiff's vehicles.

The court found that the defendant was the occupier of the road and knew of the extreme danger posed by the pipeline. It held that the posting of the warning signs was not nearly enough to comply with the occupier's duty, which required taking active measures to prevent any fracture of the pipeline. The occupier was therefore liable to compensate all of the damage incurred by the plaintiff company, which could not have realised that the danger was present.

Legislative principles

In England and Wales, the common law principles described above have been restated and somewhat reformed by legislation,[7] namely the Occupiers' Liability Act 1957. This legislation simply adopted the common law definition of "premises" and "occupiers". Regarding the persons to whom the occupiers may be liable, it combined the categories of "licensees" and "invitees" into a single category of "visitors". A visitor would have been defined at common law as either a "licensee" or an "invitee".

FIGURE 14 | Legislation

There is therefore no longer any need to decide which of those two common law categories is applicable, because occupiers now owe a "common duty of care" to persons falling within either category. In particular, occupiers are required to "take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there."

The legislation specifies relevant "circumstances of the case," where the visitor is a child rather than an adult, or if a person visits "in the exercise of his calling", eg, during and as part of a person's job (which would entail the appreciation and management of special risks). The courts of England and Wales have added other circumstances to the list of those which are presumably relevant, such as:

- the state of the occupier's knowledge
- the conduct that could be expected of the visitor
- the degree of obviousness of the danger
- the nature of any warnings actually given or other measures actually taken to prevent injury
- the degree of the expense and difficulty that would have been involved in taking more effective measures.

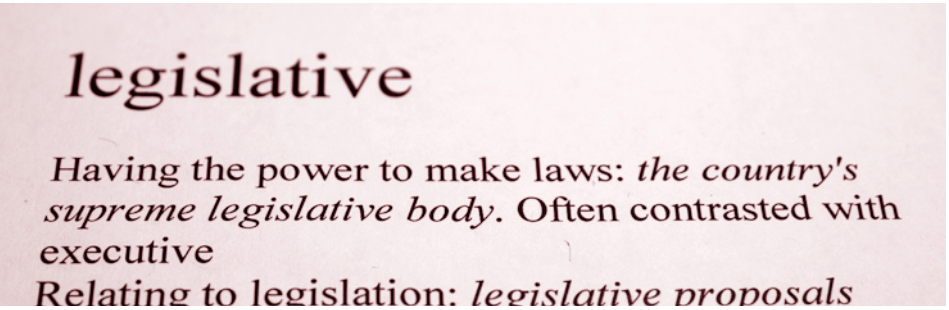


FIGURE 15 | Legislative

The fact that a professional assessment of the danger is now available is also considered relevant. Now, an occupier who has followed the advice of a professional or expert who has competently surveyed the source of danger is found to have fulfilled his or her duty (and thus avoided liability). This is even if a danger subsequently causes an accident and injures a visitor.

This suggests, therefore, that where a reputable demining operator has carried out demining operations, or has certified a particular premises to be free of mines, and a visitor is subsequently injured by a mine on the premises, a court would find that the occupier (as opposed to the operator) had "taken such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises".

Application to dangers created by third parties

A fundamental and legally unsettled question remains as to whether or not occupiers can be made liable for injuries caused by mines or ERW occurring on their premises. This is because these inherently dangerous devices are not normally placed on premises by the occupier, but by a third party, who often acts in total disregard of the law, and over whom the occupier has no control.

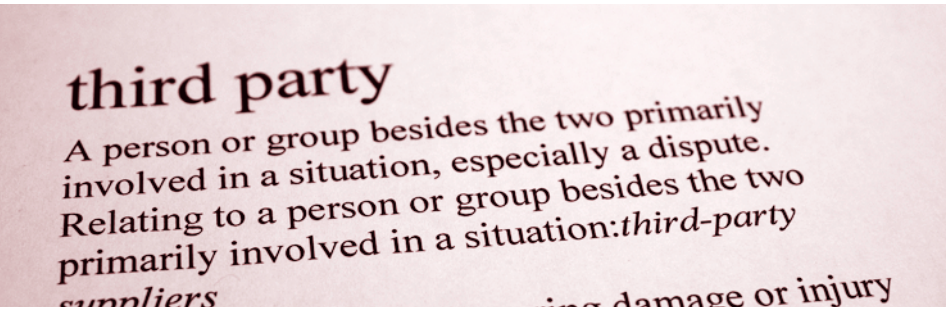


FIGURE 16 | Third party

Of the reported English cases on occupiers' liability, none involves dangers created by strangers, and the relevant legislative provisions do not mention the possibility. The theoretically relevant principle, traditionally applied by English courts, is that *tortious* liability will not be imposed on an owner of property for injuries that are a result of the criminal conduct of a stranger, while unlawfully in control of the property.

Australian courts have directly excluded the application of occupiers' liability to landlords of premises where violent robberies have been committed, even when the landlord did not take any action to dissuade the criminals.[8]

Research conducted for this Guide, though, suggests however that a different approach would probably be taken in cases of injury caused by mines or ERW that are placed on premises by, or as a result of the actions of, strangers. This would at least be the case once the strangers have departed, and the occupier has regained control of his premises, and has had an opportunity to survey the results of the armed conflict. From that point onwards, the occupier would be in a position to warn licensees of the danger, to prevent injury to invitees, and/or to see that visitors are reasonably safe.

On the basis of the two Canadian cases cited above, a court would likely treat a landmine triggered by a trip-wire in the same way as the guy-wire case (*Sanders v. Frawley Lake Lumber Co. Ltd*), and a landmine triggered by pressure in the same way as the oil and gas pipeline.

The English case of *Ward v. Tesco Stores Ltd*[9] is probably relevant. It arose out of a claim made by a shopper at the defendant's supermarket, after she slipped on yoghurt which had been spilled near the side of a shopping aisle. There was no doubt that the spillage had been the act of a third party and that the defendant was under a duty to prevent the claimant from slipping on it, either by removing the yogurt, or by warning the claimant of the danger. The legal argument centred on the question of how long the yogurt had been on the floor before the slippage occurred, and thus of whether or not the defendant had had an opportunity to take any action.

LIABILITY FOR NEGLIGENCE (NEGLIGENT MISSTATEMENTS)

A very large, complex, and inconsistent body of jurisprudence has resulted in recent years from claims of losses caused as a result of negligence on the part of accountants, auditors, architects, engineers, surveyors, and other professionals.[10] Specialist demining organisations would most probably be considered by courts to be professionals in this context, so it is necessary to address this aspect of tortious liability under common law.

There is no doubt as to the nature of the relevant legal duty: professionals must exercise such skill and take such care as is required by the standards of their profession, in the particular circumstances of each case. Thus, if a person is injured by a mine after the area had been cleared by a demining organisation, and then makes a claim for compensation against the organisation, the principal task of the court is to determine whether another hypothetical careful and competent (accredited) demining organisation would have conducted the survey and clearance differently, and whether that different course of conduct would have meant that the claimant could have avoided injury. The outcome will also be affected by whether the land has been subject to quality assurance and quality control by the NMAA or by another body authorised by the NMAA.

On the other hand, much-debated and in constant evolution is the so-called "scope of the duty of care", or in other words, the issue of who will be permitted by the law to make a claim against a professional whose conduct is negligent. This issue is of particular importance in "certification cases", where the professional has certified the existence of certain facts in writing, but the certificate later turns out to be inaccurate, and the claimant is someone other than the original addressee of the certificate.

The courts try to restrict the circle of successful claimants as a matter of judicial policy, using concepts such as:

- "reliance" on the certification by the claimant
- the "foreseeability" of such reliance from the point of view of the certifying professional
- the "remoteness" of the loss actually incurred by the claimant in respect to the kind of loss the professional had undertaken to prevent.

Again, everything depends upon the exact circumstances of each case. At one end of the spectrum, it is unlikely that a court would award damages for wasted expenditure to a neighbouring landowner, who, for example, had built commercial structures in reliance on an erroneous certificate that access paths on adjoining land were free of landmines. Judges do not want to open the floodgates of potential liability for "pure economic loss".

At the other end of the spectrum, a court would almost certainly award damages for personal injuries to a shepherd who had accompanied animals onto mined land in reliance on an erroneous certificate that all landmines had been removed from that land. Judges want to ensure that justice is seen to be done where negligence has resulted in personal injuries. Where exactly the line would be drawn as a matter of legal principle is difficult to predict.

APPLICATION OF THE COMMON LAW TO LIABILITY IN MINE ACTION

Legal systems generally provide for liability of demining organisations for accidents that occur during demining operations due to negligence (eg, lack of adequate precautionary measures and operational management). In some legal systems, there is also strict liability for carrying out dangerous activities, ie, the company might be held liable for injuries that occur in the course of demining operations even if there was no negligence.

The State might be held liable for accidents that occur during demining operations where it was negligent. Negligence might be found if a State did not require safety measures to be taken by a demining organisation It is, of course, also possible to provide for general liability of the State for mine accidents (without proof of negligence of the State), although special legislation would be required (such as is in place for example in France).

ENDNOTES

1 A tort is a civil wrong resulting from a breach of a legal duty that exists by virtue of society's expectations rather than a contractual relationship. The remedy for a tort is a common law action for damages.

2 Although legislative reforms had already come into force in England and Wales when the volume was published, the title "Negligence" in Vol. 28 (issued in 1959) in Viscount Simonds (Ed.-in-Chief), Halsbury's Laws of England, 3rd edn., London: Butterworth & Co., 1952, contains explanations of the position of common law, particularly in paragraphs 35, 36, 40, 44, and 45.

3 The legal situation may, though, be more complicated. For example, when the owner of land is also the occupier, but has leased some of the land out to another person for a number of years. This other person is then the occupier of the leasehold premises, except if he temporarily licenses another person to use some "sub-parts" of his or her land, who is then the occupier of the premises held under licence.

4 At least in the English cases of Hartwell v. Grayson Rollo and Clover Docks Ltd, [1947] Law Reports, King's Bench 901, and Bunker v. Charles Brand & Son Ltd, [1969] 2 Law Reports, Queen's Bench, 480.

5 19 Dominion Law Reports (3rd series), (1971), 378.

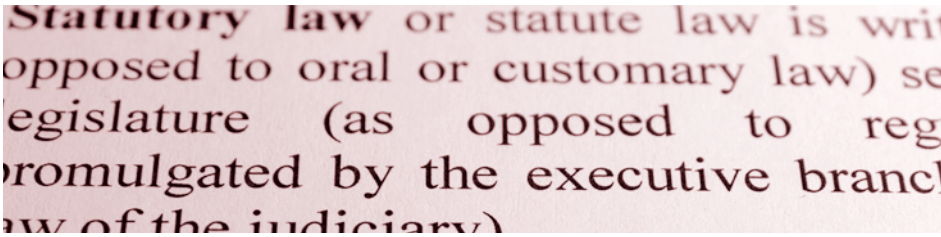
6 [1973] 2 Western Weekly Reports 1.

7 For an analysis of the legal position currently existing in England and Wales, refer to A.M. Dugale & M.A. JONES (gen. eds.), Clerk & Lindsell on Torts, 19th edn., London: Sweet & Maxwell, 2006, pp. 740–785, paragraphs 12-02 to 12-86.

8 Refer to the cases cited in A.M. Dugdale & M.A. Jones (Gen. Eds.), Clerk & Lindsell on Torts, 19th edn., London: Sweet & Maxwell, 2006, p. 755, paragraphs 12–31, fn. 46.

9 [1976] 1 All England Law Reports 219.

10 For a survey and analysis of that jurisprudence, see ibid., pp. 563 et seq., particularly at 670-671 and also to A. Grubb (gen. ed.), The Law of Tort, London: Butterworths LexisNexis, 2002, pp. 718–720, paragraphs 16.77 to 16.83.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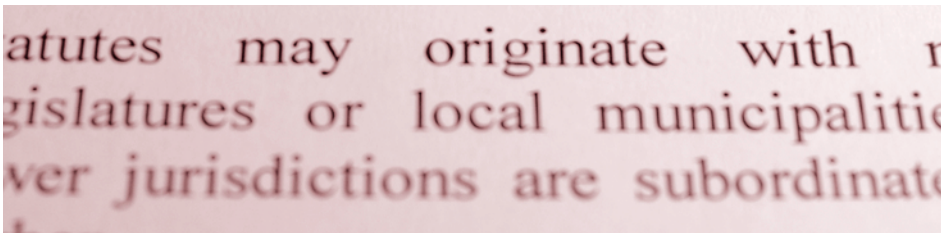
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In most continental systems, public authorities are not held liable on the same grounds as private individuals.

LIABILITY OF PRIVATE INDIVIDUALS

Conditions of civil liability

The principle of liability originates in the French 1789 Declaration of the Rights of Man and of the Citizen, Article 4 of which states: "Liberty consists in being able to do anything that does not harm others." Consequently, someone is liable to his or her victim if he or she causes such harm.

French law makes a clear distinction between liability in case of a breach of a contractual obligation, and tort liability in other cases.[1] A breach of a contractual obligation will generally lead to contractual liability. It should be mentioned that special liability schemes also exist, such as liability for motor vehicle accidents[2] and liability for defective products.[3] The distinction between the two types of liability also exists in other continental systems, though it is generally possible for the same factual situation to result in liability under both tort and contract law.

Regarding contractual liability, Article 1147 of the French civil code provides for liability in case of no, or inadequate, performance. The courts first determine the exact content of the obligation, ie, what has been promised. For that purpose, the courts make a distinction between the contractual duty of care (*obligation de moyens*) and the contractual obligation (*obligation de résultat*).

Establishing that a party has failed to perform a contractual duty of care requires proving negligence. Establishing that a party has failed to perform contractual obligations, in contrast, merely requires proving that the result foreseen in the contract was not reached. In addition, courts recognise an implied duty of security in many types of contracts, such as within the duty of care or a contractual obligation, leading to the right to compensate in the event of harm within the scope of duty.[4]

Articles 1382 to 1386 of the French civil code govern tort liability, and state in a general provision: "Anyone who, through his fault, commits an act which causes harm to another is responsible to compensate that other person for the harm that occurred."[5] In other words, *tort liability* demands a causal link between a *faute* (an, at least negligent, action or omission) and harm (damage actually existing, certain, and personal to the plaintiff). These provisions impose a broad duty to compensate for the harm caused by an action or omission, ie, the victim should be restored as closely as possible to the situation

he or she would have been in, had the harm not occurred. These provisions on the law of tort are general and vague, so the role played by case law of the "Cour de Cassation" (final Court of Appeal) and of other civil courts is essential.

The courts generously interpret the notion of *faute* as including both the failure to comply with a written statutory duty and negligence of the wrongdoer who did not behave as a reasonable person would have in the same circumstances. Nevertheless, all categories of liability require proving harm caused by an act or omission. The burden of the proof rests on the victim, who has to show that harm to a legitimate interest has occurred. French law provides for a system of full compensation (*réparation intégrale*), which means that all kinds of harm are compensable, eg, harm to property or a person (physical or moral harm), as well as loss of profit, opportunity, or chance.[6]

For instance, a person who has been injured can request compensation for pain, medical costs, loss of income, aesthetic loss, or even loss of the normal joys of life. If goods have been damaged or destroyed, the victim can ask for compensation to repair or to replace them, or for the loss of enjoyment of his or her goods. Even third parties (persons close to the victim) can be considered as harmed, on the basis of "*préjudice par ricochet*", ie, a moral or economic damage suffered by a third party who was dependant on the victim. French law is more open to compensation regarding the loss of opportunity than other continental legal systems.

In order to demonstrate the causal link between the act and the harm suffered by the victim, courts may be satisfied with the presumption that if it were not for the act, the harm would not have occurred.[7] Courts may also hold that a causal link exists in a case in which the injury was a normally foreseeable consequence of the act or omission. In other words, the question for the judge is that of whether the damage suffered was a reasonably foreseeable consequence of the defendant's act or omission. This approach confers a wide margin of appreciation upon the judge to determine the existence or not of a causal link.

In German law, tort liability requires an additional condition apart from intention or negligence, causation, and harm (§823, Bürgerliches Gesetzbuch). This is "unlawfulness", which, in German law, requires either the violation of a specific human right (life, physical integrity, property, or another recognised right) or the violation of a norm aimed at protecting the interests of the victim.

Exoneration and limitation of civil liability

French law allows three exceptions to the rule of liability each in case of *force majeure*: namely, where there is an irresistible cause (one that cannot be avoided), where the cause is external (the person has no control over it), or where the cause is unforeseeable (one that made the harm unavoidable).[8] Force majeure totally exonerates the person from liability, while contributory negligence or breach of contract by the victim (*exception d'inexécution*) might be a full or partial defence.[9] Other continental legal systems reason according to similar concepts.

Courts normally acknowledge the validity of penalty clauses limiting or even excluding liability or compensation, as long as they apply to liability in contracts,[10] and the non-performance is not wilful. A penalty clause can fix the precise amount of damages to be awarded.[11] In contrast, clauses limiting tort liability are invalid,[12] because the principle of full compensation has the character of public policy (*ordre public*).

The consequences of civil liability

The sanction for contractual liability is usually the enforcement of the contractual obligations. Courts interpret Articles 1143 and 1144 of the Civil Code as setting down a general rule of performance, and damages are only allocated if performance is impossible.[13] Two kinds of damages exist: damages for delay, and compensatory damages[14] (in case of non-performance).

In tort cases, the judge usually orders payment of damages to compensate the harm done, though he or she can also opt for compensation in kind, for example, repairing or replacing the goods when appropriate. Compensation can take the form of either a fixed sum of money or periodical payments. In assessing that amount, courts do not take into account whether liability is based on intention or negligence, as French law rejects the idea of punitive damages. In fact, the concept of punitive damages is generally not admitted in continental legal systems.

ADMINISTRATIVE LIABILITY

In most, if not all, continental legal systems, there is a clear distinction between public and private law. In France, since the French Revolution there has been a gradual development of public authorities' liability in the case law of administrative courts.

The cornerstone of state liability is to be found in the *Tribunal des conflits* decision of 1873, known as the Blanco case.[15] In this case, the tribunal enunciated the principle of administrative liability, and rejected the application of the Civil Code's liability provisions. In other words, the liability of public authorities has special rules, which are different from civil liability. The State can be held liable for its actions or lack of action. Administrative law also distinguishes between tort liability and contractual liability.[16]

State tort liability

Three conditions have to be met in order to invoke the State's liability: an act or omission, an injury, and a causal link between the two.

Administrative liability for faute

Under French administrative law, usually State liability presupposes faute and administrative courts have jurisdiction to deal with this. Faute consists of a State agent's negligent or intentional behaviour, or in an institutional failure (*faute de service*), or both simultaneously.

When a State agent acts negligently outside the scope of his or her mission, he or she may be held personally liable in civil courts. The administration may also be liable on behalf of the agent, insofar as the agent caused the harm during the performance of duty.

Public authorities may also have to take responsibility for a general failure in the functioning of the public service. It is therefore not always necessary to prove the negligence of an individual agent. The *faute* may even be in the refusal of the public authority to take necessary measures.[17] While most of the time State liability only requires negligence, there are cases in which a higher degree of failure applies (*faute grave*), in view of the complexity of the activity undertaken by the authority.

Strict administrative liability

In France, the principle of equality before public responsibility (*égalité devant les charges publics*) has been the basis of the State's liability for risk.

It applies in cases where a citizen suffers disproportionate harm in the public interest, which exceeds the harm suffered by the entire population, therefore putting him or her in an "unequal" situation. In such cases the right to compensation does not require proof of negligence. The only requirement is showing that compensation is necessary, in order to avoid imposing a special and onerous burden on the plaintiff.[18] In this respect, administrative liability without fault is very favourable to the victim.[19]

State liability of this kind is usually associated with the notion of risk. When a public authority conducts dangerous activities, and takes a deliberate risk knowing that an injury is likely to occur, it should assume liability. The risk has to be serious and lead to exceptional and specific harm. Case law has shown that where the administration itself creates a hazard it should be liable even in the absence of negligence. For instance, the administration can be held liable for risk if an ammunition storage area explodes, causing property damage or death to a neighbour.[20] This approach was confirmed by a case concerning the explosion of a wagon, full of ammunition, in a train station.[21]

The administration also takes responsibility for public works (*travaux publics*). When a public authority undertakes dangerous activities, it is not necessary for the victim to prove negligence. However, here the victim's own negligence contributed to the injury, or if there is a case of *force majeure*, liability may be limited or excluded.

Regarding loss or injury, it must be *certain*; *specific* (ie, an identifiable victim); *abnormal* (lead to serious inequality when compared to the situation of other citizens); and it must *affect a legitimate interest*. The loss may be material or moral. Concerning the causal link, the approach is different to civil liability, in the sense that the wrongful act would have rendered the injury foreseeable in a normal course of events.

State contractual liability

An administration can enter into either an administrative contract or a private contract with a person, depending on its content. An administrative contract is essential to determine which set of rules is applicable, and which court has jurisdiction. Contracts relating to a public service and that give special powers to the administration are usually administrative. Administrative contracts are governed by administrative case law and administrative courts have jurisdiction.

Contractual liability on the part of the State requires a breach of a contractual obligation. Liability will arise only if the loss suffered by the victim was a direct consequence of the State's breach of its contractual obligation. The legal issue is that of whether the breach of the contract was the direct cause, or merely an indirect origin of the damage incurred.

State liability may be limited or even excluded in case of *force majeure*, or in case of contributory negligence. Courts acknowledge the validity of contractual clauses limiting or even excluding liability or compensation and also penalty clauses, such as in private law.

Liability in the Cambodian Mine Action Programme

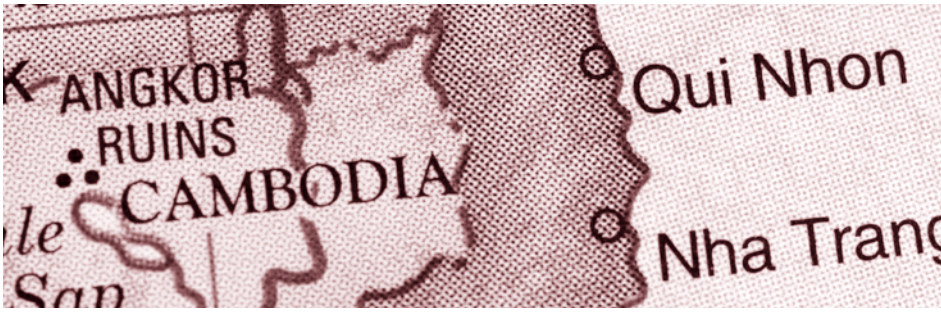


FIGURE 17 | Cambodia

According to the Cambodian Mine Action and Victim Assistance Authority (CMAA), mines/ERW are primarily and ultimately a national responsibility and, as such, the Royal Government of Cambodia (RGC) has a responsibility to accept accountability and liability for victims in all areas affected by mines/ERW. The CMAA is the only body representing the RGC for mine action. If an area has been tasked to an accredited operator for clearance, the operator has the responsibility of ensuring that it is cleared in accordance with Cambodian Mine Action Standards (CMAS) to the required depth. Until the land is declared to have been cleared by the CMAA, the operator is responsible for the land from the moment when it commences the clearance task. After the handover of land, and as long as the area has been subject to external quality assurance (QA), the cleared land then becomes the liability of the RGC.

The CMAA is currently reviewing the requirements for a formal handover of land.

Cambodia has also recently adopted a Land Release Process (CMAS No. 15). Land Release has four stages. Stage 1 is known as Baseline Survey (what Cambodia calls Non-Technical Survey), as set out in CMAS No. 14. Stage 2 is Technical Survey; Stage 3 is Full Clearance; and Stage 4 is End State Land.

Liability in the Cambodian Mine Action Programme

Land release is the process of converting previously suspected or confirmed land to Stage 4. There are three main categories in Stage 4:

- reclaimed land – which is when the community has used tractors in an area of land that was previously suspected for more than three years, and they have not had any casualties or evidence of mines
- land released through technical survey, and
- land released after full clearance has been conducted.

If explosive hazards are found within an area that has previously been released, it does not automatically imply that the operator should be held liable. An investigation will occur in accordance with CMAS No. 5 and liability will be determined.

An operator will, in principle, be liable in cases of accidents caused by missed mines/ERW, if investigation shows that:

- the accident was caused by wilful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual(s) harmed
- the organisation was not licensed, certified or authorised to carry out acts leading to the erroneous land release decision, and
- the organisation has conducted gross procedural errors, or grossly deviated from the agreed CMAS.

Failure to comply with the conditions stated in the relevant CMAS may result in the suspension of accreditation. Any resulting liability or compensation claims as a result of a missed mine will be the responsibility of the operator involved.

In a "C2 area" (land released through technical survey), the CMAA should conduct some form of quality control of the area prior to it being released back to the user. This quality control will likely be targeted, or will involve systematic sampling. This quality control capability is currently being developed at the CMAA with the support of the UN Development Programme.

In the case of a C1 area (where a suspected area has been reclaimed by a community over a period of time—normally three years with the use of tractors—and there is no evidence of mines or UXO), there is no liability as there were no mines or ERW deemed to be present. If, however, after the land is reclaimed an accident occurs, for whatever reason, the land is identified as hazardous and is given a land classification[22] and prioritised for clearance.

A specific compensation regime for mine clearance activities carried out by public authorities[23] has been put in place in France. It states that "the detection, removal, neutralization, storage and destruction of munitions, mines, traps, weaponry and explosives are to be considered as public works."[24] Therefore, the rules on strict liability[25] for public works are to be applied.[26]

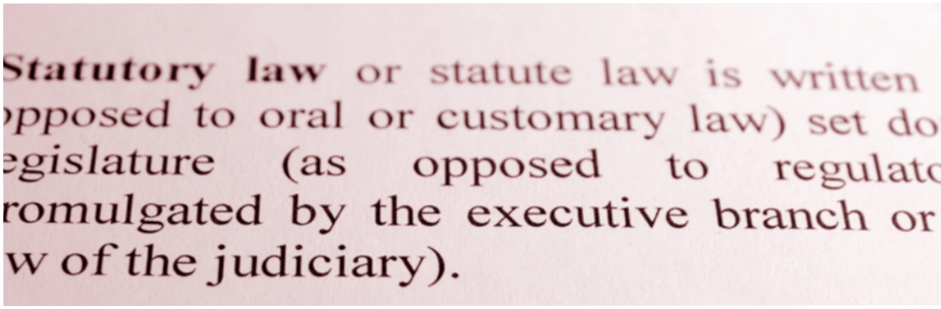


FIGURE 18 | Statutory law

In these circumstances, courts hold the State accountable for the risk that an injury was likely to occur. The victim is entitled to full compensation for material damage[27] and physical injury.[28] However, where the victim's own negligence has contributed to the injury, or if there is a case of *force majeure*, liability may be shared, limited, or excluded.[29]

Liability in the Croatian Mine Action Programme

FIGURE 19 | Croatia

According to the Croatian Mine Action Centre (CROMAC), CROMAC and the Republic of Croatia are jointly responsible for damages (material and non-material) in accordance with the general principles of responsibility for damages according to the principle of objective liability.

If an accident occurs after an area has been declared as having been cleared, CROMAC and the Republic of Croatia may, if the official investigation shows that the demining operator is responsible for the incident, demand compensation from that body.

APPLICATION OF CIVIL LAW TO LIABILITY IN MINE ACTION

After demining operations, demining operators will generally be liable for negligence, if the claimant can prove that not detecting a mine was due to the operator failing to act according to accepted professional standards. In addition, there might be strict liability for carrying out dangerous activities (as in the French model) or a liability for accidents, for example if the operator issues a statement that a specific area of land is mine-free (as per English common law).

After demining operations, several legal systems have recognised the liability of the State (ie, liability for any accident due to a mine) on territories expressly validated as mine-free or "usable". French law recognises strict liability of the State in all cases, and all legal systems permit introduction of State liability, without negligence, through national legislation.

Legislation providing for the strict liability of the State in all cases, or in cases where the State has declared certain territories as mine-free, would avoid the generally complex assessment of negligence/reprehensible conduct. Therefore, overall it may be most cost-effective. However, whether or not to determine liability in mine action through specific legislation remains a policy choice of the legislator, taking into account the appropriate allocation of risk.

ENDNOTES

1 G. Viney, "Tort liability", in Introduction to French law, Kluwer, 2008.

2 Law No. 85-677 of 5 July 1985, available at: www.legifrance.gouv.fr.

3 Law No. 98-389 of 19 May 1998, available at: www.legifrance.gouv.fr.

4 First recognized on the transport of persons, see Compagnie Générale transatlantique, C.Cass. civ., 21 November 1911, Recueil Dalloz 1913 I, Sarrut, p. 249.

5 Translation from Bermann, A. and Picard, E., Introduction to French law: "Tout fait quelconque de l'homme qui cause à autrui un dommage oblige celui par la faute duquel il est arrivé à le réparer".

6 Only if the opportunity was genuine.

7 Theory of the "équivalence des conditions", C.Cass. Civ.2, 14 December 1965, JCP 1966 II 14573, note R. Savatier.

8 Articles 1147 and 1149, C.Civil.

9 C.Cass. Civ., 5 May 1920 DP 1920.1.37.

10 C.Cass. Com. 6 July 1955, Gazette du Palais 1955, 2 253.

11 Article 1152, C.Civil.

12 C.Cass. Req. November 27, 1911, Recueil Sirey 1915.113.

ENDNOTES

[13] Article 1142, C.Civil.

[14] Article 1146, C.Civil.

[15] TC February 7, 1873, Blanco, Rec. CE, 1er Suppl. p. 61, Grands arrêts de la jurisprudence administrative, No. 1, 15th edn., 2005.

[16] Aubry, J.B., Fasc. 801 Juriclasseur Administratif.

[17] CE May 13, 1982, Dame Lefèvre, Ajda 1983. 476.

[18] Long, Weil et al., Les grands arrêts de la jurisprudence administrative, p. 310 (1993). The principle of equality before public burdens is to be found under Article 13 of the Declaration of the rights of man and of the citizen of 1789: "For the maintenance of the public force, and for administrative expenses, a general tax is indispensable, it must be equally distributed among all citizens, in proportion to their ability to pay."

[19] Vincent, F., Fasc. 824 Jurisclasseur Administratif.

[20] CE 28 March 1919, Regnault-Desroziers, Gaja, No.35 : "que ces opérations effectuées dans des conditions d'organisation sommaires, sous l'empire des nécessités militaires, comportaient des risques excédant les limites de ceux qui résultant normalement du voisinage, et que de tels risques étaient de nature, en cas d'accident survenu en dehors de tout fait de guerre, à engager, indépendamment de toute faute, la responsabilité de l'Etat."

[21] CE, ass., 21 October 1966, Ministère des Armées c/ SNCF, Dalloz, 1967, jurisp., p. 164, note J. Baudoin.

[22] Land classifications as follows: A - (Mined Area), Land that presents evidence of mines, B - (Residual Threat Land) Land that presents evidence of ERW or an indeterminate presence of mines and C - (End State Land), Land presenting no obvious threat.

[23] Law No. 66-383, 16 June 1966 concerning mine clearance missions carried out by public authorities, www.legifrance.gouv.fr.

[24] Ibid., Article 1: "les travaux de détection, d'enlèvement, de neutralisation, de stockage et de destruction des explosifs, pièges de guerre ont le caractère de travaux publics."

[25] CE, 26 June 1968, Sté Péduzzi, Rec. CE, 1968.

[26] Jurisclasseur, Fascicule 894, Responsabilité de l'armée pour les dommages subis par les particuliers.

[27] CE, 26 January 1968, Sté Peduzzi et Cie: Rec. CE 1968: "le législateur a entendu étendre les règles applicables à l'indemnisation des dommage de travaux publics aux dommages causés aux biens par la présence ou l'explosion de mines." CE, 23 February 1968, Aubrée, Recueil Lebon 1968.

[28] CE, sect., 21 March 1969, Veuve Lefaivre: Recueil Lebon 1969.

[29] CE, Epoux Roos, April 16, 1982. Cour Administrative d'Appel de Lyon, July 23, 2003, Société de Transport Uniroute. Cour Administrative d'Appel de Nancy, 17 November 1994, Chamerois.

BASIC PRINCIPLES

The verses in the *Qur'an* that refer to responsibility and liability identify three different types of responsibility. These are:

- general principles of responsibility that highlight the importance of a Muslim taking responsibility and being accountable[1]
- specific provisions addressing the responsibility of the governor (generally used by jurists as basis for liability of the State)[2]
- and individual persons' criminal and civil liability.[3]

In the Sunna, there are several "reported practices" (*hadith*) of the prophet touching on areas of liability. However, one in particular the "*hadith* of liability", is considered the legal basis of civil and State liability in Islamic law.

According to Ibn'Omar,[4] the prophet said:

You are shepherds and you are responsible for what is in your hands.
The head of state is shepherd and is responsible for his people.
The man is shepherd in his family and is responsible for it.
The wife is shepherd in the house of her husband and is responsible for it.
The servant is shepherd of the goods of his master and is responsible for it.
The man is shepherd of his fathers' goods and is responsible for them.
You are all shepherds and are responsible for what is in your hands.[5]

This hadith reminds every Muslim of his or her responsibilities. A legally responsible person (known as Mukallaf) should be responsible for him or herself and his or her dependants, and should make every effort to protect his dependants as he or she does him or herself. The responsibilities mentioned in the hadith are diverse, starting with the head of State. Thus, basic Islamic texts already include concepts such as responsibility.

GENERAL CONDITIONS FOR REPARATION (DHAMAN)

Rather than using the terms "responsibility" or "liability", when mentioning the obligation to compensate harm caused to someone else, Islamic law uses the word *al-Dhaman*, which is most closely translated as "reparation". Using that term, the *Sunna* refers to liability to compensate another's loss of something with one's own goods.[6]

In this context, scholars distinguish between compensation of damages (equivalent to tort liability) and compensation in the contractual sphere. There is no difference between the liability of the State and the liability of the individual.

Dhaman, meaning the duty to repair, comes about under two conditions: "ta'adi" and "damage". These terms are explained below.

Ta'adi

Islamic lawyers use the term *ta'aδi* to express the idea of reprehensible conduct, meaning doing something one is not entitled to do and/or to go "beyond the limits".[7] Ancient scholars considered the limits as what the law permitted the individual to do. A newer, wider definition considers the limits to be usual, practical behaviour. Thus, it is equivalent to reasonable diligence.

On the basis of the above, legal scholars work with different types of *ta'aδi*:

- *ta'aδi* through recklessness
- *ta'aδi* through negligence
- *ta'aδi* through willingness to cause harm
- *ta'aδi* through the abusive exercise of a right[8] (ie, if it causes harm to another, such as stealing in order to eat).

Ta'aδi is appreciated in objective terms.[9] If an act objectively appears to be unreasonable or to go beyond the limits, the real intention and the legal capacity of the person do not matter. Therefore, anyone who causes harm to the goods of another has to repair them, without consideration of legal capacity. If the person responsible does not have enough assets, compensation is due as soon as he has enough assets to make good the harm he has caused.

Harm

Islamic law scholars denote the concept of harm or damage in different ways: the terms *itlâf* (destruction) or ifsâd (deterioration) are used, both material expressions of harm. This terminology led to a material perception of harm or damage, which either touches a person or the assets.[10] Moral damages and immaterial harm is therefore almost inexistent in Islamic law, with the exception of libel. In the area of liability, legal scholarship distinguishes between two types of harm:[11] direct damage (*moubâchara*)[12] and damage caused indirectly (*taɔabbob*).[13] The distinction between the two is a matter of analysing causation, and it has an important impact on liability (the duty to compensate).

Causation

The distinction between direct and indirect damage lies in the analysis of causation. The distinction is essential, as the nature of the duty to repair differs in the two situations. The person causing direct harm always has to repair it (thus is liable), even if he or she does not commit *ta'aḍi*, while liability for indirect damage requires the author to have committed *ta'aḍi*.[14] Thus, there is a type of strict liability (without negligence) for direct damage. Article 283 of the Civil Code of the United Arab Emirates incorporates this rule, providing for liability of the author of direct damage without fault. Similarly, the Jordanian Civil Code requires no additional condition for liability to be established in case of direct harm (Article 257-2). In case of indirect damage, the author is only liable (and has a duty to repair) if, in addition to harm, he or she committed a wrong (*ta'aḍi*), thus acted either intentionally or negligently[15].

Liability in the Lebanese Mine Action Programme

FIGURE 20 | Lebanon

According to the Lebanese Mine Action Centre (LMAC), if after an area is declared as having been cleared, any item(s) of ordnance is found within three months of the site completion date, the relevant operator is required to return to the area and carry out area clearance of 10,000m^2 around the discovery to a depth of 20cm. If during this search additional item(s) of ordnance are found, an investigation will be conducted, to determine the reasons for their presence.

LIABILITY FOR "THINGS"

In Islamic law, there is generally no liability for damage caused by "things", as liability requires personal activity. If a thing causes damage, there is generally no ta'adi, no illegal act.[16] The Shafi school applies this principle very strictly, while the Hanfi school considers liability for buildings an exception.[17]

There is no reference to liability for mechanical things in classical sources, as machinery did not exist at the time. However, according to modern academics, the defendant of indirect damage (*moutaçabbib*) would be liable if he had acted intentionally or violated a duty of maintenance, or if he was negligent in some other respect.[18]

APPLICATION OF ISLAMIC LAW TO LIABILITY IN MINE ACTION

Islamic principles of liability require some sort of reprehensible conduct. Regarding demining operators, there would generally be liability where the operator had acted negligently.

Regarding the State, liability would have to be based on reprehensible conduct. A declaration by the State that a certain territory is free of mines without checking it appropriately could be seen as such. In addition, it might be possible to base a principle of State liability on general Qur'anic principles.

The text boxes below show how the Afghan and Lebanese mine action programmes have addressed liability.

Liability in the Afghanistan mine action programme

FIGURE 21 | Afghanistan

According to the Afghan National Mine Action Authority (ANMAA), as of January 2011 no formally adopted government document delineates the responsibility of ANMAA for management of residual mine/ERW risk in a cleared or released area. Draft national mine action legislation from 2006 sought to lay down such responsibilities for both the ANMAA and the clearance operators. This law was submitted to the Ministry of Justice but has not yet been adopted.

The Department of Mine Clearance (DMC)/Mine Action Coordination Centre of Afghanistan (MACCA), in coordination with the Ministry of Justice, has been working on a new decree on mine action, which will be followed by a new or amended mine action law to regulate all aspects of mine action. These will address the issue of responsibility for missed mines and the relevant legal consequences.

Regarding the legal responsibility of a clearance operator when an accident occurs after an area is declared as having been fully cleared, the ANMAA stated as follows.

Although there is no legal document to hold a clearance organisation responsible in case of a missed mine or a mine accident that occurs due to a missed device within the certified cleared area, traditionally the MACCA/DMC have taken the following steps in such cases:

When a missed mine is reported, a MACCA/DMC investigation team is sent to the site to confirm whether there are any other missed devices, whether it was a newly laid device, or if an accident was caused by a missed mine within the boundary of a certified cleared area. Subsequently, the concerned communities and clearance operator are provided with a final investigation report and recommendations for further action.

Based on the recommendations of the investigation team, the clearance organisation must, where deemed necessary:

- Re-clear the area under the internal and external QC and QA, to the satisfaction of the landowner and the local authorities (an example from 2008 was cited, where clearance by a mine operator was found to have missed an anti-vehicle mine)

Liability in the Afghanistan Mine Action Programme

- Cover the cost of damages (local value). An example from 2004 is when an EOD team from the Demining Agency For Afghanistan (DAFA) was tasked in the Kandahar province Arghandab district for a Village-by-Village EOD operation. During this operation they found a buried Aircraft bomb, this bomb was not movable and required to be rendered safe in situ. Despite following all required technical and safety preparation the bomb detonated and caused damages to some of the villagers. Following the event the inhabitants informed DAFA of damages that they incurred due to the explosion and requested compensation. After a joint assessment by the Area Mine Action Center (AMAC) and DAFA the forecasted amount was compensated to the identified people.
- Compensate the victim's family by following traditional compensation practices.

Using a "Balanced Score Card", MACCA reflects such failures and reduces their score for performance, which can affect their chance to obtain funding through the Voluntary Trust Fund (VTF).

ENDNOTES

1 7:6; 15:92-93; 37:24.

2 5:47; 5:45; 2:10-11-12.

3 5:95; 5:45; 4:92.

4 Abdullah ibn Umar (Arabic: **عبدالله بن عمر بن الخطاب**) (ca.614-693) was the son of the second Caliph Umar ibn Khattab. He was a prominent authority in hadith and law, and was known for his neutrality toward factions engaged in the first civil war within the Muslim community (656-661).

5 Sahih Al Bukhari, Dar al fikr Bayrut, 1981, p. 215.

6 Naẓariyyat aḍ-ḍamān wa aḥkām al-masūliyyah al-madaniyyah wal-ǧināiyyah fī al-fiqh al-islāmī: dirāsah muqāranah/Wahbah Az-Zuḥaylī, Dimašq: Dār al-fikr, 1982, p. 15.

7 Majma al Damanat, Baghdadi, Edn. 1307, Cairo.

8 Zuḥaylī, Wahbah, op. cit., p. 18.

9 Emile Tyan, Le système de la responsabilité délictuelle en droit musulman, Thèse de doctorat, Imprimerie Catholique, Beirut, 1926, p. 177.

10 Al sanhouri, masadir alhak, p.161.

11 ARBĀḤ, ḤALĪL AḤMAD, AL-MASULIYYAH AT-TAQṢĪRIYYAH 'AN AL-A'MĀL AŠ-ŠAḤṢIYYAH, BINGĀZĪ: Dā Rabāḥ, 1995, pp. 188–194.

12 See also Article 257-1, Jordanian Civil Code.

13 Article 887 méjellé (Ottoman Civil Code) defines direct damage as "damage caused by the fact itself".

14 ibid. defines the author of damage as "the one who carries out an act of which the consequence alone is damage".

15 Majma al Damanat, Baghdadi, Edn. 1307, Cairo, p. 165; cf. Articles 92, 93, 912, 922, and 924, Mejellé (Ottoman Civil Code). Articles 92 and 93 establish the liability of the author of indirect damage only for his or her voluntary actions, the author of direct damage is liable even for involuntary acts.

16 See Article 257-2, Jordanian Civil Code.

17 Bahr rayek, Ibn Noujaim, Dar al koutoub al arabya, Cairo, p. 353. 1955

18 Zuḥayli, Wahbah, op. cit., p. 258.

GENERAL LEGAL CONCLUSIONS ON LIABILITY

- The extent of civil liability for any negligence on the part of mine action operators should be clarified in national standards (and arguably also national legislation).
- Legislation providing for the strict liability of the State in all cases, or in cases where the State has declared certain territories as mine-free, would avoid the generally complex assessment of negligence/reprehensible conduct. Therefore, overall they may be most cost-effective. However, whether or not to determine liability in mine action through specific legislation remains a policy choice of the legislator, taking into account the appropriate allocation of risk. NMAAs should have well established standards for handing over of cleared land. Such standards should define at what exact point the responsibility of the operator is handed over to the authority.
- Once a cleared area has been formally handed over to the relevant mine action centre or NMAA, there should be strict liability for the State regarding any mine/ERW accidents that occur on that land.
- Despite the fact that only French legislation clearly provides for strict liability of the State, it appears possible under all legal systems to introduce systems of strict liability of the State, in regard to mine accidents on territories that have been expressly validated as mine-free or "usable" by State agencies. This would avoid the possibly complex assessment of negligence/reprehensible conduct and appears to be the most efficient approach.
- Generally speaking, the liability of demining operators is based on negligence, though in some legal systems there is strict liability for carrying out dangerous activities. Both options are viable solutions.
- NMAAs should have clear rules for compensation including procedures and levels of compensation following any accidents occurring in areas that have previously been cleared and subsequently accepted and handed over to the authority.
- National standards should be detailed to the level of information that is to be collected and reviewed as a part of the handover of cleared land. Such standards should also include how and for how long such information should be stored.

CHAPTER 7 | AN OVERVIEW OF INSURANCE

WHAT IS INSURANCE?

Insurance is a form of risk management primarily used to protect against the risk of a contingent, unforeseen loss. Insurance is defined as the equitable transfer of the risk of a loss from one entity to another in exchange for payment of a premium.

An insurer is a company providing the insurance; an insured, or policyholder, is the person or entity buying the insurance policy. An insurance broker finds sources for contracts of insurance on behalf of their customers. The rate of premium is a factor used to determine the amount to be charged for a certain amount of insurance coverage.

The purpose of insurance is to restore the operation or person to a situation as near to that in which they found themselves immediately prior to the loss. Obviously this has to be viewed as a "principle" only. There are some cases where complete restitution is not possible eg in the case of injury.

History of insurance

History of insurance refers to the development of modern laws and market in insurance against risks. In some sense we can say that insurance appears simultaneously with the appearance of human society. We know of two types of economies in human societies: money economies (with markets, money, financial instruments and so on) and non-money or natural economies (without money, markets, financial instruments and so on). The second type has been used much longer than the first. In such an economy and community, we can see insurance in the form of people helping each other. For example, if a house burns down, the members of the community help build a new one. Should the same thing happen to one's neighbor, the other neighbors must help. Otherwise, neighbors will not receive help in the future.(Source: Wikipedia)

Insurance

An arrangement by which a company or the state undertakes to provide a guarantee of compensation for specified loss, damage, illness, or death in return for payment of a specified premium Origin: Late Middle English (originally as ensurance in the sense 'ensuring, assurance, a guarantee'): from Old French enseurance, from enseurer. insurance dates from the mid 17th century. (Source: Oxford Dictionaries)

The transaction involves the insured assuming a guaranteed and known relatively small loss. This is represented by payment to the insurer in exchange for the insurer's promise to compensate (indemnify) the insured, in the case of the insured suffering an unexpected financial loss. The insured receives a contract, called the insurance policy, which details the conditions and circumstances under which the insured will be financially compensated.

FIGURE 22 | Insurance Policy

The cover available for demining personnel normally includes accidental death, loss of limb, and other permanent disablement. Demining personnel are often provided with cover for emergency assistance, including a 24-hour emergency assistance helpline, evacuation cover, medical expenses, and repatriation costs.

WHERE TO OBTAIN INSURANCE AND THE ROLE OF THE BROKER

An insurance broker acts on behalf of his or her client to secure the best terms available in the insurance market place. He or she takes into account factors such as the security of the market, breadth of cover, premium cost, and claims service. Following this, a broker`s function is to provide a source of advice, assistance, and service between the client and the insurance market.

The broker places the insurance with insurers. These may be insurance companies, or syndicates at Lloyd's of London (groups of underwriters who specialise in underwriting particular risks). Insurers usually operate in specific areas. Certain underwriting organisations will underwrite all regular commercial and private classes of business, but do not provide the market for high or "unusual" risk organisations. When dealing with specialised operations such as demining, therefore, specialist underwriters are required - mostly found among the underwriters in Lloyd's.

When a suitable insurance programme agreed and the particular requirements are established with the client, the broker:

- seeks out the appropriate underwriters
- negotiates the terms
- presents everything to the client for their consideration.

At this stage, the client has to establish with the broker the precise levels and risks to be insured. There may be areas where the client will decide to accept exposure to the risk; in others, the client may limit the benefits or cover, provided to the insured, while still ensuring protection against a major loss. Insurance is part of the commercial decision-making process of any operation or organisation.

The simplest aspect to consider is the insurance of property. It is known what the property is, what it is worth, and how much it will be to replace it. The type and extent of possible loss is also known.

INSURANCE IN MINE ACTION: AN OVERVIEW

Mine action is a relatively new humanitarian discipline, at least from the insurance industry's perspective. Since its emergence in the late 1980s in Afghanistan it has experienced rapid growth, becoming an important sector within the relief and development community.There is significant annual expenditure by both commercial and non-governmental operators each year, involving many thousands of employees.

Mine action largely takes place in a labour-intensive and high-risk environment where insurance is fundamental to the management of risk for operators. Insurance provides a measure of protection against the consequences of an accident.

While mine action has developed expertise in many technical areas, little has been written about insurance. The Guide to Insurance for Mine Action Operators was published by the GICHD in May 2004. In compiling this new publication, the contents of the original document have been updated and supplemented with new information, including a section out of common questions and answers regarding insurance.
Risk and risk assessments

Risk assessments are a crucial part of the insurance process. They allow:

- brokers and insurers to establish the level of risk and therefore the premium charged.
- mine action operatorsto use risk assessments as a key means to control and reduce risks.

They are also good practice for legal and quality assurance reasons, as they provide a record of actions taken and help accident investigations to establish what went wrong and why.

Mine action operators should ensure that they carry out their own risk assessments of possible accidents and losses from their operations. An insurer who perceives that a mine action operator has inadequate, or no, risk assessment procedures of their own, will view the operator as "high risk" and, therefore, more likely to generate claims under their own policies. As a result the insurer will charge a higher premium to insure these operators.

FIGURE 23 | Risk

It is very important to ensure that records are kept of all accidents involving injury to anyone. Full statements and reports, together with photographic evidence made at the time, may be valuable evidence in the future and must be kept safely. Remember that a liability claimant against the insured organisation has to be able to establish proof of negligence to succeed. For a robust defence to be made on behalf of the insured, all relevant details should be available.

Insurance requirements: IMAS and NMAS

Obtaining and retaining insurance accreditation for demining requires that the applicant is competent to apply the general provisions of IMAS and the specific provisions of the NMAS, including financial and insurance requirements. As a part of organisational accreditation, the desk (provisional) assessment should consider the applicant's insurance cover, both staff medical insurance and third party liability (called "general liability" in the US). Personal accident insurance

IMAS 10.10 (Safety & occupational health – General requirements), states that it is the employer's responsibility to provide, at no cost to the employee, adequate health care and emergency medical support in case of accidents and to ensure that adequate insurance cover exists for all employees against death, disablement, and injury. IMAS 10.40 (Safety & occupational health – Medical support to demining operations) also specifies that the preparations for a possible demining accident shall include the development and maintenance of:

- a capacity to transport victims, whether male or female, to an appropriate treatment facility or surgical hospital, or provide insurance to cover the cost of transport to a suitably equipped and staffed hospital
- insurance to cover the cost of surgical care and treatment, including prosthetics, for victims of demining accidents
- insurance to provide an appropriate disability pension to demining workers who become victims of demining accidents.

IMAS 10.40 also states that the NMAA must establish and maintain gender-sensitive standards for insurance cover for medical treatment for demining workers, and gender-equal standards for compensation for demining workers.

For desk accreditation, IMAS does not mention the language to be used. It may, though, be advisable for accreditation staff to specify which language(s) are to be used in insurance policies.

FIGURE 24 | IMAS

Monitoring of demining organisations should also include the inspection of demining management documentation which mentions insurance cover. See, for example, IMAS 07.40 (Monitoring of demining organisations).

Insurance coverage is also included in most National Mine Action Standards (NMAS).[1] The text box below is an example from Afghanistan.

Insurance Coverage Requirements in Afghanistan

All national staff employed by mine action organisations in Afghanistan shall be provided with insurance coverage at no cost to the individual. The coverage should include;

a) Coverage for trauma orientated injuries and death

b) The minimal amount of compensation for total permanent disablement and death shall be US$20,000

c) The partial permanent disablements should be compensated according to the percentage of impairment and disability

d) Temporary complete and partial impairment and disability should be compensated on weekly indemnity basis

Afghanistan Mine Action Standards No. 30, Second Edition, paragraph 30.6, January 2008.

The NMAS in Mozambique also require insurance coverage to be provided. Accreditation cannot otherwise be obtained from the National Demining Institute (IND).

Insurance Coverage Requirements in Mozambique

For accreditation, IND shall carry out the Desk Assessment. This assessment will consider the suitability of the applicant's:

k) insurance cover, both staff medical insurance and third party liability. IND requires the contractor to purchase acceptable medical, life and disability insurance for the international staff as well as third party liability insurance. The contractor shall purchase the minimum insurance cover for national staff as follows; medical insurance in the amount of $30,000, death insurance in the amount of $15,000 and insurance for disabilities in accordance with the Continental Scale. Evidence of insurance will be required prior to receiving accreditation in Mozambique.

l) insurance cover provided shall not have any clause contained within that excludes insurance cover for any individual as a result of any non-conformance to any agency SOP, Mozambique National Standard, and International Mine Action Standard.

National Standard 07.30, Second Edition, September 2002, §§5. General Requirements and 5.2.3: Desk Assessment.

Insurance requirements and mine action contracts

In mine action contracts, insurance coverage forms a part of the legal component of the contract. It should contain details on insurance to be held by the mine action operator (ie, medical, life, disability, worker's compensation, and third party liability). The statement of works should also include administration and logistical details, such as insurance requirements to be provided by the contracting agency or other agencies. These should also be included in the tender documentation.

In the simplest of terms, apart from the actual statement of work, there are three elements whose interests are fundamental to any contract:

- the contracting agency
- the contracted mine action operator
- the 'rest of the community' (third parties).

For the purposes of this Guide, we will assume that the contracts under consideration will be prepared by a contracting agency seeking mine action operators to conduct demining or explosive ordnance disposal (EOD).

The primary aim of a contract is to place responsibility for the consequences of the activity with the organisation in control of day-to-day events, and to protect the contracting agency from facing any claims or financial losses which may arise out of such activities. For this purpose, in addition to imposing responsibilities on the mine action operator, the contract will normally incorporate minimum levels of insurance to be provided in support of such responsibilities.

Any limits of insurance requested within the terms of the contract will not necessarily be the limit of claim which could be made against the mine action operator and for which they may be responsible. This is an important point to consider when agreeing the contract.

The contracting agency will draw up contract terms to reinforce those responsibilities and their accompanying liabilities. It will often incorporate terms which impose more onerous and wider responsibilities on mine action operators than normal "legal liability" would demand.

"Liability" aspects of any contract are the most important sections for all parties to understand thoroughly. The oil, energy and civil engineering industries have developed armies of contract writers, negotiators, and lawyers to create strong and well-tried contract terms and conditions. All organisations

are now wary of the litigious world in which they live and aim to protect themselves. As a result of these contextual changes, and the particular fears which surround demining operations, industries with limited expertise in demining operations will often impose strongly-worded contracts. Sometimes these contracts reflect their lack of understanding of the division of responsibilities and insurance requirements appropriate to the demining industry. The most contentious problems can often arise as a result of confusion over the division of responsibilities and liabilities between contracting agencies and mine action operators, as laid out in these contracts.

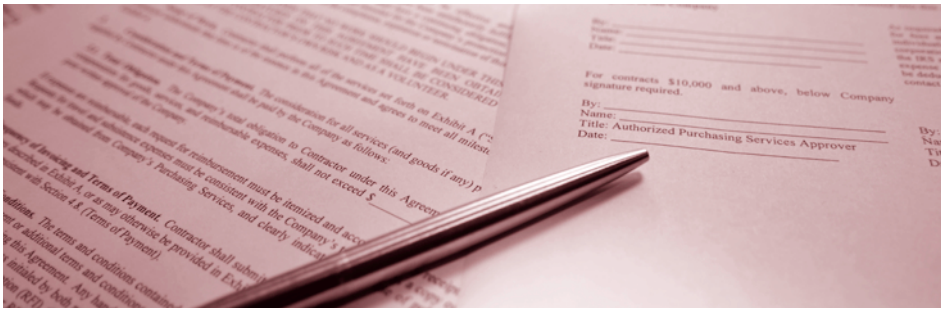


FIGURE 25 | Contract

Below are the main elements likely to be in a contract regarding insurance.

1) The contracting agency will aim to make the mine action operator responsible for all injuries or illnesses suffered by their employees and all the related costs in respect of treatment, support, and movement, no matter how they were caused.

Under this aspect, the contracting agency will require the mine action operator to provide general Employers Liability Insurance where the operator chooses to employ nationals from countries where the provision of this cover is a legal requirement. The contracting agency will also require personal accident coverage for all employees and personnel provided by the mine action operator plus adequate medical treatment and evacuation and repatriation coverage and management.

The laws of many countries require that any employer provide insurance to comply with specific "Workers Compensation Act" [2] legislation, regulations or similar, if the employer recruits national staff. Typically, regulations require that this insurance be purchased from a local provider approved by the government. The need to comply with any such requirement needs to be clarified between the mine action operator and the contracting agency.

The impact of such legislation may differ depending on the contractual agreement(s) covering the work: for example, the requirement may be different for a temporary consultant compared to a locally employed deminer. Professional legal advice should be sought locally to establish what, if any, the legal requirement is for insurance in any given country. Usually, the relevant sections are in the employment and contractual statutes, rather than being explicitly linked to demining.

2. The contracting agency will aim to deflect any responsibility for damage to the plant, machinery, including demining machines, or any other property owned by or under responsibility of the mine action operator. This may even include loss or damage actually caused by the actions of the contracting agency.

The insurers of such property must be made aware and waive subrogation rights,[3] if applicable.

3. The contracting agency may aim to make the action operator responsible for all loss or damage to the contracting agency's own property or injury caused to their personnel.

Any likely insurance coverage would only respond to "negligent acts" committed by the mine action operator and their personnel; contract terms should be negotiated accordingly.

4. The contracting agency will almost certainly aim to make the mine action operator responsible for any injury to third parties or damage to their property.

Under this aspect of the contract the contracting agency is likely to stipulate that the mine action operator provide third party liability coverage to specified limits of indemnity.

5. The contracting agency may incorporate many specific terms related to this area of responsibility and insurance. For example, a common requirement will state that the mine action operator should: "hold harmless,[4] defend, and indemnify" the contracting agency against all claims and ensure that insurers "waive rights of subrogation".

The "hold harmless" without the waiver can present major problems to the mine action operator. Similarly, nothing other than a "mutual" hold harmless agreement is very onerous for the mine action operator to consider and in some areas difficult to insure.

It is also important to ensure that the responsibility is identified as relating to the mine action operator's specific scope of work and claims arising from the performance of these works. However, the area of contractual responsibility holds the greatest likelihood for misunderstanding is "liability insurance".

LIABILITY INSURANCE

Liability insurance is a part of the general insurance system of risk financing, to protect the insured from the risks of liabilities imposed by lawsuits and similar claims. It protects the insured in the case he or she is sued for claims that come within the coverage of the insurance policy.

Originally, individuals or companies that faced a common peril (danger) formed a group and created a self-help fund out of which to pay compensation, should any member incur a loss. In other words, it was a mutual insurance arrangement. The modern system relies on dedicated carriers, usually for profit, to offer protection against specified perils for a premium, even though large amounts of insurance will be provided or guaranteed by governments.

Liability insurance is designed to offer specific protection against third party insurance claims. This means that a payment is not typically made to the insured, but rather to a person who suffers a loss, who is not a party to the insurance contract.

In general, neither damage caused intentionally, nor contractual liability, is covered under liability insurance policies. When a claim is made, the insurance carrier has the duty (and right) to defend the insured. Normally, the legal costs of a defence do not affect policy limits, unless the policy expressly states otherwise. This default rule is useful, as defence costs tend to soar when cases go to trial.

To insure a risk, the risk must be insurable. An insurable risk meets the ideal criteria for efficient insurance. The concept of insurable risk underlies nearly all insurance decisions. An insurable risk must fulfil the following criteria:

- the insurer must be able to charge a premium sufficient to cover not only claims, but also to cover the insurer's expenses. The risk cannot be catastrophic, or so large that no insurer could cover the potential loss
- the nature of the loss must be definite and measurable financially
- the loss should be random in nature.

Insurance is only effective for insurable risks. Risks which are too large cannot be insured, or the premiums have to be very high to make the price of the insurance infeasible. Also, risks that are not measurable, if insured, will be difficult, if not impossible, for the insurer to quantify.. Subsequently, they cannot establish the correct premium. Instead they will need to charge a conservatively high premium in order to mitigate the risk of paying too large a claim. The premium will then be higher than ideal, and inefficient.

It is crucial to understand the basics of liability coverage, and important to get suitable liability insurance, as per your needs. Insurance companies offer various types of liability insurance coverage.

1. The first one is 'employer's liability coverage,' which covers the employee with proper coverage protection during work. By law, the employee receives proper coverage under the employer's liability policy.

2. The second one is 'public liability coverage,' which covers any damage to public property or injury to person. It is important to get the required coverage under public liability coverage, appropriate to the operation.

3. The third one is 'product liability coverage,' which gives protection to manufacturers. It covers against any damage or injury that might occur due to the products or services provided.

4. The fourth type of coverage is 'directors and officers insurance' which protects in the event of a lawsuit.

5. The fifth type is 'professional coverage,' which protects professionals against any claims.

FIGURE 26 | Liability and Insurance

The protection offered by a liability insurance policy is twofold: a legal defence, in case a lawsuit is taken against the policyholder; and indemnification (payment on behalf of the insured) in respect of a settlement or court verdict. Liability policies typically cover only the negligence of the insured, and will not apply in cases of wilful or intentional acts by the insured.

LIABILITY INSURANCE AND LIABILITY V. DEMINING CONTRACTS

Not only is a full understanding of coverage essential in terms of the adequacy of the protection provided but it is also necessary to check the significant exclusion clauses/cover write-backs[5] under different policies to ensure a level playing field for the tendering parties competing for a contract. The subjects under this area of insurance are the most important from both the contracting agency and the mine action operator's point of view. The following few key points are worthy of note.

Liability losses or claims do not have a pre-determined "sum insured" as does property insurance. For example, an insured machine has a known value which will be lost in the event of its damage or destruction. That amount will be the "sum insured", and the overall loss is unlikely to ever exceed the machine's overall value. However the defence costs, expenses, and the resultant settlement figure from a legal action are unknown quantities. They are beyond the control of either the contracting agency or the mine action operator. As a result, liability insurances have a "limit of indemnity" instead of a "sum insured". "Indemnity limits" can vary, not only in chosen levels but whether, when chosen, they are "in the aggregate" or "any one occurrence/unlimited in the period of insurance".

- An aggregated limit of indemnity limits the total amount payable under the insurance to the stated limit, whether from one or several claims. Any claim paid reduces the remaining cover in place during the policy period of insurance.
- Any one occurrence/unlimited in the period of insurance (or words to that effect) means that the full limit of indemnity is available for each event which generates claims against the mine action operator.

It is also essential to establish whether the policy wording states that the policy is written on a "claims made" or "losses occurring" basis. A "claims made" type of coverage will only pay claims which are made within the period of insurance. This is appropriate if a "claims made" insurance policy is purchased year after year for many years and a claim is made within an insured period. By their very nature, liability claims are often only made,

against an organisation, long after the actual event took place which was the ultimate cause of the claim. This is particularly significant with regard to injury or illness claims. "Claims made" policies, which are allowed to lapse, and are not replaced/renewed, will leave the mine action operator with no cover whatsoever for a new claim, which may arise after this date, even if the event which triggered it happened during the time the policy was active.

"Losses occurring" coverage ensures that any incident which may occur, but not necessarily produce a claim for a long time thereafter, will still be dealt with by the insurers of the insurance period in which the incident took place. This form of policy wording is particularly important for insurances which are placed for "contract periods".

The potential for long periods of exposure to claims arising from events which occur during the contract work make the "losses occurring" wording the most appropriate and also reinforces the need for secure insurers to be demanded by both principal and contractor.

Many liability insurances exclude "war and terrorism" risks in very broad terms. As demining and EOD operations relate to remnants of war and take place in areas susceptible to terrorist attacks, such conditions could be very significant in the event of a claim.

Liability policies tend to be very specific in terms of the "geographical limits" and "jurisdiction limits":

- geographical limits relate to where in the world the activities of the insured organisation will be covered, while
- jurisdictional limits relate to the countries under whose laws and in whose courts the underwriters will defend and indemnify the insured.

These issues, and particularly the country of origin of the insured organisation, can restrict the ability of an insurer to provide the coverage required. The policy wordings presented for a contract must be appropriate to the location and the law governing the contractual agreement between the contracting agency and the mine action operator.

It should be noted that the international insurance market is regulated to considerable extent by licenses/approvals granted by sovereign governments around the world. The governments of many countries will only allow domestic insurers to provide insurance for individuals and/or organisations domiciled within their territorial boundaries. Non-domiciled international insurance companies are often not licensed to provide insurance, other than on a re-insurance basis. This is a matter of some significance for a mine action contractor as it will determine which insurer they can or cannot use.

The contracting agency imposing contractual requirements that demand appropriate liability cover should take into account the financial stability and location of the insurer. The mine action operator must also consider the stability/reliability of the insurer they choose to use, because the failure/disinclination of an insurer to pay a claim will not relieve them of their contractual obligations.

A significant disparity could occur in an international tendering process where strong insurance coverage may feature in one contractor's tender, but less reliable insurer's terms are used in another. This is an important element to be considered by the contracting agency, as they may be exposed to an uninsured claim in the future.

It is wise for the contractor's basic liability exposures to be insured under a "combined liability" form of policy. The policy will provide at least two classes of liability insurance: Employer's Liability and Third Party Public Liability. These types of insurance coverage must be arranged to respond to claims arising from the operations involved (see text boxes below). Hence, it is a good idea that they should be placed within a combined liability insurance policy so there will be the same insurance company dealing with both aspects.

Employer's liability insurance

This insurance will cover the insured organisation's legal liability for illness or injury suffered by the employee in the course of his or her work, which is attributable to negligence on the part of the employers. The insurance will have an indemnity limit within its terms and conditions. This will be a maximum amount which will be paid for defence costs and expenses and any award which a court may make.

Any award or defence costs will only be triggered when legal action is taken against the insured organisation within an insured jurisdiction. The amount of the award will be decided by the court and will not necessarily consider the limit of the insurance policy as a limit to the award. The indemnity limit in any insurance arrangements must be adequate for foreseeable settlements.

This insurance tends to be more appropriate to internationals and countries with active and appropriate legislative systems. Many nationals in developing countries are unable to afford access to professional legal counsel and hence are often unable to bring formal employers liability claims against current or former employers.

It is essential for both the contracting agency and the mine action operator to be aware of the extent of the coverage provided. The reliability of the insurer is also of immense importance as this coverage can be claimed upon in the future. There must be confidence that the insurer will still be there.

Third party public liability insurance

Any person not involved in the work but who may be injured as a result of such activities is a "third party". The mine action operator owes a duty of care to ensure that the community at large is safe and not likely to be harmed by the work he is conducting.

Third party public liability insurance provides indemnity for claims in respect of bodily injury or property damage suffered by third parties that arise out of the insured mine action operator's negligence.

It will cover the defence costs of the mine action operator for claims which are made against it and pay any damages awarded by the courts, subject to the indemnity limit.

Third party product liability

This refers to the liability for bodily injury or property damage arising out of products, goods, sold, serviced or supplied.

This type of liability may not feature so much for many organisations in mine action but is easily included for the sake of any elements of activities that could fall into this area of exposure. The examples of claims here will always relate to events which happen after the product has passed from the manufacturer or supplier to the purchaser or a construction has been completed.

The indemnity limit under for this type of insurance is usually an "aggregate" or "in all" limit unlike the public liability insurance where the limit of indemnity is "any one occurrence unlimited".

It should be noted that other classes of liability insurance are available and can be included under a combined liability policy. The classes mentioned above should be viewed as the starting point for a mine action operator looking to set up an insurance programme. The essential features to look for in a combined liability insurance policy include:

- liability coverage relies on negligence, which is defended and proven in courts of law, cover will extend to include legal defence costs
- it is essential that adequate limits of indemnity are incorporated to meet the contractual requirements, and that the insurance is arranged on a "losses occurring" basis as discussed above
- the policy should respond to activities and resultant claims in the appropriate countries and likely jurisdictions (not necessarily the same)

- cover must match the contract terms; for example, insurers must agree such elements as hold harmless terms and waivers of subrogation and any other clauses which may take the contractor's responsibilities beyond common law liability.

Liability insurance has three basic elements:

- involvement of legal procedures
- demonstrable negligence on the part of the mine action operator
- settlement of an award imposed by a court of law.

This insurance relates to claims arising out of negligent acts incurred in the course of the actual work. It is not completed operations coverage. It is unlikely to provide coverage for claims which occur after the contract work has been completed, the mine action operator has left and the site has been handed over.

Liability in the various legal systems has been explored in Part I of this Guide.

PROFESSIONAL INDEMNITY INSURANCE

The standard form of this coverage is designed to indemnify professional advisors, experts, consultants and the like for claims which may arise against them for financial loss as suffered by their clients and resulting from negligent errors or omissions that they may have committed. The form of coverage was designed for professions such as lawyers, accountants, architects, and many others whose work results in some form of advice, design, recommendation or study for which a fee is paid and upon which clients will act. The potential for a claim arises from errors or omissions in such "work".

It should be noted that professional indemnity is not a guarantee that any given advice, plan, design, or specification will achieve its intended or contracted purpose or function. A professional indemnity policy will only respond to third party claims where an identifiable error or omission has resulted in the plaintiff having suffered a financial loss.

Professional indemnity insurance policies normally specifically exclude any claims arising out of "bodily injury or property damage". In general, they have far more restrictive terms and conditions and lower levels of indemnity than other classes of liability insurance such as employers or public liability.

Invariably, when this coverage is placed it is done so on a "claims made" basis and with an "aggregate level of indemnity" as described above.

The arrangement of professional indemnity insurance is inappropriate for any short period of actual contract work. When it is appropriate, it should be placed on an annual basis and replaced annually for many years.

CASUALTY INSURANCE

Casualty insurance insures against accidents, not necessarily tied to any specific property. It is a broad spectrum of insurance in which a number of other types of insurance could be classified, such as auto, workers compensation, and some liability insurances.

- Crime insurance is a form of casualty insurance that covers the policyholder against losses arising from the criminal acts of third parties. For example, a company can obtain crime insurance to cover losses arising from, for instance, theft.
- Political risk insurance is a form of casualty insurance that can be taken out by businesses with operations in countries in which there is a risk that revolution or other political conditions could result in a loss.

In general, liability insurance policy documents are seldom the same, even though they may have the same titles. Within each nation's insurance markets, policies may vary and will incorporate clauses, terms and endorsements which rule in or out vital elements of coverage. There will be even more differences in documents prepared by insurers in different countries. An example of how insurance and liability can be included in a contract document is set out in the text box below.

The contracting agency shall not be held liable for any of the contractor's action, omission, negligence or misconduct in respect of life, health, accident, travel or for any insurance coverage which may be necessary or desirable for the purpose of this contract, nor for any costs expenses or claims associated with any illness, injury, death or disability of the contractor's personnel performing services under this contract. The contractor shall ensure that such personnel are adequately covered by insurance, including for any service incurred illness, injury, death or disability.

The contractor shall maintain in force, for the duration of the contract activities, a third party liability insurance with a recognized international insurance company to cover such risks. They shall submit a copy of such insurance policy to the contracting agency before beginning the services to be performed under this contract. The contracting agency shall not be held liable for compensation for the death, efforts or other hazards which may be suffered by any third parties or to their property as a result of the contractor's actions, errors, omissions, negligence or misconduct.

Note that the above only forms an example of the how insurance requirements can be included in contract documentation.

PERSONAL ACCIDENT INSURANCE

It is worth briefly considering why insurance cover is purchased. An individual will purchase personal accident insurance because of the perceived risk of accidental injury that will affect their ability to provide financially for themselves and their dependents. For most demining operators, it is standard practice to take out personal accident insurance for their workforce due to the risks involved in their operations, to ensure that these people are properly provided for in the event of an accident occurring. For the same reasons, some donors, service providers and contracting agencies such as the UN Office for Project Services (UNOPS), demand insurance cover as a condition for a contract to be awarded.

Who precisely is covered by insurance should depend on the risk assessment that has been undertaken. It is, however, common practice in mine action to arrange personal accident insurance for everyone in a programme.

This insurance will provide a previously agreed sum in compensation for pre-determined injuries without, as employer's liability requires, any proof of negligence or litigation to decide upon its payment. This may well be the only insurance that can effectively provide any compensation for injury to some workers in certain parts of the world where employer's liability coverage would not yet be effective.

The cover is not simply an "accidental death" benefit, it is more appropriate to think of it as a "damaged life" benefit.

" The average annual premium to insure one mine clearer could range between $5,000 to $8,000 a year, depending on the level of risk involved in a particular project or region."

Jonathan Pooley, Accident and health broker at Miller

" Clients are assessed by their experience, the quality of technology used for clearing mines, the level of security, as well as loss history. Most underwriters expect their clients to comply with the United Nations International Mine Action Standards (IMAS), which outline the safety standards common in the industry for all UN mine action operations. The political stability of a region is also considered."

Lloyd's

Extracts from Lloyd's News, 23 November 2010

If a person becomes disabled, whatever the cause may be, the financial consequences can be immense. In realistic terms, the personal accident sum insured should be set at an amount appropriate to a person's earnings.

FIGURES 27 - 30 | Demining Personnel

Cover must fully cater for the hazards in the work involved and the geographical and political risks which may feature. Terrorism and war exclusions from coverage should be removed.

The average standard travel insurance package is unlikely to cater for the requirements of EOD operations or apply in the countries in which they may be called upon to work.

International expatriate staff

For expatriate staff, it is normal for organisations to purchase a personal accident policy for death and permanent disability that offers capital benefits of between US$450,000 and US$500,000. The exact amount is of course a decision for the organisation and individual concerned (see, for an example, the text box below). Naturally, the higher the sum insured, the higher the premium.

Insurance coverage

How much insurance cover is required depends in part on an individual's personal circumstances. A lump sum of US$500,000 for a single person may be sufficient. But someone who is married with children may desire a higher amount. While organisations, and to some extent the insurance industry, tend to offer standard cover, individual circumstances vary widely and operators should undertake a personal risk assessment (ie, what would be the impact on your family of not leaving sufficient funds to look after them) to make sure they have appropriate cover. It is also worth remembering that personal accident insurance is no-fault cover, providing benefits on the basis that an event occurred in the work environment, irrespective of whether negligence was involved.

The maximum lump sum payment is usually paid in the event of an accident that results in death, or permanent disability such as loss of sight or limb. For lesser injuries, insurance companies often use a scale for partial disabilities, sometimes referred to as the "continental scale". Under this scale, a percentage of the lump sum is paid out depending on the injury. Some examples would be: loss of hand at the wrist, 50 per cent; loss of big toe, 15 per cent; loss of sense of smell, 10 per cent. These scales can be used for both local and international staff.

An issue not currently covered by some insurance policies, but which is attracting the attention of some legal bodies and governments, is the issue of rehabilitation costs. This is something that should be considered, because rehabilitation of a victim is both in the victim's own interests and those of the government and insurance company as it can reduce long-term costs.

Most insurance policies currently do not explicitly cover these costs as a separate item. People who were permanently disabled would have to find their rehabilitation costs from within their lump-sum payment. It is possible to specify separate insured sums - in some cases, twice that payable for accidental death - to reflect the difference in costs of caring for someone permanently disabled. Any additional payments to separately cover rehabilitation would almost certainly involve some increase in the insurance premium.

Locally recruited staff

Organisations should check to see if there are legal minimum insurance requirements in-country or whether the NMAA provides any guidance. Some organisations work on the basis that a multiple of salary (as with international staff) is an appropriate way to maintain equivalence between international and local insurance levels.

The sum insured should be a multiple of the local employee's income, not a national average, to reflect the individual's position and also account for any change in their position within an organisation. It is important to keep the amount of insurance under review. Circumstances change. A local staff member who started as a driver may now be running a team of several hundred deminers, with a proportionate rise in salary. The use of categories of risk should be applied to local staff, as well as internationals.

Occupational category ratings

Some insurance brokers offer a scheme by which employees are placed in a category which corresponds to the level of risk they face. These categories should be applied to both international and national staff. They allow the proper allocation of cover, appropriate to the risk to which individuals are exposed during their particular allocated tasks. There is no point paying higher premiums for individuals to perform high risk work unless their roles require this.

The premium for each category varies, based on the level of risk. An example of such categories might be as follows:

Category A: Any person involved in locating mines and/or ERW in known mined or hazardous areas, or in the actual defusing and/or clearance of explosives/ordnance. For example: a deminer, technical adviser, a mine detection dog handler, or a demining machine operator.

Category B: Any person who may enter known hazardous and/or mined areas or handle explosives/ordnance, but who is not involved in its location, defusing, or clearance. For example: a paramedic or a community liaison officer.

Category C: Any person who will neither enter known hazardous and/or mined areas nor handle explosives/ordnance. For example: a driver, mechanic, or administrative staff.
Definition of "Operative Time"

The issue of when cover applies depends again on the risk assessment. Personal accident and medical expenses policies require a definition of "Operative Time". Typically there are two definitions to choose from:

- "24 hour cover" which provides an individual with insurance for injury or death resulting from bodily injury and associated medical expenses that may arise from accidents happening at any time of day, whether the individual is on or off-duty.
- "Occupational risks only" which provides an individual with insurance for injury or death resulting from bodily injury and associated medical expenses which may arise from accidents that happen solely whilst the individual is performing work for the mine action operator, ie, only while on duty.

The easiest and most secure option is 24-hour cover. However, due to its broadness, it is also the most expensive. Most policies offer this as an option, if not standard.

Local residents employed to work on projects have spent a lifetime living with the ever-present risks presented by mines and ERW. Mine action operators, therefore, look to provide insurance purely for the additional risk to which these staff members will be exposed by working on a project, and not the inherent risk presented in living their daily lives. In these circumstances occupational risk is a more appropriate definition of "operative time".

International mine action staff are sometimes exposed to increased risks purely as a result of their status as non-members of the local community. These risks are ever-present for as long as they are in the country and do not apply purely while working.

Personal accident insurance – other considerations

Mine action organisations often offer standard insurance packages to their staff. If an individual feels that the amount insured is not sufficient, purchasing top-up insurance should be considered. There are two ways of doing this: by taking out a separate insurance policy or, if possible, by paying an additional premium to top up the organisational insurance. The latter option is probably cheaper and simpler.

Ideally, mine action operators want to avoid the possibility of gaps appearing in their cover, where particular exposures are left uninsured. However, it is also important for budgetary purposes to only purchase the insurance that a given project needs. While insurance brokers have a range of standard insurance products, these policies can usually be altered to suit individual people and organisations. Negotiation with the broker is worth considering and reinforces the importance of giving as much information as possible to the broker to enable them to make as accurate an assessment as possible of the risks presented by any given project.

Alongside personal accident insurance, insurance for death by natural causes can be taken out. The cover provided is particularly appropriate if personnel spend time in countries where illness or disease can be just as fatal as an injury. A choice of methods of selecting the benefit insured is available: it can be a multiple of salary or an agreed sum, just as with personal accident. The latter is normally more appropriate as it enables the coverage to be equitably arranged for short-term staff, consultants, or permanent employees operating on behalf of the organisation insured. A significant amount of information may be required about the health, age, and more of the insured personnel if high levels of sum insured apply. This type of insurance does not cover death following injury.

Insurance coverage in selected mine action programmes

All staff members employed by mine action organisations are provided with insurance cover, at no cost, by the employing organisation. This insurance covers traumatic injuries or death during all field operations, as well as office work. The minimum amount of compensation for total and permanent disability or death is currently US$20,000. There is no public liability insurance in place in the Afghanistan mine action programme.

Similarly, in Croatia, there is public liability insurance in case of a mine incident. The damage caused by mine explosions is covered by the State budget. Croatia is, in accordance with general principles of liability, objectively responsible for damage caused by mine incidents.

Deminers, auxiliary workers (eg, dog-handlers and demining machine operators), and QA monitors and inspectors in Croatia, are covered by personal insurance policies, and are covered by insurance policies while performing demining and related activities at any time during the week. Insurance coverage in case of death has to be a minimum of HRK400,000 (approximately €55,000), and at least HRK600,000 (approximately €80,000) in case of injury.

In Lebanon, all national staff working for the mine action programme must be insured in accordance with Lebanese Labour Law. They must be provided with personal insurance cover against injury, accidental death, and permanent total or partial disability (continental scale) of at least US$100,000 for each demining or Battle Area Clearance operator, and submit to the Lebanon Mine Action Centre the copies of the insurance policy, along with a detailed list specifying the exact level of compensation for each injury or accident.

MEDICAL AND REPATRIATION EXPENSES

International travellers, including mine action personnel, will need to be covered for medical, hospitalisation, surgical, and related costs incurred, as a result of unforeseen illness and/or accidental bodily injury which they might suffer outside their normal country of domicile. They will also need to be insured for the costs of repatriation on medical grounds or alternatively transport to another country for treatment, where appropriate.

National staff members need different coverage, namely insurance for medical expenses incurred to treat bodily injury sustained while working in their home countries.

The 24-hour support of a tried and tested medical assistance organisation should feature with this insurance coverage. All those who manage the contract programme should be aware of the steps to be taken and contact requirements to handle a situation rapidly.

FIGURE 31 | Helicopter Medical Evacuation

Insurance for medical and repatriation expenses may include the following components:

- emergency medical expenses
- emergency medical evacuation
- repatriation of remains
- accidental death and dismemberment
- 24-hour worldwide assistance.

There is exclusion for HIV/Aids.

HEALTH INSURANCE

Health insurance policies will normally cover the cost of medical treatments. Dental insurance protects policyholders for dental costs. It is the norm for international expatriate staff to have this kind of insurance coverage. However, it may be expensive to enrol large numbers of national staff for health insurance from an international provider, and frequently coverage available from national providers can be of mixed value and quality. It should also be borne in mind that these products often exclude injuries sustained as the result of working with mines and ERW or of acts of terrorism or war.

Like other forms of insurance, health insurance is a form of collectivism through which individuals collectively pool their risk. In the case of health insurance, this is of course the risk of incurring various medical expenses. The collective is usually publicly owned or can also be organised as a non-profit organisation for the members of the pool. Health insurance pools may also be managed by for-profit companies. It is sometimes used more broadly to include insurance covering disability or long-term nursing or custodial care needs.

Health insurance can be provided through a government-sponsored and managed social insurance programme, or from private insurance companies. It may be purchased on a group basis, for instance by an employer to cover all its employees, or by individuals. In each case, the covered groups or individuals pay a fee, premium, or tax, to help protect themselves from unexpected health care expenses. Benefits paying for medical expenses can also be provided through social welfare programmes funded by governments.

By estimating the overall risk of health care expenses occurring, a routine finance structure, such as a monthly premium, can be established, ensuring that money is available to pay for the health care benefits specified in the insurance agreement. The benefit is administered by a central organisation such as a government agency, private business, or not-for-profit entity.

FIGURE 32 | Medical History Form

A health insurance policy is a contract between an insurance company and an individual and, for example, an employer. The contract is normally renewable annually or monthly. The type and amount of health care costs that will be covered by the health insurance company are specified in advance in the contract. The individual insured person's obligations may take several forms, including those set out below:

- **Premium**: the amount the policy-holder or his/her sponsor has to pay to the health plan each month for the health coverage
- **Deductible**: the amount that the insured must pay towards the costs before the health insurer pays its share
- **Co-payment**: the amount that the insured person must pay out of pocket before the health insurer pays for a particular visit or service
- **Co-insurance**: can be used instead of, or in addition to, paying a fixed amount up front (a co-payment), the co-insurance is a percentage of the total cost that insured person may also pay
- **Exclusions**: not all services are covered. The insured person is generally expected to pay the full cost of non-covered services out of their own pocket
- **Coverage limits**: some health insurance policies only pay for health care up to a certain amount. The insured person may be expected to pay any charges in excess of the health plan's maximum payment for a specific service. In addition, some insurance company schemes have annual or lifetime coverage maximums. In such cases, the health plan will stop payment when they reach the benefit maximum and the policy-holder must pay all remaining costs in relation to treatments and medicine
- **Out-of-pocket maximums**: similar to coverage limits, except that in this case, the insured person's payment obligation ends when they reach the out-of-pocket maximum, and the health company pays all further covered costs
- **Prior authorisation**: the certification or authorisation that an insurer provides prior to medical service occurring. Obtaining an authorisation means that the insurer is obligated to pay for the service, assuming it matches what was authorised. Many smaller, routine services do not require authorisation
- **Capitation**: an amount paid by an insurer to a health care provider, for which the provider agrees to treat all members of the insurer.

FIGURE 33 | Medical Insurance Information

CRITICAL ILLNESS AND INCOME PROTECTION INSURANCE

Personal accident insurance represents a cost effective solution for short to medium-term disability from work plus an attractive lump sum in the event of death or permanent disability as result of bodily injury. For longer term disability preventing work, particularly as result of critical illnesses such as cancer, strokes, or multiple sclerosis, other insurance products are available. These policies are designed to provide long-term financial support in the event of the policyholder becoming unable to work because of disabling illness or bodily injury. They can be used to provide monthly payments to help pay such obligations as mortgage loans and credit cards.

Long-term disability insurance covers an individual's expenses until such time as they are considered permanently disabled and thereafter. Insurance companies will often try to encourage the person back into employment in preference to, and before, declaring those unable to work at all and therefore totally disabled.

FIGURE 34 | Insurance Claim Form

Given that these are long-term insurance products, they are best purchased and retained for the entirety of a working life. Usually individuals purchase these products in their own right and do not rely on their employers to provide them.

LIFE INSURANCE/ASSURANCE

Life insurance provides a monetary benefit to a descendant's family or other designated beneficiary, and may specifically provide for income to an insured person's family, burial, funeral, and other final expenses. Life insurance policies often allow the option of having the proceeds paid to the beneficiary either in a lump-sum cash payment or an annuity.

FIGURE 35 | Life Insurance Policy

Annuities provide a stream of payments and are generally classified as insurance because they are issued by insurance companies, are regulated as insurance, and require the same kinds of actuarial (the calculation by specialists of life insurance risks and insurance premiums) and investment management expertise that life insurance requires. Annuities and pensions that pay a benefit for life are sometimes regarded as insurance against the possibility that a retiree will outlive his or her financial resources. In that sense, they are the complement of life insurance and, from an underwriting perspective, are the mirror image of life insurance.

Certain life insurance contracts accumulate cash values, which may be taken by the insured if the policy is surrendered or which may be borrowed against. Some policies, such as annuities and endowment policies, are financial instruments to accumulate or liquidate wealth when it is needed.

Individuals should remember that there are typically exclusions from life insurance for certain countries and territories. It is important for individuals to be aware of this and to check which exclusions are in place.

INSURANCE OF PLANT MACHINERY, DEMINING MACHINES & EOD EQUIPMENT

If contractors are made responsible for all claims relating to specific property under the terms of a contract, eg, plant machinery or the contracting agency's property, then specific "all-risks insurance" may be arranged to cover these items.

It is uneconomical and risky to insure plant machinery and demining machines under a series of policies ie, while in storage, marine/air cargo, land transit, in country storage and operational risks. The more policies involved, the more gaps may appear in coverage; plus each one has independent premium requirements. Single global insurance is available, including operational risks, war risks and terrorism, three elements which are often excluded from insurance.

Since insurance is available for all operational plant, machinery, equipment and vehicles anywhere in the world, including operational risks, it is advisable for organisations and companies to insure all their property on an annual basis.

The equipment and plant machinery which is employed in EOD and demining will vary from handheld detectors to road-going vehicles and heavy flail and tiller systems. This subject may comprise another element of the contract with the requirement to insure under reference to "the mine action operators property".

Exposure to loss can result from conventional losses in the course of shipment around the world. The exposure can also be compounded by extensions of maritime law which can involve the owner of cargo in contributions to General Average or Salvage Charges.

FIGURE 36 | Maritime Cargo

Cargo policies may cease on arrival at a port or work site. Cover may then be transferred to a site-based policy; this could have limitations relating to operational risks in mined areas and war or terrorism losses. Such divides in cover not only leave obvious gaps but can also be the source of contention between insurers when damage has been caused but the actual event cannot clearly be identified.

Vehicle insurance can also be an issue. Despite accepting contractual responsibility to insure, the country in which the work site is situated may not have local providers of vehicle insurance. Conversely, whilst local regulations may dictate a local provider to be used, this provider may be of questionable reliability.

FIGURE 37 | Demining Machine

As more and more mechanical demining systems are deployed, the insurance of this machinery during demining operations becomes an increasingly significant issue. Many policies fail to cover the use of such machinery when operating in a known mined area or hazardous area.

Basically, the insurance relating to the "mine action operators property" should aim to provide "all risks of physical loss or damage" coverage, or as near to that as possible, and embrace all items of property in one cover.

FIGURE 38 | Demining Machine

As each contract may differ, it is always advisable for a mine action operator to ensure that their insurers are made aware of the scope, area, value and likely hazard level of work involved and agree, as appropriate, to the terms and conditions of contracts.

No insurance will be totally free from clauses, conditions and limitations. It is essential that the mine action operator and contracting agency are both aware of the extent of cover being sought and secured from the point of tender. It must then be understood and agreed which areas of the contractual exposures, while accepted, are not insured or where renegotiation of the contract is appropriate.

OTHER TYPES OF INSURANCE

- "All-risks" insurance is an insurance that is designed to provide cover for machinery, plant equipment, stock/supplies and other "material damage" exposures. It covers a wide-range of incidents and perils, except those noted in the policy. All-risks insurance is different from peril-specific insurance that cover losses from only those perils listed in the policy.
- Business interruption insurance covers the loss of income, and the expenses incurred, after a covered peril interrupts normal business operations.
- Kidnap and ransom insurance is designed to protect individuals and corporations operating in high-risk areas around the world against the perils of kidnap, extortion, wrongful detention and hijacking.

- Legal expenses insurance covers policyholders for the potential costs of legal action against an institution or an individual. When something happens which triggers the need for legal action, it is known as "the event". There are two main types of legal expenses insurance: before the event insurance and after the event insurance.

FIGURES 39 - 40 | Legal Insurance

- Travel insurance is insurance cover taken by those who travel abroad, which covers certain losses such as medical expenses, loss of personal belongings, travel delay, and personal liabilities. Most travel insurances are best suited for those performing non-hazardous and non-manual tasks.

- Vehicle insurance (also known as auto insurance, car insurance, or motor insurance) is insurance purchased for cars, trucks, and other road vehicles. Its primary use is to provide protection against physical damage resulting from traffic collisions and against liability that could also arise from this. In most countries it is compulsory to have vehicle insurance before using or keeping a motor vehicle on public road. This insurance must be purchased from a government-approved local provider. Most jurisdictions relate insurance to both the car and the driver; however, the degree of each varies greatly.

FIGURES 41 | Legal Insurance

FIGURE 42 | Auto Insurance

CLAIMS

Consider drawing up a pre-prepared form to list the essential information that the broker would need to process a claim. It should not be assumed that a broker wants the same information as a programme manager investigating the accident. Of course, the insurance broker should always be contacted as soon as possible to make them aware of the possibility of a claim.

When writing emergency plans, make sure that all the information required for both the medical service provider and the insurance broker is included. These standard operating procedures should be easily accessible by all staff members, who, ideally, should also carry a card with essential contact and policy numbers at all times.

It is an essential feature of any insurance contract that the underwriters must be made aware of any accident which could give rise to a claim as soon as possible. On notification they may ask for:

- copies of the statements reports
- independent assessments
- other documents that are available.

The underwriter may simply note the situation and await further developments or they may appoint loss adjusters. In each case, it is essential that they are made aware of the claim promptly and that the underwriters' interests are not prejudiced through delayed notifications.

In cases where a solicitor's letter is received, this is always the starting point of the actual claims process. When such a letter is received it must be passed on to the broker for submission to the insurers, together with an acknowledgement to the sender of receipt and that it has been passed on. The insurers will then appoint a loss adjuster who will contact the insured and begin by

investigating all aspects of the claim to consider the defence. Whatever further steps to be taken are then out of the insured's hands and will be taken by the claims adjuster, or lawyers will be brought in to defend the position and proceed to court. All costs and awards will be paid by the insurer and the process can take a significant time.

It must always be remembered that failure to advise underwriters of an accident could prejudice any further claim settlement.

Checklist for claims

1. Know what information the broker will need to process a claim.
2. Establish whether the broker specifies a medical service provider. Identify what the medical service requires from you. Clarify the relationship and responsibilities between the insured (whether an individual or organisation), the broker and the medical service provider.
3. If there is an accident, contact the insurance broker as soon as possible.
4. Brokers are there to help, so use them. They have the experience of handling insurance claims.
5. Retain information that may be useful for the claim, such as receipts for medical expenses, reports and photographs.
6. If necessary, prepare forms to be completed and sent to the broker in the event of an accident.

SELF-INSURANCE

What is self-insurance?

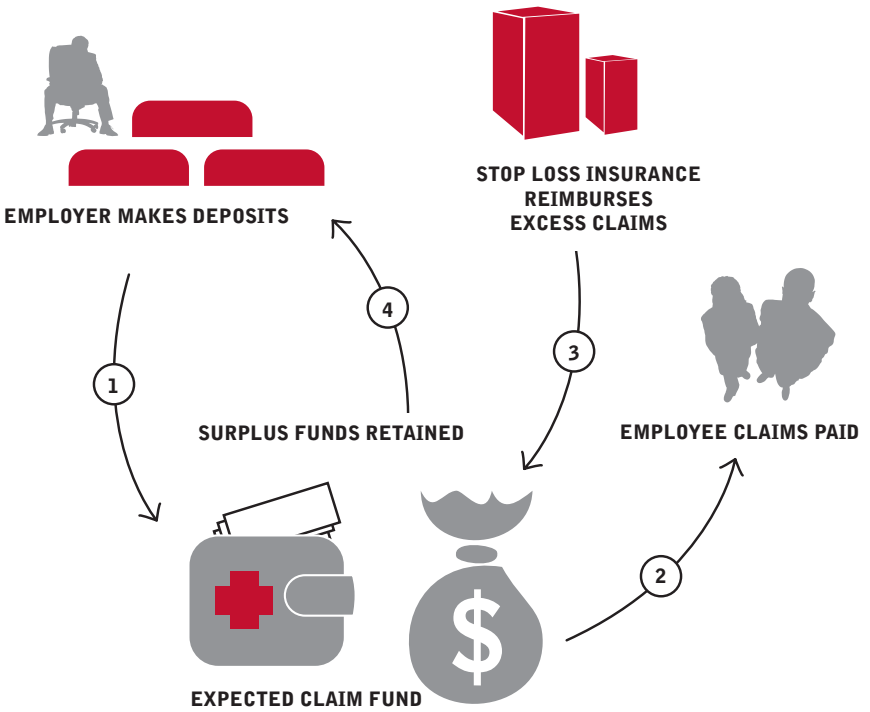
Self-insurance is a risk management method in which a calculated amount of funds is set aside to compensate for a potential future loss. If self-insurance is undertaken seriously, money is set aside using actuarial and insurance information and the "law of large numbers".[6] This is done so that the amount set aside (similar to how an insurance premium is managed) is enough to cover the future uncertain loss. This is done in a manner similar to how an insurance premium is managed.

Self-insurance is, in theory, possible for any insurable risk, meaning that a risk that is *predictable and measurable enough*, as a whole, to estimate the amount that needs to be set aside to pay for future uncertain losses. For a risk to be insurable, it must represent a future, uncertain event over which the insured has no control. Other characteristics which assist in making a risk self-insurable include the ability to *price or rate the risk*. If the insurable

event is one in a large number of similar risks, the aggregate risk can be estimated, according to the law of large numbers and the probability that the possible event can be quantified. Normally, catastrophic risks[7] are not self-insured, as they are highly unpredictable and high in loss-value. Catastrophic risks are normally underwritten by the re-insurance or wholesale insurance market.

Full or exclusive self-insurance is rare in mine action, as a combination of self-insurance and commercial insurance usually provides the best cover for the self-insured. Usually the predictable losses of the risk are retained and self-insured, forming a first or "working" layer of cover. A policy is purchased from the commercial insurance market for the remaining cover. The commercial insurance market then pays for losses above the specified self-insurance limit per loss, thereby stopping the cost of losses to the self-insured above the retained values. Effectively the losses paid for by the insured before the stop-loss policy pays becomes the deductible layer. Depending on the level at which risks are stopped, commercial insurance cover should become less and less expensive the further away the commercial insurer moves from the working layer of paying claims each year.

FIGURE 43 | Self Insurance



A popular and cost-effective form of self-insurance can be found in various types of employee benefits insurance offered by corporations with many thousands of employees. Employee benefits self-insurance programmes are often underwritten by the captive insurance companies formed. Hundreds of thousands of employees constitute a large enough risk pool for the corporation to be able to predict and price the risk of losses from benefits offered to employees. Through doing this, corporations are able to manage their financial exposure to the self-insurance programme without buying commercial insurance.

The idea of self-insurance is that, by retaining, calculating risks, and paying the resulting claims or losses from captive financial provisions, the overall process is cheaper than buying commercial insurance from a commercial insurance company. Cost savings to the self-insured entity are usually realised through removing or reducing the carrying-costs that commercial insurers are obliged to pass on to their insurance consumers.

An example of this is a self-funded health care plan under which a smaller employer, such as demining NGO or commercial company, helps finance the health care costs of its employees by contracting with a third party administrator to administer most aspects of the plan. The employer may also contract with a reinsurer to pay amounts in excess of a certain threshold, in order to share the risk for potential catastrophic claims experience.
The risks of self-insurance

The subject of self-insurance is interesting but presents lots of uncertainty. The use of self-insurance depends on what kind of insurance coverage that is being considered. For equipment, where it is known what the maximum loss is, the owner may choose to insure it, or not, as the absence of the insurance affects no one other than the organisation owning the equipment.

In the case of liability insurance a full self-insurance is not a feasible option since awards are unpredictable. The extent of potential bodily injury or illness to third parties or damage to their property can be severe and it also depends on the jurisdiction governing the court which is to determine the award. Furthermore, defence in any court cannot be conducted without legal costs and expenses.These are also unpredictable and can be costly.

Reliance on self-insurance to provide liability cover is a potentially risky exposure and therefore questionable. In some countries the provision of employer's liability insurance is a legal requirement and cannot be dealt with by a self-insurance provision.

A liability claim can materialise years into the future. The amount is unpredictable and so is the timescale in which a claim can be made. What happens if the organisation has been dissolved by then, or if the business fails?

Self-insurance can potentially be used as a vehicle to provide personal accident cover, depending on the wealth and size of the organisation concerned. However, whilst it is a tempting proposition to elect to self-insure on the belief that claims occur infrequently, and one or two is the maximum likely level of exposure. This is not such a good idea if the potential risk of multiple injuries from one event is ignored. For example, explosions in stockpiles, vehicle accidents, terrorist attacks, air crashes, and similar accidents can potentially involve many individuals. Would the self-insurance programme have the resources to cope with a major catastrophe, ie, many deaths or major injuries in one go or a series of the same in quick succession? As an example, if individuals are insured for $500,000 each as a common level, the amount of self-insured funds reserved for such an event has to be significant. The biggest danger is organisations using self-insurance and then leaving victims with no potential for any compensation, owing to inadequate levels of reserved funds.

In countries with well-developed and established insurance industries, insurance companies are heavily regulated to ensure their ability to pay. This is not necessarily the case with self-insurance schemes. A self-insurance scheme should ideally have some legal basis to ensure the proper administration of such money. If donor funds are used to contribute to such self-insurance schemes, it is worth checking that the donor agrees to their money being used in this way.

Self-insurance, an alternative risk management model by the Swiss Foundation for Mine Action (FSD)

The basics of Risk Management – by The Foundation for Mine Action (FSD)

Before looking into the principles of self-insurance, let's briefly recall the foundation of a sound Risk Management. Commercial entities and not-for profit organisations in the mine action industry try to control their operational and overall risks in priority through three strategies which aim at reducing the exposure of their staff, assets and processes to unforeseen, damaging events:

a) by avoiding the risks: naturally, any organisation will try to reach its target in terms of quality and productivity by avoiding as much as possible any risk exposure. Typical measures and approaches in the industry are the definition of SOPs and training/drilling of the staff, enforcement of security rules in war-zones, equipping the operators with reliable, high quality tools, vehicles and material, promoting and implementing health guidelines and rules and others.

Self-insurance, an alternative risk management model by the Swiss Foundation for Mine Action (FSD)

b) by reducing the negative effect of the risk : even with the best work method and staff training, state-of-the art equipment and tools and the best negotiated contracts, some residual risks will always remain, and exposure to natural or man-made disasters is unavoidable. In preparation for such unfortunate and uncontrolled events, an organization will take measures to reduce as much as possible the human and material damage. Examples: wear seat-belts in cars, limit the number of passengers in a car or a plane, keep safety distances in the mine-field, and many others.

c) by transferring the risks to other parties : an important part of the success of a risk management strategy is also depending on the way an organisation is contracting it's tasks and how it is delimiting the responsibility for the unavoidable risks between itself and its staff, it's partners, it's suppliers and its clients. All contracting must be governed by the question on how responsibility is divided in the worst possible case or event. Examples are: medical care for staff, exchange rate variations with paymasters and donors, malfunctioning equipment from suppliers, liability for quality and safety for civilian users of demined areas etc.

In addition to all those measures, a company / organization will buy insurance cover, in order to be able to care for the material losses in case of an unfortunate, unforeseen impact on the setup. An alternative to buying external insurance is to self-insure the remaining risks.

Self-insurance as an alternative tool for Risk Management

The basic aim of self insurance is to be able to identify and quantify risks internally, and in a way that makes it cheaper than buying insurance from the commercial insurance market. Successful self-insurance schemes depend on a professional, systematic, and rigorous overall risk management system of the entity. Risk consciousness is not only necessary at the management level, but has to be part of the overall culture of the organisation.

Cost savings to the self-insured entities are often also realised through removing or reducing the administrative costs that commercial insurers are obliged to pass on to their insurance consumers.

Enhanced flexibility is also an important objective of self-insurance schemes, in at least two areas:

First, in the administration of the insured values and staff. If commercial companies usually impose very strict rules and systems in terms of contracting of assets and staff (often based on advance declarations of asset, staff, and activity lists, combined with advance charging of premiums), self-insurance schemes can be based on post-declarations (established once the reality of the business is known).

Second, premiums paid to commercial insurance companies leave the financial system of the entity and are registered and charged to the projects/products as costs. Premiums paid to the self-insurance fund, however, are retained within the financial system of the entity and therefore can enhance and optimise the overall financial engineering, particularly in the area of the cash management.

Limitations of self-insurance

Catastrophic risks[8] normally are not self-insured as their probability of loss occurrence is relatively low, but the loss-value potentially very high. Catastrophic risks are therefore usually underwritten on the re-insurance or wholesale insurance market, even in organisations with professional self-insurance schemes.

Also, the risk of third party liability often cannot be covered reasonably by self insurance schemes, since compensation amounts often are very high, unpredictable and dependant on local legislation.[9] Further, a liability claim can materialise years into the future. Not only is the amount unpredictable but so is the timescale in which a claim can be made. What happens if the organisation has been dissolved by then, or if the business fails? In addition, for the loss adjustment in this field, specialists and lawyers from commercial insurance companies often are much better equipped to defend the insured interests than its own staff.

Full or exclusive self-insurance is therefore rare, both in general and in mine action specific organisations. A combination of self-insurance and commercial insurance usually provides the best cover for the self-insured: the predictable[10] losses in each risk area are retained and self-insured, forming a first "working" layer for the cover. For the second, less predictable level, a policy is purchased from the commercial insurance market. The commercial insurance market then pays for losses above the specified self-insured limits per loss (extended excess limit) or per loss aggregate (stop-loss), thereby limiting the cost of individual or cumulated losses for the self-insured.

An example of this is a self-funded health care plan under which a smaller employer, such as demining NGO or commercial company, helps finance the health care costs of its employees by contracting with a third party administrator to administer most aspects of the plan. The employer may also contract with a reinsurer to pay amounts in excess of a certain threshold, in order to share the risk for potential catastrophic claims experience.

Conditions for building a successful self-insurance scheme

Basically, self-insurance schemes are likely to be successful in scenarios where the insured entity is a very risk-conscious organisation, with a professional risk management system, and which aims for high-quality processes and operations, within an insurance market which offers comparatively low incentives for low loss ratios.

This can apply typically for the mine action sector, where the very limited and exclusive commercial insurance market offers low premium reductions for clients with losses that are below the average in the industry.

This alone, however, does not guarantee self-insurance as a successful venture. The following factors are also required for implementation:

- National legislation, allowing for an internal or external self-insurance scheme
- A sound financial system which allows the start of such a scheme, ideally with a basic core-capital. Such a basic fund then is gradually increased and optimised, in parallel to the evolution of the business volume, over years, through continuous optimisation of the proportion of self-insured and externally insured risks
- A reliable, high-quality administrative back-up, able to produce the required information, timely and regularly, based on clearly-defined rules and procedures and integrated rules on valuation of assets, outside and within the core-financial system
- A low-cost administrative team or a network of decentralised administrators. As mentioned above, commercial insurance companies charge their administrative costs through the premiums. These process costs can only be optimised by administrative processes produced by low-cost workforces (either project-based or produced in a location with lower salary levels than in western countries)
- A self-insurance scheme requires to be administered by an insurance expert. Maximal possible losses (MPL) in each individual risk area, and their probability of occurrence need to be calculated, ideally by an expert from the insurance market, who provides the required technical and mathematical skills and who has the overview in the insurance market
- The entity aiming at self insurance needs the confidence/reputation and connections in the insurance market required to obtain the necessary complementary re-insurance covers. In today's transparent and fast-communicating world, only well-established and reputable organisations and companies, able to document full track records and risk management rules and regulations, are able to gain this confidence.

FSD, with guidance from Bruno Kopp from Risk Management Service (RMS) (www.rms.ch), has successfully implemented such a scheme since 2002 and is now benefiting from the previously mentioned advantages of its self-insurance scheme. FSD self-insurance covers the following areas:

- insurance of international staff: accident (conventional and war), medical insurance, repatriation and risk of death and permanent and temporary disablement
- insurance of national staff: stop-loss scheme for professional and non-professional accidents, including war risk plus severance pay and pension and seniority schemes
- asset insurance: war risk (war, terrorism, forced abandonment) and conventional risks (fire, water, theft)
- corporate liability insurance (limited self-insurance)
- contract frustration insurance.

QUESTIONS AND ANSWERS REGARDING INSURANCE

Question and Answer 1
Are all insurance companies the same?

Answer: All insurance companies are not the same. When sourcing insurance, carefully compare and review offers from the various insurance providers. Choosing a good, established company will ensure that your insurance will be there when and if it is needed.

One difference between insurance companies is the types of insurance they offer. Of course, many companies offer a variety of insurance products, but they may have one speciality that they offer. It is always a good idea to choose a company with an established reputation. Using a newer company may lead to problems in the future. For instance, if a health insurance is purchased from a brand new insurance provider, it may happen that the cost of the premiums starts increasing year after year as the new provider experiences that medical care costs much more than originally anticipated. With an established company it is less likely that the company will experience financial problems

The level of customer care offered is also an important differentiation between insurance companies. Choose a company that will be available to answer questions and meet needs when they arise in a timely fashion.

Insurance is confusing and sometimes complicated; an insurance provider who will assist the insured entity to understand the coverage and policy should be selected.

For insurance of demining personnel it is important to review and compare the insurance coverage offered, regarding medical and repatriation expenses, since this may vary from company to company.

Question and Answer 2

What kind of information is required in order for an insurance broker to provide a quotation for insurance coverage?

Answer:

- Type of work
- Locations of work
- Numbers of personnel international and national staff
- Duration of projects
- Levels of funding
- Level of wages or payments to staff
- Standards working to
- Specific limits/sums insured to meet insurance requirements under contracts received from donors
- Types and values of machinery used
- Details of previous claims histories

There may be further information required depending on contract type.

Question and Answer 3

What are the appropriate amounts for coverage?

Answer: It is worth suggesting that many limits will be dictated by the terms of donor contracts. Most personal accident sums insured are subjected to no pre-set limit depending on the personnel insured. Brokers are often able to make suggestions.

Question and Answer 4

What should be reviewed in particular when reviewing an insurance policy for personal accident and medical expenses for demining staff?

Answer:

- Levels of sum insured
- Definition of operative time
- Definitions of what constitutes capital disability and what will trigger payment of a capital benefit
- Excluded territories
- Excluded activities such as high risk demining in hostile environments
- Exclusion of war and terrorism perils
- Can the policy be extended to accommodate project overruns?
- Which countries' laws governs dispute between the mine action operator and the insurer
- Language in which the policy is written
- Is the premium refundable in full or in part in the event of early cancellation?
- Does the policy include cost of medical repatriation to an insured person's home country?
- Is there any cover in force for expenses incurred after repatriation?
- Does cover operate for claims arising while personnel are in transfer to and from country where they are working?
- Does the policy cover cost for treating unforeseen illness?
- Is there a policy excess or deductible?
- Does the policy have a pre-existing medical condition exclusion?
- Are there any inner limits applicable for different types of treatments?
- Does the policy cover repatriation of mortal remains?
- Does it include a 24-hour medical helpline?

ENDNOTES

[1] For more examples see www.mineactionstandards.org/national-standards/about-nmas/.

[2] Workers' compensation is a form of insurance that provides compensation and medical care for employees who are injured in the course of employment, in exchange for mandatory relinquishment of the employee's right to sue his or her employer for the tort of negligence.

[3] Subrogation in its most common usage refers to circumstances in which an insurance company tries to recoup expenses for a claim it paid out when another party should have been responsible for paying at least a portion of that claim.

[4] Hold harmless means to indemnify someone or something.

[5] The process of restoring to profit a provision for bad or doubtful debts previously made against profits and no longer required.

[6] In probability theory, the law of large numbers is a theorem that describes the result of performing the same experiment a large number of times. According to the law, the average of the results obtained from a large number of trials should be close to the expected value, and will tend to become closer as more trials are performed.

[7] Global catastrophic risks are risks that seriously threaten human well-being on a global scale. An immensely diverse collection of events could constitute global catastrophes: potential factors range from volcanic eruptions to pandemic infections, nuclear accidents to worldwide tyrannies, out-of-control scientific experiments to climatic changes, and cosmic hazards to economic collapse.

[8] Ibid.

[9] In general, employers may be held liable for an accident arising out of the general course of employment. In some jurisdictions, it is possible for the employee to take legal action against the employer to recover damages for harm caused by the employer's negligence.

[10] Predictable = average loss records of previous years, industry average figures, etc.

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WEB RESOURCES

- **Lloyd's** www.lloyds.com
- **HMT Insurance Brokers Ltd** www.hmtib.co.uk

Active underwriter
The individual at the underwriting box with principal authority to accept insurance and reinsurance risk on behalf of the members of a syndicate.

Additional premium
A further premium payable by the insured as a result of policy endorsement, which may have increased the risk or amended the policy conditions or sum insured.

Aggregate
Total (limit of indemnity, premium, retention, etc).

Assured
Another name for an insured.

Brokerage
The commission that is payable to a broker for placing an insurance or reinsurance contract with an insurer or a reinsurer. Compare fee for service. Although brokerage is payable by the insured as part of the gross premium the amount of brokerage is agreed by the insurer. The insured may request his broker to state the amount of his brokerage on a given placement. Similar considerations apply to reassureds under reinsurances. Sometimes the term brokerage may be used to refer the business of a broker.

Certificate of insurance
Depending on the context this term may refer to:

(a) A document that evidences the existence of insurance cover but which does not detail all its terms. The terms are instead contained in a separate policy of insurance. Certificates of insurance are required by the law in some countries.

(b) A document that is issued by a coverholder which evidences the existence of insurance cover and details the terms of such cover. No policy of insurance is issued where such a certificate is issued.

Claim
Depending on the context this term may refer to:

(a) a demand made by a policyholder on his insurer(s) for payment or some other contractual benefit under an insurance policy

(b) a demand made by an insurer on its reinsurer(s) to be paid under a reinsurance contract

(c) a demand made by a third party on a policyholder to be compensated for some injury, damage or loss for which the third party blames the policyholder. A claim is payable under an insurance or reinsurance contract if it is caused by an insured peril and it is not excluded under the terms of that contract.

Claimant
The person making a claim.

Claim history
A record of the number of previous insurance claims submitted by a demining organisation to an insurer.

Claims made policy
A policy which only pays claims that are notified to the insurer during a specified period.

Claims procedure
The steps to collate the required data and documentation to present to the insurer.

Compensation
An award, usually payment, made to someone as a recompense for loss, injury or suffering.

Cover
Insurance or reinsurance as it applies to one or more specific risk exposures.

Coverholder
A company or partnership authorised by a managing agent to enter into a contract or contracts of insurance to be underwritten by the members of a syndicate managed by it in accordance with the terms of a binding authority.

Deductible
The amount that is deducted from some or all claims arising under an insurance or reinsurance contract. The practical effect is the same as an excess: the insured or reassured must bear a proportion of the relevant loss. If that loss is less than the amount of deductible/excess then the insured or reassured must bear all of the loss (unless there is other insurance in place to cover the deductible). An increase in deductible should result in a reduction in premium.

EOD
Explosive ordnance disposal

ERW
Unexploded ordnance (UXO) and abandoned explosive ordnance (AXO).

Employers' Liability insurance
Insurance policy that protects employers from liabilities arising from disease, fatality, or injury to employees resulting from workplace conditions or practices. Some jurisdictions make it compulsory for employers to buy such insurance.

Endorsement
A written clause or amendment in an insurance policy detailing an exemption from a change of cover which becomes part of the policy; this may detail an inclusion or exclusion to risk.

Exclusion
A provision in a Policy that excludes the Insurer's liability in certain circumstances or for specified types of loss; identified risks which will not be covered in a policy.

Excess
The amount or proportion of some or all losses arising under an insurance or reinsurance contract that is the insured or reassured must bear. If the loss is less than the amount of the excess then the insured/reassured must meet the cost of it (unless there is other insurance in place to cover the excess). Compare deductible and retention. Excesses may either be compulsory or voluntary. An insured which accepts an increased excess in the form of a voluntary excess will receive a reduction in premium.

Hazard
Something that causes an exposure to injury, loss or damage. (Hazard is defined in IMAS 04.10 as a "potential source of harm")

IMAS
International Mine Action Standards

Incurred losses
The aggregate of the paid and outstanding claims of an insurer or reinsurer for a year of account or some other given period of time. These losses represent known losses to an insurer or reinsurer and, subject to issues of proof of liability and the determination of the final amount payable in the case of outstanding claims, are relatively certain.

Indemnity
The principle according to which a person who has suffered a loss is restored (so far as possible) to the same financial position that he was in immediately prior to the loss, subject in the case of insurance to any contractual limitation as to the amount payable (the loss may be greater than the policy limit). The application of this principle is called indemnification. Most contracts of insurance are contracts of indemnity. Life insurances and personal accident insurances are not contracts of indemnity as the payments due under those contracts for loss of life or bodily injury are not based on the principle of indemnity.

Insurance
A contract whereby an insurer promises to pay the insured a sum of money or some other benefit upon the happening of one or more uncertain events in exchange for the payment of a premium. There must be uncertainty as to whether the relevant event(s) may happen at all or, if they will occur (eg, death) as to their timing.

Insurance broker
An individual or firm that acts as agent for an individual, body or firm in arranging insurance cover and in presenting claims under such cover. An insurance broker (also called an agent) finds sources for (ie, "brokes") contracts of insurance on behalf of his or her customers in exchange for a commission or fee.

Insurance contract
Determines what insurance coverage is in place and determines the legal framework under which the content of an insurance policy is enforced.

Insurance policy
In insurance, the insurance policy is a contract (generally a standard form contract) between the insurer and the insured, known as the policyholder, which determines the claims which the insurer is legally required to pay. In exchange for payment, known as the premium, the insurer pays for damages to the insured which are caused by covered perils under the policy language. Insurance contracts are designed to meet specific needs and thus have many features not found in many other types of contracts. Since insurance policies are standard forms, they feature boilerplate language which is similar across a wide variety of different types of insurance policies.

Insurance rate
The insurance rate is a factor used to determine the amount to be charged for a certain amount of insurance coverage, called the premium.

Insured
A person who is insured under a contract of insurance. Where there is one insured this person may also be referred to as the policyholder.

Insurer
A provider of insurance. If the insurance is underwritten at Lloyd's the insurer(s) will be the members of one or more syndicates. If the insurance is not underwritten at Lloyd's the insurer(s) will be one or more insurance companies. Some insurance may be underwritten by syndicates and insurance companies.

Insurance premium
The amount paid by the policyholder to an insurer in consideration of their acceptance of a risk.

Liability
Legal responsibility for causing loss to someone else by injuring them, damaging their property or causing them financial loss.

Liability insurance
An insurance which covers the insured against third party claims or, in the case of employer's liability insurance, claims by employees, subject to specified terms and conditions.

Life insurance
A policy that pays a specified sum to beneficiaries upon the death of the life assured, or upon the assured surviving a given number of years, depending on the terms of the policy. Life insurance policies may be for fixed or indefinite term. Also referred to as Life Assurance.

NMAA
National Mine Action Authority

Negligence
(Lat. *Negligentia*, from *neglegere*, to neglect, literally "not to pick up something") is a legal concept in the common law legal systems mostly applied in tort cases to achieve monetary compensation (damages) for physical and mental injuries (not accidents). Also used in other legal systems (*Fahrlässigkeit, négligence*) to denote one type of fault (*Verschulden, faute*) required for compensation.

Peril
A harmful event which may be covered under a contract of insurance or reinsurance as an insured peril or excluded from it.

Personal accident insurance
A type of insurance which provides for the payment of specified sums in the event that the insured suffers some bodily injury as a result of an accident.

Professional indemnity insurance
Protects professionals against legal liability claims for financial loss due to injury, loss or damage resulting from negligent work.

Public liability
Liability incurred by the insured to another party under law. Also referred to as third party liability.

Quality Assurance (QA)
Part of QM focused on providing confidence that quality requirements will be fulfilled.

Quality Control (QC)
Part of QM focused on fulfilling quality requirements.

Quality Management (QM)
Coordinated activities to direct and control an organisation with regard to quality.

Residual risk
In the context of humanitarian demining, the term refers to the risk remaining following the application of all reasonable efforts to remove and/or destroy all mine or ERW hazards from a specified area to a specified depth.

Risk
The combination of the probability of harm and the severity of that harm. (Harm – physical injury or damage to the health of people, or damage to property or the environment). In insurance matters the term may variously refer to:

(a) the possibility of some event occurring which causes injury or loss
(b) the subject-matter of an insurance or reinsurance contract
(c) an insured peril.

Risk analysis
Systematic use of available information to identify hazards and to estimate the risk. (hazard – potential source of harm).

Risk reduction
Actions taken to lessen the probability, negative consequences or both, associated with a particular risk.

Risk management
The identification, measurement and control of risks that threaten an organisation.

Self-insurance
A risk management method in which a calculated amount of funds is set aside to compensate for the potential future loss.

Sum insured
The maximum amount an insurer will pay for any claim.

Third party
Someone other than the insured or his insurer who has suffered injury or loss.

Third party liability
See public liability.

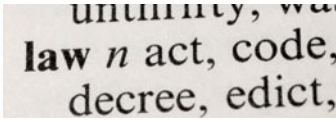
Tort
In common law jurisdictions; a wrong that involves a breach of a civil duty owed to someone else. It is differentiated from criminal wrongdoing, which involves a breach of a duty owed to society. Though many acts are both torts and crimes, only the state may prosecute a crime, whereas any party who has been injured may bring a lawsuit for tort. One who commits a tortious act is called a tortfeasor. The equivalent of tort in civil law jurisdictions is delict.

Underwriting
Refers to the process that a large financial service provider (bank, insurer, investment house) uses to assess the eligibility of a customer to receive their products (equity capital, insurance, mortgage, or credit). The name derives from the Lloyd's of London insurance market. Financial bankers, who would accept some of the risk on a given venture (historically a sea voyage with associated risks of shipwreck) in exchange for a premium, would literally write their names under the risk information that was written on a Lloyd's slip created for this purpose.

UN
United Nations

UXO
Unexploded Ordnance

The above glossary of terms and definitions has been compiled from the Lloyd's (2010) Glossary (www.lloyds.com), Wikipedia (2011) (www.en.wikipedia.org) and IMAS 04.10 Glossary of Terms, Second Edition (2003).



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