

**TRUSWAL SYSTEMS 2006 NATIONAL MANUFACTURERS
CONFERENCE—RISK MANAGEMENT TECHNIQUES AND
BEST PRACTICES “PUNCH LIST”**

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Pagel, Davis & Hill, P.C. (the “Firm”) is a Houston based law firm with a diversified practice that includes a focus on providing the services required for many companies serving the construction industry. The Firm serves as outside general counsel to the Wood Truss Council of America.

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Background and Disclaimer

The presenter makes no representations as to the effectiveness of any of the techniques discussed herein. THE INFORMATION IS INTENDED TO FOSTER DISCUSSION OF RISK MANAGEMENT AND LEGAL ISSUES. IT IS NOT INTENDED TO PROVIDE SPECIFIC LEGAL GUIDANCE OR OPINION. LEGAL ADVICE SHOULD BE OBTAINED FROM AN ATTORNEY FAMILIAR WITH THE COMPONENT MANUFACTURER AND THE LAWS IN THE JURISDICTION(S) INVOLVED. The publication of these materials furthermore does not constitute an explicit or implicit endorsement by Kent J. Pagel or Pagel, Davis & Hill, P.C., of any specific risk management or liability avoidance technique.

About the Presenter

As the president and a senior shareholder of the Houston, Texas law firm of Pagel, Davis & Hill, a professional corporation, Kent J. Pagel's practice involves the local, regional, and national representation of companies in construction contracts, risk management techniques and litigation, insurance and product liability matters.

Mr. Pagel's clients include wall, truss and component manufacturers and other numerous segments of the construction industry--including owners, general contractors, subcontractors and other trade suppliers. Mr. Pagel and his firm also serve as outside general counsel for the Wood Truss Council of America, the Steel Truss and Component Association, the Structural Component Distributors Association and the Engineered Wood Products Association. Mr. Pagel is furthermore a regular writer and lecturer on liability (including construction defect litigation), risk management, and insurance issues facing companies in the construction industry. Mr. Pagel writes frequently for *Structural Building Components Magazine*.

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Introduction to Risk Management Techniques and Best Practices “PUNCH LIST” for the Component Manufacturer

- Presentation will involve background discussion on risks and liabilities facing the component manufacturer.

- Presentation will also involve a discussion of risk management techniques that are basically the result of almost 20 years in the area of risk management and liability avoidance for wall, truss and component manufacturers.

- The risk management techniques presented are referred to as a BEST PRACTICES PUNCH LIST.

- The BEST PRACTICES PUNCH LIST constitutes:
 - Some actual suggested things to do.
 - View these recommendations as a punch list only with all the aspects of a complete risk management and liability avoidance program being the various rooms of the structure.
 - If you already do one or more of these things, then if it can not be improved upon by the suggestions that are made, cross it out.
 - If you do not, prioritize your need to do what is suggested and consider implementation.
 - Many recommendations on the punch list are simple, involve some action, and can be done all at once or one at a time.

RISK—Some Background

- Not all risks are covered by insurance.
 - Customer non-payment—most definitely NOT COVERED except.....
 - Customer warranty claims—most likely NOT COVERED
 - Backcharges—most definitely NOT COVERED.
 - Delay claims—most definitely NOT COVERED.
 - Injuries to third parties caused by the manufacturer's products—most likely COVERED.
 - Injuries to third parties caused by the manufacturer's personnel—most likely COVERED.
 - Construction defect claims—either likely COVERED or likely NOT COVERED—your insurance company will be the judge.

- What risks are covered by insurance—
 - “Bodily Injury” caused by an “Occurrence” within the “Policy Year” so long as no “Exclusions” apply.
 - “Property Damage” caused by an “Occurrence” within the “Policy Year so long as no “Exclusions” apply.

- Risk management is far more than insurance management.

REASON: The insurance industry traditionally looks in its “rearview mirror” to predict and manage the future. The focus is on historical losses. Current activities and programs seem to matter very little. Risk management places a strong emphasis on developing and implementing programs now to prevent claims in the future.

REASON: Insurance management is reactive and passive and not active and dynamic as risk management should be.

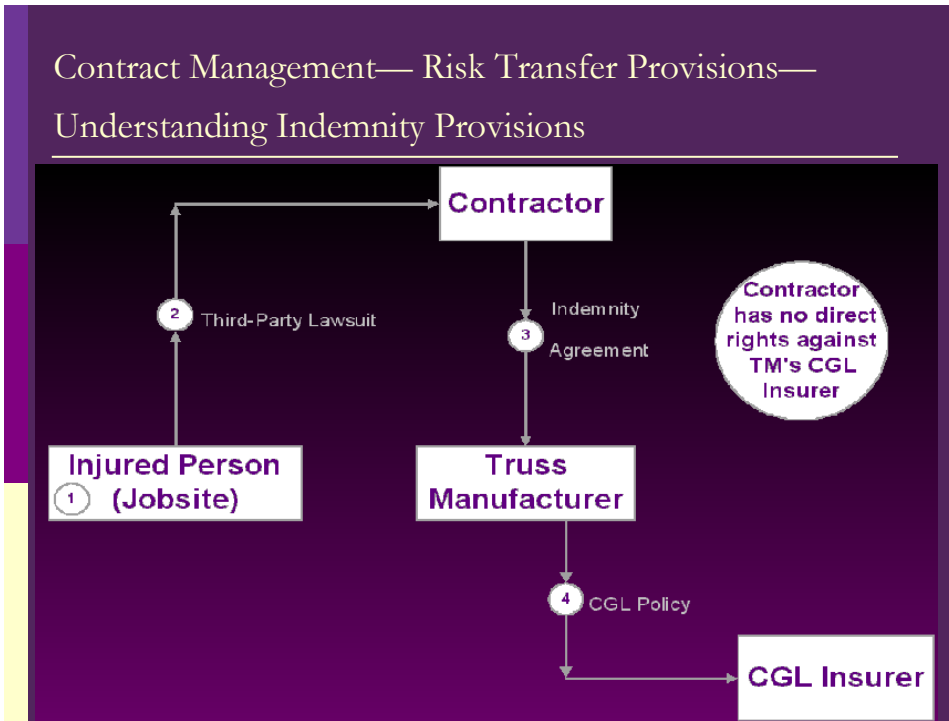
REASON: THERE IS A LINK. Risk management should result in fewer losses. And, fewer losses should mean lower insurance premiums in the future.

RISK—Categories of Risk Management Techniques

There are five primary categories of risk management techniques:

- **Risk Avoidance** involves making a decision to not engage in activities that present certain risks.
- **Risk Minimization** or **Loss Control** is a technique where liabilities can be minimized.
- **Risk Transfer** is choosing to transfer risk to another party by means of specific contract language. Indemnification and Insurance Requirements provisions contained in a builder's customer contract form are examples of risk transfer.
- **Insurance Transfer** is the technique of passing risk off to an insurance company who will agree to accept such risk of loss in exchange for the payment of premiums.
- **Non-insurance** involves the thoughtful and intentional choice to refrain from the use of insurance to cover an exposure to risk.
 - When a wall, truss and component manufacturer elects non-insurance, the risk identification should be thorough.
 - Second, the uninsured risks should be well known and understood.
 - Finally, the alternative of insurance should be considered.
 - When the wall, truss and component manufacturer elects non-insurance, all uninsured losses are absorbed as a direct expense.

RISK—Why is Indemnity such a HOT TOPIC—an Example



RISK—Common Sources of Risk Facing the Component Manufacturer

- **Premises and Operations:**
 - Risk of injury and property damage caused by conditions that exist in and around the manufacturer's production facility.
 - The biggest exposure in this area relates to how the business operations of the manufacturer may affect visitors to the plant and adjacent and nearby landowners.

- **Products and Completed Operations:**
 - Risk of injury and property damage caused by the manufacturer's products.
 - This includes products that are either manufactured or resold.
 - Includes injury or damage caused by a truss collapse or construction-related defects claimed by a homeowner years after the trusses were designed, manufactured and installed.

- **Contractual Liability.**

- **Vehicle Liability.**

- **Independent Contractors Liability.**

RISK—Risk to the Component Manufacturer will Depend on...

- How they go to market—the chain of distribution.

- Geographic markets served.

- The manufacturer's customer base.

- What design work and jobsite services are done.
 - Systems design, value engineering, or whole building design?
 - Delivery with cranes?
 - Onsite erection, truss repair or mold remediation?
 - Inspection services?

RISK—General Discussion of Common Truss Plant Risks and Liability Exposures

A review of the losses from CNA insured plants from 1996 to 1999--the records tracked 1,844 claims.

- Of the 1,000 reported workers' compensation losses:
 - 294 struck by objects.
 - 282 manual handling and lifting of materials.
 - 176 struck against body or cut.
 - 200+ caught by or against, slip and fall, objects in eyes, and repetitive motions

- Automobile Claims. 36% or 669 were automobile related.
 - 148 cargo clearance claims.
 - 93 out of 669, occurred when objects fell off vehicles and struck other autos or people.
 - Rear-end accidents accounted for 110 claims.
 - Being backed into is another key cause of loss, with 65 claims.
 - Remaining claims regarding operation of trucks by manufacturer employees

- General Liability Claims. Small in number average cost to defend and resolve is higher. 81 claims (this does not include 100 claims which were shown at a \$0 reserve by CNA).
 - 17 multi-party construction defect claims.
 - Surprisingly there were only eight product liability losses.
 - Summary of noteworthy claims:
 - Numerous truss collapses resulting in bodily injury and/or property damage.
 - Truss toppled—1 fatality and 5 injured.
 - Truss collapse—5 hospitalized and serious injuries to employee (third-party over action)
 - Truss collapse—4 hospitalized

BEST PRACTICES PUNCH LIST—Bidding and Terms and Conditions of Sale

- A bid or proposal form is the manufacturer's written offer to design, manufacture, sell and deliver certain manufactured products and other resold products identified on the proposal form.
- To make the bid or proposal form into a useful sales agreement, the form should reference or include Terms and Conditions of Sale.
- A properly prepared set of terms and conditions of sale will significantly enhance the manufacturer's contractual rights.
- EITHER print the standard terms and conditions on the reverse side of the bid form OR attach them to the bid.

BEST PRACTICES PUNCH LIST —Successfully Negotiating an Acceptable Customer Contract Form from the Builder’s Form Agreement

- Why builders use these forms?
- Forms go by many names—but do not be fooled.
- Review ALL and the ENTIRE customer contract form INCLUDING all attachments, schedules and exhibits.
- Negotiate the most problematic provisions.
- Learn the effective means to negotiate such contract forms.

BEST PRACTICES PUNCH LIST —Understanding the Component Manufacturer's Standard Scope of Work

- What is the standard?

Background on WTCA 1-1995, *Standard Responsibilities in the Design Process Involving Metal Plate Connected Wood Trusses*. Background on WTCA 4-2002, *National Standard and Recommended Guidelines on Responsibilities for Construction Using Metal Plate Connected Wood Trusses*.

- Where do things go wrong?
 - Pressures placed on the component manufacturer to expand its scope of work.
 - One sided scope of work provisions...
 - Misperceptions—intentional or contrived? Dispel the misperceptions
- Areas of concern:
 - Do the project specifications matter.
 - What are we sealing?
 - Should we be required to point out deficiencies in the project plans and drawings.
 - Should we be required to verify dimension on site or field measure?
 - Are we the designers of record for temporary and permanent bracing?
 - Should we inspect?

BEST PRACTICES PUNCH LIST—Quality Control is a Risk Management Technique/Best Practice

- Quality control means less manufacturing deficiencies and allows for lawsuits to be easier to defend.
- Juries expect all manufacturers to make quality a top priority.
- Record the quality management process. Maintain records and schedules of quality reviews and what has been done each day to ensure the quality of the product. Implementing quality control standards without recording them is almost the same as not implementing any quality standards at all. At the same time, undertake to perform the necessary remedial and corrective action.
- As an example, the WTCA QC program fits these requirements quite well.

BEST PRACTICES PUNCH LIST—Go Beyond Merely Implementing a Good Safety Program

- Define the role of each safety person in writing in a document that is distributed to the entire company.
- Person in charge of safety must have direct access to CEO and there must be confidentiality when that person requests it.
- Expose safety personnel to data on claims.
- Consider a pocket safety manual signed by each employee.
- Web-based safety manual—more are doing it.
- Consider once a year all day meeting for all employees on safety.
- Incentive programs—do they work or have they become a lottery? Reward particular actions.
- Think outside the canned talks.

BEST PRACTICES PUNCH LIST—Not Your Ordinary Safety Committee

A safety committee is quite common, but...

- Consider involving the CEO, CFO and COO—or all the above.
- Risk manager, real or de facto, should serve as chairperson.
- Meet at least quarterly.
- Publish minutes to company.
- Review all accident reports.
- Consider for every other meeting a guest speaker—a lawyer on your claims, another safety person...

BEST PRACTICES PUNCH LIST—Develop Loading and Unloading Policies for Third Party Truck Drivers

- **QUESTION:** How can the component manufacturer minimize the possibility of injuries (and the lawsuits that may follow) to truck drivers either delivering materials such as lumber or retrieving trusses for delivery to a customer's job-site.
- **ANSWER:** Make them follow rules and sign them. Consider a set of rules along the following:
 - Designate where drivers should park.
 - Instruct drivers to observe all safety instructions and warning signs.
 - Do not allow drivers to release or unbind loads until their trailer is at a predetermined location in the yard to be unloaded.
 - Instruct in writing that drivers should not stand, sit, jump, or walk on the trailer as it is being loaded or unloaded and always remain clear of the immediate loading or unloading area as a trailer is being loaded or unloaded.
 - Instruct the driver to inspect and approve the method and manner of loading and to enable it to be safely transported to its destination.
 - Caution the driver to exercise care. Advise the driver that if he has any concern about stability of the load, to bring that to your attention.
 - Advise the driver not to climb on, through or under the load when he is binding it down.
 - Instruct the driver not to move his rig or hook up his tractor to the trailer if the load has not been properly bound.
 - Advise the driver to exercise extreme caution in unbinding the load after reaching the job site. Advise the driver that the load may shift during transportation and may be unstable.
 - Advise the driver to stay away from your forklift drivers.

BEST PRACTICES PUNCH LIST—Dealing with Risks Regarding Company Vehicles

- Liability for company vehicles extends to:
 - Company owned cars and trucks.
 - Company leased cars and trucks.
 - Employees' vehicles when they are used on company business.
- Risks relating to company vehicles:
 - A company vehicle may be damaged or an employee may be injured OR
 - A company vehicle may cause property damage or injury to someone else.
- How can the component manufacturer protect against such losses?
 - Check driving records.
 - Road tests
 - Driver qualifications—e.g., prior experience and license endorsements.
 - Driving safety orientation upon hiring and established driver training program.
 - Take a firm stand on substance abuse.
 - Establish clear policies about the use of company vehicles.
 - Maintain vehicles in good working order.
 - Program reviews
 - Tracking leading indicators such as outside monitoring firm, MVR checks, and maintenance records.

BEST PRACTICES PUNCH LIST—Considerations Regarding Vendor and Procurement Contracts

- Examples of vendor and procurement contracts:
 - Raw material purchase agreements.
 - Software license agreements.
 - Service agreements.
 - Leases
 - Temporary personnel agreements.
- Review all vendor and procurement contracts. If one-sided terms exist, strongly consider negotiating/modifying such terms.
- Written service agreements should be considered.
- Certificates of insurance should be obtained along with all written service agreements, all vendor agreements, and even those performing services at your plant with whom you do not have a written agreement.
- The following insurance issues should be considered each time a service agreement is executed:
 - Stipulate minimum acceptable limits for Commercial General Liability, Commercial Automobile Liability and Excess Liability insurance.
 - Require the contractor's insurance carrier to name you as Additional Insured on contractor's policies.
 - Require Workers' Compensation coverage with Waiver of Subrogation.

BEST PRACTICES PUNCH LIST—Use a Transportation Agreement with Outside Freight Companies

- Know the difference between a transportation company and a truck broker—know who you are hiring.
- Reduce all outbound freight contracts to writing. For these agreements consider the following terms:
 - The terms of the agreement including the freight rate to be charged.
 - A well-written indemnity provision providing for you to be the Indemnitee.
 - Insurance requirements including:
 - (a) Cargo insurance to cover full loss of the products to be shipped.
 - (b) Comprehensive Automobile Liability insurance with minimum acceptable coverage limits.
 - (c) Comprehensive General Liability insurance with minimum acceptable coverage limits.
 - (d) Naming component manufacturer as an Additional Insured on the commercial general liability insurance policies.

BEST PRACTICES PUNCH LIST—the Importance of Providing Job-Site Education, Instruction and Warnings

- The majority of accidents involving trusses occur because of inadequate or improper:
 - Temporary bracing.
 - Bracing connections.
 - Connection of trusses to the supporting structure.
 - Construction overloading.
 - Field alterations.
 - Installation of damaged trusses.
 - Truss alignment before bracing.
- It is a MYTH that since erection and bracing is outside the component manufacturer's scope of work (IS IT?) that the manufacturer need not be concerned with providing its customers and erectors erection and bracing information.
- How should the component manufacturer go about educating, instructing, and warning its customers and those who erect its products?
- A job-site package of instructions is the answer. Consider it loss avoidance, loss minimization, and JUST THE SMART THING TO DO.
- Remember it is one thing to offer guidelines and quite another to make recommendations.
- BE ABLE to prove delivery of a jobsite package.
-

BEST PRACTICES PUNCH LIST—“Mold is Gold—or Maybe not”

The component manufacturer must KNOW:

- **RULE #1**—Mold WILL grow on wood:
 - At less than 20% moisture content no mold can grow.
 - Between 20% and 28% surface mold can grow.
 - At greater than 28% decay fungi can take over.
- **RULE #2**—Drying lumber, while reducing the likelihood of mold formation, does not guarantee the wood will remain free of mold—See RULE #1.
- **RULE #3**—Mycotoxins are relatively large and heavy molecules; this means they are not volatile and do not evaporate from the mold spore or substrate particle. The musty odor associated with mold comes from volatile compounds generated as the mold reproduces. These compounds may be annoying, but are not mycotoxins and thus are not highly toxic. The Texas Medical Association’s Council on Scientific Affairs has reporting finding no reputable studies that linked health problems to mold and concluded that black mold or “toxic mold” only causes problems in people who are allergic to it.

HOW should the component manufacturer act when:

- A builder customer states all structural components should be mold free in their form customer contracts.
- A builder demands that mold be remediated from the structural components.
- A builder asserts a backcharge for clean-up expenses.
- A homeowner sues for construction defects including moisture infiltration and mold on structural components.

BEST PRACTICES PUNCH LIST—Insurance Broker Selection and Use

- Does your insurance broker strive to improve your company's risk management profile? If not, replace them.
- Chose carefully—too often they are chosen because of a social relationship.
- It is a pretty good bet you have located the right broker who has been doing business in the same geographical area for a long time AND has clients in the component manufacturing industry.
- Determine how many insurance companies the broker does business with and the most predominant insurance companies used by the broker's agency.
- Determine the amount of staff support available to the broker. Servicing an insurance buyer's account may include reviewing and issuing certificates, reviewing an insurance buyer's customer contract insurance requirements, reviewing audits and experience rating data, checking insurance policies, loss prevention, and claims handling or assistance.
- For the average sized component manufacturing company, most often a single broker or a single direct writer should be used to coordinate all of the property and casualty insurance. This would include property, liability and automobile coverages. Either the same broker or another broker may be used for workers compensation insurance.
- WTCA has created two levels of approved insurance brokers –they are referred to as “Partners” and “Expert Partners.” Each level requires a different level of participation.
- Go over the policy with broker.
 - This is an industry that, over the years, has spawned some of the poorest contracts drafted by any industry group anywhere.
 - Typographical errors, missing pages, duplicated sections, and wayward endorsements are commonplace.
 - Make sure your broker spends the requisite amount of time checking policies.
 - Also ask your broker(s) to explain what to do to file a claim under each policy.

BEST PRACTICES PUNCH LIST—Do you have a Truss Collapse Policy

- Trusses will fall down and when they do:
 - It will be a high-profile event.
 - The minutes and hours immediately following the collapse are crucial to the investigation and determining who or what is responsible.
 - Without an investigation, the manufacturer and its insurance company may find their ability to mount a defense against subsequent lawsuits has been compromised.
- Goals of an investigation:
 - DETERMINE what happened and when.
 - DETERMINE who was involved.
 - DETERMINE how it happened.
 - DETERMINE why it happened.
- During the investigation—document, document, document:
 - Where injured persons were at the time of the collapse and the condition of where the injured persons were working.
 - Photos tell a story to the person who will never see in person what you have seen.
 - DO NOT photograph blood, police, or the injured persons—these photos will later be enlarged to get sympathy from the jury.
 - The more you are convinced you have no liability in an incident, the better your investigation should be.
- Do not forget that juries like construction claimants:
 - Oftentimes the claimant has been a hard worker all his/her life.
 - The claimant is usually a family man/woman.
 - The claimant usually has children under age 18.
 - Usually the claimant has no other employment training, so their trade career could be over.
- Other investigation considerations:
 - Step back and think, if I was the plaintiff's lawyer, what theory of liability would I be creating..
 - Spend less time defending and being right, and spend more time looking for other parties that caused the incident.
 - When you receive the call, get as much information over the phone as possible.
 - Absolutely investigate all collapses where there was a personal injury.
 - Determine the weather conditions at the time of the incident.
 - Request that the jobsite be left undisturbed
 - Try to recreate the accident.

BEST PRACTICES PUNCH LIST—10 Claims Management Suggestions

Claims management is an essential part of an effective risk management and liability avoidance program.—second only to an effective loss control program. CONSIDER:

1. Prompt processing is the cornerstone of any effective claims management program.
2. Respond in writing to all threats of litigation.
3. Control certain losses without legal representation—utilize a simple release form—BE CAREFUL.
4. Follow insurance company and insurance policy requirements regarding notice of claims that may be covered by insurance—THERE IS NO ALTERNATIVE.
5. Keep a copy of everything you send the insurance company. Copy your broker on all correspondence with your insurance company.
6. Memorialize conversations with your broker and the insurance company. On all correspondence with your insurance company—identify the named Insured (your Company), the policy number, the date of loss, and the claim number.
7. Understand the role of the claims adjuster—remember your job is to convince the adjuster to cover the claim. Know they are overworked and your taking an interest will result in better service.
8. Know that a large percentage of claim costs relate to fees paid to insurance defense lawyers—and thus a number of claims that could be defended are instead settled.
9. Periodically visit; hold meetings at the insurance company with the administrator in charge of your claims. Discuss:
 - The open claims report.
 - Amounts reserved.
 - Actions taken by the adjuster, future activity, and potential settlement strategies—especially for the more difficult cases.
 - Evaluate the promptness and thoroughness of f the insurance company in handling of claims.
10. Take a firm stand on those cases that need to be defended.

BEST PRACTICES PUNCH LIST—Are we done yet?

- Keep good records/document your files/reduce it to writing.
- Review internal checklists and procedures—WHY—they are fertile ground for use in trials.
- Reduce jobsite inspection requests to writing.
- Know that some records retained for a long time can help.
- .Keep all insurance policies forever.
- Look out for the project with little design professional involvement or customer looking to cut corners.
- Creative selling is great but can create liability:
 - “We look at projects from top to bottom.”
 - “We design roof and floor systems.”
 - “Our engineering department can help with that.”
 - “Our truss engineers will review and seal without any problem.”

RISK MANAGEMENT TECHNIQUES and BEST PRACTICES PUNCH LIST— Description of ORisk Program

- Component manufacturers must commit resources to education and training in risk management best practices--there are bright spots on the horizon
- ORisk is a comprehensive web based program intended to assist component manufacturers in identifying risks and liabilities and setting forth recommended risk management and liability avoidance practices.
- Online program basics:
 - 4 Specialties including Risk Management Techniques; Customer Contracts; Insurance; and Claims Handling.
 - Each Specialty contains three or more Tracks. For example, the Risk Management Techniques Specialty includes tracks for Risk 101 (risk and risk management background), Risk Management Techniques/Best Practices, Risk Management—Vehicle Liability, and Scope of Work/Design Responsibilities.
 - Each Track will contain as many as 25 Modules which is 6 to 12 minutes of content on a particular topic.
 - More than 40 hours of online training planned.
- Resources to enhance training experience:
 - An interactive function which defines individual risk and liability terms as they are introduced to the program.
 - Case Breaks—providing case examples based on real-life situations faced by component manufacturers.
 - Fast Fact/Best Practices slides within certain Modules identifying recommended best practices for component manufacturers in terms of risk management and liability avoidance.
 - Printable handouts that are relevant to the educational training of particular Modules.
 - And, to test your knowledge of the risk management and liability material presented, the subscribers will find a set of quiz questions at the end of each Module. Questions will be in either a multiple choice or true/false format. After giving your answer, the correct answer and an explanation will appear.