Tools of Risk Management

• Once organizational risk exposures are identified and evaluated, risk managers make use of either/both of the following RM tools to effectively deal with risk:
  – Risk control: risk avoidance, risk reduction
  – Risk financing: risk retention, risk transfer

Historical Neglect of Risk Control

• 1. Government regulation was less stringent prior to OSHA (1970)

• 2. Difficulties in applying marginal benefit/marginal cost analysis to risk control (hard to justify to CFO)

• 3. Insurance was inexpensive and plentiful
Mandatory Standards for Risk Control

- The role of government
- Public interest justification based on externality argument(s)
- Example - OSHA (1970)
- Such standards are legally binding

Voluntary Standards for Risk Control

- The role of non-governmental groups
- Examples:
  - JCAHO Environment of Care Standards
  - Underwriters Laboratories
- Such standards are considered “voluntary” in that they are not statutory or otherwise legally binding
Areas of Risk Control

- Employee safety (***)
- Employment practices liability (***)
- Non-employee crime control
- Internal controls (employee dishonesty)
- Computer security (***)
- Transit exposures
- Property – direct/indirect loss exposures
- Liability risk control (***)
- Motor vehicle safety
- Antiterrorism
- Disaster planning

Required Expertise for Risk Control Practice

- Many of the techniques used in risk control are specific to one area or another, and require different skills.
- Preventing employee injuries calls for different expertise than reducing the risk of a directors' and officers’ liability suit, or preventing embezzlement, but all require a mixture of technical skills.
Responsibility for Risk Control

- Many authorities believe that responsibility and authority for loss prevention and control program should be vested in a single person.
- The risk manager, by virtue of familiarity with the exposures of the organization and the costs arising from such exposures, is a logical person to whom such responsibility might be assigned.

Risk Manager and Risk Control

- The risk manager will rarely possess the wide range of skills required for a comprehensive loss prevention and control effort.
- He/she needs the ability to recognize the need for risk control and the managerial skills necessary to accomplish the desired goal through the efforts of those who have the needed skills.
Theoretical Aspects of Risk Control Practice

- The emphasis of risk control activities within the organization is PREVENTION.
- Both risk avoidance and risk reduction techniques require an understanding of the causal nexus associated with identified risk exposures - i.e. risk factors.
- e.g. What factors increase the likelihood of a given patient experiencing an adverse drug event?

Theories of Accident Causation

- There are two major theories concerning accident causation, each of which has some explanatory and predictive value.
  - The domino theory, developed by H. W. Heinrich, a safety engineer and pioneer in the field of industrial accident safety.
  - The energy release theory, developed by Dr. William Haddon, Jr., of the Insurance Institute for Highway Safety.
Heinrich's Domino Theory

• According to Heinrich, an "accident" is one factor in a sequence that may lead to an injury.
  – The factors can be visualized as a series of dominoes standing on edge; when one falls, the linkage required for a chain reaction is completed.
  – Each of the factors is dependent on the preceding factor.

Heinrich’s Domino Theory

Ancestry or Environment  Faults of Persons  Personal or Mechanical Hazard  Accidents  Personal Injury
Heinrich’s Domino Theory

- A personal injury (the final domino) occurs only as a result of an accident.
- An accident occurs only as a result of a personal or mechanical hazard.
- Personal and mechanical hazards exist only because of the fault of persons.

Heinrich’s Domino Theory

- Faults of persons are inherited or acquired as a result of their environment.
- The environment is the conditions into which an individual is born.
Heinrich’s Domino Theory

• Heinrich held that a person responsible for loss control should be interested in all five factors, but be concerned primarily with accidents and the proximate causes of those accidents. (risk factors)
• The factor preceding the accident (the unsafe act or the mechanical or physical hazard) should receive the most attention.

Accidents, Not Injuries

• Heinrich also emphasized that accidents, not injuries or property damage, should be the point of attack.
  – An accident is any unplanned, uncontrolled event that could result in personal injury or property damage.
  – If a person slips and falls, an injury may or may not result, but an accident has taken place.
Haddon's Energy Release Theory

• Instead of concentrating on human behavior, Haddon treats accidents as a physical engineering problem.
  – Accidents result when energy that is out of control puts more stress on a structure (property or person) than that structure can tolerate.

Haddon's Energy Release Theory

  – Situations in which "energy is out of control" could include fire losses, accidents, industrial injuries, and virtually any other situation in which injury or damage can result.
Haddon’s Energy Release Theory

• Haddon suggested strategies to suppress conditions that produce accidents or to enhance conditions that retard accidents.
  – Prevent the creation of the hazard or limit the amount of energy that is created.
  – When the hazard cannot be prevented or limited, separate in time or space the hazard and that to be protected.

Haddon’s Energy Release Theory

  – Make what is to be protected more resistant to damage from the hazard
  – When damage has occurred, act to repair the damage caused by the hazard.
The Two Theories Compared

• Differences in emphasis for risk control
• Both theories explain a sequence that leads to damage or injury.
  – Heinrich places most of the blame for accidents on human behavior.
  – Haddon concentrates on the physical engineering aspects of the conditions that give rise to accidents.

Approaches to Loss Prevention and Control

• The human behavior approach focuses on the individual, and seeks to modify human behavior.
  – Education – making people aware of the benefits of safety/risk control
  – Enforcement - For some reason, some people feel immune to injury from the hazards they face and must be compelled to follow safety rules.
Approaches to Loss Prevention and Control

• The engineering approach is aimed at mechanical and environmental factors, and seek to eliminate hazards.
  – The engineering approach has little confidence in the individual’s inclination or willingness to act safely.
  – Assumes that people need to be protected by the elimination of hazards; fire resistive construction, machine guards, and other protective devices.

Risk Control Measures and Time of Application

• Control measures can be classed according to the time at which they are applied.
  – pre-event actions
  – simultaneous-with-event actions
  – post-event actions.
Risk Control Measures and Time of Application

• Another classification focuses on whether the loss control measure is aimed at
  – the person,
  – the mechanical device or mechanism, or
  – the environment within which the accident occurs.
• Figure 5-2 illustrates the “risk control matrix” (target vs. timing)

Sources of Assistance for Risk Control

• Insurance companies
• Safety engineers/loss prevention specs
• Legal Professionals – major players in the post-loss phase of liability loss control
Risk Control Applications in Health Services Organizations

- Employment-based risks
  - Primarily liability-based risks
  - Employer-employee disputes
  - Changes in employment-based risks over time
  - Areas of liability risk: wrongful dismissal, discrimination, sexual harassment, workers compensation, ADA compliance

Wrongful Dismissal

- Erosion of employment at will concept over time has led to more WD liability
- Legal exceptions to employment at will:
  - Claims in contract -- implied contract with employee recognized by some courts
  - Intentional torts -- employee alleges defamation of character (lack of paper trail)
  - Public Policy -- whistleblowers, retaliation, violation of due process rights
Wrongful Dismissal

• Risk control issues
  – Thorough documentation of all employee events with corroborating evidence
  – Use and documentation of progressive discipline (due process)
  – Use of objective job evaluation criteria
  – Education/training of management staff

Discrimination Liability

• Title VII of Civil Rights Act (1964) w/amendments
• Changes in discrimination liability risk over time
  – Allowances for jury trials/punitive damages in some discrimination cases
  – Changes in evidentiary standards for Title VII cases due to recent Supreme Court ruling
Discrimination Liability

• Bases of potential liability for discrimination
  – Disparate treatment (proof of intent)
  – Disparate impact (no proof of intent) -- 80% rule of selection

Discrimination Liability

• Risk control issues
  – Use of objective recruitment, selection, and performance evaluation criteria that are unequivocally job-related
  – Education/training of management as to the extent of discrimination prohibitions and basis for discrimination liability
Sexual Harassment Liability

• Evolving area of HSO liability
• HSO “risk factors” for S-H liability
  – Male-dominated power structure
  – Intimate working environment
  – Large group of independent contractor physicians with lack of direct line control
• Historical lack of S-H reporting in HSO’s

Sexual Harassment Liability

• Bases for S-H Liability
  – Quid Pro Quo cases
  – Hostile Environment cases
  – HSO’s are often found to be vicariously liable for the action(s) of specific employees in both types of cases
**Sexual Harassment Liability**

- **Risk Control Issues**
  - Adoption of “zero tolerance” policy towards sexual harassment in workplace including both employees AND physicians
  - Well developed procedures for reporting and investigating alleged cases of S-H
  - Clearly articulated (and appropriate) punishments for S-H offenders to promote future deterrence
  - Management/staff education

**Workers Compensation Risk**

- **Background on Workers Comp insurance**
  - One of the first forms of social insurance in U.S.
  - Mandatory employee coverage in exchange for significant civil immunity from prosecution
  - Increasing costs of WC insurance (approx. 50 billion a year in 2001)
Workers Compensation Risk

• Majority of WC costs related to mostly preventable causes:
  – 40% strain-related injuries on the job
  – 30% slips/falls with injuries on the job

• Risk control activities directed towards reducing costs associated with WC claims/insurance

Workers Compensation Risk

• Risk control measures
  – Accident/injury prevention techniques: reducing workplace hazards, employee education/training, changes in job structure/design, monetary incentives
  – Monitoring/managing WC costs: return to work program development, UM of medical care utilization, network development, self-insurance of WC claims if allowed
ADA (Disability) Related Risk

- 1991 amendments to CRA of 1964
- Prohibition of job discrimination based on individual disability
- Requires employers to make “reasonable accommodations” for disabled workers to perform “essential job functions” while not imposing “undue hardship” on employer

ADA (Disability) Related Risk

- Risk Control Issues with ADA
  - Written ADA compliance policy that is current and distributed to all employees
  - Review of all employee job descriptions to ID all “essential job functions”
  - Review of employment/HR policies to ensure ADA compliance
Organizational Safety and Security

• Institutionalized within HSO’s secondary to passage of OHSA (1970)
• Benefits of safe/secure workplace
  – Reduced injuries/illnesses
  – Reduced absences
  – Reduced WC insurance costs
  – Reduced WC claims costs

Organizational Safety and Security

• Formal assessment of HSO safety/security programs (OSSP):
  – OSHA regulatory compliance
• Liability risks associated with regulatory non-compliance as well as failure to meet/exceed EOC standards
Organizational Safety and Security

• Environment of Care Standards
  – Safety and Security committees of HSO provide oversight of OSSP activities and report directly to CEO/GB
  – Designation of organizational safety officer(s) with designated responsibilities
  – HSO planning to maintain/improve safety/security for employees, patients, and families

Organizational Safety and Security

• Components of HSO OSSP Planning
  – Employee health program
  – Accident prevention program
  – Up to date security risk assessment plan
  – Security staffing plan
  – Organizational disaster plan
Disaster Planning

• The objective of a disaster control plan is to allow those responsible for the enterprise during an emergency to focus on the solution of major problems.
• The disaster plan establishes an emergency organization, designed to perform specific tasks before, during, and after a disaster.

Disaster Planning

• An initial step in developing the disaster plan is to establish priorities that will be followed in resolving conflicts in developing the plan.
• This permits appropriate attention to the rankings, and avoids decisions regarding priorities under pressures of an actual disaster.
Organization Disaster Priorities

- The first priority is to protect human life.
- The second priority is to prevent or minimize personal injury.
- The third priority is to prevent and minimize potential damage to physical assets.
- The fourth priority is to restore normal operations as quickly as possible.

Miscellaneous HSO Risk Issues

- Patient informed consent liability
  - Still a major source of liability for HSO’s and their providers
  - Bases for IC liability: negligence, intentional tort offense, breach of contract, fraud / misrepresentation
  - Responsibility for obtaining “appropriate” informed consent resides with provider
Miscellaneous HSO Risk Issues

- *Negligence-related IC liability* - standards for obtaining consent not followed
- *Intentional tort IC liability* -- traditional battery offense (unwanted touching of another’s person without permission)
- *Breach of contract IC liability* -- provider “promised” an outcome that didn’t happen

- *Misrepresentation-related IC liability* - provider materially misled the patient into providing consent using knowingly faulty information (punitive damages)
Miscellaneous HSO Risk Issues

- Various federal and state laws/statutes have clearly established the right of all “competent” individuals to participate in treatment decisions, INCLUDING the right to refuse treatment as well as the right to withdraw consent once provided.
- 1997 Consumer Bill of Rights, CRA of 1964, PRCOP, EMTALA

Miscellaneous HSO Risk Issues

- Elements of “appropriate” consent process
  - Nature/purpose of tx
  - Probable risks/benefits of tx
  - Alternative tx’s and risks/benefits
  - Benefits/risks of no tx
  - Opportunity to ask questions/receive “understandable” answers
  - Opportunity to make tx decision free from coercion
Miscellaneous HSO Risk Issues

• Legal exceptions to IC requirements
  – Rare and narrowly defined
  – True emergency situations
  – Patient unable to communicate
  – Lack of time/access to alternative sources of consent (advanced directives, DPOA)
  – Therapeutic privilege exception
  – Compulsory treatment exception

Miscellaneous HSO Risk Issues

• Risk control issues with IC
  – Development of IC policies/procedures
  – Identification/assessment of IC-related risk exposures (incident reports, chart review)
  – Staff/MD education on valid consent procedures under routine and special circumstances
  – Choice of IC documentation method(s)
Miscellaneous HSO Risk Issues

• Data Management Risk
  – Organizational liability secondary to federal (HIPAA) and state laws
  – HIPAA established minimum national privacy and security standards for all HSO’s and related organizations that process PHI

Miscellaneous HSO Risk Issues

• Data Management Risk
  – HIPAA identified specific types/sources of data that are covered/protected
  – HIPAA prohibits use of PHI for any purpose other than direct treatment, payment, and related health care operations unless specific voluntary consent provided by patient
Miscellaneous HSO Risk Issues

• Data Management Risk
  – HIPAA imposes fair information protections that allow patients to know who has access to their PHI and for what purposes
  – HIPAA allows for patient access to their own PHI and for patient-initiated changes to their PHI where inaccuracies are found

• Data Management Risk
  – HIPAA requires HSO’s and other uses/processors of PHI to enact steps to effectively safeguard such information
  – HIPAA holds users of PHI accountable for their use of PHI and provides legal remedies (fines) for any confirmed cases of misuse
Miscellaneous HSO Risk Issues

- Data Management Risk
  - Risk control issues with HIPAA -- staff education/training, I.T. security enhancements, policies/procedures for obtaining consent to use PHI for purposes other than those listed in HIPAA, policies/procedures for allowing patient access to their own PHI, review of all vendor/3rd party contracts to ensure HIPAA compliance