



The 2019 Ottawa Region
Charity & Not-for-Profit Law
Seminar™
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Lessons Learned from Claims to the Courtroom Part 1 – The Claims

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By the numbers



- We insure over 7,500 charities across Canada
- In the decade between 2007 - 2017, we saw 696 legal actions commenced against our own client organizations and/or boards directors
- These actions include civil court liability awards, out-of-court settlements, claims involving legal defense costs only, medical payment claims and human rights tribunal proceedings
- Of those actions, two civil liability claims were in excess of \$10,000,000

By the numbers ... continued

What is the largest civil liability judgement for a single personal injury victim?

\$18,400,000 awarded in 2009 to a teenage girl who suffered catastrophic and permanent injuries as a passenger in automobile accident in Ontario

What are the implications of these types of liability awards for organizations who routinely have...

- Large numbers of adults, youth and children in programs?
- Participants in sports and recreation activities?
- Passengers transported in buses, vans & personal vehicles for sponsored events?
- Off-premises activities, field trips and short-term missions in countries and regions prone to crime, terrorism, civil unrest and natural disaster?

Underinsurance ... liquidation of charitable assets ... unfunded personal liability against directors, and against members in an unincorporated church or association

3

What “triggers” a Liability claim?



- A Third Party Civil Lawsuit, usually in the form what is known as a *Statement of Claim*
- A threatened legal action, or what we in the insurance industry call a “love letter” from a lawyer, notifying the Policyholder of a lawsuit on behalf of a victim/plaintiff
- A serious accident, occurrence or incident that might reasonably lead to a lawsuit

Examples: An abuse allegation; a wrongful dismissal claim by a former employee; a slip and fall in your building or parking lot; an auto accident in an owned or leased vehicle, or in a private vehicle while being used on behalf of your programs and events, where there may be a potential injury, etc.

4

Responsibilities of a Policyholder



When taking out a Liability insurance policy-

- Both policyholder and insurer must demonstrate Utmost Good Faith
- Non-Disclosure and/or Misrepresentation of Risk can void a claim

Ongoing, including at renewal time-

- Communicate Material Changes in Risk for your property and to your operations

In the event of a Claim-



- Duty to Report as soon as practicable to your Insurer any occurrence that may result in a liability claim
- Duty to Cooperate in an investigation and defense of a legal proceeding
- No admission of Liability to Third Party that may prejudice defense

Remember, it is to your advantage to communicate with your insurance provider about potential liability claims to avoid breaching your policy conditions, and because your policy can cover your legal defense costs in an insurable claim!

5

Any Charity & Not-For-Profit needs at least two (2) types of Liability Coverage

General Liability (CGL)	Directors & Officers Liability (D&O)						
<ul style="list-style-type: none"> • BODILY INJURY Physical injury, disease, death, mental injury, etc. • PROPERTY DAMAGE Damage to tangible Third Party property • PERSONAL INJURY Libel, slander, defamation, invasion of privacy, etc. 	<ul style="list-style-type: none"> • NEGLIGENT ACTS, ERRORS, OMISSIONS, MISSTATEMENTS, BREACHES OR NEGLECT OF DUTY, etc. <p>EXAMPLES:</p> <table border="0"> <tr> <td>- Wrongful Dismissal</td><td>- Discipline Proceedings</td></tr> <tr> <td>- Other Employment Practices</td><td>- Financial Mismanagement</td></tr> <tr> <td>- Discriminatory Practices</td><td>- Breaches of Insurable Contracts</td></tr> </table>	- Wrongful Dismissal	- Discipline Proceedings	- Other Employment Practices	- Financial Mismanagement	- Discriminatory Practices	- Breaches of Insurable Contracts
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Commercial General Liability(CGL) and Directors and Officers (D&O) Liability

These two forms of liability protection work hand in glove; each covering both the organization entity, and its directors and officers; and covering the full range of normal insurable liability risks.

6

All Liability Insurance policies are created equally

WRONG!

- Some policies have geographical or territorial restrictions, vs. worldwide coverage
- Some policies limit legal defense costs within the amount of coverage, thereby eroding the available amount to pay awards or settlements; others provide defense in excess of the policy amount
- Some policies limit defense and coverage for Compensatory damages only; others cover ALL insurable civil defense and damages including Compensatory, Punitive, Exemplary and Multiplied damages

(continued next slide)

7

- Some have restrictive conditions for stacking of policy limits, reporting requirements, etc., some do not
- Some are “claims-made” (recommended for D&O if retro); some are “occurrence-form” (recommended for Abuse)
- Not all policies are the same! Unfortunately the “fine print” can mean the difference between full coverage and zero coverage if certain risks are excluded, no matter how high the amount of coverage it says on your policy!
- Check with your broker or agent, ask lots of questions, and make sure your organization is insured with an insurance provider who understands your unique risks and coverage needs

8

Based on unique risks and types of programs, operations and ministries, some organizations may require additional types of important liability protection, including:

- **Professional Liability**; for Medical, Legal, Financial and other professional services
- **Fiduciary Liability**; if the organization/trustees sponsor Pension Plan
- **Media Liability**; if the main object is Broadcasting, Telecasting, Publishing or Internet Streaming
- **Privacy Breach Liability** and/or full **Cyber Liability**; including privacy breaches (electronic or hard copy) disclosing *Personal Information* held by the organization
- **Worldwide Liability**; for Short-Term Mission Trips and for Missions, Relief and Development Operations
- **Auto, Aircraft or Watercraft Liability**; if owned or leased

***Liability Insurance 101* newsletter available upon on request**

9

So *How Much* is enough, when it comes to Liability protection?

In light of the increasing size and frequency of liability awards in Canadian courts and our experience with Churches and Charities across Canada, we currently recommend the following minimum amounts for any organization:

\$15,000,000 Commercial General Liability, or combined General Liability and excess Umbrella Liability, to cover against Third Party Bodily Injury claims.

\$5,000,000 Occurrence Form Abuse Liability. Avoid claims-made Abuse coverage!

\$2,000,000 to \$5,000,000 Directors and Officers Liability, depending on the scale of your financial operations and your staff size.

Disclaimer: The above amounts are recommended based on recent civil court awards and settlements for risk exposures to certain types of claims. However your organization may have risk factors requiring higher amounts of coverage.

10

Umbrella Liability Coverage

Most Property & Casualty insurance companies in Canada have maximum Commercial General Liability coverage capacity of between \$2,000,000 to \$5,000,000 per claim occurrence and annual aggregate, regardless of number of claims in a policy period



A separate “excess” policy known as Umbrella Liability may be available to “top up” your primary General Liability coverage (and Auto Liability coverage, if any)

Umbrella policy wordings are on a “follow form” meaning that they provide excess protection in excess of most risks covered in organization’s primary General Liability policy wordings and limit of coverage

For example, a \$10,000,000 Umbrella Liability policy in excess of an organization’s \$5,000,000 General Liability policy, now provides the organization with \$15,000,000 combined protection for insurable Bodily and Personal Injury awards and settlements

The single biggest and most practical step any organization and board can take to address insurable risk, is to purchase optional Umbrella Liability protection!

11

5 Real World Claims

Charities and Not-For-Profits
in Canada



12

1 - Slip and Fall Claim



Most common form of liability claim – 70% of all claims

Most claims settled in the tens or hundreds of thousands of \$\$\$

Under Occupiers Liability Acts, owner or tenant has responsibility at law for safe condition and supervision of building premises and property

FACTS: New immigrant to Canada falls in icy church parking lot after Sunday morning service, is taken by ambulance to hospital, suffers subsequent stroke, sues church and settles out of court of \$2,900,000

Sources of Insurance Coverage:

Commercial General Liability (and Umbrella Liability) covering Bodily Injury

Or alternatively if no lawsuit, a First Party no-fault Medical Payment Rider or Group Accident Policy, covering Medical Expense, Loss of Income, etc.

13

2 - Abuse Liability Claim

Our client organizations are primarily from the evangelical Christian faith community

Over 85 cases of individual or multiple victims, representing hundreds of total victims

90% of our client organizations have an approved abuse prevention plan

FACTS: Organization receives Statement of Claim from victim's lawyer alleging childhood abuse perpetrated by leader at church-run camp in the 1970's and 1980's.

Organization unable to locate General Liability or Abuse Liability policy in place at time of the alleged abuse

Currently defending this uninsured claim

No Statute of Limitation for claim. Importance of keeping insurance policy documentation in perpetuity!

Source of Insurance Coverage:

Commercial General Liability with no Abuse Exclusion; or stand-alone Abuse Liability coverage, preferably Occurrence-Form coverage



14

3 – Social Media Claim

Rise of use of social media in Charities and NFP's including examples of the "good, the bad and the ugly"



FACTS: Teenaged youth leader at a summer camp (themselves under 18 years of age) posts on Instagram picture of child in their camp group cropped from camp's Instagram account, with a caption containing profane language and extremely derogatory of the child and their behaviour

The organization did have a Social Media Policy in place ✓ signed by the youth leader and has subsequently placed them on notice legally.

The camp did not have a Photo /Video Permission Form ✗ signed by parents/guardians to place the images of minors (or adults) on their website or social media accounts.

Legal action has been threatened by the parents against both the camp organization and leader on behalf of their child

Source of Insurance Coverage:

Commercial General Liability policy under Personal Injury assuming no exclusions in policy with respect to website or other electronic content.

15

4 – Employment Practices Claim

Churches and charities are workplaces too!



#MeToo Movement has raised awareness of workplace harassment

Board members need to understand their responsibilities as Employers, including ESA Standards, Workplace Safety including Ontario Bill 132, and in Common Law

FACTS: Administrator at Christian school guilty of sexually harassing multiple female staff members is eventually fired, after threatened lawsuit by staff. Fired employee then sues school and its directors for Wrongful Dismissal.

Source of Insurance Coverage:

Directors & Officers Liability covers Wrongful Dismissal including employment-related Humiliation, Harassment and Discrimination in a civil liability claim, however only if the D&O policy includes full Employment Practices coverage.

Note: D&O Liability does not pay what an employer otherwise owes by law, including both ESA standards and under Common Law.

16

5 – Short Term Mission Trip Claim



Significant trend in short term mission trip sponsorship from national denominations and missionary societies, to local churches and smaller special purpose charities - less than 24,200 in 1979 to over 1,760,000 travellers in 2006!

Importance for charities sponsoring expat missionaries or short-term mission trips to require several types of concurrent insurance for participants and the organization for full protection, including:

- Worldwide Third Party Liability coverage (General Liability and D&O Liability)
- Mandatory individual or group Travel Emergency Medical Insurance
- Special Risk coverage for Kidnap, Ransom & Evacuation, depending on area of travel

FACTS: Both a church and mission-sending organization as co-sponsors of a short-term mission trip are sued for lack of supervision for injury to a youth who suffers quadriplegia, as result of a fall from a balcony where group is staying.

Source of Insurance Coverage:

Commercial General Liability (and excess Umbrella Liability) policy under Bodily Injury, assuming the policy has Worldwide Coverage Territory.

17

Thank You!

We hope this presentation helps provide your organization and leaders with general information regarding liability risk and insurance for charities and not-for-profits


Disclaimer:

The information contained in this presentation has been compiled by Robertson Hall Insurance Inc. to assist charitable organizations and leaders to better understand insurance and risk management; and to help reduce foreseeable and preventable liability risks associated with programs, operations and events. However, your organization may have risks and liability insurance requirements that are unique to your premises and your activities which are not addressed by this presentation and should be specifically reviewed with a qualified professional.

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 BARRISTERS SOLICITORS TRADEMARK AGENTS	The 2019 Ottawa Region Charity & Not-for-Profit Law Seminar™ February 14, 2019
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	2
OVERVIEW	
<ul style="list-style-type: none">• Know Your Venue and Prepare• The Changing Landscape in Insurance and Coverage Disputes• Charities and Not-for-Profits in Litigation• Preparing Your Narrative	
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3

A. KNOW YOUR VENUE AND PREPARE

“Location, Location, Location...”: why where the dispute proceeds can have a profound impact on the nature of the case, strategy and potential outcome.

- Ontario Superior Court of Justice:
Small Claims Court; Simplified Procedure;
...the good, the bad and the ugly
- Human Rights Tribunal of Ontario: a pyrrhic victory at best if you are a respondent
- Private Binding Arbitration and more: there are other options!

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• Factors to consider when considering venue

- Ability to recover your legal costs (and disbursements) and under what circumstances; also what restrictions/limits may exist
- Length of time to adjudication and options to address interim relief;
- What type of relief (including damages or adjudicative regulation) is available (e.g. are you asking the court for just monetary damages; do you want to claim for ‘declaratory’ relief; are equitable remedies helpful, etc.)
- The need for confidentiality, enforceability and what appeal routes are available

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- Know the rules of procedure and how stringently they are enforced in your venue
- Understand what law is being applied and in what context
- **Also remember...**
 - “We’re not in Kansas anymore...” : preparing for multiple jurisdictions (within Canada and internationally), don’t assume you will be able to apply Ontario law in an Ontario Courtroom
 - You will *not* always have the choice concerning what venue you will be subject to, but understanding the limits which may lead to a potentially completely different strategy is applied for the same case, if the venue is different

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- **Sample of important lessons learned over a decade of cases**
 - Great majority of cases (though different for each venue) settle at “production”/discovery stage; adapt strategy accordingly
 - Litigation and dispute resolution is a human process that seeks justice; uncertainty must be assumed and plan accordingly in all aspects
 - 99% of the time, neither party leaves completely satisfied (and often that is the type of judgment a judge will purposively render)
 - Before commencing litigation, be realistic and proactive regarding costs (which can eclipse damages), and the toll litigation takes on people and the organization

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7

B. THE CHANGING LANDSCAPES IN COVERAGE AND RESULTING CONFLICTS

- Make your insurer/insurance agent your partner in liability reduction, understand what products and coverage are available, and keep the channels of communication open
- Know your policy terms, its limits, and ensure that re-assessment happens when programs, ministries, or situations change
- Denial of coverage – like much of life – “it happens” on an increasing basis, so prepare for a potential dispute while seeing if it can be avoided
- Policy terms (particularly exceptions) are expanding, but can seem ‘harmless’ – getting legal help in explaining consequences could be critical in understanding limits and the basis for potential denial (e.g. denial of directors and officers coverage re ‘intentional torts’)

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Managing the Important Relationship...

- A divergence of interest between an insurer and an insured can arise during litigation – ensure you keep abreast of developments and monitor litigation (e.g. how damages are allocated can impact coverage)
- Be prepared if facts arise during discovery that could impact/change the insurer’s stance on recovery
- Keep an open dialogue with your lawyer (even if appointed by the insurer), and understand your role in instructing legal counsel and carriage of the case
- A disagreement with an insurer doesn’t need to devolve into a dispute; take proactive measures, respect the differing and ‘dovetailing’ of interests and responsibilities

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C. CHARITIES AND NOT-FOR-PROFITS IN LITIGATION

- Charities and not-for-profits are just as vulnerable to litigation as any corporation
- Not only can a charity, not-for-profit, or its officers/directors be the subject of litigation, but there are particular vulnerabilities (just two examples):
 - Courts generally do not like unnecessary litigation by charities or not-for-profits – particularly internal matter, which is reflected in cost awards and judgments
 - *Charities Accounting Act*, R.S.O. 1990, c.C.10: ss.6 and 10... surprise – a whole separate mechanism for redress to the civil courts and a plethora of remedies (including public inquiry)

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- Cases (criminal and civil) where charities or not-for-profits have been involved in litigation throughout the past year and the consequences
 - ***SLPP et al. v. Brown et al.*** – using the *Charities Accounting Act* to accelerate process of challenging (among other things) the remuneration of officers; ‘shotgun’ approach to naming respondents and remedies sought; ultimately dismissed and hundreds of thousands of dollars in legal costs awarded to respondents.
 - Case of **Jeremiah Perry** (C.W. Jeffreys Collegiate) July 2018 – 15 year old child drowns while on field trip to Algonquin park – teacher criminally charged, civil actions a strong likelihood (early stages)

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11

- **UK House of Commons International Committee Report 2018** – finds that the sexual abuse of vulnerable women and girls by aid workers is “endemic” with perpetrators moving easily around sector
- ***Doucet v. Royal Winnipeg Ballet***, 2018 ONSC 4008 – class action certified by former students re sexual abuse/misconduct
- ***K.M. v. Marson***, 2018 ONSC 3493 – vulnerable student successfully sues teacher and school board for sexual abuse – general and aggravated damages of \$250,000 (plus)

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12

D. PREPARING YOUR NARRATIVE: “Lucy... You Got Some ‘Splainin to do!”

- What a judge will most often inquire about:
 - What protections or policies were in place before the incident? (are they ‘empty’ or implemented)
 - Did they have any warning or should they have known?
 - When it happened – how did they react and was there reasonability attached to it?
 - Can they prove it; and were actions taken in good faith/in line with equities of situation?
 - What steps were taken to mitigate/reduce impact or damages?

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- Involve litigation counsel and your insurer (potentially) at early stages of a potential claim
 - Work to avoid coverage denial
 - Understand proactive duties regarding preservation of evidence (which can turn into negative inferences or worse...)
 - Prepare for contingencies and beware of those that assure absolute success
 - As soon as possible, create a written record and proactively seize the narrative as early as possible

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
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Last Thoughts...

- Working towards a narrative of due diligence, vigilance, implementation of policies, be prepared with a war chest and or insurance coverage
- **You can TAKE CONTROL** of managing the risk... it can never be eliminated, especially since so much of the charitable and not-for-profit sector reaches out to vulnerable persons in our society. However, you can reduce that liability or risk to an acceptable level for your organization.
- Litigation and related claims are an increasing reality for the charity and not-for-profit sector. With proactive due diligence and strategy, a potentially crippling claim can be absorbed with minimum repercussions for your purpose and programs

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