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THE 25TH ANNUAL CHURCH & CHARITY LAW SEMINAR November 8, 2018

LESSONS LEARNED FROM CLAIMS TO THE COURTROOM PART 1: THE CLAIMS

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Lessons Learned from Claims to the Courtroom Part 1: The Claims

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By the numbers

16 Minutes to present Important Information for your Leaders

8 Myths exploded about Lawsuits, Risk and Insurance

4 Real World Liability claims suffered by client organizations, no names!



Myth # 1 - Churches, Charities and Not-For-Profits don't get sued!

WRONG!



By the numbers

- Robertson Hall Insurance insures over 7,500 churches and charities across Canada
- In the decade between 2008 - 2017, we saw 696 legal actions commenced against our own client organizations and 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?

ANSWER:

\$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 and 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

Myth #2 – There is High Risk, Low Risk and No Risk

MOSTLY WRONG!

Organizations and leaders can effectively assess and mitigate risk

Risk Management 101

- **Identify** the risks of your organization's operations and ministries
- **Reduce** those risks through effective prevention and safety
- **Eliminate** risks that are not reasonable or necessary
- **Transfer** risks (i.e. through Insurance, Waivers, etc.)

However there is no such thing as "No Risk"



Myth #3 - Insurance means an Insurance Company

WRONG!

- Insurance is first and foremost a risk-sharing concept, a tradition existing among communities and societies for many centuries, long before the modern commercial insurance industry existed
- It has been prevalent among many European and North American faiths, including the Mennonite community well into the 20th century
- It continues to exist today among individuals, organizations, governments and corporations who create private risk pools and insurance captives; side by side with the commercial for-profit life and general insurance companies we utilize each day to provide safety and security for our lives, our property and our future income.



Whether private, public or commercial the concept is the same...

The resources of the many (i.e. premiums) pay for the misfortunes (i.e. claims) of the few, including fires and multi-million \$ lawsuits; misfortunes that could bankrupt an individual, business or charity

Myth #4 – Insurance is like a bank account; equal premiums in, equal claims payments out, for every policyholder!

WRONG!



- Many people will pay premiums for term life, disability, homeowner's, auto, commercial and other forms of insurance, who will never have a claim ... fortunately
- Otherwise there is no money to pay large claims for those less fortunate!
- The average church or charity may pay just a few thousand dollars of insurance premiums each year; however it would take the annual premiums of 1,000 organizations just to pay one major building fire claim; or 2,000 organizations to pay one major liability award or settlement

And that assumes none of those other thousands of organizations has any claims at all, large or small!

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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!

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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.

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Myth #5 - A Third Party claimant can't take legal action (sue) after 2 years

PARTLY WRONG!



- For many types of civil liability matters or wrongs (also known as "torts") including bodily injury and property damage, the basic limitation period in many provinces including Ontario is 2 years from the date of the tortious act, injury or occurrence; or from when the claimant first became aware a claim could be made.

However there are Exceptions!

- For some forms of civil actions there is no statute of limitations, including by victims of childhood abuse!
- These exceptions underscore the importance for child and youth-serving churches and charities to keep documentation on file in perpetuity – subject to privacy laws - including liability insurance policy documentation; employee and volunteer screening, criminal record checks; and accident and abuse incident reports

This documentation could make a big difference to your organization and future leaders in a lawsuit many years from now!

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Myth #6 – We only need one type of Liability policy

WRONG!

Any Church, Charity or Not-For-Profit and its leaders need at least two (2) basic types of Liability policy –

Commercial General Liability 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.

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

- Professional Liability; for Medical, Legal, Financial and other professional services
- Fiduciary Liability; if they sponsor Pension Plans
- Media Liability; if the main object is Broadcasting, Telecasting, Publishing or Internet Streaming
- Cyber Liability; including Privacy Breaches potentially disclosing Personal Information held by the organization
- Worldwide Liability; for Short-Term Missions and long-term Missions, Relief and Development
- Auto, Aircraft and Watercraft Liability; if owned or leased

NOTE: Liability Insurance 101 newsletter available upon request

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Myth #7 - Big charities have big lawsuits; small charities have small ones



WRONG!

- Of our 2 client organizations with liability claims in excess of \$10,000,000, both were against smaller charities with operations considered lower risk, and both had annual operating revenues less than \$150K!
- ALL organizations need to carry sufficient liability limits based on what they do, whether big or small. Sometimes the largest organizations such as a foundation with millions of dollars in equity and investment income have lower risk; while very small charities operating on a shoe-string budget have the highest risk!
- Remember, higher amounts of liability protection are much costlier for organizations with a higher volume of activities, versus those with less programs, ministries, activities, members and participants
- A large church for example, with thousands of members, a Christian school, day care, fleet of vehicles, etc., might pay \$10,000+ in premium for the same Umbrella Liability coverage amount, as a small church paying \$500.
- However the very same accident, injuries or fatalities happening at a small organization will result in the very same lawsuit and the same court award or settlement, as at a large organization!

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A Note about *Judicial inflation*



The increasing cost of things over time is not limited to products and services only.

It's true of civil liability damage awards by courts over time too!

Judgements for some categories of non-auto personal injuries have increased by double over the past 20 years but Liability policy limits of coverage to pay those future damages are not indexed.

Court awards made years or decades in the future for accidents occurrences that take place now, especially those not subject to the usual 2-year Statute of Limitations such as child abuse and other harm to minors, may be astronomically higher as time goes on.

Your organization and future leaders will be stuck with the liability insurance policy coverage amounts you choose today.

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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 and excess Umbrella Liability, to cover against Third Party Bodily Injury claims

\$5,000,000 Occurrence Form Abuse Liability

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

Note about Umbrella Liability coverage:

Although most liability insurance companies have maximum Commercial General Liability capacity of between \$2,000,000 to \$5,000,000 per risk, per occurrence and annual aggregate, a separate Umbrella Liability policy may be available to "top up" your General Liability coverage (and Auto Liability).



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

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Myth #8 – All Liability insurance policies are the same



WRONG!

- Some policies have geographical or territorial restrictions, vs. worldwide
- 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
- 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.

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4 Real World Claims Churches, Charities and Not-For-Profits in Canada

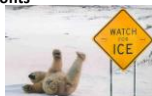


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4 Real World Claims

Churches, Charities and Not-For-Profits in Canada

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.

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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



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3 – 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.



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4 – 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, with worldwide Medical Assistance provider
- Special Risk coverage for Kidnap, Ransom and Security Evacuation, depending on region 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.

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Thank You!

We hope this presentation helps provide your organization and leaders with general information regarding liability risk and insurance for churches, 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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OVERVIEW

- 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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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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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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- 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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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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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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