HANDLE WITH CARE

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A Risk Management Newsletter for the Health Care Protection Program's Members

In this Issue:

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Health Team Leader's Message

Over the past several months, legislative amendments have had a big impact on the operation of the Health Care Protection Program (HCPP). In April 2013 the *Emergency Health Services Amendment Act* was passed and, as a result, BC Emergency Health Services (formerly the Emergency and Health Services Commission) became a public health sector organization and a client of HCPP. More integration with the health authorities is just one consequence of this change and here at HCPP we welcome the opportunities this will provide for integrated risk management.

This issue our thanks go to our external contributor Nigel Kent of the legal firm of Clark Wilson for use of his article ***Coverage for Additional Insureds***. Additional insured status is commonly requested but what does it really mean?

In our latest ***Claims Abstract*** we use a real example to demonstrate the principle of Tort Immunity for a Tenant from the Landlord's Insurer. This will be important reading for anyone with the task of managing and negotiating risk transfer in lease agreements.

Our ***Risk Wise Answers*** deals with the topic of Pollution Liability Insurance. Continuing awareness of the vulnerabilities of our planet and a societal demand for its protection mean an even greater need to manage risk associated with hazardous substances and environmental contamination.

Finally, we include an update and brief overview of revisions to our ***Section 51 Toolkit***, the reasons for them, and our commitment to continuing to provide relevant advice relating to this piece of legislation.

As always, we welcome any suggestions for future articles, risk tips you would like to share or initiatives you may like to showcase. Please do not hesitate to send your comments/suggestions to us at HCPP@gov.bc.ca.

Linda Irvine, Director—Client Services
Health Care Protection Program

Coverage for Additional Insureds

BC Court of Appeal narrows the test for coverage under an Additional Insured endorsement

By Nigel Kent

On June 29, 2012, the BC Court of Appeal issued judgment in *Vernon Vipers Hockey Club v. Canadian Recreation Excellence (Vernon) Corporation*, 2012 BCCA 291 and in doing so narrowed the scope of coverage for persons added to a CGL policy by way of an "Additional Insured" endorsement.

The Named Insured's business will frequently involve contracts which require other parties to be added to and protected by the Named Insured's liability policy. This sort of requirement is common in commercial leases, rental agreements, construction contracts, and the like.

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Coverage for Additional Insureds (continued from page 1)

In Canada, the most common form of Additional Insured endorsement will usually add the third parties as Additional Insureds under the policy "…but only in respect of liability arising out of the Named Insured's operations". This qualification raises questions about the "reach" of the coverage under the Additional Insured endorsement: what sort of link to the Named Insured's business does the phrase "arising out of" import? Does the coverage extend to the Additional Insured's own negligent conduct or only to liability imposed on that party because of the Named Insured's negligent conduct?

In the *Vernon Vipers* case, the plaintiff slipped and fell as he was leaving the hockey rink facility to buy some refreshment at a retail outlet across the street. The complex was the home of the Vernon Vipers Hockey Club and it was owned and managed by the municipality and CREVC. The latter two entities were added to the hockey club's CGL policy "but only in respect of liability arising out of the [hockey club's] operations".

The plaintiff sued only the owner and manager of the complex and did not name the hockey club as a defendant. He claimed he lost his footing as a result of defective lighting and made a variety of negligence and Occupiers Liability allegations against the owner/operator of the complex relating to lightings, warnings, safe walking routes, etc. The owner/operator turned to the hockey club's liability insurer seeking coverage for the claim under the hockey club's policy by virtue of the Additional Insured endorsement.

The question squarely before the court, then, was whether the alleged liability for unsafe premises "arose out of the hockey club operations". In particular, the focus was on the nature and extent of connection required between the injury and the operations in order that the former might be said to "arise out of" the latter.

Both the Supreme Court and the BC Court of Appeal held there was insufficient connection between the injury and the hockey club operations to trigger coverage under the policy. The Court of Appeal held:

> "At the heart of this appeal is a question of pure law: what degree of connectedness is required by the phrase "arising out of"? Does it mean simple "but for" causation, …or does it require a stronger nexus?…I conclude that the latter interpretation is the correct one";
>
> "…the correct interpretation of "arising out of" and "arising from" in the context of an insurance contract requires a closer causal connection than a simple "but for" test…Though [some case law] contain excerpts which, taken in isolation, seem to equate "arising out of" with simple causation, this interpretation is not supported by a reading of the cases in their entirety. Compliance with a simple "but for" test is necessary, but not sufficient";
>
> "Merely incidental or fortuitous connections are not enough to satisfy the causation standard";
>
> "I conclude that the contractual term "arising out of the Named Insured's operations" as written in the hockey club's policy endorsement, imposes a causal requirement greater than a simple "but for" test. Borrowing from the cases discussed above, the phrase "arising out of" should be construed as requiring "an unbroken chain of causation" and a connection that is more than "merely incidental or fortuitous".

The court reviewed a number of cases where the connection between the Named Insured's operations and the alleged source of the Additional Insureds liability was "direct and apparent". For example, the claimant struck by a stray lacrosse ball launched out of bounds during a lacrosse game was an obvious and sufficient "causal link" between the sports club activities and the injury such that the Additional Insured municipality in that case was covered under the lacrosse team's policy.

In the *Vernon Vipers* case however, the court held,

> "By contrast, the link here is far more tenuous, even allowing for a broad and

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Coverage for Additional Insureds *(continued from page 2)*

> liberal interpretation to the term "operations". No aspect of the hockey club's operations are alleged to have *caused* [the plaintiff] to fall and injure himself. The most that the pleadings allege is that these operations caused him to be in a place where, for unrelated reasons, he became injured. This might have been enough to meet a simple "but for" test but in my view, it cannot satisfy the more rigorous causal requirement established in [the case law]".

Most of these coverage contests occur in the context of "duty to defend" coverage under a CGL policy to which the Additional Insured has been added. The *Vernon Vipers* case represents a narrowing of coverage for such Additional Insureds and makes it conditional upon a closer causation requirement than a simple "but for" test such as an unbroken chain of causation and a stronger connection that is more than merely incidental or fortuitous.

The implications of this decision may be significant. Questions to be considered in all of these Additional Insured cases include:

- Does the language of the Additional Insured endorsement match the requirement of the contract between the Named Insured and the third parties who are supposed to be added to coverage?
- If the connection between the Named Insured's operations and the injury triggering the source of the Additional Insureds liability is vague, must insurers assume the defence of the Additional Insured on a "reservation of rights" basis (raising the prospects of a denial of indemnity at a later date)?
- Must different defence counsel be appointed for the Named Insured and the Additional Insured?
- Are there additional conflicts as between the Named Insured and Additional Insured arising out of issues such as allocation of fault, indemnity provisions in contracts between the parties, and so on?
- Does the Additional Insured have its own liability coverage in any event and, if so, how is the priority of overlapping coverage determined?

While most endorsements in Canada extend fairly broad coverage for Additional Insureds, each case is fraught with its own unique complications and it would be wise for insurers to obtain advice from coverage counsel before stepping into the fray.➤

This article was originally published in the July 6, 2012 of Clark Wilson's Insurable Interest. *Republished with permission.*

In Memoriam: Glen Frederick

Glen Frederick was the Director of Client Services for Core Government and Crowns at the Risk Management Branch (RMB). He was a great ambassador for risk management and well known and respected throughout the risk and insurance communities.

During his years with RMB, Glen was instrumental in the evolution of risk management in the BC public sector. He intersected with the Health Team on many projects including public-private partnerships with the health authorities, major government outsourcing deals and the 2010 Winter Olympic Games. Glen also taught the Canadian Risk Management courses for many years.

With heavy hearts, we share the news of Glen's passing on August 9, 2013 after a long illness. To those of us who worked with him, he was a mentor and friend who will be greatly missed on both a professional and personal basis.➤

Claims Abstract— Tort Immunity for Tenants

Background:

A Health Authority leased an entire building from a Landlord and began work to install tenant's improvements that were necessary for a specific program to occupy the space. During the course of work for the tenant's improvements, the building heat was turned off. Part way through the renovations construction project, a shift in program direction occurred. The program was discontinued and, since the space was no longer needed, construction stopped. The Landlord became aware of the lack of heating and brought this to the attention of the Health Authority, which took no action to correct the situation. Due to a lack of heating, old pipes in the building froze, causing water damage to the building. The Landlord's property insurer paid the water damage claim and attempted subrogation against the Health Authority.

The Investigation:

The Facts:

The HCPP Claims Examiner reviewed the incident and there was no dispute as to the facts:

- the Health Authority had leased the building,
- construction on tenants' improvements was begun but had been discontinued,
- the heat had been turned off by the contractor hired by the Health Authority to do the work
- the Health Authority had been advised by the Landlord of the lack of heat in the building
- the lack of heat led to freezing of pipes, which burst causing water damage to the building.

The Lease:

The HCPP Claims examiner obtained a copy of the lease agreement between the Health Authority and the Landlord. This was a ten year lease and the loss occurred in the first year of the term. A review of the lease revealed that there were several relevant clauses that could impact the claim proceedings. The Landlord was obligated to repair damage to the building and the Health Authority (Tenant) was obligated to repair damage to tenant's improvements. The Landlord was required to obtain and maintain property insurance on the building and the Health Authority was obligated to pay for the cost of Landlord's insurance as part of its monthly operating costs. The definition of operating costs to be paid by the Health Authority specifically excluded any cost for which the Landlord is entitled to be reimbursed by insurance. The lease agreement contained Mutual Indemnity language.

Case Law:

The HCPP claims examiner researched case law that could be applied to the incident. There are three cases[1] from the 1970's Supreme Court of Canada which remain relevant today. In each of these cases, the Court held that a landlord's covenant to insure relieves a tenant from liability for losses caused by the tenant's negligence. This tort immunity applies to subrogated lawsuits by an insurance company against someone who is an insured, or paid premiums, under the policy. In other words, lawsuits are barred by a landlord, or an insurer subrogating in the landlord's name, when the landlord covenanted to insure and impliedly covenanted to give the tenant the benefit of that insurance.

A more recent case from the Alberta Court of Appeal[2] is also applicable and confirms this principle. In this case, a landlord's building was destroyed by fire occurring during construction in

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[1]Ag*new-Surpass Shoe Store Limited v. Cummer-Yonge Investments Ltd.*, [1976] 2 S.C.R 221
Ross Southward Tire v. Pyrotech Products, [1976] 2 S.C.R. 35
T. Eaton Company v. Smith, [1978] 2 S.C.R. 749

[2]*Howalta Electrical Services Inc. v. CDI Career Development Institutes Ltd.*, 2011 ABCA 234

Claims Abstract *(continued from page 4)*

the building. While not responsible for starting the fire, the tenant and one of the tenant's employees were included along with the contractor in legal action by the landlord's insurer which was attempting subrogation following payment of a property claim for the fire damage. The reason for naming the tenant was not based on tort but rather breach of contract because of the tenant's failure to notify the landlord that the fire had broken out. However, the insurer discontinued its action against the tenant and the tenant's employee when it discovered that the lease required the tenant to pay for part of the property insurance on the building and that the tenant had complied with this obligation (the tort immunity was created). The contractor then issued third party proceedings against the tenant seeking contribution and indemnity. Although the tenant applied to have the third party proceedings struck, the trial court denied this and the tenant then appealed. The Court of Appeal ruled that the contractor's claim for contribution and indemnity from the tenant could not succeed because of the complete immunity enjoyed by the tenant as against the landlord. In other words, the tenant could not be liable to the landlord, in tort or otherwise, under the terms of the lease.

The Outcome:

The HCPP claims examiner denied the claim based on the lease provisions and the case law cited above. The Landlord's insurer has not pursued the claim further.

Lessons Learned:

The terms of leases should include obligations for:

1) The Landlord to arrange and maintain appropriate insurance coverage on the building; and
2) The Tenant to pay for the building insurance arranged by the Landlord – usually as part of the operating expenses.

When these two clauses are contained in the lease, a tort immunity is created that prevents the Landlord's insurer from subrogating against the Tenant.➤

Sharon White, CIP, CRM
Senior Risk Management Consultant

Risk Wise Answers - Pollution Liability Insurance

Q - *Pollution Liability - when is this type of insurance necessary?*

Pollution Liability Insurance is an environmental insurance product that covers pollution risk associated with owning, leasing, financing or other operations taking place at a facility or site. Pollution insurance may be considered for the following reasons:

- For compliance to Laws and Regulations in British Columbia (*Environmental Management Act*)
- Financial implications to the Health Care Agency (HCA) or an operator not having insurance

If operations by others are being conducted on HCA lands that include the potential for significant pollution damage, then a dedicated insurance product should be requested. For example, a services agreement where the operations include the handling, transportation or disposal of biomedical waste materials.

Pollution Liability policies can cover the cost of cleaning up spills on-site (first party claims) and on nearby sites (third party claims). Coverage can be structured to insure past, current and future environmental losses. There are many different types of Pollution Liability policies depending on the nature and scope of the insured's operations. The insured can tailor a program to meet their specific needs. The severity of the risk, quality of underwriting information, retention level and policy period can significantly impact pricing. Therefore, requiring such policies should be limited to situations where there are material pollution risks. For more information, please contact HCPP.➤

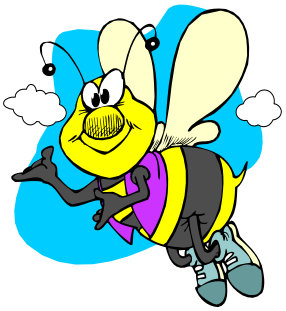
Risk Buzz—Section 51 Toolkit

At the time of the writing of this article, HCPP's Section 51 Toolkit (the Toolkit) is in the process of being revised. By publication date of this newsletter, the Toolkit may in fact also be ready for release. A major driver for the revision of the Toolkit was the introduction of the *Emergency Health Services Amendment Act* 2013 (*the Act*) effective April 1, 2013. *The Act* included consequential changes to Section 51 of the *Evidence Act*. While advocates have long argued that Section 51 should extend to care provided in community settings, changes as a result of *the Act* have been the first to expand its scope. In addition to care provided in designated hospitals and mental health facilities, the prohibition on release of information generated as part of a review of the quality of care now extends to care provided during transportation to and from those facilities.

As HCPP recognized the necessity of revising the Toolkit in consideration of these legislative changes it became apparent this was also an opportunity to expand the Toolkit in other areas. In discussion with the risk leads of the regional and provincial health authorities we were encouraged to examine some additional areas that could, as evidenced through practice, be better defined and therefore more valuable from an advisory perspective. These areas included:

1. sharing clinical information between health authorities where it would benefit a quality of care review;
2. joint and/or multi agency reviews;
3. requests under FOIPPA; and
4. more clarity around what in the Patient Safety Learning System is prohibited from release.

The revised Toolkit has been produced with input from a number of knowledgeable sources including our own health authority risk leads, HCPP consultants and HCPP legal counsel. We also sought feedback and input from Catherine Woods, QC of Alexander Holburn Beaudin and Lang LLP, who regularly advises health authorities on quality assurance reviews and on s. 51 issues within the context of civil litigation. The revised Toolkit was also reviewed by Penny Washington of Bull, Housser and Tupper. Penny provided legal advice on the first version of the Toolkit and brings a consistent lens to this version. Ms. Washington regularly advises health authorities on quality assurance reviews.



We would like to thank all the contributors to the Toolkit for sharing their feedback and experiences and helping us to make this a practical resource. Please feel free to share your ongoing comments with us.➤

Linda Irvine, Director—Client Services
Health Care Protection Program

Goodbye to a HCPP Claims Examiner !

If you've been involved with a property loss at a Health Care Agency, chances are you've met Blair Loveday. Blair joined the Risk Management Branch in 1999 and he is the HCPP resident expert on large and complex property losses, equipment and construction claims and in the investigation of losses which may have occurred due to the negligence of an outside party.

Blair has been a regular contributor to this newsletter sharing his knowledge about many things including water damage claims, effective subrogation and construction defects.

He has contributed to many advisory publications including Risk Notes and The Program and Practice Guide. Blair's expertise acquired through a lifetime of experience in the field will be missed.

Blair is retiring at the end of 2013. Please join us in wishing Blair well in all his future endeavors.➤

About Our Organization...

We are the Client Services Team for the Health Care Protection Program (HCPP). HCPP is a self-insurance program which is funded by the Health Authorities of BC. The program is housed within the offices of the Risk Management Branch of the Ministry of Finance which also has responsibility for similar programs such as the Schools Protection Program, and the University, College & Institute Protection Program. As part of the services of our program, we provide risk management services including risk mitigation, risk financing and claims and litigation management to HCPP member entities including all the Health Authorities and various other stand-alone health care agencies in the Province of BC.➤

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We Need Your Feedback!

What do you think about "Handle With Care"? We always love to hear your comments. Please send us your feedback!

Are there any topics you would like us to cover? Email us at HCPP@gov.bc.ca

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