

What's inside

- Did you know?
- How do you Measure Up?

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Severe Acute Respiratory Syndrome (SARS) Insurance Implications

**by Ross Haight*

As reported by CBC News, by the end of June, 2003, Severe Acute Respiratory Syndrome (SARS) had cost Ontario \$945 million in direct health expense and an additional \$185 million spent by the Province to gain back lost tourism, for quarantine compensation and for legislation to protect jobs.

Although it is too early to tell what the full impact will be to the Canadian economy, some losses may be lessened by insurance. The principles discussed in this article may apply to other events of exposure to different toxic agents than SARS. Below is our review of various insurance coverages and our perspective on how SARS could be insured.

This review is provided by Marsh Canada Limited for information purposes only and is intended to give only a general overview of various lines of insurance that may be called upon to respond to SARS related losses. It is not a legal opinion nor is it a representation that insurance coverage will apply in any given fact situation. Whether insurance coverage will apply to SARS related losses will depend on the facts of each particular case and the terms, conditions, limitations and exclusions of the applicable policy. Legal counsel should be consulted for advice on the availability of coverage in any given fact situation.

LIABILITY

General Liability (including Employer's Liability):

This type of policy covers bodily injury, typically including "...bodily injury, sickness or disease...including death resulting from any of these...". If an allegation is made that an insured negligently contributed to or failed to prevent someone acquiring SARS, General Liability policies could respond subject to other terms and conditions of the policy. Similarly, property damage to the property of others could be alleged for negligently allowing the SARS virus to be introduced into or on to such property, resulting in decontamination costs, as well as loss of use of property – due to quarantine being imposed for example. If found to be physical damage to tangible property, General Liability policies again could respond subject to the other terms and conditions of the policy.

Umbrella/Excess Liability:

This type of policy usually covers bodily injury and property damage either on a broadened basis (Umbrella) or following the form of underlying policies (Excess), so our conclusion is the same as for General Liability policies – always subject to all terms and conditions.

Directors' & Officers':

This type of policy does not cover bodily injury or property damage directly. Some Directors' & Officers' policies may cover indirect financial consequences of bodily injury and/or property damage, such as shareholder suits alleging that a failure to adequately

address SARS resulted in bodily injury and/or property damage and so caused the value of equities in the corporation to decline. Other Directors' & Officers' policies may exclude on a broader basis, such as "...any claim based upon, arising out of or in consequence of bodily injury/property damage... thus also excluding indirect financial consequences of bodily injury or property damage.

It is important to note that general statements as above do not supercede the provisions of any policy that may apply. Reference must always be made to such specific policies – for example, some liability policies may exclude any form of biological agent and so would specifically exclude viral agents such as SARS.

Liability insurance policies generally are subject to one form or another of Pollution exclusion. These exclusions typically define pollutants as, "...any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste." It is possible that an insurer might attempt to exclude liability for SARS by classifying the SARS virus as a pollutant. While only the courts could settle a dispute on this point, in light of previous events and cases it seems doubtful to us that this attempt would succeed. Among these events is the Walkerton e.coli contamination event – in fact, there was no judicial determination as insurers accepted that coverage applied to the bodily injuries without recourse to denial based on any Pollution exclusion.

One recent case involved bodily injuries sustained by employees of the City's bus system and their spouses. In *Medicine Hat (City) v. Continental Casualty Co.*, the Plaintiffs complained of "exposure" to chemicals used in running buses. While the parties agreed that the chemicals were "pollutants," the court drew a distinction between the alleged "exposure" and the standard language of the pollution exclusion, which applied to the "discharge, dispersal, release or escape" of pollutants. In holding that the claims were not clearly beyond the scope of the policy, the court stated in part as follows:

"In my view, the pollution exclusion clause is intended to protect the insurer from liability for the enforcement of environmental laws. The exclusion clause uses environmental terms of art because it is intended to exclude coverage only as it relates to environmental pollution and the improper disposal or contamination of hazardous waste" (emphasis added).

An earlier case was *Zurich Insurance Co. v. 686234 Ontario Ltd.* in which the Ontario Court of Appeal interpreted a commercial general liability (CGL) policy's "absolute pollution exclusion" clause.

Tenants of the insured launched a class action against it for damages caused by a carbon monoxide leak that resulted from faulty furnace repairs. Zurich applied for a declaration that it was not required to defend or indemnify the insured based on the Pollution exclusion. The application was dismissed and Zurich appealed.

The Court noted that even where an exclusion clause may be clear and unambiguous, the clause would not be applied if (1) it is inconsistent with the main purpose of the coverage and where it would virtually nullify the coverage; and (2) where it is contrary to the reasonable expectations of the person purchasing the coverage.

The Court engaged in consideration of the history of the exclusion clause and its environmental context, the purpose of the CGL policy and the reasonable expectations of the parties. According to the Court, "dictionary literalism is often a poor substitute for connotative contextual construction" (emphasis added).

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The court found that the definition of “pollutant” in the CGL policies was overly broad and subject to more than one interpretation. Carbon monoxide could fall within the definition. The resulting ambiguity was to be resolved in favour of the insured. Furthermore, the historical context of the exclusion suggested that its purpose is to exclude “environmental pollution” or “active industrial polluters of the natural environment.” In the Court’s view, a reasonable policyholder would have expected the exclusion clause to apply to “industrial pollution” but not carbon monoxide from a faulty furnace (emphasis added). The Court went on to state that the approach put forward by the insurer would effectively negate the purpose of the insurance and would allow the insurer to have the benefit of the premiums without being exposed to the risk.

Business Interruption insurance covers loss of business income and/or expense associated with the necessary interruption of business following an incident of covered physical loss or damage to insured property

PROPERTY/BUSINESS INTERRUPTION

The typical “All Risk” Property from insures, “...all risks of direct physical loss of or damage to the property insured.” However, again typically, “contamination” is excluded as direct peril. On the surface, this would normally be the end of the discussion, and most insurers would take the position that there is no “...direct physical loss of or damage to the property insured,” and thus no coverage. They are likely to argue that even if the introduction of the SARS virus does constitute “direct physical...damage to the property insured,” it is excluded as “contamination.”

However, counter arguments may be available. Contamination is sometimes covered if it results from either a Named Peril (Fire or Lightning, Explosion, Impact by Aircraft, Spacecraft or Land Vehicle, Riot, Vandalism or Malicious Acts, Smoke Leakage from Fire Protective Equipment, Windstorm or Hail, all as defined and limited) or if it results from any other peril not excluded. The latter is found in some manuscript policies.

Accidental contamination of property by the SARS virus in and of itself may be clearly excluded. However, if Named Peril (e.g. a malicious act by another intentionally introducing the virus) or, when applicable, if any other peril not excluded (an employee sneezing?) operates to introduce the virus, coverage may respond. The actual physical loss or damage may well be slight; still, the importance of engaging coverage relates to the following discussion of Time Element coverages. Insurers are expected to resist this argument. Whether coverage can be engaged on such a basis will depend upon the terms and conditions of the particular policy and is obviously a matter for consultation with legal advisors.

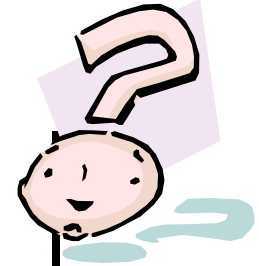
BUSINESS INTERRUPTION (TIME ELEMENT)

Business Interruption insurance covers loss of business income and/or expense associated with the necessary interruption of business following an incident of covered physical loss or damage to insured property. Extra Expense is covered as part of business interruption, but it may also be insured as a stand-alone coverage or together with Business Interruption to extend that coverage. Another Time Element coverage is Civil Authority discussed below.

Business Interruption (Gross Earnings) coverage normally extends to the period of time that is required to repair or replace the damaged property and so would likely have little or no applicability, as decontaminating or replacing exposed property should take very little time. On the other hand, Business Interruption (Profits) coverage extends to a determined Indemnity Period (twelve months is common) following an incident of physical loss or damage to insured property when the business is affected as a result, so it could in theory provide coverage for reduced business following a SARS virus contamination incident.

Extra Expense as a stand-alone coverage could be invoked for the rental of temporary premises and other extra expenses incurred after such an incident. Civil Authority covers Business Interruption and/or Extra Expense for a limited period, usually two or four weeks, when access to the property insured is prohibited by a civil authority (e.g. Public Health) following loss or damage as is insured to a neighbouring premises. In a widespread quarantine, assuming the arguments above held, this coverage could apply. ■

DID YOU KNOW?



CURIE has a new employee:

Karen Six (Insurance Operations Assistant) joined the CURIE staff in September. She will be handling Certificate of Insurance requests, Loss Control Reports and General Accounts Payable.

John Kerr has left CURIE this summer and has joined the Bank of Montreal in their Risk Management Department. Carrie Green has taken on John's duties.

CURIE' University and College Risk Management Meeting will be held in Winnipeg, Manitoba, Oct. 2 & 3, 2004, plan to attend.

Resources/services that are available to CURIE members:

- CURIE E-mail news groups
 - "*Subscribers-L*" - closed list to employees of CURIE member institutions only
 - "*CURMI-L*" - opened Canadian Universities Risk Management & Insurance list
- Web based International Travel program offering interactive courses on the topics of Traveler's Risks; Security Solutions; Institutional & Personal Liability
- SafeRisk - a two stage sports liability assessment program conducted by *McGregor and Associates*
- Aquatic Safety Audit through the *Lifesaving Society*

For more information regarding the above services, please visit our web site www.curie.org or contact CURIE directly at 905-336-3366



How do you Measure Up?

**by Ian McGregor*

Introduction

As the Standard of Care continues to rise, professionals in the sports and recreation field increasingly worry if they are meeting the standard. Risk assessment is a key step in determining whether a department 'measures up' to the prevailing standard.

A web-based risk assessment survey was developed with three primary objectives:

1. To determine the feasibility of conducting a risk assessment 'online'
2. To assign a risk management 'score' to an institution
3. To compare institutional scores

The starting point was a risk assessment survey developed by McGregor & Associates and currently used in the 'SportRisk' program. The survey was modified to make it useable for completion on web. Questions were asked in following areas: Emergency Response Plan; Supervision; Facilities & Equipment; Transportation; Documentation; Risk Management Committee.

Point values were assigned to each question. Weighting of point values was carried out based on judgment and experience (this weighting was validated by survey responses). While the maximum possible score for the survey was 160, all scores were 'normalized' to 100.

Institutions belonging to the National Intramural Recreational Sports Association (NIRSA) were chosen as the target market, and five distinct population categories were identified:

- <2,500 students
- >2,500 but <5,000
- >5,000 but <10,000
- >10,000 but <20,000
- over 20,000 students

The goal was to sample 20 % of each category. All schools in each population category were assigned a number, and SPSS was used to create sets of random numbers. Schools matching those numbers were selected, and a total of 159 were invited to participate.

An e-mail was sent to Directors of selected schools inviting their participation and directing them to the web site to conduct the survey. Three reminder emails were sent out. Of the total number of emails sent out, approximately 20 'bad' emails were un-resolvable, and a final total of 69 responses were received – a response rate of 50% based on the number of 'good' email addresses. This was an excellent response rate and was consistent across all categories.

Results of Survey

Preliminary background questions in the survey revealed that of all the institutions responding, 88% had experienced a medical emergency; 51% had experienced a life threatening emergency; 29% had performed CPR; 27% had reported the death of a participant, and 27% had been involved in a negligence lawsuit. These results indicated that

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participant injuries are a relatively frequent occurrence within the campus sport and recreation setting.

Institutional Scores and Percentile Scores

Across the total sample, 'normalized' scores ranged from 19.3 to 86.0 with the average score being 58.4. Scores varied based on the school size as follows:

School size	Range
0 - 2,499	39.4 – 71.3
2,500 – 4,999	19.3 – 68.3
5,000 – 9,999	39.1 – 80.1
10,000 – 20,000	53.6 – 86.0
>20,000	35.5 – 77.8

Institutions in the 5,000 – 20,000 range scored better overall than schools in other ranges. A possible explanation for this is that at larger institutions there is a greater tendency for someone on staff being designated as the 'risk manager', and hence at these schools, risk is being more efficiently managed. However, this does not explain the lower scores for institutions larger than 20,000.

Percentile scores were also tabulated allowing direct comparison of scores between schools. Each institution completing the survey received the following feedback:

- Institution Score
- Top Score; Bottom Score, Average Score
- Percentile Score

One of the original objectives for this study was to provide specific feedback to each institution on their scoring profile and to point out areas of weakness and concern. However, due to the limitations of this particular study (discussed later), it was difficult to provide timely feedback in a useable form.

What does this study tell us?

The main conclusions reached were as follows:

1. Conducting a risk assessment on a web-based platform does work!
2. The survey provides a 'snapshot' of the institution.
3. The survey provides useful comparisons between institutions and supplies sufficient data to help a schools determine where they stand relative to others.
4. While this survey does not create a 'standard', percentile scores can indicate an institution's overall risk management performance relative to other schools.
5. The study's limitations prevented more detailed comparisons between institutions and minimized the usefulness of feedback to schools on areas of weakness. The major weakness of the study was that it was too general and lacked specific 'in-depth' questions in some areas. While this approach made the survey easy and quick to complete, the general nature of some questions resulted in ambiguity.

Next Steps

As a follow up to this preliminary study the next phase will be to:

1. Create a more comprehensive survey instrument. This will mean developing in-depth questions in most areas.
2. Provide institutions with an overall score; scores for individual survey sections, and percentile scores to allow comparison with other institutions.
3. Provide a detailed institutional report highlighting strengths and weaknesses, and documenting a series of action-oriented recommendations. ■

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The staff at C.U.R.I.E. wish all our readers a happy holiday season!



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