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** David Beal is Risk Manager of OSBIE. This article was reprinted with permission from the ORACLE, December 2006, Volume 17 Number 4*

This article is applicable to all individuals that rent vehicles in Ontario on University business

Changes to Ontario Auto Insurance Legislation Impacts School Boards

**by David Beal*

Based on recent discussions and further clarification on rental vehicles (daily, weekly, or less than 30 days) for school board purposes, there is a change in the way the OAP-1 Owner's Auto Liability coverage works in conjunction with the OSBIE Non-Owned Policy and the rental agency's auto policy. Based on the NEW legislation, which was effective March 1, 2006, the new priority of coverage reads as follows:

Primary Auto Liability - Personal auto policy of driver who rents the vehicle
Excess Auto Liability # 1 - OSBIE Non-Owned Auto Policy

Excess Auto Liability # 2 - Rental Agency

This is a change over the previous rules that made the Rental Agency Auto Liability policy the primary coverage, and the OSBIE Non-Owned Auto policy in excess of that policy.

To date, we have received numerous calls from school boards asking for further clarification. The following are the most frequently asked questions and the responses we have provided:

(1) What is the reason for this change in the law? **RESPONSE:** The Insurance Act was changed in response to a court decision that held a long term LEASING company liable for serious injuries resulting from a driver's negligence. The law was changed to remove/limit the leasing company from being held responsible for the actions of drivers. However, in the process, the change was also made to include short-term (daily, weekly) RENTAL vehicles as well.

(2) Does this change affect Physical Damage coverage for rental vehicles? **RESPONSE:** No – the Insurance Act changes only apply to Third Party Automobile Liability coverage. School boards should still continue to buy the Deductible Waiver coverage through the rental agency to reduce the deductible should the rental car be damaged.

(3) (a) If the driver who rents the vehicle doesn't own their own vehicle, who provides primary coverage? **RESPONSE:** The rental company may require the driver to purchase an insurance package that will include Third Party Liability coverage. The OSBIE Non-Owned Auto Liability policy will respond in excess to that coverage.

(b) Why can't we just tell the rental agency we don't have insurance and buy the package from them – will that keep us from exposing our personal auto policy? **RESPONSE:** We would not recommend anyone provide incorrect information regarding

insurance to a rental company. The legislation is currently worded to state that the renter's policy will respond first – if a claim occurs, and it turns out that the renter did have a policy, it may still be called on to respond, even though the other insurance was purchased.

(4) Does this apply to vehicles rented at a location outside Ontario? RESPONSE: These regulations only apply to vehicles rented/operated in Ontario. If you rent a car in another province or country, you would be bound by the laws of that local jurisdiction.

(5) How does this affect personal automobile policies? RESPONSE: The change in the Insurance Act also amended the Ontario Automobile Policy to extend primary Third Party Liability coverage for rental vehicles, subject to certain conditions. At this point, we are not aware of additional premium being charged for this extension of coverage.

Based on this change in the provincial Insurance Act, school boards are advised to take this into consideration when vehicles are being rented by staff for board business or for school approved activities (e.g. passenger van rentals). While it is still recommended that vehicles be rented in the name of the school board, the new regulations do expose the renting driver's personal automobile liability insurance as noted above. ■

FROM THE COURTS:

Herbert v. The City of Brantford ¹

** by Michell Brodey*



This action arises from a Plaintiff's claim against a municipality for injuries sustained in an accident on September 23, 2003. The 64 year old Plaintiff was riding his bicycle along a recreational trail when he swerved off the trail to avoid two pedestrians, falling onto an area covered in boulders, sharp rocks and pieces of concrete embedded with steel rods. He sustained serious injuries, including a fracture to his spinal column, rendering him an "incomplete quadriplegic."

The municipality brought a motion for summary judgement, with a view to dismissing the Plaintiff's action before trial.

The evidence before the motions judge included the report of an expert engineering firm retained by the Plaintiff to analyse the trail in the area where he fell. The expert attended at the site several times, taking measurements and photographing the area. Some of the photographs were taken at the same time of year as the accident (albeit three years later), which showed the area in question to be covered with vines and foliage. In its report, the Plaintiff's expert compared the dimensions and structure of the trail to various industry guidelines and standards and concluded that the trail did not conform to existing bicycle path standards. The expert also opined that it was reasonable to conclude that the accident had occurred as a direct result of several factors, including insufficient forward visibility distance; the narrow dimensions of the path, coupled with the absence of a "recovery zone"; and the presence of concrete slabs located immediately to the south of the bicycle path.

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Contrary to the municipality's assertions, the motions judge concluded that the Plaintiff had a real chance of success at trial and dismissed the municipality's motion for summary judgement. In so doing, the motions judge considered the narrow test to be applied on a motion for summary judgement and reviewed the relevant sections of the *Occupiers' Liability Act* (the "Act") as they pertain to the duty of care owed to persons using recreational trails. The latter provides that a person entering a recreational trail shall be deemed to have willingly assumed the risks of doing so, subject to a duty of the occupier "to not create a danger with the deliberate intent of doing harm or damage to the person or his property and to not act with reckless disregard of the presence of the person or his property." The

municipality conceded that it was an occupier of the trail within the meaning of the *Act*. The Plaintiff, however, did not admit that the path was a recreational trail as defined in the legislation (and, as such, was presumably arguing that a higher duty was owed). Regardless, the motions judge made no finding on the issue, as it was not necessary for the purposes of the decision. However, the motions judge identified a more substantial issue requiring a trial; specifically, whether the municipality had acted "with reckless disregard of the presence of the person" in relation to the area where the Plaintiff fell.

The Court reviewed case law on the duty of occupiers in the context of snowmobile and trespass cases and concluded that there was no definitive statement in the appellate cases as to the meaning of "reckless" in the phrase "reckless disregard for safety". The Court also agreed with the municipality's submission that no cases have thoroughly analysed the meaning of "reckless disregard" as it relates to the planning, design and construction of a "recreational trail" in the context of the *Act*. Nevertheless, the motions judge made the following observations based on the evidence before the Court: (i) the municipality knew that the trail was being regularly used by cyclist; (ii) the lack of a "recovery zone" and the presence of boulders, jagged rocks and pieces of concrete embedded with iron bars immediately adjacent to the bicycle path constituted a dangerous trap; and (iii) the trail did not comply with recognized standards (which called for a wider path and a "recovery zone"). With respect to the latter, the motions judge noted that the municipality could easily have rectified the situation by laying down more asphalt and by placing sod next to the asphalt (after burying the rock and concrete). By failing to do so, the motions judge stated that a trial Court could easily find that the municipality had acted "with reckless disregard of the presence of the person".

It bears repeating that this was not a trial decision, and that the motions judge made no findings with respect to liability on the part of the municipality. Having said that, the case raises several interesting issues, including how the Courts have interpreted "reckless disregard" in other occupiers' liability cases and the lack of definitive consensus regarding its interpretation. It also reinforces the narrow test for summary judgement, in that the Courts will only summarily dismiss a Plaintiff's claim in the clearest of cases, where there is no genuine issue of fact requiring a trial and where the plaintiff has failed to establish that his claim has a real chance of success. Finally, this case serves as an important reminder for municipalities, parks authorities and other occupiers of recreational trails to reflect on the safety of their own trails and to consider any hidden dangers that may pose a hazard to their users and expose them to future claims.

1 2006 CanLII 36621 (Ont. S.C.) (Released October 25, 2006)■

...this case serves as an important reminder for municipalities, parks authorities and other occupiers of recreational trails to reflect on the safety of their own trails...

?? Questions & Answers ??

Q. I am seeing an increasing “need” from our Facilities staff to allow contractors greater access to University buildings at off-peak times in order to complete their jobs on time and on budget.

Many of the CURIE member institutions have established key control policies which include requirements for third party contractors using University keys (i.e., sign in, sign out, etc.). However, given the trend to allow contractors greater access to University buildings, I was wondering if any of you have any additional loss prevention strategies to reduce the potential for:

- (a) loss of keys by the contractor;
- (b) loss of University property due to loss or misuse of University keys by the contractor;
- (c) assault claims due to access to individual offices or dorm rooms

For example, do you require criminal background checks on the contractors who will be using your keys? Do you require the contractor to indemnify the University against all claims/losses associated with the use of University keys?

A. CURIE has had a claim that was a bit of an issue, in which a contractor was given a key for a residence of all things. Yes things allegedly disappeared.

It is not a wise idea to give contractors a key to anywhere on campus. If you have work going on in a building that only houses classrooms, then it may not be too bad. But you should never give a master key to a contractor if it will give them access to a residence or to anyone’s office. In those cases you should always have one of your own employees with them.

If a contractor has a key and things disappear, it is very hard to prove that someone actually broke in, i.e. no evidence of break and enter. Unless we can prove the contractor actually did it, and if we gave someone the key, I am pretty sure a court would have no problem finding the university responsible. So it is always best to have a staff member with the contractor. Even after the contractor is let into the room or office.

LOSS CONTROL TIPS

Here are some helpful loss control tips to follow:

- Maintain good housekeeping in boiler rooms.
- Mechanically exercise and inspect circuit breakers at least once a year.
- Perform infrared thermography surveys of electrical equipment at least once a year.
- Test and maintain safety valves according to jurisdictional and code requirements.
- Ensure all electrical equipment is in clean, cool, dry and tight condition.
- Establish and implement a formal electrical maintenance and testing program.

CURIE UPDATE

Statement of Income and Expenses

For the twelve months ended December 31, 2006

	2006	2005
Written Premium	\$ 19,762,679	\$ 16,034,466
Earned Premium	19,762,679	16,034,466
Less Reinsurance Costs	1,649,235	2,980,218
Net Earned Premium	18,113,444	13,054,248
Net Incurred Claims	12,105,387	7,037,583
<i>Net Loss Ratio</i>	66.83%	53.91%
Underwriting Profit (Loss) Before Operating Expenses	6,008,057	6,016,665
Operating Expenses	2,612,295	2,483,538
<i>Net Operating Expense Ratio</i>	14.42%	19.02%
<i>Combined Ratio</i>	81.25%	72.94%
Underwriting Profit (Loss)	3,395,762	3,533,127
Income from Investment	1,934,944	1,645,702
Other Income	1,500	1,500
NET PROFIT (LOSS)	\$ 5,332,206	\$ 5,180,329

4th QUARTER CLAIMS HIGHLIGHTS

The relatively mild weather in most areas of the country has resulted in a reduction in the number claims reported in both the liability and property programs. Of the six defamation claims we have two that have the potential to be expensive from a defence point of view. The reported property losses are all minor with the exception of one fire.

Liability Claims Reported

Alcohol	1
Bike	1
Defamation	6
Failure to Educate	2
Maintenance	2
Medical Malpractice	1
Vehicle	2
Sexual Harassment	1
Slip & Fall	13
Sports	4
Other	1
Total Liability	34

Property Claims Reported

Fire	2
Theft	1
Water	7
Wind	1
Total Property	11

FM Loss Control Update

**by John Breen*

FM GLOBAL RISKMARK & RECOMMENDATIONS

RISKMARK

A location's RiskMark score is the result of a complex algorithm that is calculated using a combination of site specific information and FM Global loss history and experience. FM's field engineering staff provides site-specific information as part of their routine servicing of your location. In addition to preparing a FM Global Risk Report the engineer is responsible for collection of information and data that support the conclusions and recommendations you commonly see in the reports. It is this data that primarily drives RiskMark.

To arrive at the RiskMark score the three major causes of property loss are weighted as follows:

- Occupancy – 20%
- Natural Hazards Experience – 35%
- Fire-Related Factors – 45%

For example, because roughly 45% of FM's loss experience is related to the perils of fire, approximately 45% of the overall RiskMark score is weighted to an assessment of risk related to fire hazards. Similarly, natural hazard exposures impact the RiskMark calculation, as does an inherent nature of the occupancy itself.

Within each RiskMark component FM try to provide the most accurate differentiation of risk quality possible using the information available. The natural hazard assessment, for example, first considers the address of the location to determine if it is within a windstorm or earthquake zone. FM try to provide the most accurate differentiation of risk quality possible using the information available. The natural hazard assessment, for example, first considers the address of the location to determine if it's within a windstorm or earthquake zone. FM use location-specific information to determine if the site is subject to flood or other deficiencies related to natural perils (i.e., recommendations and loss expectancies associated with windstorm, flood, earthquake, etc.). The natural hazard component score is then added to the other component scores to provide the overall location score.

RECOMMENDATIONS

FM Global's objective is to ensure that CURIE campus management understands what their main property risks hazards are, and to adequately protect and mitigate against them. This involves both physical risk improvement and the implementation of human element programs. The human factor is the most frequent and costly factor involved in the cause of property loss.

A recent review of FM Global recommendations showed the following breakdown.

**John Breen is the
Manager, Risk Reduction
& Loss Control at CURIE*

	PHYSICAL	HUMAN
FIRE HAZARDS	887	585
EQUIPMENT HAZARDS	10	51
NATURAL HAZARDS	25	16
TOTALS	922	652

2007 CURIE Board

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University

Dan Murray

University of New

Brunswick

Phyllis Clark

University of Alberta

Alan Simms

University of

Manitoba

Carole Workman

CAUBO

Critical Human Element deficiencies include:

1. Maintaining fire protection systems in service
 - a) Valve inspection and alarm testing programs - 168 recommendations
 - b) Valve locking to prevent tampering – 61 recommendations
 - c) Red Tag Programs – 59 recommendations
 - d) Fire pump testing – 44 recommendations
2. Ignition source control
 - a) Hot work programs – 58 recommendations
 - b) Electrical – 34 recommendations
 - c) Smoking – 4 recommendations
3. Emergency Organization – 62 recommendations

Not mentioned above are other deficiencies that while they generally do not pose large exposure, are easy to do, such as removing combustibles from electrical rooms.

For more information on RiskMark and recommendations pertaining to individual campuses visit FM Global's MyRisk at <http://www.fmglobal.com/myrisk/>

✓ **DATES TO MARK ON** ✓ **YOUR CALENDAR**

September 15 & 16, 2007

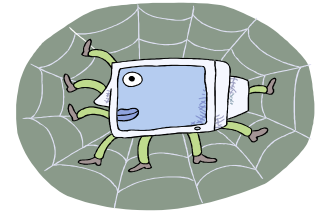
CURIE University & College Risk Management
Conference

Halifax Marriott Hotel, Halifax, Nova Scotia

September 16 – 19, 2007

RIMS Canada Conference, Halifax, Nova Scotia

CURIE – NEW WEBSITE



We are very pleased to announce that the new CURIE website was launched on February 14, 2007. This new site will contain the original sites information as well as several new features.

Our aim is for you to have access to the latest information directly from the webpage, encouraging you to come back often and see what is new. We will also be looking for feedback from you as to what we can provide for you through the website.

The website has been conceived to be easy to navigate. We hope you find it to be so, and that you will get all the information you need in a quick and easy way. Besides new features this site will be less complicated to update.

The new website will have the same URL address <http://www.curie.org> In the near future the website will also incorporate member only services. To access these services a Username and Password will be required. Once you have chosen a Username a computer generated Password will be forwarded to you. After your initial log-on you can change the Password to one of your choice.

For those who have made use of the certificate service through the website you will go to the Insurance Certificate section, there will be no change to the Usernames and Passwords that have been utilized in the past. ■

*****NEWS FLASH***** 6 Dead in Bus Crash

A charter bus carrying a Bluffton University baseball team from Ohio, crushed in Atlanta on March 2 this year, killing 6 people and injuring 29 others.

FROM EDITOR: "Another reminder of the importance of hiring reputable bus firms with qualified operators that have adequate insurance coverage."

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