Insurance Issues for Charities

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Introduction and Overview

Insurance may be "essential" for charities but it is not always available or affordable. Further, charities may not always understand what their real risks are and how those risks can be managed and mitigated through a combination of risk transfer mechanisms such as insurance, indemnities, adherence to best practices, and seeking appropriate advice from qualified professionals.

Post-September 2001, many charities across Canada have seen their insurance coverage costs rise dramatically, often at the same time as classes of coverage and coverage limits have been reduced and, in extreme cases, liability coverage has become unavailable. Further, the now notorious corporate governance crisis in the for-profit sector has had profound implications on the duties and liabilities of directors not only of major public companies, but of charities as well.

As noted in a recent article in *The Wall Street Journal*, even though nonprofit corporations are not covered by *Sarbanes-Oxley*, officers and directors of nonprofit organizations to a certain extent face virtually the same exposures to lawsuits, the same kind of corporate governance concerns, and the same best practices concerns as officers and directors of for-profit companies.[1]

These continually developing exposures mean that the insurance markets are often faced with the difficult predicament of attempting to price a product (future liability of a charity or its board of directors) based on present conditions that may not necessarily be reflective of the actual exposures or risk. To the extent that the product is under-priced, the insurer may be forced to reduce its capacity and refuse to write less profitable lines of business. To the extent the product is overpriced, charitable organizations must prioritize the types and amount of insurance they can reasonably afford.

Sometimes the increased premiums and reduced coverage are warranted by the charity's claims history or poor risk management practices, but frequently they result from market conditions within the insurance industry that cause both coverage and the cost of coverage to change dramatically without regard to the risk profile of the individual charity.

For many fledgling charities, comprehensive insurance coverage is the "necessary luxury" they can't afford or even justify. In some instances, established charities have been forced to eliminate or curtail programs because coverage

is no longer available or is prohibitively expensive. However, an appropriate insurance program is not only an effective way to manage a charity's various exposures but is also crucial from a corporate governance perspective in order to ensure that the assets of the charity are not compromised or otherwise depleted due to various operational and systemic risks.

Directors of charitable corporations should be particularly concerned since, after myriad scandals at companies such as Enron, Worldcom, and Tyco, increased scrutiny of corporate governance practices has now seeped into the nonprofit sector and conflicts of interests have become a real source of concern.[2] For example, the University of Georgia Foundation, which manages a $400M (US) endowment fund, recently came under scrutiny for spending over $30M (US) on business with companies linked to 27 of its 55 trustees.[3]

The advent of new technologies, such as the Internet, have expanded charities' exposure and the needs for coverage. For example, the dissemination of information to the public through a Web site turns an organization into a "publisher" and increases exposure to defamation, copyright, trademark infringement, and invasion of privacy. Additional coverage may be required and existing coverage may be inadequate or may become non-responsive as the charity's operations change.

All too often, because the nobility of the charity's purpose is central to its fundraising efforts and volunteer commitment, many neophyte directors and administrators believe that underwriters will be primarily influenced by the altruistic objectives of the charity and that premium and terms will be adjusted accordingly. In fact, the underwriters, in setting the terms, conditions, and pricing of insurance products, are governed by market conditions and the risk management profile of the insured relative to other types of similar risks. In this article we therefore propose to review:

1. initial considerations to be undertaken before acquiring insurance and options that are available when coverage is either unavailable or not affordable;
2. the steps that a charity should undertake before and when marketing its risk to insurers;
3. the insurance broker's role and duties; and
4. general principles concerning insurance and how coverage is triggered.

To Insure or Not to Insure: Prerequisites and Alternatives

In 1997 there were approximately 175,000 not-for-profit organizations operating in Canada. Of these, over 78,000 were registered charities. Two thirds of the registered charities had annual revenues of less than $100,000 and half had annual revenues of less than $50,000.[4] Clearly many charities simply do not have the resources to purchase any insurance let alone comprehensive insur-

ance covering most potential exposures. Other charities have limited resources to devote to insurance and can only afford to purchase insurance essential to their charitable operations without being able to provide their directors and officers with satisfactory directors' and officers' (D & O) coverage.

What's a shallow-pocketed charity to do?

A. Risk Management When Insurance Is Not Available

The courageous volunteers and employees who undertake the responsibility of growing nascent charitable organizations into more mature insurable entities can take some comfort from the fact that effective risk management is augmented by, but does not depend upon, the availability of insurance.

Such organizations can benefit in their early stages from considering the following defensive strategies to minimize and transfer risk:

- Initially limit the scope of charitable activities to less risky ventures.
- Rely upon third-party fundraising activities and special events run independently of the charity by corporate sponsors who carry insurance and who are willing to assume responsibility for the administration of the events and may even be willing to provide an indemnity to the charity.
- Initially limit the number of members of the board and closely monitor all volunteer activities to minimize potential liabilities.
- Seek out volunteers with legal, accounting, human resources, and risk management experience to sit on the board or to advise the board.
- Recognize that some individuals who are key to the organization's growth and success may be reticent to become officers or directors in the absence of insurance or some form of secured indemnity being available. Invite them to serve as advisors pursuant to written agreements that may limit their liability.
- Liaise with the executive directors and board members of more established charities to gain enhanced awareness of risks they have identified and risk management procedures they are adopting.
- Suggest that all volunteers and board members review other insurance policies, such as corporate coverage available through their employer, homeowner's policies, and any professional liability policies to determine what coverage, if any, is available to them for their volunteer activities with charitable corporations.
- Suggest that volunteers and board members consider augmenting coverage under their personal policies at their own expense on an interim basis until the charity becomes more established.

B. Corporate Indemnification of Directors and Officers

Directors, officers, and trustees of a charity may seek a corporate indemnification from the charity. Unlike D & O insurance, there is no immediate cost associated with the passage of a by-law permitting indemnification. However, the indemnification is only as good as the assets of the charity at the time the indemnification must be honoured. Further, corporate by-laws can always be amended or revoked and are subject to public policy constraints (see discussion of statutory limitations below) that may not exist with respect to an insurance policy. Accordingly, many directors are now seeking formal indemnity agreements drafted to survive changes in the by-laws and to provide protection apart from D & O coverage.

Before passing a by-law authorizing director indemnification in general or any resolution pursuant to the by-law authorizing specific indemnification (pursuant to an indemnity contract or otherwise), the charitable board must carefully consider whether or not the charity is legally justified in providing the indemnification sought and closely review the governing corporate statute as well as its existing articles of incorporation.

Indemnification provisions in the by-laws should be permissive rather than mandatory and specify that indemnification will not be provided for intentional misfeasance, failure to act honestly and in good faith with a view to the best interests of the corporation, or for other proscribed activity.

C. Statutory Provisions Related to Corporate Officer and Director Indemnification and Insurance

Many directors of charitable organizations believe that the standards for corporate indemnification and insurance of directors and officers are the same for charities as for all other corporations. In fact, charities operating in Ontario are not entitled to indemnify directors or officers for losses occasioned in the exercise of their duties nor provide them with directors' and officers' insurance unless a court order is obtained or certain statutory conditions are met.[5]

1. Current Federal Legislation

Currently, federally incorporated charities are governed by Section 93 of the *Canada Corporations Act*,[6] which provides:

> 93. Every director of the company, and his heirs, executors and administrators, and estate and effects, respectively, may, with the consent of the company, given at any meeting of the shareholders thereof, from time to time and at all times, be indemnified and saved harmless out of the funds of the company, from and against,
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> (a) all costs, charges and expenses whatever that such director sustains or incurs in or about any action, suit or proceeding that is brought, commenced or prosecuted against him, for or in respect of any act, deed, matter or thing whatever, made, done or permitted by him, in or about the execution of the duties of his office, and
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> (b) all other costs, charges and expenses that he sustains, or incurs, in

> or about or in relation to the affairs thereof, except such costs, charges or expenses as are occasioned by his own wilful neglect or default.

2. Pending Federal Legislation[7]

If proclaimed, Bill C-21 will modify the standards and procedures for indemnification of directors of federally incorporated corporations without share capital including charities.

Section 152(1) of the proposed legislation sets out the general right to indemnification as follows:

> 152(1) A corporation may indemnify a present or former director or officer of the corporation or another individual who acts or acted at the corporation's request as a director or an officer or in a similar capacity of another entity, against all costs, charges and expenses including an amount paid to settle an action or satisfy a judgment, reasonably incurred by the individual in respect of any civil, criminal, administrative, investigative or other proceeding in which the individual is involved because of that association with the corporation or another entity.

Section 152(3) limits the above by prohibiting the corporation from indemnifying an individual under subsection (1) unless the individual:

> (a) acted honestly and in good faith with a view to the best interests of the corporation or other entity for which the individual acted as director or officer or in a similar capacity at the corporations request; and
> (b) in the case of a criminal or administrative action or proceeding that is enforced by a monetary penalty, had reasonable grounds for believing that their conduct was lawful.

Section 152(2) provides that the corporation may advance money to a director, officer, or "other individual" (as defined in subsection (1)) for the costs, charges, and expenses of a proceeding referred to in subsection (1) but that the recipient shall repay the money if she or he does not fulfill the conditions of subsection (3).

Subsection (4) permits corporate indemnification of persons referred to in subsection (1) as follows:

> (4) A corporation may, with the approval of the court, indemnify an individual referred to in subsection (1) or advance money under subsection (2), in respect of an action by or on behalf of the corporation or other entity to procure a judgment in its favour to which the individual is made a party because of the individual's association with the corporation or other entity as described in subsection (1), against all costs and expenses reasonably incurred by the individual in connection with the action, if the individual fulfills the conditions set out in subsection (3).

Subsection (5) provides that a person fulfilling duties outlined in subsection (1) according to the standards set out in subsection (3) and who is not judged by the court or other competent authority to have committed "any fault or to

have omitted to do anything that the individual ought to have done" has a right to indemnity from the corporation in respect of all "costs, charges and expenses reasonably incurred by the individual in connection with the defence."

Subsections (7) through (9) provide that individuals referred to in subsection (1) may make application to the court to approve an indemnity under the section and make such further orders as the court thinks fit. Such applications shall be on notice to the director appointed under the act and the court may order notice to be given to any interested person who is entitled to appear and to be heard in person or by counsel.

Subsection (6) of the proposed section provides for the charity's purchase of D & O insurance as follows:

> (6) A corporation may purchase and maintain insurance for the benefit of an individual referred to subsection (1) against any liability incurred by the individual:
> (a) in the individual's capacity as a director or an officer of the corporation; or
> (b) in the individual's capacity as a director or an officer, or in a similar capacity, of another entity, if the individual acts or acted in that capacity at the corporations request.

It is important to note the entitlement to indemnification under this proposed legislation will be determined ex post facto. The officer or director will have a right to indemnification even in the absence of indemnification provisions in the by-law but only if he or she has fulfilled the conditions set out in subsection (3) and has not been adjudged to have committed disentitling sins of commission or omission. Interim court applications by directors for indemnity pursuant to subsection (4) may prove problematic when the charity's other board members have doubts about the merits of the claim and the final outcome of proceedings.

3. *Ontario Legislation*

In Ontario, charitable boards are currently required to objectively justify corporate indemnification and the purchase of D & O insurance. For many years the Office of the Public Guardian and Trustee of Ontario took the position that charities could neither provide directors and officers with indemnities nor purchase D & O insurance on their behalf without a court order. The rationale was that directors of charities were trustees of trust property and could not confer a benefit (e.g., indemnification or D & O insurance coverage) upon themselves.

In Ontario all corporations, except charitable corporations, may purchase and maintain insurance for their directors and officers covering any liability incurred in that capacity except in cases of "failure to act honestly and in good faith with a view to the best interest of the corporation."[8]

However, in the case of charitable corporations, Section 283(6) of the Corporations Act provides:

A corporation referred to in subsection 1(2) of the *Charities Accounting Act* may not purchase insurance described in subsection (5) unless,

(a) the corporation complies with the *Charities Accounting Act* or a regulation made under that act that permits the purchase; or

(b) the corporation or a director or officer of the corporation obtains a court order authorizing the purchase.

On January 17, 2001, Regulation 4/01 under the *Charities Accounting Act* came into force. This regulation permits the corporate indemnification of officers, directors, or trustees and the purchase of D & O insurance for them, without a court order, provided certain criteria are met.

Section 2 of Regulation 4/01 provides as follows:

(1) In the circumstances and subject to the restrictions set out in this section, an executor or trustee and, if the executor or trustee is a corporation, each director or officer of the corporation may be indemnified for personal liability arising from their acts or omissions in performing their duties as executor, trustee, director or officer.

(2) An executor, trustee, director or officer cannot be indemnified for liability that relates to their failure to act honestly and in good faith in performing their duties.

(3) In the circumstances and subject to the restrictions set out in this section, insurance may be purchased to indemnify the executor, trustee, director or officer for the personal liability described in subsection (1).

(4) The terms of the indemnity or insurance policy must not impair a person's right to bring an action against the executor, trustee, directors or officer.

(5) The executor or trustee or, if the executor or trustee is a corporation, the board of directors of the corporation shall consider the following factors before giving an indemnity or purchasing insurance:

1. The degree of risk to which the executor, trustee, director or officer is or may be exposed.
2. Whether, in practice, the risk cannot be eliminated or significantly reduced by means other than indemnity or insurance.
3. Whether the amount or cost of the insurance is reasonable in relation to the risk.
4. Whether the cost of the insurance is reasonable in relation to the revenue available to the executor or trustee.
5. Whether it advances the administration and management of the property to give the indemnity or purchase the insurance.

(6) The purchase of insurance must not, at the time of the purchase, unduly impair the carrying out of the religious, educational, charitable or public purpose for which the executor or trustee holds the property.

(7) No indemnity shall be paid or insurance purchased if doing so would result in the amount of the debts and liabilities exceeding the value of the property or, if the executor or trustee is a corporation, render the corporation insolvent.

(8) The indemnity may be paid or the insurance purchased from the property to which the personal liability relates and not from any other charitable property.

(9) If the executor, trustee, director or officer is deceased, the indemnity or the proceeds of the insurance may be paid to his or her estate.

The thrust of this legislation is clear. While many participants in charitable endeavour may regard indemnification and D & O insurance as "essential," both federally and in Ontario, the current trend is to require charitable boards to meet objective, justifiable standards before providing indemnification or acquiring D & O coverage.

Marketing the Charity's Risk

A. Take a Good Look in the Mirror

Once a charity has determined what insurance it needs and that it can afford to buy it, the charity needs to consider how to get the quantum of cover required at the best available price.

The first order of business is for the client organization to take a look at itself as if through the eyes of a potential underwriter and ask: "Do we project ourselves as efficient risk managers?" When answering this question, the risk management committee should consider the following:

- Do the operations of the charity conform to the charitable objects in the letters patent or do the latter require amendment?
- Do the by-laws reflect a competent governance structure and are they up to date?
- Is the board of the charity composed of influential members of the community? If so, is their expertise reflected in the charity's annual report or other documents available to be sent to brokers?
- Are audited financial statements prepared and available and have all comments to management in auditors' annual letters been addressed?
- Is the charity's intellectual property protected through trademark registrations and licensing agreements?
- Has the charity in conjunction with its legal counsel developed contracts, releases, waivers, disclaimers, and indemnity agreements appropriate for its operations?
- Has the charitable organization established a parallel foundation? If so, does the parallel foundation operate at arm's length? Does the parallel foundation's structure and operations reduce or exacerbate the charity's risk? Should the charity and the parallel foundation be jointly or separately insured?

Still looking in the mirror, the charity needs to ask: "Can we demonstrate that we are proactive risk managers who have addressed potential liabilities?" When answering this question, the charity should consider whether or not it has developed the following:

- an equal opportunity employment policy that prohibits discrimination in the hiring, employment, and promotion of staff;

- a screening policy that imposes reasonable safeguards in the selection of staff, board members, and volunteers including procedures governing criminal record checks if required;
- a harassment policy that prohibits physical, verbal, visual, and sexual harassment and that covers board members, employees, volunteers, donors, and beneficiaries of the charity's operations;
- a privacy policy that conforms with the provisions of PIPEDA or applicable provincial legislation[9] and clearly discloses any commercial use of donor information and procedures used to collect, distribute, retain, and destroy all confidential information coming into the charity's possession;
- a comprehensive conflict of interest policy governing volunteers, employees, officers, and directors and that fully complies with applicable federal or provincial legislation;
- public relations policies related to publicising the charity's good works, including provisions related to the use of charitable recipients' personal information, photographs, etc., for promotional purposes;
- approved procedures for publishing information on the charity's Web site and in any publications distributed by the charity;
- an investment policy overseen by a finance committee;
- an adverse event plan that identifies potential risks, outlines how to deal with them, and assigns responsibility for dealing with adverse publicity and communicating the charity's position to the media;
- policies for employee use of the charity's e-mail, Internet access, and Web site specifically prohibiting the distribution of inappropriate e-mails and the downloading of inappropriate information onto the charity's computers; and
- special events and fundraising risk management policies and checklists.[10]

Once these internal issues have been addressed, the charity is ready to look for the right broker in its community.

B. Take a Good Look for the Right Broker

All brokers are not equal. This is particularly true when it comes to dealing with insurance for charities.

From the broker's and insurer's perspective, charities generate relatively low commissions and premiums respectively at relatively high risk levels. Charities often assume fiduciary obligations to vulnerable individuals. They often lack the control and vertical power hierarchy of for-profit corporations. They rely upon broad-based support from people whose expertise lies in other areas and who sometimes approach their charitable duties more casually than their regular jobs.

Brokers depend upon insurers for their livelihood. Very often the more business a broker writes with a limited number of insurers, the higher the compensation the brokerage will receive. The higher the premiums the charity pays, the higher the broker's commission.

Brokers who write a lot of business with certain insurers have more influence with those insurers when marketing your risk and settling claims.

Accordingly, you want a broker who serves several charities and has a strong relationship with insurers who underwrite charities' risks on a regular basis.

These brokers and insurers will be more appreciative of a client's internal risk management efforts and they will be better able and more inclined to differentiate between that charity's real risks and the risks of others.

It is wise to ask a broker for references from other charitable clients before engaging the broker's services and to contact other charities with similar mandates or risks to evaluate broker performance.

Having someone on the charity's board or as an advisor who has an insurance background will be of considerable assistance when selecting a broker and insurer as well as a valuable resource when negotiating cover, terms, and claims. However, extreme care must be taken if a board member is the broker or an employee of the insurer as these situations are fraught with current and potential conflicts.

The broker you select should be willing to:

- sit down with members of the charity's risk management committee to identify which risks can be insured and the desirable levels of coverage;
- canvass the market, soliciting quotations from a number of potential insurers;
- evaluate in writing the various coverage offers received;
- serve as your advocate to explain to the insurer why the risk posed by the charity's operations is not similar to riskier ventures undertaken by other organizations;
- work to solve problems that arise during the course of negotiations by suggesting compromises to facilitate coverage or reduce costs such as higher deductible limits, modifying operational procedures or policies;
- ensure prompt delivery of the policy by the insurer once coverage is obtained;
- discuss the coverage with the risk management committee annually well in advance of the renewal deadlines;
- promptly and accurately report and assist in the settlement of claims; and

- update the risk management committee on any new coverage or other trends that have been affecting its other charitable clients and that may affect the insured's policy upon renewal.

Broker's Standard of Care and Disclosure Duties

A. Standard of Care

Remember that charities aren't the only participants in these transactions who require insurance. Occasionally lacunae in coverage or inadequate coverage levels result from broker negligence.

Accordingly, it is incumbent upon staff and board members dealing with brokers to document all instructions and responses and, in the case of an uninsured claim, to review these documents to determine whether a claim over or separate claim against the broker may be appropriate.

The two leading cases on insurance agents' duties to the insured are the 1977 Ontario Court of Appeal decision in *Fine's Flowers*[11] and the 1990 Supreme Court of Canada decision *Fletcher v. Manitoba Public Insurance Corp.*[12] Madam Justice Wilson wrote both the majority decision for the Ontario Court of Appeal in *Fine's Flowers* and, thirteen years later, the unanimous decision in the Supreme Court of Canada.

In the latter decision at page 21-23, she summarized the duty of private insurance agencies as set out in *Fine's Flowers* and then went on to expand upon those duties as follows:

> In my view, Fine's Flowers stands for the proposition that private insurance agents owe a duty to their customers to provide not only information about available coverage, but also advice about which forms of coverage they require in order to meet their needs. I note that Professor H. Snow has summarized the effect of Fine's Flowers in "Liability of Insurance Agents for Failure to Obtain Effective Coverage: *Fine's Flowers Ltd. v. General Accident Assurance Co.*" (1970), 9 Man. L.J. 1654, in the following terms (at p. 169):
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> The implication of this case and many others like it in recent years seems clear. Consumers who place their faith in insurance agents holding themselves out as competent and find their faith misplaced, will frequently be able to find recourse against the agent … [T]he extent of the duty owed by an insurance agent, both in placing insurance and in indicating to the insured which risks are covered and which are not, as set out in this case, is a fairly stringent one for the agent. Moreover, given the general situation of the principal relying very heavily on the expertise of the agent, it does not seem to be an unreasonable burden for an insurance agent to bear.
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> . . .
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> In my view, it is entirely appropriate to hold private insurance agents and brokers to a stringent duty to provide both information and advice to their customers. They are, after all, licensed professionals who specialize in helping clients with risk assessment and in tailoring insurance policies to fit the particular needs of their

> customers. Their service is highly personalized, concentrating on the specific circumstances of each client. Subtle differences in the forms of coverage available are frequently difficult for the average person to understand. Agents and brokers are trained to understand these differences and to provide individualized insurance advice. It is both reasonable and appropriate to impose upon them a duty not only to convey information but also to provide counsel and advice.[13]

B. Broker's Disclosure Duties

Recent concerns about potential conflicts of interest affecting brokers' relationships with their clients has led to regulatory amendments in Ontario.

Ontario Regulation 410/04 under the *Registered Insurance Brokers Act*[14] includes an amendment obligating brokers to "disclose in writing to a client or prospective client any conflict of interest or potential conflict of interest of the member that is associated with a transaction or recommendation."[15]

In December 2004, the Registered Insurance Brokers of Ontario issued a commentary requiring full disclosure by the broker to its client of any of the following circumstances:

(a) The client is entitled to any information about a broker's business relationships that pertain to a transaction or recommendation.

(b) Business relationships include direct or indirect interests or benefits relevant to the transaction or which arise from placing or the recommendation to place a contract of insurance with a particular insurer.

(c) Interests are sufficient to raise the perception of influence over the broker's independent decision-making process.

(d) A broker is influenced in placing a policy with a particular insurer because of an "ownership" relationship between that broker and the insurer.

(e) A broker is influenced in placing a policy with a particular insurer because both entities are owned or controlled by another common company or group of companies.

(f) A broker is influenced in placing a policy with a particular insurer because of a financial relationship.

(g) Network affiliations exist between brokers and insurers that could influence the placing of a policy.

(h) A broker is precluded by a contract with an insurer or by reason of a "limited market situation in the ordinary course of business" from offering a choice of insurers in the placement of an insurance product.

(i) Restrictive requirements are placed on brokers by insurers that limit the placement of insurance product.

(j) A broker's contractual relationship with an insurer provides for a contingent commission structure.

(k) Sales incentives are offered by insurers to brokers.

The standard to be applied to each one of these disclosure obligations is whether the described relationship would create the perception in a reasonable person in possession of all the facts that the relationship could influence the broker's independent decision-making process.

The directive sets out examples of disclosure required and states:

> A client is entitled to full and overt transparency in the disclosure of information.[16]

Understanding Insurance and Applicable Legal Principles

A. *First- and Third-Party Coverage*

Depending upon the nature of the coverage and the risk that is intended to be underwritten, an insurance policy may provide third-party liability coverage, which would include defence costs, settlements, and judgments, for claims brought by non-insured parties for errors, misstatements, acts, omissions, neglect, or breaches of duty, or it can provide first-party coverage for losses which an insured sustains due its own negligence or the negligence or fraud of others. Examples of the former type of coverage would include directors' and officers' liability insurance, employment practices liability insurance, and comprehensive general liability insurance. Examples of the latter type of coverage would include fidelity (employee theft and dishonesty) insurance, cyber-liability insurance, and kidnap and ransom insurance.

B. *General Principles of Interpretation*

While the fundamental nature of the type of coverage being provided is different in either instance, the general principles relating to the interpretation of the contracts remains the same. In *Non-Marine Underwriters, Lloyd's of London v. Scalera* ("*Scalera*"),[17] the Supreme Court of Canada took the opportunity to make clear and definitive its perception of the role and operation of a contract of insurance. The Supreme Court echoed and adopted interpretative principles espoused by predecessor courts, including the following:

(a) Any ambiguities in the contract of insurance will be construed against the insurer.[18]

(b) Coverage provisions will be construed broadly, and exclusion clauses will be construed narrowly.[19]

(c) In instances where the contract of insurance is unambiguous, a court should give effect to the clear language, considering the entire contract of insurance as a whole.[20]

(d) Where there is ambiguity in the contract of insurance, the court should give effect to the reasonable expectations of the parties and will admit extrinsic evidence of the parties' intentions, together with the business context and surrounding circumstances, in order to do so.[21]

The Supreme Court was very clear, however, to caution against overly literal or technical construction of a contract of insurance, where to do so would bring about a result that neither party reasonably anticipated or intended at the time that the contract of insurance was applied for, negotiated, underwritten, bound, issued, executed, and delivered:

> …literal meaning should not be applied where to do so would bring about an unrealistic result or a result which would not be contemplated in the commercial atmosphere in which the insurance was contracted. Where words may bear two constructions, the more reasonable one, that which produces a fair result, must certainly be taken as the interpretation which would promote the intentions of the parties. Similarly, an interpretation which defeats the intentions of the parties and their objective in entering into the commercial transaction in the first place should be discarded in favour of an interpretation of the policy which promotes a sensible commercial result. …Said another way, the courts should be loath to support a construction which would either enable the insurer to pocket the premium without risk or the insured to achieve a recovery which could neither be sensibly sought nor anticipated at the time of the contract.[22]

In considering the underlying economic rationale for insurance, the Supreme Court quoted, with approval, the following characterization:

> Insurance is a mechanism for transferring fortuitous contingent risks. Losses that are neither fortuitous nor contingent cannot economically be transferred because the premium would have to be greater than the value of the subject matter in order to provide for marketing and adjusting costs and a profit for the insurer. It follows, therefore, that even where the literal wording of a policy might appear to cover certain losses, it does not, in fact, do so if (1) the loss is from the inherent nature of the subject matter being insured, or (2) it results from the intentional actions of the insured.[23]

C. The Coverage of Fortuitous Loss

In *Scalera*, Mr. Justice Iacobucci recognized that an essential element of a contract of insurance, indeed the element that gives the contract economic sense, is the premise that the contract is intended to apply only in relation to a consequence that is fortuitous:

> In other words, insurance usually makes economic sense only where the losses covered are unforeseen or accidental: "The assumptions on which insurance is based are undermined if successful claims arise out of loss which is not fortuitous" (C. Brown, *Insurance Law in Canada* (3rd ed., 1997, at page 4). This economic rationale takes on a public policy flavour where, as here, the acts for which the insured is seeking coverage are socially harmful.[24]

Recent jurisprudence suggests Canadian courts are becoming more concerned about whether public policy issues should affect insurability. In a recent case, the Ontario Court of Appeal considered insurance coverage claims for racial

discrimination. While coverage was denied on other grounds, the court noted that it would "leave the broader public policy issue of insurance coverage for claims of discrimination for another day."[25]

These general principles are important when considering the types of risk that are necessary to insure and understanding the various terms and conditions of an contract of insurance, including the application that is provided to the underwriter when coverage is sought. Insurance is fundamentally predicated on the insured having sustained a "fortuitous" loss, meaning therefore that the insured is not aware of such a loss or conduct giving rise to it at the time that insurance is sought or otherwise not engaging in conduct with a view to bringing about the loss intentionally.

D. Insured's Disclosure Obligations

Further, insurance policies are contracts of utmost good faith (*uberrima fides*). Consequently, there is a duty on each party to an insurance contract to fully and accurately disclose to the other all material facts relative to the risk, particularly upon the insured who is transferring the risk of the particular loss to the insurer.

The rationale for this is obvious: in deciding whether it should accept the risk, and the amount of the premium to be charged, the insurer must be able to judge the likelihood of the loss occurring, and since most of the facts relating to the risk are known only to the insured, the insurer, in making this determination, must rely on information provided to it by the insured. Thus, an organization applying for insurance has a duty to disclose all matters within its knowledge that are relevant to the nature and extent of the risk.

The insured's disclosure obligations continue until the initial contract is concluded and are revived upon each renewal. For example, if an insured has been subject to a claim that it chose not to report to its insurer under an expiring policy, the failure to disclose that claim upon renewal may give rise to issues of material non-disclosure, particularly if that claim is based on underlying conduct that gives rise to other claims for which the insured seeks coverage. Such a situation can easily occur in the context of a fidelity loss where the charitable corporation discovers what it believes to be an isolated incident of employee theft and chooses to absorb the loss itself rather than submit a claim, only to subsequently discover, following renewal of its policy, that the fraud was far more extensive than originally known.

The consequence of non-disclosure or misrepresentation of material facts by the insured are the same – the loss of coverage because the insurer is entitled to render the insurance contract void.[26] Certain types of insurance that afford coverage to numerous different insureds, such as directors' and officers' insurance, can contain specific provisions that limit the ability of an underwriter to void a policy against an "innocent" insured who may not have been involved in procuring the insurance

and otherwise was unaware that there had been a misrepresentation to the insurer. Such a feature is known as severability and is found either in the application for insurance or the policy itself and essentially treats the insurance as a separate contract vis-à-vis each insured, with the result that it can be voided against those insured who participated in the misrepresentation while preserving the coverage for those who were "innocent."

E. Structure of Third-Party Liability Policies

Insurance policies that afford coverage for liability on account of third-party claims, while generally similar in structure, can contain quite significant features, which are important when considering the nature of the coverage afforded and the premium being proposed. For example, such coverage can be written on the following basis:

1. "Claims made."
2. "Occurrence."
3. "Occurrence" and "claims made."
4. "Claims made" and reported.

When a liability policy is afforded coverage on a "claims" basis, as is commonly the case with directors' and officers' liability coverages, the "claim" must be made against the insured during the policy period. If no such "claim" is made during that time, the insured is generally not entitled to seek coverage under the policy even if the conduct in issue that gave rise to the "claim" occurred during the policy period. However, some "claims" made coverages contain specific provisions that allow an insured to report, during the policy period, circumstances that could give rise to a "claim" and, by doing so, preserve any coverage that may exist under the policy for any subsequent "claim" made against the insured, even if the insurer is no longer on risk.

When coverage is afforded on an "occurrence" basis, as is common with general liability insurance, the conduct or "occurrence" giving rise to the claim must have occurred during the policy period. It is therefore important, as part of a general risk management strategy, for an insured to keep copies of all such coverages, even after the policies have expired, since it may be years before the insured becomes aware that they are being sued for conduct that occurred during a previous policy period. Numerous claims have been advanced in the last few years against various religious and charitable organizations as a result of allegations of sexual abuse dating back over 40 years.

An "occurrence" and "claims" made policy, although rare, can be used for certain types of error and omission coverage where the underwriter is concerned about previous operations and only wishes provide coverage for "forward moving conduct" and then only for "claims" made during the policy period.

Finally, "claims made" and reported coverage requires, as a condition precedent of insurance being available, that the "claim" not only be made during the policy period but also reported to the insurer before the policy expires. Coverage written on this basis has the potential to be quite restrictive to the insured, which is why many such policies provide a "window" clause that allows the insured to report a "claim" for a specified period of time following the expiration of the policy period.

It is therefore important to understand the basis upon which the type of third-party liability coverage that is being contemplated affords coverage and to ensure that coverage is not jeopardized by a failure to report a claim or preserve a copy of the policy.

It should be noted that first-party type insurance, such as fidelity insurance, also contains very specific reporting provisions and will require that the insured report a loss either upon its discovery or upon discovery of conduct that could reasonably have given rise to a loss. Again, a failure to adhere to this type of reporting obligation can be potentially critical to preserving rights to coverage and should be fully understood at the time of procuring the insurance.

F. Triggering Event(s)

From the foregoing discussion, it should also be apparent that if the coverage is written on any type of "claims" made basis, it is crucial to understand how that triggering event is defined since not all policies address this in the same manner. If "claim" is not defined, it is generally the case that for a "claim" to be made, there must be some form of communication of a demand for compensation or other form of reparation by a third party upon the insured, or at least communication by the third party to the insured of a clear intention to hold the insured responsible for the damages in question.[27]

Where, in a third-party liability form, "claim" is defined, it is important to understand how that definition is structured since it may impose a level of formality, such as a court proceeding or written demand for monetary damages, which the insured need receive before any coverage is engaged under the policy.

Third-party liability insurance can also be underwritten on a "duty to defend basis" or a non-duty basis, the significance of which can be important in terms of who gets to make actual decisions in respect of the conduct of the "claim." As is typical in the not-for-profit sector, if third-party liability coverage is underwritten on a duty to defend basis, the insurer has the right and duty to defend the insured and the insured cannot appoint and instruct counsel or settle the claim. Where appointed pursuant to the policy of insurance, defence counsel is counsel to both the insured and the insurer and must report to both and not take a position on behalf of either in respect of any coverage issues that may arise. If the policy is written on a non-duty basis, the insured appoints counsel but requires the consent of the insurer, which typically cannot be

unreasonably withheld and the insurer simply has a right to associate in the defence of the "claim" and consent to settlement, judgments, or defence costs being incurred.

G. Determining Whether Duty to Defend is Triggered

Regardless of whether the insurance is written on a duty to defend basis or a non-duty basis, it is crucial to understand how the defence obligation, or the obligation to indemnify an insured in respect of defence costs, is integral to the determination of whether a "claim" is covered under a third-party liability insurance policy.

In *Nichols v. American Home Assurance Co.*,[28] the Supreme Court of Canada established what became the standard for determining the scope of an insurer's obligation to defend; the duty to defend only arises where the pleadings raise claims that would be payable under the agreement to indemnify in the insurance contract.[29] In other words, even absent policy language linking the duty to defend to the duty to indemnify, and as a matter of general principle, any limitation on the duty to indemnify an insured would also be a limitation on the duty of the insurer to defend its insured. However, the legacy of *Nichols*, and the cases that followed it, was that the court's analysis of the insurer's duty to defend was at the mercy of the wording of the allegations contained in the statement of claim, regardless of whether the factual allegations were capable of being established at trial. This created the anomalous situation that an insurer could be compelled to fund a defence of allegations that might sound good, but had little prospect of actually triggering the insurer's duty to indemnify.

More recently, in *Scalera* and *Sasalone v. Wawanesa*,[30] the Supreme Court of Canada re-visited the duty of an insurer to defend its insured.

In *Scalera*, the plaintiff alleged in the underlying lawsuit that between 1988 to 1992, while she was still a young girl, she had worked part-time in a grocery store owned and operated by her parents, located near the terminus of two B.C. Transit bus routes. The Defendant, a driver with B.C. Transit, was alleged to have regularly attended at the store during that time and became acquainted with the Plaintiff. The Plaintiff alleged that the Defendant had committed a series of sexual assaults against her during the time period in question. The Plaintiff based her claim for damages against the Defendant on various causes of action, which were:

(a) sexual assault (battery);
(b) breach of fiduciary duty;
(c) negligent misrepresentation; and
(d) negligence.

The Defendant in the underlying action was an insured under a homeowner's insurance policy issued by Lloyd's Non-Marine Underwriters ("Lloyd's") that

excluded bodily injury or property damage caused by any intentional or criminal act or failure to act by any insured.

In *Scalera*, the Supreme Court of Canada held that the limitation on the duty to indemnify caused by the intentional act exclusion under Lloyd's policy also limited the duty to defend. Moreover, in ascertaining the scope of the duty to defend, the Supreme Court concluded that a court was required to look beyond the choice of labels used by the Plaintiff's solicitor in preparing a statement of claim, examine the substance of the allegations advanced, and determine the "true nature" of that claim. If the claim were classified such that it would be excluded under the policy, then any other claims considered to be "derivative" to that excluded claim would also be removed from coverage.

Accepting that Lloyd's duty to defend its insured was linked to the duty to indemnify, Justice Iacobucci considered the application of the intentional act exclusion in the policy in light of the non-intentional torts of negligence and breach of fiduciary duty. Justice Iacobucci specifically rejected the notion that in determining whether the duty to defend was invoked, the manner in which the allegations were framed in the underlying statement of claim was determinative, quoting with approval the observation of the Rhode Island Supreme Court: "a plaintiff, by describing his or her cat to be a dog, cannot simply by that descriptive designation cause the cat to bark."[31] A court, therefore, in reviewing a pleading in the context of considering whether the duty to defend has been triggered, must accept the factual allegations as framed but then must assess which of the plaintiff's legal claims could potentially be supported by those factual allegations. A pleading may disclose properly advanced allegations of both intentional and non-intentional tort; however, the court must further consider whether the harm allegedly inflicted by the negligent conduct is derivative[32] of that caused by the intentional conduct.[33]

This does not mean that the duty to defend will be precluded simply because a plaintiff has pleaded in the alternative; a claim should only be regarded as derivative if it is an ostensibly separate claim which nonetheless is clearly inseparable from a claim of intentional tort.[34] While recognizing that pleading in the alternative is commonly used for a number of reasons,[35] Justice Iacobucci noted that the characterization of a plaintiff's tort allegations should not be taken to affect any areas of the law outside of the insurance context.[36]

The tension of the Court's decision in *Scalera* is the extent to which a plaintiff will be permitted to plead in the alternative while still advancing a claim that is not clearly inseparable [factually] from a claim of intentional tort. In *Scalera*, the Court characterized each of the underlying plaintiff's properly pleaded claims as necessarily involving an intent to injure because each required that the defendant bus driver either knew or ought to have known that the plaintiff did not validly consent to the sexual activity. For Justice Iacobucci, in either case, actual or constructive knowledge of the non-consent could not mean, in

law, that the defendant did not intend any harm; the intent to harm flowed from the failure to obtain consent, which meant that one could not commit a sexual battery without an intent to harm.[37]

The majority decision in *Scalera* has also created a challenge for lower courts faced with assessing pleadings that advance allegations of intentional conduct but also contain allegations in the alternative that may trigger coverage. The extent to which those alternative claims should be regarded as "derivative" to the intentional claim continues to be the source of much contention and debate.

H. General Points About Exclusions

Third-party liability insurance policies, irrespective of the specific risk being underwritten, typically contain similar type exclusions. These include, but are not limited to, exclusion for suits or claims that are pending against an insured prior to policy incepting, exclusions for deliberately fraudulent conduct or for wilful violation of statute, or exclusions for an Insured having gained a profit, remuneration, or advantage to which that insured was not legally entitled.

The latter type of exclusions may be linked to either a final adjudication or "in fact" determination, which means that the exclusion is not engaged until that finding has been made following a final adjudication or such a finding can be demonstrated as having occurred "in fact" by the insurer. Clearly, a "final adjudication" standard denotes a higher degree of proof and is typically found in a "fraud" exclusion.

Standard exclusions include pollution, workers' compensation claims, liability assumed under contract, or pension liability. Certain of these types of exposures are separate risks that are underwritten and insured under specially tailored policies, such as environmental liability insurance or fiduciary liability insurance.

Other types of exclusions can represent exposures already covered under other types of insurance provided to the same insureds. For example, directors and officers of an organization are typically insured under a general liability insurance policy for loss on account of bodily injury and property damage. However, a directors' and officers' policy, which insures the same individuals, will typically contain a bodily injury and property damage exclusion since the coverage is intended to respond for pure economic loss.

It is also important to review the definition of "loss" in a third-party liability policy since it will delineate the types of heads of damages or other amounts that are covered under the policy and the types that are not. For example, a definition of "loss" typically excludes amounts that are uninsurable under the law pursuant to which the policy is construed. Since Canadian law prohibits an insurer from providing indemnity to an insured, as a matter of public policy, where the insured committed an act with intent to bring about loss or damage and an award of punitive damages is based upon "malicious, oppressive and

high-handed" misconduct that "offends the court's sense of decency,"[38] such an award would be considered uninsurable.

Care must be taken to examine the definition of "insured" to ensure that it covers volunteers as well as employees, officers, and directors. The definition of "volunteer" usually only extends to activities on behalf of the insured organization. Whether coverage is available should the volunteer assume duties on behalf of an umbrella charitable organization or in conjunction with other third parties should be closely reviewed.

Specific Risk Management Considerations For Directors

Since directors of charitable corporations are ultimately responsible for overseeing the direction and operation of the organization but ultimately must rely upon others for execution of that direction and the management of the day-to-day operations, they must be particularly vigilant in managing their own potential liability. While this article does not purport to exhaustively review and analyze appropriate risk management and loss prevention procedures, a few general observations can be made.

- Board meetings should be regularly attended and, where appropriate, key members of management should be invited or be available for questions or clarification.
- Documentation pertinent to a particular decision by the board should be provided well in advance of the meeting at which a decision is going to be made, and where advice from professional advisors is required, those advisors should also be in attendance at the meeting in order to provide any amplification or clarification required.
- Directors should carefully review all documentation and information provided in advance of a meeting. Specific procedures should be in place to ensure that information and documentation is distributed in a timely manner to all directors. For regular meetings, a detailed agenda, sufficient background information, and copies of all committee meetings and minutes from previous board meetings should be part of the documentation and information that is provided in a timely fashion.
- Minutes of meetings should be as accurate and as complete as is possible. At minimum, the minutes should document the matters discussed by the board, any directions or instructions given to management, including any limitations on authority, who was present during the deliberations and what advice, if any, was obtained from professional advisors, and what position was taken by those present. Any related documentation incorporated by reference into the minutes should be physically attached to the minutes, and the minutes should be reviewed by all directors present for accuracy, as well as by legal counsel.
- Committees should be used to allow the entire board to benefit from a more in-depth analysis of a particular issue, such as, for example, the purchase of insurance. Appointments to the various committees should

be considered in light of each director's professional background or business experience and their ability to devote the appropriate time to the task at hand. The board of directors should periodically be assessing what committees it needs and what specific functions it wishes to delegate to each. Common committees for charitable corporations include audit, compensation, finance, risk management, conflict of interest, and information technology committees.

- The board should ensure that the charitable corporation has a documented conflict of interest policy that is understood by the directors, management, employees, and volunteers of the charitable corporation.

Conclusion

As Canadian legal exposures continue to evolve through the development and expansion of theories of legal liability, as well as through the proliferation of new regulations and statutes, the issue of risk management has become an increasingly important subject for the boards of charitable and for-profit corporations alike.

Without effective risk management and risk transfer, these corporations could be exposed to financial and reputational damage, which, in some instances, could be fatal to their very existence. Understanding the operational and systemic risk profile of a charitable corporation is the first step in assessing risk management alternatives and determining which risks should be effectively transferred outright.

Seeking appropriate professional advice and understanding the different insurance products and coverages available in the marketplace is not only crucial to the purchasing decision but also represents sound governance practices.

In this article, we have attempted to address a number of the issues involved in this process. Obviously, time and space has not permitted a complete review of all of the insurance issues that charitable corporations face; by providing an overview, we hope that charitable corporations can better identify the issues they face and can seek out the expertise they require in order to make informed decisions.

Notes

1. Chad Bray, Dow Jones Newswires, January 26, 2004.
2. See "Battle in an Omaha Charitable Group Reflects Issues Raised in Corporate Scandals" by Stephanie Strom, *The New York Times*, January 9, 2004.
3. *Ibid.*
4. The Panel on Accountability and Governance in the Voluntary Sector Final Report, February 1999, p. 13.
5. In this article, we are focusing on recent developments in the proposed federal and existing Ontario legislation. Provincial and territorial legislation related to charitable directors indemnification and the purchase of D & O insurance varies considerably. Manitoba, New

Brunswick, Newfoundland, P.E.I., Quebec, and Saskatchewan all have provincial legislation permitting indemnification of charitable directors. British Columbia also provides for director indemnification but requires a court application. Provincial legislation in British Columbia, Manitoba, Newfoundland, and Saskatchewan specifically provides for the purchase of directors liability insurance. In Saskatchewan, Section 112.1(1) of the *Non-Profit Corporations Act*, 1995, insulates directors of charitable corporations from liability for pecuniary or non-pecuniary loss arising out of their good faith exercise of their duties not in contravention of provincial or federal statutes. The charitable corporation is not similarly insulated. Alberta, Nova Scotia, the Northwest Territories, Nunavut, and the Yukon did not contain express provisions related to directors indemnification or insurance. Alberta: *Societies Act* R.S.A. 2000, c. S-14; British Columbia: *Society Act* R.S.B.C. 1996, c.433 s.30; Manitoba: *Corporations Act* R.S.M. 1987, c. C225 s.119; New Brunswick: *Companies Act* R.S.N.B. 1973, c. C-13 s.95; Newfoundland: *Corporations Act* R.S.N.L. 1990 c. C-36 s.205–208; North West Territories: *Societies Act* R.S.N.W.T. 1988, c.S-11 (also covers Nunavut); Nova Scotia: *Societies Act* R.S.N.S. 1989, c.435; Prince Edward Island: *Companies Act* R.S.P.E.I. 1988, c. C.14 s.64; Quebec: *Companies Act* R.S.Q. 1991, c. C-38 s.90, s.123.87; Saskatchewan: *Non-profit Corporations Act* S.S. 1995, c. N-4.2 s. 111, s. 112.1; Yukon: *Societies Act* R.S.Y. 2002, c.206.

6. R.S. 1970 c. C-32, Section 157(1)(c) provides that the provisions of Section 93 are applicable to corporations without share capital.
7. Bill C-21, *An Act Respecting Not For Profit Corporations And Other Corporations Without Share Capital*.
8. Section 283(5), *Corporations Act*, R.S.O. 1990 c. C38 as amended.
9. For a recent comprehensive review of privacy legislation affecting charities see Sweatman, M. Jasmine, "The Protection of Personal Information by Charities and Not-For-Profit Organizations: A National Perspective" (2004), Second National Symposium on Charity Law, Canadian Bar Association.
10. For a discussion of the issues to be considered when managing risks associated with charitable special events, see McEown, Jeffrey M., "Charitable Special Events: Risk Management," Issues in Charity Law, October 2004, OBA.
11. *Fine's Flowers Ltd. et al v. General Accident Assurance Co. of Canada et al.* (1977) 17 O.R. (2d) 529 (O.C.A.).
12. *Fletcher v. Manitoba Public Insurance Corp.* (1990), 1 C.C.L.I. (2d) 1 (S.C.C.).
13. *Ibid.* at page 21–23.
14. O.R. 410/04 amending Reg. 991 R.O. 1990.
15. *Ibid.* paragraph 4.
16. RIBO commentary December 17, 2004.
17. (2000), 185 D.L.R. (4th) 1 (S.C.C.).
18. *Ibid*. at page 30, paragraph 70, citing *Brisette Estate v. Westbury Life Insurance Company,* [1992] 3 S.C.R. 87, and particularly at p. 92 (S.C.C.).
19. *Ibid*., citing *Reid Crowther & Partners Ltd. v. Simcoe & Erie General Insurance Company,* [1993] 1 S.C.R. 252, and particularly at p. 269 (S.C.C.), and *Indemnity Insurance Co. of North America v. Excel Cleaning Service,* [1954] S.C.R. 169 at 179-180 (S.C.C.).

20. *Ibid.* at page 31, paragraph 71, citing *Brisette Estate v. Westbury Life Insurance Company, supra,* and citing *Parsons* v. *Standard Fire Insurance Co.* (1880), 5 S.C.R. 233 (S.C.C.).
21. *Ibid.,* citing *Reid Crowther & Partners Ltd. v. Simcoe & Erie General Insurance Company, supra,* and *Scott v. Wawanesa Mutual Insurance Co.,* [1989] 1 S.C.R. 1445, and particularly at 1467 (S.C.C.).
22. *Ibid.,* quoting from Estey, J. in *Consolidated Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co.,* [1980] 1 S.C.R. 888 at 901–902 (S.C.C.).
23. *Lloyd's of London v. Scalera, supra,* at page 30, paragraph 68, per Iacobucci, J., adopting from Brown & Menezes, *Insurance Law in Canada* (2nd. ed., 1991) at pages 125–126.
24. *Ibid.* at paragraph 69, per Iacobucci, J. Also at page 55, paragraph 135: "Insurance is meant to cover risk of loss. …Where the loss is caused intentionally, it is hardly the result of a risk. Regardless of whether an insurance company could find a way profitably to insure someone against intentionally caused injuries, the respondent clearly did not believe it was doing so when it wrote the policy at issue in this appeal."
25. *Liberty Mutual Insurance Co. v. Hollinger Inc. et al.,* released February 13, 2004.
26. *Railway Passengers' Assurance Co. v. Standard Life Assurance Co.* (1921), 63 S.C.R. 79 (S.C.C.).
27. See *Reid Crowther & Partners Ltd. v. Simcoe & Erie General Insurane Co*. [1993]1S.C.R. 252.
28. [1990] 1 S.C.R. 801 (SCC).
29. *Ibid*. at p. 810.
30. [2000] 1 S.C.R. 627.
31. *Peerless Insurance Co. v. Viegas,* 667 A.2d 785 (1995).
32. "Derivative" in this context, according to Justice Iacobucci, means that the underlying elements of the negligence and of the intentional tort are not sufficiently disparate to render the two claims unrelated. If both the negligence and intentional tort claims arise from the same actions and cause the same harm, the negligence claim is derivative and it will therefore be subsumed into the intentional tort for the purpose of the exclusion clause analysis.
33. *Scalera*, *supra* at p. 599.
34. *Ibid.*
35. For example, the application of potential limitation periods can often result in a single set of facts being pleaded in support of different legal causes of action. Justice Iacobucci recognized this concern at p. 601 where he quoted from the Supreme Court's decision in *M. (K.)* v. *M. (H.),* [1992] 3 S.C.R. 6, in the context of observing that limitation periods applying to intentional or negligent actions did not apply to claims for breach of fiduciary duty: "[i}ncest is a breach of both common law and equitable duties".
36. *Scalera*, *supra* at pp. 601–602.
37. *Scalera*, *supra* at pp. 615–618. Justice Iacobucci concluded at p. 618 that "[e]ven if a victim is unconscious, the perpetrator has still violated another person's physical integrity." Thus, for Justice Iacobucci, the "harmful and offensive" element of sexual battery is satisfied by showing a lack of consent which is determined on an objective standard.
38. *Hill v. Church of Scientology of Toronto,* [1995] 2 S.C.R. 1130, at para. 196.