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Market Overview

Katrina, Rita and Wilma - you won't hear those names again, at least not in relation to hurricanes. These three named storms were part of record storm activity in 2005, which resulted in new damages of some \$58 billion compared to \$23 billion in 2004. In Ontario, we experienced increased storm activity and a tornado causing over \$250 million in damages. There were 8 airline crashes resulting in 700 deaths and over \$1.5 billion in property damage claims. Despite record gas prices at the pumps, motorists continued to drive and auto physical damage claim frequency increased in 2005 contrasted to declines over the last 4 years. Though the US Property & Casualty industry recorded an underwriting loss in the third quarter due mostly to weather related claims, the Canadian markets fared better and will likely report a profit for 2005.

Notwithstanding the above, the more difficult liability risks - hospitals, municipalities, errors and omissions - continue to be subject to increased claims activity resulting in upward price pressure. This will likely continue into 2006, especially for Directors & Officers and Errors & Omissions coverage.

Municipal Liability Insurance continues to be a substantial challenge resulting in a limited number of markets willing to write this class of business. The Municipal Sector is affected by the broad exposures being downloaded to them, increases in claims frequency and severity and growth of court bodily injury awards.

So, what will 2006 bring? Catastrophic Storm Modeling indications are that activity will continue at a record pace. There will be further consolidation in the Canadian Property & Casualty market. Niche insurance markets will continue to develop as insurance companies shift their focus to becoming specialists in certain classes of business. The Bank Act is set for review and their reach into the provision of insurance services will be debated once again. Insurance companies will see a decrease in their rate of return, as claims continue to develop, driven by increased litigation activity.

The trends in Public Sector Liability make it important to continue to enhance, focus and dedicate resources to risk management initiatives. We look forward to working with you to assist in managing your risks.

In response to many requests from our clients, we are bringing back Cowan News in it's original format. An electronic version can also be found at www.frankcowan.com

Joint and Several Liability

The continued increase in damage awards is an alarming trend. Municipalities can protect themselves through diligent risk management practices. However, in serious injury cases, even the best risk managed efforts may not produce the standard of "perfection" that our courts sometimes seem to think is achievable in the real world. As David Boghosian, of the firm, Boghosian and Associates writes,

At common law, damages in negligence and tort are deemed to be the indivisible result of the joint or concurrent action of one or more wrongdoers (this is referred to as the *in solidum* principle), such that the joint and several liability rule applies in the absence of statutory modification. To be held jointly and severally liable, each defendant must be found to be the effective cause of the entire loss suffered by the plaintiff. Joint and several liability does not increase a defendant's liability; in relation to the plaintiff, each defendant is 100% responsible; however, a result, if one of the defendants is unable to pay the share of damages allotted to them, the other defendant(s) are responsible for the entire loss sustained by the claimant.

The central argument in favour of joint and several liability is fairness to the plaintiff who has suffered the loss and damages. The rationale is that the fact that the actions of another wrongdoer contributed to the same loss should not jeopardize a plaintiff's right to be fully compensated for the damage and that it would be unfair to a plaintiff to shift to the plaintiff from the defendant(s) the risk of a defendant's inability to pay damages.

Tick All The Boxes

A municipality had comprehensive and well documented procedures. Road Crew Cards had clearly marked sections indicating completion of Sanding, Salting and Plowing in specific weather conditions.

However, during a lawsuit concerning a severe injury road accident, investigation of facts confirmed that only the "Plowing" box on the crew card had been ticked. At trial, the operator testified that he had indeed performed all three functions, and it was his custom to tick "Plowing" at the end of all of the steps.

The judge found that since "Sanding" and "Salting" were not ticked, he could infer the steps were not completed and the weather conditions called for these. Result: Judgement in favour of the Plaintiff.

The lesson...Procedures for documentation must be followed. Oral evidence will not defeat written evidence

That risk ought to be borne by the defendant(s) because they have caused the financial or economic loss to the plaintiff.

The principal argument against joint and several liability is also fairness but fairness to defendants. It is argued that it is unfair for a defendant whose degree of fault is minor when compared to that of other defendants to have to fully compensate a plaintiff should the other defendants be insolvent. In theory, the less blameworthy defendants can recover contribution from the more blameworthy defendants; in practice, however, the former, particularly where they are insured professionals or large corporate or government entities, are left to bear the lion's share of liability when other defendants are insolvent or have disappeared.

It is argued that joint and several liability encourages plaintiffs to unfairly target defendants who are known or perceived to be insured or solvent. Plaintiffs decide when, where and whom to sue, therefore, plaintiffs will sue persons who they believe afford the best opportunity for recovery. It has also been suggested that the likelihood of having to pay an entire damages award puts pressure on deep pocket defendants, such as municipalities to avoid protracted, expensive litigation by settling for amounts that may be excessive.

In addition, to incorporating and following diligent risk management practices, municipalities may wish to consider working with the Provincial Government regarding legislation that would restrict municipalities from being held financially responsible for someone else's negligence.

Bill 124 - Changes To The Building Code

As of January 1, 2006, municipalities will now have to comply with an additional three aspects of Bill 124 the Building Code Statute Law Amendment Act, 2002. All other elements of this Act have previously been brought into force.

Reg 389/05 2.16

Chief Building Officials and Inspectors must have completed the applicable examinations and have filed the information with the director of the Building and Development branch of the Ministry of Municipal Affairs and Housing. Inspectors must have completed the appropriate examinations prior to being able to conduct those specific inspections.

Reg 389/05 2.4.1

Municipalities are required to issue or refuse a building permit application within set times as indicated in the Table 2.4.1.1B of Regulation 389/05. These deadlines range from 10 working days for single detached houses and townhouses up to 30 days for high-rise buildings. The reasons for a refusal must be provided in writing. With these strict deadlines, municipalities must consider staffing issues (vacations, illness, pregnancy, training) to ensure there is adequate, trained staff able to approve and write reasons for refusals within the allotted time frame.

Reg 389/05 2.23.1.1

Building permit fees must be transparent to cover only the direct and indirect costs of the Municipality related to the administration and enforcement of the Ontario Building Code. A Report must be submitted annually to the Ministry. Within the Report Municipalities must break out their direct costs (review of applications for permits, inspections, reasons for refusing an application, etc) and their indirect costs (clerical support, overhead, etc). No longer will building fees be permitted to generate revenue to offset other municipal operations. However, Municipalities will be able to keep a reserve fund if it has been established specifically related to the administration and enforcement of the Act.

The council of each municipality is responsible for the Enforcement of the Building Code. The councils of two or more municipalities can enter into an agreement for the appointment of a chief building official and inspectors on a shared cost arrangement. Upper-tier municipalities can enforce the code on behalf of lower tier municipalities on a contracted basis and appoint a chief building official as well as inspectors for the lower tier municipality.

Contractual agreements should not only address contracted services and respective fee payments but should also address the assumption of liability. We strongly recommend consultation with legal counsel when drafting the agreement. The agreements should include a Hold Harmless and Indemnity Clause as well as responsibility for errors and omissions, liability insurance and WSIB.

Propane Storage Tips

Due to the increased threat of vandalism and theft, the storage of LPG (Liquified Petroleum Gas)/propane tanks inside buildings is on the rise. During recent inspections, propane tanks and their BBQ's have been found in all types of occupancies including municipal offices, equipment depots and even the occasional fire hall.

Propane has a highly expansive quality and is heavier than air, making indoor storage dangerous due to pilot lights and any source of electrical sparking. For the safety of the occupants of these buildings and the protection of property itself, all propane tanks are required to be stored outside the building in compliance with the Fire Code. Storage cages must be located away from any means of egress or principal routes that provide access to exits and should be designed to prevent tampering of valves and be kept locked at all times.

It is our hope that this information will make your communities a safer place to live and enjoy.

ABC's Of Outdoor Rink Maintenance

Alcohol is forbidden at all ice rinks

Benches should be provided for resting, otherwise skaters will group together on the ice

Cracks, frost boils, chopped up surface must be repaired immediately

Document all inspections, repairs and maintenance

Even surface preparation in the fall makes for a better skating surface in the winter

Flood the rink as often as needed when weather permits applying light sprays of water

Garbage containers should be provided or else the ice rink will become the container

Hockey should not be allowed during public or open skating

Ice shavings may contain bodily fluids; dispose of accordingly

Justify your rules to the public in terms of safety and legislation

Know what the different colours of natural ice mean (blue, white, grey)

Lights must be in working condition and should point towards the ice surface

Maintain adequate water supply and equipment at all rinks

No food or drink on the ice

Only maintained ice is safe ice

Parking should be provided for users

Quick response to any reports of unsafe conditions can prevent injury

Rules should be posted on signs, websites and in newspapers

Signage should advise when the ice is OPEN and when the ice is CLOSED

Trucks are not the preferred method of clearing snow

Users of the rink should be encouraged to report problems with the ice

Volunteers are crucial for any outdoor ice rink program

Wearing of helmets by all skaters is recommended

Xplain your policies, procedures and incident reporting protocol to volunteers

You should train your volunteers as if they were your own employees

Zamboni or any ice resurfer should be transported on a flat bed to an outdoor rink

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