Falls, Floods, and False Information: Defending CGL Claims

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Introduction and Overview

- What kind of claims arise under CGL Policies?
  - Personal injury claims (falls, etc.)
  - Property damage (floods, fire, etc. caused by negligence or nuisance)
  - Defamation (false information)
  - Etc.

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Falls: Occupier's Liability

- Someone gets hurt on the insured's property or property that the insured exercises control over. Is the insured responsible for their injuries?
- Statutory duty of care imposed by Ontario's *Occupier's Liability Act*
  - s. 3(1) An occupier of premises owes a duty to take such care as in all the circumstances of the case is reasonable to see that persons entering on the premises, and the property brought on the premises by those persons are reasonably safe while on the premises.

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Who is an "occupier"?

- s. 1 – "occupier" includes:
  - (a) a person who is in physical possession of premises, or
  - (b) a person who has responsibility for and control over the condition of premises or the activities there carried on, or control over persons allowed to enter the premises,

  despite the fact that there is more than one occupier of the same premises

- Examples: property owners, tenants, maintenance contractors

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Available Defences to Occupier's Claims: Meet the Standard of Care

- standard of care is *reasonableness, not perfection*
- need to have a reasonable, functional system in place to ensure people will be "reasonably safe" at the premises
- Reasonable system of inspection and maintenance was in place and was being followed
- This is a case by case analysis
- Courts look for the following
  - *Owners* – take steps to satisfy themselves that they can rely on the contractor; keep salt/sand on premises for interim use
  - *Independent contractors* – perform services in accordance w/ contract; keep maintenance logs/records; track weather and respond to changes

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Another Defence: Delegate duty to Independent Contractor

- Does the owner/tenant have a contract with a maintenance company?
  - OLA, s. 6(1) – Where damage to any person or his or her property is caused by the negligence of an independent contractor employed by the occupier, the occupier is not on that account liable if in all the circumstances the occupier had acted reasonably in entrusting the work to the independent contractor, if the occupier had taken such steps, if any, as the occupier reasonably ought in order to be satisfied that the contractor was competent and that the work had been properly done, and if it was reasonable that the work performed by the independent contractor should have been undertaken.

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How can an owner rely on s. 6(1)?

- Ask:
  - (a) did the owner conduct any research/investigation (i.e. due diligence) before hiring the contractor?
  - (b) what did the owner do to satisfy itself that it could rely on contractor?
  - (c) What were the terms of the contract (i.e. was snow removal left to the contractor's discretion or was the landlord required to call before the contractor attended?)
  - (d) How often did they attend the premises and inspect the contractor's work? Other monitoring or supervision?
  - (e) Does the owner *still use* the contractor? Any complaints?

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What does the contract say?

“Hold Harmless” Agreements

- a.k.a. “risk allocation” or “risk transfer”
- Often arise in leases and maintenance agreements between landlord/tenant and maintenance contractors
- No magic words are required to create a binding hold harmless clause
- General purpose of these clauses: protection from costs of lawsuit

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- Standard clause in contract between owner and contractor:
  - "[The contractor] agrees to hold [the owner] and its employees free and harmless from any damage or claims of any nature whatsoever that may arise from or through [the contractor's] operations."

- To determine whether a clause applies, the court will consider
  - (1) the scope of the clause, looking at the agreement as a whole, including its wording and the factual context in which it was created; and
  - (2) the specific facts of the case before the court

- These clauses generally do not protect an owner from its *own independent negligence*. It is possible for the clause to apply to the owner's own negligence, BUT there must be clear express wording to that effect

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- Maintenance contracts often contain an obligation for the contactor to take out a CGL policy with certain policy limits and to add the owner as an “Additional Insured” on the contractor's insurance policy
  - Generally, these clauses will not extend coverage to the owner’s own negligence

- Practical Tip: If one party admits jurisdiction for the area of the fall (not liability), the Plaintiff will generally agree to discontinue the action against the other party
  - The simplest option - saves costs and ends the law suit against the insured, if the facts and allegations are clear

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Example: Hold harmless

- Facts:
  - Canadian Museum of Nature rented a portion of its facility to Royal LePage for a dinner and dance event
  - Plaintiff attended the event and fell down marble stairs at the Museum's main entrance as she was leaving the event
  - Plaintiff sues the Museum only
  - Hold harmless clause in the rental agreement stated: "The Renter shall indemnify and save harmless the Museum from…all claims, damages, suits and actions whatsoever…which arise out of or in connection with the entry onto and use of the Museum's facilities."
  - *Two Questions*:
    - **(1)** Does the clause protect the Museum for its own liability?
    - **(2)** On these facts, is Royal LePage's required to indemnify the Museum?

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Potvin v Canadian Museum of Nature, 2003 CarswellOnt 1932 (SCJ)

- *Held*:
  - **(1)** "**No**".
    - No clear language in the clause encompassing the Museum's own negligence
  - **(2)** "**No**".
    - For the indemnity to apply, Royal LePage's activities must have been the *proximate* or *immediate* cause of the plaintiff's injury
    - the plaintiff's injury was not connected in a causal sense to the activity of the event – exiting the Royal LePage event was merely a "temporal connection"

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- Now let's adjust the facts slightly…
- Same case, except the plaintiff slipped on some wine from the Royal LePage party that had spilled on the steps
- Is the clause triggered to require Royal LePage to hold the Museum harmless against the plaintiff's claim?
- What if there the hold harmless provision included the Museum's own independent negligence?

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Contributory Negligence

- Not really a “defence” – just reduces insured’s liability
- Look for things like:
  - poor footwear
  - rushing
  - carrying bulky/heavy packages
  - using cellphone and/or other handheld device
  - looking at the ground
  - exercising poor judgment
  - impaired by drugs, alcohol, etc

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Example: *OLA* and MVA

- Facts:
  - Plaintiff pulls her vehicle into the parking lot of a hotel
  - She exits the vehicle and slips on some ice
  - She receives accident benefits and then sues the hotel as an occupier
- *Question:*
  - Is the hotel able to deduct the accident benefits paid to the plaintiff when calculating damages in the slip and fall action?

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Burhoe v Mohammed, 2008 CarswellOnt 9052 (SCJ)

- *Held:*
  - **"Yes"**
    - Look to the *Insurance Act*
    - ss. 267.8(1), (4) and (6) of the *Insurance Act* allow the hotel to deduct collateral benefits that the plaintiff received if the plaintiff's injuries arose directly or indirectly from the use and operation of a motor vehicle
    - the section does not differentiate between protected and unprotected defendants
    - the key is that the injuries arose directly or indirectly from the use and operation of a motor vehicle

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Other things to keep in mind

- *Limitation Periods*
  - generally, 2 years (*Limitations Act*, s. 4)
  - starts on the day which the plaintiff knew *or ought to have known* that
    - (a) injury/damage occurred;
    - (b) injury/damage caused by an act/omission;
    - (c) act/omission attributable to defendant;
    - (d) a lawsuit would be an appropriate means to seek remedy

    (*Limitations Act*, s. 5(1))
  - *Important point*: limitation period does not start if the claimant is incapable of commencing a lawsuit because of his or her physical, mental or psychological condition (*Limitations Act*, s. 7(1)(a))

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Other things to keep in mind (cont'd)

- Claim against Municipalities, the Crown (Ont.)
  - **Municipalities**
    - for claims alleging that roadways or sidewalks are in disrepair, plaintiff must give written notice to the clerk of the municipality within 10 days after the injury (*Municipal Act, 2001*, s. 44(10))
    - also consider Minimum Maintenance Standards
    - gross negligence standard
  - **Crown (Ont.)**
    - must give notice to Crown with sufficient particulars
      - 60 days prior to commencing an action
      - for occupier's claim within 10 days of incident

      (*Proceedings Against The Crown Act*, s. 7)

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- WSIB
  - bars some workers' claims if brought respecting injury incurred while worker acting in course of his/her employment
  - see "Schedule 1" and "Schedule 2" of Workplace Safety and Insurance Act for employers
    - e.g. various manufacturing employers, security guards, operation of apartment building

- Settlements with children
  - require court approval (*Rules of Civil Procedure*, Rule 7.08)
  - signed release is not sufficient

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Floods: Property Damage Claims

- Often subrogated claims
- Negligence
- Nuisance
- *Basic definition:*
  - "…unreasonable interference with the enjoyment and use of, the plaintiff's property, as an indirect result of the defendant's use of property"

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- *Nuisance Test:*
  - (1) the interference with the plaintiff's use or enjoyment of land must be substantial or "non-trivial"
  - (2) the interference is unreasonable, having regard to:
    - gravity of the harm;
    - frequency + duration of interference;
    - utility of defendant's conduct; and
    - defendant's actions in addressing the interference

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Possible Defences

- Statutory defence for Municipalities
  - Section 449 of the *Municipal Act* bars any proceedings based on nuisance in connection with the escape of water or sewage works or water works against a municipality
  - 449. (1) No proceeding based on nuisance, in connection with the escape of water or sewage from sewage works or water works, shall be commenced against,
    - (a) a municipality or local board;
    - (b) a member of a municipal council or of a local board; or
    - (c) an officer, employee or agent of a municipality or local board.
  - However, it does not bar a claim based in negligence

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Possible Defences cont'd

- Contractual defences
  - Waiver of subrogation – look to lease agreements
  - Covenants to insure may limit insurer form bringing subrogated action against negligent party – generally arises in landlord-tenant situations
    - Landlord covenants to obtain insurance for property
    - Tenant pays proportionate share of insurance
    - See trilogy decisions by the Supreme Court from 1970s:
      - *Cummer-Yonge Investments Ltd. v. Agnew-Surpass Shoe Stores Ltd.*, [1976] 2 S.C.R. 221 (S.C.C.); *Pyrotech Products Ltd. v. Ross Southward Tire Ltd.*, [1976] 2 S.C.R. 35 (S.C.C.); *and Smith v. T. Eaton Co. (1977)*, [1978] 2 S.C.R. 749 (S.C.C.).

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False Information: Defamation

- Purpose = to protect an individual's or corporation's reputation
- Classic definition*:*
  - "A publication, without justification or lawful excuse, which is calculated to injure the reputation of another, by exposing him to hatred, contempt, or ridicule."

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- So basically…
  - Saying or writing something untrue and bad about someone else in public
  - “bad” = almost anything that can lower the opinion that reasonable people may have of someone
  - Examples: liar, cheater, thief, lazy, immoral, perverted, biased, etc.

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Defences

- *(1) Justification*
  - "You can't handle the truth"
  - ***complete*** defence
  - onus is on defendant to show that statement is true

- *(2) Consent*
  - defendant must show that she had plaintiff's consent to publish the bad things

- *(3) Qualified Privilege*
  - where someone is under a duty to comment
  - includes legal, moral and societal duties
  - examples: references checks, assessing employees, physicians' notes
  - *except* if plaintiff can prove malice

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Defences cont'd

- *(4) Absolute Privilege*
  - Parliamentary proceedings
  - Court proceedings (i.e. statement of claim)
  - motive is irrelevant

- *(5) Fair Comment*
  - (i) must relate to "public" interest
  - (ii) must be expression of opinion (vs. fact)
  - (iii) facts on which opinion are based must be true
  - (iv) opinion must be honestly and reasonably held, and the comment must reasonably relate to the facts
  - (v) absence of malice

- *(6) Responsible Communication on Matters of Public Interest*
  - (i) must be on a matter of public interest
  - (ii) the defendant must show that the publication was responsible, in that he or she was diligent in trying to verify the allegations, having regard to all the relevant circumstances

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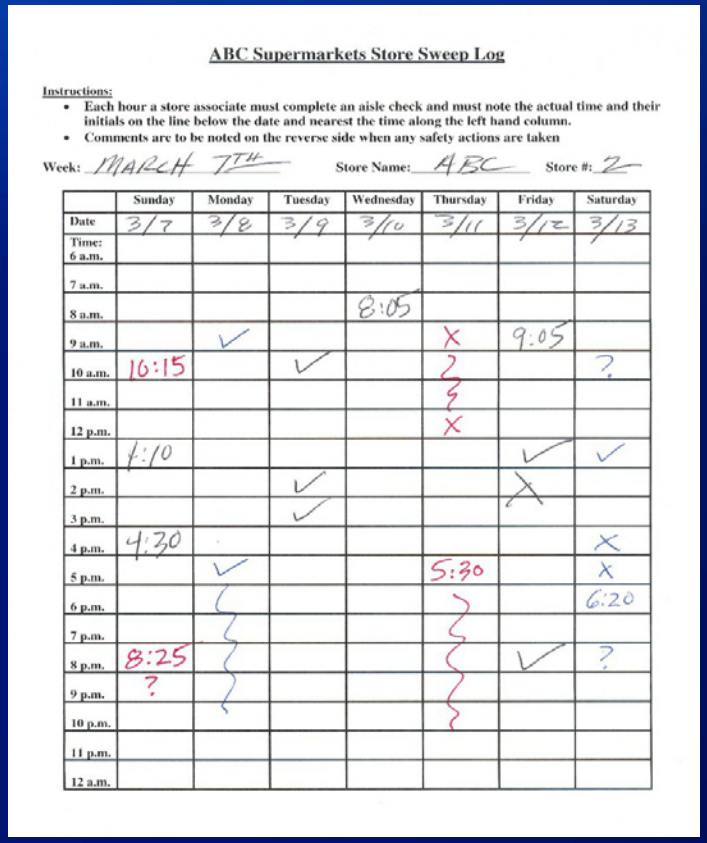
Best Practices for Investigating a New Claim

- do investigation as soon as possible
- contracts
- secure evidence
- photos/CCTV footage
- statements
- witnesses
- evidence on systems in place to maintain safety of premises (e.g. policy manuals)
- Why? strong defence, streamline litigation, reduce legal fees, etc.



ABC Supermarkets Store Sweep Log

Instructions:

- Each hour a store associate must complete an aisle check and must note the actual time and their initials on the line below the date and nearest the time along the left hand column.
- Comments are to be noted on the reverse side when any safety actions are taken

Week: MARCH 7TH Store Name: ABC Store #: 2

	Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
Date	3/7	3/8	3/9	3/10	3/11	3/12	3/13
Time: 6 a.m.							
7 a.m.							
8 a.m.				8:05			
9 a.m.		✓			X	9:05	
10 a.m.	16:15		✓		≀		?
11 a.m.					≀		
12 p.m.					X		
1 p.m.	1:10					✓	✓
2 p.m.			✓			X	
3 p.m.			✓				
4 p.m.	4:30						X
5 p.m.		✓			5:30		X
6 p.m.		≀			≀		6:20
7 p.m.		≀			≀		
8 p.m.	8:25	≀			≀	✓	?
9 p.m.	?	≀			≀		
10 p.m.							
11 p.m.							
12 a.m.							

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Strategies for Closing Files

- Early mediation
  - Are discoveries necessary? Do we have enough information to settle? Are the plaintiff's expectations reasonable? Is the plaintiff motivated to settle?
- Summary Judgment (Rule 20)
  - If the Court is satisfied that there is no "genuine issue requiring a trial" with respect to a claim
    - There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment when the process: (1) allows the judge to make the necessary findings of fact; (2) allows the judge to apply the law to the facts; and (3) is a proportionate, more expeditious and less expensive means to achieve a just result
  - *Remember*: the facts must be clear

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Strategies for Closing Files (cont'd)

- Motion to Strike a Claim (Rule 21)
  - *Test*: "plain and obvious that the plaintiff cannot win"
  - *Principles*:
    - (i) facts in Statement of Claim ***assumed to be true***
    - (ii) claim read generously, putting aside errors of drafting and mislabeling
    - (iii) difficult or novel issues of law not enough – "the law is supposed to change and develop"
- Smoking gun evidence
- Surveillance
  - One of the few "arrows in the quiver" of the defence

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Tips on Working With Counsel

- Set expectations at the beginning regarding reporting and communication
- Any special instructions?
- Provide counsel with contact person for insured
- Help identify if claim is appropriate for special settlement initiatives
- Consider a meeting or conference call to discuss strategy

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Thank you.

Any questions?

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