

## CIVIL LIABILITY DAMAGES AND INSURANCE PROTECTION

It could come as a big surprise to many charitable organizations and board members that their liability protection may not cover all civil damages in a lawsuit. The fact is that the general liability insurance policies issued by the vast majority of insurance companies in Canada restrict coverage to "compensatory damages" only. Most policy wordings specifically exclude coverage for any other form of civil damages being sought by a third party in a lawsuit, including:

- punitive damages
- exemplary damages
- multiplied damages

To understand why this exclusion might be potentially catastrophic to your church or organization, it is important to understand the differences in damages that can be awarded and the precedents being set in Canadian courts in the past decade. Compensatory damages can be divided into two broad categories of awards made to injured parties; pecuniary and non-pecuniary. Pecuniary damages are essentially a form of financial compensation or relief to the victim of a bodily or personal injury that can be quantified in monetary terms, such as:

- loss of future income
- rehabilitation costs
- long-term medical care.

Non-pecuniary damages are those that cannot be easily quantified in dollars and cents, such as:

- mental anguish
- mental injury
- pain and suffering

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- loss of enjoyment
- loss of companionship
- loss of sexual function;

and other conditions that are often suffered by individuals in a bodily injury, personal injury or abuse claim. Unlike civil liability claims in the United States, where awards for punitive and exemplary are commonplace, compensatory damages have historically represented the lion's share of civil damages awarded in Canadian courts. However, the judicial landscape is changing and punitive damage awards are being considered much more frequently by civil courts in Canada.

As a result of lower court rulings appealed 1978 and known collectively as the "Trilogy", the Supreme Court of Canada set a precedent for future court rulings by placing a cap on awards for non-pecuniary compensatory damages at a maximum of \$100,000 for any one victim. The cap is indexed and currently stands at just under \$400,000 in 2012. This cap is in large part the reason why Canadian court awards are not nearly as generous, inflated or outrageous as those made in U.S. jurisdictions. However, the cap has also created a

great deal of incentive for injury victims in Canada to seek additional damages above and beyond the usual non-pecuniary compensatory awards. There has also been pressure for Canadian courts to consider the award of punitive damages, particularly in cases of egregious negligence and severe injury. The burden of proof for these types of damages is higher, however, there is no cap on the amount that can be awarded.

With respect specifically to abuse claims, which cannot easily be quantified in terms of monetary loss and where victims are generally limited to the non-pecuniary cap (even in the most serious cases of abuse or molestation), there is even more incentive for courts to consider the award of punitive damages. In order to get around the cap, lawyers representing abuse victims have been increasingly seeking legal remedy through the award of punitive damages against perpetrators and against defendant organizations, who are being held vicariously liable for the actions of those perpetrators as their employees or volunteers, including schools, day cares, youth associations and churches.

The plaintiffs in two of the most

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## Civil Liability Damages and Insurance Protection...continued

recent liability suits launched against church client organizations of Robertson Hall Insurance have sought substantial punitive damages against the organization and its board members. In one case the non-pecuniary compensatory damages being sought by the victim were just over \$300,000, while the punitive damages were in excess of \$1,800,000!

With respect to civil damages in a physical, sexual or emotional abuse claim, it is important to remember that insurance coverage for abuse liability claims is not widely available in the insurance marketplace. However when available, it is always preferable for a church or charity to secure coverage on an "occurrence-form" policy, rather than on a "claims-made" policy. The reason is that claims-made policies have no obligation to cover past claims once the policy is cancelled or non-renewed, whether the organization ever changes insurance

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companies in future or the insurer ever chooses to non-renew the policy. By contrast, "occurrence-form" coverage guarantees that the insurance company and the policy contract covering an organization during the time frame in which an abuse incident takes place must provide coverage for ensuing defense costs, awards or settlements in an insurable claim, regardless of when the claim and lawsuit is made in the future. This is particularly important in abuse litigation, where the standard two-year

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statute of limitations for injury claims can be waived and courts usually allow childhood victims of abuse to initiate lawsuits decades afterward.

Even insurers who do offer abuse liability coverage on an occurrence-form basis often impose a restriction on the stacking of multiple policy limits, by deeming continuing or repeated abuse caused by one perpetrator, or suffered by one victim, to be one single occurrence commencing from the first incident. The reason for this is so that continuing abuse occurring over many years and policy periods will trigger only one single policy limit, not multiple policy limits from many renewal periods. This type of restriction can be detrimental to organizations defending abuse claims that took place over many years.

The potential for uninsured damages is also a concern in wrongful dismissal and employment practices lawsuits, as

evidenced by the recent award of \$573,000 by a BC court to an employee terminated without notice after 34 years of service.

Changing legal standards, new precedents, inflation and restrictive insurance policy conditions can pose a real challenge for organizations and leaders trying to adequately protect their organization, directors, employees and volunteers against liability suits arising from future claims. The insurance policy contract and coverage limit that the board members of a church or charitable organization purchases today may be their only source of protection for a bodily injury, personal injury and abuse incident that occurs now or in the near future, but which may not come to light in the form of a civil liability suit for many years or decades into the future.

The fact that most Canadian insurance companies provide only compensatory damage coverage in their liability policy wordings, combined with the growing trend in civil courts awarding other forms of civil damages, now and in the future, means that many organizations and the board members serving them who thought they had coverage for injury claims may in fact only have very limited protection for the potential awards or settlements they face in the future.

We are pleased to say that **Church Protection Plus** clients have full liability protection for all insurable civil damage claims and defense costs, **including compensatory, punitive, exemplary, multiplied and other damages.** We can also confirm that our coverage contains no restriction on the stacking of multiple policy limits.

This unique protection has been available to our Church and Charity client organizations since 1995 and is one of the many reasons why the Canadian Council of Christian Charities (CCCC), 25 national denominational organizations and over 6,000 individual church and charitable organizations entrust their protection to Robertson Hall Insurance.

**"The difference is in the details" and we invite you and your board members to contact our office if you have any questions about this or other important coverage features.**