DOLDEN WALLACE FOLICK LLP

LEGAL ASPECTS OF OCCUPIERS LIABILITY – AN ADJUSTER'S GUIDE

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I. INTRODUCTION

Insurance adjusters must be trained in the method in which an investigation is conducted upon arrival at the site of a loss which may give rise to insurer's responsibility under a CGL or other liability policy. The adjuster will need to compile as complete a file as possible to enable the insurer to properly assess the likelihood that its insured will be found liable, the extent of the claimant's damages, and whether there are any grounds on which coverage under the policy may be denied.

When the site of the loss is at premises "occupied" by one or more persons, it is important for the adjuster to keep in mind throughout the investigation a number of important issues affecting the insured's potential liability under the *Occupiers Liability Act* of British Columbia (the "Act"). The Act has a number of unique aspects in codifying the ordinary duty of care in negligence applicable to persons considered to be "occupiers" of "premises". Through an adequate understanding of the Act, the adjuster can ensure that on-site inspections, witness interviews, statements and reports properly consider facts which may ultimately have a dramatic impact on the level of responsibility of the insurer.

This paper addresses a number of key issues which the adjuster must keep in mind when heading to the accident site, and seeks to outline how the adjuster can best deal with those issues in compiling a complete, quality file.

II. THE OCCUPIER

A. Was your insured an "occupier" at the time of the loss?

Your insured will have no liability under the Act unless he or she qualifies as an "occupier". It is important to distinguish the status of an "occupier" from that of an "owner". *An occupier may or may not be an owner* of the premises which he or she occupies and, by the same token, *an owner of premises is not necessarily its occupier*.

An "occupier", as defined in the Act, is a person who *either*:

(a) is in physical possession of the premises where the loss occurs; or,

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(b) has responsibility and control over all, of the following:

(i) the condition of those premises; and

(ii) the activities conducted on those premises; and

(iii) the persons allowed to enter those premises.

It is important to remember that the insured, to have occupiers liability, must have been an "occupier" at the time the incident occurred which gave rise to the loss.

Upon arrival at the site, it will therefore be necessary to establish at the outset the relationship between your insured and the premises where the loss has occurred. Often it will be clear that your insured was in "physical possession" at the time of the loss. For instance, if your insured was present at his or her business or home at the time of the loss, he or she is clearly an "occupier" and therefore subject to the duty imposed by the Act.

What if, though, your insureds were homeowners but the loss occurred at a party of their adult son while they were on an extended vacation? If the son is not an unnamed insured under their homeowners' policy, the insurer may be able to avoid liability for the loss even if the premises were inherently unsafe. This is because the courts have held that a person can only have occupiers liability if it is provided for under the Act. If the parents were not "occupiers" at the time of the loss, there may be no liability.

It will not be enough, though, simply to know that the parents were on vacation and that it was the adult son's party. Because of the second arm of the test for "occupiers", the adjuster must go further. Although not in "physical possession", the parents may nevertheless have maintained responsibility and control over (a) the premises; (b) the activities conducted there; and (c) the persons allowed to enter. Because they must have had control over all three factors, the adjuster will have to ascertain such facts as:

(i) did the parents know and approve of the party before they left on vacation?

(ii) did they allow the son generally to have parties at their home, and if so, had they allowed it on other occasions when they were away?

(iii) were there any special activities at the party which may have affected the parents' decision had they known of them?

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(iv) had there been friction in the past over who was allowed to come over to the parents' home, or over the son's friends generally'?

So if, for example, the parents were indifferent over who entered the premises or over what kind of parties their son held, and in fact allowed him to hold parties at his pleasure, the parents were probably not "occupiers" at the time of the loss. As a result, even if the loss resulted from a poorly lit step, which the parents had neglected to repair although two other guests had previously tripped at the same spot, only the son will have occupiers liability and, unless he is an unnamed insured under the parents' homeowners policy, the insurer may have no responsibility to indemnify the claimant.

The adjuster who addresses thoroughly, through his or her on-site investigations and witness interviews, whether or not the insured was an "occupier" at the time of the loss, will permit the insurer to properly assess its insured's liability and hence the insurer's ultimate exposure.

B. Multiple occupiers - sharing liability

There may be more than one occupier or group of occupiers at the time of a loss. In the previous example, if the parents were away but had maintained sufficient control to be considered "occupiers", then both the son (under the first arm of the definition) and the parents (under the second arm) will have owed the duty of care prescribed by the Act.

Similarly, the owner of an apartment building who allows tenants to use a meeting room for predefined activities may be a concurrent "occupier" of that room with those tenants during the time period in which the activities are carried out.

Since the Negligence Act applies to occupiers liability cases, the insurer of one occupier can, in assessing its potential liability, consider the availability of receiving contribution from the other occupier (or its insurer) for a proportion of the damages caused by the loss. So, again, even if the loss resulted from unsafe premises caused by the owner, the tenants (or the son) may be responsible for a portion of the loss, and vice-versa. This is another reason why it is so important for the adjuster to properly assess all factors qualifying various persons as "occupiers" at the time the initial investigation is performed.

C. Independent contractors - when is the "occupier" liable?

Does the owner of a building have occupiers liability for the negligence of a crew engaged to work on the building? The answer is no, so long as:

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(a) the owner exercised reasonable care in the selection and supervision of the contractor; and

(b) the undertaking of the work was reasonable in the circumstances.

If the loss being investigated involved an independent contractor, the capable adjuster will therefore seek to gather as much information as possible in an effort to establish whether the owner can be held partly responsible for the loss. The information will be important whether your insured is the building owner (in which case you seek to establish that the owner acted reasonably) or the contractor (in which case you should seek to show that the owner acted unreasonably in one of the above respects).

Consider, for example, that your insured, a welder, is hired by the charterer of a ship to repair a faulty pipe in the engine room. (A ship, as we shall see below, is considered "premises" and hence the charterer is subject to the Act.) The boat's lead engineer wanders onto shore while the repairs are being done. The welder then improperly lights his torch, a fire erupts and others on board are injured.

Unless it can be shown that the charterer ought to have cleared the ship before allowing the work to be undertaken, it is unlikely that the injured parties could succeed in a claim of negligence against either the charterer or the engineer, and hence your insured appears to be 100% liable. However, if your investigation reveals that the engineer ought, under the circumstances, to have supervised the welder rather than heading for shore, occupiers liability may be attributed to the charterer and your insurer's exposure may be reduced accordingly. Had the engineer been present he might have caught the welder's error before the fire erupted.

The informed adjuster will, in taking statements from the ship's crew, ascertain such things as:

(a) the qualifications of the engineer and of any others on board with mechanical experience (showing the *opportunity* for supervision);

(b) the whereabouts of such people at the time of the loss;

(c) the system ordinarily undertaken by the charterer when work was performed on the boat;

(d) the qualifications and experience of the welder (since the charterer may also be liable for a failure to exercise care in his *selection* and

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(e) the need for having the repair performed at that time rather than at the next scheduled service date (since the charterer may be liable if he or she engaged the welder to do work that was not reasonable to be undertaken at the time).

The adjuster should keep in mind that the occupier may be liable for improper selection or supervision of *any independent contractor.* This will most often involve work crews at construction or demolition sites but may also involve negligence on the part of a consultant, a temporary secretary or even an outside adjuster engaged by the occupier at its place of business! In all cases the adjuster ought to consider the reasonableness of the selection and supervision process and of the work performed by that contractor.

III. THE PREMISES

A. The types of premises which are subject to the duty

A duty of care is imposed under the Act only on the occupier of "premises". The term "premises" is quite broad and includes, generally:

(a) land and buildings, including portable buildings and trailers;

(b) ships and vessels; and

(c) vehicles (including railway cars and aircraft) while *not* in operation.

Vehicles in operation are not subject to the Act.

B. Location of incident relative to insured's premises

More difficult than identifying the type of premises is the adjuster's task of ascertaining where in relation to the premises the incident giving rise to the loss occurred. You may avoid liability altogether if an argument can be made that the incident occurred "off premises". The adjuster's investigation is obviously all-important in gathering the facts necessary to advance such an argument.

It is not unknown for a loss to occur on a sidewalk. Consider the construction site at which the contractor's negligence results in personal injury. The claimant discovers that the contractor ought, under the circumstances, to have been supervised by the owner,

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your insured, and accordingly seeks to impose occupiers liability upon the owner. The adjuster who discovers that, in fact, the loss occurred on the sidewalk, on the road or on neighbouring property, will likely have ascertained the sole fact which will obviate his or her insurer's liability.

The same result can ensue in residential circumstances. Consider again the situation of the man who has a party at his parents' home. This time the parents are asleep and thus clearly "occupiers" since they are in "physical possession". The home is located on an acreage bordering on a park, and the innocent claimant is injured in the course of a brawl arising out of a football game started by the drunken son and his drunken friends. The claimant had been an observer of the game.

In this case again the work of the adjuster on the day following the incident may be determinative of the liability of the parents and hence their insurer (assuming again that the son is not an unnamed insured). If the adjuster can determine that the brawl occurred on park premises, liability will likely not result. If there is doubt, however, because the adjuster failed, for instance, to take sufficient statements from witnesses or proper photographs of the site in relation to identifiable landmarks, the claim against the parents may succeed.

The Act is not, of course, the only reason why the capable adjuster should always seek to identify with precision the location of the loss and of all steps leading up to it. If potential occupiers liability claims are kept in mind, however, they should assist the adjuster in ensuring that his or her file is as complete as possible.

C. Leased premises

A landlord is clearly subject to an occupier's duty of care in respect of occurring in common areas of the building. A landlord will also be subject to the Act in respect of losses occurring on leased premises where he or she is responsible for the maintenance or repair of those premises, but only in respect of losses arising as a result of the landlord's failure to maintain or repair. The landlord is thus considered to be an "occupier" in connection with matters on the leased premises for which he or she is responsible.

Consider the following example. Your insured, the tenant, has rented a house. The tenant's friend is over for dinner and trips on the unlit basement staircase, the bulb having burnt out. Your insured is almost certainly liable as an "occupier"; the question is whether the landlord can be made responsible for contribution or indemnity.

The first question which the adjuster must ask under the Act is what, exactly, is the extent of the landlord's responsibility under the tenancy to maintain and repair. In a residential

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tenancy there are minimum requirements prescribed by the *Residential Tenancy Act*, such as the compliance with health, safety and housing laws and reasonable suitability for occupation, but there may have been more extensive obligations agreed to either orally, in writing or implicitly through the course of conduct. This should at once be established by securing a copy of the lease (if any) and by taking separate statements from the landlord and the tenant.

The next question is whether the loss was caused, in whole or in part, by the landlord's failure to comply with his or her responsibility. If, for example, your insured (the tenant) was an elderly lady and the landlord had, either expressly or through the course of conduct, assumed the responsibility of changing burnt-out light bulbs. The adjuster must seek to ascertain such things as:

(a) how frequently the landlord had agreed to come around or had made it his or her habit of coming around to maintain the house;

(b) how recently the landlord had done so prior to the date of loss;

(c) whether the landlord had changed this bulb during the last visit;

(d) whether the tenant had made a specific request that this bulb be changed, and if so, when; and

(e) when the bulb had in fact burnt out.

If, on the other hand, the tenant was required to, and generally did, change her own bulbs, the landlord will not be considered an "occupier" in respect of the loss and your insured will be 100% liable.

Consider, alternatively, that the claimant fell in part due to dim lighting and in part due to the absence of a railing on the staircase, in contravention of the British Columbia Building Code and of local by-laws. In this case the landlord is liable as he or she has failed to maintain the premises in a safe condition in accordance with the standard imposed by statute, the requirement to maintain thereby constituting the landlord an "occupier" in respect of this loss. Moreover, the tenant is also liable in that she has failed to meet the standard imposed by the Act.

In summary, when investigating a loss which has occurred at leased premises, whether on behalf of the landlord's insurer or the tenant's insurer, the adjuster must always consider the possibility that the landlord may be concurrently liable with the tenant in respect of

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the loss. Diligent efforts must be made to establish the nature of the relationship between the landlord's responsibility to maintain or repair and the factor(s) which led to the loss.

IV. THE DUTY OF CARE

A. Looking for all the factors

Once qualified as an "occupier", a person owes a duty to take "reasonable care" that entrants onto the premises and property brought onto the premises will be "reasonably safe". In assessing the duty one must have regard to the following:

(a) the condition of the premises;

(b) the activities on the premises; and

(c) the conduct of third parties on the premises.

A failure to exercise care with respect to any one or more of these factors can result in liability under the Act. Thus an occupier can breach his or her duty, for example, by maintaining an inherently unsafe stairwell, or by hosting an inherently unsafe party, or by overcrowding the premises, and will be liable in any case if a loss results.

More often, though, the loss will have involved an interplay between a number of factors. For instance, the site of a construction project might be unsafe to external visitors but "reasonably safe" for the workers employed there who are aware of the hazards. Similarly, to arrange an archery contest at a party may be perfectly reasonable under normal circumstances but unreasonable when combined with the service of alcohol. It is therefore critical that the investigating adjuster take into account all of the above factors when approaching the site of the loss and potential witnesses.

The facts which ought to be specifically addressed by the adjuster will obviously vary tremendously with the circumstances of each loss, and the number of examples is thus endless. Nevertheless, while keeping in mind the three factors of condition, activities and conduct, there are a number of questions which the adjuster can ask him or herself in approaching the problem.

The first is whether there appears to have been any unusual danger which may have caused or contributed to the loss; if so, there may well be liability, and all facts in relation to that danger must be thoroughly gathered. The existence of a danger must be

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considered in relation to the character of the premises and the purposes for which they were being used at the time of the loss, and also in relation to the character of the particular persons at the premises and the purposes for which they came. So a dimly lit stage at the community hall may be normal, even expected, for most plays, yet may constitute a danger and hence a breach of duty if not modified before the annual Grandmas' Quintet production.

Moreover, in considering "unusual danger" the adjuster ought to ensure that he or she ascertains which persons might reasonably have been expected to enter the premises. In the last example, the occupier may not be liable if the Grandmas' Quintet was a last-minute stand-in for the Thirty-Something-Quartet. Similarly, the absence of a wheelchair access ramp may be "unreasonable" for the owner of a shopping centre, who must expect patrons using wheelchairs, yet not for a homeowner who, although suddenly approached one day by a person in a wheelchair (who has an accident), cannot reasonably have anticipated that such a person would enter.

The second question which the adjuster should ask is whether some system of inspection and/or maintenance might have prevented the loss from occurring. Obvious examples are ice in the parking lot and refuse on the shopping centre floor. The system may, however, be more complicated if it involves, say, technical procedures to be followed at a construction site.

If the adjuster has any suspicion that a system of inspection and/or maintenance may have been either in place or required under the circumstances , the adjuster should include full particulars in his or her file, including:

(a) statements from all maintenance and supervisory staff to ascertain what system (if any) was in place, and to what extent the system was followed on the day in question;

(b) a review (and photocopy, if possible) of maintenance records which indicate which employee(s) has been assigned to the task, when and where the maintenance was in fact performed, etc.;

(c) copies of any policy manual outlining the system of inspection and/or maintenance in effect; and

(d) statements from other people (such as nearby merchants or customers) who may have knowledge of the maintenance/inspection actually performed.

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Remember that the absence of a system should be as well documented as particulars of a system which was in effect.

Finally, the adjuster should ask him or herself whether there is any peculiar relationship between the claimant and the premises which might serve to lessen the standard of care owed under the circumstances. If, for instance, the claimant was called to perform an inspection of a property on behalf of the owner, the claimant will be presumed to have understood that there may be deficiencies, and thus required to exercise a degree of precaution over and above that required of the general public. Similarly, a painter who, while setting up, becomes injured due to the absence of staircase handrails, may not be successful in suing although an ordinary invitee would have been. Full details of the relationship between claimant and premises are thus essential.

The adjuster should, therefore, during the investigation process, keep in mind the occupier's duty of care prescribed under the Act. So long as the principal factors comprising that duty are kept in mind, the adjuster's file can be made as complete as possible.

V. THE CLAIMANT

A. Looking for "risks willingly assumed" by the claimant

Although the occupier may not have exercised due care in the circumstances, he or she will not be liable if it can be shown that the claimant "willing accepted" the risks involved "as his own risks". This presents the adjuster with a further opportunity to collect evidence which may absolve the occupier's insurer of liability.

It is critical that all facts be sought which may link the risks involved to the knowledge of the claimant, as a risk cannot be "willingly accepted" in the absence of a full understanding by the claimant of what it is he or she is being asked to accept. Warning signs and contractual exemption clauses will be of key importance in any attempt to exonerate the defendant.

Consider, for example, that you investigate an injury at a ski resort operated by your insured. The claimant had ventured into an area which had been temporarily closed off due to bad weather, and the loss had apparently resulted from adverse conditions in that area. Since your insured's liability will likely depend upon the claimant's knowledge of the risk, it will be critical to ascertain such facts as:

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(a) the existence and prominence of any signs advising skiers to stay out of the relevant area;

(b) whether there were any such signs and/or barricades at the apparent point (or alternative points) at which the claimant entered the area;

(c) the existence of any written provision purporting to exempt your insured from liability, whether contained in an entrance ticket, an equipment rental contract, a signposted advisory, etc.;

(d) the existence of any sign or brochure advising skiers generally to stay out of certain areas;

(e) the point at which the claimant apparently entered the closed off area;

(f) who was with the claimant at the time of entry and who was following whom;

(g) whether the claimant was in possession of a brochure containing an advisory and whether he or she had read that brochure either or that day or on previous occasions;

(h) whether the claimant had lined up for tickets in the presence of a general warning sign and/or had signed a contract containing an exemption clause; and

(i) the frequency of closures at the ski resort (especially at that location) and the claimant's previous skiing experience at the resort.

It is critical that the adjuster consider all factors which either did affect or ought reasonably to have affected the claimant's knowledge and/or acceptance of the risks involved.

Furthermore, it is very important that the adjuster take extensive photographs, and that he or she do whatever is necessary to ensure that the photographs are documented in their proper context, keeping in mind the "risks willingly accepted" test. For instance, if a photo is taken of a barricade and warning sign at an entrance point to the off-limits area, the adjuster should make extensive notes and collect evidence which will render that photo useful for these purposes. Steps in this regard will include:

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(a) other photos and personal notes showing with certainty the precise location of the photo and the time it was taken;

(b) statements from potential witnesses (*e.g.*, other skiers, maintenance crew, the claimant and/or his or her partners) to establish the presence of the barricade and sign at that location; and

(c) copies of any maintenance records indicating the time and location of the placement of the barricade and sign.

In summary, when approaching the site of the loss the adjuster ought not to place too much reliance upon the fact that the claimant has apparently engaged in an inherently dangerous activity. It should be anticipated that the claimant will ultimately raise a lack of appreciation of the risks involved in favour of his or her position. The adjuster must therefore seek out and properly record the nature of the risk which gave rise to the loss as well as all factors which may indicate an acceptance of that risk.

B. Has the claimant been contributorily negligent?

Since, as mentioned earlier, the *Negligence Act* applies to occupiers liability cases, the adjuster should seek out and properly record any evidence to suggest that the claimant's own negligence has contributed to the loss. The adjuster's tasks in this regard will be the same as those involved in any investigation which involves potential negligence.

C. The trespasser

The fact that the claimant may have been a trespasser on the occupier's premises does not normally absolve the occupier of liability under the Act. Nevertheless, it is always important for the adjuster to discover and record the purpose for which the claimant entered onto the premises, and whether he or she had been previously advised not to enter. Such a fact may have a bearing on the claimant's assumption of risks, his or her contributory negligence, and/or on the court's willingness to resolve the case in his or her favour if there is a doubt as to the outcome.

The one exception to the above rule is that a "trespasser" who enters premises used primarily for agricultural purposes cannot succeed in a claim against the occupier under the Act unless the occupier has harmed the claimant (or the claimant's property) intentionally or recklessly. To qualify as a "trespasser", the claimant must have:

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(a) been inside the occupier's "enclosed land" (land either surrounded by a "lawful fence" or having posted signs prohibiting trespass at each ordinary access); and

(b) been there without the consent of the occupier (which consent, absent evidence to the contrary, may be presumed).

The adjuster who investigates a loss upon land which may be considered agricultural should therefore address his or her mind specifically to the following questions in taking statements and photographs and in collecting information:

(a) what evidence exists that the land is used primarily for agricultural purposes?

(b) is the land properly classified as "enclosed land" having regard to the above tests?

(c) what was the claimant's point of entry upon the land?

(d) had the claimant been on the land before and, if so, does this history indicate an implied consent to enter?

(e) what was the claimant's purpose for entering?

(f) did the claimant enter upon an easement?

Once again, it will be critical, for a number of these reasons, that the adjuster pinpoint precisely where the loss incident occurred.

VI. THE LOSS

A. Loss must be "reasonably foreseeable" and caused by the breach

If the claimant has a valid claim under the Act, the damages which he or she may recover are restricted to those which were "reasonably foreseeable" by the occupier. Also excluded from recoverability are damages resulting from an intervening cause. These limitations are intended to impose upon the occupier a duty of care only in respect of condition, activities and conduct which he or she ought reasonably have been able to predict at the

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outset, and to limit the occupier's responsibility to those damages flowing from the breach of duty.

If the loss therefore appears to the adjuster to have been a "real longshot" which might not have been predicted in advance, or which involved a number of stages, full particulars ought to be secured at the investigatory stage as there may be an opportunity to absolve the occupier-insured of responsibility for the consequences.

VII. LOSSES INVOLVING OTHER STANDARDS

A. Concurrent duties

Every adjuster will, from time to time, encounter losses involving both a duty of care under the Act and other duties imposed by law. There may be coexisting duties arising from other laws, and the adjuster ought to be able to identify the issues and deal with the various duties involved.

Two common examples of concurrent duties of occupiers are those relating to the service of alcohol and those relating to the keeping of animals. Each of these will now be considered in turn.

B. Incidents involving liquor

Increased social awareness of the tragic costs inflicted on the community by alcohol-induced accidents has resulted in bar and hotel operators having to face an increased number of claims from both intoxicated patrons and those injured by intoxicated patrons.

The adjuster should be aware of certain specific issues which confront him or her upon encountering the site of a loss involving an alcohol-related incident. The issues require that the adjuster keep in mind both a number of considerations unique to the service of alcohol and the application of general occupiers liability issues to this type of case.

Establishments serving alcohol face, under the Act, a duty of care in respect of activities conducted on the premises. As we have seen, this duty of care relates both to the physical condition of the premises and to the activities of the customers and others while on the premises. The overriding principle is that the operator of such premises will be responsible for loss and injury which he or she knows or reasonably should know to be a likely result of the physical condition of, or customer activity on, the premises in question.

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The operator's liability for on-site alcohol-related injuries falls within the scope of this responsibility. If the establishment, for example, admits a known "troublemaker" into the bar, who is known to periodically break out in fight when intoxicated, and loss or injury results, the proprietor will be liable together with the troublemaker, as having failed to protect the injured party from the foreseeable loss.

The proprietor will also be liable for on-site injury caused by his or her own employees. Reported case law is replete with examples of bar operators held liable for the unruly conduct of bouncers, bartenders, security guards and other employees which causes injury to an intoxicated patron or others on the premises.

It is therefore the adjuster's primary duty to enquire not only into the facts giving rise to the loss, but also into the history of those patrons and employees who were involved in the incident and into the knowledge of the establishment's management and/or employees of this history.

In addition to liability for on-site injuries, the operator of an establishment serving alcohol may be liable for injury to a patron or an innocent party in circumstances where the operator has no immediate control over the intoxicated person's activity. The most common example is the involvement of the intoxicated person in a motor vehicle accident. Canadian courts have laid down the following principles governing the conduct of the establishment serving alcohol:

1. The operator faces liability where he has breached statutory provisions such as (a) section 45 of the British Columbia *Liquor Control and Licensing Act*, which prohibits the sale or provision of liquor to an *intoxicated person or a person apparently under the influence of liquor*; or (b) sections 34 and 35 of that Act, which prohibit:

    (i) the sale or service liquor to any person who *is or is apparently a minor*;

    (ii) the possession of liquor for the purpose of selling, giving or otherwise supplying it to a minor; or

    (iii) a person from *permitting the consumption of liquor ,* in or at a place under his or her control, by a person who is apparently a minor.

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The capable adjuster will consider the above issues in ascertaining, in as much detail as possible, such facts as:

(a) whether the person involved had shown signs of intoxication and, if so, to whom and at what stages;

(b) the amount of alcohol consumed;

(c) details of any tests administered by, and observations of, peace officers relating to the level of inebriation, and of any criminal charges laid in consequence thereof;

(d) the ages and apparent ages of any persons involved who were or may have been served alcohol;

(e) whether the establishment operator had contemplated the consumption of liquor by minors, and by whom and in what manner it was thus provided; and

(f) the degree of control maintained by the various persons involved in the event in question.

The answers to these questions will often have a dramatic impact on the potential liability of the adjuster's insured, either having the effect of absolving him or her of responsibility, establishing that responsibility, or sharing it with others.

2. The establishment may be liable to the intoxicated customer himself if, knowing of his state, it fails to warn or to prevent him from putting himself at risk. just when and under what circumstances the law will impose upon the establishment a positive duty to act is the subject of an increasing amount of litigation.

The adjuster must in this regard inquire into such matters as:

(a) the knowledge of the operator and employees of the establishment of the person's state of intoxication;

(b) their knowledge, if any, of his or her history in relation to alcohol consumption; and

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(c) their knowledge, if any, of his or her intended destination upon leaving the establishment and of any dangers inherent in proceeding to that destination.

In addition to these specific questions are those generally applicable to occupiers liability cases. The adjuster's investigations may relate to, among other things, the identification of possible "occupiers", the pinpointing of the location of the incident in relation to the premises in question, or the physical condition of the premises having regard to the activities conducted there. While questions such as these necessarily involve consideration of the facts surrounding the service of alcohol, they can be approached in the same manner as in all occupiers liability cases and thus do not warrant further discussion in this section.

C. Damage inflicted by animals

An adjuster who attends at "premises" to investigate a loss caused by an animal should be aware of the special issues involved, in addition to those detailed generally in this paper. Most cases will involve attacks by dogs.

The keeper of a domesticated animal is responsible for damage inflicted by it if it presented a "real risk" of harm at the time of the loss. Such an animal is, in effect, deemed to have been a wild animal. Whether it presented a "real risk" is dependent upon whether the animal's past activities indicate a propensity to do damage.

The adjuster's primary role is thus to ascertain not only how the loss occurred, but also the animal's past history. It is often critical to take the parties' statements before they are become apprised of the legal issues involved.

Consider, for instance, the adjuster who investigates the scene of a loss in which an occupier's dog has removed the eye of a visiting niece. However unjust it may seem, the occupier-insured will have no responsibility either under the Act or as a dog-keeper without some knowledge of "real risk". The adjustor who is attuned to the issue will, once advised by the insured of the incident, quickly take statements from all family members as to the dog's history. However, if the adjustor waits for the claimant's parents to contact a lawyer before asking the proper questions, it is possible that the insured, alerted to the issues and wanting compensation to be paid, will have manufactured a story. The truth will likely remain undiscovered and the insurer will pay out.

The adjuster should obtain as detailed an account as possible of the past incidents as they may or may not have been sufficient to place the animal in the "real risk" category. For

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instance, a propensity to attack other animals is not sufficient to constitute a real risk in the absence of indicators that the dog would have acted similarly toward humans.

Finally, the incident itself should be documented in great detail while the memories of all involved are fresh. Attention to detail in this regard may again absolve the keeper-insured of liability. Consider, for example, the visitor who is "welcomed" by a very large dog. The adjuster asks the right questions, and discovers that:

(a) the dog was known to be extremely boisterous and playful but not vicious;

(b) the dog was intensely excitable when meeting new people but at the time of the loss the insured attempted to restrain it;

(c) the bite was inflicted when the dog jumped up against the claimant to greet her and in the process sank its teeth into the claimant's eye without intending to do her harm.

Despite the known boisterous nature of the dog, the circumstances of the loss (and, in particular, the absence of ferocity) may be sufficient to absolve the insured of responsibility. Had the adjuster simply discovered that the dog had attacked the claimant and that it was known to be boisterous around newcomers, liability would likely have ensued.

D. Nuisance and *Rylands v.Fletcher*

Occupier's liability under the Act can coexist with duties not to cause a nuisance or allow noxious substances to escape onto others' premises.

These are both separate topics not dealt with in this paper. They are mentioned in this section only to alert the adjuster to the potential liability of occupiers which may extend, under appropriate circumstances, to matters not directly within the scope of the occupier's duty of care under the Act.

VIII. CONCLUSION

The purpose of this paper has been to alert the insurance adjuster to numerous issues to be kept in mind when embarking upon an investigation involving potential occupiers liability. The recognition of these issues, and of their implications, will enable the adjuster

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to assemble as comprehensive a file as possible in order to enable the insurer to properly assess the likelihood that its insured will be found liable, the extent of the claimant's damages, whether there are others with whom liability may be shared, and whether there are any grounds on which coverage under the policy may be denied.

It is hoped that the matters canvassed herein will assist the capable adjuster in conducting and preparing for those on-site inspections, witness interviews, statements and reports which may ultimately impact upon the level of responsibility of the insurer.

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