

# THE Reciprocal

## Regulations and Codes:

Below are a few examples, provided by the Electrical Safety Authority, where utilities are required to comply with the Ontario Electrical Safety Code and file for permits, as required by Rule 2-004:

**1. Activity:** Utility maintenance or installation of customer-owned secondary or primary lines and associated poles and hardware on customer property. This could also include the maintenance of customer-owned substation equipment.

**These installations must be inspected and appropriate permit fees paid and the utility must be in receipt of a connection authorization before energizing.**

**2. Activity:** Utility repair of service entrance equipment (i.e. meter base, main breaker, bonding) on consumer service applications.

**Any electrical repair work accomplished beyond the consumer service conductor connection point requires an inspection with appropriate permit fees paid.**

**3. Activity:** Utility installation of service entrance equipment for traffic signals or bus shelters.

**These installations must be inspected and the appropriate permit fees paid. The utility must be in receipt of a connection authorization before energizing.**

## A Quiet Night's Sleep... *Non-Owned Auto Demystified!*

It is a general practice in the Insurance Industry to keep automobile claims with the Automobile Policy. The Ontario Automobile Policy (OAP1) is written in such a manner as to respond first to any claim involving an insured automobile.

Physical Damage claims generally go back against the Owner's policy, while Bodily Injury and Property Damage Liability claims fall under the broad wording, "legal liability arising out of the use, operation or ownership of an automobile".

Although that is the preferred situation, there are cases where the Owner's Policy might not respond, and other circumstances may arise when it is not the **only** policy responding. The following are some common occurrences that indicate why every individual (and definitely every Corporation) needs "Non-owned Automobile Coverage".

### Example One

Ms. Jones works in the Administration Department. One day, an urgent need arises for supplies and Ms. Jones volunteers to pick them up in her own vehicle.

On the way to the store, Ms. Jones strikes another vehicle. Her auto policy will pay the damages to her vehicle and record an 'at-fault' accident against her. The other driver is also an Ontario-licensed and insured driver. He makes a claim against his own policy (physical damage goes back on

the Owner's policy) and finds coverage there. This is how the Ontario Auto Plan works.

Now let's assume that the other driver is an American tourist driving his own automobile. He is severely injured, and due to these injuries, he is hospitalized and loses wages. Although his policy may cover some of his damages, he is likely to bring a lawsuit against Ms. Jones. He also discovers that she was running an errand at the time of the collision, and names your Corporation as a co-defendant. Where do you turn for coverage?

- Your automobile policy will not respond, as it is an **Owner's** form. The corporation did not use, operate or own the vehicle. Your automobile carrier denies your claim.
- Your Commercial General Liability Policy doesn't respond either. There is an exclusion on all CGL policies with respect to legal liability related to an automobile. This is written into the policy to keep the auto claims with an auto policy.

*continued on page 4*

## In this Issue...

**Claims Corner:  
Wrongful Dismissal**

**Leasing Garage Facilities;  
Waiver of Subrogation;  
Social Function Liability**

### How to Use This Publication

*The Reciprocal* is for information purposes only, intended for the benefit of MEARIE members. Any information provided by *The Reciprocal* shall not represent confirmation of coverage for specific circumstances, incidents and claims. Individual cases of coverage interpretation are dealt with external to this publication and shall be solely determined by MEARIE policy wordings. Members wishing assistance on specific matters are invited to consult with MEARIE staff directly. (E. & O.E.)

### Claim Issue:

### **Discrimination/Wrongful Dismissal**

A utility's former employee issued a lawsuit against the utility for discrimination and wrongful dismissal. The employee accused the utility of offering a position to another person because they were younger. The employee further alleged that the stress of the matter affected their job performance, which ultimately led the utility to fire the employee. In this case, the utility submitted the claim to MEARIE.

**MEARIE Position:** The MEARIE Liability Policy specifically excludes any claim for discrimination or wrongful dismissal. This is not uncommon. Most liability policies tend to exclude these types of claims as employment matters (firings, promotions, etc.) as they are considered to be deliberate acts contemplated by companies and only after giving careful consideration to the employee and related issues/events in question. In view of the MEARIE policy exclusion, the utility in this case was informed to contact its legal representative for further assistance.

Having stated the above, coverage for discrimination and wrongful dismissal is afforded under the MEARIE Enhanced Directors' & Officers' Liability Endorsement, introduced for the 2001 policy year. In the case outlined above, had the utility elected coverage under the Enhanced Directors' & Officers' Liability Endorsement (and depending on the particular merits of the claim), the claim would likely be covered.

### Claim Issue:

### **Looking for Deep Pockets**

If there were ever a case that demonstrates the lengths that a Court might go to finding liability against an insured entity, it would have to be the recent case of Linda Hunt v. Sutton Group and P.J.'s Pub. This case also reinforces the onus placed upon employers when serving alcohol.

Linda Hunt was a part-time employee of the Sutton Group who was

working regular office hours as a receptionist. On December 14, 1994, the office held a party on its own premises for their staff and clients. While Linda was expected to answer the phone while the party went on, and clean up afterwards, she was also allowed to partake of the unsupervised open bar. Later that evening, while driving home in winter storm conditions, she lost control of her vehicle, veered into the opposing lane of traffic and was badly injured when she was hit by another vehicle.

She sued her employer on the basis that her accident happened because she was intoxicated, and that her employer and P.J.'s Pub were responsible for her state of intoxication. Her suit also alleged that her employer did not take appropriate steps to prevent her from driving.

The court agreed with her in part, and awarded her in excess of \$300,000 – representing 25 per cent of her assessed damages. Since the pub was uninsured at the time and is no longer in business, the Negligence Act applied and her employer was therefore responsible to pay the full amount.

In his ruling, the judge said, "...the likelihood of such an accident occurring in her state of intoxication was foreseeable..."

A few facts:

- The office party was from 1:00 p.m. to 6:30 p.m.
- At about 4:00 p.m. her employer noticed that she was acting a little drunk and told her to stop or he'd call her husband to pick her up.
- She quit drinking at that time and apparently acted in a responsible manner for the remainder of the party.
- Her employer offered to arrange for a taxi to drive her home when the party ended at 6:30 p.m. She refused the offer.
- A guest at the party who wasn't drinking offered her a ride home. Again, she refused.
- She went to a nearby pub and drank there until 8:00 p.m.
- The distance from the pub to the accident location was 12.5 kilometers.

- The time between leaving the pub and the accident was one hour and 45 minutes (no one can or will account as to her whereabouts during this time).
- Her accident happened more than three hours after she left her place of employment.

This case is currently under appeal; however, it does send a strong message as to what lengths the courts will go to in order to compensate those injured in accidents. It certainly highlights the employer's obligations when serving alcohol.

The Court of Appeal decision is anxiously awaited and we will provide an update on this issue once the decision is reached.

The Court of Appeal recently handed down a decision in another matter, this time against the Ministry of Transportation, that highlights the court's efforts to find liability in favour of injured plaintiffs.

In this case, a woman was seriously injured when – due to unusual weather conditions in October, 1988 – she lost control of her vehicle on black ice that had formed on a bridge. A winter road maintenance policy, including sanding and salting, normally started in November. The Court of Appeal found that the defendant should have anticipated that bridges could become ice-covered in October and was negligent in not having a policy in place that would have prevented the black ice from forming. The total award in that case exceeded \$6,000,000.

Based upon both of these cases, it is of the utmost importance to recognize the high onus placed upon businesses to act in a manner that will protect both their employees and the public at large. As illustrated, this is an extremely high hurdle to achieve, especially when liability may be assessed many years after the occurrence – based upon court precedents and attitudes at the time of judgement.

**MEARIE members are invited to submit claims issues or concerns they wish to see addressed in future Claims Corner features to Al Friesen, Director of Claims or Magdalena Nagy, Risk Management Analyst.**

## In the Know: MEARIE Answers Your Questions

This question-and-answer column is intended to provide subscribers with the answers to commonly asked questions regarding risk management or coverage issues. The responses provided in this article are for information purposes only, and are not intended to represent MEARIE's insurance coverage position. MEARIE assumes no responsibility for claims incurred by any member companies that arise out of their decisions to either apply or reject, in any form, the responses provided herein.

**Q** Our utility is leasing garage facilities to house some of our vehicles. Is this non-owned location covered by the MEARIE liability policy?

**A** The MEARIE liability policy extends to cover the electrical utility operations as defined by the policy, even if these operations are carried out at an "other-than-owned" location. This applies to the portion of unowned premises leased by the utility (in the case of multi-tenant buildings). This coverage extension is an important consideration should a member of the public, for example, take action against the utility for injuries incurred while that person was on the utility's leased premises.

In addition, the MEARIE policy also includes coverage for Tenant's Legal Liability. This coverage insures the utility for damages it causes (or is responsible for) to premises it leases. Owners of buildings should therefore not count on a Tenant's Legal Liability coverage as an only source of insurance – because a Tenant's coverage would only apply in the event that the Tenant was found negligent or responsible for damages to the owner's property.

Any utility occupying unowned property should ensure, for its own protection, that it does so under the terms of a properly executed lease agreement. As part of the negotiation process, the utility should review the terms of any leases it has entered into, to be made aware of the liability risks that the utility will encounter.

**Q** We have a third-party contract that includes a waiver of subrogation clause in it. Should we agree to this clause, and if we do, what are we agreeing to?

**A** Many agreements and contracts include a standard wording, found within an agreement/contract normally under the "Insurance" or "Indemnification" sections. The wording may be similar to the following statement:

*"The insurance referred to herein above shall contain a waiver of any rights of subrogation which the (utility's) insurer may have against the "Owner" (third party), whether or not the damage is caused by the act, omission or negligence of the "Owner".*

MEARIE can not agree to this statement as the MEARIE liability policy will provide coverage for claims for its utility members if they are found liable, and not for negligence of a third party to the contract. Having said that, if the utility signs a contract with this wording, it is accepting the liability for the negligent acts of third parties to the contract. MEARIE would have the legal right to try to subrogate or recover against any person or organization.

Therefore, it is in the best interest of MEARIE members to submit for review any agreements/contracts of this nature prior to final signature, or any agreements/contracts they feel would require approval from MEARIE.

**Q** Our utility hosts employee social functions several times a year; sometimes this involves the consumption of alcohol in off-utility premises. With an event coming up next month, we are concerned about the liquor liability implications. Are we covered, and what can we do to control our risk?

**A** The MEARIE Liability Policy does cover legal liabilities that may arise out of the use of alcohol at utility-sanctioned events, either on or

away from utility premises. The qualifier is that *they must be utility events for coverage to apply*, not those hosted or operated by outside groups, such as employee clubs, private gatherings or licensed establishments.

There is little difference in liability exposure to the utility between these scenarios: a wine and cheese party versus a beer tent at a company picnic. As long as liquor is being served, there is the chance that one intoxicated person might leave the party and drive home. Should that person be injured or injure someone else in an automobile accident, the utility, as "host", faces legal recrimination.

The courts have even held that the host is not relieved of responsibility simply because the guest did not exhibit any signs of intoxication. In the court's eyes, a reasonably prudent person (or in this case, utility) should foresee that an inebriated person would drive and take positive actions to control or restrain that person. In other words, the utility (to control the risk) absolutely cannot turn a "blind eye" to the behaviour of individuals when alcohol is being served.

There must be fundamental risk control practised at both ends to: (a) control consumption; and (b) detect and intercept when there has been over-consumption or even suspected intoxication.

The courts are taking a very stern attitude to host liquor liability. It is up to the utility to ensure that consumption does not go beyond reasonable limits, and to act with "tactful authority" to prevent anyone from inviting harm or inflicting harm on others. Reasonable measures, such as alternative transportation arrangements (i.e., utility transports persons to and from the party) or designated driver incentives should now be the norm at any party.

If there is any shred of doubt about your utility successfully controlling liquor liability risk, then the utility simply should not allow liquor to be served at these functions.

To see specific issues addressed in future Q&A columns, contact Magdalena Nagy, MEARIE's Risk Management Analyst at (416) 484-5355 or 1-800-668-9979; or [Mnagy@mea.on.ca](mailto:Mnagy@mea.on.ca).

## Non-Owned Auto Coverage

*continued from page 1*

What can you do to ensure coverage in this very common situation?

Non-owned Automobile Coverage can be obtained for both your Automobile policy **AND** your CGL. On your Automobile Policy, you can obtain an OPCF 27 or 27B endorsement that will extend the coverage that exists on your current policy to any non-owned automobile.

Your Legal Liability Limits will be the same as those on your Auto Policy; however, physical damage coverage is **usually** restricted to the difference in deductibles (*see example 2*).

On the Commercial General Liability policy, you can obtain a separate policy that attaches to the CGL. The SEF 6 is a separate rider, and is statistically recorded as an Automobile Coverage. Claims made against this rider are rare, as there is usually an OAPI in existence that will act as the primary coverage.

The SEF 6 is a Legal Liability cover only. It will cover physical damages, but only when it is clear that your Corporation was in some way liable for those damages. It is generally assumed that there is an Automobile Policy in existence to cover those damages. (A couple of exceptions are found in examples 2 and 3).

### Example 2

Your executive team is required to go to a seminar out of town. It is decided that they will fly to the site and rent an automobile.

While at the rental agency, they are asked if they would like to purchase the Limited Damage Waiver (LDW) provided with the rentals. The executives decide against the coverage and

sign that they are waiving this coverage. What they have done, in essence, is contractually assumed the liability for all damages.

While the rental is in their care, custody and control, it is damaged in the convention centre parking lot. When they return to the rental agency, the cost of these damages is billed to your Corporation.

You in turn notify your Insurance Company of this situation and if you have Non-owned Automobile Coverage, the following will happen:

Your Automobile carrier will look at the endorsements to your OAP 1 and determine that you have the appropriate endorsement (OPCF 27B). They will then reimburse your Corporation for the difference in the comprehensive deductibles. It is not unusual for rental agencies to carry high deductibles on their fleets. They are more concerned with the loss of several cars, i.e. a catastrophic loss. For this example, we will say the Rental Agency has a \$20,000 deductible, your policy has a \$500 deductible. The OPCF 27B section of your policy will react to reimburse you for the difference, or \$19,500.

Now, let's look at the situation where you don't have an Automobile Policy. Your SEF 6 (the Non-owned Automobile Rider attached to your CGL) will respond to liability assumed under contract if the SEF 96 is also present. Since a contract (rental agreement) was signed waiving the LDW, this section of the policy will cover your losses. There is usually a deductible involved with this coverage.

### Example Three

Your Corporation decides to 'out-source' some of your work. The contractors that you bring in are required

to use their own vehicles, but you have decided that you will agree through a contract to assume their Legal Liability when they are performing work for your Corporation.

One of the contractors is involved in a collision that causes extensive damage to private property. Due to the contract, you are deemed to be liable. Even if your Corporation is not named in the lawsuit, the contractor can go back on your SEF 6 policy for coverage. Your policy will act as if it is his policy, as you have assumed his liability through a contract.

### Example Four

Your Corporation decides to lease a vehicle. Technically, you do not own this vehicle; the leasing company (or municipality) still maintains the ownership of the automobile.

The OAP 1 will require an endorsement to allow you to obtain insurance for that leased vehicle. The policy can be endorsed to extend your Owner's Policy to cover **long-term leases** by adding the OPCF 5.

This endorsement is evidence that the Insurance Company is giving you permission to have certain non-owned automobiles covered on your policy, and that they will treat these vehicles as if your Corporation owns them.

The OPCF 5 does have a reporting requirement, as does the OPCF 21 (Blanket Fleet Endorsement). You are required to notify the Insurer when a vehicle is leased from a company that is not already listed on your policy, as the policy will only cover 'specified' lessors.

**Your MEARIE Automobile and Commercial General Liability Policies include the Non-owned Automobile coverage outlined in the above examples.**



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*The Reciprocal* is published by the Municipal Electric Association Reciprocal Insurance Exchange for its members – some 146 municipal electric utilities. MEARIE is a reciprocal insurance exchange for members of the Municipal Electric Association. The MEA is the utilities' voice to government and other industry stakeholders.

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