CURIE

Careful with that Computer

by Steve Hiller

What's inside

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Universities continue to face increased risks of liability arising from use and alleged misuse of computer systems including email and Internet services. Despite policies and notices applicable to all holders of Universities Computing ID's, many staff and students just do not understand the responsibilities which are tied to the privileges of system access.

Some of these people seem to rationalize that using Internet access or email attracts less personal accountability – maybe it is because nothing gets physically signed or it was just so simple to send (or download) without regard to consequences. As a result Universities face all sorts of potential problems with breach of confidentiality, workplace harassment, defamation and general loss of productivity. Human rights and workplace harassment complaints can create significant burdens for University Administration if standards are not well understood, maintained, documented and enforced. The problem, of course, is not unique to Universities, but the key to managing these problems is to ensure that up-to-date policies are:

- clearly and regularly conveyed and explained to users;
- enforced in a consistent and fair manner;
- maintained according to case law for employment and student discipline.

For obvious reasons, monitoring and enforcing compliance with University policies on computer use cannot and does not rest solely on the shoulders of your Universities computing services department. These issues seriously impact the work and learning environment for which everyone is responsible.

Responses to uphold the policies and the integrity of system usage need to be timely and appropriate to the seriousness of the non-compliant behavior. For some cases, if warnings have not been effective, it is time to step up the consequences. But for other cases, immediate and decisive sanctions are essential. We strongly recommend that all breaches of the computer use policy be treated seriously, promptly and in the best interests of your University community as a whole.■

Upcoming Workshops

7th Annual Ontario Universities Risk Management Workshop - November 22 & 23/05
- Faculty Club of the University of Toronto

FOR MORE INFORMATION CHECK WEBSITE: http://www.insurance-risk-mgmt.utoronto.ca/English/Workshop.html

Atlantic Universities Risk Management Workshop - November 29/05
- Holiday Inn, Dartmouth, NS

FOR MORE INFORMATION CONTACT R. MACDONALD :rcm@interuniversity.ns.ca

Your Department and the Competitive Procurement Process

by Christine Rapp

The University is regularly involved in the acquisition of goods and services through the competitive procurement process. Perhaps your Department has recently enjoyed (endured?) this experience. If so, did you appreciate the complexities of this process? And the potential legal liability of the University?

The legal issues arising in every competitive procurement process are difficult and ever changing. In addition to the usual contractual concerns, there are further laws which apply to competitive contracting (e.g. each process involves Contract A (described below) and Contract B (final contract)). Since the competitive procurement process within Canada often involves purchases and contracts with a significant dollar value, legal issues are regularly considered by the courts, including the Supreme Court of Canada. This process is administered for the University by experienced (and friendly) representatives of Supply Management Services.

Let us assume that Supply Management Services is preparing a Request for Proposal ("RFP") document for your Department. The RFP must contain specific information applicable terms, disclaimers and clauses which import a specific legal meaning. Such clauses include the right to reject all bids, the right not to accept the lowest bid, the right to reject a bid for failing to meet mandatory requirements. In order to meet legal requirements, the University has certain obligations which must be satisfied within the RFP and the related process. These obligations include the duty to warn of known dangers, duty of full disclosure, duty not to misrepresent and the duty to treat each bidder fairly and equally. Each Department is required to provide all relevant information to permit the University to meet these obligations. It is not always easy to apply a particular fact situation to these legal concepts. Some of it is just common sense. **The duty to treat each bidder fairly and equally means that the Department cannot operate beyond the RFP to advise its favorite supplier/contractor of its preferred requirements, budget, and related confidential details.** Care must be taken prior to the deadline for the submission of bids to ensure that all information is provided to bidders by the University through one designated individual, i.e. not by individual professors or staff of the Department.

Following receipt of the various bids, the evaluation process begins. Final evaluations and decision-making are usually conducted by a University committee. Do all of the bids meet the mandatory requirements? Should any of the bids be excluded from the evaluation process? Do any of the bids require clarification? How do you distinguish between clarification and substantive changes to a bid? What are the evaluation criteria? How are they to be applied? Are the bidders being treated fairly and equally in the evaluation process? Are there any factors being considered in the evaluation which were not fully disclosed to the bidders? Again, the application of competitive procurement laws and rules to the bids submitted is not always easy. Ultimately, a decision is made to award the contract to a particular bidder. Subsequently the unsuccessful bidders are "debriefed" in order to specifically discuss their bids and also to satisfy them that the competitive procurement process was conducted in an ethical, objective, fair and reasonable manner.■

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The legal issues arising in every competitive procurement process are difficult and ever changing.

RISK MANAGEMENT: What Is It? Why Is It Important?

Risk is an on-going aspect of life. We cannot always avoid risk, but there are many ways in which risk can be prevented or controlled. Risk is often defined as the potential for loss that can be measured through probability assessment. For the Risk Manager in the university or college setting risks exist in varying degrees. For example:

- Science laboratories contain an obvious mixture of potential risks. Students and staff may be using dangerous equipment or hazardous substances without first being instructed as to the safety aspects of their utilization.
- The sports complex, complete with swimming pool and gym, contain an equally extensive array of hazards. Equipment must be properly maintained and correctly used. Swimming pools require the use of trained life guards, well maintained emergency equipment and extensive safety monitoring procedures.
- Dormitories and other public buildings present a variety of risks. Exits and stairways require proper lighting, safe construction and proper maintenance.
- Student health services and university hospitals are areas in which there is unique potential for risk. Clearly written and frequently monitored quality assurance policies and procedures are a basic requirement for health care services.

All of the above potential risk exposures exist in most post secondary institutions The Risk Manager in addressing these situations has two major objectives. The first objective is to prevent or control loss. The second objective is to fund losses that do occur in the most efficient and cost effective manner.

To illustrate what Risk Management involves, the following Risk Management issues are outlined with reference to the previous example of the science laboratory risk potential:

1. Risk Management involves the identification of exposure to loss. In the science laboratories there may be significant exposure due to the lack of an adequate and compulsory introductory session in laboratory safety. Safety training should be required for all students and staff utilizing dangerous equipment and hazardous substances.
2. Risk Management involves an analysis of the significance of risk. Given the wide range of science courses and degree of hazard there will most likely be more significance of risk in certain areas. Graduate students working with experiments involving a centrifuge may be more of risk than the undergraduate enrolled in Botany 100. Whereas a base line of safety instruction is essential, the degree of risk may vary from one discipline to another and between course offerings.
3. Risk Management requires the ability to select and apply proper Risk Management techniques. In the science laboratories it is essential that the instructors work together with the Risk Management staff to develop and implement correct and often complex methods for teaching and monitoring safety in the laboratory.
4. Risk Management involves on-going auditing of the safety process. Complacency is a serious threat to any Risk Management operation. Processes for evaluation of safety procedures and programs must be strictly followed. Safety programs for the science areas require frequent updating as new or additional equipment and substances are introduced into the laboratory.

This article was written for CURIE in 1989 by Jane Auman,from the Wyatt Company.

Risk Management is important to all members of colleges and universities as well as other institutions. Post secondary institutions are increasingly being pressured by factors of budgetary constraint and complex operational situations in which the hazard potential may increase. Losses from personal injury or property affect not only the operating budget and personal loss of injured students, staff or visitors, but also carries the potential for negative public relation outcomes.

Across North American there is an increasing awareness of the important role for Risk Management. The question is not whether you can afford to have in place a well integrated and efficiently run program of Risk Management but rather can you afford not to have such a program■

Why Johnny Can't Sue

by Thomas O'Reilly

"Unlike the activity of the highway or the marketplace, classroom methodology affords no readily acceptable standards of care, or cause, or injury. The science of pedagogy itself is fraught with different and conflicting theories of how or what a child should be taught, and any layman can-and commonly does-have his own emphatic views on the subject".

Peter W. v. San Francisco Unified School Districts (1976 California Court of Appeal)

So far, courts in Canada and the United States have resisted finding educational institutions liable to students who simply allege that the education they received was substandard. "Quality of education" has generally been viewed as a standard too subjective to be actionable in tort or contract.

However, there have been a few successful claims in Canada against educational institutions, by students claiming they did not get what they signed up for. These claims are typically based on misrepresentation, or breach of contract, rather than merely "quality of education". For example, if a program is taught on a basis that is markedly different than what was described at the time of offering, a student may be able to successfully sue for damages for breach of contract or misrepresentation. However, if the program is taught as described, but a student feels it was poorly taught or wrongly focused, it is much less likely a successful legal claim could be made.

An example of a misrepresentation-based claim is the recently publicized case of *Crerar v. Grande Prairie Regional College*. That student was allegedly given advice about university transfer course selection by a college employee, advice which turned out to be incorrect. The lack of proper prerequisite courses delayed the student in pursuing a chosen program at the transfer university. The student was successful in small claims court, but the decision was overturned on appeal, with the appeal justice holding the student responsible for confirming the correctness of her course selection by reading the calendar herself.

Errors or misrepresentations that lead to delay in completion of educational programs are serious, because Courts are willing to recognize that a year's delay in graduation can mean a loss of a year's wages, plus the incurrence of an extra year of student costs. Further, the

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claim limit in small claims court is now $25,000, making it easier for disgruntled students to bring significant damage claims.

Even though such claims are not yet widespread, instructors should be mindful of the risk of a student alleging a misrepresentation whenever considering the replacement of an advertised key component of a course or program. Precautionary steps can be taken such as advance notice of changes, and the incorporation of changes on a "transitional" basis.■

Is Your Building a Senior Citizen?

Are you fully aware of the structural integrity of your buildings? Considering their ages, are they still structurally sound?

As the years pass by, gradual deterioration in the structures in which we work are often overlooked. This is due to ever so small changes being practically unnoticeable from day to day. Cracks in floors and walls appear; roofs begin to sag; support columns become weakened, damaged or pushed from their correct positions; and insulation is torn loose or removed where it once provided protection. Also, numerous floor and wall penetrations caused by various occupancy changes over the years, add further stress to these components.

Of course, the value of the building also must be considered: Is it worth spending the necessary capital to restore it to a structurally sound, efficient structure once again? Perhaps a thorough evaluation by a structural engineer is in order to determine this. However, if the cost to rebuild or relocate to a new facility is not financially worthwhile, then attention directed at the existing structures should start promptly if some of the problems just discussed are apparent.

Sagging roof decks can allow water ponding during heavy rainstorms and, together with weakened or damaged support columns can result in a roof collapse. Energy efficiency is becoming more and more important, with increased heating and cooling costs and decreased profit margins. By replacing or reattaching missing or loose insulation, weather-stripping windows and doors, caulking cracks in wall siding and trim, considerable savings can result. This is also true for wall and floor penetrations between heated and unheated areas within structures. Applying insulation, grouting, or both can greatly reduce loss of air that has been heated or cooled, as well as restore structural strength. Finally, repair or replacement of cracked floor and wall sections can help not only to restore building efficiencies but can help prevent accidents involving employees or students.

Rather than being caught unaware, why not take a building tour at the earliest opportunity. You may find that all is well, but then again……!!!!!■

This article was written for CURIE in 1989 by Pat Cruickshank, Engineering Services Manager

Insurers Are Insurers; Occupiers Are Not

by R.W. Howard Lightle

Every so often a simple case helps one refocus upon simple truths. One such truth is that an injury in a slip and fall is indicative only of injury. Slip and falls have not been legislated as absolute or strict liability occurrences.

After yet another year of dealing with counsel for plaintiffs, I had become convinced that they believed, "She slipped and fell in a parking lot; the occupier must be liable." But a recent decision of the Newfoundland and Labrador Supreme Court Trail Division has revived my own belief: "She slipped and fell/ it must be winter." It snows in Newfoundland. Ice forms. Commercial entities try to maintain properties. But people fall anyway. And some people injure themselves. Sometimes no one is to blame. That I suggest, is the reasoning in the decision of Justice Dunn in Murphy v. Interprovincial Shopping Centres Ltd.[1] It's refreshing and even more refreshing is that it can apply in Ontario too.

Before getting too excited, everyone should be aware of the facts, as each case must be decided on its own facts. Murphy dealt with a man who went to play darts at a sports bar in St. John's, Newfoundland. The sports bar was situated in a busy strip mall, which had available a large parking lot for customers. It was approximately 7:30 in the evening when he left his home, and he arrived shortly thereafter at the mall, parking his automobile in the parking lot. At noon hour, a large snowstorm had just ended. Freezing rain began, and continued for some time into the evening. The man remained with his acquaintances at the sports bar until between 10:30 p.m. and 11:00 p.m., and then left the bar to get into his automobile. There was a slip and fall on ice: the man became a plaintiff, and the mall and its contractor a defendant and third party. There was evidence that maintenance was reasonable, and the claim was dismissed.

Like so many slip and fall cases, this was a fact driven case. The Supreme Court of Canada says they are supposed to be.[2] For that reason, many will suggest that because the events followed on the heels of a significant winter snowstorm, the case is unique, distinguishable and of little assistance. Well, since all Occupiers' Liability Act cases are fact driven, they are all unique and to some extent distinguishable. But the Murphy decision reminds us all that "in the common law jurisdictions in Canada a generally consistent approach to occupiers' liability has emerged," and insofar as it has, it is of assistance. Nor does it hurt that the claim was dismissed. The consistent approach, loosely, is as follows:

- There is a positive obligation for occupiers to see that their premises are reasonably safe.
- The onus is on the plaintiff to prove on a balance of probabilities that an occupier has failed in its obligation.
- An injury does create a presumption of negligence (which some might consider a revolutionary statement)
- An occupier can discharge a negligence case made against it by showing a reasonable maintenance system was in place and adhered to.
- An occupier's efforts at maintenance are to be judged solely on those efforts, and not on any injury. (In other words, the fact that someone is injured is evidence of nothing when considering the issue of liability).

This article is reprinted with the permission of the Ontario Insurance Adjusters Association, taken from their March 2005 publication of the Without Prejudice Magazine.

Be careful not to confuse assuming attendant risks with volenti non fit injuria. That defence, for all intents and purposes, is something defence counsel can only tearfully reminisce about.

- Instant response is not expected.
- The occupier is not an insurer or guarantor of safety (even if the occupier is actually an insurance company)[3]

These are helpful statements of law when dealing with a parking lot slip and fall. For example, a different standard (a lower one) is applied to a parking lot than to a walkway. Even the fact that everyone else traversed the parking lot without incident on the evening in question seems to be a favourable consideration. As well, people who set out in adverse winter conditions" assume the attendant risks and must take care for their own safety and well being."[4] Be careful not to confuse assuming attendant risks with volenti non fit injuria. That defence, for all intents and purposes, is something defence counsel can only tearfully reminisce about.[5]

In an Ontario case decided in 2001, Justice Quinn recounts his questioning of plaintiff's counsel, suggesting to her that one must "reasonably expect a few, isolated slippery spots" in the parking lot of Casino Niagara (a busy spot). Evidently the response from counsel for the plaintiff was "No." Justice Quinn thought that a standard of perfection, and too high. Remember, then, that ice and snow in parking lots are acceptable in Ontario, as long as there is a reasonable maintenance system in place that is followed. Without citing authorities, I am reasonably confident that the statement applies to the rest of Canada.

While only a few isolated slippery spots might be the standard for Niagara Falls, Ontario, it appears that farther north, in Thunder Bay, Ontario, a mixture of bare pavement and icy spots (apparently in excess of a "few"), some of which were covered by a dusting of snow, is acceptable. Again, of course, provided a reasonable system was in place and abided by.[6]

Returning to the case that generated the enthusiasm behind this article: we all should take heed of the penultimate paragraph in Murphy and continue to resist claims that require perfection, or anything near it.[7] Assume there is no liability. Make the plaintiff prove otherwise. Ice patches, snow and slipperiness are not necessarily enough. The complete coverage of a parking lot on a day following a snowstorm is a standard of perfection. It takes time to bring a parking lot, a roadway and the like to such a standard, particularly in a province such as Newfoundland, which faces "periodic crisis weather conditions." I might suggest that applies equally to the country or at least to locales as pristine and idyllic as Northern Ontario.■

FOOTNOTES:
1 (2004) N.J. No. 377 (November 9, 2004).
2 Waldick v. Malcolm, (1991) 2 S.C.R. 456
3 Murphy, supra at p. 10; see also Garofalo v. Canada Safeway Ltd. And Hladysh v. Canada Safeway Ltd., in which two Thunder Bay, Ontario, judges agree that an occupier is not an insurer or guarantor of safety.
4 Murphy, supra at p. 16.
5 Its death knell came in Crocker v. Sundance Northwest Resorts Ltd., (1988) 1 S.C.R. 1186.
6 Gardiner v. Thunder Bay Regional Hospital, (1999) O.J. No. 833 (Ont. Gen. Div.).
7 Murphy, supra at p. 17, para. 48.

SCUTTLEBUTT
Student Help For The Idle Rich

A young lady was working her way through university by soliciting odd jobs in the community during the summer break. One day she approached a fellow at his palatial home in one of the better parts of town and asked him if he had any odd jobs she could do for cash. "You could paint my porch", he replied asking: "How much would you charge?" "Fifty bucks" she countered. "You can certainly paint my porch for that price!" he instructed, showing her where he had some paint and the brushes.

The man's wife, having heard the exchange, came out and asked him if the young lady appreciated that the porch extended all the way around the house. "I don't care", said the husband, "A deal is a deal."

About an hour later the young lady knocked on the door and announced she was done. "Already?", the man asked. "Yup", she replied, "And I felt it needed two coats so that's what I did." After handing over the money, the man thanked her. "Don't mention it", she said as she walked away, "And by the way, it isn't a porch, it's a Lexus."■

"HPR": What Does It Mean?

People involved with property insurance program have heard the term, "HPR", meaning "Highly Protected Risk". Different property insurers have different definitions of what constitutes an HPR facility, but all HPR properties have certain things in common no matter who insures them. In general, 10 basic factors exist in an HPR facility:

- Interest in Loss Control. A genuine commitment by senior management for loss control is essential. This will filter down to the other management levels and is likely to result in concern and involvement in overall loss control programs.
- Good Housekeeping. This would involve obvious items such as disposing of waste frequently, neat arrangements of storage areas, safe smoking practices, etc.
- Sprinklers Where Needed. An effective sprinkler system is the backbone of a good loss control program in any commercial or industrial or institutional property having fire hazards.
- Adequate Water Supply. For sprinklers to be effective, fire protection water supplies must be available and be adequate in both volume and pressure.
- Emergency Organization and Public Fire Department. Your facility should have an emergency organization suitable for its individual size and needs.
- Regular Inspections. A major facet of a highly protected risk is the existence of a regular, documented inspection program including the fire protection equipment.
- Maintenance of Buildings and Equipment. A regular preventive maintenance program for buildings and equipment should be instituted. In addition to loss control, such a program can save thousands of dollars in preventing breakdowns and expensive building repairs.
- Suitable Construction. Building construction plays a major part in determining the extent of the fire exposure it can withstand.
- Protection of Special Hazards. Special hazards that may exist and would require special attention include flammable liquids operations, operations involving combustible dust, flammable gases, and any cutting and welding operations.
- Protection Against Exposures. A complete loss control program should consider the hazards created by conditions outside the building. These involve exposures such as fire, windstorm, flood, and earthquake.

If your facility and operations have all of these ingredients necessary for a well protected plant, you are entitled to call your property a "Highly Protected Risk".■

This article was written for CURIE in 1989 by Pat Cruickshank, Engineering Services Manager

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