

Insurance implications of the New Technologies

As we've seen from Kate's terrific presentation, emerging technologies present fascinating opportunities, but as with all new developments, they also create challenges.

Throughout human history, we have always been able to learn and adapt. And these new technologies afford us the chance to do so once more.

As examples, with the printing press came mass circulation of information and with it, the possibility of more widespread dissemination of defamatory statements. With this, came changes to the law, and the provision of insurance coverage to address such claims. As we know, the Internet has now further complicated these issues.

And, with the development of the internal combustion engine, and what are now called conventional vehicles, came the need for legislation to govern the operation of vehicles, and insurance to cover the eventualities of, for the most part, human-made accidents.

Risk management tools and data compilation have permitted insurers to respond to these developments although doing so is a constantly-evolving process. As a column in *Business Insurance* has noted, it has taken fire insurers a couple of hundred years to create the risk management tools they advocate and require of their insureds.¹

Given we are on the cusp of these nascent technologies, while there is a growing body of literature to which I am greatly indebted for the ideas and, yes, speculation, I'm going to share with you this afternoon, we can at the moment only deal mostly in conjecture. Accordingly, what I'm going to do is to highlight very briefly four of the emerging technologies, and offer some examples of what they may mean for insurance coverage.

Given time constraints, I'm only going to touch upon the following technologies in a very brief fashion:

- 1) 3D printing or additive manufacturing;
- 2) unmanned aerial vehicles or drones;
- 3) the Internet of Things; and
- 4) the sharing economy and, in particular, home sharing.

And, as Kate has addressed them, and Cynthia will be doing so, I'm not going to discuss autonomous or semi-autonomous vehicles except to note that in terms of insurance issues, as collisions in the future will be dealing with the failure in the design, manufacture and maintenance of vehicles, we can expect that the insurance industry will look to product liability and/or service failure, whether hardware or software-related, not driver error, as the primary means to manage the risk of collisions. And, residual risks to

¹ Insurers Could Hold Key To Managing Cyber Risks, *Business Insurance*, April, 25, 2016, p. 14.

owners for vehicle theft and damage may eventually be included in homeowners' or tenants' coverage. Alternatively, it has also been suggested by Eric Schuh of Swiss Re that some form of comprehensive mobility policy that addresses coverage for persons involved in car sharing, or as a pedestrian, or as a public transit passenger, might be in the offing.

But autonomous vehicle liability issues and how they are addressed may just be the "tip of the iceberg", as we'll see from 3D printing which Kate took us through.

In a Defense Research Institute paper, one of the co-authors described 3D printing as "a form of additive manufacturing where a printer that functions much like an ink-jet printer creates a 3D object through a layer-by-layer deposition of material".²

Among other insurance issues, the author of the 3D printing portion of the paper notes that general liability insurers "will be hit with coverage challenges...as to what is and what is not a professional service when it comes to the design of a product".³

Who is the designer, manufacturer or vendor of the object that was created? And is product liability coverage being afforded, and to what entity? Would, or how would, the "your work" and "your product" exclusions apply?

In terms of homeowners' insurance, if an insured produces a part of a machine at home, and it fails and causes damage, is this a business pursuit captured by the business pursuits exclusion?⁴

And, this takes us to an example that demonstrates the inter-connectedness of these new technologies, for which I'm indebted to an article published by the U.S. firm of Hunton & Williams in *IndustryWeek*.⁵

The article posits a couple of scenarios, including that of an auto parts manufacturer that makes a computer-aided design (CAD or an image) file available to auto parts stores so that they may print 3D print replacement auto parts on demand and on-site in response to customer needs. An auto parts store sells the 3D-printed part to a customer, who later is involved in an accident and blames the 3D-printed part for causing the accident. Those potentially sued for which insurance coverage might or might not have been obtained in this new world would include the auto parts manufacturer, the store, and the 3D printer manufacturer.

² Coverage Issues Arising from Emerging Technologies, by Jonathan L. Schwartz, Kathleen Browne, and Heather A. Sanderson, DRI Insurance Coverage and Practice Symposium, December 2015. This quote is taken from Heather Sanderson's paper.

³ *Ibid.* at p. 206.

⁴ *Ibid.*, with the question posed differently.

⁵ See "3D Printing and Its Uncertain Products Liability Landscape", found at: http://www.lexology.com/library/detail.aspx?g=b74b6123-0fbf-41a9-8bd0-78fcea88e805&utm_source=Lexology+Daily+Newsfeed&utm_medium=HTML+email+-+Body+-+General+section&utm_campaign=Lexology+subscriber+daily+feed&utm_content=Lexology+Daily+Newsfeed+2016-05-16&utm_term=

Variations on this theme are what if the end user sells the part to someone else who is involved in an accident? Or, what if the individual printed the part on their own 3D printer? What coverage would the individual have as a supplier or indeed, a 3D manufacturer?

The possible scenarios and what could be done to address insurance for them are numerous, and present interesting risk management concerns.

Let's turn to our next technological flight of fancy, (so to speak): drones, which Kate also discussed.

In Canada, unmanned aerial vehicles, or UAVs, or drones, are considered aircraft, and have to be operated "in accordance with the rules governing the flight of manned aircraft to the greatest extent possible".⁶ Transport Canada requires commercial drone operators to have liability insurance. The regulations do not specify the amount, but anecdotal evidence suggests the minimum is at least \$100,000.⁷

In the context of recreational drones, would homeowners' insurance afford coverage?

Two scenarios have been suggested involving a camera-equipped drone that:⁸

- a) crashes into a neighbour's car; or
- b) takes pictures of the neighbour's children in their backyard.

Claims could ensue for property damage or invasion of privacy.

For the former, questions would arise as to whether any exclusions might apply. In particular, depending on the language of the policy, and how that language may have been modified, and depending on what a recreational drone is found to be, if the exclusion provides there is no insurance for "claims arising from...the ownership, use or operation of...any aircraft", and if a drone is an aircraft, would the "aircraft exclusion" apply?

And, for the latter, if the Personal Liability Coverage is for "unintentional bodily injury...arising out of...your personal actions anywhere in the world", does this extend to what might be considered "personal injury" type coverage for invasion of privacy in a CGL policy? If "bodily injury" is not defined to include mental distress, or emotional harm, would there be coverage?

⁶ *Supra* note 6 at p. 167, in the portion of the paper by Jonathan Schwartz.

⁷ *Ibid.* at p. 169.

⁸ Thanks for these to the authors of the August 4, 2015 *Claims Journal* post, entitled, "Recreational Drones: Do Homeowners' Policies Provide Coverage?", found at: <http://www.claimsjournal.com/news/national/2015/08/04/264918.htm>

Further, if the action is based on the recently recognized torts in Ontario of "intrusion upon seclusion"⁹ or "public disclosure of private facts",¹⁰ (if, in the case of the second tort, the pictures taken are, for example, posted on the Internet), can it be said that the actions were unintentional? And, depending on how the policy is worded, if the absence of coverage for intentional acts is, instead, found in the Exclusions, is the language sufficiently unambiguous to avoid a defence and indemnity?

As you'll see, many questions. Definitive Canadian answers must await adjudication.¹¹

And, you'll appreciate that similar privacy issues potentially arise in respect of the Internet of Things, which was defined in a *Canadian Underwriter* article as a "system of intelligently connected smart-computing devices, machines, objects, animals and people that have unique identifiers and, as a result, can sense one another and communicate without the impetus of human-to-human or human-to-computer contact, thus changing how, where and by whom decisions about the physical world are made".¹²

As a result, healthcare devices can monitor and transmit information; manufacturing facilities can increase efficiencies in supply chain logistics and inventory tracking; smart home and building environments can be controlled by mobile devices; and city infrastructure can be operated by wireless devices.

And, aside from privacy matters and coverage concerns, in terms of bodily injury or property damage, would current CGL policies, or even newly-minted cyber policies, respond if the damage was as a result of the manipulation of data?

And finally, what about the home-sharing part of the sharing economy where individuals rent out all or part of their primary residence to people on a short-term basis, that is, a night, a few nights, or a week? Airbnb is the best known of the companies that facilitates these arrangements, using technology. It connects hosts and travellers and handles the transaction for both parties.¹³

Again, subject to the wording used in a homeowners' policy, while it is contemplated that an insured may rent out a room or part of their residence to one or two boarders, this formalized business-type relationship is not generally expected. Questions arise as to whether the renter is an insured, or the "business pursuits" exclusion may apply.

⁹ *Jones v. Tsige*, 2012 ONCA 32

¹⁰ *Jane Doe 464533 v. N.D.*, 2016 ONSC 541.

¹¹ A discussion of the U.S. cases that touch upon these and other issues so far are in the *Claims Journal* post, *ibid.*, and in the paper by Kenneth P. Williams prepared for the DRI's April 2016 Insurance Coverage and Claims Institute entitled, "The New Expansion of Homeowners Insurance Liability Coverage".

¹² "Things to Consider", by Brain Rosenbaum, *Canadian Underwriter*, April 2016, p. 12.

¹³ This is discussed in the paper by Cathy Schwamberger and Melissa A. Murphy-Petros, entitled, "The 'Sharing Economy' and Personal Lines Insurance Coverage Issues", prepared for the DRI's March 2015 Insurance Coverage and Claims Institute, p. 243. And see also "Learning to Share", by Craig Harris, *Canadian Underwriter*, June 2015, p. 28.

And, as examples of the risks that have already manifested themselves, we have all heard on the news of situations in both the U.S. and Canada where premises have been rented through a home-sharing service, and the following was taking place: an orgy was being held in a Manhattan penthouse for which an admission price was charged and during which all of the penthouse contents were destroyed; drug addicts in Oakland using rentals as drug sale points; and a San Francisco woman who returned home to discover that the renter, who e-mailed her repeatedly to tell her how beautiful her apartment was, ransacked the apartment, wore her clothes and shoes, burned sheets in the fireplace with the flue closed, dumped Comet powdered bleach on all of the furniture and throughout the kitchen, and smashed through a locked closet door in order to discover (and steal) her passport, credit cards, and grandmother's jewellery.¹⁴

And, in Toronto, a fraudster rented a condominium unit she had rented from the owner on a short-term basis with a stolen credit card to 10 people for stays of varying lengths. As *The Globe & Mail* article noted, quoting a property manager: "People don't understand that if a one-week tenant overloads the washing machine and water spews out, the owner pays tens of thousands of dollars in damage. Your insurance would be null and void."¹⁵

As is being done for UberX, will insurers create new products to afford coverage to these new-style hoteliers, and on what basis?¹⁶

As I indicated, we have just scratched the surface of the insurance issues that may arise as a result of the new technologies I have mentioned.

The following observation about self-driving cars is, I think, *a propos*, in respect of all new technologies. The issues that arise can be credited, as one author has done, to "the mismatch between technology and humanity". Citing the example of a self-driving car that was not able to advance through a four-way stop as its sensors were calibrated to wait for the other drivers to make a complete stop as opposed to inching continuously forward, which most did, *The New York Times* noted, "Researchers in the fledgling field of autonomous vehicles say that one of the biggest challenges facing automated cars is blending them into a world in which humans don't behave by the book".¹⁷

But, has it not been ever thus?

¹⁴ *Ibid.*, DRI paper, at p. 252.

¹⁵ <http://www.theglobeandmail.com/real-estate/nightmare-rental-a-cautionary-tale-for-short-term-stays/article26033529/>

¹⁶ In fact, according to the May 31, 2016 Morrison Mahoney Insurance Law Update newsletter, <https://t.e2ma.net/message/g150t/8iykrj>, Allstate is now offering coverage for Airbnb members and other insureds who share homes in Arizona, Colorado, Illinois, Michigan, Tennessee, and Utah. The HostAdvantage endorsement can be added to conventional homeowners' policies.

¹⁷ This information is thanks to an article found on the Who's Who Legal website, by Tricia Hobson, entitled, "The Changing Face of the Insurance Market: What It Means For Lawyers". See http://whoswholegal.com/news/features/article/33130/changing-face-insurance-market-means-lawyers/?utm_source=Law%20Business%20Research&utm_medium=email&utm_campaign=7100917_WHO%20Briefing&dm_i=1KSF,4873P,K47HBR,FET4G,1

And, is that not one of the main reasons the insurance industry (and the rule of law) came into being. All of us who work in and work with insurance and the law strive to support the market economy by forever adapting to every new advancement by taking into account the vagaries of humanity, in order to promote human ingenuity.

And, fortunately, so that we all benefit from human progress, this will continue.