



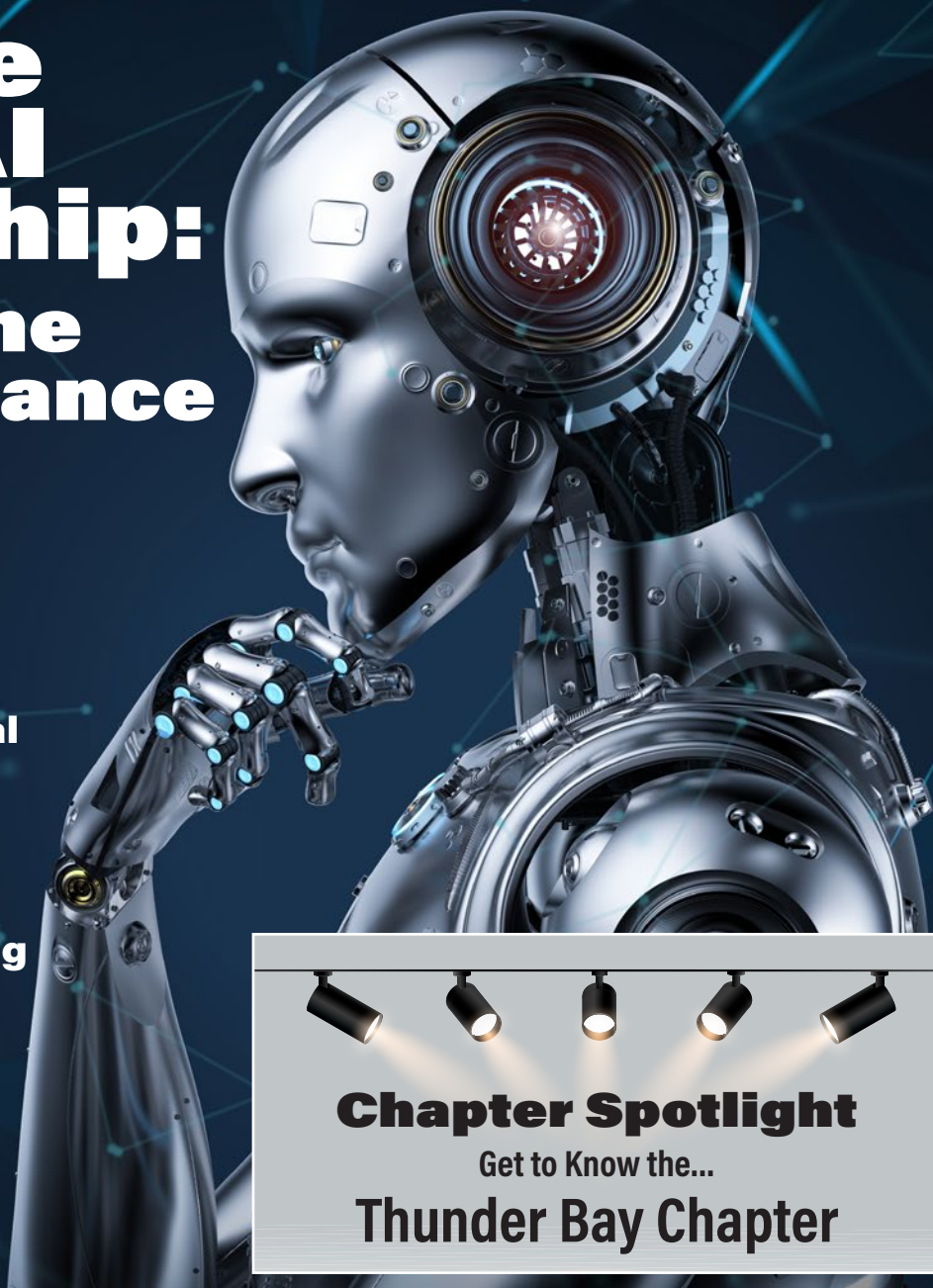
# Inside the Human-AI Partnership: Enhancing the Role of Insurance Adjusters

*Plus...*

**Determining Liability in the Structural Failures of Prefabricated Residential Inground Swimming Pools**

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**Dropping the Hammer: Considerations for Choosing a Fire Investigator**

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**TERRY DOHERTY, CFEI**  
**President, OIAA**

**I**t finally happened; we got snow. Not a lot of it, but enough to make it feel like the holidays. I have spent a lot of time reflecting this year, which is wild as I don't like to do that. It is well out of my comfort zone; I didn't grow up in a country that got snow in the winter; but I can remember the 1st time I saw it for real and not on TV. It still makes me smile each year when we have our 1st snowfall, it is something I look forward to every year.

Al can't believe that our annual Holiday Party has come and gone. It was a spectacular success, and I am so happy that it went off without a hitch. From the amazing decorations and hall set up, to our wonderful DJ – Adam; who I just found out works in the industry as an adjuster. This year, we added Past Presidents and Honorary Members night to our Holiday Party, and I believe not only did they enjoy being a part of the biggest celebration of the year; so did all of our guests. It was amazing to have our Past Presidents right back to 1970, be able to join us.

My favorite part of the evening was honestly spending time and seeing friends from yesteryear. I ran into so many people that I have met throughout my time in insurance. I have always said that Insurance is a Little Big Industry, so many wonderful people and companies who truly care.

I want to personally thank Michael, Brittany, and (little) Gianna for attending this year's holiday party and sharing their story of how McMaster Hospital helped Gianna and their family. I know that it touched a lot of hearts. I got an opportunity to hang out with Gianna, Michael, and Brittany throughout the night and you could not help but be happy just spending 1 minute with Gianna. I can only imagine, what joy she brings to their family every day. This is why it is so important that everyone had an opportunity to hear what the benevolence is all about. It is about helping others, and I am very proud to say that the OIAA goes out of its way to do that each any every year.

To all of our sponsors, members, partners, and to the executive, Merry Christmas, Happy Hanukah, Happy Kwanzaa, and Happy Holidays to all. I hope you all have a safe and happy holiday with your family and friends, and I look forward to seeing you all in 2024.

We have so much still left to do;

- ◆ *February 6th – Oshawa Generals vs. Kingston Frontenacs in Oshawa, tickets go on sale in January 2024;*
- ◆ *March 13th – we have our Celtic Kitchen Party in Kingston; tickets will go on sale at the end January;*
- ◆ *April 9th– Claims Conference at the MTCC, please sign up, get your booths and we look forward to another spectacular event;*
- ◆ *Blue Jays Game – Date is still up in the air (we will update you all very shortly);*
- ◆ *May 31st – Annual Golf Tournament, back by popular demand; we have our 9 and Dine at Cardinal Golf and Country Club;*

***Wishing you all a Happy Holiday and a very Merry Christmas, from my family to yours;***

**Terence Doherty,**  
**Accident Reconstructionist-Level 3**  
**President, Ontario Insurance Adjusters**  
**Association**

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			OCTOBER Kick Off@K1 Speed Mississauga	Christine Andrews	All members

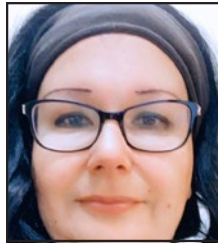
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# Determining Liability in the Structural Failures of Prefabricated Residential Inground Swimming Pools

By: Y. Korany & W. Morris



One of the unintended consequences of the restrictions of the COVID-19 pandemic is the sharp rise in the installation of inground swimming pools on residential properties across Canada. As a result, in the past few years, insurers have experienced a high volume of claims arising from structural failures of residential inground swimming pools during construction or service. Structural failures of inground swimming pools are costly as the surrounding hardscape and auxiliary structures are typically damaged due to the pool failure and/or the significant water leakage that

follows. Unfortunately, the design and construction of residential inground swimming pools are not as rigorously regulated in Canada as other structures, and determining the party, or parties, liable for the resulting damages can be challenging. This article presents the current landscape of the technical and permitting requirements that govern the installation of residential inground swimming pools in Canada and attempts to help the reader determine the liability in their structural failures by explaining the responsibilities of the parties involved.



## Types of Inground Swimming Pools

The main commercially available options to install an inground swimming pool are a cast-in-place concrete pool, a prefabricated wall panel and vinyl liner pool (known as vinyl pool), and a prefabricated fiberglass pool. Only cast-in-place concrete pools can truly be customized and fully engineered to site conditions. A vinyl pool consists of prefabricated steel or polymer wall panels and a floor that varies from compacted sand to poured concrete slab complete with a vinyl liner over the walls and floor. Fiberglass pools are factory-fabricated, pre-finished, single-piece shells. Concrete pools are the most expensive whereas vinyl pools are the cheapest. Fiberglass pools fall in the middle in terms of cost and have recently gained popularity as they offer many advantages over both concrete and vinyl pools such as being maintenance-free. The discussion in this article focuses primarily on vinyl and fiberglass pools which can be described as prefabricated pools.

Inground swimming pools are structures that hold water and retain soil and ground water. Both the water inside the pool and the soil and ground water outside the pool generate lateral/horizontal pressures on the walls and vertical pressures on the floor of

the pool. A concrete bond/ring beam (also known as coping) is typically constructed at the top of the walls of fiberglass pools to enhance resistance to lateral pressures by altering the idealized wall behavior from a free-standing to a propped cantilever. The contribution of concrete bond/ring beams to lateral resistance is more pronounced in fiberglass pools than in vinyl pools as the wall panels of vinyl pools are typically fitted with top and bottom flanges that are usually 5" wide. Diagonal braces and a bottom concrete ring beam are installed to enhance the lateral stability of the wall panels. Pool manufacturers do not provide structural design details for bond/ring beams apart from recommending minimum dimensions such as an 8" minimum thickness.

## How Inground Swimming Pools Fail

Excluding installation flaws and rare material defects such as insufficient galvanization causing premature corrosion of steel wall panels or thin spots in the fiberglass pool shell causing localized cracking, the common causes of inground swimming pool structural failures are soil movements, imbalanced soil and/or hydrostatic pressures, and corrosion. Inground swimming pools are most vulnerable to failure when they are fully or partially drained for winterizing,

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maintenance, and/or cleaning. Pressure imbalance occurs more often in the spring where the soil is saturated due to melting snow and run-off rainwater. Saturated soils exert much higher lateral pressures on retaining walls than dry soils. Under these conditions, the ground water table is high while the water level inside the pool may still be low due to the pool winterization process, causing imbalanced hydrostatic pressures on either face of the pool's walls.

Fiberglass pools are particularly sensitive to imbalanced hydrostatic pressures and soil movements whether it is consolidation, settlement, or heave. Inadequate bond/ring beams exacerbate the situation leading to the formation of cracks and deformations in the fiberglass shell of the walls and floor of the pool.



*Fiberglass pool collapsed under imbalanced lateral pressures (Photo credit: Y Korany)*

Fiberglass pools are more prone than other types to be pushed out of the ground under the hydrostatic

pressure of ground water. However, vinyl pools and surprisingly even the heavier construction concrete pools can also fail in this manner.



*Concrete pool pushed out of ground by hydrostatic pressure (Photo credit: AJ Lohonyai)*

The inevitable corrosion of steel braces and wall panels over time weakens vinyl pools and may cause excessive bulging or titling of the walls depending on the balance between the lateral pressures exerted by the water inside the pool and the soil and ground water outside the pool.

### Swimming Pool Codes and Standards

There is little guidance in Canada regarding the standards applicable to the construction of residential in-ground swimming pools. For the time being, standards for the construction of pools have been left to industry. There is no section of the National Building Code of Canada (NBCC)<sup>1</sup>, provincial codes such as the Ontario Building Code (OBC)<sup>2</sup>, that specifically deals with the structural design of



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residential inground swimming pools. This raises the question: what resources exist in aid of the proper structural design and safe construction of residential inground swimming pools? This section intends to address that question and covers both Canadian and American resources. The *Walford v. Jacuzzi Canada* case suggests that in litigation, where there is an absence of local standards, the relevant American standards may be used.

Although Ontario and many other Canadian provinces do have regulations for the health and safety of publicly accessible swimming pools, there are no designated codes or standards for the structural design of residential pools. The most notable Canadian resource is Guidelines G-0411<sup>3</sup> that was developed by the Pool and Hot Tub Council of Canada. The guidelines address important plumbing, electrical, and general safety issues but do not include any specifics for the structural design and proper installation of the pool structure other than to direct adherence to the manufacturer's recommendations.

The situation is slightly different in the United States. Standards for pool construction exist at least in some state and local (municipal) levels and guidance is accessible at the industry level. For example, the International Swimming Pool and Spa Code (ISPSC)<sup>4</sup> provides guidance for the installation of residential inground swimming pools in Chapter 8. Section 802 of ISPSC requires the structural design and materials to be in accordance with the International Residential Code (IRC)<sup>5</sup> and all materials, components, and accessories to be "suitable for the environment in which they are installed." While Chapter 42 of IRC provides substantial guidance on the safe installation of electric wiring and equipment of swimming pools to protect occupants from the hazard of electrical shock, it does not address any structural design aspects.

Still, we could not locate any specific structural design guidance for inground swimming pools that is

applied nationally in the United States. Requirements that exist at the state and local level do not provide adequate guidance for structural design. For example, Section 454 of the 2020 Florida Building Code<sup>6</sup> refers the user to the manufacturer's specifications and does not offer specific guidance for structural design. Sections 3109, 6109, and 8118 of the 2020 Los Angeles Building Code<sup>7</sup>, and the Los Angeles Department of Building and Safety bulletin titled *Design and Construction of Swimming Pools*<sup>8</sup> provide some general and prescriptive requirements only for the structural design of cast-in-place concrete pools.

Some American jurisdictions reference the publications of the American National Standards Institute (ANSI) which attempt to provide some delineation of acceptable standards. The primary standard for residential inground swimming pools that is frequently referenced in the United States is ANSI/APSP/ICC-59. However, the standard does not offer much guidance on structural design and simply states that "The structural design and materials used shall be in accordance with accepted structural engineering practices and methods."



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## Swimming Pool Permitting Requirements

While permits are required by most Canadian municipalities prior to the installation of a residential swimming pool, these permits are intended to ensure proper grading, adequate fencing around the pool area, and the adherence to zoning and bylaw requirements such as minimum setbacks from property boundaries. Surprisingly, most of the Canadian municipalities do not require a “building permit” to install a pool on a residential property. There are no requirements to submit structural drawings or have a professional take responsibility for the design and review of construction of the pool itself.

British Columbia appears to be the only Canadian province that requires owners to obtain a building permit to install a residential inground swimming pool. Although British Columbia doesn't have a province-wide code for residential swimming pools, several of its municipalities (e.g., Vancouver, Kelowna, and Surrey) require letters (Schedule B) from the structural engineer and geotechnical professional involved in the project that assure their responsibility for the design of the pool and commitment to conduct field reviews. For example, under part 11 of building bylaw No. 724510, the City of Kelowna requires the submission of engineer's sealed structural design drawings for the pool and any retaining walls to be constructed as part of the pool and letters of assurance from structural and geotechnical professionals.

## When Engineering to Site Conditions Occurs

Pool installation on residential properties utilizes two types of prefabricated swimming pools; that is, either a steel/polymer pool kit or a fiberglass pool shell. In principle, there is nothing wrong with the use of prefabricated pools. This is no different from erecting prefabricated steel buildings which are commonly used as farm buildings. In Ontario, prefabricated steel buildings cannot

be erected without structural drawings sealed by a professional engineer confirming that the building can withstand the code-specified design loads, such as snow and wind loads, for the location where it is to be installed. The problem with prefabricated swimming pools is that no engineering takes place to determine the geotechnical conditions and ensure the structural adequacy of the pool to resist the soil and hydrostatic pressures of the site where the pool is to be installed. Unfortunately, the installation of a residential inground swimming pool is viewed by many authorities as “digging a hole in the backyard” and, as such, no building permit is needed.

## Who is Liable for Pool Structural Failures

Most structural failures of inground swimming pools can be attributed to neglecting to investigate and carefully consider the geotechnical conditions of the site where the pool is to be installed, and failing to undertake proper structural design to ensure that the walls and floor of the pool can withstand the loads and movements specific to the site. The design of retaining walls - which is the functionality of the pool walls - and the proper consideration of loads and movements due to soil-structure interactions are

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complex technical issues that require the involvement of competent professionals and cannot be left to the judgement of the pool installer. Yet it seems that in many cases the pool installer acts also as the “designer”. Indeed, many pool installers hold themselves out as a design-build service. However, the extent of design is limited to backyard layouts, pool configurations, and landscaping. When pool installers wear the designer’s hat, they become the primary liable party for pool structural failures.

Under Ontario Occupational Health and Safety Act (OHSA)<sup>11</sup>, each project has one person with overall authority and responsibility for health and safety matters. This person is termed the constructor of the project. Section 1 of OHSA defines the constructor as “a person who undertakes a project for an owner and includes an owner who undertakes all or part of a project by himself or by more than one employer.” The definition of employer in Section 1 of OHSA includes contractors and subcontractors who perform work or supply services. When an owner undertakes a project by directly hiring separate trades working simultaneously, and not in succession, the owner becomes the constructor if no general contractor has been retained by the owner to oversee the work of the separate contractors. If an owner retains multiple trades for their pool installation project such as an interlocking installer, a landscaper, and a pool installer, then the owner in this scenario is the constructor responsible for safety. When they take on the role of constructor, homeowners can become the primary liable party for pool structural failures if professional design services are not engaged.

The need for a geotechnical investigation of the site or for engaging a professional engineer to ensure the structural stability of the pool shell under the specific site conditions is not addressed in the available literature from pool manufacturers and suppliers such as installation manuals. In fact, some manufacturers even promote the idea that homeowners can install their pool kits as a do-it-yourself project. Strangely, the same manufacturers acknowledge, in the installation manuals, that the suitability of floor material depends on the soil conditions and the level of ground water table. An argument can be made for deeming pool fabricators to be a secondary liable party for failing to require site-engineering their

products.

The Ontario Building Code Act<sup>4</sup> states that “No person shall construct or demolish a building or cause a building to be constructed or demolished unless a permit has been issued therefor by the chief building official.” The Act defines building as “(a) a structure occupying an area greater than ten square metres consisting of a wall, roof and floor or any of them ....., (b) a structure occupying an area of ten square metres or less that contains plumbing, including the plumbing appurtenant thereto, ...” The question is would an inground swimming pool be deemed a building under the Act and, as such, would a building permit be required for its installation? It is the authors’ view that swimming pools are indeed buildings as defined in the Act. They consist of a floor and walls and are no different from any other structure that does not have a roof such as terraces and retaining walls. It is also obvious that swimming pools of all sizes contain plumbing. The authors are of the opinion that the authority having jurisdiction could be held as a secondary liable party for failing to require that a building permit is issued based on a professional design of the pool according to site conditions.

## Summary and Conclusions

There is an overall lack of regulation of the structural design of prefabricated residential in-ground swimming pools in Canada, with some noted exceptions. It may be that, at least up to the start of the COVID-19 pandemic, residential in-ground pools were considered as luxury items and sufficiently uncommon in Canada that regulation was viewed as unnecessary. The time is ripe to reconsider this view as the COVID-19 pandemic spurred a boom in new pool construction. Climate change is creating warmer summers, and with those increasingly warm temperatures, demand for new pool builds is likely to increase. At the same time, increased rates of precipitation due to climate change render concerns about hydrostatic loads on in-ground pools more acute. Safety and environmental concerns are areas which have traditionally benefitted from government regulation. We would suggest the same policy of regulation should apply in the case of residential in-ground swimming pool construction. Municipalities should require the approval of pool design and

construction in a manner comparable to how they are endowed with the authority to approve projects which may affect building structural integrity.

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## About the Authors



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Dr. Yasser Korany is a construction litigation expert and the Principal of KSI Engineering, a firm that specializes in investigating structural collapses and building envelope failures. He has been qualified numerous times as an expert witness by all levels of the court in both Canada and USA. He is a board-certified senior member of the National Academy of Forensic Engineers and the Founding Chair of the Forensic Engineering Technical Committee of the Canadian Society for Civil Engineering.



### Wade Morris

Wade Morris is the principal of Wade Morris Litigation Counsel Professional Corporation and has been practising civil litigation since 2007. His practice areas include commercial, estates, and property-related litigation. He was admitted to the Law Society of Upper Canada in 2007 and has appeared in all levels of court in Ontario.



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# Inside the Human-AI Partnership: Enhancing the Role of Insurance Adjusters

By: Jenna Earnshaw



**W**hile artificial intelligence (AI) is one of the newest large-scale markets in the world, insurance is one of the longest-standing industries. Records of insurance policies go as far back as ancient Sumeria, where laborers were compensated in line with a payment schedule for the loss of a finger or a fractured limb. Early forms of health, life, and merchant insurance were used to protect assets in ancient Rome.

In an industry as old as this one, it's justifiable for

technology adoption to lag behind. Although today's claims professional has access to a host of tech tools, adoption of AI in insurance has tended to be slow, especially at a large scale. However, while insurance might have its roots in ancient history, there are still opportunities for it to be refined.

Tools like AI are now being regulated at a global scale. With a precedent now set for safe use, and experts suggesting AI won't take away claims industry jobs, there's never been a better time to adopt this modern technology. For insurance adjusters, working with AI

technologies can do more than cut back on paperwork. It can also make for a more fulfilling workday, save up to 70% of time, and tackle an issue at the industry's core: reducing risk.

## **Human-AI partnerships can help keep claims professionals afloat**

The insurance put on merchant ships in ancient Rome was called bottomry because the policy was technically written on the keel (the bottom) of the ship. Principal was provided before the voyage, and if the ship sank, the money was lost for both parties. Return the ship's bottom, and the borrower had to pay for their premium plus return the cash. A major blow to the insurer in the event of a shipwreck, but almost double the return versus other loans.

In the absence of tools to predict or prevent risks, bottomry's ship sank. However, modern claims professionals no longer have this problem. With a combination of human analysis and AI-powered processing, today's claims adjuster can focus on looking ahead - which means spotting storms, strains, and pitfalls before they happen.

The claims industry can't afford to delay change. Underwriting losses are putting pressure on profits for insurers. Between inflation and rising legal costs, insurance adjusters are looking to cut costs, offload a manual workload plagued by paperwork, and provide better service to their clientele. Artificial intelligence isn't the automations of the past: today's AI can index, sort, and summarize, potentially saving claims adjusters thousands of hours of time. Using tools like indexes or medical summaries, AI can complete tasks in a fraction of the time it would take a human to manually do the same task.

This technology doesn't replace the human - in the example above, indexes can be used to quickly prepare large dossiers of information for human analysis while AI generated medical summaries can be pulled to give medical insights and details at a glance, and save a human claims adjuster hours of reading time further analyzing the claim.

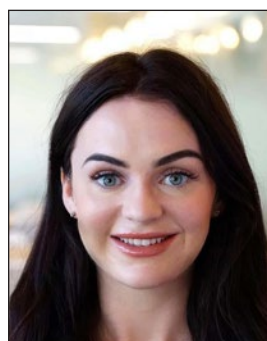
In both examples, artificial intelligence doesn't cut down on the human interface. Instead, it takes the most time consuming parts of the workflow and uses the technology to automate and save time. This is a process known as Human in the Loop (HITL) - a term

for human oversight combined with automation. HITL uses AI tools for the most routine, time consuming tasks, without replacing the creativity, problem solving, and analysis that human users do well. This way, claims adjusters can use their unique human compassion, training, and expertise on tasks that are most critical - without sacrificing speed or processing time.

## **AI and Insurance: A not-so-risky business**

Technologies like AI are sometimes seen as risky, but from an insurance perspective, there isn't much to protect against. While cyber attacks or data breaches can be a major threat to an insurer, it's reluctance to add tech into the claims process that can cause enterprise risk. Two factor authentication, for example, was slow to be adopted by users and organizations. It wasn't until social media made it easier to scrape for answers to security questions that two factor tech became a widespread answer to high numbers of security threats.

Deloitte's recently published 2024 Insurance Industry update highlights the need for this shift. With threats to the global environment and economy spanning from climate change to cyber crime, insurance industry professionals will need to adapt if they want to keep their role as a 'financial safety net' for the world. The report emphasizes prevention, and with new threats and new underinsured or uninsured populations, the modern claims adjuster is facing situations never seen before - and will need to use never before seen technology to keep up.



**Jenna Earnshaw**  
**Co-Founder & COO**

Jenna Earnshaw is the Co-Founder & COO at Wisedocs. Jenna has been involved with the company since its inception and has spent over a decade working with technology startups and scaling them from pre- to 8-figure revenue. Prior to joining Wisedocs, Jenna led the go-to-market strategy for three pre-seed to Series B Canadian

technology companies - Showpass, PartnerStack, and Railz. During this time, Jenna oversaw Sales and Customer Success teams as large as 25, was responsible for the go-to-market technology stack, and supported in setting the strategic direction for each organization. In her free time, you can find Jenna reading, podcasting, and supporting the startup community.

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# Chapter Spotlight

Get to Know the...

## THUNDER BAY CHAPTER

### OIAA Thunder Bay President's Message

The OIAA Thunder Bay Chapter has been working hard to bring the association back to full operation and provide valuable learning opportunities for our members. We are excited to share some of our recent events with you.

In the summer we held a softball tournament that brought out teams from across the industry, including brokers, lawyers, adjusters, and contractors. It was a fun-filled day of games and camaraderie, and we were thrilled to see so many people come out to support our chapter. It was a great work out in 30+ degree weather!

Congratulations to the lawyers' team for demolishing everyone and taking home the championship trophy! We are all still sore from the intense games!

We also held a golf tournament at the beautiful Whitewater golf course. The day was amazing, with perfect weather and stunning views. After the tournament, we enjoyed a delicious dinner and had a chance to network with other members of the industry and held a prize giveaway. We raised \$500 for The Thunder Bay District Humane Society who are dedicated to providing care and shelter to animals in need.

Finally, we loved seeing everyone at our holiday drop-in this year for good food and great conversation. We raised \$255 for Grace Place Charity, which provides food and shelter for those who need it the most in our city. It was a great way to give back to our community and connect with other members of the association.

On a personal note, this year I hiked to The Gorge Lookout, and the Top of the Giant Trail. It was a challenging hike, with an unprecedented view as a reward. The Gorge Lookout has the tallest cliffs (greatest vertical drop) in Ontario. Much like navigating the unpredictable terrain of the Sleeping Giant, our profession requires resilience and adaptability. Just as

I relied on my well-prepared gear during the hike, our members must equip themselves with knowledge and tools to tackle the ever-evolving landscape of risk. The summit, attained through determination and planning, mirrors our collective goals as a chapter. Let us, like fearless hikers, continue to forge ahead, meeting obstacles head on, and ensure our climb towards excellence in the insurance realm remains both steady and rewarding.

In the spirit of our Chapter's resurgence, I extend a heartfelt invitation to all members to actively participate in our upcoming events. These gatherings serve as important milestones in our professional journey. Let us come together, like a collective force ascending a summit, to celebrate our shared achievements and propel our chapter to even greater heights.

We hope our events have helped to bring our members together and inspire a sense of resurgence within our chapter. The chapter is composed of company and independent adjusters as well as social members including brokers, lawyers, restoration contractors, investigators, medical/rehab associates, as well as many other service industries involved on a daily basis in the auto, property, and casualty insurance business. We look forward to continuing to provide valuable learning opportunities and networking events in the future. You can check out our events page by visiting our website at [oiaatbay.ca](http://oiaatbay.ca) to see upcoming events and activities.



***Thank you for your continued support of the OIAA Thunder Bay chapter!***

**Alisa Hainrich  
President  
Thunder Bay Chapter**



# Chapter Spotlight

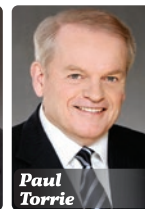
A look at the...

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## THUNDER BAY CHAPTER HOLIDAY DROP IN



At the Thunder Bay Insurance Adjuster's Association 2023 Holiday Party 2023 we enjoyed a broker panel which went very well! It was fun to answer some pre-arranged questions and then the group asked us a few. Lindsey Jaworski Alisa, Lindsey does Auto/SIU so her stories were very interesting.



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# Dropping the Hammer: Considerations for Choosing a Fire Investigator

By: Kurt Gagain



**A**braham Maslow once said, “if your only tool is a hammer, then every problem looks like a nail.” For any fire cause investigator to be successful, they must continually add tools to their intellectual and technical skill sets. But, having several tools other than a single hammer is only useful if the investigator understands how and when to use their “other tools.”

Fire investigations by their nature are often very complex. The individual intricacies of each investigation are never quite the same, often requiring specific expert opinions to assist in understanding the root cause of the incident. When choosing a fire investigator to assist in a fire loss claim, it is critically important to choose someone who clearly

understands not only their role, but how to best navigate the details to get to a solid, science backed cause while maintaining the relationship that your company has built with each client.

The integrity of the investigator must always be paramount. If there is any doubt in the ability of your investigator to deliver a fact based, unbiased opinion on cause, then the investigation is over before it starts. Investigators are often on scene very early after the loss. The investigator will likely be one of the first points of contact that your company has with your client. If the investigator comes across as brash, rude, unprofessional, or incompetent, not only will you have started your investigation on the wrong foot, there’s also a high likelihood that you may also have a

difficult claim or potentially lose that client altogether.

A high-quality investigator will never have all the answers. All knowing investigators should immediately trigger an alert to disengage and look elsewhere. Much like criminal investigations, cases are built on information and insight from multiple sources including interviewers/interrogators, evidence collection specialists, laboratory analysts and attorneys. Fire cause investigations are not for

the physically or intellectually lazy. They require work. They require a genuine desire to seek out the truth, whatever that may be.

I'm certain that most everyone can agree that sometimes things go the way we want, and sometimes they do not. Despite the high likelihood that opinions may vary, truly understanding why we conduct fire cause investigations is quite simple. We often refer to subrogation and recovery when discussing fire losses. These are the financial reasons "why." Although important, the core reason why we as investigators must always strive for the truth is to prevent similar catastrophic events caused by fires that could cause people to become horribly injured or perhaps even lose their life. A thorough, honest, and scientifically based fire cause investigation should be the bar to which we all aspire.

High calibre investigators, among all their designations and intellectual achievements, must have a naturally curious mind. This curiosity and unwavering quest for the truth must remain paramount over both ego and client expectations. Although we are retained by various clients, the true loyalty of any worthwhile investigator should always be to the truth. By clearly confirming and managing any potential conflicts, the investigator will have a quality, or a tool that cannot be taught. That tool is integrity.

The field of fire investigation has evolved dramatically over time. New technologies, the abandonment of many "old wives' tales," and the

adaptation of the scientific method have helped to set the trajectory of fire cause investigations on a solid foundation for the future. As the science and technology improve, so should our understanding of what a true investigator should be. A seeker of the truth with the ability to use every tool, every piece of knowledge and every bit of integrity in their toolbox which will always prove more effective than an investigator whose only tool is a hammer.



### Kurt Gagain

Kurt Gagain is a certified fire and explosion investigator and the President of Advanced Fire Forensics. Mr. Gagain has investigated over 570 fire incidents over the past 15 years including multiple large loss and several fatal fires. With over 27 years of fire suppression experience both as a volunteer and as a career firefighter, Mr. Gagain retired as a Suppression Captain in 2023. Mr. Gagain has also worked as an associate instructor at the Ontario Fire College and as an instructor with the Pre-Service Firefighter Program at Northern College. To maintain a high level of professionalism, Mr. Gagain has sat on the Board of Directors for the Canadian Association of Fire Investigators and maintains membership in multiple fire protection and fire investigation organizations.

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# Five Year Statutory Period for Medical and Rehabilitation Benefits is not a Hard Cap

By: Cary Schneider



## Introduction

Since the changes to the accident benefits *Schedule* commenced on June 1, 2016 we have been operating on the premise that insureds only have entitlement to medical and rehabilitation benefits for a maximum hard cap of five years for non-catastrophic claims. For some insureds, this period of entitlement is not sufficient to receive the treatment which they feel they need. This is particularly true for insureds who fall within the gray

zone as to whether they have suffered a catastrophic injury who still find their treatment to be beneficial.

A trio of decisions released in 2023 have slightly cracked this hard cap and allows for treatment and assessments to proceed after the 5 year statutory cap ("statutory cap"). In short, if a treatment plan is submitted before the statutory cap it is payable in full if it is found to be reasonable and necessary; even if it is not incurred until after the statutory cap.

## The Law

In *Han v. Wawanesa Mutual Insurance Company, 2023*<sup>1</sup> (“*Han*”) the issue in dispute was whether an assessment and treatment submitted before the statutory cap for medical benefits would be payable if it would not be incurred until after the latter time period. This particular case specifically dealt with a psychiatrist assessment that was in dispute but the Adjudicator expanded his analysis to include treatment as well.

The adjudicator found that a treatment plan that is submitted before the expiry of the five year statutory period is payable if it was reasonable at the time that it was submitted. It has been determined by the courts that to require an insured person to pay for treatment as a precursor to commencing an application to the Tribunal would “disadvantage the impecunious”. The Adjudicator found that once a treatment plan is submitted an insurer has 10 days to approve the treatment plan as a whole. An insurer cannot approve part of a treatment plan up for therapy up until the 5 year mark and then deny the balance of the treatment thereafter. Similarly, if a treatment plan is denied before the five year statutory period and later found to be payable then an insurer is obligated to pay for same regardless when it is actually incurred.

“If the OCF-18 is found to be reasonable and necessary, the issue is not when Wawanesa will have to honour its obligations to fund treatment under the Schedule at some point in the future, but when should it have honoured its obligations in the past.

...

“Rather, the only way to resolve any apparent absurdities is to see a treatment approval as an undertaking to pay for the whole course of treatment even though it terminates beyond the 260 week period. ... In effect, the Tribunal decision is stating that the insurer should have approved the plan within 10 days as required by the Schedule”.

The Tribunal subsequently followed the reasoning in *Han* in *Picken v. Aviva Insurance Company, (2023)* and in the Reconsideration decision *Tyner v Certas*

*Home and Auto Insurance Company, (2023)* (“*Tyner*”). The latter case deals with four treatment plans that were ultimately considered to be reasonable and necessary but not incurred within the 5 year statutory period. The Reconsideration Adjudicator found that the reasoning in *Han* is “persuasive” and that the original Adjudicator has made an error in law by not considering it. The fact that this is a Reconsideration decision gives this statement of the law a more binding effect on further Adjudicators.

“I find the Tribunal erred in not considering the *Han* decision. *Han* states that the intent of the legislation would not have permitted a situation wherein a dispute could be filed within the prescribed 2-year time period but be ultimately un-payable as a result of the dispute resolution process being longer than 5-years post-accident. While the respondent is correct in that *Han* is not binding, its reasoning is persuasive and consistent with the consumer protection nature of the *Schedule*. In not considering this case law before it, the Tribunal made an error in law in paragraphs 26 and 27 which led it to not properly consider the issues before it on the proper merits.”

<sup>2</sup> *Picken v. Aviva Insurance Company, 2023 ONLAT 21-001978/AABS*

<sup>3</sup> *Tyner v Certas Home and Auto Insurance Company, 2023 CanLII 91439 (ON LAT)*

## Practice Points and Conclusion

As a practice point for insurers, care should be afforded when adjusting treatment plans that are submitted shortly before the statutory cap is about to expire. For example, if a treatment plan for a chronic pain management program is submitted 15 days before the statutory cap expires, a letter denying the treatment plan on the basis that it cannot be consumed with the requisite amount of time will not be found to be a proper denial. Any treatment plan submitted within the statutory cap ought to be considered potentially payable and adjusted like any other.

For claimant counsel, a client’s file should be properly analysed as the statutory cap approaches. If a client has been regularly attending for physical / psychological therapy then consideration should be given for submitting a treatment plan for further substantive care before the time limit expires. If the

client has not undergone a chronic pain management program or a different form or therapy then this is the last chance to submit a treatment plan for same. Perhaps this is the right time to pursue vocational training, home modifications, or a gym membership.

With that being said, if the client has not attended for therapy for a couple of years it will be difficult to establish that the treatment plans submitted on the cusp of the statutory cap period are reasonable and necessary. The more substantive the pattern of treatment the more likely the chances for success.

In conclusion, the five year statutory period for medical and rehabilitation benefits is not a hard cap. Insurers should be cognizant to adjust every treatment plan as if it potentially payable in full within 10 days of it being submitted. Importantly, claimant counsel should recognize that this is the last opportunity for a worthy client to obtain the treatment she needs.



**Cary Schneider**

Cary Schneider is a co-founder and partner at Schneider Law Firm. For the first 19 years of his practice, Cary primarily worked for insurance companies as a partner at a top downtown Toronto law firm. He has attended Jury / Judge Only Trials, Ontario Court of Appeal, Divisional Court, Reconsiderations, and LAT Hearings. He has a niche practice preparing opinions on standard of care in solicitor negligence cases both for plaintiffs / LawPro and has testified as an expert at trial. He has been recognized by Best Lawyers Canada, Lexpert, Martindale-Hubbell AV Pre Eminent.



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# Income Statement 101

By: Conor Paxton



## Introduction

**A**lthough accountants deal with income statements daily, I must remind myself that not everyone is as familiar with income statements. So, I thought the exciting topic of income statements 101 would be helpful to share with the industry.

## What is an income statement?

An income statement is a report that shows how much **revenue** a business earned over a specific period of time (usually a month, quarter or year). It also shows the **expenses** incurred over that same period associated with earning that revenue.

The difference between the **revenue** and the **expenses** is called the **net income** or the net profit.

Simply put into a formula: Revenue (**A**) – Expenses (**B**) = Net Income (**C**).

Another way to think about it is from a personal perspective. Hopefully, you receive income in return for labour you provide your employer (similar to how a business receives revenue). You also incur various

required expenses to survive and have the ability to provide that labour (e.g. mortgage/rent, food, transportation). What is left over is your disposable income to spend as you wish (e.g. vacations, savings, luxury items).

Below is an example of an income statement for a business, Conor's Colourful Candies (a business that makes and distributes candy).

Conor's Colourful Candies			
Description	FYE December 31, 2022		Ref.
	Amount	% of Rev	
Total Revenue	1,000,000	100.00%	<b>A</b>
Expenses			
Cost of Goods Sold			
Raw Materials	500,000	50.00%	
Packaging	100,000	10.00%	
Direct Labour	100,000	10.00%	
Other Expenses			
Amortization	20,000	2.00%	
Repairs and Maintenance	10,000	1.00%	
Utilities	10,000	1.00%	
Professional Fees	5,000	0.50%	
Rent	50,000	5.00%	
Insurance	5,000	0.50%	
Management Salaries	100,000	10.00%	
Total Expenses	900,000	90.00%	<b>B</b>
Net Income (Loss)	\$ 100,000	10.00%	<b>C=A-B</b>

## In this example, a few key things to note:

- The income statement covers the 12-month period (a fiscal year) ended December 31, 2022 (i.e. January 1 to December 31, 2022).
- During that year, the business generated revenue of \$1,000,000 and incurred expenses of \$900,000. The result is net income (or net profit) of \$100,000. If expenses exceed revenue, a net loss would be reported.
- For businesses that offer taxable supplies, revenue and expenses are recorded net of sales tax (HST) as the taxes on revenue are remitted to the government and the tax on expenses are reimbursed through an input tax credit.
- When a significant asset is purchased that will provide a benefit to the business over many years, the full cost of that asset is not reported as an expense in the year it is purchased. Instead, it is capitalized and the cost is spread out over the useful life of the asset. The expense representing the annual allocation of the assets is referred to as the amortization or depreciation expense.

Simple enough right? Now let's understand how expenses behave a little better. This will help us understand how expenses may be impacted by a business interruption.

## How do Expenses Behave?

There are two key categories for how expenses behave:

- > Variable – a cost that varies directly with revenue or production volume or other measure of activity.
- > Fixed – A cost that does not vary with business volume.

Depending on the nature of the business, certain expenses may be considered variable for one business that would be fixed for another. The next table lists a few expenses and how they might be considered for a retail store compared to a manufacturer.

There is a third category of expense called a step expense. Step expenses are costs that remain fixed for a range of workload, but then suddenly change after crossing a certain threshold level. An example may be a software subscription that may be fixed at \$1,000 for 100 licenses but then increases to \$5,000 if 100 licenses are exceeded.

Variable vs. Fixed Expense		
Description	Retail Store	Manufacturing
Cost of Goods Sold	Variable	Variable
Professional Fees	Fixed	Fixed
Insurance	Fixed	Fixed
Repairs and Maintenance	Fixed	Variable
Utilities	Fixed	Variable
Office Supplies	Fixed	Fixed
Rent	Depends	Depends
Amortization	Fixed	Depends
Direct Labour	Fixed	Variable
Management Labour	Fixed	Fixed

## So What?

Still awake? Now that we have a basic understanding of income statements and expenses, why do we care about this and how can it assist in understanding business interruption claims.

If the operations of a business are interrupted, they may suffer a decline in revenue as a result (i.e. the \$1,000,000 in the example above may be reduced). However, the interruption will also impact the expenses of the business and variable and fixed expenses may be impacted differently.

If revenue is reduced by 20%, variable expenses (which vary with volume) will also be reduced by 20%. In the example above, if I sell 20% fewer candies as a result of the interruption, I also avoid incurring the material costs of making those candies.

However, in this same scenario (20% reduction in revenue) fixed expenses are likely to be unimpacted and would continue at the same level (e.g. insurance expense or rent). It may not be until there is a significant interruption (e.g. a total loss fire and sales are reduced to \$nil) that fixed expenses may stop, such as rent abating.

## The End?

Simple enough right? Unfortunately, reviewing income statements are rarely this straight forward. Below I will leave you with a few additional points to think about as you go about your day:

- Don't forget that sometimes expenses may increase as a result of an interruption and that incremental amount needs to be considered (subject to coverage available).

- Is all payroll insured under a policy? A portion of payroll can sometimes be categorized within an expense (e.g. within costs of goods sold or direct operating expenses). It is important to understand the where payroll is captured in the income statement and how the policy treats this expense.
- How would expenses react if that 20% revenue reduction is due to discounts (i.e. same level of production).
- Some businesses do not have accurate record keeping and a current income statement is not available.
- Many small businesses can include personal expenses in the income statement that may not cease if an interruption occurs (e.g. personal vehicle).
- For corporations and larger businesses the income statement is just one part of the financial statements. There are also balance sheets and cash flow statements (we won't get into those here).
- The "notes to the financial statements" follow the reporting statements and may contain further

breakdown of revenue and expenses or important information about the amounts reported.

Thanks for taking the time to read- if any errors are found, feel free to blame ChatGPT ;)



**Conor Paxton**  
**BA, CPA, CA, CBV, CFE, CFF**  
**Senior Manager/Vice President**

Conor joined MDD Forensic Accountants in 2013. He is a Senior Manager/Vice President at the firm's Kingston office.

Conor has been involved in several investigations involving the quantification of economic damages in insurance and litigation matters. These assignments have been related to business interruption, extra expenses/increased costs, expropriation, fidelity, surety, downtime losses, lost profits, stock & contents, accident benefits, business valuations and personal injury & wrongful death matters. He has vast experience in the retail and wholesale, agricultural, manufacturing, restaurants, power generation, residential and commercial rental properties, hotel and hospitality, professional practices and healthcare sectors. Conor has presented numerous seminars and workshops to insurance and legal professionals on topics such as business interruption, accident benefits, fraud investigations, basics of financial statements and pecuniary claims/damage analysis. He received his Bachelor of Arts (Honours), Economics and Accounting from Wilfrid Laurier University.

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# Lessons that were learned in 2023

By: Dave Dhillon

**A**s we begin 2024, it is useful to consider some of the lessons that were learned by insurance coverage counsel and claims professionals in the previous year:

## 1. *Read the Pleadings!*

All is not lost with broadly worded exclusions. While courts will often read ambiguous policy exclusions in favour of an insured, broadly worded exclusions that exclude claims “in any way involving” an act may still be enforced.

Consider Jack-O’s Sorts Bar v. US Liability Insurance Co., 2023 ONSC 5925, in which the Ontario Superior Court granted the insurer’s summary judgment motion, upholding its denial for a duty to defend as the claim involved an “assault” or “battery”. This is certainly reassuring to insurers where clear exclusionary language can be applied in mixed claims, where otherwise a duty to defend would be engaged.

## 2. *...but move beyond the “labels”*

The Court’s task in a coverage application is to consider the essence of a complaint. Even where negligence is pled in a Statement of Claim, an exclusion for a duty to defend can apply where the exclusion is the basis for a covered derivative act.

For instance, in Butterfield v. Intact Insurance Company, 2023 ONCA 246, the Court of Appeal held that a negligence claim was derivative to an intentional act, making the intentional act exclusion apply. Here, the appellant insured suffered a psychotic episode at a firearms store and stabbed the store owner. He sought defence and indemnity under a liability policy, which the insurer denied and the Court upheld.

## 3. *“Arising out of” may be broader than “liability for”*

As always, coverage provisions in a policy are interpreted broadly, while exclusions are interpreted narrowly. Remember when drafting exclusions to consider using broad language where necessary.

“Liability for” may be considered in its legal context, which may limit the scope of the exclusion.

## 4. *Claims-made means report early!*

Courts often award relief from forfeiture to insureds where a policy breach is considered imperfect compliance. However, courts have been reluctant when the failure to comply with a condition prejudices the insurer.

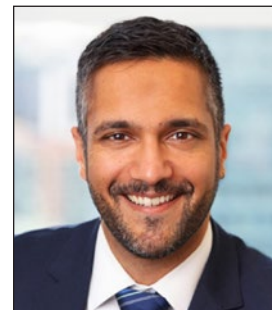
In Furtado v. Lloyd’s Underwriters, 2023 ONSC 5803, the insured delayed until a year to give notice of a claim. The Ontario Court of Appeal upheld the application judge’s decision, and found that the delay was a “substantial breach in a claims-made policy, where notice is the triggering event for coverage”.

## 5. *COVID-19 is not necessarily Property Damage*

While the COVID-19 pandemic lockdowns have long passed, courts are still considering coverage issues related to the virus.

In at least one decision in Ontario, the Court of Appeal upheld a Superior Court decision that COVID-19 did not constitute “direct physical loss or damage” to property required to trigger business interruption coverage. This reinforces the predominant understanding that “direct physical loss or damage” requires physical alteration or property-related event.

Hope everyone had a restful holiday and are ready to get back to those claims!



**Dave Dhillon**

Dave Dhillon is a cybersecurity and insurance lawyer called to the Ontario bar, and practices at Clyde and Co LLP in Toronto, Ontario. His practice includes cyber coverage and breach response, and the defence and litigation of insurance disputes (including the professional/specialty lines). You can often find his musings

online on LinkedIn, in person at various insurance events, or at a local dog park.



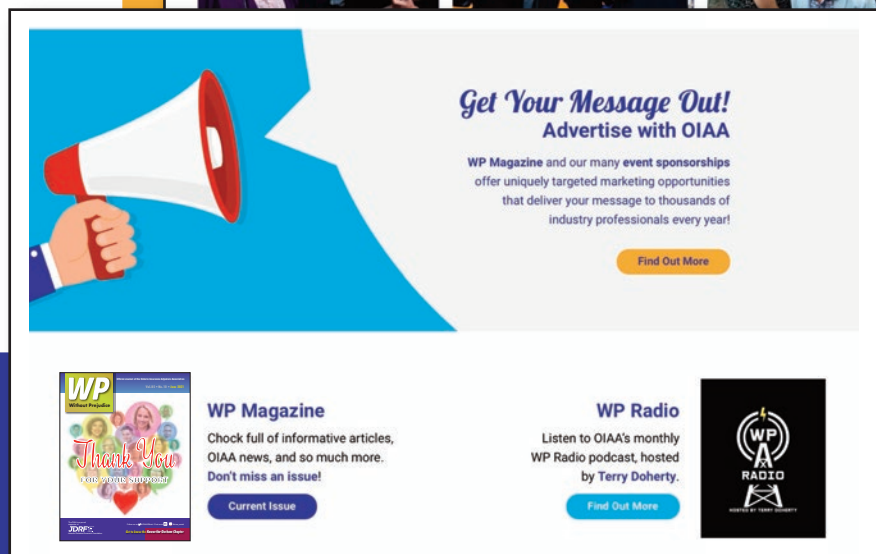
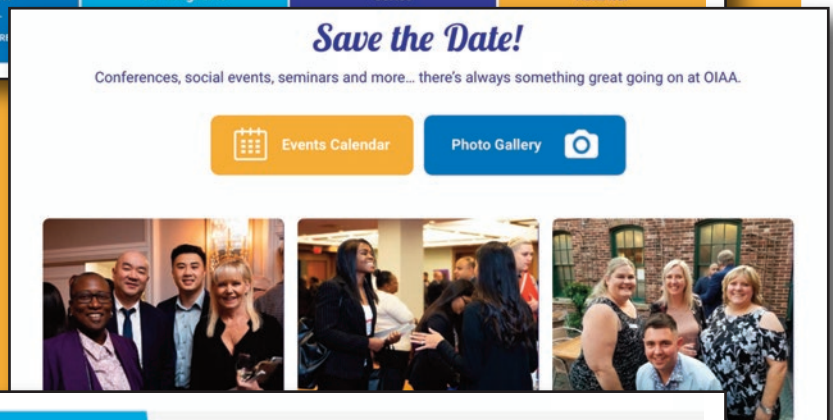
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"We are thrilled to bring our listeners a new season of engaging and informative content," said Terry Doherty, host of WP Radio. "We've been doing this for more than half a decade now and we're still just as excited and looking forward to speaking with all of our guests every time we record an episode."

WP Radio will continue rolling out MyKey's series 'Home Away From Home', on the podcast network and will additionally be at all Ontario Insurance Adjusters Association events, recording live with guests, sponsors and other members of the industry.

In 2023, WP Radio has focused on expanding their production of branded content shows, as part of their mission to constantly grow and enhance their roster of episodes.

"We are committed to providing our listeners with the most valuable and up-to-date information in the insurance industry," said Doherty. "The new season of WP Radio will be an essential resource for anyone working in the insurance industry or interested in learning more about it."

Listeners can tune in to the podcast on all major platforms, including Spotify, Apple Podcasts, and Google Podcasts.

For more information on all branded content productions, options for sponsorship, and guest spots on interviews, please contact Kieran Doherty by phone or email.

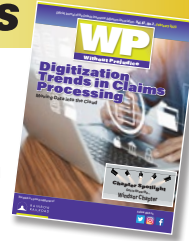
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