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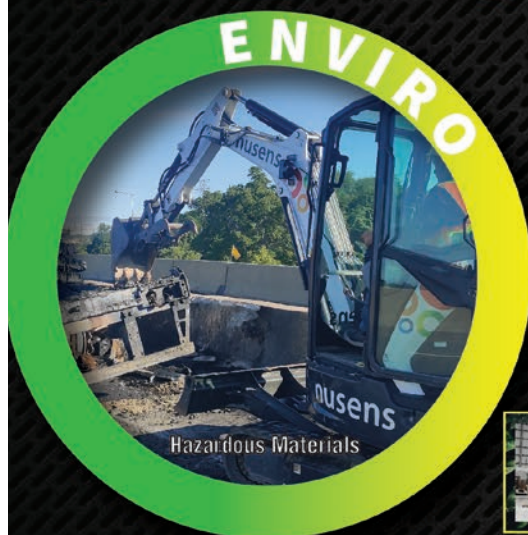
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President's Message

**Kyle Case, FCIP, CRM
President, OIAA**

Hello Everyone!

I can't believe that we are already in June. Honestly, where does time go? I started my journey as the 92nd President of The Ontario Insurance Adjusters Association last July and the time has flown by. As I reflect on this past year, some of the things that I am most proud of include.

1. Bringing our industry friends and family back together for our first Post-COVID Claims Conference that was held in October 2022. This event brought nearly 1000 industry partners together over the course of a two-day period. A huge thank you to all that were involved in making this event happen. From our attendees, trade show exhibitors, OIAA Volunteer Board Members and our generous

- sponsors, we could not have done it without you!
2. Being able to nominate and welcome two new Honorary Life Members to the OIAA. Jackie Johnston and Simone Cybulski were both formally recognized as our newest Honorary Life Members at our Past Presidents Night Celebration in March of 2023.
3. Partnering with Rainbow Railroad as the OIAA Charity of choice for the 2022-2023 OIAA Year, which was done to signal our organizations support for LGBTQ2I+ community within our industry, our country and importantly, around the globe.

While I have so many happy memories of this past year, I am starting to look forward to what is yet to come. In just a few weeks, we will be welcoming our incoming president Terry Doherty as leader of the OIAA for the 2023-2024 OIAA Year. I know Terry has some great things planned and instore for everyone.

As I close out my final WP President's Message, I would like to once again thank Rhu Sherrard for her dedication and service to the OIAA at not only the Provincial level, but at that Chapter level as well. Rhu has been a dedicated volunteer within our community for many years and I know she will continue to be a familiar face at industry functions in the years to come. Rhu, as you step away from your official role within the OIAA, I want to wish you all the best and I hope you enjoy some time for yourself.

Thank you to our members for allowing me the privilege to serve as President of our organization. It has been an honour to hold this position and I will continue to be an advocate for the great work we do within the insurance industry.

*Sincerely,
Kyle Case,
FCIP, CRM
President, OIAA*

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KYLE CASE, FCIP, CRM
President
The Co-operators
1-877-682-5246 ext. 272453
E-mail: Kyle_Case@cooperators.ca



TERRY DOHERTY, CFEI
First Vice-President
Aviva Canada Inc.
(613) 386-5513
FAX: 1-866-805-8585
E-mail: terry.doherty@aviva.com



SHAWNA GILLEN, CIP
Second Vice-President
AIG Insurance Company of Canada
(416) 596-3060
E-mail: Shawna.Gillen@aig.com



JENNIFER BROWN, CIP
Treasurer
Definity Insurance Company
(519) 570-8434
FAX: (866) 239-0231
E-mail: jennifer.brown@definity.com



RHU SHERRARD, CIP
Past President
ClaimsPro
(289) 339-1976
FAX: (905) 565-0009
E-mail: rhu.sherrard@scm.ca



JOE CUMMING
Georgian Bay Delegate
The Co-operators Insurance
(705) 712-1503
E-mail: joe_cumming@cooperators.ca



CHRISTINE ANDREWS, CRM, FCIP
Hamilton Delegate
Sage Claims Solutions Inc.
(905) 389-4522
E-mail: Christine@sageclaims.ca



JASON SAUCIER, CIP, ACS
Kawartha/Durham Delegate
QBE - Canada | European Operations
(416) 587-3192
E-mail: Jason.Saucier@ca.qbe.com



CARRIE KEOGH, BA Hons.
Kitchener-Waterloo Delegate
Gore Mutual
1-800-265-8600 ext. 2545
FAX: 1-800-601-9773
E-mail: ckeogh@goremutual.ca



MICHELE FIELD, FCIP
London Delegate
Trillium Mutual Insurance Company
(519) 291-9300 ext. 5713
FAX: (519) 291-1800
E-mail: mfield@trilliummutual.com



CRAIG OZOG, CIP, CFEI
Niagara Delegate
Leading Edge Claims Services Inc.
(289) 897-8676
FAX: (289) 897-8677
E-mail: craig@leadingedgecs.ca



MIKE BOTTAN, CIP, CFEI
Northern Delegate
Crawford and Company Canada Inc.
(705) 647-6781
FAX: (705) 647-6783
E-mail: Mike.bottan@crawco.ca



MARGARET MACKENZIE
Ottawa Delegate
Travelers Canada
(613) 780-6498
E-mail: MAMACKEN@travelers.com



DUNCAN SOUTHALL
Thousand Islands Delegate
P.C.A. Adjusters Limited
(613) 344-2395
FAX: (613) 544-3487
E-mail: duncans@pca-adj.co



CLAIRE RICHARDSON, BA, CIP
Thunder Bay Delegate
Sedgwick
(807) 345-7676 ext.1
E-mail: claire.richardson@sedgwick.com



NATALIE BARROW, CIP | Claims Adjuster
Toronto Delegate
Sedgwick Canada Inc
DIRECT 905.709.5072 | CELL 437.424.3471
E-mail: Natalie.Barrow@sedgwick.com



EMILY FEINDEL
Toronto Delegate
AIG Insurance Company of Canada
(416) 596-3917
FAX: (855) 453-1063
E-mail: emily.feindel@aig.com



MADHURI GHOSALKAR, B. Pharm
Toronto Delegate
ClaimsPro
E-mail: Madhuri.Ghosalkar@scm.ca
(905) 471-1396



ZOHAIR M. NASSUR, BBA, AIII, CertCII, CertCILA, GIE
Toronto Delegate
Sedgwick Canada Inc
(437) 286-1791
E-mail: zohair.nassur@sedgwick.com



WILLIAM HUMPHREY, BA, FCIP, CRM
Windsor Delegate
ClaimsPro
(226) 782-1002
E-mail: william.humphrey@scm.ca

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2023 Career Fair	Terry Doherty	Shawna Gillen, Jennifer Brown	Golf Tournament	Joe Cumming	Jason Saucier, Mike Bottan
			September Kick Off@Come Back To Town	Kyle Case	Simone Cybulski

FOR THE MAGAZINE



CARRIE KEOGH,
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EMILY FEINDEL,
*Associate Editor/
Articles*



JENNIFER BROWN
Editorial Assistant



JASON SAUCIER,
Advertising Manager



WILLIAM HUMPHREY
Articles

CONTRIBUTORS



**Tim
Gillibrand,
Strigberger
Brown
Armstrong
LLP**

Tim is the full package. Better known around the water cooler as "Amazon Prime", Tim has a knack for knowing just what his insurance clients need and delivering it overnight.



**Nishan
Perera
B.A.Sc.,
P.Eng.
30 Forensic
Engineering**

Associate,
Mr. Nishan
Perera is an
Associate in

the Collision Reconstruction team at 30 Forensic Engineering. He is specialized in the forensic video analysis of CCTV, cell phone and dashboard camera footage, as well as the application of photogrammetric techniques to extract measurements and locations of objects from photographs.



**Michael
Blinick,
Partner**

Michael is a partner at MBBM Lawyers LLP. He has a broad litigation practice with a sub-specialty

in trucking relating litigation. He brings an energetic yet reasoned approach to the files that he handles.



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For submission of proposed articles please contact Carrie Keogh or Emily Feindel.

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Intent is a state of mind. Or is it?

By: Tim Gillibrand, Strigberger Brown Armstrong LLP



In 2019, Mr. Butterfield attended a firearms store in Cambridge, when he experienced a psychotic episode related to his pre-existing schizophrenia. He fell under the deluded belief that the owner of the store had raped and murdered his female friend. He left the store and returned with a knife, attacking and stabbing the owner. The owner survived the attack and commenced an action against Mr. Butterfield for \$600,000.00.

Intact provided insurance to Mr. Butterfield under a homeowner's policy, which included coverage for third party liability. The policy contained exclusions for intentional and criminal acts as follows:

We do not insure claims arising from:

6. bodily injury or property damage caused by any intentional or criminal act or failure to act by:

a) any person insured by this policy;...

Mr. Butterfield filed an Application seeking a declaration that Intact owed him a duty to defend the

action.

When determining if an insurer owes a duty to defend, the Court must consider the allegations in the pleadings. Assuming the allegations are true, if there is a mere possibility that there could be indemnity under the policy, then a defence ought to be provided. However, the Court is not limited to the wording in the pleadings and shall consider whether it is an attempt to "dress up" a non-covered claim as one that falls within the confines of the policy.

In this case, the Statement of Claim alleged that Mr. Butterfield was negligent. It was alleged that he had schizophrenia prior to the incident, which was asymptomatic. While in that asymptomatic state, he applied for a gun licence and then attended the gun shop. These acts were alleged to be negligent, since he ought to have known that he could suffer a psychotic episode, causing harm to the plaintiff. The Statement of Claim did not allege assault, battery, or any other intentional tort. This was likely because

plaintiff's counsel understood that such torts would not be covered under the liability provisions of Mr. Butterfield's homeowners insurance policy.

Mr. Butterfield was charged criminally with aggravated assault. He underwent psychiatric assessments and was found Not Criminally Responsible ("NCR") due to his mental condition.

It is important to note that there are different tests for responsibility, depending on the allegations:

- ◆ **Criminal:** Under section 16 of the Criminal Code, a person can be found NCR where they are incapable of: (1) appreciating the nature and quality of their actions (i.e., the physical consequences of the wrongful act); or, (2) knowing their actions were "morally wrong"
- ◆ **Negligence:** A defendant will not be liable if, as a result of their mental illness, they: (1) lacked capacity to understand or appreciate their duty of care owed, or (2) were unable to discharge their duty of care because they had no meaningful control over their actions. There is some discrepancy amongst provinces as to whether the person must have a "sudden onset" of the mental condition, but this is not required according to the leading authority in Ontario.
- ◆ **Intentional torts:** A defendant will not be liable if they cannot appreciate the "nature and quality" of their actions. It is irrelevant whether the person believed their actions to be morally wrong. If the extent of the person's condition were "so extreme" or to the level of automatism, they may not be liable for an intentional tort.

In the initial Application decision, Justice Braid examined the Statement of Claim. Despite the pleadings being limited to negligence, the Court must consider the true nature of the allegations. Justice Braid held that the

negligence claim was derivative of an intentional tort which was the true nature of the claim:

[17] the alleged negligence claim is based on the same harm as an intentional tort of assault (if it had been pleaded). The elements of the negligence and intentional tort are not sufficiently disparate to make them unrelated. While Mr. Butterfield may have been negligent in applying for the firearms permit, there is no causal link between that negligence and the damages, without the intentional tort of assault.

[18] The damages suffered by [the plaintiff] clearly flow from the attack. A plaintiff cannot convert the intentional tort of assault into an action in negligence solely to ensure that the defendant's insurer will provide the necessary 'deep pocket' to make a judgment recoverable.

Justice Braid found that the intentional act exclusion would apply, resulting in no indemnity for Mr. Butterfield. As such, Intact did not have a duty to defend.

The Court further considered the criminal act exclusion. Mr. Butterfield had been found NCR. Justice Braid held that this must have been because



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Mr. Butterfield did not know his actions were “morally wrong”. In such a case, the accused is essentially guilty of the crime, but is “excused” from legal culpability and diverted into a special stream. It is implied in the Criminal Code that the person who benefits from the “morally wrong” excuse still committed the underlying criminal act. The criminal court must be satisfied that the accused has met the actus reus and mens rea before finding them to be NCR. Therefore, Justice Braid reasoned that Mr. Butterfield had in fact committed a criminal act, despite there not being a formal conviction.

The Ontario Court of Appeal issued a brief decision dismissing Mr. Butterfield’s appeal. The Court agreed with Justice Braid’s analysis of the intentional act exclusion and commented as follows:

Despite the fact that negligence has been pled in this case, that claim is clearly derivative to the intentional tort alleged, namely, that the appellant assaulted the plaintiff, causing injury. In result, the Court of Appeal did not need to review the criminal act issue.

This case is important for multiple reasons. There is surprisingly very little case law concerning civil liability for mental health issues. Most of the leading authorities are dated, leaving many to wonder how a contemporary court will tackle this issue. Until now, there was perhaps some uncertainty as to whether the courts would treat the word “intentional” in the policy exclusion the same as in the world of intentional torts when mental health issues are involved. This decision makes clear that the two terms are equal. An insured will not be afforded coverage where they commit an intentional act, regardless of whether they had a psychiatric episode.

The decision further enforces that courts must read the pleadings with caution. A plaintiff cannot bring a claim within the defendant’s policy coverage simply by pleading

negligence. Even where the negligence claim might appear to have some merit, such as this case, coverage will be denied where the damages ultimately resulted from an excluded cause.

See *Butterfield v. Intact Insurance Company*, 2022 ONSC 4060 (CanLII) <https://canlii.ca/t/jqfnz> and *Butterfield v. Intact Insurance Company*, 2023 ONCA 246 (CanLII) <https://canlii.ca/t/jwkbq>

1. *Buckley and The Toronto Transportation Commission v. Smith Transport Limited*, 1946 CanLII 77 (ON CA).

2. *Lawson v. Wellesley Hospital*, (1976), 9 OR (2d) 677.



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Tim Gillibrand, Strigberger Brown Armstrong LLP

Tim is the full package. Better known

around the water cooler as “Amazon Prime”, Tim has a knack for knowing just what his insurance clients need and delivering it overnight. Whether he’s flexing his subrogation muscles, “nerding out” over a new coverage issue or investigating fraud, Tim enjoys thinking outside the box. A music and karaoke lover with a newly discovered passion for playing hockey, Tim has a wide variety of interests that keep him on his feet. Tim shares a hometown with Neil Young, born and raised in the country outside Peterborough. While he stills rocks the Canadian tuxedo on special occasions, Tim has since traded his pick-up truck for a Zipcar membership and his calluses for paper cuts (until we went paperless!). Tim is also the younger brother of three older sisters, making him feel right at home at the female-led SBA.

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Matt Mulholland

CPA, CMA, DIFA, CFF
mmulholland@mdd.com

Brad Ebel CPA, CA, CFE, CFF
bebel@mdd.com

Ephraim Stulberg

CPA, CA, CBV, CFF
estulberg@mdd.com

Toronto: 416.366.4968

Conor Paxton

CPA, CA, CBV, CFE, CFF
cpaxton@mdd.com

Kingston: 613.389.3176
Ottawa: 613.366.6008

Martin Pavelic CPA, CMA, CFF

mpavelic@mdd.com

Hamilton: 905.523.6363

Sheri Gallant CPA, CMA, CFF
sgallant@mdd.com

London: 519.432.1123



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The Digital Witness

The Use and Limitations of Video Evidence

By: Nishan Perera B.A.Sc., P.Eng.



The increasing presence of cell phones, dash cams, and surveillance cameras in our lives has given rise to a plethora of evidentiary footage capturing everything from car crashes, slips, trips and falls, and even shootings. On first glance, video appears to be an unbiased 'digital witness,' capable of providing answers to those crucial questions surrounding an incident. In reality, these digital witnesses often raise more questions than they answer. It's critical to be aware of the limitations of video evidence in order to use it effectively in your case.

The first step when dealing with video is to ensure you obtain the original footage, in its original format. Many types of footage cannot be readily played on traditional players like Windows Media Player, Apple QuickTime, or VLC. Many investigators fall into the trap of attempting to convert 'unplayable' footage



Figure 1: Incorrectly converted footage (top image) versus the original footage, as intended to be viewed (bottom image).

by using online conversion tools so the files can be viewed using a traditional player. Unfortunately, these online converters can alter how the original footage was meant to be viewed. The converted video, while viewable, may have altered the timing, colour, or even dropped or distorted frames (**Figure 1**). It stands to reason that if the evidence you're relying on does not depict the most accurate version of events, it may not be worth relying on it at all.

Let's assume you are working with the original footage for a moment and focus our attention on a video's timing. After all, a video is simply a group of images, sequenced together over time to give the appearance of motion. The timing of these images in relation to each other is referred to as the video's frame rate. Misunderstanding, or unknowingly miscalculating, things like speed (of a car or a person slipping and falling) without knowledge of how frame rate is reported can have significant impacts on the outcome of a case.

This was precisely the issue in a real-world case where a vehicle entering an intersection with the right of way struck a young man crossing against the signal. The video player reported that each frame of the video played back at a constant frame rate (i.e., the timing between frames was constant). In reality, a review of the video's metadata, which is embedded within the binary values that make up a video, revealed that the frame rate was variable. That is, the timing between frames varied from instant to instant. Tracking the vehicle's motion under a constant versus a variable frame rate (Figure 2) highlights how

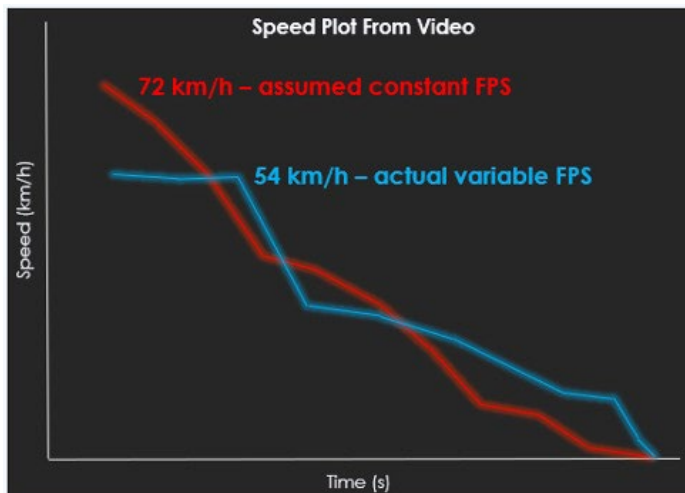


Figure 2: Graph showing the difference in outcome when considering frame rates of a video.

drastically the frame rate impacts the calculation of the vehicle's initial speed. In this case, the speed limit in the area was posted at 50 km/h. A simple misunderstanding regarding frame rate might have indicated the driver was exceeding the speed limit by as much as 22 km/h.

But what about qualitative observations? Surely, we can make general observations regarding the signal colour of a traffic light, or what a person was wearing in the video? Unfortunately, even qualitative observations have to be considered carefully against an understanding of what type of device captured the footage. Many cameras are equipped with a 'rolling shutter,' which effectively means that areas at the top of a frame can be captured at a different moment in time from areas at the bottom of the same frame. Consequently, if a video showing a car entering an intersection suggests the vehicle disobeyed a traffic signal, the reality may be to the contrary. This is best shown visually in Figure 3, when the rolling shutter effect captured the car's position, before it captured the signal colour. The resulting 'final' image shows a car entering on a red light, when in reality, it may not be possible to determine what the signal colour actually was in that moment.

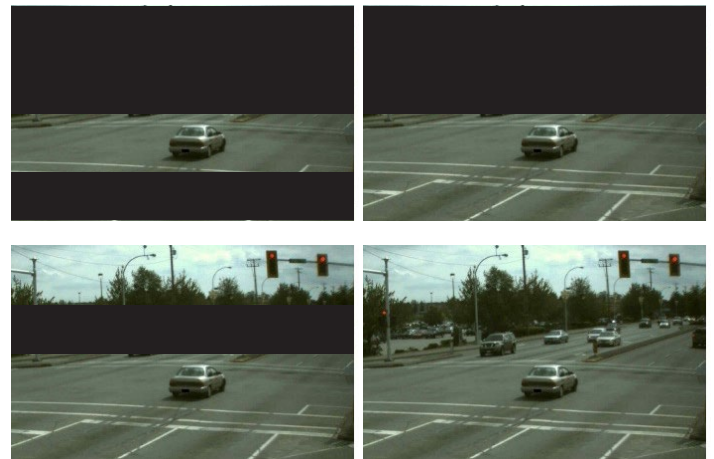


Figure 3: Rolling shutter effect showing how the car's position is captured before the signal light is captured; note that the final frame shows a composite of various moments in time, giving the appearance of a car running a red light.

¹ Image retrieved from <https://3xnhi43vikn244hoyg160zl4-wpengine.netdna-ssl.com/wp-content/uploads/2017/04/38108surreyredlightcam-7web.jpg>.

Surveillance cameras with night vision capability are typically equipped with infrared (IR) LEDs, which allow the camera to capture better quality footage in nighttime conditions. The limitation here is that IR cameras capture infrared light. The human eye sees colours based on how an object reflects the specific wavelength of that colour. IR cameras function by interpreting reflected IR light. Because IR light reflects at different frequencies than natural light, colours in the video footage show differently than their true colours. This can be tricky to deal with when attempting to use the appearance of a subject's attire to draw conclusions about their identity (**Figure 4**).



Figure 4: View of the colour differences between normal day time capture (left), and the use of IR capture (right).

These examples only scrape the surface when it comes to correctly interpreting and presenting video evidence. Rightly, the tides are turning on simply taking video at face value. A recent high profile example was in the Kyle Rittenhouse trial, when footage capturing Mr. Rittenhouse fatally shooting Mr. Joseph Rosenbaum was called into question. There was uncertainty about how pinching and zooming of the footage on a touch screen device, could potentially distort the imagery, and artificially show pixels that give the appearance of objects that weren't actually there.

Of course, while limitations certainly exist when it comes to interpreting video evidence, video can hold information that may have otherwise been thought lost or unrecoverable. Those of us familiar with the television show CSI know all too well about the 'enhance' button used to convert a blurry image into

a crystal clear one. It's not so easy in real-life, and I have yet to come across a program with this touch-of-a-button enhance feature. However, clever application of image rectifying algorithms is one way to extract usable data from less than ideal video footage. One of the many examples of this is shown in Figure 5, where a licence plate that appeared illegible due to motion blur was successfully recovered.



Figure 5: Image enhancement from a blurry frame of a video.

² Images retrieved from <https://videos.cctvcamerapros.com/i/hd-security-cameras-night-vision.html>

³ Image retrieved from <http://www.tricedesigns.com/wp-content/uploads/2013/05/office-license-plate.jpg>.

While video footage has been traditionally misinterpreted as an unbiased witness, it's important to keep in mind its abundance of inherent limitations. These limitations can affect how the layperson may understand what they are seeing. Video footage is an evolving source of evidence and can often be a game changer when cracking a case, but interpreting the data is not quite as simple as leaving its interpretation up to the casual observer.



Nishan Perera B.A.Sc., P.Eng.
30 Forensic Engineering
Associate, Collision
Reconstruction
Direct: 647-484-6704
nperera@30fe.com

Mr. Nishan Perera is an Associate in the Collision Reconstruction team at 30 Forensic Engineering. He is specialized in the forensic video analysis of CCTV, cell phone

and dashboard camera footage, as well as the application of photogrammetric techniques to extract measurements and locations of objects from photographs. Nishan has been involved in conducting vehicle examinations and extracting 'Black Box' Data, as well as the investigation of numerous collisions involving, automobiles, motorcycles and pedestrians.

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It's Not Over Until It's Over:

Settlement & Negotiating Confidentiality Clauses

By: Michael Blinick, Partner & Simren Dhothar, Articling Student



There is an implied expectation between parties to a dispute that a full and final agreement (Release) will be prepared and executed to document the terms of settlement. The purpose and intent of a Release is to contractually bind parties to the terms of the agreed upon settlement.

Whether confidentiality is an implied term of settlement so as to be documented in a standard-form Release was recently considered by the Court. The decision of *Bouzanis v. Greenwood et al.*, arising as a result of a motion by the Defendants to enforce settlement, addresses whether the inclusion of a confidentiality clauses in a Release ought to be

considered an implied term of settlement or whether it represents a separate term that must be agreed to and negotiated between the parties.

Facts

The Plaintiff initiated a legal action as against her former lawyer and other defendants arising from the alleged professional negligence associated with the restructuring of the ownership of shares in privately-held companies and the associated adverse tax consequences arising from the restructuring.

During the course of the litigation, the Plaintiff proposed to withdraw the claim as against the Defendants on a without costs basis. The lawyer for

the Defendants agreed to the dismissal on a without costs basis on the condition that the Plaintiff sign a Release in the form provided by the Defendants' insurer. When presented with the draft Release, the Plaintiff refused to sign the Release as it contained a confidentiality clause. The Defendants then brought the motion to enforce the settlement.

The Defendants argued that the settlement occurred when the offer to settle the litigation on a without cost basis was accepted and that they would have altered the draft Release to remove the confidentiality clause had they known of the objection to its inclusion. The Plaintiff responded by arguing that no settlement was reached because the Defendants made the settlement conditional on the execution of the standard form Release and the confidentiality clause was an essential term of the Release that was provided.

The Court held that it is well established that the delivery of a full and final release, in customary form, whose terms give effect to common sense and normal business practice, is an implied term of the settlement of an action, unless the parties agree otherwise. If the Defendants, in accepting the Plaintiff's settlement offer had been silent on the terms of the release,

the court would have no difficulty in determining that a settlement has been reached, subject to an agreement on the terms of the Release. This is not what occurred, as the Defendants' response was conditional on the Plaintiff agreeing to execute the LawPRO standard form Release. The Court found that the requirement of execution of the standard form Release was a condition of settlement and an essential term of the agreement.

While counsel for the Defendants argued that the inclusion of a confidentiality clause could be a standard term in a Release, the Court stated:

When the parties have agreed that a release will be executed, but the settlement agreement is silent as to the content of the release, the court will imply that the parties agreed to sign a standard form general release consistent with the settlement.

In order to determine what terms fall within the scope of a standard release, the jurisprudence has established that the test to be applied is objective, rather than the subjective intentions of the parties to the settlement.

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The Court ultimately concluded that there was no suggestion that the Plaintiff agreed to execute a release with a confidentiality clause and the Defendants' motion to enforce settlement was dismissed. As the Defendants had made the execution of the Release which contained a confidentiality clause a condition of settlement, there was no meeting of the minds between the parties and there is no settlement.

Conclusion

The Bouzanis decision reinforces the basic law of contract whereby there must be an offer and acceptance, with both parties clearly and intentionally agreeing to the terms of settlement for there to be an enforceable agreement. Included in the terms of settlement will be anything out of the ordinary, including the inclusion of a confidentiality clause, in the Release to be signed by the parties. If a settling party requires for there to be confidentiality as a term of settlement, then this needs to be clearly communicated and accepted by the other party for settlement to be enforceable.

For parties who are concerned about confidentiality when settling disputes, this must be clearly communicated early and often during settlement discussions. It is wise for counsel and their clients to properly consider this before engaging in settlement talks.



**Michael Blinick,
Partner**

Michael is a partner at MBBM Lawyers LLP. He has a broad litigation practice with a sub-specialty

in trucking relating litigation. He brings an energetic yet reasoned approach to the files that he handles. He has represented clients at the Court of Appeal, Superior Court of Justice, Ontario Provincial Court, in private arbitration and at various administrative tribunals. In addition, he routinely presents to and works with claim handlers "behind the scenes" to assist with refining and perfecting risk management practices.

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ONTARIO, CANADA - WP Radio, the premier insurance adjusters podcast in Ontario, is excited to announce the upcoming season of guests, episodes and interviews for 2023.

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WP Radio will be continuing with 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 is focusing on expanding their production of branded content shows, as part of their mission to constantly grow and enhance their roster of episodes.

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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.

Kieran Doherty
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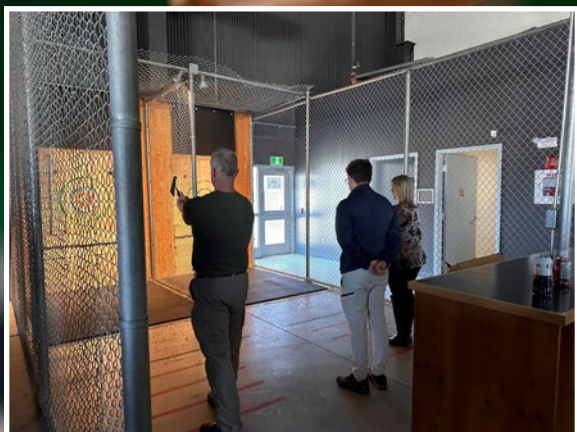
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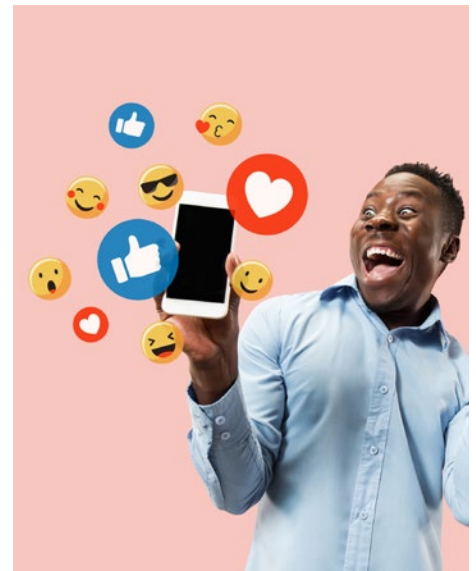
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MEDIATIONS ARBITRATIONS



**Marvin J.
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Marvin has over 30 years of experience in insurance disputes. He is a former Vice-Chair of the Ontario Commercial Registration Appeal Tribunal, and is the current Integrity Commissioner for several municipalities, and a Deputy Judge of the Small Claims Court in the Toronto Region.

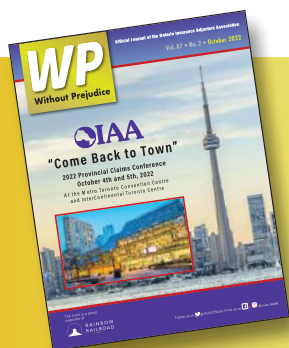


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Jeffrey brings 25 years of insurance dispute resolution experience, including 8-years as a tribunal adjudicator, where he adjudicated and mediated automobile accident benefits and catastrophic impairment determinations. He has expertise in accident benefit/auto-insurance, personal injury and disability.

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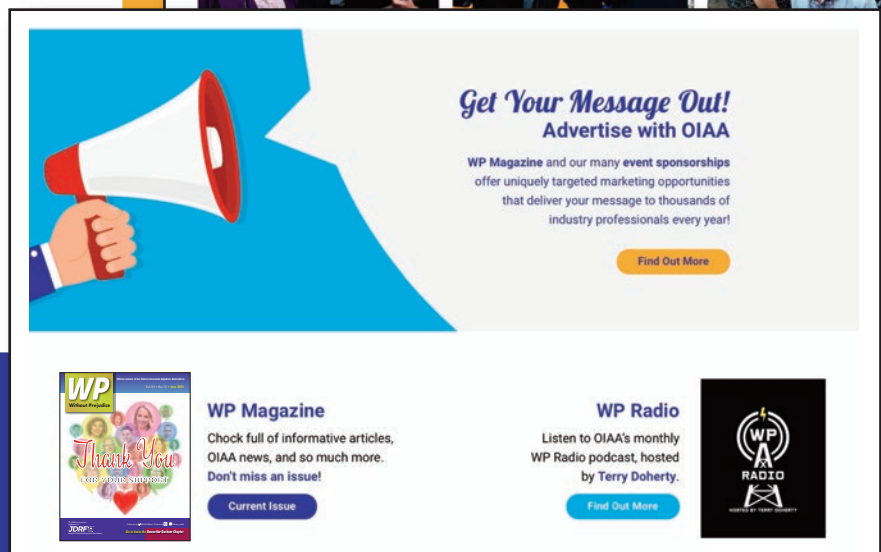
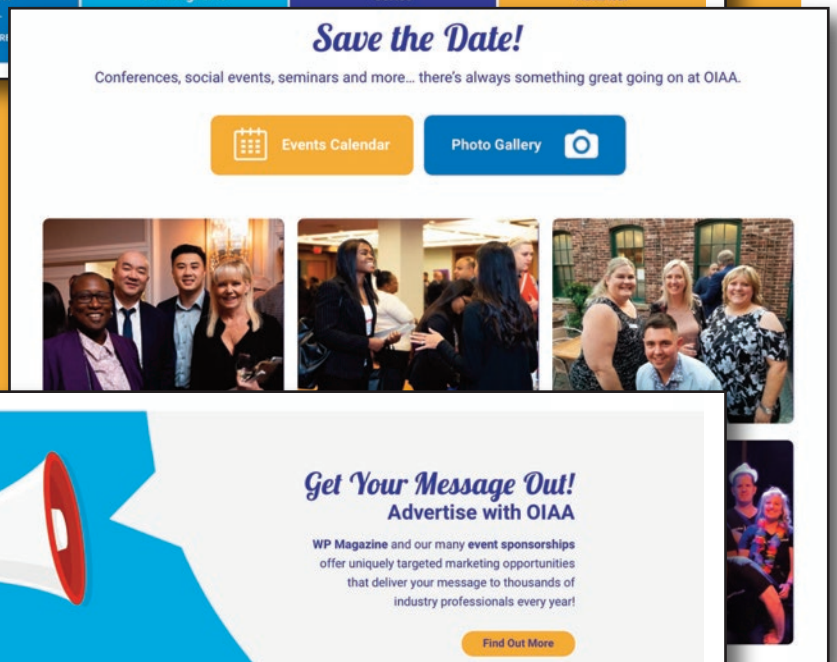
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It has been an experience to say the least and I now join a varied and enigmatic group of Past President's of the OIAA. A moment to reflect on the over 10 years of volunteering at the association both at the Chapter level and Provincial level. A wonderful opportunity to meet industry leaders and various professionals from all aspects of our industry. I have learned a great deal both within and outside the industry. We truly can't stop learning, changing, and moving forward.

I believe the OIAA will be making those decisions based on how the insurance industry is changing and the challenges going forward. The OIAA is on a plan to redefine our goals and how we approach our industry partners and work with various insurance companies and their objectives. We now have social memberships and hope to partner with various other insurance associations and nurture the ones we have continued to support.

Some of our challenges are with insurance companies and how they move forward with their cooperation and employee goals and objectives. The various changes within their organization, including how new professionals feel about how they navigate the education, socialization, and networking within their organization and throughout our industry. I believe it's important to keep connections in a time when we were isolated, our colleagues provided solace for

some of us during the lockdown in the form of simply reaching out and connecting via Zoom, social media etc. Now we have the opportunity to reconnect in a more human way, sharing stories, discussing our tales within the industry and our common interest. I also believe the OIAA has allowed me to connect with so many individuals who at times have assisted me with the option to share my thoughts on a claim file or just provide me with an option I may have not realized, or simply a chat on a different perspective and those options, issues, and outcomes which benefit all those involved.

I would like to wish the best going forward to the upcoming Provincial OIAA Executive.

Kyle Case who will be stepping up a Past President for 2023-2024 and Terry Doherty as President, Shawna Gillen 1st VP, Jenn Brown 2nd VP, Emily Feindel, Treasurer and Carrie Keogh as Secretary.

The organization is in great hands with new initiatives and new ideas moving us into the future filled with changes to maximize your experience within the insurance industry and partners.

"Experience is the teacher of all things"
Julius Ceasar

"Always pass on what you have learned." –
Yoda

"Deeds will not be less valiant because they are unpraised." – Aragorn

My inner geek signing off.
Cheers R.



2022 BURSARY WINNERS



CONGRATULATIONS TO OUR 2022 BURSARY WINNERS



Elyssa Marsh

Hello, my name is Elyssa Marsh. I am a 3rd year Bachelor of Science in Nursing (BScN) student at Cambrian College. I love traveling, exploring nature and trying new things. I am excited to graduate from my program and see where my career in nursing will take me.



Katlyn Melcher

Katlyn Melcher is a queer, non-binary, white person who is in their third year at Wilfrid Laurier University. They are majoring in Communications Studies and Women and Gender Studies with minors in Indigenous Studies as well as French. Community holds significance to Katlyn, inspiring

their volunteer work with the Sexual Assault Support Centre of Waterloo Region. In the future, they have goals of completing a Master's program and creating an inclusive environment for 2SLGBTQIA+ peoples.



Julia Saucier

I am very honoured to be receiving the OIAA Student bursary. Education, family and community involvement have always been very important to me. Growing up, I was highly involved in competitive baton twirling and continue to treasure those experiences.

During my baton career I was awarded the Shining Star Award, a cherished moment as this was awarded to me by my peers. This award represents someone who is a positive teammate, puts forth immense effort on and off the competition floor, and carries an optimistic mindset. I was very involved at my high school playing on the field hockey and the field lacrosse team as well as holding the student representative position with the parent council. I graduated high school in 2022 as an Ontario Scholar with Honours while also receiving the Theory & Art History, Athletic and Physical Education Sportability Awards. Baton twirling and school involvement have taught me valuable life lessons I will take with me throughout my University career. Such as dedication, preparation, teamwork, time management and the importance of hard work. I am currently studying Education at Trent University and am excited to continue learning. I'm incredibly passionate about education and am working towards becoming a teacher. This bursary provides additional financial assistance to help me achieve my academic goals.

GET IN TOUCH

We would love to hear from you! If you have any inquiries or comments, please contact us.

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Director:	COURTNEY ALLISON	Intact Insurance
Director:	JENNIFER MOREAU	Howard Mutual Insurance Company
Past President:	HEIDI BRONNENHUBER, B.A.,CIP	ClaimsPro Inc. London
Chapter Delegate:	MICHELE FIELD, FCIP	Trillium Mutual Insurance Company
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Director:	JEFF EDGE, CIP, CFEI	Leading Edge Claims Services Fonthill
Director:	CRAIG OZOG, CIP, CFEI	Leading Edge Claims Services Fonthill
Director:	CHRIS JOLLIFFE, B.Sc.,CIP,CFEI	Leading Edge Claims Services Fonthill
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Website:	www.oiaaniagara.com	
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Website:	www.wearetiaa.com	
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Website:	www.oiaatbay.ca	
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Website:	www.oiaawindsor.ca	