WP
Without Prejudice

Official Journal of the Ontario Insurance Adjusters Association

Vol. 86 • No. 1 • September 2021

Innovation Perseverance

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Get to know the Windsor Chapter

OIAA Annual Kick-Off Event

Oktoberfest at the Collective Arts Brewery

207 Burlington Street East, Hamilton

Wednesday, October 6, 2021

Time: 5:00 pm to 8:00 pm

Cost: $50.00 for OIAA Members (including Social Members) & $75.00 for Non-Members

Appetizers to be provided & Cash Bar.

This event is being held on a outdoor patio and is limited to a maximum of a 100 attendees, rain or shine with no refunds. COVID Protocols in place.

Sponsorship Opportunities available at $1,000.00 which includes signage at the event & social media shout-outs.

Tickets and sponsorship can be purchased at **https://www.oiaa.com/events/oiaa-annual-kick-off-2021/**

For Registration information please contact: **Shawna Gillen** at **Shawna.Gillen@aig.com**

For Sponsorship information please contact: **Emily Feindel** at **Emily.Feindel@aig.com** or Bryan Levisauskas at **bryan.levisauskas@sedgwick.com**.

OIAA

WP
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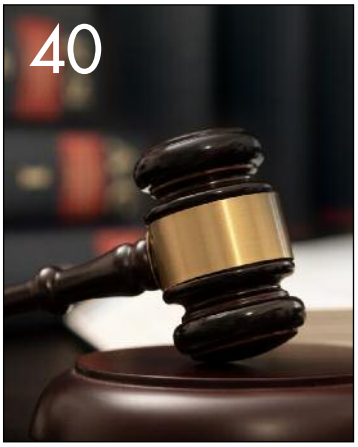

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Rhu Sherrard
President, OIAA

President's Message

Welcome Welcome Welcome *and what a year and half it has been!*

I'm not as witty as John Oliver but I do appreciate his dry sense of humour. On that note I should introduce myself. My name is Rhu Sherrard and I have been in the insurance industry for over 20 years. I am currently an all-lines independent adjuster with ClaimsPro. With the full support from family, friends, and colleagues I'm looking forward to being the 91st OIAA President. And it's truly an honour to a part of a great volunteer organization. My tag line for the year will be **Innovation and Perseverance**.

As part of the Innovation process put in place, we have updated our OIAA website **www.oiaa.com** to be more user friendly and to provide current and efficient registration and sponsorship opportunities.

Innovation is crucial to an organization ongoing success. Simone Cybulski made this a priority during her Presidential year, and we can't thank her enough to see it come to fruition. We hope you enjoy the improvements and utilize the new format.

Perseverance allows us to be do something despite difficulty or delay in achieving success. We can relate and understand ourselves during this challenging times. We have lost friends, family and colleagues and have endured day to day, month to month. I hope the worst is behind us and we can move forward, maybe with a little caution. In my family I'm the eternal optimist, good or bad it works for me.

Generally, the September issue is to highlight the incoming President. So this will be short and sweet. I have rediscovered gardening and totally enjoy being in the dirt. There is joy and serenity being around nature. I have always enjoyed reading and rediscovered my local library. I have somewhat been banned from buying more books, there is supposedly not enough room in the house, and they are taking up valuable gaming space in the basement. I'm also not entirely sure will wear high heels again. By the time you read this my husband and I will be empty nesters, and with most things in life I have mixed emotions. But seeing our children begin new adventures and following their passions make it a lot easier. We enjoy travelling and have not only rediscovered Ontario but hope to travel to far off places next year.

We have a fantastic year and due to the past year – we are striving to provide our OIAA members, social members and insurance professional new and seasoned value in education and ongoing experiences.

I have had the opportunity already to visit a few Chapters' and must say to see the OIAA community in action is just amazing. The volunteers, the dedication, the support from industry partners across the province is greatly appreciated.

The charity I have chosen is **JDRF** https://www.jdrf.org/ for their ongoing research. "From funding innovative research to advocating for government action to providing a support structure for our community, no other organization does more to fight type 1 diabetes (T1D) than JDRF." Please feel free to share your personal stories for the *WP* Magazine.

Many events within the insurance industry are scheduled for this September. The OIAA September Kick-Off will now be an Oktoberfest on Oct 6, 2021, allowing for a chance to meet and reconnect. I believe we have all lived through our "bubbles" and may be willing to reach out and connect again. We truly have an amazing group of professionals throughout the insurance industry. Please reach out to Emily Feindel at Emily.Feindel@aig.com for sponsorship or prize donations.

The OIAA webinars will continue throughout the 2021–2022 to provide education no matter where you are in our great country. We truly hope you share the invites with your colleagues across the country. OIAA Membership and Social Membership will allow free registration. We hope to provide value added "perks" for members.

Due to the limited activities, we are being cautious – Christmas/Holiday Season celebration will be on December 2, 2021. A Very Merry Mystery: A Holiday Whodunnit. Please reach out to Joe Cumming for sponsorship and prizes donations at joe_cumming@cooperators.ca

The Past President's night will be held in late March 2022. Please reach out to Laura O'Hearn for sponsorship opportunities at laura@maxwellclaims.net

I am very fortunate to have Kyle Case as my 1st VP who is sharing his expertise and enthusiasm in organizing the OIAA "Come Back to Town" which will be held in Toronto in lieu of our Claims Conference on October 4th, 5th and 6th 2022. Please look for details at www.oiaa.com September 2021.

The *WP* Magazine is fully digital and can be shared on Social Media and we are always looking for articles and advertisers so please reach out to the TEAM and *WP* Magazine, Articles and Advertising.

SAVE the DATE June 3, 2022, OIAA Annual Golf Tournament at Cardinal Golf and Country Club. A Nine and Dine. We have a great TEAM responsible for the event. Please reach out to Carrie Evans at carrie.evans@scm.ca for sponsorship and prize donations.

The OIAA succeeds on the full support of our members, insurance partners and the dedicated volunteers in the various chapters throughout the province. These individuals thrive to bring you the best product and experience they can. Thank you in advance for your ongoing support and to the wonderful people I get to share my year with. I would also like to thank all the lovely people who have been part of my insurance family, from my days at Wawanesa, Meloche Monnex and my current family at ClaimsPro. You all have a part in this and I'm unable to list everyone but most who know me will know how much you are appreciated. I'm not shy–direct quote from my husband.

"It always seems impossible until it is done."

– Nelson Mandela

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OIAA - Executive Council 2021 – 2022

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Seminars & Education	Rhu Sherrard	Kyle Case, All Committee Members
Adjuster Training	Kyle Case	Shawna Gillen, Terry Doherty
Strategic Planning	Terry Doherty	Jennifer Brown, Shawna Gillen
Bursary	Mike Bottan	Christine Andrews, Conar Marcoux
CONFERENCES		
2022 Claims Conference - Toronto	Joe Cumming	Laura O'Hearn, All Committee Members
2022 Career Fair (TBD- ZOOM)	Kyle Case	Terry Doherty, Shawna Gillen

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Discipline	Simone Cybulski	
Constitution/Incorporation	Kyle Case	Terry Doherty, Shawna Gillen
Handbook	Claire Richardson	Christine Andrews, Jason Saucier
Mentoring (Ways and Means)	Kyle Case	Rhu Sherrard, Terry Doherty
Nominating	Simone Cybulski	
Vendor Relations/Sponsorship	Terry Doherty	Shawna Gillen, Kyle Case
ENTERTAINMENT		
Past-Presidents' Night	Laura O'Hearn	Carrie Keogh, Christine Andrews
Holiday Party	Joe Cumming	Carrie Keogh, Christine Andrews
Golf Tournament	Carrie Evans	Jason Saucier, Jordan Tremblay
September Kick Off	Emily Feindel	Brian Levisauskas Shawna Gillen

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Section 33 of the Schedule: When is the Production Request "Reasonably Required" (page 10)

Cary N. Schneider is a co-founder of Schneider Law Firm who specializes in civil litigation including personal injury litigation, real estate litigation, cyber/privacy breaches, and commercial litigation. He is providing advice to policy holders about potential COVID-19 business interruption claims.

Barry Cox

Negligence in the Peloton? (page 22)

Barry Cox is Counsel at the law firm of Boghosian + Allen LLP. He has been certified by the Law Society of Ontario as a Specialist in Civil Litigation since 2013. In addition to representing Boghosian + Allen's municipal clients, Barry has a diverse insurance defence practice encompassing personal injury, products liability and professional negligence matters.

Glenn Gibson

Smith Building and Developments v Wynward Insurance Group (page 40)

Glenn Gibson is the President & CEO of The GTG Group. Glenn is a highly-qualified International Executive General Adjusters and retired CEO who has published almost 300 articles over a lengthy career.

Andrew Eckart

Smith Building and Developments v Wynward Insurance Group (page 40)

Andrew Eckart is the principal of Eckart Mediation - providing online and in-person dispute resolution services of civil disputes, including property losses. He is also the Staff Lawyer at the Class Action Clinic, North America's only legal clinic focused exclusively on class member rights.

Kevin Thomas

Business Interruption Claims - What business owners and insurance representatives should know? (page 50)

Kevin Thomas has nearly a decade of experience providing professional accounting services with a focus on forensic and investigative accounting. Kevin has extensive experience in managing complex investigations in insurance and litigation matters relating to commercial insurance claims such as business interruption, inventory losses, extra expense, downtime claims, and accident benefits.

Tony Militello

Business Interruption Claims - What business owners and insurance representatives should know? (page 50)

Tony Militello has over 24 years of experience providing professional accounting services with a focus on forensic and investigative accounting. Tony has extensive experience in managing complex investigations in insurance and litigation matters relating to commercial insurance claims such as business interruption, inventory losses, extra expense, downtime claims, and accident benefits.

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For submission of proposed articles please contact Zohair Nassur or Emily Feindel.
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From the Editor

It is my privilege to have been selected as the Editor of the *WP* Magazine for the year 2021 – 2022. As this is a challenging role with high expectations, I would personally like to thank my predecessor, Jennifer Brown for setting high standards and trusting my work and capabilities meet those expectations.

As the new year commences, I would like to welcome our 91st OIAA President, Rhu Sherrad who has been in the Insurance Industry for over 20 years and involved with the OIAA for many years. With this, I would also like to thank our Past President Simone Cybulski for her dedication and hard work towards the OIAA.

By way of introduction, my name is Zohair Nassur and I have been part of the Insurance business for over 14 years. Started my career as an Independent Adjuster working in the Middle East, namely Muscat - Oman, Doha - Qatar and Dubai - UAE. I spent some time working in the Caribbean on CAT losses prior to moving to Canada in 2019. I have had the opportunity to come across some great colleagues and mentors throughout my entire journey so far. Loss Adjusting runs in the blood as my father, now retired, was also an Adjuster for over 30 years – Like father like son! This is my second year on the OIAA Executive Committee, and I am honored to be part of this great organization.

We at the OIAA are working hard towards providing our members with some interesting educational seminars and events along with our industry partners and various experts in their respective fields this year. As we may or may not have some of the events in person, I would encourage you all to keep an eye out and encourage your colleagues and friends in the industry to register with the OIAA.

"*Knowledge is better than wealth because it protects you while you have to guard wealth. It decreases if you keep on spending it but the more you make use of knowledge the more it increases. What you get through wealth disappears as soon as wealth disappears but what you achieve through knowledge will remain even after you*" - Ali Ibn Abi Talib (as).

As the Editor for this year, I will also be putting a spotlight on the Past Presidents of the OIAA including but not limited to introducing a new section that would talk about international news and events to keep our members updated with some global headlines.

I am hopeful I get to meet you all in person and put a face to the name. Until then, please sit back and enjoy our *WP* Magazine!

Zohair Nassur, BBA, AIII, CertCII, CertCILA, GIE
Managing Editor, *Without Prejudice*
Email: zohair_nassur@cooperators.ca

OIAA

Upcoming Monthly Webinars

Mark these dates down on your calendar

DON'T MISS THEM!

September 23, 2021	Presented by **Geoff Keating,** Kostyniuk & Greenside Lawyers Topic - Repayment under the SABS – Best Practices AB
October 21, 2021	Presented by **Oliver Gonzalez,** OGEE Solutions Inc. Topic - Mould & Asbestos
November 18, 2021	Presented by **Colleen Arsenault** and **Bonnie Clarke,** Beard Winter LLP Topic - Slip Slidin' Away: Contemporaneous Steps to Take for a Better Slip and Fall Defence
December 9, 2021	Presented by **Blair Nitchke,** Black Sutherland LLP Topic - Chronic Pain
January 20, 2022	Presented by **Barry Cox,** Boghosian + Allen LLP Topic - Expert Witness (To be Confirmed)
February 17, 2022	Presented by **Keith Elliott,** Reed Research
March 24, 2022	Presented by **Lisa Armstrong** and **Krista Groen,** Strigberger Brown Armstrong LLP
April 21, 2022	Presented by **Sandra Cramb,** SCM Insurance Services Topic - Liability

A **$50 gift card** will be raffled off at each webinar.
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WE HOPE YOU CAN JOIN US!

Visit www.oiaa.com to register.

Section 33 of the Schedule: When is the Production Request "Reasonably Required"

The "duty of an applicant to provide information" section of the *Schedule* (Section 33(1)1) is a highly effective tool utilized by insurance companies to both adjust their claims and to challenge an insured.

An insured runs the risk of a suspension of their benefits if they fail to properly respond in a timely manner to a reasonable request for documents.

By Cary N. Schneider,
Schneider Law Firm

Section 33 of the Schedule: When is the Production Request "Reasonably Required"

The case law is rife with decisions in which the insured has failed to comply with their documentary obligations and suffered the consequences of same. Insurers mostly use this section to obtain the documentation they need to properly assess a case. However, sometimes the request for documentation is overly broad and not "reasonably required" as per the *Schedule*. An analysis of the law in which an insured was not required to provide documentation as per Section 33 will help us assess what is reasonable and what is not.

Section 33: The Basics

Under s. 33(1)1 of the *Schedule*, an insured person must provide upon request any information reasonably required to assist the insurer in determining the applicant's entitlement to a benefit. The time period for complying is 10 business days.

The insurer is not liable to pay a benefit during any period in which the applicant fails to provide the insurer with the requested information: s. 33(6). If the applicant eventually complies with the insurer's request, with a reasonable explanation for the delay, the insurer must pay the withheld benefit: s. 33(8).

Only Necessary Documentation Required To Commence Claim For IRBs

One of the battles regarding documentation often revolves around what is needed at the outset of the claim in order for benefits to be initiated. An insured who has suffered a disability resulting in her being off work often is in desperate need for IRBs in order to keep up with their basic necessities of life. The question is whether an insurer is entitled to a full picture of an insured's life before commencing payment of IRBs.

In ***M.M. v. Aviva (2019) 17-006475/AABS*** the issue was what documents were reasonably required to determine the applicant's initial entitlement to an IRB. The insurer requested the following documentation and when it was not provided suspended benefits.

1) A completed employer's confirmation form (OCF-2);
2) Clinical notes and records from Mount Sinai from April 14, 2017 to present;
3) A decoded OHIP summary;

4) Notice of assessment from 2016;
5) T4's from 2016 for all jobs worked;
6) 4 weeks of pre-accident paystubs and/or 52 weeks of pre-accident paystubs; and
7) Any post-accident paystubs.

The Adjudicator found that of the documents requested, that the (1) OCF-2, (2) four weeks of pre-accident paystubs or 52 weeks of pre-accident paystubs, and (3) any post-accident paystubs are reasonably required to determine the applicant's eligibility for IRBs. The remaining items, albeit helpful in determining the applicant's entitlement to medical and rehabilitation benefits and on-going entitlement to IRBs, are not required to initially determine the applicant's entitlement to IRBs.

Insured Only Required To Provide Sufficient Answers At EUO

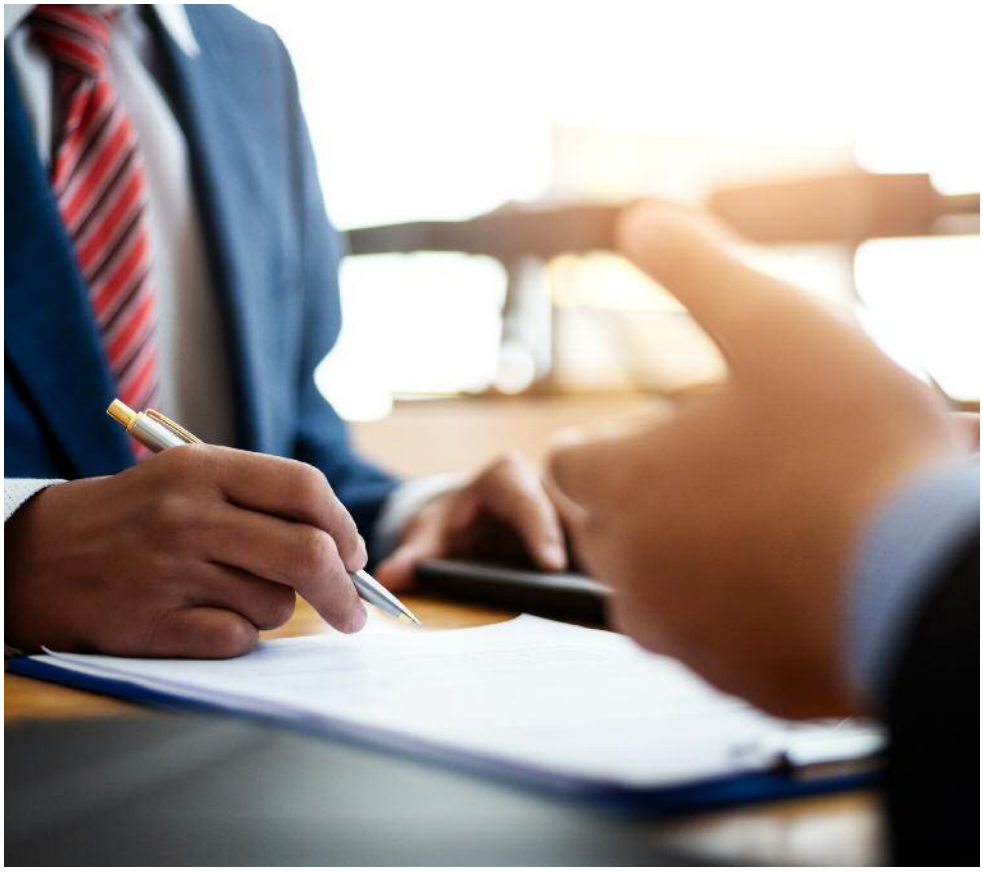
An astute defence counsel at an EUO will often ask detailed questions in order to obtain as much information as possible for the immediate and future handling of the file. The question is whether the refusal to answer some of these questions jeopardizes the claimant's right to receive his entitlement to income replacement benefits.

In ***P.I. v. Aviva (2017) 17-000465*** the Applicant refused to answer some questions at the EUO on the basis that they were not relevant to the issue of entitlement to IRBs and / or that the insurer already was in possession of the information. The Adjudicator found that the "applicant's claim for benefits was not barred because she provided *sufficient evidence* under section 33 of the Schedule". The adjudicator found that the questions not answered at the EUO did not prevent the respondent from making an informed decision regarding the applicant's entitlement to IRBs. The Adjudicator found that the respondent had all the information that it reasonably required to make a determination about the applicant's entitlement to IRBs.

Insurer Cannot Use Section 33 To Deny A Claim After The Fact

If an insurer is relying on section 33 in order to deny an entitlement to a benefit it is obligated to properly advise the insured of same and not as a secondary argument after the fact. For instance, if an insurer medical examiner denied an entitlement to a benefit without requiring further medical records the insurer will have a challenging time proving that this documentation is needed.

The question is whether the refusal to answer some of these questions jeopardizes the claimant's right to receive his entitlement to income replacement benefits.



The question is whether the Applicant is forced to suffer the consequences if this documentation is late to materialize.

As per the decision ***S.U. v. Wawanesa (2017) 16-003333*** the insurer denied entitlement to a treatment plan on the basis that it was not reasonable and necessary. At no time did the insurer advise the applicant that more information was needed in order to determine the entitlement to benefits and the insurer examiners did not indicate that more documentation was required in order to assess the claim for benefits. The Adjudicator found that the insurer's handling of the claims indicated that the information requested was not "reasonably necessary" for the determination of the entitlement to the benefit. The adjudicator stated that:

> "[a]n insurer cannot deny a claim on the grounds that it is 'not reasonable and necessary', with no reference to information it has requested under s.33, and then go on to use non-compliance with s.33 of the Schedule as a bar against its liability to pay the benefits in that claim after its decision is appealed to the Tribunal".

No Violation of Section 33 If Insurer Could Obtain Records On Its Own Or Insured Acted Reasonably

Insurers quite reasonably request the production of third party records such as the clinical notes and records of a family doctor. This is documentation that is not in the power and control of an insured. Some family doctors are very efficient in producing the records and some are quite the opposite. The question is whether the Applicant is forced to suffer the consequences if this documentation is late to materialize.

In ***P.M v. Aviva (2020) 18-009518*** the Applicant was in breach of sec-

tion 33(1) as the documentation was not provided within the appropriate time frame but she provided a reasonable explanation for same as per section 33(8). The Applicant established that she had made reasonable efforts to obtain the necessary records and that the insurer had the ability to obtain her records with the consent that she provided early on when she applied for accident benefits. Accordingly it was found that here was no violation of section 33 of the Schedule as (1) the insurer was able to obtain the records that it required on its own, and (2) the Applicant had made efforts to obtain the information.

Self-Employed Litigants Are Not Required To Produce All Records Sought By Insurer Accountant

One the most common disputes regarding the production of documentation revolves around self-employed litigants. Lawyers traditionally have not done well in high school math and often get brain cramps when discussing income tax calculations with accountants. Accordingly, when self-employed claimants receive a detailed list of documentation requested by the insurer accountant it is challenging to know what is actually "reasonably required" by the insurer to calculate the benefits. The Applicant is only required to produce the financial documentation that satisfies the requirements of the *Schedule*. Further, if the clamant has its own accounting report that sets out the basis of the calculations this is certainly helpful.

In the decision of ***Applicant v. Coachman (2018) 17-004906*** the insurer retained an accounting firm that set-out a list of documentation that it required to be produced in order to calculate the entitlement to an IRB for a self-employed litigant. As stated by the Adjudicator:

> "The applicant proved his entitlement to the quantum of IRBs claimed based on the provision of his Income Tax records at the time. I accept that it is reasonable to base IRB calculations on the year prior's gross business income and that this is contemplated in s. 4(3) of the *Schedule*. As such, the applicant is entitled to IRBs based on the income tax documents he provided.
>
> Regarding the continuing requests for further and supporting information from [accountant] and the insurer, I find, that the applicant is only required to prove his self-employment income in accordance with the *Schedule*. He has done so. Not only has he provided his income tax returns, he has also provided an accounting report setting out his IRB entitlement

Lawyers traditionally have not done well in high school math and often get brain cramps when discussing income tax calculations with accountants.

OIAA BURSARY 2021

Do you have a child or grandchild enrolling or enrolled in Post-Secondary for 2021/2022?

The OIAA Student bursary offers financial assistance in the form of 3 awards in the amount of $1,000.00 each. The applicant must be pursuing full time post-secondary studies at a College or University.

Selection is based on financial need, contribution to school, community life and/or other meaningful pursuits, major accomplishments and strong indication of academic promise. Eligible applicants will be a child or grandchild of an active OIAA member, who has been a member in good standing for a year and is a current member in good standing for 2021-2022.

Previously successful award recipients are welcome to apply again with a new Essay.

The deadline to apply is October 2, 2021 at 5:00 pm.

Visit our website www.oiaa.com for further details.

based on those income tax records. The continuing requests from [accountant] for supporting documents (other than income tax records) were excessive."

Failure To Provide Records Does Not Prevent An Insured From Pursing LAT Application

If an Applicant fails to attend an insurer medical examination without a reasonable explanation it has been found that she is prevented from proceeding with a LAT Application. The question was raised as to whether a similar restriction exists for the failure to provide information as per section 33.

According to the Adjudicator in ***W.P. v. Aviva (2017) 16-000693*** the Applicant is not precluded from applying to the Tribunal for failing to submit to an examination under oath or failing to provide information requested by an insurer that is reasonably required for the adjustment of the claim. Section 33 does not preclude an applicant from making an application to LAT but merely refers to a potential suspension of benefits. Section 55 lists four possible instances of when a proceeding may be prohibited, none of which include the failure of an insured person to attend at an examination under oath or to provide information when properly requested by an insurer. As such, and Adjudicator does not have the authority to order the applicant to attend an examination under oath, nor to order her attendance as a condition for her application to the Tribunal to proceed. A similar decision was rendered more recently in ***K.A. v. Aviva (2020) 19-002676***.

Conclusion

In conclusion section 33(1)1 of the *Schedule* has been successfully utilized time and again by insurers to suspend and deny payment of income replacement benefits. Most of the time the request for documentation is relevant and great care ought to be taken to utilize best efforts to obtain same. With that said, sometimes insurers are overbroad with their requests and seek information (unintentionally or otherwise) that overstep the boundaries of "reasonably required". While as much of the risk falls on the insured to obtain the necessary records, insurers should also be cognizant that all because documentation is requested does not mean that there is an obligation to produce same. If an insurer denies the benefit strictly on procedural grounds, without any substantive analysis of same, than this could have significant adverse consequences. In short, the following principals emanate from the case law should be considered by insureds and insurers alike:

1. it is not "reasonably required" that an insurer has an entirely complete picture of the insured's life before commencing payment of an IRB;
2. an insured is only required to provide sufficient answers at EUO in order for the insurer to assess the entitlement to the benefit;
3. an insurer may not use section 33 to deny a claim after it has denied the benefit for a different reason;
4. there is no violation of section 33 if the insurer could have obtained records on its own or the insured acted reasonably;
5. only the documentation that is reasonably required by the insurer accountant is producible;
6. the failure to provide records as per Section 33 does not prevent an insured from pursing a LAT application.

Cary N. Schneider is a co-founder of Schneider Law Firm who specializes in civil litigation including personal injury litigation, real estate litigation, cyber / privacy breaches, and commercial litigation. He is providing advice to policy holders about potential COVID-19 business interruption claims. After working as a partner downtown Toronto on behalf of insurance companies for 19 years he now uses that inside knowledge to the benefit of his clients. He is proud to have received referrals from insurance defence lawyers and represents adjusters in their personal injury matters. If you or a loved one has suffered a personal injury contact Cary to let him assist them in their time of need.
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In the meantime, we're always looking for ways to expand the reach of the association, connect with people and create great experiences for our members. WP Radio has been something that over the past three years, has really evolved into something that is consistently seeing year-over-year growth and even the pandemic did not stifle that.

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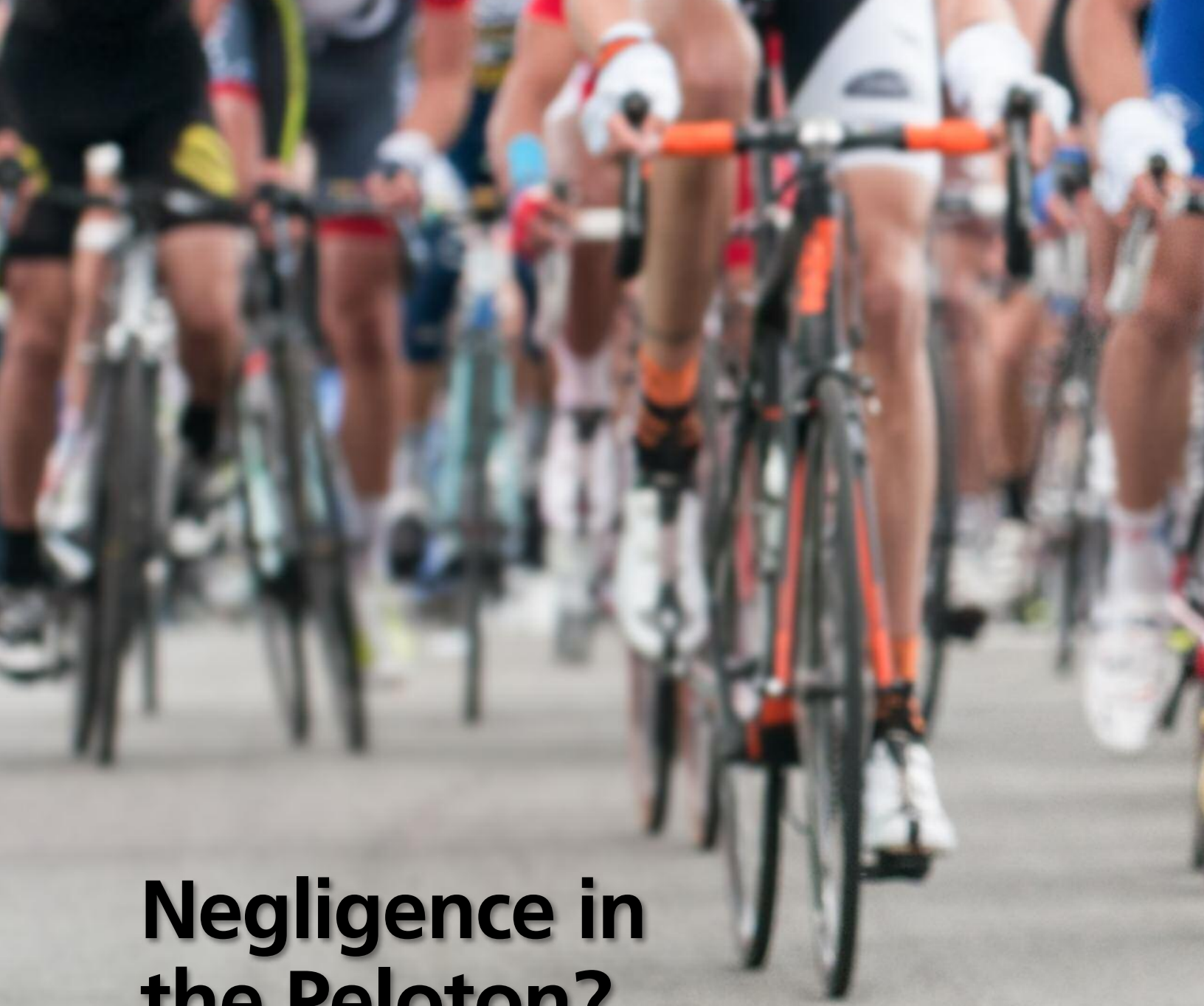
- The WP Radio Team



Negligence in the Peloton?

It has almost become a cliché to describe road cycling as the "new golf" but each year, it seems that the cycling calendar is filled with club rides, grand fondos, charity rides and other similar events that bring the cycling community together. And what better way to spend a Sunday than zooming through the countryside at 30km/h with a group of like-minded individuals?

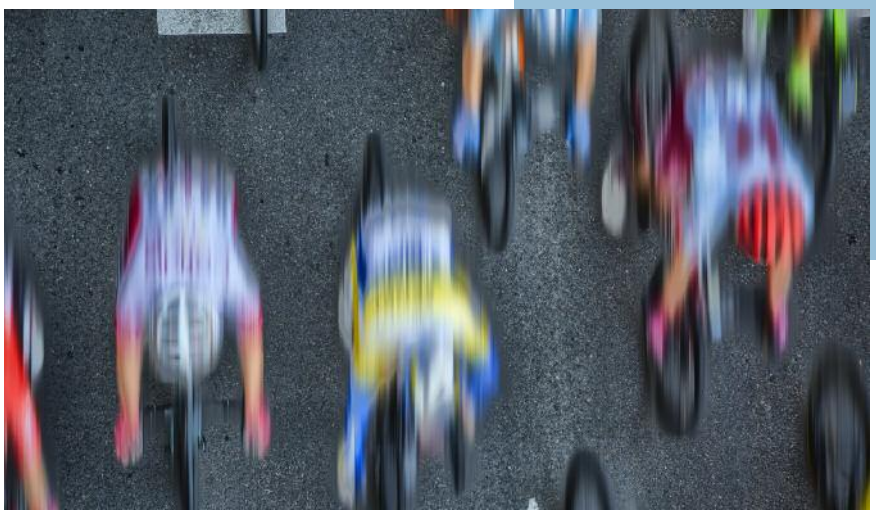
By Barry Cox, Boghosian + Allen

Negligence in the Peloton?

This is not to say, though, that participating in a large group ride is not without its dangers. Riders on a large group road ride tend to stick together in a pack, with the stronger riders at the front, sheltering those behind from the wind. The result is a large group of fast-moving cyclists in extremely close quarters to one another, which is known as a "peloton". On a large charity ride, such as the Ride to Conquer Cancer or the Ride for Heart, these cyclists' abilities will typically go right across the board from complete rookie to seasoned veteran. All it can take is one bad move from one cyclist in a group situation for a fun group ride to turn into a carnage-filled yard sale. What is surprising, given cycling's resurgence in popularity, is that there are not more personal injury lawsuits arising from accidents in cycling events.

Indeed, the only reported court decision in Ontario of which I am aware involving one rider suing another for injuries sustained on a charity ride is *Kempf v. Nguyen* [2013] OJ No. 1531 (Ont. S.C.J.), which arises from a crash at the 2008 Ride for Heart. As many of you will know, the Ride for Heart is a single-day charity ride that takes place in downtown Toronto each June, taking place on the Gardiner Expressway and Don Valley Parkway (which, of course, is closed while the event is taking place).

In this case, Mr. Kempf and Mr. Nguyen were described by the trial judge as experienced road cyclists, who had participated in "many group rides" in the past, and who were familiar with the etiquette of riding in a peloton. As it turns out, however, both of them had only been riding for a year at the time of this incident which in my view makes them relatively inexperienced cyclists. The "rules of etiquette" described by the trial judge include riding in a smooth and predictable manner, not braking suddenly, not overlapping wheels with the rider in front, and not swerving unexpectedly. A cyclist who does any one of these things puts the other riders around them at risk.



The incident in question happened when Mr. Kempf, who was riding a few bike lengths behind Mr. Nguyen, accelerated to move in to Mr. Nguyen's left so as to take advantage of the draft from a rider in front. As Mr. Kempf pulled up next to Mr. Nguyen, and at the precise moment his front wheel was overlapping Mr. Nguyen's back wheel, the riders in front of the two of them slowed down. As a result of the peloton slowing down, the rider in front of Mr. Nguyen braked and suddenly swerved right. To avoid colliding with this rider, Mr. Nguyen served left, which caused his front wheel to clip Mr. Kempf's front wheel, resulting in Mr. Kempf falling and sustaining serious injuries. Mr. Kempf sued Mr. Nguyen, alleging negligence on his part.

Mr. Kempf's position was that Mr. Nguyen had breached the rules of cycling by failing to hold his line, unexpectedly swerving left without first announcing or signalling his intent to do so, and as such was negligent. Both riders had signed a waiver before participating in the event and Mr. Nguyen took the position that he was entitled to rely on the waiver signed by Mr. Kempf to protect himself from liability. Mr. Kempf's position was that by signing this waiver (which was not a particularly clearly worded or exhaustive one), he agreed that he would abide by the rules of the road, that his bike was in good mechanical condition, and that he would not sue the Ride for Heart in the event of the accident, but his evidence was that he did not understand that by signing the waiver he was agreeing to forego suing another participant who was negligent. The waiver did not expressly mention claims against other ride participants.

Mr. Nguyen also took the position was that he had to react in a split second to an emergency situation, caused by a rider slowing and swerving in from of him, and that he did so reasonably under the circumstances. Moreover, Mr. Nguyen argued that participating in a group ride such as this one was an inherently risky activity and that the Plaintiff acknowledged this by signing the waiver before participating. It does not appear that it was seriously argued at trial that the Plaintiff was contributorily negligent or the author of his own misfortune by overlapping wheels with the Defendant [1].

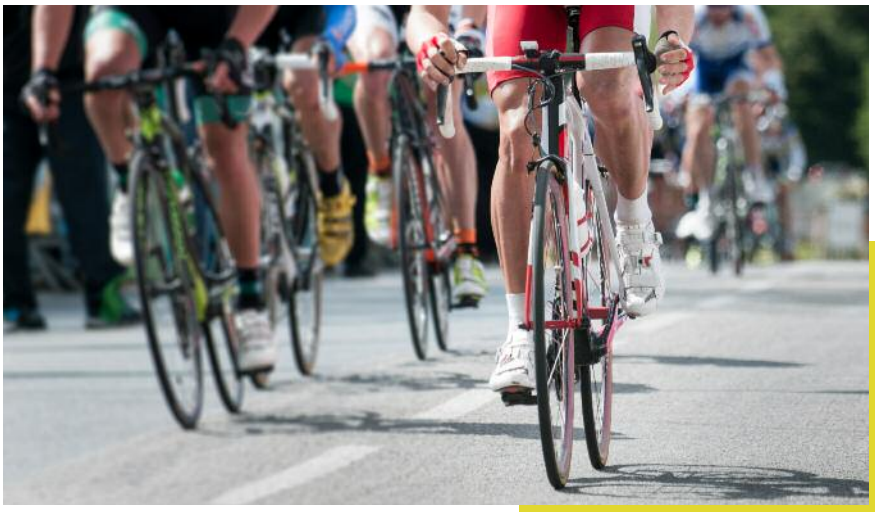
A number of other riders testified, and none of them saw a rider move unexpectedly to the right and slow down in front of the Mr. Nguyen. One rider gave evidence that just before the accident, Mr. Nguyen stood up on his pedals as if he was going to accelerate hard, and when he did so, his bike lurched to the left and hit Mr. Kempf's front wheel. The trial judge found as a fact that Mr. Nguyen moved unexpectedly left for no apparent reason, and did not accept Mr. Nguyen's evidence that he was reacting to another rider in front of him making an unexpected move.

She went on to conclude that notwithstanding the risks inherent in a group road ride, the riders in a peloton owe each other a duty of care, stating:

"there is an element of trust between cyclists who ride in a group because of the proximity to others and the fact that any sudden or

unexpected movement can have a disastrous effect on the safety of the other riders",

The trial judge then turned to the standard of care that is imposed upon participants in a group road ride, and concluded that participants on a group ride will not be found negligent for an accident on the ride if they behave in a manner consistent with the "reasonable" cyclist or if the injuries in question are the result of "a risk inherent in the sport in question". It was found that in this particular case, a reasonable cyclist would know to hold their line and to not make unexpected manoeuvres in the paceline without first giving prior warning. As such, the trial judge concluded that Mr. Nguyen fell below the applicable standard of care by swerving left unexpectedly, and as such was negligent. Again, curiously, no comment was made on Mr. Kempf essentially putting himself in harm's way by overlapping his front wheel with Mr. Nguyen's back wheel. It was also found that the waiver signed by Mr. Kempf did not apply because it did not specifically exclude the negligence of other participants [2]. It is noteworthy that the waiver used by the Ride for Heart was revised extensively following this incident such that negligence of other participants was expressly excluded.



This decision was overturned on appeal as a result of the judge dismissing the jury that was scheduled to hear this matter and hearing the case alone. It was concluded that a new trial should be ordered before a jury so that the issue of whether Mr. Kempf was partially responsible for this accident (i.e. by "half-wheeling" Mr. Nguyen) could be considered. However, the appeal did not concern itself with the trial judge's findings of fact, or her analysis of the duty or standard of care. This case settled before the second trial took place, so the trial judge's decision in this case represents the current state of the law in Ontario as it pertains to negligence in group cycling events.

So what are the takeaways here for people who might want to participate in a charity ride, who want to organize one, or most importantly, who are insuring one?

1. Participants should make sure that they abide by the "rules of the peloton": hold your line, don't half-wheel, don't brake or slow unexpectedly, call out pot-holes for the riders behind and don't make any unexpected moves. If you fail to do so and someone gets hurt as a result, you could be looking at civil liability;
2. If you are organizing a grando fondo, charity ride or similar cycling event, you would be wise to "recruit" some of the more experienced

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riders participating as ride marshals, whose job it is in part to educate the less experienced riders in the peloton about the do's and don'ts of group riding.

3. It might also make sense to have a link to a couple of articles about how to ride safely in a group on your event website, and to encourage newer riders to read same in advance;
4. A properly drafted waiver is a "must". As can be seen by the *Kempf v. Nguyen* case, the court will read a waiver very carefully and any ambiguity (such as in this case the failure to exclude volunteers) will likely be interpreted against the ride organizer.
5. If you are reading this as a ride organizer and are not sure about how strong your event waiver is, please feel free to get in touch with me. I am always happy to talk about cycling!

I hope that my comments on liability on group rides have been of interest. I'll see you out there on the road next spring. Just please hold your line.

[1] It is important to note that either one of the lawyers representing the parties at trial was a cyclist, nor was the trial judge. The lawyer representing Mr. Nguyen at appeal, however, is an extremely experienced cyclist himself….

[2] the trial judge found that the Ride for Heart waiver signed by Mr. Kempf was "poorly drafted and confusing"

Barry Cox is Counsel at the law firm of Boghosian + Allen LLP. He has been certified by the Law Society of Ontario as a Specialist in Civil Litigation since 2013. In addition to representing Boghosian + Allen's municipal clients, Barry has a diverse insurance defence practice encompassing personal injury, products liability and professional negligence matters.
Prior to joining Boghosian + Allen in February 2016, Barry practiced with another prominent Toronto litigation firm. Over his 20 year career as a lawyer, he has acted for architects, engineers, insurance brokers, property developers, commercial property owners, paramedics, transportation companies and nursing homes.
When not serving Boghosian + Allen's clients, Barry is a competitive cyclist, who has engaged in cross-country mountain biking at the provincial level (with varying degrees of success) for the past two decades. Barry earned a B.A. (Hons) in Political Science from Queen's University and graduated from the University of Western Ontario Faculty of Law in 1996.
By virtue of writing this article, Barry officially now knows what to deduct.

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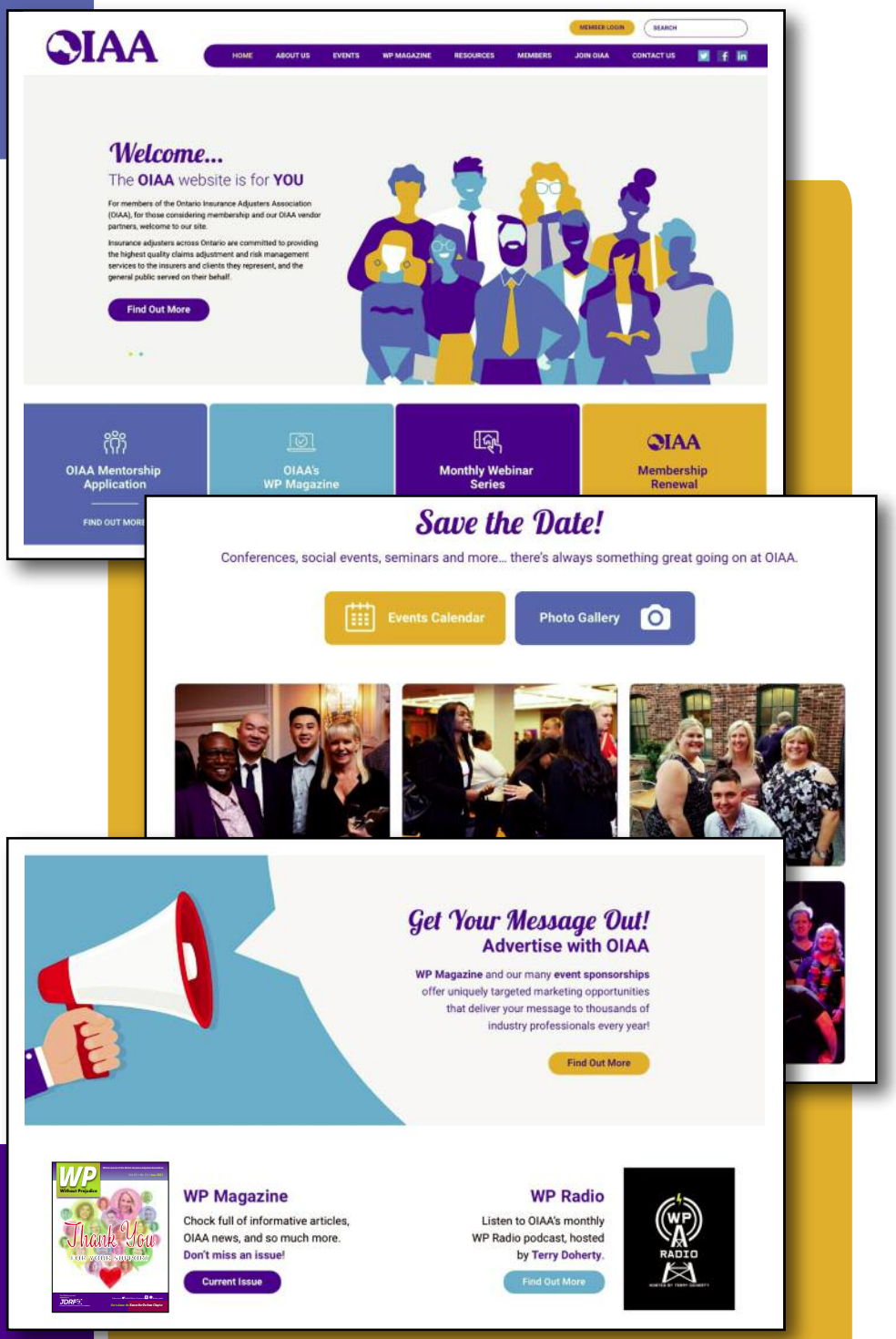


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OIAA Windsor Chapter

The pandemic, which began its recognized start in March 2020, has transformed life as we know it.

Our children have been in and out of school (mostly out) and the majority of us now work from home in varying capacities. The worst part for most of us is the uncertainty about whether life will return to normal anytime soon.

Some may ask, why put on events, seminars, webinars, online games, etc., at all? This is a valid question subject to many opinions. Thankfully, our small but mighty OIAA Windsor Chapter Executive of 5 have been on the same page in deciding what's possible, what will be successful in this current pandemic world and where to put our focus and efforts to try to stay relevant, connected and involved with our local insurance community.

I want to thank our amazing executive starting with our Provincial Delegate and Treasurer Tena Allen, Vice President Jennifer Olson, Secretary Melissa Robb and Director Chris Renaud. Although we had a scaled back 2019-2020 year and 2020-2021 year, our executive worked well together to overcome challenges and even successfully put on 2 Covid Golf Day events! Thank you to our 2021 Drivin' Fore Deb Golf Day Major Sponsors: R&S Renovations and Construction, Canada Construction, BioSweep, Bartlet & Richardes LLP, Alpine Construction, London Claims Association, Supreme Services / GUS and Paul Davis. Thank you to Rhu Sherrard, the 2021-2022 OIAA Provincial President, for coming down to Windsor for our event. She brought with her the amazing energy which no doubt lifted the spirits, even further, of everyone in attendance.

I expect our amazing executive to try to put on as many events as possible in the 2021-2022 OIAA season. No one knows what can be done before its done, but I know our team will put every effort possible into planning for the best and preparing for the unexpected.

The start of the 2021-2022 OIAA event year will be my 10th year with this amazing non-profit organization. We have been through many changes, challenges and good times together. I am very proud of our resolve, dedication and accomplishments both individually and as an executive. We are not just industry colleagues on a board, we are a family.

Greg Steed
OIAA Windsor Chapter Past President

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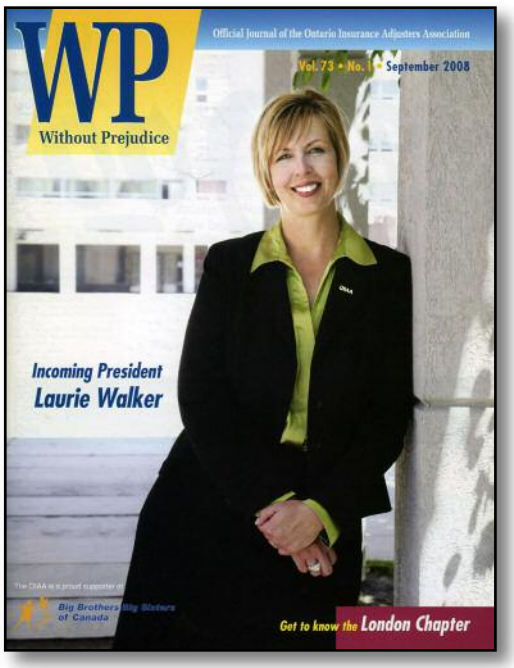

Laurie Walker, CIP, CRM

OIAA Past President 2008-2009

Since leaving the OIAA as President, I have been involved in a number of charitable adventures, but I have also left the Region of London and relocated closer to the GTA. Granite Claims Solutions, the third largest national independent adjusting firm and third-party administrator, gave me the opportunity of a lifetime to be the Executive Vice President of Client Services. But during my tenure there, I also starting my own firm – Laurie Walker Consulting & Auditing. My career was largely based on Ontario Statutory Accident Benefits. I seemed to be always delivering some form of training, engaged in speaking at various events and eventually auditing insurance company's claims work, London Market business and compliance audits. So, I started my little firm as a "side project".

Following the acquisition of Granite Claims by ClaimsPro, I joined the Senior Leadership of Cunningham Lindsey and Sedgwick Canada. After their merger, I left their executive and I grew my Auditing and Consulting firm into a larger scale operation where I now focus my efforts.

The OIAA executive process and efforts made me more aware than ever of the diversity and unity of a single group to come together with different opinions, different approaches and leave with a single goal. It helped shape my career and helped me understand this claims world. I met so many wonderful people!

Laurie Walker

From Around the World...

Olympics in Japan

The International Olympic Committee (IOC) took around 800 million USD in event-cancellation insurance, with additional cover purchased by the local organizing committee. Bloomberg Intelligence has previously suggested that the insured cost of cancellation would have ranged around 2 - 3 Billion USD.

Estimates from Fitch suggested that the total insurance cover for the Olympics was around $2.5 Billion of which, $1.4 Billion was by the International Olympic Committee and the Tokyo Organizing Committee, $800 million by broadcasters and $300 million by others such as individual teams, sponsors, and the hospitality industry.

Japan's decision to keep out spectators from the Tokyo Olympics is estimated to have costed the global reinsurance sector between $300 million and $400 million due to expense for tickets and hospitality refunds.

However, this would total only 10%–15% of what reinsurers would have encountered if the Olympics had been cancelled in its entirety. From these costs, reinsurers are expected to absorb the majority, given that high-severity exposures are typically heavily reinsured.

If the Olympics would have been cancelled, this would have been the largest ever insured losses from a single event cancellation, adding to pressure on reinsurance earnings from the pandemic and following several years of high natural catastrophe losses.

Source – Reinsurance News

Kudos to our Team Canada at the Olympics for securing 7 Gold, 6 Silver and 11 Bronze Medals!

Riots in South Africa

Property claims analysts are currently looking at an insurance industry loss of between US $600 million and $1 billion from the South Africa riots, albeit this depends on several variables.

Reports from state-owned insurer Sasria, which covers all political violence risks in the country, has suggested an industry-wide loss figure of roughly 12 billion rand which when converted is around $830 Million and may potentially escalate to around $1 billion.

Former President Jacob Zuma was jailed for contempt of court which is when conflicts began in South Africa on 8th July 2021 that triggered riots and looting within the former Presidents home province of KwaZulu-Natal. The crisis spilled over to other regions, including Johannesburg which prompted the government to deploy 25,000 troops.

Reports of damages to 161 malls and shopping centers, as well as the hundreds of millions in stolen goods reflect majority of the costs with fears of fuel and food shortages. News reports suggest at least 215 people died and more than 2,500 were arrested on charges including theft and vandalism.

Source – Reinsurance News

A fire engulfs Campsdrift Park, which houses Makro and China Mall, following protests that have widened into looting in Pietermaritzburg, South Africa July 13, 2021, in this screen grab taken from a video obtained from social media. Sibonelo Zungu | Reuters

Floods in Germany

The German insurance industry estimated that there will be up to $6.5 billion in claims from the storm Bernd that brought catastrophic flooding to parts of the country recently.

The flooding stretched from an area close to the western city of Cologne down to southern Bavaria with parts of Belgium, causing houses to collapse, stranding residents on rooftops and sweeping away and damaging around 40,000 cars. At least 180 people died.

This year is on course to be the most expensive year for insurers in Germany since 2002, when various storms caused 10.9 billion euros in claims as per reports.

Source – Reuters

Flooding in Altenahr, Rhineland-Palatinate, Germany

Smith Building and Developments v Wynward Insurance Group

A fire loss destroyed a commercial building in Estevan, Saskatchewan on April 13, 2016. It was an arson fire but neither the building owner nor tenants were implicated. Almost five years later this matter went to trial after the insurer had declined coverage for the loss on the allegation that there had been an undisclosed material change in risk.

By Glenn Gibson, ICD.D, CIP, FCLA, FCIAA, CFE, President & CEO, The GTG Group and Andrew Eckart, B.A., LL.B., Mediator and Lawyer, Eckart Mediation Incorporated

Smith Building and Developments v Wynward Insurance Group et al, 2021 SKQB 54

Court of Queen's Bench, Saskatchewan, Megaw J., Feb. 25, 2021

Background Facts

The building had been purchased by the insureds as a commercial rental property. The insured allowed their tenant to sublease part of the premises to various businesses including a motorcycle club and a tattoo parlor. The motorcycle club was known as the "Reaper's Riders" and then eventually changed its name to "Heretics MC".

The building's owners were aware of the existence of the motorcycle club and so was their insurance company. Mention is made of the insurer doing a site inspection at some point well prior to the fire. The insurer did not raise any concerns regarding the sublease to the local motorcycle club. Things took on a different light after the fire when an Internet search suggested that there was a connection between the Heretics and the notorious "Hells Angels MC".

Denial of Coverage

Five weeks after the fire the insurer denied coverage for this loss. This was primarily based on an Internet search conducted by a claim's adjuster on a site called, "Gangsters Out Blog". This site comments that it is, *"Your alternate news source: Connecting the dots between politics and organized crime."* The reference to the Heretics MC spoke to a specific member of this club as being, *"[h]igh up in the Heretics which is a Hells Angels puppet club in Saskatchewan"*.

Prior to, and at trial, the "*Gangsters Out Blog*" was the only report that suggested a connection between the clubs. This news story was the main document relied upon by the insurer to justify a denial of coverage. According to the insurer, the motorcycle club was an "outlaw" motorcycle club. Its status as an "outlaw" club was a material fact that the insured ought to have disclosed to the insurer.

Despite drawing this conclusion based solely on the "*Gangsters Out Blog*" report, the insurer did not initially produce the story to the insured when the claim was denied. It was only produced as part of an undertaking to "provide any documents that show any claims adjudication and relating to the investigation". No other reports were produced. The trial judge commented that:

> "[f]airness requires this information be available to be reviewed by the insured, and if possible, to be challenged as to its accuracy or veracity. This was not available here."

The judge went onto comment that the adjuster produced no notes

This news story was the main document relied upon by the insurer to justify a denial of coverage.

The officer did observe a few Hells Angels members at these events and that there was Hells Angels memorabilia being sold. It is unclear who was selling those items.

regarding other source documents that alluded to this relationship between motorcycle clubs. At trial, the judge commented that the adjuster had done:

> "[f]urther research on the internet which, according to his oral testimony at trial, provided a connection between the Heretics Motorcycle Club and the Hells Angels. He said he saw articles in various newspapers relating to this connection..... [h]e said his research also informed him of particulars of this connection including the Heretics Motorcycle Club being involved in the selling of drugs and large fights."

But, in cross-examination the adjuster could not produce any of these other articles.

In addition to the "alternative news" report, the insurer adduced evidence from a member of the local police department who was a member of their local drug intelligence unit. That officer was aware of three social events that the Heretics MC ran each year. This included attendance by "*[r]egular citizens*". The officer did observe a few Hells Angels members at these events and that there was Hells Angels memorabilia being sold. It is unclear who was selling those items. The judge concluded that:

> "The references by Cst. Shewchuk do not establish the connection sought by the defendant nor do they establish a material change in risk."

Taking all of the evidence, or lack thereof, into consideration, the trial judge found that:

In all of these circumstances, based on the totality of the evidence presented by the defendant, there is nothing sufficient to establish, on a balance of probabilities, there had been a material change in risk in this case. Again, it is worth emphasizing [the adjuster] readily recognized there was no suggestion by the insurer the presence of a motorcycle club was, in and of itself, a material change in risk. Rather, it was his suggestion, this particular motorcycle club with its alleged connections to the Hells Angels and its alleged history of crime or unsavoury character, evidenced a material change in risk. I determine the defendant has failed to establish this on a balance of probabilities.

Damages

As a preliminary matter, there was also a dispute about whether or not the policy of insurance was written on a Replacement Cost basis or Actual Cash Value. The insurance broker was originally named as a defendant but the plaintiff discontinued their action against them prior to the trial.

The judge analyzed the insurance history and he concluded that there was replacement cost coverage in place. The insured understood they were applying for Replacement Cost coverage but when the policy was issued it contained only Actual Cash Value coverage. This was not communicated to the insured in any standalone document but rather contained in the policy wording itself. Relying on provisions of *Saskatchewan's Insurance Act* which require the insurer to give written notice to the insured of the differences between the issued policy and the application, the trial judge

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found that the notice was not properly provided. Moreover, the underwriter admitted at trial that a renewal prior to the fire had included the language that, "*This file is subject to Replacement Cost Valuation.*" The underwriter conceded this was a "*[t]ypographical error*". This mistake carried no weight with the trial judge.

The insured had not rebuilt the building by the time of the loss. The insurer argued that this lack of mitigation entitled the insured to only the ACV of the building which was agreed upon pre-trial at $406,000. The judge felt that since no funds were paid to the insured it could not be held that the insured had forfeited their right to the replacement cost. The insurer's position was logically fallible – by denying the claim, an insured is prevented from accessing funds needed to rebuild the property. By failing to rebuild, the insurer then argues it can avoid paying the replacement cost. In the words of the trial judge, the "denial then becomes a self-fulfilling prophecy on the inability to rebuild. This is not the way insurance coverage is intended to be applied." Accordingly, the judge declined to find that the insured had forfeited its rights to replacement cost coverage. Accordingly, the judge found the plaintiff was entitled to replacement cost coverage to the policy limits of $640,000.

In addition, the judge went on to make appropriate allowances for rental income lost and debris and demolition sums that were incurred.

The remaining issue which the

The judge felt that since no funds were paid to the insured it could not be held that the insured had forfeited their right to the replacement cost.

trial judge carefully considered was whether the insured was entitled to punitive damages requested in the amount of $100,000.

The judge's written reasons include an excellent summary of insurance coverage denials in Canada attracting punitive damage awards. While the judge was critical of the quality of the investigation carried out by the insurer he did not feel this case warranted a punitive damage award. The insurer attempted to defend themselves by saying they had arrived at a reasonable decision to deny coverage. And they pointed out that they felt the insured had been "*[l]ess than cooperative in the claim investigation and was being less than honest in his denial of knowledge.*" These arguments did not seem to carry much weight with the trier of fact but he concluded:

> "However, these shortcomings do not allow the court to conclude the insurer's behaviour was such to offend a sense of decency. Ill-advised attacks, perhaps. But this aspect does not move beyond that."

The finding of the court was that the insured had no obligation to disclose to the insurer that an "outlaw" motorcycle club was subleasing the premises. This is because this was not a "fact" known only to the insured. That issue had been decided and as a result the plaintiff was entitled to the damages sought in the action. The court found that the insurer held an honest, though mistaken, belief that the nature of the motorcycle club was a basis for denial but that this denial was not malicious or oppressive and therefore did not warrant a finding of punitive damages.

Case Summary

The rules of evidence in civil trials impose a high threshold for admissibility for good reason – they do not accept rumor, innuendo, or speculation as a basis for justifying costly decisions like those that deny over $600,000 worth of insurance coverage following a loss. An allegation, any allegation, that an insurer relies upon to deny coverage will be heavily scrutinized by a court to determine whether or not that allegation is reasonable and rooted in fact. Media articles can assist a court in understanding the basis for the insurer's belief, but those articles must also be supported by proving that they are based on accurate reporting and not speculation. Having the author of an investigative piece testify could bring reputability to the allegation if their testimony is accepted after it has been challenged through cross-examination.

A denial or coverage is not a decision to be made lightly and anyone should be very careful about relying on news articles available online. Independent verification from even main stream and well reputed news sources ought to be done, and that suggestion goes doubly for any news source that is independently run.

Finally, it is worthwhile considering the availability of punitive damages in this case. It was clearly a mistake for the insurer to have denied coverage based on internet sleuthing and speculation, but that in itself does not rise to the high level of oppressive conduct required to make a finding of liability for punitive damages. That conduct must "offend the court's sense of decency" and is only available in exceptional cases. It is not conduct that is negligent, which is a better description of the conduct at issue in this case.

Cases get better or worse at trial. Evidence comes into the courtroom through the witness box. The quality of the investigation work you have done has to be able to stand up to intense cross-examination. It clearly didn't in this particular case.

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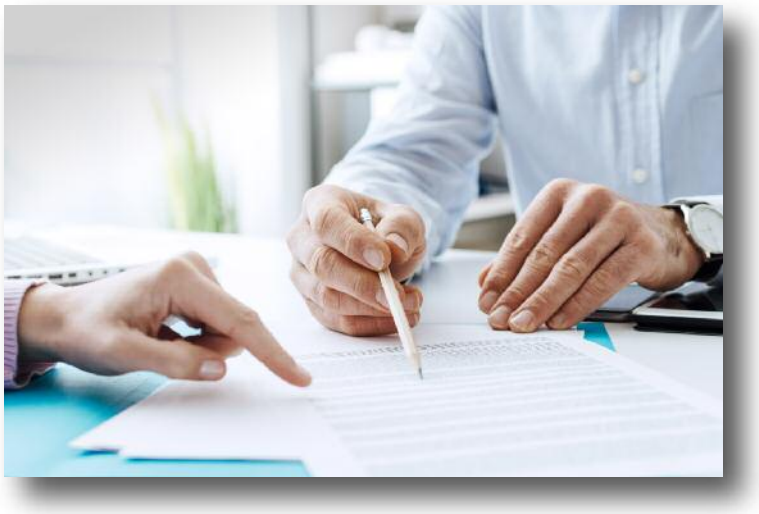
Business Interruption Claims - What business owners and insurance representatives should know?



An unfortunate reality for many businesses is that unforeseen incidents can have a significant adverse impact on their business operations[1]. Examples include fires, water damage, equipment failures, temporary or prolonged power outages, cyber-attacks leading to the loss of key data or ransom demands to release businesses data, and the breakdown of key machinery. These incidents can cause a business interruption ("BI") and give rise to a BI insurance claim.

By Kevin Thomas and Tony Militello, BDO Canada

Business Interruption Claims - What business owners and insurance representatives should know?

In this article, we will discuss the key concepts, common issues and misunderstandings that often arise with business owners, insurance adjusters and other stakeholders in the process of quantifying the BI claims. The views in this article provide insights on these matters from a perspective of professional accountants experienced in quantifying BI claims.

1. Does my policy cover the loss of revenues or the loss of profits/earnings of a business?

When a business has an interruption to its operations, a common misconception is that the business is insured for all of the revenues that it lost during the period of disruption. It is important to understand that this is not the case. The intended purpose of BI insurance is to put the insured in the same financial position as if the business did not experience the loss incident at all. Only considering the revenues and not the related costs would result in the insured doing better, financially speaking, than they would have without the loss incident. BI policies only cover the loss of profits/earnings of the business on the revenues that have been lost as a result of the interruption. For example, let's assume that a restaurant suffered a loss as a result of a fire and on average it earns revenues of approximately $1,000 per day and it was closed for 120 days as a result of the fire, yielding a total revenues loss of $120,000 ($1,000 x 120 days = $120,000). If we were to assume that the gross profit rate/earnings percentage of the restaurant is 25%, then the actual loss incurred is $30,000 ($120,000 x 25% = $30,000) and not the loss of revenues of $120,000. Thus, at the outset of preparing a BI claim, it is critical for those involved to understand that a business is insured only for the loss of profits/earnings that would have been received from the lost sales. This is the most common misconception when dealing with these types of losses we face at the outset of our involvement. By logical extension, it is also critical to have a clear understanding of the cost structure and behaviours of the business as the assessment of costs will have a direct impact on the calculation of the profit/earnings of the business. An experienced claims accountant can assist in developing and supporting a lost revenue and relevant cost analysis.

2. What is the indemnity period?

The indemnity period is the period that a business suffered a loss as a result of an interruption and for which BI coverage may be provided. Insurers will cover the BI loss for the period during which the incident negatively impacted the business, subject to the policy in force at the time of the loss. This period may be determined as either when the damages to the business premise/equipment are repaired, known as a gross *earnings* policy, or when revenues return to normal, known as the gross *profits* policy. BI policies usually have a stated maximum length of time—typically one year—for which a BI loss will be covered. For example, let's assume that a hair salon that has a gross *profits* policy, had a fire on January 1, 2020 and continues to experience a loss of revenues after December 31, 2020 (one year). The insurer will not insure any BI losses incurred by the hair salon subsequent to December 31, 2020, regardless if the BI loss continued after this date. The indemnity period would limit the coverage to the 12-month period subsequent to the incident. However, if the hair salon had a gross *earnings* policy and its premise had been repaired and it resumed operations three months after the incident, then the approximate indemnity period would be January to March 2020. The indemnity period ends upon the premises being repaired even if the revenues of the business have not returned to normal pre-loss revenue levels.

3. How to project revenues for the indemnity period?

The most difficult part of calculating a BI loss is to determine the revenues that a business would have earned if the loss incident had not occurred. This analysis can be very complex as many factors can affect these projections. Considerations include. but are not limited to, gains/losses of key customers, changes in services/products, the impact of changing technology, or increased competition. The projection of revenues that the business would have earned is usually based on historical revenues, such as the revenues for the same period of the year prior to the indemnity period. This assumes that the business has operated for quite some time prior to the BI loss and that the historical results provide a reasonable basis for projecting sales. If the

business is fairly new, or if its revenue history is volatile and otherwise unreliable, it may be necessary to consider broader data sources, including industry statistics, to establish revenue expectations had the loss not occurred.

It is important to focus not only on revenue history, but also on temporal trends when projecting the loss of revenues during the indemnity period. For example, let's assume that a business suffered a fire and it did not operate for several months after the fire. Prior to the fire, the business revenues had been growing at a rate of 10% each year for the three years leading up to the loss. This historical performance indicates a growth rate to apply to the projected revenues for the indemnity period. If the business earned revenues of $10,000 per month during the year prior to the loss, then the projected revenues for the months that the business closed may be estimated at $11,000, being $10,000 per month from the year before, multiplied by 110% to reflect expected growth. However, if the business' revenues had been declining 10% each year for the past three years prior to the loss, then the projected revenues for the months while the business was not operating will need to reflect the downward trend. Similarly, seasonality trends should also be considered when projecting revenues in the indemnity period. Such trends can often be observed from detailed analysis of historical sales data. The impact of seasonality is often overlooked and could have a material impact on the projection of revenues. One of the things to always consider when preparing projections is to determine whether the business has prepared, as normal course of operations, a forecast/budget for the loss period. If so, a loss accountant should understand and evaluate the business practice of preparing budgets and assess the historical quality of those budgets when compared to actual past experience.

These are simple illustrations of issues that can impact how to project revenues for a BI loss. However, BI losses can be quite complex as there are many factors that can impact the projections of revenues in the indemnity period.

4. What are non-continuing expenses?

Non-continuing expenses are expenses that a business incurred prior to the loss but have ceased or have been reduced, as a result of the loss. If a business was closed as a result of a fire and it could not oper-

ate for a substantial period of time, there could be non-continuing expenses. These include, but are not limited to: the hourly employees of the business who are furloughed (assuming ordinary payroll is not insured); a portion of the utilities expenses related to active operations of the business; and perhaps rent as the insured business may have a rent abatement clause in their rent/lease agreement with the landlord. Although a business may be closed for repairs, some of its expenses would still continue to be incurred such as business insurance, telephone, wages and salaries of permanent staff and key employees, office, and interest, just to name a few. Those expenses would be considered continuing expenses or "standing charges". In order to identify these amounts, a thorough analysis of the business expenses incurred prior to and subsequent to the loss incident should be conducted. This analysis requires a clear understanding of the nature of each business and the behaviour of its expenses. An experienced claims accountant will have insight in preparing this analysis.

5. What is ordinary payroll?

Most businesses incur payroll expenses and in the case of BI claims, these payroll expenses are categorized in two ways: expenses related to key employees, such as the owners of a business and high-level managers; and those related to ordinary payroll, which includes hourly/salaried employees who may otherwise be furloughed if the business experiences a lengthy interruption. For example, if a business experienced a machinery breakdown at a manufacturing plant, the salaries and wages to the assembly line workers may not be insured during the indemnity period. In such a case, these costs would only be insured if the owner of the business purchased a specific payroll endorsement for ordinary payroll. However, the key employees of the business, such as the owners or a Production Plant Manager who oversees the entire operations of a manufacturing facility and whose salaries would continue to be incurred, are insured under a BI policy through an indemnity period.

Some BI insurance policies have an endorsement clause that covers ordinary payroll, meaning that the insurer will cover the entire payroll of a business for a certain number of days. This is typically for 30 to 90 days following an interruption event. Although it may seem straight-forward as to who is and is not a key employee, each business is different and, therefore, each business would have different employees who would be considered ordinary and key to its operations. Some of the considerations in determining key vs ordinary employee may involve, scarcity of the skillset they possess, how easily can be replaced which may be dictated not only by the skills but location of the business, i.e. remote loca-

Some BI insurance policies have an endorsement clause that covers ordinary payroll, meaning that the insurer will cover the entire payroll of a business for a certain number of days.

tion vs operating in a metropolis. To ensure that a claim is accounted for appropriately, it is important to thoroughly assess the unique circumstances of each business in order to identify key and non-key employees.

6. What are increased costs of working?

A business that suffers a BI loss may also incur increased "costs of working". These types of expenses are considered additional expenses that are reasonable, necessary and are incurred by a business to mitigate the loss of revenues and assist with maintaining normal operations after the loss occurred. The total increased costs of working can be claimed if it can be tied to a mitigating activity that ultimate reduces the BI loss. In other words, but for incurring those costs the BI loss could have been higher. Examples of these types of expenses can include, but are not limited to, additional overtime wages incurred, the rental of a temporary premise or equipment, subcontracting to other businesses and hiring casual labour.

7. What is co-insurance?

Co-insurance is a clause that requires a business to carry insurance that is equal to the value of the property being insured, or at least equal to a specified percentage of the value of the property.

The purpose of co-insurance clauses is to discourage businesses from under-insuring their operations and to encourage all stakeholders to ensure that the business has an insurance policy that is adequate for its operations. This clause can be seen as punitive wherein if the business is found to be under insured, the coverage that would otherwise be available to the business is reduced proportionately by the level of risk not insured by the policy in place. For example, if a business purchases insurance coverage of $200,000; however, it is found to actually require $400,000 in insurance coverage, then the insurer would only be responsible for fifty percent of the loss of gross profits/gross earnings. In other words, by purchasing the policy for 50% of its potential exposure, the business agreed to share the risk (and self-insure) for portion of the losses, i.e $200,000 or 50% in this case. This clause has significant impact on the recoverability of a business interruption loss by a business owner and is often unknown/misunderstood by the business. We

strongly recommend that business owners work closely with their insurance brokers and an experienced claims accountant to review coverage levels annually ensure that their business has sufficient insurance coverage when an unforeseen incident could occur.

8. What are extra expenses?

When a BI occurs, a business may incur expenses that it typically would not but for the loss incident. Extra expenses coverage separately covers businesses, in addition the BI coverage, for expenses that a business incurs during the indemnity period that are over and above normal operating expenses. The coverage is generally limited to a set dollar amount and may set out in the policy the type of expenses covered. Contrary to the requirement for increased cost of working under BI coverage, costs under the extra expense coverage are not tied to or limited to loss mitigated. Extra expenses may include expenses that are one-off expenses or a higher than normal level of a regular expense that a business would incur but for the loss incident. An experienced claims accountant can assist in identifying and assessing the extra expenses that may be claimed and which are insurable.

This article has briefly discussed the key concepts that we deal with on a daily basis when we, as claims accountants, are retained to calculate BI losses experienced by various types of businesses. It is important to keep in mind that the concepts are the same across similar BI policies but the businesses are not. Hence, careful consideration of unique circumstances is critical in preparing a BI claim. If you would like to discuss any of these concepts in more detail, please reach out to our experienced team of claim accountants. We would be pleased to hear from you!

[1] In this article, the term "business" refers to both profit and non-profit organizations as the BI issues raised herein apply to both.

Kevin Thomas has nearly a decade of experience providing professional accounting services with a focus on forensic and investigative accounting. Kevin has extensive experience in managing complex investigations in insurance and litigation matters relating to commercial insurance claims such as business interruption, inventory losses, extra expense, downtime claims, and accident benefits. Kevin can be contacted at 905-615-5890 or kethomas@bdo.ca.

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Final Report

Tena Allen, Windsor Chapter Delegate

Do we? Don't we? Should we? Shouldn't we? Will everyone be safe? What protocols will be in place?

…well, okay, let's take a vote…5 out of 5… In Favour!

So, the Windsor Chapter decided to have a little faith and take a chance on having our 8th annual Drivin' Fore Deb Golf Day, in Memory of Debbie Tremblay. This would be our second golf event during COVID.

It's well and good to make a decision but, would people be receptive and what would the new protocols be? Would the event be successful enough to provide some funds to a local charity? We picked a date, July 22, 2021, I said a sincere prayer to God, an impassioned request to Mother Nature and a plea to the Weather Gods for a good day, and we started planning. Hand-sanitizers and masks at the ready. We prepared individual golfer packages. There would be individually-served food. There would be no speeches by board members…probably a good thing. Prizes would have to be announced via a live-stream on Facebook after the event, out of our secretary's garage…maybe not the classiest décor but, it is bigger than my dinette. The support from our local industry-partners, broker friends and reliable adjusters came flooding in. We took it as a good sign that people felt comfortable enough to travel from out of town to attend, including our new OIAA President, Rhu Sherrard.

We could not have had a better day. The event went off without a hitch: great weather, happy people, the greens were in good condition, some fun and games, lots of tasty food (including snow cones) and human/in-person/face-to-face conversations. It was great to see distance hugging and some high-fives. We were once again able to connect with Debbie's family: catch-up and reminisce. Through the generosity of those who attended we will be making a donation to Maryvale*, a local charity doing much-needed work in our community, in excess of $2,000.

The Windsor Chapter Executive: Greg, Melissa, Jennifer, Chris and myself, want to thank all those who helped make this such a successful event, including: the Tremblay and Dupuis families, Ambassador Golf Club, our volunteers, our Major Sponsors, our Hole Sponsors, our photographer, those companies and individuals who donated raffle prizes and of course, our golfers. We hope you enjoyed the day and we look forward to another great event in July 2022.

Please take a look at some of the photos from our day on page 34 and 35.

*Maryvale is a Children's Mental Health Treatment Centre where children and teens experiencing serious emotional and psychological distress can receive therapy and assistance from a team of experts. Its mission is to improve the quality of life for youth and their families experiencing mental health distress in Windsor/Essex, Chatham/Kent.
To learn more about Maryvale visit: https://www.maryvale.ca/.

Tena Allen is Windsor Chapter's Golf Co-Convenor and Treasurer

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- As a social member and advertiser in the ***WP*** magazine September 2021 – June 2022 year, we will be pleased to offer you a free resource link on our website - www.oiaa.com
- The cost to advertise in ***WP*** magazine to reach a large group of potential clients is extremely reasonable - see below.

Please give consideration to advertising in ***WP*** and contact me if you have a question or visit our website at **www.oiaa.com**.

I look forward to hearing from you.

Tena Allen, ***WP*** Advertising Manager
Phone: 866-688-3888 ext. 6324680 E-mail: **wp@oiaa.com**

Great rates!
15%-20% off all rates for Social Members

Social Member is a current member (with no outstanding membership dues) of either the Provincial Chapter (including Toronto) or the local chapters (Georgian Bay, Hamilton, Kawartha-Durham, Kitchener-Waterloo, London, Niagara, Northern, Ottawa, Thousand Islands, Thunder Bay, and Windsor).
In order for a business to qualify for the discounts outlined below, at least 5 employees of the business must be social members or if the business has less than 5 employees, all the employees must be social members.

WP ADVERTISING RATES

Prices are for space only – Sept. 2021 to June 2022

Size	Single Issue	Five Issues	Ten Issues	Member/Social Member Pricing		
				Single Issue 15% discount	5 Issues 20% discount	10 Issues 20% discount
Full Page	$855	$810 per issue	$783 per issue	$726	$648 per issue	$626 per issue
2/3 Page	$720	$679 per issue	$648 per issue	$612	$543 per issue	$518 per issue
1/2 Page	$598	$567 per issue	$540 per issue	$508	$453 per issue	$432 per issue
1/3 Page	$504	$477 per issue	$454 per issue	$428	$381 per issue	$363 per issue
1/4 Page	$405	$382 per issue	$360 per issue	$344	$306 per issue	$288 per issue
1/6 Page	$301	$283 per issue	$270 per issue	$256	$226 per issue	$216 per issue

Ads must be submitted in Press Quality High-Resolution PDF or JPEG formats. The resolution of all images should be at least 300 dpi.
For details on publishing schedule and dimensions of ads please go to www.oiaa.com

WP radio ads are available, Please contact Terry Doherty at: wpdigital@oiaa.com