IAA

Kitchener-Waterloo

# JANUARY 2016

# PRESIDENT'S MESSAGE

# JANUARY 2016

Our President, Jennifer Brown, is taking some time off from her duties to have a baby and we wish her the best of luck.

I hope all of our members had a good Christmas Holiday Season and a Happy New Year!

The first meeting of the year is The Round Table Property Discussion on the current status of Property Claims. This will be a very educational meeting, sharing the thoughts of the Panel below.

The panel includes:
**Sean Purcell** -- Claims Manager, Curo Claims Services
**Shawn Little** -- Assistant Property Line Manager, Economical Insurance
**Paul Byrne** -- Property Team Leader, Heartland Farm Mutual (North Waterloo Farmers Mutual)
**Gary Washuta** -- Senior Front Line Manager Ontario Property Claims, Aviva Insurance
**Colin Bailey** – Claims Manager, Wawanesa
**Moderators** – Mark Potts – Claimspro, Laura Potts -- Aviva Insurance

I would like to thank all the members of the panel for participating in The Round Table Discussion.

See you at the meeting.

If you have any questions please contact, Vice President Ryan Potts.
Phone: 519-501-2478
Email: ryan.potts@scm.ca

**Ryan Potts**
ClaimsPro
K-W OIAA Vice President

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**If you have any questions, concerns or comments, please do not hesitate to contact any of the above committee members.**

# IN THIS ISSUE…



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# SCHEDULE OF K-W CHAPTER EVENTS FOR 2015-2016

**January 28, 2016 –** Property Round table discussion- Laura Potts & Mark Potts

**February 25, 2016 –** Accident Benefits Dispute Provisions- Monika Bolejszo , Carrie Keogh & Gillian Reain

**March 31, 2016 –** Desktop Investigation Strategies- Stephen Tucker & Stephanie Storer

**April 1st, 2015 -** Annual Curling Bonspiel with the Insurance Institute and Insurance Brokers Association.

**April 28, 2016 -** Election & Fun Night: Monika Bolejszo & Cyndy Craig

**May 26, 2016 –** Accident Benefits/Bodily Injury Accounting Topic: Carrie Keogh & Gillian Reain.

**June 23, 2016 -** Golf Tournament- Ariss Valley Golf & Country Club: Jen Brown & Ryan Potts

All events occur at Golfs Steakhouse: 598 Lancaster St W, Kitchener, ON N2K 1M3, unless otherwise noted.

**Please note that topics are subject to change**

## Articles

Do you have an article that you would like to submit to the bulletin? We are always looking for interesting articles relating to insurance that will help educate adjusters and vendors!!

Please submit your articles to Manish Patel at mpatel@larrek.com

Are you hosting an event that you would like photos to be included in the bulletin? Please submit them to Manish Patel.

# SOCIAL CHIT CHAT

## January 2016


Happy New Year!!!

As we ring in the New Year in celebration, it is heart-warming to know that the less fortunate out there have not been forgotten.

Many families in Canada and worldwide do not have a lot to celebrate this season and, due to ISIS/ISIL, the situation is worse than ever. Despite this unhappy fact, it is comforting to know that our industry has stepped up once again to help families lighten the burden.

According to the Canadian Underwriter's *Daily News* on Dec 17th, both Co-operator's Insurance ($250,000) and Intact Insurance ($75,000) have made corporate donations towards the Syrian Refugee job placement effort in Canada as we welcome 15,000 new refugees into the country by Feb this year.

According to the article, ***Intact donating $75,000 to help Syrian refugees get jobs in Canada***, "Intact [has also] donated $100,000 to UNICEF Canada to help Syrian refugee youth". The article also indicates that Co-operators "has committed $250,000 towards a special one-time grant program that [will] support organizations' initiatives aimed at preparing refugees for employability in Canada" and "Co-operators employees are eligible to use two paid days a year to volunteer towards such efforts".

According to the United Nations Refugee Agency (UNHCR.ca), an estimated "10 percent of the 4.1 million registered refugees in countries neighbouring Syria are vulnerable and are in need of resettlement or humanitarian admission to a third country".

As Canadians we are known worldwide for our open arms, sensitivity, and compassion toward the distress of others. As a country, we already lead by example. In our industry, we are doing our part. As a community, at work and at home, let's continue to do our part to live up to our Canadian reputation and be mindful of those less fortunate.

Our thoughts are with the many families facing distress and displacement due to ISIS/ISIL attacks and especially with those who have suffered violence, exploitation, severe loss, and terror this past year. We look forward to a more peaceful, more humane 2016.

Stephanie Storer
OIAA Social Director 2014-2015
National Account Manager, XPERA Risk Mitigation and Investigations

# TORONTO DELEGATE REPORT

The 2015 OIAA Holiday Party took place on December 9th at the CN Tower in Toronto. It was a clear evening and it truly was "a night amongst the stars". The venue created a very fluid environment that kept people moving around the tower between the excellent food stations. Congratulations to Michael Hoffman and Johanna Rienzo for organizing this incredible event. It was a fantastic way to put an exclamation mark on the 2015 OIAA calendar.

The first major OIAA event of 2016 is the Claims Conference which takes place at the Metro Toronto Convention Centre on Wednesday February 3rd. The event is a full day of educational seminars, networking, luncheon with keynote speaker General Rick Hillier and trade show with over 150 exhibitors from across Canada. Registration to this event is free for claims professionals I encourage you to register if you have not already done so.

Once again I am coordinating the OIAA Curling Bonspiel taking place in Richmond Hill on Tuesday March 8th. Registration is open on our website until February 23rd and I would love to see a few teams registered from the Kitchener-Waterloo chapter.

As always details and registration are available at www.oiaa.com and you can stay tuned to OIAA events by following @PresidentOIAA on twitter or on Facebook.

**Regards,**
**Stephen Tucker**
**Kitchener Waterloo OIAA Chapter, Toronto Delegate**

# INTEGRITY


Lee Samis


Greg Heckel


Gerry George


Kevin Mitchell


Neil Colville-Reeves


Mauro D'Agostino


Louise Kanary


Daniel Strigberger


Lisa Armstrong


Krista Groen


Kathleen O'Hara


Michal Baura


Tim Gillibrand


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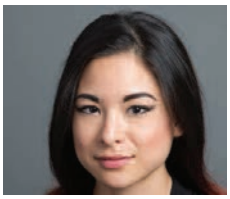
Shalini Thomas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## 2015: The Year Before 2016

**Daniel Strigberger | 519.279.6864 |dstrigberger@samislaw.com**

As we look forward to a new year of insurance law excitement, let us reflect on some of the interesting cases and legal developments that impacted Ontario's auto insurance industry in 2015.

**Statutory Accident Benefits**

In January 2015, Toronto personal injury lawyer Joseph Campisi launched a "charter challenge" application against Bill 15, which eliminates a claimant's ability to sue its insurer in court over an accident benefit dispute. Among other things, the application asserts that Bill 15 violates a claimant's constitutional right to have access to the courts. We expect the hearing will take place in June 2016.

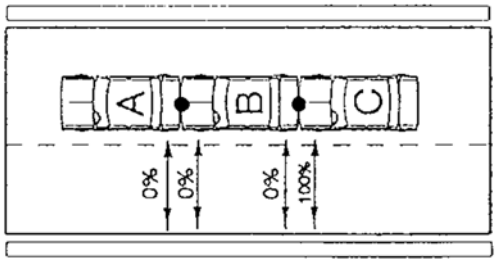
On August 26, 2015, the Ontario Legislature filed Bill 251/15, which amends the *Statutory Accident Benefits Schedule* in a number of remarkable ways. For the most part, the amendments apply only to policies issued or renewed on or after June 1, 2016. Existing contracts will remain subject to the current limits until the contract is terminated or renewed.

The most notable changes redefine "catastrophic impairment". Among other changes, the non-CAT medical/rehabilitation benefits are capped at five years. The six-month waiting period for the non-earner benefit is replaced by a four-week waiting period, but the benefit is no longer payable after two-years and anyone under 18 is not entitled to receive the benefit.

Some cases of interest from 2015 include *Shawnoo v. Certas Direct* ("virtual" attendant care is OK), *Davis v. Wawanesa* (February 2014 attendant care benefits changes are not retroactive), and *Waldock v. State Farm* (Arbitrator issues huge special award, interest, and legal costs against insurer who didn't call any witnesses at CAT determination hearing).

**Priority and Loss Transfer**

The Court of Appeal for Ontario was busy in 2015 hearing loss transfer disputes. In October 2015, the Court held in *State Farm v. Old Republic* that Rule 9 of the Fault Determination Rules does not allow the insurer of vehicle A to recover loss transfer from the insurer of vehicle C in this scenario:



In November, the Court released its much-anticipated decision in *Intact v. Lombard* / *Zurich v. TD* holding the equitable doctrine of laches (sitting on your legal rights) does not apply to loss transfer disputes. This means that a first party insurer can wait several years before demanding loss transfer reimbursement from a second party. As of writing, Zurich and Lombard are seeking leave to appeal this decision to the Supreme Court of Canada.

On Christmas Eve, the Court of Appeal released an interesting decision interpreting what "ordinary rules of law" means in a loss transfer dispute. In *State Farm v. Aviva*, the Court held that the loss transfer scheme and section 3 of the *Fault Determination Rules* require the arbitrator to avoid applying the ordinary rules of "tort" law to determine fault. Rule 5(1) calls for an analysis that is distinct from the approach required in a pure tort analysis.

The Supreme Court of Canada released a rare decision in a priority dispute between two insurance companies. In April, the highest court in the land reversed the Court of Appeal in a nexus case. The decision affirms that, except in the most extreme circumstances, any insurer in Ontario that writes auto insurance policies must respond to a received application for accident benefits.

**Tort**

The hottest tort topic of 2015 was interest. On January 1, 2015, the *Insurance Act* was amended by eliminating the 5% interest rate under Rule 53.10 to amounts awarded for non-pecuniary damages for bodily injury or death caused by motor vehicle accidents. Rather, prejudgment interest for such amounts would be calculated the "usual" way pursuant to s. 127(1) of the *Courts of Justice Act*, i.e., the (much lower) bank rate. That change generated four Superior Court decisions on whether the change applied retroactively. Three of the four decisions held that the changes affected a substantive right to interest, meaning the changes were not retroactive. One decision held that the changes were procedural and, therefore, were retroactive. The appeal in one case will be heard in 2016.

Similar debates emerged after the statutory tort deductible increased from $30,000 to $36,540.00 from August 1, 2015 until December 31, 2015. The issue was whether those changes were procedural (retroactive) or substantive (not retroactive). In December, a Superior Court judge held in *Vickers v. Palacious* that the deductible changes were substantive and, accordingly, not retroactive.

**What Will We See in 2016?**

The most anticipated change in 2016 will be to the dispute resolution process for accident benefits. As of April 1, 2016, all disputes will be handled by the Licence Appeal Tribunal, which currently has a mandate to hear appeals arising from disputes involving, among other things, gambling and liquor licenses. We will wait and see how LAT arbitrators interpret new CAT definition texts like "Structured Interviews for the Glasgow Outcome Scale and the Extended Glasgow Outcome Scale: Guidelines for Their Use, Journal of Neurotrauma, Volume 15".

Daniel Strigberger is a lawyer at Samis+Company's Waterloo Office.
www.samislaw.com | @samislaw | #OntInsLaw
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# MEET YOUR EXECUTIVE:

# GILLIAN REAIN

This is Gillian's second term serving as Director of the K-W OIAA.

Gillian graduated with Honours from the University of Guelph, with a Major in Psychology and Minor in Sociology. She joined Economical Insurance in 2006 and moved to the Accident Benefit Claims department in 2010. She has most recently worked as a Senior AB adjuster, but is excited to begin her new role as a Team Leader in the Accident Benefits department this month.

As with most of our executive, Gillian shares a love of traveling - with Disney World being a favourite destination. Animals are also a soft spot for Gillian, and she has been a volunteer with the Kitchener-Waterloo Humane Society for the past 9 years (which is also where she adopted her cats, Abbey and Sprinkles). Gillian also occupies her time with amusement parks, movies, concerts and winning contests.

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**To Investigate Or Not To Investigate?**
**The Duty Of Good Faith And Third Party Claim Investigations**

Does a liability insurer have an obligation to investigate a claim made against its insured before a Statement of Claim is served upon the insured?

You may ask yourself why an insurer would ever refuse to investigate a claim? Where there is only one liability insurer involved, the insurer would rarely if ever refuse to investigate a claim that appeared to fall within coverage. The prejudice to the insurer resulting from the loss of important evidence would usually outweigh any cost savings from foregoing an investigation. However, we often see insurers refuse to investigate claims against our clients where our clients have been added as additional insureds onto other parties' liability policies. Presumably the insurers for the named insureds are relying on our clients' own liability insurers to perform a diligent investigation into any claim.

On the one hand, the wording of a standard CGL policy gives a clear if simplistic answer to the question: An insurer's power to investigate is discretionary. Typically, the language in the insuring agreement of a liability policy says "we may investigate and settle any claim or "action" at our discretion".

On the other hand, an insurer's duty of good faith requires it to exercise its powers having regard to the legitimate interests of the insured. Certainly, it is in the interest of the insured that the insurer conducts a prompt investigation into any claim against the insured. If the insurer is exercising its powers having regard to the interests of the insured, then you would think the duty of good faith would compel the insurer to conduct an investigation upon receiving notice of any claim.

Maybe not. There is no Canadian authority on point, but one American case suggests that the duty of good faith does not require an insurer to investigate a claim before a lawsuit is started.

*Capstone Building Corporation et al. v. American Motorist Insurance Company,* 308 Conn. 760, is a 2013 decision of the Supreme Court of Connecticut. Capstone entered into a contract with the University of Connecticut to act as a general contractor for the construction of a student housing project. Capstone received notice of a claim from the University of Connecticut three years after it finished the project. The claim alleged that Capstone had improperly installed water heaters

resulting in elevated levels of carbon monoxide in the building. The CGL insurer for Capstone denied coverage on the basis of an exclusion in the policy. Capstone settled the claim against it and then sued its insurer for indemnity, breach of contract, and for bad faith in failing to carry out an investigation. The Connecticut Supreme Court was asked to determine whether the insurer's refusal to investigate the claim could give rise to a cause of action for bad faith. The Court ultimately decided that an insured does not have a cause of action solely on the basis of an insurer's failure to investigate a claim.

Therefore, the *Capstone Building* case suggests that a stand-alone claim against an insurer for failing to investigate a claim would not succeed in the United States. Although the *Capstone Building* case is not a binding precedent here, the duty of good faith tends to be applied more robustly in the U.S. than in Canada. If notice of a claim does not trigger a duty of defend in the U.S., then it is unlikely that notice of a claim triggers a duty to investigate in Canada before a Statement of Claim is served upon the insured.

This should be of particular interest to those of you who have responsibility for risk management. If your clients want to divest themselves of the responsibility for investigating claims against them, then you should consider amending the Insurance and Indemnity Clauses in your clients' contracts to impose an express obligation upon the other parties to the contracts to investigate any claim made against your clients upon receipt of notice of a potential claim.

*This article was written by Ted Dreyer of Madorin, Snyder LLP in Kitchener. The assistance of Erin Kadwell, student-at-law, is gratefully acknowledged. The information contained in this article is provided for general information purposes only and does not constitute legal or other professional advice. Readers are advised to seek specific legal advice in relation to any decision or course of action contemplated.*


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# Intentional Act Exclusions in Arson Cases

**Authored by:**

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I recently had occasion to conduct some research in relation to a suspicious fire, potentially set by a person who was clearly an unnamed insured under a homeowner's policy at the time of the fire. The leading case in this area is still the Supreme Court of Canada's decision in *Scott v. Wawanesa Mutual Insurance Company* [1989] 1 SCR 1445. In that case, the plaintiff husband and wife were named insureds under a homeowner's policy and sought indemnification for a loss suffered when their home was damaged by a fire, which was clearly deliberately set by their 15-year-old son, who lived in the home. The plaintiffs had no knowledge of their son's actions and were not implicated in any way. The policy excluded loss or damage caused by the criminal or willful act "of the insured or of any person whose property is insured hereunder". The definition of "insured" included the relatives of the named insured and any other person under the age of 21 in their care.

At trial, the Court held that the plaintiffs' loss was not excluded. The insurer appealed to the Court of Appeal and this was allowed. The plaintiffs' appeal to the Supreme Court of Canada was dismissed. It was held that when the wording of a contract is unambiguous, the Court should not give it a meaning different than its clear terms, unless the contract is unreasonable or has an effect contrary to the intentions of the parties. In this case, both the exclusion clause and the definition of "insured" were clear and unambiguous, and the risk, which caused the loss, was specifically excluded under the policy. The plaintiffs' son was clearly a resident of the household and was both a relative of the named insureds and a person under the age of 21 within the care of the insureds.

The issue which I will discuss is that of mental capacity in these types of scenarios. This is an issue which may become more and more prevalent with the aging population.

In the case of *Darch v. Farmers' Mutual Insurance*, 2012 ONSC 3696, Donald Darch set his parents' home on fire, resulting in the total destruction of the premises. He was charged with arson and two weapons offences, but was found "not criminally responsible" for the offences in the criminal proceedings.

The home was insured under a homeowner's policy of insurance. The issue was whether the exclusionary provisions in the insurance policy applied so that the insurance company would not be liable to compensate the insured parents for their loss.

The Court had no difficulty in deciding that Donald was an "insured" as defined in the policy. He had been living with his parents for 30 years after having suffered a brain injury in an MVA in 1978. The policy, in *Darch*, excluded coverage for loss or damage "caused by or resulting from wrongful conversion, intentional, willful, criminal acts, infidelity, or any other dishonest act or omission by an insured". Justice Lack held that the terms were used disjunctively, meaning that the exclusion applied to any intentional, willful or criminal act. He held that "each is an act that is excluded. The interpretation makes sense in the context in which the words appear. Moreover, it is an interpretation which does not render the terms of the insurance contract meaningless."

As to whether this might be found to be, separately, an "intentional act", Justice Lack held that the test was "whether Donald appreciated the nature and consequences of his act, in the sense that he knew the physical aspects of what he was doing and knew what would follow from them". In this regard, Justice Lack held that "in the circumstances, Donald Darch knew that what he was doing was setting a fire and he knew that the consequences would be that the house would burn down. On all the evidence, the conclusion is inescapable, and I find, that the fire was caused by the intentional act of Donald Darch." In spite of his mental shortcomings, Donald had set out on an elaborate plan to set this fire as he admitted that he wanted "to burn her good".

I have the feeling that if Justice Lack had heard the criminal trial, he would not have been inclined to find that Donald Darch was "not criminally responsible".

Things cannot always be as clear as they were to Justice Lack in the *Darch* case. In *Chipkar v. RBC General Insurance*, 2008 CarswellOnt 2843, the plaintiff's husband, a named insured, set fire to their home and died shortly after as a result of injuries sustained in the fire. The insurer denied coverage and moved for summary judgment. The exclusion clause in the policy excluded coverage for "your intentional acts, your criminal acts, your failure to act …".

There were expert reports on both sides of the case dealing with the husband's mental condition, both before and for the short time that he lived after the fire, based solely on a review of documents. The plaintiff's expert indicated that more likely than not he would have been found not criminally responsible, that it was highly probable that the husband's behaviour was a reflection of paranoid delusions and that he lacked intent to commit arson. The insurer's expert stated that the husband "took a rational series of actions and was clearly able to and did intend the injuries that resulted from his actions".

The Court considered whether the husband was suffering from a mental disorder at the time of the fire, such that he would not have been criminally responsible pursuant to the *Criminal Code* generally and, if so, whether this meant that he did not commit a "criminal act" for the purposes of the policy.

Justice Pattillo held that:

> "Notwithstanding that under criminal law a person who is found not criminally responsible on account of a mental disorder has still committed a criminal act, the question remains whether such an act would constitute a criminal act within the meaning of the exclusion in the Policy. Neither counsel was able to provide me with any authority on this issue. Nor have I been able to find any such authority."

Consequently, the Court refused to grant summary judgment and, on appeal to the Divisional Court, the Motions Court Judge's decision was upheld. The Divisional Court (2008 CarswellOnt 5418) held that "there are no prior decisions in this jurisdiction as to whether an exclusion for "criminal acts" would apply if the person insured and committing the act is or would be found not criminally responsible. It is a novel point and an important one."

It does not appear that this case ever went to trial, as no trial decision could be located.

While the law in this area is therefore somewhat unsettled, the decision in *Darch* is reasonably clear and is supported by U.K. authority to some extent. In *Porter v. Zurich Insurance Company* [2009] EWHC 376, Zurich's insured, Porter, set fire to his home attempting to kill himself while suffering from Persistent Delusional Disorder and an alcohol problem. He changed his mind, managed to escape the home and then claimed under his homeowner's policy. The policy excluded "any willful or malicious act".

With respect to the "state of mind" issue, the Court held that it was sufficient if he was aware that what he was about to do risked damage of the kind that gave rise to the claim, or if he did not care that there was such a risk. In order to succeed in the claim, Porter would have had to establish, on a balance of probabilities, that his mental state was so impaired that he did not know the nature and quality of the act he was doing or, if he did know, that he did not know what he was doing was wrong. Porter had failed to prove such matters. Rather, the evidence made it clear beyond doubt that he knew both what he was doing and that it was wrong; therefore, his claim failed.

Consequently, as can be seen, there appears to be a pretty high standard for an insured to be able to establish mental incapacity to such an extent as to be able to get around a clearly worded intentional act exclusion.

Many thanks to our articling student, Ariel Wong, for her helpful research in this area.

*Randall (Randy) Carter is a litigation lawyer and partner in the Waterloo office of Miller Thomson. Prior to working at Miller Thomson, Randy acted as in-house counsel for a mid-sized casualty insurer for several years. He places an emphasis on personal injury law and insurance defence work.*

# 2015-2016 K-W OIAA ADVERTISER'S DIRECTORY