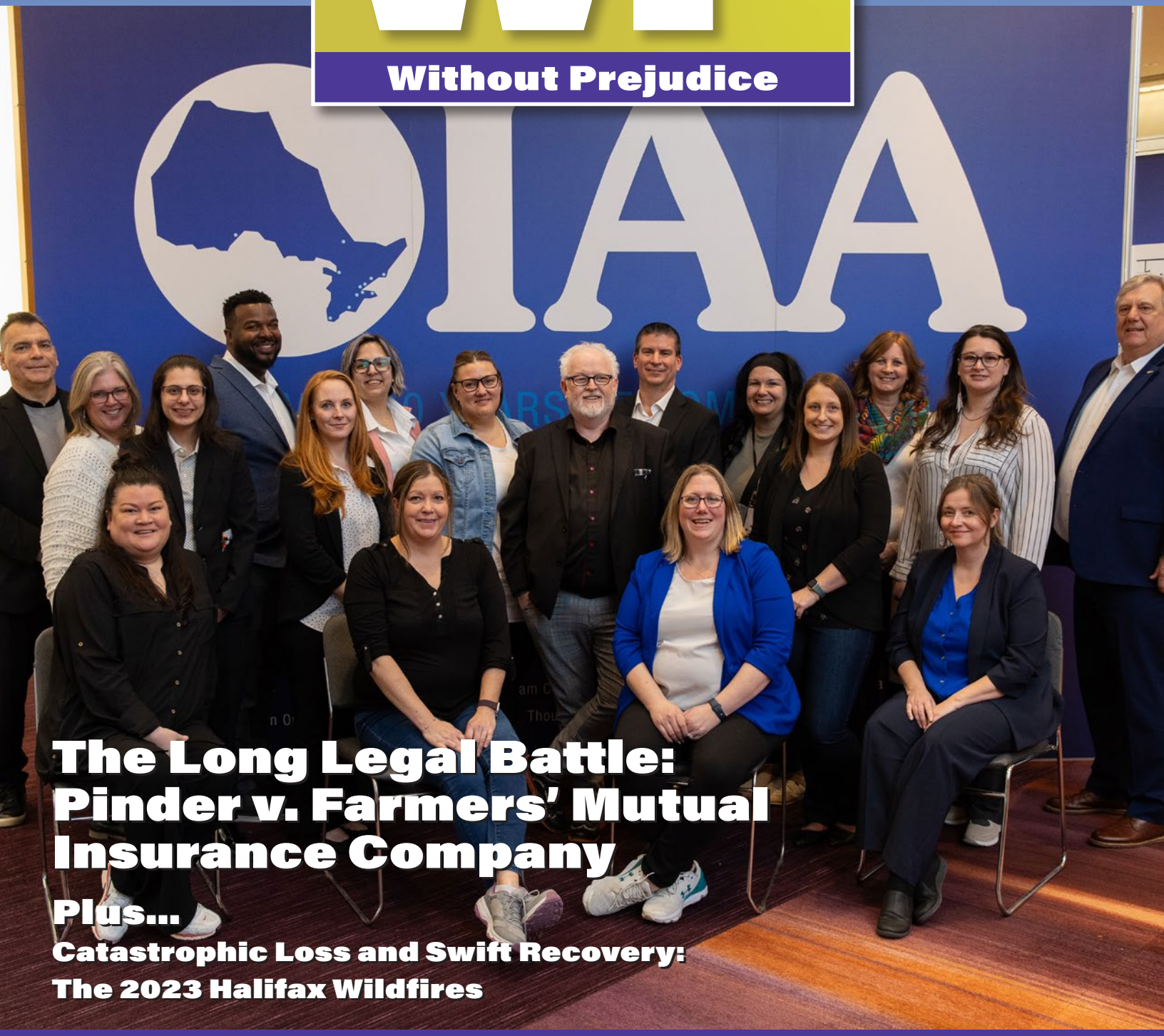
Official Journal of the Ontario Insurance Adjusters Association · **Vol. 89 · No. 9 · MAY 2025**

WP

Without Prejudice



The Long Legal Battle: Pinder v. Farmers' Mutual Insurance Company

Plus...

Catastrophic Loss and Swift Recovery: The 2023 Halifax Wildfires

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WHAT'S HAPPENING

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President's Message

SHAWNA GILLEN, CFEI
President, CIP

As we step into May, we are reminded of growth, renewal, and the steady transition towards the warm weather and of course the busy summer season! Just like the blossoming landscapes around us, our work continues to evolve- bringing fresh new challenges such as AI, innovation, looming changes to the auto legislation, and CATs.

Speaking of CATs, I was in Oro-Medonte from March 29 to 30 for my sister's birthday and I can confidently say that I have not witnessed a weather event of this magnitude. To the ice-covered foliage, to the eerie sounds of trees creaking and crashing, to the blocked roads, and lack of power, it was a stark reminder of the power of Mother Nature. I am including some photographs that I took chronicling my precarious travels through the Barrie/Orillia area.

I have spoken to many adjusters and contractors who have been working around-the-clock to service and help all those affected by this. To all the insurance professionals dealing with the large influx of claims resulting from the powerful ice storm that occurred during the weekend of March 28th in many communities across Ontario, my kudos and praise goes out to all of you!

The 2025 OIAA Claims Conference took place on April 2nd at the Metro Convention Centre and was a resounding success! We had over 1,100 attendees, 135 exhibitors and 13 seminars being offered. The overwhelming feedback from attendees was extremely positive. An event of this magnitude cannot be successful without an amazing team in place. A heartfelt thank you to the OIAA Executive for your dedication and hard work in making the 2025 OIAA Claims Conference a great success. In particular, I want to shout-out the contributions of the Co-Chairs of the Conference, Jennifer Brown and Christine

Andrews, as well as the rest of the Senior Executive, Terry Doherty, Emily Feindel, Carrie Keogh, and Joel Bobb. I am including a picture of the 2024-2025 OIAA Executive taken at the Conference.

Our next event is the 2025 OIAA Nine & Dine Golf Tournament taking place on Friday, May 30th at Cardinal Golf Club. Registration and Sponsorship are currently live on our website at www.oiaa.com. Limited foursome registration and sponsorship opportunities are still available. Separate dinner tickets are also available. Registration is from 10:00 AM to 11:00 AM and Lunch from 11:00 AM to 12:00 PM. Shotgun start is at 1:00 PM and dinner at 5:00 PM. We are still accepting prize donations for the raffle taking place during dinner. Proceeds of the raffle will go to our charity of the 2024-2025 year, Holland Bloorview Children's Hospital. If you would like to donate a prize or have any questions, please feel free to reach out to me.

The OIAA is also running a contest for adjusters to attend the 2025 OIAA Nine & Dine Golf Tournament. If you are an Active Adjuster, you can enter a contest to golf in my foursome at the tournament. To enter, you must be an Active Adjuster (membership in good standing by May 15th) with the Ontario Insurance Adjusters Association and send me an email at sgillen@facilityassociation.com indicating that you would like to enter. See details on pg. 22.

I welcome your comments and feedback. Please feel free to reach out to me at sgillen@facilityassociation.com.

Yours truly,
SHAWNA GILLEN, CIP
President
(437) 962-5820

SAVE THE DATE

MAY 2025

May 1 ..... Georgian Bay - Past President & Elections night @ Sheba Shrine

May 6 ..... Kawartha Durham OIAA - Education Day @ Ajax Convention Centre

May 8 ..... OIAA Hamilton – Poker Tournament @ Burlington Curling Club

May 15 ..... OIAA Windsor - Business Interruption Lunch n Learn seminar. Presented by Gary Phelps of Davis Martindale.

May 15 ..... Kawartha Durham - OIAA Education Day @ Deer Creek Golf Club in Ajax

May 27 ..... OIAA Niagara - Bocce Ball Tournament @ Vale Health & Wellness Centre in Port Colborne

May 29 ..... London Claims Association - Trunk Trade Show & Drive-In Movie Night @ Mustang Drive In – London

May 30 ..... OIAA Provincial - Annual Golf Tournament @ Cardinal

JUNE 2025

June 12 ..... OIAA Hamilton – Bocce Ball Tournament & Dinner @ Croatia Sports & Community Centre Hamilton SOLD OUT – this is a partnered event with IIO & IBAH!

June 12 ..... OIAA Thousand Islands - Kingston 1000 Island Boat Cruise

June 12 ..... Kawartha Durham OIAA Election Day – 11:00 am

June 12 ..... Kawartha Durham OIAA Golf Tournament - 9 & Dine @ Winchester Golf Club – 1:30 PM

June 25 ..... Kitchener Waterloo - Annual Golf Tournament @ Ariss Valley

JULY 2025

July 16 ..... OIAA Niagara - Christmas in July @ Cardinal Lakes Golf Club in Welland

AUGUST 2025

August 14 ..... London Claims Association - Golf Tournament @ Fanshawe Golf Course

August 21 ..... OIAA Hamilton – Golf Tournament @ Flamborough Hills Golf & Country Club

OIAA - EXECUTIVE COUNCIL 2024 – 2025

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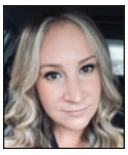

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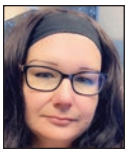

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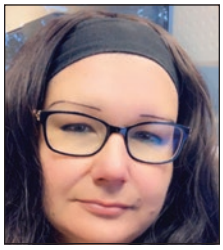

NATALIE BARROW
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Glenn Gibson is qualified as an International Executive General Adjuster with over 5 decades of experience. He has acted as an Umpire in the Appraisal Process for over 3 decades. His white paper on this process has been noted in the courts as an authority.

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Michael brings an energetic yet reasoned approach to his litigation practice. He fights fiercely for his clients and will work tirelessly until his clients achieve their desired outcome. All the while, he is cognizant of his clients' appetite for litigation and is in regular and routine communication to ensure that they are always well informed and in control of their claims.

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OIAA

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Faithfully Wed but Legally Misled?

By: Michelle Panagiotakos

Dealing with Claimants Who Have Entered Voidable or Void Marriages in Good Faith in the Context of Priority Disputes – the Second of a Three-Part Series Dealing with the Definition of "Spouse" in the Insurance Act.

In the April edition, this series on spousal status was launched, exploring the various definitions of "spouse" under section 224(1) of the Insurance Act. After all, a claimant's spousal status can have significant implications in the context of accident benefits coverage and priority disputes.

The April installment focused on the definition pertaining to claimants who have been married and the key principle that applies to them – that once they are a "spouse", they forever remain a spouse, until death or divorce.

In this edition, the focus is on the next part of the definition: what it means to "have entered into a marriage...that is voidable or void, in good faith on the part of the person asserting a right under [the] Act."

Recap: What is a "Spouse"

Recall that the Statutory Accident Benefits Schedule (SABS) defines the term "spouse" as it is defined in Part VI of the Insurance Act. The Act defines a "spouse" as either of two individuals who:

1. are married to each other;
2. have entered into a marriage to each other that is voidable or void, in good faith on the part of the person asserting a right under the Act; or
3. have lived together in a conjugal relationship (outside of marriage) continuously for at least 3 years, or in a relationship of some permanence and are the biological or adoptive parents of a child.

If you missed part one of this series, "'Til Death (or Divorce) Do Them Part", visit https://oiaa.com/members/wp-magazine/ to view the April 2025 issue.

Definition #2: Voidable or Void Marriages that are Entered into in Good Faith

At first glance, definition #2 may sound like a more elaborate way of saying definition #1. Both definitions seem to deal with people who were married. But they are actually quite different.

Definition #1 only captures those who entered a marriage that is recognized as legally valid. The analysis is simpler: either a couple is still legally married (i.e. they are not legally divorced), or they are not. By contrast, definition #2 deals with those whose marriages were found to be legally invalid. This analysis is not as straightforward. It requires a deeper factual analysis, as it considers the claimant's state of mind, knowledge, and intentions at the time of the marriage.

Recognizing which definition applies can be critical when investigating priority of an AB claim. If the marriage was valid from the start (i.e. per definition #1), the investigation is relatively straightforward. However, if there is any suggestion that the marriage could be void or voidable (i.e. per definition #2), a more extensive investigation will be needed to determine whether the claimant truly believed their marriage was legitimate.

Void vs. Voidable Marriages

A void marriage is one that was never legally valid from the outset. It is considered null and void, as if it never occurred. Common reasons for which a marriage may be void include:

- a failure to meet formal requirements, i.e. the marriage did not comply with the Marriage Act requirements (e.g. it was not properly solemnized);
- bigamy, i.e. the marriage involved one party who was legally married to someone else at the time of the ceremony; and
- prohibited relationships, i.e. the marriage was between close relatives.

A voidable marriage, by contrast, is presumed valid and remains valid until it is challenged and ultimately annulled by a court. Common grounds for challenging and annulling a marriage include:

- a lack of mental capacity, i.e. the marriage involved a party who lacked the mental capacity to consent to the marriage;
- failure to consummate, i.e. the marriage was never physically consummated due to an incapacity; and
- fraud or duress, i.e. the marriage involved a party who was forced or deceived into entering the marriage.

The Role of Good Faith

While it's important to determine whether one is dealing with a "void" or "voidable" marriage, the crucial part of definition #2 lays in the latter part of the definition: "...in good faith on the part of the person asserting a right under the Act." That is because, even

if a marriage is declared void or voidable, a claimant may still be considered a "spouse" for insurance purposes if they (i.e. the claimant) entered into the marriage in good faith.

In this context, good faith refers to the honest, sincere belief that the marriage is valid. Practically speaking, if a claimant genuinely believed they were lawfully married, and there was no fraudulent intent, he or she may still qualify as a "spouse" even if the marriage is later annulled by a court. Consider the example of an individual who unknowingly married someone who was still married to someone else (e.g. where someone's divorce to a prior partner was not finalized). Even though the marriage would be considered void due to bigamy, that individual could still be considered a "spouse" under section 224(1), if there was no reason to suspect the other marriage still existed.

This good faith requirement essentially acts as a "saving provision" to protect individuals who, through no fault of their own, enter marriages whose validity can be challenged.

Definition #2 in the Case Law

As discussed in part one of this series, according to section 268(2) of the Act, spousal status – regardless of by which definition – can put an insurer at the top of the priority scheme and first in line to handle a claimant's AB claim. Whether a claimant is a "spouse" is therefore a common issue in priority disputes between insurers.

Cases specifically dealing with definition #2 are not as abundant as those dealing with definitions #1 and #3. However, the following examples emphasize that the central question on which these cases hinge is whether the claimant in a void or voidable marriage can establish that they entered the marriage in good faith.

Aviva v. Security National (2016)

This case centered on whether the claimant was a "spouse" as a result of a religious ceremony performed in his country of origin. The arbitrator found that the ceremony did not comply with the Marriage Act requirements as little information was presented about the nature of the ceremony performed (e.g. when it took place, under what civil or religious laws it was conducted, the number of attendees, the dress or garb worn during the ceremony, etc.).

Arbitrator Bialkowski considered whether, despite the failure to meet the requirements, there was a good faith intention on the part of the claimant to enter a valid marriage. After all, those who have participated in foreign marriage ceremonies cannot be expected to know the requirements of the Marriage Act. However, in this case, there was no evidence as to why the parties never registered their purported marriage or took steps to have it recognized in Ontario after moving to Canada. As such, the arbitrator found that there was no good faith intention to enter into a valid marriage.

Intact v. Dominion (2019)

In this case, the claimant and his partner had participated in a commitment ceremony, as his partner remained married to her ex-spouse; her divorce had not been finalized. The evidence indicated that they both acknowledged that they could not be legally married until that divorce was finalized. They simply held a commitment ceremony to demonstrate that they wished to be together and to be recognized by their family and friends to be in a committed relationship. They knew their ceremony was not a marriage in accordance with the Marriage Act.

The arbitrator concluded that the parties were not spouses according to definition #2 of section 224(1). Their ceremony did not meet the formal requirements of a legally valid marriage, and they also lacked the requisite belief that they were getting legally married and complying with the Marriage Act.

Conclusion & Key Takeaways

Understanding what it means to "have entered into a marriage that is voidable or void in good faith" is crucial for insurance professionals tasked with investigating priority and resolving priority disputes. When questions about the validity of a marriage arise, especially in multi-jurisdictional settings (as in Aviva above) or in cases where a spouse had a complex marital history (as in Intact above), insurers should focus on the element of good faith: Does the evidence suggest that the claimant genuinely believed the union was valid, or did they enter the invalid union knowingly?

A well-documented investigation not just about the validity of the claimant's marriage but the claimant's belief in the validity of their marriage can help insurers make informed coverage decisions and avoid unnecessary litigation. A thorough investigation should include the following:

1. Obtain marriage certificates and other documents. Request the official marriage certificate and any court records related to annulment or divorce. If the marriage was declared void or voidable, obtain the legal basis for that determination.
2. Assess the claimant's knowledge and intent. Conduct interviews to establish whether the claimant genuinely believed the marriage was valid. Ask whether they were aware of any legal barriers (e.g. prior marriages, misrepresentations to immigration authorities, incomplete divorce proceedings). Financial and tax records indicating joint finances may also corroborate the belief in a valid marriage.
3. Investigate the other's party's legal status. If bigamy is suspected, verify whether the spouse was still legally married at the time of the wedding. Check for any prior legal challenges to the marriage.
4. Consider the length and nature of the relationship. Evidence that the couple lived together as spouses may support a finding of good faith. Review financial records, joint property ownership, and other indicators of a genuine marital relationship.
5. Consider the case law. Prior decisions can provide guidance on how the courts and arbitrators have interpreted "good faith" in similar disputes.

Stay tuned for the third and final part of this series, which will examine the last definition of "spouse" in section 224(1): common law relationships and those with a child in common.

See *Aviva Insurance Company of Canada v. Security National (2016)* (Arbitrator K. Bialkowski).

See also *Intact Insurance Company v. The Dominion of Canada General Insurance and Wawanesa Mutual Insurance Company (2019)* (Arbitrator P. Samworth).

Michelle Panagiotakos

Michelle has extensive insurance defence experience in both tort and accident benefits, though her practice focuses more on the latter, including priority and loss transfer disputes. Before joining SBA, she spent several years in-house with a national insurance company where she gained invaluable insights into the complexities of the industry and, more importantly, a first-hand understanding of her clients' needs and practices. Michelle's unique experience of working not only for her clients but with them has both deepened her knowledge of insurance defence and fueled her commitment to delivering exceptional, client-focused support. Though her upbeat attitude and charm help her resolve even the toughest of insurance disputes outside of the courtroom, Michelle's courtroom adventures span the Court of Appeal, Divisional Court, Superior Court of Justice, and the Licence Appeal Tribunal, where she's known for her impressive success rate and client victories.

Outside of work, Michelle finds joy in raising her little girls and bringing loved ones together for her delicious Greek feasts – where no one leaves hungry, or without trying her legendary Baklava. Opa!

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Catastrophic Loss and Swift Recovery:
The 2023 Halifax Wildfires

By: Tom Streek, President of Rebuild Response Group

Introduction

In the spring of 2023, a horrific wildfire blew through the outlying suburbs of Halifax, Nova Scotia, decimating kilometres of houses and forest landscapes. The RCMP issued evacuation orders, resulting in the closure of many roads and the fleeing of approximately 16,000 people. The wildfire destroyed over 23,500 hectares of land and damaged 200 properties (including 151 houses). This catastrophic loss resulted in approximately 3,240 personal property claims worth $240,670,000.

The wildfire burned untold acreages of natural wood, imposing a tremendous cost to remove and somehow regenerate in time.

Within days, multiple large property loss claims managers within varying insurance companies contacted Rebuild Response Group for assistance.

With an established presence across Ontario, the insurance industry expected, based on pre-existing trust, that our team could deliver on the same follow-through integrity for this catastrophic loss resolution. The questions asked by the insurers were, "What can you do to help us?" and "How fast can you execute?". We knew the clock was ticking and valuable moments started to pass, so we took the following steps to make an action plan.

Pre-Planning

Communication was the foundation for the logistics that unfolded in the days and months following the catastrophic loss. We were involved in efficient and assertive meetings (typically held virtually) with various insurance companies every day or week. We collaborated to assess the "big picture" situation and then triaged our efforts to best meet the insurers' and insureds' needs.

The insurers had specifically appointed individuals to lead their large loss teams, which was invaluable to remaining anchored in all communication functions. This dialogue included emails, phone calls, and virtual or in-person meetings. All parties represented needed to be included in all the large and small discussion points to avoid confusion and misunderstanding around the plan's vision and mission.

Although the insurers sometimes differed on their action plans, they all aimed for the same goals:

1. Understand the magnitude of the damage per site
2. Assess the impact structurally and environmentally
3. Connect with the insured early on to open up dialogue and support
4. Obtain information for thorough scope generation.
5. Source, review, and approve accurate estimates for restoration.
6. Secure commitment from contractors to complete clean-up and potentially rebuild construction.

Although frequent discussions centred on how to respond to the "red zone", the geographical area was still under lockdown, and local authorities would not permit access to anyone. With such a large loss spread over several kilometres, security to people's undamaged property, structural damage creating a safety concern, and environmental unknowns demanded prudent guard and protection. This restriction added more stress to all parties since homeowners, adjusters, and contractors were naturally keen to gain access for the first time.

Knowing we were required to respond to the impacted neighbourhood, we expeditiously secured local rental housing for our team until we determined we could work less onsite and return to Ontario. We knew the availability of local hotel and accommodation rentals would quickly deplete, so securing a place for the following months was critical to establishing our team's headquarters. Recharging from long days onsite was invaluable to ongoing performance in the field.

While our team waited for the green light to get our feet on the ground in Halifax, we continued to glean exactly what each insurer wanted us to achieve, specifically with their insured. This exercise included determining who was responsible for completing the scope details for upcoming estimating, clarifying demolition and clean-up directions, and receiving all necessary contact information for ongoing communication. We equipped the insurers and insureds with our scope template to gather relevant information as soon as possible. In each case, the insurer had secured an engineering firm to work closely with us, which was beneficial due to the environmental and structural impact on many properties.

It was determined well in advance that most homes had oil-based heat sources, which led to various spills and complex clean-ups in the weeks and months ahead. Some policies did not cover this component, which unveiled further consideration.

Since the fire department could not respond to these properties due to the scale of the wildfire, structures were exposed to extreme heat for days, causing immense damage to the foundations. In the cases we were involved with, all foundations were deemed compromised, requiring total demolition and disposal.

Wells were the primary water source since they were primarily located in rural subdivisions, creating a heightened concern for quality and safety moving forward. The City of Halifax also mandated significant testing and assessment.

As the list of addresses filtered into us from the insurers, we researched the properties online to find pictures and Google Maps street views so we could understand the type of homes we were anticipating for estimating. These visuals allowed us to consider what products may be in high demand, creating a potential shortage.

Although we still had not been permitted to respond to the site, we spent hours and days reaching out to all our contacts from the East Coast and Ontario to secure the necessary labour and materials well in advance of our feet hitting the "red zone". Halifax was already in a shortage within the high-demanding construction industry while still reeling from the large-

loss damage from the year before due to Hurricane Fiona. We knew the area would struggle to meet the enormous need placed on it due to this large wildfire. Therefore, we secured suppliers for roof trusses, shingles, lumber, insulation, drywall, and other materials in Ontario and New Brunswick, should we need them.

At this point, our team had maximized our pre-planning phase. Our staff in Ontario was notified of our upcoming absence to focus on the East Coast. We had information in hand, the mission provided by the insurers, and the target in view, but we remained on standby until we could access the affected area.

Operational Impact

When local authorities lifted the evacuation orders, giving the green light to visit the "red zone", various agencies and parties had their boots hit the ground. The security detail was still in place on multiple streets to limit the general public doing inquisitive drive-throughs. Homeowners, insurance professionals, contractors, and engineers visited the properties for the first time since the damage. The adjusters lined up site meetings with their insureds, and we followed suit, visiting each property together. There were tears and lengthy discussions about what used to be there. There were many questions, but sometimes, only a quiet loss for words.

The scale of devastation left us with a numb feeling of what it must feel like in war times and places elsewhere in the world experiencing disaster. Entire neighbourhoods were ravaged, and the surrounding mature forest landscapes were charred. Children's toys and melted family pools littered around various yards were some of the only remaining items to be seen. In some cases, foundations were crumbled and cracked due to prolonged exposure to the fire's heat. The emotional impact only further fueled our passion to be a part of the help.

We captured bird's-eye-view footage of the property damages with our company drone to provide the insurers and quantifiers with valuable visuals. We efficiently organized the contact information for the lists of insureds into working spreadsheets for our tracking and subsequent work with them. We scheduled follow-up meetings that varied in location, time of days, and duration to ensure we had timely discussions and developed trust early on. In many

cases, we were the only hope they had to believe something good would eventually come out of this disaster.

One day at a time, with no unachievable promises, we fulfilled punctual meeting commitments and offered a listening ear to the insurers and insureds we were connected with.

The focus was clear:

1. Meet with the insured onsite for the first visit and introduction.
2. Outline what the steps ahead were.
3. Request and secure demolition estimates to present to the respective adjuster for each property.
4. Initiate any scope information, including finishes and details in and around the home.
5. Connect with the assigned engineer and quantifier to discuss any pertinent information.
6. Submit a thorough replacement estimate once all information is adequate and compiled.

While meetings unfolded over the days and weeks ahead, we worked with local contacts to provide the insurance adjusters with timely demolition estimates. We knew the sooner the debris could get cleaned up, the better the insureds would feel about positive momentum.

However, the many oil leaks from melted tanks complicated this demolition process. Septic tank systems and drilled wells were closely assessed to determine how large the environmental impact had leeched. Multiple environmental engineers and extraction professionals were roaming the sites up and down the streets, performing their work as expeditiously as possible. By the day, gravity was pulling escaped oil into whatever crack or subsoil material, absorbing it below grade. We discussed the risk and liability issue with the insurance teams we reported to in several virtual meetings. We understood that cleaning up the damaged debris was a focus to mitigate safety risks but that the unknown costs and potential liability around the environmental factor were also vulnerable elements.

The building department and insureds provided blueprints and other supportive documentation for us to analyze the replacement cost. Most homes weren't older than 20 years, so comprehending the typical construction and finishes streamlined this process. Further meetings with homeowners revealed the remaining information needed to initiate work on estimating.

Our two Rebuild Response builders in Nova Scotia shouldered most of the estimating work as their understanding of cost factors was already in place. Our corporate team reviewed and paralleled efforts to ensure we accurately delivered on our time commitments.

Ongoing trust and relationships strengthened as the weeks passed, and countless meetings revealed an unwavering commitment to the task at hand. We quickly met problems with solutions and sustained solid communication amongst every party involved. We managed the risk with a prudent mitigation response. We delivered the demolition and replacement estimates quickly, allowing for review and approvals from the insurers and insured homeowners. This first stage of operations was complete, leading to the second work stage in the "red zone".

Visual Momentum

Once our team received the first round of demolition estimate approvals, we were keen to get equipment to the various sites and continue to deliver on what we promised. Updating insureds and adjusters that clean-up was happening was nothing but a positive injection!

Rebuild Response yard signs were installed to show the community that progress was happening and that we were literally putting a stake in the ground with a visual presence. The challenge with the demolition phase was managing timelines and communicating them efficiently to all parties involved. Some sites took an extra day to clean up, delaying the following site's arrival. Sensitive environmental sites with oil leaks sometimes slowed or halted progress as assessments unfolded. Ensuring safety on all sites was critical, as the general public and homeowners naturally wanted to watch and be involved. Hard fencing installed earlier on all sites by the City of Halifax was beneficial in sending that message, yet we had to remind

multiple people to respect that zone and give the equipment, trucks, and crews the space required to work.

The City of Halifax building department cooperated with demolition permit applications and worked seamlessly with the engineering agencies. Once again, the process's success revolved solely on clear, crisp communication among all parties.

As septic tanks, wells and surrounding soils were being tested and extracted when required, there were close conversations with the insureds and their adjusters about what coverage was in place and at what limits—due to the unknown impact and subsequent cost of the abatement, each day represented a higher level of stress to these parties, until the definitive "notice of completion" was delivered. Several properties had large holes well below the original grade of the foundation or footing, requiring imported engineered granular fill to be compacted and tested for upcoming new construction.

As we were submitting replacement estimates to adjusters each week, it created more momentum toward actually replacing homes. This phase resulted in different options and challenges regarding the builder selection and budget determination. Although multiple insurance companies tasked us with estimating all their property loss claims, we understood they would not automatically award us the project. We knew the insureds had the choice to select another builder. The main questions asked by the insureds were, "How quickly can you start?" and "How long will it take to build?". Our competent teams in the outside territory of Hammond Plains represented themselves as professional local builders. Yet, other local builders and family relatives offered their services, which provided multiple choices for insureds. Naturally, Rebuild Response desired to be the preferred company by all insureds, but the paramount goal was to be part of the overall solution in Halifax; the number of insureds that chose to work with us was secondary to being a leader on the ground in the time of turmoil.

As the months rolled by, we secured several homes to rebuild and connected with five different insurance companies.

Some insureds chose to cash out and not return to the site due to the trauma's emotional toll. Others modified their new design from what they had while staying within their insurance budget. And others

had their property put precisely back the way it was. Regardless of the direction, every insured received our attention and input as they moved forward.

To close the replacement estimates, we confirmed with the insureds that they had approved the details and worked closely with their adjuster to understand how the budget for their rebuild was determined. Sometimes, policy limits had to be assessed, but effective dialogue was critical to maintain trust and cooperative efforts. Some estimates took additional time, as further review by quantifiers and cost consultants also provided input and assessment.

When insureds chose to work with a Rebuild Response builder to rebuild their home, we drafted, reviewed, and signed contracts with them. We finalized their blueprints, applied for permits, and determined their product choices for finishings. Again, communication between the insurers and insureds with weekly updates was the catalyst between all parties and the success of the ongoing new construction.

Seeing pictures of new foundations, framing, and finishing stages was the ultimate "oxygen" in the air for many people involved. For all different reasons, our Rebuild Response builders completed some houses sooner than others, but in the end, everyone was excited to move back home and restart new memories.

Invoicing and weekly reporting to the insurers and insureds was ongoing administrative work that continued throughout the following months, all the while not taking our eye off the finish line.

Key Takeaways

Critical analysis of what we experienced and accomplished from the Halifax wildfire event taught us how to improve in the next catastrophic loss we're involved in. We invited the insurers to open a forum through debriefing meetings whereby we could discuss what went well and what could have improved. Pursuing this activity reflected an attitude of humility, which also sends the accurate message that we live out in the Rebuild Response Group–we want to "get better" each day. The only way to continuously improve is to be introspective and invite others' feedback.

This reflective exercise proved to be a success and likely created some excellent points for the insurers to take away from as well:

1. **Understanding everyone's roles and authority:**
   Determining this detail early on was imperative to maintain the clearest direction and reporting. Leaving out the wrong professional without proper updating or reporting would prove to be detrimental.
2. **Understanding the expectations of the insurer:**
   Each insurer required slightly different processes. It is critical to ask questions for clarification and outline what we couldn't commit to at the onset. Overpromising to impress or please could later be embarrassing for all parties.

3. **Engineering and environmental lines drawn:** Determining which agency, firm, or professional group is vital when structural and environmental requirements and guidance are required to respond to a catastrophic loss. Any blurred lines or contractor misunderstanding can lead to heightened risk and liability, which can snowball into a higher cost for the claim or, even worse, put a human in danger.
4. **Daily/Weekly meetings:** A large team meeting must be conducted at least weekly, but at times, a daily meeting may also be required early on. Whatever time is needed to effectively and assertively resolve issues that arise by the day or week is a must. Delays, lack of teamwork, and inappropriate leadership will create a negative outcome.
5. **Sensitive communications with insureds:** Any conversations with the insureds require tact and prudence. They are looking for any hope and promise to hang on to. All discussions and questions they have surrounding their policy are not for contractors to entertain other than kindly directing them to their insurer. Contractors are permitted to provide facts and updates on what they are completing and working on for them. Conservative timelines will prevent under delivering.
6. **Internal costs and staff consideration:** Responding expeditiously to a catastrophic loss costs money. Staff and team players are out of their home routines and carry a heavier load than is typical. Being aware of what the corporate cost could be and the impact on the internal people is something to analyze early on. The costs need to be addressed immediately with the insurers to ensure proper payment structure and financial understanding. Switching out team players when required is vital to prevent burnout. Most professionals responding already have a full workload to deal with before the catastrophic loss.
7. **Future resource compiling:** Creating a standard operations manual specific to catastrophic losses with detailed guidelines and step-by-step processes will improve logistics management. Understanding better what resources are required in the catastrophic loss response will open corporate eyes to what may be needed when another event occurs. Securing additional management or estimating teams for early response is prudent. Determining which people may be needed for emergency containment and board-up would also be wise. It is better to have more options and resources available than required.

In the aftermath of the 2023 Halifax wildfires, Rebuild Response Group demonstrated an unwavering commitment to restoring hope and properties. Through meticulous planning, clear communication, and a deep sense of responsibility, our team navigated the complexities of environmental impacts, structural damage, and emotional tolls on the affected communities. The journey was marked by challenges, from securing demolition estimates to managing environmental hazards, yet each step was a testament to our dedication to delivering timely and effective solutions. As we continue to rebuild, the resilience and cooperation of all parties involved stand as a beacon of strength and a reminder of the power of unity in the face of disaster. Together, we are not just reconstructing homes but also revitalizing the spirit of the community in the midst of a catastrophic loss.

Tom Streek
Chief Executive Officer, Rebuild Response

Tom has over 35 years of construction experience covering commercial and residential projects. Having grown up in his father's prior family business, the longstanding delivery of quality and integrity has been a staple throughout his current province-wide large insurance rebuild company, Rebuild Response Group, and custom home business, Harmony Homes.

With an ongoing passion and insight for teaching/training, Tom inspires students and professionals alike by sharing his experiences, which include the East and West Coast catastrophic loss of wildfires in the past couple of years and countless large losses across Ontario.

Tom leads a strong network of large loss builders within Ontario and is currently developing into the East Coast through a developed franchise model/network to provide some of the best insurance industry service and customer care experiences possible.

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The Long Legal Battle:
Pinder v. Farmers' Mutual Insurance Company

By: Glenn Gibson

Background

A fire occurred on February 2, 2004, in a house solely owned by Joyce Pinder, where her daughter was residing at the time. Both were jointly named insureds on the policy.

A proof of loss was submitted on March 29, 2004. The insurer denied coverage for the submitted claim on May 27, 2004, citing two primary reasons:

1. Material Change in Risk – The insured failed to notify the insurer about a change in the home's heating system.
2. Willfully False Statements – The insured was alleged to have made false statements regarding the contents claim.

On February 1, 2005, the insured initiated legal action against the insurer. What evolved from that point were several legal actions:

1. The insurer paid the mortgage outstanding to a bank and then started a subrogation action against the named insured for recovery.
2. The insured elected "Appraisal" to determine the "amount of loss".
3. The insured's sued their insurer for damages.

Subrogation and Initial Court Rulings

The insurer paid over $97,000 to a bank mortgagee to discharge the mortgage on the building. The insurer subsequently filed a subrogation action on December 18, 2006, against the named insured to recover this payment.

In July 2007, the insurer sought a summary judgment on the subrogation issue, arguing that the mortgage clause was an independent contract between the insurer and mortgagee. The motion court judge ruled in favor of the insurer. However, on November 26, 2009, the Ontario Court of Appeal (ONCA 831) overturned that decision, finding the subrogation action was premature since the policy coverage dispute was still unresolved. The insurer was not happy with that decision and launched an appeal.

On May 6, 2010, the Supreme Court of Canada denied the insurer's appeal of the ONCA decision.

Subsequently, on November 10, 2010, the insurer offered a settlement to the insureds whereby if they would agree to authorize the payment to the mortgagee of their interests, then the insurer would discontinue their legal actions without asking for costs. This offer was rejected by the insureds.

Appraisal

While the litigation was flowing on the mortgagee issue the insured initiated a demand for the appraisal process to be engaged. An appraisal award was issued on March 30, 2007, but it was provisional. The appraisal established the amount of loss of the claimed items. The process was not empowered to determine whether the listed items existed or were damaged by the fire.

The Jury Trial and Key Findings

After an extensive litigation process, the case went to a 15-day civil jury trial, concluding on December 22, 2017. The jury had a series of questions to address including whether the insureds had made willfully false statements regarding their contents claim. Key findings included:

- Discrepancies were identified in 39 of the 68 claimed items (over 55% of the total submission). This hurt the insured's credibility.
- The jury was instructed that an honest belief in a statement's truth would not constitute a willfully false statement, but a finding that the insureds showed a reckless disregard for the truth would.
- The insurer did not allege the insured attempted "fraud" but did argue that willfully false statements were made and therefore this voided the claim (Statutory Condition #7).
- An argument for relief from forfeiture also failed since this was not a case of imperfect compliance with Statutory Condition #6.
- The insureds lost on all motions brought before Justice Mary Vallee (2018 ONSC 2910).

Appeal and Final Decision

An appeal was launched on the jury's decisions to the Ontario Court of

Appeal. The key focus was on whether the trial judge's jury instructions were appropriate. They released a unanimous decision on June 25, 2020, which affirmed the facts-finding of the jury.

In particular, the appeal court reviewed the testimony of the insured's daughter, who had filed the contents claim:

- She provided details on where and when she purchased items and estimated replacement costs, but she failed to provide proof of purchase for several items.
- She claimed some items were paid for in cash and others were inherited.
- Her explanations under cross-examination were underwhelming.

The Appeal Court upheld the jury instructions, noting that:

- Honest mistakes do not necessarily constitute willfully false statements. The jury had been instructed that for a statement to be willfully false the person had to "[k]nowing it to be false; without belief in its truth and recklessly without caring whether it is true or not."
- The jury's role was not to assess general honesty but to determine whether the insureds made willfully false statements in their proof of loss. And they concluded that the insureds had.
- Since Joyce Pinder co-signed the proof of loss with her daughter, she was legally bound by the contents of that document.

The appeal was unsuccessful. However, the appeal court reduced the legal costs awarded to the insurers from $647,000 to $420,000. Still, this represented a significant sum of money which showed this was a high stakes trial.

Key Takeaways from the Litigation

1. The insurer successfully proved that the insureds made willfully false statements, impacting the coverage outcome at trial and on appeal.
2. The scale of discrepancies (39 out of 68 items) played a crucial role in the verdict.
3. A distinction does exist between 'fraud' and a 'willfully false statement', though both can void a claim under Statutory Condition #7.
4. Evidence is critical in proving falsification. Key testimonies came from a contractor, an adjuster, and the insured's daughter, whose credibility was pivotal.

Understanding Evidence in Legal Proceedings

Evidence is not based on rumors, innuendo, or speculation. It falls into three categories:

- **Direct Evidence** – Based on the five senses (sight, hearing, smell, touch, taste).
- **Circumstantial Evidence** – Facts from which conclusions can be drawn.
- **Hearsay Evidence** – Statements made outside of court and not in the direct presence of the subject.

Evidence can take three forms:

1. **Testimony** – Witness statements based on direct observation.
2. **Real Evidence** – Physical objects such as burn patterns or documents.
3. **Secondary Evidence** – Items like videos or photographs.

Weighing the Evidence

The trier of fact (jury or judge) considers multiple factors, including:

- Witness Credibility – Issues such as criminal records, incomplete notes, or poor case preparation. Their recall (memory) of key fundamentals is important. And whether their evidence is presented in a sincere, consistent, complete, and truthful manner.
- Witness demeanor- Eye contact. Body language.
- Effectiveness of Cross-Examination. Is the witness reticent or evasive in answering questions? Is there conflicting or corroborating evidence?
- Volume and Quality of Evidence. Is it grounded in common sense? Is it backed up by other evidence in the case?
- The thoroughness of the Investigation – Poor case management can weaken a claim.

- Continuity and Integrity of Exhibits – Preventing contamination is crucial.

The burden of proof varies:

- Criminal trials require proof beyond a reasonable doubt. (Regina vs Lifchus, 1997, S.C.C., 3 SCR 320). The onus in criminal court is on the prosecutor to prove their case with no requirement that the accused must give evidence.
- Civil trials require proof based on the balance of probabilities. Civil plaintiffs (insureds) must testify and are subject to cross-examination. This is often where critical weaknesses in claims are exposed.

When an insurer denies a claim based on criminal conduct (e.g., fraud), they must exercise extreme caution. Courts expect the insurer to meet a high standard of proof, close to that of a criminal proceeding.

The Paradigm Shift- Civil Litigation

When a claim is denied, litigation against the insurer often follows, including accusations of "bad faith" and demands for punitive damages.

In such cases, the quality of claim file handling and case management is under intense scrutiny. The insurer must defend its actions and demonstrate that it acted in good faith.

To mitigate allegations of bad faith, insurers should proactively establish and document their good-faith efforts from day one. Key areas to consider include:

- Expertise of Loss Adjusters: Do the adjusters handling the claim have the necessary knowledge, skills, and experience?
- Quality of File Documentation: Are file notes comprehensive, accurate, and well-maintained?
- Statement Documentation: Are statements properly recorded—written, oral, or narrative? How do they support the claim decision?
- Communication with the Insured: Is there a strong communication pathway? Does the file handling align with the Statutory Conditions of the policy?
- Use and Selection of Experts: Are experts qualified in the relevant areas? Have they provided credible expert testimony in court?
- Vendor Quality in Documenting Damages: Are vendors thorough and reliable in documenting the loss?

By focusing on these factors, insurers can strengthen their position in potential disputes and demonstrate their commitment to fair and ethical claim handling.

Conclusion

The case I referenced took a long and complex path before concluding. In this instance, the outcome favored the insurer. A decision was made to take the case to a jury—a strategy that has often yielded positive results for plaintiffs in the past, but not in this situation.

As always, there are valuable lessons to be learned from the reasoning of our courts. One key takeaway is that the true test comes at trial when witnesses take the stand and provide testimony. At that point, the sworn proof of loss document becomes a crucial element of the case. Undoubtedly, the insureds in this matter would have welcomed the opportunity to revise their submission.

Glenn T. Gibson
ICD.D CIP FCIAA FCLA CFE
Glenn Gibson is qualified as an International Executive General Adjuster with over 5 decades of experience. He has acted as an Umpire in the Appraisal Process for over 3 decades. His white paper on this process has been noted in the courts as an authority.

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Palmer v. Teva Canada Limited, 2023 ONCA 220

By: Rory Love

In Palmer v. Teva Canada Limits, 2023 ONCA 220, an appeal by representative plaintiffs was rejected by a Court where the plaintiffs sought certification of a proposed product liability class action. This is a significant outcome for all those involved with products liability actions.

Overview

This proposed class action, involved the alleged contamination of the defendants' blood pressure medication. The medication, valsartan, allegedly had traces of two contaminants, N- nitrosodimethylamine ("NDMA") and N-nitrosodiethylamine ("NDEA"), which are toxic carcinogens. The medication was voluntarily recalled by the defendants.

Damages were sought by the plaintiffs for psychological harm and the costs associated with medical services, travel costs, time thrown away, and disposal costs of the drugs.

Originally, the Superior Court of Justice denied the certification of the proposed class action by the plaintiffs. The Court decided that there was no causal link between the plaintiffs consuming the drug and actually being diagnosed with cancer. The Court ultimately found that there was no possible action as there was no definite injuries sustained by the plaintiffs.

The plaintiffs appealed the decision.

Decision

The Ontario Court of Appeal dismissed the plaintiffs' appeal. The Court stated that "...the wrongful conduct on the part of the drug manufacturers is non-compensable not only because, as the motion judge found, physical harm has yet to materialize, but also because the harm that had materialized - psychological harm from the shock of the recall – was not sufficiently serious to be compensable in tort law."

The plaintiff raised two errors in their appeal. First, that the motion judge failed to consider genotoxicity which is "internal bodily composition at a cellular or molecular level" caused by consuming NDMA and NDEA. Secondly, the motion judge erred in concluding that the psychological harm related to the risk of increased cancer was not a viable cause of action. Regarding the genotoxic injury, the Court found that this damage had not occurred. The Court emphasized that for the claim for negligence to be successful there needed to be injury and that there would need to be a "...materialized loss that gives rise to a defendant's obligation to compensate the plaintiff for the injury."

On argument that there was an error in the treatment of the psychological injury claim,

the Court found that the claims for psychological injury did not "rise above the anxieties and fears commonly experienced from time to time by people living together in society". The plaintiffs failed to plead material facts that supported damages under this tort as seen in the Supreme Court decisions in Mustapha or Saadati.

Further, the Court also dismissed the plaintiffs' claims for battery, damages under the Consumer Protection Act and Competition Act, and the claim for unjust enrichment.

Key Takeaways

Palmer clarifies the Court's position as outlined in a previous blog I wrote on the Ontario Court of Appeal Decision in Bothwell. In order to be entitled to damages for psychological injuries the issues must be "serious and prolonged and rise[s] above the ordinary annoyances, anxieties and fears". From a product's liability perspective, Palmer offers some comfort to manufacturers that theoretical risk of harm by their products will be safeguarded by the Court. Where the test in Bothwell is not met, a plaintiff's claim will fail for damages for psychological injury.

See: Palmer v. Teva Canada Limited, 2024 ONCA 220

Rory Love

Rory's practice is focused on insurance defence and he regularly deals with matters relating to CGL, personal injury, motor vehicle liability, municipal liability, product's liability, property damage and errors and omissions. He has attended court of behalf of national, international and self-insured clients for various motions, pre-trials, case conferences, applications and hearings. He has extensive experience with alternative dispute resolution, successfully mediation many claims.

Prior to joining the legal profession, Rory worked as a claims adjuster, providing him with a unique perspective that is directly applicable to his daily work.

Understanding the Silo Approach for Calculating Damages:

The Deductibility of Non-Earner benefits in tort actions

By: Michael Blinick, Partner & Dylan Zamani, Articling Student

Overview

Can Non-Earner Benefits ("NEBs") be deducted from a claimant's awarded damages for income loss in a tort action? In the recent decision of Kolapully v Myles (2024 ONCA 350), the Ontario Court of Appeal reversed the trial judge's ruling, finding that NEBs under the Statutory Accident Benefits Schedule("SABS") should be deducted from the damages awarded to the claimant for past loss of income under s. 267.8 of the Insurance Act.

Summary of Decision

Shoba Kolapully (the "injured person") was struck by a Toronto Transit Commission bus ("the TTC") on March 6, 2012. On Dec 3, 2013, the injured person initiated an action for general and specific damages as against the TTC, claiming she suffered serious and permanent physical and psychological injuries as a result of the accident. The injured person also initiated a proceeding before the LAT, where she was found to be catastrophically impaired and entitled to NEBs in accordance with the SABS.

Upon completion of a 6-week trial, the injured person was awarded $175,000 in non-pecuniary damages and $200,000 in damages for past loss of income. The trial judge, relying on the decision of Walker v Ritchie (2005), 197 O.A.C. 81 (C.A.). ("Walker"), ruled that NEBs received from the AB insurer (approximately $95,000) are not related to loss of income, and should not be deducted from a tort award for loss of income under s.267.8(1) of the Insurance Act.

The TTC appealed the decision, stating that the trial judged erred by not deducting NEBs from the past loss of income award in the tort action, amongst other grounds of appeal. The TTC argued that the Court of Appeal decision in Cadieux v Cloutier (2018 ONCA 903) ("Cadieux"), is in direct conflict with Walker, as the court in Cadieux listed NEBs in the category of "income replacement benefits".

The Court of Appeal in the subject case agreed with the Cadieux court's treatment of NEBs, finding that NEBs and income replacement benefits are interrelated and belong in the same income replacement silo. The Cadieux court replaced the "apples to apples" approach (meaning statutory accident benefits were only deductible based on a precise matching of individual benefits with identical heads of damages) with the silo approach where all statutory accident benefits that fall within the same broad category and deducted from the damages that are awarded in the corresponding broad category.

As the Court of Appeal stated, "Non-earner benefits belong in the income replacement silo precisely because the legislature has signaled that they are an alternative to other benefits in that silo. Far from revealing dissimilarity, the substitutability of the other benefits for non-earner benefits reinforces the view that they are interrelated and therefore belong in the same income replacement silo".[1]

Further, additional support was provided for the finding made by the Cadieux court that the proper interpretation of the current version of s. 267.8 "does not support matching at a more particular level than the three silos of income loss, health care expenses and other pecuniary loss".[2] The silos are described at paras. 12-14:[3]

There are three broad categories of SABs under the Insurance Act and the Statutory Accident Benefits Schedule, O. Reg. 34/10. The first category provides income replacement benefits or, if the person was not employed at the time of the accident, "non-earner" benefits, or "caregiver benefits", if they provided caregiver services to another person at the time of the accident.

The second category is health care benefits. "Health care" is a defined term in s. 224(1) of the Insurance Act. It "includes all goods and services for which payment is provided by the medical, rehabilitation and attendant care benefits provided for in the Statutory Accident Benefits Schedule"...

The third category of benefits addresses "other pecuniary loss", which includes lost educational benefits, expenses of visitors and housekeeping, and home maintenance expenses.

The Court of Appeal concluded that the Walker decision was overruled by Cadieux, and that the inclusion of NEBs in the income loss silo mentioned in Cadieux was authoritative and therefore binding on the trial judge. As a result, the Court of Appeal found that the trial judge was required to deduct the injured person's NEBs (around $95,000) received under the SABS from the past income loss award since NEBs belong in the income replacement silo.

Future Implications

This Court of Appeal decision is a reminder for tort defendants and their insurers to be cognizant that NEBs are in the silo of income replacement benefits, and therefore are deducted from a tort income loss award. The "apples to apples" approach that was previously being applied pre-Cadieux has shifted to the "silo" approach and further confirmed by the Court of Appeal in this decision.

Insurers should also be mindful of the fact that a claimant who has been involved in an accident after June 1, 2016, will only be entitled to a maximum of $185/week for 104 weeks with a 4-week waiting period (maximum $18,500). As a result, the timing of the accident is important since a claimant who suffered "a complete inability to carry on a normal life" as a result of an accident that occurred prior to June 1, 2016, was entitled to NEBs beyond 104 weeks, with a set formula re-adjusting the benefit at the age of 65. In the underlying appeal, the injured person was deemed catastrophically impaired and awarded around $95,000 for NEBs for an accident that occurred in 2012, a significant difference from the maximum amount payable to a claimant today.

Given the foregoing, insurers that find themselves in a similar position where the claimant has been paid NEBs for an accident that occurred before June 1, 2016, should be even more mindful of the deduction available if the claimant is later awarded damages for income loss in the tort action.

It is also important to note, as the Court of Appeal highlighted, that statutory accident benefits are never to be deducted from general damages for pain and suffering in a tort action. As the Court of Appeal stated in their decision, "the key principle is that the deduction from the tort pecuniary damages award is confined to the apposite silo".[4]

[1] Kolapully v. Myles, 2024 ONCA 350, at para 79.

[2] Cadieux v. Cloutier, 2018 ONCA 903 (CanLII), at para 85

[3] Ibid, at para 12-14

[4] Kolapully v. Myles, 2024 ONCA 350, at para 67.

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Michael brings an energetic yet reasoned approach to his litigation practice. He fights fiercely for his clients and will work tirelessly until his clients achieve their desired outcome. All the while, he is cognizant of his clients' appetite for litigation and is in regular and routine communication to ensure that they are always well informed and in control of their claims.

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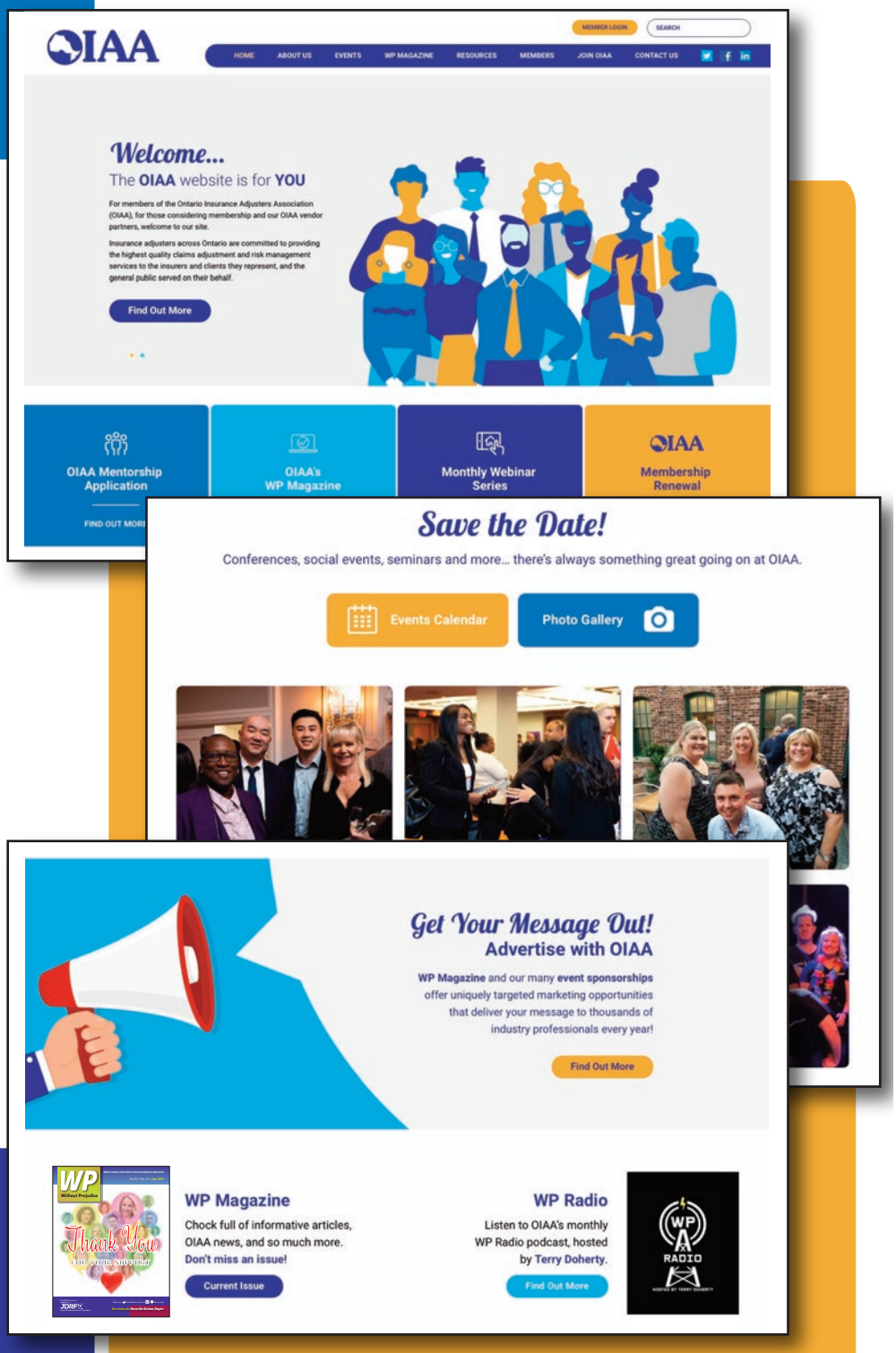

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