PRESIDENT'S MESSAGE

March 2013

Congratulations to all of the Graduates!!! On February 28 the Insurance Institute held its annual graduation ceremony for students who completed their GIE, CIP and Fellowship. Congratulations also go out to those award winning students!!

March is going to be a busy month in the insurance industry. On March 21 it is the London OIAA Annual Trade Show at the London Convention Centre – please contact the London OIAA if you wish to attend. March 22nd is it the 2nd Annual Tri-Association Curling Bonspiel – who wouldn't have fun throwing some rocks?? March 28 is our monthly OIAA and that leads us into the weekend of the Ontario General Insurance Hockey Tournament. Hope to see everyone at these events!!

If you are interested in joining the KW OIAA Committee, we will be having the opportunity for new board members in the month of April – if you have any questions, please do not hesitate to contact me!

Regards,
Charlene Ferris, FCIP CRM
President – KW Chapter

March 2013

The Bulletin Index

Inside your March issue you will find:

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

BURNSIDE

Structural Assessments and Pre-existing Conditions

Brian Boyle, P. Eng.

"That crack is new." Engineers doing post-event structural assessments of existing buildings hear that statement from owners during every assessment. Assessing whether the damage is new, or whether it existed prior to the event is often one of the more difficult tasks facing the person doing a structural assessment.

There are too many pre-existing conditions to address them all in this one article, so I will limit my discussion in this article to scenarios where the building was properly constructed and maintained.

Damage can result from a wide variety of conditions. This article will focus on scenarios where the apparent damage was as a result of certain extraordinary physical forces acting on the structure. This would include high wind, high snow load, significant seismic event, vehicle impact and nearby construction activity.

With the exception of construction activity, most of the damage from other causes occurs without warning. Photographs, surveys and other documentation of existing conditions prior to the event can be very valuable when assessing the structure. Unfortunately such information is usually not available. The person doing the assessment has to rely on a number of different sources of information in order to assess the condition. Owners or building occupants must be relied upon to a large extent. However, the reliability of information provided by the owner has to be assessed. Following a significant extraordinary event like a tornado, owners will do their own detailed visual assessment of damage based on a genuine concern for the condition of their building. Their belief that the event caused damage is what triggers the engineering assessment through the insurer. It is common to hear the statement "I never saw that crack before" and the statement can be completely truthful. The crack may have been there for years, but it had simply gone unnoticed. The other limitation is that most initial structural damage assessments are typically non-invasive visual assessments. In other words, most structural components are not visible, and the person assessing the structural condition must rely on the visual appearance of the building finishes.

What kind of damage do we see in our assessments? Major damage such as components that are missing or collapsed, are generally relatively easy to attribute to the event. Less significant damage such as cracks, walls that are out of plumb, floors that are not level, and doors and windows that do not fit, are more difficult to assess. With the less significant damage indicators, time is of the essence in assessing if it was a result of the event. Let's look at some of these issues individually.

Cracks

Cracks in interior finishes, such as plaster, drywall, and painted trim are very common. Cracks also occur in brick, stone, masonry and concrete in foundations and exterior walls. Are the crack edges sharp or rounded? Are the faces of the material exposed by the crack clean? "Weathering" of a crack over time will result in rounded edges and dirt in the crack. This weathering generally occurs faster for exterior cracks. Being called upon to undertake a structural assessment nine months after the event severely impairs the ability to assess whether the damage was caused by the event.

Does the surface of the plaster, drywall, concrete, or masonry around the crack look like it has been patched? Many crack patches are cosmetic patches which have not been reinforced. If a crack pre-existed the event, and had been patched, the component likely does not have the strength it had before it cracked. Relatively minor forces will usually cause these cracks to re-open.

Cracks happen in buildings for a number of reasons, all of which need to be considered when assessing a building for structural damage. Wood frame construction shrinks, warps, twists and splits as it dries over time. The resulting dimensional changes may result in bowing, or cracking of the more brittle finishes, which are generally not structurally significant. Truss uplift in the winter time can cause the ceiling to lift off the interior partitions if the original drywall installation did not allow for this effect. Concrete, and masonry to a lesser extent, shrinks over time. This shrinkage reduces over time, but it can result in cracks early in the life of a structure. Foundation settlement occurs when the load of the building compresses the soil under the building footings. Soil is not homogeneous, and differential settlement can occur, resulting in cracking. Changes in groundwater conditions can effect foundation settlement. Normal wind loads and minor seismic events exert lateral forces on a structure, which cause the structure to sway. Interior finishes and trim may crack under these normal loads.

Out of Plumb/Not Level

"The door/window won't close now." Was the structure plumb and level before the event? Without information obtained prior to the event, this can be as difficult to determine as with cracking. Many of the mechanisms that result in cracking of buildings under normal situations, also impact fit of doors and windows, and the perception of plumb and level conditions in the building. Owner perceptions of these issues are similar to those for cracking. Again, prompt timing of the structural assessment after the event is critical.

If a door or window does not operate properly after an event, it is often because something is not square. A door or window binding in an opening will likely show scrapes where the binding is occurring. The sooner this is observed after the event, the less significant the scrapes should be. If a door and frame are painted, and it is observed that a portion of the paint is scraped completely off the door and/or jamb at the top or bottom of the door/frame, it is likely that there has been a fit problem for some time prior to the

event. If the door will still close, it is unlikely there has been significant structural movement as a result of the event. When a door can no longer be operated, and there are no signs of scraping on the door or jamb, it is likely that there was a relatively sudden change in the door or frame. This condition is not necessarily attributable to a specific event, as it could have been this way before the event. One would need to look at other doors or windows with similar orientation in the building, to see if they appear to have been affected in the same manner.

Humidity increase in a building can cause swelling of wood members, and result in improper fit. This humidity change could be consequential change as a result of window breakage during a high wind event, and not an indicator of structural movement. It could also be a result of seasonal changes in the interior environment in the building.

Structurally Significant or Not?

Most events that result in extraordinary loads and damage to a building are relatively short term. Building movement is to be expected in these situations, as is cracking of building finishes, and changes to the fit of doors and windows. The building movement can be elastic, where the structure returns essentially to the pre-event position. Cracks and fit problems are usually very small, and the presence (and determination) of pre-existing conditions is not that significant with respect to the structural condition assessment, or the repair of finishes. The building movement can also be inelastic, where the structure remains in a position somewhat deformed from the pre-event position. Usually larger cracks are evident in the finishes, and there are more severe fit issues with doors and windows. Pre-existing cracks that are weathered and dirty may have become significantly wider. Doors or windows with pre-existing fit problems may have been broken, or become completely inoperable. Cracks in finishes and fit issues with doors and windows are normally just symptoms. Significant inelastic movement and permanent deformation is a likely indication of issues that are structurally significant. It is often difficult to determine the exact nature and magnitude of damage to the structure without an invasive investigation, which would involve removal of finishes to expose the structure.

I have attempted to outline some of the issues related to determining whether certain observed conditions pre-existed an event triggering a structural assessment. Clearly the person undertaking the assessment must have significant experience in how buildings perform as they age, and how they perform under extraordinary loading situations. I have not attempted to address the issue of whether pre-existing conditions may have contributed to damage observed during a structural assessment; that can be a topic for a future Burnside article.

Brian Boyle is a Senior Structural Engineer with over 30 years experience in the design and review of construction of a wide variety of structures. His detailed knowledge of the Building Code. expertise implementing condition surveys, and unique repair design are all proven assets needed to support the Insurance Industry.

For more information contact: Nancy Orr
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Transferable Skills Analysis
Ergonomic Assessments
Driving Evaluations
Implementation of DAC Recommendations

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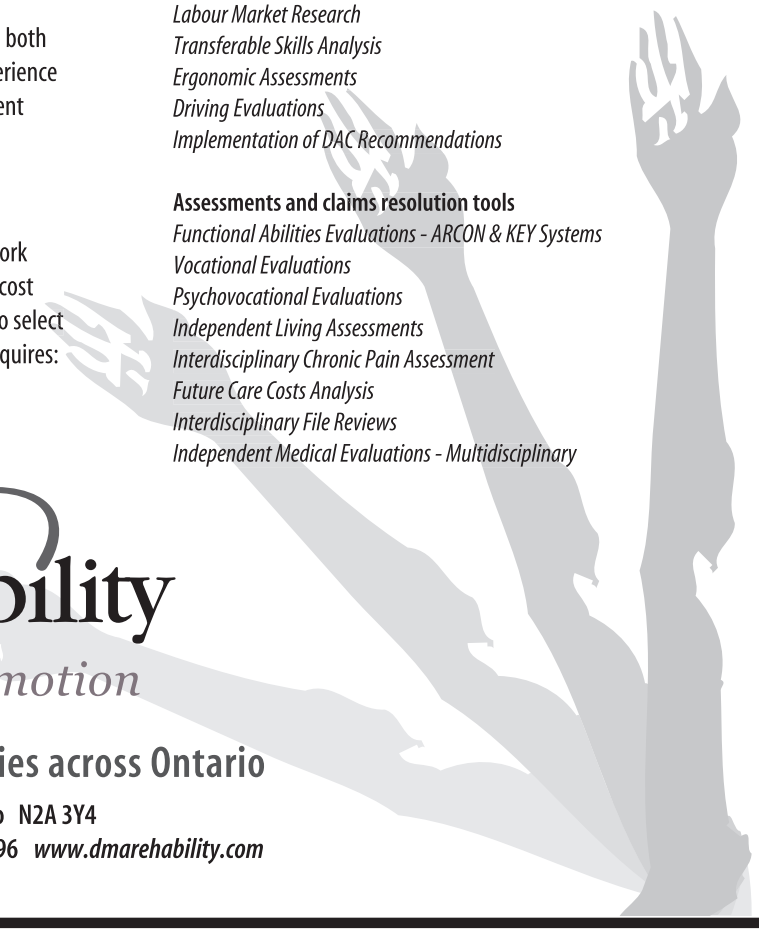

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Schedule of K-W Chapter Monthly Meetings 2012-2013

Date	Topic	Contact
2012		
SEPTEMBER 27	TRADE SHOW	Charlene Ferris Cyndy Craig
OCTOBER 25	BAD FAITH	Stephanie Jermyn Laura Potts
NOVEMBER 29	CHILI COOK-OFF	Dale Stuart Mark Hale
DECEMBER 9	KIDS CHRISTMAS PARTY	Randy Higgins Dale Stuart
DECEMBER 13	CHRISTMAS PARTY ***NEW THIS YEAR***	Stephen Tucker Charlene Ferris
2013		
JANUARY 31	CARGO THEFT	Lisa Dobson Dan Strigberger
FEBRUARY 28	PANEL DISCUSSION	Stephen Tucker Mike McLeod
MARCH 28	PROVINCIAL SEMINAR	Mike McLeod
APRIL 25	FUN NIGHT & ELECTIONS	Stephen Tucker Laura Potts
MAY	**NO MEETING AS PROVINCIAL CONFERENCE**	
JUNE 27	GOLF TOURNAMENT	Charlene Ferris Cyndy Craig

** All meeting dates, topics and contacts are subject to change

**Cost for meeting is $35 per person

Kitchener-Waterloo Adjusters Association
Chapter of Ontario Insurance Adjusters Association

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TORONTO DELEGATE REPORT

The 2013 OIAA Claims Conference at the Metro Toronto Convention Center was held on February 6th and was a success with almost 2000 attendees. It was a full day packed with a wide range of industry hot topic seminars, a trade show with 150 exhibitors, a job fair and a keynote speech at the luncheon by Joe Roberts "The Skid Row CEO" which was inspiring.

March 19, 2013 brings the annual Curling Bonspiel which will be held at the Richmond Hill Curling Club. You can register online at www.oiaa.com.

April 10, 2013 brings the Annual OIAA GTA representative elections and cocktail party at The Sheraton Centre. You can register online at www.oiaa.com.

"CALL FOR ARTICLES"

Without Prejudice Magazine has issued a *"Call For Articles"* so if you would like to become a published author please send me an article and I will submit it to the WP editorial team for consideration. We issue 2200 magazines 10 months of the year distributed throughout the province so the magazine is a great vehicle to share information and ideas in the ever changing industry landscape. We are looking for articles approximately 200-2500 words in length with content that is of interest to our readers and not self promoting. A head shot and brief bio should also be provided prior to publishing.

If you would like more information or have any questions or concerns please do not hesitate to contact me at Michael.mcleod@crawco.ca.

Regards,
Michael McLeod
Chapter Toronto Delegate

ASSOCIATION CONTACTS AND INDUSTRY EVENT SCHEDULE

March 22nd, 2013 .....Insurance Associations Curling Bonspiel
March 28th, 2013 .....KW-OIAA Educational Meeting
April 25th, 2013.....KW-OIAA Fun Night & Elections
May 9th & 10th, 2013.....OIAA Provincial Claims Conference

Insurance Brokers Association of Waterloo
Contact – Dianne Monteiro
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K-W Ontario Insurance Adjusters Association
Contact – Randy Higgins
randy@pdskw.ca

Insurance Institute-Conestoga Chapter
Contact – Heather Graham
hgraham@insuranceinstitute.ca

March is Fraud Prevention Month!

Check out some stats from local articles to help keep you a step ahead this month and stay aware:

"IBC, FSCO remind consumers how to report auto insurance scams as Fraud Prevention Month kicks off"
The Insurance Bureau of Canada and Financial Services Commission of Ontario kicked off Fraud Prevention Month on Thursday by reminding consumers of how to report insurance fraud, especially in auto insurance in the province. "Fraud & Financial Crimes cost Canadians over $10b annually" …Fraud Prevention Month runs through March across Canada as an education awareness campaign about various types of fraud. All month, the federal Competition Bureau will host awareness initiatives, and the department has also launched a "Little Black Book of Scams" as a resource for Canadian consumers. Fraud tips can also be reported through the Canadian Anti-Fraud Centre.

In Ontario, both IBC and FSCO have recommended that consumers report suspected insurance fraud to Crime Stoppers, IBC's tip line or to FSCO directly, while also ensuring insurers and brokers are properly licensed. The Ontario Auto Insurance Anti-Fraud Task Force Final Report suggests auto insurance fraud in the province costs consumers up to **$1.6 B/yr** in premiums, not including additional health care, emergency services and court costs.

IBC is also pointing out to consumers that exaggerated claims constitute fraud. "When someone makes a false or exaggerated claim, honest policyholders pay for it," noted Rick Dubin, vice-president of investigations at IBC. "Insurance criminals take money right out of your pocket. When they cheat, you pay."
Source: *http://www.canadianunderwriter.ca/headlines.aspx* DAILY NEWS Feb 28, 2013 10:32 AM

OPP launches Fraud Prevention Month: **"Focuses on preventing auto insurance fraud"**

Every vehicle owner is seeking lower auto insurance premiums and scammers know this, said the Ontario Provincial Police. To kick off March as Fraud Prevention Month, members of the OPP anti-rackets branch are reminding vehicle owners that if it sounds too good to be true, it likely is.

Fraudsters have been offering low automobile insurance premiums in newspaper and online ads, and at trade shows often impersonating legitimate, reputable vehicle insurance brokers. Their various "offers" guarantee [large savings]… Victims have sent premium payments to these phoney vendors through Western Union or Money Gram [and receive] a bogus insurance slip [in the] mail. Victims don't realize they have no coverage until they are involved in a collision or are stopped by police.

In 2012, the Canadian Anti-Fraud Centre (CAFC) — of which the OPP is a partner — received 7,394 Canadian complaints of service scams including auto insurance fraud. The 2,736 people who were identified as victims lost a total of just over $2.1 million. If you are about to purchase auto insurance, you can protect yourself by verifying legitimate vendors through two reputable sources:

-Registered Insurance Brokers of Ontario (RIBO) - All insurance brokers must be licensed in Ontario with RIBO. Call 1-800-265-3097 or visit www.ribo.com.

-Financial Services Commission of Ontario (FSCO) - In Ontario, automobile insurance is regulated by FSCO, an agency of the Government of Ontario's Ministry of Finance. In order to legally provide insurance, the insurance companies must be registered with FSCO. Visit www.fsco.gov.on.ca.

If you suspect you have purchased phoney auto insurance — or think you or someone you know has, contact police (Canadian Anti-Fraud Centre) at 1-888-495-8501 or Crime Stoppers at 1-800-222-8477(TIPS)

Source: http://www.northernlife.ca/news/policeandCourt/2013/02/28-fraud-prevention-month-sudbury.aspx Feb 28, 2013

Cheers! Stephanie Jermyn, CKR Global Investigations, Social Director, KW OIAA

If you have an ad or an article you would like to place in the KW OIAA bulletin
Please contact Randy Higgins – randy@pdskw.ca - 519-570-0438 x 242

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OIAA Ontario Insurance Adjusters Association

Death by Firewall

Authored by:

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A recent Superior Court decision highlights the ongoing struggle automobile insurers face with privacy issues and firewalls. In *De Sousa v. Aviva Insurance*[1], the plaintiff was injured in a motor vehicle accident. The plaintiff claimed and received first party statutory accident benefits from Aviva and later brought a tort action against the insurer for inadequate insurance coverage.[2]

The issue was whether the plaintiff could compel an accident benefit representative from Aviva to attend an examination for discovery in the tort action. Aviva refused to produce the representative. It argued among other things that producing the accident benefit representative would breach the company's firewall between the accident benefit and bodily injury departments.

Master Muir heard the motion and ruled against the insurer. He found that the purpose of the firewall is so that an insurer is not advantaged by the fact that it is responding to both accident benefit and tort claims. However, the consent of the insured obviates this concern and the master found that the plaintiff had clearly and unequivocally provided his consent to the transfer of information (by asking for the discovery). In view of this consent, the defendant was no longer required to maintain the firewall.

The *De Sousa* decision is a perfect example of just how out of control the firewall concept has become in motor vehicle accident claims handling. The issue is compounded by the increase of privacy obligations over the past several years, coupled with internal confusion on how the auto insurance firewall is supposed to work.

Let us start at the beginning.

Igniting the Firewall

Ontario's automobile insurance scheme guarantees statutory accident benefits coverage to any person involved in a motor vehicle accident in Ontario. Section 268 (2) of the *Insurance Act* creates a priority "pecking order" that determines which insurer is responsible to pay accident benefits. If the claimant does not have their own insurance coverage, they have recourse against the insurer of the vehicle in which they were an occupant (or which stuck them). If there is no coverage there, they have recourse against the insurer of any other vehicle involved in the accident, followed by recourse against the Motor Vehicle Accident Claims Fund.[3]

Because the priority scheme affords coverage to claimants who do not have access to their own polices, frequently an insurer can become responsible for handling a plaintiff's accident benefits file, while offering its own insured a defence to the same plaintiff's tort claims. In other words, the same insurance company ends up insuring both the tortfeasor for liability coverage and the plaintiff for accident benefits. Consequently, the company's accident benefits department obtains a wealth of medical information and records early in the claim while the bodily injury department receives only those records that the plaintiff agrees to produce.

You can see why a bodily injury adjuster would be tempted to take a peek at the accident benefits file, just a peek.

The industry can trace the origins of the accident benefits/tort firewall to the Insurance Bureau of Canada's Bulletin 184, called "Internal Transfer of Information from Accident Benefits Adjuster to Tort Adjuster"[4]. The Bulletin's preamble explains that the IBC received complaints (presumably from tort plaintiffs) that some automobile insurance companies, who were handling both accident benefits and tort claims, were facilitating a process whereby bodily injury adjusters were obtaining copies of medical records directly from the accident benefits department, without the plaintiff's consent.

Bulletin 184 reminded insurers of Rule 13 of the All Industry Claims Agreement, which states:

> *Insurers agree, as a matter of corporate policy, that they shall not gather medical information from doctors or their employees, without the written consent of the patient, subject only to any right to such information under law or rules of practice.*[5]

[1] De Sousa v. Aviva Insurance Company of Canada, 2013 ONSC 185 (CanLII), <http://canlii.ca/t/fvj28>

[2] Pursuant to the OPCF 44R Family Protection Change Form that formed part of his policy of insurance.

[3] *Insurance Act,* Section 268 (2).

[4] January 22, 1997.

[5] Rule 13 became Section IV with the 2002 revision of the IBC Claims Agreement. The revised clause extends the list of medical providers to include health care practitioners and hospitals.

Through the Bulletin, the IBC cautioned that liability insurers are not to seek this medical information indirectly from the accident benefits department. Where the same insurer is handling both the accident benefits and tort claims, the IBC advised that companies:

> *should set-up "Chinese walls"[6] so that information gathered by it regarding the accident benefits claim does not become available to the tort adjuster, unless the insured so authorizes.*

As noted above, Master Muir appreciated the purpose of the firewall in *De Sousa*. He also referenced several prior firewall decisions that followed similar reasoning.[7]

So what's the issue (and why should you care)?

The Firewall Spreads like Wildfire

If we accept that the firewall's purpose is to protect a plaintiff's accident benefits file from the same company's bodily injury adjuster, why are firewalls being lit in so many other situations? Take the following real life war stories I have seen on numerous files over the years (I have anonymized the insurers' names to protect the innocent):

- 123 Insurance's bodily injury department suspected that the plaintiff was not involved in the subject accident. It obtained some statements, which conflicted with the plaintiff's version of how the accident happened. It also obtained an engineering report that brought the circumstances of the accident into question. But because of the company's firewall procedures, this information never made it to the accident benefits department, which was still paying the same plaintiff claimant benefits, unaware of a potentially fraudulent claim.
- ABC Insurance was responding to a loss transfer claim. Its accident benefits department was handling the loss transfer response and, in doing so, was trying to prove that its insured (also the tort defendant) was not at fault for the accident. Meanwhile, the bodily injury department was responding to the tort claim and was also denying liability. The BI department interviewed witnesses and had obtained an engineering report that helped its insured defend the liability claim. Because of the company's firewall, the BI department refused to share any of the investigation fruits with the accident benefits department, resulting in duplicative investigative efforts and inconsistent findings.
- Same scenario as above but this time the accident benefits department had a wealth of information that would help the insured defend his tort claim. Because of the company's firewall policies the BI department never saw this information, resulting in overpayment for the loss.[8]
- Same scenario again, but this time the accident benefits department settled the loss transfer dispute on the basis that its insured was 75% at-fault for the accident, without considering that this could prejudice the bodily injury department's position on liability in the tort action.[9]
- KW Insurance's bodily injury department had great surveillance on the plaintiff, but would not share it with the accident benefits adjuster.

In all these scenarios, internal firewall procedures (or fears) hampered vital communications between the bodily injury and accident benefits departments, to the detriment of insurers and tort defendants (insureds) alike. This continues to happen. For lack of a better expression, "the right hand has no idea what the left hand is doing". Successful claims investigation and fraud prevention usually depend on early discovery and coordinated efforts between departments with different resources. Yet somehow the two departments[10] in an insurance company that are most involved in the accident claims handling process are not talking to each other because of a firewall.

Fight the Firewall with Fire

Insurers need to return to the basic purpose of the auto insurance firewall, namely, to ensure that an accident benefits claimant isn't prejudiced by having their claims handled by the tortfeasors' insurer.[11]

Clearly there is an interest in protecting medial information and the *Rules of Civil Procedure* provide mechanisms to disclose that information. That said, liability information (including fraud investigations) do not deserve the same level of deference or protection. That information was not intended to be shielded from disclosure.

With that in mind, insurers need to be practical when deciding whether information should be exchanged between departments. Only you can prevent unruly firewalls.

Daniel Strigberger is a Partner in the Insurance Litigation Group in our Waterloo office. Daniel provides litigation services to many of Canada's leading property and casualty insurers.

[6] Now commonly referred to as a firewall.

[7] See *Klingbeil (Litigation Guardian of) v. Worthington Trucking Inc.,* 1997 CarswellOnt 4870 (GD) at paragraphs 30 and 31; *McLennon v. Pilot Insurance Co.,* 1999 CarswellOnt 5584 (OIC Director of Arbitration) at paragraph 35 and *Anand v. Belanger*, 2010 ONSC 2345 (CanLII), at paragraph 32.

[8] Can you imagine the potential bad faith claim by the tort defendant who loses his house because his insurer withheld useful information from those defending his claim?

[9] *Ibid.*

[10] Usually the property damage department gets into the action too right after the accident but I have seen only one or two incidents where the PD department refused to share information with the other departments.

[11] Or in some cases, whether by co-incidence or by operation of the uninsured motorist provisions of the policy, their own insurers.

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Misnomer: *Does A Rose By Any Other Name Smell As Sweet?*

Limitation periods are an insurer's friend. The purpose of limitation periods is to balance claimants' rights to sue with defendants' rights to certainty and finality. Recent developments in the law of misnomer have tilted the balance perceptibly in favour of claimants at the expense of defendants and their insurers.

The *Limitations Act*, *2002* came into effect on January 1, 2004. The *Act* introduced a two year limitation period on most types of claims. The two year limitation period runs from the date that a claim is "discovered". The definition of "discovered" requires a claimant to act diligently to investigate and enforce a claim. A claim is "discovered" on the first day the claimant knew or *ought* to have known the material facts giving rise to a claim. A claimant who fails to act diligently to investigate and discover a claim may be barred by the *Act* from pursuing the claim. Judges have repeatedly warned that claimants must act diligently and not "sleep on their rights".

Subsection 21 of the *Limitations Act 2002* prohibits a claimant from adding a defendant as a party to an action after the two year limitation period has expired:

> Adding party
>
> 21. (1) If a limitation period in respect of a claim against a person has expired, the claim shall not be pursued by adding the person as a party to any existing proceeding.
>
> Misdescription
>
> (2) Subsection (1) does not prevent the correction of a misnaming or misdescription of a party.

The general rule, therefore, is that where a claimant tries to add a party as a new defendant to a proceeding more than two years after the accident or occurrence, and the claimant has failed to act with due diligence, his or her motion will fail.

Misnomer is an important exception to the general rule. Subection 21(2) of the *Act* allows a judge to add a defendant to an action after the two year limitation period has expired if there has been a "misnaming or misdescription" of a party.

Two recent developments have expanded the scope of the misnomer exception.

First, the scope of what is considered a misnomer has expanded. The doctrine of misnomer has always applied in cases where a claimant made a spelling mistake in a defendant's name. It also applied where the claimant named "John Doe" as a defendant because the identity of the defendant was unknown to the claimant at the time of the action was issued. What is new is that the Court of Appeal will apply the misnomer exception where a claimant names the entirely wrong party as a defendant.

The change started with the 2008 decision of the Court of Appeal in *Lloyd* v. *Clark*. On January 26, 2006, the plaintiffs issued a Statement of Claim exactly two years after a motor vehicle accident. The municipalities of Ajax and Whitby were named as defendants. In February 2006 an insurance adjuster sent a letter to the plaintiffs notifying them that the Region of Durham had jurisdiction over the road in question. The plaintiffs did not take any steps to have the Region added as a defendant until July 2006. The Court of Appeal said that the doctrine of misnomer could be applied even in a case where the claimant named the wrong party:

> "4 The case law amply supports the proposition that where there is a coincidence between the plaintiff's intention to name a party and the intended party's knowledge that it was the intended defendant, an amendment may be made despite the passage of the limitation period to correct the misdescription or misnomer."

The Court of Appeal allowed the plaintiffs to add the Region as a defendant to the action after the two year limitation period had expired because the plaintiffs always intended to name the road authority as a defendant and the insurers for the Region always recognized that the Region was the road authority.

Second, failing to act diligently to investigate or enforce a claim is no longer fatal to a motion to correct a misnomer. In the 2012 decision of *Skribans* v. *Nowek*, Master Benjamin Glustein wrote:

> "..., it is <u>not relevant</u> whether a plaintiff knew or ought to have known of the identity of the defendant within two years from the cause of action. Despite the passage of the limitation period, a plaintiff can correct a misdescription or misnomer provided that the plaintiff intended to name that party as a defendant and that party knew that it was the intended defendant (or reasonably would have understood that the "litigating finger pointed at them")."

Skribans and cases like it have markedly diminished the importance of due diligence, but it is not entirely dead. A judge has a residual discretion not to add a party as a defendant to an action. A judge could exercise his or her discretion to deny a motion to add a defendant where a claimant did not act with due diligence. My guess is that will only happen in the most extreme cases.

The sky is not falling. Even in its expanded form, the misnomer exception has limited application. However, the day will come for many of you when an insured gets dragged into an action long after the two year limitation has expired, even though the claimant has failed to act with due diligence. It won 't feel right, and, in my view, it isn't.

Patrick Leonard, *VP Southwest Ontario*

Jason Dumbreck, *VP Southwest Ontario*

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