IAA Kitchener-Waterloo

2016 Chili Champ - Donald Perry

December 2016

PRESIDENT'S MESSAGE

DECEMBER 2016

Hello All,

Mother Nature was nice to us this past month and gave us unseasonably warm weather. I hope that everyone enjoyed the extra time outdoors in the fall season. Let's hope that it stays this nice in the Holiday season.

November brought our annual chili cook off. We had 16 home cooks present us with their very best chili's and over 60 people were out to taste test. Andrew Coppolino from Waterloo Region Eats (http://www.waterlooregioneats.com/) joined us to present the Critics Choice Award. The rest of the attendees voted on their favorite chili to award the People's Choice trophy.

Andrew decided to base his decision on the traditional chili and a variety of other traits. The Critic's choice was awarded to Donald Perry of Ground Force Environmental. The Runner- Up was Emily Durst's Chili from Miller Thomson. With a special mention to those of Samis & Co. The People's choice award was won by Donald Perry for the Second year running. Take note challengers, you have a year to come up with your best recipe to de-throne Mr. Perry in November 2017.

With the holidays coming we are all reminded of the need that is within our communities. Many of us have the charities and causes that are close to our hearts and we chose to support. At the Cook- Off we requested attendees to bring donations for the Sleep Tight Campaign (http://www.sleeptightcampaign.org/) in which we collect Pajama's that are donated throughout this campaign to various agencies throughout the region. Thanks to your generosity we collected 75 pairs of Pajama's for the Sleep tight campaign and a variety of canned good for the Food Bank of Waterloo Region.

I wish you and your families nothing but health and happiness this holiday season. May you be well enough to do everything you desire and have enough to provide for you and your family.

We will see you at our first event on 2017 on January 26 at which we will have a panel of Property contractors in to have a Round Table discussion.

Happy Holidays and all the Best in the New Year,

Jennifer Brown
President of K-W OIAA

K-W OIAA EXECUTIVE COUNCIL 2016-2017

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

IN THIS ISSUE…

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EVENTS SCHEDULE 2016-2017

January 26, 2017- Contractor's Round Table: Stephen Tucker & Jennifer Brown

February 23, 2017- Accident Benefits- Ashleigh Leon & Leeann Darke

March 30, 2017- Liability Topic- Carrie Keogh & Dan Strigberger

March 31, 2017- Tri- Council Curling Bonspiel: Westmount Golf and Country Club

April 27, 2017- Election Night- Jennifer Mohr & Jaime Renner

May 4&5, 2017- OIAA Provincial Conference – The Inn of Waterloo

June 22, 2017- John McHugh Memorial Golf Tournament: Jennifer Brown & Charlene Ferris: Ariss Valley Golf and Country Club

All events will be held at Golf's Steak House and Seafood unless otherwise noted.

SOCIAL CHIT CHAT

December 2016

We are quickly approaching the end of yet another very eventful year in Ontario's insurance industry and we hope that you are able to take some time to enjoy the season.

Aviva Canada seems to be in the holiday spirit, recently announcing a 15% auto insurance discount for all of its insured drivers of vehicles with automatic emergency breaking. This is an industry first discount (and given that auto rates appear to continue to be increasing despite the recent overhaul of the insurance system) it will definitely make Aviva insureds a bit more jolly this season. For the full story go to http://www.canadianunderwriter.ca/insurance/aviva-canada-announces-15-auto-insurance-discount-drivers-vehicles-automatic-emergency-braking-1004104634/.

The executive members wish you a wonderful holiday season and we look forward to seeing you for our January property roundtable.

Cheers,

Your 2016-2017 Social Director
Ashleigh Leon

Articles

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

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

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

PROVINCIAL DELEGATE REPORT

As I write this report we are only days away from the 2016 OIAA Holiday Party at the Fairmont Royal York in Toronto. It is a Great Gatsby Inspired event with many surprises and prizes in store for our guests. The event is sold out with a $10 benevolent portion from every ticket going to the Alzheimer's Society of Ontario.

The first major OIAA event of 2017 is the Claims Conference which takes place at the Metro Toronto Convention Centre on Tuesday January 31st. This is a milestone year as it will mark the OIAA's 25th anniversary of hosting the Claims Conference. The event is a full day of educational seminars, networking and trade show with over 150 exhibitors from across Canada. On-line registration opens on December 15th and is free for claims professionals.

Without Prejudice is still looking for informative articles. WP is a great way to share informative educational topics with our entire provincial membership. WP reaches 1600 claims professionals and industry partners on a monthly basis. Please feel free to contact me at stephen.tucker@economical.com if you have any questions or would like more information about publishing an article in WP.

January 31, 2017
2017 Claims Conference - Metro Toronto Convention Centre, Toronto, ON
- Online registration opens December 15th at 9:00am

Sign up for Toronto events at OIAA.com. You can follow OIAA events on Twitter, @OIAAOfficial, or on Facebook.

Regards,

Stephen Tucker
Kitchener-Waterloo OIAA Chapter, Provincial Delegate

The Contractors Are Coming!

Come join us for the first educational meeting of the year - Contractors Round Table Discussion

All the questions you are afraid to ask will be asked and answered. This discussion will be moderated by David Colyn of Crawford & Company (Canada) Inc.

Thursday January 26, 2017 at Golf's Steakhouse

If you have any questions, please contact:

Stephen Tucker
Provincial Delegate
519-497-4632

Cyndy Craig
Past President
647-293-5436

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May 4

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An opportunity to network with those in the Insurance industry

May 5

7 educational sessions

SABS and LAT Panel Discussion – Is this what anyone expected?

Hoarding – Digging out from under the exposure

Casualty Update – The Year in review

Insurance 2.0: The Sharing Economy

Fort Mac Round Table Discussion

VP Claim Panel

Drones Presentation – Outside and Interactive

The education seminars will be followed by a dinner and traditional fest hall.

Surveillance Tells the True Story

Surveillance is one of the most powerful tools insurance companies can use for a claim dispute, however, the strength of this tool may depend on the quality of the report and video obtained. When done effectively, surveillance has the potential to illustrate inconsistences or exaggerations in claims, establish or deconstruct credibility, and affect the value of any potential settlement. In order for surveillance to be the most beneficial tool that it can be, there are several guidelines that should be followed.

First and foremost, it is important to note that private investigators hired to carry out surveillance by companies in Ontario are bound by the rules and regulations of the Security and Investigative Services Act. This act ensures that all investigators are trained and licensed to legally conduct surveillance. A private investigator is required to possess a valid licence. Without proper licensing, any surveillance obtained will be deemed inadmissible if brought to court.

Hand in hand with proper licensing is the assurance that privacy laws are upheld. When in plain view, while in public, video documentation of a subject can lawfully be obtained, without the knowledge of the subject. This includes locations such as on driveways, in parks, or in a mall. It is important to note that in these locations, other individuals may be captured on video while documenting the subject, however, there is no breach of privacy for those individuals. Areas where there is a general expectation of privacy, such as change rooms and washrooms, should not be documented during surveillance. If any video is captured in these areas, it may cause those scenes to be deemed inadmissible in court, and may call into question the ethics of the investigator, and the motive of the client. Following legal and ethical standards is a baseline necessity to utilizing surveillance for claims, however, the real power in surveillance is the ways that it captures subject activity in an informative and objective manner.

In order for surveillance be an advantageous tool, surveillance should generally be conducted over consecutive days. Conducting surveillance in this manner allows for context to be given to a subject's actions. If a subject is seen continually engaging in particular activities, such as driving children to school or going to work every day, or mowing the lawn every week, this assists in establishing the routine and regular activities that the subject performs, and helps to single out "one-off" occasions. Consecutive days of surveillance also allows for the repercussions of activities to be observed, such as not being observed outside the residence, needing assistance, or attending medical or physiotherapy appointments. Generally, it is not enough to merely document a subject performing physical tasks on a single given day. It is essential that surveillance be conducted on the day after observing physical activity, in order to refute claims that performing the said activities were incapacitating and that the subject suffered negative effects as a result.

Another way in which consistency of activity can be determined is to conduct surveillance over various seasonal periods. Summer is a popular time of year to check on a subject's activities, however, winter can be just as informative. Routines such as driving to work and grocery shopping still occur, socializing may take place in restaurants instead of parks, and outdoor activities can show a variety of different abilities, such as shoveling snow, scraping frost from windows, playing with children in the snow, and participating in winter sports.

Surveillance video is at the crux of modern surveillance, and can be scrutinized for objectivity and context. Measures can be taken to ensure the surveillance report and video are "showing" actions, rather than "telling", which is essential for the most objective reporting. Good quality video and consistent recording allows the viewer to clearly observe uninterrupted actions, ensuring all aspects of a subject's actions are documented. This also means that activities may impugn or support a subject's claim. The inclusion of these activities adds credibility to the objective nature of surveillance.

Similarly, the surveillance report should describe what is observed, and support the video obtained, but be free from subjective opinion, such as characterizations of individuals, and manner of movement (ie: normal or abnormal). A report can describe actions, such as entering and exiting vehicles or lifting children, however, over-description, such as the angle at which a subject bends forward, may be construed as subjective. It is generally accepted by the courts that investigators may comment on observances as a lay person might, however, investigators must avoid any type of medical opinion or judgement. For example, it is acceptable for an investigator to state that "the subject was observed limping", however, it is not acceptable to state that "the subject appeared to walk in a painful manner" or "the subject's left leg appeared to be bothering him". Since the investigator is not qualified to determine what the causation of the limp is, they cannot speculate on it. A good report will also orientate the reader by including information about actions on a given day, at specific times and in various locations.

A good surveillance report may support or discredit a subject's claim – it is important to keep in mind that, either way, pertinent information is determined. It is essential to ensure that surveillance is conducted and documented correctly and concisely for it to result in an advantageous outcome for the client. Larrek Investigations prides itself in conducting surveillance in a discreet, ethical, and professional manner, continually striving for excellence – both within ourselves, and in the services that we provide.

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FSCO arbitrator finds Economic Loss must be Shown for each Attendant Care Monthly Payment

Jenna Meth | 416.365.0000 | jmeth@samislaw.com

It has long been unclear from the attendant care provisions in the *Statutory Accident Benefits Schedule* (SABS 2010) whether the "economic loss" component of the "incurred" definition need only be proven once to generate benefit entitlement or if it needs to be proven periodically as attendant care expense claims are submitted.

The recent FSCO decision of Arbitrator Mongeon in *Keeping and Aviva Canada Inc.* (FSCO A14-003770), dated October 31, 2016, sheds some light on this longstanding area of regulatory ambiguity.

The concept of "incurred", defined in subsection 3(7)(e) of the SABS 2010, acts as a threshold for entitlement to attendant care benefits (among others), in conjunction with the criteria set out in section 19. One of the most controversial components of the "incurred" definition is the requirement that the person providing attendant care goods or services in a non-professional capacity sustain an "economic loss" as a result of providing those goods or services to the insured person.

Following changes effective February 1, 2014 to the SABS 2010, the concept of "economic loss" now acts not only as one of the requirements for benefit entitlement, but also as a cap on the quantum of benefits payable for accidents on or after the transition date where care is rendered by a non-professional service provider.

Further changes to the attendant care section were brought in even more recently by Ontario Regulation 251/15, which added that if a service provider is paid for providing attendant care, and this amount is less than the amount on the applicable "Assessment of Attendant Care Needs" form (Form 1), then the insurer is only liable to pay the actual incurred expenses. Previously, case law had suggested that even if a service provider was actually paid less than the Form 1 amount, the insurer remained liable for the full Form 1 amount.[1]

A body of case law has grown around the term "economic loss" (which is not defined in the SABS), primarily focused on what is or is not an "economic loss". In *Simser and Aviva*, Arbitrator Lee adopted the definition of "economic loss" from *Black's Law Dictionary* and held that it must relate to some form of *financial* or *monetary loss*. This conclusion was upheld on appeal.

In *Keeping and Aviva*, the claimant was injured in a serious motor vehicle accident on June 4, 2013. He was unlicensed at the time and collided with a tree at high speed. His front seat passenger was killed

[1] Delegate Blackman in the *TTC and Marcus* appeal decision actually said that "[t]he amount of attendant care benefit is not stated to be determined by, amongst other things, the expense actually paid" (emphasis added), *Toronto Transit Commission Insurance Company Limited and The Estate of Reuben Marcus, Deceased, By Its Executor, Amy Marcus*, FSCO Appeal P14-00005, Delegate L. Blackman, September 19, 2014, p. 12.

and two rear passengers sustained serious injuries. One of the issues before the arbitrator was whether the claimant was entitled to receive attendant care benefits and if so, for what periods and in what amounts.

As a result of the accident, the claimant was hospitalized for a number of weeks and deemed catastrophically impaired by the insurer, giving him access to up to $6,000.00 per month in attendant care benefits for "incurred" expenses.

Following discharge from the hospital, the claimant lived with his mother for a time, then with a friend, and then with Ms. Graham, who was the only witness to testify to corroborate the claimant's position that his service providers sustained an economic loss. He subsequently spent time in a youth detention centre for charges related to the accident, and upon release stayed with his grandmother and a number of friends for various periods of time.

In his analysis, Arbitrator Mongeon found that the only period for which attendant care services were actually provided was when the claimant was residing with Ms. Graham. This finding was based primarily on the lack of evidence with respect to any other service providers.

In answering the question "Does economic loss have to be periodically proven or is it a once and for all test?" the arbitrator referenced the decision in *Henry and Gore*, which characterized the "economic loss" test as a "rough check" on the payment of attendant care. Arbitrator Mongeon elaborated on this characterization:

> **The rough check to be applied, the need to show the economic loss, occurs for *each* expense. Each time the Insurer is required to consider a monthly payment of attendant care services, the Applicant has an onus to show the economic loss. In the case of multiple people providing services, as the Insurer has argued, those multiple people must *each* provide evidence of economic loss.**
>
> **It is not sufficient to show an economic loss at some time during the entire passage of time from one person. (emphasis added, italics in original)**

Ultimately, the arbitrator found that attendant care was payable in relation to the services provided by Ms. Graham. This was despite a lack of evidence to support her expenses. The arbitrator nonetheless found her to be a credible witness and applied *Aidoo and Security National*, confirming that "oral testimony alone may be sufficient to establish economic loss."

Despite confirming the *Aidoo and Security National* principle that sets a relatively low bar for claimants to prove economic loss at a hearing, *Keeping and Aviva* is nonetheless valuable in that it finally sheds light on how often economic loss must be proved. For the moment at least, this puts to rest the debate over whether once is enough to justify benefit entitlement. In accordance with this decision, insureds are expected to show that their non-professional service provider has sustained an economic loss for each monthly payment of attendant care services, effectively clarifying – and arguably tightening up – the test for attendant care benefit entitlement.

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Water Damage Claim – Evaluating BI risk from mold

The effect mold can have on human health has been studied for many years. Research studies have been performed around the world, resulting in numerous sources of published literature on the subject. Governmental organizations have also produced their own documents including Health Canada, Centers for Disease Control and Prevention, and the World Health Organization.

SIGNIFICANT ISSUES

There are a few key conclusions which are most significant. They are:

1. There are no defined human exposure limits for mold. Therefore, results from tests for the presence of mold in air cannot be used to assess risks to the health of building occupants [1]. The common guidance is basically, if you find mold contamination in a building: a) remove it, and (b) implement preventative measures.

2. Different people can be affected by the same mold contamination in different ways. One building occupant may feel no effects, while another may require immediate medical attention. Predicting a person's response may not be possible. However, it is generally accepted that there is a higher risk that mold contamination may have an adverse effect on some persons who have a sensitivity to mold, have a pre-existing medical condition which is affected by mold (ex. asthma), have a compromised immune system, pregnant women, or the very young and elderly [2].

3. There are common misconceptions about what type of mold is more harmful than others. Many people may have heard the term "black mold" (Stachybotrys Chartarum), and consider this to be the mold with the highest potential health risk. It is true that, when compared to other genus like Aspergillus, this species of mold can have a higher toxic effect. But spores from the Stachybotrys genus are big and the majority are too large to penetrate the lungs [3]. Conversely, Aspergillus mold spores are predominantly within the human respirable range [3], therefore, their presence may result in a greater inhalation risk to humans compared to Stachybotrys.

4. Molds can be found almost anywhere. Mold is a natural and important part of the environment. It is impossible to eliminate all mold and mold spores in the indoor environment [4].

In summary, the potential risk of adverse health effects, to a specific person, from exposure to mold cannot be predicted with accuracy.

WHAT THIS MEANS FOR THE LOSS ADJUSTER

A. If a building occupant states that they had an adverse health effect from mold, there aren't many options available to try and confirm or deny the accuracy of their statement. A professional consultant can obtain samples of any active mold growth observed to determine what type of mold it is. The professional consultant can also obtain air samples from inside and outside the building to try and

determine the origin of the airborne mold spores. However, current research does not make conclusive correlations between this data and human health effects.

B. If an assessment for mold spores is performed in any building related to a water damage claim, it is likely that the lab analysis will confirm the presence of mold spores. The positive result for mold spores does not mean that there is mold contamination which resulted from the claim. There may not even be any active mold growth anywhere in the building. The mold spores identified could simply be the result of outside ambient conditions. The potential complexity and ambiguity of any mold assessment results can cause confusion with stakeholders unless the process is managed effectively by the professional consultant and the adjuster.

RECOMMENDATIONS

1. Thoroughly evaluate the cause of any mold contamination that is identified. The scope and objectives of any mold assessment should be discussed in detail with the professional consultant prior to the execution of work. If it is likely that the mold contamination did not result from an insured peril, then consideration should be given to deny compensation for the mold remediation.

2. The lack of guidance on acceptable exposure limits for mold, make it very challenging to determine whether a person is actually experiencing an adverse effect from the mold contamination. If a person states that the mold contamination is affecting them, it is recommended that they be evaluated by a medical doctor.

3. Professional opinions should only be accepted from a qualified expert. Confirmation should be obtained in advance that the professional has insurance coverage that will respond to mold, in the event that it is required.

For professional advice contact:
Michael LeBlanc, P.Eng., RPIH
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1-855-624-2943; mleblanc@deicanada.com

References

[1] "Residential Indoor Air Quality Guidelines"; Health Canada, 2007
[2] "Facts about Mold"; American Industrial Hygiene Association, 2011
[3] "Fungal Contamination in Public Buildings: Health Effects and Investigation Methods"; Health Canada, 2004
[4] "Mold Remediation in Schools and Commercial Buildings"; United States Environmental Protection Agency, 2013

EXPERIENCE


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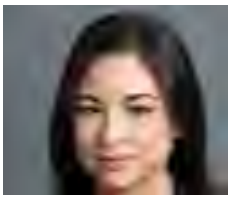
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Ledcor and Parkhill: Recent Appeal Cases Extend Coverage Despite "Faulty Workmanship" and "Your Own Work" Exclusions

Authored by:

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On September 16, 2016, the Supreme Court of Canada released its decision in *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.* The facts and analysis resulted in an important decision confirming that: (1) a typical "faulty workmanship" exclusion in a builder's risk policy excludes only the cost of re-doing the faulty work, not necessarily the cost of repairing physical damage resulting from the faulty work; and (2) appellate courts need not defer to trial courts about the interpretation of standard form insurance contracts.

Ledcor revolved around the construction of an office building in Edmonton. An "all risks" policy covering the owner, contractors, sub-contractors and others was obtained to run during the project. After windows were installed, a sub-contractor tasked with cleaning the windows scratched them. A claim for replacement of the windows at an estimated cost of $2.5 million was denied.

The exclusion and exception clause at issue included the following: "This policy section does not insure: …The cost of making good faulty workmanship, construction materials or design unless physical damage not otherwise excluded by this policy results, in which event this policy shall insure such resulting damage."

The trial court heard and agreed that competing plausible interpretations made the policy ambiguous as to whether only the cost of the cleaning work or also the cost of the window replacement fell within the coverage. It found in favour of the insureds, relying on the doctrine of *contra proferentem,* which operates to interpret ambiguity in a contract against its drafter.

Alberta's Court of Appeal reversed the trial decision. It found the damage to the windows was excluded from coverage and the exclusion clause was not ambiguous. In the process, it devised a new method to distinguish between the cost of making good faulty workmanship and the physical damage that was covered as resulting damage. This creativity resulted in much debate and analysis but has now been rejected by the Supreme Court as unnecessary.

The Supreme Court repeated its reasoning in *Progressive Homes Ltd.* v. *Lombard General Insurance Co. of Canada,* (2010), where it stressed that "perfect mutual exclusivity [between exclusions and the initial grant of coverage] in an insurance contract is not required." On this basis, it rejected the finding the Alberta Court of Appeal that that the exclusion clause must exclude some physical loss from coverage or it would be redundant.

The Supreme Court commented that the overall purpose of builder's risk policies is to provide broad coverage to construction projects "which are singularly susceptible to accidents and errors… in exchange for relatively high premiums… provides certainty, stability, and peace of mind…". The Supreme Court concluded that interpreting the exclusion clauses to preclude from coverage only the cost of re-doing faulty work aligns with commercial reality, sensible results and the parties' reasonable expectations, without transforming the policy into a construction warranty. It rejected the argument (favoured by Alberta's Court of Appeal) that accepting an interpretation granting coverage would

promote commercially unreasonable behavior by influencing how work is divided among various contractors on a project in an effort to maximize coverage – in essence providing an incentive to divide up the work as finely as possible.

On the issue of the standard of review to be applied by appellate courts considering standard form insurance contracts, the Supreme Court acknowledged that there has been disagreement since its decision in *Sattva Capital Corp. v. Creston Molly Corp*. (2014). To clarify the issue, the majority held that where appeals involving the interpretation of standard form contracts have precedential value because there is no factual matrix specific to the parties to assist in the interpretation, the question at issue is best characterized as one of law and subject to review on a standard of "correctness." We can expect that this elucidated lack of deference to trial decisions may result in an increase in appeals involving interpretation of policy language.

Even more recently, on November 9, 2016, the Ontario Court of Appeal released its decision in *Parkhill Excavating Limited v. Royal & Sun Alliance Insurance Company of Canada, et al.* It was reported that between 2004 and 2010, Parkhill designed, supplied and installed septic systems for a subdivision near Peterborough. After potential problems with some of the systems came to light, 36 were replaced and Parkhill was sued. Parkhill had purchased three commercial general liability insurance policies over the six-year period. When the insurers declined to defend Parkhill, it took them to court.

The trial court had found that none of the three insurance companies owed Parkhill a duty to step in and defend. With reference to *Progressive,* Justice Healey of the Ontario Superior Court found that the allegations against Parkhill "may constitute 'property damage caused by an occurrence' thereby triggering coverage." However, Justice Healey ultimately ruled that the "work performed" exclusions applied and that Parkhill had not proven that the supplier of sand was a subcontractor within the meaning of the policies.

The Ontario Court of Appeal considered it critical that the claim referred to remedial work, the damages sought from Parkhill were approximately four times what had been paid to install the systems and the allegations against Parkhill included costs purportedly incurred and continuing in order to perform remedial work and satisfy orders to comply. As such, the Court of Appeal concluded that there was a possibility of consequential damages and the insurers accordingly owed a duty to defend the legal claims against Parkhill according to the policies of insurance it had purchased. The mere possibility that an alleged claim falls within coverage triggers the duty to defend. Whether or not the insurers will eventually have to pay for damages, if any are eventually awarded against Parkhill, is of course another matter. It has been long established that the duty of an insurer to defend an insured is not dependent on the insured actually being liable or the insurer actually being required to indemnify it.

While the facts scenarios, policies, and exclusion wordings in these two cases are different, the underlying trend is similar – a strengthening of the rule of interpreting coverage broadly and exclusions narrowly, and finding coverage for parties involved in construction related disputes.

Tim McGurrin is an experienced litigator often acting in complex cases involving negligence, breach of contract, construction disputes, partnerships and shareholder's rights, real estate, estates, wills and powers of attorney, environmental matters and other disputes.

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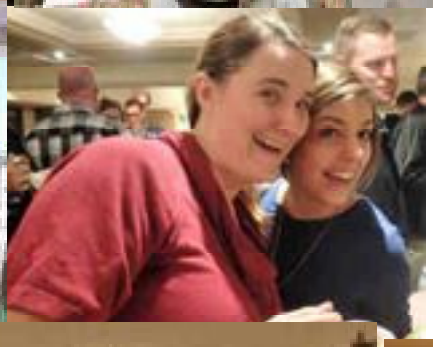



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