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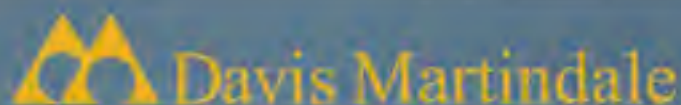
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PRESIDENT'S MESSAGE

MAY 2017



Hello,

On April 27, 2017, we held our annual elections and fun night with approximately 70 people in attendance we were entertained by a magician and a comedian. We also held our elections. We are pleased to announce that the following people will be joining the K-W OIAA executive team for the 2017- 2018 year.

Randy Henderson, Arcon Forensics - Social Director
Kristin McCutcheon, First On Site - Web Director
Manish Patel, Larrek Investigations - Bulletin Editor
Leeann Darke, Co-Operators - Director
Ellie Travis, Co-operators - Secretary

Thank you to all who put their names forward for a position. We say good-bye to Dan Strigberger, Monika Boleszjo and Cyndy Craig. These individuals have worked so hard for this organization and were crucial to many of the changes you have seen over the years. Thank you for everything.

Registration for the John McHugh Memorial Golf Tournament is now live on our website <http://www.kw-oiaa.ca/Events> . It is being held at Ariss Valley Golf and Country Club on June 22, 2017. We hope to see you there.

Jennifer Brown
President of K-W OIAA



K-W OIAA EXECUTIVE COUNCIL 2016-2017

Jennifer Brown

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

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The K-W OIAA is pleased to be hosting the John McHugh Memorial Golf Classic at Ariss Valley Golf and Country Club. Please join us for a day of golf and fun among your industry friends. Every year the K-W OIAA president chooses a charity to be the beneficiary of a generous donation that will greatly assist that organization. This year the chosen charity is KIDSABILITY.

PLEASE REGISTER ONLINE: <http://www.kw-oiaa.ca/>. REGISTRATION DEADLINE IS WEDNESDAY JUNE 14, 2017.

Itinerary for Thursday June 22, 2017:

8:30am	Registration Opens - Breakfast
10:00am	Shot Gun Start
12:00pm	Lunch on the turn
4:00pm	Approximate time for dinner

Players Golf Package

\$155 HST inclusive per person, Fees include one round of 18 holes of golf, use of a cart, breakfast, lunch and dinner. A team of 4 will be \$620.00

Other Options:

All Day Food Tickets: \$50 (Breakfast, lunch and dinner)

Dinner Only Tickets: \$35

Sponsorship

A generous donation will be made to KIDSABILITY from all hole sponsorships.

Hole Sponsorship (2 types) is available for \$225 A prize hole (longest drive/ closest to the pin) requires sponsors to bring both a male and female prize in addition to sponsoring the hole. A non-prize hole has no additional requirements. ****Please note:** You are responsible for providing your own tent, table and chairs.

Title Sponsorship is also available should you be interested:

You may display your banner at this portion of the event should you sponsor these.

Breakfast Sponsor- \$500

Lunch Sponsor- \$1000

Door Prizes are also welcomed and are drawn for at the dinner. If you are donating a door prize please advise Charlene Ferris (charlene_ferris@cooperators.ca) or simply bring it with you with a businesscard attached to it.

Questions? Please contact:

Charlene Ferris (charlene_ferris@cooperators.ca) or by phone 877-682-5246 Extension 272280

Jennifer Brown (jen.guttridge@gmail.com) or by phone 519-635-3678



PROVINCIAL DELEGATE REPORT



Under a deluge of precipitation and the threat of the impending water CAT, the industry came together in Waterloo on May 5 – 6 for the 2017 OIAA Provincial Conference. Neither the weather nor the aging inn could put a damper on the networking and education experience that was delivered and the overall positive vibe of the conference.

Thank you, thank you, thank you to everyone who made Maytoberfest a huge success. This includes the hard working members of conference committee, our generous sponsors and loyal industry partners, the exceptional guest speakers and most important our guests. Despite some minor hiccups there were many highlights and firsts at this conference. From the exceptional event program, to the development of an OIAA Provincial Conference website, to significant sponsor exposure and real time conference updates on social media, Maytoberfest will be remembered as the conference that modernized this important industry gathering. The torch has been passed to the Ottawa and Thousand Islands chapters who will host the next provincial conference and I challenge them to continue to move the needle with regard to innovation and social media in 2019.

Up next the 2017 annual OIAA golf tournament takes place on May 31 at Deer Creek Golf and Banquet Facility in Ajax. Registration for the tournament is now open at oiaa.com.

Please remember to follow OIAA events on Twitter, @OIAAOfficial.

Regards,

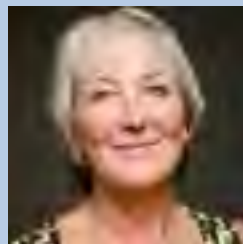
Stephen Tucker

Kitchener-Waterloo OIAA Chapter, Provincial Delegate

OIAA Provincial Conference – Co-Chair Thank You!

Wow! What a successful 2 days we just had. Positive feedback is rolling in and we could not be more delighted that all attendees, sponsors, industry partners and speakers enjoyed themselves. This event couldn't have been run without the help of quite a few people. We would first like to acknowledge the amazing work done by our conference committee: Jen Brown, Manish Patel, Charlene Ferris, Leeann Darke, Jenn Mohr, Stephen Tucker, Jaime Renner, Emily Durst, Dave Bushell, Gary Phelps, Dan Strigberger, Ashleigh Leon, Stef Storer & Monika Bolejszo. You should all be proud of this accomplishment! We would also like to thank all the conference sponsors, trade show exhibitors and guest speakers for your continued support. We would like to send a special thank you to Jay, Paul and Scott from Relectronic-Remech Inc. for assisting us with planned and unplanned audio and visual. What's a big conference without a hiccup or two! The support of the OIAA executive council was valued, especially the added support from Catherine Groot.

The countdown is now on for the 2019 Provincial Claims Conference in Ottawa. We can't wait to see what their team comes up with!



Carrie Keogh & Cyndy Craig
Co-Chairs – 2017 Provincial Conference





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Dear Participants of the 2017 OIAA Provincial Claims Conference,

On behalf of the OIAA conference executive, we are thankful to each and every one of you who attended Maytoberfest 2017. Thank you to all of the participants, sponsors, industry partners, guest speakers and honoured guests. We appreciate that you took the time and effort to attend this conference. We hope that Maytoberfest lived up to your expectations and that you had the opportunity to network with industry partners and colleagues and gained some knowledge from our guest speakers in the process. We had over 600 people in attendance at the tradeshow and 325 for the education sessions and festhalle, an amazing turn-out!

The conference executive committee worked hard to organize this event. We appreciate the support from the co- chairs, committee members, past conference committees, Industry partners, employers and conference staff, who contributed to the success of this event. Without all of you the conference would not be a success. We look forward to seeing you in 2019 in Ottawa.

Jennifer Brown

President K- W OIAA Chapter



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Thank You Trade Show Exhibitors,

On behalf of the KW OIAA Chapter, and the OIAA Provincial Claims Conference Committee, I would like to thank you for your participation in our event. With your attendance, attendees were able to learn more about the industry partners that we work with on a daily basis, and network to get to know you better. We truly appreciate you spending the time and effort to attend our conference, and look forward to your participation at the Provincial Conference in Ottawa in 2019.



Charlene Ferris, CFIP CRM CFEI
Vice President – K-W OIAA Chapter
Chair – Trade Show Committee

2017 Provincial Claims Conference Tradeshow Exhibitors

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Hughes Amys	Miller Thomson LLP	Kodsi Forensic Engineering
Doeer Claims Services Inc	Intrepid Investigations	Bay Medical & Health Services
CARSTAR	Enterprise Rent-A-Car	CRDN
First General	Evolve Assessments	Distinctive Engineering Inc
MKD International Inc	Larrek Investigations	Ground Force Environmental
Dynamic Functional Solutions	Jenish Forensic Engineering	ASAP Secured
Newtron Group	Retire-At-Home Services	WINMAR
GUS Restore	PCA Adjusters Limited	HRYCAY Consulting Engineers
Power & Associates	EMRG Canada	MEA Forensic
Lerners LLP	Total Textile Solutions	Davis Martindale
Samis+Company	First Response Restorations	Arcon Forensic Engineers
CDT International Inc	Roar Engineering	DSB Claims Solutions
Core I.H.R	McCague Borlack LLP	Viewpoint Medical Assessments
SPECS Limited	KG Services	Access Restorations Service Kitchener
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Woodhouse Group	Servpro Industries Canada	MDD Forensic Accountants
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PERSON AND PROPERTY LOCATES
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We defend your policy-holders in commercial general liability claims spanning a wide variety of areas, including fire losses, oil spills and construction losses. Claims of this nature require significant technical skills over a broad range of losses. We have the experience and expertise to manage claims of this nature, as well as a deep bench of experts to call on as needed.

Subrogation

Subrogation requires a distinct and different skill set from the defence of liability, coverage or property claims. Our firm has a strong track record in advancing subrogated claims on behalf of its clients, bringing a practical and common-sense approach to subrogation. Above all else, we ensure that insurers don't throw good money after bad in pursuing claims where liability facts are poor and target defendants cannot satisfy a judgment.

Bodily Injury Litigation

Our lawyers have experience in all aspects of motor vehicle bodily injury litigation in Ontario. We have a thorough understanding of the threshold for pain and suffering damages in Ontario, the large body of law interpreting the threshold over the last twenty years and the interplay between first- and third-party compensation systems. We work with recognized science and medical experts to obtain opinion evidence where necessary and provide strategic counsel to help our clients manage risk.

Coverage

We have experience acting as coverage counsel for both insurers and corporate policyholders. We provide coverage opinions with respect to a variety of types of insurance coverage, including liability, property, errors and omissions, automobile, and fidelity bonds. We have also litigated insurance coverage cases at the Ontario Superior Court of Justice and Ontario Court of Appeal, addressing a diverse range of coverage issues. Our coverage lawyers also publish and speak regularly on the interpretation of insurance policies.

First-Party Accident Benefits Claims

Ontario's first-party auto compensation framework has undergone major change on several occasions since 1990. Our lawyers have skillfully guided Ontario's property and casualty insurers through those changes.

Priority and Loss Transfer Disputes Between Insurers

Ontario's Insurance Act contains priority and loss transfer rules that address which insurer is responsible for paying first party benefits to a claimant in any given case. Disputes between insurers are resolved through private arbitrations pursuant to the Arbitration Act, 1991. This is an active area of insurance-related litigation unique to Ontario and our lawyers have expertise and a strong track record in this area.

Premises Liability

We act for a number of different insurers and institutions who self-insure property and casualty risks in premises liability matters. Claims of this nature require general bodily injury law expertise as well as an understanding of commercial leasing contracts and overlapping injury reparation systems. We understand the legislative framework, common law principles and contractual risk shifting that inform the defence of premises liability claims.

Property Losses

We act for insurers in first-party claims advanced by their insureds when disputes arise in the course of adjusting a loss, whether the issue is one of coverage or valuation. We understand that claims advanced by insureds can present special risks to an insurer for extra-contractual damages. We keep this issue at the forefront in handling claims of this nature.

Additional Expertise

In addition to expertise in specific areas of insurance law, we also provides clients with counsel on issues such as policy wording and endorsements, underwriting strategies, government relations and media information requests.

LEADERSHIP

Samis+Company provides our client community with in-house training and education on developing issues and trends. We also share our legal knowledge with the broader insurance community. For example, we regularly serve as instructors for the Insurance Institute of Ontario and have developed and presented programs that lead the industry on issues such as personal injury compensation, environmental law and insurance, and subrogation trends and best practices. In addition, the insurance community frequently calls on us to present on current legal issues to organizations such as:

- Canadian Insurance Claims Managers Association
- Insurance Bureau of Canada
- Ontario Mutual Insurance Association
- Ontario Insurance Adjusters Association
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- commercial & host liability claims
- surety & bonding
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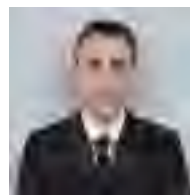
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In the recent decision of *Smith v. Coca-Cola Bottling Company*, Rady J. dealt with the common practice of executing a Release after an offer has been accepted. The facts of the case were fairly straight forward. Mr. Smith worked for Coca-Cola. Coca-Cola provided short term and long term disability policies to its employees. Short term disability payments were paid by Coca-Cola, but administered by Sun Life. Sun Life paid and administered the long term disability benefits. Mr. Smith was involved in a motor vehicle accident on June 8, 2010. Three *separate* claims were commenced. One against the tortfeasor, another against his accident benefits insurer, and a third against the short and long term disability carriers.

Close to trial all three claims settled. In the usual fashion, offers were accepted and then Releases were drafted. In Coca-Cola's case it offered to pay the full amount of short term disability benefits owing (\$9,200.00), plus pre-judgment interest. In exchange, Mr. Smith would sign a release. The offer was accepted. Coca-Cola forwarded a release that purported to settle any and all claims Mr. Smith had against Coca-Cola, including other benefits that arose in the simultaneous, but separate, actions. Mr. Smith refused to sign the Release and argued that he had only agreed to settle the short term disability claim and the Release should be restricted to that issue. Coca-Cola argued they were entitled to the broader Release, because Mr. Smith had received compensation for other benefits in the other claims which had settled. Mr. Smith brought a motion to enforce the settlement.

Rady J., noted that the law in the area was well settled. An accepted offer to settle forms a binding contract. The parties may then furnish Releases as appropriate, but only so far as they encompass the essential terms of the settlement. As the moving party, the burden was on Mr. Smith to prove that there was a mutual intention by the parties to create a legally binding agreement and that there was agreement between the parties on all the essential terms of the settlement.

Focusing on the specific wording of Mr. Smith's Statement of Claim against Coca-Cola and the settlement discussions between counsel, Rady J. found it was clear that the claim against Coca-Cola was limited to only the short-term disability benefits.

Rady J., found:

It is clear that the parties were focused solely on the short term disability claim. The timing of the settlement of all claims in the three actions was fortuitous and driven by the plaintiff's legitimate concern about what position the other defendants would take on costs if the plaintiff settled with Coca-Cola independently. But there was no "global" settlement. There were three separate actions. Each settlement was negotiated separately, with a breakdown of the amounts paid by each defendant in accordance with their exposure. There were no global minutes of settlement or release.

In my view, the release demanded by Coca-Cola was not contemplated or negotiated as part of the settlement. There was no consideration for such a release as between these parties.

Therefore, although Mr. Smith settled the other claims more or less contemporaneously, each claim was separate with its own pleadings framing the issue. In this particular case, what Mr. Smith did, or did not, agree to in the other claims had no bearing on the settlement reached with Coca-Cola. Rady J. found that the release demanded by Coca-Cola was not contemplated or negotiated as part of the settlement. There was no consideration for such a release and Mr. Smith was not obliged to accept Coca-Cola's release.

This case is an excellent reminder that separate claims that proceed together as a practical matter are still discrete disputes. While claims for bodily injury, accident, benefits, and long term disability may ultimately arise from the same accident, they remain distinct proceedings framed by their pleadings. Although it is common practice to provide a Release after an offer has been accepted, parties should be aware of what they are agreeing to. Essential terms of the settlement such as confidentiality, non-disparagement, and release of additional claims should be discussed, and ideally put in writing, prior to final acceptance. Properly papered settlements can avoid a situation of a Court imposing terms of a settlement that a party might not have expected.

See [*Smith v. Coca-Cola Bottling Company*](#), 2017 ONSC 396

Devan Marr is a lawyer at Samis+Company's Toronto Office.
www.samislaw.com | @samislaw | #OntInsLaw
Toronto | Waterloo





IBAWR Habitat for Humanity Broker Build

IBAWR is proud to announce that we will be working with our members and sponsors to give back to Waterloo Region by raising donations and volunteers to provide a local family with financial assistance and hard work at the job site that will be their future home!

We are reaching out to Brokerages and our key Insurance Company partners to help the IBAWR make this event a success, by teaming up to help us reach and exceed our goals!

In addition to helping a local family and well respected charitable organization build a home in our community, this event is designed to encourage the members and partners or our association to mobilize together to achieve a common goal in a major way!

We will be visiting our member brokerages to drop off a small information package to principals and to introduce the event to them and their staff, if desired.



In order for us to meet (and hopefully exceed) our goals we are asking for contributions and participation in the following ways;

Event Dates: May 31 and June 1, 2017

Bronze Event Sponsor:

\$250.00 to sponsor 1 staff member who will spend one day volunteering at a job site.

Silver Event Sponsor:

\$450.00 to sponsor up to 2 staff members who will each spend a day volunteering at a job site. The volunteers can each work the same day, or volunteer on separate days.

Gold Event Sponsor:

\$1,000.00 to sponsor up to 5 staff members to volunteer.

Platinum Event Sponsor:

\$2,500.00 to sponsor as many volunteers as you can for each day of the event.

Please note that all contributors will be provided with a Charitable Donation Receipt and the event will be covered by Habitat for Humanity and their impressive social media team and photographers. We will also feature the event in the following months IBAWR bulletin.

Please contact Joe Dalton anytime by email (jdalton@encoregrp.com) or cell phone (519-573-6682) to discuss in further detail.

Thank you in advance for your consideration and participation. We are looking forward to making this event a huge community and industry success together!



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No Vested Rights in SABS



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One of the more confusing aspects of adjusting an accident benefits claim is dealing with the numerous amendments to the Statutory Accident Benefits Schedule (SABS). Not surprisingly, during the life of an accident benefits claim, the SABS may be amended several times, each time enacting new provisions that may (or may not) affect the benefits available to a claimant. Over the past few years adjusters have had the unpleasant task of attempting to reconcile the transition provisions in the SABS on a number of key fronts, the most prominent of which being entitlement to interest after September 1, 2010 and the amount of attendant care payable after February 1, 2014 for services provided by a non-professional.

The issue of whether SABS amendments apply retroactively was addressed in *Federico v. State Farm* (FSCO Appeal Decision, P12-00022). In this case, the claimant was involved in an accident on December 20, 2006. One of the disputed issues was whether or not the claimant was entitled to interest beyond September 1, 2010 in the amount of 2% compounded monthly (pursuant to the 1996-SABS) or 1% compounded monthly in accordance with the amendments which became effective September 1, 2010. It was found that the wording of section 3(1.4) did not provide for interference with the substantive right of entitlement to interest in the amount of 2% per month. Thus the introduction of the distinction between substantive/vested rights vs. procedural

rights. Essentially, this case set off a chain of litigation which attempted to deal with the transition provisions as the result of amendments to the SABS in the context of whether the amendment affects a substantive right or a procedural one. If the change was procedural only, it was generally felt that the change could take affect retroactively. This included the decision in *Davis v. Wawanesa Mutual Insurance Company*. In that case, the claimant was seeking a determination of whether or not her attendant care benefits were subject to the February 1, 2014 amendment to the SABS which limited the maximum amount payable to a non-professional service provider to the lesser of the economic loss of the service provider or the Form 1 amount. The accident occurred prior to the amendment and the claimant's attendant care benefit was ongoing as of February 1, 2014. The arbitrator found that the amendment would affect a substantive and vested right and therefore did not apply to the claimant's accident benefit claim. The decision was upheld on appeal to the Superior Court.

However, on April 6, 2017, Director's Delegate Rogers released an appeal decision in the case *MVACF v. Barnes* (P16-00087). The same issue was at play as in the *Davis* case above but Director Rogers came to the opposite conclusion. In fact, he went further and found that there are no vested rights in unchanged SABS at all due to the fact that these benefits are not part of a private contract between parties who have control over the terms of the contract and changes thereto as well as the fact that rights cannot vest in context of SABS benefits as they are subject to ongoing qualification for the benefit in dispute. In Director Roger's opinion, Ms. Barnes did not have a vested right in attendant care benefits simply because she was injured in an MVA,

instead her right to the benefit was contingent on her ongoing need, the provision of services and that the benefit is incurred. It was also found that the application of the amendment was prospective and not retrospective or retroactive.

Contrary to the outcome in Davis, Director Rogers found that attendant care benefits payable beyond February 1, 2014 in relation to a pre-February 1, 2014 MVA are limited to the amount of economic loss sustained by a non-professional service provider.

This case will have future implications in adjusting accident benefits claims and likely sooner than later as the June 1, 2016 amendments to the SABS have recently come into force.

Ashleigh Leon is a Litigator and Partner in Miller Thomson's Guelph office, with industry expertise in insurance. Ashleigh received her Bachelor of Laws from Osgoode Hall Law School in Toronto. In 2005 she was awarded the McCarthy Tetrault scholarship.

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Court Restricts Use of Surveillance Evidence at Trial



Danielle M. Gauvreau

There has been much discussion and judicial attention regarding the use of surveillance evidence following the Ontario Court of Appeal's decision in *Iannarella v. Corbett*, including the recent Ontario Superior Court of Justice decision of *Nemchin v. Green*.

In *Iannarella v. Corbett*, the Court of Appeal undertook a comprehensive review of the rules governing the disclosure and use of surveillance evidence in personal injury actions. The Court of Appeal noted that video surveillance is typically listed as a privileged document in a defendant's affidavit of documents. A plaintiff then has an opportunity to seek particulars; specifically, the date, time, location, nature and duration of the activities depicted, and the names and addresses of the videographers. A party is obliged to provide an updated affidavit of documents post-discovery if additional surveillance is obtained and must disclose the particulars upon request.

Even if a defendant is seeking to use surveillance evidence strictly for impeachment purposes, the surveillance evidence must be listed in an affidavit of documents. That being said, a trial judge has the ability to admit surveillance into evidence if it is not disclosed in certain circumstances. Assuming that surveillance is otherwise admissible for impeachment purposes, the trial judge is to consider the fairness, representativeness, and admissibility of the surveillance. To be admissible, the probative value of the surveillance videotape has to be capable of contradicting, challenging or impugning the witness' testimony. If these requirements are not met, the surveillance will not be put before the jury.

In *Nemchin v. Green*, the plaintiff brought a motion at trial regarding the defendant's use of surveillance evidence, most of which had been listed in updated affidavits of documents and served well in advance of the trial.

Near the completion of the plaintiff's examination-in-chief, the trial judge heard evidence from the defendant's investigator and viewed the edited and unedited versions of the surveillance video. The Court stated that, given the Defendant's intention to rely on the surveillance as substantive evidence, the admissibility of all of the surveillance evidence depended on its accuracy, fairness, and verification. For any portion of the surveillance satisfying these three criteria, the Court then had to consider whether the probative value of the evidence outweighed the potential prejudice to the plaintiff.

The Court expressed a number of concerns with respect to the accuracy of the video; specifically, the manner in which the surveillance was conducted, reported, and depicted. For example, portions of the video lacked time-stamps and some of the footage depicting the plaintiff had been

deleted. The investigator did not know what editing had been done by support staff and he had not reviewed the edited video.

In addition, there were a number of “gaps” in the footage, resulting from the investigator having to change position while driving. The Court opined that, if there were a driver and a videographer, some of the gaps would have been eliminated. The Court concluded that the surveillance video was inaccurate in truly representing the facts. The Court also opined that it was inappropriate and unfair for the investigator to include any of his personal, subjective observations of the plaintiff in the surveillance report. Finally, with respect to verification, the investigator was unable to explain what was done in the editing process. Given the above, the Court concluded that the surveillance evidence did not satisfy the three-part test.

Further, the Court did not think that the footage of the plaintiff walking, sitting, standing, doing yoga, driving, or bending over to pick something up off the ground was contradictory to her evidence that she had driving anxiety, a decreased capacity to socialize, and an inability to work. Additionally, none of the experts had reviewed the surveillance evidence and provided an opinion as to the significance of the activities depicted in the footage. As the surveillance had minimal probative value, the Court ruled that it was inadmissible.

Given the recent case law concerning surveillance, meeting the disclosure obligations in itself is not enough to ensure that surveillance evidence will be put before a jury. The takeaway for defence counsel and insurers is that it is imperative to obtain and review unedited surveillance videos at an early stage. Time-stamps should be present throughout. The surveillance video must be accurate, fair, and verified. Attention must be paid to clear and direct contradictions of a plaintiff’s account of his or her injuries, impairments, and limitations. If the surveillance does not meet these requirements, it may not be put before a jury.

Given the Court’s concerns regarding “gaps” in the video, the use of a surveillance team may be useful. In addition, surveillance videos should be sent to experts for analysis. This will increase the cost of obtaining surveillance in a personal injury action. The question to be asked in each case should be whether the potential benefit exceeds the cost.

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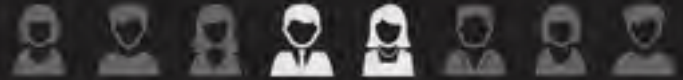
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