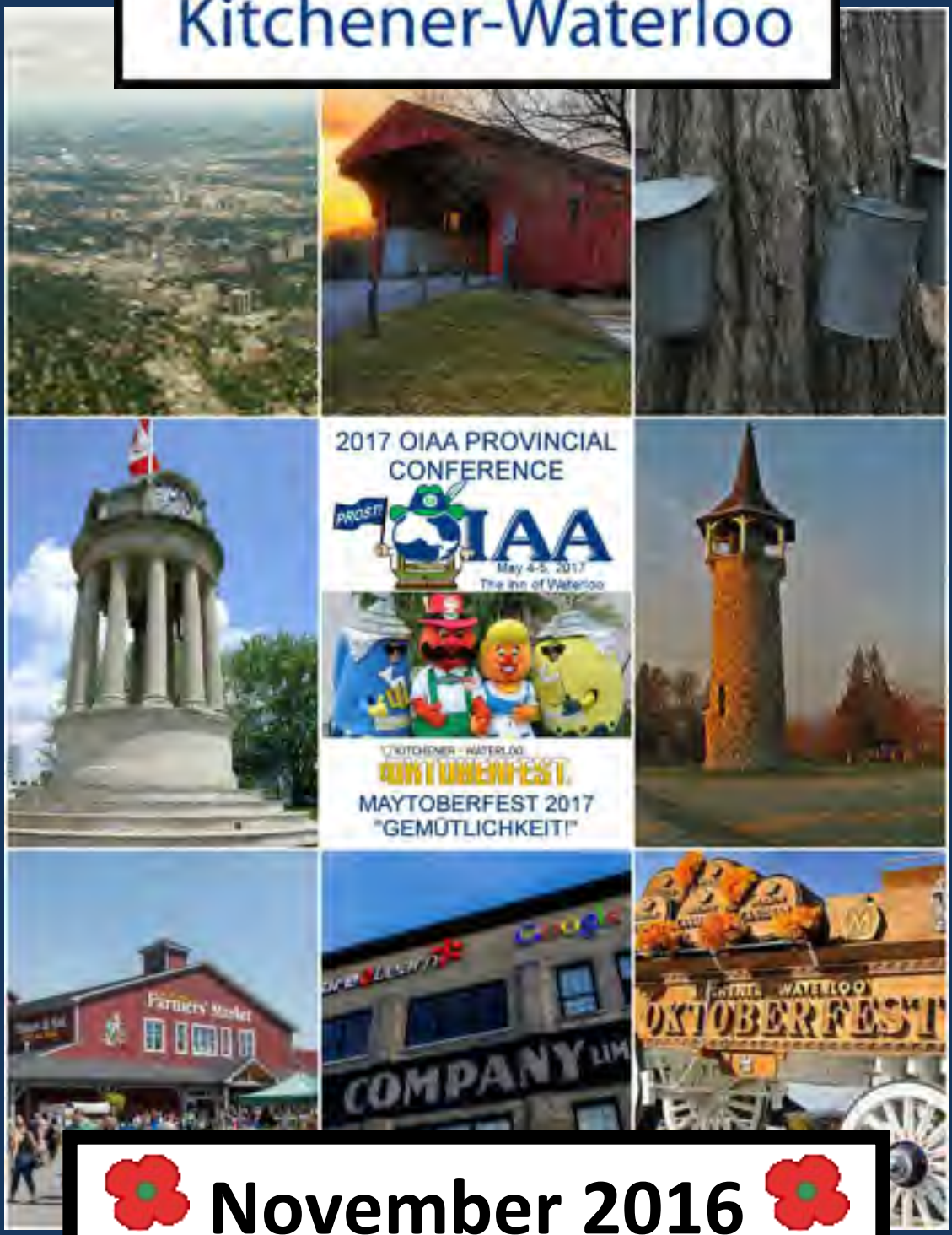
OIAA

Kitchener-Waterloo



November 2016

PRESIDENT'S MESSAGE

NOVEMBER 2016

Hello All,

Well, October sure brought an interesting mix of weather to Ontario. As you are aware, we cancelled our October Meeting due to many being unavailable to attend due to CAT claims, water claims and another industry events. Don't worry, the contractors will be coming on January 26, 2017. We hope to see many of you out to attend this event.

This month we have our annual chili cook-off on the 24th. Will you win the coveted trophy for Chef's Choice or People's Choice? I can't wait to try the amazing chilis! If you are interested in entering a chili in the competition, please contact Manish Patel mpatel@larrek.com or Cyndy Craig ccraig@archinsurance.com. Tickets for the event are now available online, please ensure you purchase them in advance.

The Executive committee and I are always available if you have questions or concerns about our organization, and you can always reach me at jen.guttridge@gmail.com

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

November 24, 2016- Annual Chili Cook Off: Manish Patel & Cyndy Craig

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

April 1, 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-

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.

OIAA
Kitchener-Waterloo

SOCIAL CHIT CHAT

November 2016

This month is our annual chili cook-off; I hope you're ready to bring your appetite! This year we are again supporting the Sleep Tight Campaign. Please support this event by bringing a new pair of pyjamas to the chili cook-off as well as a non-perishable food item for the Food Bank of Waterloo Region. Anyone who brings in a new pair of pyjamas will be entered in a draw for a $25 gift card.

This year we are hosting the OIAA Provincial Claims Conference; stay tuned for more details about this exciting event! As always, if you have any questions about the upcoming conference or have any suggestions on how to best serve our industry partners, please do not hesitate to contact myself or Ashleigh Leon. We'd love to hear from you.

Your 2016-2017 Social Director
Monika Bolejszo

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

Our annual Past Presidents Night took place on October 12th in Toronto. The event was a sellout and provided a great opportunity to catch up with old friends. I was fortunate enough to sit at a table with some of my favourite Past Presidents – Catherine Groot, Skip Sutherland, Norm McGlashan and Margaret Challis. It struck me that what all of these great Past Presidents share in common is that they all broke down barriers throughout their tenure. Perhaps most noteworthy is the very charming ninety year old Margaret Challis who was one of the first female members of the OIAA in 1972, and who was elected first female President of the OIAA in 1979.

On the local front, a special thank you to Jennifer Brown who was acclaimed to the role of President for a second term and to Cyndy Craig who stepped back into the role of Past President. Congratulations to Charlene Ferris who was acclaimed to the position of Vice President. Charlene was a very popular and effective Past President of the Kitchener-Waterloo OIAA and we are very fortunate to have her back on the executive as well as the Provincial Conference team.

Once again Without Prejudice is looking for informative articles. WP is a great way to share informative educational topics with our entire provincial membership. WP reaches 1600 claims professional 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.

Here is a list of upcoming Provincial OIAA events taking place in Toronto.

December 14, 2016
Christmas Party - Fairmont Royal York, Toronto, ON
- This event will sell out quickly

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

Sleep Tight
SENDING A MESSAGE OF COMFORT AND HOPE

Most of us know how comforting it feels to crawl into a pair of our favourite pajamas, settle in for the night, and look forward to what the next day will bring. But here in our community, there are people who have very few nights like that.

We are thrilled to support the "Sleep Tight Campaign" again this year. Sleep Tight is collecting new pajamas that will be distributed to people in need in Waterloo Region.

We are asking members to support this great cause by bringing a new pair of pajamas to the chili cook-off in addition to non-perishable food items for the Food Bank of Waterloo Region. Anyone who brings a new pair of pajamas will be entered into a draw to win a $25 Gift Card.

Last year, we raised over 75 pajamas for Sleep Tight. This year our goal is to exceed 100 pajamas!

Interested in cooking? Please RSVP by Friday, November 18, 2016:
Cyndy Craig – Ccraig@archinsurance.com or
Manish Patel – mpatel@larrek.com

Join us for fun, food and prizes. And Pajamas!

IAA
Kitchener-Waterloo

Thursday, November 24
5:30 PM to 8:00 PM (EST)

Golf's Steakhouse
598 Lancaster St W
Kitchener, ON N2K 1M3

View Map

Register Here

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Small-Town Garage Liable for Crash Involving Vehicle Stolen from its Premises

Authored by:

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The Village of Paisley, population 1,100, is situated in the heart of Bruce County. Until recently, its claim to fame was its annual Beef Fest held every August. Recently, the Ontario Court of Appeal cast a spotlight on this quiet village in a decision involving one of its local garages.

On October 3, 2016 the Court of Appeal released its decision in the case of *J. J.* v. *C.C.* One of the Defendants in that case was Rankin's Garage and Sales, known by the locals as "Rankin's Garage". The Court found Rankin's Garage partially responsible for serious injuries suffered by a teen who helped steal a vehicle from its lot before it crashed.

Background

On July 8, 2006 J.J., then 15 years of age, met up with his friends, C.C. (age 16) and T.T. (age 16) at the dam in Paisley, Ontario. C.C. and T.T. shared eight beers T.T. had brought with him. C.C. testified that J.J. did not have any of the beer. The three boys walked to C.C.'s house around 8:30 p.m. where C.C. and T.T. continued to drink beer. C.C.'s mother had purchased a case of beer (24) for the boys to drink.

C.C.'s mother went to bed prior to 11:00 p.m., leaving the boys unsupervised. C.C. found a bottle of vodka later that evening and the boys drank vodka mixed with orange juice. They also shared a single marijuana cigarette. T.T. went home later that evening. C.C. and J.J. left the house around the same time, setting in motion a series of events that ended with a crash and serious injuries to J.J.

According to C.C., the two boys walked around Paisley with the intent of stealing things from unlocked cars. They ended up at Rankin's Garage, which services and sells used cars and trucks. The garage property was not secured. C.C. testified that he checked two cars on the lot. He found an unlocked Toyota Camry parked behind the garage. The keys to the Camry were in the ashtray. C.C. decided to steal the car even though he did not have a driver's licence and had never driven a car before. J.J. got into the car as a passenger. The plan was to drive to the nearby town of Walkerton to pick up a friend. The car crashed on the way there. J.J. suffered a catastrophic brain injury.

C.C. pleaded guilty to theft under $5,000, dangerous operation of a motor vehicle causing bodily harm and possession of stolen property obtained by theft. A charge of driving with over 80 milligrams of alcohol in his blood was dropped. C.C.'s mother pled guilty to a charge of supplying alcohol to minors. J.J. was not charged with any criminal offences.

The Trial

J.J. sued C.C., Rankin's Garage and C.C.'s mother for negligence. The trial judge instructed the jury that Rankin's Garage owed J.J. a duty of care "because people who [are] entrusted with the possession of motor vehicles must assure themselves that the youth in their community are not able to take possession of such dangerous objects."

The jury found C.C., C.C.'s mother and Rankin's Garage negligent. J.J. was found contributorily negligent. The jury offered the following comments:

- Rankin's Garage's negligence arose out of leaving the car unlocked; leaving the key in the car; knowing (or ought to have known) of

the potential risk of theft; having very little security; and testimony inconsistencies.

- C.C.'s mother's negligence arose out of providing alcohol to minors; failing to supervise minors; and failing to keep her own alcohol secure.

- C.C.'s negligence arose out of drinking underage; not having a driver's licence; stealing a car; impaired operation of a car; and trespassing.

- J.J.'s contributory negligence arose out of willingly getting into a stolen car; knowing C.C. did not have a driver's licence; knowing that C.C. was impaired; knowing that C.C. was an inexperienced driver; and participating in stealing a car.

The jury apportioned liability as follows:

Rankin's Garage:	**37%**
C.C.'s mother:	30%
C.C.:	23%
J.J.	10%

The Appeal

The Ontario Court of Appeal upheld the trial decision.

Justice Grant Huscroft, speaking for the three-judge panel, correctly identified the central issue as "whether [Rankin's Garage] owed a duty of care to a minor involved in stealing a car from [a] garage and car dealership". He further commented "On the face of things, the notion that an innocent party could owe a duty of care to someone who steals from [it] seems extravagant … but matters are not so simple". He noted that "the finding that a duty of care is owed to a third party is relatively rare in cases arising out of the theft of a vehicle." He added that in most cases, a duty of care to a third party is *not* usually found because injury to the third party is not reasonably foreseeable.

In addressing the negligence of Rankin's Garage, the court noted that the stolen car was left unlocked with the keys in it; the car was known to be operational; it was stolen from a business rather than a private owner; and it was stolen by minors in the context of knowledge that unsecured vehicles were at risk of theft.

The Court echoed many of the comments of the trial judge; an unlocked car with keys left in it is an inviting target to an impaired person looking for transportation; it was foreseeable that injury could occur if a vehicle was used by inebriated teenagers; and there were no policy reasons to negate or limit the duty of care owed by Rankin's Garage.

The Court's decision to uphold the trial verdict weighed heavily on the "practices" of the garage. Several witnesses testified that Rankin's Garage had a practice of leaving cars unlocked with keys in them. Customers dropping off cars were sometimes instructed by Rankin's Garage to leave car keys under floor mats, in the ashtray, or over the visor. Evidence at trial confirmed that other garages in the area had drop boxes or locked boxes for their customers' keys. The owner of the vehicle which was stolen testified that his vehicles were regularly serviced by Rankin's Garage. He would always leave the keys in them when he dropped them off in front of the garage. He did not think that his cars were always locked when he returned to pick them up.

The Court also considered evidence that vehicle thefts in the area were a known historical problem. Officer Pittman gave evidence that vehicle theft and mischief – rummaging through vehicles – was a common occurrence within the detachment area. The OPP encouraged residents to lock their vehicles. Newspaper and radio messages had been used, along with a project involving auxiliary police checking vehicles and notifying owners if they were found unlocked.

In commenting on the issue of foreseeability, the Court found that Rankin's Garage was easily accessible by anyone. There was no evidence of any security measures designed to keep people off the property when the business was not open. Cars were left unlocked with the keys in them. The risk of theft was clear. In these circumstances, the Court reasoned that it was foreseeable that minors might take a car from Rankin's Garage that was made easily available to them. Evidence that a vehicle had been stolen from Rankin's Garage years earlier for joyriding, and that vehicle theft and mischief were common occurrences in the area, reinforced this conclusion. The Court noted "It is a matter of common sense that minors might harm themselves in joyriding, especially if they are impaired by alcohol or drugs". The Court further noted that Rankin's Garage should have had minors like J.J. in mind when considering security measures, adding that Rankin's Garage had care and control of many vehicles for commercial purposes; with that comes the responsibility of securing them against minors, in whose hands they are potentially dangerous. The Court found that securing these vehicles was not an

"onerous obligation". Rather, it was a simple matter of locking the vehicles and storing the keys.

The Court next considered the notion that "establishing liability for the injuries of someone who participates in a theft is offensive to society standards". Underlying this sentiment was the notion that wrongdoers should be responsible for the damage they cause to themselves by their own wrongdoing. In addressing this issue, the Court commented that "sentiment is not principle … it is well established that the duty of care operates independently of the illegal or immoral conduct of an injured party".

The Court concluded that Rankin's Garage had not only an *interest* in securing the vehicles on its property, both as owner of some vehicles and as bailee of others, but also a *responsibility*. Rankin's Garage could easily have met the standard of care by ensuring that all vehicles were locked and keys protected – precautions regularly taken in the industry.

In addressing the jury's apportionment of liability, the Court noted that there was "room for reasonable disagreement" adding that "another jury might well have apportioned liability differently". The Court chose not to interfere with the jury's decision on the apportionment of liability, commenting that "It cannot be said that the jury's decision is so plainly unreasonable and unjust as to satisfy the Court that no jury reviewing the evidence as a whole and acting judicially could have reached it".

This decision has garnered mainstream media attention. Publications, including the KW Record, Toronto Sun and the local Paisley newspaper, have all written about this decision, with some unfavourable commentary. Much of it focusses on the principle that wrongdoers should be responsible for the damage they cause to themselves by their wrongdoing. Some suggest that the party being robbed should not have been found *more* responsible than the teenagers who robbed it.

Rankin's Garage's lawyer indicated that he expects his client will seek leave to appeal to the Supreme Court of Canada.

James Bromiley is a Partner is the Waterloo office of Miller Thomson. He has a diverse practice encompassing all areas of civil and commercial litigation.

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:

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Cyndy Craig
Past President
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Monika Bolejszo


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Mauro D'Agostino


Gabe Flatt


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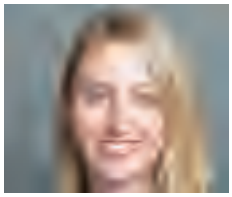
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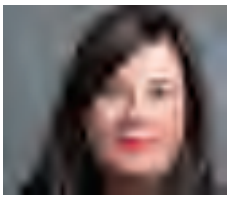
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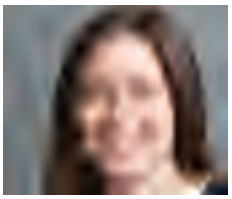
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ROAR
ENGINEERING

What can I do to stop a fraudulent auto claim?

It's Monday morning, and you're sitting down with a hot cup of coffee to begin reviewing another new auto claim. Almost immediately, you get that feeling in your stomach: Something isn't right with this claim. You think it might be fraudulent, but what can you do about it?

According to the Coalition Against Insurance Fraud, between 5 and 10% of claims contain a fraudulent element. Insurance Hotline reports that approximately 15% of the cost of an insurance premium is spent covering fraudulent auto claim. Auto adjusters throughout the Province of Ontario are reporting that the number of fraudulent claims is rising.

In order to determine whether an auto claim is fraudulent, start by asking these five questions:

Does the damage match?

Fraudsters often report that their vehicle collided with a Third Party, when in fact no collision occurred at all. Their collision damage is a result of a previous collision that they do not want to pay for, or some deliberate crash that did not involve the Third Party. Paint transfer that does not match either vehicle can be a dead give-away, but more often than not, the evidence is more subtle. Features of the damage, such as height, shape, and severity must match if the vehicles actually collided. For example, one such fraudulent claim was made where an insured reported that he was sideswiped by an unidentified driver. The short, severe, and concentrated damage with yellow paint transfer revealed that he in fact collided with a fire hydrant.

Do the vehicle speeds make sense?

With investigators catching on to collisions that did not happen at all, fraudsters have adapted by actually colliding their vehicles during collisions that they stage. However, the fraudsters are rarely willing to actually injury themselves in a serious collision. As a result, the actual collisions occur at speeds lower than reported. Damage analysis allows a Forensic Engineer to reconstruct the speed at which the vehicles collided, which may or may not be consistent with the reported circumstances. Fraudsters will state that they were travelling faster than they actually were, and often the reported speeds will exceed the speed limit. During a recent investigation, an insured reported that he was travelling 80 km/h in a 60 km/h. It was determined by examining

the damage that he could not have been travelling faster than 40 km/h. The involved parties later admitted to staging the collision.

Are the reported circumstances consistent?

In order to increase the value of the claims associated with a particular collision, fraudsters will often add many claimants to the list. Many times, these individuals were not in the vehicle during the collision. During interviews, these "passengers" will have very different stories about where they were going, how they know the other occupants, the direction of the impact, etc. In one case, the passengers did not even know the names of each other, and reported completely different reasons for being in the vehicle. One stated that they were on their way to dinner (at 8pm) and one reported that they were on their way home from the movies. Neither passenger ended up being in the vehicle at the time of the alleged collision.

Was everyone wearing their seatbelt?

In many cases, vehicles that are involved in fraudulent claims are unoccupied when the collision occurred. A large vehicle, sometimes a tow truck, will collide with the insured vehicle. The "driver" then reports that he/she was belted at the time of the collision. All other occupants say the same. If they were wearing their seatbelts, depending on the severity of the collision and its direction, physical evidence observed on the seatbelts themselves will provide proof. If all occupants state they were wearing their seatbelts, but no seatbelt evidence is found, perhaps you have more claimants than occupants. In another recent investigation, an alleged right front seat passenger stated that he was belted at the time of impact. Analysis revealed that no seatbelt was worn, and it was later determined that the right front seat was unoccupied.

Is there any Event Data Recorder information to be downloaded?

One of the most underutilized fraud prevention tools is the vehicle's Event Data Recorder (EDR), often described as the vehicle's "Black Box". An EDR is linked with the vehicle's airbag system, and downloads are available in almost all vehicles manufactured in the last ten years. An EDR download can provide details about impact speed, impact direction, pre-impact speed, pre-impact braking, steering, and more. Often the EDR download provides irrefutable evidence that sinks a fraudulent claim. An example of the effectiveness of an EDR download was a claim investigated involving a vehicle which was allegedly parked. The insured stated that his vehicle was off at the time of impact. The EDR download revealed it was driving and its brakes were applied before impact, in complete contrast with the reported circumstances. That claim was denied.

If the damage does not match, the speeds do not make sense, the stories are inconsistent, or the seat belts were not worn, it's time to dig deeper. Hiring a Forensic Engineer to examine a vehicle and download the vehicle's EDR is an inexpensive way of determining whether the claim is fraudulent. If the claim is fraudulent, legal teams (either in-house or external) are typically engaged in order to contest the claim. Engineering firms, such as the one which employs the author, provide reports and expert testimony in court which support the legal argument that the loss has been misrepresented. The Province of Ontario is fortunate to have a tremendous number of talented and tenacious defence lawyers and Forensic Engineers who have supported insurers in denying thousands of fraudulent claims.

Next time you have that feeling in your stomach that the claim you are reviewing is fraud, asking the above questions and seeking out a little bit more information can make all the difference. Talk to your colleagues, speak to in-house counsel, or call an Engineer. Auto fraud is a crime, and affects us all.

About the Author:

Darryl Schnarr is a Forensic Engineer & Accident Reconstruction Manager with Roar Engineering. He has investigated over three hundred vehicle collisions and testified as an expert witness in the Ontario Superior Court of Justice. He also has experience investigating motor vehicle manufacturing defects and airbag deployment failures.

SAMIS+COMPANY
Toronto | Waterloo

A New Era of "Reasonableness" Dawns on Appeals from Private Arbitrations

Shalini Thomas | 416.365.0000 | sthomas@samislaw.com

On August 4, 2016, the Ontario Court of Appeal released its decision in *Intact v. Allstate*[1] and changed the correctness standard of review for appeals from private arbitrations to one of reasonableness. The impact of this change will most likely have a chilling effect on the ability to successfully appeal them. However, given the spate of recent priority and loss transfer appeals, skeptical minds might question whether the change perhaps came about by design.

In coming to its decision, the Court of Appeal held that the administrative law framework set out in *Dunsmuir v. New Brunswick,* [2008] 1 S.C.R. 190 applied, rather than the "appellate" framework, as an appeal of an insurance arbitration reviews the decision of a non-judicial decision maker. As such, even though the review is "styled as an appeal" the administrative law framework should determine the applicable standard

The Court of Appeal noted that insurance arbitrations are not court proceedings but, rather, are governed by a distinct and defined regime which seeks to efficiently resolve such disputes between insurers and which did not warrant judicial intervention, given that courts and arbitrators do not share the jurisdiction at the first instance. The Court of Appeal also noted that insurance arbitrators are recognized to have expertise and experience in interpreting insurance law and since parties select their decision-maker a presumption is created that the parties will choose an arbitrator with relevant expertise. Furthermore, since the decision-maker is interpreting its "home" statute or statutes closely connected to its function, the presumption is that a reasonableness standard of review applies as set out in the Supreme Court's decision in *McLean v. British Columbia* [2013] S.C.R. 895.

The Court of Appeal considered one "unlikely scenario" in which a correctness standard of review would apply to appeals from an insurance arbitration – where the appeal involved an "exceptional" question, i.e. one that was jurisdictional, constitutional or was both of central importance to the legal system and outside of the arbitrator's expertise. However, since most appeals from an insurance arbitration regarding a priority dispute engage questions of mixed fact and law or questions regarding the interpretation of the SABS, reasonableness was deemed to be the appropriate standard.

In *Dunsmuir*, at paragraph 47, the Supreme Court of Canada explained:

> **[a] court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly**

[1] *Intact v. Allstate*, 2016 ONCA 609 (CanLII)

> **with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.**

Similarly, in the subject decision, the Court of Appeal set out that when reviewing a decision for reasonableness, a court must consider "the reasons proffered and the substantive outcome in light of the legal and factual context in which the decision was rendered". The Court added that a decision may be unreasonable where the arbitrator failed to carry out the proper analysis, where the decision was inconsistent with underlying legal principles or where the outcome of the decision ignored or could not be supported by the evidence.

Generally, the change from a correctness standard to a reasonableness standard will undoubtedly result in the decisions of arbitrators being granted much greater deference such that greater emphasis will need to be placed on the conduct of the initial private arbitration itself. Moving forward, parties should avail themselves of all the tools available to ensure that a fulsome record of the evidence is presented at the arbitration and that broad rights of appeal are set out in their arbitration agreement.

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


Remembrance Day
11 NOVEMBER
In Flanders Fields
poem by Lieutenant Colonel John McCrae, 3 May 1915
In Flanders fields the poppies blow
Between the crosses, row on row,
That mark our place; and in the sky
The larks, still bravely singing, fly
Scarce heard amid the guns below.
We are the Dead. Short days ago
We lived, felt dawn, saw sunset glow,
Loved and were loved, and now we lie,
In Flanders fields.
lest we forget

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Environmental Spills – Evaluating "Sudden"

SCENARIO

The insured reports that their basement floor is covered in fuel. The insured's neighbor says that their water tastes funny. An adjuster (you) is assigned the claim and visits the property to assess the incident, and determine if the insurance policy will respond to the claim.

This scenario, or a similar version, occurs on a relatively frequent basis across Canada. There are many factors that impact the decision as to whether an insurance policy will respond to a claim. Two common criteria are that the incident must be "sudden" and "accidental". This review will look at some of the environmental engineering aspects of an incident that affect our ability to determine whether the spill was a "sudden" event.

THE SCIENCE OF FUEL

There are 4 common types of petroleum hydrocarbons that are involved in environmental incidents. Each type has their own unique chemistry, and different scientific methods for evaluating origin and age. The 4 types are:

- Gasoline
- Distillates (Diesel and Fuel Oil)
- Motor/Lubricating Oil
- Crude Oil

Diesel and fuel oil are very similar products, and are common types of petroleum hydrocarbons that are involved in spills which result in insurance claims. For that reason, I will focus my discussion on diesel and fuel oil, and refer to them as "fuel oil".

The composition of fuel oil changes when it is exposed to the environment. Sun, water, soil, air, bacteria they all can have an impact on the composition of fuel oil over time. This is called "weathering". Different chemicals in fuel oil will also react differently to environmental conditions, and therefore will "weather" at different rates. In order to estimate how old a fuel oil sample is, we commonly look for signs of weathering in the fuel oil. Over the last 25 years some studies have been performed that developed models which allow the "age" of fuel oil to be estimated. These models can also compare two fuel oil samples and determine if they have the same origin. However, the scientific models are based on some very specific site conditions. Some of the models have also been challenged, effectively, in the scientific community. As a result, most estimations of fuel age are just that, estimates.

For fuel oil samples that are very old (5+ years) it is easier to determine if the fuel oil is weathered, and therefore may not be from a recent spill event. The capabilities of the laboratory analysis, and the scientific models, to estimate weathering of fuel oil is also dependant on what type of sample you have. In general,

the higher the contaminant concentration the more effective the science is. Therefore, pure fuel oil is best, contaminated soil second best, and contaminated ground water may work but is usually the least effective.

Special laboratory analysis must be performed in order to estimate the level of weathering in fuel oil. There are various types of analysis that can be performed. Some common methods include biomarker fingerprinting, alkylated PAHs, C17 Pristane & C18/Phytane ratio analysis. Sampling is typically destructive, so a decision to do this analysis often needs to be made early in the site assessment process. Sometimes you cannot go back and get the sample you need.

SIGNIFICANT ISSUES

Here are some of the key issues that affect our ability to determine if a spill incident is a "sudden" event. They are:

1. The source of a fuel spill can usually be identified relatively easily. But for some spills, like the ones that originate from a hole in a tank or the mechanical failure of equipment, determining when the spill started can be very difficult. These slow leaks also provide new, fresh fuel to the spill zone. The new fuel can dominate the laboratory analysis process and mask, or hide, the presence of older weathered fuel that may exist.

2. The science of estimating the "age" of a fuel oil sample, based on the "weathering" characteristics that it exhibits, is only accurate to within approximately + or – 2 years, at best. And that level of accuracy is only valid if the site conditions are similar to the scientific model, which is often not the case.

3. The maintenance records for the fuel system are sometimes incomplete, do not exist, or are not available. These records describe when work was last performed on the system, and what activities were completed. This information can be useful when trying to determine when a spill incident may have started.

4. The property owner may provide incomplete or inaccurate information regarding the spill incident. This may include the last time they inspected the area where the spill occurred, what they were doing in the days/weeks prior to the leak incident be identified, etc.

WHAT THIS MEANS FOR THE LOSS ADJUSTER

1. For most fuel oil spills, it is not likely that an evaluation of the fuel contaminations "age" will provide sufficient information to conclusively determine that a spill event was "not" sudden. However, performing the special laboratory analysis, which is required in order to try and characterize the "age", or "weathering", of a fuel oil sample, can be very useful in the future. If there is fuel oil contamination identified during the remediation process that appears to be "old", a comparison to the original fuel oil sample can be performed. It may be possible to determine that this "older" contamination is from a different spill event.

2. For spill incidents that are the result of a mechanical failure or leak, the most effective method of estimating when a leak event started is to have a forensic assessment performed. This would typically involve having a mechanical forensic expert inspect the site, equipment, tank, etc. The forensic expert would then provide an opinion on the origin and cause of the fuel leak. If this work is performed effectively, and by a qualified person, the results of the forensic assessment should be able to stand up in litigation.

3. The information available to the adjuster from interviews, maintenance records, forensic assessments, and other sources, may not be sufficient to determine conclusively if the spill incident was a "sudden" event.

RECOMMENDATIONS

1. Thoroughly evaluate the origin and cause of the spill incident. This includes:
   - A site assessment by an environmental expert (MOE/TSSA Qualified Person);
   - A forensic assessment if there was a mechanical failure;
   - Detailed review of all records related to the incident; and
   - Comprehensive review of incident with the insured, witnesses, and other stakeholders.

2. Consider obtaining a sample, at the beginning of the claim, for special laboratory analysis to characterize the fuel observed at the source. There is an added cost to do this work, but it could be very useful later on in the claim if "older" contamination is encountered.

3. If it appears that a spill incident is not a "sudden" event, but the information is not conclusive, obtain legal advice on the best way to proceed with the claim.

Michael LeBlanc, P.Eng., RPIH
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