

# PRESIDENT'S MESSAGE



**January 2014**

Baby, it's cold outside! And for some of those less fortunate, it's still cold inside! The Ice Storm that struck our area and Toronto and knocked out power to thousands is still being remedied, just as the temperature is dropping to it's regular winter pattern. The Holidays have officially come and gone, and now it's back to work for all of us while we wait for the next long weekend...

We have an excellent seminar coming up in January on Non-MVA injuries (trip and fall, anyone?) and I encourage you to attend. We will be having a few more educational meetings in the coming months (February and May) as well as our Provincial meeting in March which is always one to attend. We have our Elections night on April 24<sup>th</sup> and we will be looking for candidates that would be interested in becoming part of the executive. If you are interested, please speak with any of the executive so that we can get your name on the ballot come voting time! Also, the joint IBC/IBAO/OIAA Curling Bonspiel will be held in April, and you can find the registration forms in this bulletin.

We look forward to seeing you January 30<sup>th</sup>. Remain calm, and stay warm.

Cyndy M. Craig, CIP CRM

President – KW-OIAA

January 2014

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

## Schedule of K-W Chapter Monthly Meeting 2014

<u>Date</u>	<u>Topic</u>
January 30 <sup>th</sup> , 2014	Educational Meeting – Non MVA Injuries
February 27 <sup>th</sup> , 2014	Educational Meeting- Site Security - ESM
March 27 <sup>th</sup> , 2014	Provincial Conference
April 24 <sup>th</sup> , 2014	Elections and Fun Night
May 29 <sup>th</sup> , 2014	Educational Meeting
June 26 <sup>th</sup> , 2014	Annual Golf Tournament

Details of each event will be in that month's bulletin



### **So what is Dry Ice Blasting... Really?**

In the nineteenth century, scientists experimenting with carbon dioxide learned that when the gas temperature was significantly reduced (to below  $-78^{\circ}\text{C}$ ) that 'dry ice' was formed, and that if the temperature climbed back above that freezing point the ice would sublime directly back to a gas without first passing through the liquid phase. Little did they suspect that restorers in the twenty-first century would use that discovery to their advantage.

Approximately forty years ago, entrepreneurial spirit took dry ice technology that was being used to keep things cold and to make fog at rock concerts to a new level. The concept of pelletizing dry ice and forcing it through a nozzle at elevated pressure would achieve what we commonly refer to today as dry ice blasting, ice jet blasting or cryogenic blast cleaning. Recent innovations have made this technology readily accessible to all who choose to invest in the operating equipment.

Dry ice blasting is often compared to forms of abrasive blasting such as sand blasting, soda blasting, glass blasting or sponge blasting, and while it makes sense to group them together, the reality is that CO<sub>2</sub> blasting is really quite different if you study the processes in detail. Abrasive blasting methods cause a contaminant to be scrubbed away, and it is easy to imagine how damage can be done to a surface finish if the material being used to abrade is harder than the surface being cleaned. If you have ever visited a house on the beach where the wind has pummeled the sun porch with sand for many years, you will see the damage done by abrasion as the window panes have become slightly frosted. Under a microscope the glass surface would appear much like our coastal mountain range.

Dry ice pellets are about the same size as grains of rice, and each pellet is quite soft and of low density, so as an abrasive media, dry ice would not do a very credible cleaning job. The secret to the success of dry ice blasting is the radical temperature differential. When extremely cold ice pellets make contact with a surface that is much warmer, a rapid transfer of heat occurs as the pellets draw heat from that surface on impact. If you asked a scientist to explain how dry ice blasting works, he or she might tell you that thermal shock causes high shear stresses and resultant coating bond failure; and that the rapid thermal fracturing would induce explosive expansion of the carbon dioxide pellet in the form of a shock wave as it reverted to a gaseous state. In simple terms the pellets suck heat out of the contaminant and weaken it, after which the sublimating CO<sub>2</sub> lifts the contaminant away from the surface being cleaned so it can fall to the floor for easy collection and removal.

While it might seem similar to abrasive cleaning, it really isn't similar at all. Dry ice Blasting will not etch because it lifts or raises the surface being cleaned. It can for example, raise the grain of wood. It can in some cases successfully lift paint if the coating is not excessively thick or well bonded, and yes, it can successfully lift by-products of combustion and visible mould growth. While the process is costly, many believe that the reduced cleanup cost and reduced containment cost makes this process extremely viable. As the process does not involve degreasing or encapsulation, greasy contaminants will still be greasy and may re-adhere when they fall to the floor, sometimes making collection and removal a slow process. Only loosely adhered oxidation can be removed from metal, and under the right circumstances dry ice blasting can shatter glass. Because carbon dioxide is heavier than air, blasting within a confined space will result in a layer of CO<sub>2</sub> build-up on the floor, and if proper ventilation is not provided, the operator could end up in an oxygen deficient atmosphere. A clearly defined site specific safety plan is required prior to initiating any ice jet blasting project.

Marshall Oliver CR  
Director, Technical Services

# ENTER TO WIN

## **BULLETIN NEWSLETTER PHOTO CONTEST**

The Kitchener-Waterloo Chapter OIAA Bulletin publication is known for traditionally representing an historical monument or event on its cover as an icon of our Region's history. This year, we are inviting all KW OIAA members to take part in a **Photo Contest to find next year's cover photo for our 2014-2015 Bulletin newsletter**. Submissions can be made online or via email to any of our executive team members and should include a short bio explaining the significance of the photo to Waterloo Region and/or the OIAA (examples below). The selected photo will remain on the cover of the Bulletin monthly for the duration of the 2014-2015 year circulation and the winner will receive recognition in the Bulletin as well as a free year's subscription and a big bottle of Grey Goose. Please submit your contest entries to: [dstrigberger@millertomson.com](mailto:dstrigberger@millertomson.com)

## **DEADLINE FOR SUBMISSION IS MIDNIGHT ON TUESDAY DECEMBER 31<sup>st</sup> 2013 AND THE WINNER WILL BE ANNOUNCED AT THE JANUARY DINNER MEETING**

Some examples for you to get into the spirit:



In 2012-2013, the Bulletin cover held an image of the West Montrose Covered Bridge (or "Kissing Bridge") which, according to the Waterloo Region Official Tourism Website, is: "recognized as an historic site by Ontario's Archeological & Historic Sites Board" and is "Ontario's last remaining covered bridge" with a "198' span across the Grand River. Visitors come from all over the world to see and photograph this picturesque bridge."



In 2013-2014, the Bulletin will show Woodside House on its cover, the Birthplace of William Lyon MacKenzie King and, according to Parks Canada's website ([www.pc.gc.ca](http://www.pc.gc.ca)) was also "the boyhood home of William Lyon Mackenzie King, Canada's longest-serving Prime Minister. The house has been restored to the Victorian style of the 1890s. The importance of this residence is best reflected in King's own words: "The years that left the most abiding of all impressions and most in the way of family associations were those lived at Woodside."

## **What will the 2014-2015 Bulletin photo be?? WE NEED YOUR HELP!**

Good Luck!!!

Your Executive Team

2013-2014

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## Beyond The Eye Can See

What separates the average from the great, the mediocre from the successful? One key attribute is the ability to see and understand beyond what is plainly obvious. Although this principle can be applied to many fields of expertise, it has been our experience as a remediation contractor that this principle resounds with such truth; for our success is achieved in the ability to control what the eye cannot see – namely the hazards in dust.

Dust perhaps sounds like a meagre term which is why some perhaps ignore its importance; however, could there be a difference between the ubiquitous accumulation found on the top of every fridge and the powdery artwork left behind by the gruff contractor? The easy answer is if it's not my house, it doesn't matter; or, a little dust never hurt anyone. Harmless comments like this take on a whole new meaning when holding a newborn baby or the hand of a friend being treated for cancer. Maybe we need to look a little more closely than just what is on the surface?

So what is on that dusty surface? Dust by definition is composed of tiny particles of matter derived from sources that are organic (plant materials, fungi, soil, etc) or inorganic (metals, rock, etc). The following list of particles often found in dust does not sound so friendly though: pollen, mould, lead, silica and asbestos are the unseen and overlooked hazards in dust. In fact, many of these materials are listed as designated substances under the Ministry of Labour's Occupational Health and Safety Act. All of a sudden, dust is no longer an issue that is just to be swept under the carpet.

Dust can be found or created by any contractor in our homes, healthcare facilities, office spaces, institutional facilities, commercial and industrial workplaces. Each location has its own unique environment consisting of occupants, building materials, equipment and physical design. Occupants may be immune compromised or suffer from specific allergies. Building materials could be contaminated with hazardous materials. Sensitive medical tools, technical instruments, or food processing equipment may be stored onsite. Finally, HVAC systems and vertical shafts may move and redistribute contaminants far beyond the work area and to areas unknown.

The ability for dust to become airborne not only makes it difficult to control, but also allows it to be suspended in the air for prolonged periods of time so even hours after the dust was 'cleaned up', it can be inhaled unnoticed. Once in our airways, it may come in contact with sensitive tissues, and may even accumulate deep within the lungs. Depending on the amount and type of dust, serious health complications can result that are often irreversible.

As a remediation contractor, it is our business to seek out the hazards and sensitivities found within each workplace. Experience and knowledge has shown how often hazardous materials are present in common building materials typical of most work sites. Some examples include:

- Silica (causing silicosis) is a particle found in most cement products.
- Asbestos (causing mesothelioma) is a fiber found in drywall compound, plaster, vinyl flooring and insulation.
- Aspergillus (causing aspergillosis) is a mould found in water damaged building materials.

Since serious diseases are associated with materials found in construction dust, it becomes imperative that these hazards are controlled to protect the environments where we live and work.

We cannot control where the hazards are found, but we can protect those working with these materials and the surrounding environments. Properly fitted respirators and disposable coveralls are often the minimum requirement to protect those working with construction materials. To protect the surrounding environments and prevent cross contamination, further measures are needed. Physical barriers and sealed HVAC systems are critical to controlling air movement. Vacuums and negative air machines equipped with certified HEPA filters are useful tools to ensure dust is controlled when created. Regardless of the equipment, nothing can replace knowledge and training in proper dust control methods.

It has been our experience that many claim to understand the science of dust control; however, their false claims are quickly spotted in some typical mistakes. If we go back and pick on the gruff contractor, we might first see his eagerness to jump into his job with no dust barrier and a power tool in hand. Little does he know that his time-saving power tools also make plenty of dust. Not to worry; his well-worn paper mask should protect him from the plumes coming off his 'filtered' shop vac – too bad the seals around the filter are cracked. Well, to spare his reputation he is sure to quickly sweep the floors before he leaves. The job may be done but you are certain to have received much more than you paid for.

As with many things, education and awareness will help improve the safety of everyone. We all play a part promoting safe work practices, so the next time you are involved in a construction related project be sure to look beyond what is obvious and ask the important questions about dust.

Joel Van Es

*About the author – Following a Science-Business degree and with an interest in construction, Joel has spent the past 10 years working in the restoration field with a specialized focus on environmental hazards. He has used this opportunity to manage a wide variety of projects including designated substance abatements of entire buildings and remediation and repair in Class 4 infection control sites within healthcare facilities. His current role is a Project Manager with Zero Environmental.*  
[www.zeroenvironmental.com](http://www.zeroenvironmental.com)



# 3rd Annual Local Insurance Associations Charity Curling Bonspiel

Friday, April 4, 2014



Time is more valuable than ever with busy schedules it is often difficult to support the many insurance events. Leaders within your local Broker, Adjuster, and Insurance Institute associations have been working to organize a winter event that will bring our memberships together providing an opportunity to net work with like minded individuals within our community.

Based on your feedback, we recognized that building and creating connections within our industry is important to you and key to career development and success. Our 1st partner associations are please to extend an invitation to join our second annual Local Insurance Associations Charity Curling Bonspiel.

We hope you can come out and join us at Westmount Curling Club on Friday, April 4th. We are offering a morning and afternoon draw so you can still get a half-day in at the office. A buffet style lunch will be catered to both the morning and afternoon curlers, with four (4) end draws providing lots of opportunity to connect with colleagues throughout the local industry.

This is a fun event so experience is not required but we will try to match up experienced groups in the draws along with offering some instructions at the rink. A registration is provided below. It will be first come first serve for your choice of a morning or afternoon draw. If you care to sponsor part of the event please indicate so on the registration form. We will present proceeds to the United Way of Kitchener Waterloo.

Curling is a really fun social sport that most of us do not get to try or do very often, we really hope you can join us on the 4th.

## Prize Sponsorships:

Donations of prizes to Melissa Snyder and Cyndy Craig  
msnyder@mcica.ca or ccraig@archinsurance.com

**Location:** Westmount Curling Club

**Date:** Friday April 4, 2014

**Time:** 9 am - Start. Select preferred draw time on form below.

**Prices:** \$56 (includes hst); \$226 for a team of 4 (includes hst).

**Note:** Wear warm clothing and flat, indoor shoes

## 3rd Local Insurance Associations Charity Curling Bonspiel

First name		Last name	
Company		Address	
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<b>Price</b> \$56 per person (includes hst); \$226 for a team of four (includes hst). Telephone registrations: 519-579-0184 Email registrations: <a href="mailto:Conestogacurling@img.ca">Conestogacurling@img.ca</a> or <a href="mailto:imil@img.ca">imil@img.ca</a>		Select Preferred Draw Time: <input type="checkbox"/> AM <input type="checkbox"/> PM Payment Choice Method: (check one) <input type="checkbox"/> Cheque <input type="checkbox"/> Money order Amount <input type="text"/> Date <input type="text"/> Signature <input type="text"/>	
<b>Team Member Names:</b> <input type="text"/> <input type="text"/> <input type="text"/> <input type="text"/>		<b>Previous Experience</b> <input type="checkbox"/> None <input type="checkbox"/> Curled 1-10 games <input type="checkbox"/> Curled 10-20 games <input type="checkbox"/> League Curler <input type="checkbox"/> None <input type="checkbox"/> Curled 1-10 games <input type="checkbox"/> Curled 10-20 games <input type="checkbox"/> League Curler <input type="checkbox"/> None <input type="checkbox"/> Curled 1-10 games <input type="checkbox"/> Curled 10-20 games <input type="checkbox"/> League Curler <input type="checkbox"/> None <input type="checkbox"/> Curled 1-10 games <input type="checkbox"/> Curled 10-20 games <input type="checkbox"/> League Curler	



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# 3<sup>rd</sup> Annual Local Insurance Associations Charity Curling Bonspiel Celebration Event



## Sponsorship Opportunities

**When:** Friday, April 4<sup>th</sup>, 2014

**Where:** Westmount Curling Club

**Time:** 9 am - Start. Select preferred draw time on the registration form

**TITLE SPONSOR:** \$1,250 – Covers ½ the cost of the combined lunch the day of the event.  
(Morning Draw's Lunch or the Afternoon Draw's Lunch)

**GOLD SPONSOR:** \$500.00 – Covers the cost of complimentary drink ticket(s) for each attendee at lunch.

**SILVER SPONSOR:** \$350.00 – Covers the cost of the rink rental for the event and instruction

**BRONZE SPONSOR:** A cash donation of your choice that will be contributed to any miscellaneous expenses and/or the total proceeds from the event, to be donated to the United Way of Kitchener Waterloo & Area.

**DOOR PRIZE:** Door Prize of your choice.

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## Ontario Building Code Changes - An Overview

*Steve Reid, P.Eng.*

**The new edition** of the Ontario Building Code 2012 (OBC) has come into effect as of January 1st, 2014. I'd like to take this opportunity to highlight some of the more significant changes that may affect insurance claims involving renovation work resulting from damage covered by the owner's insurance policy, as well as a few others that may be of general interest. Remember, a building permit application for even a small structural repair could trigger other requirements of the OBC that may seem unrelated to the task at hand.

**First, a brief background** of the Code: The OBC governs most building construction, modifications and additions in Ontario. The complete code, as a physical document, is amassed in a double binder set - the first includes the three primary Divisions: compliance and objectives; acceptable solutions for designers; and administrative provisions for building authorities and qualified designers. The Divisions are further divided into several Parts which include fire protection, structural design, heating and ventilation, plumbing and a host of others. The second binder includes two appendices and more than a dozen supplementary standards related to design of specific building components such as guards and sewage treatment units, as well as requirements for energy efficiency and fire and sound resistance. This is the format used for the new Code as well as previous editions. Sound intimidating? Don't worry at times it can be confusing to engineers, as well.



**In order to remain relevant** and up to date with the ever changing world of building technologies as well to address public safety of buildings, the OBC is updated periodically – roughly every 5-6 years. Once the updated code is accepted by the province, the former code is revoked and the new requirements, often more stringent, become applicable for new building construction and even renovations.

**From a** very high level, the new building code is intended to advance Ontario's health and safety and environmental protection requirements, ensure that our building sector remains competitive through increased flexibility of requirements and allowing new building products, and further Ontario's status as a leader in terms of energy efficiency and water conservation.

**In the new code**, fire safety for buildings large and small, is addressed with new requirements for smoke alarms in every sleeping room in addition to the ones already required on each level of the building in corridors. These smoke alarms must be hard wired and have battery back-up for protection during periods of power outage. New permissions have been included that allow for a system of smoke detectors that sound a centralized in-suite alarm in multi-unit residential units.



**Backflow prevention** – technology that protects our municipal water supply from potential contamination from reversed water flow from a building back into the water supply – will now be a requirement for medium-hazard buildings such as commercial and multi-unit residential buildings as well as hotels.

**Energy conservation** has been a hot topic for several years and we've seen many incentives from the government to upgrade the energy performance of older buildings by replacing doors and windows, installing additional attic insulation and new high-efficiency furnaces. Additionally, new buildings have



benefited from new insulation products with higher thermal resistance which has allowed them to meet ever increasing requirements for energy efficiency. Continuing on this trend, the new OBC will require buildings built after 2017 to have an energy efficiency that is between 13 and 15% higher than they were in 2012. With all this being said, the cost of designing and insulating new and renovated buildings will see some degree of increase based on these new requirements. As well, requirements for water conservation in homes built or renovated under the new code have increased in regard to fixtures such as toilets, urinals and showers, which will now all need to be high-efficiency units.

**Accessibility of buildings** has long been a part of the OBC, however new requirements for accessibility for all public and private buildings are being investigated and may be included in the new OBC as an amendment in the coming years. This stems from an act passed in 2005 called the Accessibility for Ontarians with Disabilities Act which calls for all buildings in Ontario to be fully accessible by 2025, including wheelchair access to the building and barrier free design for usable spaces and washrooms within a building.

**Opportunities for innovation** have been created in the new code in relation to rain water harvesting, storage and re-use for various applications including clothes washing, toilet flushing, hose bibs and a few others. Imagine the positive consequences this could have for businesses like hotels with large flat roof areas and an enormous water demand for washing sheets. Suddenly a water system could be used that considerably reduces the amount of potable water used as well as storm water runoff from the building that must be handled by the municipal storm water sewer. Other opportunities for innovation include a new code provision that allows composting toilets to be installed in any building, including those connected to a municipal sanitary system. Previously, these types of toilets could only be used when a sanitary sewer was not present.

**Additional ventilation** requirements are included in the new code specific to laboratories and repair garages which will offer increase protection to occupants from gases such as carbon monoxide and others. On a related note, carbon monoxide detectors are now permitted to be battery powered in buildings not supplied with electrical power.

**Overall**, the new edition of the code includes dozens of clarifications intended to make the document easier to interpret as well as increased harmonization with the National Building Code, the Fire Code and Electrical Safety Code – things that intuitively should reduce confusions when working with engineers, architects and building authorities. Consideration of expectations, opportunities, and potential costs associated with the OBC changes should be accounted for during the property claims process.

**On one final note**, those of you who have travelled abroad will be familiar with the ‘green running man’ located above exit doors – it’s actually an ISO standard symbol for exits. Well, he’ll be arriving in Ontario in 2014 to all new and modified buildings, replacing the traditional exit sign requirements such as ‘EXIT’ or ‘EXIT/SORTIE’ in red lettering. Though not something likely to affect insurance adjusters, it’s at least something fun to look forward to!



Steve Reid, P.Eng.  
Structural Engineering Services Group Leader  
R.J. Burnside & Associates Limited

*Mr. Steve Reid, P.Eng., is the Leader of Burnside's Structural Engineering Services Group. He has structural design experience in a wide array of areas spanning the industrial, residential, commercial, agricultural, and institutional sectors and has conducted many condition review assessments.*

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R.J. Burnside & Associates Limited



## A Lesson Lesson: Making the Case for the Mitigation of Damages



Authored by:

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The duty to mitigate is a basic tenant in our common law system spanning many areas of law, including contract, employment and tort. The doctrine of “mitigation of damages” is also known as the “doctrine of avoidable consequences”. It imposes an obligation on a party injured by breach of contract or a tort duty of care to exercise reasonable diligence in minimizing damages or to avoid aggravating the injury. The duty to mitigate derives from the general proposition that a plaintiff cannot recover from a defendant damages which the plaintiff could have avoided by taking reasonable steps.

The plaintiff’s failure to mitigate is a boiler plate allegation contained in most all Statements of Defence. If a defendant’s position is that the plaintiff could reasonably have avoided some part of the loss, the defendant bears the onus to prove it at trial. As such, the defence needs to ensure that a case is properly prepared for trial if there is an intention to rely upon the affirmative defence of mitigation.

In *Branco v. Ephstein*<sup>1</sup>, the Ontario Divisional Court outlined the following three elements that a defendant must prove to establish that a plaintiff has failed to mitigate damages:

1. The steps which the plaintiff might have pursued to avert loss;
2. The reasonableness of pursuing those steps; and
3. The extent to which loss would have been averted.

Medical evidence in support of these elements is pivotal.

The question of whether a plaintiff has been “reasonable” in mitigating damages is a triable issue. In personal injury

cases, mitigation typically centres on the pursuit of treatment. In this context, a trier of fact has to take into consideration the degree of risk of the treatment, the gravity of the consequences of refusing the treatment, and the potential benefits to be derived from the treatment.

The mitigation test is said to have both subjective and objective elements. The test is based on whether the “reasonable patient”, having all the information at hand that the plaintiff possessed, ought reasonably to have undergone the recommended treatment. If any one of several recommended courses of treatment is followed, a plaintiff will likely not be found to have acted “unreasonably”. This all presupposes that the plaintiff is capable of making a choice, that is, that a plaintiff does not have an underlying mental infirmity that explains why the plaintiff has not made a decision about treatment. A person who is incapable of making a choice about treatment because of a pre-existing psychological condition can be excused from the “reasonableness” standard. Similarly, it may not be “unreasonable” for a plaintiff to avoid treatment where he or she cannot afford to take time off work due to a legitimately held fear of job loss<sup>2</sup> or when the treatment is unaffordable.<sup>3</sup>

The 1985 Supreme Court of Canada decision in *Janiak v. Ippolito*<sup>4</sup> is often cited as a seminal case about mitigation. In that case, the plaintiff claimed compensation for alleged disability arising from a car accident. The plaintiff claimed he could not return to work. His main injury was a disc protrusion in the cervical spine. Medical experts recommended a course of treatment for surgical excision

<sup>2</sup>*Bradshaw v. Matwick*, 2011 BCCA 111 (CanLII)

<sup>3</sup>*Trites v. Penner*, 2010 BCSC 882 (CanLII)

<sup>4</sup>1985 CanLII 62 (SCC)

<sup>1</sup>[2006] O.J. No. 2391

of the disc together with a spinal fusion. The plaintiff was given a 70% chance of success, and if successful, a 100% chance of recovery and the possibility of returning to work. The plaintiff feared surgery and refused to undergo the operation without being assured of a 100% chance of success. The plaintiff remained disabled and out of work at the time of trial. Given the plaintiff's refusal to undergo the surgery on those odds, the defence maintained that the plaintiff was not entitled to damages.

The trial judge was persuaded by the defence argument about the plaintiff's failure to mitigate. The plaintiff's refusal to undergo medical treatment or surgical operation was unreasonable. Taking into account the estimated period of convalescence from a spinal fusion operation, the judge found that had the plaintiff acted reasonably, he would have been able to return to work two years after the accident. Accordingly, he found the defendant responsible for the plaintiff's income loss only for that period.

The decision was upheld by the Ontario Court of Appeal, but the award for loss of income was increased to take into account the fact that recovery was not completely guaranteed. That Court agreed generally with the line of reasoning of the trial judge, but differed in his calculation of damages. The Court took into account the fact that the recommended surgery entailed only a 70 per cent chance of success. Even if the plaintiff had acted reasonably, his recovery would not have been assured. The plaintiff's damages were assessed based on loss during two years post accident and 30% of his losses after that time (since there was only a 70% chance of surgical success). The Court therefore increased the award for income loss to reflect the contingencies entailed in the surgery and the plaintiff's future job prospects had he undergone the operation.

The case was appealed further to the Supreme Court of Canada. The Supreme Court agreed with the Court of Appeal's approach. The plaintiff's refusal to have surgery was unreasonable, and so the claim was limited to his unavoidable losses. The appeal was dismissed, subject to correction of calculation errors by the court below.

There are a number of other contexts in which the failure to mitigate can be argued, including: failing to follow educational and vocational advice, missing treatment or specialist appointments, and stopping medication. There are also several cases where failure to mitigate has been argued successfully, resulting in a reduction of damages ranging between 10% and 33%.<sup>5</sup>

<sup>5</sup>*Gregory v. Insurance Corporation of British Columbia*, 2010 BCSC 352 (CanLII) (10%); *Ksiazek v. Newport Leasing Ltd.*, 2006 CanLII 36958 (ON SC) (25%); *Peloso v. 778561 Ontario Inc.*, [2005] O.J. No. 2489 (S.C.J.) (30%); *Hsu v. Williams*, 2011 BCSC 1412 (CanLII) (33%)

The duty to mitigate is a two way street. The plaintiff has a duty to mitigate, but the defendant has the burden to prove the plaintiff's failure to do so. Expert medical opinion is usually necessary to discharge the defendant's burden. Defence medical experts can be asked to comment about treatment options that were available to the plaintiff and the extent to which the pursuit of treatment would have reduced the plaintiff's symptoms and impairments, thereby improving the plaintiff's health and functioning. Lessen your litigation exposure by remembering the lesson of mitigation.<sup>6</sup>

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*She is a prolific speaker on topics of interest to the insurance industry. She has obtained certification in Canadian Risk Management, and sees all matters through the lens of risk.*



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<sup>6</sup>Thanks for the rhyme, Katie Quinlan, BA, LLB, Esq.

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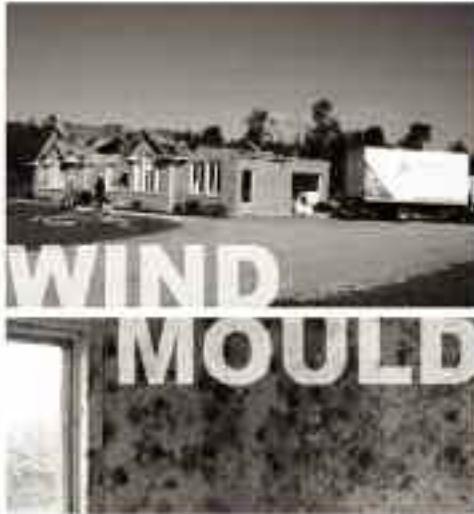


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## Delicate Flowers with High Winds

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According to the Mental Health Commission of Canada, the fastest growing claims in the workplace are mental health issues among employees. This is a trend that has continued to grow for a number of years with no indication of slowing down any time soon. From an investigative standpoint this presents it's own unique yet exciting challenges differentiating the physical injury claims.

I would like to preface this by noting that there certainly are legitimate claims when it comes to employees suffering from mental health. These issues need to be dealt with on an individual basis promptly, to ensure the safety of not only that particular employee but the entire workplace. I will also agree with the fact that in many industries this current economy can be taxing on stress levels of many. By the same token however, it is this economy and the uncertainty it brings that will escalate the 'not so legitimate' claims.

When certain people see that work is about to slow down, justification to solidify their monetary stability can be easily achieved regardless of ethics. As we all know, getting paid by the organization or insurance company is always going to amount to more than what the government will provide.

This rising trend of using mental health as the claim is increasingly difficult for human resources departments for a couple of reasons:

1. *The main one being that no matter what the gossip is, or what logic is telling you, the fact is that these issues are difficult to prove with the resources from within.*
2. *The next issue that seems to be arising more frequently revolves around the aftermath of the subject if they are questioned. This could exacerbate the issue and provide further ammunition for the employee being questioned.*

The first thing any employer should do is educate themselves of any issues the employee may be going through; whether at work, or in their personal lives. The top 10 general stressors in life according to a recent on line survey:

- |                              |                            |
|------------------------------|----------------------------|
| 1. Death of a spouse         | 6. Injury or Illness       |
| 2. Divorce                   | 7. Marriage                |
| 3. Marriage separation       | 8. Fired from job          |
| 4. Jail term                 | 9. Marriage reconciliation |
| 5. Death of a close relative | 10. Retirement             |

*Most mental health illnesses stem from depression (not letting go of a past issue), or anxiety (fearing the future) as these listed issues clearly illustrate.*

This can be done by offering the EAP option and starting a dialogue to get a sense of the true issue, without prying of course. Also a lower stress, less demanding job could be offered as an alternative. In addition, it's important to note times and dates and that all the correct steps have been taken in the event that an investigation commences.

This is the one area that is increasingly causing organizations to scratch their heads and wonder what their next step should be. As we have necessarily changed the legislation to protect workers from harassment that may cause this very issue, we have also justified many false claims that have and will continue to grow. The first thing to do in regards to an investigation is to back off and excuse everyone directly related to the organization in their involvement. After all, it was the workplace that caused the issue, and any further negative contact could certainly make it worse. It is imperative that a third party handles these types of [workplace investigation](#) issues.

It is crucial that a list of restrictions be obtained from the doctor treating the subject and based on this list every possible light duty or modified position needs to be offered. Every time it is turned down or an effortless attempt is made, it too needs to be noted. Based on this growing list, a specific strategy in how to conduct the investigation will be devised.

We recently conducted an investigation that began with a subject on stress leave. We had the employer offer every light or modified duty to the individual that wouldn't breach the restrictions listed according to their doctor. It was no surprise that every time a new position was offered; a new restriction was born. This was exactly what we wanted in this investigation, although the subject wasn't aware, they were playing right into the plan as they were further limiting themselves from numerous everyday activities, to the point where the subject was even restricted from driving.

We then began to build the evidence. The easiest breach to prove and record was the subject driving and according to their doctor this was something the subject wasn't fit to do. Now unless the subject was willing to confess they were feeling better, this matter could quickly escalate to a public safety issue involving the police. Needless to say, the threat of potential police involvement cured the subject back into mental wellness.

Although the new legislation can make things increasingly difficult in regards to the hurdles it presents, there are always ways to jump higher.



## **Overland Flooding vs Sewer Back Up**

**By Micheka Kostyniuk**

With the recent Alberta Floods and Toronto Floods this past summer, we were asked several times to help in determining the cause of water damages: Was there a sewer backup, overland flooding, or both? If both events occurred, which one began first?

Sometimes water damage is solely due to one reason (sewer backup, overland flooding, sump pump failure, etc). Sometimes water damage is from a combination of causes. It can be obvious or difficult to determine, but there are a lot of things you can look for to help determine the cause(s) of damage. It can sometimes be difficult or impossible to determine which cause started first when it is a combination, but it is possible in some cases.

To assist with the investigation, it is helpful to get as much background information as possible. Some important questions to find out are if the power went out and if so when, if there are pump stations that service the area and if so did they continue to function properly, were the insured at home at the time and what did they observe/document, and is there a backwater valve at the property?

A thorough interior and exterior examination should be undertaken as soon as possible. As time goes by, the evidence can be destroyed through clean-up efforts, further rain storms, etc. If there is a question whether or not there was a sewer backup, doing a bacterial swab to test for E.Coli. can sometimes assist, as it is unusual to find E.Coli. in overland flood waters. However, this testing needs to be undertaken shortly after the event to get accurate lab results.

During an exterior examination, there are several things to look for, such as water lines on exterior

buildings, fences, sheds, etc, damage to vegetation, broken windows, location of sump pit outlets, and whether or not basement windows were below the height of the water level.

During an interior examination, there are various areas to look for clues to cause of water damage. Where was the damage – was it limited to the basement or did it extend to the main level? How high did the water level reach in the basement and is there evidence of sewage in the water (e.g. toilet paper, feces, etc)? Check to see if there is a sump pump and if it failed, and if there are any sanitary connections in the basement that could back up (e.g. floor drain, laundry sink, toilet, etc). What is the depth of the basement – is it a crawl space or a full basement, and is the foundation deeper than adjacent properties? Look for a backwater valve access in the basement and compare the water levels inside the house to the exterior to determine if the water heights are the same. An examination of the framing can show if there was pressure on one side of a wall or post that caused it to move during the event.

If you find there was a backwater valve and there was a sewer backup, you may have a subrogation case on your hands. Backwater valves open in one direction only and should not allow any sewage or water to come backwards into the home. If they fail, the evidence should be preserved so that a failure analysis can be undertaken to determine why it failed.

There are many things to look for during an inspection to determine the cause of damage and time is of the essence. If you're uncertain and need assistance, give us a call.



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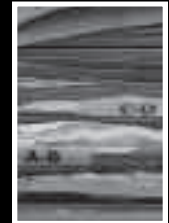
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