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# PRESIDENT'S MESSAGE

## AUGUST 2016



Welcome to the first online issue of the KW-OIAA bulletin for the 2016-2017 year. This year our bulletin will only be online.

If you would like to advertise, submit articles or have questions please contact our bulletin director Manish Patel, [mpatel@larrek.com](mailto:mpatel@larrek.com) 519-576-3010.

I would like to welcome the new committee members; Secretary-Jenn Mohr of Economical Insurance; Director- Jaime Renner of Economical Insurance; Social Director- Ashleigh Leon from Miller Thomson LLP.

The 2016 KW-OIAA Golf Tournament raised \$6747.00 which was donated to the Food Bank of Waterloo Region.

Our annual Trade Show will be held at a new location, the Crowne Plaza in Kitchener (105 King St E, Kitchener, ON N2G 2K8) on September 29th. The registration is open and will be done online, <http://www.kw-oiaa.ca>. Registration will be first come first serve. This will be a sellout event.

The tradeshow is a great networking opportunity, who knows you may possibly win a door prize. Please tell all of your co-workers about the event, everyone is welcome.

If you have any questions regarding the upcoming trade show please contact Ryan Potts, [ryan.potts@scm.ca](mailto:ryan.potts@scm.ca) -519-501-2478 or Laura Potts, [laura\\_potts@avivacanada.com](mailto:laura_potts@avivacanada.com) - 519-883-7579.

This year will be having many educational events starting with the Contractor's Round Table discussion on October 27, 2016 at Golf's Steakhouse.

This year the KW-OIAA will be hosting the 2017 Provincial Conference from May 4-6 at the Crowne Plaza Hotel in Kitchener.

Don't forget to check out our website (<http://www.kw-oiaa.ca>) Sign up for our mailing list, Facebook (<https://www.facebook.com/KwOiaa/>) and Twitter (<https://twitter.com/kwoia>) to see the upcoming events that will be taking place this year.

The executive committee and I are always available. If you have any questions, please contact us at [kw-oiaa@yahoo.ca](mailto:kw-oiaa@yahoo.ca) or myself at [ryan.potts@scm.ca](mailto:ryan.potts@scm.ca)

I am looking forward to the upcoming year and hope that everyone had a safe and happy summer.

See you all at the Trade Show!

Sincerely,  
Ryan Potts  
ClaimsPro  
K-W OIAA President

## This Month's Cover

**K-W OIAA is honoured to host the 2017 Provincial Conference & Trade Show – May 4-6, 2017, at the Crowne Plaza Hotel in Downtown Kitchener!**

# 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.**

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# EVENTS SCHEDULE 2016-2017

**September 29, 2016 - Trade Show - Ryan Potts & Laura Potts**

The annual tradeshow will be held at the Crowne Plaza Kitchener-Waterloo. Reserve your dinner tickets for this event and be ready to mix and mingle with those in the insurance industry, while learning about all of the great services local vendors have to offer.

**October 27, 2016 - Contractor's Round Table - Mark Potts & Laura Potts**

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

**January 26, 2017 - Liability Topic - 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 Brown, Jennifer Mohr, Jaime Renner**

**May 4&5, 2017 - OIAA Provincial Conference- Crowne Plaza Kitchener-Waterloo**

**June 29, 2017 - John McHugh Memorial Golf Tournament Ryan Potts & Mark Potts**

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



# SOCIAL CHIT CHAT

August 2016



The summer is starting to wind down which means that our KW OIAA year is revving up. We are looking forward to a great year networking, education and fun. On a personal note, I am very excited to be back as a social director this year and would like to



thank you all for your support. Please be sure to touch base with me with any comments, suggestions or concerns about the association.

Next month's trade show is quickly approaching and we hope to see everyone there. Remember to check out the website for registration information!

Cheers,

Your Social Director  
Ashleigh Leon

## Articles



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

Please submit your articles to Manish Patel at [mpatel@larrek.com](mailto: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.



# TORONTO DELEGATE REPORT



I hope everyone is enjoying a safe and happy summer; it certainly has been a hot one. It has also been a busy one for many industry colleagues and partners who have been supporting recovery efforts in Fort McMurray. To all involved thank you for making a difference to those impacted and thank you for positively impacting the industry's reputation and brand.

The 2016 – 2017 OIAA term is upon us and I would like to thank Catherine Groot for all of her contributions as President in 2015 – 2016. Catherine introduced many new and innovative ideas throughout her term to mark the OIAA's 85th anniversary. Ian Gallagher is the incoming President and Catherine will assume the role of Past President. Ian also has exciting plans that he will be implementing this year. First up is the September Kickoff event scheduled to take place at the spectacular Ripley's Aquarium on September 21st.

I am looking forward to representing the K/W chapter on the provincial executive again in 2016 - 2017 and I will do my best to keep everyone informed of what is going on in Toronto and throughout the province. OIAA education and event details are available at [www.oiaa.com](http://www.oiaa.com).

You can register for OIAA events at [oiaa.com](http://oiaa.com). Also, follow us on twitter @OIAAOfficial or find us on Facebook.

**Regards,**  
**Stephen Tucker**  
**Kitchener Waterloo OIAA Chapter, Toronto Delegate**



## Coverage, Exclusions, and Exceptions – Interpreting Homeowner Policies

Lisa Armstrong | 416.365.0000 x 118 | [larmstrong@samislaw.com](mailto:larmstrong@samislaw.com)

Alexandra Wilkins | 416.365.0000 x 155 | [awilkins@samislaw.com](mailto:awilkins@samislaw.com)

The Court has once again illustrated that determining coverage under a Homeowner's Policy is never easy. Below is a summary of three recent cases that remind us that interpreting coverage, exclusions and exceptions is a complex task.



### ***Allstate v. Aftab*, 2015 ONCA 349**

In May 2015, the Court of Appeal for Ontario released the *Allstate v. Aftab* decision. In *Aftab*, the homeowner's young son was hit and injured by a car while crossing the road after getting out of her van. The third-party driver claimed against the mother for failing to take reasonable steps to ensure her son's safety. The mother held a Homeowner Policy with Allstate and sought coverage.

Allstate argued that the homeowner's policy excluded coverage for bodily injuries to residents of the mother's household. Ultimately, the Court of Appeal concluded that Allstate did not have a duty to defend. In coming to its decision, the Court

dissected the policy wording.

The relevant provisions included: (emphasis added)

**You are insured for claims made against you arising from:**

- 1. Personal Liability – Legal Liability arising out of your personal actions anywhere in the world**

**You are not insured for claims made against you arising from:**

- (a) The ownership, use or operation of any motorized vehicle, trailer, or watercraft, except those insured by this policy;**
- (e) Bodily injury to you or to any person residing in your household other than a residence employee**

Guiding the Court's interpretation of the policy provisions was two prior and opposing decisions – *Quick*

v. *MacKenzie* (1997) and *Bawden* (2013).

In *Quick v. MacKenzie* (1997), the coverage and exclusion provisions were essentially identical to the provisions above. The Court found that on plain wording of the policy, the counterclaim against the parents was one “arising from” the child’s bodily injury and was excluded from coverage. In contrast, the relevant coverage and exclusion provisions in *Bawden* used the terms “arising out of” and “for”. The Court of Appeal found that these terms are not interchangeable, and coverage was found.

In *Aftab*, the Court of Appeal ultimately decided there was no duty to defend. They found that *Bawden* was distinguishable from *Quick* and the current facts because of the *ambiguous* language of the exclusion clause in *Bawden*. In *Bawden*, the use of the word “for” in the exclusion clause, rather than “arising from” (as in the *Quick* and *Aftab* policies), was found to limit the scope of the exclusion clause. The Court emphasized that unambiguous policy language (as in *Aftab* and *Quick*) should be given effect. The Court also highlighted that similar insurance policies should be construed consistently to give certainty and predictability.

***Unifund Assurance Company v. D.E., 2015 ONCA 423***

In *Unifund*, the insureds held a homeowner policy with Unifund, which included liability coverage if their personal actions caused unintentional bodily injury or property damage. The insureds were defendants in a claim stemming from their daughter’s bullying. The claim was founded in negligence for their failure to control their daughter.

Unifund did not defend the claim, relying on two exclusion clauses in the policy:

**Coverage E – Personal Liability**

**This is the part of the policy you look to for protection if you are sued. We will pay all sums which you become liable to pay as compensatory damages because of unintentional bodily injury or property damage arising out of:**

- 1. Your personal actions anywhere in the world**

**Exclusions – SECTION II**

**We do not insure claims arising from:**

- 6. bodily injury or property damage caused by an intentional or criminal act or failure to act by:**
  - a. any person insured by this policy; or**
  - b. any other person at the direction of any person insured by this policy;**
- 7. (a) sexual, physical, psychological or emotional abuse, molestation or harassment, including corporal punishment by, at the direction of, or with the knowledge of any person insured by this policy; or**  
**(b) failure of any person insured by this policy to take steps to prevent sexual, physical, psychological or emotional abuse, molestation or harassment or corporal punishment**

The trial judge found that Unifund had a duty to defend. With respect to exclusion 6, Unifund contended that the claim against the parents flowed from the claim against the daughter, arising from her intentional threatening and bullying. The trial judge rejected this argument on the basis that the

intentional tort claim against the daughter and the negligence claim against the parents are distinct. With respect to exclusion 7, the trial judge also rejected the contention that the provision precluded coverage. The court found that, in contrast to exclusion 6, exclusion 7 was silent as to whether it applied to intentional and unintentional acts. The judge held that clause 7b was ambiguous, and because exclusion clauses are to be interpreted narrowly, it should be limited to intentional. Unifund appealed.

The Court of Appeal went through the three part test for interpreting insurance policies in the context of the duty to defend, as outlined in *Non-Marine Underwriter*:

1. Based on the pleadings, what is the true nature of the claim?
2. Are the claims entirely derivative in nature?
3. Whether any of the properly pleaded, non-derivative claims could potentially trigger the insurer's duty to defend?

The Court of Appeal found no issues with the first two parts of the test. In deciding the third prong of the test, the Court emphasized that it is necessary to consider the words of the Statement of Claim and of the coverage and exclusion clauses, all together.

The Court found that the Statement of Claim came clearly within a negligence claim, for its "failure to take..." wording. In reading exclusion 7(b), the Court of Appeal found no ambiguity in the language of the exclusion, commenting that the first word of the clause is "failure", which is the core of the definition of "negligence" and the core of the Statement of Claim. Ultimately, the Court allowed the appeal and declared that Unifund did not have a duty to defend.

### ***Gill v. Ivanhoe Cambridge, 2016 BCSC 252***

Finally, in February 2016, the Supreme Court of British Columbia cautioned us that here is an inherent risk in comparing specific clauses or language to different insurance policies.

In *Gill*, the infant plaintiff was on the second floor of a shopping mall with his father when he fell through an opening. A litigation guardian on behalf of the son filed a claim against the owner, occupier, and manager of the mall. The defendants filed a third-party claim against the father, alleging he failed to supervise his son and to ensure his safety. The father sought coverage under his homeowner's policy with Economical.

Economical argued that the family exclusion clause applied. The exclusion clause reads:

**Personal liability: there is no coverage in this Section for claims arising from**

- a. **Bodily injury to the Insured or to any person residing in the Insured's household other than a residence employee.**

The court accepted that the language in insurance policies is often interpreted by referring to other cases in which similar or identical language has already been considered. However, a guiding tenant when interpreting the language of an insurance policy is the need to examine the language of the policy as a whole. The Court cautioned that there is inherent risk in comparing specific clauses or language in different insurance policies, without access to the whole of those insurance policies.

The Court compared the wording of the personal liability exclusion to the wording of other provisions in the policy and found that there was ambiguity in the family exclusion clause. The Court went on to look at the purpose of the exclusion, which is to prevent collusive claims.

The Court found that Economical was trying to extend the exclusion clause to circumstances that have nothing to do with the intended object of such clauses.

### What's Next?

Interpreting whether there is coverage under a homeowner's policy is rarely easy. These recent cases remind us that not every policy is alike and determining whether there is coverage requires a meticulous analysis of the entire policy.

Remember that where a contract is unambiguous, the Court seeks to give effect to the clear language, reading the contract as a whole. Where there is ambiguity, the Court has shown that they look at the reasonable expectations of the parties, and opts to choose the reasonable approach that promotes the intention of the parties. The *contra proferentem* rule is also a factor, where the standard practice is to construe ambiguities against the insurer.

Lisa Armstrong and Alexandra Wilkins are lawyers at Samis+Company's Toronto Office.  
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## **Kitchener Waterloo Tradeshow – Thursday September 29, 2016**

- Location:** Crowne Plaza Kitchener  
105 King St E Kitchener ON N2G 2K8  
(519) 744-4141
- Vendor Drop Zone:** Upon arrival vendors can access the front entrance or back service entrance to drop supplies. Parking is included.
- Registration Desk:** Located inside the crush area in the Crowne Plaza
- Important Times:**
- |        |   |                |
|--------|---|----------------|
| 12 pm  | - | Booth set up   |
| 4 pm   | - | Doors open     |
| 6:30pm | - | Tradeshow ends |
| 7pm    | - | Dinner         |
- Supplies:** Electrical power is available at all booths but you may want to consider bringing an extension cord or power bar. A table and two chairs are provided.
- Prizes:** The prize table will be made available in the dining room. We ask that each vendor draw a name for the recipient of their prize. Tag the prize with the recipient's name and place it on the prize table. *A member of the OIAA executive will attend your booth shortly after 6pm and ask you to identify the recipient of your prize.* The vendor and recipient's name will be displayed in the power point display in the dining room. It is the vendor's responsibility to ensure the appropriate person receives the prize.

**Alternate contact:** Ryan Potts (cell) 519-501-2478 will be on site all day.



# 2016 K-W OIAA TRADE SHOW DINNER REGISTRATION

WHEN: THURSDAY, SEPTEMBER 29, 2016

WHERE: **NEW LOCATION**  
Crowne Plaza Kitchener  
105 King St E  
Kitchener, Ontario



DOORS OPEN: 4:00 P.M.

DINNER: 7:00 P.M.

DINNER PRICE: **\$40.00** (HST included in price)  
HST#: 89331 1217 RT 0001.

## MEALS MUST BE ORDERED IN ADVANCE

Please Register at: <http://www.kw-oiaa.ca/>

To order your meal(s) please complete the following:

Name: \_\_\_\_\_ Telephone : (    ) \_\_\_\_\_

Company Name: \_\_\_\_\_

# of Dinner Tickets \_\_\_\_ X \$40.00 = \$ \_\_\_\_\_ Amount Enclosed

Cheques payable to : **K-W OIAA**

### Mail cheque and Registration form to:

K-W OIAA  
P.O. Box 40079 – Waterloo Square  
75 King Street South  
Waterloo, On N2J 1P2

Inquiries can be directed to:

**Ryan Potts**  
ryan.potts@scm.ca  
(416)307-2903

**Laura Potts**  
laura\_potts@avivacanada.com  
(519)883-7579

**\* PLEASE NOTE – NO MEALS CAN BE PURCHASED ON THE  
DAY OF THE TRADESHOW \***



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## Adverse Cost Insurance: Evolving Case Law



Authored by:

Evan Bawks

Associate, Waterloo

519.593.3201

ebawks@millerthomson.com

A growing issue in personal injury litigation has been the propagation of adverse cost insurance, also known as "after-the-event" insurance. This insurance is typically a policy purchased by a plaintiff in a lawsuit to provide protection in the event of a judgment for costs against a plaintiff if they are unsuccessful at trial. The advent of adverse costs insurance has been celebrated in some corners, primarily on the view that it "levels the playing field" and provides access to justice for plaintiffs that would otherwise be facing the risk of a costs award. An insurer that disputes an action to trial may also take some comfort that a successful verdict could result in the recovery of some costs against an otherwise impecunious plaintiff. However, there is a concern that adverse cost insurance will be an impediment to the litigation process, from attempts at settlement to the conduct of the parties throughout the litigation to trial.

A recent decision, *Sacks v. Ross*, 2016 ONSC 2498, considered whether to grant an order fixing costs in favour of a defendant against the unsuccessful plaintiff. In discussing the principles of awarding costs, Justice Wilson cited the fact that plaintiffs could purchase adverse cost insurance as a form of protection in litigation. In Justice Wilson's view, this would enable access to justice for plaintiffs by making it easier to advance challenging but meritorious claims.

The decision in *Markovic v. Richards*, 2015 ONSC 6983, considered whether the plaintiff's premium for their after-the-event insurance was a compensable disbursement. Justice Milanetti did not accept that such a premium should be reimbursed by the

defendants, noting that it would not be compensable as a taxable disbursement and that the premium appeared to only be payable if the case was successful. Further, it was noted that:

*Existence of the policy may well provide comfort to the plaintiff, it is however an expense that is entirely discretionary, does nothing to advance the litigation, and may in fact even act as a disincentive to thoughtful, well-reasoned resolution of claims. I do not think it fair and reasonable that an insurer be expected to cover the disbursement for this payment of premiums.*

In the recent decision in *Abu-Hmaid v. Napar*, 2016 ONSC 2894, Master Short considered whether a plaintiff was required to disclose a policy of adverse cost insurance. Specifically, the defendant was seeking disclosure of whether such a policy had been taken out for the benefit of the plaintiff; the plaintiff had refused to answer whether they had adverse cost insurance or not. Rule 30.02(3) was specifically considered, which states that a party shall disclose and, if requested, produce for inspection any insurance policy under which an insurer may be liable (a) to satisfy all or part of a judgment in the action, or (b) to indemnify or reimburse a party for money paid in satisfaction of all or part of the judgment, though no information concerning the insurance policy is admissible in evidence unless it is relevant to an issue in the action.

Master Short was of the view that the existence of adverse cost insurance (viewed as "protection") was relevant to the resolution of personal injury disputes, and ought to be disclosed at the same stage as disclosure by a defendant as required by Rule 30.02. However, he was not convinced that the specifics of the policy or carrier were of any probative value in the case before him, leaving it open that there may be factual situations that may justify the coverage quantum details being disclosed in other cases. Using his discretion and principles of proportionality, he thought it was adequate to simply advise whether or not coverage of this nature had been obtained,

and to keep that information current by way of implied disclosure obligation to the date of trial.

Master Short noted in *obiter* that the difference between a policy that provided "indemnification" and a policy that "insures" against an adverse cost judgment was "a distinction without a difference", thus the policy providing adverse cost coverage ought to be subject to the disclosure requirement.

Adverse cost insurance is a growing issue that defence counsel are seeing in more and more cases. Knowing if such a policy exists is crucial when considering whether the parties in a matter can reach a settlement before trial and acknowledging the increasing willingness of Plaintiffs to go to trial.

*Evan is an insurance defence litigation lawyer and associate in the Kitchener-Waterloo Office of Miller Thomson. His practice includes accident benefits disputes and tort litigation involving motor vehicle accidents, property claims, and occupiers' liability claims. Evan takes pride in using a detail-oriented and creative approach to find the best possible resolution for his clients.*



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