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# PRESIDENT'S MESSAGE

## MARCH 2018



As February draws to a close, so did the PyeongChang 2018 Olympics. I'm sure everyone caught the Olympic fever at some point, and ended up watching Ice Dancing, Snowboarding, Curling and of course, Hockey! For those that didn't here is how Canada ended up in the standings: Overall we came in 3rd for the number of Medals won with 29! Only Norway and Germany were ahead of us. The Medals won were 11 Gold, and 8 Silver and 10 Bronze!

For those interested in trying their hand at some Olympic style sports don't forget we've got a few events coming up!

**March 9 – 10** – Ontario General Insurance Hockey Tournament is taking place in Kitchener. Feel free to come out and cheer on your local adjusters or industry partners

**March 23** – Curling Bonspiel. Spots are still available if you are interested in participating.

In this bulletin you'll see information in regards to our big event in April. BATTLE OF THE BANDS!! It is also our election night – if you are interested in joining our board, or have any questions, please reach out to a board member, we would be happy to chat!

Thank you,  
Charlene Ferris  
President of K-W OIAA



# K-W OIAA EXECUTIVE COUNCIL 2017-2018

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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 2017-2018

**March 29, 2018- Kate Lines- Investigative Solutions Network – Jennifer Brown & Ashleigh Leon**

Kate is Canada's First Female criminal profiler. We will learn about profiling and stories from her career within the OPP and as an investigator.

**April 26, 2018- Battle of Bands + Election Night- Jennifer Brown, Randy Henderson & Dave Bushell - MAXWELL'S CONCERTS AND EVENTS, 35 UNIVERSITY AVENUE EAST, WATERLOO**

Election for positions available on the board, Members wishing to join the board must be in good standing with the K-W OIAA.

**May 31, 2018 – Mini Tech Showcase- Kristin McCutcheon and Jennifer Brown**

**June 21, 2018- John McHugh Memorial Golf Tournament: Ariss Valley Golf & Country Club- Charlene Ferris & Carrie Keogh**

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

Join us for our annual  
**Leadership Breakfast**

Keynote Speaker  
**Dave Sanderson**  
"Miracle on the Hudson" Survivor, Author and Speaker

Friday, April 6, 2018  
**Brace for Impact**  
How One Defining Moment Can Create a Lifetime of Purpose

MC: Mike Farwell  
Host of The Mike Farwell Show  
570 NEWS

Alumni Speaker  
John Goodman  
Class of 2015

**DATE:** Friday, April 6, 2018

**TIME:** 7:00 to 9:00 a.m.  
Followed by a meet and greet book signing with Dave Sanderson

**PLACE:** Bingham's Ballroom  
425 Bingham Centre Dr.,  
Kitchener

**COST:** \$50/person  
\$400/table of 8  
(pre-registration required)  
Includes breakfast buffet.

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## Who wants to win a \$500 Visa Gift Card?!

From September 2017 to April 2018 we will be running a contest to increase adjuster attendance at our meetings. Not just any adjuster – adjusters who are not currently members of our Chapter! Every time you bring a new adjuster to a meeting your name is entered into the draw!

### **Rules:**

1. Contest is open to current adjuster members, Industry Partners in good standing and Board Members of the K-W OIAA.
2. An adjuster can only be “brought” once to a meeting, the same adjuster cannot come every meeting with the member and qualify for the contest.
3. If current adjuster members, Industry Partners and Board Members of the K-W OIAA bring more than one new adjuster to a meeting, their name is entered into the draw equal to the amount of people they brought! (This is the equivalent of stuffing the ballot box!)
4. The adjuster member that is brought does need to have a ticket to attend.

### **FAQ:**

1. Do I need to be in attendance to win the prize? ANSWER – if you are not able to make the May meeting when the announcement is done, you can still win the prize and arrangements will be made to get the prize to you.
2. Who keeps the list until May? ANSWER – the list of current adjuster members, Industry Partners in good standing and to Board Members of the K-W OIAA and the adjuster that they brought will be kept with the current President- (Charlene Ferris)
3. What happens if the same adjuster is brought a second time? ANSWER – the second person who brought them will not be eligible to enter the draw with that adjuster, they would need to work to bring someone else out!



# BATTLE OF THE BANDS

HAVE A LOVE FOR MUSIC? ENJOY ROCKING OUT TO CRAZY FANS? BATTLE OF THE BANDS IS THE PLACE FOR YOU!  
JOIN THE K-W OIAA FOR BATTLE OF THE BANDS!

DATE: THURSDAY, APRIL 26, 2018

LOCATION: MAXWELL'S CONCERTS AND EVENTS, 35 UNIVERSITY AVENUE EAST, WATERLOO

TICKETS: \$40

TIME: 5:30 TO 7:00PM IS MIX AND MINGLE, FOOD AND BEVERAGES

ELECTION SPEECHES: 7:00PM

BATTLE OF THE BANDS: 7:30PM



IN ORDER TO PARTICIPATE IN THE BATTLE OF THE BANDS:

- BAND ENTRIES **MUST** CONTAIN AT LEAST ONE OIAA ADJUSTER OR SOCIAL MEMBER (OF ANY CHAPTER)
- ENTRIES WILL BE ALLOWED FROM IBAWR AND IIC
- BAND INFORMATION IS TO BE SENT TO JEN BROWN ([jennifer.brown@economical.com](mailto:jennifer.brown@economical.com))

THIS NIGHT IS ALSO ELECTION NIGHT! THE CURRENT POSITIONS THAT ARE AVAILABLE ON THE BOARD ARE:

- SOCIAL DIRECTOR
- SECRETARY
- TORONTO DELEGATE
- DIRECTOR

NOMINATIONS FOR OPEN POSITIONS ARE ACCEPTED BY THE CURRENT SECRETARY, ELLIE CELESTINE.  
([ellie\\_travis@cooperators.ca](mailto:ellie_travis@cooperators.ca))

PLEASE PROVIDE YOUR NOMINATION TO HER ALONG WITH THE POSITION TITLE.

## MAY THE BEST BAND WIN!

# K-W OIAA MARCH 2018 DINNER MEETING INFO



Come and join us as we listen to Kate Lines speak about her career as a Criminal Profiler!

She now works as a Principal Investigator | Executive Trainer for Investigative Solutions Network Inc. But prior to this - Kate was Canada's First FBI trained Female Criminal Profiler.

She also has an extensive history with the OPP. Kate is now a licensed private investigator specializing in corporate internal investigations including workplace harassment and violence and human rights investigations. She teaches an online criminal profiling course and is also the volunteer board chair of the national non-profit, *Victim Justice Network*.

Date – March 29

Location – Golf's Steakhouse

Cocktail Hour – 5:30 to 6:30

Dinner – 6:30

Registration is available online through the Website at <https://www.kw-oiaa.ca/Events>

Cost for the Educational Seminar is \$40 per person.



# SOCIAL CHIT CHAT



March 2018



Social Chit Chat

Ahhh March is here and

Spring is sure to be just around the corner! There are more hours of daylight, temperatures above zero and some pretty awesome events happening. Daylight Savings Time, the Easter Bunny, March Break and the OIAA KW chapter's annual curling bonspiel and monthly dinner meeting.

This time of year always brings an increase in property claims and many of our social members may feel there's no time for frivolity but without a break now and then, we can get pretty moody so let's all make sure to get out and enjoy ourselves.

Also at this time of year, Mother Nature creates some pretty unsafe conditions in our lives. Use your company's Twitter and Facebook accounts to remind people to stay away from rivers and lakes.

There is a higher likelihood of black ice when we have moisture in the air and temperatures are around freezing or when they drop and we have a flash freeze – slow down and pay attention on the roads!

Well, that's enough advice from us! Smile, enjoy those around you and walk with a spring in your step – golf season can't be far away.

Kindest regards,

Your Social Director,  
Randy Henderson





# PROVINCIAL DELEGATE REPORT



The 2018 Toronto Delegate Elections take place on April 11 at the Sheraton Parkway Toronto North Hotel and Suites. We are currently seeking nominations for 3 Toronto Delegate positions. If you are an OIAA member who works or resides in the GTA and are interested in running for one of these positions please contact Ian Gallagher at [igallagher@kernaghan.com](mailto:igallagher@kernaghan.com).

The OIAA student bursary offers financial assistance in the form of 3 awards in the amount of \$1000.00 each. Applicants must be pursuing full time post-secondary studies at a college or university. Selection is based on financial need, contributions at school, community involvement and/or other meaningful pursuits. More information is available on the OIAA website. If you are a member in good standing and have a child or grandchild who meets the eligibility requirements it would be great to see a bursary winner from the Kitchener-Waterloo chapter this year. The deadline to apply is September 30, 2018.

If you have not yet tuned into WP Radio it is time to check it out and see what all of the hype is about. I just finished listening to Episode 2 featuring Chris Dunn from Dutton Brock talking about the fallout from the Carneiro decision. There are now 16 different podcasts on WP Radio. You can find links to the WP Radio on the OIAA website.

Finally, the annual OIAA Golf Tournament is moving to a new venue in 2018. It is schedule to take place on June 8 at the Cardinal Golf Club in Newmarket. Registration opens April 12th at 9:00 am.

As always OIAA Provincial event details are available at [oiaa.com](http://oiaa.com).

Regards,

**Stephen Tucker**

**Kitchener-Waterloo OIAA Chapter, Provincial Delegate**



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## The Elusive Vapour

By Sadie Breg

*Sadie graduated in 2014 from the University of Waterloo and is recognized as an EIT by the PEO. Her degree in Systems Design Engineering has equipped her with knowledge across engineering disciplines: structural, mechanical, electrical, fire behavior and building science*

Water comes in three states: solid, liquid and vapour. The building envelope (walls, windows, roofs etc.) separates the interior from the exterior. Generally, we want to keep solid and liquid water outside, and find this intuitive. What about vapour? Whenever we exhale, vapour is released into the air. Other activities like cooking or showering can increase humidity levels inside. Some humidity inside is comfortable, and harmless. Problems begin to crop up when vapour inside the building or within the building envelope can transform into water or ice.

Vapour becomes liquid when it contacts a cold surface and condenses. If the surface is very cold, it may freeze. To avoid accumulation of water and ice, we can do three things:

1. Control the temperature;
2. Control the humidity; and
3. Make provisions for drying.

Condensation occurs when air becomes saturated with vapour. This is called the dew point, and it changes depending on the temperature of the air. As air decreases in temperature, its capacity to store water vapour decreases – this is why we see dew and frost at night when the temperature drops and the humid air from the day is no longer able to hold as much moisture. We also tend to see condensation and ice build-up on other cold surfaces where relatively warm, moist air has passed by. For example, condensation may occur on the outside of cold water pipes, or the underside of attic sheathing where warm, moist air from the interior is getting into the attic.

Let's imagine a balcony supported by a steel beam which extends into the building where the surrounding air is warm and moist. Over the winter, this steel beam will conduct cold temperatures into the building. This is a design flaw called thermal bridging: not only is it inefficient from an energy perspective, it can damage the building. If the beam is cold enough, condensation can freeze and build up layers of ice over the winter. This is the same phenomenon that happens inside a freezer that needs a good defrosting. When the weather warms, this ice can melt all at once and give the misleading impression that a leak has occurred.

Vapour often moves with air and can travel any path which air can travel. Water vapour molecules can also diffuse through some materials which are impervious to air. The building envelope should be designed to control the flow of vapour so that water or ice is not able to accumulate, and so that humidity levels are maintained below 60% relative humidity to prevent mold growth and deterioration of moisture-sensitive materials.

We can control the humidity using vapour barriers and the temperature using insulation, so that we don't reach the dewpoint inside our buildings. As a third line of defense, we should also allow the building envelope to dry when it becomes wet (whether from water ingress or condensation). A small amount of condensation can become a big problem over time, when moisture is trapped inside the wall.

Sometimes leaks aren't quite what they appear – condensation and ice buildup may be the culprit.

# Axe Throwing Tournament



Join us to experience the thrill of axe throwing at this fun industry networking event, and find out what the craze is all about!

Axe throwing is the new and unusual "sport" that has fast built momentum as the go-to activity for team-building, networking and general fun.

Beat the March blahs – get your co-workers and colleagues together and join us for a bit of friendly competition. This is not your normal networking event with colleagues!

"The feeling of that axe sinking into wood, there's really nothing like it..."

Past champions include: Bill Dobson CIP, Crawford & Company (Canada Inc.)  
Markus Mann, Economical

Will your name be next?

**Wednesday, March 28th**  
**6 pm – 9 pm**  
**BATL - The Backyard Axe Throwing League**  
**69 Agnes Street**  
**Kitchener, ON**

Price: \$47 (plus hst)



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*Thank  
you*



On behalf of the K-W OIAA we would like to thank all of our Industry Partners for their continued support of the events held throughout the year.

In recognition of all that you do for the K-W OIAA Chapter, for the 2017-2018 we are waiving the social membership fee for all of our industry partners. We would ask that you still register through the website so that you receive emails notifying you of the upcoming meetings and events.

\*please note that the monthly meeting charges will still apply



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## The Impact of Criminal Sentencing on Punitive and Exemplary Damages: Case Comment – *Ngo v Miller*



Authored by:

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The Superior Court's recently released decision in *Ngo v Miller*<sup>1</sup> sets the stage for dispensing with punitive and exemplary damages in the face of a custodial criminal conviction, even where there is no proof the sentence has been carried out.

The defendant driver was intoxicated at the time of the accident. He was charged with, *inter alia*, impaired operation of a motor vehicle causing bodily harm, dangerous operation of a motor vehicle causing bodily harm, and operation of a motor vehicle with a blood alcohol concentration over 80 milligrams.

At the hearing on the criminal convictions the defendant was convicted of impaired driving causing bodily harm and was sentenced to two years imprisonment and a two year driving prohibition.

The defendant passed away after the criminal sentence was handed down. The judge in the civil hearing noted that there was no evidence whether the criminal sentence had been served.

The defendant pursued a partial summary judgment motion to dismiss the plaintiff's claims for punitive, exemplary and aggravated damages, citing continuation with those damages was not permissible given the objectives had been met by the criminal sentence imposed.

<sup>1</sup> 2018 ONSC 526 [*"Ngo"*].

Plaintiff's counsel relied on *McIntyre v Grigg*<sup>2</sup> and *Cobb v Long Estate*<sup>3</sup> to show that while another form of punishment for the same misconduct may be an important factor in determining whether punitive damages are warranted, that was not what had happened in the case at bar. Plaintiff's counsel submitted that there was no evidence the criminal sentence would accomplish the objectives of retribution, deterrence and denunciation. Plaintiff's counsel also took issue with the fact that there was no evidence the defendant had served his custodial sentence, even in part.

Plaintiff's counsel led evidence from his treating psychologist that the defendant's drinking and driving worsened the plaintiff's depression, anxiety, nightmares, and other psychological issues.

Defendant's counsel relied on the same Court of Appeal cases to support their position that there was no claim for punitive damages in the absence of evidence that the defendant's custodial sentence was insufficient. They also opposed aggravated damages citing a lack of medical evidence to substantiate the claim.

Edwards J cited the Court of Appeal's guidance in *Butera v Chown, Cairns LLP*<sup>4</sup> in agreeing with Plaintiff's counsel that partial summary judgment was only granted in rare circumstances. Nevertheless, the question of whether the jury should deal with punitive, aggravated and exemplary damages was easily determined, and was one of those rare cases.

His Honour took judicial notice of the fact that punitive damages are not covered by standard policies of motor vehicle insurance, and he noted the

<sup>2</sup> (2016) 83 OR (3d) 161 (ON CA).

<sup>3</sup> 2017 ONCA 717.

<sup>4</sup> 2017 ONCA 783.

potential that proceeding with the punitive claim may impact the defendant's estate.

Edwards J held it was inappropriate for a civil court to "go behind the determination of the criminal court and substitute its own finding as to whether the sentence appropriately met the objective of retribution, deterrence and denunciation<sup>5</sup>." He relied on *McIntyre* as authority to find that where a defendant has already been punished for an offence, punitive damages do not serve a rational purpose. Partial summary judgment was therefore granted and the plaintiff's claim for punitive damages was dismissed.

The goal of exemplary damages was likewise to punish and deter the defendant. His Honour used the same line of reasoning to grant partial summary judgment in the dismissal of the exemplary damages claim.

Edwards J did not allow the same line of reasoning to dismiss the claim for aggravated damages. Aggravated damages serve a compensatory purpose, and the plaintiff had led *some* evidence to substantiate this claim. There was some evidence to show that the impaired driving resulted in increased psychological harm, emotional distress and upset. The question of whether aggravated damages should be put to the jury was left to the trial judge.

The impact of this decision should result in hesitance of plaintiff's counsel to include claims for punitive or exemplary damages where a defendant has already been subject to criminal convictions, lest they be responsible for the costs of a summary judgment motion.

Although this case does not speak to whether *any* criminal conviction is sufficient to escape punitive or exemplary claims, it raises the question as to whether there must be a custodial sentence imposed, or whether other sentences would be sufficient – for example if a fine is imposed or a diversion program is undertaken. Criminal sentencing outcomes exist on a continuum of severity, yet all are informed by the same objectives. The reasoning in this case ought logically to stand for any criminal conviction imposed, as notably the motions judge did not require or rely on any evidence that the sentence had actually been served. Only time will tell whether judges apply the same reasoning to non-custodial convictions or whether this may be taken as a point of distinguishing.

*Lyndsay Reuvers-Hone is an associate in the London office of Miller Thomson LLP. Her practice services a broad range of litigation needs including commercial, insurance and estate litigation.*

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<sup>5</sup> *Ngo, supra* Note 1, at para 23.



Save the date: **March 9-10 2018 in Kitchener** for the 2018 Ontario General Insurance Hockey Tournament.

**Team Entry Fee:**

- \$1,100.00 Early Bird Discount for payments, registrations & team lists *received by January 19, 2018 @ 5pm*
  - \$1,200.00 If received AFTER that date

If you have any questions, or are looking for further information, please check out the website at: [www.ogihockey.com](http://www.ogihockey.com)



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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 network 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 tripartite associations are pleased to extend an invitation to join our sixth annual Local Insurance Associations Charity Curling Bonspiel.

We hope you can come out and join us at Westmount Curling Club on Friday, March 23, 2018. 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 served 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 23<sup>rd</sup>.

**Prize Sponsorships:**  
 Charlene Ferris : charlene\_ferris@cooperators.ca  
 Joe Dalton : jdalton@encoregrp.com

**Location:** Westmount Curling Club  
**Date:** Friday, March 23, 2018  
**Time:** 9 a.m. – Start. Select preferred draw time on form below.  
**Price:** \$56 (includes hst). \$226 for a team of 4 (includes hst).  
**Note:** Wear warm clothing and flat, indoor shoes

**7<sup>th</sup> Annual Local Insurance Associations Charity Curling Bonspiel**

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## “Pushing Rope – Moving the Litigation file”



Every adjuster who deals with claims that have moved past the issuance of a statement of claim has had at least one of these files. Every insurance defence counsel has a drawer in their filing cabinet dedicated to them. They cause headaches, nightmares and dismal repetitive reporting where even the most effective lawyer feels impotent. These are what I like to call files in the “dead zone”. They are files where the Plaintiff has stopped moving the file forward and they just sit there dormant. In spite of best efforts and gentle persuasion opposing counsel

and the plaintiff seem to have no interest in the file at all and the file just stops progressing. The file just sits in limbo with no dates moving it forward and no conclusion in sight.

The purpose of this article was to provide some practical advice for getting a file out of the “dead zone” and what are the strategies that can be used to pick the file up and getting it back on track and heading towards a reasonable timetable and conclusion.

The first thing to remember is that you can’t always see these files coming. That being said the more outlandish the claims and those with bolder accusations seem to be more likely to fall into the “Dead Zone”. They start with letters to the insurer written by a brash and confident lawyer who will not only carry the day by winning the litigation and significant bad faith damages but they are also going to save the world from the scourge that are insurance companies. The claim arrives full of energy and accusations and shortly after the defence is served the litigation hits a brick wall and you hear nothing for the next two (2) years.

There is a multiplicity of reasons why the litigation falls into the “Dead Zone”. It has been my experience that the timing of when the break down occurs can often provide some insight as to the cause. If the litigation slows down immediately following the exchange of pleadings (after they see the defence for the first time) then the cause is usually that the plaintiff’s counsel was not prepared to hear the Insurer’s version of the facts. After only hearing the plaintiff’s version of the facts, plaintiff’s counsel suddenly realizes that he/she may not have heard the whole story and did not anticipate such a viable defence. Plaintiff’s counsel suddenly sees that the case is not anything like what had been portrayed by the client. When the litigation stalls just prior to a major step being taken like “discovery” it has been my experience that this is often the sign that the litigant has run out of funds. Plaintiff’s counsel won’t move the matter any further until his/her trust account has been replenished. Lastly if the litigation slows down after all interlocutory steps have been taken then the plaintiff is either having funding concerns as noted above or someone is unhappy with how the case has played out and is trying to position for settlement.

While the reason why the file is in the “dead zone” can be helpful help in understanding the mindset of the plaintiff and counsel the more important consideration is how do we find a way out of the “Dead Zone”. The first step is the “debate”. That debate is usually one about resources and expenses. When a file enters the “dead zone” it is clear that it is not progressing but at the same time it is not costing anything either. A file that sits and has no expenses may be just fine for many involved and the status quo can be maintained. The hard decision is that the only way to get out of the “dead zone” is to

implement a strategy and expend resources and take on the responsibility to move the file forward as a defendant. The question then becomes what strategies can be employed and what is the benefit as compared to its cost.

### **Strategy 1 – “The Lucky Ones”**

Those parties engaged in litigation in Ottawa, Toronto and Essex County (Windsor) have an advantage. In these cities there is mandated Civil Case Management as designated in the Rules of Civil Procedure. Where a party can establish that a case is proper for case management a judge or master is assigned to the case. That judge or master are then granted special powers to manage the case and move it swiftly and properly to conclusion. Not every case that falters in progress immediately qualifies for case management. The Court sets out ten (10) factors to consider in determining if a case qualifies for case management. One of the most significant criteria however is “whether there has been substantial delay in the conduct of the proceeding”.

With “Case Management” the parties have the ability to seek judicial intervention by way of a “case conference” which allows the parties to quickly and cheaply get into see a judge or case management master and deal with issues like delay, scheduling and the overall progress of the file immediately. This is a very cost effective method but there is always the risk that case will not meet the threshold needed to obtain “Case Management” status.

### **Strategy 2 - The “Half Court Press”**

For those that are not located in the jurisdictions that allow case management you can opt for a moderated aggressive approach. This involves immediately, after pleading have been exchanged, issuing a “Discovery Plan” to be exchanged between counsel. A “Discovery Plan” is akin to a mutually agreeable timetable for how discoveries will proceed and conclude. To be aggressive the Discovery Plan is issued with a deadline for response of days or weeks. This forces all parties to quickly agree on dates for the steps in the action. If the parties agree to the Discovery Plan then in that timetable you have a fixed series of dates that require compliance. You also have the ability to bring a motion and seek court orders for sanctions when and if the slow party does not keep, or cancels, dates unilaterally and without good reason. In essence the discovery plan becomes the blueprint for participation moving forward. Deviation from the Discovery Plan, namely not participating at a reasonable and normal speed, will lead to court intervention. If the party does not actively participate and comply with the Discovery Plan on a reoccurring basis it could result in the dismissal of the case as a whole. It is a relatively inexpensive option but may require significant resources in drawing the courts attention to the failure of the party not actively participating.

### **Strategy 3 – The “Full Court Press”**

In those cases that are more complex and have more parties to deal with and the delivery of a Discovery Plan is not sufficient to wrangle the slow party there is the ability to seek judicial intervention under Rule 37.15 for a milder form of case management. Under Rule 37.15 a single judge can be appointed to hear all motions on a complicated matter. Inevitably that judge begins to exercise influence on the process and it should instill some measure of control. The cost of doing this full engagement (Discovery Plan and Case Management) can begin to be higher as multiple court interventions will be needed.

### **Strategy 4 – The “Hail Mary”**

Strategy four (4) is the most radical. When you have a case that has fallen in the “Dead Zone” and is not moving despite attempts by counsel, and in addition, the case has doubtful merits there is a radical step which is to bring a motion for summary judgment. By bringing the motion it forces Plaintiffs counsel to evaluate its position and expend resources in putting together an affidavit defence. If counsel does not have the evidence and resources to fight of the motion for summary judgment they may seek renewed talks of resolution or abandon their case. If they have the ability and desire to oppose it allows for cross

examination and an affidavit that clearly enunciates the Plaintiff's case. The risk is that if you lose the motion there may be significant cost sanctions. That being said if summary judgment is used as a tool it provides the ability to investigate the plaintiff's position, obtain clear affidavit material, determine the strength of their case, complete a cross examination and push the case forward. There are benefits to the file as a whole just in bringing the motion. It will force the case forward. However the cost associated may simply be too high.

### **Conclusion**

No matter how it is accomplished a file that has fallen into the "Dead Zone" is very difficult to advance. Some have suggested it is just like "pushing rope". I hope these tools provide some guidance as to how you can move out of the "Dead Zone" and get a file moving. The inevitable debate will always be is it worth spending the resources and money only to be pushed into the litigation further which costs even more money.



Robert Dowhan (Bob) is both the Managing Partner and a partner in the Civil Litigation and Employment Law Practice Groups with a primary focus on civil litigation and a particular interest in property litigation. Bob also works with Insurers with respect to both property claims and title insurance claims.

He has extensive experience with all civil litigation also dealing with construction matters, property disputes, real estate defects and related litigation. Bob has appeared before all levels of Court in Ontario. Bob is truly most comfortable meeting with clients and finding solutions to problems in a unique and practical fashion and litigating only when all other avenues have been exhausted. Bob also advises both employers and employees in all aspects of the workplace law: hiring, terminations, drafting contracts and workplace policies and procedures, workplace investigations, and notice pay or termination pay issues.

Bob was born and raised in Tecumseh, Ontario he obtained a Bachelor of Arts degree from the University of Windsor and a Bachelor of Laws degree from the University of Western Ontario. He was called to the bar in 2001 and has been at SmithValeriotte Law Firm LLP without interruption since his call. Bob and his wife, Kate have three children (Bobby, Lily and Eloise) who keep them busy. Bob enjoys basketball and other sports. He spends his true leisure time kayaking and fishing. He lives to be on the water and actually has a list of special fish he is trying to land. Bob's wife Kate is a trained chef, so they share a love of cooking, baking and eating.



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## HOW TO CORRECTLY IDENTIFY FITNESS EQUIPMENT FOR AN ACCURATE REPLACEMENT VALUATION



Our experience has shown that with many claims that include fitness equipment, the original model is more likely to be damaged than stolen. A claim involving fitness equipment typically provides you with the opportunity to correctly identify the original model for an accurate replacement valuation, unlike a theft claim where there may be no guaranteed way to accurately identify the original model. In this article, we've put together a list of questions and a couple of tech tips that can help you identify the original

model within some of the most popular categories of cardio fitness equipment.

Accurately identifying the original model can greatly reduce an insurer's costs, and so it is important to ask the right questions and properly document the original model where possible. While each product category will have its own specific questions, here are some questions that should be used for all categories:

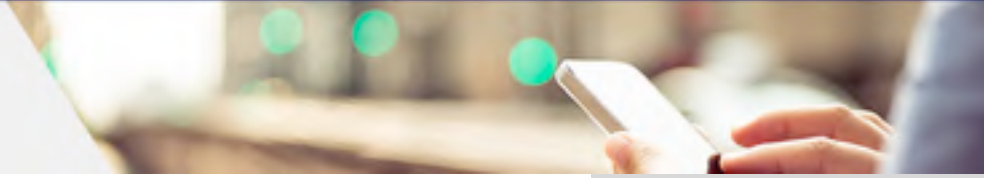
- Is the model still at the insured person's home or at a service centre? If you, the contractor or the insured have access to the piece of equipment and it has not been too badly damaged, documenting the model with clear photos is a good starting point. We would suggest taking a minimum of four photos, which should include an overall view of the model from the front, back and side as well as a close-up shot of the control panel.
- Does the insured have their original invoice? An invoice is still the single best document to collect since it should identify the brand, model number, age and selling price for the original model.
- Does the insured have the owner's manual? The manual will list the brand, series and sometimes even the specific model.



## TECH TIP



In many cases, a photo of the control panel can show many of the equipment functions as well as the brand (True).



- On equipment with a power supply such as a treadmill, look for a sticker or plate near the power cord. This sticker should contain either the model and/or serial number of the original model. Be sure to take this information from the listed location and not from the console or control panel so that you get the model number or serial number for the unit and not just that individual component.
- While the model number is always preferable, the serial number on most models of cardio training equipment can be used to track the model information, unlike the serial number on most consumer electronics, which does not provide access to any useful information.
- Does the insured remember the brand or series (e.g., Life Fitness Club Series or Precor Precision Series)?
- Where did the insured purchase the item?
- When did the insured buy it?
- How much did the insured pay for it?
- Did it have any special or unique features? This is an important question, as it will potentially allow you to identify the feature or features that were most important to your insured.



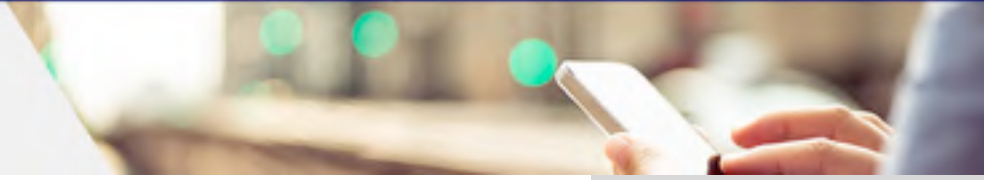
## TECH TIP



Make sure you get the model number from the sticker or plate near the power cord!

NEXT PAGE: WHAT TO LOOK FOR TO CORRECTLY IDENTIFY FITNESS EQUIPMENT





## WHAT TO LOOK FOR TO CORRECTLY IDENTIFY FITNESS EQUIPMENT

### TREADMILLS

- ✓ Was it a folding or fixed model?
- ✓ What information was displayed on the console?
- ✓ Did it offer things like a heart rate monitor, calorie counter, preset workout programs, fans or speakers?
- ✓ What was the max user weight?
- ✓ Do they know the running surface size (width and length)?
- ✓ What is the motor HP rating?
- ✓ What were the speed and incline/ decline ratings?



Folding



Fixed

### ELLIPTICALS

- ✓ Was it a Rear-Drive or Front-Drive?
- ✓ What information was displayed on the console? Did it offer things like a heart rate monitor, calorie counter, preset workout programs, fans or speakers?
- ✓ Did it have hand-held (moving) resistance bars, or were they fixed bars?
- ✓ How many resistance levels and programs did it have?
- ✓ Do they know the stride length and was it adjustable?
- ✓ Was the incline adjustable?

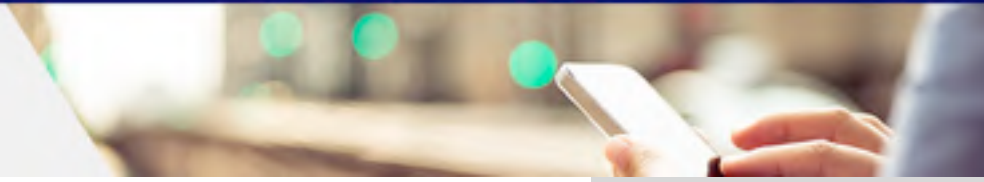


Rear-Drive



Front-Drive

This article is designed to provide you with an overview of questions for some of the most popular categories of Cardio Fitness Equipment.



## EXERCISE BIKES

- ✓ Upright or Recumbent?
- ✓ Was it powered (plugged into the wall) or self-powered?
- ✓ What information was displayed on the console?



Upright



Recumbent

## SPINNING BIKES

- ✓ What drive system did it have? A chain or belt?
- ✓ Do they know the flywheel weight?
- ✓ Was there a console or did it offer any type of monitoring?



## ROWERS

- ✓ What was the resistance type?
- ✓ Was it Magnetic, Water, Air or Piston/Hydraulic?
- ✓ What type of console if any did it have (example a Row Computer or Monitor) and what functions or displays did it provide?
- ✓ Do they know the max user weight rating?



Magnetic



Water



Piston/  
Hydraulic



Air



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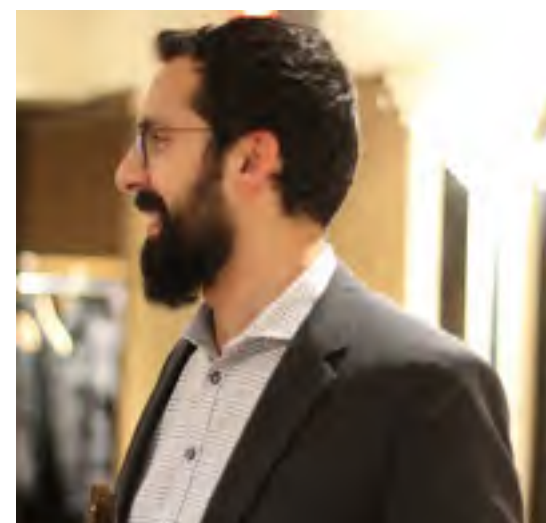
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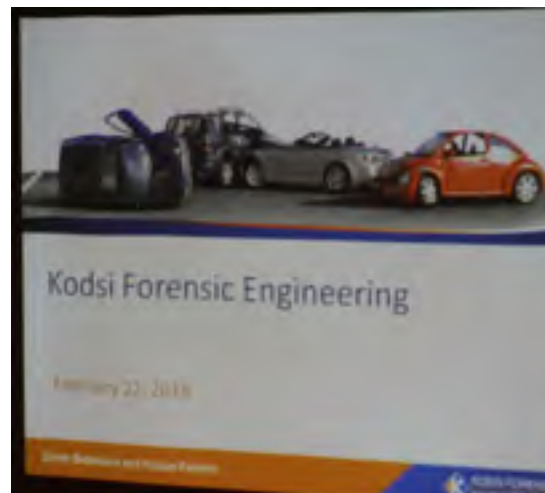
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