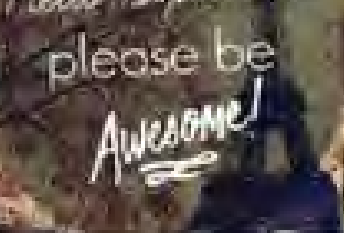


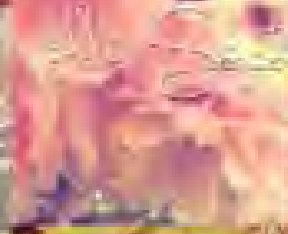
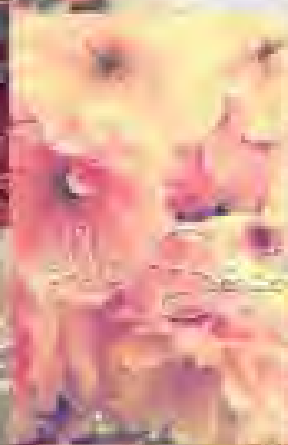
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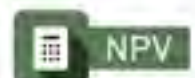
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PRESIDENT'S MESSAGE

SEPTEMBER 2018



Pumpkin spice and everything fall is in the air! Kids are back at school, routines have resumed and your K-W OIAA executive team have been working on planning a great 2018-2019 year! We have some great topics planned that will be of interest for every line of business and, in care you had not heard, our Annual Fall Trade Show is back and at a new location!

Plan to join us on Thursday, September 27th from 4:00-6:30 pm at our new location, Marshall Hall at Bingemans. Dinner will follow at 6:30 pm in the Ballroom. Come out and socialize with your fellow claims adjusters and insurance industry partners. And maybe even take home some information, new contacts or even a little treat!

We are always looking for your feedback! We want to make sure we are planning education dinner topics you want to hear and fun events you want to participate in! You are always welcome to contact anyone on the board and share your ideas. We love hearing from you!

I hope to see you out at an OIAA event (or two...or three!) this year and make sure to come say hi!

**Thank you,
Carrie Keogh
President of K-W OIAA**



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**If you have any questions,
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IN THIS ISSUE...

President's Message	Page 1
2018-2019 K-W OIAA Executive	Page 2
2018 Trade Show Information	Page 4
Social Chit Chat	Page 5
Provincial Delegate Report	Page 6
Miller Thomson: When a Spouse is not a Spouse	Pages 10-11
KPMG: Defending Against Loss of Income Claims	Pages 16-18
Advertisers' Index	Page 26

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2018 TRADE SHOW

Thursday, September 27

4:00 pm - 6:30 pm (Dinner to follow)

At Bingemans - 425 Bingemans Centre Dr

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Questions?

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ckeogh@goremutual.ca

SOCIAL CHIT CHAT

September 2018



This month's social chit chat will be short and sweet, like September itself. I believe the saying "September is here with the best of summer's weather and the best of autumn's cheer" sums up this lovely month beautifully.

We cannot wait to see you all at our upcoming tradeshow and to kick of this season right! I hope that all of you parents were able to get your children back into the groove of school without too much difficulty. As always, we welcome your input, comments and questions openly. Please feel free to email me or any other member of the executive any time. See you at the Tradeshow!

Cheers, Your Social Director,
Ashleigh Leon





PROVINCIAL DELEGATE REPORT



I hope everyone had a safe and enjoyable summer. The weather has been unpredictable thorough out the majority of the summer. With the flash flooding, continuous storms, forest fires and extreme heat these conditions certainly kept our industry colleagues and partners very busy throughout the summer.

On the bright side fall can be a beautiful time of the year and the 2018 / 2019 OIAA term is upon us. This year marks the 88th anniversary of the OIAA. Congratulations to Michael McLeod who is the incoming Provincial OIAA President and congratulations to Carrie Keogh who is your incoming Kitchener-Waterloo Chapter President. The OIAA is in good hands and I am excited to see what Michael and Carrie have planned for 2018 / 2019.

Please check your mail and remember to renew your OIAA membership for 2018 - 2019. Your membership provides you with a subscription to WP Magazine and access to many excellent education and networking events throughout the year.

Finally here is a list of upcoming Provincial OIAA events for the remainder of 2018.

September 19, 2018

September Kick-Off – Ripleys, Toronto

October 10, 2018

Past President Night – Sandman Airport Hotel Airport, Toronto

December 12, 2018

OIAA Holiday Party– Westin Harbour Castle, Toronto*

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You can sign up for Provincial events at oiaa.com.

Regards,

Jennifer Brown

K-W OIAA Chapter, Provincial Delegate

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When a Spouse is not a Spouse



Authored by:

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The Superior Court has recently had the opportunity to revisit an issue that has not been addressed by the courts in twenty years: whether the *Family Law Act* definition of “spouse” applies to the *Insurance Act* definition of “spouse”. For ease of reference, both statutes in part define a spouse as being someone “who has lived together in a conjugal relationship, whether inside or outside marriage” with the other person for a requisite period of time. Under the *Insurance Act*, the requisite period of time is three years.

In *Royal and Sun Alliance Company of Canada v. Desjardins/Certas*, 2018 ONSC 4284 (CanLII), Justice E.M. Morgan, was tasked with judicially reviewing the private arbitration decision of Shari Novick, which found that RSA was the priority insurer for an accident benefits claim involving the claimant, Ms. Halliday, following her involvement in a motor vehicle accident that occurred in March 2014. Arbitrator Novick found that Ms. Halliday was the spouse, as defined in the *Insurance Act*, of RSA insured Mr. Zorony. Ms. Halliday and Mr. Zorony had been seriously dating since 2008 and had moved in together in February/March 2013. Prior to moving in together, the couple maintained separate residences and spent the weekends together, usually at Mr. Zorony’s home.

Arbitrator Novick reviewed the case law which dealt with the definition of spouse under the *Family Law Act*, noting that the definitions in the *Family Law Act* and the *Insurance Act* are the same. Case law had developed in the family law context to apply appropriate flexibility to the definition of spouse which requires a more global or unitary approach and focuses on how the couple is socially perceived. It was acknowledged that a literal interpretation of the definition would seem to necessitate that the couple actually live together (ie. in the same residence) but this literal interpretation of the definition was rejected by the arbitrator in favour of the family law interpretation that favours a more inclusive approach. Arbitrator Novick eventually found that despite only living together in the same residence for a year before the accident, Ms. Halliday and Mr. Zorony had been living together in a conjugal relationship outside of marriage for at least three years before the accident.

On appeal, Justice E.M. Morgan reverted to case law from 1995 and 1998 to overturn the arbitration decision on the basis of it being unreasonable. The court relied upon the earlier principle that the *Insurance Act* requires a context specific approach of its own and unlike in family law the insurance context contains no imperative to deviate from the ordinary understanding of what it means for two person to “live together”. In essence, Justice Morgan found that the sociologic factors which create the need to consider a more inclusive interpretation of the words “live together” in the family law context such as lifestyle, social habits, career support, financial status, etc. do not have a place in the insurance setting. Therefore, a person can be a spouse under the *Family Law Act* but may not also be a spouse for the purposes of insurance coverage.

This creates an interesting dichotomy in Ontario, especially as the case law has always acknowledged the purpose of insurance as being remedial and consumer protectionist in nature. In most other areas of insurance, the statute is given a broad and liberal interpretation, with the understanding that the legislation is meant to be inclusive, not exclusive. We will have to wait and see if this decision will be appealed further and allow the Court of Appeal reconsider the outcome of this line of jurisprudence in light of the expanding acceptance of sociologic factors in determining the nature of a spousal relationship in the family context.

Ashleigh Leon is a partner in the Guelph office of Miller Thomson LLP. She has a litigation practice that focuses on insurance and personal injury. She also specializes in catastrophic impairment and brain injury related cases.

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Defending Against Loss of Income Claims

This article was first published in the [Focus on Property and General Liability Insurance, Volume 1, No. 9](#)

A machine, manufactured by your insured and recently sold to AlphaCo malfunctions and the AlphaCo's operations stop for three weeks until the problem is identified and fixed. As a result, orders to certain key customers cannot be filled by AlphaCo and the customers turn to a competitor for supply. The competitor, seeing an opportunity, contacts other customers and obtains more sales.

Or, a component sold by your insured to BetaCo for installation in a larger product is found to be defective. As a result, BetaCo must recall all affected pieces and the defective part is replaced. BetaCo's production on new stock is halted to deal with the recall. BetaCo's management directs all sales and service staff to identify and contact affected customers. As a result, no new sales calls are made for three weeks and service to existing customers suffers.

As would be expected, both of the above examples of product liability will lead to claims of damages against the supplier of the defective items. The supplier of course, will look to its insurance company to cover some or all of a successful claim. In addition to claims for the cost of replacing equipment and inventory, damages for loss of income flowing from the problem will also be faced. Loss of income may be claimed as a result of a variety of effects allegedly arising from the problem including:

- The cost to recall and replace products
- Orders on hand that could not be filled
- Orders that were purportedly not obtained from customers
- Lost profits flowing from a damaged reputation

- Management effort diverted from a new project

The analysis of claims for loss of income will generally fall to accountants who have practical expertise with the calculation and review of damages. It is necessary for the accountant retained to have experience with loss of income claims as well as a practical approach to their review. This article provides an overview of various issues related to defending loss of income claims in product liability matters.

[An Introduction to the Defence of Loss of Income Claims](#)

A claim for loss of income is intended to compensate the injured party for reduced profits or increased losses as a direct result of the product liability. It is meant to put the company in the same financial position it would have been in had there been no problem. Simply stated, the loss of income will amount to the profit that the company would have earned, less what it actually earns following the problem. Of course, it will never be possible to know exactly what would have happened had the problem not occurred. It is this uncertainty of future results that will generally become the focus in defending against loss of income claims.

The calculation of loss of income will be made following the development of a theory of loss, the adoption of a calculation approach, a review of certain information, and the use of a variety of assumptions. Each of these components forms one important area of enquiry and examination when defending loss of income claims.

[The Theory of Loss](#)

The theory of loss focuses on how the defective product impacted the company and why a loss of income resulted. It is this theory which forms the cornerstone of the claim for loss of income and it must be closely examined. If the theory of loss cannot be supported by facts, then the basis of the calculation will be negatively impacted.

For example, the plaintiff's theory of loss may be that as a result of the supply of a defective product, the company suffered an immediate reduction in income due to a loss of orders, and an ongoing loss due to a damaged reputation in the market. A close review of the situation may reveal, however, that many orders were only delayed, not lost. Also, investigation may show that the knowledge of the required product recall was not widespread and that affected customers were not greatly concerned with the problem. Based upon this information, the theory of a long-term loss of income may be reasonably questioned.

[Calculation Approach](#)

There are a number of different approaches to the calculation of a loss of income that can be used depending on the circumstances, the theory of loss, and available documentation. The plaintiff's accountant will have selected one or more approaches and these must be closely reviewed. A thorough understanding and analysis of the approach is critical to the defense's review of loss of income reports.

Sometimes accountants use approaches that are not the

best in the circumstances or are entirely inappropriate. The way in which an acceptable approach is implemented may also be open to question. In some cases, there will be more than one applicable approach and the results of different approaches will lead to differing results. These issues need to be fully explored to ensure that any fundamental problems with the plaintiff accountant's approach (and thus results) are identified and the impact quantified.

Identification and Review of Information

It is necessary to review all available information, both within and outside the company, to arrive at the best assessment of the impact of the product liability on profitability. The starting point will be the information reviewed and/or relied upon by the accountant working for the plaintiff company. This will provide an understanding of the information on which the estimated loss of income was based. The quest for information, however, will not end with this documentation. It is necessary to seek out other relevant information, as follows:

- Statistics and other data about the industry, and the position of the company and competitors in the market
- Interviews with competitors, customers and suppliers. These enquiries are helpful in gaining an understanding of how the product liability actually affected the company. Approaches to external parties should only be made with the concurrence of legal counsel who will be considering various strategic, and other, issues
- Discovery transcripts of the plaintiff company's representative and others. Often the accountant will assist with providing areas to be explored in discoveries
- Other relevant information from the plaintiff company. The nature of this information will depend on the theory of loss and the specifics of the case.

The review and analysis of the available information will form the basis of much of the defence accountant's comments. Sometimes important data may have not been obtained or may have been overlooked by the plaintiff's accountant. Also, statistics or other data may be misinterpreted or analysis may include data incorrectly extracted from documents. This review can, by itself, lead to useful comments and analysis that will bring into question the estimated loss of income.

Assumptions Made

As a loss of income calculation is dealing with an unknown (i.e., what would actually have been earned in the absence of the product liability), there will always be assumptions made by the plaintiff's accountant. While many assumptions may be explicitly stated or entirely obvious, there are likely many assumptions that are implicit or are 'hidden' in the report or within the calculations. The assumptions are often the weakest part of the accountant's estimate of loss of income and, thus require a complete and thorough review.

There are many questions that need to be asked regarding the assumptions made, including the following:

- Why was each assumption made?
- Which assumptions are critical to the calculation?
- Is each assumption reasonable?
- Has the accountant been provided with and accepted the assumptions without question?
- What information or documentation is available to support each assumption?
- Is there information which brings the practicality or appropriateness of an assumption into question?
- What alternative assumptions are possible and are they more or less probable?

The answers to these questions will help to determine whether and how to comment on the assumptions made.

Business Reality

In addition to a detailed analysis of each component of a claim for loss of income, the defence accountant must consider whether the claimed loss makes sound business sense. This check of "business reality" will often be most telling and useful. It requires a broad understanding of business and how it works. If at the end of the day, a calculated loss does not make business sense, there is likely something wrong with it. Non-accounting issues such as financing, the market economy, or production capacity are often overlooked in loss calculations. The review of business reality should bring these critical issues back to the forefront where they belong.

The Defence Accountant's Reports

The nature and extent of required reporting by the defence accountant will depend on the circumstances of the case and the approach to be used in court, if the action cannot be settled. Two or more reports may be required. The first report will likely comment on the plaintiff accountant's report and estimated loss of income. A second report may be required to provide the defence accountant's own estimate of the loss. This estimate may start with the plaintiff's estimate and adjust it, or it may use a different approach entirely. Finally, a report may be required to assist legal counsel with the cross examination of the plaintiff's accountant.

When to Consider Damages for Loss of Income?

With any product liability claim there will be many issues of a technical nature that must be addressed related to what went wrong and why, who was responsible and how, and what could have been done to prevent the problem, and why this was not done. While these liability issues are fundamental to the defence of any product liability claim, it is important to not focus exclusively on these issues. Questions related to damages are best considered as early in a proceeding as possible. Much useful and necessary information to assist with reviewing claims for loss of income can best be obtained as the action proceeds.

Conclusion

Defending against loss of income claims requires the assembly of an experienced team which can critically and completely assess the claim made. The development of an appropriate approach to the review and analysis of such claims is critical and will be an important element in the successful resolution of product liability cases.

For more information, contact



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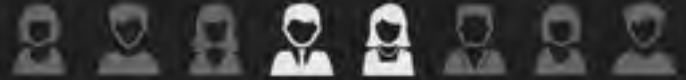
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