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# PRESIDENT'S MESSAGE

## DECEMBER 2014



Winter arrived early this year and with the end of 2014 I would like to thank our executive committee, adjuster and vendor members for a great year. I hope everyone has a happy and safe holiday season and a Happy New Year. We have many exciting events coming up in 2015. I look forward to seeing everyone come out to our events to support the K-W OIAA.

On November 5 our Vice President Jennifer Brown and myself attended an event called "Feed the Minds of the Youth", at Ontario Mutual Insurance Association, that was put on by the Insurance Institute of Ontario. This was a great event where parents in the Insurance Industry took their children into the office for a day. They saw what their parents did and had an office tour in the morning. In the afternoon we gave a presentation on what it is like to have a career as an adjuster and our career paths. It is great to see opportunities like this for children just entering high school. It is important that we educate the youth on a career path in the Insurance Industry and let them know what options they have out there. Now we are seeing children take insurance programs in school and planning a career in this industry. This is a great new direction for our industry.

We had a great Chili Cook-off this year. There were many great dishes to try! Thanks to everyone who brought a chili. We had two awards for the night- Chef's Choice Chili and People's Choice Chili. The winner of Chef's Choice was Bill Dobson and the winner of People's Choice was Winmar Kitchener. It was a tough competition. Congratulations to the winners! The 50/50 prize winner was Marlene Pike who graciously donated her winnings to charity. I would like to thank Relectronic-Remech for putting on the football game display.

This month we have the Adults' Christmas party - registration is now open on our website. This year we are combining the adults' party with a Past Presidents' night. This event will take place at Golf Steakhouse on Thursday December 18, starting at 5:30pm. If you are a past president of the K-W OIAA and would like to attend this event please let me know ([laura.potts@tdinsurance.com](mailto:laura.potts@tdinsurance.com)). Our Past Presidents and executive committee are what have made this organization so successful. We would like to thank them for all of their hard work over the years. Past Presidents will have a special rate for this night.

Starting in January 2015, we are pleased to introduce dinner meeting sponsors. For \$350.00, your company can advertise at one of our monthly dinner meetings; 2 dinner tickets are included in this cost. The advertising will include signage provided by your company along with tent cards on display at each dinner table. If you are interested in sponsoring one of our meetings please let me know. We will also be increasing our dinner meeting costs to \$40 per person. The reason for this is due to increased costs of each dinner purchased by the K-W OIAA.

Don't forget to check out our website, Facebook and Twitter to see the upcoming events that will be taking place this year. We are always looking for good articles regarding all aspects of our business and I would encourage our members to come forward with any ideas for our educational meetings. If you have any articles that you would like published in our bulletin please contact our bulletin director Manish Patel at [mpatel@larrek.com](mailto:mpatel@larrek.com).

The executive committee and I are always available if you have any questions about our organization, we have a new email address where you can reach any of us at: [kw\\_oiaa@yahoo.ca](mailto:kw_oiaa@yahoo.ca). I hope to see you all at the Christmas Party and Past Presidents Night.

Laura Potts, TD Insurance  
K-W OIAA President

# OIAA – Executive Council 2014-2015

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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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## Schedule of K-W Chapter Monthly Meeting for 2014-2015

<u>Date</u>	<u>Topic</u>
December 6	<b>Kids Christmas Party 4:30-7:00pm</b> <b>*Please note this is a Saturday</b> <b>Jennifer Brown and Randy Higgins</b>
December 18	<b>Christmas Party and Past President's Night</b> <b>Laura Potts and Ryan Potts</b>
January 29	<b>Educational Meeting – “Anatomy of a Jury Trial” – Gordon Robson – Miller Thomson</b> <b>Dan Strigberger – Cyndy Craig</b>
February 26	<b>Educational Meeting – “Regulatory Requirements and Remediation Options – A Review” – Lori Festarini – Crawford &amp; Co.</b> <b>Stephen Tucker and Gillian Reain</b>
March 26	<b>Provincial Seminar</b> <b>Ashleigh Leon and Stephen Tucker</b>
March 27	<b>Annual Curling Bonspiel</b>
April 30	<b>Election and Fun Night</b> <b>Ryan Potts and Mark Potts</b>
May 7-9	<b>Out of Town Meeting</b>
June 25	<b>Charity Golf Tournament</b> <b>Laura Potts and Jennifer Brown</b>



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## Social Chit Chat

Bill 15 was passed by the Ontario Liberal government last month which is supposed to lower insurance premiums by fifteen percent and fight fraud. It also takes away an insured's right to bring a lawsuit over accident benefits disputes and instead will force all disputes to be heard by the License Appeals Tribunal. There is significant debate about whether the new legislation will have the desired effect, but only time will tell. For more information visit:

[www.torontosun.com/2014/11/20/Ontario-passes-new-auto-insurance-legislation](http://www.torontosun.com/2014/11/20/Ontario-passes-new-auto-insurance-legislation).



**Ontario Finance Minister Charles Sousa and Government and Consumer Services Minister David Oraziotti (right) at Queen's Park on Thursday, Nov. 20, 2014. (Antonella Artuso/Toronto Sun)**

Don't forget about this month's Christmas Party and Past President's Night. We hope to see everyone there for a wonderful evening to celebrate the holiday season.

Your 2014-2015 Social Director

Ashleigh Leon

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# TORONTO DELEGATE REPORT



The 2014 Christmas Party takes place on December 10<sup>th</sup> at the Weston Harbour Castle in Toronto. This is always a fantastic event and moreover a great way to kick off the holiday season. The Christmas party also signals that 2015 is just around the corner. The first major OIAA event of 2015 is the Claims Conference which takes place at the Metro Toronto Convention Centre on February 4<sup>th</sup>. The event is a full day of seminars, networking, luncheon with keynote speaker Jim Ralph and trade show with over 150 exhibitors. Registration for the conference opens on

December 16<sup>th</sup>.

As always details and registration for OIAA events are available at [www.oiaa.com](http://www.oiaa.com) and you can stay tuned to OIAA events by following @PresidentOIAA on twitter or on Facebook.

December 10, 2014

Christmas Party - The Westin Harbour Castle, Toronto, ON

February 4, 2015

2015 Claims Conference - Metro Toronto Convention Centre

March 10, 2015

Curling Bonspiel - Richmond Hill Curling Club, Richmond Hill, ON

April 8, 2015

Vendor Appreciation event – TBA

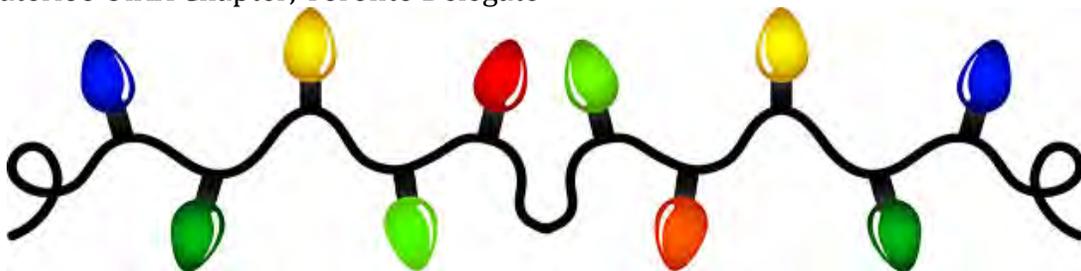
June 3, 2015

Golf tournament – TBA

Regards,

Stephen Tucker

Kitchener Waterloo OIAA Chapter, Toronto Delegate





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**Chad Hanlon**

The holiday season is upon us and for many it truly is the most wonderful time of the year. However, the results benefit us all in terms of the economic contribution and the foreshadowing of the fiscal year ahead. Fortunately, in the world of investigations it becomes a land of opportunity due to the fact that even the homebodies make an appearance for their seasonal errands. This tradition is becoming increasingly chaotic especially with the black Friday pandemonium which Canada seems to be progressively adopting.

It was this time last year we conducted surveillance on a WSIB claim – with an individual who’s list of restrictions were as long as a well behaved child’s Christmas list. Coupled with this list the subject had a doctor’s note stating he couldn’t operate a vehicle in any capacity. This particular individual was somewhat of a recluse and resided in a 12<sup>th</sup> floor apartment which made him a particularly difficult assignment. We had periodically stopped by his residence to ensure his name remained on the controlled access list to the building, however. The one advantage we had was the fact that he was a very tech savvy individual which of course meant that he frequently utilized social media as an outlet. As you may have guessed we were one of his 26 followers.

We got our break when he announced a door crasher item for the first few customers of a big box electronics retailer via one of his tweets; this particular item was a 50” plasma which we know to be approximately 70lbs. We knew most of the other details through his tweet. The main detail was that the store would have a 6 am opening and the lucky recipients would have to be among the first ones in. Now, although this individual didn’t display the same passion or drive in his workplace, we had to assume he would be in that line.

We began surveillance at 4pm in the subject’s parking lot to ensure we wouldn’t miss his departure since we were unclear on which location he would be attending. It was approximately 11pm when we witnessed our subject get into his vehicle (with no labored movements I might add) and yes, he was driving. We arrived at the retail location and observed that a small line had begun to congregate as everyone present had the same goal in mind. Now we didn’t count more than 14 people (including the investigator) at this time so we had to assume perhaps the other 12 followers hadn’t yet read his tweet. The investigator remained in line with the rest of the crowd for the duration of the night, which was more of a jovial camping atmosphere as the temperatures weren’t too cold. During this time the subject was observed moving about freely with no issues and the evidence was captured with a covert camera the investigator had with him.

At 6am the doors were about to open and the lineup had about 50 people who were beginning to become aggressive as though they needed to retreat from the impending sunrise. As the doors opened we witnessed our subject (along with many others) sprint to his desired product: the aforementioned 50” plasma. The aggression and sense of urgency that had taken over the store didn’t allow for any courtesy, respect, or most importantly ergonomically correct lifting. Our 180 lb subject picked up the 70 lb unit in a comparable fashion to a mother with super strength lifting a car off her child. He could certainly use the adage “it’s not heavy, it’s just awkward” and in this case the latter would certainly prove to ring true.

Now you probably want to know if our investigator took advantage of any of the deals while he was there. Even though I’m sure he wanted to, his hands were already full.....with evidence.



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## **Congratulations to the two winners of our annual Chili Cook-off!! Bill Dobson won the Chef's Choice Award and Winmar Kitchener won the People's Choice Award!**



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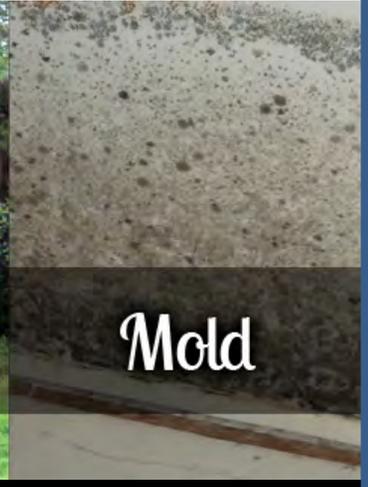
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## Exterior Walls and Rain Control: Perfection can be Counterproductive

*Peter Mensinga, P.Eng.*

I'm a history addict. I love reading books or watching movies covering everything from antiquity to World War 2; Alexander to Zhukov. So I eagerly went to the theatres for the recently released and incredibly gritty WW2 movie "Fury". Since I'm an engineer and like statistics, I checked out the tank production numbers of both sides after watching the movie. And that in turn, got me thinking about how we fix walls. I know that sounds like a stretch but bear with me.

Deep in German territory, Pitt and his tank crew come face to face with the most famous of German WW2 tanks, the Panzerkampfwagen VI, more commonly known as the "Tiger". It was the pinnacle of tank design by either side in the war, boasting an 88mm main gun and 100mm of frontal armour. However, weighing in at 55 tons it was hard to maneuver in close quarters and guzzled diesel like Oktoberfest draught. It was notoriously prone to breakdowns, and as only 1400 would ever be manufactured, spare parts were hard to come by. Compare this to its main adversary, the Soviet Red Army's T-34. It weighed in at 26 tons, sported a 76mm turret gun, and had 52mm of frontal armour. Its controls were primitive and by all accounts tank crewman comfort was not even an afterthought. In every category it was outclassed by German Panzer V and Tiger tanks. However, the Soviets managed to crank out over 55,000 T-34s and over 45,000 other tanks during the war (in addition to 150,000 tanks and self-propelled guns manufactured by the British Empire and USA) compared to Germany's wartime tank production of 46,000. Even with the T-34's staggering battle casualty rate of 83%, the Allies sheer weight of numbers swamped Germany's technologically superior Panzers and Tigers.

There are a few lessons one can draw from this: quantity in certain circumstances can trump quality and the pursuit of perfection can be counterproductive. It's that last one that is also applicable to wall leakage repairs.

There are three approaches to managing rain penetration through building walls. Thick, multi-wythe, stone/brick/concrete block masonry walls are able to store water during a rain event and then subsequently dry out, effectively acting like a big sponge. The moisture storage capacity of this type of walls is rarely exceeded when also protected by an overhanging sloped roof or outward projecting parapet. A more common method is the "drained" or "rainscreen" approach. In this approach, a façade, such as masonry veneer, panel system, or wood or vinyl siding, limits the amount of water entering the wall assembly and any incidental leakage is forced back out to the exterior by an internal drainage cavity and through-wall flashing membrane. Lastly, there are perfect barrier systems which block water at a single plane. Examples of this would be structural sealant glazing curtainwall systems or some types of architectural pre-cast concrete. Yet even these systems typically include drained joints and a sub-sill flashing to minimize the risk of incidental interior leakage, making them at least a partially drained system. Examples of the three approaches to rain control are shown in Figure 1.

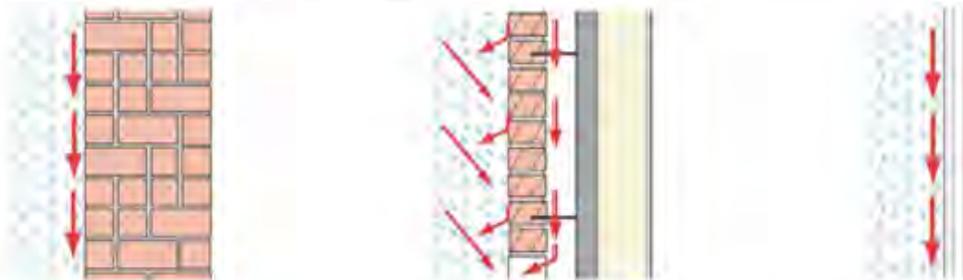


Figure 1. Three approaches to rain control: i) storage, ii) drainage, iii) perfect barrier

It is important to understand how a wall is meant to control rain when processing a repair claim. If the wall is a drained assembly, the repair should incorporate characteristics of a drained system. This includes maintaining an unobstructed drainage cavity, reinstating a continuous, waterproofing layer, and ensuring that the base of the cavity is drained to the exterior by a through-wall flashing membrane.

Problems arise when attempting to turn a drained wall assembly into a perfect barrier wall. This is one of those cases where the pursuit of perfection is counterproductive. Why is achieving a perfect barrier so difficult? Here are a few reasons:

- Every leakage path, no matter how small, must be sealed.
- The most favoured approach to sealing leakage paths is to apply caulking. Caulking is only as good as the surface to which it is bonded, so the receiving surface must be rigorously prepared, cleaned, and then maintained in that state until the caulking is applied.
- The lifespan of most sealant is between 10 to 15 years. However if movement at joints is greater than expected, or the cross-sectional profile of the sealant is incorrect, localized areas of failure can occur much sooner.

This requires an intense attention to detail and a capacity for advanced planning that, let's be honest, very few of us have. Even if it is initially successful, the relatively short service life of caulking means it will not continue as a perfect barrier for very long. Usually what happens is that the barrier is imperfect enough to allow water into the wall assembly but perfect enough to prevent it from draining back out to the exterior. Trapped water builds up in the wall assembly, saturates any moisture sensitive materials (insulation, wood framing, gypsum) and leaks to the interior. So, repairing a drained wall by turning it into a perfect barrier is a really bad idea but it's one that people keep returning to with predictable results.

Burnside was recently asked to provide a second opinion on the quality of repairs meant to address storm related damage at a two-storey building with an adjoining one-storey garage. The repairs had included replacing the stucco-faced, exterior insulated finish system (EIFS) cladding on a wall located above the garage. Prior to the storm, the Owner reported that there was no leakage into the garage below. During repairs, again according to the Owner, a through-wall flashing membrane was not installed at the base of the EIFS, rather a piece of sheet metal was installed between the EIFS and garage roof concrete topping and caulked around its perimeter, turning the original drained approach into a "perfect barrier", as shown in Photo 1.

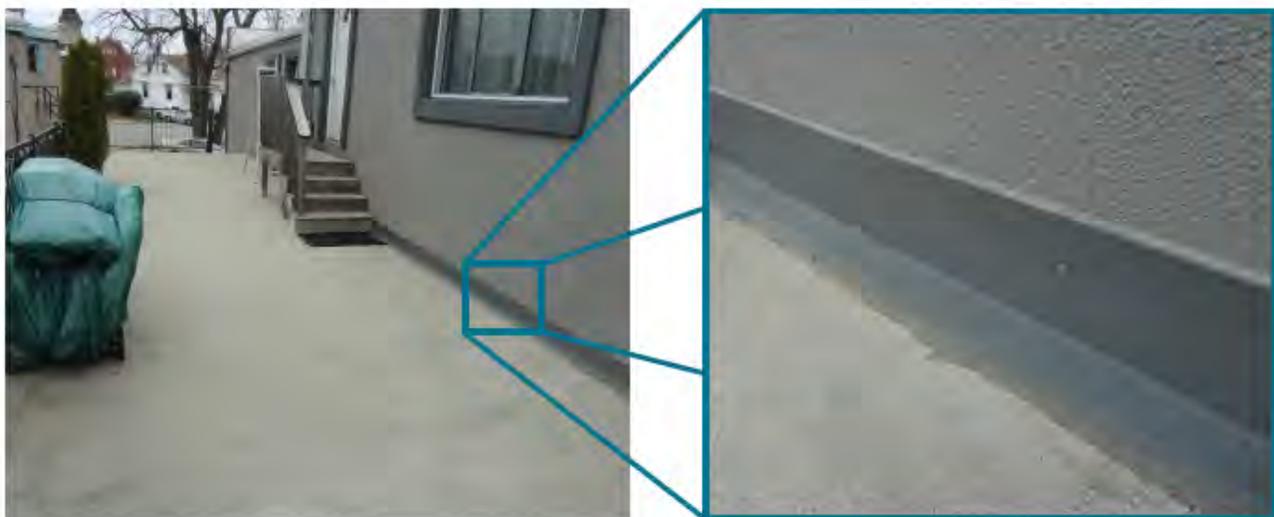


Photo 1. EIFS "(im)perfect barrier": Original cavity drainage was not maintained during repair; unsealed fasteners through the sheet metal are a possible leakage path.

Bulk water was able to bypass the EIFS “perfect barrier” at a number of locations. The most prominent leakage path at this building involved poor detailing of the roof membrane at the parapet, allowing water to leak from the roof and then down the exterior wall in behind the EIFS cladding. Unsealed fasteners through the sheet metal also allowed water to leak past the EIFS cladding. While perhaps not a major source of leakage during rain events, unsealed fasteners can be a significant source of leakage when exposed to a constant source of water such as melting snow. Other typical leakage paths can include failed sealants, joints in window and door frames, and at exhaust vents. Lacking a through wall flashing membrane and weep holes at the base of the EIFS cladding, water was trapped inside the wall and leaked into the garage below (Photo 2).



Photo 2: Water trapped behind perfect barrier assembly leaking into the garage below

While roof problems needed to be addressed, water damage in the garage would have been greatly reduced, if not eliminated, had a drained EIFS assembly been maintained during repairs. When processing a wall repair claim, be sure you and the contractor understand how the wall assembly is meant to control rain. There is a risk that damage stemming from an unsuccessful repair can form the basis of a further claim. A successful repair needs to maintain the rain control elements of the original wall assembly. Just remember, in most cases, don't try to be perfect!

Peter Mensinga, P.Eng.  
Senior Engineer - Building Sciences Group  
R.J. Burnside & Associates Limited

*Peter Mensinga, P.Eng. is a Senior Engineer in Burnside's Building Sciences group, providing clients with building condition assessment, component evaluation, design/tender, and construction review services. Peter has been involved in projects as diverse as rehabilitating a stone masonry foundation wall, clock tower masonry repairs, multi-phase roof replacement of industrial buildings, and parking garage suspended slab replacement. The Building Sciences group also works in concert with Burnside's structural, mechanical, and electrical groups to form a fully integrated engineering and design team.*

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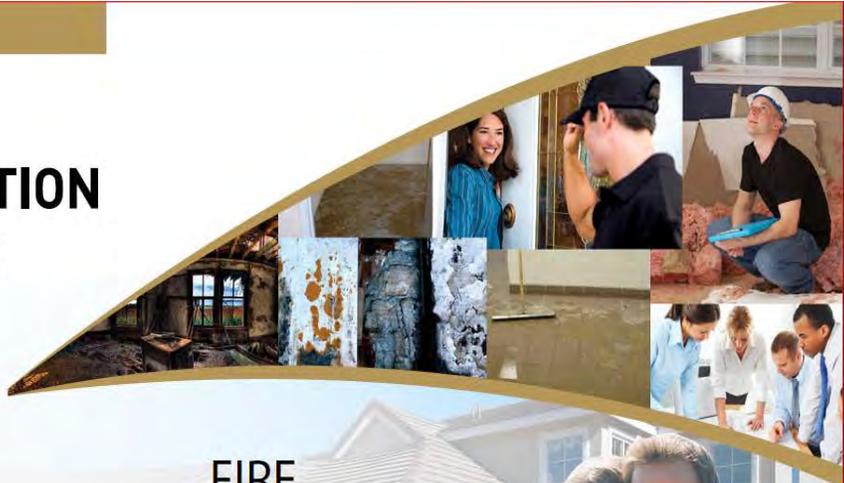
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## THE USE OF SOCIAL MEDIA IN BODILY INJURY CLAIMS

Tobin Horton  
Blaney McMurtry LLP

### *Introduction*

In the past decade, social media has become ubiquitous in our day-to-day lives. It has essentially become the new communication medium for the younger generation as everywhere you go you tend to see advertisements for social media and people using social media to “stay connected.”



With that in mind, social media creates a very useful tool for litigating bodily injury claims as some plaintiffs literally put their lives online. For people who work in this area, we should make efforts to keep abreast with developments in social media as, in some instances, it obviates the need for surveillance and can be used to force the plaintiff’s hand into equitable settlement of the claim or a dismissal without costs.

The purpose of the article is to provide a brief synopsis of some of the uses of social media in litigating bodily injury claims and to provide suggestions on initial considerations when a new claim arrives.

### *Initial Considerations*

When a new claim is received, it is prudent to run a simple Google search on the plaintiff(s) name. Conducting this search in even a perfunctory fashion is a great initial starting point as one never knows what one may find. The typical items that may come up are Facebook accounts, Twitter accounts or LinkedIn profiles. Although these can be quite useful, there is a plethora of other information which may come up through a simple search.

The items that can be found are extensive and can provide surprising insight into a plaintiff’s functionality. For example, on past files in our office, the following items have been found:

- a Kijiji advertisement where the plaintiff has been advertising maid services;
  - YouTube videos of a plaintiff who moonlighted as a reggae DJ;
  - Photographs from a cricket league which depicted the plaintiff playing cricket; and,
  - a martial arts BLOG, where the plaintiff posted photographs of himself doing karate.
- These examples illustrate that, beyond the normal avenues of investigation, such as Facebook and Twitter, there can be several interesting discoveries waiting to be found

by a plaintiff who was not conscious of the far-reaching capabilities of internet search engines.

### *Social Media*

When searching social media, you want to be mindful of the search parameters being employed to make efforts to track down the plaintiff. Using Facebook as an example, if the plaintiff's name is John Smith, it is prudent to search not only "John Smith" but also derivatives of his name: "Johnny Smith", "John S.", "Johnny S." etc.

Further, Facebook provide modifiers to limit the search to "Burlington, Ontario" or "York University", for example. This is where taking a detailed look at the records provided by counsel is important as it can provide insight into the search parameters to help track down a plaintiff's account. As an example, on a previous file where our firm was retained, a doctor's clinical note made reference to the fact that the plaintiff was an aspiring hip-hop singer. Some digging on the internet revealed his hip-hop alias and this alias was his handle on Facebook and YouTube. This brought about some absolutely devastating photographic and video evidence that was incongruent with the plaintiff's allegations of impairment.

When endeavouring to do some background research on a plaintiff through social media, be sure to use all the resources available to ensure the maximum results. Being meticulous with the productions from counsel and the online searches are of crucial importance when attempting to track down a plaintiff's profile.

### *Lesser Known Social Media Outlets*

Although most people are familiar with the popular social media outlets (Facebook, Twitter, Instagram etc.) there are other resources available as well. The following are a few of the lesser known sites which may be helpful:

**Wayback Machine:** This web site is essentially an internet archive of over 4 billion

websites dating back to the 1990s. It allows a user to input a web address and select the point in time you would like to view. It is useful to find content which may have been modified since its inception.

**Vine:** Especially popular with younger generations, Vine is a site which allows users to upload short (usually 7 seconds or less) video clips. This site is popular for videos that go "viral" (i.e. popular videos that become internet sensations), but also holds host to several mundane videos, some of which may have been posted by a plaintiff.

**Pinterest:** A social media site where users post items they enjoy or have interest in on their own board. The posted items can range anywhere from recipes for desserts to physical fitness pursuits and can provide useful insight into a plaintiff's hobbies or post-accident activity/functionality.

**Tumblr:** This site is similar to a BLOG, but it contains photographs which can be shared with other users. Users can following like-minded users and post photographs about activities or hobbies.



□ **Shots:** This relatively new social media outlet is exclusively for “selfie-photographs” and users post pictures of themselves and friends doing various activities. Typically, the purpose of these photographs are to elicit other users to like or share the photographs, so they tend to be ostentatious in nature.

*Conclusions and Recommendations:*

Social media has an ever-present role in society and will likely have that role for many decades to come. As it is now a main medium for world-wide communication, individuals who litigate bodily injury claims must keep in mind its potential uses when opening a new claim. The free information available to individuals who take the time to search the internet can be quite robust and, in some circumstances, capable of significantly diminishing the value of a claim.

Taking 15 minutes to conduct a brief internet search when a file is first opened should become part of your normal routine when opening a new matter. In some instances, this simple search can elicit fruitful information or evidence that can be used to settle a claim or put the plaintiff in a compromising position with respect to credibility.

The courts have held that the internet and social media are now fair game for bodily injury actions. Defendants who conduct diligent internet background research, are in a better position diminish the value of a claim of plaintiffs who fail to conduct themselves accordingly.



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## 2015 OIAA Provincial Claims Conference Huntsville, ON May 7th - 9th, 2015

### Schedule of Events

#### Thursday May 7th, 2015

- 2:00 pm—8:00 pm      Registration in main lobby  
6:00 pm—9:00 pm      Trade Show with free time following

#### Friday May 8th, 2015

- 7:00 am—9:00 am      Continental Breakfast  
8:00 am—10:00 am      Registration in main lobby  
9:15 am—10:15 am      Seminars  
   1 - Daniel Dooley - Dooley Lucenti Barristers & Solicitors  
        Trying tort cases without trials  
   2 - Kadey Schultz - Hughes Amys LLP  
        Getting to the bottom of Auto Reform, Accident Benefit & Tort  
10:15 am—10:30 am      Coffee Break  
10:45 am—11:45 am      Seminars  
   1 - Stephanie Beattie - Centre for Disaster Recovery  
        Catastrophic Management & Handling  
   2 - Anthony Kunkle - Mitchell Partners Investigation Services  
        Advanced Desktop Investigation  
12:00 pm—1:30 pm      Luncheon with guest speaker Dennis Hull  
2:00 pm—3:30 pm      Seminar - Outdoors (rain or shine)  
   DKI - Burn house demonstration  
3:30 pm—5:00 pm      Seminar - Outdoors (rain or shine)  
   Kodsi Forensic Engineering - Crash demonstration  
5:00 pm—6:00 pm      Free time  
6:00 pm—7:00 pm      Social time  
7:00 pm—9:00 pm      Dinner  
9:30 pm—1:00 am      Hospitality Gathering

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## The latest from the Court of Appeal on Costs: *Elbakhiet v. Palmer*



Authored by:

James Bromiley  
Partner, Waterloo

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jbromiley@millerthomson.com

This 2014 decision from the Ontario Court of Appeal addresses issues concerning offers to settle and resulting cost consequences. It deals primarily with the application and interpretation of Rule 49 of the *Rules of Civil Procedure*.

The appellants, defendants in a motor vehicle accident claim, appealed from the trial judge's costs award of \$578,742.28. Prior to the commencement of trial, the appellants made two offers to settle. The first offer was for \$120,000. This was made several months before trial. The second offer was for \$145,000, exclusive of costs or interest. It was served on February 10, 2012, being 10 calendar days before the trial was scheduled to begin. Both offers were to include "pre-judgment interest in accordance with the Courts of Justice Act and costs to be agreed upon or assessed".

The respondents initially claimed damages of almost \$2 million. They made one offer shortly before trial for \$600,000 "plus costs as upon agreed or assessed".

After a nine week trial, the jury awarded the Plaintiffs \$144,013.07. Of this amount, \$25,000 was for general damages, \$87,852.75 was for loss of future earnings, \$6,160.32 was for cost of future care and \$25,000 was for three family law act claims. The total award, inclusive of interest, was calculated by the court to be \$153,999.37.

During cost submissions following trial the appellants relied upon Rule 49.10, claiming that the Plaintiff's failed to accept an offer which was equal to, or

better than what they received at trial. They argued that if interest at 5% was added to their offer of \$145,000 it would exceed the Plaintiffs' award of \$153,999.37. They argued that there was a "general understanding" that interest at 5% should apply to the entire offer. They asserted that this would entitle them to partial indemnity costs from the date the offer was made, representing an exception to the standard 'loser pays' principle in awarding costs.

The appellate court first dealt with the timing of the appellant's second offer. In order for Rule 49 to apply it had to have been made 7 days before the commencement of the hearing, within the meaning of Rule 49.10(2)(b). It was conceded that holidays, including weekends, were not to be counted in calculating the seven days. It was further conceded that the seven day requirement was met only if the hearing commenced on February 22.

The respondents argued that the trial began on February 21, being the date the jury was selected, opening statements were made and preliminary rulings occurred. The appellate court disagreed, finding that a jury trial commences for the purpose of Rule 49 when evidence has been first heard.

The court then addressed whether the appellant's offer was *as or more* favourable than the judgment. In doing so the court had to deal with the interest component of the appellant's second offer. The appellate court echoed the comment's of the trial judge that "the terms of a Rule 49 offer must be fixed, certain and capable of clear calculation in

order to attract the cost consequences”.

The appellate court upheld the trial judge’s reasoning. It found that the offer was not fixed, certain or capable of clear calculation because the pre-judgment interest component of the offer did not provide a specified amount or a specified rate for the various elements of the claim.

The court went on to find that the appellants did not meet the burden of proof imposed by Rule 49 as they could not clearly establish that their offer exceeded, or was equal to, the trial Judgment.

Despite the above, the court significantly reduced the costs award to \$100,000. In doing so the court relied upon the principles in Rule 57.01, requiring a court to consider proportionality and fairness when assessing costs. The court held that it was not fair and reasonable to award costs of almost \$580,000 for a claim the jury assessed at only \$145,000. The court also relied upon Rule 49.13, which allows a court to take into account any offers to settle made in writing, the date the offer was made and the terms of the offer.

The key takeaway from this decision is to ensure that Rule 49 settlement offers set out clear amounts and clear rates upon which interest is to be calculated.

*James Bromiley is a partner in the Waterloo office of Miller Thomson. His diverse practice encompasses all areas of civil and commercial litigation, acting for clients in property and casualty insurance, personal injury, motor vehicle, employment and environmental law matters.*

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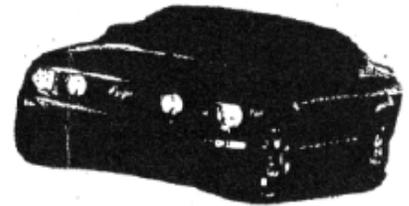
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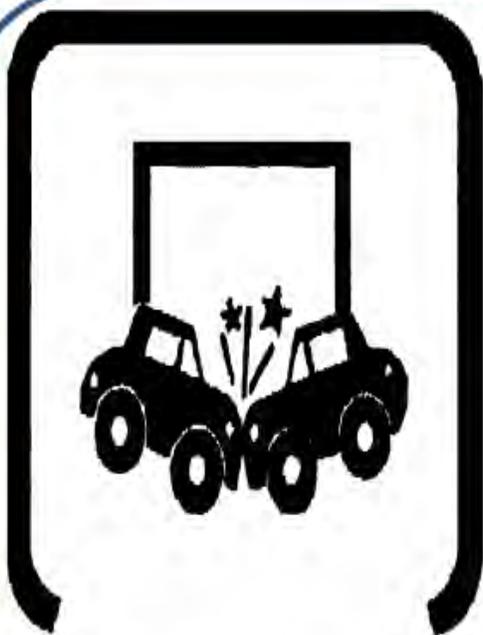
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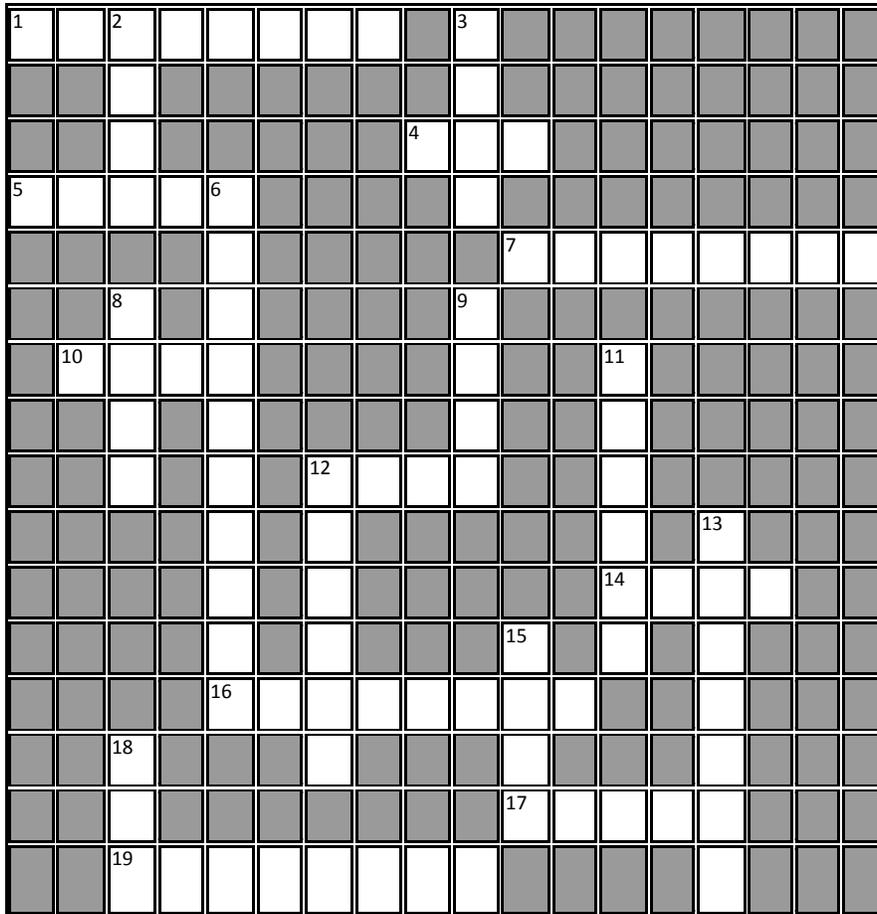
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# Christmas Crossword Puzzle



## ACROSS

1. Stand underneath to get a kiss. (8)
4. Wrap with paper, ribbon and a ---. (3)
5. If you send some, you will receive some. (5)
7. Santa's favourite animals. (8)
10. Wishes written on paper make this. (4)
12. Santa delivers these to good children. (4)
14. First word of a famous Christmas poem. (4)
16. Keeper of the flocks. (8)
17. Freedom from war. (5)
19. The Christmas Season. (8)

## DOWN

2. Bright light leads the way. (4)
3. Flakes that fall from the sky. (4)
6. He comes down the chimney on Christmas eve. (5,5)
8. Desire. (4)
9. A short word for Christmas. (4)
11. They twinkle and glow.(6)
12. Traditional meat for Christmas dinner. (6)
13. They hang from the Christmas tree. (7)
15. What you do before giving a present. (4)
18. --- to the World. (3)

[Hanukkah](#) - 17 December 2014

Hanukkah is the Festival of Lights and marks the restoration of the temple by the Maccabees in 164 BCE. Hanukkah is celebrated at roughly the same time as Christmas, but there is no connection at all between the festivals.

[Christmas](#) - 25 December 2014

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## Infection Control Requirements in the Construction, Renovation and Maintenance of Health Care Facilities

By Bob Caskanette



Did you know that in Canada approximately 250,000 patients annually develop hospital acquired infections, which results in approximately 8,000 – 12,000 deaths per year? That equates to roughly 28-40 deaths per 100,000 people, as compared to around 13.8 deaths per 100,000 people from breast cancer. Approximately 7 - 8% of these occurrences are directly related to construction, maintenance and repair activities within these health care facilities, which correlates to approximately 500-1000 deaths each year in Canadian hospitals.

The most notable concerns are moulds such as *Aspergillus* and *Stachybotrys* species and bacteria such as *Legionella* and *Anthrax*. People, particularly immune compromised individuals such as those found in such health care facilities are at the highest risk factor. So what can be done about it?

The Canadian Standards Association (CSA) developed standard *CSA Z317.13-12 – Infection control during construction, renovation, and maintenance of health care facilities* (the Standard). This Standard applies not just to hospitals, but to all buildings where health related services are offered, such as clinics, doctor offices, nursing homes and many others. The amount of precautions required in each will vary as outlined in a risk assessment matrix found within the Standard. Not surprisingly, work performed near an intensive care unit (ICU) within a hospital would be among the highest risk level, while minor work within a doctor office would be much lower. But projects in both types of facilities still fall under this Standard. It deals with not just new large scale construction projects and additions, but also minor renovation and maintenance projects such as removing and replacing a section of wall or ceiling.

The CSA Standard encompasses and outlines the use of many other standards also in some cases, such as the IICRC S500 and S520 standards on Water Damage Restoration and Mould Remediation respectively, the CCA Mould Guidelines for the Canadian Construction Industry, which we currently incorporate into many residential and commercial projects, just to name a few.

The CSA Standard outlines a number of things such as; risk factors and assessments, sources of contamination, construction materials, mechanical equipment and duct work, plumbing and other building systems, selecting a multidisciplinary team, infection prevention and control measures (various levels), remedial measures, investigations, containment, abatement, inspections and much more. A multidisciplinary team for such projects can consist of a variety of people such as facility health care staff and administrators, constructors or restoration professionals, project managers, environmental services personnel, operation and maintenance staff, infection prevention and control professional, and design and management professionals such as ourselves.

Our staff is trained on the CSA Z317.13-12 Standard and is available to assist you with these projects including; investigation, project management from start to finish, sampling, abatement requirements, corrective measures, clearance testing and reporting. Make sure you have the right people involved the next time a project involving a health care facility is being undertaken. It is critical to have the right people involved with appropriate levels of expertise and training through CSA, to protect yourself from liability and protect people from exposure to infection which could result in serious consequences.



## Make the Right Move

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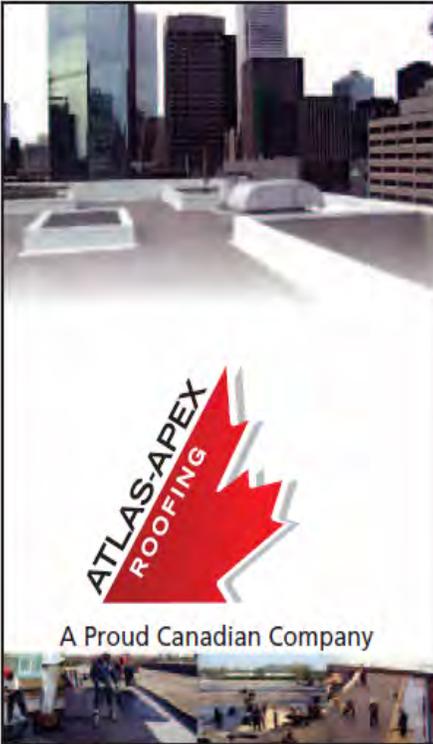
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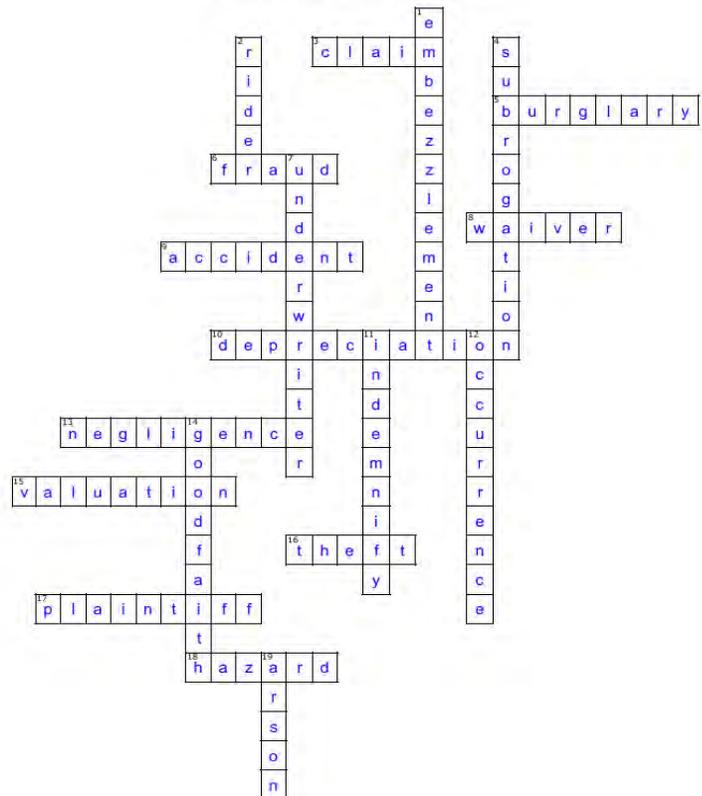
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