OTTAWA VALLEY ADJUSTERS ASSOCIATION
A CHAPTER OF OIAA


AUGUST 2019

# HOW HITTING A BICYCLE CAN LEAD TO SIX-FIGURE LIABILITY CLAIM

# LAIMANT LOSES APPEAL OVER WHETHER ONTARIO COURT CAN HEAR BAD-FAITH CLAIM

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OVAA Newsletter

## Publication Deadlines

If you have a submission for the newsletter, please advise the editor ASAP so space can be reserved. The actual submission content (articles, advertising changes, etc.) must then be received by the following dates:

| **Newsletter Issue** | **Submission Deadline** |
|---|---|
| July 2019 | June 15, 2019 |

If you have an article that will
**Enlighten, Educate or Entertain,**
kindly contact a member of the OVAA Executive (See page 1 for Contact Info) for submission guidelines and publication deadlines.

Ottawa Valley Adjusters Association

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## *SEMINAR SUGGESTIONS*

During the course of planning our year, we look to our members, associates, advertisers and friends either to provide guest speakers for our monthly meetings or to let us know what topics are of interest.

Should you wish to present a seminar for the OVAA Membership or should you have an idea for a seminar topic you would like to see presented, please contact:

**Conar Marcoux, BA & CIP**
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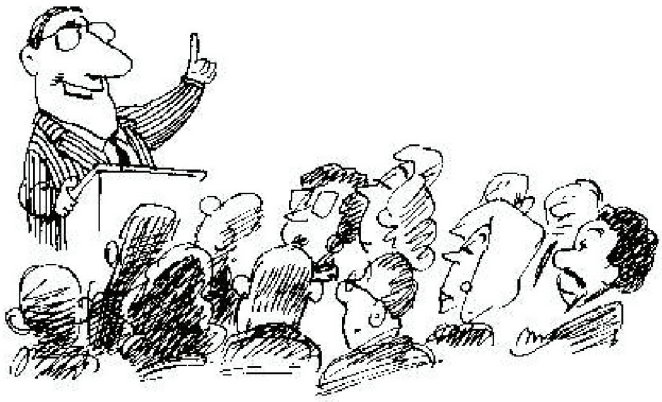

Ottawa Valley
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# UPCOMING LUNCHEONS & EVENTS

## 2019 Kick Off
## September 11, 2019

## The YIPO (Young Insurance Professionals of Ottawa) launch party

*held at the Moscow Tea Room (527 Sussex Drive, Ottawa)*
*on July 11th from 5-8pm*

*Tickets are free but space is limited.*
*Tickets can be reserved here – https://bit.ly/2X8wRsZ*

*Door prizes and a photographer on site doing head shots for free*

# President's Pen & REP's Ramblings

I can't believe it is July already!!! I hope everyone is enjoying the first couple of weeks of summer. The weather has been glorious. Extremely hot at times but I'll take that any day over the bitter cold days of winter. I am very much a summer, fall kind of girl!!! I am sure everyone is looking forward to their summer vacation and a little down time. The past six months in particular have been ridiculously busy. Let's hope this isn't going to be the new normal for us Property Field Adjuster's!!!

Our Annual Golf Tournament was held on the 27th of June of at the Meadows Golf and Country Club. It was the perfect day sunny and warm with a nice breeze. We couldn't have asked for a nicer day. I am pleased to advise that once again all the holes were sponsored and thankfully Mother Nature was on our side and didn't give us any new weather events the week before so we had a fantastic turn. A great time was had by everyone and it was a resounding success thanks again to everyone's continued support!!! This is my favourite event. It was so nice to see everyone and get caught up outside of our normal hectic days. Pictures of this fantastic tournament and a list of our sponsors are highlighted on our website.

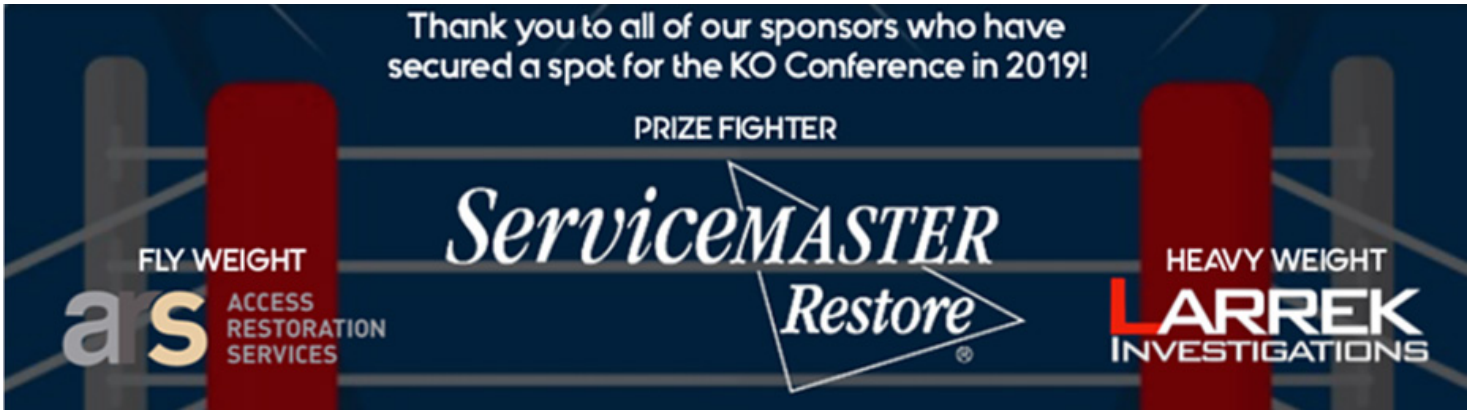
August will be the start of our new term and I am pleased to announce a number of changes to our executive. Ryan Reiss will be the new President, Conar Marcoux will resume his position as treasurer and Sarah Smith will be the new secretary. I will be the Past President as well as maintaining my position as the Ottawa Delegate. I am very excited for the new 2019-2020 term. If you are interested in joining our executive, we do have a position for a new director since Sarah will be in her new role as secretary. Please send an email to www.ovaa.ca.

Please keep an eye on our website for a list of all the events and seminars for the upcoming year.

The OIAA Changeover took place on the 15th of June. Leanne Hardman is the new President for the 2019/2020 term. Our first meeting will take place on August 14, 2019 via telephone conference. Our Kick-off will take place on September 18th in the Distillery District at Archeo Trattoria in Toronto. Come and kick off our new year with our new incoming President, Leanne Hardman.

Please visit our website as well as the OIAA website for a list of upcoming events, dates and venues for the new term.

Take care. See you soon!!!
Cindy Bridge, CIP, CRM
OVAA President/OIAA Ottawa Delegate




# We Want to Stay Connected with You!

Canada's Anti-Spam Legislation (CASL) came into effect on July 1, 2014 and requires that we obtain your express consent to receive any communications from us sent after this date. Although we received several responses via email, we note that several are still outstanding. As our email blasts are one of the most important methods in getting information to our members, we need your help!

Please copy and send this page via email with "I Agree" in the subject line to allow us to communicate with you electronically in the future OR with "Disagree" in the subject line if you do not wish to receive further email communications.
These emails can be forwarded to ovadjustersassociation@gmail.com

By agreeing you are consenting to receive electronic messages from the OVAA (ovadjustersassociation@gmail.com) about the OVAA and its events, etc...
I understand I have the right to withdraw this consent at anytime by informing OVAA, in writing / email that I no longer wish to receive OVAA-related electronic messages.

Please note that on membership expiry / removal from the OIAA membership Listing, your name will be automatically removed from the OVAA's email list.

# HOW HITTING A SKATEBOARDER WITH A DEALERSHIP'S COURTESY CAR LED TO A PRIORITY DISPUTE

WRITTEN BY DAVID GAMBRILL

A vehicle owner asks someone who is not on his insurance policy to take his car to the dealership for a repair. When that driver subsequently gets into an accident with the dealership's courtesy car, is the car owner's insurance company on the hook for the liability lawsuit?

No, a Calgary court recently found.

On June 4, 2016, Gurpreet Sran drove a vehicle owned by Harjit Gill to the Northwest Acura dealership in Calgary with Gill's permission. Sran was not a named insured under Gill's policy, nor was she considered a spouse of Gill, since she did not reside with him.

Gill requested that she take his vehicle to the dealership for servicing and had told her that the dealership would provide her with a courtesy vehicle. The dealership did provide her with a courtesy vehicle after she signed a "Loaner Vehicle Agreement."

Sran was driving the courtesy vehicle provided by the dealership when she collided with a skateboarder. The skateboarder sued Sran, which resulted in a priority dispute between insurers.

Gill's vehicle was insured by Security National Insurance Company. The courtesy vehicle was owned by Honda Canada Finance Inc. and leased to Honda Canada. Honda Canada then loaned the vehicle to Northwest Acura pursuant to the Acura Courtesy Car Program Agreement. The courtesy vehicle was insured by Tokio Marine & Nichido Insurance Company Limited.

Tokio Marine contended that Gill's insurer, Security National, should be required to defend Sran in the skateboarder's action.

The insurer of the courtesy car noted that Gill's insurance policy contains the standard SPF No. 6 provision, which provides coverage to "a person who with his consent personally drives the automobile." There is also a provision providing coverage for a "temporary substituted vehicle."

Tokio Marine argued that since Gill gave Sran permission to drive his vehicle to the dealership, that same consent transferred to the courtesy vehicle provided by the dealership. In other words, the courtesy vehicle became a "temporary substituted vehicle" under his insurance policy.

A case master disagreed with Tokio Marine's position, and the Court of Queen's Bench of Alberta upheld the case master's ruling.

Coverage for a "temporary substituted vehicle" would apply if Gill drove the courtesy car, the Alberta Court of the Queen's Bench found, but it did not apply in Sran's situation.

As the court put it: "I have no doubt that the understanding between Mr. Gill and Ms. Sran was that she would drop off his vehicle at the dealership and that the dealership would provide her with a courtesy car to use while Mr. Gill's vehicle was being serviced. However, I cannot make the leap that this understanding between these two parties applies to the other parties involved [e.g. the dealership]." The court also did not accept Tokio Marine's contention that a "priority flip" applied under the terms of the Miscellaneous Insurance Provisions Regulation. Basically, it would mean Gill's insurer would take priority if the dealership were to be considered a "rentor" or "lessor" of the courtesy car under the definitions of province's Highway Traffic Act.

However, the dealership was not the "rentor" or "lessor" of the courtesy car, the court found.

First, the "rental" part of the Loaner Vehicle Agreement was left blank, so Sran would not have known she was entering into a rental agreement, the court said.

Second, a car dealership does not rent or lease cars "in the ordinary course of its business," as defined in the province's Highway Safety Act.

# HOME INSURANCE CAN COVER DAMAGE BY A CONTRACTOR DURING RESTORATION, COURT FINDS

WRITTEN BY GREG MECKBACH

If your client's house is accidentally damaged by a repair or renovation contractor while it is working on that building, does the home insurance cover it?

Some carriers would say no, but a recent court ruling means exclusions for "property while being worked on" and "faulty workmanship" are not quite as broad as some underwriters intended.

In Monk v. Farmers' Mutual Insurance Company (Lindsay), released July 19, the Court of Appeal for Ontario upheld a 2017 Superior Court of Justice ruling that more than $100,000 in damage to Diana Monk's Bracebridge log house falls within the coverage of the all-risk "Security Plus" policy she bought from Farmers Mutual.

Monk hired a contractor in 2008 to restore the exterior of her home. The work included cleaning, grinding, sanding and finishing the log exterior.

In 2009, she discovered a wide array of damage including stains to carpets, abrasions to windows, as well as windows coming loose in exterior doors. The door frames also became loose, causing the doors to sag and to become difficult to open and close.

A coverage dispute resulted. In 2011 she filed lawsuits against her contractor, broker and insurer.

In denying the claim, the insurer relied on both a delay in notifying the broker of the loss, and on two exclusions. Ultimately, the court's July 19 ruling means the claim is not covered. However, it was the timing of the claim — not the exclusions — that kept the insurer off the hook.

Ontario Superior Court Justice Edward Koke in 2017 found that Monk waited at least two years after discovering the damage before reporting her claim to her broker. Monk insisted that she reported the loss in 2009 and not in

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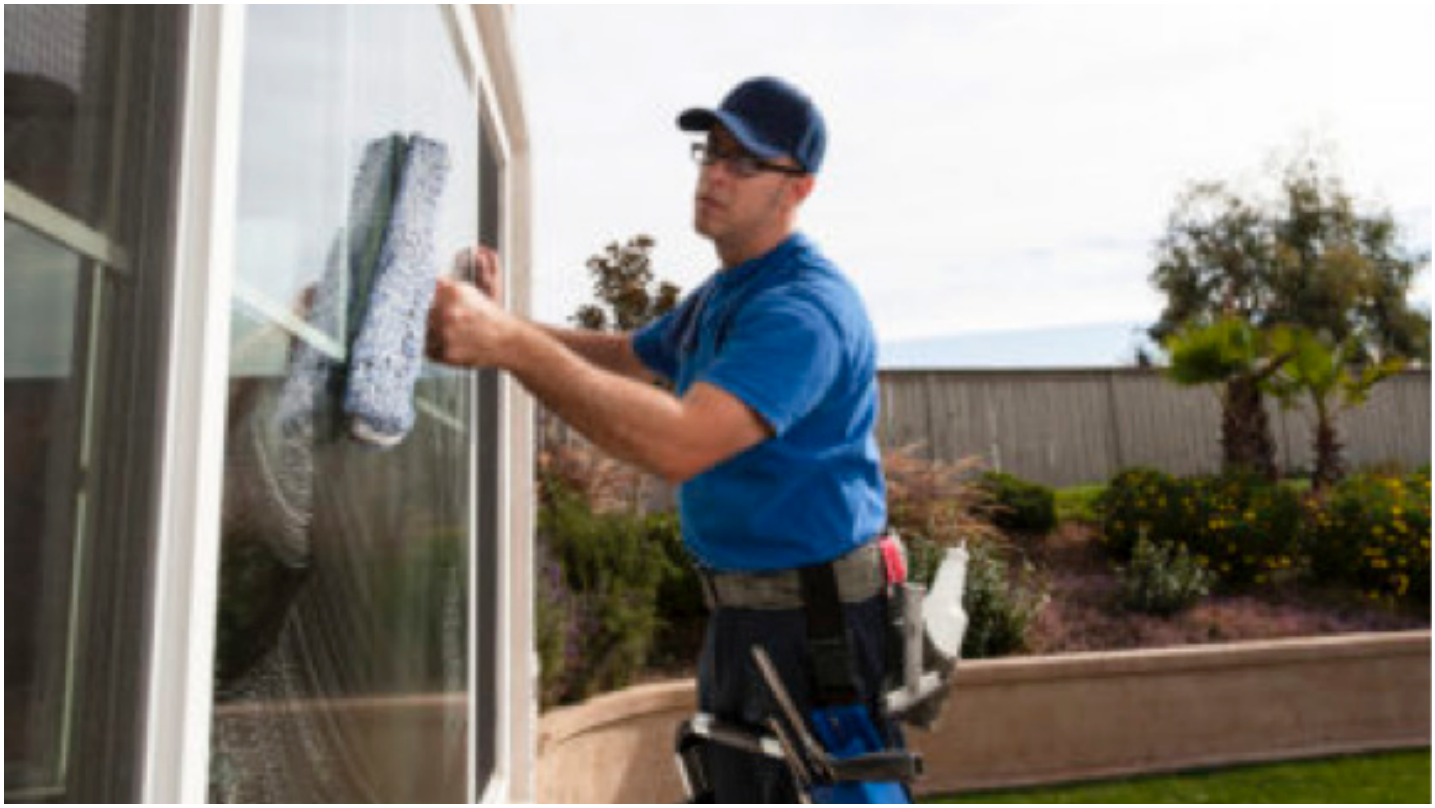

# HOME INSURANCE CAN COVER DAMAGE BY A CONTRACTOR DURING RESTORATION, COURT FINDS

WRITTEN BY GREG MECKBACH

2011, as her brokerage reported. But Koke preferred the brokerage's story over the client's. His finding was upheld on appeal.

Farmers Mutual cross-appealed without success the finding that the two exclusions did not apply. One exclusion was for "the cost of making good faulty material or workmanship." The other was for loss or damage to property "while being worked on, where the damage results from such process or work (but resulting damage to other insured property is covered)."

Justice Koke ruled that in interpreting the faulty workmanship exclusion, a court must take into account the reasonable expectation of both the insurer and the insured. "A homeowner expects to be covered for unexpected or resulting damages which are not directly related to the scope of his or her contract with a contractor."

In a case like Monk's, a homeowner who buys an "all risk policy" can reasonably expect that the exclusion for faulty workmanship or for property while being worked on will be interpreted narrowly and the exception in the exclusion for resulting damage will be interpreted broadly, Justice Koke wrote.

Monk's contractor was hired to restore the exterior of logs and board and the batten structure using a wood restoration system. It was not hired to install carpets, replace windows, doors, exterior fixtures or thermal pane glass units, Justice Koke reasoned.

In the "property while being worked on" exclusion, there is an exception for "resulting damage to other insured property," Justice Koke noted. This means there is coverage for damage not within the scope of work of the exterior restoration contract.

In Monk's case, the exclusion for "cost of making good faulty material or workmanship" should be interpreted to mean the cost of re-doing the work that Monk's exterior restoration contractor was hired to do, wrote Koke.

Justice Koke cited Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co., released in 2016 by the Supreme Court of Canada. Ledcor arose from an office tower construction project in Edmonton in 2001. The dispute was over the interpretation of a faulty workmanship exclusion in a commercial builder's risk policy. In Edmonton, a subcontractor to Ledcor caused damage to windows while cleaning them. The Alberta Court of Queen's Bench ruled against the insurers, finding that the damage does not come under the faulty workmanship exclusion. That ruling was initially overturned by Alberta's appeal court but restored by the Supreme Court of Canada.

# LAIMANT LOSES APPEAL OVER WHETHER ONTARIO COURT CAN HEAR BAD-FAITH CLAIM

WRITTEN BY GREG MECKBACH

When the Ontario government moved accident benefits dispute resolution to the Licence Appeal Tribunal in 2016, it did not intend for two similar issues in a disputed claim to be adjudicated both in court and before the LAT, the Court of Appeal for Ontario suggests.

The ruling in Stegenga v. Economical Mutual Insurance Company, released July 19, nearly closes the door to claimants wanting to pursue bad-faith claims against their accident benefits insurers in court.

In 2015, the Ontario government passed Bill 15, the Fighting Fraud and Reducing Insurance Rates Act. One measure from that omni-bus bill was Section 280 of Insurance Act. It stipulates that insurers and claimants can take accident benefits disputes to the LAT but cannot bring a proceeding to court "with respect to" an accident benefits dispute – unless it's an appeal from a LAT decision or an application for judicial review.

That new provision was controversial, with some personal injury lawyers arguing it limits accident victims' access to justice.

The LAT has to the power to determine not only whether the insurer should have paid out on a claim but also whether any delay or failure to pay was reasonable, Justice Benjamin Zarnett wrote for the Court of Appeal for Ontario in its unanimous ruling this past Friday in Stegenga.

Morgan Stegenga, then 15, was catastrophically injured in 2011 in a vehicle accident.

In addition to multiple rib fractures, she had a head injury which resulted in a loss of cognitive ability as well as personality, behaviour and psychological changes. She made an accident benefits claim with Economical, her father's insurer.

Her family had several disagreements with Economical over how her claim was handled. For example, it was allegedly initially treated as non-catastrophic. Allegations

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# LAIMANT LOSES APPEAL OVER WHETHER ONTARIO COURT CAN HEAR BAD-FAITH CLAIM

WRITTEN BY GREG MECKBACH

against Economical have not been proven.

Stegenga tried to sue Economical but the lawsuit was quashed, in 2018, by Justice James Ramsay of the Ontario Superior Court of Justice.

That ruling was upheld in the Court of Appeal for Ontario ruling released July 19, 2019.

Removing accident benefits disputes from the courts – in the hopes of making dispute resolution more efficient – was one aim of Bill 15, appeal court Justice Zarnett noted. Stegenga claims Economical was acting in bad faith. Stegenga further argued her bad faith claim is distinct from a dispute over accident benefits entitlement.

But with Bill 15 the Ontario legislature "did not intend the same, similar, or overlapping issues to be adjudicated in more than one forum," wrote Justice Zarnett.

Stegenga argued Section 280 of the Insurance Act means the LAT only has the exclusive power to adjudicate disputes over whether or not a benefit should be paid and disputes about whether a benefit was paid in an incorrect amount.

But the LAT has much more power than that, the Court of Appeal for Ontario found in its unanimous ruling.

Ontario regulations give the LAT the power to make a special award – of up to 50 percent of the benefits to which the insured is otherwise entitled – if it finds the insurer unreasonably withheld or delayed the payment of benefits, Justice Zarnett wrote. The LAT can also order the insurer to pay the claimant a higher interest rate than it otherwise would have.

"I agree that bad faith can be characterized as a cause of action which is available to a person insured by an insurance contract but is independent of and distinct from a claim for payment or indemnity under the insurance contract. However, it does not follow that this automatically takes the subject matter of a claim, even when characterized as one for bad faith, outside of s. 280," wrote Justice Zarnett. "The legislature made a choice as to what disputes would be within the exclusive jurisdiction of the LAT, and what remedial powers the LAT would have. That was a policy choice it was entitled to make," wrote Justice Zarnett. "The Insurance Act and its regulations form a comprehensive scheme for the regulation of insurers and insurance. The legislature must be taken to have armed the LAT with the remedial powers it considered appropriate to deal with improper insurer behaviour, knowing those remedial powers were different from the court's."

# HOW HITTING A BICYCLE CAN LEAD TO SIX-FIGURE LIABILITY CLAIM

WRITTEN BY GREG MECKBACH

An Ontario auto insurer is out more than $500,000 after a motorist hit a cyclist, causing soft-tissue injuries.

In St. Marthe v. O'Connor, released this past Monday, Ontario Superior Court Justice Patrick Hurley awarded Peter St. Marthe $380,000 (including sales taxes and disbursements) for his legal bills alone to pursue his tort claim.

St. Marthe was riding his bicycle to work along Dupont Street in Toronto on Nov. 8, 2011. Leslie O'Connor drove his vehicle out of a gas station, hitting St. Marthe's bike.

The $380,000 cost award announced Monday is on top of $206,000 in damages that St. Marthe was awarded in a ruling released Mar. 11. That ruling resulted from an 11-day trial that wrapped up Dec. 3, 2018.

Court records indicate that at one point, O'Connor's insurer, Aviva Canada Inc., had an opportunity to settle for $40,000 plus costs before the trial started. The defence's reaction left the judge baffled, given the testimony of a doctor acting as an expert for the defence.

After St. Marthe's bike was hit from the right by O'Connor's vehicle, St. Marthe was knocked off the bike. O'Connor remained on scene. St. Marthe declined O'Connor's offer to call an ambulance.

St. Marthe called his boss, who showed up to the scene and drove St. Marthe home. Later that morning, he went to a hospital emergency room due to back pain. He

***Continued on page 15***

# HOW HITTING A BICYCLE CAN LEAD TO SIX-FIGURE LIABILITY CLAIM

WRITTEN BY GREG MECKBACH

returned to his job at a landscaping firm the week after the accident, though he still felt pain in his back. St. Marthe later underwent physiotherapy which resulted in some improvement.

Three years after the accident, St. Marthe started working as a construction labourer, but he had some problems with the physical labour. The construction firm did not have light duties available for him so he was laid off in November 2014.

He filed his lawsuit against O'Connor the following July. St. Marthe has not fully recovered; he is taking courses in computer networking so he can get a more sedentary job. The plaintiff and defendant disagreed on many things. The defendants argued the plaintiff was partly liable for failing to wear a helmet, but Justice Hurley found the defendant fully liable, mainly because St. Marthe had the right of way. The defendant also argued:

- the plaintiff's complaints of pain were exaggerated
- his condition is due to causes unrelated to the accident
- he failed to undergo treatment that would have completely rehabilitated him, and
- he could have continued as a manual labourer but did not seek any accommodation that would have permitted this to happen.

The defendant asked the plaintiff to see a spinal surgeon in November 2017. The surgeon told the court that the plaintiff had chronic soft-tissue sprain injury; he advised that conditions like that do not tend to get better, and that the plaintiff should be seeking a different line of work.

The damage award released in March 2019 consisted of about $81,000 in past loss of income, $47,000 in future loss of income, $46,000 in future housekeeping and about $32,000 in pain and suffering.

Costs are normally awarded on a partial indemnity scale, but could be awarded on substantial or full indemnity scale. The difference is significant.

In St. Marthe's case, the $300,000 cost award was on a partial indemnity basis up to Aug. 30, 2018 and on a substantial indemnity basis after that. Aug. 30, 2018 was the date St. Marthe's lawyers made their offer to settle for $40,000.

During the trial, the plaintiff made another offer to settle, this one for $60,000 in damages plus $153,000 in costs, including fees, disbursements and sales tax. There was no response to that offer, Justice Hurley wrote.

Judges can use their discretion to award a party costs on a substantial indemnity scale. As a general rule, partial indemnity costs are awarded unless special grounds justify a departure. In determining which scale to use, a court considers whether the time and expense devoted to a proceeding was proportionate to what was at stake. On Aug. 20, 2018, about three months before the trial started, the defence made an offer to consent to dismissing the lawsuit on a without-costs basis if St. Marthe would accept the offer by Oct. 1. The plaintiff did not accept, and the trial started Nov. 19.

"The defendant did not explain in his written submissions why he was unwilling to make any settlement proposal other than the offer of August 20, 2018," Justice Hurley wrote. "In the absence of an explanation, I can only conclude that the defendant decided, at an early stage of this litigation, that he would not pay any amount, however modest, to settle the case. This position is baffling in view of the admission of liability and the defence expert opinion."

The defence expert concluded that the plaintiff suffered from a chronic pain condition, "which was supported by objective findings, and it was reasonable for him to retrain for a more sedentary occupation."

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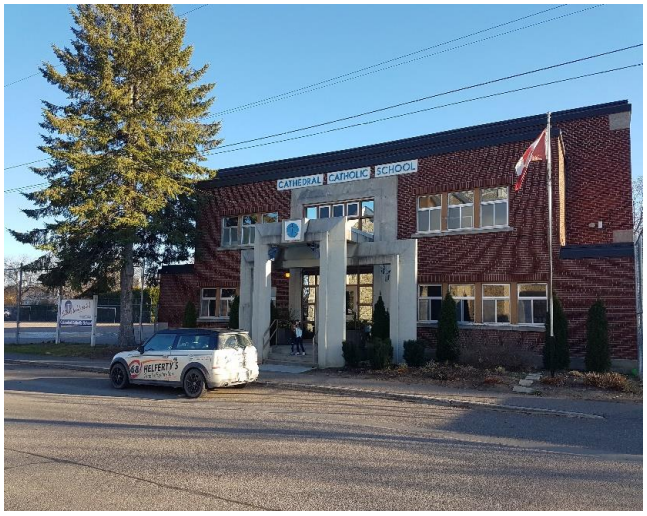


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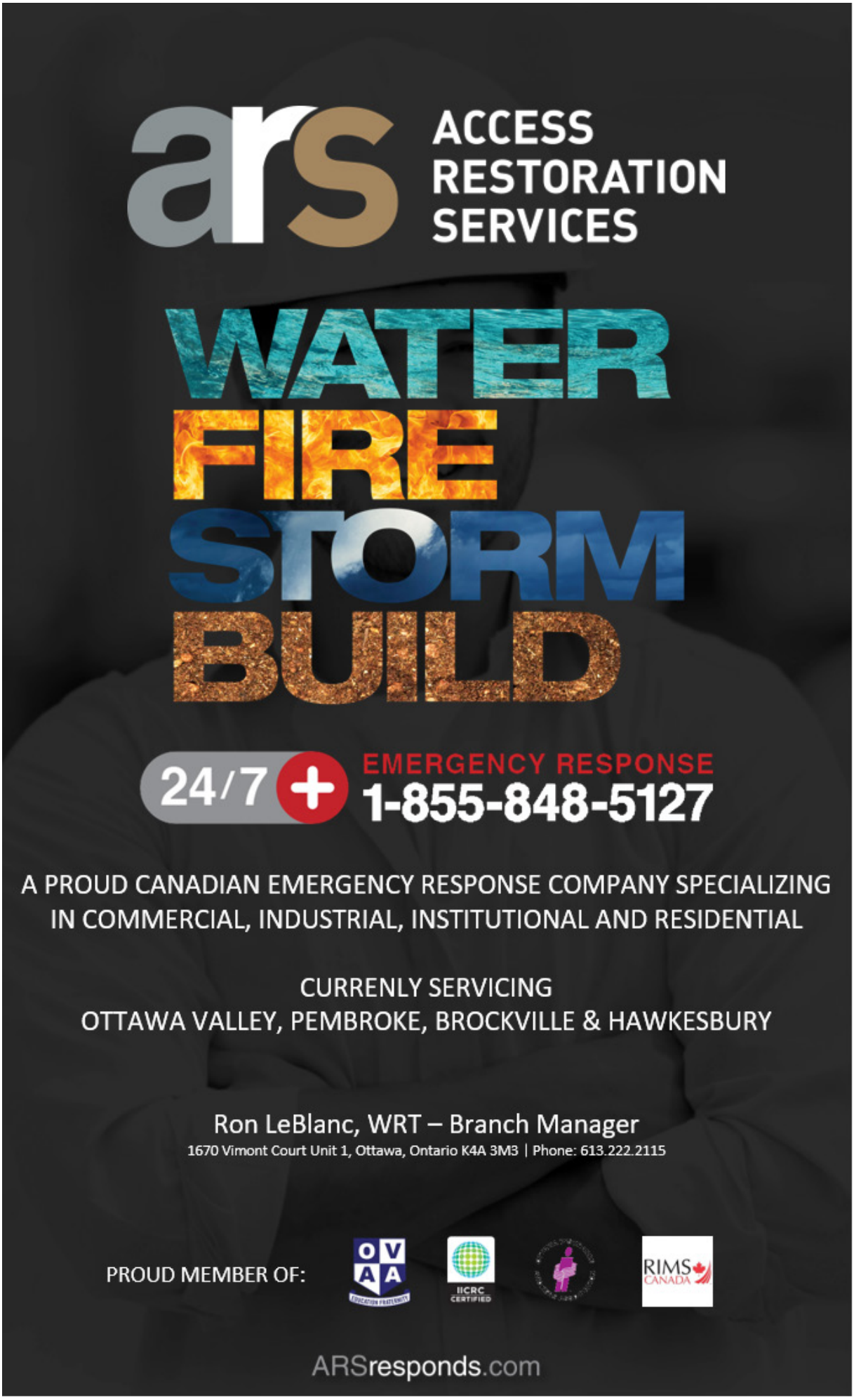
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