

NOT IN THE PLANS:

Architects, Risk and Personal Injury Lawsuits

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OAA Conference: *Designing for Dignity.*

WE UNDERSTAND ARCHITECTURAL RISKS

OUR CAUSE

To support the architectural profession to take the risks necessary to design a better world. We do so by championing the wise, effective, and efficient management of risk.

OUR PURPOSE

To be the trusted ally to protect & defend the architectural profession and their families by strengthening and supporting their resiliency to the risks associated with practice.

OUR AMBITION

To strive each day to be the authority on risk, resulting in financially sustainable practices that unleash the full potential of the profession to improve society and human interaction through better design.

OUR VALUES

We build upon our core values of **Trust, Accountability, Collaboration, Innovation.**

MODERATOR + PRESENTERS



**SALVADOR
KNAFO**

Lead Architect



**PHILIP
GHOSH**

Senior Legal Counsel



**LESLIE
PARKER**

Architect

LEARNING OBJECTIVES

1. Identify the reasons why architects need to be concerned about personal injury lawsuits.
2. Describe the logistics of how a personal injury lawsuit will unfold, and the impact to architects.
3. Name circumstances and design features that are often the subject of personal injury lawsuits.
4. Avoid some common design issues that can lead to personal injury lawsuits AND implement risk management strategies to help protect against future personal injury lawsuits.

EXAMPLES OF ACTUAL PERSONAL INJURY CASES

1

Slip and falls in Change Rooms and Showers

2

Falls in Stairways

3

“Accidents” in Schools

WHY ARCHITECTS ARE SUED FOR PERSONAL INJURIES

- Design Issues
- Construction Issues
- Deep Pocket

BIZARRO

By Dan Piraro

THE JURY IS INSTRUCTED TO IGNORE COMMON SENSE, LOGIC, JUSTICE, AND THE "BIG PICTURE," AND CONSIDER ONLY THE MINUTIAE AND TECHNICAL LOOPHOLES PRESENTED TO YOU BY THESE PEOPLE WHO ARE PAID TO CONCEAL THE TRUTH...



THE LAWYER'S PERSPECTIVE

Philip Ghosh, Senior Legal Counsel

LEGAL PRESENTATION OUTLINE

- 1. Legal basis for personal injury claims**
- 2. Liability**
- 3. Damages**
- 4. Resolving Cases**
- 5. Case Studies**



1.

RISK EDUCATION

LEGAL BASIS FOR PERSONAL INJURY CLAIMS

 RISKALLIANCE



CAUSES OF ACTION

- Potential causes of action against architects:
 - Contract
 - Tort / Negligence
 - Negligent Misrepresentation
 - Breach of fiduciary duty
- Negligence applies to most personal injury suits. It was developed through common law, and codified in the *Negligence Act*, R.S.O. 1990, c. N.1



ELEMENTS OF NEGLIGENCE

1. A wrongful act or omission
2. The act or omission breached the standard of care expected in the situation
3. There are damages (like a personal injury)
4. Causation – the act caused the harm claimed
5. Duty of Care – the harm is caused to a person to whom a duty is owed



ARCHITECT'S STANDARD OF CARE

An architect's standard of care is to meet the standard of practice expected of a reasonably competent architect performing similar services on a similar project.

- The standard is not perfection, nor what a singular perfect architect would do
- The court will look to expert evidence on industry practice to determine if an architect met the standard

LIMITATIONS ACT

- A plaintiff cannot sit on their right to sue forever
- Ontario's *Limitations Act, 2002* sets out a **two year** presumptive limitation period
- The two-year period is subject to **“discoverability”**
- Therefore, the action is limited not two years after a project is complete, but **two years after someone sustains an injury**
- There is an “Ultimate Limitation Period” of **15 years...**
- ... but even this has some exceptions, like not running while an injured party is a minor





2.

RISK EDUCATION
LIABILITY



WHO MIGHT BE AT FAULT?

Project-Related

Personal injury lawsuits involving architects relate to allegedly dangerous buildings, so anyone involved in design or construction:

- Architects
- Other Consultants
- Construction Managers
- General Contractors and Subcontractors
- Municipalities
- Developers

Other Parties

There are often other potential causes to an injury, meaning these cases can also involve:

- Occupiers
- Building managers
- Coaches, teachers, personal support workers
- Winter maintenance contractors
- Event hosts

OCCUPIERS LIABILITY

- The *Occupiers Liability Act*, R.S.O. 1990, c.O.2, makes occupiers of a premises liable for the safety of members of the public invited into the space
- “occupier” includes,
 - a) A person who is in physical possession of premises, or
 - b) A person who has responsibility for and control over the condition of premises or the activities there carried on, or control over persons allowed to enter the premises
- There can be more than one Occupier
- An Occupier can deflect blame onto other negligent parties



CONTRIBUTORY NEGLIGENCE

- The plaintiff themselves can also be found to be partly or wholly responsible
- Typical examples:
 - Inebriation
 - Poor footwear (untied shoelace)
 - Forgetting glasses
 - Not looking where you are going
- There also can be “inevitable accidents” where no one is to blame





3.

RISK EDUCATION
DAMAGES



GENERAL PRINCIPLE OF DAMAGES

- Damages are meant to be compensatory.*
- The goal is to put the plaintiff in exactly the same position they would have been had the negligent act or omission never taken place.
- For personal injury cases, this is complicated. Without telepathy and a crystal ball, how do you put a dollar figure on pain, or evaluate future losses that could last a lifetime.

*Other forms of damages include Aggravated, Punitive, and Restitutionary, but these are not usually applicable in personal injury cases.



CATEGORIES OF DAMAGES

Damages that can be claimed by personal injury plaintiffs include:

1. General or non-pecuniary damages
2. Past & future income loss
3. Future care costs
4. Out-of-pocket expenses
5. *Family Law Act* plaintiff damages
6. Pre-Judgment Interest
7. Costs



CALCULATING DAMAGES: CONSIDERATIONS

General

- Putting a value on pain & suffering
- Compare to precedents with similar injuries
- Focus on how this individual's life will be affected
- More art than science

Income Loss

- Past income loss is easier to calculate, but subject to duty to mitigate
- When will they return to work (if at all)
- Lost opportunity for promotion
- How much would they have earned over the rest of their career?
- When would they have retired. When will they?

Future Care

- What future therapy and treatment might they need to life expectancy?
- Medical devices & home modification
- Occupational therapy, psychotherapy, physiotherapy, massage, chiropractic
- Medication expenses
- Attendant care



4.

RISK EDUCATION
**RESOLVING
CASES**

 RISKALLIANCE



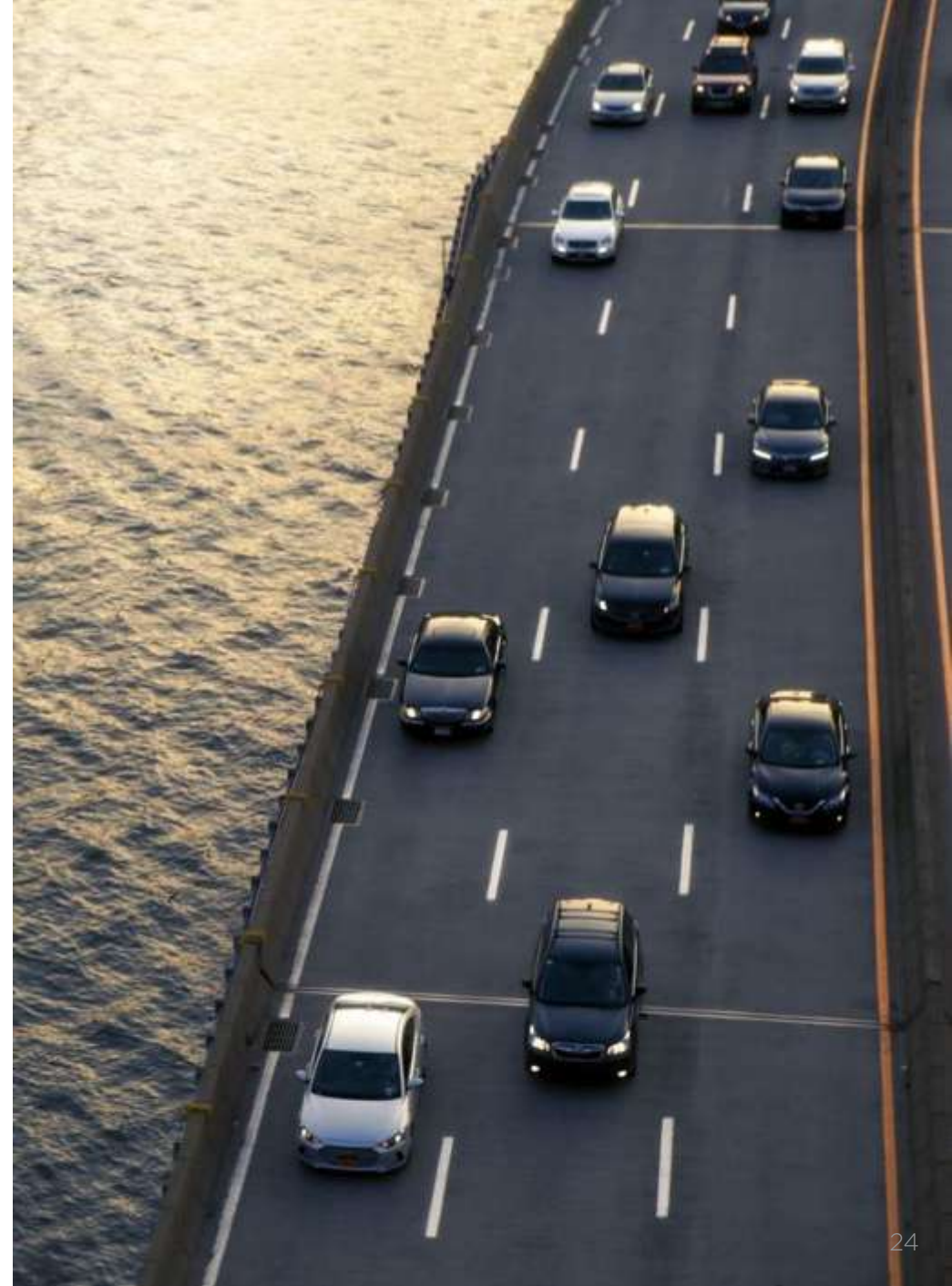
HOW CASES RESOLVE

- At least 98% of personal injury cases resolve with a settlement and never go to trial
- Settlement does not necessarily mean every party pays
- It is still important to prepare each case as though it is going to trial
- It can take 3 – 7 years for a case to get to trial, and many settlements happen right before trial



FINDING AN OFF-RAMP

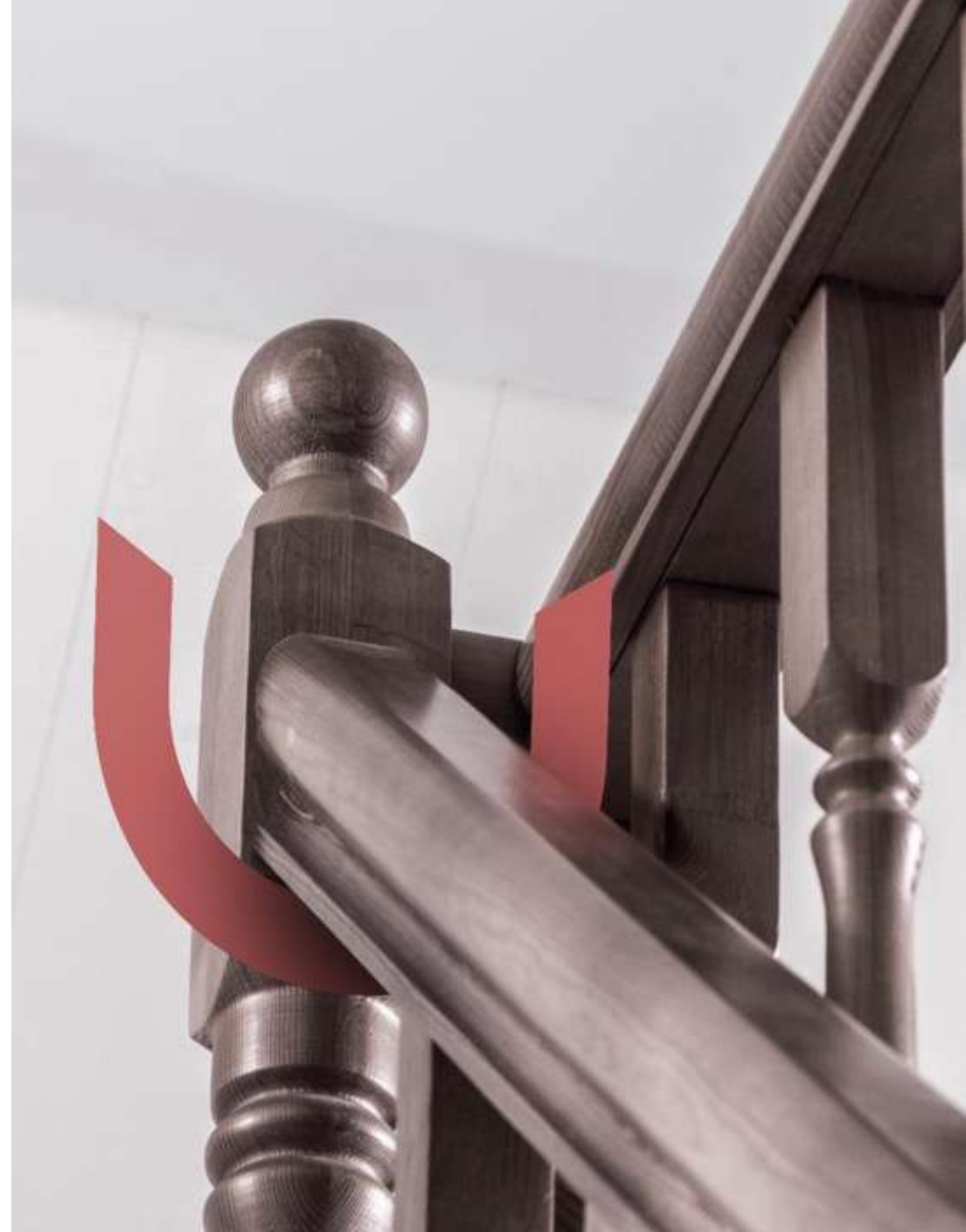
- Settlement can be reached at any stage of a lawsuit
- Both sides are looking for the right off-ramp. You cannot force the other side to agree.
- In addition to damages, both sides face a costs risk
- Stages of litigation where a case may settle:
 1. Pleadings
 2. Discovery
 3. Mediation**
 4. Pre-Trial
 5. At the Trial Courtroom Door





5.

RISK EDUCATION
CASE STUDIES



TOURISM ATTRACTION TRIP & FALL CASE

FACTS

- In 2018, plaintiff trips on heaved sidewalk outside of a popular tourist attraction that has seen more than 4 million visitors since it opened in 2013.
- Granite pavers inset in concrete first heaved after the 2013-14 winter. The landscaping subcontractor came back to repair it under their warranty. The same feature continued to heave in subsequent years with no further repairs.
- Plaintiff was 59 years old, not working but intended to find a job. She sustained a right knee fracture requiring surgery but recovered well. She never went back to work.
- Defendants include:
 - The Tourism Attraction
 - The General Contractor
 - The Landscaping Subcontractor
 - The Architect
 - The Landscape Architect

QUESTIONS

1. Who is the most at fault?
2. Is anyone else at fault? If so, who?
3. What were the approximate damages:
 - a) \$0
 - b) \$10,000
 - c) \$50,000
 - d) \$250,000
 - e) \$1,000,000.

TOURISM ATTRACTION TRIP & FALL CASE

ANSWERS

1. Who is the most at fault?

The Tourism Operator. They were the Occupier of the space, responsible for rectifying the issue, but let it linger for years.

2. Is anyone else at fault? If so, who?

The case settled at mediation. Everyone contributed *except Pro-Demnity*.

3. What were the approximate damages:

c) \$50,000

The actual value of the settlement was \$68,000, which included legal expense.

RESISTANCE BAND HOOK CASE

FACTS

- In November 2019, plaintiff is taken to a new upscale private gym by his personal trainer on the first week after it opened.
- On his first use, resistance band hook detached from the wall and struck his throat, causing pneumothorax, laceration, bruised vocal chord, PTSD, trouble swallowing.
- Hook was secured to 3/4-inch plywood blocking when manufacturer's guidelines required 2-inch penetration into wood stud.
- Plaintiff was 35 years old, PhD student in laboratory science who graduated on time and found job at a lab in France.
- Defendants include:
 - Gym Owner
 - General Contractor
 - Drywall Subcontractor
 - The Architect
 - Designer (the prime consultant)
 - Structural Engineer

QUESTIONS

1. Who is the most at fault?
2. Is anyone else at fault? If so, who?
3. What will be the largest damages claim:
 - a) General Non-Pecuniary
 - b) Income Loss
 - c) Future Care
 - d) Out of Pocket Expenses

RESISTANCE BAND HOOK CASE

DISCUSSION

1. Who is the most at fault?

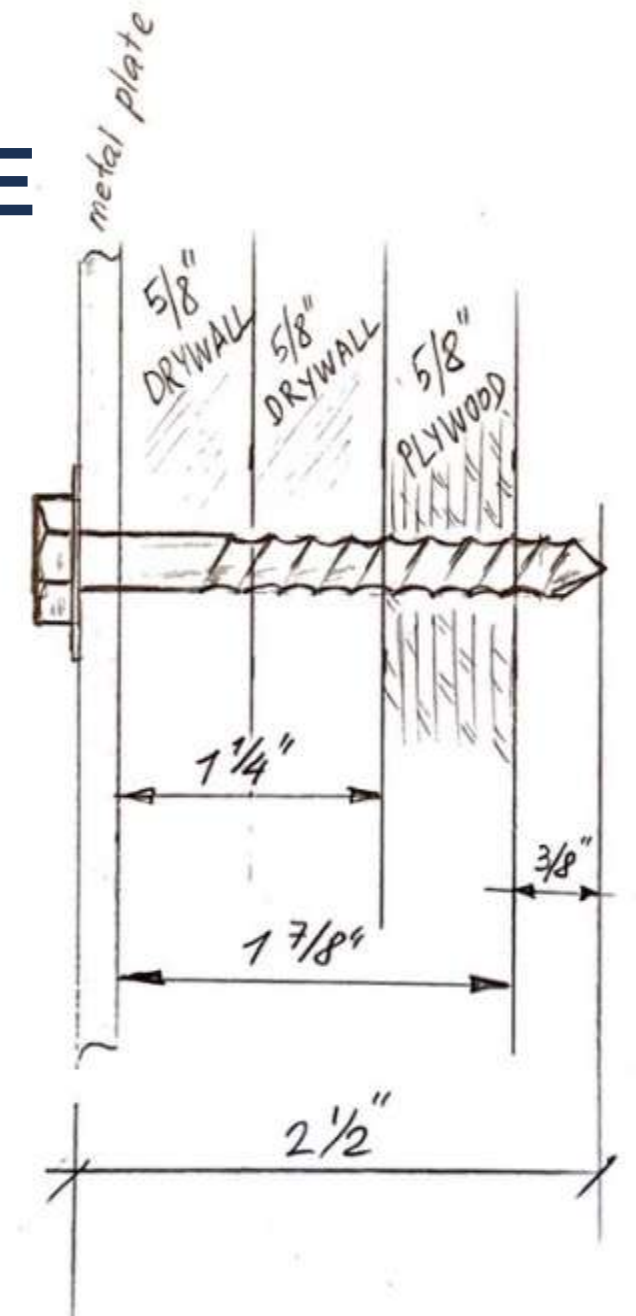
The gym. They selected the equipment, invited the plaintiff to their premises which were not safe.

2. Is anyone else at fault? If so, who?

General contractor and drywall subcontractor were responsible for insufficient blocking, not installing per manufacturer's guidelines. Risk on the designer for not co-ordinating with structural, small risk on architect as sealing the designer's drawings.

3. Largest damages claim:

- a) General non-pecuniary damages.



RAPID FIRE ROUND – WHO WAS SUED?

Urinal Case

Plaintiff trips and fractures right hip at trough-style urinal with a four-inch step located at a hospital.

Falling Millwork Case

Plaintiff suffers concussion while eating at a steakhouse when wooden millwork falls and strikes him on the head.

Fell Into Well Case

Plaintiff suffered vertebral fractures, lacerations and concussion when she fell into 8-foot-deep window well at her condominium.

Kid Playing Tag Case

While playing “Octopus”, child plaintiff’s arm was caught on door handle in a gym and was “torn apart”.

CASES SHOW DESIGNING FOR DIGNITY IS IMPORTANT

- None of these scenarios were dignified, nor is recovery from injury dignified.
- The legal process even less so.
- Most frequent personal injury lawsuits my team handles: slip & falls and trip & falls.
- These injuries disproportionately affect the mobility impaired and the elderly.



THE END

OVER TO LESLIE...



THE ARCHITECT'S PERSPECTIVE

Leslie Parker, Architect, Risk Services Advisor

THE ROLE OF RISK ALLIANCE ARCHITECTS IN CLAIMS

- Assist the claims team in understanding the technical issues.
- Provide a professional opinion for each claim in the form of a report.
- Attend initial meetings with architects.
- Attend mediations and other court proceedings.

DATA ON CLAIMS I'VE REVIEWED SO FAR

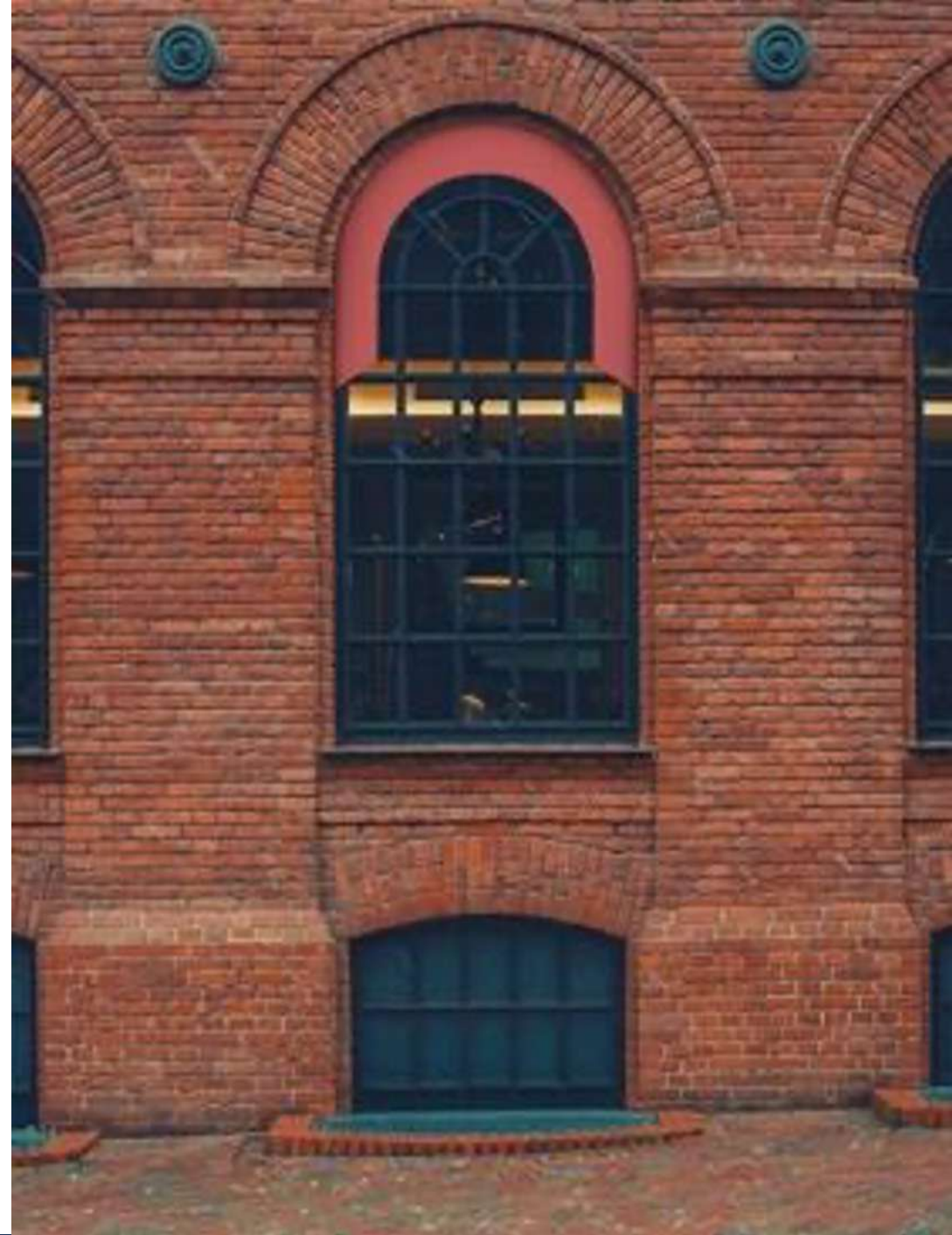
- Reviewed 73 claims (and counting).
- 15% were personal injury claims (11 claims).
- 82% of personal injury claims were trip and fall
- Seven claims were exterior and four interior.
- A stair or step was involved in seven claims.
- A different type of obstruction was involved in three claims
- Two claims involved renovations to stairs.



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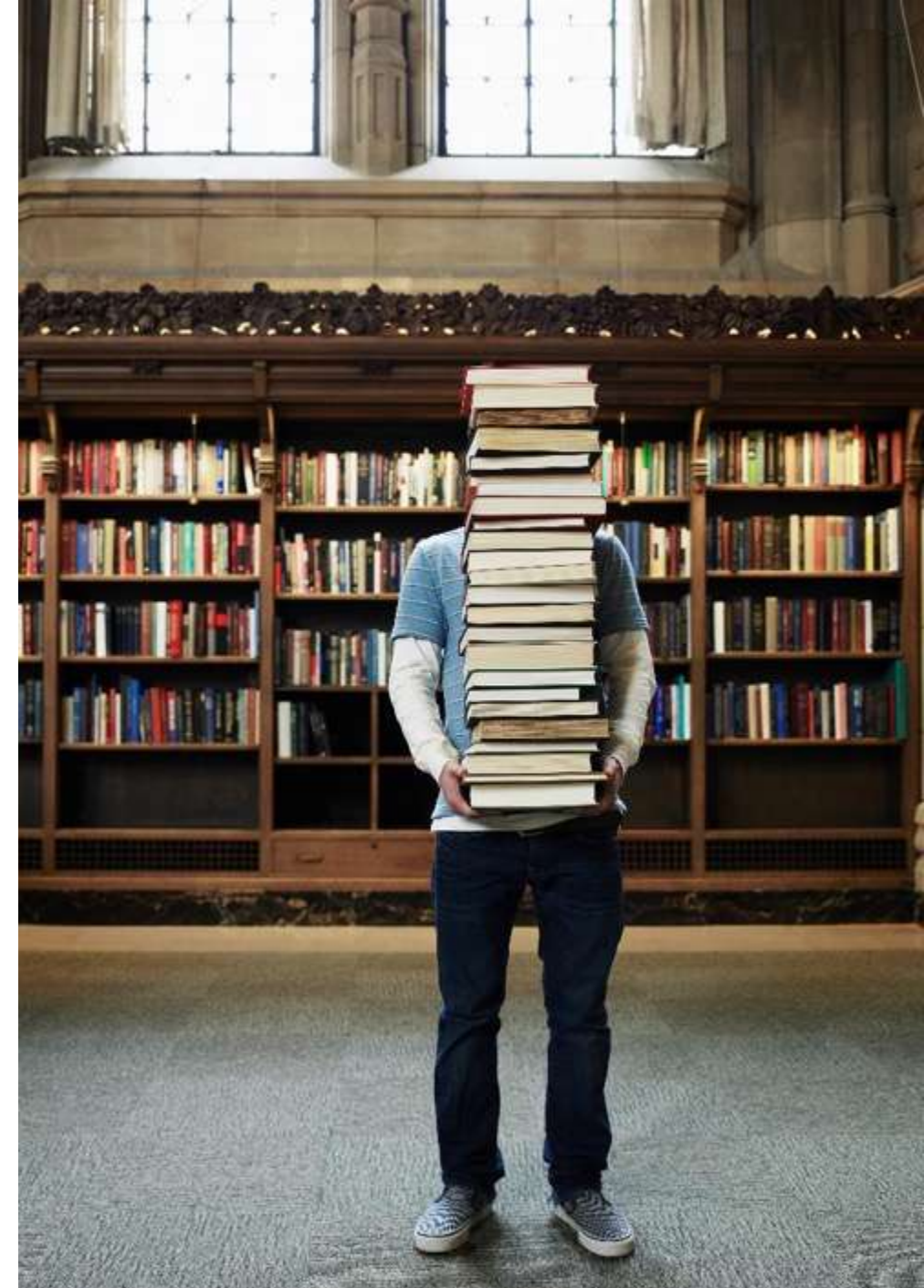
ASSESSING PERSONAL INJURY CLAIMS

- Identify the legislation under which the personal injury falls.
- Identify the consultant responsible for that scope of work.
- Review technical and construction phase documents.



REGULATIONS RELATED TO PERSONAL INJURY CLAIMS

- Applicable Building Code.
- *Accessibility For Ontarians With Disabilities Act.*
- Municipal By-laws.
- Municipal Accessibility Standards.
- *Occupational Health and Safety Act.*
- Ontario Human Rights Code.



THE 'ONTARIO BUILDING CODE'

- The Building Code Act regulates 'BUILDINGS'.
 - Interior spaces.
 - Building envelope.
 - Structures that are physically attached to buildings – i.e., Stairs or ramps.
- The Building Code also regulates 'Barrier-Free Paths of Travel' to exterior parking areas and to passenger loading zones as prescribed under 3.8.2.2.
- While not always clear cut, the Building Code does NOT regulate exterior spaces such as:
 - Exterior paths of travel at grade level that are not regulated under 3.8.2.2.
 - Exterior paths of travel safe from fire exposure.



‘THE ACCESSIBILITY STANDARD FOR THE DESIGN OF PUBLIC SPACES’

- Intended to apply to public spaces not already regulated under the Ontario Building Code.
- Regulates most applicable land developments in Ontario constructed by public, private and not-for-profit organizations.
- The scope may overlap with municipal by-laws.
- There are requirements for site features such as ‘Sidewalks and Walkways’, ‘Ramps’, ‘Stairs’ and ‘Curb Ramps’ .
- ‘Stair’ is not defined under this regulation. There is a potential that any step in a path of travel may be interpreted as a ‘Stair’.



RESPONSIBILITY FOR SCOPE IN A CLAIM

- Determine if the architect was responsible.
- Determine if the architect retained the responsible party.
- Determine what agreement was used.
- Check there was a clear delineation of work and that it is documented.
- Check the architect followed the letter of the scope delineation on their documents and site reviews.

Clear construction agreements are important



KEY RISK AREAS FOR PERSONAL INJURIES



- One or two riser step – known as an “Air Step”.
- Unexpected and atypical height level changes.
- Surface irregularities caused by frost heave or other factors.
- Renovations and code changes that impact accessibility.
- Failure to document potential hazards during site review.



PROTECT YOURSELF

- Solicit and record decisions on safety.
- Request client decisions in writing.
- Document your consultant meetings and interactions.
- Document the barrier-free path of travel(s).
- Document the version of the building code that applies to your project.
- Create checklists for key risk areas to review during site review.



IMPLEMENT A PROCESS TO DESIGN FOR DIGNITY

- Discuss accessibility/inclusivity goals before starting.
- Identify requirements for all paths of travel.
- Consider who will use each path of travel and potential barriers to use.
- Review the design with your client frequently.
- Coordinate with your consultant team.
- Perform a final walk-through of the design.
- Have a look at our conference article.



“Mr. Smith’s office doesn’t have a door. You have to batter your way through the wall.”

Remember, you can do everything right and still be named in a claim. Report it to us.
We are here to assist you.

QUESTIONS?

www.prodemnity.com



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