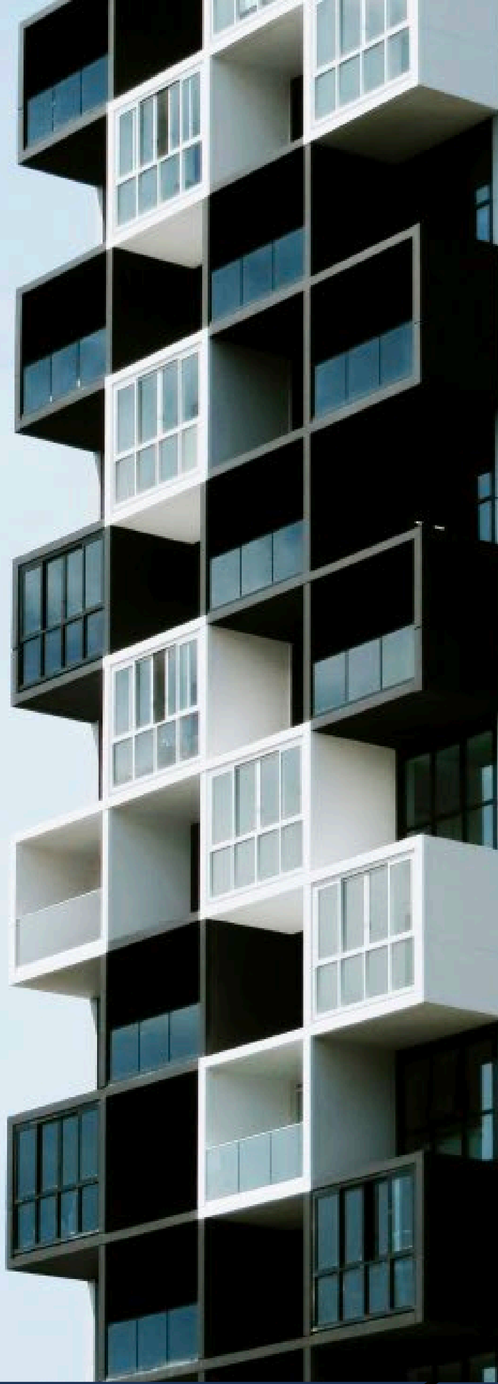
BLACKBERRY/BLACK SWAN

Design Decisions on Trial (CE18)

Leslie Parker, Senior Architect,
Risk Services, Pro-Demnity Insurance Company
2026 OAA Conference
May 14, 2026



40 Years PRODEMNITY | AN ALLIANCE FOR PROTECTION

CRACKBERRY


BlackBerry
Fri, May 20
12:21 PM
3G
Messages
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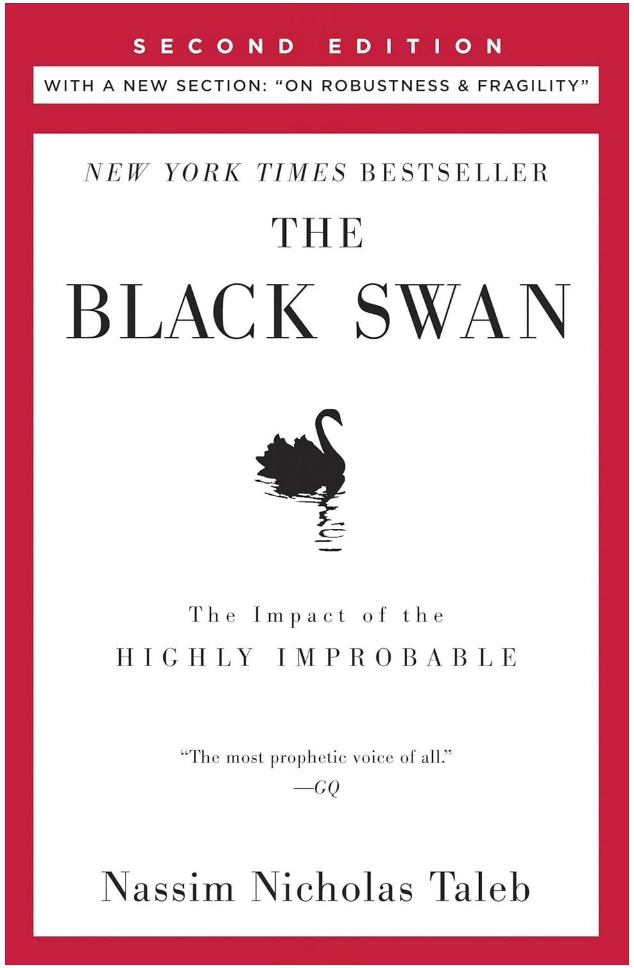
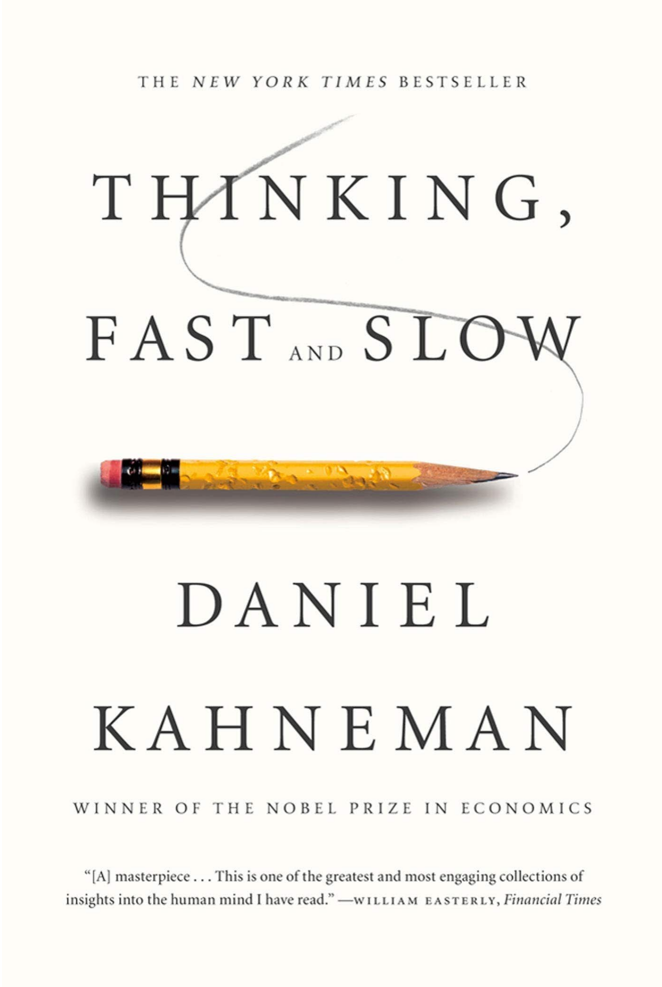
FAILURE

RISK MANAGEMENT, WHAT IS IT GOOD FOR?

THE IDEA OF BLACK SWANS





SHOW OF HANDS

IT WAS A TRICK

I have good contracts in place

I implement QA/QC measures

I solicit peer reviews of my work

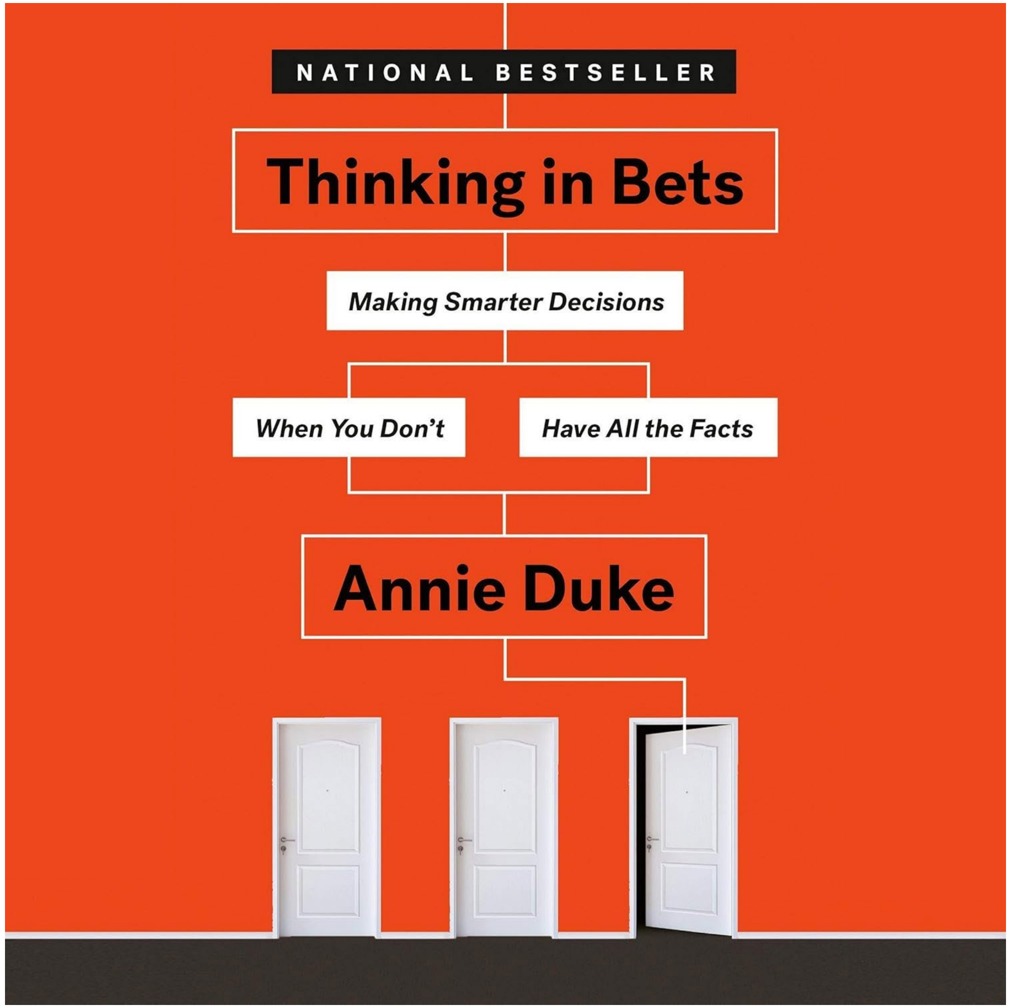
I'm a nice person

I avoid conflict

I rarely make mistakes

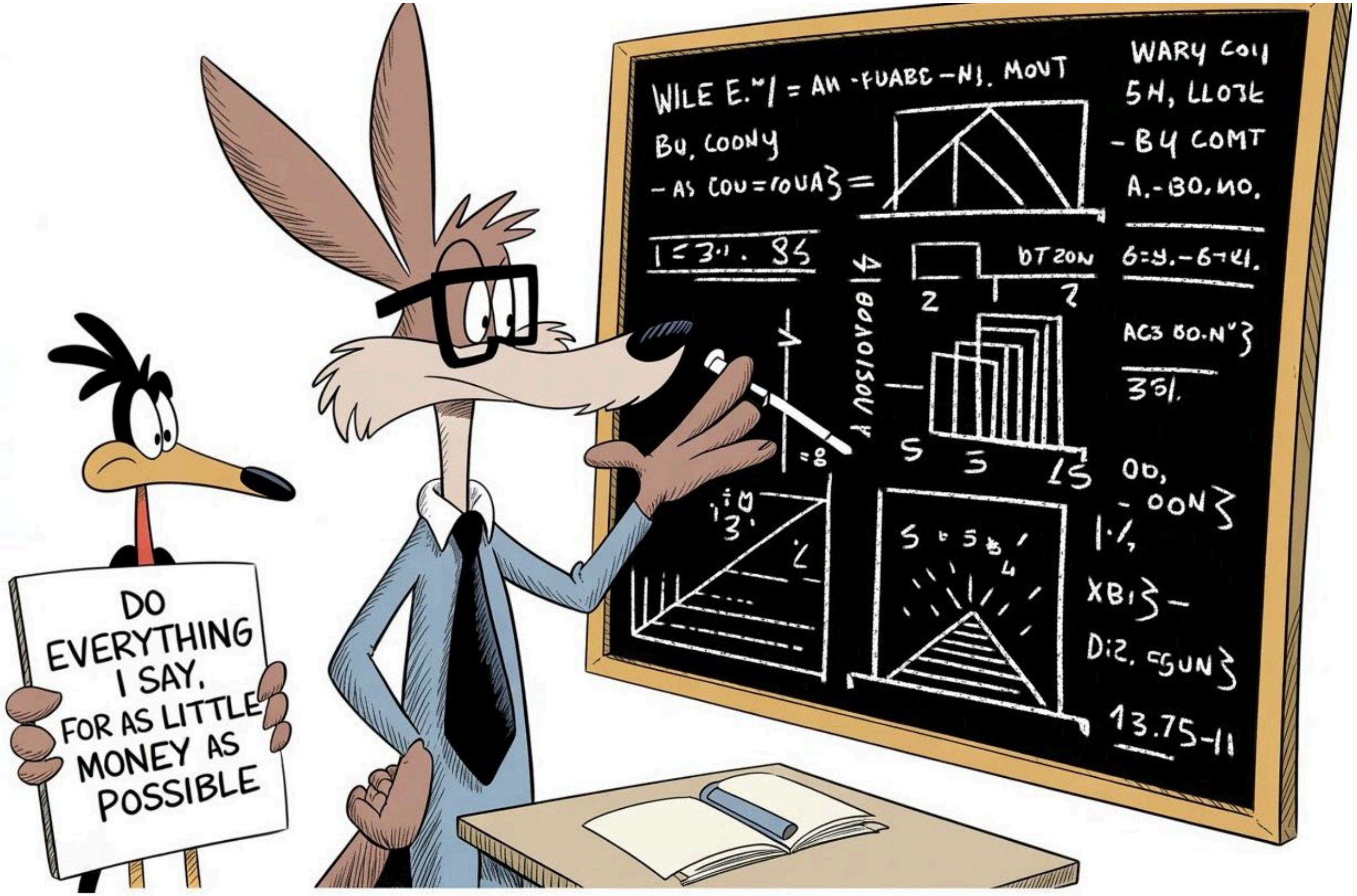
I'm a good architect

THINKING IN BETS



THINKING IN BETS MEANS RESISTING OUTCOME BIAS

PROBABILITY OF LOSING A CLIENT VS BEING SUED WITH A POOR CONTRACT



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RISKY BUSINESS

Document risk - Every building is unique

Volatility of market – COVID, 2008 CRASH

Changes in technology – AI, BIM

Climate change – Zero Carbon, Passive House

Regulatory changes – 2024 Building Code

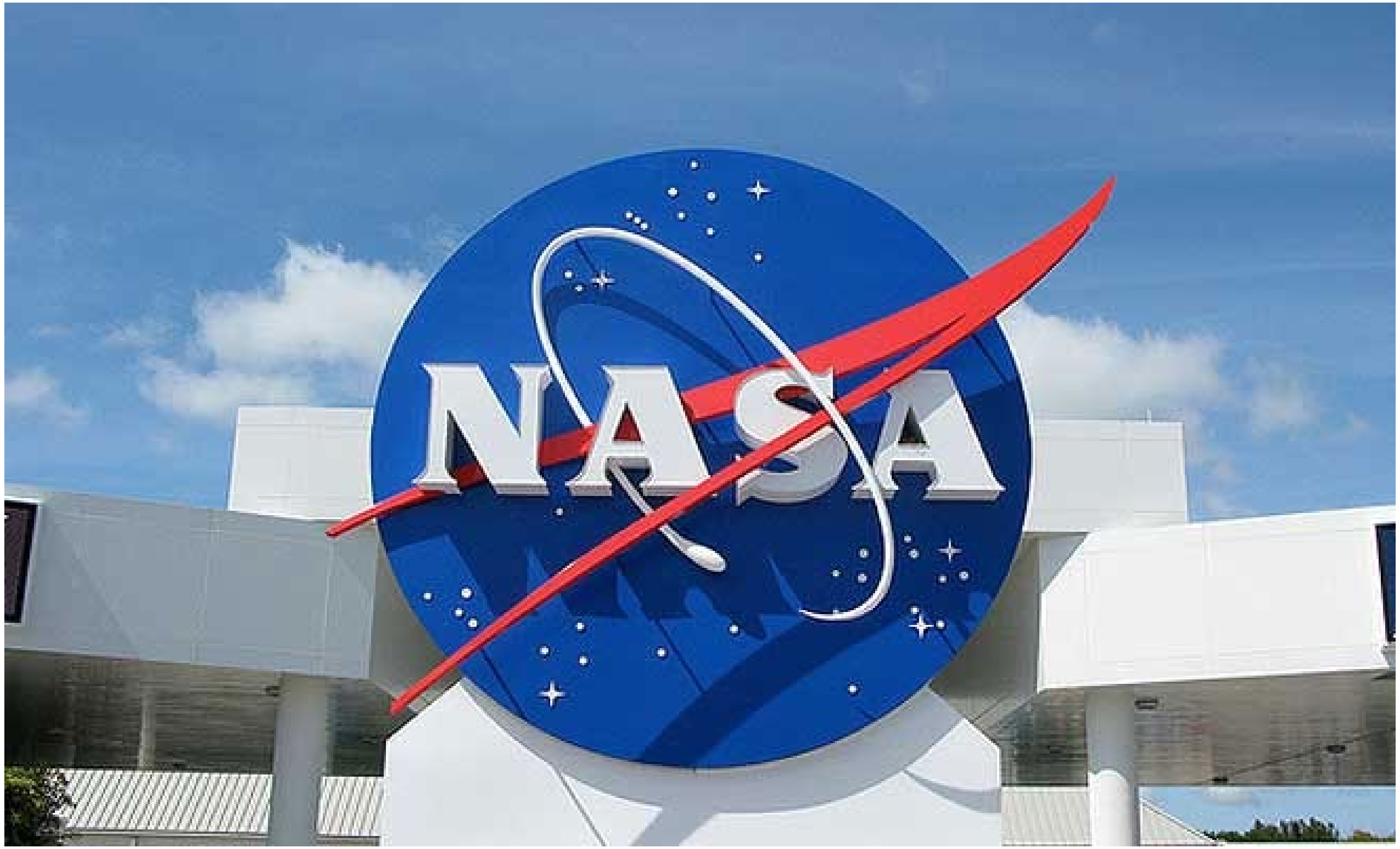
Innovations in materials – Influx of new products

Innovations in construction methods – Mass Timber, Modular

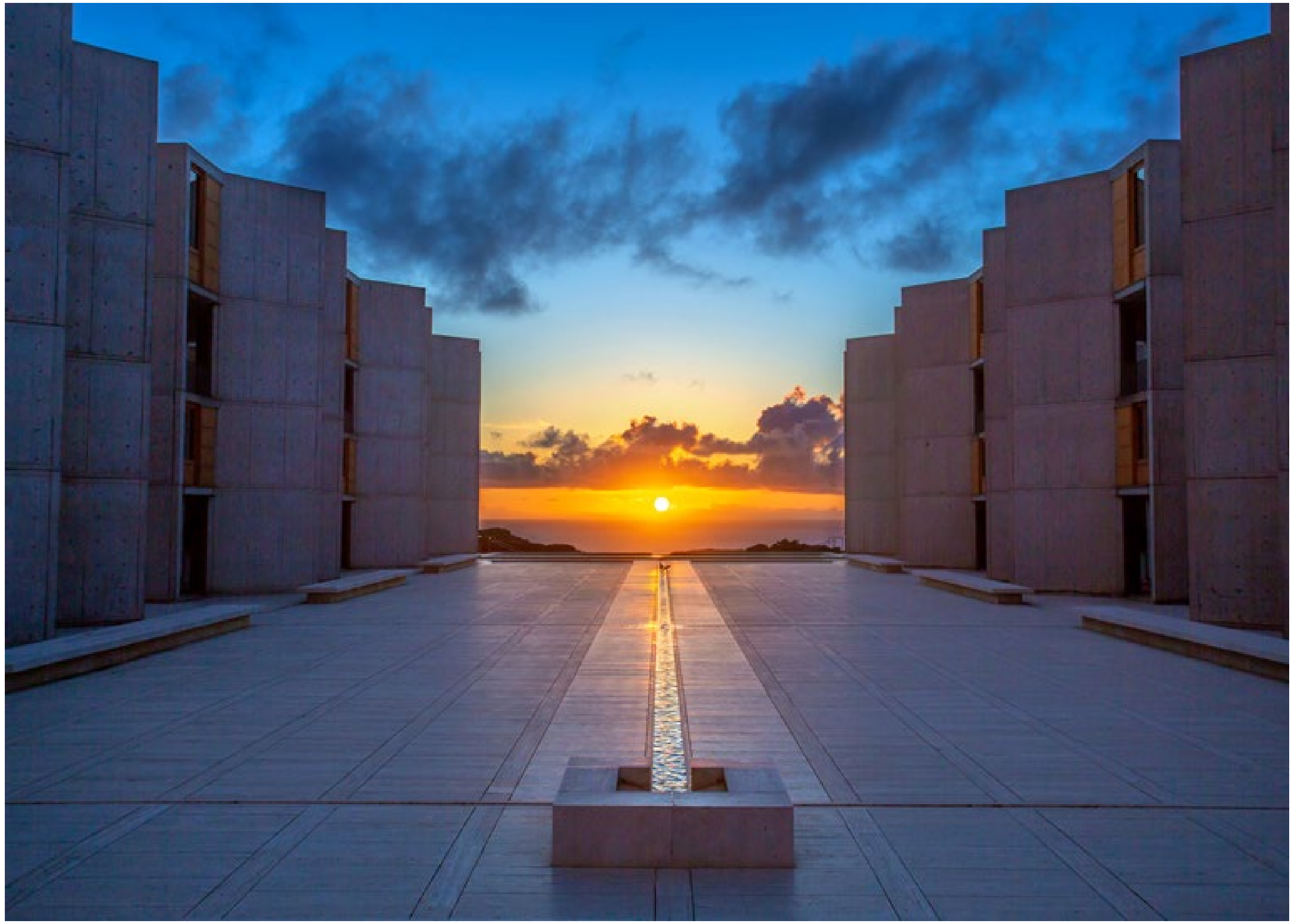
Changes in Project delivery – Changing expectations

Procurement methods – Increasing transfer of risk

SMART PEOPLE, BAD DECISIONS

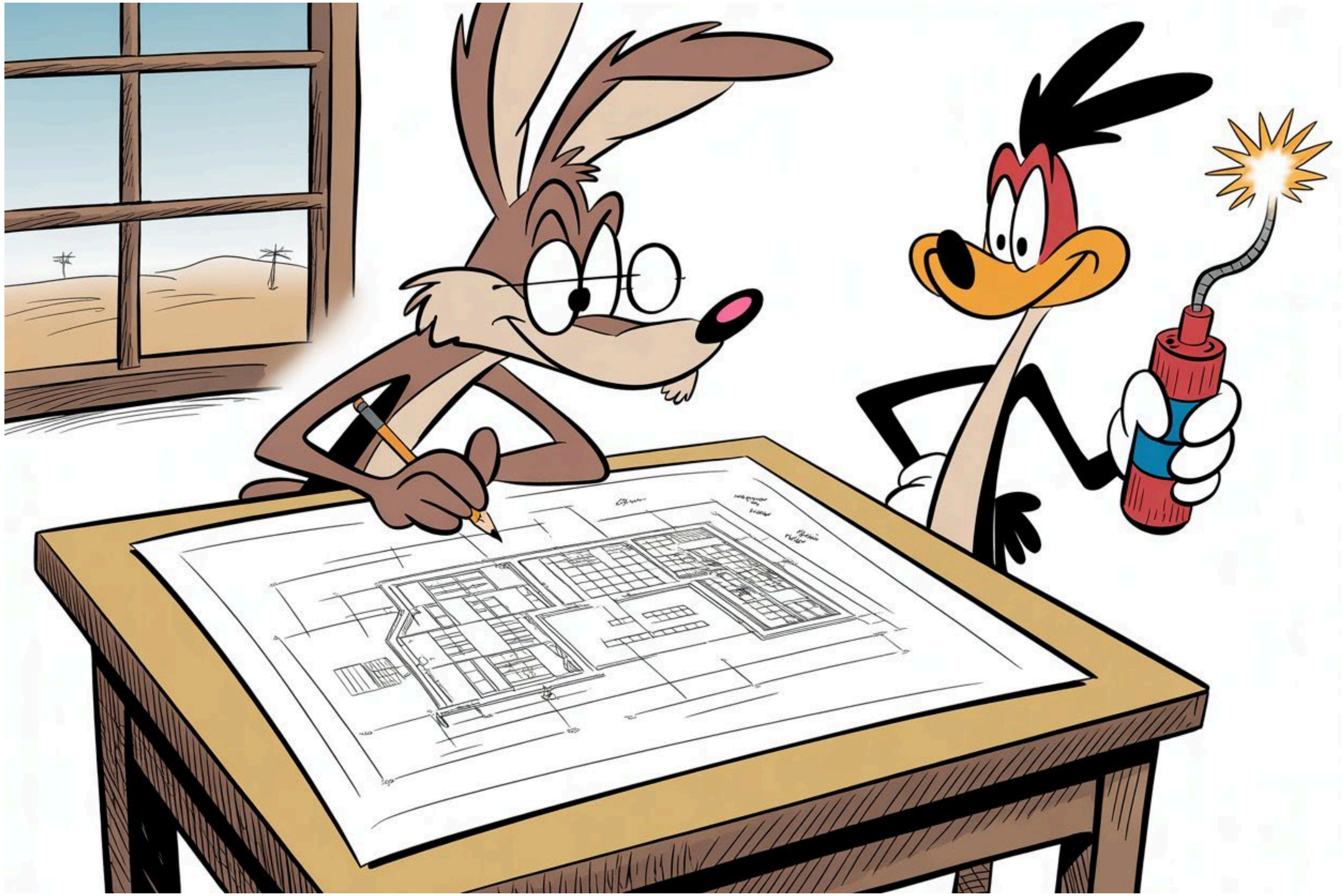


GOOD PROCESSES CAN MAKE GREAT THINGS HAPPEN



Salk Institute, Louis Kahn

YES, BUT WHAT ABOUT PEOPLE?



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THE CAST OF CHARACTERS

MICHAEL
'I'M SO EXCITED ABOUT MY FIRST PROJECT'
SCOTT

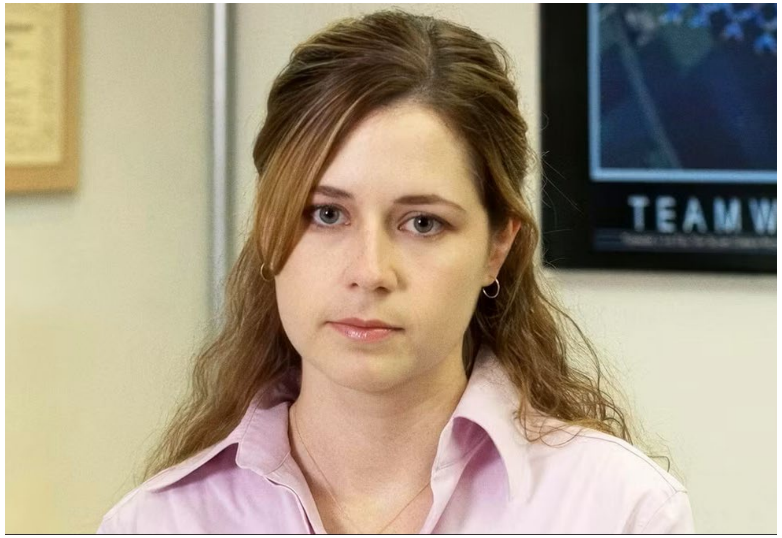
RYAN
'WHAT IF WE JUST VALUE-ENGINEERED THE WHOLE THING'
HOWARD

JAN
'I'M NOT GOING TO COMPROMISE ON THE VISION'
LEVINSON

Characters from The Office (NBC)

THE CAST OF CHARACTERS

TOBY
'I NEED TO RUN THIS BY THE COMMITTEE'
FLENDERSON



PAM
'YOU CAN TRUST ME'
BEESLEY

Characters from The Office (NBC)

MICHAEL 'I'M SO EXCITED ABOUT MY FIRST PROJECT' SCOTT

And I knew exactly what to do. But in a much more real sense, I had no idea what to do.

LET'S VOTE: YOUR SUCCESS WITH 'MICHAEL' PROJECTS

67-100% *"I make money and I'd do it again"*

33%-66% *"It's a coin flip"*

0%-32% *"Never again"*

PRO-DEMNITY ‘FAMILY FEUD’

Michael is most likely to…

5. NOT SUPPORT PROPER DUE DILIGENCE, SITE REVIEW AND THIRD-PARTY INSPECTIONS.

4. MAKE UNAPPROVED CHANGES ON SITE TO THE PERMIT DRAWINGS.

3. THREATEN, BULLY AND FEEL WRONGED.

2. FIRE HIS ARCHITECT, THEN DEMAND THE ELECTRONIC DRAWINGS.

1. **STOP PAYING INVOICES, THEN ALLEGE THE ARCHITECT MADE ERRORS AND OMISSIONS TO JUSTIFY THEIR NON-PAYMENT.**

STOP ASKING TO BE PAID…OR ELSE

Facts of One Claim (BUT Typical of Many)

- New auto repair shop. No formal contract – hourly fee per email.
- Owner stopped paying the architect, architect kept working for another four months.
- Owner turned verbally abusive. Accused the architect of making a decision on the structural system, half a year previous, without their approval.
- Architect decided to resign and then filed a lien for unpaid work.
- The owner retaliated by filing a legal action, claiming the architect's decisions delayed the work, and that they were inflating their invoices.

LET'S BRAINSTORM

Risk Management Before you Sign

4. DUE DILIGENCE – REFERENCES, FINANCIALS.

3. CHECK THAT THE BUDGET AND TIMELINE FOR THE PROJECT ARE REALISTIC

2. HAVE CLEAR NON-PAYMENT TERMS IN YOUR CONTRACT AND 'RULE' BASE THOSE TERMS.

1. BE CAREFUL WITH HOURLY FEES

RYAN 'WHAT IF WE JUST VALUE-ENGINEERED THE WHOLE THING' HOWARD

If I had to, I could clean out my desk in five seconds, and nobody would ever know that I'd ever been here. And I'd forget, too.

LET'S VOTE: YOUR SUCCESS WITH RYAN PROJECTS

67-100%	*"I make money and I'd do it again"*
33%-66%	*"It's a coin flip"*
0%-32%	*"Never again"*

PRO-DEMNITY 'FAMILY FEUD'

Ryan is most likely to...

5. EXPECT ONLY MINIMAL DRAWING SETS AND SPECIFICATIONS, AND NOT SUBMIT PROPER SHOP DRAWINGS AND PRODUCT DATA.

4. SUGGEST SUBSTITUTIONS WHICH THE ARCHITECT IS EXPECTED TO AGREE TO.

3. EXPECT THE ARCHITECT'S INSURANCE TO FUND EVERY ARCHITECTURAL ERROR DURING CONSTRUCTION, EVEN IF EVERYTHING ELSE HAS BEEN PERFECT.

2. HAVE POOR WORKMANSHIP RESULTING IN LEAKY BUILDINGS.

1. **NOT CORRECT DEFICIENCIES IN THE TARION PERFORMANCE AUDITS WITHIN A REASONABLE TIME FRAME.**

'DINE AND DASH' DEVELOPERS

Facts of One Claim (BUT Typical of Many)

- New condominium, Ottawa
- Architect was retained via fee proposal letter. The developer's team also included an envelope engineer.
- During construction the architect performed regular site visits, relying on the contractor to document deficiencies, and to circulate shop drawings.
- Occupied in two phases in 2017 and 2019. The architect fully completed their contract.
- The architect was not involved or aware of any deficiency reviews or 'Performance Audits'.
- In 2025, six years later, the architect was served with a claim for envelope failures – the first they had heard of them.
- The developer /construction manager has gone out of business.

LET'S BRAINSTORM

Risk Management Ideas

4. HAVE A WELL-WRITTEN CONTRACT AND KEEP GOOD RECORDS.

3. BE EXPLICIT ABOUT WHAT IS NOT INCLUDED IN CONTRACT.

2. CHECK SUBMITTALS HAVE ADEQUATE DETAIL AND ARE STAMPED.

1. DO NOT SIGN ANYTHING (SCHEDULE G!) FOR SERVICES THAT YOU DID NOT PROVIDE

JAN 'I'M NOT GOING TO COMPROMISE ON THE VISION' LEVINSON

My psychiatrist thinks that I have some self-destructive tendencies, and that for once, I should indulge them

LET’S VOTE: YOUR SUCCESS WITH JAN PROJECTS

67-100%	*“I make money and I’d do it again”*
33%-66%	*“It’s a coin flip”*
0%-32%	*“Never again”*

PRO-DEMNITY 'FAMILY FEUD'

Jan is most likely to...

5. BE A LAWYER, OR KNOW A LAWYER, AND SEE LITIGATION AS A REASONABLE WAY OF RESOLVING DISPUTES.
4. NOT BE ABLE TO PROVIDE DECISIONS ON AESTHETIC ISSUES LIKE FINISHES, FIXTURES AND MATERIALS IN A TIMELY WAY.
3. HAVE WEALTHY NEIGHBOURS WHO WILL START LITIGATION OVER THE CONSTRUCTION WORK.
2. REALIZE LATE INTO CONSTRUCTION THAT THE COST OF THE WORK HAS EXCEEDED BUDGET.
1. **GET IN A DISPUTE WITH HER CONTRACTOR OVER THE QUALITY, COST AND/OR SCHEDULE OF THE WORK, WHICH OFTEN INVOLVES TERMINATION OF THAT CONTRACTOR.**

I LIKE YOU, BUT…

Facts of One Claim (BUT Typical of Many)

- New single-family detached home. Budget of $1.6 million. OAA 800 contract.
- Owner selected the contractor with lowest budget, against architect's verbal recommendation.
- Owner entered a cost-plus contract with no upset limit, against architect's verbal advice.
- Project was impacted by COVID-19, owner-initiated changes, and trade deficiencies. Cost escalated to approximately $2 million. No clear completion date and still no fixed price.
- The relationship between owner and contractor deteriorated, culminating in termination.
- Owner sued the contractor; contractor filed a third-party claim against the architect for design changes and drawing errors.

LET'S BRAINSTORM

Risk Management Ideas

4. KEEP WRITTEN RECORDS DOCUMENTING CONCERNS.

3. KEEP WRITTEN RECORDS DOCUMENTING LIMITATIONS OF PROVIDING NAMES OF CONTRACTORS.

2. CONSIDER ADDING INDEMNIFICATION CLAUSES FOR SITUATIONS WHERE THE CONTRACTOR IS PROVIDING PRICING OR BUILDING USING INCOMPLETE DRAWINGS.

1. NOTIFY OWNER WHEN THEIR OWN ACTIONS MAY BE CAUSING A DELAY

TOBY 'I NEED TO RUN THIS BY THE COMMITTEE' FLENDERSON

I am supposed to collect eyewitness accounts. Who saw Dwight do this?

LET'S VOTE: YOUR SUCCESS WITH TOBY PROJECTS

67-100%	*"I make money and I'd do it again"*
33%-66%	*"It's a coin flip"*
0%-32%	*"Never again"*

PRO-DEMNITY ‘FAMILY FEUD’

Toby is most likely to…

5. RETIRE MID-PROJECT AND HAVE SOMEONE LESS QUALIFIED WITH NO PROJECT BACKGROUND TAKE HIS PLACE.
4. GET IN A LETTER WRITING CAMPAIGN WITH THE CONTRACTOR OVER DELAY CLAIMS.
3. BE WINED AND DINED BY THE CONTRACTOR FOR THE PROJECT, WHILE THEY TELL HIM ALL THE THINGS THE ARCHITECT DID WRONG.
2. AVOID HEADACHES WITH THEIR PROCUREMENT DEPARTMENT BY NOT PROCURING IMPORTANT WORK, LIKE INVESTIGATIVE DEMOLITION WORK.
1. **RUN ALL CHANGE ORDERS BY A COMMITTEE, WHO DECIDES TO BILL THEM BACK TO THE ARCHITECT.**

ARCHITECTS WORK FOR FREE, RIGHT?

Facts of One Claim (BUT Typical of Many)

- Hospital renovation with a recurring client - large hospital conglomerate.
- OAA 600 contract with 27 pages of owner-authored supplementary conditions, including architect responsibility for consultant errors and owner right to claim back construction cost increases.
- Owner did not have a complete set of as-built drawings of the hospital.
- Unexpected slab condition discovered during construction – six-figure change order.
- Project manager left mid-project; inexperienced replacement issued a Notice of Default for a list of change orders – including the structural one - and stopped paying the architect.

LET'S BRAINSTORM

Risk Management Ideas

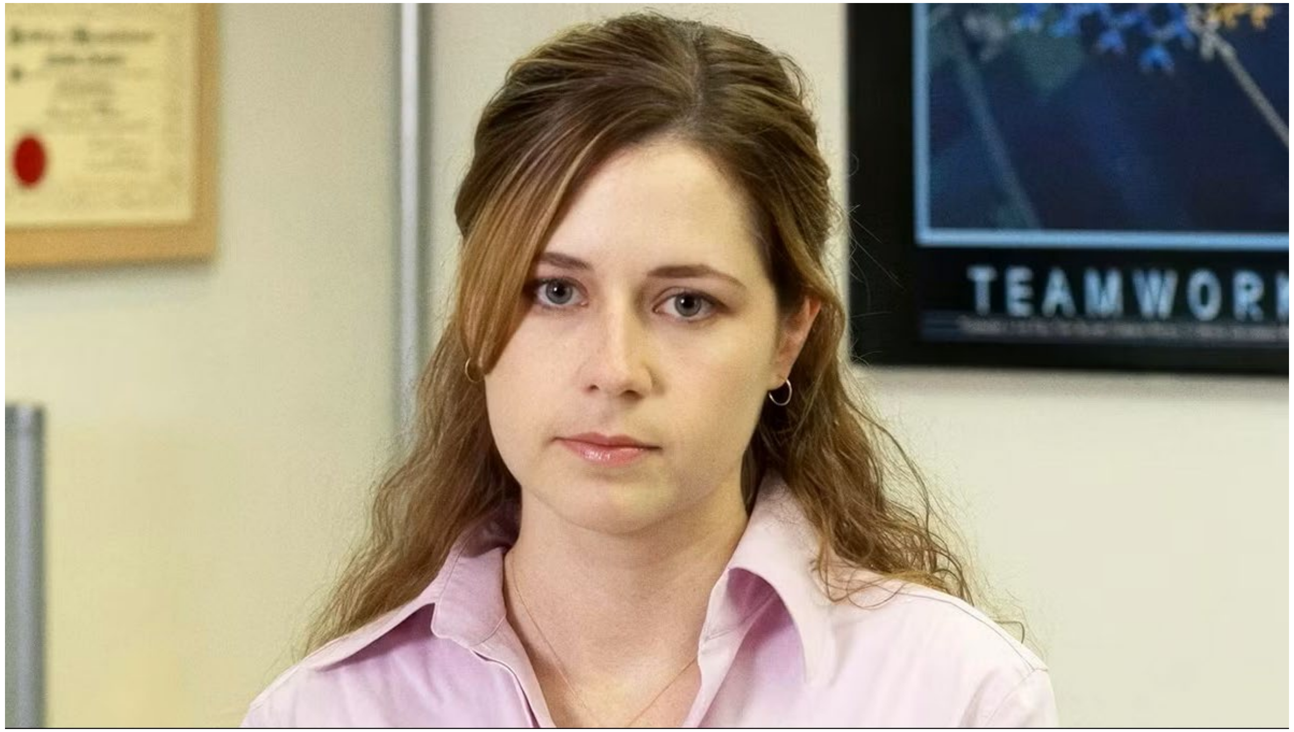
1. DO NOT ACCEPT UNREASONABLE SUPPLEMENTARY CONDITIONS IN YOUR CLIENT AGREEMENT. IF THEY WILL NOT BUDGE, CONSIDER WALKING AWAY.

2. UNDERSTAND THE STATE OF EXISTING BUILDING DOCUMENTATION BEFORE YOU START. IF THERE ARE GAPS BRING FORWARD (IN WRITING) RIGHT AWAY.

3. MAKE SURE YOUR CLIENT UNDERSTANDS THE UNKNOWNS ASSOCIATED WITH CONSTRUCTION WORK IN EXISTING BUILDINGS, AND THEIR COST ESTIMATES AND BUDGETING REFLECTS THIS.

4. BRING FORWARD CLIENT DEMAND LETTERS TO YOUR INSURER BEFORE RESPONDING.

PAM 'YOU CAN TRUST ME' BEESLEY



I hate the idea that someone out there hates me. I even hate thinking that al-Qaeda hates me. I think if they got to know me, they wouldn't hate me.

LET'S VOTE: YOUR SUCCESS WITH PAM PROJECTS

67-100%	*"I make money and I'd do it again"*
33%-66%	*"It's a coin flip"*
0%-32%	*"Never again"*

PRO-DEMNITY ‘FAMILY FEUD’

Pam is most likely to…

5. EXPECT ‘EFFICIENCIES’ IN COST IN DRAWING PRODUCTION AND ARCHITECTURAL CONSTRUCTION SERVICES

4. LOSE COLLECTIVE KNOWLEDGE AND EXPERIENCE WHEN A LONG-TERM EMPLOYEE LEAVES THE BUSINESS.

3. TAKE AN ABRUPT CHANGE IN DESIGN DIRECTION OR PROCEDURES WHEN THERE IS NEW MANAGEMENT OR NEW LEADERSHIP DIRECTION.

2. NOT SIGN A CONTRACT – WE TRUST EACH OTHER, DON’T WE?

1. **USE THE WORKING RELATIONSHIP AS LEVERAGE WHEN THERE IS A DISPUTE.**

EVERYBODY LOVES PAM

Examples from our Prior Case Studies

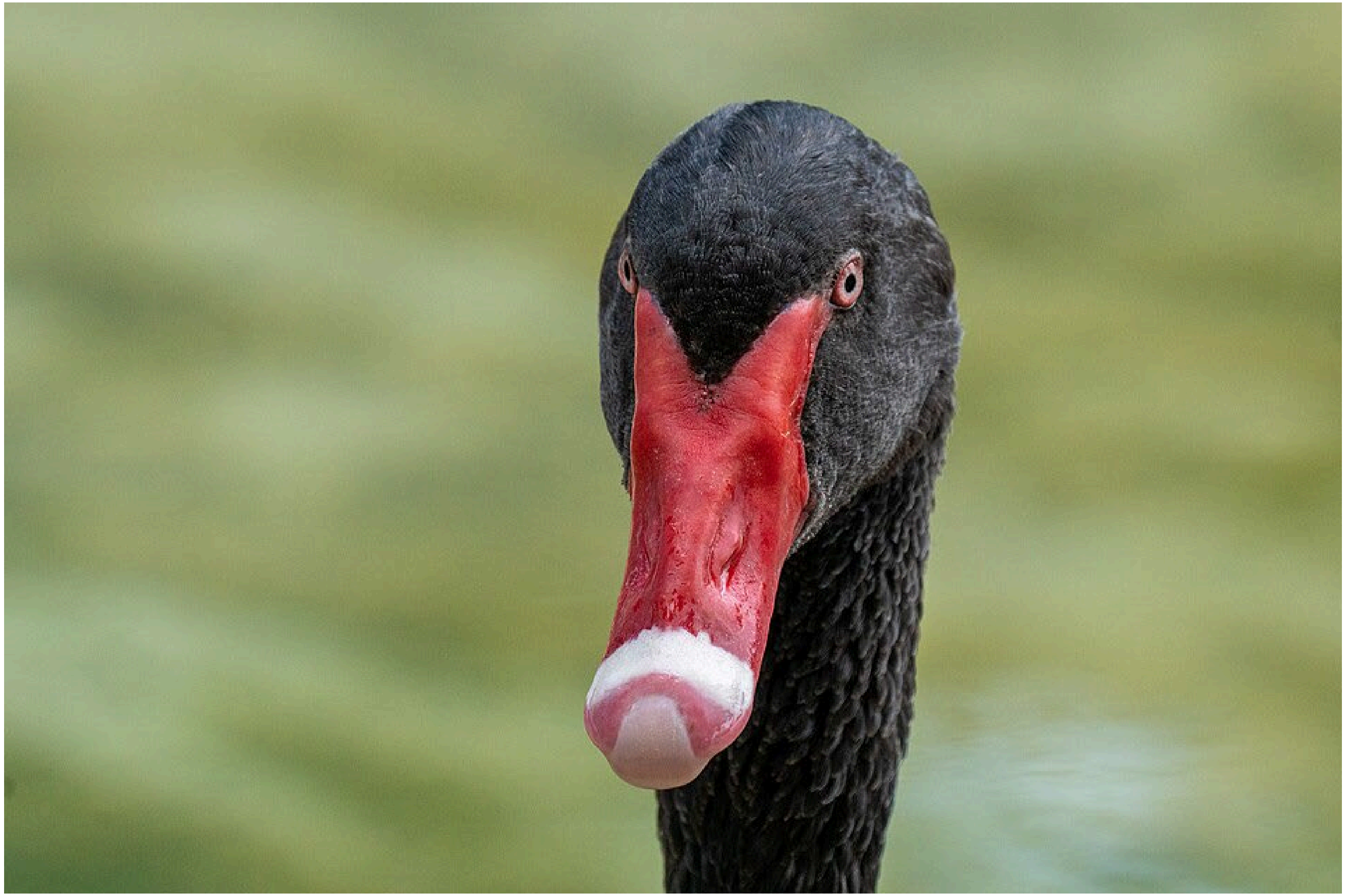
- ‘Trust’ in hospital renovation - recurring client ‘Toby’ :
  - Architect trusted supplementary conditions wouldn’t be a problem.
  - Architect trusted long-term project manager would manage the financial committee.
- ‘Trust’ in the condominium claim - recurring client ‘Ryan’:
  - Architect trusted a formal contract wasn’t needed.
  - Architect trusted the developer would keep project records.
  - Architect trusted the developer would document site deficiencies in meeting minutes.

LET'S BRAINSTORM

Risk Management Ideas

1. IMPLEMENT 'RULES-BASED' LOGIC WHEN INSISTING ON PROPER CONTRACTS.
2. DON'T ASSUME DESIGN STANDARDS AND PROCEDURES CARRY OVER FROM PAST PROJECTS. PUT EVERYTHING IN WRITING.
3. KEEP YOUR OWN RECORDS – DON'T TRUST OTHERS TO KEEP THEM FOR YOU.
4. CONTACT PRO-DEMNITY BEFORE ATTEMPTING TO SETTLE DISPUTES 'IN THE INTEREST OF KEEPING THE RELATIONSHIP'

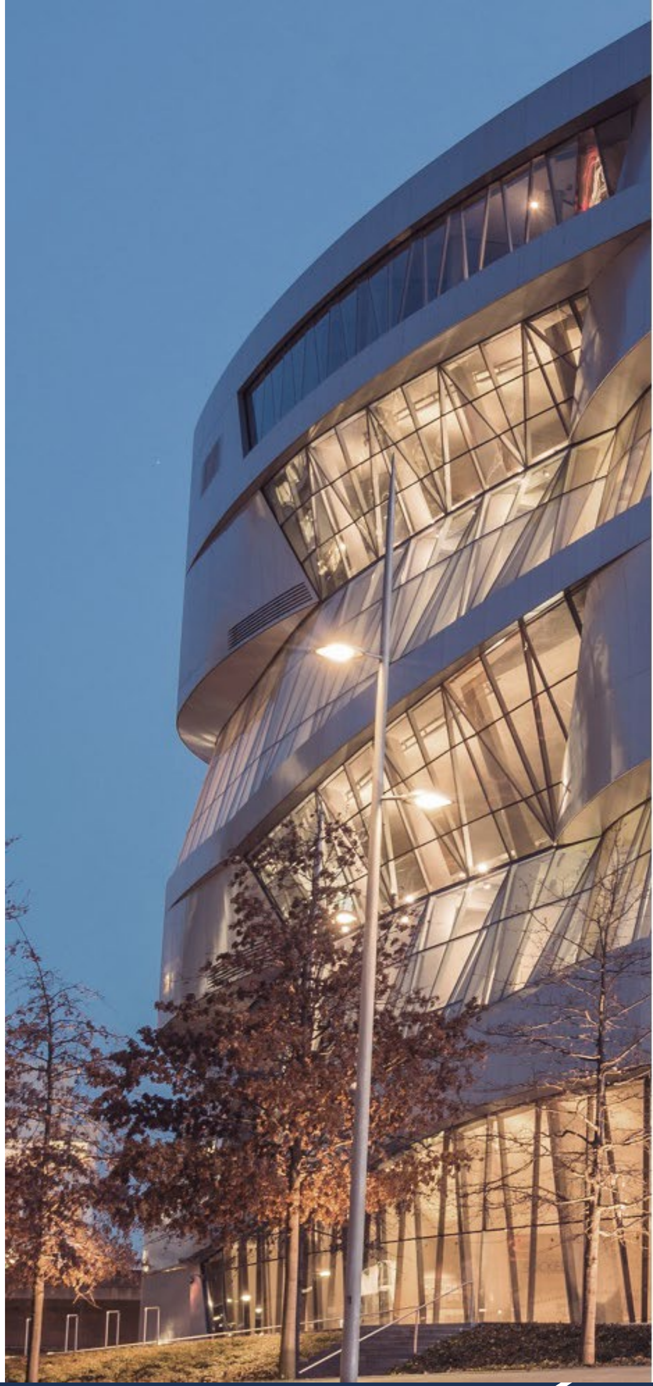
BACK TO BLACK...SWANS



Take risks worth taking

THANK YOU

PRODEMNITY



RISK EDUCATION

DESIGN DECISIONS ON TRIAL:
Lessons from REAL claims

Philip Ghosh, Managing Counsel,
In-House Litigation, Pro-Demnity
May 14, 2026

RISKALLIANCE

LEGAL PRESENTATION OUTLINE

PART 1 - LEGAL CONCEPTS

A. Causes of Action

B. Liability

C. Damages

D. Resolving Cases

PART 2 – CASE STUDIES & LESSONS LEARNED

A. Collaboration

B. Innovation

C. Water, water, water

D. Bonus: Oddball Cases

1.

RISK EDUCATION

LEGAL CONCEPTS

RISKALLIANCE

CAUSES OF ACTION

- Anyone can sue anyone for anything, anytime, but meritorious cases are based on recognized causes of action

- Potential causes of action against architects:
    - Contract
    - Tort / Negligence
    - Negligent Misrepresentation
    - Breach of fiduciary duty

- Each of these causes developed through Common Law

- Negligence was later codified in the *Negligence Act*

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 is to exercise the reasonable skill, care and diligence expected of a reasonably competent architect performing similar services on a similar project at the time of the project.

NOTE THAT:

- 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

WHO MIGHT BE AT FAULT?

Project-Related

Lawsuits involving architects relate to 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 parties to a dispute

- Occupiers (owners, tenants)
- Property managers
- End users
- Plaintiff themselves (contributory negligence)

CONTRACTS

What is a Contract?

- A legally binding agreement between two or more persons for a particular purpose

Basic Elements of a Contract:

- **An Offer** … *from one party to another to provide something of value (ex: goods or services)*

- **Acceptance** … *of the offer by the second party*

- **Consideration** … *money to be paid in return for the goods or services*

*A **contract** may be oral or written…*

BREACH OF CONTRACT

Claims for Breach of Contract

To establish liability one must prove…

1. A breach of a term of the contract occurred,
2. Loss or damage was caused by the breach, AND
3. Damages suffered are within limits permitted by law

All 3 must apply for a successful claim…

NEGLIGENT MISREPRESENTATION

Elements of Negligent Misrepresentation:

1. **Special Relationship**…*exists with the claimant such that you know or ought to know they will rely on your statements*
2. **A False or Misleading Statement**…*the representation made is false*
3. **Negligence in Making the Statement**…*the speaker failed to take reasonable care to ensure the accuracy of the information*
4. **Reasonable Reliance**…*the claimant relied on the statement and it was reasonable to do so*
5. **Detrimental Reliance**…*the reliance on the statement caused a loss*

DAMAGES

So, what if you are found liable?

- You are responsible for **DAMAGES**
- This is compensation, usually financial, **to put the plaintiff in the position they would have been in but for your wrong** (negligence or breach of contract)
- How this is measured varies, it could be:
  - Cost of a change order resulting from design error
  - Cost to repair a problem discovered post-construction
  - Diminution in value of a building
  - Personal injury damages (lost work time, cost of care, pain and suffering)
- Plaintiff has a duty to mitigate their loss

VICARIOUS LIABIITY

- A party can be held for the wrong done by another if they are responsible for that other party (ex: parents for their children, employers for employees)
- An architect can be vicariously liable for subconsultants hired by them
- Vicarious liability for subconsultants is most dangerous when the subconsultant does not have enough insurance, disappears, or goes bankrupt

RESOLVING CASES

- At least 98% of cases resolve with a settlement and never go to trial (although we always prepare as if they will)
- Settlement does not necessarily mean every party pays
- It can take 3 – 7 years for a case to get to trial
- Settlement "off-ramp" can be at pleadings, mediation, pre-trial, trial door

2.

RISK EDUCATION
CASE STUDIES

RISKALLIANCE

COLLABORATION – “FOREST HILL” CASE

FACTS

- Multimillion dollar custom home in exclusive neighbourhood, with modern design, highly fenestrated
- Homeowner was a tech-millionaire, but an electrical engineer by training
- Project budget of $6,500,000; HVAC of $900,000
- Complicated HVAC system involved connecting zone control system to multiple sets of a different manufacturer’s heat pump units
- Client specified they wanted to control temperature throughout home to 0.5 degrees Celsius. On peak days, home could not cool to 20°C
- Architect recommended the mechanical engineer - “He worked on my own home”

QUESTIONS

1. What is the cause of action against the Architect?
2. Who is most at fault?
3. What were the approximate damages:
   a) $0
   b) $10,000
   c) $50,000
   d) $300,000
   e) $900,000

COLLABORATION – "FOREST HILL" CASE

DISCUSSION

1. What is the cause of action against the Architect?

- Actually, there are three: Breach of Contract, Negligence, Negligent Misrepresentation.

2. Who is most at fault?

- The mechanical engineer.
- But the pre-trial judge was firm in his belief the Architect shared some blame, and Pro-Demnity contributed around 12% of the settlement value.

3. What were the approximate damages:

- d) $300,000
- The actual value of the settlement was $317,500, which included legal expense.

COLLABORATION – RAPID FIRE ROUND

Which subconsultant was involved?

Sprinkler pipe burst

Pipe froze in first winter after retrofit of an office building. The heater in the room where it froze did not activate because of a failure to install a thermostat.

Slip on uneven sidewalk

Plaintiff suffered broken hip tripping on heaved stones in an exterior paved sloped walkway.

COLLABORATION – RAPID FIRE ROUND

Which subconsultant was involved?

Falling Millwork Case

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

Highrise Redesign

Podium space in a building was redesigned to incorporate more office floors. During construction discovered foundation-level structure could not support the add'l load.

COLLABORATION - LESSONS

- Subconsultants are a liability risk to Architects
- You can be vicariously liable for subconsultant work, or liable for failure to co-ordinate or communicate
- If you include subconsultant services:
  1. Use a contract
  2. Use a **good** contract
  3. Verify they have adequate insurance

INNOVATION – AVANT-GARDE HOME

FACTS

- Client wanted modern cutting-edge home
- Architect met with supplier, specified use of fibre cement board for the first time. This particular product was new to the market (less than 2 yrs at time specified)
- Installation guide a translation to English from Italian by the supplier. This project only their 2nd or 3rd involving a private residence. Korean-speaking subcontractor installed the material.

QUESTIONS

1. What parties are at fault?
2. How should damages be measured?
   a. Cost of the material
   b. Cost incurred to reclad the home
   c. Something else

Cracking

Fading

INNOVATION – AVANT-GARDE HOME

DISCUSSION

1. **What parties are at fault?**
   - ***Supplier***
   - ***Contractor***
   - ***Subcontractor***
   - ***Architect***
   - ***Manufacturer?***

2. How should damages be measured?

c) Something else

- The owner reclad in masonry; actual damages = estimate of recladding in similar fibre cement board

INNOVATION – LESSONS

- Perform appropriate due diligence before specifying new materials
- Make sure the contractor is up for the task
- Make sure the manufacturer's installation guide is available; do not design with conflicting detail
- Innovative materials and designs are riskier, so be ready to increase your level of diligence accordingly

WATER, WATER, WATER – RAPID FIRE ROUND

In which two of these die Pro-Demnity pay $0 to settle?

A. Another Sprinkler Pipe Burst

Pipe burst in winter while banking pavilion under construction, but heating system turned on, insulation blamed

B. Pipe Dreams

Water supply pipe to generator room on roof burst in winter due to failure of heat tracing and insulation where pipe exposed.

C. When it rains … it leaks

Stormwater drainage pipe in condo failed, causing water to leak into units below.

D. Brown Water

Sewage backup incident because sanitary line wrongly connected to storm line

Options:

a) A & B

b) B & C

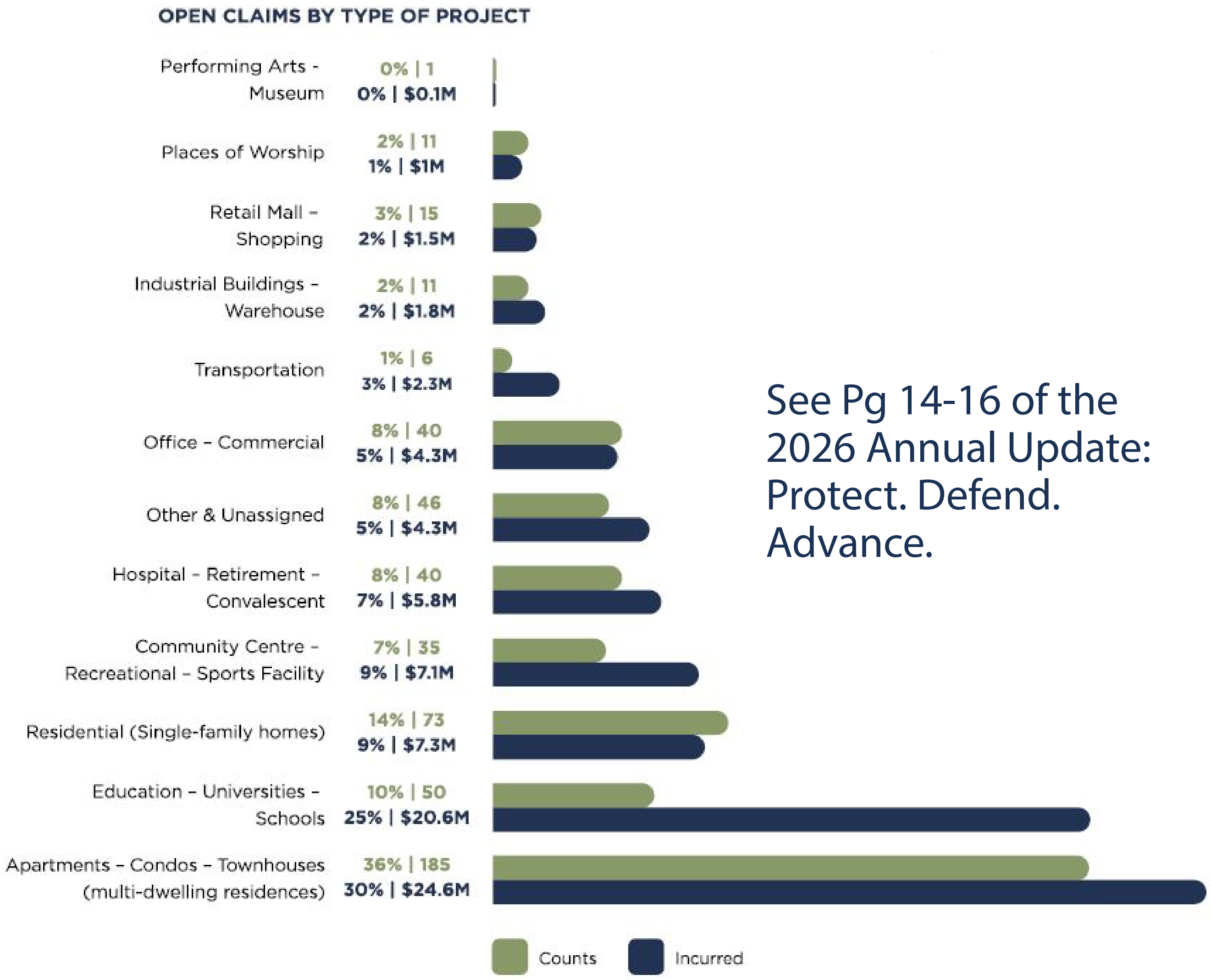
c) C & D

d) A & D

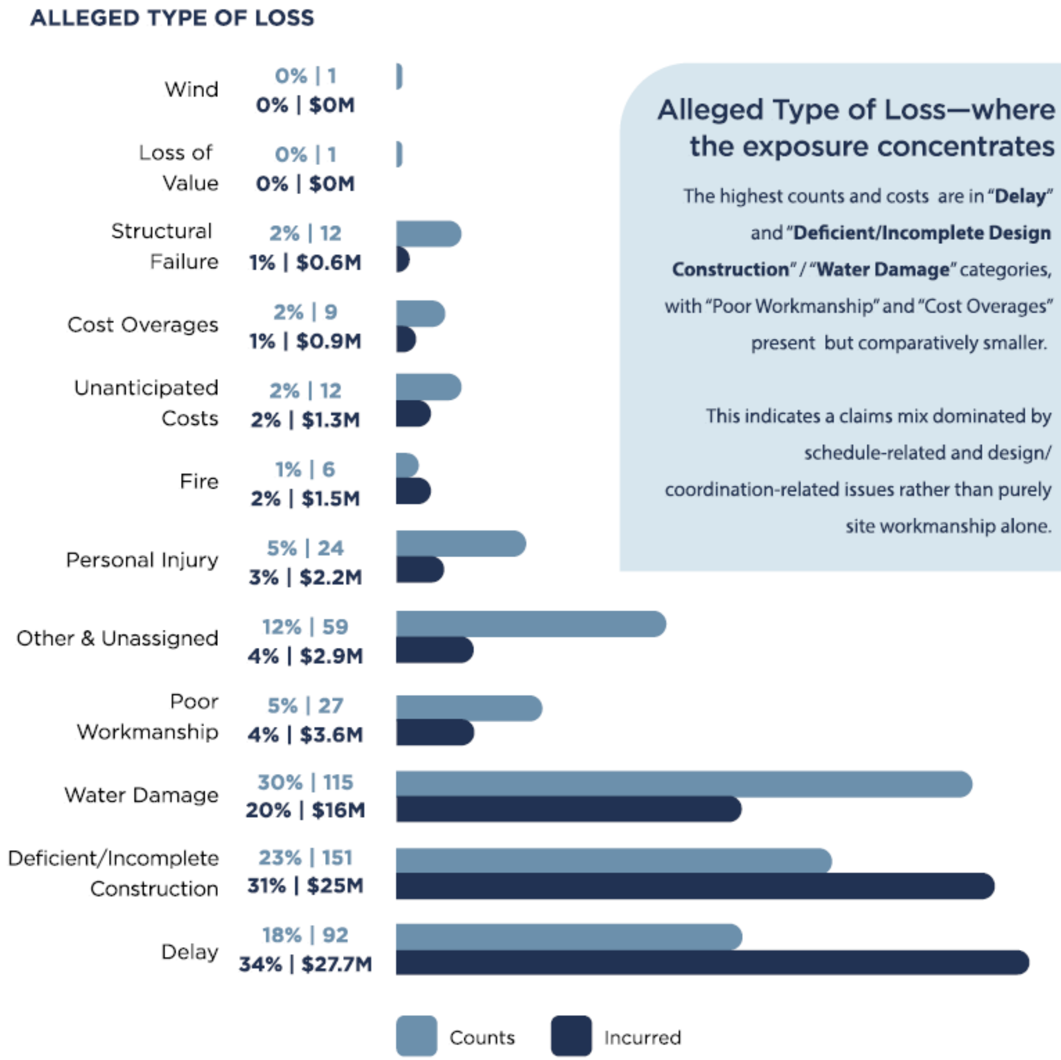
WATER, WATER, WATER – LESSONS

- So many potential areas for failure: rainwater, subsoil; sprinkler, supply, drainage pipes; condensation
- Pro-Demnity policy **excludes** coverage for liability claims for water ingress (Exclusion 21) **except** where cladding in a form approved by our ***Technical Requirements Schedule***
- Most water claims involve mechanical engineering, but beware cladding, roofing, and insulation detail as areas of risk

CLAIM DISTRIBUTION



See Pg 14-16 of the 2026 Annual Update: Protect. Defend. Advance.



Alleged Type of Loss—where the exposure concentrates

The highest counts and costs are in "**Delay**" and "**Deficient/Incomplete Design Construction**" / "**Water Damage**" categories, with "Poor Workmanship" and "Cost Overages" present but comparatively smaller.

This indicates a claims mix dominated by schedule-related and design/coordination-related issues rather than purely site workmanship alone.

ODDBALL CASES - RAPID FIRE ROUND

Why is the architect alleged to be at fault?

Semi-Detached Nightmare
Neighbour sued architect, contractor, and neighbour homeowners for damage to common wall, dust and raccoons in attic.

A Very Secret Project (Shhh!)
Client handwrote confidentiality clause into architect's agreement, upset when his ex-wife found out about his project.

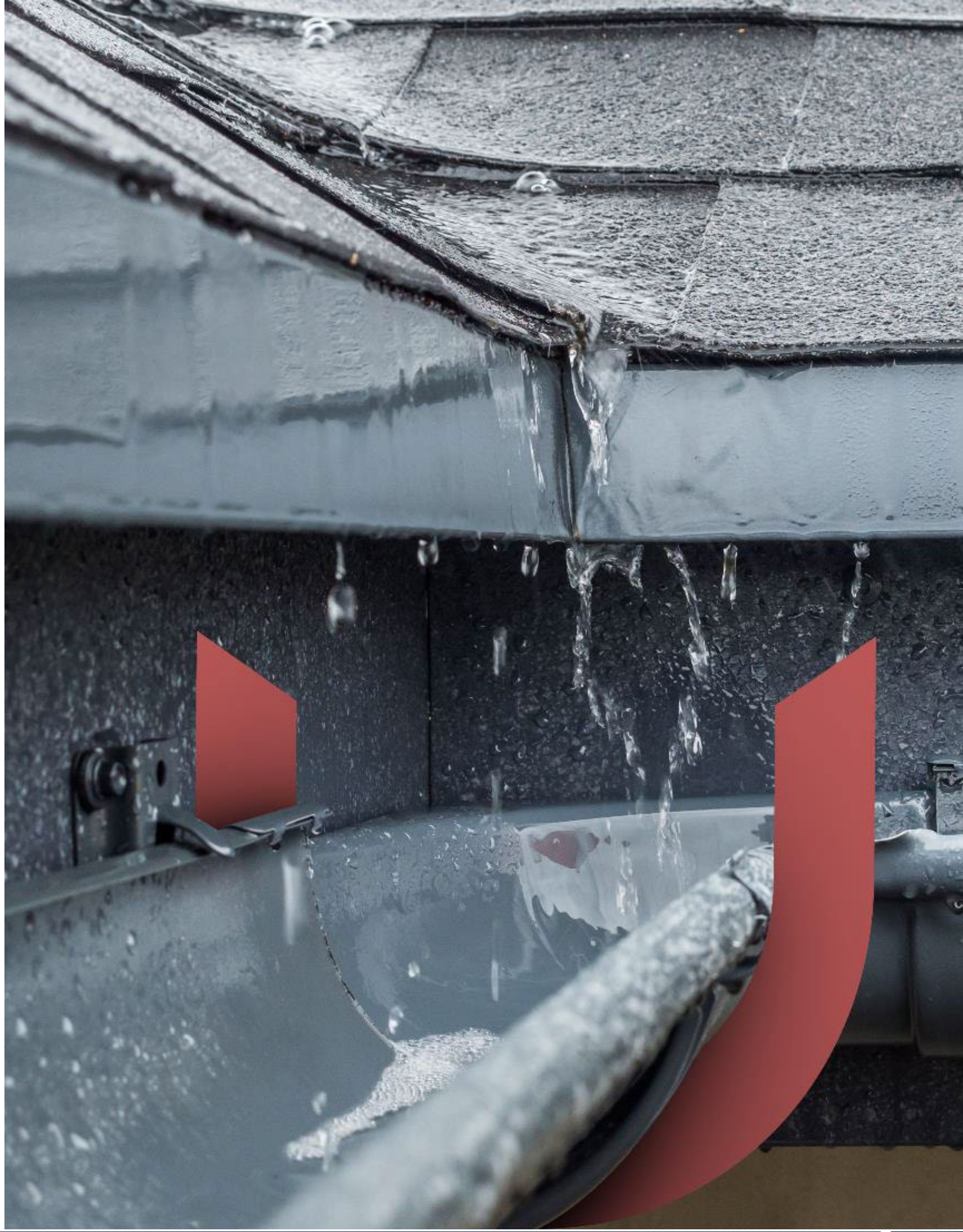
A Sled Makes for a Sorry Home
Foundation did not take soil conditions properly into account, home was slowly sliding downhill on ravine lot.

Home too short
Designs maximize zoning height, but they claim against architect when they realize it is not the tallest on the street.

FIVE BEST PRACTICES

Minimize your litigation risk:

1. Always have a contract with your client
2. Always have a (good) contract with subconsultants
3. Keep records of site visits, meetings, client instructions
4. Stay within the scope of your services
5. Report potential claims early



THE END. THANK YOU.

PRODEMNITY