CITATION: D.E. v. Unifund Assurance Company, 2014 ONSC 5243
COURT FILE NO.: CV-13- 495144
DATE: 20140911

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: D.E. and L.E., Applicants

AND:

UNIFUND ASSURANCE COMPANY, Respondent

BEFORE: Stinson J.

COUNSEL: *Vusumzi Msi*, for the applicants

Thomas J. Hanrahan, for the respondent

HEARD: June 30, 2014

ENDORSEMENT

[1] The applicants seek a declaration that the respondent, Unifund Assurance Company ("Unifund") has a duty to defend and indemnify them under a comprehensive homeowner's property and liability insurance policy with Unifund (the "Policy"). The dispute involves the application of the legal principles governing the interpretation of insurance policies in the context of the claim for which the applicants seek coverage under the Policy.

FACTS

[2] The applicants, D.E. and L.E., are a married couple who reside in Toronto with their minor daughter, R.E.. The applicants and R.E. are three of 13 co-defendants in an action commenced in the Superior Court of Justice by N.R. and her daughter K.S. (the "Action"). At the relevant time, K.S. and R.E. were Grade 8 classmates at a school operated by the Toronto Catholic District School Board ("TCDSB"). The statement of claim in the Action was issued in June 2012. It initially named as defendants, R.E. and two other Grade 8 students (all classmates of K.S.), the TCDSB, and several of its employees. The statement of claim was subsequently amended to add as co-defendants, the applicants and the parents of the other two Grade 8 student defendants.

[3] The amended statement of claim contains allegations that R.E. and the two other student defendants bullied, threatened, hit and physically assaulted K.S. It alleges that K.S. was the

victim of repeated acts of bullying at the hands of R.E. It further alleges that the acts of bullying were continuous and ongoing and that they were caused solely as a result of the negligence of the defendants. The amended statement of claim contains the following specific allegations of negligence as against the applicants:

> (a) they knew or ought to have known that the minor defendants were bullying K.S. and failed to investigate same;
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> (b) they knew or ought to have known that the minor defendants were bullying K.S. and failed to take steps to remedy the bullying;
>
> (c) they failed to take reasonable care to prevent the bullying and harassment of K.S. by the minor defendants of which they were aware;
>
> (d) they failed to take disciplinary actions against the minor defendants;
>
> (e) they failed to discharge their duty to prevent the continuous physical and psychological harassment by the minor defendants for whom they are responsible in law.

[4] The amended statement of claim claims substantial damages on behalf of K.S. and her mother, and asserts that K.S. and her mother have sustained serious and lasting psychological injuries, emotional trauma and anxiety.

[5] After being served with the amended statement of claim, the applicants notified their insurer, Unifund, and sought coverage under the Policy. Unifund concedes that it was given appropriate notice in a timely fashion and it takes no issue with any notice provisions under the Policy. Unifund has taken the position, however, that the claims made in the Action fall outside the scope of coverage of the Policy. As a result, Unifund has denied coverage and has refused to defend the Action on behalf of the applicants.

[6] At the heart of this dispute is whether the claims made against the applicants in the Action fall within the scope of coverage under the Policy, or are excluded under certain exclusion clauses.

The Policy

[7] The Policy terms are contained in a document entitled "Homeowners Comprehensive Form". Among other terms, the Policy provides as follows:

> **SECTION II - LIABILITY COVERAGE**
>
> **Coverage E-Personal Liability**
>
> This is the part of the policy you look to for protection if you are sued.

We will pay all sums which you become legally liable to pay as compensatory damages because of unintentional bodily injury or property damage arising out of:

1. your personal actions anywhere in the world;

….

EXCLUSIONS - SECTION II

We do not insure claims arising from:

….

6. bodily injury or property damage caused by an intentional or criminal act or failure to act by:

   (a) any person insured by this policy; or

   (b) any other person at the direction of any person insured by this policy;

7. (a) sexual, physical, psychological or emotional abuse, molestation or harassment, including corporal punishment by, at the direction of, or with the knowledge of any person insured by this policy; or

   (b) failure of any person insured by this policy to take steps to prevent sexual, physical, psychological or emotional abuse, molestation or harassment or corporal punishment;

[8] For purposes of personal liability coverage, the policy defines an "insured" as meaning:

the person(s) named as insured on the Coverage Summary Page and, while living in the same household:

- his or her spouse
- the relatives of either; and
- any person under 21 in their care

ISSUES AND ANALYSIS

Legal considerations relevant to assessing a "duty to defend" application

[9] An insurer is obligated to provide a defence if the pleadings allege facts which, if true, would require the insurer to indemnify the insured for the claim. The duty to defend is much broader than the duty to indemnify. It is not necessary to prove that the obligation to indemnify

will in fact arise in order to trigger the duty to defend. The mere possibility that the claim is within the policy is sufficient to trigger the duty to defend. See *Nichols v. American Home Assurance Co.*, [1990] 1 S.C.R. 801.

[10] The duty to defend is nonetheless related to the duty to indemnify. Absent express language to the contrary, the duty to defend extends only to claims that could potentially trigger indemnity under the policy. See *Non-Marine Underwriters, Lloyd's of London v. Scalera*, 2000 SCC 24. An insurer's obligation to defend is triggered where, on a reasonable reading of the pleadings, a claim within coverage can be inferred. The determination of whether an insurer's duty to defend has arisen lies with an examination of the claims contained within the pleadings. See *Nichols v. American Home Assurance Co., supra*.

[11] The court must accept the allegations contained in the pleadings as true. If the claim alleges a state of facts which, if proven, would fall within coverage of the policy, the insurer is obliged to defend the suit regardless of the truth or falsity of such allegations. See *Monenco Ltd. v. Commonwealth Insurance Co.*, 2001 SCC 49. It does not matter that the actual facts surrounding the claim may be different than the alleged facts as stated in the pleadings. In determining whether or not the duty to defend has arisen, the court must remain disinterested in the truth or falsity of allegations contained within the statement of claim and must not become engaged in a fact-finding analysis. See *Cooper v. Farmer's Mutual Insurance Co.* (2002), 59 O.R. (3d) 417 (C.A.).

[12] The court is not bound by the plaintiff's choice of wording or labels contained within the pleadings. The nature of the plaintiff's claim is both determinative and the paramount consideration. The existence of the duty to defend depends on the nature of the claim made. See *Nichols v. American Home Assurance Co.*; *Prudential Life Insurance Co. v. Manitoba Public Insurance Corp.* (1976), 67 D.L.R. (3d) 521 (Man. C.A.).

[13] Courts must interpret the provisions of a policy in light of general principles of interpretation of insurance policies including:

(1) the *contra proferentem* rule;

(2) the principle that coverage provisions should be construed broadly and exclusion clauses narrowly; and

(3) the desirability, at least where the policy is ambiguous, of giving effect to the reasonable expectations of the parties.

See *Zurich Insurance Co. v. 686234 Ontario Ltd.*, 2002 CanLII 33365 (ON CA) at para. 23 citing *Reid Crowther & Partners Ltd. v. Simcoe & Erie General Insurance Co.*, [1993] 1 S.C.R. 252. The onus of establishing the applicability of coverage, of an exclusion, or of an exception to an exclusion rests on the party seeking to rely on that policy provision: *Aitken v. Unifund Assurance Co.*, 2011 ONSC 1809; affirmed 2012 ONCA 641.

Positions of the parties

[14] The applicants contend that the claims advanced against them in the Action are claims in negligence, arising from failing to take disciplinary actions and for failing to investigate and remedy bullying. Such claims and the grounds for which liability is sought to be imposed as against the applicants are not expressly excluded under the Policy. As such, the applicants are entitled to a defence and are entitled to coverage under the Policy.

[15] The respondent submits that, at its heart, the Action seeks damages for intentional acts committed as against K.S. Only fortuitous or contingent losses are covered by a liability policy; the policy does not insure for intentional acts. The actions of R.E., who was also an insured under the Policy, were plainly intentional, and thus the Policy should not and does not respond.

Analysis

[16] I will deal with the last submission first. Where multiple theories of liability are advanced to support the same claim for damages, an insurer may be ordered to defend the entire action, even if some of the claims are excluded by the policy. See *RioCan Real Estate Investment Trust v. Lombard General Insurance Co*. (2008), 91 O.R. (3d) 63 S.C.J. at para. 38. Here the mere fact that the Policy may not respond to intentional acts committed by one of the insureds (R.E.) does not preclude coverage being triggered in favor of the applicants, against whom liability is sought to be imposed on a theory of negligence.

[17] In determining whether the claims advanced against the applicants in the action could trigger indemnity, I am required to follow a three-step analysis:

(1) I must determine which of the plaintiffs' allegations as pleaded could trigger coverage under the Policy, bearing in mind that I am not bound by the label chosen by the plaintiff, and I must decide the true nature of the claims;

(2) I must then determine if the claims are entirely derivative in nature. The duty to defend will not be triggered simply because a claim can be cast in terms of both negligence and intentional tort. If the alleged negligence is based on the same harm as the intentional tort, I cannot allow the insured to circumvent the exclusion clause for intentionally caused injuries.; and

(3) finally, I must decide whether any of the properly pleaded non-derivative claims could potentially trigger the insurer's duty to defend. See *Non-Marine Underwriters, Lloyd's of London v. Scalera*, 2000 SCC 24 at paras. 50 to 52.

[18] In reliance on *Scalera*, Unifund argues that the applicants cannot circumvent the clause in the Policy excluding liability for intentional acts (Section II – Clause 6) merely because the plaintiff in the action has framed the case against them in negligence. In the final analysis, Unifund argues, the harm of which the plaintiff complains arose due to the intentional conduct of assault, threatening and bullying.

[19] A comparable situation arose for consideration in *Durham District School Board v. Grodesky*, 2012 ONCA 270. In that case, the plaintiff School Board sued a student and his parents, alleging that the student had set up a fire that caused extensive property damage to a school building. In turn, the parents commenced a third party action against their insurer for indemnification under their homeowners' comprehensive insurance policy. The insurer brought a motion for determination that it was not required to defend the parents, and therefore the third party action should be dismissed. The insurer relied on an exclusion clause which provided that the policy did not cover claims arising from intentional acts. The claim against the parents, however, had been framed in negligence and included allegations that they failed to provide and enforce a curfew for their son, they failed to supervise him and discipline him and they failed to instill in him a respect for property.

[20] In the course of its analysis, the Court of Appeal considered the Supreme Court decision in *Scalera*. At paragraphs 11 through 14, Juriansz J.A. wrote as follows:

> In *Scalera*, the clause excluded claims arising from "bodily injury or property damage caused by any intentional or criminal act or failure to act by ... any person insured by this document" (para. 59). Iacobucci J., in his concurring reasons, observed that reading the clause to exclude negligent failures to act would lead to absurd consequences because almost any act of negligence could be excluded. He explained his approach to interpreting the clause at para. 92:
>
> > At the outset, the wording of this clause presents a threshold issue. The respondent [the insurer] argues that the clause requires only an intentional act, not an intent to injure. The majority below agreed with this interpretation. However, I agree with Finch J.A.'s dissent on this point. If the respondent were correct, almost any act of negligence could be excluded under this clause. After all, most every act of negligence can be traced back to an "intentional ... act or failure to act". As this Court made clear in *Canadian Indemnity Co. v. Walkem Machinery & Equipment Ltd.*, [1976] 1 S.C.R. 309, "negligence is by far the most frequent source of exceptional liability which [an insured] has to contend with. Therefore, a policy which would not cover liability due to negligence could not properly be called 'comprehensive'" (pp. 316-17). Consistent with this decision, the purpose of insurance, and the doctrines of reasonable expectations and *contra proferentem* referred to above, I believe the exclusion clause must be read to require that the injuries be intentionally caused, in that they are the product of an intentional tort and not of negligence. [Emphasis added by Juriansz J.A..]
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> 12 At the same time, at para. 84, Iacobucci J. cautioned against relying on the plaintiff's characterization of the claim made against the defendant because "a plaintiff may draft a statement of claim in a way that seeks to turn intention into

> negligence in order to gain access to an insurer's deep pockets." Whether the plaintiff uses the language of negligence or intentional torts is not the end of the inquiry. The judge must look to the actions taken by the defendant underlying the claim. Further, when there are multiple claims (e.g. when intentional torts and negligence are both alleged) the judge must decide if the negligence claim is merely derivative of the intentional claim, or whether the two claims are severable, by examining the actions allegedly taken by the defendant, and deciding whether the claims are related to the same actions.
>
> 13 In this case, the School Board's claim against the appellant for his alleged failures is drafted in terms of negligence. The trial judge described the claim as a "claim in negligence", at para. 16.
>
> 14 Though this negligence claim caused the same harm as the intentional tort allegedly committed by the son, it is not derivative of the intentional tort claim in the sense indicated by Iacobucci J. At para. 84, he remarked that "a claim for negligence will not be derivative if the underlying elements of the negligence and of the intentional tort are sufficiently disparate to render the two claims unrelated." The elements of the intentional tort claim against the son and the negligence claim against the parents are entirely distinct. Therefore the negligence claim is not derivative of the intentional tort, and should not be subsumed under it for the purposes of applying the exclusion clause.

[21] In my view, the analysis of Juriansz J.A. is applicable to the case at bar. The elements of the intentional tort claim against the applicants' daughter, and the negligence claim against the applicants, are entirely distinct. Liability is sought to be imposed against the applicants on the basis that the harm to the plaintiffs was caused by their negligent conduct in failing to investigate the bullying, in failing to take steps to remedy it and in failing to take reasonable care to prevent it. The negligence claim is thus not derivative of the intentional tort claim. Since there is no allegation that the applicants' acts were intentional, coverage should not be excluded on this ground.

[22] It remains to consider the effect of the exclusion clause contained in Clause 7(b) of Section II of the Policy. That clause excludes from coverage claims arising from the "failure of any person insured by this policy to take steps to prevent sexual, physical, psychological or emotional abuse, molestation or harassment or corporal punishment".

[23] In Clause 6, the exclusion clause that precedes Clause 7, the Policy exempts from coverage claims for "bodily injury or property damage caused by an intentional or criminal act or failure to act". By contrast, Clause 7(b) is silent on whether that exclusion applies to only intentional or unintentional failure to take steps to prevent physical abuse or harassment. Had the insurer intended to exclude liability for both intentional and negligent failure to prevent physical abuse or molestation, it could have included express language to this effect. Arguably, especially in light of the previous use of the concept of intentional acts in Clause 6, Clause 7(b) is ambiguous.

[24] Applying the concept of *contra proferentem* and, as well, the principle that exclusion clauses are to be interpreted narrowly, I conclude that the proper construction of Clause 7(b) is that it should be limited to intentional failure to take steps to prevent physical abuse or molestation; i.e. where the insured intentionally fails to act and thus permits the offensive conduct to continue. The exclusion should not extend, however, to situations where that failure arose through negligence.

[25] Such an interpretation is also consistent with the notion that the Policy is a comprehensive policy intended to provide coverage for legal liability arising out of the applicants' personal actions, worldwide. Here, the liability sought to be imposed on them is founded on their alleged personal actions in unintentionally – i.e. negligently – failing to take appropriate steps to prevent the activities that caused the harm. Thus, the interpretation that I would give to the language in question is consistent with the parties' reasonable expectations.

DISPOSITION

[26] For these reasons, I conclude that the claims advanced against the applicants in the Action fall within the scope of the coverage provided by the Policy and they are not caught by the exclusion clauses. A declaration shall therefore issue that the respondent has a duty to defend and indemnify the applicants in relation to the claims made against them in the Action.

[27] If the parties are unable to agree on costs, they may make brief written submissions as follows:

(a) The applicants shall serve their bill of costs on the respondent, accompanied by written submissions within fifteen days of the release of these reasons.

(b) The respondent shall serve its response on the applicant within fifteen days thereafter.

(c) The applicants shall serve their reply, if any, within ten days thereafter.

(d) In all cases, the written submissions shall be limited to three pages, double-spaced plus bills of costs.

(e) I direct that counsel for the applicants shall collect copies of all parties' submissions and arrange to have that package delivered to me in care of Judges' Administration, Room 170 at 361 University as soon as the final exchange of materials has been completed. To be clear, no materials should be filed individually: rather, counsel for the applicants will assemble a single package for delivery as described above.

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Stinson J.

Date: September 11, 2014