

Duty to Defend: Co-Operators v Ross

by Michael Teitelbaum

In a decision released on June 10th, 2003, Power, J. found that Economical and Lloyds owed their insured a duty to defend.

The insured, Ross, installed a fireplace in a house he constructed in 1988. In 1997, a fire destroyed the house. The Amended Statement of Claim alleged that the fire originated in the fireplace. The wooden support beams were damaged by pyrolysis caused by exposure to heat, due to the proximity of the beams to the fireplace and hot air ducts. The damage commenced when the fireplace was first used and continued until the wooden support beams combusted. The damage to the beams was concealed behind the fireplace and was not discoverable until the combustion occurred in November .

Ross brought a motion for, inter alia, an order that the insurers were obliged to defend, that they had to pay the costs of the solicitors he appointed, and that the defence be subject to his control. The insurers brought a summary judgment motion seeking, inter alia, dismissal of the insured's Third Party Claim.

Interestingly, the insured filed an Affidavit in support of his motion, and all parties also filed expert reports on the cause of the fire. It appears no objection was raised, and the decision does not address the appropriateness of considering such extrinsic evidence, further to

the Supreme Court's decision in *Monenco*.

Economical was on risk for one year (1988-89). Lloyd's then came on risk until 1996. The insured had no insurance when the fire occurred in 1997.

Economical's position was that it was not responsible for an accident which occurred after the expiration of its policy, and the term "accident" refers to "the event causing the damage, rather than the negligent conduct causing the event". An obligation to indemnify therefore arises only at the time when the damage occurs, and there was no damage during its policy period.

Economical's expert opined that the pyrolysis of the wood was not the cause of the fire and was not the start of the ignition. He pointed to the excessively high temperature of radiant energy from the improperly installed hot air duct as the cause of the ignition.

At para. 20, His Honour stated: "In my opinion, there is a possibility that, after the relevant evidence is heard, the insurance policies might apply." He added that it would be improper for him to make any specific fact findings on whether the process of pyrolysis caused or contributed to the property damage, or to pick and choose among the expert opinions. His Honour did,

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however, use the opinions to show that the arguments made by the insurers might not succeed.

Lloyd's argued that any damage caused by pyrolysis was de minimis and that virtually all of the damage took place on the date of the fire. In essence, this is a fire loss claim, and the court should follow *Scalera* and look at the real nature of the case.

While characterizing these arguments as "impressive", Power, J. stated at para. 25 that he must focus on the allegations in the Amended Claim that the pyrolytic condition developed during the currency of the Economical and Lloyd's policies and, therefore, constitute "property damage". He also held that, at this stage, he could not attempt to apportion the extent of the damages that occurred during the coverage period, and that part that occurred after the expiration of the policies.

His Honour concluded that the duty to defend and indemnity issues could be resolved only after a court had made the relevant fact findings concerning the cause of the fire and when the property damage occurred. However, he then found that the insured was entitled to a defence at the expense of the insurers. He did not say that this finding was subject to reallocation after the trial of the underlying action. There was no mention of reimbursement.

At the request of counsel, Power, J. reserved his decision on the other relief sought, so that they could make submissions on that relief, if no accommodation on those issues could be reached. His Honour stated that he would require further submissions regarding whether counsel appointed by the insurers would be in a conflict situation such as to justify an order allowing Ross to retain solicitors of his choice. He also stated that at this point, he was unable to conclude whether

"appropriate counsel can be retained by the insurers for the purpose of representing [Ross'] interests".

While it appears that the greater burden might fall on Lloyd's since it was Ross' insurer for a longer period of time than Economical, without further submissions, His Honour stated that he was reluctant to attempt to apportion defence costs between the two insurers. By implication, this would mean that they should share equally, but this issue was not squarely addressed.

This case is interesting for:

- (1) its apparent unchallenged use of extrinsic evidence, if for no other purpose than to further muddy the waters in terms of whether indemnity might be payable; and
- (2) the finding that the allegations that a process (or continuing event) which began in 1988 and continued to 1997 that appeared to have caused some property damage was sufficient to engage the defence obligation

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by Michael Teitelbaum

In an intriguing, and some might say controversial, decision, Justice Colin Campbell of the Superior Court has held that a homeowner's insurer must contribute with the automobile insurer towards the defence costs of their insured who was involved in an automobile accident.

In *Dominion of Canada v. Axa Insurance Co.*, (July 2nd, 2003),

Dominion, the automobile insurer, which was defending the claim against its insured, Colleen Durno, brought an application seeking contribution from her homeowner's insurer, Axa, towards the cost of that defence.

The Statement of Claim alleges that the Plaintiff, Alexandra Kikot, was struck by a vehicle driven by the co-Defendant, Antonio Iarusci, while crossing

the street after leaving a vehicle owned and operated by Durno.

The Claim also alleges that the Durno vehicle stopped in the southbound lane, the Plaintiff exited from the passenger side, proceeded to the rear of the vehicle, and was then proceeding to cross the street when struck by the northbound Iarusci vehicle.

Among the allegations of negli-

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gence made against Durno was that she permitted the Plaintiff to exit in an unsafe location; failed to warn the Plaintiff that it was unsafe to cross the street and of the approach of the other vehicle; and failed to properly supervise the Plaintiff.

Axa's policy contained a "standard" automobile exclusion denying coverage for claims "arising from the ownership, use or operation of any motorized vehicle...".

C. Campbell, J. referenced the Supreme Court of Canada's decisions in *Nichols* and *Scalera* when deciding whether a defence was owed by Axa. His Honour found that the "mere possibility" that a claim may succeed is sufficient for determination, particularly at the pleading stage".

Dominion argued that while Durno was in the care and control of her vehicle, there may well be something in the nature of the relationship between Durno and the 14-year old Plaintiff and outside of Durno's duty as a driver, to impose a duty on Durno with respect to the Plaintiff's safety sufficient to engage the Axa's coverage under the Axa policy. Axa submitted that all of the alleged breaches of duty arise from the use, operation and ownership of the vehicle.

In deciding whether the exclusion applied, Justice Campbell held that recent cases "have tended to broaden rather than narrow the coverage available under automobile insurance". It appears His Honour was re-

ferring to the issue of whether or not an event arose from the use or operation of a vehicle. The S.C.C decision in *Law, Union & Rock Insurance Co. v. Moore's Taxi Ltd.*, [1960] S.C.R. 80, could support the case at hand. There, a taxi company was insured under a comprehensive liability policy containing an automobile exclusion clause. The taxi driver's duty was to convey and deliver children home from school. One child was let out of taxi and allowed to cross the street alone. The child was hit by a truck and seriously injured. The Court held that the vehicle was stationary when the accident occurred and the chain of causation originating with its use was severed by the intervening negligence of the taxi driver. Although the driver's obligation in the instant case is arguably different, there are some similarities between the circumstances.

While paragraph 17 of the decision is not entirely clear, it appears His Honour refers to the decision of Lax, J. in *Incerto v. Landry*, [2000] O.J. No. 861 in support of the proposition that there can be auto-related and non-auto-related causes for the same accident, which negates the application of the automobile exclusion in the homeowner's policy.

Although not cited by Justice Campbell, the Supreme Court's decision in *Derksen v. 539938 Ontario Ltd.*, [2001] 3 S.C.R. 398 clearly contemplates such a scenario. In the result, His Honour concluded that, at this stage, he "cannot rule out the possibility

that the exclusion clause in the homeowner's policy may not apply". He continues at paragraphs 21-22:

"The Statement of Claim alleges a breach of duty on the part of Colleen Durno to supervise the alighting passenger. What the nature of the duty might be, and what might constitute a breach of any such duty will require a factual examination that it is not possible to make at the pleadings stage.

While some of an alleged duty to supervise might well arise in the context of the "use of an automobile" there may be other parts of that duty that could arise outside of specific driver duties. One would require the full factual connotation to determine the scope of the duty. The duties are not necessarily mutually exclusive."

This decision, prompts the following comments, and raises the following issues:

1) While *Derksen* arguably opened the door to this decision, i.e., there can be two different causes for an accident, each covered by different policies and unless the exclusion in one or the other policy clearly excludes the exposure, both are obliged to respond, it would seem to be a close call whether, when using the *Scalera* "real nature" test, this is not a claim involving the use of an automobile.

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All the more so given His Honour's reference to the Supreme Court's *Heredi v. Fensom* decision in which the Court held that in a motor vehicle accident, the limitation applied to a contractual claim because "where a claim brought in contract is, essentially, an attempt to frame what is really a tort action in terms that mean to evade the operation of the limitation period, the period will operate nevertheless".

2) The Court did not consider how the costs are to be shared. Presumably, based on the Court of Appeal's decisions in *Broadhurst & Ball v. American Home*, *Alie v. Bertrand* and

E.M. v. Reed, this would be done on an equal basis.

3) No consideration was given to the issue of reimbursement, although this may be implied by the Court's reference to Axa being able to bring a summary judgment motion.

4) In that connection, since, in accordance with *Kerr v. LPIC* and *Monenco v. Commonwealth*, the defence obligation is to be determined prospectively, and not retrospectively, on the basis of the pleadings, and without extrinsic evidence, subject to certain exceptions, the nature of a future summary judgment motion

would likely be contentious.

5) Finally, no mention is made of the potential for conflict arising between the interests of the insured and the insurers, and as between the two insurers, and the possible need for counsel independent of the insurers if there is any concern about how the case might be defended, in accordance with *Brockton v. Frank Cowan Co.*, i.e., the mandate given to defence counsel must be to protect the interests of the insured, and not one of the insurers.

It will be interesting to see whether other insurers may be encouraged to pursue similar relief in light of this decision.

Firm News

The Firm is pleased to announce the appointment of three new associates. Jennifer Malchuk and Melisa Gust will be practising in our Hamilton office and Hershel Sahian will be in our Toronto Office. Jennifer was called to the bar in 1999 and was previously in-house counsel for a major insurer. Melisa and Hershel articulated at Hughes Amys and were called to the bar in 2002 and 2003 respectively. Melisa is also a member of the Illinois state bar.

The Firm is also very pleased to extend congratulations to our former partner Jim Keaney on his appointment as a judge of the Ontario Court of Justice.