

Hodgkinson v. Economical Mutual Insurance Company: The Intentional Act Exclusion in Defamation Cases



by *Pamela Stevens*

In the recent case of *Hodgkinson v. Economical Mutual Insurance Company*, we persuaded the Court of Appeal that Economical had no duty to defend the appellant insured in an action commenced against him claiming damages for defamation. In its decision released December 17, 2003 the Court of Appeal held that the “intentional act” exclusion in Economical’s homeowner’s policy excluded coverage.

The issue originally came before Pitt J. on an application by Hodgkinson seeking an order that Economical was obliged to defend him in an underlying action commenced by Northern Financial Corporation and Vic Alboini. The plaintiffs claimed general damages of \$1,000,000.00 for defamation and intentional interference with economic relations, and aggravated, exemplary and punitive damages in the amount of \$500,000.00. It was alleged that Hodgkinson, using a pseudonym, had posted defamatory messages about the public company on an internet-based discussion forum devoted to a

number of different businesses and investment topics. The postings included comments about pending litigation.

Hodgkinson had delivered a Statement of Defence to the action in which he admitted making the postings but denied that any were defamatory of the plaintiffs. He further alleged that the statements were substantially true, were expressions of opinion and fair comment and were made without malice.

Pitt, J. held that while there may be coverage for defamation under the “property damage” section of the homeowner’s policy, there was no duty to defend as the intentional act exclusion operated to exclude coverage.

The exclusion in the policy read as follows:

“You are not insured for claims arising from:

... (5) bodily injury or property damage caused by any intentional or criminal act or failure to

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act by,

(a) any person insured by the policy; or ...”

Although the insured Hodgkinson had sworn an Affidavit in support of the application, it was conceded in argument before Pitt, J. that it was appropriate to consider only the provisions of the policy and the pleadings in determining whether a duty to defend existed. There was essentially no dispute as to the law to be applied. The two decisions of the Supreme Court of Canada in *Nichols v. American Home*, [1990] 1 S.C.R. 801 and *Scalera v. Lloyds of London*, [2000] 1 S.C.R. 551, were agreed to give rise to the following principles:

1. The duty to defend arises only where the pleadings raise claims that would be payable under the insurance policy;
2. The duty to defend may be broader than the duty to indemnify;
3. Wide latitude must be given to the pleadings to determine if there is even a mere possibility of success in the underlying action;
4. Exclusion clauses are to be construed narrowly;
5. Activity by an insured that

involves an intent to injure will fall under the intentional act exclusion.

On appeal, Hodgkinson argued that there was a distinction between an intention to act so as to cause injury and an intention to commit an act causing injury, submitting that this distinction was key to the determination of whether the exclusion clause applied. Hodgkinson relied on the definition of the tort of defamation as a tort of strict liability in order to avoid application of the exclusion clause.

The Court of Appeal agreed that defamation is by definition a tort of strict liability and a finding of liability does not necessarily require a finding of intent to injure. The Court, commenting on the insured’s argument, stated at page 4:

“From this the insured submitted that the cases concerned with intentional torts are inapplicable to this case.”

In response we submitted on behalf of Economical that:

“Certain torts entail an intent to injure so that the intent to commit the act ‘brings in its train the intent to cause the harm’.”

G.H.L. Fridman, The Law of Torts in Canada, 2nd Edition, at page 20

In disposing of the appellant’s argument, the Court of Appeal stated at page 7 of its reasons:

“What is clear from the Statement of Defence is that it negates the possibility that the publication was accidental - that is, not intended - and that the insured did not have the plaintiffs in mind in making his statements. ... There is no room for concluding that it was not an essential part of this intention that the plaintiff’s reputation be lowered.”

The Court held that Hodgkinson’s conduct fell within the class of the “typical case” of defamation in which, at page 8:

“... the publisher (1) realized that the statement made was defamatory, and (2) intended to refer to the plaintiff, and (3) intended to communicate it to a third person or persons.”

The Court of Appeal concluded that Pitt, J. was correct in finding that by reason of the

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intentional act exclusion the duty to defend was not triggered.

Of interest in this case was the Court of Appeal's consideration of both the Statement of Claim and Statement of Defence in the underlying action against Hodgkinson as incorporated in the "pleadings" capable of being considered. Although this point was not specifically argued, it is submitted that this extended consideration was appropriate in light of the admissions made by Hodgkinson in his Statement of Defence.

In light of its findings on the issue of duty to defend, the Court of Appeal did not com-

ment on several other issues raised before it and in the court below. These included the question of coverage for punitive damages and whether or not the insurer or the insured had a right to select counsel in the circumstances of the case.

In this writer's view, there would have been no issue on the first point as the policy wording was clearly restricted to coverage for "compensatory damages". The second issue has been extensively discussed by the Court of Appeal in *Brockton v. Frank Cowan Co.*, [2002] O.J. No. 20, in which it was held that the right of the insurer to control the defence will only be lost where there is a reasonable apprehension of a

conflict of interest on the part of counsel appointed by the insurer to defend the civil action. Where an insurer takes the position of a reservation of rights, no conflict of interest automatically arises, particularly where separate coverage counsel has been appointed.

In *Hodgkinson*, the insurer had initially appointed defence counsel, but withdrew from defence of the underlying action when it concluded that there was no duty to defend under the homeowner's policy. It is submitted that by following this procedure, Economical preserved a strong position from which to argue that it should continue to maintain the right to control the selection of defence

Chenderovitch v. Doe; Separate Limitation Periods Under Bill 59

by *Richard Horak*

The Ontario Court of Appeal in *Chenderovitch v. Doe* [2004] O.J. No. 681, a decision released on February 25, 2004 has clearly ruled that under Bill 59 there are separate causes of action for separate heads of damages arising out of the same act of negligence. As a result, separate limitation periods may apply, given the application of the discoverability principle.

The Plaintiffs commenced an action as a result of a motor vehicle accident which occurred on April 29, 1997. The action was not commenced until November 12, 1999, more than two years after the accident occurred. While the Defendant conceded that the Plaintiffs' claim for non-pecuniary damages was issued within the two year limitation period, based on

the application of the discoverability principle, it was argued that the action was nevertheless statute-barred because it had not been commenced within two years of May 6, 1997, the date on which the Plaintiff knew that she had a pecuniary damage claim for loss of income (the Plaintiff had abandoned her claim for pecuniary damages prior to the hearing

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of the Summary Judgment Motion).

After considering the legislative history of automobile insurance within Ontario, from Bill 68 through Bill 164 to Bill 59, the Court indicated that the purpose of Bill 59 was “to enable accident victims to recover pecuniary damages without regard to the severity of their injuries; it was not to lay a limitation trap to prevent them from recovering legitimate non-pecuniary damages”.

The Court accordingly rejected the argument of the Defendant, who was seeking to establish a “single cause of action”. By enacting Section 267.5, the Court of Appeal concluded that “the legislature intended to draw a distinction that the common law does not recognize. To be precise, it chose to create separate causes of action for separate heads of damages arising out of the same act of negligence”.

The Court accordingly concluded that the Plaintiff could pursue her non-

pecuniary damage claim. Of particular significance is the comment that “because she abandoned her pecuniary damage claim . . . it is unnecessary to finally decide whether that claim would have been statute-barred had she chosen to pursue it”.

It will accordingly be left to another case for the Court to determine whether a Plaintiff may “shelter” a pecuniary damage claim under an extended limitation period applicable for a non-pecuniary damage claim.

Firm News

Hughes Amys LLP welcomes Linda Kiley as its most recent associate. Linda was called to the Bar in 1996 and since then has practiced in the areas of estates and trusts, insurance and accident benefits litigation. She will continue her practice with Hughes Amys, principally in the field of accident benefits litigation.

Jack Fitch co-chaired and delivered a paper at the 5th annual National Summit on Institutional Liability for Sexual Assault and Abuse on February 24-25, 2004