

Noteworthy

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LIBERTY MUTUAL v. HOLLINGER: REINVENTING PERSONAL INJURY COVERAGE?

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BARRISTERS & SOLICITORS

by Michael Teitelbaum

In a decision released February 13th, 2004, the Ontario Court of Appeal addressed whether a general liability policy is obliged to provide a defence to a claim of intentional discrimination. The Court's comments, while finding that there was no duty to defend, have the potential to make every claim involving "personal injury" coverage in a liability policy a contentious one.

Liberty Mutual issued a Comprehensive General Liability policy to Hollinger Inc., and others. A prominent U.S. journalist, Carl Rowan, sued the Chicago Sun Times, a Hollinger subsidiary, for wrongful dismissal. The claim also included allegations of intentional racial and age discrimination.

Hollinger acknowledged that claims for "breach of contract" and "constructive discharge" did not attract a defence obligation. However, after retaining counsel to defend the claim and eventually settling it, Hollinger requested contribution from Lib-

erty toward the cost of defence and indemnity with respect to the discrimination claims. On an application by Liberty for a declaration that it owed no duty to defend Hollinger, the application judge, Justice Backhouse, ruled that Liberty was required to provide Hollinger with a defence. The Court of Appeal (Sharpe, J.A., on behalf of Rosenberg and MacPherson, JJ.A.) reversed that decision.

The Court found that the Amended Complaint was drafted in a manner in which Rowan alleged intentional discrimination in violation of the District of Columbia Human Rights Act and the United States Civil Rights Act. Rowan alleged that after the Sun Times came under the control of Hollinger, management "entered upon a calculated policy" of changing the newspaper's orientation towards a "white" audience and "brazenly" set out to remove "black images", including Rowan's columns, from the newspaper. The allegations against Hollinger included that it "wilfully, wantonly, maliciously,

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and deliberately entered upon the course of action . . . designed with a discriminatory purpose against Mr. Rowan on account of his race, either to terminate the employment contract or to force Mr. Rowan to conclude that his services for Defendant were effectively being terminated by Defendant”. Similar allegations of intentional discrimination were made with regard to age discrimination.

Hollinger’s policy with Liberty included “personal injury coverage” for “false arrest, detention or imprisonment, malicious prosecution, libel, slander, defamation of character, invasion of privacy, wrongful eviction or wrongful entry sustained by any person or organization during the policy period” and for “discrimination, except in such jurisdiction where by legislation, court decisions or administrative ruling such insurance is prohibited or held to violate the law or public policy of any such jurisdiction”.

The “personal injury coverage exclusions” provided there would be no coverage for the “wilful violation of a penal statute or ordinance committed by or with the knowledge or consent of any insured”. Liberty relied on this exclusion, but the Court found it had no application. Liberty also ar-

gued that the acts of intentional discrimination were not covered because:

(a) According to the “fortuity principle”, indemnity insurance covers only fortuitous acts of the insured and intentional harm is excluded; and,

(b) It would be contrary to public policy to permit insurance coverage for intentional discrimination.

“this language must be read and interpreted in light of a general principle of insurance law that arises from the very nature and purpose of insurance, namely, that ordinarily only fortuitous or contingent losses are covered by a liability policy”

The Court observed that these two grounds did not appear to have been the focus of Liberty’s submissions before the application judge.

In addressing Liberty’s argument that the policy does not

cover claims of intentional discrimination, the Court acknowledged that apart from the exclusion clause: “there are certain features of the Policy that would appear, on their face, to allow for coverage for claims of intentional discrimination”. Such claims are but one aspect of a broader category of claims for “personal injury”, and several of the itemized categories falling within that general category involve intentional wrongdoing. For example, coverage is provided for claims for false arrest and malicious prosecution. Such causes of action are “intentional torts and ordinarily require a high level of intentional conduct” (paragraph 15 of the Court’s Reasons).

Justice Sharpe held, however, that “this language must be read and interpreted in light of a general principle of insurance law that arises from the very nature and purpose of insurance, namely, that ordinarily only fortuitous or contingent losses are covered by a liability policy”. The Court observed that where an insured intends to cause the very harm that gives rise to the claim, the insured cannot look to a liability policy for indemnity. The court referenced the comments by Justice Iacobucci in *Non-Marine Underwriters, Lloyd’s of London v. Scalera*, [2002] 1 S.C.R. 551, at paragraphs 68-

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69, in this regard.

The Court also held that by its terms, the policy is “an occurrence-based liability policy that only covers accidental or fortuitous losses”.

The Court further found that the fortuity principle does not exclude coverage for all claims that arise from intentional acts, as “an intentional act may have unintended consequences”. Thus, if the unintended consequence falls within the terms of the policy, it will be covered even if it was caused by the intentional act of the insured. In the context of claims for discrimination, referring to a Miami Law Review article, the Court explained that coverage is precluded only for liabilities arising out of conduct intended to cause harm. Public policy does not prohibit insurance coverage when an employer seeks coverage for intentional actions that have resulted in injuries, but only when an employer seeks indemnification for injuries that it intended to inflict.

The Court held that the claims for discrimination in this case “cannot be described as claims for accidental or fortuitous loss nor can they be qualified as claims for the unintended consequence of an intentional act”. Rather, they are claims of “intentional wrongdoing and arise from

allegations that Hollinger intended to inflict the very wrong of which Rowan complains”. Accordingly, Rowan’s claims fall outside the terms of the policy and Liberty is not required to provide Hollinger with a defence.

Hollinger argued that the underlying facts pleaded in the Complaint could result in a finding of unintentional or “disparate impact discrimination” and, as a result, the duty to defend arises on this basis.

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The Court did not accept this argument, holding that on application of the Scalera three-step test in determining whether any claims are derivative in nature under the second step, “any suggestion of indirect or adverse impact discrimination in a claim is . . . entirely derivative of the claim of intentional discrimination”.

While deciding the appeal on the basis of the fortuity principle, the Court observed that the “public policy” argument is not entirely distinct in na-

ture. The Court stated that while the issue of whether insurance coverage for discrimination claims is contrary to public policy does not appear to have been considered by any Canadian court, there is an extensive body of American authority on the point. Most American courts that have considered the question have excluded insurance coverage for claims of intentional discrimination but, for the most part, have distinguished intentional or “disparate treatment” discrimination from unintended or “disparate impact” claims and allowed liability insurance coverage for the latter.

The Court stated that it was deciding this appeal on the basis of the fortuity principle and leaving the broader public policy issue of insurance coverage for claims of discrimination for another day.

Depending on how this decision is interpreted, argued and applied, and subject to the specific wording of individual policies, it may lead to insurers arguing that not only discrimination claims, but other offences for which it was understood coverage was provided, may not, in fact, be available depending on the nature of the allegations made in each case. Arguably, this will generate increased litigation, at least at the outset, as insureds and insurers, and the

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courts, struggle with whether specific allegations in an originating pleading can be characterized as asserting that there was an intention to cause the injury itself (which, according to Hollinger, would not be covered), and the intention to commit the act

that causes injury (which might still mean that coverage is available).

The Court's reserving consideration of the "public policy" argument to another time will likely lead to a similar argument being made in future cases not only in respect of

discrimination but the other listed offences both insureds and insurers had always understood were the subject of "personal injury" coverage.

It appears interesting times are ahead as these various considerations are addressed.

"Faithless is he that says farewell when the road darkens"

Noteworthy will return next fall

Have a safe and warm summer