

## ONTARIO COURT OF APPEAL INVIGORATES THE "CRIMINAL ACT" EXCLUSION

By Michael Teitelbaum

In *Eichmanis v. Wawanesa Mutual Insurance Co.*, 2007 ONCA 92, the Ontario Court of Appeal applied the "criminal act" exclusion to deny recovery to a claimant seriously injured when he was shot by an insured.

In doing so, the court found that s. 118 of the Insurance Act did not apply in the circumstances.

### Facts and Issue

A 15 year-old boy, Ryan P., broke into his father's locked house, with two friends, including Ryan E.. Ryan P. picked up a shotgun, showed the other boys that it was loaded, and pointed it at Ryan E.. He backed up against the wall, and the gun accidentally discharged at short range, striking Ryan E. in the abdomen with bird shot, causing Ryan E. permanent and serious injuries.

Subsequent to the shooting incident, Ryan P. pleaded guilty in Youth Court to a charge of criminal negligence causing bodily harm, contrary to s. 221 of the Criminal Code.

In the underlying tort action, the Court of Appeal found Ryan P. 30% at fault and Ryan P.'s fa-

ther 45% responsible, with Ryan E. being 25% contributorily negligent.<sup>1</sup> Ryan E. sued Wawanesa Mutual Insurance Company and Commercial Union Canada, the insurers of Ryan P.'s aunt and uncle, and mother, respectively, pursuant to s. 132 of the Insurance Act when the judgment against Ryan P. and his father went unsatisfied. At first instance, the motion judge, Pierce J., found that Ryan P. was insured under Wawanesa's policy, but not under Commercial Union's policy, on the basis that he was a member of his aunt and uncle's, and not his mother's, household. Justice Pierce also found that the "intentional or criminal act" exclusion in Wawanesa's policy did not apply.

The Court of Appeal declined to disturb the finding that Ryan P. was an insured under his aunt and uncle's policy with Wawanesa. However, the Court reversed the motion judge's finding that the exclusion was inapplicable, and held that there was no entitlement to recovery.

The Court stated the main issue presented by the appeal was "whether criminal negligence causing bodily harm is a

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1. *Eichmanis (Litigation Guardian of) v. Prystay (Childrens' Lawyer)* (2004), 185 O.A.C. 97.

## Noteworthy

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'criminal act' within the meaning of the exclusion clause".

### Court of Appeal's Analysis

The Court noted that the exclusion in issue applied to "bodily injury or property damage caused by any intentional or criminal act or failure to act by any person insured by this policy".

The Court also observed that the motion judge stated that s. 118 of the Insurance Act limits the scope of an exclusion where an insured has engaged in criminal behaviour. Section 118 reads as follows:

Unless the contract otherwise provides, a contravention of any criminal or other law in force in Ontario or elsewhere does not, by that fact alone, render unenforceable a claim for indemnity under a contract of insurance except where the contravention is committed by the insured or by another person with the consent of the insured, with intent to bring about loss or damage, but in the case of a contract of life insurance this section applies only to disability insurance undertaken as part of the contract.

The Court further noted that Wawanesa's principal argument both before the motion judge

and the Court of Appeal was not that the intentional act exclusion applied, but that the criminal act exclusion clearly applied because Ryan P. had been convicted of criminal negligence causing bodily harm. In this connection, Pierce J. had stated:

Ryan P.'s conviction for criminal negligence is not a criminal act that is caught by the exclusion clause. Criminal negligence is a sub-set of negligence. It is included in the Criminal Code because Parliament has enlarged criminal responsibility beyond intentional conduct. The mens rea for criminal negligence is recklessness as defined in s. 219 of the Criminal Code. This is qualitatively different from the mens rea for intention. . . Ryan P.'s criminal negligence is the very type of conduct that is contemplated by s. 118 of the Insurance Act.

Borins J.A., on behalf of a three-member panel, disagreed with the motion judge's conclusion that, on the basis of s. 118 of the Insurance Act, Ryan E. was not precluded from recovering under Wawanesa's policy because Ryan P.'s contravention of the criminal law was not intended to cause loss or damage. The Court stated that Pierce J. was "incorrect in interpreting s. 118 as a limitation on the criminal act exclusion in

Wawanesa's policy".

The Court cited *Scott v. Wawanesa Mutual Insurance Co.*, [1989] 1 S.C.R. 1445, (a property as opposed to a liability claim), which characterized a similar exclusion as "perfectly clear and unambiguous". Borins J.A. continued:

Indeed, Canadian courts have not discerned any ambiguity in the 'criminal act' exclusion in this policy, or in similar exclusions. In this case, the policy of insurance excludes liability of the insurer for damages caused by intentional or criminal acts of the insured. I do not see how the insurer could have worded its policy to exclude the risk of damage caused by a criminal act other than by the precise terms used in its policy. It is undisputed that Ryan E.'s injury was caused by Ryan P.'s criminal act. He acknowledged committing the criminal act by pleading guilty to, and being convicted of, criminal negligence causing bodily harm. I appreciate that the result of this appeal may appear to be harsh. However, where the language of a contract is unambiguous, as in my view it is in this case, courts should not give it a meaning different from

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that expressed in clear language, unless the contract is unreasonable or is contrary to the intention of the parties.

The Court goes on to find that the language of the exclusion in issue is disjunctive so that an "act of an insured that causes injury is excluded when it is either an intentional act, or a criminal act".

The Court also stated that Pierce J.'s interpretation of "criminal act" as applying only to criminal acts intended to cause injury renders the phrase "criminal act" superfluous. The Court continued:

An insurer intending to exclude only criminal acts where the insured intends to cause injury could achieve the same result by merely excluding intentionally caused injuries. It is a well-established principle that insurance contracts should not be interpreted to render their terms meaningless. Moreover, contrary to the view of the motion judge, the criminal act exclusion does not exempt certain categories of crime, or specific crimes. In my view, in Canada the phrase "criminal act" means any breach of the Criminal Code because s. 9 of the Criminal Code abolishes all common law crimes,

with the exception of the common law power of judges to punish for contempt of court . . . .

The Court also disagreed with the motion judge that the language of s. 118 of the Insurance Act affects that interpretation of insurance policies. Although Pierce J. was correct in stating that Ryan P.'s criminal negligence was the type of conduct contemplated by s. 118, she failed to consider the opening phrase of that section, which states: "Unless the contract otherwise provides". The Court stated:

This language permits liability insurers, as Wawanesa has done in this case, to exclude indemnification for loss or damages caused by contravention of the criminal law, or other statute, regardless of the intent, or lack of intent, to cause loss or damage by the commission of an illegal act. In other words, s. 118 does not apply to Wawanesa's insurance contract because it 'otherwise provides' that damages caused by a criminal act of the insured are excluded from coverage.

The Court goes on to find that the law on the criminal act exclusion is correctly stated at pages 18-181 to 18-182 in *C. Brown, Insurance Law in Canada*, which reads in part:

The [criminal act] exclusion applies even without proof of intention to cause the injury or damage, so long as the act or omission that causes the harm is criminal in nature. This is especially important in certain criminal offences where mens rea or criminal intent is not an element of the offence, such as criminal negligence, and of certain criminal failures to act, such as failure to provide the necessities of life and neglect to obtain assistance in child-birth.

#### Comment

The Court of Appeal clearly differed with the motion judge in the interpretation of s. 118 of the Insurance Act. As we understand Pierce J.'s decision, she held that s. 118 applies because even though there was a contravention of criminal law, there was no intent on the part of Ryan P. to bring about loss or damage. While accepting this reasoning, the Court of Appeal found that the exclusion was rendered applicable because Wawanesa's policy "otherwise provides" that damages caused by a criminal act are excluded from coverage.

The interesting question is whether the exclusion has this effect without some additional wording that specifically ad-

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dresses the point regarding "intent to bring about loss or damage". There is a long line of authority in the interpretation of the "intentional act" exclusion requiring the intent to cause injury before that exclusion can be found to apply. Query whether given the wording of s. 118, the language of the "criminal act" exclusion in issue "otherwise provides", in a fashion sufficient to satisfy the statutory requirement, that the contravention of the criminal law was committed "with intent to bring about loss or damage".

On another point, we also find

interesting the scope of the following statement by the Court:

However, where the language of a contract is unambiguous, as in my view it is in this case, courts should not give it a meaning different from that expressed in clear language, unless the contract is unreasonable or is contrary to the intention of the parties.

We presume that the references to a contract being "unreasonable" or "contrary to the intention of the parties" are not intended to be a different formulation than the longstanding interpretive

principles that (1) if an insurance contract is ambiguous, then the reasonable expectations of the parties can be considered, or, (2) in certain instances, even where an exclusion clause may be clear and unambiguous, it will not be applied where it is inconsistent with the main purpose of the insurance coverage and the result would be to virtually nullify the coverage provided by the policy.

Otherwise, if the test were to become whether the contract is "unreasonable", then this could have the potential for opening a wide-ranging inquiry.

#### FIRM NEWS

We are very pleased to congratulate Barb McAfee on her appointment as a Case Management Master in Toronto. We wish her all the best as she takes on this new challenge.

Jack Fitch recently co-chaired the Canadian Institute's 7th National Summit on Institutional Liability for Sexual Assault & Abuse.

Michael Teitelbaum and Mario Pietrangeli will be speaking at the Osgoode Professional Development Conference on Insurance Law and Coverage Disputes on March 27 -28, 2007.