Toronto Law Journal

Recent Cases Interpreting Insurance Exclusions: While policies may be "standard-form", disputes over interpretation continue

Rory Barnable, Barnable Law P.C and Mahdi Hussein[1]

Insurance coverage jurisprudence has its share of general principles. Lawyers even remotely familiar with the area may eagerly recite phrases like "contracts of adhesion", they may expound that "coverage is interpreted broadly while exclusions are interpreted narrowly", or perhaps at the opportune moment they may even throw out a "*contra proferentem*".[2] Insurance "generalities" are so reliable that in *Ledcor Construction Ltd. v Northbridge Indemnity Insurance Co.*, 2016 SCC 37 the Supreme Court of Canada assured us that parties interpreting insurance policies should resort to the general rules of interpretation that apply to insurance policies, adding further that appeal courts ought to apply a correctness standard of review as insurance policies constitute standard-form contracts not normally subject to negotiation. But although insurance coverage cases have generated well-established principles of interpretation, various cases within the last year confirm that the current state of the law does not provide all the answers or foreclose on future insurance coverage litigation.

A survey of recent insurance coverage cases over the past year confirm that interpreting exclusion clauses remains a nuanced and highly contestable topic. These recent cases display certain themes including the declining utility of legal terminology in insurance policies, the importance of plain and precise language, and suggest that (as before) the facts are what drive individual coverage determinations.

Tort Does Not Equal Contract

On the use of legal terminology, in *CIT Financial Ltd. v. Insurance Corporation of British Columbia*, 2017 BCSC 641, the British Columbia Supreme Court recently addressed distinctions between tort law and contract law when interpreting the meaning of an exclusion pertaining to "conversion". A lessee committed arson, and the decision addresses whether an exclusion referencing "conversion" ought to exclude the loss.

To interpret the exclusion in context, both parties attempted to outline to the Court what 'conversion' meant. They did so by focusing their submissions on tort principles of conversion. However, citing jurisprudence, the Court wrote that "general principles of tort law are no substitute for the language of the policy" and "…that general principles of tort law do not necessarily inform the meaning of insurance policy wording".[3]

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[1] Rory Barnable is the founder of Barnable Law P.C. He regularly advises insurers, policyholders and lawyers on insurance coverage issues. Mahdi Hussein is a recent call and lawyer in Toronto.
[2] One of our profession's last vestiges of latin.
[3] *CIT Financial Ltd. v. Insurance Corporation of British Columbia*, 2017 BCSC 641 at para. 14.

Rather, the Court encouraged a "plain language" approach when interpreting policy language. Therefore, a plain language approach must apply to interpret the term "conversion" as it was used in the policy. Seemingly somewhat reluctant to accept the legally accepted meaning of the term "conversion", the Court noted that "[i]t is a virtual certainty that the proverbial average insured has never heard of the tort of conversion".[4] The Court went so far as to express doubt that members of the insurance industry, and even most lawyers, would have an accurate appreciation for the tort of conversion. Noting uncertainty in the case law about the tort of conversion (as to the nature of the impugned act - such as theft, denial of title or possession to the owner - or even the extent of damage necessary), the Court ruled it is incumbent upon an insurer to specifically delineate what types of loss or damage it intends to exclude; and failing an adequate degree of precision, an exclusion may be read against the insurer.

Thus, after assessing what constitutes the tort of conversion, and what the term could possibly mean within the policy wording, the Court concluded "this particular exclusion ("conversion") is so vague and obscure in its application as to be effectively unenforceable".[5] The Court added that as exclusions are to be narrowly construed, and as the damage in this case was repairable, there could be no finding that the vehicle was "lost to its owner" (as the Court deemed necessary to establish the tort of conversion).[6] The decision serves as a reminder that the use of legal terminology within a policy does not necessarily provide certain guidance on that policy's application.

The challenge with relying on legal terminology in exclusion clauses is again highlighted in *Desjardins Financial Security Life Assurance Company v. Émond*, 2017 SCC 19, a recent short decision of the Supreme Court of Canada that adopted the reasoning of the Quebec Court of Appeal. At issue was an exclusion clause that excluded liability for incidents involving an indictable offence. However, the particular offence at issue, in fact, permitted the Crown to elect to proceed summarily or by indictment. The insured had died before being charged, but the claim against the policy was being advanced by his heirs.

The Court noted that exclusions must be interpreted to favour "... precision and certainty..."[7] The Quebec Court of Appeal held, and the Supreme Court agreed, that the exclusion "…concerns only indictable offences, those that are punishable exclusively by way of indictment, and not, as in this case, hybrid offences."[8] Thus, the courts avoided any ambiguity by applying a restrictive (and exclusive) interpretation of the exclusion.[9] Notably, as in the *CIT Financial* case, the Quebec Court of Appeal once again encouraged insurers to use precise and explicit language in exclusion clauses.

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[4] *Ibid* at para. 40.
[5] *Ibid* at para. 60.
[6] *Ibid* at para. 61.
[7] *Desjardins Financial Security Life Assurance Company v. Émond*, 2017 SCC 19.
[8] *Ibid*.
[9] *Ibid*.

The Demand for Precision

The case *Aviva Insurance Co. of Canada v. Intact Insurance Co.,* 2017 ONSC 509 involved an insurer resisting a defence duty based on a pollution exclusion. A claim against Avondale Stores Limited alleged that contaminants from property on which Avondale had operated ("source property") had migrated onto the plaintiff's property and caused damage. The umbrella insurer and the CGL insurer's policies both included the same pollution exclusion clause, which contained an exception in the event of release of pollution that was "sudden and accidental".[10]

Aviva provided the primary and umbrella insurance from 1993 to 1999. However, the Aviva umbrella policies from 1993 to 1997 included a qualified pollution exclusion ("QPE") that contained an exception if the "...discharge, dispersal, release or escape [of pollution] was sudden and accidental". Given the exception within the QPE, Aviva responded and defended Avondale under the 93-97 umbrella policies. Meanwhile, Intact was the commercial general liability insurer from 1983 to 1991. The Intact policies from 1983 to 1986 had the same QPE wording as the early Aviva Umbrella policies.[11] Aviva acknowledged Intact could deny liability for 1987 to 1991, but (because Intact's QPE also contained the exception) disagreed that Intact could otherwise deny all liability and refuse to defend Avondale. Aviva therefore applied for a declaration that the Intact 1983-86 policies were triggered and Intact should participate in Avondale's defence and indemnify Aviva for Intact's proportionate share of expenses and defence costs incurred and into the future

The Court granted Aviva's application. The Court concluded that the underlying pleading did not sufficiently allege particularized facts as to how the pollution escaped from the insured's underground storage tanks. The pleading repeatedly used the term "migrate".[12] But the Court noted that such a term pertained to the manner of damage to the property, rather than to the manner of release from its source. Notably, "…the word 'sudden' as used in the exception will be held to relate to the discharge, dispersal, release or escape of contaminants out of which damage to property arises, and not to the damage to property arising therefrom".[13]

Therefore, there was a possibility at trial that the manner of escape may be found to be 'sudden'. As a possibility remained, the insurer who sought to resist the defence duty could not establish that all of the possible claims made in the underlying action would ultimately be found to be excluded from coverage. The nature of the claim could fall within the exception to the exclusion and the insurer had a duty to defend the insured.

The decision emphasizes the difficult burden a party may have in demonstrating that all possible outcomes could still fall within the wording of an exclusion clause. Parties attempting to rely upon exclusions to negate cover must do so with particular caution.

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[10] *Aviva Insurance Co. of Canada v. Intact Insurance Co.,* 2017 ONSC 509 at para. 9.
[11] The Intact policies referred to the QPE as an "environmental liability exclusion".
[12] *Ibid* at para. 24.
[13] *Ibid* at para. 22.

Lastly, although the principles of insurance interpretation are well-established, the actual application may vary depending on statutory differences, and the fact scenarios at issue. The next two cases underscore that despite the adage "insurance contracts … should be interpreted based on how an ordinary person would understand them",[14] the results may not be what an ordinary person may expect or desire.

Just Results for Intentional Conduct Exclusions

The Ontario Superior Court and the Court of Queen's Bench in Alberta both recently addressed whether interests of co-insureds might be joint or several. While "an ordinary person will generally believe that the interests of multiple co-insureds under the same policy are several and not joint..."[15] these contrasting cases show the application of the law is not always so favourable to an innocent co-insured.[16]

In *Soczek v. Allstate Insurance Co.*, 2017 ONSC 2262, the Ontario Superior Court considered the rights of a wife who was co-owner of property to claim under a property insurance policy after the husband caused damage to a property through an intentional, criminal act. In this tragic case, the husband attempted to murder the wife by pouring gasoline on her and lighting the gasoline. The wife suffered grievous burns over a large percentage of her body while the home was damaged by the fire. The husband was convicted of attempted murder and was imprisoned.

The insurer, Allstate, denied the wife's claim for property damage to the home because the husband was a co-owner and the policy excluded liability for property damage caused by any intentional or criminal act done by a person insured under the policy. The Court acknowledged that the exclusion clause was not ambiguous and that it was:

> "...within Allstate's discretion to interpret the exclusionary clause in the policy in a way that would exclude Soczek, but not the Plaintiff, from a claim. However, the company is standing strictly on what it sees as its rights under the contract of insurance".[17]

In addition to Allstate standing on its rights under the contract, Allstate asserted that the wife's claim was an abuse of process.[18] The Court refused to accept the claim was abusive. Still, and despite the apparent unfairness to the innocent wife, the Court acknowledged Allstate's decision to "...stand firmly on this 'fine print'" and to exclude a claim for damage caused by the intentional act of a co-insured.[19]

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[14] *Haraba v. Wawanesa Mutual Insurance Company (The)*, 2017 ABQB 190 at para 11 citing the Supreme Court of Canada in *Scott v. Wawanesa Mutual Insurance Co*, 1989 CanLII 105 (SCC), [1989] 1 SCR 1445 [*Scott*].
[15] *Ibid*. Note that if their interests are joint, then the actions of one may permit the insurance company to deny recovery by other innocent co-insured. However, if the interests are several, then the actions of one co-insured will not bar the innocent co-insured from collecting under the same policy.
[16] *Ibid*.
[17] *Soczek v. Allstate Insurance Co.*, 2017 ONSC 2262 at para. 9.
[18] As a collateral attack on the criminal trial.
[19] The Court was seemingly bound by the majority decision in *Scott v. Wawanesa Mutual Insurance Co.* 1989 CanLII 105 (SCC), [1989] 1 SCR 1445, at para. 14. In a somewhat similar fact scenario, the Supreme Court of Canada permitted an exclusion to omit coverage after a teenager burnt down his parents' home. Interestingly, portions

The Court also noted that British Columbia, Quebec and Alberta have enacted legislation prohibiting insurance policies from denying compensation to innocent co-insureds, while Ontario has not.[20] The Court recognized that in most contexts, Allstate, as the successful party, would be entitled to costs. However, the Court declined to award costs to either side.[21]

This innocent co-insured theme was also explored in *Haraba v. Wawanesa Mutual Insurance Company (The)*, 2017 ABQB 190, albeit with a different outcome. The plaintiff purchased a truck for her live-in boyfriend and listed him as a co-insured and the primary driver of the truck. Unbeknownst to the plaintiff and the agent for Wawanesa, the boyfriend provided his Nova Scotia identification, which the plaintiff and agent mistook as his driver's license. In fact, the boyfriend's license was suspended at the time. Eight days after he obtained the vehicle, the boyfriend was involved in an accident. Wawanesa realized that the boyfriend was not permitted to drive and asserted that the policy was void as against the plaintiff and her boyfriend due to the boyfriend's misrepresentation.

Wawanesa contended that the plaintiff violated Section 554 of the Alberta *Insurance Act*, which indicates that "...a claim by the insured is invalid and the right of the insured to recover indemnity is forfeited" if "an applicant ... knowingly misrepresents or fails to disclose in the application any fact required to be stated in the application".[22] However, the Court:

- applied "... the modern approach to interpreting insurance contracts…";
- noted that policies "... should be interpreted based on how an ordinary person would understand it"; and
- added that "... the ordinary person will generally believe that the interests of multiple co-insureds under the same policy are several and not joint, and that the misrepresentations of one co-insured will not affect the other co-insureds' interests."

On that basis, the boyfriend's misrepresentations did not undermine the plaintiff's "... ability to claim under the policy because the statute and the insurance contract do not contain express language indicating that the policy will be void against innocent co-insureds if another co-insured makes a material misrepresentation."[23]

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from the dissent written by La Forest, J. outline what has become the present approach to insurance interpretation, suggesting that a court must look to the reasonable expectation and purpose of an ordinary person in entering such contract, and the language employed in the policy is to be given its ordinary meaning. Notionally, it would seem that a policy intended to cover fortuitous and accidental events need not include an exclusion pertaining to the intentional actions of an insured, other than to bind the interests of different insureds.

[20] *Supra*, note 16, at para. 21-22.

[21] *Supra*, note 16; see also "[42] Given my dismissal of the claim, in most contexts I would say that Allstate, as the successful party, is entitled to costs. Much as Allstate's counsel has made a successful legal argument, however, it must be said that Allstate's corporate conduct is less than admirable. At least since the publication of the *Scott* decision in 1989, with its strongly worded criticism by Justice La Forest, Allstate has been aware that its exclusionary clause, while technically legal, is unfair to its innocent customers."

[22] *Haraba v. Wawanesa Mutual Insurance Company (The)*, 2017 ABQB 190 at para. 34.

[23] *Ibid*, para 35. In contrast with the decision in *Soczek*, see also para. 25, wherein the Court wrote "I conclude that, given that the Supreme Court cited La Forest J's interpretive framework with approval in *Katsikonouris*, it is possible to follow the Saskatchewan Court of Appeal's line of reasoning in *Wigmore* to narrowly construe the majority decision in *Scott*, adopt La Forest J's framework from the dissent, and apply it to situations where one

Conclusions on Exclusions

The above cases confirm that insurance coverage exclusions are a challenging tool upon which to maintain a denial of coverage. As courts increasingly embrace an ordinary and plain meaning, as expected by the "ordinary person", the utility of the insurance exclusion increasingly narrows.

Insurance policy exclusions are most effective when crafted with precise, but ordinary, wording. Imprecision may permit a multitude of interpretations and expose insurers and insureds to uncertainty, and thus to risk. Incorporating legal terminology into policy wording does not necessarily lead to certainty, and may do the opposite. Parties are best able to assess their respective positions through a policy with straightforward meanings and carefully delineated scopes of coverage. And last, a decent set of facts will go a long way.

co-insured makes a misrepresentation that may affect the ability of innocent co-insureds to collect under the policy."