Dutton Brock LLP

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"The conversation on global warming has been stalled because a group of denialists fly in to a rage when it is mentioned." ~ Al Gore

INSURANCE FOR BULLYING: ALONE AND ADRIFT ON A POLAR ICE CAP

In Unifund Assurance Company v. D.E., 2015 ONCA 423, and the companion action of C.S. v. TD Home and Auto Insurance Company, 2015 ONCA 424, the Court of Appeal unanimously held that there is no duty to defend and indemnify the parents of a bully under a Comprehensive Homeowner's Property and Liability Insurance Policy.

In the original Statement of Claim commenced by the Plaintiff ("K.S."), and her mother, three Grade 8 students ("the bullies"), the Toronto Catholic District School Board and several of its employees were named as Defendants. The Statement of Claim was amended to add the parents of all three bullies as co-Defendants.

The amended Statement of Claim alleges that three bullies threatened, hit and physically assaulted K.S. As a result of the harassment she endured, K.S. allegedly sustained a variety of physical and psychological injuries. The amended Statement of Claim further alleges that the continuous and ongoing acts by the bullies were caused solely as a result of the negligence of their parents.

The parents of one of the bullies made an Application to the court in which they sought a declaration that Unifund, their home owner insurer, had a duty to defend and indemnify them.

Unifund denied coverage on the basis that the allegations in the Amended Statement of Claim fell outside of the scope of coverage provided by their homeowner policy.

Unifund's position was based on the wording of the policy. This excluded coverage for claims arising from bodily injury or property damage caused by an intentional or criminal act or failure to act by any person insured by the policy; or person insured by this policy to take steps to prevent sexual, physical, psychological or emotional abuse, molestation or harassment or corporal punishment.

Justice MacPherson, in arriving at the decision that Unifund is not required to defend or indemnify the parents of R.E., followed the three-part test for interpreting insurance policies in the context of the duty to defend and indemnify found in *Lloyd's v. Scalera*, 2000 SCC 24.

This test asks the court to consider if the Plaintiff's legal allegations are properly pleaded; if any claims are entirely derivative in nature; and then decide whether any of the properly pleaded, non-derivative claims could potentially trigger the insurer's duty to defend.

At first instance, Justice Iacobucci of the Supreme Court of Canada cautioned against relying on the Plaintiff's characterization of the claim made against the parents of the bullies. His concern arises from the ability of Plaintiffs to "draft a statement of claim in a way that seeks to turn intention into negligence in order to gain access to an insurer's deep pockets." This part of the test asks the court to determine if a claim can be made in both negligence and intentional tort.

Next, the court must examine the actions of all the Defendants named in an action. In this case it asked

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the court to determine if the alleged negligence of the parents is derivative of the intentional acts of the bullies, or whether the two claims are severable. On appeal, Justice Iacobucci of the Supreme Court of Canada remarked that "a claim for negligence will not be derivative if the underlying elements of the negligence and of the intentional tort are sufficiently disparate to render the two claims unrelated."

With this in mind, Justice MacPherson of the Court of Appeal found that the first two criteria were easily met, so he focused his analysis on the third criteria, specifically, whether the properly pleaded, non-derivative claims triggered the insurer's duty to defend. In order to answer this part of the test, he read the wording of the Statement of Claim and the coverage and exclusion clauses of the policy together.

Justice MacPherson looked at the Amended Statement of Claim wherein the allegations against the parents of R.E. were described as a "failure to investigate", "failure to take steps to remedy", "failure to take reasonable care to prevent", "failure to take disciplinary action" and a "failure to discharge their duty to prevent the continuous physical and psychological harassment."

He then turned to the exclusion clause in section 7(b) of the policy which precluded coverage for the "failure of any person insured by this policy to take steps to prevent sexual, physical, psychological or emotional abuse, molestation or harassment or corporal punishment." After reviewing the foregoing, Justice MacPherson "did not see any ambiguity in the wording of this clause. The first word of the cause is 'failure' which is the core of the definition of 'negligence.' 'Failure' is also the centrepiece in the Amended Statement of Claim of each allegation against the parents of the bully."

Jocelyn Tatebe joined Dutton Brock in 2013. Jocelyn's insurance defence practice focuses on first party accident benefits disputes. She has appeared before the Superior Court of Justice as well as the Financial Services Commission of Ontario.

Global Warming: El Nino and the Hot Air of Old Case Decisions

The law surrounding uninsured and underinsured motorist (UIM) coverage in Ontario is constantly evolving. In the recent decision of *Kovacevic v. ING Insurance*, 2015 ONSC 3415, Justice MacKenzie granted ING's motion for summary judgment, dismissing the plaintiff's claim for damages as against ING pursuant to the OPCF 44R. The court ruled that an insured cannot pursue their own insurer for UIM coverage if they have settled their action as against the tortfeasor for less than the tortfeasor's available policy limits.

On February 4, 2004, the plaintiffs were involved in a motor vehicle accident in the State of Florida. The plaintiffs pursued an action for personal injuries in Florida as against the tortfeasor. ING, the UIM carrier, was not a party to the Florida action.

The tortfeasor had a policy of insurance with Lincoln General Insurance. He confirmed by way of written interrogatories that the policy limits were $1,000,000 and that there were no coverage issues. On April 21, 2010, the plaintiffs settled the Florida action for $300,000 at mediation.

In resolving the file, a full and final release was executed which detailed that the plaintiffs were settling the action with the tortfeasor for less than the available policy limits due to concerns over the potential insolvency of Lincoln General. The plaintiffs subsequently commenced a claim for damages arising out of the Florida accident as against ING pursuant to the UIM provisions of their policy with ING.

ING launched a motion for summary judgment, arguing that in settling their claim as against the Florida tortfeasors for less than that tortfeasor's available policy limits, the plaintiffs lost their right to pursue a claim as against their own insurer for underinsured coverage. In the alternative, ING argued they were entitled to a deduction of the Florida tortfeasor's full policy limits of $1,000,000 from any damages award at trial.

Justice McKenzie granted ING's motion for summary judgment, relying on the decision of *Sadhu v. Driver,* 2009 CanLII 18699, and distinguishing the case from the Supreme Court of Canada's decision *Somersall v. Friedman,* [2002] SCC 59.

In *Sadhu,* Justice Arrell found that the plaintiff was not entitled to pursue a claim as against her own insurer for UIM coverage after settling with the tortfeasor for less than the tortfeasor's policy limits. Justice Arrell distinguished this from Somersall, where the plaintiff entered into a limits agreement whereby the tortfeasor paid its total available limit and admitted liability in exchange for a release as against the at-fault driver personally. In Somersall, the Supreme Court of Canada found the plaintiff was allowed to seek damages from her own insurer, despite the fact that the insured had frustrated the insurer's right to subrogation by executing the limits agreement.

In granting ING's motion for summary judgment, Justice MacKenzie ruled that the plaintiffs could not pursue their own insurer for UIM coverage after settling their action as against the tortfeasor for less than the tortfeasor's available policy limits. The court rejected the plaintiff's argument that the

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limits of the policy were unavailable in the Florida action, finding there was insufficient evidence to establish Lincoln General was potentially insolvent at the time of settlement.

This case provides some clarity into the details an UIM carrier should be requesting from the plaintiff during the early stages of litigation such as to determine whether or not a case is ripe for summary judgment.

Joanna Reznick articled with Dutton Brock and joined the firm as an associate in 2013. Joanna is developing a broad civil litigation practice which includes general negligence, occupiers' liability, product liability, and personal injury

Ending the Reliance on Fossil Fuels: New Obligations in Surveillance Disclosure

The recent decision of *Bishop-Gittens v. Lim* considered the defence obligations for disclosing surveillance in advance of trial. This decision referred to the Ontario Court of Appeal decision of *Iannarella v. Corbett*, which provided a comprehensive review of defence disclosure obligations in a personal injury action.

In *Bishop*, the defence wanted to rely on surveillance evidence of the plaintiff for the purposes of impeaching the Plaintiff at trial. Since the completion of the examination for discovery of the Plaintiff in 2012, the defence had conducted three separate rounds of surveillance, in the fall of 2012, summer of 2014, and December of 2014. The case was called for trial in May of 2015. No disclosure of the surveillance was given until the defence delivered a letter to plaintiff's counsel on May 8, 2015, which set out particulars of all of the surveillance, but did not include a copy of the video surveillance.

Justice McKelvey concluded that the defence was in clear breach of its obligations under the Rules in not providing an updated affidavit of documents, disclosing the surveillance within a reasonable time. Justice McKelvey referred to the Iannarella decision, where the court found that there was an obligation to deliver an updated affidavit of documents where additional privileged documents were obtained under the provisions of Rule 30.07 (b).

In addition, Rule 31.09 (1)(b) provides that where a party who has completed examination for discovery subsequently discovers that the answer to a question on the examination is no longer correct or complete, the party is required to forthwith provide the information in writing to the other party. Justice McKelvey noted that a delay of over two years in providing this information does not satisfy the requirements under rule 31.09 (1)(b). He further stated "given surveillance was conducted during three separate time frames, three separate notifications should have been given to the plaintiff about the surveillance which was conducted."

Justice McKelvey then proceeded to assess whether the surveillance evidence is admissible for the purposes of impeaching the Plaintiff, in light of the defence's failure to disclose it in a prompt manner. In granting leave, Justice McKelvey concluded that the prejudicial effect of the surveillance did not outweigh its probative value and that the defence should be entitled to refer to the surveillance evidence with some conditions, including the defence producing copies of the video surveillance and paying the costs of the plaintiff if an adjournment is requested by the Plaintiff.

The overall message of this decision is summed up by Justice McKelvey in that "the obligations of the defence to disclose surveillance evidence in accordance with the rules is an important responsibility and is not to be taken lightly." To avoid the risk of a mistrial, defence counsel should heed this decision and provide timely and adequate disclosure of surveillance including provision of a copy of any video footage of the Plaintiff.

Lida Moazzam articled with Dutton Brock before joining the firm as an associate after her call to the Bar in 2014. Lida is developing a broad civil litigation practice.

Catastrophic Weather and Impairment

The arbitration decision of *Watters and State Farm* (FSCO A13-006328, June 26, 2015) is the first to provide an analysis of the Glasgow Outcome Scale ("GOS") criteria under the current s.3(2)(d)(ii) of the SABS. It is also relevant to the June 2016 SABS changes to the CAT criteria for brain injured claimants.

Section 3(2)(d)(ii) of the current SABS requires a score of 2 (vegetative) or 3 (severe disability) on the GOS. A score of 2 – vegetative state – was not addressed in the *Watters* case. A score of 3 for severe disability, as defined by Jennett and Bond, is set out in *Watters*. The criteria is used to describe patients who are dependent for daily support by reason of mental or physical disability due to brain impairment, usually a combination of both, and involving institutionalization or daily care at home.

Arbitrator Feldman accepted that "the focus is on the person's function and his/her ability to engage independently in normal daily care and activities." He rejected the position of Dr. Moddel, a neurologist, that GOS is based solely on neurological deficits and neurological test results. In the Watters case the insurer relied upon a neurological CAT opinion of Dr. Moddel, who found virtually no neurological deficits on testing or outlined in the medical documentation.

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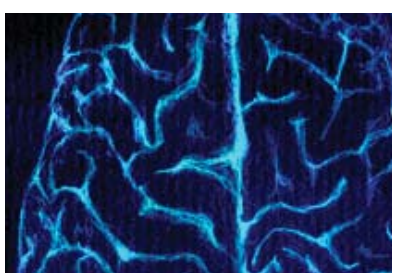
In coming to this conclusion, Arbitrator Feldman focused on the 1975 Jennett and Bond article and the purposes behind the GOS scale. The article makes it clear that the goal of the GOS is to accurately reflect a brain injured person's level of function in the real world after the person has had some time to recover from the initial trauma. The assessor should focus on the extent to which a person who sustained a brain injury has been able to return to their usual pre-accident activities with special emphasis on the person's level of independence inside and outside of the home. Finally, personality changes were the most common and most disabling sequelae of brain injury (not captured by neurological testing alone).



Arbitrator Feldman accepted the CAT GOS opinion of Dr. Vaidyanath, a physiatrist with expertise in brain injury rehabilitation. He engaged in a detailed discussion of why Dr. Vaidyanath's opinion was accepted, which provides us with a framework of what makes for a strong and reliable GOS evaluation that is consistent with the intent and spirit of the GOS and the SABS:

- Familiarity with the GOS through teaching, research or clinical practice;
- Understanding and application of the 1975 Jennett and Bond article on GOS, as well as how it has been used and interpreted since it was first published, including some congruency with or consideration of the 1981 Jennett et al. article (clarifying the GOS criteria) and the 1998 Wilson et al. structured interview;
- Detailed interview with the claimant regarding daily activities, behaviour, relationships etc. before and after the accident;
- Collateral interviews with family members who can discuss their observations of the claimant's daily activities, behaviour, personality, etc. before and after the accident;
- Review and proper consideration of all medical reports and functional testing such as an OT assessment.

It was acknowledged that applying the specific criteria and approaches of the 1981 and 1998 articles on GOS is not mandatory under the current SABS. This includes the Extended Glasgow Outcome Scale ("GOSE") and the standardized structured interview. The GOSE and the 1998 article will be mandatory under the new CAT definition next year. However, these articles provide helpful insight into properly applying the current GOS criteria. A stronger GOS opinion will be consistent with the spirit of the later articles.

Arbitrator Feldman, in particular, accepted the importance of interviews with family in order to better understand the daily impairments of the claimant in the real world and in comparison to pre-accident, especially since it is common for those with brain injury to lack insight into their impairments or to downplay or deny disability.

GOS cases will often involve significant or 24 hour supervisory care (*in person or regular cueing and monitoring remotely, as discussed in T.N. and Personal and Shawnoo and Certas*), RSW and OT involvement, monitoring or assistance with financial matters such as spending, paying expenses, and so forth.

Overall, the *Watters* case provides a sound analysis by Arbitrator Feldman, and provides helpful insight into current GOS and the upcoming GOSE.

Michelle Mainprize has been practicing insurance defence litigation for 14 years. She specializes in accident benefits including complex cases such as brain injury, catastrophic impairment and novel issues.

WEB CONTEST

Our last contest had 4 winners, Jessica Larrea, Ken Jones, Tiba Dimichele and Jennifer Bethune.

Congratulations to all who played!

NOW PLAY OUR SUPERTRIVIA GAME

Al Gore narrated a movie which brought global warming to the forefront of worldwide environmental issues. The director of this documentary won an Oscar for best documentary or feature. He is married to an actress who went back to the future and who also starred in a movie set in Las Vegas in which she was nominated for best female actor and the male lead won best male actor. This male actor grew up as a fan of a particular superhero and almost played the superhero in a film, but that project ended up being scrapped. Who are the male and female actors and how does this superhero character connect back to the director of the Al Gore documentary?

Email your answers to dlauder@duttonbrock.com. Do NOT email answers by hitting reply to this email address, as it will get lost in spam-limbo.

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