Blaney McMurtry LLP

PUBLICATION

The Innocent Insured: Intent vs. Negligence

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Durham District School Board v. Grodesky, [2012] O.J. No. 1829 (C.A.)

On April 27, 2012, the Ontario Court of Appeal released its decision in *Durham District School Board v. Grodesky*, on review from the Ontario Superior Court. The panel overturned the lower Court's decision and ruled that ING Insurance Company of Canada ("ING") could not rely on an Intentional/Criminal Acts exclusion to deny its policyholder, Todd James ("James"), a defence.

This decision is important to Ontario insurers as the panel found, in the circumstances of this matter, that the Intentional/Criminal Acts exclusion was ambiguous and capable of two meanings. The panel's interpretation effectively ends any debate in Ontario as to whether allegations of a policyholder's negligent "failure to act" falls within this exclusion.

The Underlying Case:

In the underlying claim, the Durham District School Board ("DDSB") sued James, amongst others, for fire damage to the Cartwright Central School (the "School"). The DDSB alleged James' son, Colton, set fire to the contents of the School's plastic recycling bins. The fire then spread to and damaged the School's building. DDSB's claim against James was pleaded in negligence and alleged a myriad list of "failure to act" conduct in relation to his son (including failure to supervise and enforce a curfew).

James was insured by ING under a Comprehensive Homeowner's policy. James tendered the claim to ING for a defence. ING denied coverage based on the Intentional/Criminal Acts exclusion, reproduced in relevant part by the Court of Appeal as:

We do not insure your claims arising from (6) Bodily injury or property damage caused by any intentional or criminal act or failure to act by: (a) any person insured by this policy; or (b) any other person at the direction of any person insured by this policy. [Emphasis added by Court of Appeal.]

James commenced a Third Party Claim against ING for coverage. ING brought a *Rule 21* (pleadings) motion for a determination of coverage.

The Motion Court Ruling:

At the motion hearing, ING conceded the claim as pleaded fell within the insuring agreement. The Motion Court framed the issue to be decided as whether the claim against James was excluded by his failure to act. The panel summarized the Motion Court's decision as follows:

The motion judge interpreted the School Board's statement of claim to specifically allege that the appellant "*failed to act* in terms of providing/enforcing a curfew, supervising, disciplining and instilling in [his son] a respect for private and public property" (emphasis in original).

Consequently, he found that the School Board's claim against the appellant fell within the "failure to act" exclusion, and that therefore ING had no duty to defend the appellant.

The Motion Court relied on *G.P. v. D.J.*, a non-binding Ontario Superior Court decision, which applied an identical exclusion to a claim for negligently failing to act. In *G.P. v. D.J.*, the Court held the "plain language" of the Intentional/Criminal Acts exclusion applied to "… *any* tortious failure to act (not just an intentional or criminal one)…" [emphasis in original]. The Motion Court relied on this reasoning and stated:

In the case before me, the only allegations made against Todd James references an alleged "*failure to act*". Such an allegation is specifically caught by the exclusion clause before me.

Since the allegations made against Todd James in the main action fall under the exclusion clause with respect to a "*failure to act*", ING does not owe a duty to defend him. [emphasis in original]

The Appeal Ruling:

On appeal, the unanimous panel disagreed with the Motion Court's reasoning (and by necessary application the *G.P. v. D.J.* decision). The panel found the Intentional/Criminal Acts exclusion was ambiguous, stating:

The exclusion clause can be read in two ways. First, the clause can be read so that the words "intentional or criminal" modify the phrase "act or failure to act". Read in this way, the clause would only exclude an "act or failure to act" that is intentional or criminal. Alternatively, the clause can be read to exclude an intentional or criminal act, and any failure to act. Read in this way, the clause would exclude a failure to act that was merely negligent. The motion judge, following *G.P. v, D.J.*, adopted the second interpretation of the provision.

The panel found the first interpretation was proper because: (i) ambiguities are interpreted against the insurer; (ii) exclusion clauses are narrowly construed; and (iii), as harm resulting from negligence can typically be characterized as a failure to act, the second interpretation would render the insurance coverage largely useless.

The panel relied on the Supreme Court of Canada's *Non-Marine Underwriters, Lloyd's of London v. Scalera* decision which considered a similar exclusion. The panel stated:

The Supreme Court considered a similar clause in *Non-Marine Underwriters, Lloyd's of London v. Scalera*, 2000 SCC 24, [2000] 1 S.C.R. 551. In *Scalera*, the clause excluded claims arising from "bodily injury or property damage caused by any intentional or criminal act or failure to act by ... any person insured by this document" (para. 59). Iacobucci J., in his concurring reasons, observed that reading the clause to exclude negligent failures to act would lead to absurd consequences because almost any act of negligence could be excluded.

The panel, relying on *Scalera*, held a Court is not bound by the plaintiff's characterization of a claim, and stated:

Whether the plaintiff uses the language of negligence or intentional torts is not the end of the inquiry. The judge must look to the actions taken by the defendant underlying the claim. Further, when there are multiple claims (e.g. when intentional torts and negligence are both alleged) the judge must decide if the negligence claim is merely derivative of the intentional claim, or whether the two claims are severable, by examining the actions allegedly taken by the defendant, and deciding whether the claims are related to the same actions.

The panel noted the allegations against James were framed in negligence, and stated:

Though this negligence claim caused the same harm as the intentional tort allegedly committed by the son, it is not derivative of the intentional tort claim in the sense indicated by Iacobucci J. At para. 84, he 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." The elements of the intentional tort claim against the son and the negligence claim against the parents are entirely distinct. Therefore the negligence claim is not derivative of the intentional tort, and should not be subsumed under it for the purposes of applying the exclusion clause.

Based on this reasoning. the panel concluded the claim against James did not fall within the Intentional/Criminal Acts exclusion. The panel allowed the appeal and held ING had a duty to defend.

Impact on Future Cases:

Of interest, this decision should have little to no impact on the "innocent insured" debate where the "failure to act" allegations arise from the intentional or criminal act of a co-insured. Originally we questioned why counsel did not direct the Court to follow existing appellate decisions to exclude the claim as "property damage" arising from the intentional/criminal act of "any person" insured by the policy (in this case, the son Colton). However, from our review of the underlying proceedings, it appears Colton did not reside with James. He was therefore not a person insured by the ING policy. In our view, had the son resided with James, the panel would likely have come to a different conclusion on coverage.

Under similar circumstances involving identical wording, insurers can expect a properly informed Court to find the Intentional/Criminal Act exclusion to be ambiguous. In keeping with interpretative principles, Courts will narrowly construe the exclusion to apply only to a policyholder's intentional or criminal "failure to act".