

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**BETWEEN:** )  
 )  
GUY KELLOWAY )  
 )  
 ) Plaintiff ) Gordon Harris, for the Plaintiff  
 )  
 )  
– and – )  
 )  
HAROLD DOUGLAS EAKINS operating ) James R. Morgan and Ognjen Miketic, for  
as JACK-O’S SPORTS BAR, HAROLD ) the Defendants Harold Douglas Eakins and  
DOUGLAS EAKINS, and JACQUELYNN ) Harold Douglas Eakins o/a Jack-O’s Sports  
DIANE STUART ) Bar  
 )  
 ) Defendants )  
 )  
 )  
– and – )  
 )  
 )  
BROKERLINK INC. and UNITED ) Lindsay Rodenburg, for the Third Party,  
STATES LIABILITY INSURANCE ) Brokerlink Inc.  
COMPANY )  
 )  
 ) Anthony Gatensby, for the Third Party,  
Third Parties ) United States Liability Insurance Company  
 )  
 )  
 ) **HEARD:** September 28, 2023

**TRANQUILLI J.**

**Introduction**

- [1] The issue on this summary judgment motion is whether the third-party insurer, United States Liability Insurance Company, has a duty to defend its insureds, the defendant Harold Douglas Eakins and Harold Douglas Eakins operating as “Jack-O’s Sports Bar” in a personal injury claim.
- [2] The plaintiff Guy Kelloway alleges he suffered bodily injuries in December 2021 when he attended the defendant Jack-O’s Sports Bar. He claims the defendants, or its employees over-served him, upon which he fell from a barstool. He claims he was then forcibly removed from the establishment by the defendant proprietor Harold “Doug” Eakins. The

plaintiff commenced an action against the defendants in October 2022 seeking damages for his alleged injuries.

- [3] The third party, United States Liability Insurance Company (“the Insurer”), insured Mr. Eakins and Jack-O’s under a policy that included both commercial general liability and liquor liability coverage (“the Policy”).
- [4] It is undisputed that the plaintiff’s claim falls within primary grants of coverage within the Policy for claims for “*compensatory damages*” because of “*bodily injury*.” However, the Insurer relies upon broadly worded exclusions that deny a duty to defend where the action is in consequence of or “*in any way involving*” assault or battery, including whether it is caused in whole or in part by “*negligence*” and any “*acts or omissions*” of any insured or its employees.
- [5] The defendants commenced a third-party claim within this tort action against its insurance broker and the Insurer, seeking “contribution and indemnity” pursuant to the *Negligence Act* and in “common law” regarding the denial of a duty to defend and indemnify.
- [6] For the following reasons the court is satisfied that summary judgment must be granted, dismissing the third party claim as against the Insurer. The pleadings of negligence in the Amended Statement of Claim cannot be severed from the factual matrix to avoid the application of these broad exclusion clauses.

### **Issues**

- [7] The single question is whether the Insurer owes the defendants, Mr. Eakins and Jack-O’s, a duty to defend them in this personal injury action.
- [8] Embedded in that determination is whether there is a genuine issue on this third-party claim that requires trial.
- [9] It should not be controversial that this issue is suitable for summary judgment. The determination of a duty to defend is document-driven. There are no credibility issues. The duty to defend is derived from the pleadings and interpretation of the policy of insurance.
- [10] This court did question the manner of this proceeding, with a coverage matter to be determined on summary judgment within the context of a third-party coverage claim to the main action. Coverage matters such as these are typically addressed by way of a proceeding separate from the underlying tort action, such as, by way of application, which culminates in a Rule 21 motion.
- [11] To complicate matters, the third-party claim is put forward against the Insurer as one of “contribution and indemnity”, either under the *Negligence Act* or in common law. In my view, the duty to defend arises from a contractual relationship. One questions whether the third-party claim as drafted discloses a reasonable cause of action against the Insurer.

- [12] In any event, the court will not stand on form. I will deal with this motion given the way the coverage claim has been presented. It would be an injustice to require the parties to follow form in properly pleading their coverage claim. In pith and substance, the pleadings and policy are before the court and the motion record fairly engages the principles relevant to deciding whether the pleadings trigger a duty to defend. No party suffers an injustice by proceeding in this manner.
- [13] The plaintiff amended the statement of claim on the eve of the return of this motion, after the Insurer had delivered its motion record. The moving party Insurer approached apoplexy in its supplementary factum in that regard, arguing that the plaintiff had attempted to manipulate the pleadings to artificially impose a duty to defend. However, at the hearing, the Insurer ultimately advised the amendments did not affect its position and maintained the amended claim nevertheless fails to trigger a duty a defend.
- [14] The court accepts the Insurer's position.

## **Background**

### **The Parties**

- [15] The defendant, Harold Douglas Eakins, operates Jack-O's Sports Bar as a sole proprietorship in Woodstock, Ontario. The defendant Jacquelynn Diane Stuart is alleged to be a co-owner of and/or employee of Mr. Eakins and Jack-O's. Ms. Stuart has not defended the action and did not appear on the motion. All further references to "the defendants" in these reasons are with respect to the defendants Mr. Eakins personally and in his capacity as sole proprietor of Jack-O's Sports Bar ("Jack-O's"). The third party, BrokerLink Inc., did not oppose the motion and did not appear. The plaintiff attended as observer at the motion but did not seek standing at the motion.

### **The Statement of Claim**

- [16] The Statement of Claim issued October 5, 2022, is ostensibly brought under the Simplified Procedure, but claims damages of \$500,000 plus interest and costs. As an aside, I note the current monetary jurisdiction for Rule 76 proceedings is \$200,000. Further, although punitive and aggravated damages are alleged, there is no such claim in the prayer for relief.
- [17] Paragraph 7 of the claim contains the material allegations. The court understands "Guy" to refer to the plaintiff Mr. Kelloway, and "Doug" to be the defendant Mr. Eakins:

*On or about December 10, 2021, Guy attended the Defendants' property after consuming alcohol at his residence. He continued to consume alcoholic beverages at the Defendants' property until he was so intoxicated, he fell of the stool he was sitting on. Doug then escorted Guy out of the establishment through the back alley exit where he proceeded to assault Guy physically and verbally. As a result of this altercation, Guy sustaining [sic] serious and permanent injuries.*

- [18] At paragraphs 7(a) through (m) the plaintiff alleges particulars in support of his claim that his injuries, damages, and losses “*are as a direct result of the negligence of the Defendants.*” Most of those contentions of negligence relate to allegations of overserving alcohol to the plaintiff.
- [19] Paragraph 7(l) alleges: “*in the alternative, Doug intentionally assaulted and battered Guy;*”
- [20] The remaining paragraphs of the claim largely state that the plaintiff’s injuries and consequent damages are the result of “*the acts or omissions of the Defendants*”.
- [21] In the alternative, at paragraph 18, the plaintiff alleges Mr. Eakins’ actions “*amount to an assault and battery*” upon the plaintiff.

### **The Third-Party Claim**

- [22] In the third-party claim, issued April 3, 2023, Mr. Eakins and Jack-O’s claim contribution and indemnity from the Insurer as well as from the brokerage who placed the insurance coverage.
- [23] At paragraph 8 of the third-party claim, the defendants acknowledge there is no coverage under the Policy “*for intentional actions by the insured.*” However, the defendants allege there is coverage for the “*many acts of alleged negligence*” by the defendants.

### **The Summary Judgment Motion**

- [24] The Insurer immediately brought this motion following issuance of the third-party claim. The return date was ultimately set for September 28, 2023, and the Insurer’s materials were delivered well in advance of that date.

### **The Amended Statement of Claim**

- [25] However, the amended statement of claim was issued September 7, 2023, on the eve of this motion.
- [26] Paragraph 7 of the amended claim now reads as:

*On or about December 10, 2021, Guy attended at the Defendants’ property after consuming alcohol at his residence. He continued to consume alcoholic beverages sold to him at the Defendants’ property until he was so intoxicated, he fell off the stool he was sitting on. Doug then aggressively and physically escorted Guy out of the establishment through the back alley exit where he proceeded to assault Guy physically and verbally Guy’s face struck the wall and he fell to the ground. As a result of this ~~altercation~~ incident, Guy ~~sustaining~~ sustained serious and ~~permanent~~ painful injuries.*

- [27] At paragraph 9(l) the particulars of negligence are amended to state:

*in the alternative, Doug intentionally assaulted and battered Guy while and/or after removing him from the property;*

**The Insuring Agreement**

- [28] The Insurer provided commercial liability and liquor liability coverage to the defendants under the Policy. There is no dispute that the plaintiff's claim comes within the coverage grant but for the Insurer's position as to the application of the exclusionary clauses.
- [29] This analysis focuses on the exclusion clause from the commercial general liability coverage ("CGL") as the court is satisfied from a detailed review that the terms of both the commercial general and liquor liability endorsements are substantially the same or similar for the material interpretative issues on this motion.
- [30] The CGL provides coverage for: "those sums that the insured becomes legally obligated to pay as *"compensatory damages" because of "bodily injury" or "property damage" to which this insurance applies."*
- [31] However, the CGL includes an "Assault or Battery Exclusion". The material parts of that exclusion as it pertains to the Amended Statement of Claim are as follows:

*This insurance does not apply to:*

*Any "actions", claim or demand based upon any actual or alleged "assault" or "battery", or out of any act of omission in connection with the prevention or suppression of any "assault" or "battery", including the use of reasonable force to protect persons or property...*

*Further, no coverage is provided for any claim, demand or "actions" in which the underlying operative facts constitute "assault" or "battery".*

*This exclusion applies to all "bodily injury"... sustained by any person, including emotional distress and mental anguish, arising out of, directly or indirectly result from, in consequence of, or in any way involving "assault" or "battery"... arising out of or caused in whole or in part by negligence or other wrongdoing with respect to...*

- [32] The exclusionary language goes on to specifically enumerate excluded circumstances such actions as the hiring and training of employees, the insured's investigation or reporting of an assault or battery, the failure to protect, and *"any acts or omissions"* of any insured *"resulting from any "assault" or "battery"."*
- [33] Finally, the exclusion clause defines the terms "Assault" and "Battery" beyond the understood legal definition. In particular, the definitions expressly include negligence:

*“Assault” means the threat of, or use of force on another that causes that person to have apprehension of imminent harmful or offensive conduct, whether or not the threat or use of threat or use of force is alleged to be negligent, intentional or criminal in nature. “Battery” means negligent or intentional physical contact with another without consent that results in physical or emotional injury.”*

### **Analysis**

[34] The following principles regarding the interpretation and application of insurance policies on a question of a duty to defend are well-established and guide the analysis on this motion:

- a. The pleading by the claimant against the insured is what triggers the duty to defend. If the facts alleged in the pleading would, if true, require the insurer to indemnify, then the insurer has the duty to defend. It is triggered by the mere possibility of coverage. The pleadings are to be interpreted broadly, with any doubt to be resolved in favour of the insured. Where the alleged facts might fall within coverage, the duty arises. The analysis determines the substance of the claim rather than the legal label chosen by the claimant: *Panasonic Eco Solutions Canada Inc. v. XL Specialty Insurance Company*, 2021 ONCA 612 at para. 22.
- b. The court should give effect to clear policy language, reading the contract as a whole. Ambiguous policy language is resolved by general rules of contract construction. Those rules of construction are applied to resolve ambiguity. They do not operate to create ambiguity where there is none in the first place: *Panasonic*, at para. 23.

[35] The defendants acknowledge that intentional acts do not trigger a duty to defend. However, they submit there are personal injury claims in negligence that are severable from those claims that fall within the exclusion clauses. They also contend that the plaintiff’s allegation of a fall from the barstool is severable from the uncovered claims.

[36] A plain reading of the terms of the Policy as a whole defeat these submissions.

[37] The Amended Statement of Claim still marks the plaintiff’s alleged injuries and damages as arising from his removal from the premises:

*... Doug then aggressively and physically escorted Guy out of the establishment through the back alley ~~where he proceeded to assault~~ ~~Guy physically and verbally~~ Guy’s face struck the wall and he fell to the ground. As a result of this ~~altercation~~ incident, Guy ~~sustaining~~ sustained serious and permanent painful injuries.*

[38] The fall from the stool is narrative or context that ostensibly caused the defendant Eakins to remove the plaintiff from the premises. His fall from the stool remains linked to the “incident” as is now alleged in the Amended Statement of Claim and at paragraph 7. It includes both the falling from the stool and the alleged aggressive and physical escorting

of the plaintiff by the defendant Eakins from the premises, whereupon the plaintiff sustained his injuries.

- [39] Even if some or all of the alleged injuries were sustained from falling from the barstool are part of the claim, the terms of the Policy clearly exclude such recovery as pleaded in the context of the plaintiff's alleged over-serving and removal from the bar. Any injuries sustained from the fall from the stool cannot be severed from the claim. The exclusionary language is drafted in the broadest terms such that the defined terms of "assault" or "battery" need only be part of the chain of events leading to the claimant's injuries. The exclusion clauses negate coverage for bodily injury "arising out of, directly or indirectly resulting from, in consequence of, or in any way involving assault or battery". [emphasis added]. In other words, even if there is a claim in negligence arising from the plaintiff's fall from the barstool, the alleged events are also connected to his subsequent removal from the defendant premises, and also involve allegations of assault or battery as defined in the Policy, such that there is no duty to defend.
- [40] In any event, there can be no question that a plain reading of the Policy excludes a duty to defend for personal injuries arising from a negligent removal of the plaintiff from the premises. As reviewed, the terms of "assault" and "battery" are expansively defined in the Policy to include negligence in the insured's use of force.
- [41] The court questioned whether the effect of these clauses was to make the coverage purchased illusory or nullified. I accept the explanation that the Policy would hypothetically cover claims for bar patrons who were over-served and fell off stools but not for claims arising from situations such as fights, brawls, and removal from the premises.

### **Disposition**

- [42] Summary judgment is therefore granted, dismissing the third-party claim by the defendants against United States Liability Insurance Company.
- [43] Pursuant to the parties' agreement as to costs, the defendants Harold Douglas Eakins and Harold Douglas Eakins, operating as Jack-O's Sports bar, shall pay costs of this motion to the third-party defendant United States Liability Insurance Company, fixed in the amount of \$12,500.



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Justice K. Tranquilli

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**BETWEEN:**

GUY KELLOWAY

Plaintiff

– and –

HAROLD DOUGLAS EAKINS operating  
as JACK-O'S SPORTS BAR, HAROLD  
DOUGLAS EAKINS, and JACQUELYNN  
DIANE STUART

Defendants

– and –

BROKERLINK INC. and UNITED  
STATES LIABILITY INSURANCE  
COMPANY

Third Parties

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**REASONS FOR JUDGMENT**

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Justice K. Tranquilli