Citation: 2023 NBKB 062

Date: April 18, 2023

Docket: FM-21-2022

IN THE COURT OF KING'S BENCH OF NEW BRUNSWICK

TRIAL DIVISION

JUDICIAL DISTRICT OF FREDERICTON

BETWEEN:

THE ESTATE OF PIERRE WÜST

Applicant

– and –

NOVEX INSURANCE COMPANY

Respondent

Date of Hearing:	September 1, 2022
Date of Decision:	April 18, 2023
Subject Matter:	**Insurance – Duty to Defend**
Before:	Justice Terrence J. Morrison
At:	Burton, New Brunswick
Appearances:	Catherine A. Fawcett, K.C. for the Applicant
	Jason P. Mangano for the Respondent

DECISION

Morrison, J.

I. INTRODUCTION

[1] This is an application by the Estate of Pierre Wüst (the "Estate") against Novex Insurance Company ("Novex") for a declaration that Novex owes a duty to defend the Estate with respect to two proposed class actions against the Estate. The thrust of the allegations in the actions is that Mr. Wüst took videos of his female patients in the massage treatment room without their knowledge or consent.

[2] The Estate submits that Novex misinterpreted the true nature of the pleadings in denying coverage and that at least some of the allegations in the pleadings, if proven, would fall within the coverage provisions of the policy and are not excluded such that a duty to defend necessarily follows.

[3] Novex submits that the allegations of negligence against Wüst contained within the pleadings are derivative of the true nature and substance of the claims being unlawful and abusive intrusion upon seclusion. Further, Novex submits that the claims did not arise out of Wüst's rendering or failure to render professional services and thus does not fall within policy coverage. In the alternative, Novex submits that certain policy exclusion preclude coverage.

II. FACTS

[4] Pierre Wüst was, at all material times, a registered massage therapist.

[5] Novex issued a master policy of professional and general liability insurance to the Association of New Brunswick Massage Therapists of which Wüst was formerly a member (the "policy"). The policy provided for miscellaneous malpractice liability coverage ("MML Coverage") and commercial general liability coverage ("CGL Coverage").

[6] On or about July 19, 2019, the representative of the Estate was served with a copy of a Notice of Action with Statement of Claim with respect to a proposed class action identified as Court File Number FC-180-19 (the "Moxon Action").

[7] On or about August 7, 2019 the representative of the Estate was served with a second Notice of Action with Statement of Claim in respect of a second proposed class action, identified as Court File Number FC-184-19 (the "Boyce Action").

[8] Based on its interpretation of the substance of the pleaded allegations and its interpretation of the language of the MML Coverage and CGL Coverage, Novex denied that it had a duty to defend the Estate against both actions.

A. The Moxon Action

[9] The Moxon Action was brought on behalf of 99 female patients. As mentioned, the thrust of the allegations in the Moxon Action is that Mr. Wüst took videos of the female patients in his massage treatment room without their knowledge or consent. Broadly, the pleaded allegations assert that Mr. Wüst breached his fiduciary duty, committed assault and battery and was negligent. The following pleaded allegations as against Mr. Wüst are relevant to the consideration of this application:

> 12. From at least 2006 to 2017 Wüst provided massage therapy treatments to patients in the massage treatment rooms at the Clinic. During that time Wüst secretly recorded videos of the Plaintiffs and at least 99 other Class Members, all female victims, in the massage treatment rooms. The Class Members were videoed without their knowledge or consent while dressing and undressing including at times when their naked breasts, buttocks and other private body parts were exposed or were covered only by their bra or panties.
>
> 13. Wüst viewed the videos, edited them and saved them to at least one universal serial bus (USB) digital storage devices or other storage media.
>
> 14. Wüst also selected and captured certain still images of the some of Class Members in various states of undress, which he saved as photographs on the USB device and other storage media.
>
> 15. When saving the videos and photos Wüst used a naming protocol which incorporated the date of the video and certain details about the victims that he wanted to remember, such as their occupation, sport or other identifying details.
>
> 16. Some of the Class Members were minors at the time the videos were taken.
>
> 17. Wüst would later view the videos and photos from time to time for his own sexual gratification.
> (...)
>
> 50. Myoflex and Wüst were each in a patient-client relationship with the Plaintiffs and the other Class Members and were in a position of trust and confidence requiring the utmost good faith on the part of Myoflex and Wüst and as such each owed a fiduciary duty to the Plaintiffs and the other Class

Members arising from the vulnerable position they were in as patients and when getting undressed, dressed and receiving therapy in the treatment rooms of the Clinic.

51. Wüst breached his fiduciary duty to the Plaintiffs and the other Class Members when Wüst videotaped them without their knowledge or consent.
(...)

53. The breach of fiduciary duty by Myoflex and Wüst caused or substantially contributed to the injury, damage and loss suffered by the Plaintiffs and the other Class Members.
(...)

56. Wüst breached his duty and was negligent in his actions and omissions as follows:

a. Installing a hidden camera in the treatment rooms;
b. Failing to inform the Plaintiffs and other Class Members that they were being videoed;
c. Viewing, editing and saving videos and images from the videos for his own pleasure;
d. Failing to adequately protect the confidentiality of the videos and images from viewing by third parties;
e. Failing to destroy the videos and images; and
f. Such further and other causes of negligence as the Plaintiffs and the Class Members may advise prior to trial of this matter or that may appear on the evidence.

(...)

67. Wüst intentionally intruded on the privacy and intruded on the seclusion of the Plaintiffs and other Class Members by videoing them in the treatment room without their knowledge or consent.
(...)

71. The consent of the Plaintiffs and other Class Members to Wüst touching them for the purpose of providing massage therapy was vitiated by Wüst's breach of contract, bad faith, breach of fiduciary duty, negligence and intrusion upon seclusion. As a result, the touching of the Plaintiffs and the other Class Members by Wüst was not consented to and amounted to assault and battery

B. The Boyce Action

[10] The Boyce Action is brought on behalf of 101 former clients of Mr. Wüst, each of whom allege to have been photographed and/or videotaped by him while they were dressing and undressing in the massage therapy treatment room without their knowledge or consent.

[11] The Boyce Action seeks damages for negligence, breach of contract, breach of fiduciary duty and intrusion upon seclusion. The following pleaded allegations are relevant to the consideration of this application:

> 5. From the period of at least 2006 until 2017, Pierre Wüst provided massage therapy treatment to clients at the Myoflex Massage & Rejuvenation Clinic.
>
> 6. The massage treatment was provided by Pierre Wüst in rooms in the Clinic. Clients were brought into a room by Pierre Wüst and were asked to remove some or all of their clothing for the massage treatment, and then to lay on a massage therapy table, and then to cover themselves with a sheet. Pierre Wüst would leave the room while the clients removed their clothing in preparation for the treatment. When Pierre Wüst returned to the room, the clients would be on the massage table and covered by a sheet. The clients would then receive the massage therapy treatment.
>
> 7. During the period of at least 2006 until 2017, Pierre Wüst took photos and videos of his massage therapy clients dressing and undressing in the massage therapy treatment room. Pierre Wüst took photos and videos of at least 100 of his clients, including the named Plaintiff. The photos and videos were taken without the clients' knowledge or consent. Some of the clients were also under the age of nineteen at the time the photographs or videos were taken.
>
> 8. Pierre Wüst edited the photos and videos and used digital storage devices in order to save the photos and videos.
>
> 9. On January 22, 2019, the photos and videos were discovered by Robert Jackson in his capacity as executor of Pierre Wüst's Estate. The Fredericton Police Force was notified of the photos and videos on the same day.
> (...)

12. On or about July 16, 2019, the Plaintiff was notified by a member of the Fredericton Police Force that they were in the possession of photos and videos which showed the Plaintiff in different states of undress.
(…)

14. The Defendants owed the Plaintiff and the Members of the Class a duty of care, which they breached.

15. The incident referred to in Paragraphs 5 to 8 was a result of the negligence of Pierre Wüst, the particulars of which are as follows:
(a) installing and using a camera or video recording device in the treatment rooms;
(b) failing to inform the Plaintiff and Class Members that they were being photographed or videotaped;
(c) encouraging or directing the Plaintiff and Class Members to remove their clothing in the treatment room;
(d) recording, uploading, editing, and saving images and videos;
(e) failing to adequately protect the videos and images from viewing by third parties; and
(f) failing to destroy the images and videos.
(…)

25. The Defendant, Wüst, had a therapist-client relationship with the Plaintiff and Class Members. The Defendant, Wüst, breached his fiduciary duty by photographing and videotaping the Plaintiff and Class Members without their knowledge or consent.
(…)

30. The Defendant, Wüst, intentionally intruded upon the seclusion and the privacy of the Plaintiff and the Class Members by taking photographs and video recordings of the Plaintiff and the Class Members while they were in the treatment rooms.

C. *The Novex Policy*

[12] As mentioned, the Novex policy provided for both MML Coverage and CGL Coverage.

(1) MML Coverage

[13] The MML Coverage insuring agreement provides, in part, as follows:

1. Insuring Agreement

a. The Insurer will pay those sums that the Insured becomes legally obligated to pay as "damages" because of "injury" arising out of the rendering of, or failure to render, during the "policy period", professional services described in the "Declaration Page(s)"…

[14] The term "injury" is defined as follows:

9. "Injury" means bodily injury, sickness, or disease sustained by a natural person. This includes death, shock, fright, mental anguish, mental injury, or disability which result from any of these at any time.

[15] The MML Coverage is subject to the following exclusions:

This insurance does not apply to:

c. (1) "injury" caused by the Named Insured or, with the knowledge of the Named Insured, by any of his/her employees, in the commission of any criminal act, in the violation of any law or ordinance, or while under the influence of hypnotics, narcotics or intoxicants:

(2) '"injury" arising out of or on account of, resulting from or relating to any actual or threatened "abuse".

The insurer shall not have any duty to defend any "claim" or action arising out of, or on account of, any "claim" for "injury" arising out any "abuse".

"Abuse"' means, but is not limited to, sexual, physical, mental, psychological, or emotional abuse or molestation, sexual harassment, sexual assault, assault or battery.

(2) CGL Coverage

[16] The insuring agreement under the CGL Coverage provides, in part, as follows:

1. Insuring agreement

a. The Insurer will pay those sums that the Insured becomes legally obligated to

pay as "compensatory damages" because of "bodily injury" … to which this insurance applies. The Insurer will have the right and duty to defend the Insured against any "action" seeking those "compensatory damages". However, the Insurer will have no duty to defend the Insured against any "action" seeking "compensatory damages" for "bodily injury" … to which this insurance does not apply…

b. This insurance applies to "bodily injury" … only if:

(1) The "bodily injury" … is caused by an "occurrence" …

[17] The term "occurrence" is defined as follows:

22. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

[18] The CGL Coverage is subject to the following exclusions:

2. Exclusions

This policy does not apply to:

a. Expected or Intended Injury
"Bodily injury" or "property damage" expected or intended from the standpoint of any Insured.

…

p. Abuse– See Common Exclusions

(…)

COMMON EXCLUSIONS- COVERAGES A, B, C, AND D

This insurance does not apply to:

1. Abuse

a. Claims or "actions" arising directly or indirectly from "abuse" committed or alleged to have been committed by an Insured, including the transmission of disease arising out of any act of "abuse".

(…)

c. Claims or "actions" alleging knowledge by an Insured of, or failure to report, the alleged "abuse" to the appropriate authority(ies).

[19] Under the CGL Coverage (Section V) the terms "abuse" and "occurrence" are defined as follows:

> **1. "Abuse"** means, but is not limited to, any act or threat involving molestation, harassment, corporal punishment, assault or battery or any other form of sexual, physical, mental, psychological or emotional abuse.
> (...)
>
> **22. "Occurrence"** means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

III. ANALYSIS AND DECISION

A. General Principles

[20] The principles governing the determination of an insurer's duty to defend are well-settled. The core principles are set out in a series of leading Supreme Court of Canada decisions: *Non-Marine Underwriters, Lloyd's of London v. Scalera*, 2000 SCC 24; *Monenco Ltd. v. Commonwealth Insurance Co.*, 2001 SCC 49; *Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada*, 2010 SCC 33.

[21] The principles established by these cases can be summarized as follows:

(1) the duty to defend is broader than the duty to indemnify;

(2) the mere possibility that a claim advanced in the pleadings is covered by the policy is sufficient to trigger the duty to defend;

(3) the court must accept the allegations made in the pleadings as being true for the purposes of analyzing the duty to defend;

(4) it is the true nature of the claim that determines the duty to defend not the labels selected by the plaintiff;

(5) the claim is then considered in light of the terms of the policy using the following interpretive principles:

- Firstly, if the wording of the disputed clause is unambiguous when reading the contract as a whole, effect should be given to that clear language;
- If (and only if) there is ambiguity in the language should the general rules of contract construction be employed to resolve the ambiguity; and
- Finally, if those rules of construction fail to resolve the ambiguity, then the principle of contra proferentem should be used, i.e. coverage provisions should be interpreted broadly while exclusion clauses should be interpreted narrowly (*Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37).

[22] The burden is on the insured to prove that the pleaded claim falls within the grant of coverage in the policy and if the insured discharges that burden, then the onus shifts to the insurer to show that coverage is precluded by an exclusion clause. (*Progressive Homes Ltd.*, at para. 51; *Michaud v. Securite Nationale compagnie d'assurance,* 2021 NBCA 39 at para. 30).

[23] The starting point in the analysis of the duty to defend is to determine the true nature of the claim.

B. True nature of the claim

[24] The Estate submits that the thrust of the allegations in the Moxon Action is that Mr. Wüst recorded videos of his female patients in his massage treatment room without their knowledge or consent. The Estate concedes that both the Boyce Action and the Moxon Action are comparable, with similar allegations and similar proposed class definitions. The Estate submits that the true nature of the underlying actions is negligence and any intentional tort alleged is a particular of that negligence. Novex, on the other hand, submits that neither of the actions sound in negligence. Rather, all allegations of "negligence" are wholly derivative of the intentional conduct of Wüst. In short, Novex submits that the true nature and substance of the actions is an intentional act which does not fall within the coverage of the policy and, in any event, coverage is precluded by exclusion clauses.

[25] In *Scalera,* Justice Iacobucci set out a three-step test for determining the "true nature" of the claim, at paras. 50-52:

(1) The Court looks beyond the choice of labels and examines the substance of the allegations contained in the pleadings;

(2) The Court should determine if the alleged negligence is based on the same harm as the intentional act, that is, whether the claim is derivative of an intentional tort; and

(3) The Court must determine if there are any properly pleaded, non-derivative claims, which could potentially trigger the insurer's duty to defend.

[26] Neither of the parties took issue with whether the allegations were properly pleaded. The issue is whether, employing the pleadings rule, the allegations of negligence are derivative of an intentional act.

[27] In *Scalera,* the Court provided guidance on the issue of derivative pleadings at par. 85:

> [85] Having construed the pleadings, there may be properly pleaded allegations of both intentional and non-intentional tort. When faced with this situation, a court construing an insurer's duty to defend must decide whether the harm allegedly inflicted by the negligent conduct is derivative of that caused by the intentional conduct. In this context, 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. **If both the negligence and intentional tort claims arise from the same actions and cause the same harm, the negligence claim is derivative, and it will be subsumed into the intentional tort for the purposes of the exclusion clause analysis. If, on the other hand, neither claim is derivative, the claim of negligence will survive and the duty to defend will apply**... [Emphasis added]

[28] In *Rocky Mountain House (Town of) v. Alberta Municipal Insurance Exchange*, [2007] ABQB 548, the Court provided helpful guidance on the issue, at para. 69:

> [69] A helpful way of determining whether two claims "arise from the same actions and cause the same harm" is set out in Unrau v. Canadian Northern Shield Insurance Co., 2004 BCCA 585, 262 D.L.R. (4th) 186. In Unrau, the plaintiff sued two insureds alleging bodily injury resulting from their failure to take action when the plaintiff was being assaulted with a baseball bat. As in Scalera, supra the issue before the Court was whether the claim in negligence set out in the Statement of Claim was derivative of the claim for intentional tort which was expressly excluded by the policy. **In conducting its analysis the question asked was whether, it you take away the facts which set out the factual basis for the intentional tort, there are remaining facts sufficient to support the claim in negligence. If so, the two claims are independent of each other.** [Emphasis added]

[29] The Estate submits that the pleadings themselves generally do not use the term "intentional" and the Court should not infer intentional act if it has not been pled. The Estate submits that the only intentional act pleaded is the taking of the photographs and the video

recordings (para. 67 of Moxon Action and para. 30 of Boyce Action). The other allegations of installing and using the cameras in the treatment rooms, as well as the editing, uploading, collecting and storage of the images, are alleged to have been done negligently, could have been done negligently, and thus there is a possibility of coverage. In short, other than the intrusion upon seclusion allegation, the other claims are non-derivative of an intentional act and could therefore possibly trigger coverage and a duty to defend.

[30] Novex submits that the substance of the claim against Wüst is intrusion upon seclusion, that is, the intentional surreptitious making of the recordings/photographs without the knowledge and consent of the patients. It argues that all the claims of damage derive from that intentional act. Novex submits that the true nature and substance of the underlying actions as against Mr. Wüst is one of intentionally harmful conduct and all claims alleged in negligence are wholly derivative of that intentional conduct.

[31] The Estate referred to *Morrison v. The Co-operators General Insurance Company,* 2004 NBCA 62, for the proposition that when the state of intention of the defendant is unresolved, that is, where the conduct can sound in either intentional act or negligence, then there is a possibility of coverage and thus a duty to defend. The Estate argues that the factual matrix of this case makes it impossible to discern the intent of the now-deceased Mr. Wüst and thus there is at least a mere possibility that the claim in negligence might succeed.

[32] In support of its position, Novex refers to *Scalera*; *Demme v. Healthcare Insurance Reciprocal of Canada*, 2022 ONCA 503; and *Southside Muay Thai Academy Corp v. Aviva Insurance Company of Canada*, 2020 ONCA 385 ("*Southside Academy*"). In *Scalera*, the

plaintiff alleged in the underlying action that five bus drivers, including the insured, sexually assaulted her while she was an adolescent. The statement of claim alleged battery, negligent battery, negligent misrepresentation and breach of fiduciary duty. The policy in question contained an exclusion clause stating that the insured was not covered for claims arising from intentional or criminal acts. The issue was whether the plaintiff must establish that the insured "intended" harm. The court concluded that there was no possibility that a claim within coverage could succeed. At para. 39, the Court stated:

> [39] The logic is simply that either the act must have been consensual or not consensual. If it was not consensual, the policy does not apply because neither the insured nor the insurer contemplated coverage for non-consensual sexual activities. If it was consensual, then there is no battery and no claim for recovery. In either case, the policy does not apply.

[33] Novex submits that the recordings made by Mr. Wüst were either consensual or they were not. If consensual, then the plaintiffs have no cause of action and there is no recovery. If they were not consensually taken then coverage is precluded because it is outside the coverage of the insuring agreements and/or is precluded by the "abuse" exclusion (discussed in more detail below).

[34] In *Demme*, the allegations against the insured, a registered nurse, were that she surreptitiously accessed the confidential medical records of the plaintiffs, thereby committing the tort of intrusion upon seclusion. The motion judge concluded that the true nature of the claims against the insured was the intentional tort of intrusion upon seclusion. He concluded that there could be no liability for that tort unless there is a finding that the insured intended to intrude upon the seclusion of the plaintiffs. The motion judge determined that the claims in negligence were entirely derivative of the intentional tort of intrusion upon seclusion. The Ontario Court of

Appeal found that intrusion upon seclusion could only be intentional (paragraph 62-64). It went on to uphold the motion judge's pleadings rule analysis and his conclusion that the negligence claims were entirely derivative.

[35] In *Southside Academy*, the plaintiff in the underlying action was a student of a martial arts academy who alleged that she was sexually assaulted on May 1, 2017 by an employee and co-owner of the academy. The pleadings alleged negligence on the part of the academy in failing to properly supervise the employee (who was also a co-insured). The insurer denied coverage on the basis that the claims arose directly or indirectly out of "abuse" which was excluded from coverage under the policy. The Court found that the true "subject matter" of the underlying action was the sexual abuse. The Court concluded at paras. 28-29:

> [28] Therefore, while we agree with the application judge that coverage is to be interpreted broadly and exclusion clauses narrowly, **there is no claim for damages resulting from Southside's negligence other than the claim arising from the subject matter of this action, that is, the May 1, 2017 incident.**
>
> [29] Since there is no claim or action in the statement of claim other than the claim arising from the sexual abuse that took place on May 1, 2017, which is excluded from coverage under the policy, there is no need to assess whether those claims would be covered by the policy. [Emphasis added]

[36] I return now to *Morrison* which is relied upon by the Estate. In my view, that case is clearly distinguishable from the facts of this case and from *Scalera*. In *Morrison*, the plaintiff in the underlying action was involved in a motor vehicle accident. Immediately subsequent to the collision, the plaintiff was assaulted by the other driver. The pleadings alleged that the collision was either intentional or negligent. Unlike here, the pleadings contained a free-standing negligence pleading. The Court of Appeal distinguished *Scalera* on that basis. The court found that the claim based on the intentional tort could fail while the negligence claim

could succeed because "the two torts involve different acts or conduct". In the present case, all the claims derive from the non-consensual making of the recordings.

[37] In the present case, the pleadings allege that Mr. Wüst not only surreptitiously recorded the plaintiffs, but also that he edited and stored the videos. He is alleged to have saved the images using a naming protocol and later viewed the images for his own sexual gratification. The Estate's suggestion that there is a possibility that such claims would be characterized as negligent or non-intentional lacks any air of reality (see *Demme,* para. 65).

[38] In this case, the underlying claim is for intrusion upon seclusion which, by its nature, is intentional (*Southside Academy*, paras. 62-64). In my view, the true nature of the claims against Mr. Wüst are intentional conduct and the claims of negligence are entirely derivative. As will be discussed below, the conduct does not fall within the coverage of the insuring agreements of the policy. Further, the claims are excluded from coverage by virtue of policy exclusions.

C. MML Coverage

[39] Under the policy, Novex agreed to indemnify Mr. Wüst for "damages" he became legally obligated to pay arising out of the "rendering of, or failure to render professional services" described in the Declaration Page. The Declaration Page states that the policy provides coverage for the following "modalities": "registered massage therapy as defined by the scope of practice of the College of Massage Therapists of New Brunswick."

[40] The Certificate of Insurance (Record, page 15) further expands the notion of "modalities" by giving examples of massage therapies and treatments. The Estate argues that the policy does not define "professional services", but merely provides a non-exclusive list of modalities that may be included in professional services. In the absence of a definition, the Estate submits that the Court should adopt a commonsense approach to the meaning of "professional services". It submits that a reasonable interpretation of "professional services" encompasses the entire interaction with the patient which includes meeting patients, obtaining consent, instructing them on robing and control of the environment before, during and after treatment. The Estate submits that if the evidence shows that the photos and videos were taken for justifiable purposes, their collection, storage and use would be related to professional services, even if negligently performed. The Estate argues that there is therefore a possibility of coverage and the duty to defend is triggered.

[41] In response, Novex points out that coverage is provided only for "registered massage therapy as defined by the College of Massage Therapists of New Brunswick". Section 3(4) of the *Massage Therapy Act*, SNB 2013, C.49 provides as follows:

> **3**(4)The practice of massage therapy is, subject to the exclusions contained in section 72 of the Act, the assessment of the soft tissues and joints of the body and the treatment and prevention of physical dysfunction and pain of the soft tissues and joints by mobilization to develop, maintain, rehabilitate or augment physical function, or relieve pain, and does not include manipulation or movement of the spine or the joints of the body beyond an individual's usual physiological range of motion, using a high velocity, low amplitude thrust.

[42] I reject the Estate's argument. First, it strains credulity to suggest that the recordings could have been taken for a justifiable purpose. More significantly, the surreptitious

recording of patients in various stages of undress falls outside the scope of the services set out in s. 3(4) of the *Act*. Further, the fact that the recordings were made without the consent of the plaintiffs takes the conduct outside even the expansive definition of "professional services" suggested by the Estate. In short, it is inconceivable that a patient would consent to the recordings as part of the "professional service" offered by Mr. Wüst.

[43] Although that is dispositive of the question of MML Coverage, I will nonetheless go on to consider whether coverage is precluded by any of the MML Coverage exclusions.

[44] Novex relies primarily on the "abuse" exclusion. That exclusion precludes coverage for injury arising out of "abuse". As outlined earlier, "abuse" is defined as "sexual, physical, mental, psychological or emotional abuse or molestation, sexual harassment, sexual assault, assault or battery". The Estate submits that Novex cannot rely on the abuse exclusion for two reasons: (1) the definition of "abuse" is ambiguous and must be resolved in favour of the insured; (2) the allegations of Mr. Wüst do not fall within the definitions of "abuse".

[45] Dealing first with the Estate's assertion of ambiguity, the thrust of the Estate's argument is that the abuse exclusion in the MML Coverage is circuitous in that it defines "abuse" as "abuse" with certain examples. As a result, the Estate submits that there is an inherent ambiguity in the exclusion. I disagree.

[46] It is sometimes difficult to articulate why a provision is or is not ambiguous. A policy provision is not ambiguous simply because it may be difficult to interpret. To be

ambiguous, the provision must be capable of two or more plausible interpretations (*Dominion of Canada General Insurance Company v. Ridi,* [2022] ONCA 564, at para. 36). Read in the context of the clear intention of the exclusion, I conclude that the provision does not admit to more than one interpretation, that is, that the mental and emotional harm alleged by the Plaintiffs falls clearly within the definition of "abuse" contained in the policy. I agree with the submission of Novex's counsel, that an ordinary person would understand that the term "abuse" would include the harm alleged by the plaintiffs. In my view, the exclusion is clear and unambiguous.

[47] I turn now to the second reason the Estate submits that coverage is not precluded by the abuse exclusion. The Estate submits that the types of abuse enumerated in the definition of "abuse" are not comparable to the allegations made against Mr. Wüst. The Estate concedes that the thrust of the claims against Wüst is that he recorded the plaintiffs in various stages of undress without their consent and stored the images for his own purposes. However, the Estate submits that the pleadings make no allegations of "abuse". Further, "abuse" contemplates interaction between the abuser and the abused, which is absent with respect to the surreptitious recording. The Estate submits that the act of being recorded does not constitute an abuse contemplated by the policy. I disagree.

[48] All of the injuries alleged to have been suffered by the plaintiffs in both actions (Moxon Action, para. 73; Boyce Action, paras. 33 and 40) – namely, shock, mental anguish, mental suffering, mental and emotional injuries - arise out of the non-consensual, surreptitious recording. In my view, the injuries claimed clearly fall within the sexual, mental, psychological and emotional injuries contemplated by the abuse exclusion.

[49] Further, I reject the notion that there must be some physical interaction between the plaintiffs and Mr. Wüst in order to constitute abuse. As mentioned, the tort of intrusion upon seclusion (which is the thrust of the claims) can only be intentional. It is the invasion itself which causes the injury. Physical interaction is not a requirement.

[50] In any event, in the Moxon Action, the plaintiffs alleged that the surreptitious recording vitiated any consent to the massage therapy. As a result, Wüst's touching of the plaintiffs during therapy constitutes assault and battery. Although assault and battery is not pleaded in the Boyce Action, the material facts alleged are essentially the same as those in the Boyce Action and in essence constitute an assault. The definition of "abuse" specifically includes assault and battery.

[51] In summary, there is no possibility that the claims against Mr. Wüst could fall within the insuring agreement because they do not arise from the provision of "professional services". Further, Novex has met its burden of establishing that the claims asserted against Mr. Wüst fall within the abuse exclusion of the MML Coverage.

[52] For the foregoing reasons, it is not necessary for me to address the alternative argument advanced by Novex, that the claims fall within the violation of law exclusion of the MML Coverage.

D. CGL Coverage

[53] Novex submits that the claims do not fall within the CGL Coverage. The CGL Coverage requires Novex to indemnify Mr. Wüst for "bodily injury" that is caused by an "occurrence". The term "occurrence" is defined to mean "an accident, including continuous exposure to substantially the same general harmful conditions". Novex says the word "accident" refers to "an unlooked-for mishap or an untoward event which is not expected or designed" (*Progressive Homes*, at paras. 47 and 49). Novex submits that the intrusion upon seclusion is not an "accident" and therefore not an "occurrence" covered by the CGL Coverage.

[54] The Estate submits that "accident" is not a defined term. It refers to *Wawanesa Mutual Insurance Company v. Beaverdam Pools Ltd.*, 2010 NBCA 1, where the Court considered the issue of accident in the context of a coverage provision similar to the one in the present case. In that case, the Court adopted the reasoning in *Straits Towing Ltd. v. Washington Iron Works*, [1976] 1 SCR 309, where "accident" was characterized as "any unlooked-for mishap or occurrence", and specifically held that a negligent act could be an accident and therefore an "occurrence". The Estate argues that since the pleadings in the underlying action sound in negligence, they could constitute an "occurrence" and potentially be covered by the CGL Coverage.

[55] I disagree. In my view, *Beaverdam* is distinguishable from the facts of the present case. In *Beaverdam*, the claim against the insured, a contractor, was that he negligently installed a swimming pool such that the plaintiff was required to replace the surrounding deck. The Court

concluded that the contractor's negligent work could be characterized as an "accident" and therefore an "occurrence". In *Beaverdam*, the Court was dealing with a negligent act. I have already concluded that the true nature of the present claims is an intentional act, and they do not sound in negligence. Here, the substance of the claims against Mr. Wüst is that he surreptitiously recorded his female patients in various stages of undress, some minors, stored the images, and later viewed them for his sexual gratification. That is a far cry from improperly installing a swimming pool. In my view, Mr. Wüst's alleged conduct cannot reasonably be considered an accident and therefore is not an "occurrence" covered by the CGL Coverage.

[56] If I am wrong in this regard, I will go on to consider whether coverage is precluded by any CGL Coverage policy exclusions.

[57] I will deal first with the "abuse" exclusion. The Estate concedes that the "abuse" exclusions in both the MML Coverage and the CGL Coverage are substantially the same (Estate Pre-Hearing Brief, para. 33). For the same reasons set out above under the heading "MML Coverage", I conclude that the conduct alleged against Mr. Wüst constitutes "abuse" as defined in the policy and is excluded from coverage.

[58] Novex also denied coverage on the basis of the "expected or intended injury exclusion". This exclusion denies coverage for "bodily injury…expected or intended from the standpoint of the insured". The Estate submits that the exclusion is wholly inapplicable to the allegations made against Mr. Wüst. The Estate points to the fact that the recordings/photos were allegedly taken without the knowledge of the patients. Further, the recordings are alleged to

have been kept private and only came to light after Mr. Wüst's death. Given these alleged facts, the Estate contends that it is implausible that Mr. Wüst expected or intended that bodily injury would flow from the alleged acts.

[59] A multi-part analysis is required to determine whether the "expected and intended injury exclusion" applies. First, it must be determined if the conduct in question was deliberate/intentional. In this case, I have already determined that the true nature of the claims is intentional, not negligent, conduct by Mr. Wüst. That, however, does not end the inquiry. Intentional injury does not necessarily flow from every intentional act.

[60] In *Sirois v. Saindon*, [1976] 1 SCR 735, the Court concluded that the expected or intended injury exclusion applies where the risk of injury is inherent in the insured's deliberate act (para. 746). In other words, if the insured commits a deliberate act that was the dominant cause of the alleged injuries, and the injuries were foreseeable, then the exclusion applies.

[61] The test to be applied in determining whether the injury is expected or intended from the standpoint of the insured is an objective one. In *Sansalone v. Wawanesa Mutual Insurance Company*, [1998] BCJ 834, affirmed 2000 SCC 25, the Court was dealing with an intentional act exclusion. The Court found that the exclusion applies if it can be said that the harm from the acts alleged is "a natural and probable result" of those acts and the risk of injury is inherent in those acts. The Court agreed with the findings of the chambers judge, set out in para. 78:

> 78 I agree with Mr. Justice Finch when he concludes that the chambers judge correctly stated the ratio of *Saindon* when he said:

> These cases stand for the proposition that when the risk of injury is inherent in the insured's deliberate act so that the injury is the natural and probable consequence of the act, **the intention to commit the act is the intention to cause the injury, and the claim is therefore excluded from coverage by the intentional-act exclusion.** [Emphasis added]

[62] Specifically with respect to the tort of intrusion upon seclusion, the *Demme* case is instructive. In *Demme*, the Court was dealing with an expected or intended exclusion almost identical to the one in the present case. Recall that in that case the plaintiffs in the underlying action alleged that a nurse surreptitiously accessed their medical records. The Court stated at para. 67:

> 67 The motion judge did not accept her argument. As required by the pleadings rule, he focused his analysis on the nature of the claims brought against Ms. Demme in the Underling Actions. The motion judge held that their true nature is the intentional tort of intrusion upon seclusion, as defined in *Jones*. For that tort, the relevant intention is the defendant's intention to access private patient records. If that is demonstrated, **the nature of the tort is such that the intention to access the records amounts to an intention to cause injury. That is because under the tort the injury caused is the patients' loss of control over their private information. Drawing on those elements of the tort, the motion judge concluded that the pleading of intrusion upon seclusion took the claims against Ms. Demme outside the Policy's definition of the "occurrence" and, as well, within the ambit of the intentional act exclusion.** [Emphasis added]

[63] Finally, the Court in *Demme* concluded that for the insured to contend that her alleged conduct could be characterized as causing injury that was neither expected nor intended from her standpoint simply lacked any air of reality (para. 65).

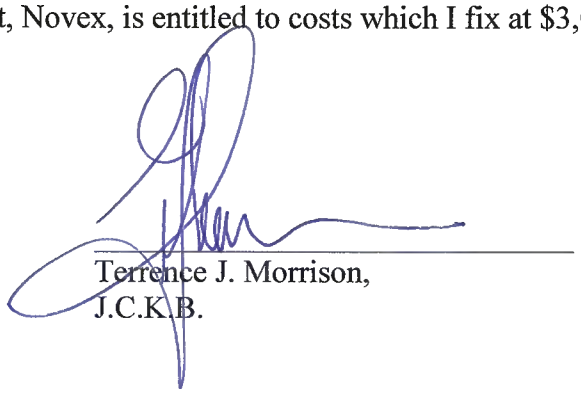
IV. CONCLUSION

[64] The true nature of the claims made against Mr. Wüst in both underlying actions is intentional conduct not negligence. The policy issued by Novex provides no coverage for the

claims made against Mr. Wüst. In addition, the claims are excluded from coverage under both the MML Coverage and the CGL Coverage by virtue of the policy exclusions discussed above. Accordingly, the application is dismissed.

[65] In light of the foregoing, it is not necessary to address the question of whether the Estate is permitted to choose its own counsel with the expense borne by Novex.

[66] The respondent, Novex, is entitled to costs which I fix at $3,000.00.



Terrence J. Morrison,
J.C.K.B.