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Coverage Covered: Recent Developments in Insurer Liability Cases

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Welcome

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Today's Topic

The Rise of Summary Judgment Motions

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Misrepresentation:
Innocent mistake, or grounds for denial?

Brittnee Holliday, McKercher LLP, Regina (SK)

McKERCHER LLP

Defence Costs Allocation between
Competing Liability Insurance Policies
– New Jurisprudence from Ontario Court of Appeal

Presented by Peter Stanford, Lindsay LLP, Vancouver (BC)

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The Rise of Summary Judgment Motions

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Summary Judgment pre-2010

- What is Summary Judgment
- Rule 20 of the *Rules of Civil Procedure*
- Summary judgment granted if there was “no genuine issue for trial”
- Jurisprudence: genuine issue for trial = genuine question of credibility

Amendments to Summary Judgment post-2010

- Change of wording of the rule from “no genuine issue for trial” to “no genuine issue requiring a trial” (Rule 20.04 (2))
- Addition of powers for judges (not masters) to weigh evidence, make determinations of credibility and draw inferences even if the court determines that there is a genuine issue and to conduct a mini trial if necessary (Rule 20.04 (2.1) & (2.2))
- Enhanced powers to define the issues to be tried and to give direction concerning the manner of trial (Rule 20.05)

Interpretation of post-2010 Amendments *Hryniak v. Mauldin*, 2014 SCC 7,

- Rules must be interpreted broadly, favouring proportionality and fair access to affordable, timely and just adjudication of claims
- Alternative models of adjudication are no less legitimate than the conventional trial
- The proportionality principle means that the best forum for resolving a dispute is not always that with the most painstaking procedure

Roadmap

- (1) Is there a genuine issue requiring trial based on the evidence before the court?
- (2) If yes, can trial be avoided by using the new powers under Rule 20.02(2.1) and (2.2)?
- (3) If the court cannot rule on summary judgment with the use of the new powers, can the court salvage the resources invested in the summary judgment motion by devising a summary trial procedure under Rule 20.05?

POST *HRYNIAK* DECISIONS

- *Pammett v. Ashcroft*, 2014 ONSC 2447
- *Mississippi River Power Corporation v. Municipal Electric Association Reciprocal Insurance Exchange*, 2014 ONSC 3784

Effect of *Hryniak*

- Will the *Hryniak* decision have an impact on how parties approach matters?
- What effect if any will this decision have on insurance defence matters?

Misrepresentation: Innocent mistake, or grounds for denial?

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With thanks to:
Jeremy Ellergodt

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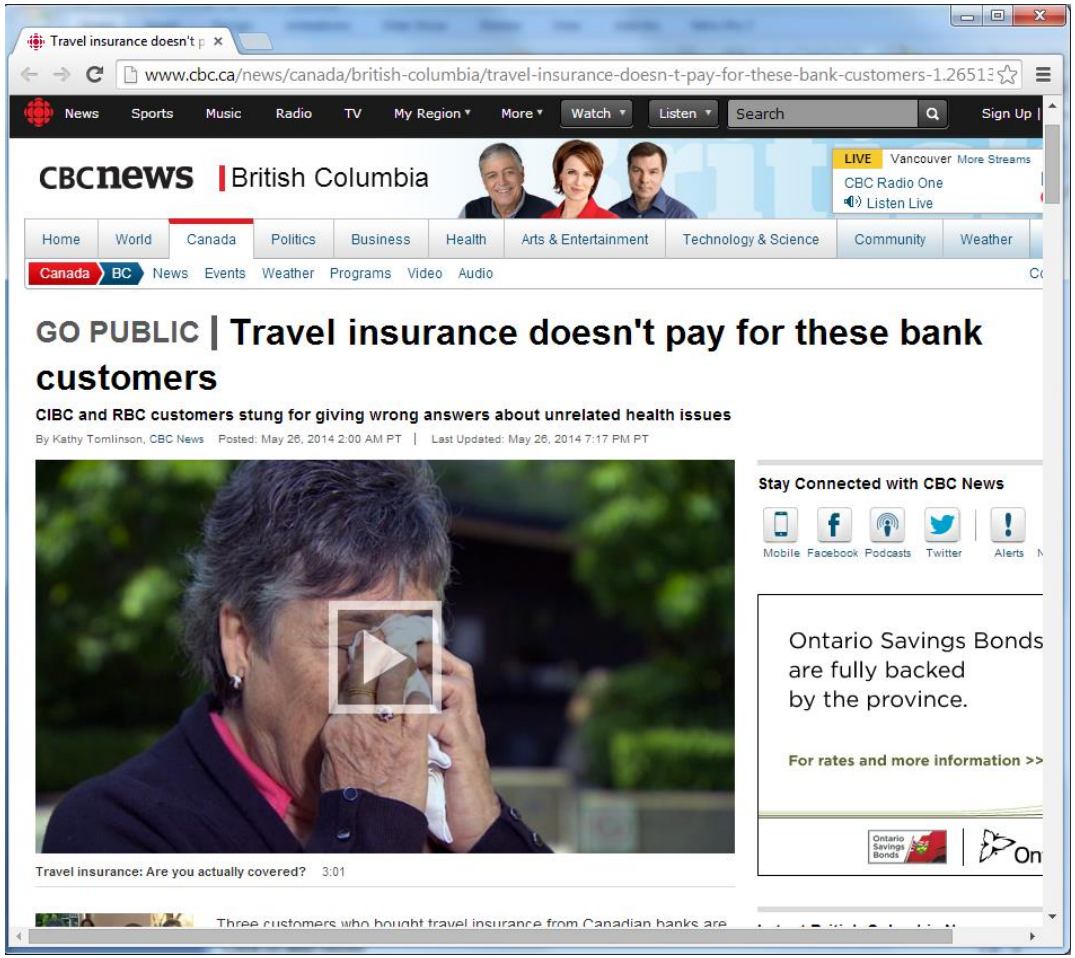
What is Misrepresentation?

- Misrepresentation often occurs at the beginning of the relationship between the insurer and the insured.
- A misrepresentation is when the insured gives the insurer information that is untrue or inaccurate.
- Not every misrepresentation will allow the insurer to void the policy.

Misrepresentation in the News



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Impact on the Insurance Policy

- In order for an insurer to deny coverage the misrepresentation on the part of the insured must be “material” to the insurance policy.
- In *Mutual Life Insurance Co. of New York v. Ontario Metal Products Co.* the Privy Council stated a misrepresentation would be “material” if it would have influenced a “reasonable insurer”.

Impact on the Insurance Policy

- So, the insurer must establish that had the insured given the correct information, that correct information would have caused the insurer to either decline the risk, change the premium, or otherwise alter the insurance policy.

Impact on the Insurance Policy

- When determining whether the correct information would have influenced the insurer's decision, a court will consider what a "reasonable" insurer would have done, not necessarily the specific insurer who is involved in the claim.
- Thus, the test is objective.

Impact on the Insurance Policy

- If the insurer can establish that the misrepresentation was material, the insurer can refuse to provide insurance coverage because the insured did not make the insurer fully aware of the risk.

Impact on the Insurance Policy

- Expert evidence would always be required to prove that had the insured provided the correct information, the insurer would have altered the insurance policy.
- For example, if an insured states on a questionnaire that she smokes 5 cigarettes per year when in reality it was 10, the insurer would need to show that this information would have changed their decision in granting the insurance policy.

Impact on the Insurance Policy

- The questions that are posed by an insurer on a questionnaire form or application will always be interpreted narrowly against the insurer.
- For example, if a question asks whether the insured has a “chronic” respiratory problem, the insurer would have to prove that any ailments not mentioned are “chronic”.

Impact on the Insurance Policy

- In most cases once it is proven that the misrepresentation was material, the insurance policy is void and the insurer does not need to establish that the specific misrepresentation caused the loss or damage.

Impact on the Insurance Policy

- If an insured states that his home does not have a fireplace, when in fact it does, and if his house burns down because of a lit cigarette, the insurer can deny coverage even though the presence of the fireplace did not cause the loss.

Impact on the Insurance Policy

- This rule can appear harsh at times, however the courts have stated that an insured has a duty of “utmost good faith” towards an insurer as the insurer relies solely on the information from the insured to assess the risk. When the insured breaches this duty of good faith, the insurance policy is void.

Legislation Across Canada

- The common law duty imposed on an insured to provide accurate information to an insurer has been codified in most jurisdictions under the “Statutory Conditions” present in the applicable legislation.
- In Saskatchewan, Alberta, British Columbia, and Ontario, the first Statutory Condition in relation to fire insurance relates to the rule that an insurance contract is void if the insurer misrepresents any facts which are material.

Legislation Across Canada

- There are, however, some legislative provisions which relate to different types of insurance which limit the insurer's ability to cancel an insurance policy if misrepresentation has occurred.

Material Change in Circumstances

- Provincial legislation also has statutory conditions in relation to the insured's duty to advise of a material change in circumstances.
- Although this duty is similar to when an insured makes a misrepresentation, there are other factors a court considers which are outside the scope of this current presentation.

Case Law Examples

- In *Kong v. Manulife Financial Services Inc.* 2008 BCSC 65, the insured purchased life insurance with a one million dollar death benefit.
- He answered “no” in relation to questions about whether he had a problem with his heart or his nose, throat or lungs.

Kong v. Manulife Financial Services Inc.

- After receiving the insurance policy, the insured traveled to Cambodia to visit his mother where he was subsequently shot and killed.
- His wife applied for the death benefit but the insurer denied her claim as the insured's medical history indicated that he had previously had issues with "shortness of breath, chest discomfort and asthma".

Kong v. Manulife Financial Services Inc.

- The court reviewed the medical evidence which indicated that although the insured had complained of “shortness of breath” and “chest discomfort” to his doctor, his doctor ultimately ruled out that it was a heart problem.
- Since the insured did not have a “heart problem” the fact that he answered in the negative to the list of various conditions was truthful.

Case Law Examples

- In *Fernandes v. RBC Life Insurance Co.* [2008] O.J. No. 3191 (affirmed by the Court of Appeal: [2009] O.J. No. 5240) the plaintiff purchased accident and sickness insurance.
- The insured stated on his application that he did not have any issues with his back, spine, hip, ankle or any other joints.

Fernandes v. RBC Life Insurance Co.

- After obtaining his insurance the plaintiff fell ill with meningitis and was not able to work. He made an application under his policy and the insurer then obtained medical information from previous doctors he had visited.
- The medical information indicated that he had previous pain in his back and had seen an orthopaedic surgeon about problems with his hip.

Fernandes v. RBC Life Insurance Co.

- Based on this medical history, the insurer argued that the plaintiff misrepresented his physical condition and as such the insurance was void.
- The court agreed with the insurer and found that the plaintiff had misrepresented the various pieces of information in his application form.

Case Law Examples

- In *Maginnes v. Non-Marine Underwriters, Lloyd's, London* [1997] S.J. No. 163, the plaintiff purchased life and sickness insurance for her horse. Shortly before she renewed her policy a veterinarian removed a large tumour from the horse's leg.
- The plaintiff stated on her application form that the horse did not have any ailments or illnesses.

Maginnes v. Non-Marine Underwriters, Lloyd's, London

- One year after the insurance policy was renewed, the horse died from malignant melanoma in its throat and a post mortem revealed melanoma throughout its body.
- The trial judge concluded that since there was a very small chance the horse would have developed cancer, it would not have influenced the insurer's decision to enter into the insurance policy.

Maginnes v. Non-Marine Underwriters, Lloyd's, London

- On appeal, the court of appeal stated that the trial judge had erred in relying on the vet's opinion in relation to whether the information would have influence the insured's decision to accept the risk.
- Thus, the appeal was allowed and the insurance contract was held to be void.

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- Liability Insurance Law in Canada, 5th edition
  - By Gordon G. Hilliker
- *Kong v. Manulife Financial Services Inc.* 2008 BCSC 65
- *Fernandes v. RBC Life Insurance Co.* [2008] O.J. No. 3191 (affirmed by the Court of Appeal: [2009] O.J. No. 5240)
- *Maginnes v. Non-Marine Underwriters, Lloyd's, London* 1997 CanLII 11188 (reversed by the Court of Appeal: 1998 CanLII 12313)

Defence Costs Allocation between Competing Liability Insurance Policies

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ACE INA Insurance v. Associated Electric & Gas Insurance Services Limited, 2013 ONCA 685, 118 O.R. (3d) 428

- Multi-claim litigation against Toronto Hydro following explosion and fire
- Primary policy limit of $1,000,000, plus duty to defend (not eroding limit)
- Excess policy with $45,000,000 limit, no duty to defend but drop-down coverage for defence costs:
  - recoverable if not covered by other insurance
  - but eroding limit of liability
- Fire losses greatly exceeded primary limits, defence costs did as well less than halfway through litigation
- Action brought for 'equitable contribution' re defence – argued was unfair for AEGIS to get "free ride" with exposure 45 times greater than primary

ACE INA INSURANCE V. ASSOCIATED ELECTRIC & GAS INSURANCE SERVICES LIMITED, 2013 ONCA 685, 118 O.R. (3d) 428

- HELD, 'equitable contribution' not available, as policies didn't cover same risk:
  - different layers of indemnity for damages
  - different coverage for defence expenses – AEGIS was excess only:

[33] There is no duty to defend under the AEGIS policy. While there is a duty to pay defence costs under both policies, the express terms of the excess policy exclude liability for defence costs to the extent they are covered, as they are here, by another policy. The liability for defence costs is not, therefore, congruent or overlapping in any way. Each insurer has insured different risks in relation to the defence of the insured and defence costs.

- Fairness / 'free ride' argument rejected:

[35] …There is nothing unfair in holding the primary insurer to its bargain with the insured. On the contrary, it would be quite unfair to rewrite that bargain to reflect ACE's conception of what would be fair in the circumstances. <u>There is no basis to invoke equitable principles where "each party's respective liability …[is] in accordance with what each had bargained for</u>"

(emphasis added)

ACE INA Insurance v. Associated Electric & Gas Insurance Services Limited, 2013 ONCA 685, 118 O.R. (3d) 428

- Take-away lessons (confirmations of prior authorities):

1) Equitable contribution – i.e. recovery by an insurer in its own name – not available where the policies don't cover the same risk

2) No duty on an excess insurer to contribute to defence costs merely because the damages claimed implicate its layer of indemnity cover; must first be a contractual duty to defend or pay defence costs

3) Insurers will be held to their bargain with the insured as reflected in the express terms of their policy

Broadhurst & Ball v. American Home Insurance et al., (1990) 1 O.R. (3d) 225, [1990] O.J. No. 2317 (C.A.)

- Similar fact structure, very different result
- Lawyers' professional liability insurance: $500,000 primary (American Home), $9,500,000 excess (Guardian)
- Claim for $20,000,000
- Each policy contained a duty to defend
- Argument by Guardian that an excess insurer is relieved of a duty to defend where the primary policy makes provision for defence rejected:

  To conclude, as did the court below, on the one hand, that guardian has a clear contractual duty to defend the respondents under the terms of its policy and, on the other hand, that Guardian need to nothing in furtherance of the defence …, is to render the contractual duty meaningless … and to confer a windfall on Guardian

- Allocation of defence costs is a matter of 'fairness' for the court to determine:

  It seems to me, in viewing the matter broadly and as best I can, that the fairest, most reasonable and most equitable allocation of costs that can be made in the overall circumstances of this case is to apportion them equally between the insurers.

Alie et al. v. Bertrand & Frere Construction et al., (2002) 62 O.R. (3d) 345, [2002] O.J. No. 4697 (C.A.)

- Costs allocation among multiple insurers on a massive scale – lawsuit by 137 homeowners over foundations ruined by defective concrete (bad 'fly ash')
- Trial lasted 150 days, saw Bertrand & Frere and Lafarge both held liable
- Bertrand third partied 5 of its insurers, and Lafarge 18 of its insurers
- Court of Appeal reasons 280 paragraphs long, almost half concerning costs
- HELD, trial judge's allocation of defence costs equally across the 7 policy years implicated, and equally among the excess and primary insurers participating in each of those years, was reasonable:
- *[235] As discussed above, Broadhurst & Ball holds that the allocation of defence costs as among insurers who have a concurrent obligation to defend is essentially a matter of fairness as among those insurers. As such, the allocation of costs is not an exact science and a trial judge's determination is owed considerable deference.*
- *[236] … Given the nature of the claims and the uncertainty as to which insurers would be required to indemnify, we are satisfied that an equal distribution of defence costs among the seven policy periods and an equal distribution among insurers with a duty to defend was fair and reasonable.*

Alie et al. v. Bertrand & Frere Construction et al., (2002) 62 O.R. (3d) 345, [2002] O.J. No. 4697 (C.A.)

- BUT, obligation to contribute to defence costs didn't extend to one insurer (Guardian) which had neither a duty to defend nor an indemnity obligation for defence costs:

  [216] Guardian, the third level of excess insurance for the 1987 policy period, stands in a different position. …

  [217] [Its policy] *condition forecloses the incorporation of any obligation to defend found in an underlying policy into the Guardian policy. The definition of ultimate net loss in the Guardian policy also excludes any expences incurred in connection with the defence of the suit from the indemnity obligation of Guardian. …*

  …

  [221] The principle in Broadhurst & Ball which holds that excess insurers may be required to contribute to defence costs is premised on the existence of a duty to defend on the part of the excess insurer. Without that duty, one does not reach the 'equities of the matter' as among the insurers with a duty to defend.

Family Insurance Corporation v. Lombard Canada Ltd., 2002 SCC 48

- Duelling excess-only 'other insurance' clauses in homeowner (Family) and CGL (Lombard) policies notionally responding to a $500,000 loss
- HELD, where the competing policies can't be read in harmony, i.e. are truly irreconcilable, the conflicting clauses should be treated as mutually repugnant and inoperative – here, Court of Appeal was wrong to disturb trial judge's equal apportionment of loss by using 'Minnesota Approach' (testing for 'closeness to risk', etc.) to pin one policy as sole responding primary
- The liability of each insurer is to be determined by the terms of their policies:
- *[16] … Thus the proper instrument to determine the liability of each insurer is the policy itself.*

  …
- *[19] … Once the interest of the insured is no longer at stake, that is, where the contest is only between the insurers, there is simply no basis for looking outside the policy. In the absence of privity of contract between the parties, the unilateral and subjective intentions of the insurers, unaware of each other at the time the contracts were made, are simply irrelevant.*

St. Mary's Cement Co. v. ACE INA Insurance

[2008] O.J. No. 2622 (S.C.J.)

- Another case of multi-party property losses from allegedly defective concrete
- Potential liability far exceeded $4M primary, could reach $25M excess limit
- Excess policy provided for defence, but insuring agreement required that the "*limits of liability of the underlying insurance are exhausted*" – excess insurer argued that duty to defend not triggered, as primary layer not exhausted
- HELD, duty to indemnify for damages determined by outcome of litigation, but duty to defend to be determined "prospectively":
- *[9] It is not necessary to prove that the obligation to indemnify will in fact arise in order to trigger the duty to defend. The operation of that duty will be determined prospectively by reference to the allegations made in the claim …*
- *[10] Thus, where an excess insurance policy (as with the ACE policy) includes a duty to defend, the insurer may be called upon to provide that defence before it is known whether the primary policy … will be exhausted. That is, the duty to defend is to be determined prospectively.*
- Defence costs apportioned equally between the primary and excess insurers, but subject to reallocation following trial and resolution of coverage issues

'Other Insurance' clauses – Form *AND* Content

- *Alie* scenario the exception, but are overlapping coverage cases trending up?
- Treatment options for insurer: exclusion, condition, and/or definition
  - *exclusion*: go hard or go home
  - *condition*: typically, excess-only coverage
  - *definition*: e.g. *ACE v. AEGIS – "Defence Costs"* definition used
- Exclusion – risk of 'Maginot Line' outcome
- Condition – more predictable, may not score the touchdown but at least will deprive the other side of one (shared loss per *Family Ins*., still tolerable result)
- Definition – clearly can work, Ont. C.A. has just confirmed

Subrogation as Remedy if no Equitable Contribution?

- Common law rights of subrogation, frequently confirmed right in the policy
- Rights ripen once payments are made under policy for insured's defence
- Action then brought in the name of the insured to enforce coverage owed to him/her/it under the competing policy (e.g. *Broadhurst & Ball* – primary had agreed to pay defence; excess was the one denying coverage)
- Another example – proceedings brought in Toronto under subscription policy with an excess-only condition vs. D&O policy with endorsement covering "*one hundred percent" (100%)*" of defence costs for non-covered claims (and an other-insurance exclusion that can't be invoked)

‘Rules’ re Defence Costs Allocation

- Courts will look to the express terms of any policies that notionally respond, and will hold each insurer to the bargain it made with the insured.
- An insurer’s obligation, if any, to contribute to defence costs must be found within the terms of its policy – ‘equities of the matter’ insufficient on their own.
- Potential exhaustion of primary limits may trigger excess defence coverage (provided the excess policy does provide some coverage for defence).
- Equitable contribution – i.e. recovery by insurer in own name – not available in cases where policies don’t cover the same risk.
- Subrogation may be available as alternative remedy to equitable contribution.

Analysis Tree for Cases of Overlapping coverage

Three questions to ask when liability policies overlap:

- 1) Do express terms of first policy call for a defence or the payment of defence expenses, notwithstanding the competing coverage?
- 2) If so, does the other policy provide defence coverage too? (Was subject overlooked? Untenable exclusion used??)
- 3) If coverage is excess-only, is the situation one of 'mutual repugnancy' with the other policy? (In which case allocation should be available.)

QUESTIONS?

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