COURT OF APPEAL FOR ONTARIO

CITATION: Unifund Assurance Company v. D.E., 2015 ONCA 423
DATE: 20150611
DOCKET: C59471

MacPherson, Cronk and Gillese JJ.A.

BETWEEN

Unifund Assurance Company

Respondent (Appellant)

and

D.E. and L.E.

Applicants (Respondents)

Mark M. O'Donnell and Mark W. Barrett, for the appellant

Vusumzi Msi, for the respondents

Heard: May 21, 2015

On appeal from the judgment of Justice David G. Stinson of the Superior Court of Justice, dated September 11, 2014.

MacPherson J.A.:

A. OVERVIEW

[1] D.E. and L.E. have a homeowners' insurance policy with Unifund Assurance Company. The policy includes liability coverage if their personal actions cause unintentional bodily injury or property damage.

[2] D.E. and L.E. are defendants in a lawsuit where the anchor claim is that their daughter and two other girls, all Grade 8 students, bullied a fellow student, causing her physical and psychological injuries. The claim against D.E. and L.E. sounds in negligence, namely, their failure to control their daughter.

[3] D.E. and L.E. requested that Unifund defend and indemnify them pursuant to the insurance policy. Unifund refused, relying principally on two exclusion clauses in the policy.

[4] D.E. and L.E. brought an application seeking a declaration that Unifund had a duty to defend and indemnify them in the underlying action. They were successful. In a judgment dated September 11, 2014, the application judge declared that "[Unifund] has a duty to defend and indemnify [D.E. and L.E.] in relation to the claims made against them in the action."

[5] Unifund appeals. The principal issue on the appeal is whether either of two exclusion clauses in the insurance policy saves Unifund from having to defend and indemnify D.E. and L.E. in the underlying action.

B. FACTS

(1) The parties and events

[6] D.E. and L.E. are a married couple residing together in Toronto with their minor daughter, R.E. They are three of the 13 defendants in the underlying action commenced in June 2012 by N.R. and her daughter K.S.

[7] K.S. and R.E. were Grade 8 classmates at a school operated by the Toronto Catholic District School Board. The Statement of Claim initially named as defendants R.E. and two other Grade 8 classmates, the TCDSB, and several of its employees, including two principals and two vice-principals. The Statement of Claim was subsequently amended to add as defendants the parents of the three Grade 8 girls, including D.E. and L.E.

[8] The foundation of the lawsuit is an allegation that R.E. and the other two minors bullied, threatened and physically assaulted their classmate K.S.

[9] The action alleges that the parents of the three girls, including D.E. and L.E., were negligent in that they, *inter alia*, knew or ought to have known that the minor defendants were bullying K.S. and failed to investigate, failed to take steps to remedy the bullying, failed to take reasonable care to prevent the bullying and harassment of K.S. by the minor defendants of which they were aware, failed to take disciplinary action against the minor defendants, and failed to discharge their duty to prevent the continuous physical and psychological harassment by the minor defendants for whom they are responsible in law.

[10] D.E. and L.E., relying on their homeowners' insurance policy, asked Unifund to provide a defence to the lawsuit. Unifund declined on the basis that the claims made in the action fall outside the policy's scope of coverage.

[11] The key provisions of the insurance policy are:

> **SECTION II – Liability Coverage**
>
> **Coverage E – Personal Liability**
>
> This is the part of the policy you look to for protection if you are sued. We will pay all sums which you become legally liable to pay as compensatory damages because of unintentional bodily injury or property damage arising out of:
>
> 1. your personal actions anywhere in the world….
>
> **Exclusions – SECTION II**
>
> We do not insure claims arising from:
>
> 6. bodily injury or property damage caused by an 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;
>
> 7.(a) sexual, physical, psychological or emotional abuse, molestation or harassment, including corporal punishment by, at the direction of, or with the knowledge of any person insured by this policy; or
>
> (b) 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.

[12] When Unifund declined coverage, D.E. and L.E. brought an application in the Superior Court of Justice.

(2) <u>The decision</u>

[13] With respect to exclusion clause 6, Unifund contended that the claim against the parents in negligence flowed from or was derivative of the claim

against their daughter arising out of her intentional conduct of assault, threatening and bullying; accordingly, exclusion clause 6 applied.

[14] Relying on this court's decision in *Durham District School Board v. Grodesky*, 2012 ONCA 270, the application judge rejected this argument. He said, at para. 21:

> In my view, the analysis of Juriansz J.A. is applicable to the case at bar. The elements of the intentional tort claim against the applicants' daughter, and the negligence claim against the applicants, are entirely distinct. Liability is sought to be imposed against the applicants on the basis that the harm to the plaintiffs was caused by their negligent conduct in failing to investigate the bullying, in failing to take steps to remedy it and in failing to take reasonable care to prevent it. The negligence claim is thus <u>not</u> derivative of the intentional tort claim. Since there is no allegation that the applicants' acts were intentional, coverage should not be excluded on this ground.
>
> [Emphasis in original.]

[15] The application judge also rejected Unifund's claim that exclusion clause 7(b) precluded coverage for the lawsuit brought against D.E. and L.E. He reasoned, at paras. 23 and 24:

> In Clause 6, the exclusion clause that proceeds Clause 7, the Policy exempts from coverage claims for "bodily injury or property damage caused by an intentional or criminal act or failure to act." By contrast, Clause 7(b) is silent on whether that exclusion applies to only intentional or unintentional failure to take steps to prevent physical abuse or harassment. Had the insurer intended to exclude liability for both intentional and negligent failure to prevent physical abuse or molestation, it could have included express language to

> this effect. Arguably, especially in light of the previous use of the concept of intentional acts in Clause 6, Clause 7(b) is ambiguous.
>
> Applying the concept of *contra proferentem*, and, as well, the principle that exclusion clauses are to be interpreted narrowly, I conclude that the proper construction of Clause 7(b) is that it should be limited to intentional failure to take steps to prevent physical abuse or molestation; i.e. where the insured intentionally fails to act and thus permits the offensive conduct to continue. The exclusion should not extend, however, to situations where that failure arose through negligence.

[16] Unifund appeals.

C. ISSUES

[17] The appellant advances seven grounds of appeal, framed as questions:

(1) Did Stinson J. prematurely find a duty to indemnify?

(2) Is R.E. a person insured by the policy?

(3) Did Stinson J. err in finding exclusion 6(a) ambiguous?

(4) Does exclusion 7(a) apply to entirely exclude the claim?

(5) Did Stinson J. err in finding exclusion 7(b) is ambiguous?

(6) Did Stinson J. err in finding that the word “Intentional” in exclusion 6 modifies the phrase “failure to act”, or in failing to consider whether the phrase does so?

(7) Did Stinson J. err by failing to consider that the pleading in the Underlying Action alleges the applicants/respondents “knew” or were “aware” that R.E. was bullying the minor plaintiff?

D. ANALYSIS

[18] In *Non-Marine Underwriter, Lloyd’s of London v. Scalera*, 2000 SCC 24, Iacobucci J. set out a three-part test for interpreting insurance policies in the context of the duty to defend and duty to indemnify. He said, at paras. 50-52:

> Determining whether or not a given claim could trigger indemnity is a three-step process. First, a court should determine which of the plaintiff’s legal allegations are properly pleaded. In doing so, courts are not bound by the legal labels chosen by the plaintiff. A plaintiff cannot change an intentional tort into a negligent one simply by choice of words, or vice versa. Therefore, when ascertaining the scope of the duty to defend, a court must look beyond the choice of labels, and examine the substance of the allegations contained in the pleadings. This does not involve deciding whether the claims have any merit; all a court must do is decide, based on the pleadings, the true nature of the claims.
>
> At the second stage, having determined what claims are properly pleaded, the court should determine if any claims are entirely derivative in nature. The duty to defend will not be triggered simply because a claim can be cast in terms of both negligence and intentional tort. If the alleged negligence is based on the same intentional tort, it will not allow the insured to avoid the exclusion clause for intentionally caused injuries.
>
> Finally, at the third stage the court must decide whether any of the properly pleaded, non-derivative claims could potentially trigger the insurer’s duty to defend.

[19] On the first step, there is no question that the plaintiffs' claim against D.E. and L.E. is properly pleaded.

[20] On the second step, the application judge did not err by concluding that the plaintiffs' claims against D.E. and L.E. were not derivative of the intentional tort claim against their daughter R.E. In my view, the application judge properly applied this court's decision in *Durham District School Board v. Grodesky*.

[21] That leaves the third step: do the properly pleaded, non-derivative claims trigger the insurer's duty to defend? In order to answer this question, it is necessary to consider the words of the Statement of Claim and the coverage and exclusion clauses of the insurance policy, all read together.

[22] I begin with the Amended Statement of Claim. The conduct of D.E. and L.E. (and other parents) that provokes the plaintiffs' lawsuit against them is described as "failed to investigate", "failed to take steps to remedy", "failed to take reasonable care to prevent", "failed to take disciplinary action" and "failed to discharge their duty to prevent the continuous physical and psychological harassment."

[23] It is obvious from this language that the plaintiffs' claim against D.E. and L.E. is a negligence claim. *The New Oxford Dictionary of English* (Clarendon Press: Oxford, 1998) defines 'negligence' as "failure to take proper care over

something” (p.1240). The claims in the Amended Statement of Claim come four-square within this definition of negligence.

[24] Against this backdrop of the language of the Amended Statement of Claim and the dictionary definition of ‘negligence’, I turn to exclusion clause 7(b) which precludes coverage for:

> 7.(b) 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.

[25] I do not see any ambiguity in the wording of this clause. The first word of the clause 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 D.E. and L.E.

[26] Indeed, the overlap between the wording of the s. 7(b) exclusion clause and the wording employed in the Amended Statement of Claim is significantly broader than just the word ‘failure’. The wording of exclusion clause 7(b) includes “failure… to take steps to prevent… physical, psychological or emotional… harassment”. The wording of the Amended Statement of Claim includes “failed to take steps… to prevent… physical and psychological harassment”.

[27] The application judge found ambiguity in exclusion clause 7(b) because of its silence about whether it applied to “negligent failure to prevent physical abuse or molestation” and suggested that, if this were intended, the clause “could have

included express language to this effect”. In light of my analysis above of the dictionary definition of ‘negligence’ and the wording of exclusion clause 7(b), I do not accept the analysis leading to a conclusion of ambiguity. Exclusion clause 7(b) is clear on its face and it applies to the lawsuit as pleaded against D.E. and L.E. in the Amended Statement of Claim.

[28] I observe that my analysis and conclusion are consistent with those of Mesbur J. in a similar case, *D.J.F. v. B.L.*, 2008 CanLII 39786 (ONSC). In that case, the claim against the insured was that she negligently failed to properly supervise the infant plaintiff whom she was babysitting, and this resulted in the infant plaintiff being sexually assaulted by the other defendant. The insurance policy contained this exclusion clause:

> ABUSE OR MOLESTATION, meaning any form of actual or threatened sexual, physical, psychological or emotional abuse or molestation, directly or indirectly, by:… any person or any named insured who is insured by this policy failing to prevent such an activity from taking place.

[29] The insurance company declined to provide a defence to its policy holder. It took the position that the essence of the claim against the defendant in the underlying action clearly brought it within the “failing to prevent abuse or molestation” exclusion. Mesbur J. agreed and said, at para. 10:

> The pleading brings the claim squarely within the exclusion. …If, at trial, it is found that Ms. B.L. failed to properly supervise the child, and that as a result the abuse happened, then that must be tantamount to a

> finding that she failed to prevent the abuse from happening. That finding would bring her actions squarely within the exclusion. Indeed, the only way that the claim can succeed is if the plaintiffs can show that by her actions, Ms. B.L. failed to prevent the abuse from happening. The policy excludes coverage for that very thing.

[30] I agree with this reasoning. It leads to a similar result in this case with a similarly worded exclusion clause.

E. DISPOSITION

[31] I would allow the appeal, set aside the judgment of the application judge, and declare that Unifund does not have a duty to defend or indemnify D.E. and L.E. in the underlying action.

[32] Unifund is entitled to its costs of the appeal fixed at $15,000, inclusive of disbursements and applicable taxes.

Released: June 11, 2015 (“J.C.M.”)

“J.C. MacPherson J.A.”
“I agree. E.A. Cronk J.A.”
“I agree. E.E. Gillese J.A.”