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YOU'RE NOT CRIMINALLY RESPONSIBLE, BUT ARE YOU COVERED UNDER YOUR INSURANCE POLICY?

— Imroz Ali and Sean Tessarolo. © Clark Wilson LLP. Reproduced with permission.

A violent knife attack in a firearms store leads to a civil action by the victim against the attacker. A criminal proceeding found the attacker not criminally responsible for his conduct due to mental illness.

In the civil action, does the attacker's home insurer have a duty to defend him against allegations framed as negligence?

In the recent case of *Butterfield v. Intact Insurance Company*, 2022 ONSC 4060 [*Butterfield*], Ontario Superior Court Justice D. Braid concluded the insurer was under no duty to defend the insured against criminal and intentional acts masquerading as negligence claims because those claims were excluded under the policy.

Background

In 2019, Mr. Butterfield entered a firearms store and applied for a firearm license when he suddenly suffered a psychotic episode. He then left the store and returned with a hunting knife and proceeded to stab the store owner (the "**Store Owner**") in the honest but deluded belief he was defending himself and his family (the "**Attack**").

The Attack led to Mr. Butterfield being criminally charged with aggravated assault. After his arrest, two forensic psychiatric assessments diagnosed him with schizophrenia and concluded that due to his mental disorder, Mr. Butterfield did not know that stabbing the Store Owner was morally wrong. In his criminal proceeding, Mr. Butterfield admitted to stabbing the Store Owner, but took the position he did not appreciate that stabbing the Store Owner was wrong. The criminal court determined that Mr. Butterfield had committed aggravated assault, but found him "not criminally responsible" ("**NCR**") because of his mental illness.

The Civil Action

The Store Owner brought a civil action against Mr. Butterfield for physical and psychological injuries caused by the Attack (the "**Action**"). The Store Owner's Statement of Claim (the "**Claim**") alleged that Mr. Butterfield was negligent for attending the store and applying for a firearms license when he was lucid because it was reasonably foreseeable he would injure or kill someone during the course of purchasing or possessing a firearm. The Claim did not allege any other torts besides negligence.

Mr. Butterfield held a Condominium Unit Owners Policy (the "**Policy**") underwritten by Intact Insurance Company ("**Intact**"), which included third-party liability insurance. It was

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not disputed that the Claim fell within the Policy's insuring agreements. However, the Policy specifically did not insure claims arising from bodily injury caused by any criminal or intentional act by an insured. Intact denied Mr. Butterfield coverage because it took the position that the Attack was both a criminal and intentional act.

Mr. Butterfield sought a declaration that Intact owed him a defence against the Claim under the Policy.

The Duty to Defend

Intact, as the insurer seeking to rely on an exclusion to avoid defending its insured, had the onus to prove, on a balance of probabilities, that the exclusion clause applied to the Claim. The Court followed the following four-part framework of analysis in assessing whether Intact had a duty to defend Mr. Butterfield:

A. What is the true nature of the Claim?

B. Were Mr. Butterfield's actions criminal?

C. Were Mr. Butterfield's actions intentional?

D. Does Intact have a duty to defend Mr. Butterfield in the Action?

A. What is the true nature of the Claim?

The Claim pleaded negligence as the only cause of action against Mr. Butterfield. Rather than limiting itself to the style of pleading adopted by the plaintiff, the Court looked behind the plaintiff's labelling of the Claim to determine the Claim's true nature. The Court found the negligence claim was based on the same harm as the intentional tort of assault (if it had been pleaded). While Mr. Butterfield may have been negligent in applying for a firearms permit, the Court held there was no causal link between that negligence and the Shop Owner's alleged damages, without the intentional tort of assault.

The true nature of the Claim was the tort of assault and the Store Owner could not convert an intentional act into negligence by its own choice of words or labels (adopted, no doubt, to avoid Mr. Butterfield's insurer from denying coverage).

B. Were Mr. Butterfield's actions criminal?

In assessing the criminal act exclusion's language, the Court interpreted "criminal act" to mean any breach of the *Criminal Code*. This language permits the insurer to exclude indemnification for damages caused by any contravention of the *Criminal Code*, regardless of intent or lack of intent to cause damage. A criminal conviction was not required for the exclusion to have effect.

In addressing the NCR finding in the criminal proceeding, the Court noted that an NCR finding is only available once an offence's elements are established. The Court held that the judge in the criminal proceeding must have been satisfied that the *actus reus* and *mens rea* of aggravated assault were proven beyond a reasonable doubt because, without that being the case, there would have been no need to consider whether Mr. Butterfield was NCR for his conduct.

C. Were Mr. Butterfield's actions intentional?

The issue of intentionality in this case posed an interesting question – in light of the NCR finding in the criminal proceeding, was Mr. Butterfield's conduct intentional for the purposes of the Policy's intentional act exclusion?

Relying on previously decided cases, the Court held that a defendant in a civil action will be found to have acted intentionally if the defendant understood the nature and quality of their actions but simply did not realize that those actions were wrong. In a civil action, the threshold for determining whether an individual suffering from a mental disorder is responsible for their tortious conduct is whether the defendant was able to appreciate the nature and consequences of their act.

While psychiatric assessments determined Mr. Butterfield could not appreciate that stabbing the Store Owner was morally wrong, he did intend to stab the Store Owner. This intention was evidenced by the fact that the criminal court

found Mr. Battlefield committed the act, and Mr. Butterfield took several steps to effect his intention including retrieving the hunting knife and yelling at the Store Owner that he needed to be murdered.

Mr. Butterfield's words and conduct demonstrated a clear intention to injure or kill the Store Owner with a knife, even if it was based on a delusional belief.

D. Does Intact have a duty to defend Mr. Butterfield in the Action?

An insurer's duty to defend is triggered where there is a mere possibility that, based on the pleaded facts, the claims are covered under the policy. In this case, the Court decided the Attack was both a criminal and intentional act and was excluded from coverage under the Policy. As a result, Intact did not owe Mr. Butterfield a defence in the Action under the Policy.

Conclusion

The threshold for triggering an insurer's duty to defend is low. However, not every set of facts, no matter how artful a plaintiff may be in crafting its pleadings, will result in an insurer having to defend their insured in a civil action. *Butterfield* presents one example of a set of facts that permitted the Court to conclude there was not even a mere possibility of coverage under the Policy. The criminal and intentional act exclusion removed all of the allegations contained in the Claim from coverage.

Where an insurer relies on an exclusion in defending an insured's application for a defence under a policy, the insurer has the onus of proving the exclusion clause applies. In assessing whether to deny an insured a defence against a claim, an insurer should consider its ability to discharge its legal burden of proof to establish the that the exclusion clause will remove the allegations from coverage. *Butterfield's* unique set of facts provide some guidance on how a court will interpret criminal and intentional act exclusions where the duty to defend is at issue.

QUANTUM OF DAMAGES

Injury	Non-Pecuniary	Total	Paragraph
Shoulder	$130,000	$810,826	[2023] I.L.R. ¶M-3385
Chronic pain	$130,000	$314,678	[2023] I.L.R. ¶M-3386
Chronic pain	$140,000	$629,947	[2023] I.L.R. ¶M-3387

RECENT CASES

Insurance Decisions

Court upheld finding that civil fraud was made out and automobile collisions were staged

Court of Appeal for British Columbia, September 9, 2022

The appellants alleged that they were involved in three rear-ending motor vehicle accidents, in 2013 and 2014. The accidents did not have independent witnesses. The appellants claimed personal injury damages in relation to the accidents. The respondent Insurance Corporation of British Columbia ("ICBC") brought an action in civil fraud, conspiracy, and fraudulent misrepresentation, alleging that the accidents were staged. At trial, the evidence showed that there were connections between the people involved in the accidents. The trial judge rejected the appellants' explanations regarding the connections, which were "fraught with inconsistencies." The trial judge held that the collisions were staged, and ICBC was awarded damages representing the amounts it had paid out in vehicle damage claims.

The appellants appealed, taking the position that the trial judge erred in failing to apply the proper legal test and burden of proof for civil fraud.

The appeal was dismissed. The trial judge had summarized ICBC's primary position as being based in civil fraud and set out the elements of civil fraud, as found in case law. Specifically, ICBC was required to show that the collisions were staged; the appellants either knew or were wilfully blind to the fact that they were going to be involved in a staged collision before it occurred; the appellants represented to ICBC that they were involved in a real accident; and ICBC paid money as a result of that representation. The Court dismissed the appellants' submission that this summary of applicable legal principles was incorrect for failing to capture the need to prove that the appellants knew that they made a false representation, either through actual knowledge or recklessness. There was no error in the judge's summary of legal principles, and she made findings of fact consistent with liability on the basis of those principles.

The Court, further, did not find that the judge reversed the burden of proof. The judge correctly stated the burden of proof as the plaintiff bearing the burden against the defendants on a balance of probabilities, with ICBC's case relying on the inherent improbability of things occurring as the appellants claimed to ICBC, when those details were examined in a broader evidentiary context. The judge was entitled to reject the appellants' evidence, as it was both internally and externally inconsistent. This was not the same as a reversal of the burden of proof. The trial decision was upheld.

Singh v. Insurance Corporation of British Columbia, [2023] I.L.R. ¶I-6368

Court refused to extend deadline for providing notice of unidentified driver claim to Insurance Corporation of British Columbia

Supreme Court of British Columbia, August 24, 2022

In April 2015, the plaintiff was injured while working at a lumber yard. The plaintiff was counting items in the back of a customer's van when the customer slammed the rear hatch on the plaintiff's head. The plaintiff was knocked to the ground and momentarily lost consciousness. After coming to, she completed the customer's transaction, charged him for the purchase, and opened the gate for him to drive away. The customer and his van were unidentified. The plaintiff later asked her manager for a copy of the customer's receipt, which could not be found. The other employees stated that they had not witnessed the incident. The plaintiff felt pain in her neck and head and experienced nausea. Two days after the accident, she contacted her WorkSafeBC ("WSBC") representative, and she began receiving compensation under the *Workers Compensation Act* (the "WCA"). Two weeks post-accident, the plaintiff followed up with her manager about locating the customer's receipt and also checked security camera footage, which she found had been non-operational. In April 2016, after a conversation with a lawyer friend, the plaintiff learned that she could pursue a claim under the unidentified driver provisions in the *Insurance (Vehicle) Act* (the "IVA"). By letter dated August 2016, the plaintiff reported the claim to the defendant Insurance Corporation of British Columbia ("ICBC") and she filed her civil claim in March 2017.

ICBC applied to summarily dismiss the plaintiff's claim for her failure to comply with the notice timing requirements under section 24(2) of the IVA, which required that notice be given to ICBC within six months of the accident involving an unidentified driver and vehicle. ICBC also relied on section 24(5), which precluded claims where the plaintiff did not make a reasonable attempt to obtain the driver's identity.

The application was granted. The evidence that the plaintiff was unaware of her section 24 claim until she spoke with a lawyer friend was uncontested. The Court considered case law on the discoverability rule, which "applied to avoid the injustice of precluding an action before the person is able to raise it." The Court found that, within days of the accident, the plaintiff was aware of all the material facts underlying her section 24 cause of action. Specifically, she knew that she had been physically injured by the customer by the use of his vehicle and that she was unable to identify him. The plaintiff only lacked the "legal knowledge" that these circumstances gave her a section 24 claim. The Court found that lack of legal knowledge fell outside of the discoverability rule described in the case law. Accordingly, the discoverability rule did not apply to extend the section 24(2) deadline, and the plaintiff's proceeding was barred, as she did not give ICBC notice within six months of the accident. The plaintiff's claim was dismissed.

In the alternative, if the discoverability rule applied, the Court found that the plaintiff did not fail to exercise reasonable due diligence regarding her legal situation. It was not unreasonable for the plaintiff to refrain from seeking legal advice, as it was reasonable for her to assume that WSBC would have advised her if there were additional claims she could pursue. The Court also rejected ICBC's submission that the discoverability rule should not extend the section 24(2) deadline, as WSBC was a sophisticated party that had no justification for failing to identify a cause of action within six months. The Court noted that section 24(2) imposed the notice obligation on "the person bringing" the proceedings, which was the plaintiff.

At the time of the accident, section 10(6) of the then-version of the WCA provided that WSBC had exclusive jurisdiction to decide whether to sue ICBC, and whether to do so in its own name or that of the plaintiff. The Court considered the plaintiff's submission that the time for bringing a notice under section 24(2) did not start running until WCB authorized her to bring a claim against ICBC, in July 2016. The Court noted that the WCA did not preclude the plaintiff from giving the ICBC notice within six months post-accident, and she did not need to bring a claim against ICBC within that deadline.

The Court did not find that the plaintiff acted unreasonably in not ascertaining the unknown driver's identity before he left the lumber yard. The evidence was that the plaintiff was shaken and confused, despite being able to finalize the purchase transaction. It was not unreasonable for her to not obtain the requisite information in that moment.

Hoflin v. Doe, [2023] I.L.R. ¶I-6369

"Your work" exclusion did not apply to exclude duty to defend under "wrap-up" policy

Supreme Court of British Columbia, September 21, 2022

The petitioners were developers and contractors of the Shangri-La tower hotel and residential development in Vancouver. The project was insured under a "wrap-up" liability insurance policy issued by the respondent insurer. The unit owners brought actions naming the petitioners as defendants, third parties, or both. The common theme of the actions was that there were defects and deficiencies in the design, manufacture, and installation of the curtain-wall system covering the exterior of the building. The system consisted of sealed insulating glass units that were alleged to have fogged up, cracked, or spontaneously shattered. The actions claimed damages for the cost of repairing and/or replacing the defective items and consequential damage to other property of the strata unit owners and loss of the use of the strata units. The insurer denied that it had a duty to defend the petitioners, relying on its policy's "your work" exclusion. The exclusion stated that it excluded "property damage" to "that particular part of 'your work' out of which the 'occurrence' arises and included in the 'completed operations hazard'". The policy defined "your work" as "Work or operations performed by you or on your behalf" and "Materials, parts or equipment furnished in connection with such work or operations", including "warranties or representations made at any time with respect to the fitness, quality, durability or performance of any of the items included". The insurer's position was that since the developers' and contractors' work "was effectively the entire project", it was entirely captured by the exclusion. The petitioners brought an application seeking to enforce the insurer's duty to defend.

The application was granted. The Court stated that pursuant to *Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada*, [2010] I.L.R. ¶I-5051 (SCC), ("*Progressive Homes*") and *Lombard General Insurance v. The Canadian Surety Company*, [2012] I.L.R. ¶I-5269 (BCSC), the contention that the "your work" exclusion ousted coverage for any defects and deficiencies in any part of a project for a developer or general contractor was no longer authoritative. In *Progressive Homes*, the Supreme Court of Canada had interpreted a similar "your work" exclusion that focused on "that particular part" of the work. The Court had found that the intent of the wording was to divide the work into its component parts. Coverage would be excluded for damage to "that particular part" of the insured contractor's work that was deficiently done, whereas the resulting damage caused by the defects to other parts of the insured's work would be covered. Accordingly, the insurer was potentially liable for covering resulting damage to parts of the development from the defective curtain-wall system.

The Court found that the allegations in the actions included claims for resulting damage, and were therefore broad enough to trigger the duty to defend. It was not possible, at the pleadings stage, to disentangle the covered and excluded claims, namely, the resulting damage and defective work claims, and a trial could determine what was entitled to coverage under the policy. At this time, the pleadings triggered the duty to defend, the Court held.

11 Ventures Ltd. v. XL Insurance Company Ltd., [2023] I.L.R. ¶I-6370

Pre-litigation medical examination was not same as first medical examination for trial purposes, and Court ordered that disability benefits insurer was entitled to seek independent medical evaluation

Ontario Superior Court of Justice, August 11, 2022

The plaintiff was insured under a group insurance policy issued by the defendant insurer. In March 2013, the plaintiff stopped working, submitted a claim for disability benefits to the insurer, and was approved for disability benefits starting March 30, 2013. The insurer requested that the plaintiff attend a psychiatric assessment with Dr. Chad. After receipt of

Dr. Chad's resulting report in April 2018, the insurer concluded that the plaintiff was not "totally disabled", and advised her that her benefits would end in December 2018. In April 2019, the plaintiff brought an action against the insurer, seeking a declaration of total disability, payment of benefits, and damages. In December 2019, the plaintiff served the insurer with an independent medical evaluation ("IME") psychiatric report prepared in connection with the action in which she was diagnosed with major depressive disorder with anxious features and unspecified trauma and stressor related disorder. The insurer requested that the plaintiff attend a psychiatric IME with Dr. Bloom, as Dr. Chad was not available. The plaintiff refused.

The insurer brought a motion for an order requiring the plaintiff to attend the psychiatric IME pursuant to section 105 of the *Courts of Justice Act*.

The motion was granted. Section 105(2) states, "Where the physical or mental condition of a party to a proceeding is in question, the court ... may order the party to undergo a physical or mental examination". Section 105(4) states, "The court may, on motion, order further physical or mental examinations." Pursuant to case law, first medical examinations were generally granted as a matter of right, and courts were to exercise discretion whether to grant subsequent examinations. The Court noted that case law had found that a pre-litigation medical examination did not constitute an examination under section 105, such that the latter pre-empted the right to obtain the former. The Court cited policy considerations set out in the case law, specifically, that the defence medical exam had the purpose of upholding the right of the defendant to conduct their defence and to assist the court at trial by providing expert evidence. Following case law, the Court concluded that the examination being sought was a "first examination" under section 105, and as a result, an order was to be made requiring the plaintiff to attend the IME.

In the alternative, the Court found that the evidence supported that there was a change in circumstances that warranted a further medical examination. The Court considered the plaintiff's statement at her examination for discovery that she felt that her condition was getting worse, the inclusion of a new diagnosis in the report provided by the plaintiff, and evidence that the plaintiff had not filled her prescriptions for psychiatric medication since November 2018. It would, further, be prejudicial for the insurer to be precluded from responding to the plaintiff's litigation expert report. The Court ordered that the insurer was permitted to conduct an IME of the plaintiff, with the examining psychiatrist to be Dr. Bloom or such other qualified psychiatrist as the parties could agree to, acting reasonably.

Terra v. Desjardins Financial Security Life Assurance Company, [2023] I.L.R. ¶I-6371

Occupant of stolen vehicle not entitled to claim uninsured coverage from vehicle's insurer

Ontario Superior Court of Justice, August 29, 2022

In August 2014, the plaintiff was a passenger of a vehicle that was involved in an accident. The driver was deceased. The plaintiff was unaware that the vehicle had been stolen until he woke up days after the accident. The owner of the vehicle reported it as stolen three days prior. The plaintiff brought an action against the driver's estate and the owner of the vehicle, seeking damages in relation to his bodily injuries. The owner's automobile insurer, the defendant, took the position that the plaintiff, as a passenger in a stolen vehicle being operated without the owner's consent, did not have any right to recover uninsured coverage, pursuant to section 1.8.2 of the Standard Ontario Automobile Policy, "Excluded Drivers and Driving Without Permission". The plaintiff took the position that section 1.8.2 only excluded coverage if he had known or reasonably ought to have known that the vehicle was being operated without the owner's consent. He claimed that he did not have any reasons to believe the vehicle was stolen at the time of the accident. The insurer brought a motion seeking to determine a question of law before trial, pursuant to rule 21.01 of the R*ules of Civil Procedure*, and to dismiss the action against it.

The motion was granted. The version of section 1.8.2 in force at the time of the accident provided, "[T]here is no coverage (including coverage for occupants) under this policy if the automobile is used or operated by a person in possession of the automobile without the owner's consent or is driven by a person named as an excluded driver of the automobile policy or a person who, at the time he or she willingly becomes an occupant of an automobile, knows or ought reasonably to know that the automobile is being used or operated by a person in possession of the automobile without the owners' consent." The Court accepted the insurer's interpretation of the provision, finding the use of "or" between the clauses meant that they were to be read disjunctively. Accordingly, the first clause of the first paragraph of

section 1.8.2, read as an independent exclusion, meant that there was no coverage for "the automobile" insured by the policy, if the vehicle was being used or operated without the owner's consent. As a result, there was to be no uninsured automobile coverage for the occupant of the policy's automobile that was operated without consent. This interpretation was consistent with case law, including case law that distinguished between "the automobile", as present in the first two clauses, and "an automobile", as present in the third clause. Specifically, "the automobile" was the automobile insured under the subject policy.

There was no dispute that the vehicle in which the plaintiff was an occupant was being operated without the consent of the owner on the date of the loss. As this was not a claim for uninsured coverage by the plaintiff against another automobile policy, namely a policy other than that under which "the automobile" was insured, there was no need for the Court to consider whether or not the plaintiff knew or ought reasonably to have known that the vehicle was being used or operated without the consent of the owner. The action against the insurer was dismissed.

Burnham v. Co-Operators General Insurance, [2023] I.L.R. ¶I-6372

Plaintiff satisfied threshold requirement for non-pecuniary damages due to permanent impairment

Ontario Superior Court of Justice, September 27, 2022

The plaintiff was involved in a motor vehicle accident in March 2012. The plaintiff was struck by a bus of the defendant Toronto Transit Commission ("TTC") as she was crossing a road. The plaintiff underwent emergency surgery to repair an open left ankle fracture. The parties agreed that the plaintiff also suffered a mild concussion, a laceration over her eyebrow, and a fracture of the left tibial spine and left and right fibular heads. At trial, the jury found the plaintiff was 25 per cent liable for the accident. The jury awarded the plaintiff $175,000 in non-pecuniary damages.

The TTC and defendant bus driver brought a motion to determine whether the plaintiff met the threshold under section 267.5(5) of the *Insurance Act* for entitlement to non-pecuniary damages. Specifically, the plaintiff was required to establish that her "bodily injuries" arose directly or indirectly from the use or operation of an automobile, and that as a result, she sustained permanent and serious impairment of an important physical, mental, or psychological function.

The motion was dismissed. There was no dispute that the plaintiff had sustained physical injuries from the accident, as upon being struck, she was taken to the hospital by paramedics and required immediate ankle surgery and a blood transfusion due to blood loss. The Court considered whether the plaintiff sustained a permanent impairment of a physical function. Pursuant to case law, "permanent" did not mean forever, but rather required "a weakened condition that [was] expected to last into the indefinite future that [was] medically corroborated." The Court preferred the evidence of the plaintiff's expert, who opined that she sustained a serious injury to her left ankle with continued restricted range of motion amounting to an impairment and altered gait, and showed irregularities consistent with post-traumatic osteo-arthritis. The conclusions arose out of a thorough review of the plaintiff's medical records, imaging, and the expert's own physical examination. The plaintiff's expert had examined the plaintiff three times over nine years, finding that her restricted range of motion in her ankle, evidence of arthritis, and altered gait had not materially changed, which the expert opined fit the definition of permanence. While the defendants' expert concluded that the plaintiff had a "normal" range of motion, he did not specify what that meant. The defendants' expert also did not opine on the plaintiff's x-rays. The Court accepted that the plaintiff's ankle impairment and knee injury permanently affected physical functions such as walking, shopping, and household chores.

The Court further found that the permanent impairment was to an important physical function, namely, important to the usual activities of daily living, considering the plaintiff's age. The impairment affected the plaintiff's ability to walk and stand, which affected her cooking, cleaning, shopping, socializing, and taking care of her grandchild, activities that were fundamental to her life. The Court further concluded that the impairment was serious. It accepted that the plaintiff had been diagnosed with chronic pain syndrome, persistent somatic symptom disorder with predominant pain, and major depressive disorder. The plaintiff's condition had led her to make a suicide attempt. The Court found that the threshold requirements under section 267.5(5) were met. The plaintiff established that she had sustained a permanent and serious impairment of an important physical function and was entitled to the non-pecuniary damages awarded by the jury.

Kolapully v. TTC et al., [2023] I.L.R. ¶I-6373

Homeowner's policy exclusion limiting compliance costs for rebuild of home did not apply

Ontario Superior Court of Justice, September 29, 2022

In April 2019, the applicants' home was damaged by a flood and deemed a total loss. The applicants' homeowner's insurance policy was a "comprehensive" package and included a guaranteed rebuilding cost ("GRC") endorsement that the applicants claimed was important to them, as their home was located on a waterfront. The policy included an exclusion for the increased costs of repair or replacement "due to the operation of any law" regarding zoning or construction, and included an exception: "except as provided under Additional Coverages". The "Additional Coverages" section stated that there was additional building by-law and code compliance ("BBCC") coverage of up to $10,000. The applicants took the position that the GRC coverage provided them with guaranteed rebuilding costs without limitations. As the applicants' home was on a river, the rebuilding was subject to additional compliance costs, including under the Mississippi Valley Conservation Authority's "regulation policies". The applicants' rebuild estimate, with costs associated with rebuilding the property in compliance with rules, regulations, laws, and bylaws that applied at the time of loss, greatly exceeded the insurer's estimate.

The insurer took the position that there was a $10,000 cap on "qualifying compliance costs" under the BBCC coverage, and that the GRC endorsement did not override this limit of liability and did not extend coverage to all compliance matters. The applicants applied for a declaratory order that they were entitled to unlimited rebuilding costs coverage under the policy.

The application was granted. The Court found the language in the GRC endorsement to be clear and unequivocal and providing "guaranteed rebuilding cost" coverage. There were no limitations on coverage in the GRC endorsement itself. While the endorsement referenced the cost of repairs or replacement "without deduction for depreciation", this did not amount to a limit on coverage in relation to compliance costs. Following case law, the Court did not accept the insurer's position that a without-limitation interpretation of the GRC endorsement would be inconsistent with the commercial context of the policy, becoming a warranty for rebuilding costs, with the insurer as guarantor. The applicants established that their loss fell within the initial grant of coverage.

The Court turned to consider the exclusion. The exclusion was clear and unequivocal in stating that it excluded only the costs of repair or replacement due to the operation of "any law." Accordingly, the Court found that it did not exclude compliance costs attributable to the operation of rules, regulations, by-laws, or ordinances. The Court noted that the BBCC coverage provision used the terms "law", "by-law", "regulation", and "ordinance." If the insurer wanted for "law" to include these items, it could have included them in the exclusion provision wording. The Court concluded that the exclusion did not exclude *Building Code* requirements and the Mississippi Valley Conservation Authority's regulation policies.

The Court further found that the insurer's interpretation of the exclusion would contravene the nullification of coverage doctrine. If the exclusion applied, it would render nugatory the coverage for the most obvious risks for which the GRC endorsement was issued. The applicants had specifically purchased the policy with the expectation that if their home were damaged by an overland flood, the insurer would pay rebuild costs. To rebuild, the applicants would have to comply with the Mississippi Valley Conservation Authority's regulation policies, current *Building Code* requirements, and municipal by-laws. The insurer's interpretation of the exclusion would exclude practically all compliance costs. The Court declared that the applicants were entitled to coverage of the costs of rebuilding, on the same location with the same materials, without limitation of coverage resulting from compliance costs.

Emond v. Trillium Mutual Insurance Company, [2023] I.L.R. ¶I-6374

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For LexisNexis Canada Inc.

Sandeep Samra
Editor
905-415-5872
sandeep.samra@lexisnexis.ca

Customer Support
1-800-387-0899
service@lexisnexis.ca
Customer Service is available from 7 a.m. to 11 p.m. (ET) Monday to Friday, and from 9 a.m. to 11 p.m. (ET) on Weekends.

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LexisNexis Canada Inc.
111 Gordon Baker Road
Suite 900
Toronto, Ontario
M2H 3R1