

A Commentary on Recent Cases and Relevant Legal Issues

1. What Constitutes a “Claim” under a “Claims-Made” Policy?

On June 1, 2006, the Supreme Court of Canada released its decision in *Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*. Although the case relates to insurance coverage in the context of historic institutional abuse, the issues it addresses are of importance to insurers and insureds alike, particularly where “claims-made” policies are involved (such as professional liability policies).

The Jesuits operated a residential school for First Nations children from 1913 to 1958. In January 1994, the Jesuits were put on notice of a specific claim for damages by the lawyer for a former student by the name of C. In March 1994, the Jesuits put their insurer on notice of C's claim and also raised the possibility that the Jesuits might be facing other future claims for abuse at the residential school. In so doing, the Jesuits provided the names of nine other potential victims (who had not yet made claims). After receiving information about C's claim and the other possible claims, the insurer (Guardian) refused to renew the policy. The Guardian policy expired later in 1994.

After the policy expired, the Jesuits received approximately 100 additional claims relating to alleged abuse at the residential school. Guardian refused to defend any of those

claims, other than the claim of C, taking the position that the claims were “first made” after the policy expired and were not covered.

Insurers may be relieved to hear that the Supreme Court agreed with Guardian and concluded that the insurer did not have a duty to defend the 100 or so claims against the Jesuits (other than C's claim) that were received after the policy had expired. The Guardian policy was “claims-made” and, other than C, no claim had been made against the Jesuits during the policy period by any other former students, nor had any intention to do so been communicated to the Jesuits before the expiry of the Guardian policy.

Interestingly, although the issue was not part of this appeal, the Supreme Court found that the trial judge had erred in finding that there were claims made by the nine other individuals identified in the Jesuits' March 1994 correspondence. Contrary to the lower court's findings, the Supreme Court found nothing in the evidentiary record to suggest any intention communicated to the Jesuits by or on behalf of any of those nine named individuals to hold the Jesuits responsible for their damages.

In this case, “claim” was not specifically defined in the policy, and the Supreme Court held that it was not enough for the Jesuits to communicate circumstances that could potentially give rise to a claim (including

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identifying possible victims and/or perpetrators) in order to invoke the duty to defend. Rather, the Supreme Court found that there must be a claim made against the insured by or on behalf of the victim (or an intention communicated by or on behalf of the victim to that effect) in order to trigger the duty to defend under the “claims-made” policy.

This decision should not affect how or when an insured notifies its insurer of a claim. The prudent course is for the insured to review the policy (particularly the definition of “claim”, if any, and the insured’s reporting obligations) and to promptly report all circumstances that could reasonably give rise to a claim – whether or not an actual claim by a third party has been made or an intention to that effect has been communicated to the insured. Upon receiving such notice, the insurer may take the position that no claim has been made within the meaning of the policy, and it may simply keep this information on file. Nevertheless, complying with the policy’s reporting obligations, and promptly notifying the insurer of the circumstances in question, could avoid a denial of coverage down the road.

2. Insurance – Duty to Defend – The Danger of Not Reporting a Potential Claim

This case commentary deals with the situation where an insured fails to report a potential claim to its insurer before the expiry of a “claims-made” policy.

In April 2006, the Ontario Superior Court of Justice released its decision in *Brelih v. St. Paul Companies*. In that case, the applicant realtors brought an application against two insurers for a determination as to whether either one was required to defend the applicants in an action commenced against them by their clients, who were vendors in a real estate transaction.

Prior to the commencement of the clients’ action in June 2005, the applicants had received an e-mail in March/April 2004 from their clients’ solicitor, indicating that they were considering suing them. However, the applicants believed that their clients were merely attempting to avoid paying their commission and were not serious about pursuing an action. As a result, the applicants did not report the matter to St. Paul, their insurer at the relevant time.

Coverage under a Lloyd’s policy commenced on September 1, 2004. After being served with the clients’ Statement of Claim on June 21, 2005, the applicants put Lloyd’s on notice of the claim. Lloyd’s denied coverage on the basis of a policy exclusion for all events giving rise to the claim which occurred before the inception of the Lloyd’s policy and of which the applicants had knowledge before the policy period commenced.

The applicants subsequently reported the matter to their old insurer, St. Paul, who denied coverage on the basis that the claim was reported after the expiry of the “claims-made” policy period.

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The language of the St. Paul and Lloyd's policies was identical, and the parties agreed that both policies were "claims-made" and not "occurrence-based". The applicants also agreed that the allegations made by the clients' solicitor in the 2004 e-mail met the definition of a "claim" under the policy.

Nevertheless, the applicants argued that they were entitled to coverage under the St. Paul policy because of a "saving provision" in the part of the policy dealing with the Notice of Claim, which provided as follows:

"It is agreed, however, that failure to give notice of any Claim or circumstances, as outlined above, which, at the time of its happening, did not appear to involve this Policy, but which at a later date, would appear to give rise to a Claim hereunder, shall not prejudice such Claim."

With respect to the Lloyd's policy, the applicants argued that it was not reasonably foreseeable at the time of the inception of the Lloyd's policy on September 1, 2004 that the solicitor's March/April 2004 e-mail would result in a claim against them in June 2005.

The applications judge rejected both of these arguments and found in favour of the insurers that there was no duty to defend arising under either policy.

With respect to the St. Paul policy, this was a "claims-made and reported" policy. As such, the event triggering coverage was notice – being a condition precedent to the availability of rights under the policy. The "saving provision" relied upon by the

applicants might preserve coverage where there were notice deficiencies, but such deficiencies had to be corrected during the policy period or any renewal thereof (irrespective of whether there was any actual prejudice to the insurer).

The applications judge went on to say that allowing an extension of reporting time after the end of the policy period in a "claims-made and reported" policy would be tantamount to an extension of coverage not contemplated by the policy. There was no ambiguity in the language of the policy, and the court must give effect to the agreement the parties have made. Accordingly, the judge found that the applicants' first argument had failed, and that there was no coverage under the St. Paul policy.

The applicants' second argument also failed. The judge found that the solicitor's e-mail clearly alleged an intentional withholding of important information from the vendor clients which, if disclosed, would have led the clients to negotiate different terms of sale. This withholding allegedly resulted in substantial damages, in respect of which the clients' solicitor was instructed to refer the matter to the Real Estate Board and to consider commencing an action for damages. There were a few additional e-mails between the parties thereafter, which further fleshed out the clients' allegations in greater detail.

While the applicants may have subjectively believed that the e-mails were just an attempt to avoid payment of the real estate commission, the court noted that their "belief" was subject to an objective test and

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not a subjective one. In other words, the correct question was whether the applicants' belief that their clients did not intend to sue was reasonably held under the circumstances.

Applying the objective test, the judge concluded that when an insured receives communications from a solicitor alleging acts that caused damages and raising the prospect of a lawsuit, it is reasonably foreseeable that this will result in a claim.

Accordingly, there was no coverage under the Lloyd's policy because the policy excluded claims for errors or omissions taking place prior to the inception of the policy if, on or before the commencement of the policy, the insured knew or could have reasonably foreseen that such errors or omissions did or would result in a claim against the insured.

The court went on to say that relief from forfeiture was not available in this case. In simple terms, relief from forfeiture allows a court to exercise its judicial discretion to "forgive" an insured who has not complied with policy conditions depending upon the specific circumstances at hand (so that their rights under the policy will not be forfeited as a result of their breach).

In denying relief from forfeiture, the applications judge relied on the authority of the Ontario Court of Appeal's decision in *Stuart v. Hutchins* (1998), 40 O.R. (3d) 321. Specifically, since the notice requirement was an integral part of the event triggering coverage, the breach amounted to non-compliance with a condition precedent to

coverage, for which relief from forfeiture was unavailable.

This case reinforces the importance of reporting to insurers all communications from third parties expressing an intention to sue or to hold the insured responsible for damages, whether or not the insured actually believes that the third party is serious about pursuing a possible claim. The obvious danger in not doing so - as was the case here - is that the insured could find himself or herself without any insurance coverage when faced with a claim.

3. Professionals – Appropriate Standard of Care

In the May 2006 decision of *Carlsen v. Southerland*, the B.C. Court of Appeal allowed the appeal of a surgeon and ordered a new trial because the trial judge had erred in applying an excessively high standard. The only issue at trial was whether the surgeon was negligent in failing to meet the appropriate standard of care when performing disc surgery on the Plaintiff.

The Court of Appeal held that the "standard of excellence" to which the surgeon had been subjected by the trial judge was excessively high and did not conform to the established standard. Rather, it amounted to a standard of perfection that the law had never imposed on physicians and surgeons in Canada. Instead, the surgeon should only have been required "...to have and exercise the degree of skill and learning ordinarily possessed by practitioners in similar communities, in similar cases and to possess

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the knowledge and skill of an average specialist in his field” (*Wilson v. Swanson* (1956), 5 D.L.R. (2d) 133, S.C.C.).

The trial judge improperly focussed on the results of the surgery and, in so doing, held the surgeon to a standard that amounted to a guarantee. The Court of Appeal observed that such a standard for professionals has never been the law as exemplified in a passage from the House of Lords in *Greaves & Co (Contractors) Ltd. v. Baynham Meikle & Partners*:

“The law does not usually imply a warranty that a [professional] will achieve the desired result, but only a term that he will use reasonable care and skill. The surgeon does not warrant that he will cure the patient, nor does the solicitor warrant that he will win the case.”

While this decision deals specifically with the legal standard of care in the context of physicians and surgeons, it reinforces the general principle that professionals must exercise reasonable care and skill and are not to be held to a standard of perfection or to a standard that amounts to a guarantee of the results, absent specific agreement or representations to that effect.

4. Expert Witnesses – Immunity from Civil Lawsuits Based on their Evidence

If you are a professional who has been retained to provide expert evidence on behalf of a party to a lawsuit, you may be wondering whether you could be exposing

yourself to a successful lawsuit from the opposing party as a result of the opinions and conclusions set out in your report and/or in your testimony at trial. The short answer is “no”.

Witness immunity is a privilege given at common law, regardless of whether the witness is a fact witness or an expert witness retained to provide his or her professional opinion.

The overarching principle of witness immunity is that the witness shall be immune from the consequences of what he says in his testimony (with the caveat that a witness who deliberately gives false evidence can be prosecuted for perjury). This immunity extends not only to testimony but also to statements made before trial if the statement relates to the nature of the evidence to be given and is made to the solicitor preparing the witness’ evidence to be presented in court (*Elliott v. Insurance Crime Prevention Bureau*, [2005] N.S.J. No. 323 (Nova Scotia Court of Appeal)).

The purpose of witness immunity is two-fold. First, it allows for the freedom of witnesses to make their statements and opinions candidly at trial, and in the preparation of their evidence, without the looming fear of litigation. The second reason is that of judicial efficiency - to ensure that courts will not be clogged with the re-litigation of issues that have already been decided in a trial.

There are other underlying policy reasons for granting witness immunity. For example, if fact witnesses could be held civilly liable as a consequence of giving

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their evidence, this would have a chilling effect on their willingness to come forward. In the case of experts, opinion evidence is crucial to the adjudication of all kinds of lawsuits, including - for example - professional liability cases where Plaintiffs must adduce expert evidence in order to prove that the standard was not met by the Defendant. If experts were not immune from liability for their opinions, this would also have a chilling effect on their willingness to participate in judicial and quasi-judicial (e.g., PEO hearings) processes.

Although the case law is constantly evolving in this area, immunity from civil liability is the rule and not the exception for experts with respect to their reports and testimony. This does not give experts the licence to communicate their findings in any other setting or to any other parties.

It is also noteworthy that while witness immunity will shield a professional from a lawsuit lodged by an opposing party for his or her report(s) and testimony, it will not necessarily protect the professional from an action brought by the party who has contracted his or her services if those services are delivered in a negligent manner.

The courts in Ontario have demonstrated a real willingness to dismiss actions on the grounds of expert witness immunity at an early stage in the litigation. If faced with this kind of lawsuit, a preliminary motion (such as a motion for summary judgment or a motion to strike) should be considered by the professional, his insurer and/or his

lawyer with a view to dismissing the action on the basis of witness immunity.

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