

## ALLOCATING DEFENCE COSTS

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Eleven years ago, the Ontario Court of Appeal finally resolved a dispute between an adjunct professor and his former employer, the University of Western Ontario (Western). Of the various causes of actions alleged against the university, only the claim of wrongful dismissal found success. Last year, the Ontario Court of Appeal put an end to the related coverage dispute. At issue was how to allocate the obligation for defence costs between Western and its insurer given that only a small portion of the adjunct professor's action against the university triggered the insurer's duty to defend.

Western's insurer, Guardian Insurance Company of Canada, had refused to defend the university in the related action. The trial judge in the coverage dispute found that a duty to defend was properly owed though most of the claims advanced against Western fell outside of coverage. Despite the disproportionate number of uncovered claims, the Court ordered Guardian to pay 95 per cent of Western's defence costs, which totalled in excess of \$2 million. Guardian appealed and sought an allocation of costs that reflected the large number of uncovered claims advanced against Western.

Before the Court of Appeal, Guardian invoked notions of fairness and equity and urged the Court to consider a variety of factors; these included the proportion and significance of the covered and uncovered claims and the extent to which the work of the defence was reasonably related to covered or uncovered claims. In response, Western characterized the issue as one of contractual interpretation; any right to allocate costs associated with both covered and uncovered claims must be found in the policy. Without such language, Guardian alone should bear the burden of defence costs even if, to quote the judgment, "those same costs furthered the defence of uncovered claims."

The Court of Appeal favoured the contractual approach advocated by Western and concluded that the nature and extent of an insurer's obligation to pay defence costs is not a question of fairness. Rather, it is a question to be resolved by reference to the wording of the insurance policy. If, by the terms of the policy, the insurer has contracted to cover all defence costs relating to a claim, no matter of fairness arises if that defence also benefits an uncovered claim—the insurer's costs do not increase because they also assist the insured in the defence of an uncovered claim. The only question that should concern the Court is what the terms of the policy dictate.

Nothing in the language of Guardian's policy qualified its defence obligation or suggested that its defence obligation did not apply to a mixed claim. Without that language, costs reasonably associated with the covered claim were payable even if they also assisted with defending an uncovered claim.

The Appeal Court's decision did provide some comfort to insurers. Its reliance on the contractual approach led it to reject other authority that disallowed allocation (perhaps as a penalty) where the defence of a claim was improperly declined. The Court could find no justification for holding an insurer responsible for paying the entirety of the defence costs simply because it breached its contract. An insurer's liability for defence costs remains a function of the policy wording: that is, the insured will only be restored to the position it would have been in had the defence been afforded in the first instance. The Court suggested that the burden of proving the defence costs recoverable should be the insured's, not the insurer's, responsibility. That is consistent with the general rule that the person claiming the damages bears the burden to prove them.