

INSURER REQUIRED TO DEFEND CIVIL LAWSUIT INVOLVING CRIMINAL ACTS

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In early 2009 the New Brunswick Court of Appeal held that an insurer had a duty to defend an action brought against its insured where the action involved an admitted criminal act, despite exclusions in the insurance policy for criminal acts. The insurer, Optimum Insurance Co., appealed to the Supreme Court of Canada, but leave to appeal was denied.

The lawsuit originated from a house party where Brandon Donovan unintentionally shot and killed a guest, Cody Gillespie. Mr. Donovan's home insurance policy bound Optimum Insurance Co. to provide indemnity for unintended bodily injury arising out of his actions and to defend him against any suit making a claim for which he was insured. However, the policy also contained an exclusion clause relating to claims arising from bodily injury caused by any "criminal acts."

Optimum refused to provide for Mr. Donovan's defence arguing that the "criminal act" exclusion applied. He responded by bringing third-party proceedings against the insurer, alleging that it failed to comply with its duty to defend under the policy. This issue became the subject matter of the appeal.

The statement of claim in the main action against Mr. Donovan featured no explicit references to the *Criminal Code*, nor any assertion the death arose from a criminal act by him. Optimum argued that the statement of claim was, nevertheless, substantially based on a criminal act and the insurer further attempted to introduce evidence of Mr. Donovan's criminal guilt. That evidence was an affidavit by one of Optimum's claims examiners who deposed that Mr. Donovan admitted on discovery that he had pleaded guilty to a charge of manslaughter for the subject incident. However, no transcript of that examination was available, nor was a certificate of conviction submitted into evidence.

Mr. Donovan took the position that he had not been sued for a violation of Canadian criminal law but for civil negligence in the shooting death of Mr. Gillespie. He also argued that the affidavit evidence was irrelevant and inadmissible because the insurer's duty to defend was to be determined solely on an examination of the pleadings in the statement of claim.

Relying on established Canadian legal principles, the Court of Appeal held that the statement of claim needed to be scrutinized to ascertain the true nature of the claim advanced; any claim that clearly fell within an exclusionary clause did not oblige the insurer to defend Mr. Donovan. The onus was on the insured to first establish that the allegations made against him would, if proved at trial, bring the claim within the four corners of the insurance policy. If that onus was met, then the insurer was obliged to provide a defence unless the insurer could establish that his claim was within an exclusionary provision.

Despite reading the statement of claim broadly, the Court found that the lawsuit did no more than attribute Mr. Gillespie's shooting death to Mr. Donovan's negligence, with the result that Optimum failed to meet the onus of bringing the claim within the criminal act exclusion. The Court declined to look at the evidence of the criminal conviction because the specific rules that governed an insurer's duty to defend did not permit the Court to do so. However, the Court declined to resolve whether, generally, in other circumstances it would be permitted to consider such evidence.

This decision is a significant development in the law regarding the duty to defend. As the Court of Appeal noted, a variety of unintentional acts and omissions have, over the past several decades, become crimes. The Court also stated that judges should be "rightly disinclined" to exclude the duty to defend solely on the basis of similarity between the plaintiff's claim and a *Criminal Code* provision. This broadens the circumstances when an insurer's duty to defend is triggered even where [though?] the substance of the civil lawsuit is an admitted criminal act.

Arguably, this decision may appear to contradict the Supreme Court of Canada's 2000 decision in *Non-Marine Underwriters, Lloyd's of London v. Scalera* that one is not bound by the craftsmanship of the pleader (the lawyer drafting the statement of claim) in determining the nature of a "claim" but can assess its "gist" by a liberal reading of the document as a whole. The Court of Appeal referenced the *Scalera* case and others in its reasoning but went on to determine coverage on what would appear to be a narrow reading of the statement of claim. In the result, this case demonstrates the critical importance of pleadings in a particular case; nonetheless, the general principles for determining coverage remain those established by the Supreme Court of Canada in *Nichols v. American Home Assurance Company et al.*, *Monenco v. Commonwealth Insurance Company* and *Scalera*.