The "True Nature" of a Claim – Division of (Legal) Labour in the Occupiers' Liability Context

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Summary

In December 2013, the Ontario Superior Court heard a "duty to defend" application in the occupiers' liability context in *Liardi v. Riotrin Properties (Kingston) Inc. et al.*[1] The court affirmed that an insurer's duty to defend an additional named insured against an entire claim arose even when certain of the allegations in the statement of claim were not covered, as long as the "true nature" of the claim was covered.

Overview and facts

In this slip-and-fall case, the plaintiff brought an action against Future Shop and Riotrin Properties. Riotrin was the owner of a shopping mall of which Future Shop was an occupant. A Future Shop employee instructed the plaintiff to bring his car to the back of the store to load the plaintiff's new TV. As he moved around the car, he slipped on some ice.

The plaintiff brought an action against Future Shop, the occupier, and Riotrin, the mall owner. Pursuant to its obligations under their lease, Riotrin had added Future Shop as an additional named insured under its policy.

The Statement of Claim in this case alleged, among other things, that Future Shop was negligent in failing to have sufficient personnel to help load merchandise and in directing customers to the back of the store to load their goods into their vehicles.

The insurance company declined to cover Future Shop on the basis that the claim – Future Shop's alleged negligence in conducting its business – was not covered. The

[1] 2013 ONSC 7544.

insurance company also sought to introduce extrinsic evidence to show that these allegations were outside the scope of coverage.

Issues

(1) Could the insurance company introduce extrinsic evidence to show that the claim was not covered?

(2) Was the insurance company's duty to defend Future Shop triggered by this claim?

Decision and reasons

> *1. Could the insurance company introduce extrinsic evidence to show the claim was not covered?*

The court found in this case that the company could not introduce extrinsic evidence. It referenced an Ontario Court of Appeal decision, *1540039 Ontario Ltd. v. Farmers' Mutual Insurance Co.* for the general proposition that

> Underlying facts may be admissible in certain limited circumstances, where the underlying facts do not deal with any matters at issue in the action against the insured (emphasis added).[2]

The insurance company sought to introduce evidence relating to the manner in which Future Shop operated its business, including any policies concerning loading merchandise into customers' vehicles, in support of its position that these particular allegations fell outside the risks covered by Riotrin's policy.

In declining to admit this extrinsic evidence, the court noted that "this proposed evidence would touch upon certain matters at issue in this action against Future Shop."

[2] 2012 ONCA 210 at para. 26.

2. Was the insurance company's duty to defend Future Shop triggered by this claim?

The court then determined that the duty to defend was indeed triggered by this claim. The court reviewed the established principles surrounding the duty to defend and affirmed that the duty to defend is to be determined with reference to the "true nature" of the claim. That is, whether a claim of the nature alleged (if true) obligates the insurer to defend the insured.

The court determined that the nature of this particular claim was an injury arising from a slip and fall, not Future Shop's allegedly negligent business practices and policies. As such, "the reason the plaintiff walked around the car, in my view, is not relevant." The insurance company was therefore obliged to defend Future Shop in respect of the entire claim.

The court did note that where covered and non-covered claims are sufficiently robust as to stand on their own, the duty to defend may be confined to the covered claims only.

Comments

This case affirms that both insurers and insureds should continue to look to the "true nature" of any claim made jointly against parties in order to determine whose insurance should respond. Where the true nature of a claim is covered by the insurance policy in question and any ancillary claims are not sufficiently robust as to stand on their own, insurers will likely be obligated to extend a defense and indemnity to the named insured with respect to the entire claim.

A practice in the commercial retail space has arisen by which commercial tenants and landlords effectively agree to divide legal responsibility for different physical areas among themselves. However, this division of (legal) labor is not always so simple in practice, where statements of claim typically allege multiple claims against multiple defendants.

The factual matrix giving rise to a claim can encompass a multitude of factors, some of which are in the jurisdiction of one party and some of which are in the jurisdiction of another. Take, for example, a hypothetical case where a customer may wheel a shopping cart out of a store and subsequently trip over a curb covered in snow and ice.

In this rather unlikely scenario, up to three defendants (and their insurance policies) could be implicated: the store, for allegations relating to the shopping cart; the landlord, for failure to place warning signs relating to the curb; and a snow-removal contractor, for negligently piling up snow in a way that disguised a hazard.

Each party can (and likely will) incur substantial time and costs just to determine who owes whom a defense and indemnity. Other parties may try to provide weak or faulty justification for a refusal to assume a defense. In those situations, this case's summary of the duty to defend may provide a useful guide in analyzing the scope of each party's responsibilities in respect of any given multi-defendant claim.

To the extent possible, practical solutions should be pursued. In many claims, the "true" nature of the claim is fairly easy to ascertain. Often it is a slip-and-fall inside the store, where the tenant retailer can and probably should admit jurisdiction and/or assume the defense of the landlord (assuming that the insuring arrangements follow the lease requirements). In other cases, it is a slip-and-fall in a common area outside the store, where the landlord, as occupier of the common area, can and probably should admit jurisdiction, and/or assume the defense of the tenant retailer.

To the extent possible, the parties should be encouraged to work with the plaintiff and streamline the litigation process so that the appropriate entity (whether landlord, tenant, or third-party contractor) is responding to the plaintiff's claims, and not some combination of all the potential defendants.

Hopefully, this article and the *Liardi* decision will assist in that process.