Duty to Defend an Additional Insured on a CGL Policy

A Commentary on *A & P v. Economical*

On April 25, 2014, in Great Atlantic & Pacific Company of Canada Limited v. Economical Mutual Insurance Co., 2014 ONCA 350 the Ontario Court of Appeal addressed the issue of the extent of the duty to defend an additional insured under a commercial general liability policy. I had originally missed commenting on this decision when it was released because the reasons were so short that they did not on their face appear interesting or important. However, the Court of Appeal, in this unusual decision, simply adopted the application court judge's findings and reasons, and so, by implication these become, in effect, reasons of the Court of Appeal. The applications court decision is found at Great Atlantic & Pacific Co. of Canada Ltd. v. Economical Mutual Insurance Co., 2013 ONSC 7200.

This case involved the common situation where an agreement required a contractor (in this case CSBG) to have its client (in this case A & P) added as an additional insured on the contractor's liability policy (which in this case was with the Economical).

A & P was added to the Economical policy pursuant to an endorsement which read:

> "This insurance applies to those stated on the Declaration as 'Additional Insureds' but only with respect to liability arising out of the operations of the Named Insured."

The operations of the named insured, i.e. the contractor, CSBG, were janitorial services.

In addition, A & P was provided with a Certificate of Insurance that read:

> "It is understood and agreed that the Great Atlantic and Pacific Company of Canada Limited and its subsidiaries are added as additional insured ***but only insofar as their legal liability arises vicariously out of the negligent operations of the Named Insured***." [emphasis added]

The fact situation was that the plaintiff slipped and fell in an A & P supermarket on account of the accumulation of water left behind by a floor cleaning machine operated by the contractor, CBSG.

Both CBSG and A & P were sued, but Economical refused to defend A & P. The matter was tried and subsequent to the trial, A & P brought an application seeking re-imbursement from Economical for its defence costs.

In their statement of claim, the plaintiffs specifically claimed against A&P for among other things, a failure to warn the plaintiffs that the premises were in an unsafe or dangerous condition, and a failure to instruct its cleaning personnel. The plaintiffs did

not make a specific allegation that A&P was vicariously liable. Economical, therefore, in reliance on the wording of the certificate, which stated that coverage was available "but only insofar as their legal liability arises vicariously out of the negligent operations of the Named Insured" took the position that it did not owe a duty to defend.

The applications court judge, Hennessy, J. noted that the wording of the certificate was different from the wording of the policy endorsement. Although the certificate restricted coverage to vicarious liability, there was no such restriction in the endorsement. Hennessy, J. held that the endorsement trumped the certificate, noting:

> [36] The Policy is determinative. On the face of the Certificate, it reads: "The insurance afforded is subject to the terms, conditions and exclusions of the applicable policy. This Certificate is issued as a matter of information only and confers no rights on the holder and imposes no liability on the insurer." There is no support for the proposition that the Policy is to be read subject to the Certificate.

Hennessy, J. reiterated the test to be applied in determining whether a duty to defend is owed:

> [40] The test under the "pleadings rule" affirmed in Monenco Ltd. v. Commonwealth Insurance Co., 2001 SCC 49, [2001] S.C.J. No. 50 requires the court to (paras. 28- 35):
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> - assess the pleadings to ascertain the 'substance' and 'true nature' of the claims
> - consider the factual allegations in their entirety, and
> - resolve any doubt as to whether the pleadings bring the incident within the coverage of the policy in favour of the insured.

Hennessy, J. went on to say:

> [43] The plaintiff alleged that the incident was caused by the negligence of the defendants or the cumulative effect of any combination of their negligent acts or omissions. The Statement of Claim particularizes the negligence of each of the defendants.
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> [44] As against A&P, the plaintiff alleged:
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> - failure to properly instruct agents or employees with respect to safe cleaning
> - employing or contracting with cleaners who were untrained and not
> - experienced
> - failure to exercise reasonable care and attention for persons lawfully on the
> - premises

- failure to minimize the risk of harm to customers with respect to cleaning of
- the premises
- failure to inspect the premises
- carrying on business when it knew the premises were unsafe
- failure to warn or advise the plaintiffs when it knew the premises were
- unsafe and unusually slippery, and
- permitting the premises to be in a dangerous or unsafe condition.

Hennessy, J. drew parallels to snow removal cases and stated that there is, "a duty to defend where the true nature of the case, on a fair reading of the pleadings, was that injuries were suffered as a result of negligence in failing to maintain the premises."

Economical argued that the claim against A&P was with respect to their duties as an occupier, however, Hennessy, J held that "that may have been a question put to the jury. But it does not diminish the substance and true nature of the factual basis of this claim. It is a simple slip and fall alleged to have occurred as a result of the negligent janitorial operations. A&P had contracted out the janitorial operations and the contractor, CBSG, had added A&P as an insurer with respect to commercial general liability arising out of these operations."

Hennessy, J, further stated:

> [50] The authorities do not require an analysis of the legal foundation which may give rise to damages, i.e. occupier liability or vicarious liability arising from the negligence of the individual operator. The focus of the assessment must be the facts alleged in the Statement of Claim. The coverage provisions should be construed broadly.
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> [51] I do not have any trouble finding that the plaintiff is alleging damages as a result of unsafe conditions left by the floor cleaning operator. The true substance of this claim, giving a fair reading to the entire pleadings, is that the plaintiff alleges that she slipped and fell on the floor in close proximity in time and place to the floor cleaner who was operating floor cleaning equipment and who left the floors in a slippery and hazardous condition. The allegations against A&P claim a breach of their obligation to ensure that the floors are safe and that the floor cleaners do not cause unsafe conditions.

Finally, Hennessy, J. addressed the issue that the application had not been brought until the conclusion of the trial as follows:

> [55] The underlying action is long over. The insurer refused to defend the applicant. The applicant provided its own defence and the plaintiffs' case was dismissed as against all defendants. There is no ongoing duty to defend. There should be a remedy however, for a breach of this duty.

> [56] The applicant claims their defence costs as the damages they incurred for breach of the duty. The applicant submits that the proper remedy for the failure to provide the defence in accordance with the duty to defend is indemnification for the costs incurred defending the action… Rather it may be more appropriate to note that the measure of damages in this case is simply the costs incurred by the applicant to mitigate damages when the respondent declined to provide a defence.

This case will have broad general applicability not only to snow removal and slip and fall cases, but to landlord and tenant cases and constructions cases, and any other case in which one party agrees to have another added as an additional insured to its liability policy.

Insurers will have think long and hard before denying a defence to additional insureds under these circumstances and need to take extra care to ensure that the language in their certificates more closely tracks the language in their endorsements.

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