Focus INSURANCE

Court examines duty to defend parents of alleged bully

Homeowner policies might not be as comprehensive as they appear

Anna Wong

One in three adolescent students in Canada have been bullied recently. Physical fighting has increased since 2002, with 21 per cent of grade six boys reported participating in a fight in the past 12 months back then, compared with 24 per cent in 2010. With the growing popularity of social media, cyber-bullying has also been on the rise.

The apparent upswing in reported instances of bullying has given prominence to the issue of insurers' obligations to defend and indemnify bullies and their parents who may be sued.

The issue hinges on insurance policy interpretation and the nature of the underlying action. The duty to defend only requires a possibility of coverage under a policy. Coverage clauses are interpreted broadly, and exclusion clauses are interpreted narrowly. When the language of the policy is unambiguous, courts are to give effect to the clear language, reading the contract as a whole. Where there is ambiguity, interpretations that are consistent with the parties' reasonable expectations are preferred. See *Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada* [2010] SCC 33; *Non-Marine Underwriters, Lloyd's of London v. Scalera* [2000] 1 SCR 551.

Homeowners' insurance policies typically contain an exclusion from coverage for intentional bodily injury. Given that actions against alleged bullies more often than not sound in intentional tort, such as assault and battery, and that any claims of negligence are derivative in nature, the exclusion operates to relieve the insurer from having to defend and indemnify. Any doubt otherwise was dispelled by the Court of Appeal in *C.S. v. TD Home and Auto Insurance Co.* [2015] ONCA 424.

Insurers' duty to defend and indemnify parents of alleged bullies was front and centre in *D.E. v. Unifund Assurance Co.* [2015] ONCA 423. *Unifund* involved parents sued for failing to control their minor daughter, who, along with two other eighth graders, bullied, threatened and physically assaulted a fellow student. The claim against the parents alleged that they knew or ought to have known that their daughters were bullying their classmate and "failed to investigate"; "failed to remedy the bullying"; "failed to take reasonable care to prevent the bullying and harassment"; "failed to take disciplinary action"; and "failed to discharge their duty to prevent the continuous physical and psychological harassment." It was, in essence, a negligence claim.

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The parents brought an application for a declaration that their insurer had a duty to defend and indemnify them pursuant to their homeowners' insurance policy. The insurer opposed, relying on two exclusions in the policy:

"We do not insure claims arising from:

6. bodily injury or property damage caused by an intentional or criminal act or failure to act by:

(a) any person insured by this policy; or

(b) any other person at the discretion of any person insured by this policy;

7. (a) sexual, physical, psychological or emotional abuse, molestation or harassment, including corporal punishment by, at the direction of, or with the knowledge of any person insured by this policy; or

(b) failure of any person insured by this policy to take steps to prevent sexual, physical, psychological or emotional abuse, molestation or harassment or corporal punishment."

An exclusion clause similar to clause 6 was interpreted by the Court of Appeal in *Durham District School Board v. Grodesky* [2012] ONCA 270, to be strictly one for intention acts or omissions, not negligence. There was no question that the claim against the parents is for negligence, and is not derivative of the intentional tort claim against their daughter. Accordingly, clause 6 is not triggered to preclude coverage.

Focus then turned on clause 7(b). D.G. Stinson, the judge in *D.E. v. Unifund Assurance Co.* [2014] ONSC 5243, observed that the clause is silent on whether it applies to only intentional or unintentional failure to take steps to prevent physical abuse or harassment, and concluded that it is ambiguous. Applying the *contra proferentem* rule and the principle that exclusion clauses are to be read narrowly, he held that clause 7(b) is limited to intentional failure to take steps, and does not extend to situations where the failure arose through negligence.

MacPherson J.A., writing for a unanimous Court, disagreed that there was ambiguity. The first word of the exclusion clause is "failure," which is the core of the dictionary definition of "negligence" (defined in the *Oxford Dictionary* as "failure to take proper care over something") as well as the centrepiece of the lawsuit as pleaded against the parents. Thus, the action against the parents falls squarely within the exclusion clause.

While the Court of Appeal's reasoning is certainly tenable, the result is somewhat incongruous with the Supreme Court of Canada's remark in *Scalera* that "a policy which would not cover liability due to negligence could not properly be called 'comprehensive.' "

The policy at issue in *Unifund* is a comprehensive homeowner's policy intended to cover legal liability arising out of the insured's actions worldwide. Arguably, parties to such a comprehensive policy reasonably expect it to cover broadly, and to only negate coverage for intentional acts or failures to act, and not just any failure to act, unless there is clear language to the contrary.

It has been some time since *Scalera* when the Supreme Court of Canada considered the exclusions in a homeowner's policy, which notably did not contain a provision comparable to clause 7. An application for leave to appeal *Unifund* has been filed, offering the Supreme Court of Canada a ripe opportunity to clarify the parameters of a comprehensive homeowner's policy.

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