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Recent Caselaw

1st Case

Our first case this month deals with the "criminal act" exception in an insurance policy and the insurer's duty to defend. The New Brunswick Court of Appeal interpreted Rule 23 and strictly held the issue was to be resolved solely on the basis of the allegations made in the pleadings against the insured.

2nd Case

Our second case also concerns the "criminal act" exclusion. Here, the Ontario Court of Appeal confirmed that for the exclusion to apply the act does not have to be intentional, it simply has to be a breach of the Criminal Code.

Our newsletter is not intended to give legal advice, however, to discuss legal matters or obtain the full text of cases readers are welcome to contact Foster & Company.



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Gillespie v. Donovan, 2009 NBCA 6

1st Case

On March 24, 2002, Mr. Donovan hosted a party at his family home. Following the consumption of an undetermined amount of alcohol, Mr. Donovan unintentionally shot and killed Mr. Gillespie. Actions were brought against Mr. Donovan pursuant to the Survival of Actions Act and the Fatal Accidents Act, claiming that the death of Mr. Gillespie resulted from the negligence of both Mr. Donovan and his parents. The insurer, Optimum Insurance Company, refused to provide for Mr. Donovan's defence relying on the "criminal act" exclusion found in the homeowners policy. Mr. Donovan issued a Third Party Claim against Optimum seeking a declaration that Optimum was under a duty to defend him in the Gillespie action. The insurer and Mr. Donovan both applied for judgment under Rule 23 of the New Brunswick Rules of Court ("Determination of Questions before Trial"). Rule 23 involves the "pleadings rule" which generally states that disputes over the insurer's duty to defend stand to be resolved solely on the basis of the allegations made in the pleadings against the insured. The Motions Judge sided with Mr. Donovan and declared that Optimum was duty bound to defend him under the policy. In granting the Motion, the Motions Judge rejected the affidavit evidence of the insurer and stated that since the suit against Mr. Donovan was in negligence only and no basis for the application of the "criminal act" exclusion emerged from the record, Optimum's Motion had to be dismissed. Optimum's appeal was dismissed. Rule 37.03(b) states that a Notice of Motion shall feature a reference to "any statutory provision or rule to be relied on" when stating the grounds to be argued. Neither Optimum nor Mr. Donovan identified which clause of Rule 23.01(1) they were relying upon in their motion for judgment, however both the motions judge and Chief Justice Drapeau of the New Brunswick Court of Appeal were willing to overlook this error. Chief Justice Drapeau, however, was unwilling to overlook the fact that Optimum did not make any reference to ss. 86(1) and 87(1) of the Criminal Code in its Notice of Motion and thus did not meet the fundamental prerequisites set out by Rule 37.03(b). In addition, Rule 23.02 prescribes that "except with leave of the courts, on applications under Rule 23.01(1), evidence shall not be admitted except (a) a transcript of a relevant examination". Optimum did not produce a transcript of Mr. Donovan's discovery evidence to prove the admission of criminal guilt upon which it was relying, nor did it request leave of the court to adduce secondary evidence of that admission. Therefore, the affidavit evidence given by Optimum was inadmissible and the motions judge was correct in erasing from his mind the unsubstantiated allegation that Mr. Donovan plead guilty to a charge of manslaughter.

This case shows that a party relying on a specific Rule to obtain a specific remedy has to exercise caution and must meet all of the criteria imposed by the language of the Rule. Had Optimum included a reference to the specific Criminal Code provision in the Motion and quoted portions of the transcript from the discovery, the court's disposition of the matter may have been totally different.

Eichmanis v. Wawanesa Mutual Insurance Company, 2007 ONCA 92

2nd Case

The Plaintiff, Ryan Eichmanis, was seriously injured when he was shot by the Defendant, Ryan Prystay, on June 12, 1998. The Defendant plead guilty in Youth Court to a charge of criminal negligence causing bodily harm, contrary to s. 221 of the Criminal Code. At trial the Plaintiff was awarded damages of \$800,000 against the Defendant and his father. The judgment was unsatisfied and the Plaintiff commenced proceedings against Wawanesa Mutual Insurance Company ("Wawanesa") and Commercial Union Canada ("CU"), the insurers of the Defendant's aunt and uncle and his mother, respectively

The Motions Judge held that the Defendant was not insured under the CU policy but was insured under the Wawanesa policy. The "criminal law" exception in the Wawanesa policy did not apply in this case because in the Motion Judge's opinion, the exception applied only to criminal acts intended to cause injury. Both Wawanesa and the Plaintiff appealed the decision of the Motion Judge. Wawanesa's appeal was allowed and the Plaintiffs appeal was dismissed. It was open to the Motions Judge, on the evidence, to find that the Defendant was covered by his aunt and uncle's insurance policy and that he was not covered by his mother's insurance policy. Therefore the main issue of the appeal was whether criminal negligence causing bodily harm was a "criminal act" within the meaning of the exclusion clause. Justice Borins held that the criminal act exclusion does not exempt certain categories of crimes, or specific crimes, rather the phrase "criminal act" meant any breach of the Criminal Code. In coming to the conclusion that Wawanesa was not required to indemnify the Plaintiff for his damages because of the exclusion clause, Justice Borins adopted the comments of C. Brown in Insurance Law in Canada which stated "the exclusion applies even without proof of intention to cause the injury or damage, so long as the act or omission that causes the harm is criminal in nature. This is especially important in certain criminal offences where mens rea or criminal intent is not an element of the offence, such as criminal negligence..."