The Exclusion for Intentional or Criminal Acts

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Introduction

As third party liability insurance is not intended to cover an insured for intentionally caused harm, liability policies, particularly homeowner's and commercial general liability policies, invariably have some form of an exclusion for intentional or criminal acts.

This is the case notwithstanding that some liability policies, particularly older CGL policies, also addressed the issue with a limitation in the insuring agreement that the property damage must be caused by an accident. With such policies then providing a definition of "accident" which precluded intentionally caused loss or damage. Similarly, early case law including ***Fenton v. J. Thorley & Co.***,[1] provided an interpretation of the word "accident" that was consistent with an intention to exclude intentionally caused harm:

> " … [T]he expression "accident" is used in the popular and ordinary sense of the word as denoting an unlooked-for mishap or an untoward event which is not expect or designed."[2]

Current examples of the exclusion for intentional or criminal acts include the following:

> Intact Commercial General Liability Policy (based on IBC 2100 wording)
>
> "2. This insurance does not apply to:
>
> a. Expected or Intended Injury
>
> Bodily Injury or Property Damage expected or intended from the standpoint of the insured. This exclusion does not apply to Bodily Injury resulting from the use of reasonable force to protect persons or property."
>
> ING Homeowner's Policy
>
> "We do not insure your claims arising from (6) Bodily injury or property damage caused by any intentional or criminal act or failure to act by: (a) any person insured by this policy; or (b) any other person at the direction of any person insured by this policy;"

Interestingly, the standard CGL policy wording does not actually use the phrase "intentional or criminal acts" for what is the equivalent of the intentional and criminal acts exclusion. Rather the CGL policy references "bodily injury and property damage expected or intended from the standpoint of the insured". Clearly, it is reminiscent of language similar to that used by the House of Lords early in the last century.

Issues of the applicability of the intentional or criminal acts exclusion will arise in both the duty to defend context as well as with respect to the obligation to indemnify. As with any case that involves the interpretation of any aspect of an insurance policy knowledge of the basic principles of insurance law developed by the Supreme Court of Canada in such cases as ***Nichols v. American Home Assurance Co.***[3], ***Reid Crowther & Partners***

1 [1903] A.C. 443 (H.L.)
2 Ibid at p. 448
3 [1990] 1 S.C.R. 801 ("Nichols")

Ltd. v. Simcoe & Erie General Insurance Co.[4], ***Sansalone v. Wawanesa Mutual Insurance Co.***[5], ***Non-Marine Underwriters, Lloyd's of London v. Scalera***[6], ***Monenco Ltd. v. Commonwealth Insurance Co.***[7], ***Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada***[8], ***Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada***[9] and ***Ledcor Construction v. Northbridge Indemnity Insurance Co.*** [10] is essential.

Distinguishing the Intention to Commit an Act versus the Intention to Cause Harm

Because much of the law of negligence consists of the unforeseen consequences of intentional conduct, the author Gordon G. Hilliker, characterizes the intentional or criminal acts exclusion as the "intentional injury" exclusion. Negligence is covered, but intentional torts, generally, are not."[11]

Often it is necessary to distinguish between the intent to commit an act versus the intention to cause harm, or between intentional conduct versus intentional harm.

Hilliker cites the following example: a driver makes a right hand turn and strikes an unseen pedestrian in a crosswalk, causing the pedestrian to sustain injuries. The act of turning the vehicle is deliberate but there is no intent on the part of the driver to injure the pedestrian.

The leading case to establish that the exclusion clause must be read so as to require that the injuries be intentionally caused, in the sense that they are the product of an intentional tort and not negligence is that of ***Non-Marine Underwriters, Lloyd's of London v. Scalera***.[12]

This decision addressed the question of whether the insurer had a duty to defend. In 1996, a plaintiff brought a civil action against five B.C. Transit bus drivers, including the appellant, arising out of various alleged sexual assaults that occurred between 1988 and 1992. The allegations included battery, negligent battery, negligent misrepresentation and breach of fiduciary duty. The appellant owned a homeowner's insurance policy issued by the respondent insurer. The policy provided coverage for "compensatory damage because of bodily injury" arising from the insured's personal actions, excepting "bodily injury or property damage caused by any intentional or criminal act". The Respondent insurer sought a declaration that it was not required to defend the appellant against the plaintiff's claims.

The British Columbia Supreme Court dismissed the Insurer's request for a declaration that it not be required to defend the appellant against the plaintiff's claims. The British Columbia Court of Appeal allowed the insurer's appeal and the Appellant homeowner appealed to the Supreme Court of Canada.

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4 [1993] 1 S.C.R. 252 ("Reid Crowther")
5 [2000] 1 S.C.R. 627, 2000 SCC 25 ("Sansalone")
6 [2000] 1 S.C.R. 551, 2000 SCC 24 ("Scalera")
7 [2001] 2 S.C.R. 699, 2001 SCC 49 ("Monenco")
8 [2006] 1 S.C.R. 744, 2006 SCC 21 ("Jesuit Fathers")
9 2010 SCC 33 ("Progressive Homes")
10 2016 SCC 37 ("Ledcor")
11 ***Liability Insurance Law in Canada***, 5th edition at p. 277
12 Note 6

The Supreme Court of Canada held that the appeal should be dismissed. There were two separate judgments. One authored by McLachlin, J. (as she then was) and one by Iacobucci, J. Although the result was the same the majority decision (McLachlin, L'Heureux-Dubé, Gonthier and Binnie, JJ.) differed from the minority (Iacobucci, Major and Bastarache, JJ.) in connection with the minority's treatment of the tort of sexual battery.

In finding that the exclusion clause for intentional or criminal acts is to be read so as to require that the injuries be intentionally caused, Justice Iacobucci stated:

> "There is no dispute in this case that the plaintiff's allegations fall within the general coverage provisions of the policy. All that is at stake is whether the exclusion clause applies. That clause states that the appellant is "not insured for claims arising from: … bodily injury or property damage caused by any intentional or criminal act or failure to act" by the insured.
>
> At the outset, the wording of this clause presents a threshold issue. The respondent argues that the clause requires only an intentional act, not an intent to injure. The majority below agreed with this interpretation. However, I agree with Finch J.A.'s dissent on this point. If the respondent were correct, almost any act of negligence could be excluded under this clause. After all, most every act of negligence can be traced back to an "intentional … act or failure to act". As this Court made clear in ***Canadian Indemnity Co. v. Walkem Machinery & Equipment Ltd.***, [1976] 1 S.C.R. 309, "negligence is by far the most frequent source of exceptional liability which [an insured] has to contend with. Therefore, a policy which would not cover liability due to negligence could not properly be called "comprehensive"" (pp. 316-17). **Consistent with this decision, the purpose of insurance, and the doctrine of reasonable expectations and contra proferentem referred to above, I believe the exclusion clause must be read to require that the injuries be intentionally caused, in that they are the product of an intentional tort and not of negligence**.
>
> **Our task, therefore, is to decide which of the plaintiff's legal allegations are properly pleaded, whether any of them are derivative, and whether any of the surviving claims evince an intention to injure, thus triggering the exclusion clause. To do this, it is necessary to understand precisely what the elements of the various torts alleged against the appellant are. If the elements of a tort claim require proof of conduct that also proves an intent to injure, there will be no duty to defend because any potentially successful claim would fall under the exclusion clause.**"[13] (emphasis added)

Following ***Scalera***, the state of the law was such that for the exclusion to apply, the injuries must have been intentionally caused, that is caused by an intentional tort. Injuries caused by negligence would not be excluded.

Then recently, in ***Ontario Society for the Prevention of Cruelty to Animals v. Sovereign General Insurance Co.*** the Ontario Court of Appeal held that, absent language in the insurance policy to the contrary, unintended consequences that arise from an intentional act are still fortuitous.[14] ***OSPCA*** was an appeal concerning an insurer's duty to defend under two commercial general liability policies. There were three underlying actions that alleged claims against the OSPCA arise from intentional conduct, such as false arrest, false imprisonment, malicious prosecution and defamation. Specifically, the Court of Appeal stated:

13 Ibid at paras. 91-92
14 2015 ONCA 702 ("OSPCA") at para. 48.

> "… **Absent provisions in an agreement to the contrary, the critical issue when determining whether the fortuity principle aids in precluding coverage for harm caused by an intentional act is whether or not the insured intended to inflict the actual harm about which the plaintiff complains. An intended act may have unintended consequences.** The fortuity principle does not preclude coverage for an intentional act with unintended consequences. Rather, it precludes coverage for an intentional act with intended consequences: see ***Hollinger*** (***Liberty Mutual Insurance Co. v. Hollinger Inc.***), at paras: 18-19." (emphasis added)

In ***OSPCA,*** the Court was asked to interpret the Personal Injury Liability and Personal and Advertising Injury Liability coverages of the CGL policy and not the coverages for bodily injury and property damage. For both policies under consideration, the coverage for personal injury liability was not occurrence based or accident based and the definitions of "personal injury" encompassed torts which involved intentional conduct, including malicious prosecution. The Court also noted that the elements of the tort of malicious prosecution must include a plea that the plaintiff incurred or suffered damage in consequence of the malicious prosecution, and hence by extending the Personal Injury Liability coverage to include malicious prosecution, the insurer provided coverage for actions that involved the deliberate infliction of harm[15]. Under the circumstances, there was no need to establish that the harm arising from the intentional tort was unintended or an unintended consequence.

OSPCA may be distinguishable based on the nature of the allegations in the underlying actions and the specific wording of the coverages under consideration by the Court.

In ***Savage v. Belecque***[16] the female plaintiff was injured as a result of a bizarre set of circumstances involving "horseplay" including the acceleration of a vehicle while the plaintiff, who was wearing ice-skates, was outside of the vehicle leaning in to ask for a cigarette, a fall in which she was uninjured, and then the driver of the vehicle deciding to execute a "high-speed doughnut" manoeuvre which then caused the vehicle to strike the plaintiff, resulting in the plaintiff sustaining serious bodily injuries. The driver subsequently testified that he had no intention to harm the plaintiff. The Court of Appeal upheld the motion judge's finding that there was no genuine issue for trial with respect to defendant's intention and the insurer had a duty to indemnify. The driver's conviction for careless driving did not give rise to any inference that he intended to harm the plaintiff.

Savage v. Belecque was an indemnity application and under these circumstance evidence of the defendant driver's lack of intention to harm the plaintiff was admissible. Had this been a duty to defend case determined solely based on pleadings, the result may have been different.

An example of a case of an intended act with intended consequences, for which there was no coverage is that of ***Reeb v. Guarantee Company***[17]. The underlying action involved a claim by James that he was injured at his parent's home by the applicant/defendant, Ryan. On the date in question, James and Ryan were playing at James' house. They were both 14 years of age. James and Ryan were playing a game using BB guns. Ryan fired a pellet which struck James in his left eye which resulted in James losing the sight in that eye. There were two homeowner's policies. The application before the Court was brought by Ryan seeking a declaration that he was

15 Ibid at para 64
16 (2012), 111 O.R. (3d) 309, 2012 ONCA 426
17 2016 ONSC 7511.

an insured under the two policies. The insuring agreements of both policies provided coverage for "unintentional bodily injury or property damage". Each of the policies had an exclusion clause for intentional or criminal acts.

The evidence introduced at the application indicated that Ryan and James had been playing a game where they intended to shoot each other with the BB guns. James' evidence was that there had been a "timeout" called in the game immediately before he was shot in the eye. As a result of the "timeout", both Ryan and James stood up and while they were both standing facing each other, Ryan shot point-blank at James' eyeball. According to James, Ryan was looking directly at him when he pulled the trigger. Ryan's evidence was that he did not intend to shoot James in the eye and that the injury to James was an accident. Ryan admitted at discovery that he had shot toward James, and that he was trying to hit James somewhere, though not specifically in the eye.

The Court concluded from the evidence on the application that Ryan acknowledged that he intended to fire the fateful shot, he acknowledged that he intended that the shot hit James, and he acknowledged that he intended that the shot injure James and cause "some level of pain". What Ryan denied was an intention to hit James in the eye, and an intention to injure him to the extent that he did.

The Court in dismissing Ryan's application concluded:

> "… I cannot think of a more intentional sequence of events. The only thing denied by Ryan was the intention to cause the particular injury that had resulted from James being hit in the eye with the pellet rather than in some other body part."[18]
>
> "I reiterate that at the second stage, if the alleged negligence is based on the same harm as an intentional tort, it will not allow the insured to avoid the exclusion clause for intentionally caused injuries."[19]
>
> "I find the distinction between shooting James in the eye and shooting him in some other body part to be a distinction without consequence. …"[20]
>
> "The first reason is that "if a tort is intended, it will not matter that the result was more harmful than the actor should, or even could have foreseen." …"[21]
>
> "**The second reason is because there is no effective distinction between an exclusion clause which covers "intentional acts" and one which covers "intentional injuries". … Where the tort was intended, it doesn't matter if the result was more harmful than intended.** …"[22]
>
> "… **I find that the damages resulting from the negligence pleaded were entirely derived from the intentional shooting and, accordingly, were subsumed for purposes of the exclusion clause. In other words, the harm which resulted from that intentional shooting was the same harm upon which the claims in negligence are based.** … It follows that even if the plaintiff is successful at trial, the respondents will have no duty to indemnify because of the exclusion clause for intentional acts."[23] (emphasis added)

18 Ibid at para. 30.
19 Ibid at para. 31.
20 Ibid at para. 33.
21 Ibid at para. 34.
22 Ibid at para. 35.
23 Ibid at para. 37.

Distinguishing Intentional Acts and Derivative Negligence Claims

Again, the leading case is ***Non-Marine Underwriters, Lloyd's of London v. Scalera***.[24]

With respect to the duty to defend, Justice Iacobucci reiterated the principle that "absent express language to the contrary, the duty to defend extends only to claims that could potentially trigger indemnity under the policy". He then outlined a three step process for determining if a duty to defend is triggered with any given claim:

> "Determining whether or not a given clause could trigger indemnity is a three-step process. First, a court should determine which of the plaintiff's legal allegations are properly pleaded. In doing so, courts are not bound by the legal labels chosen by the plaintiff. A plaintiff cannot change an intentional tort into a negligent one simply by choice of words, or vice versa. Therefore, when ascertaining the scope of the duty to defend, a court must look beyond the choice of labels, and examine the substance of the allegations contained in the pleadings. This does not involve deciding whether the claims have any merit; all a court must do is decide, based on the pleadings, the true nature of the claims.
>
> At the second stage, having determined what claims are properly pleaded, the court should determine if any claims are entirely derivative in nature. The duty to defend will not be triggered simply because a claim can be cast in terms of both negligence and intentional tort. If the alleged negligence is based on the same harm as the intentional tort, it will not allow the insured to avoid the exclusion clause for intentionally caused injuries.
>
> Finally, at the third stage the court must decide whether any of the properly pleaded, non-derivative claims could potentially trigger the insurer's duty to defend. …"[25]

Justice Iacobucci was careful to point out that bare assertions of claims of negligence, misrepresentation and breach of (fiduciary) duty are not sufficient to trigger the duty to defend. "Bare assertions alone cannot be determinative" and "What really matters is not the labels used by the plaintiff, but the true nature of the claim".[26] And further: "In my view, the correct approach in the circumstances of the case is to ask if the allegations, properly construed, sound in intentional tort. If they do, the plaintiff's use of the word "negligence" will not be controlling. ...".[27]

Justice Iacobucci cautioned that a court must look beyond the labels used by the plaintiff in drafting a statement of claim, and determine the true nature of the claim pleaded. He then provided guidance as to the proper resolution of a duty to defend situation where the pleadings alleged both intentional and non-intentional torts:

> " … **Having construed the pleadings, there may be properly pleaded allegations of both intentional and non-intentional tort. When faced with this situation, a court construing an insurer's duty to defend must decide whether the harm allegedly inflicted by the negligent conduct is derivative of that caused by**

24 Note 6
25 Ibid at paras. 50-52
26 Ibid at para. 79
27 Ibid at para. 82

> **the intentional conduct. In this context, a claim for negligence will not be derivative if the underlying elements of the negligence and of the intentional tort are sufficiently disparate to render the two claims unrelated. If both the negligence and intentional tort claims arise from the same actions and cause the same harm, the negligence claim is derivative, and it will be subsumed into the intentional tort for the purposes of the exclusion clause analysis. If, on, the other hand, neither claim is derivative, the claim of negligence will survive and the duty to defend will apply.** Parenthetically, I note that the foregoing should not preclude a duty to defend simply because the plaintiff has pleaded in the alternative. …
>
> The reasons for this conclusion are twofold. First, as discussed above, one must always remember that insurance is presumed to cover only negligence, not intentional injuries. Second, this approach will discourage manipulative pleadings by making it fruitless for plaintiffs to try to convert intentional torts into negligence, or vice versa. …"[28] (emphasis added)

And further Justice Iacobucci stated:

> "… **In the context of an insurance contract's intentional injury exclusion clause, the goal is to determine the gravamen of the complaint, and whether one can infer an intent to injure from that complaint.** …"[29] (emphasis added)

As noted above in ***Reeb v. Guarantee Company*** (supra) the Court concluded that the legal allegations were not properly pleaded because all of the particulars pleaded in the underlying action were founded in negligence with no suggestion of an intentional tort. The labels used were consistent only with negligence while the evidence supported an intentional act. The damages resulting from the negligence pleaded were entirely derived from the intentional shooting. The harm which resulted from the intentional shooting was the same harm upon which the claims in negligence were based. The Court was clearly of the view citing ***Tedford v. TD Insurance Meloche Monnex***[30], ***Monenco***[31] and ***Scalera***[32] that this was an appropriate case to "look beyond the labels used by the plaintiff in the pleadings to ascertain the "substance" and "true nature" of the claims. It was the Court's conclusion that this was an example of a plaintiff drafting "a statement of claim in a way that seeks to turn intention into negligence in order to gain access to an insurer's deep pockets".[33]

Justice Iacobucci's directive to look beyond the labels used by a plaintiff in drafting a statement of claim was at issue in the case of ***Optimum Insurance Company Inc. v. Donovan***[34]. Brandon Donovan hosted a party while his parents were away on holidays. At this party Brandon unintentionally shot and killed a guest and friend, Cody Gillespie. An action was commenced against Mr. Donovan and his parents. The Gillespie lawsuit was brought under the *Survival of Actions Act* and the *Fatal Accidents Act*. The Donovans presented the lawsuit to their insurer pursuant to a policy of homeowner's insurance and requested a defence. Optimum refused to defend and Mr.

28 Ibid at para. 84
29 Ibid at para. 88
30 2012 ONCA 429, 112 O.R. (3d) 144.
31 Note 7.
32 Note 6.
33 Note 17 at para. 15.
34 2009 NBCA 6 (NBCA).

Donovan initiated third party proceedings seeking declaratory and other relief for Optimum's "arbitrary failure to comply with its duty to defend under the Policy." Optimum denied that it owed the alleged duty to defend. Optimum relied on the criminal act exclusion and urged the Court to look beyond the labels used by the plaintiff in the underlying action.

Both Optimum and the Donovans applied for the determination of a question before trial under Rule 23 of the *Rules of Court*. At the hearing Optimum acknowledged that Mr. Donovan did not intend to injure, let alone kill Mr. Gillespie and that but for the "criminal act" exclusion, Optimum would be required to defend. The Statement of Claim did not reference the *Criminal Code of Canada* nor any assertion that Mr. Gillespie's death arose from a criminal act committed by Mr. Donovan. Mr. Donovan had admitted at discovery to pleading guilty to a charge of manslaughter in connection with Mr. Gillespie's shooting death. Optimum argued for the admissibility of affidavit evidence to establish this guilty plea to a charge of manslaughter. Further, Optimum argued that, "in any event, the Statement of Claim against Mr. Donovan sets out a claim whose validity is umbilically tied to wrongful conduct that, as particularized, constitutes a criminal act within the meaning of the "criminal act" exclusion"[35]. Mr. Donovan argued that he had not been sued for any violation of criminal law but, rather, for civil negligence in the shooting death of Mr. Gillespie. He argued against the admission of the affidavit evidence and asserted that there were no allegations in the Statement of Claim to support or trigger the application of the criminal acts exclusion. The motion judge agreed with Mr. Donovan. Optimum appealed.

The New Brunswick Court of Appeal dismissed the appeal. The Court of Appeal concluded that the "proffered affidavit evidence was inadmissible by virtue of Rule 23.02 and the motion judge rightly erased from his mind the unsubstantiated allegation that Mr. Donovan pled guilty to a charge of manslaughter under s. 236 of the *Criminal Code* (manslaughter by criminal negligence)".[36]

On the question of the true nature of the claim advanced in the Statement of Claim, the Court of Appeal concluded:

> "Under the Policy, which all agree is materially different from the policy under consideration in each of the cases mentioned in the Notice of Appeal (***Gamblin v. O'Donnell***, ***R.E. v. Wawanesa Mutual Insurance Co.***: ***Eichmanis v. Wawanesa Mutual Insurance Co.*** (2007), 84 O.R. (3d) 668, [2007] O.J. No. 482 (QL), 2007 ONCA 92 and ***Non-Marine Underwriters, Lloyd's of London v. Scalera***), Optimum undertakes to pay all sums which the insured becomes legally liable to pay as compensatory damages because of unintentional bodily injury arising out of the insured's "personal actions". Both intentional and unintentional actions are covered, so long as any resulting bodily injury was not intended. More precisely, coverage under the Policy extends, subject to any pertinent exclusion, to bodily injury arising from the insured's use of a firearm so long as he or she did not intend to cause any such injury. …
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> Section 236 of the *Criminal Code*, the only statutory provision identified in Optimum's Notice of Motion, is not mentioned at all in the Amended Statement of Claim. Moreover, it is not alleged in that critical pleading that Mr. Donovan's death-causing conduct amounted to a marked and substantial departure from the standard of the reasonable person, the test for manslaughter by criminal negligence

35 Ibid at para. 3.
36 Ibid at para. 33.

> … As the motion judge correctly observed, the only wrongful conduct attributed to Mr. Donovan in the Statement of Claim is negligence "in handling and brandishing loaded firearms in a reckless and unsafe manner" and in "[pointing] and firing a loaded firearm at Cody Gillespie, causing a fatal injury". Focusing exclusively on the Amended Statement of Claim, I am at a loss to understand how and where the motion judge committed reversible error in concluding Optimum failed to meet the onus of bringing the claim within the "criminal act" exclusion. …"[37]

Additional Case Law – Intentional or Criminal Acts

Care should be taken to note that the exclusion clause as found in most homeowner's policies, contemplates an exclusion for intentional acts and an exclusion for criminal acts. As a result there are cases interpreting the applicability of the criminal acts portion of the exclusion where the criminal offence in question is one of inadvertence rather than intention, such as criminal negligence causing injury or death or the careless discharge of a firearm. Additionally, it should be noted that in recent years most homeowner's policies also contain an exclusion for sexual, physical, psychological or emotional abuse, molestation and harassment which would seemingly encompass acts of bullying and potentially cyberbullying as well as any direct physical or sexual assaults. The intentional or criminal acts exclusion may also present with an exception to the exclusion for acts of self-defence. (See the Intact CGL policy noted above).

Slightly over a year after ***Scalera*** and ***Sansalone*** were decided by the Supreme Court of Canada, the New Brunswick Court of Appeal in ***Halifax Insurance Company v. O'Donnell (sub. nom. Gamblin v. O'Donnell)***[38] was asked to address the proper interpretation and application of an exclusionary clause in a home insurance policy that excluded "legal liability" coverage for claims arising from bodily injury caused by any "intentional or criminal act or failure to act" by the insured.

The insured, while hunting, fired his rifle at what he thought was a deer. What the insured thought was a deer turned out to be a beige SUV. A passenger in the SUV was seriously injured. The insured in subsequent criminal proceedings was found guilty under the *Criminal Code* of careless use of a firearm. In a civil action the insured was found to have been negligent. The insurer denied coverage on the basis of both the "intentional act" and the "criminal act" exclusions of the homeowner's policy. At issue was the question of whether the insurer was required to indemnify the insured.

During the trial of the civil action, the trial judge found that the insured's negligence in discharging his high-powered rifle was the sole cause of the victim's injuries. Further, the trial judge held that the exclusion for intentional or criminal acts did not apply. **The trial judge held that the "intentional act" portion of the exclusion required an intent to injure on the part of the insured which was not established. The trial judge interpreted the "criminal act" portion of the exclusion as applying to a criminal act that is "other than an inadvertent, accidental or negligent one". The trial judge categorized the insured's liability as "no more than civilly or inadvertently liable" with the result being that the criminal acts portion of the exclusion did not apply**. The insurer appealed. (emphasis added)

37 Ibid at paras. 38-39.
38 2001 NBCA 109 ("O'Donnell")

Notwithstanding that the policy wording in ***O'Donnell*** was identical to the policy wording in ***Scalera***, the Court of Appeal concluded that the intentional act exclusion, as interpreted in ***Scalera***, had no application. The Court of Appeal stated:

> "… Counsel for Halifax Insurance confirmed at the hearing before this Court that the policy at issue in ***Non-Marine Underwriters, Lloyd's of London v. Scalera***, is identical to the one that concerns us here. Like the policy issued to Mr. Allen, the policy insuring Mr. Scalera defined "bodily injury" as "accidental physical injury, sickness or resulting death". Logically, the "intentional" act exclusion can only be interpreted in the manner favoured by ***Non-Marine Underwriters, Lloyd's of London*** if the definition of "bodily injury" is read as referring to "physical injury" that is "accidental" from the standpoint of the victim.
>
> The trial judge found that Mr. Allen did not intend to injure Mr. Gamblin and that the latter's injuries were the result of the former's negligence and nothing more. The intentional act exclusion, as interpreted in ***Non-Marine Underwriter's, Lloyd's of London***, has no application in those circumstances."[39]

For the criminal acts portion of the exclusion, Halifax Insurance argued that coverage should be excluded for bodily injury caused by a criminal act, whether the insured intended to cause that injury or not. Phrased differently, that the criminal acts portion of the exclusion envisages an intention to exclude coverage where the damage or loss, although not subjectively intended by the insured, resulted from his or her criminal act.

The insured, Mr. Allen, had been convicted of the indictable offence of careless use of a firearm. The Court of Appeal was not prepared to conclude that this was in fact a criminal act coming within the criminal acts portion of the exclusion. The Court of Appeal was only prepared to conclude that Mr. Allen's conviction was, "at best, prima facie evidence that his discharge of a firearm in the direction of the Trooper [the SUV] was an offence under s. 86(1) of the *Criminal Code*".[40]

To justify the non-applicability of the criminal acts portion of the exclusion in the face of a criminal conviction under the *Criminal Code* for an indictable offence, the Court of Appeal stated:

> " . . . The present case is concerned with the impact of a criminal conviction for the unintentional conduct on an insured's right to indemnity under the liability coverage provided by his home insurance policy. In cases of that nature, judges should not be easily persuaded that it is an abuse of process for the insured to seek to rebut the prima facie evidence flowing from proof of his or her conviction.
>
> Mr. Allen's criminal conviction for what has been described as penal negligence resulted from a guilty verdict by a jury following a trial at which he chose to exercise his right not to testify. In my view, Mr. Allen might well be prejudiced for his exercise of an undoubted constitutional right if undue importance were attached to his conviction. Mr. Allen chose to testify before Justice Russell. As result, inter alia, of that testimony, the evidence considered by Justice Russell to determine whether Exclusion #5 applied was significantly different from the evidence that led the jury to return a guilty verdict.

39 Ibid at paras. 48-49.
40 Ibid at para. 57.

> In his carefully drawn reasons for judgment, the trial judge refrained from finding that the evidence before him established on a balance of probabilities that Mr. Allen committed an offence under s. 86(1) when he discharged his firearm at what he honestly believed was a deer. Indeed, Justice Russell found that Mr. Allen committed "nothing more" than "an accidental, negligent act". After noting Mr. Allen's prior criminal conviction and referring to *R. v. Gosset*, [1993] 3 S.C.R. 76, Justice Russell states, at p. 28 of his reasons for judgment, that "[it] can safely be said [Mr. Allen] was "no more than civilly … liable" (emphasis added). That unequivocal finding precludes the conclusion that Mr. Allen's negligent discharge of his firearm is a "criminal act" for the purposes of the Exclusion #5."[41]

As a result, Halifax Insurance was required to indemnify their insured for the damages awarded to the victim of the shooting.

Craig Brown and Thomas Donnelly in their text ***Insurance Law in Canada,*** opine that the New Brunswick Court of Appeal's analysis was incorrect. They state:

> "It is submitted that the court's analysis on this issue was incorrect. The exclusion applies to injury "caused by any intentional act *or* criminal act". A number of courts have held that this exclusion is clear and unambiguous. Intention is not a required element of the criminal act for at least two reasons. First, the word "or" is disjunctive: the word "intentional" does not modify "criminal". The second reason is even more compelling. If the criminal act has to be intentional there would be no need to include the "criminal act" wording. The intentional action portion of the exclusion would apply, and the "criminal act" wording would be rendered superfluous. An insurance contract is not to be interpreted so as to render terms meaningless."[42]

The cases holding that the exclusion is clear and unambiguous include ***Scott v. Wawanesa Mutual Insurance Co.***[43]***,*** where the Supreme Court of Canada noted that an exclusion for "loss or damages caused by a criminal act or wilful act or omission" was "perfectly clear and unambiguous", ***K. (B.S.) v. Co-operators General Insurance Co.***[44] where the British Columbia Court of Appeal held that the an exclusion for injury "resulting from your intentional or criminal acts" was unambiguous, and ***Roman Catholic Episcopal Corp. of the Diocese of Sault Ste. Marie v. Canadian Surety Co.***[45]

Another case of note relating to the criminal acts portion of the exclusion is ***British Columbia Insurance Corp. v. Kraiger***[46]. In this case, the insured set a fire in the forest with the intention that it burn until firefighters arrived to extinguish it. The fire burned out of control and spread to a nearby residential area. The insured's evidence was that when he realized that the fire was out of control and quickly spreading he unsuccessfully tried to put it out. The insured had plead guilty to arson. The insured tried to argue that the criminal acts exclusion should apply only to the fire damage in the forest and not to the fire damage in the residential area. The BC Court of

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41 Ibid at paras. 60-62.
42 Brown and Donnelly, ***Insurance Law in Canada***, Looseleaf edition, vol.2 at p. 18-182.
43 (1989), 59 D.L.R. 660 (SCC) at p. 674.
44 (1999), [2000] I.L.R. 1-3777 (B.C.S.C. [In Chambers]), reversed on evidentiary grounds, [2001] I.L.R. 1-3959 (B.C.C.A.).
45 (June 21, 2000), Doc. C-2556/96, [2000] O.J. No. 3446 (Ont. S.C.J.).
46 [2002] B.C.J. No. No. 2132, 41 C.C.L.I. (3d) 10 (B.C.C.A.).

Appeal did not agree, stating that the cause of the loss was the arson fire started by the insured. His attempt to put out the fire was not an intervening or supervening act "serving to legally isolate him from the consequences of starting the fire".[47]

Durham District School Board v. Grodesky [48]

In this case, the insured's son set fire to recycling bins at his school. The fire spread and caused extensive property damage. The plaintiff School Board brought an action naming several defendants including the insured, the insured's wife and the insured's son. The Statement of Claim alleged negligence on the part of the insured and his wife including: (a) failure to provide a curfew for their son, (b) failing to enforce a curfew for their son, (c) failing to properly and adequately supervise their son when they knew or ought to have known that he had a propensity for getting into mischief; (d) failing to properly and adequately supervise their son when they knew or ought to have known that he had a propensity for setting fires, (e) failing to properly and adequately discipline their son for inappropriate behaviour; and (f) failing to properly and adequately instill in their son a respect for private and public property.

ING refused to defend the insured father and brought a motion for a determination that it was not obligated to defend the appellant (the insured father). ING relied on the following exclusion clause:

> "We do not insure your claims arising from (6) Bodily injury or property damage caused by any intentional or criminal act or failure to act by: (a) any person insured by this policy; or (b) any other person at the direction of any person insured by this policy."

The motions judge interpreted the School Board's statement of claim to specifically allege that the appellant "failed to act in terms of providing/enforcing a curfew, supervising, disciplining and instilling in his son a respect for private and public property" and thereafter found that the School Board's claim against the appellant fell within the "failure to act" portion of the exclusion, and therefore ING had no duty to defend the insured father.

On appeal, the Ontario Court of Appeal held that the exclusion clause was ambiguous and could be read in two ways:

> "[F]irst, the clause can be read so that the words, "intentional or criminal" modify the phrase "act or failure to act". Read in this way, the clause would only exclude an "act or failure to act" that is intentional or criminal. Alternatively, the clause can be read to exclude an intentional or criminal act, and any failure to act. Read in this way, the clause would exclude a failure to act that was merely negligent."[49]

The motions judge adopted and applied the second reading. Ultimately, the Court of Appeal disagreed with the motions judge's adoption of the second reading for the exclusion clause stating that: "[t]he second interpretation would largely negate insurance coverage because harms resulting from negligence can typically be characterized as a failure to act. This would render the insurance coverage provided by the policy largely useless."[50]

47 Ibid at para. 47.
48 2012 ONCA 270.
49 Ibid at para. 9.
50 Ibid at para. 10.

The Court of Appeal was of the view that the School Board's claim against the appellant for his alleged failures was drafted in terms of negligence.

The Court of Appeal concluded:

> "Though this negligence claim caused the same harm as the intentional tort allegedly committed by the son, it is not derivative of the intentional tort claim in the sense indicated by Iacobucci J. At para. 85, he remarked that "a claim for negligence will not be derivative if the underlying elements of the negligence and of the intentional tort are sufficiently disparate to render the two claims unrelated". The elements of the intentional tort claim against the son and the negligence claim against the parents are entirely distinct. Therefore, the negligence claim is not derivative of the intentional tort and should not be subsumed under it for the purposes of applying the exclusion clause."[51]

ING therefore had a duty to defend the School Board's claim against the insured father.

The significant take away from this case is the Ontario Court of Appeal's finding that the intentional or criminal acts exclusion was ambiguous and capable of two meanings whereas other Courts have held that it is unambiguous, particularly in the context of the criminal acts portion of the exclusion.

Belair Direct v. Penny Moar Shoup et al. [52]

In this case, one of the plaintiffs in the underlying action was shot with a pellet gun fired from the window of a car, driven by the son of the homeowners. The son was convicted of possession of a weapon for a dangerous purpose. In the underlying action, the plaintiffs alleged that the homeowners, as parents, failed to properly supervise their son (Mulder), who was a minor at the time of the shooting incident, and failed to instill in him the moral compass to avoid causing harm to others. The parents were insured under a homeowner's insurance policy issued by the applicant, Belair Direct. The policy also insured "any person under 21 years of age under the care of the insureds and living in the same household". This would include their son. The policy contained the following exclusion:

> "We do not insure claims arising from: ….
>
> 6. bodily injury or property damage caused by any intentional or criminal act or failure to act by:
>
> (a) any person insured by this policy; or
>
> (b) any other person at the direction of any person insured by this policy."

Belair Direct asserted that Mulder's acts, leading to the claims against him, were both intentional and criminal, and that they therefore fell within the exclusion clause. Belair Direct argued, that the allegations in the main action, that the parents failed to properly supervise and raise Mulder, fell within the exclusion clause because

51 Ibid at para. 14.
52 2012 ONSC 4652 (ONSC).

those failures were factors leading to Mulder's intentional and criminal conduct. Belair Direct denied any duty to defend Mulder or his parents in the underlying action. Belair Direct applied to the Court to determine the duty to defend.

The Court focused first on the allegations in the underlying action relating to the conduct of Mulder, the son of the insured parents. The argument advanced by the respondents on Mulder's behalf was an alleged lack of a causal link between Mulder's criminal act and the injuries suffered by the plaintiff in the underlying action. It was argued that Mulder was convicted of possession of a dangerous weapon but that the plaintiff's injuries were caused by the discharge of a weapon, not by its mere possession. Mulder's participation in the incident was limited to his being the driver of the car from which his two friends were doing the shooting and to possessing a weapon.

In examining the elements of Mulder's offence, the Court stated at paragraph 16:

> "… Mulder's criminal offence is one of intention - - there is no suggestion that his possession of a dangerous weapon was accidental - - and the allegation that he engaged in harmful conduct by operating a vehicle from which his friends were shooting pellet guns amounts to a claim of participation in an intentional tort. His actions are alleged to have been part and parcel of the criminal and intentional conduct of his friends, making the damages claimed by [the plaintiff] "claims arising from … bodily injury … caused by any intentional or criminal act"".[53]

Thus there was no duty on the part of Belair Direct to defend Mulder.

For the parents, the Court applied ***Durham District School Board v. Grodesky (supra)***, ***Godonoaga (Litigation Guardian of) v. Khatambaksh***[54] and ***Scalera*** (supra)[55] and held that the claims against the parents were separate from the claims against Mulder and did not fall within the exclusion for intentional or criminal acts. The Court accepted the parents' argument that the claims against the parents amounted to separate torts, and that although the claim alleged that the intentional assault was a consequence of the negligence of the parents, those acts were directed at different parties and could not be considered one and the same.[56]

Unifund Assurance Company v. D.E. [57]

In this case, the daughter of D.E. and L.E. (R.E.) and two other girls (who were all Grade 8 students) bullied a fellow student, causing her physical and psychological injuries. The bullied student (K.S.) and her mother (N.R.) commenced an action for damages against D.E., L.E. and R.E. as well as ten other defendants.

The lawsuit alleged that R.E. and the other two students bullied, threatened and physically assaulted K.S. The action alleged that the parents of the three students were negligent in that they knew or ought to have known that the minor defendants were bullying K.S. and failed to investigate, failed to take steps to remedy the bullying, failed to take reasonable care to prevent the bullying and harassment of K.S. by the minor defendants,

53 Ibid at para. 16.
54 (2000), 49 O.R. (3d) 22, [2000] O.J. No. 2172 (CA) (Godonoaga).
55 Note 6.
56 Note 49 at para. 7.
57 2015 ONCA 423 (CA) (Unifund).

failed to take disciplinary action against the minor defendants, and failed to discharge their duty to prevent the continuous physical and psychological harassment by the minor defendants for whom they were responsible in law.

D.E. and L.E. requested that Unifund provide them with a defence to the lawsuit. Unifund declined on the basis that the claims made in the action fell outside of the policy's scope of coverage.

The Insuring Agreement of the Unifund policy provided:

> "…. We will pay all sums which you become legally liable to pay as compensatory damages because of unintentional bodily injury or property damage arising out of:
>
> 1. your personal actions anywhere in the world. …."

The Exclusions for the Unifund policy included:

> "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 direction 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."

Relying on ***Durham District School Board*** (supra)[58] the application judge rejected Unifund's argument that the claim against the parents in negligence flowed from or was derivative of the claim against their daughter arising out of her intentional conduct of assault, threatening and bullying. The application judge stated:

> " … The elements of the intentional tort claim against the applicants' daughter, and the negligence claim against the applicants, are entirely distinct. Liability is sought to be imposed against the applicants on the basis that the harm to the plaintiffs was caused by the negligent conduct in failing to investigate the bullying, in failing to take steps to remedy it and in failing to take reasonable care to prevent it. The negligence claim is thus not derivative of the intentional tort claim. Since there is no allegation that the applicants' acts were intentional, coverage should not be excluded on this ground."[59]

The application judge also rejected Unifund's argument that exclusion clause 7(b) precluded coverage for the lawsuit brought against D.E. and L.E.:

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58 Note 44.
59 Note 53 at para. 21.

> "In clause 6, the exclusion clause that proceeds Clause 7, the Policy exempts from coverage claims for "bodily injury or property damage caused by an intentional or criminal act or failure to act." By contrast, Clause 7(b) is silent on whether that exclusion applies to only intentional or unintentional failure to take steps to prevent physical abuse or harassment. Had the insurer intended to exclude liability for both intentional and negligent failure to prevent physical abuse or molestation, it could have included express language to this effect. Arguably, especially in light of the previous use of the concept of intentional acts in Clause 6, Clause 7(b) is ambiguous.
>
> Applying the concept of contra proferentum, and, as well, the principle that exclusion clauses are to be interpreted narrowly, I conclude that the proper construction of Clause 7(b) is that it should be limited to intentional failure to take steps to prevent physical abuse or molestation; i.e. where the insured intentionally fails to act and thus permits the offensive conduct to continue. The exclusion should not extend, however, to situations where that failure arose through negligence."[60]

Unifund appealed, raising seven grounds of appeal.

The Ontario Court of Appeal commenced its analysis of the case by referencing Justice Iacobucci's three-part test for interpreting insurance policies, in the context of the duty to defend and the duty to indemnify[61]. The Court of Appeal stated the following with respect to parts one and two of the test:

> "On the first step, there is no question that the plaintiffs' claim against D.E. and L.E. is properly pleaded.
>
> On the second step, the application judge did not err by concluding that the plaintiffs' claims against D.E. and L.E. were not derivative of the intentional tort claim against their daughter R.E. In my view, the application judge properly applied this court's decision in **Durham District School Board v. Grodesky**."[62]

The Ontario Court of Appeal then turned to the third step in the analysis: "do the properly pleaded, non-derivative claims trigger the insurer's duty to defend?" To answer this question, the Court of Appeal reiterated that it was necessary to consider the words of the Statement of Claim and the coverage and exclusion clauses of the insurance policy, all read together.

The Court of Appeal concluded:

> "… The conduct of D.E. and L.E. (and other parents) that provokes the plaintiffs' lawsuit against them is described as "failed to investigate", "failed to take steps to remedy", "failed to take reasonable care to prevent", "failed to take disciplinary action" and "failed to discharge their duty to prevent the continuous physical and psychological harassment".
>
> It is obvious from this language that the plaintiffs' claim against D.E. and L.E. is a negligence claim. The New Oxford Dictionary of English … defines "negligence" as "failure to take proper care over something" (p. 1240). The claims in the Amended Statement of Claim come four-square within this definition of negligence.

60 Ibid at paras. 23-24.
61 Note 6 at paras. 50-52.
62 Note 55 at paras. 19-20.

> Against this backdrop of the language of the Amended Statement of Claim and the dictionary definition of "negligence", I turn to exclusion clause 7(b) which precludes coverage for:
>
> 7.(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.
>
> I do not see any ambiguity in the wording of this clause. The first word of the clause is "failure" which is the core of the definition of "negligence". "Failure" is also the centrepiece in the Amended Statement of Claim of each allegation against the parents D.E. and L.E.
>
> Indeed, the overlap between the wording of the s. 7(b) exclusion clause and the wording employed in the Amended Statement of Claim is significantly broader than just the word "failure". The wording of exclusion clause 7(b) includes "failure … to take steps to prevent … physical, psychological or emotional … harassment". The wording in the Amended Statement of Claim includes "failed to take steps … to prevent … physical and psychological harassment".
>
> The application judge found ambiguity in exclusion clause 7(b) because of its silence about whether it applied to "negligent failure to prevent physical abuse or molestation" and suggested that, if this were intended, the clause "could have included express language to this effect". In light of my analysis above of the dictionary definition of "negligence" and the wording of exclusion clause 7(b), I do not accept the analysis leading to a conclusion of ambiguity. Exclusion clause 7(b) is clear on its face and it applies to the lawsuit as pleaded against D.E. and L.E. in the Amended Statement of Claim."[63]

Thus, the Ontario Court of Appeal determined that Unifund did not have a duty to defend the parents based on an application of exclusion clause 7(b). In this case, the Court of Appeal did not examine the applicability of exclusion clause 6.

Another case with a similar result is that of ***D.J.F. v. B.L.***[64]***,*** where the claim against the insured was that she negligently failed to properly supervise the infant plaintiff whom she was babysitting, and this resulted in the infant plaintiff being sexually assaulted by the other defendant. The insurance policy excluded: ABUSE OR MOLESTATION, meaning any form of actual or threatened sexual, physical, psychological or emotional abuse or molestation, directly or indirectly, by: … any person or any named insured who is insured by this policy failing to prevent such an activity from taking place. Justice Mesbur concluded that the pleadings in the underlying action brought the claim squarely within the exclusion.

63 Ibid at paras. 22-27.
64 2008 CanLII 39786 (ONSC).

Availability of Coverage for Innocent Co-Insureds

In ***Soczek v. Allstate Insurance Co.***[65]**,** the Ontario Superior Court found that the intentional or criminal act exclusion of an Allstate homeowner's policy applied to exclude the claim of an innocent co-insured (the plaintiff) for the recovery of damages caused to the home, when the co-insured spouse of the plaintiff deliberately and intentionally set her on fire, in an attempt to murder her, resulting in serious bodily injury and causing substantial damage to the home.

The Allstate homeowner's policy contained the following exclusion:

> "We do not insure loss or damage: …
>
> 21 Resulting from any intentional or criminal act or failure to act by:
>
> (a) Any person insured by this policy ….
>
> 29 Due to vandalism or malicious act caused by you or any resident of your household."[66]

Relying on the majority decision in ***Scott v. Wawanesa Mutual Insurance Co.***[67], the Court held that the exclusion was not ambiguous and was to be applied as it did not attract contra preferentum or any other special interpretive rule. The spouse of the plaintiff, being a co-insured under the policy, acted intentionally and criminally in starting the fire that burned the house. The plaintiff, as the innocent co-insured, was not entitled to claim under the policy.

Although this was the result, the Court did note that the exclusion clause, as worded, was manifestly unfair to innocent co-insureds. Also noted was the fact that several provinces, including Alberta, British Columbia and Quebec have enacted legislation to protect an innocent co-insured. Such legislation in effect bars or prohibits an insurer from including an exclusionary clause in the policy that has the effect of denying compensation to innocent co-insureds.

It would also be prudent in dealing with an exclusion for intentional or criminal acts to determine if the policy contains a "separate coverage" clause, the intent of which is to make it clear that claims made by each of the insureds must be assessed on an individualized basis rather than as a group or collectively.

An example of a separate coverage clause would be:

> "This insurance applies separately to each insured against whom the claim is made or action is brought."

65 2017 ONSC 2262 (Ont. SC.J.).
66 Ibid at para. 6.
67 [1989] 1 S.C.R. 1445

Conclusion

Since 2000, there has been a considerable volume of litigation pertaining to the intentional or criminal act exclusion, both in the context of the duty to defend and entitlement to indemnity. The case law is mixed. Some cases continue to hold that the exclusion is ambiguous; others that it is unambiguous. Most of this litigation is driven by the specific facts of a given case. The Courts in New Brunswick appear, rightly or wrongly, to be somewhat of an outlier when it comes to the application of the law as determined by Justice Iacobucci in ***Scalera***.

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