



DOLDEN WALLACE FOLICK ^{LLP}

Insurance Law Update

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IS RECKLESS CONDUCT AN "ACCIDENT", "OCCURRENCE", OR "INTENTIONAL ACT"?



The B.C. Supreme Court recently decided that two insurers did not owe duties to defend an insured who was alleged to have recklessly injured another player during a soccer game. The Court concluded that "reckless" conduct did not amount to either an "accident" or an "occurrence", and thus that the claim did not fall within the coverage afforded by the homeowner's and liability policies issued by the insurers. The Court further concluded that the allegations were also caught by the intentional act exclusions in each policy.

FACTS AND BACKGROUND

The underlying tort action in *Economical Mutual Insurance Company v. Doherty and Aviva Canada Inc. v. Doherty*¹ arose out of a recreational soccer game. The plaintiff first alleged that the insured had "intentionally, maliciously, and without provocation kicked the Plaintiff in the head while he was lying on the ground in a vulnerable position" following a slide tackle on the insured by the plaintiff. The plaintiff alleged that this conduct amounted to an assault. The initial pleadings did not give rise to any duty to defend because they only alleged intentional tortious conduct.

The plaintiff later amended his claim to allege, in the alternative, that the insured had *negligently* struck the plaintiff. Three particulars of negligence were provided. The Court determined that two of them - that the insured "failed" to control his temper, and that he "reacted excessively" to the plaintiff's tackle - still really amounted to allegations of intentional conduct. However, the third allegation of negligence was that the insured "participated in the game in a *reckless manner* or by the use of excessive force". The Court focussed on whether "recklessness" could amount to a claim in negligence, and thereby trigger a duty to defend.

¹ [2009 BCSC 959](#).



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THE DECISION

The insured argued that the plaintiff in the underlying tort action had properly pleaded that the insured had been negligent, and thus that the insurers had to defend him in that action. He relied upon several "sports liability" cases in which the courts had found defendants liable in negligence for "reckless" conduct.² However, the Court distinguished those cases on the basis that they were decided on tort principles, and did not address the insurance principles at issue in this case. In particular, the sports liability cases considered whether reckless conduct fell below the applicable standard of care in tort; they did not have to consider whether that conduct was "accidental", as the term is used in the context of insurance coverage, or whether that conduct was excluded from coverage by an "intentional acts" exclusion.

The Court determined that recklessness was not a tort in itself, but rather a word which had different meanings depending on the context in which it was used. Whether or not recklessness could be synonymous with "gross negligence" and therefore "negligence", as the insured contended, the Court found that reckless conduct is not always "accidental", for insurance purposes. Rather, at some point, the alleged conduct of the insured effectively becomes wilful (*i.e.*, intentional), and therefore not "accidental". The particular pleadings at issue have to be analyzed in order to make this determination.

Returning to the allegations in the underlying tort action, the Court found nothing within the plaintiff's claim that suggested anything other than that the insured had intentionally kicked the plaintiff in the head, knowing but not caring about the risk of injury. As such, the insured's conduct was not an "accident" for the purposes of the underlying liability policies, *and* was excluded by the intentional act exclusion. Having construed the allegations against the insured as pleading conduct which was not an accident, the Court did not find it necessary to address the insurers' alternative arguments using the analysis set out in *Non-Marine Underwriters, Lloyd's of London v. Scalera*,³ that the alleged negligence was entirely derivative of the intentional tort.

² Such as *Unruh (Guardian ad litem of) v. Webber* ([1994](#)), [112 D.L.R. \(4th\) 83](#) (B.C.C.A.)

³ [2000 SCC 24](#)



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The decision is currently under appeal.

PRACTICAL IMPLICATIONS FOR INSURERS

The *Doherty* decision is informative for its conclusion that allegations of “reckless” conduct may not always be equivalent to allegations of “accidental” conduct for coverage purposes. However, the decision also highlights the importance of a careful analysis of the pleadings when undertaking any determination of the duty to defend under a liability policy.

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