DOLDEN WALLACE FOLICK LLP

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INSURE UPDATES

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18th FLOOR – 609 GRANVILLE ST
VANCOUVER, BC. V7Y 1G5
Tel: 604.689.3222
Fax: 604.689.3777
E-mail: info@dolden.com

308 – 3330 RICHTER ST
KELOWNA, BC. V1W 4V5
Tel: 1.855.980.5580
Fax: 604.689.3777
E-mail: info@dolden.com

850 – 355 4th AVE SW
CALGARY, AB. T2P 0H9
Tel: 1.587.480.4000
Fax: 1.587.475.2083
E-mail: info@dolden.com

200 – 366 BAY ST
TORONTO, ON. M5H 4B2
Tel: 1.416.360.8331
Fax: 1.416.360.0146
Toll Free:1.855.360.8331
E-mail: info@dolden.com

CGL Insurer Not Required to Pay Insured's Pre-Tender Defence Costs

By: Paul Dawson

CGL Insurer Not Required to Pay Insured's Pre-Tender Defence Costs

In *Lloyd's Underwriters v. Blue Mountain Log Sales Ltd.*, 2016 BCCA 352, the British Columbia Court of Appeal released a ground-breaking decision this week that will likely prove both interesting and useful to liability insurers across Canada.

The Court of Appeal held that an insurer's right and duty to defend cannot arise under a commercial general liability (CGL) insurance policy until the insured has tendered its defence to the insurer, so the insurer has no duty to pay the insured's pre-tender defence costs. Furthermore, the denial of coverage for pre-tender defence costs does not entitle the insured to claim statutory relief from forfeiture, at least where the insurer assumes the insured's defence, going forward.

The case involves a manufacturer of cedar shakes who bought a series of CGL insurance policies for its Canadian subsidiaries. In 2012, the manufacturer became embroiled in litigation in the United States, but did not tender its defence to the CGL insurer until 2014, by which time the manufacturer had already incurred nearly USD$600,000 in defence costs. Upon receiving notice of the United States litigation, the insurer agreed to

defend the manufacturer, on a reservation of rights basis, but refused to pay the pre-tender defence costs. The insurer then sought a declaration from the Supreme Court of British Columbia that the insurer was not required to pay the pre-tender defence costs.

The chambers judge in Supreme Court ruled against the insurer, concluding that an insurer's duty to defend arises as soon as a potentially-covered claim is made against its insured, so the insurer must pay pre-tender defence costs (*Lloyd's Underwriters v. Blue Mountain Log Sales*, 2015 BCSC 630). He also ruled that the manufacturer could obtain statutory relief from the "forfeiture" of coverage for pre-tender defence costs resulting from its delay in tendering the defence to the insurer, since the insurer was not claiming to have suffered any prejudice from the delay.

However, the Court of Appeal overturned both parts of the chambers judge's decision. First, it stated that "*notice is a necessary and logical trigger*" to activate the insurer's duty to defend. Until the insurer receives notice of a claim against the insured, it cannot determine whether the claim is covered under the policy, and so cannot assume the insured's defence against any covered claims. Second, because notice of the claim is a "*precondition or necessary trigger*" to the insurer's duty to defend, the insured's responsibility to pay pre-tender defence costs is not a "forfeiture" of any coverage (assuming that the insurer, upon receiving notice of the claim, then agrees to assume control of and pay for the insured's defence.)

The Court of Appeal's decision is significant to insurers for several reasons. Unlike "claims-made-and-reported" liability policies, where notice is often expressly stated to be a "condition precedent" of coverage, CGL policies typically only require insureds to notify insurers of accidents or occurrences "as soon as practicable". However, the Court of Appeal in *Blue Mountain*

Log Sales has accepted as a practical reality that a CGL insurer cannot defend a claim of which it is unaware.

More broadly, the Court accepted that an "essential bargain" lies at the heart of CGL policies – and of other "duty to defend" liability insurance policies, it might be inferred. The right and duty to defend go together: if an insured wishes to control its own defence, it does so at its own cost, but if the insured wants the insurer to pay for the defence, it must allow the insurer to control the defence. Notice of the claim transfers to the insurer both the right to control, and the obligation to pay for, the insured's defence.

The Court of Appeal also stated that the "no-voluntary-payment" clauses in the CGL policies at issue supported its analysis concerning the duty to defend. Such clauses (which have received virtually no prior judicial consideration in Canada) grant the insurer the contractual right not to pay for defence costs incurred without its consent. The manufacturer's pre-tender defence costs were thus not covered under the Policies, reinforcing the "essential bargain" discussed above.

Lloyd's was represented at chambers and on the appeal by Eric Dolden and the author. It is unknown as to whether the manufacturer might seek leave to appeal to the Supreme Court of Canada. If the Court of Appeal decision should stand, it will likely encourage insureds to tender their defences to their liability insurers promptly. It will likely also help to protect liability insurers from being presented after the fact with invoices for defence costs incurred without the insurer's knowledge or consent.

History of Bias and Lack of Impartiality May Lead to Expert Being Disqualified

By: Morgan Martin with contributions from Aneka Jiwaji

Expert medical evidence can play an integral role in personal injury matters when assessing damages sustained by a plaintiff. The role of an expert is becoming increasingly important and it is also becoming increasingly scrutinized – as it should be. After all, the role of an expert is to assist the court, not the parties. This is why experts whose testimony has been found biased in the past could be disqualified from participating in the court process in the future.

In the recent case of *Daggitt v Campbell*, 2016 ONSC 2742, the Ontario Superior Court commented on the duty of the expert to the court. In this case the Plaintiff, Daggit, had commenced an action seeking damages for personal injuries sustained in a motor vehicle accident. The Defendant moved to compel the Plaintiff to undergo an independent medical examination (IME) with a particular psychiatrist, Dr. Monte Bail. The Plaintiff opposed the Defendant's request and argued that there was insufficient evidence to warrant a psychiatric assessment and that Dr. Bail had demonstrated a "clear and definitive defense bias in many previous cases" such that "the court should decline to make any order allowing any independent medical examination by Dr. Monte Bail, in particular."

Madam Justice MacLeod-Beliveau dismissed the motion on the basis that there was insufficient evidence to order an independent medical examination. Although it was unnecessary to comment on the chosen expert's qualification, Justice MacLeod-Beliveau took the opportunity to comment on whether to disqualify Dr. Bail as an expert due to his failure to adhere to the principles of fairness, objectivity and impartiality in the past. Madam Justice MacLeod-Beliveau was persuaded by the Plaintiff's arguments on this point and referenced

multiple cases in which Dr. Bail was found not to be a credible witness. She discussed the case of *Bruff-Murphy v. Gunawardena*, 2016 ONSC 7, where Justice Kane held that Dr. Bail was "not a credible witness and that he failed to honour his obligation and written undertaking to be fair, objective and non-partisan." Importantly, Justice Kane held that he would "not qualify witnesses as experts in the future whose reports present an approach similar to that of Dr. Bail in this case."

Madam Justice MacLeod-Beliveau noted that the "Supreme Court of Canada has held that an expert witness who is unable or unwilling to comply "with their obligation to the court" is not qualified to give expert opinion evidence and should not be permitted to do so." Justice MacLeod-Beliveau further noted that an expert's failure to honour their obligation to the court usually involves a rebuke from the court but as this does nothing to prevent that same expert from being further retained and repeating the process over again, the person disqualified as an expert should not be allowed to have any role in the court process due to the potential for a miscarriage of justice.

The principle in *Daggitt* could prove influential in disqualifying experts who have been admonished by the court for their biased testimony. Whether this decision will be widely followed has yet to be seen, however the case illustrates that all counsel should exercise caution when selecting an expert, properly advise experts about their role in the court process and their overriding duty to the court, as well as research the past cases experts have been involved in to limit the risk of disqualification.

EDITOR

Keoni Norgren
Tel: 604 891 5253 Email: knorgren@dolden.com

Please contact the editor if you would like others in your organization to receive this publication.

CONTRIBUTING AUTHORS

Paul Dawson
Tel: 604 891 0378 Email: pdawson@dolden.com

Morgan Martin
Tel: 416 360 8331 x 216 Email: mmartin@dolden.com

Aneka Jiwaji
Tel: 604 891 0394 Email: ajiwaji@dolden.com