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Insurance Journal

In this Issue…

By Lena Vartanian with contributions by Keoni Norgren

Defending the Island "whatever the cost may be."

In *Lloyd's Underwriters v. Blue Mountain Log Sales Ltd.*, 2015 BCSC 630 the British Columbia Supreme Court considered the question of whether pre-tender defence costs on a general liability policy are payable. This issue arose because the insured did not notify the insurer about claims under four policies, until two years after litigation was commenced in Washington State. By this time significant defence costs had been incurred. The insured was apparently unaware that the claims might trigger the policies issued by the insurer.

Central to the insurer's petition is the question: when does the duty to defend arise in the context of a general liability policy?

The policies all contained similar terms that required the insured to provide notice of a claim to the insurer "*as soon as practicable*." The policies also expressly precluded the insured from making any voluntary payment, incurring any expense, or assuming any obligation under the policies except at the insured's own expense. The insurer did not deny coverage and acknowledged that there is a duty to defend. The insurer contended that the terms of the policies did not require them to defend until they received actual notice of a claim. Hence, the insurer was not responsible for pre-tender defence costs under the terms of the policies.

The insurer sought a declaration concerning when the duty to defend arises. The position taken by the insurer was straightforward. As one Judge put it "*an insurer can hardly have a duty to defend a claim of which it has had no notice*." Unfortunately, there are very few Canadian case authorities on this point. But, the majority view expressed in American case law supports the position taken by the insurer; the duty to defend does not incept until a claim is actually tendered to an insurer.

However, the Court was reluctant to accept the majority view expressed in the United States, and in so doing arguably conflated two separate issues.

The Court answered the insurer's question by asking its own question: when is relief from forfeiture available? The Court relied on a number of Canadian cases in which an insured has been relieved of forfeiture when they have breached a term of the policy. The Court held that "*…on balance…the weight of Canadian authority as between insured and insurer is that the breach of such a notice provision is generally treated as imperfect compliance.*" Thus, imperfect compliance in this case would be subject to relief from forfeiture.

The Court also appeared swayed by a number of other factors. Firstly, there was no improper purpose in giving the late notice. Secondly, if the insurer avoided the pre-tender defence costs and yet received a premium from the insured, in the absence of some prejudice, the insurer would effectively be getting something for nothing.

Finally, the Court felt that achieving an equitable result between the parties was also an important consideration.

However, this decision arguably grants an insured with latitude to incur defence costs, before notifying their insurer, while still permitting them to be indemnified by the insurer. This has the effect of depriving an insurer of the opportunity to control the defence of a claim as permitted and required under a policy. Lastly, the decision arguably restricts the effect of the "no voluntary payment" clause contained in the policies.

These effects were likely not contemplated by the insurer when it issued the policies, and it will be interesting to see if the insurer appeals this decision.

By Keoni Norgren

Don't Judge a Book by its Cover.

The use and reliance upon expert evidence is becoming more and more commonplace – perhaps even in situations where the opinion does not properly qualify as "expert" evidence. To combat this, courts have developed a number of evidentiary rules that are designed to maintain the integrity of the trial process. There is concern that because of the "impressive" qualifications of an expert, or because of the complexity of the opinion, that the evidence will be viewed as being "*virtually infallible*" and simply accepted without being given its due scrutiny. If this occurs, this will undermine the entire trial process which is designed to assess facts and to weigh all of the evidence.

The risk of accepting expert evidence – simply because it is expert evidence, would be worsened if the expert was not truly an independent party or if their opinion was biased. This concern was addressed in the Supreme Court of Canada's decision in *White Burgess Langille Inman v. Abbott and Haliburton* (2015) SCC 23.

In this case, one party sought to rely on the expert evidence of a person who, at least on the face of things, appeared to have a personal financial and professional interest in the outcome of the litigation. Normally, an expert is required to be truly independent, with no interest in the outcome of the litigation, and whose primary duty is to assist the court.

In coming to its decision, the Supreme Court of Canada clarified whether concerns about potentially biased opinion goes to admissibility or mere weight: the answer is that it must be considered in the context of both. Simply because expert evidence is found to be admissible, does not mean that lingering questions about bias should not be addressed in considering what weight to afford it, in relation to other expert evidence.

The Court also noted that certain types of relationships between a party and expert can give rise to concern. Such as where there is an employment relationship, where there is a financial interest in the outcome of the

litigation, where there is a familial relationship, when an expert will probably incur professional liability if his or her opinion is not accepted by the court, or when the expert has assumed the role of advocate.

However, the Court also succinctly held that the mere appearance of bias is insufficient to exclude the evidence of an expert – even in this case. The Court noted that when "*looking at an expert's interest or relationship with a party, the question is not whether a reasonable observer would think that the expert is not independent. The question is whether the relationship or interest results in the expert being unable or unwilling to carry out his or her primary duty to the court to provide fair, non-partisan and objective evidence*."

But, perhaps a clearer way to state the Court's decision is to ask whether there is any evidence, albeit factual or from an opposing expert, to suggest that an expert is not advancing a fair, objective, and non-partisan opinion. The mere "*speculative possibility*" of bias is insufficient to exclude expert evidence and an existing relationship or possible interest in the outcome of the litigation, by itself, will not disqualify an expert from providing opinion evidence.

That said, the relationship between an expert and a party, or the expert's potential interest in the outcome of the litigation is an obvious avenue of attack from the opposing party. Given that the issue of bias affects both the admissibility and weight of expert evidence, why give the opposing party a free shot at undermining your case? While the Supreme Court's decision made it clear, that in the absence of actual evidence, the relationship or interest an expert has to the litigation does not automatically preclude them from giving evidence, the situations noted by the Supreme Court should probably be avoided when deciding to retain an expert.

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