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Welcome to the second issue of The Practical Edge on Insurance, Theall Group's newsletter on important developments in insurance law. In this issue, we review three decisions that focus on the application of typical exclusions in homeowner's and CGL policies, as well as a comparison of two decisions from Ontario and British Columbia where insureds sought coverage for losses arising from "road rage", but the Courts came to different conclusions.

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Theall Group LLP was formed in 2002 and has grown steadily as we enter into our fifth year. We are, first and foremost, a litigation firm that specializes in commercial insurance law acting for policy holders and brokers. We also have expertise in the automobile industry, product liability, risk management and transnational disputes. Our goal is to provide service-oriented expertise that focuses on finding the most effective and efficient way to reach our client's goals. Working with our clients, and leveraging the firm's information technology, we strive to deliver practical solutions to the most difficult and complex problems. This is how we do business at Theall Group LLP, your practical edge.

Criminal Act Exclusion Applies Where No Intent to Cause Injury

Case Review: *Eichmanis v. Wawanesa Mutual Insurance Co*

The Ontario Court of Appeal has addressed the issue of whether the criminal act exclusion in a homeowner's policy applies to criminal negligence that results in injury. The decision is significant because it affirms that a criminal act, intentional or not, engages the exclusion.

The plaintiff, Eichmanis, was seriously injured when he was shot by his friend, Prystay, while they were playing with a gun in Prystay's father's home. Prystay later pled guilty to a charge of criminal negligence causing bodily harm. Eichmanis obtained judgment against Prystay in a civil action, and then sought to recover the judgment under the homeowner's policy of Prystay's aunt and uncle with whom he was living at the time of the shooting.

The insurer relied on the exclusion clause that read, in part, "You are not insured for claims made or actions brought against you for ... bodily injury or property damage caused by any intentional or criminal act..." Eichmanis brought a motion to determine whether Prystay's act was covered under the policy. The motions judge held that the exclusion did not apply, even though Prystay had pleaded guilty to a criminal offence. The judge also interpreted section 118 of Ontario's *Insurance Act* as requiring that the insured's conduct be both criminal and that there be an intention to cause injury. Section 118 reads:

Unless the contract otherwise provides, a contravention of any criminal or other law in force in Ontario or elsewhere does not, by that fact alone, render unenforceable a claim for indemnity under a contract of insurance except where the contravention is committed by the insured, or by another person with the

consent of the insured, with intent to bring about loss or damage...

The judge concluded that, as Prystay's criminal act was negligent and unintentional, there was no mens rea to engage the exclusion and so it was inapplicable.

The Ontario Court of Appeal overturned the decision, holding that the criminal act exclusion applies to all criminal acts, not just those committed with intent to cause injury. The Court stated that to interpret the exclusion as applying only to criminal acts intended to cause injury renders the phrase "criminal act" superfluous – there would be no reason for the policy exclusion to refer to criminal acts if the exclusion also applied to intentional acts. The Court added that the exclusion should be read as setting out two separate exclusions: "intentional act" and "criminal act". The Court also clarified that the opening phrase of section 118 of the *Insurance Act*, which states "[u]nless the contract otherwise provides..." did not alter their conclusion. In the case before the Court, the policy did provide otherwise because it contained a criminal act exclusion. As a result, the Court of Appeal found that the criminal conviction invoked the exclusion, which was not affected by the *Insurance Act*; therefore, Eichmanis could not recover under the policy.

This case is a significant appellate level decision that widens the scope of the criminal act exclusion, and confirms that a different analysis applies to non-criminal acts. It also indicates that an insured who pleads guilty to, or is found guilty of, a criminal charge will likely be excluded from coverage under a policy containing a criminal act exclusion.

Two Courts Differ Over "Road Rage" Coverage in Automobile Policies

Case Review: *LaFond v. Allstate Insurance Co. of Canada* *Insurance Corp. of British Columbia v. Garnier*

The Ontario Superior Court of Justice ruled that an assault on an insured motorist was not an "accident" entitling him to benefits under Ontario's 1996 Statutory Accident Benefit Schedule regulations (the "SABS"). In *LaFond*, the plaintiff got out of his vehicle and confronted another motorist in a driveway, who he believed had been driving erratically, and was assaulted and severely beaten. During the confrontation, the plaintiff fell and struck his head on the fender of his own vehicle, and was repeatedly kicked while on the ground.

The SABS requires an insurer to pay benefits to an insured person "who sustains an impairment as a result of an accident." Section 2(1) of the SABS defines "accident" as "an incident in which the use or operation of an automobile directly causes an impairment." Thus, the issue before the Court was whether the incident was an "accident".

The Court held that the plaintiff had to meet a two-part test to establish causation:

- (1) was the use or operation of the vehicle a cause of the plaintiff's injuries?; and
- (2) if so, was there any intervening act that resulted in the injuries that cannot be said to be part of the "ordinary course of things"?

Although the plaintiff attempted to argue that "given the prevalence of road rage" this

type of confrontation was a normal incident to the risk created by use or operation of a motor vehicle, the Court rejected this argument. The Court stated that the act of the assailant is the dominant feature of causation, so that the use or operation of the automobile must have caused the injury in order for there to be an "accident", as defined. As a result, the Court concluded that the plaintiff's injuries were not caused directly by the use or operation of an automobile. While the plaintiff's fall against the automobile may have contributed to the degree of injury, the predominant cause of his injuries was the intervening assault. The Court also cautioned that an intervening act may not absolve an insurer of liability if it can fairly be considered a normal incident of the risk created by the use or operation of the automobile. However, an assault was not a "normal incident of the risk" of using an automobile.

This decision should be contrasted with the decision of the British Columbia Supreme Court in *Insurance Corp. of British Columbia v. Garnier*, which was an appeal from a Small Claims Court decision. In *Garnier*, the plaintiff was stopped at a red light when a driver of another vehicle approached and attacked his car with a baseball bat. Apparently, the attacker had "blinded" the plaintiff with his high-beam headlights and hit the side of the plaintiff's vehicle when passing him on the road. The

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plaintiff was unable to identify the attacker, and sought coverage under the unidentified motorist provision of British Columbia's *Insurance (Motor Vehicle) Act*, which provides, in part:

If ... damage to property arises out of the use or operation of a motor vehicle [and the owner or driver of the vehicle are unidentifiable], any person who has a cause of action ... in respect of the ... property damage may bring an action against [ICBC]...

The British Columbia Court applied a “purpose test” and “causation test” to determine whether there was a connection between the accident and the ownership, use or operation of the Vehicle. The purpose test concerns whether the accident resulted from the ordinary and well-known activities to which vehicles are put, while the causation test requires an analysis of whether the damage was causally related to that ownership, use or operation. The Court held that the incident was an “accident” for the purposes of the Act, and stated that the plaintiff's action against ICBC arose from the ownership, use or operation of the vehicle, because the attacker's “road rage” resulted from the plaintiff's use of his vehicle. The use of the plaintiff's vehicle was the cause of the damage, the attacker used his vehicle to block the plaintiff's escape, and the fact that the attacker exited his vehicle to confront the plaintiff did not break the chain of causation.

It appears that the different results in these decisions arises from the restrictive wording in the Ontario legislation that requires that the damage be “the direct result” of the use and operation of the vehicle, as opposed to the British Columbia legislation which requires that damage “arises out of” the use or operation of the vehicle. Therefore, the plaintiff in *Garnier* need only show that the use or operation of the unidentified vehicle contributed in some way to the damage suffered, or that there was some connection between its use and operation, and the damages.

These decisions illustrate the importance of the wording of the legislation, since restrictive wording denied coverage to an Ontario insured, who may have been covered under the British Columbia legislation. Still, the Ontario insured might not have been covered under the British Columbia legislation because his injuries were arguably suffered because he chose to confront the attacker. In the British Columbia decision, the insured's vehicle was damaged because the attacker apparently was upset at the way the insured was driving. Therefore, it is possible that if the insured in the British Columbia case was subject to the Ontario legislation, that insured might still have been covered because he arguably suffered damage as a direct result of the way he was driving.

Refinement of the Intentional Act Exclusion

Case Review: *ING Insurance Co. of Canada v. Mitsios*

The Ontario Superior Court recently ruled that the intentional act exclusion did not apply where the insured injured a third party while engaged in "horseplay" at work. In the underlying action, the plaintiff had sprayed water at the defendant who responded by placing the plaintiff in a headlock. Both parties fell down and the defendant landed on top of the plaintiff. The plaintiff alleged that he suffered severe and permanent injury as a result. The insurer refused to defend the insured who sought coverage under his homeowner's policy.

The insurer sought a declaration that the injury had been intentionally inflicted and was excluded under the policy. The exclusion clause read, in part, "We do not ensure claims arising from ... bodily injury or property damage caused by any intentional or criminal act..." The insurer argued that a headlock was a deliberate act that constituted assault, and therefore it had no duty to defend its insured.

After reviewing the applicable principles, including the principle that the onus is on the insurer to demonstrate that the exclusion clause applies, the Court found that the Supreme Court of Canada decision in *Non-Marine Underwriters, Lloyd's of London v. Scalera* applied. In that case, the Court held that an intentional act and intent to injure were required to bring the conduct within the policy's intentional act exclusion clause. To hold otherwise would result in virtually all negligent acts being excluded from coverage, vitiating the purpose underlying the policy, conflict with the reasonable expectations of the poli-

cyholder and be inconsistent with the *contra proferentem* rule. The Court in *Mitsios* took it one step further and stated that, "[i]f the exclusion clause were to apply to an intentional act where there was no intention to cause injury, ... it would denude the coverage clause of any meaning. Such an interpretation would be absurd."

The Court distinguished an earlier case involving two teenage boys who were fighting, because the facts in that case indicated that the insured intended to injure the other boy. The statement of claim in the underlying action in *Mitsios* did not allege that the insured had intended to injure his co-worker. The Court also agreed with the reasoning of a fellow judge in *Eichmanis v. Wawanese Mutual Insurance Co.*, a decision which was recently overturned by the Court of Appeal on the basis that the criminal acts exclusion can apply even where an act is not intentional (see discussion of this decision in this newsletter).

The significance of this decision is that it provides further refinement to the jurisprudence regarding the intentional act exclusion. It is helpful to contrast this decision with the facts in *Eichmanis*, and the conclusion reached by the Court of Appeal in that case. Given the statement of the Court of Appeal in *Eichmanis* that the exclusion should be read as two separate exclusions: an "intentional act exclusion" and a "criminal act" exclusion, it appears that this case is still good law.

A Common Sense Approach to the “Your Work” and “Your Product” Exclusions

Case Review: *Hipperson Construction (1966) Ltd. v. H.J.H. Steel Erectors Inc.*

This case is a good illustration of a common sense approach to the application of exclusions in a construction accident setting. In this case, the plaintiff contracted with the defendant insured for the installation of a pre-engineered metal building, and during construction, two steel support rafters collapsed. The plaintiff brought an action against the insured, alleging that the collapse occurred because the insured negligently failed to support the rafters during construction. The insured brought an application before the Saskatchewan Queen’s Bench for a declaration that its insurer owed a duty to defend.

The insurer relied on the “your work” and “your product” exclusions, which read as follows:

This insurance does not apply to ... property damage to ... that particular part of any property that must be restored, repaired or replaced because “your work” was incorrectly performed on it.

This insurance does not apply to ... property damage to “your product” arising out of it or any part of it.

In the policy, “Your Product” was defined to mean “any goods or products ... manufactured, sold, handled, distributed or disposed of by ... you”. “Your Work” was defined to mean “a. Work or operations performed by you or on your behalf; and b. Materials, parts or equipment furnished in connection with such work or operations.”

The rafters were furnished by the plaintiff; therefore, they were not “materials, parts or equipment furnished” by the insured, and could not fall within the policy’s definition of “your work”. The insurer also argued that the

rafters fell within the definition of “your product”, on the grounds that the insured worked on them and therefore “handled” them. The Court rejected this argument, finding that the definition of “your product” refers to “goods or products supplied by an insured, either as principal or agent”.

The Court discussed the “basic purpose” of the exclusions, and found that the “your work” exclusion was intended to prevent the insured from recovering cost of correcting its own deficient work, while the “your product” exclusion was intended to prevent its supplier from recovering the cost of replacing its own defective product. The Court held that the insurer was seeking a broader interpretation, which would require the insured to not only bear the cost of correcting its own defective work and/or repairing or replacing his own defective product (which costs could be insured by a performance bond), but also to bear the unknown cost of consequential damage caused by the insured’s negligent work or defective product. The Court opined that this was exactly the type of risk which the insured expected would be covered. As a result, the Court ordered the insurer to defend the action.

This decision helps illustrate the proper application of the “your work” and “your product” exclusions in a comprehensive general liability policy. In interpreting the policy wording, the Court considered the reasonable expectations of the insured, as well as the principle that exclusions should be narrowly interpreted, in order to ensure that the insured got what it paid for – coverage for consequential damage that may have resulted from the insured’s negligent acts.