

INSURANCE LAW BULLETIN

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Southside Muay Thai Academy v. Aviva Insurance, 2020 ONCA 385
The Duty to Defend and Successful Exclusionary Clauses

[The information below is provided as a service by Shillingtons LLP and is not intended to be legal advice. Those seeking additional information on the issues above should contact the firm at (519) 645-7330.]

Overview

In *Southside Muay Thai Academy v Aviva Insurance*, the Ontario Court of Appeal grappled with whether Aviva had a duty to defend Southside in an action commenced against it by PF, a minor and former student of the South Side kickboxing team. PF alleged that while on a return flight from Thailand, she was sexually assaulted by Mr. Fontalvo -- a co-owner and employee of Southside. Mr. Fontalvo was found guilty of sexual assault and interference with a minor as a consequence of these allegations. The Statement of Claim provided that the subject matter of the action was the sexual assault perpetrated by Mr. Fontalvo and alleged that Southside was negligent in its failure to supervise the Plaintiff and to ensure her safety while under its care and control, in particular on the day of the alleged sexual assault.

Southside brought an application seeking a defence and coverage from Aviva for the claim brought by the Plaintiff. Aviva denied coverage relying on its Commercial General Liability policy. While the policy covered claims for compensatory damages for bodily injury or property damage, it included an exclusion clause for claims arising directly or indirectly from abuse.

The sole issue for the Ontario Court of Appeal was whether Aviva had a duty to defend the claim brought against Southside for damages arising from the alleged sexual assault.

The Court of Appeal upheld the judge's conclusion that the claim against Southside fell within the policy exclusion because it arose directly or indirectly from an act of alleged abuse. However, it found that the judge erred in finding that Aviva had a duty to defend the claim.

Analysis

The wording of the policy exclusion was clear and unambiguous in that all “claims or actions arising directly or indirectly from abuse” and/or claims or actions based on “supervision or retention of any person alleged to have committed abuse” are excluded from coverage. As such, Southside agreed that the policy exclusion applied to the claim for failure to supervise on the date of the incident given that the alleged abuse took place on that flight and any claims from the abuse would be encompassed by the exclusionary clause.

The real question was whether the Statement of Claim made any claim other than the claim arising from the sexual abuse of May 1, and if so, whether such a claim was covered by the policy or properly excluded due to the terms of the subject insurance policy.

The Court first looked to Rule 25.06 of the *Rules of Civil Procedure*, which provides that every pleading shall contain a concise statement of the material facts on which the party relies for the claim or defence. In the Statement of Claim, the only claim arose from the May 1, 2017 incident and the material facts in support of the action were that Mr. Fontalvo sexually assaulted the Plaintiff. This was, as the Plaintiff had pled, “the subject matter of this action”. Furthermore, the damages claimed in the Statement of Claim were exclusively those arising from the sexual assault.

While the Court agreed with the judge that interpretation of coverage clauses must be broad and interpretation of exclusions narrow, there was no claim for damages in this case resulting from Southside’s negligence other than the claim arising from the “subject matter of this action” -- namely, the May 1, 2017 sexual abuse incident. Given this, there was no need to assess whether those claims would be covered by the policy. Accordingly, Aviva had no duty to defend the claim.

As there was no ambiguity in the exclusion clause, there was no reason to invoke the concept of *contra proferentum* (vague or equivocal language is interpreted against the drafter of the contract), despite the plea for same by counsel for Southside.

Practical Implications

Southside demonstrates the practical benefits of drafting clear and unambiguous exclusion clauses and their utility in defending against a request to defend and indemnify a claim that the drafter of the policy intended to be excluded.

Furthermore, the Court’s use of Rule 25.06 of the *Rules* demonstrates that the explicit words and phrasing employed in one’s pleadings can have a detrimental or beneficial impact on a party’s ability to rely on another’s duty to defend and indemnify. Rule 25.06 highlights the crucial role of counsel to carefully consider each statement in an action’s pleadings in order to properly defend a claim and expeditiously release one’s client from otherwise expensive and needlessly prolonged litigation.