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## LOST AND FOUND: DISPUTED COVERAGE IN MISSING POLICIES-PART III

by Marcus B. Snowden

### Manuscripts: Dead Sea Scrolls or Garbage?

As commercial underwriters and claims handlers well-know, not all commercial risks are written on the company's standard pre-printed form. What to do with evidence of a manuscript wording? This too has been addressed in recent times by our courts. The first scenario involves partial wording produced from a manuscript form.

In the case of *E.M. v. Reed*, [2000] 24 C.C.L.I. (3d) 229 (S.C.J.); affd., [2003] 49 C.C.L.I. (3d) 57 (C.A.) the trial judge was required to consider whether there were sufficient excerpts of the manuscript wording from one of three insurers on risk over a number of years. The issue arose in the context of an abuse claim against a religious organization. Justice Wilkins found that there was sufficient evidence of the manuscript policy to make findings as to the scope of coverage.

The result was very different, however, in the more recent *Navy League of Canada v. Citadel General Assurance Co.*, [2003] O.T.C. 748 (S.C.J.)["*Navy League*"] case. In this case Wilton-Siegel J. was prepared to accept that the existence of the policy had been proven. As it turns out, the case proceeded as a motion in three steps. In the first step, the court was not prepared to force the insurer to produce three forms of manuscript policy in the absence of proof that a policy of some kind existed in the relevant time-frame. In step two of the process where sufficient evidence was offered by the policyholder to compel production of the other policies. Notably, however, Wilton-Siegel J. added the following remarks (at para. 6):

> The conclusion reached in this order does not, however, imply that the Court has made any determination at this time as to the extent to which it can rely on such wording in considering whether the terms of the contract between the parties have been established in this motion

With that, the parties were ordered to appear again once the policies were produced by the insurer. As will be seen, this was not the Holy Grail sought by policyholder's counsel.

### Getting What's Asked For: Not Always What's Needed

The final chapter of the *Navy League* case unraveled for the policyholder when the case came back on before Wilton-Siegel J. in what we might refer to as Navy League(3). The learned motions court judge set the scene in the following terms (at para. 2):

> The issue in this continuation of the plaintiff's motion is whether evidence exists to establish the terms of the policy with respect to (1) the insurer's duty to defend in respect of an action initiated in the Supreme Court of British Columbia by one John Doe against the plaintiff and certain other defendants and (2) to indemnify in the event the applicant is found liable for damages in that action. In that action, John Doe asserts that he was sexually assaulted between 1969 and 1972 by certain individuals, also defendants in the action, who were associated with the plaintiff. John Doe seeks damages from the plaintiff based on causes of action in negli-

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> gence and vicarious liability.

Justice Wilton-Siegel goes on to describe the evidence offered by the institutional policyholder after the insurer's review of the records with the policyholder plaintiff (at paras. 6 and 7):

> After a search by the defendant, the Citadel General Insurance Company, the successor in interest to Great American, the plaintiff has been able to locate only three insurance policies of Great American from the relevant period. It is agreed that one policy, in favour of Camston Limited, is of no relevance for purposes of this motion as the insured in the case of that policy carried on the business of a general contractor and, accordingly, the nature of the coverage under that policy would differ significantly from the coverage provided to the applicant under its policy. The other two were issued in favour of The Sisters of St. Joseph of the Diocese of London (the "St. Joseph Policy") and the Roman Catholic Episcopal Corporation of the Diocese of Sault Ste. Marie (the "Sault Ste Marie Policy"), respectively.
>
> The plaintiff submits these two policies are similar to what would have been issued in favour of the applicant. In particular, the applicant says that, as a non-profit organization charged with the welfare of children in its training program, its mission was similar to that of the two diocesan organizations and that it is a logical inference that it would have similar insurance coverage to those two organizations. In particular the applicant suggests the language in the Sault Ste. Marie Policy is the more appropriate. That policy includes coverage for assault and battery unlike the St. Joseph Policy which has an exclusion for intentional or criminal acts.

One might be persuaded at this juncture that finding historic policy wordings covering institutions in roughly similar circumstances would garner the court's support. However, recall that the issue here is "manuscript" wordings. We are not dealing with a company's "standard form" or pre-printed rider.

Justice Wilton-Siegel put the case between the two extremes offered by the precedents of *W.-V.(T) v. W.(K.R.J.)*, [1996] 29 O.R. (3d) 277 (S.C.J.) ["*W.V.T.*"] and *Catholic Children's Aid Society of Hamilton-Wentworth v. Dominion of Canada General Insurance Co.*, [1998] O.J. No. 3720 (Gen. Div.)(Q.L.)["*Catholic Children's Aid*"] both decided before the *Navy League* case came up for hearing. He stated (at para. 11):

> The present case falls mid-way between the facts in these two cases. On the one hand, the Insurance Advice Sheet clearly indicates that the coverage extended to comprehensive bodily injury and specifies the amount of the coverage. The applicant's position is, therefore, stronger than the position of applicant M in the *W.V.(T)* decision. On the other hand, there is no evidence to address the issue of the likely wording of the provisions relating to the comprehensive liability coverage as was the case in the *Catholic Children's Aid case.*

The issues were framed as follows (at para. 12):

> (a) Is there evidence which establishes a generic or customary approach among insurers respecting bodily injury coverage? and
>
> (b) If not, is there sufficient evidence of the

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policy wording of Great American to establish the probable provisions in the policy?

The first issue was the weakness in the case as the following passage from *Navy League* (3) demonstrate (at paras. 15 and 16):

> I agree with the position of the respondent on this issue. The applicant has not satisfied the onus on it to demonstrate the existence of any practice or any customary provisions in the industry at the time the policy was written which would allow the court to establish the terms of the policy.
>
> In this connection, I note that, while the applicant was able to locate the account manager at its broker during the relevant period, this individual did not provide support for the applicant's position as to the terms of the policy. I believe the court is entitled to draw the inference from the absence of any such evidence that policies written at this time exhibited sufficient variability with respect to significant issues bearing on the potential liability of the insured that it is unreasonable to presume the existence of any generic language dealing with bodily injury. I would also note that the Sault Ste. Marie and St. Joseph Policies themselves exhibit this variability in respect of liability for intentional acts.

In the result, the learned motions court judge concluded with some reluctance that (at paras. 19-22):

> [19] First, there is no evidence of any standard form policies of the insurer during the relevant period and therefore no evidence which suggests, much less establishes, that the wording in these policies represents standard or customary wording in policies written generally by Great American during the relevant period.
>
> [20] Second, there is evidence which suggests that the Sault Ste. Marie and St. Joseph Policies may, in fact, have been unique policies written by the insurer as part of a programme of insurance for 10 of the 13 Ontario dioceses of the Catholic Church. In particular, it is clear that these policies are "manuscript" policies whose wording was put together by a broker in connection with the programme created to insure these dioceses in Ontario. While it [is] possible the broker assembled the language used in these policies from other policies written by Great American, it is also possible that the broker selected provisions from policies written by other insurers which it preferred. In addition, there is no evidence that this policy wording was used by the broker in any policies other than the diocesan policies.
>
> [21] The unique nature of these policies is further indicated in the comments of Wilkins J. in *E.M. v. Reed*, [2000] O.J. No. 4791 (QL), 24 C.C.L.I. (3d) 229 (S.C.J.), at para. 96. Wilkins J. reviewed the Sault Ste. Marie Policy in a claim for indemnity against Great American under that policy. After consideration of evidence presented at the trial before him, Wilkins J. commented upon the breadth of the coverage for bodily injury under that policy as follows:
>
> The definition of the liability of the insurer for bodily injury under Insuring Agreement (A) is remarkably broad. Having included assault and battery and having put in the words set out above, the insurer has, in my view, broadened the scope of legal liability for bodily injury far beyond what might ordinarily be anticipated in a general liability policy of insurance.

> [22] Lastly, there is no evidence that the plaintiff's broker, located in Toronto, Ontario, had any familiarity with the provisions of these policies which were written through a broker in London, Ontario. I also believe that the court can infer from the absence of any guidance on this issue from the applicant's account manager at its insurance broker that the applicant's broker did not rely on the language of these two policies in settling the terms of the policy issued to the applicant.

A more recent case from Alberta, *Synod of the Diocese of Edmonton v Lombard Insurance Company of Canada*, [2004] A.J. No. 1287 (Q.B)(Q.L.) ["*Synod*"] perhaps highlights best, by contrast, that a more conventional company standard or industry form is more easily proven. In that case, as footnoted earlier, the broker of record was a key witness in establishing the continuity of the policyholder's commercial liability insurance program by reference to the later wording issued by a different insurer but reflecting a scope of coverage "similar to" the previous (and missing) wording.

**And So...?**

In conclusion, document retention protocols should be fair, consistent and, above all, forthright. As is evident from *E.M. v. Reed, Catholic Children's Aid* and the *Navy League* decisions, once full disclosure is ordered (upon proper proof that a policy exists) the result will invariably be fair to both the insurer and the policyholder. Likewise, fair concessions by Halwell in the *W.V.(T.)* case resulted in little controversy over the wording. Although not germane for our discussion in this article, for insurers it is worth noting that, in the end, a ruling favourable to Halwell was achieved based upon a standard form exclusion. Likewise, for policyholders, Wilkins J. in the *E.M. v. Reed* case gave the policyholder the benefit of a fair reading of the manuscript wording which was drafted in favour of broad, non-conventional coverage. Justice Wilkins was upheld on appeal on this point.

As the *Synod* case demonstrates, secondary evidence can have unexpected consequences for insurers. An insurer which otherwise concedes it issued a policy, cannot simply rely on the policyholder's failure to produce the document. With sufficient and compelling evidence, a court can be satisfied of the general insuring intent and continuity of a particular insurance program on a balance of probabilities.

Depending on the quality of the secondary evidence the court may be persuaded to use another insurer's pre-printed standard wording in its place if there is "no evidence that a unique policy was requested or created".

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