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Carneiro v. Durham: Implications

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The Additional Insured

- Very common, much litigated, often misunderstood.
- An important component of many commercial agreements (leases, services contracts)
- All about transferring the risks of the main activities being pursued by two or more entities in a common enterprise
- Achieved through many means: endorsements, certificates, definitions (“real estate manager”)
- Typical language: is an additional insured, but only with respect to the liabilty arising out of the named insured’s operations—in other words, vicarious liability.
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The Case Itself

- Important decision by Ontario Court of Appeal released December 22, 2015.
- Now the leading case in Ontario on insurance coverage for an additional insured.
- Case has unquestionably changed how the issue must be approached.
- Built upon about 5 years of contradictory case law in the lower courts.
- Court of Appeal first started to define the issues about 4 years ago. Caneiro pretty much eliminates any guess work about what the Court of Appeal will do.

The Case Itself

- Typical facts ("laundry list" of allegations):
- Car accident on icy road, municipality and road maintenance contractor sued.
- Municipality added to contractor's policy issued by Zurich as additional insured.
- Statement of Claim alleges: "car suddenly and without warning … began to slide and spin on ice".
- Also alleges negligent road design.
- Municipality and contractor crossclaim, contractor alleges negligent supervision for failure to call for snow removal equipment.

The Case Itself

- The Municipality tenders for defence under the additional insured provisions. Zurich denies defence to the Municipality, as there are uncovered allegations. Coverage application begins.

- Zurich admits some of the allegations are covered by its policy. However, Zurich maintains it is defending those allegations through its defence of the contractor.

- Zurich maintains the issue of defence costs apportionment be left for another day.

- Zurich won at the lower Court.

The Appeal

- Court of Appeal
  - "Zurich is therefore obligated to pay the reasonable costs of Durham's claims. However, it is not obligated to pay costs related solely to the defence of uncovered claims" [citing Hanis]

- Court notes:
  - Policy contains unqualified promise to defend
  - The allegations trigger the duty
  - Zurich did not satisfy its obligation defending the contractor
  - Duty to defend is a separate contractual obligation
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The Appeal

"The true nature of the claim was clearly expressed in the Statement of Claim – the deceased lost control of his car because it skidded on the ice and snow on the roadway. That pleading, coupled with the allegation that [the municipality] and [the contractor] failed to keep the road clear of ice and snow, relates directly to the contractor's obligations under the contract. It engages Zurich's obligation to defend [the municipality] subject to any qualification of the policy."

The Appeal

- Court of Appeal was concerned:
  - duty to defend applies to mixed claims
  - additional insured coverage has meaning; additional insured has independent rights including a right to a defence
  - the outcome of trial is irrelevant to a duty to defend
  - Zurich is entitled to seek an apportionment of defence costs solely for uncovered claims and only after the conclusion of the proceedings (or earlier by agreement)
  - costs awarded to Durham
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The Implications

- Immediate increase in tender demands by Municipalities, landlords
- Loss of the leverage to negotiate cost sharing agreements. All the old case law is essentially irrelevant now.
- The Court of Appeal has now demonstrated in two additional insured cases (Carneiro and TD v. Tedford) that it wants reallocation to occur at the end of the day.
- This means the interim defence of the additional insured.

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The Implications

- Really only three choices now:
  - Deny outright. It will be hard to win the coverage application, unless the pleading is unique or there is a coverage defence unconnected to the pleading (e.g. breach of condition).
  - Assume defence using single counsel. Attractive option, but severely restricted by conflict issues and may or may not be able to reserve on indemnity (more on this in a moment).
  - Appoint separate counsel for the additional insured; reserve all indemnity rights; pay for the defence; don't receive reports; and don't expect to receive substantial contribution to indemnity from the other insurer (you don't really have any leverage anymore). Reallocation of defence costs occurs after the crossclaims have been tried.

The Conflict of Interest Issue

- It is not possible for the same lawyer to represent two parties where there is an unresolved conflict of interest between the parties.
- Asserting that your co-defendant is at fault for an injury creates a conflict of interest.
- Assuming the defence by appointing a single lawyer needs to resolve the conflict.
- In a recent case the Court of Appeal has demonstrated the conflict must be very carefully handled.

The Conflict of Interest Issue

- *Seidel v. Markham*, 2016 ONCA 306
- Insurer agreed to assume defence of additional insured. It appointed a single firm to defend both parties. No formal joint defence agreement was reached.
- Court of Appeal recognized there are three options open to insurers. But there was an important qualification to the shared defence option.
- The Court of Appeal implied that in order to utilize a single lawyer requires recognition that the two parties interests are now aligned or the same.
- The Court suggested that this means there was "an obvious and untenable conflict of interest."

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The Conflict of Interest Issue

- The act of defending the additional insured without a fully expressed agreement allowed the Court of Appeal to determine the terms.

- The Court implied that the insurer had not successfully reserved its indemnity rights---the insurer had therefore agreed to fully indemnify the additional insured, even though at the end of the day there was actually no coverage under the policy.

- The Court actually implied that it is not possible to defend with a single lawyer and also reserve indemnity. In our view that goes too far. Clients are permitted to waive conflicts of interest. A properly drafted agreement should be able to resolve this problem—but what incentive on the additional insured to agree?

Unresolved Issues

- Is an additional insured ever responsible for a deductible?
- The effect of a condition breach by a named insured on an additional insured?
- Notice period for additional insured?
- Pre-tender defence costs?
- How do pleading amendments or partial settlements affect the obligation to an additional insured (note: you may need to seek pleading amendments or creative settlement agreements)

Other Sources of Coverage

- Other insurance clauses – these need to be looked at in every case. Standard IBC wording typically makes the CGL excess to any policy providing coverage by way of additional insured endorsement—but it is prudent to check.

- Over limits claims—there may be opportunity to seek equitable contribution from the other insurer on the basis it provides excess coverage.