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Negligence or Intent – Soccer Game Turns Ugly

Reported Case: *Economical Mutual Insurance Company v. Doherty*

Citation: 2009 BCSC 959

At Issue: Duty to defend. Does an insurer owe a duty to defend when a policy excludes intentional acts, but the pleadings suggest the defendant is negligent?

The Court: British Columbia Supreme Court

Judgment Rendered: July 15, 2009

Factual Summary: In the underlying tort action the plaintiff claimed damages for injuries sustained in a soccer game in which he was kicked in the head by the respondent, Mr. Doherty.

Economical Mutual Insurance Company ("Economical") issued a homeowners insurance policy to Mr. Doherty, and Aviva issued a policy to the British Columbia Soccer Association. Both were in force at the time of the soccer game, and both policies excluded coverage for intentional acts.

The insurers argued that although the amended statement of claim plead that Mr. Doherty was "negligent" on striking the plaintiff, the particulars of negligence described only intentional acts.

The court also considered whether the pleading of recklessness in the context of this statement of claim alleged intentional conduct.

Decision: The insurers were entitled to their declaration that they do not have to defend the claim. While coverage provisions should be construed broadly and exclusion clauses narrowly, the true nature of the cause of action must be looked at. In this case, the particulars of the claim disclosed an intentional act that was not an accident or occurrence under either of the insurer's policies.

Reckless conduct and negligent conduct are not the same concepts, and recklessness is not a term with a fixed meaning in the law of tort. Although the authorities show that "accident" includes negligence, if the actions of the Insured were so reckless that they amounted to a deliberate knowledge of, and courting of, risk then it cannot be said that the damage resulting from those actions were caused by "accident".
The Court relied on the decision of *Non-Marine Underwriters, Lloyd's of London v. Scalera,* 2000 SCC 24 which held that the correct approach is to ask whether the allegations, properly construed, sound in intentional tort. If they do, the plaintiff's use of the work "negligence" will not be controlling. The tort of intentional battery generally requires only the intent to cause the physical consequences.

The claim was therefore one with respect to an intentional act and fell within the insurers’ exclusion policies.

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