
The Pleading Rule - Substance and True Nature of a Claim

Reported Case:	<i>Penticton (City of) v. AXA Pacific Insurance Company</i>
Citation:	2009 BCSC 1404
At Issue:	When does an insurer have a duty to defend an additional insured? How should defence costs for covered and non-covered allegations be allocated?
The Court:	British Columbia Supreme Court
Judgment Rendered:	October 14, 2009
Factual Summary:	<p>The plaintiff City hired a contractor to work on a roadway. The contractor named the City as an additional insured on its liability insurance.</p> <p>Four accidents subsequently occurred in which it was alleged that a stop sign was negligently removed. One action named the City as a defendant and the contractor issued third party notices against the City. The claims were settled and the City was not required to contribute but they incurred costs for legal defence.</p> <p>The insurer refused to indemnify the City because they claimed that liability was the result of the City's failing to replace the stop sign.</p>
Decision:	<p>Madam Justice Kerr reiterated the "pleadings rule": a duty to defend is based only on alleged facts in the pleadings: if they would require an insurer to indemnify an insured, then they must defend. Kerr J. also noted that the duty to defend arises where the claim alleges acts falling within policy coverage. The duty to indemnify arises when the allegations are proven at trial.</p> <p>She further ruled that the court must not examine an underlying claim from the insurer's view of its validity. The proper test is the "substance and true nature of the claim." In this case, in all the underlying actions the cause of the accident was an act alleged to have been done by the contractor and thus triggered the duty to defend the City.</p> <p>Where a claim alleges multiple causes of action, some within and some outside of coverage, the insurer is bound to defend the insured regarding the claims within coverage. If apportionment is possible, it should be done. If the claims are inextricably tied together and apportionment is not possible, the insurer must defend the insured on all the claims.</p> <p>Here, Kerr J. found that "[e]ven if it could be said that the pleadings contain allegations that are both within and some are outside the coverage, the claims are, in my opinion, so intertwined that there is no rational or practical basis for distinguishing costs related to the covered and arguably non covered claims."</p>