

Case Study: Pembridge Insurance Company of Canada v. Chu

Defence + Indemnity

August 2020 - 6 min read

The insurer was obligated to defend its insured under a homeowner policy where its insured was alleged to have engaged in a road rage assault against another driver after the insured stopped and exited from his own vehicle – it was not sufficiently clear that the resulting injuries arose from the ownership, use or operation” of the insured’s vehicle.

Pembridge Insurance Company of Canada v. Chu, 2019 ONCA 904; lv. to appeal to the S.C.C. dismissed 2020 CarswellOnt 2801 (S.C.C.)

Facts and Issues

The Plaintiff Moran sued the Defendant Fabrizi for injury, alleging that Fabrizi ran a red light. Fabrizi third partyed Dennis Chu. Chu was alleged to have driven negligently and then to have exited his vehicle and threatened Fabrizi and her passenger with violence, yelled at them and hit various parts of the Fabrizi vehicle and made gestures at Fabrizi and her passenger, all of which put them in fear for their lives. It seems to have been alleged that this caused Fabrizi to drive away from Chu and run the red.

Dominion Insurance had issued an auto policy to Dennis Chu and conceded that it had a duty to defend him regarding the vehicular negligence allegations.

At the time, Chu lived at home and his father John Chu had a homeowner policy from Pembridge Insurance. Pembridge’s policy had an exclusion clause which excluded claims arising from “the ownership, use or operation of any motorized vehicle”. That policy also excluded coverage for injury “caused by any intentional or criminal acts” of an insured. Pembridge denied coverage to the Chus on the basis of these exclusions.

The motions judge held that Pembridge had no duty to defend the Chus. He did not compare the allegations against them in the pleadings with the Pembridge policy but held that it was “more appropriate” that they be defended by the auto insurer, Dominion. He concluded that the auto insurer Dominion was bound to defend Chu as his acts after leaving his vehicle were incident to the ownership, use or operation of that vehicle. He found that Pembridge had no duty to indemnify the Chus.

Dominion appealed.

HELD: For the auto insurer Dominion; appeal allowed.

1. The Court summarized the principles relating to an insurer’s duty to defend:

7 The insurer is obliged to defend if a claim alleges facts which, if proven, would fall within the insurer’s policy coverage. A judge hearing a duty to defend coverage dispute is precluded from fact-finding on matters at issue in the underlying tort action: *Cooper v. Farmers’ Mutual Insurance Co.* (2002), 59 O.R. (3d) 417 (Ont. C.A.) , at para. 13.

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8 The mere possibility that a claim on the policy may succeed is sufficient to engage an insurer's contractual duty to defend: **Cooper** at para. 15.

9 If pleadings are not framed with sufficient precision to determine whether the policy covers the claims, the insurer's obligation to defend will be triggered where, on a reasonable reading of the pleadings, a claim within coverage can be inferred. Coverage clauses are construed broadly, while exclusion clauses should be interpreted narrowly: **Monenco Ltd. v. Commonwealth Insurance Co.**, 2001 SCC 49, [2001] S.C.R. 699 (S.C.C.), at para. 31.

10 Whether or not another insurer also has a duty to defend based on the construction of another policy and a comparison with the pleadings is not relevant to this determination.

2. The Court held that the intentional or criminal act exclusion in the Pembridge policy did not apply because it only applies where the insured intended the injury and there was no allegation that Chu intended to harm the Plaintiff Moran or the Defendant Fabrizi:

14 The Pembridge homeowner policy also excludes bodily injury "caused by any intentional or criminal acts" by any person insured by the policy. Dennis Chu's alleged conduct after he left his vehicle was intentional in the sense that it was advertent behaviour. However, in **Non-Marine Underwriters, Lloyd's London v. Scalera**, 2000 SCC 24, [2000] 1 S.C.R. 551 (S.C.C.), a clause excluded insurance coverage for bodily injury "caused by any intentional or criminal act". In the context of damage claims for sexual battery, the Supreme Court of Canada concluded that this clause could not be read literally. Instead, the exclusion clause had to be read to require that in addition to the intentional act, there was also intent to injure: **Scalera**, at paras. 37 and 92.

15 Here, there is no allegation that Dennis Chu intended to harm the plaintiff, Moran. There is also no allegation that Dennis Chu intended to harm Fabrizi. It is not clear that the assaults and threats attributed to Dennis Chu would be sufficient to invoke the exclusion. Based on **Scalera**, it is arguable that the intentional or criminal act exclusion has no application. Again, since the exclusion clause may be narrowly construed, and since there is a possibility that Pembridge may have to indemnify the Chus depending on what facts are ultimately found, there is a duty to defend.

3. The Court held that it was arguable that Chu's conduct after leaving the vehicle was not incident to the ownership, use or operation of the vehicle and thus not excluded from coverage under the Pembridge homeowner policy. Therefore, it was possible that the Pembridge policy might be required to indemnify at the end of the day and thus owed a duty to defend:

11 At the time of the threats and assaults attributed to Chu, he was no longer in his vehicle and was not using the car. This gives rise to an argument that the chain of causation — connecting use of Chu's car with the alleged threats and assaults, Fabrizi's flight, and Fabrizi's collision with Moran — was broken. We note that, under similar circumstances, the court in **Tench v. Erskine** (2006), 244 N.S.R. (2d) 55 (N.S. S.C. [In Chambers]), concluded that the claim could not be said to have arisen out of the ownership, use or operation of a vehicle, and the auto insurer was under no duty to defend. Without deciding whether the decision in **Tench** would be the same in Ontario, it serves to demonstrate that there is more than one possible outcome to the events in this case.

12 It is arguable that the exclusion in the Pembridge homeowner policy for acts arising from "the ownership, use or operation of any motorized vehicle", when construed narrowly, does not apply to Chu's alleged assaults. In other parts of the policy, Pembridge excluded coverage for matters such as terrorism or fungal contamination where there are other causes of the losses, whether concurrent or sequential. In other exclusions, Pembridge uses the language of bodily injury arising "directly or indirectly" from an excluded event. The automobile exclusion does not include that language. Consequently, a court might conclude that the automobile exclusion in the Pembridge homeowner policy did not apply so as to exclude coverage for Chu's actions after he got out of his car: see, for instance, the discussion in **Consolidated-Bathurst Export Ltd. c. Mutual Boiler & Machinery Insurance Co.** (1979), [1980] 1 S.C.R. 888 (S.C.C.) at pp. 898-899.

4. The Court held that the motions judge had erred in concluding that Pembridge owed no duty to indemnify the Chus. It held that this is not a determination made at a pre-trial application regarding the duty to defend:

16 Finally, as indicated above, a duty to defend motion does not resolve the ultimate factual issues as to a duty to indemnify. That motion involves comparing allegations in the pleadings and the relevant policy. Findings of fact are not made about the accident's circumstances. Determination of ultimate responsibility for indemnity must await those findings of fact.

17 The motions judge erred in ordering that “Dennis Chu’s actions after exiting the vehicle is now deemed to be incident to the ownership, use or operation of a vehicle”. He also erred in giving judgment that the Chus were not entitled to indemnity from Pembridge, and that Dominion, and the trial judge, were bound by his determination of coverage as between Pembridge and the Chus.

5. The Court rejected Pembridge’s argument that Dominion had waived its right to claim that the Pembridge policy provided coverage by conceding Dominion’s duty to defend Chu. That concession does not relate to the question of whether or not Pembridge owed a duty to defend under its policy:

19 For the first time on appeal, Pembridge argues that Dominion should be considered to have waived the right to assert that Pembridge had a duty to defend, because Dominion acknowledged its duty to defend, based on the claim relating to Dennis Chu’s driving and did not, in any way, reserve its rights. This is not necessarily inconsistent with another insurer’s duty to defend under a different policy. There is no clear evidence of waiver here, and the motions judge did not deal with this issue as it was not argued before him. It would be inappropriate to deal with this new issue on appeal, particularly given the state of the record: *Kaiman v. Graham*, 2009 ONCA 77, 245 O.A.C. 130 (Ont. C.A.) , at para. 18.