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CASE SUMMARY: INSURER'S DUTY TO DEFEND IS TRIGGERED IN CLAIM FOR COVERAGE WHERE PLEADINGS CONTAIN BOTH COVERED AND UNCOVERED CLAIMS

In considering a claim for coverage, allegedly negligent acts will not be considered the same as allegedly intentional acts for the purpose of the derivative claim analysis if it is possible that the acts were not committed with the same intention or state of mind as other causes of action in the pleading.

Insurance law – Homeowner's insurance – Bodily injury – Exclusions – Duty to defend – Derivative claims; Actions – Intentional torts; Practice – Pleadings

[Co-operators General Insurance Co. v. Kane](#), [2017] B.C.J. No. 1920, 2017 BCSC 1720, British Columbia Supreme Court, September 27, 2017, S.C. Fitzpatrick J.

The insured sought defence and indemnity coverage under his home insurance policy for an action brought against him in New York State (the "Complaint"). The insurer denied coverage on the basis that the causes of action alleged intentional acts and thus did not constitute "unintentional bodily injury" as required by the policy. The insurer filed a petition seeking an order that it had no duty to defend its insured while the insured filed its own petition seeking coverage and costs. The insurer argued that other causes of action in the Complaint were derivative of the intentional act and thus also not covered by the policy.

The Complaint set out four causes of action:

1. the insured battered her in his hotel room;
2. the insured intentionally and/or recklessly engaged in extreme and outrageous conduct towards her in a manner that exceeded all reasonable bounds of decency;
3. the insured engaged in conduct that unreasonably endangered her physical safety; and
4. the insured negligently caused serious permanent and painful injuries to her.

The Court agreed with the insurer that there was no coverage for the first cause of action as battery is an intentional tort and not a tort resulting in unintentional bodily harm. The Court disagreed with the insurer that the remaining causes of action were derivative of the intentional tort alleged in the first cause of action. The Court agreed with the insured that allegedly negligent acts should not be considered the same as allegedly intentional acts (for the purposes of the derivative claim analysis) if it is possible that they were not committed with the same intention or state of mind, namely to injure the complainant.

The derivative claim analysis will only exclude a defence if there is no possibility that the insured will be found liable in negligence because all of the allegations made depend on a finding that the complainant was intentionally injured in order to be successful.

The judge concluded that the complainant could succeed in her third and fourth causes of action against the insured without proving an intent to injure. The lack of detail in the Complaint did not preclude the Court from resolving the matter in the insured's favour.

On a widest possible reading of the pleading, it was possible for a claim to succeed that would fall within coverage. Accordingly, the insurer's duty to defend was triggered.

The Court found that the policy's abuse exclusion did not apply as the Complaint did not clearly and unambiguously allege "abuse".

Finally, the insurer was ordered to pay costs on a full indemnity or solicitor and own client basis. Citing recent British Columbia authority, the Court found that where the policy intended full indemnity in relation to defence costs, any expenditure by the insured in enforcing that objective would, if successful, be followed by a cost award that similarly achieved that objective.

This case was digested by [Raylene M. Smith](#) and first posted on Quicklaw and published in the Harper Grey Insurance Law Newsletter. If you would like to discuss this case further, please contact [Raylene M. Smith](#) at rsmith@harpergrey.com.

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