COURT OF APPEAL FOR ONTARIO

CITATION: Ontario v. St. Paul Fire and Marine Insurance Company, 2023 ONCA 173
DATE: 20230315
DOCKET: C70170

Paciocco, George and Favreau JJ.A.

BETWEEN

His Majesty the King in Right of Ontario

Appellant

and

St. Paul Fire and Marine Insurance Company

Respondent

Clarence Lui and Nicola Brankley, for the appellant

Andrew A. Evangelista, Deema Elshourfa and Avi Cole, for the respondent

Heard: November 7, 2022

On appeal from the order of Justice Jasmine T. Akbarali of the Superior Court of Justice, dated November 25, 2021, with reasons at 2021 ONSC 7786.

Paciocco J.A.:

OVERVIEW

[1] The appellant, His Majesty the King in the Right of Ontario ("Ontario"), appeals the decision of an application judge denying a declaration that its general liability insurer, St. Paul Fire and Marine Insurance Company ("St. Paul"), had a duty to defend Ontario in connection with a class action proceeding (the

"underlying action"). The application judge denied the "duty to defend" declaration after concluding that the coverage clauses in the two material insurance policies (which I will call the "First Policy" and the "Second Policy") did not include the claims made in the underlying action.

[2] Ontario argues that the application judge made a number of errors in interpreting the policies. I do not accept all of Ontario's arguments, but I do agree that the application judge misinterpreted the Second Policy. The Second Policy does provide coverage for the kind of damage claimed.

[3] I would nonetheless dismiss Ontario's appeal because the application judge's alternative conclusion, that Ontario's application was premature, is correct. As I will explain, under the Second Policy St. Paul is not required to assume responsibility for paying Ontario's defence costs until Ontario has incurred $5,000,000 in payment obligations, including defence costs. At the time of the application (and to this day) Ontario has incurred an approximate total of $300,000 in payment obligations as a result of the class action proceeding. The application judge was therefore correct in denying the declaration that Ontario sought. St. Paul had no duty to defend.

MATERIAL FACTS

[4] On June 29, 2017, a proposed $300,000,000 class action claim was commenced against Ontario arising from delays in the operation of Ontario's bail

release system. In this underlying action the plaintiff, Robin Cirillo, sought damages based on alleged negligence, breach of fiduciary duties, and breaches of the *Canadian Charter of Rights and Freedoms*, on behalf of persons who, between January 1, 2000, and "the present", were arrested and then detained for more than 24 hours prior to receiving a bail hearing.

[5] The period of 24 hours was no doubt chosen because of s. 503(1) of the *Criminal Code*, R.S.C. 1985, c. C-46. This section requires an arresting officer to "cause the [arrested] person to be taken before a justice to be dealt with according to law" without unreasonable delay, and in any event "within a period of 24 hours", unless a justice is not available within that period, in which case the appearance is to occur "as soon as possible". If this section is not complied with, the detention has not been administered according to law.

[6] The claims that were made in the underlying action were punctuated by pleadings that Ontario intentionally under-resourced the bail system and pursued policies that would increase the number of persons in remand, knowing that this would result in unnecessary detention, causing significant harm to class members, including loss of income and employment, dislocation from family and friends, and physical and psychological harms.

[7] Anticipating that it would have insurance coverage for the claims made in the underlying action, Ontario provided notice of the claim to St. Paul, which had

issued two successive general liability commercial policies to Ontario during the period contemplated by the underlying action. Of note, neither of these two policies was a standard form commercial general insurance ("CGL") policy adopted by the Insurance Bureau of Canada. The First Policy included coverage of $20,000,000 for each "occurrence" from March 31, 1998, to March 31, 2003. Under the Second Policy, which operated from March 31, 2003, to March 31, 2005, Ontario was self-insured for the first $5,000,000, described in the Second Policy as the "Ultimate Net Loss", while St. Paul provided insurance of $15,000,000 for each "occurrence" in "excess of the Ultimate Net Loss".

[8] As anticipated by the insurance policies, Ontario retained Crown Law Office – Civil, a branch of the Ministry of the Attorney General, to defend the underlying action and kept St. Paul apprised of the progress of the litigation. In its Statement of Defence Ontario resisted liability, in part on the basis that its policy decisions are not justiciable or actionable.

[9] On May 23, 2019, a motion judge denied certification for the underlying action.[1] By that point, Ontario had expended approximately $300,000 worth of legal services defending the claim. On June 5, 2019, shortly after the motion judge's decision was released, St. Paul advised Ontario that it had concluded that

---

[1] *Cirillo v. Ontario*, 2019 ONSC 3066. An appeal of the certification decision to this court was denied on May 26, 2021: *Cirillo v Ontario*, 2021 ONCA 353. Leave to appeal to the Supreme Court of Canada was denied: [2022] S.C.C.A. No. 39811.

there was no available coverage for the claim. Correspondence was exchanged but St. Paul maintained its position that there was no coverage and that it would not indemnify Ontario for its legal costs.

[10] On September 27, 2019, Ontario instituted an application for a declaration that St. Paul had a duty to defend it in the underlying class action. In its Notice of Application Ontario used singular language, referring to “a policy” and “the policy”. The only policy described in the Notice of Application was the First Policy. In its “grounds for the application” Ontario said:

> (a) Between March 31,1998 and March 31, 2003, the applicant was insured by the respondent for general liability, with a limit of $20,000,000 for each occurrence, pursuant to the terms of a Comprehensive General and Road Liability Police no. ON GEN 21525 (the ‘policy’);
>
> (b) The applicant was self-insured effective April 1, 2003;
>
> …

[11] On November 25, 2021, the application judge dismissed Ontario’s application, finding that St. Paul did not have a duty to defend under either the First Policy or the Second Policy. Ontario now appeals that decision.

[12] The parties do not contest the principles that apply in a duty to defend application. They can be stated as follows:

- If the pleadings allege facts which, if true, would require the insurer to indemnify the insured for the claim, the insurer is obliged to provide a

defence: *Monenco Ltd. v Commonwealth Insurance Co.*, 2001 SCC 49, [2001] 2 S.C.R. 699, at para. 28.

- If there is any possibility, based on a reasonable reading of the policy, that a claim falls within the liability coverage such that there could be coverage the insurer has a duty to defend the insured against that claim: *Non-Marine Underwriters, Lloyd's of London v. Scalera*, 2000 SCC 24, [2000] 1 S.C.R. 551 at para. 52; *Tedford v. TD Insurance Meloche Monnex*, 2012 ONCA 429, 122 O.R. (3d) 144, at para. 14, citing *Nichols v. American Home Assurance Co.*, [1990] 1 S.C.R. 801, at p. 810. "In this sense, the insurer's duty to defend is broader than the duty to indemnify": *Monenco*, at para. 29, citing *Nichols* at p. 810; *Panasonic Eco Solutions Canada Inc. v. XL Speciality Insurance Company*, 2021 ONCA 612, 466 D.L.R. (4th) 276, at para. 22. (For convenience, I will call this the "possibility of coverage test".)
- In determining whether coverage is possible, a court must look beyond the labels used to describe the claims and ascertain the substance and true nature of the claim: *Scalera*, at para. 50.
- Any doubt as to whether the pleadings bring the incident [or event] within coverage ought to be resolved in favour of the insured. Coverage clauses should be construed broadly in favour of coverage, and exclusion clauses should be construed narrowly: *Monenco*, at para. 31; *Tedford*, at para. 14.

Where the policy is ambiguous, effect should be given to the reasonable expectations of the parties: *Tedford*, at para. 14, citing *Scalera*, at para. 71.

- If coverage for intentional torts is excluded, there will be no duty to defend a negligence claim if the alleged negligence claim is based, in substance, on the same harm as the excluded intentional tort: *Scalera*, at para. 51. There will be no duty to defend the negligence claim in such a case because the negligence claim is not distinct from the intentional torts but "derivative".

[13] In this case, after a close examination of the pleadings the application judge held that "the true nature of the claims pleaded has to be understood to include not only that Ontario engaged in intentional acts that caused harm, but that it had knowledge of the harms that would flow from those intentional acts." She concluded that essentially, "the character of the allegations made against Ontario [is] that it knew its decisions caused specific harms to the class but took no steps to address those harms, and indeed, adopted policies that exacerbated those problems."

[14] The application judge then concluded that although the pleadings included the negligence-based language of reasonable foreseeability, this language was included to ensure that all elements of the tort of negligence were properly pleaded. In substance, the allegation went beyond negligence and was "at the very least" that Ontario was "knowingly indifferent" to the harms it was causing. The application judge concluded, "In the circumstances, the claim in negligence is

derivative in nature from the intentional acts Ontario is alleged to have engaged in."

[15] The application judge then turned to the First Policy. The policy included coverage for damages because of (a) Bodily Injury and (b) Personal Injury. In both cases, the damages had to be "caused by an accident or occurrence". These terms are defined in the policy in material part as follows:

> Bodily Injury means bodily injury … nervous shock, mental suffering, mental injury, mental anguish including death resulting therefrom and such other causes of injury to a person, at any time resulting therefrom…
>
> Personal Injury means:
>
> (a) false arrest, malicious prosecution, wilful or wrongful detention or imprisonment, or
>
> (b) libel, slander, defamation of character, or …
>
> including any other legal action alleging the foregoing by any other name or description.
>
> Occurrence means a continuous or repeated exposure to conditions which results in injury and/or damage neither expected nor intended from the standpoint of the Insured.… [Emphasis added.]
>
> Accident includes a continuous or repeated exposure to conditions which results in property damage or bodily injury neither expected nor intended by the Insured. [Emphasis added.]

[16] The application judge held that the claim falls within the definition of both Bodily Injury and Personal Injury within the policy. She then recognized that "given the definition of 'personal injury' in particular, it is apparent that the policy insures

against intentional acts". But after focusing on the phrase "neither expected nor intended from the standpoint of the Insured" she concluded that "to fall within the coverage provision, the injury for which the plaintiff seeks redress in the underlying litigation cannot be injury that was expected or intended from Ontario's standpoint."

[17] Having held that "[t]he true nature of the claims … are intrinsically tied to the allegation that the harms that resulted were, from Ontario's standpoint, expected" the application judge concluded that the damages were therefore not "caused by an accident or occurrence" and "the coverage provision plainly and unambiguously does not extend coverage to the underlying litigation". There was therefore no duty to defend arising out of the First Policy.

[18] The application judge then turned to the Second Policy. As I have described, this policy provided a limit of liability of $15,000,000 for each Occurrence, however, that limit was also subject to a $5,000,000 per Occurrence self-insured retention, referred to as the "Ultimate Net Loss".

[19] The coverage provision in the Second Policy provided, in material part, that the insurer would pay compensatory damages exceeding the Ultimate Net Loss on behalf of the insured because of (1) Bodily Injury and (2) Personal Injury. Unlike the First Policy, the Second Policy did not cover damages "caused by an accident or occurrence." For both Bodily Injury and Personal Injury, it required the compensatory damages to be "caused by an Occurrence during the Policy Period."

[20] The definitions of Bodily Injury and Personal Injury in the Second Policy are substantially similar to those found in the First Policy, providing as follows:

> Bodily Injury means bodily injury … nervous shock, mental suffering, mental injury, mental anguish, including death resulting therefrom and such other causes of injury to a person, at any time resulting therefrom…
>
> Personal Injury means:
>
> (a) false arrest, malicious prosecution, wilful or wrongful detention or imprisonment; or
>
> (b) libel, slander, defamation of character; or
>
> …
>
> (g) any other legal action alleging the foregoing by any other name or description.

[21] However, the definition of Occurrence differs materially between the two policies. In the Second Policy it reads in material part:

> Occurrence, with respect to Bodily Injury … includes a continuous or repeated exposure to the same general harmful conditions, which results in injury or damage neither expected nor intended from the standpoint of the Insured and, with respect to Personal Injury and Advertising Injury, means any act falling within the scope of those definitions…. [Emphasis added.]

[22] The application judge noted that unlike the First Policy, the Second Policy does not provide coverage for “accidents”, but then continued:

> However, “occurrence,” with respect to “bodily injury or property damage” continues to require that the resultant injury or damage must be “neither expected nor intended from the standpoint of the Insured.” Thus, for the reasons

> above [pertaining to the First Policy], I conclude that the [Second] policy does not respond to the claim either.

[23] Having resolved on this basis that there was no duty to defend, the application judge did not address any of the exclusion clauses in the policy.[2] She explicitly declined to address the "fortuity principle" that St. Paul had argued because it was unnecessary to do so, but went on to express agreement with St. Paul's alternative submission that the claim for coverage under the Second Policy is premature at this stage because it "only responds once there has been a covered claim in excess of the 'ultimate net loss,' which the policy defines to be $5,000,000 per occurrence" and "Ontario [had] incurred defence costs of [only] approximately $300,000."

ISSUES

[24] Although Ontario did not articulate its grounds of appeal precisely as follows, its submissions raised the following grounds of appeal:

A. Did the application judge fail to apply the possibility of coverage test?
B. Did the application judge err in considering extrinsic evidence?
C. Did the application judge err in identifying the true nature of the claim?
D. Did the application judge err in finding the negligence claims to be derivative?

---

[2] The parties on appeal agree that none of the exclusion clauses in either of the insurance policies apply.

E. Did the application judge err in failing to apply the nullification doctrine?

F. Did the application judge err in interpreting the coverage for an Occurrence under the Second Policy?

G. Did the application judge err in failing to apply the fortuity principle?

H. Did the application judge err in concluding that the application was premature?

[25] In the analysis that follows, I will explain why I would reject grounds of appeal A-E, and G-H. I will also explain why, although I would accept Ontario's arguments relating to ground of appeal F, I would nonetheless dismiss the appeal. Put simply, the application judge's error in interpreting the Occurrence provision of the Second Policy does not undermine her decision to deny Ontario's application for a declaration because she was correct in finding, in the alternative, that the application for a declaration was premature.

ANALYSIS

A. DID THE APPLICATION JUDGE FAIL TO APPLY THE POSSIBILITY OF COVERAGE TEST?

[26] I would not accept Ontario's submission that the application judge erred by failing to apply the possibility of coverage test. The application judge expressly recognized that the duty to defend "extends only to claims that could potentially trigger indemnity under the policy." When she stated her conclusion, she did so

unequivocally, saying “the coverage provision plainly and unambiguously does not extend coverage to the underlying litigation.” It is clear that the application judge was satisfied that there was no possibility of coverage.

B. DID THE APPLICATION JUDGE ERR IN CONSIDERING EXTRINSIC EVIDENCE?

[27] I would not find that the application judge erred, contrary to the “pleadings rule”, by considering extrinsic evidence when determining the true nature of the underlying claim. The “pleadings rule” holds that a “court may look only to the provisions of the policy and to the pleadings in the underlying action to determine whether the insurer has a duty to defend the insured”: *IT Haven Inc. v. Certain Underwriters at Lloyd’s, London*, 2022 ONCA 71, 18 C.C.L.I. (6th) 219, at para. 35. This rule, which ordinarily prevents courts from considering other “extrinsic evidence”, is intended to encourage expedition and to discourage factual findings that could prejudice the underlying action: *IT Haven Inc.*, at paras. 38-39. However, there is an exception to the pleadings rule that permits courts to consider extrinsic evidence that is explicitly referred to in the pleadings in the underlying action: *Monenco*, at para. 36; *IT Haven Inc.*, at para. 37. The reports critical of Ontario’s bail release system that the application judge considered fall within this exception since they were referred to in the pleadings in the underlying action. Moreover, the application judge cited these documents without making factual findings, while listing multiple passages from the pleadings that supported her characterization of

the true nature of the underlying claim. Simply put, she used this extrinsic evidence without violating the pleadings rule, and without creating any of the mischief the pleadings rule is intended to prevent. I would dismiss this ground of appeal.

C. DID THE APPLICATION JUDGE ERR IN IDENTIFYING THE TRUE NATURE OF THE CLAIM?

[28] I would not accept Ontario's submission that the application judge erred in identifying the true nature of the claims made, by failing to give Ontario the benefit of the ambiguity in the policy. Ontario argued that given the "negligence" language in the policy such as "reasonable foreseeability" and "ought to have known", the application judge should have proceeded on the basis that the claim goes beyond knowing conduct and includes objectively unreasonable or negligent conduct. In my view, the application judge engaged in a careful and coherent analysis of the pleadings as a whole. As indicated in paragraph 17 above, she stated that the outcome she arrived at was unambiguous. I see no basis for interfering with her characterization of the true nature of the claim advanced.

D. DID THE APPLICATION JUDGE ERR IN FINDING THE NEGLIGENCE CLAIMS TO BE DERIVATIVE?

[29] For the same reasons I have just expressed I would not accept Ontario's challenge to the application judge's finding that, in substance, the negligence claims were derivative. I see no error in the application judge's conclusion that

when the claim is read as a whole, the true nature of the negligence claims is that they rest upon allegations of intentional conduct causing expected injuries.

E. DID THE APPLICATION JUDGE ERR IN FAILING TO APPLY THE NULLIFICATION DOCTRINE?

[30] I am not persuaded that the application judge's decision nullifies coverage under the policy, contrary to the "nullification doctrine".

[31] The "nullification doctrine" prevents insurance contracts from being construed so as to defeat the coverage the policy provides, thereby defeating the very objective of the insurance contract and rendering it nugatory: *Cabell v. The Personal Insurance Company*, 2011 ONCA 105, (2011), 104 O.R. (3d) 709, at para. 15, citing Estey J. in *Consolidated-Bathurst v. Mutual Boiler*, [1980] 1 S.C.R. 888, at pp. 901-2. Ontario argues that the nullification doctrine is contravened by the application judge's finding that the term "neither expected nor intended from the standpoint of the Insured" prevents coverage for damages that Ontario knew the class would suffer. It is Ontario's position that this finding nullifies the Personal Injury coverage for intentional torts, which is expressly provided for in both policies.

[32] At first blush, this submission is alluring but it fails to recognize the important distinction between "the intention to cause injury itself … and the intention to commit the act that causes the injury": *Liberty Mutual Insurance Co. v. Hollinger Inc.*, 236 D.L.R. (4th) 635 (Ont. C.A.), at para. 18, citing Craig Brown *et al*.,

Insurance Law in Canada, loose-leaf (Toronto: Thomson Reuters Canada Ltd., 2002), at 18:178 to 18:179. Put simply, if the words "neither expected nor intended from the standpoint of the Insured" purported to prevent coverage that the policy provides for intentional acts, the nullification doctrine would likely apply, but in my view the nullification doctrine does not apply where, as here, the policy can be construed as providing coverage for the unintended or unexpected consequences of covered intentional acts.

[33] In my view, *Hollinger Inc.* drives this conclusion. In that case Sharpe J.A. recognized, at paras. 17-18, that a policy can extend coverage for the fortuitous or unintended or unexpected consequences of intentional acts, without providing coverage for the intended or expected consequences of those intentional acts. That is how Sharpe J.A. construed the policy before him. Not unlike the First Policy, the *Hollinger Inc.* policy defined "occurrence" as "an event or a continuous or repeated exposure during the policy period to conditions which, from the standpoint of Insured, unexpectedly causes injury." Sharpe J.A. held, in large measure because of this clause[3], that the coverage for "intentional discrimination" that the policy provided was limited to unexpected loss. Since the claim against the insured alleged that the insured "intended to inflict the very wrong of which [the

[3] See *Ontario Society for the Prevention of Cruelty to Animals v. Sovereign General Insurance Co.*, 2015 ONCA 702, 127 O.R. (3d) 581 (C.A.), at para. 58, where Pepall J.A. distinguished *Hollinger Inc.* on this basis.

plaintiff] complains," the loss was not unexpected therefore the insurer was not under a duty to defend: *Hollinger Inc*., at para. 19. To be sure, *Hollinger Inc.* did not address the nullification doctrine, but given the interpretation that Sharpe J.A. gave to the insurance policy that was before him, it cannot be said that a clause that prevents coverage for expected loss nullifies coverage for intentional wrongdoing where the policy will still cover unexpected loss. I would therefore reject this ground of appeal.

F. DID THE APPLICATION JUDGE ERR IN INTERPRETING THE COVERAGE PROVISIONS OF THE SECOND POLICY?

[34] For the above reasons, I am not persuaded that the application judge erred in finding that there was no duty to defend under the First Policy. However, for reasons I am about to describe, I am persuaded that she erred in construing the coverage for an Occurrence under the Second Policy. Properly interpreted, the only reasonable view is that there was a reasonable possibility of coverage for Personal Injury "caused by an Occurrence during the Policy Period", such as the wrongs alleged in the underlying action.

[35] I will begin by addressing St. Paul's argument that we should not be considering whether a duty to defend operated under the Second Policy because Ontario's Notice of Application is confined to the First Policy. I disagree with that submission. We do not have before us the entire application record, but it is clear

that notwithstanding that Ontario's Notice of Application referred only to the First Policy, the application of the Second Policy fell to be adjudicated during the course of the hearing. St. Paul's advises us that the Second Policy was raised by Ontario in affidavit evidence provided in advance of the application, and it is clear that the role of the Second Policy was fully considered. As I have recounted in paragraph 22 above, the application judge ruled on the Second Policy.

[36] I also note that in its factum in this appeal St. Paul recognized that "[a]t the hearing, … Ontario argued that there was coverage under the [First] and [Second Policy] issued to Ontario by St. Paul" and that the application judge "correctly rejected [Ontario's] arguments after her considered review of the evidence, the pleadings and the policies." In addition, the underlying action seeks damages for events that occurred within time periods covered by both policies, which clearly makes both policies relevant to the issue of St. Paul's duty to defend. The Second Policy is therefore properly before us.

[37] I am also persuaded that Ontario is correct in arguing that, with respect to the Second Policy, the application judge "improperly limited…that which the parties agreed was covered."

[38] As I have described, the application judge focused her analysis on the First Policy. She then said that her reasoning relating to the First Policy applies equally to the Second Policy. The difficulty I have is that she arrived at this conclusion

without considering the Personal Injury coverage under the Second policy. After correctly noting that the Second Policy does not provide "accident" coverage as the First Policy does, she said, "[h]owever, 'occurrence' with respect to 'bodily injury or property damage' continues [under the Second Policy] to require that the resultant injury or damage must be 'neither expected nor intended from the standpoint of the Insured'" (emphasis added). On this basis, and without considering whether there was coverage under the Second Policy for Personal Injury caused by an Occurrence, she concluded that the Second Policy "does not respond to the claim either."

[39] The application judge's decision to focus solely on Bodily Injury coverage under the Second Policy is puzzling because, as I describe above, the definitions of Bodily Injury and Personal Injury are materially the same in both policies and the application judge found when analyzing the First Policy that the harm alleged in the underlying action "falls within the definition of both, 'bodily injury' and 'personal injury'." Yet she did not explain why she focused only on Bodily Injury in analyzing coverage under the Occurrence clause of the Second Policy.

[40] In my view, no serious issue can be taken with her conclusion that the claims in the underlying action included Personal Injury claims, within the meaning of the First Policy. The listed intentional acts within the Personal Injury definition in the First Policy include "wrongful detention", and the class action claim is rife with allegations that can fairly if not only be described as allegations of "wrongful

detention". The word "detention" appears in the Statement of Claim in the underlying action 17 times, and the word "detained" six times.

[41] I am mindful in saying this that "wrongful detention" is not a recognized intentional tort or a legal term of art. But language in the coverage provisions of an insurance policy should be given its plain and ordinary meaning, in keeping with the purpose of the policy, and it should be interpreted broadly to give effect to intended coverage. The ordinary and natural meaning of the term "wrongful detention" would doubtlessly include detentions in institutional settings that fail to comply with the requirements of the *Criminal Code*, or that are unreasonably prolonged contrary to the *Charter*. In terms of the purpose of the policy, there can be no question that Ontario purchased this insurance coverage to extend coverage to situations where it has wrongfully detained persons in its correctional facilities, and St. Paul would have understood this. Therefore, even if the term "wrongful detention" was ambiguous, in order to reflect the reasonable expectation of the parties the First Policy would have to be interpreted as including the claims made in the underlying action.

[42] Therefore, the application judge was correct to consider Personal Injury coverage under the First Policy. Why not under the Second Policy? Like the First Policy, the definition of Personal Injury in the Second Policy also includes "wrongful detention". Had the application judge considered Personal Injury coverage under the Second Policy she would have noted that in the Second Policy, Personal Injury

coverage for an Occurrence is not subject to the limiting phrase, “neither expected nor intended from the standpoint of the Insured”. That limitation applies only to Bodily Injury claims. I will repeat the definition of Occurrence in the Second Policy to demonstrate this:

> Occurrence, with respect to Bodily Injury … includes a continuous or repeated exposure to the same general harmful conditions, which results in injury or damage neither expected nor intended from the standpoint of the Insured and, with respect to Personal Injury and Advertising Injury, means any act falling within the scope of those definitions…. [Emphasis added.]

[43] Simply put, given that the underlying claim alleged wrongful detention, a form of wrong included in the definition of Personal Injury in the Second Policy, and given that the coverage for Personal Injury caused by an Occurrence is not limited to damage that is “neither expected nor intended from the standpoint of the Insured”, there was a reasonable possibility of coverage under the Second Policy for damages claimed in the underlying action. Had the application judge undertaken a closer examination of the Personal Injury coverage in the Second Policy, she would have seen this, and she would have realized that her explanation for finding no reasonable possibility of coverage for Bodily Injury claims does not apply to Personal Injury claims.

[44] What I have said is enough, in my view, to demonstrate that the application judge erred in failing to recognize a reasonable possibility of coverage under the Second Policy for the damages claimed in the underlying action. But more should

be said because, in my view, the application judge also erred in failing to recognize that the claims made in the underlying action are all Personal Injury claims within the meaning of the policies, not Bodily Injury claims. I will explain.

[45] Bodily Injury is defined in both policies by reference to the kind of injury claimed, including “nervous shock, mental suffering, mental injury, mental anguish including death”. But Personal Injury is defined by enumerating the wrongful acts done, for example, “false arrest, malicious prosecution, wilful or wrongful detention or imprisonment” or “libel, slander, or defamation of character”. Since there is no limitation provided in the Personal Injury definition of the kinds of injuries that can be claimed where one of the enumerated wrongful acts has occurred, it would follow that even damages for physical and psychological injury arising from covered enumerated wrongful acts would fall within the Personal Injury coverage of the policies.

[46] A comparison to CGL policies is instructive in this regard. When it is intended to exclude damages for physical and psychological injury from Personal Injury claims under a CGL policy, the definition of Personal Injury explicitly states, “other than bodily injury”. Where this is the case, claims for physical and psychological injury must be analyzed under the terms of the policy applicable to Bodily Injury: Craig Brown *et al.*, *Insurance Law in Canada*, loose-leaf (Toronto: Thomson Reuters Canada Ltd., 2023), at 18:65 and 18:66; Gordon G. Hilliker, *Liability Insurance Law in Canada*, 7th ed. (Toronto: Butterworths, 2020) at pp. 358-59. In

my view, since the definitions of Personal Injury in the policies in this case do not include the words “other than bodily injury”, or any similar limitation, and since claims related to covered intentional acts are defined as Personal Injury claims under the policies, a claim alleging physical and psychological injury resulting from the commission of a covered intentional act falls within Personal Injury coverage. The application judge therefore erred in treating the underlying claims as Bodily Injury claims for the purpose of determining coverage under the policies.

[47] I am therefore satisfied that the application judge erred in interpreting the Occurrence clause in the Second Policy. Even if I am wrong in my view that all of the claims in the underlying action are Personal Injury claims within the meaning of the policies, the underlying action no doubt included claims for Personal Injury, and there is doubtlessly a reasonable possibility under the Second Policy that such claims would be covered.

G. DID THE APPLICATION JUDGE ERR IN FAILING TO APPLY THE FORTUITY PRINCIPLE?

[48] St. Paul submits that this difference in wording between the First Policy and Second Policy that I have identified should make no difference because even without the qualifying phrase – “neither expected nor intended from the standpoint of the Insured” – the fortuity principle prevents coverage for intended or expected injuries. The fortuity principle provides that “ordinarily only fortuitous or contingent

losses are covered by a liability policy": *Hollinger Inc.*, at para. 16. It is St. Paul's position that if the Personal Injury coverage in the Second Policy is interpreted in light of the fortuity principle, it must be interpreted as extending only to unintentional or unexpected loss.

[49] I recognise the fortuity principle but disagree that it applies here. This same general issue was addressed by this court in *Ontario Society for the Prevention of Cruelty to Animals v. Sovereign General Insurance Company*, 2015 ONCA 702, 127 O.R. (3d) 581 (C.A.) ("*OSPCA*"). Like the Second Policy in this case, the policy at issue in *OSPCA* did not include a qualifying phrase expressly limiting its Personal Injury coverage to unexpected or unintentional injuries and provided explicit coverage for the actions alleged against the insured party, in that case "false arrest", "false imprisonment" "malicious prosecution", and "slander". Pepall J.A. held for the court that the fortuity principle is an interpretive aid that should not be applied so as to preclude coverage that the insurer agreed to provide: *OSPCA*, at para. 65. The same holds true in this case. St. Paul agreed to provide coverage for wrongful detention and cannot now rely on the "fortuity principle" to avoid that coverage.[4]

[4] Had the Second Policy included the qualifying phrase – "neither expected nor intended from the standpoint of the Insured" - in describing its Personal Injury coverage, the outcome would arguably have been different, in line with *Hollinger Inc*.

H. DID THE APPLICATION JUDGE ERR IN CONCLUDING THAT THE APPLICATION WAS PREMATURE?

[50] Although I have concluded that the application judge erred in interpreting the provisions of the Second Policy, I agree with her that, in any event, the duty to defend was not triggered in the particular circumstances of this case. As described, she expressed agreement with St. Paul's submission that any claim to coverage under the Second Policy was premature because the Second Policy "only responds once there has been a covered claim in excess of the 'ultimate net loss,' which the policy defines to be $5,000,000 per occurrence." She was correct in accepting this submission.

[51] Ontario argues, to the contrary, that the application judge was wrong in arriving at this conclusion. It points to the wording of the General Conditions in Part 6 of the Second Policy which requires Ontario to give notice of a claim to St. Paul when the Ultimate Net Loss is likely to exceed certain sums. However, Ontario's submission disregards the balance of the applicable provisions. When they are read as a whole, it becomes apparent that under the Second Policy, Ontario must bear the costs of what it is obligated to pay as the result of the underlying action, including defence costs, up to $5,000,000, before the duty to defend arises.

[52] Section C (2) of Part 6 provides as follows:

> Where the Ultimate Net Loss, including reserves as estimated by the adjuster and/or counsel as the case

> may be, is greater than $5,000,000, the Named Insured has the right, but not the obligation, to tender defence of the claim to the Company, and the Company shall only then have the right and the duty to defend, in which event the Named Insured shall have the right and shall be given the opportunity to associate, at its own cost and expense, with the Company in the defence, but not the control, of any such claim, suit or proceeding. Notwithstanding this agreement, the Named Insured remains liable for costs, expenses and damages up to the date of payment contained within the Ultimate Net Loss provision [Emphasis added.]

[53] "Ultimate Net Loss" is specifically defined in Part 5 of the Second Policy:

> Ultimate Net Loss means the total sum, up to the amount stated in item 5 of the Declarations page, which the Insured shall incur, or become obligated to pay, for Immediate First Aid, Defence Costs, damages, costs or expenses in respect of claims or losses which is, and/or but for the amount thereof would be, covered under this Policy and its endorsements, less any salvages or recoveries.
>
> For the purpose of Ultimate Net Loss, "Defence Costs" means and includes reasonable legal costs and other expenses incurred by or on behalf of the Insured in connection with the defence of any actual or anticipated claim, including legal fees and disbursements (including Crown Law Office Civil Lawyers at rates agreed to between the Insured and the Company), lost wages of Employees because of attendance at hearings or trials, costs taxed against the Insured in any suit or proceedings, premiums on attachment of appeal bonds, pre-judgment and post-judgment interest, expenses for experts and for investigation, adjustment, appraisal and settlement. [Emphasis added.]

[54] Accordingly, St. Paul's duty to bear the costs of Ontario's defence is engaged only when Ontario's $5,000,000 self-insured retention has been

exhausted. Until then, Ontario "remains liable for costs, expenses and damages", including defence costs. Because Ontario expended only $300,000 in costs at the time of the application, St. Paul's obligation to indemnify Ontario for its defence costs was not triggered.

CONCLUSION

[55] The application judge was correct in finding that St. Paul owed no duty to defend under the First Policy. Although she erred in her analysis of the coverage provisions of the Second Policy, she correctly found that St. Paul owed no duty to defend under the Second Policy. For this reason, I would dismiss the appeal.

[56] As agreed between the parties, costs are payable by Ontario to St. Paul in the appeal in the amount of $15,000 inclusive of applicable taxes and disbursements.

Released: March 15, 2023 "D.M.P."

"David M. Paciocco J.A."
"I agree. J. George J.A."
"I agree. L. Favreau J.A."