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Insurance

Ambiguous ‘pollution exclusion’ cited as Appeal Court upholds insurer’s duty to defend

By **Jeff Buckstein**

(January 6, 2022, 9:11 AM EST) -- The Court of Appeal for Ontario upheld a lower court ruling that Co-operators General Insurance Company has a duty to defend following an accident that caused the death of a policyholder in 2015. The court unanimously rejected the insurer’s contention that an exclusion to the deceased’s insurance contract in *Hemlow Estate v. Co-operators General Insurance Company* 2021 ONCA 908 prevented it from doing so.

John Hemlow, an independent mechanical contractor, had been engaged as a subcontractor for Wear-Check, to sample and analyze the mechanical and refrigeration systems at the processing facility of Rich Products of Canada Limited. Hemlow accidentally opened a valve to a pipe containing pressurized ammonia that killed him and caused extensive property damage.

Rich Products sued both Wear-Check and the estate of John Hemlow for negligence, nuisance and breach of contract. Co-operators said it would not defend the claim against the Hemlow estate.

At issue was the wording of the Total Pollution Exclusion of Hemlow’s Commercial General Liability (CGL) policy stating insurance would not apply to pollution liability causing “bodily injury,” or “property damage” or “personal injury” that arose “out of the actual, alleged, potential or threatened spill discharge, emission, dispersal, seepage, leakage, migration, release or escape of ‘pollutants.’ ”

Pollutants were further defined as “any solid, liquid, gaseous or thermal irritant or contaminant including smoke, odours, vapour, soot, fumes, acids, alkalis, chemicals and waste.”

The estate brought an application seeking a declaration that the insurer had a duty to defend. This was granted by Ontario’s Superior Court of Justice in *Hemlow Estate v. Co-operators* 2021 ONSC 664.

Co-operators appealed that decision to the Court of Appeal for Ontario. The appeal was dismissed.

The Court of Appeal ruling, written by Justices James MacPherson and Ian Nordheimer and agreed to by Justice Janet Simmons, noted that the lower court decision by Justice James Turnbull found the word “pollution” was ambiguous because it had been left undefined in the policy and could have been interpreted as including only environmental pollution.

It also stated that Justice Turnbull had found the definition of “total pollution exclusion” misleading because an average person would not think of pollution as being an accidental occurrence that caused damage to a customer’s property.

The Court of Appeal ruling said that if the property damages at Rich Products had resulted from an explosion or fire, there would be no debate about whether coverage would be applied under Hemlow’s CGL policy. The justices wrote: “The fact that the damage causing substance was a pollutant does not change the nature of the claim. It also must not be allowed to distract from the proper interpretation of the CGL policy nor obscure or distort the conclusion as to whether a duty to defend arises.”

Robert Dowhan, Dolden Wallace Folick LLP

The Court of Appeal also wrote that the CGL’s Total Pollution Exclusion “cannot fairly be characterized as a standard form contract. Standard form contracts are typically standard printed forms that will often be offered on a ‘take it or leave it’ basis; the potential insured person either agrees to take the terms as they are or declines to enter the transaction altogether.”

“That’s simply not true. It is a take it or leave it proposition,” said Robert Dowhan, counsel for Co-operators, and formerly a partner with SmithValeriote Law Firm LLP (SV Law) in Guelph, Ont.

“A CGL policy has a series of exclusions that go on it. There’s a laundry list of exclusions that are always part of a CGL. Now we’re supposed to turn our heads and disregard those exclusions?” asked Dowhan, who recently joined Dolden Wallace Folick LLP in Toronto as counsel.

“I was happy to read the decision,” said Curtis Zizzo, a partner with Sullivan Festeryga LLP in Hamilton and counsel for the Hemlow estate. “I was really hoping that the Court of Appeal would get it right and in my view, they did.”

“I think the crux of the case is … where [the decision states] the fact that the damage causing substance was a pollutant did not change the nature of the claim. That was our argument since day one and that’s the way the Court of Appeal decided this,” Zizzo elaborated.

Brett Hodgins, an associate with Mann Lawyers LLP in Ottawa, said he agreed with the decision. The Court of Appeal analysis focused on the most reasonable plain meaning of the words to determine the purpose of the contractual provision, instead of parsing out the language in an overly legalistic manner, he explained.

“The ruling was also sensitive to the need to interpret an insurance contract to benefit the insured, rather than allowing the insurer to avoid coverage on a technicality. By comparing the actual basis of the claim that needed to be defended to the plain language of the contract, the court reached a reasonable, just, and fair decision,” Hodgins added.

Darryl Singer, head of commercial and civil litigation for Diamond and Diamond Lawyers LLP in Toronto, also thought the decision was correct.

“We have witnessed for many years now, in all areas of insurance law, insurers using their money and power to take a ‘deny first’ approach,” he claimed. “The poor policy holder who has dutifully paid premiums and relied on the peace of mind of having the insurance policy is suddenly thrust into the situation of having to pay to litigate two cases instead of none.”

They must defend the main action when the insurer denies coverage, and then also fight their own insurance company for indemnity. The playing field is not level because the insureds lack the resources of the insurers, and it takes so long for the matter to reach trial, Singer elaborated.

The major issue before the court in this case is that insurance companies face a very precarious situation whereby pollution liability can range from tens of thousands to millions of dollars. They can’t predict it and need to protect themselves against it, and so they try to generate that protection within the policy, said Dowhan.

“The term pollution was very clearly defined within the policy,” he asserted. “ ‘Total pollution exclusion’ when read on its own, makes perfect sense. It says if you cause the release of a pollutant and we have to go in and clean it up, or we have to compensate someone for it, that’s not covered under our policy.”

Curtis Zizzo, Sullivan Festeryga LLP

Zizzo disagreed. “Pollution, in my mind, means there is some escape to the environment, and there is no evidence that actually occurred in this case,” he said.

“The Court of Appeal found that the nature of the claim is a straightforward claim in negligence causing damage to property.The fact that the damage-causing substance happened to be a pollutant did not mean that the pollution exclusion was applicable.The purpose behind the pollution exclusion matters, which traditionally was to limit liability for damage to the environment,” Zizzo added.

“The major issue before the court in this case was simply the interpretation of the contract,” said Singer. “[Co-operators] hung on the definition of the word ‘pollutant,’ which as the motions judge said was ambiguous and that is why the insurer lost the motion.”

But the Court of Appeal went further and looked at the underlying case for which coverage was sought, he added.

“The takeaway from this case is that the duty to defend under these policies will be difficult for insurers to escape since the Court of Appeal put the focus on the nature of the lawsuit rather than just the exclusions clause of the policy,” Singer said.

“You must look at the totality of the case … don’t let the insurer dictate the parameters of the case,” he stressed.

“The decision is certainly instructive for lawyers and judges,” said Hodgins. “It provides clear guidance on how to determine whether a given claim is covered or is not covered by a given insurance contract. The court clearly held that the nature of the claim should be compared to the plain language of the contract to determine its eligibility or ineligibility,” he added.

Co-operators is considering whether to seek leave to appeal this decision to the Supreme Court of Canada, said Dowhan.