

Assault in the Home, Finding the Coverage

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Introduction

- Initial Investigation
- Statement of Claim
- Receipt of Compensation

Investigation

Homeowners Insurance

- Excludes intentional injuries
- Devlin ats. Co-operators (SCC)
- The question is whether the insured intended the harm

Investigation (Cont.)

Kamin v. Kawartha Dairy (2006), 79 O.R. (3d) 284

- Trip and fall in a parking lot
- Did not know where she fell or what caused the fall
- Evidence of parking lot's poor condition
- Snell v. Farrell
- Reduces plaintiff's obligation to prove negligence

Investigation (Cont.)

- Spouse as possible source of negligence
- Occupier's Liability Act

Investigation (Cont.)

Multiple Causes

- Derksen v. 539939 Ontario Limited
 - Multiple causes of injury
 - One cause negligence and the other intentional
 - Partial coverage under the policy
- Dominion v. Axa:
 - Multiple causes may result in multiple policies
 - Auto and home

Drafting the Claim

- Draft claim to trigger the duty to defend
- Nichols v. American Home
- Duty to defend based on wording in the statement of claim
- Insurer must offer the defence if the claim for damages possibly falls within the policy's indemnity provisions

Drafting the Claim (Cont.)

- Thorne v. Royal Sun Alliance
- Courts will rarely look beyond the statement of claim to determine whether the duty to defend has been triggered
- Insurer may have to provide a defence to the party who caused the injury and his or her spouse
- If these two parties have conflicting interests they require separate representation

Getting the Plaintiff's Compensation

A Defended Lawsuit

- Plaintiff must lead as much evidence as possible about the negligence of the perpetrator and spouse
- Ask jury to break down negligent acts versus intentional acts

Getting the Plaintiff's Compensation (Cont.)

An Undefended Lawsuit

- Section 132 of the Insurance Act states as follows:

“Where a person incurs a liability for injury or damage to the person or property of another, and is insured against such liability, and fails to satisfy a judgment awarding damages against the person in respect of the person's liability, and an execution against the person in respect thereof is returned unsatisfied, the person entitled to the damages may recover by action against the insurer the amount of the judgment up to the face value of the policy, but subject to the same equities as the insurer would have if the judgment had been satisfied.”

Getting the Plaintiff's Compensation (Cont.)

An Undefended Lawsuit

- Thus the injured party can establish a *prima facie* case against the insurer by filing the following documents:
 1. The original judgment which normally proceeds as a damage assessment
 2. Copies of the Writs of Seizure and Sale
 3. A letter to the Sheriff directing execution
 4. The Sheriff's report of nulla bona—levy report
 5. The applicable homeowner's or policy material applicable to the case

Getting the Plaintiff's Compensation (Cont.)

An Undefended Lawsuit

- Global General v. Finlay
- If the insurance company does not defend the original action they can't dispute findings regarding liability or damages
- They can only defend the claim if the policy does not afford coverage

Getting the Plaintiff's Compensation (Cont.)

An Undefended Lawsuit

Policy exclusions

- Onus is on the insurance company to prove the exclusion applies
- The exclusion shall be construed narrowly to the disadvantage of the insurer
- To demonstrate that the “intentional act” exclusion does not apply must obtain evidence of the perpetrator

Getting the Plaintiff's Compensation (Cont.)

An Undefended Lawsuit

Policy Exclusions

- R.E. v. Wawanesa
- Exclusion for criminal acts will be read separately from the exclusion regarding intentional acts
- If criminal act policy will exclude coverage regardless of whether the damage was intended

Claims with no Insurance

- Obtaining compensation from the defendant personally is risky
- Consider injunctive relief to prevent defendant's disposal of assets

Conclusion

- Claims involving a potential breach of the homeowner's policy are more complicated and risky than other personal injury claims
- In order to gain compensation must be prepared to address coverage issue from your first meeting to final resolution