Ontario Court Confirms Contractor's Duty To Defend A Municipality In Personal Injury Claims

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The Ontario Court of Appeal closed out 2015 with its decision in *Carneiro et al and Regional Municipality of Durham et al and Zurich Insurance Company Ltd.,* providing important analysis of a winter maintenance contractor's duty to defend a municipality in personal injury claims arising from wintery conditions.

On February 8, 2013, Antonio Carneiro Jr. died in a motor vehicle accident in Durham Region during a snowstorm. Mr. Carneiro's surviving family members brought a claim against the driver and owner of the third party vehicle, as well as the Regional Municipality of Durham ("Durham Region") and its roadway winter maintenance contractor ("the Contractor"). The allegations against Durham Region and the Contractor were identical and broad in many respects relating to the maintenance, plowing and salting of the roadway. The claim also made independent design allegations as to the roadway and failure to warn motorists of the dangerous conditions along the roadway as against Durham Region.

Under the contract, the Contractor was required to obtain a policy of insurance and to name Durham Region as an additional insured. While the contract expressly limited the Contractor's indemnity obligations to Durham Region by excluding indemnity for damages caused by the negligence of Durham Region or its employees, the policy contained an unqualified promise to defend Durham Region for actions covered by the policy.

At first instance, Justice Lemons dismissed Durham Region's motion seeking a defence from the Contractor's insurer, ruling that the insurer should only be required to defend Durham Region with respect to the insured claims (i.e. the covered claims). In reviewing the pleadings, Justice Lemons could not discern the "true nature" of the action, noting the broad allegations and separate causes of action relating to road design and the failure to warn motorists (i.e. uncovered claims) were clearly not something for which the Contractor was insured.

The Court of Appeal allowed Durham Region's appeal, and ordered the insurer to provide Durham Region with independent counsel, at the insurer's expense, to defend the entire action. The Court of Appeal had no difficulty discerning the true nature of the claim, which was that the deceased lost control of his car because it skidded on an icy

and snowy road. The pleadings related directly to the Contractor's obligations under the contract, and thus engaged the insurer's obligation to defend Durham Region. As there were no exclusions in the policy regarding the defence of Durham Region with respect to covered versus uncovered claims, the insurer was required to defend the claim in its entirety. At the end of the proceedings, the insurer was entitled to seek an apportionment of the defence costs, to the extent they dealt solely with uncovered claims, or exceeded the reasonable costs associated with the defence of the covered claims.

The Court of Appeal ended with the comment that the duty to defend issue must be determined expeditiously, on the basis of the allegations in the underlying litigation, read with the insurance coverage, noting that the failure to do so in the present matter had increased the costs of the litigation and has caused delay to all parties.

Carneiro serves as a reminder to municipalities and their contractors and insurers to understand both what has been contracted for by way of winter maintenance obligations, as well as the insurance coverage afforded and defence obligations in the event of a civil action for personal injury. Clarity and mutual understanding of these obligations may assist both to avoid the necessity of undue litigation and costs. And, should these issues not be resolvable, to promptly bring the issues before the court.

By

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