# Ontario court decision: Insurer not obligated to defend “mixed” claim

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The Ontario Superior Court of Justice recently released its decision in *Jack-O’s Sports Bar v. Brokerlink Inc.*, 2023 ONSC 5925, finding that the third-party insurer was not required to defend the sports bar against a claim arising from an over-service and forcible removal incident. The Court emphasized that it will give effect to clear insurance policy language, even when the policy includes broad exclusions that may seem unfair from the insured’s prospective.

## Background

The plaintiff allegedly suffered injuries after being served too much alcohol at a sports bar in Woodstock. As a result, he alleges to have fallen from his barstool and was then ejected from the premises by the bar’s proprietor. The plaintiff commenced a claim against the bar and its proprietor for $500,000 in damages. The defendants subsequently brought a third-party claim against their brokerage and insurer after the insurer denied coverage under the applicable commercial general liability (CGL) policy.

The insurer responded to the third-party claim by immediately bringing a motion for summary judgment, arguing that the claim fell within the “Assault or Battery Exclusion” of the policy and there was therefore no duty to defend in the circumstances.

## The motion decision

The Court granted the insurer’s summary judgment motion, finding that the “Assault or Battery Exclusion” applied to the entirety of the claim against the defendants.

The Court began by restating the general principles applicable to a duty of defend analysis. The duty to defend is triggered if the facts alleged would, if true, give rise to indemnification. The focus is on the real substance of the claim, rather than the legal labels chosen by the plaintiff and any doubt is to be resolved in favour of the insured. By the same token, effect should be given to unambiguous policy language, including exclusions, even if this might impose hardship on the insured.

In this case, the exclusion was worded very broadly, applying not only to “any claim, demand or ‘actions’ in which the underlying operative facts constitute ‘assault’ or ‘battery,’” but also to “all ‘bodily injury’… arising out of, directly or indirectly result (sic) from, in consequence of, or in any way involving ‘assault’ or ‘battery.’” The Court held that the fall from the barstool was “narrative or context” that ostensibly caused the defendant to remove the plaintiff from the premises. As such, the fall was linked to the “incident” – which was found to include both the fall from the barstool and the alleged assault when escorting the plaintiff from the premises. Although the claim pleaded negligence arising out of the alleged over-service and fall from the barstool, the exclusion was nevertheless found to apply.

The Court’s decision appears to be at least partially driven by the language of the pleadings suggesting that the entirety of the claimed damages arose from the plaintiff’s ejection from the bar, rather than the fall from the barstool. That said, the Court went on to state that even if some of the alleged injuries were sustained from the fall from the barstool, the terms of the Policy nevertheless applied to exclude recovery as any injuries sustained from the fall from the barstool could not be severed from the claim. The Court relied on the broad language of the exclusion clause which negated coverage for bodily injury “*arising out of, directly or indirectly resulting from, in consequence of, or in any way involving assault or battery*”. Even if the plaintiff suffered injuries from the initial fall from the barstool, those injuries were likely compounded by the alleged subsequent assault, such that the entire claim was determined by the Court to “involve” assault within the meaning of the exclusion.

# Commentary

This decision appears to depart somewhat from the general tendency in the jurisprudence to construe insurance policies – and particularly exclusions – in favour of an insured.

At the time of this publication there is no information on any potential appeal. An appeal would provide the Court of Appeal with an opportunity to clarify the law in relation to the application of exclusions to mixed claims in Ontario.

For more information, please reach out to any of the key contacts listed below.

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