



LITIGATION MATTERS

The Criminal Offence Exclusion

In this edition of Munich Re's Claims and Litigation newsletter, we recap our 2018 Claims Litigation Forum and look at two court rulings that dealt with application of the criminal offence exclusion.

Munich Re's First Claims Litigation Forum

On June 13, we hosted our first Claims Litigation Forum with 45 claims litigation specialists from 13 carriers. This inaugural event provided an opportunity for discussions on best practices, effective mediation, and recent case law on time limitations and reserve calculation methods.

We also shared the results of our recent Claims Litigation Survey on the practices of litigious claims specialists.

Thank you to all those who took part in the Forum and helped make this event a success!

What does a typical Claims Litigations Specialist look like?

According to our survey:

- Claims Litigation Specialists have an average of 11 to 15 years' experience in claims
- Their limit of authority for a litigious claim ranges from \$150,000 to \$250,000
- The average number of cases under their management is between 26 and 50, and this may include non-litigious cases
- In-house counsel (or legal department) usually administer legal costs
- A university degree is usually required for the role

Criminal Offence Exclusion

1. Common Law Decision / Life

Valentyne Estate v. The Canada Life Assurance Company, 2017 BCSC 1444 (CanLII)

In 2011, the insured purchased a **mortgage life insurance policy**. On January 7, 2013, while accompanied by his girlfriend, he received a call from two known drug dealers and went to a meeting place inside a house. His girlfriend stayed in the car, and the insured left the engine running with his wallet in the vehicle. The insured never returned. On May 30, 2013, he was declared missing and on July 16, 2014, he was declared to be presumed dead. The evidence showed that the insured was a cocaine and heroin dealer between 2007 and January 2013.

Canada Life submitted that the criminal offence exclusion can apply in either of two scenarios: (1) when death is a result of a criminal offence; or (2) when death occurs while the insured was committing a criminal offence. The judge ruled in favour of Canada

Life, stating the evidence did not have to show the insured was selling drugs at the time of death but rather, based on a balance of probabilities, his death was the result of his involvement in criminal activities. In this regard, he quoted *Norwood on Life Insurance Law in Canada*:¹

Causal connection would not seem to be required where the provision excludes death while committing or attempting to commit a criminal offence, but it would appear to be necessary where the exclusion is for death resulting from committing or attempting to commit such an offence. If a bank robber rushes onto a roadway in the course of making a get-away and is knocked down by a car, the causal connection would be established, but if he is casually strolling on the sidewalk away from the scene of the crime, and a brick falls on the robber's head, it would seem clear that the claims for the accidental death insurance benefit may still be made.

2. Civil Law Decision / AD&D

Many insurers with their head office in Quebec have already changed the wording of their criminal offence exclusion in light of the *Emond v. Desjardins Sécurité Financière* judgments. However, these decisions impact all insurers that market life insurance products in Quebec.

Émond v. Desjardins Sécurité Financière, J. E. 2014-786 (C.Q.), 2014 QCCQ 2565 (CanLII)

Desjardins Sécurité Financière, compagnie d'assurance-vie v. Émond, 2016 QCCA 161 (CanLII)

Desjardins Sécurité Financière, compagnie d'assurance-vie v. Mariette Émond, Victor Foisy et Sabrina Foisy, 2016 CanLII 41078 (SCC)

A quick look at the case....

During a road radar operation, an individual (the insured) was riding a motorcycle as he drove past a Quebec provincial police officer at more than 123 km/h in a 50 km/h zone. A high-speed chase ensued between the officer and the insured. At an intersection, the insured lost control of his motorcycle and fell into a ditch. The officer chasing him also lost control of his vehicle at the same spot, left the road and struck the insured. The insured was thrown into the air, landing face down 10 metres away. Despite being attended to by paramedics and at the hospital, the insured died about 45 minutes later.

A death claim was submitted under the deceased individual's life insurance policy. Desjardins Financial Security (Desjardins) declined payment of the benefit, on the grounds that death occurred upon commission of an "indictable offence," i.e. dangerous operation (section 249 of the *Criminal Code*) and flight (section 249.1 of the *Criminal Code*).

The insurance policy reads as follows under the heading "14. Exclusions and Limitations":

14. EXCLUSIONS AND LIMITATIONS
1) Benefits are not payable under the contract in the following cases:
[...]
f) if the accident occurs while the insured is participating in any criminal act or related offence;

The main issue of this case was therefore to establish if the criminal offence exclusion as stated in the insurance policy was applicable.

In Canada, the offence of dangerous operation (249 CCC) and flight (249.1 CCC) are both hybrid offences which means that the offender may be prosecuted by indictment or for which the offender is punishable on summary conviction. Given the fact that the insured

died, there is reason to apply section 34 of the *Interpretation Act*, which states as follows:

- 34 (1) Where an enactment creates an offence:
(a) the offence is deemed to be an indictable offence if the enactment provides that the offender may be prosecuted for the offence by indictment;
[...]

However, in Quebec, the first paragraph of article 2402 of the *Civil Code of Québec* states as follows:

2402 In non-marine insurance, any general clause whereby the insurer is released from his obligations if the law is violated is deemed not written, unless the violation is an indictable offence.

The trial court determined that the plaintiffs were entitled to the insurance benefit of the insured. This decision was confirmed by the Court of Appeal.

To better understand why the judges came to this conclusion, we reproduce below paragraphs 87 et seqq. of the Court of Appeal:

[TRANSLATION]
[87] In the case at bar, the general exclusion stated at clause 14 1) f) of the policy does not apply and the contract of insurance does not contain a specific exclusion clause pertaining to dangerous operation (s. 249 CCC) or flight from authorities (s. 249.1 CCC).

[88] Determining that the general exclusion does not apply does not mean that Desjardins cannot deny payment of any benefit by reason of dangerous operation or flight from a police officer, merely that it must do so **by way of an explicit exclusion** [our emphasis], in the same way it

did for driving under the influence [...] [...]

[90] As regards the interpretation of contracts of insurance, clauses describing the scope of coverage are interpreted broadly, whereas exclusion or limitation clauses, which entail exceptions, are interpreted narrowly, **but this does not prevent an insurer from circumscribing the insurance coverage being provided, in full transparency, by inserting clear, specific and explicit exclusion clauses in the proposed contract** [our emphasis] as stated by McLachlin C.J. in *Martin v. American International Assurance Life Co.*:²

[29] [...] coverage under an accidental death benefit policy depends not only on the circumstances but on what the insurance contract stipulates. It remains open to the insurer, as the party that drafts the insurance contract, to narrow coverage by means of **explicit exclusion clauses. If an insurer wishes not to offer coverage for deaths that occur in certain circumstances — or, for that matter, for any death that results from a deliberate or voluntary action — then an explicit exclusion clause to this effect can simply be added to the contract. Insurers**

remain free to limit accidental death coverage in any way they wish, provided they do so clearly, explicitly, and in a manner that does not unfairly leave the insured uncertain or unaware of the extent of the coverage. [our emphasis]

Tips:

- Check the wording of the criminal offence exclusion clauses in your insurance policies for all lines of business. On the basis of this Quebec case, **hybrid** criminal offences, for which the offender may be prosecuted by indictment or punishable on summary conviction, are not covered by a general exclusion for criminal offences in Quebec.
- If you plan to exclude a **hybrid** criminal offence from insurance coverage, including AD&D, Disability, and Critical Illness, the offences you wish to exclude from coverage will need to be listed in an exclusion clause in order for the exclusion to apply in civil law.

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References

¹ David Norwood and John P. Weir, *Norwood on Life Insurance Law in Canada*, 3rd Edition (Toronto, Carswell, 2002), p.462.

² McLachlin in *Martin v. American International Assurance Life Co.*, 2003 SCC 16 (CanLII), [2003] 1 S.C.R. 158.

Comments?

If you have comments on this newsletter, or have topics that you would like us to discuss in a future newsletter, please share your comments by writing to jst-laurent@munichre.ca.