IADC COMMITTEE NEWSLETTER

PROFESSIONAL LIABILITY

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IN THIS ISSUE

In Alvaro v. InsureBC, the British Columbia Supreme Court and the British Columbia Court of Appeal review leading principles on the liability of insurance brokers when there is a gap in coverage. The decisions also deal with the responsibility of the insured to read the policy and the circumstances in which that may be relevant. Here, the duty to read the policy was not material and the broker was found 100% at fault.

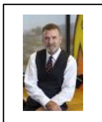
Insurance Brokers Liability in Canada Revisited

ABOUT THE AUTHOR

Harmon C. Hayden is internationally recognized as one of the world's leading lawyers in insurance, reinsurance, and product liability. He has served as a nominee of the Attorney General of Canada on the Minister's Judicial Advisory Committee and has appeared in the Supreme Court of Canada in *EDG v. Hammer* [2003] S.C.R. 459 (one of a trilogy of cases heard at the same time regarding institutional liability for sexual abuse). He has published and lectured extensively, and has served as an Adjunct Professor of Insurance Law, Faculty of Law, at Thompson Rivers University. Harmon is currently the Vice Chair of Publications for the IADC Professional Liability Committee. He can be reached at harmon.hayden@haydenlaw.ca.

ABOUT THE COMMITTEE

The Professional Liability Committee consists of lawyers who represent professionals in matters arising from their provision of professional services to their clients. Such professionals include, but are not limited to, lawyers, accountants, corporate directors and officers, insurance brokers and agents, real estate brokers and agents and appraisers. The Committee serves to: (1) update its members on the latest developments in the law and in the insurance industry; (2) publish newsletters and Journal articles regarding professional liability matters; and (3) present educational seminars to the IADC membership at large, the Committee membership, and the insurance industry. Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article, contact:



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The British Columbia Court of Appeal recently upheld a trial decision in Alvaro v. InsureBC (Lee & Porter) Insurance Services Inc., 2019 BCSC 2017; 2021 BCCA 96. The decisions succinctly review some of the leading principles in Canada on broker liability and will be of interest to insurance brokers, their liability insurers, and the counsel defending them.

I will briefly review the facts as found by the trial judge:

- The insured was a commercial landlord whose property was destroyed in a fire in June 2013.
- The insurer, Wawanesa, denied coverage on the basis that the property was vacant contrary to a vacancy exclusion in the policy.
- The insured knew that the property was vacant as they had evicted the tenants and were in the process of renovations before renting to others.
- The judge found that he did not accept the insured's evidence that they had told the broker of the eviction.
- The broker had forwarded a copy of the policy to the insured in 2007 but it was not their practice to forward another copy on renewal.
- Renewal letters from the insurer did not advise the insured to review the policy wordings.
- The renewal letters did not advise of what a material change in risk might have been.

The central issue was whether the broker had fulfilled his duty to the insured. The leading case in Canada is the Ontario Court of Appeal decision in Fine's Flowers Ltd. et al v. General Accident Assurance Co. of Canada et al (1977) 81 D.L.R. (3d) 139, the reasoning of which was approved by the Supreme Court of Canada in Fletcher v. Manitoba Public Insurance Co. (1990) 74 D.L.R. (4th) 636 where the insured suffered a loss as a result of a gap in coverage. Justice Estey, writing for the Court, said this at para. 21:

It was the duty of the defendant agent to either procure such coverage, or draw to the attention of the plaintiff his failure or inability to do so and the consequent gap in coverage. Having done neither, the defendant agent is liable in negligence, whether or not the instructions to insure all "insurable" risks or to see that the plaintiff was "adequately covered with insurance".

The insured also owes duties to their insurer. The trial judge said this:

> [79] The decision in Fletcher, supra, and the authorities which have applied it, confirm that the customer bears a duty to provide accurate information to the broker and to proactively advise the broker when and where material changes occur in connection with the insured property. Justice Freeman on behalf of the Court in Ken Murphy Enterprises Ltd. v. Commercial Union

Assurance Co. of Canada, 2005 NSCA 53 described the duties incumbent on clients of an insurance broker in the following terms:

The customer's duty is to provide accurate information respecting the risk, and to pay the premium. The customer is entitled to rely on the skill and expertise of the agency to obtain and deliver a policy which provides the insurance coverage his premium has paid for during the coverage period. If a material change in the risk occurs during the coverage period it is the duty of the customer, the insured, to notify the agency or the insurer.

[at para. 42]

[80] 528852 Ontario Inc. v. Royal Insurance Co. (2000), 51 O.R. (3d) 470 establishes the principle that an insured owes a continuing duty to promptly notify the insurer of any material change in risk, including, specifically, vacancy:

Determination of whether a fact is material requires consideration of whether or not the fact would influence the insurer in assessing or accepting a risk or in fixing the premium. (See Johnson v. British Canadian Insurance Co., [1932] S.C.R. 680, [1932] 4 D.L.R. 281). When property becomes unoccupied or vacant, this is a material change to the risk (Melvin v. Pilot Insurance Co., [1981] 1 L.R. 1-1384 (Ont H.C.)).

[at para. 17]

[81] There is a continuing duty on the client to promptly notify the agent of any material change as there is an ongoing obligation on an insured to disclose material facts: Grafton Connor Property Inc. v. Murphy, 2017 NSCA 54 at para. 125 as well as Ken Murphy Enterprises Ltd., supra, at para. 16

Counsel for the broker submitted that the insured was wholly or at least predominantly at fault based on the following:

(a) Unless the client has responsibilities and cannot ignore or choose to not read the documentation provided by the agent: CIA Inspection Inc. v. Dan Lawrie Insurance Brokers; 2010 ONSC 3639, 87 C.C.L.I. (4th) 159 at para. 23; Siemens et al v. Unrau et al (1989), 44 C.C.L.I. 99 (B.C.S.C.) at page 6, aff'd (1991) 4. C.C.L.I. (2d) 213 (B.C.C.A.); Munro v. Shackleton (1993) 21 C.C.L.I. (2d) 102 (Sask. Q.B.) at para. 9;

(b) Absent communication from the client about any difficulty in comprehension, it is not necessary for a broker to read every clause in a policy to the client: CIA Inspection at para. 24; Curry Construction (1973) Ltd. v. Reed Stenhouse Ltd. et al (1988), 35 C.C.L.I. 275 (N.W.T.S.C.) at para. 23.; and

(c) A client has an obligation to obtain clarification of the terms of the policy or other insurance documents: CIA Inspection at para. 26; Strougal v.

> Coast Capital Insurance Services Ltd. (2008) 57 C.C.L.I. (4th) 217 at para. 62.

Notwithstanding these submissions, the judge held that the broker failed in their duty to advise of gaps of coverage, such as vacancy. The renewal notices did not direct the insured to review the policy wordings they had received at some time in the past. It was unrealistic to expect an insured to review a lengthy insurance policy to ascertain information about a material change in risk and what might occur if there was a vacancy. The insured was entitled to rely on the expertise of the broker to provide that advice without the insured asking. Nothing flowed from the alleged failure of the insured to read the policy or the renewal documents. The judge concluded:

> [115] An insurance agent should communicate relevant information directly to the client. To the extent an agent relies on a standardized renewal package, it is incumbent on the agent to ensure that the materials cast important information in the clearest of terms. This would have included spelling out the impact of vacancy on coverage because that is a common concern and one that can void all coverage, particularly with rented dwellings. Where it was known that the dwelling being insured was a rental dwelling, it was particularly important to highlight the impact of vacancy on coverage.
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> [116] Even if there had been a specific "warning" of what would happen with coverage if the Property was unoccupied or vacant as was present in the policy in Meadow-North Agencies Ltd., supra, there was still on obligation on the Defendant to provide advice to the Plaintiffs. Even assuming that such advice regarding vacancy was given when the Policy was first put in place, there was an ongoing obligation on the Defendant to provide advice to the Plaintiffs regarding how and at what cost coverage could be obtained to cover a vacancy. The Defendant failed to meet its obligation in that regard even assuming that they provided such information initially. Even if I could be satisfied that any duty of care imposed upon the Defendant was fulfilled when the coverage was first written was too far in the past to be relied upon by the Defendant.
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> . . .
>
> [118] What was provided in the renewal documents was unclear at best and misleading at worse. The "Policy" was not enclosed and the renewal documents that were enclosed were not expressed in the clearest of possible terms.

Further, the judge concluded that there was no contributory negligence on the insured. He could not conclude that any failure on the part of the insured to read the policy or renewal documents resulted in any damages being attributable to their own negligence.

Even had they read the documents and the policy, they would not have been in a position to understand what might be a material change in risk or fully understand the effect of vacancy on their coverage.

The plaintiff appealed on the basis that the judge erred in assessing the quantum of damages by awarding the actual cash value than the replacement costs. I will not deal with the damage issues herein which were fact specific and dependent on the precise policy wordings. The broker cross-appealed on liability and contributory negligence of the insured.

The Court of Appeal upheld the trial decision that the broker was completely at fault for the loss sustained by the insured. The Court of Appeal said this:

> [40] While the obligations of insurance brokers and their clients are occasionally described in the jurisprudence as settled (and in Fletcher v. Manitoba Public Insurance Co., [1990] 3 S.C.R. 191 at 216, as “fairly stringent”), it must be borne in mind that the leading cases clearly describe obligations that arise out of a course of dealings. In Fine's Flowers Ltd. v. General Accident Assurance Co. of Canada (1977), 17 O.R. (2d) 529 (C.A.), Wilson J.A. (as she was) addressed the agent’s argument that it had a limited duty of care, to obtain a policy in the terms bargained for, in the following terms (at 538–39):
>
> I take no issue with counsel's statement of the scope of the insurance agent's duty except to add that the agent also has a duty to advise his principal if he is unable to obtain the policies bargained for so that his principal may take such further steps to protect himself as he deems desirable. The operative words, however, in counsel's definition of the scope of the agent's duty, are “policies in the terms bargained for”.
>
> In many instances, an insurance agent will be asked to obtain a specific type of coverage and his duty in those circumstances will be to use a reasonable degree of skill and care in doing so or, if he is unable to do so, “to inform the principal promptly in order to prevent him from suffering loss through relying upon the successful completion of the transaction by the agent”: Ivamy, General Principles of Insurance Law, 2nd ed. (1970), at p. 464.
>
> But there are other cases, and in my view this is one of them, in which the client gives no such specific instructions but rather relies upon his agent to see that he is protected and, if the agent agrees to do business with him on those terms, then he cannot afterwards, when an uninsured loss arises, shrug off the responsibility he has assumed. If this requires him to inform himself about his client's business in order to assess the foreseeable risks and insure his client against them, then this he must do. It goes without saying that an agent who

does not have the requisite skills to understand the nature of his client's business and assess the risks that should be insured against should not be offering this kind of service. …

[Emphasis added.]

[41] There is no doubt that an insured can be at fault for failing to read an insurance policy or, more commonly, the summary of coverage or specific written advice given by a broker. That is true whether the breach on the part of the broker amounts to a breach of contract or negligence: Crown West Steel Fabricators v. Capri Insurance Services Ltd., 2002 BCCA 417, aff'g 2001 BCSC 449.

[42] Contributory negligence is more likely to be found where the insurance problem arises from inadequate values than gaps in coverage, as Davies J. noted at trial in Crown West, 2001 BCSC 449:

[91] … [A]n insurance agent's liability for coverage gaps must be viewed differently from that for establishing monetary limits of coverage. The reason is obvious. A client can have real input into the determination of the appropriate amounts or limits of coverage if there are no coverage issues. The same is not true if there are gaps in coverage of which the client is unaware. See for example, Siemens v. Unrau (supra) and Green v. Donald T. Ritchie Insurance Agencies Ltd. (1984), 2 C.C.L.I. 182 (Ont. H.C.) concerning adequacy of limits as opposed to Fine's Flowers (supra) and G. K. N. Keller Canada Ltd. v. Hartford Fire Insurance Co., [1983] O. J. No. 340 (Q.L.) (H. Ct.) concerning gaps in coverage.

The Court of Appeal agreed with the trial judge that it was open to him to find that there was no contributory negligence on the insured on the facts as found. The duty of care of both the insured and the broker are contextual and depend on the facts in each case. They agreed that the trial judge did not say that there was no duty on the insured to read the policy, but the conclusions here were based on the specific facts. The insureds were not in a position to fully understand the terms of coverage and the effect of vacancy on their coverage. They would have made further inquiries if any deficiency in coverage was brought to their attention. Most importantly, the broker failed to advise how a gap in coverage could be avoided by a vacancy endorsement.

There are a number of lessons to be learned here for brokers and insurers. In my view:

1. Brokers and insurers should provide the insured with a complete copy of the policy both at inception and on renewal.
2. The insurance summary and renewal documents should highlight the need to review the documents and policy wordings, examples of material changes of risk, the duty to advise the broker of any material changes and

particular changes in occupancy and any potential vacancy.

3. Brokers should return to the practice of keeping careful notes, either digital or handwritten, on all significant communications with the insured. These notes should not be pro forma, but must be drafted in view of the specific communications that took place and the particular risks and gaps in coverage and available coverage to avoid such gaps.

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