

**A Review of Bullying & Sexual Assault and the Protection Afforded by Canadian
Insurance Policies**

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The Times They Are a-Changin': The Impact of Societal and Technological
Advancements on Insurance Law

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Introduction

As of 2015, it is estimated that approximately 3.17 billion people use the internet, up from 2.94 billion in 2014.² It is predicted that in 2020, the number of devices connected to the internet will reach 30 billion, up from an estimated 13 billion in 2015.³ Further, the Statistics Brain Research Institute, found that by September 20, 2015, the total number of monthly active Facebook users was 1.44 billion, with an average of 640 million minutes spent on Facebook each month.⁴ Finally, every twenty minutes, 1 million links are shared, 2 million friend requests are made, and 3 million messages are sent.⁵ With the ever growing use of social media, and in the increased reliance on the internet, it is not surprising that the number of legal issues involving the use of internet has dramatically increased. Canadian Courts have already had to deliberate on several issues stemming from interactions between people occurring on social media sites, including the ongoing problem of bullying and sexual violence.

With the increased ease of access to personal information and instant communication, which can be as simple as hitting a “like button”, the use of social media sites have resulted in an increase in the number of incidents of bullying and sexual harassment. With the constant development in technology and changes in societal norms, insurance companies are forced to re-evaluate their insurance policies and in particular their exclusion clauses. This paper reviews the coverage provided by Homeowner and Commercial General Liability insurance policies in relation to claims that are made regarding bullying, cyberbullying, sexual violence and sexual assault both in the virtual and real world context. Finally, we examine the cost consequences of denying coverage where the Insured successfully obtains a decision that the Insurer has the duty to defend. Overall this paper engages in a discussion of the changes in insurance coverage, and reviews how comprehensive Homeowners’ and Commercial General Liability Insurance policies really are.

² See “Facebook Used by Half the World’s Internet Users” (30 July 2015), online: Independent <<http://www.independent.co.uk/life-style/gadgets-and-tech/facebook-used-by-half-the-worlds-internet-users-10426003.html>>.

³ See “Key findings from The Global State of Information Security Survey 2016” (30 Sept 2014), online: Price Waterhouse Cooper <<http://www.pwc.com/gsis2015>> [GSISS 2016] at 9.

⁴ See Facebook Statistics” (20 September 2015), online: Statistic Brain Research Institute <<http://www.statisticbrain.com/facebook-statistics/>>.

⁵ *Ibid.*

Bullying Defined

In 2010, 49.5% of students in 33 Toronto junior high and high schools reported that they were bullied online.⁶ Further, according to a survey of Americans, 73 percent of parents are either very or somewhat worried about cyberbullying. Of those surveyed, two in five parents reported that their child was involved in a cyberbullying incident.⁷ Cyberbullying was not only restricted to youth and children, as this same survey found that one in four educators have been the victims of cyber-harassment.⁸

Bullying has been defined as, “a systemic abuse of power between individuals, where one inflicts physical, emotional, or social harm upon another.”⁹ Cyberbullying has all the main characteristics of bullying but poses a greater harm as the manner in which the bullying is carried out has a larger reach and scope, creating a larger impact.¹⁰ Cyberbullying has been defined as “wilful and repeated harm inflicted through the use of computers, cell phones, and other electronic devices.”¹¹ The *Education Act*,¹² has defined cyberbullying to include:

- a. Creating a web page or a blog in which the creator assumes the identity of another person;
- b. Impersonating another person as the author of content or messages posted on the internet; and,
- c. Communicating material electronically to more than one individual or posting material on a website that may be accessed by one or more individuals.¹³

⁶ See Faye Mishna et al, “Cyber Bullying Behaviours Among Middle and High School Students” (2010) 80:3 American Journal of Orthopsychiatry 362.

⁷ See “Cyberbullying” Microsoft’s Trustworthy Computing division (2010), online: Microsoft Cyber Trust Blog <<https://blogs.microsoft.com/cybertrust/2010/11/18/new-research-shows-parents-and-educators-concerned-about-cyberbullying-but-still-not-a-top-priority-for-schools/>> [*Cyberbullying*].

⁸ *Ibid.*

⁹ Leanne Lester et al., “Problem behaviours, traditional bullying and cyberbullying among adolescents: longitudinal analyses” (Online: Routledge Taylor & Francis Group, 2012) 17: 3-4 Emotional and Behavioural Difficulties 435 at 436.

¹⁰ See “Cyberbullying and the Non-consensual Distribution of Intimate Images” (June 2013) online: Minister of Justice and Attorney General of Canada <<http://www.justice.gc.ca/eng/rp-pr/other-autre/cndii-cdncii/pdf/cndii-cdncii-eng.pdf>> at 3.

¹¹ Burgess Proctor, A., Patchin, J.W., & Hinduja, S., “Cyberbullying Research Summary: Victimization of Adolescent Girls” (2009) online: Cyberbullying Resesarch Centre <http://cyberbullying.org/cyberbullying_girls_victimization.pdf>.

¹² RSO 1990, c E.2.

¹³ *Ibid* at s. 1.0.0.2

The most common form of cyberbullying is when someone takes a private email, instant message, or text message, and forwards it to someone else, or communicates the message publicly.¹⁴ As held in *R v. L (C)*,¹⁵ a message does not have to be made publicly for it to be deemed cyberbullying. In this case, an ex-boyfriend sent insulting comments to his ex-girlfriend through Facebook, and this was held to be cyberbullying.¹⁶

The Effects of Bullying

Cyberbullying has had a tragic impact on many people over the last few years. Familiar news stories include the death of Rehtaeh Parson, a 17-year-old from Cole Harbour, Nova Scotia, who committed suicide after being cyberbullied.¹⁷ Additionally, Amanda Todd, a teenager from Coquitlam, British Columbia, also committed suicide after intimate images of her were shared online without her consent.¹⁸

Just three weeks after Rehtaeh Parsons's death, Nova Scotia enacted Canada's first legislation, called the *Cyber-safety Act*,¹⁹ establishing cyberbullying as a tort. This *Act* allowed a victim to sue the cyberbully in civil court, and the parents were held jointly and severally liable for their children's cyberbullying, unless it could be established that they exercised reasonable supervision over their child. This Legislation was short lived as the *Act* was successfully challenged. On December 10, 2015, the Nova Scotia Supreme Court held that the *Cyber-safety Act*, infringed sections 2(b) and 7 of *Charter*. As a result, the *Cyber-safety Act* was struck down in its entirety.²⁰

While no other province in Canada has attempted to enact legislation declaring cyberbullying to be a tort, legislation is currently in place that could address cyberbullying, if used. For instance, there are many provisions of the *Criminal Code of*

¹⁴ See *Cyberbullying*, *supra* note 7.

¹⁵ [2014] NSJ No 518

¹⁶ *Nova Scotia (Director of Public Safety) v. Lee*, 2014 NSSC 71.

¹⁷ See "Rape, bullying led to N.S. teen's death says mom" (12 April 2013), online: CBC News <<http://www.cbc.ca/news/canada/nova-scotia/rape-bullying-led-to-n-s-teen-s-death-says-mom-1.1370780>>.

¹⁸ See "Amanda Todd Suicide: RCMP Repeatedly told of blackmailer's attempts" (15 Nov 2013), online: CBC News <<http://www.cbc.ca/news/canada/amanda-todd-suicide-rcmp-repeatedly-told-of-blackmailer-s-attempts-1.2427097>>.

¹⁹ SNS 2013, c 2.

²⁰ See *Crouch v. Snell*, 2015 NSSC 340 (CanLII).

*Canada*²¹ which apply to bullying. Assault, criminal harassment, and uttering threats, could apply to those who commit bullying. Additionally, the torts of defamation, battery, nervous shock, and the newly established tort of intrusion upon seclusion, all allow for civil redress.

In Ontario, legislation known as the *Parental Responsibility Act*,²² holds the parent(s) accountable for the actions of their child, unless they are able to prove they were not negligent in the supervision of their child.²³ This means that parents could face a lawsuit alleging negligent supervision as a result of cyberbullying. For example, parents could be sued for their failure to properly supervise their child's electronic activities. Therefore, while a Homeowners' policy excludes criminal acts, a parent could face a negligent supervision lawsuit after his or her child has been convicted of one of these crimes. The question becomes would a Homeowners' policy exclude coverage for parents if they failed to act?

Part 1: Coverage Provided by Homeowners' and Commercial General Liability Policies: Bullying

Although criminal acts are generally not covered by Homeowners' policies, Insurers may still have the duty to defend in the context of cyberbullying by minors. Homeowners' insurance policies provide third party liability coverage to the occupants of the home. However, as explained in *Non-Marine Underwriters, Lloyd's of London v. Scalera*, Homeowners' policies generally exclude coverage for any intentional or criminal act or failure to act.²⁴

Overall, most Canadian Homeowners' policies do not insure loss or damage resulting from any intentional or criminal act or failure to act. Ontario's Ministry of Education has described bullying as a form of repeated, persistent and aggressive behaviour, directed at an individual, intended to cause fear and distress and/or harm to another person's

²¹ *Criminal Code*, RSC 1985, c C-46.

²² 2000, SO 2000, c 4 [*Parental Responsibility Act*].

²³ *Ibid* at s.10(2).

²⁴ 2000 SCC 24 (CanLII) [*Scalera*].

body, feelings, self-esteem or reputation.²⁵ Further, the Supreme Court of Canada in *A.B. (Litigation Guardian of) v. Bragg Communications Inc.*²⁶ adopted the Nova Scotia Report's definition of bullying as behaviour that is intended to cause, or should be known to cause, fear, intimidation, humiliation, distress or other forms of harm.²⁷ Clearly after reviewing these definitions of bullying, as well as the definitions provided above for cyberbullying, it is quite clear that bullying and cyberbullying are intentional acts, and therefore should be barred from coverage by the Insurer. It makes sense then, that Homeowners' policies in most instances, do not respond to a civil suit that is brought against the bully, whether in the cyber context or not.

However, although Insurers likely do not have to respond to a claim against the bully, Counsel for the Insurers should be cautious about the exposure of liability through the parents or guardians. Courts in Canada have recognized that parents and guardians can be liable in negligence for failing to supervise their children, and this accountability is supported in the *Parental Responsibility Act*.²⁸ In the context of cyberbullying, the parents are deemed negligent for their own failure to supervise. The full impact of the changes brought about by the *Parental Responsibility Act*, in the context of bullying and cyberbullying cases was apparent in the recent Court decisions of *Unifund Assurance Company v. D.E.*,²⁹ and its companion case *C.S. v. TD Home and Auto Insurance Company*.³⁰ These cases addressed when Homeowner's insurance policies provide coverage for parents who are accused of negligent supervision of their children, and they are further explored below.

a) Case Law Prior to Unifund Assurance Company v. D.E.

Children have increasingly more access to the internet and to devices with access to the internet. This was highlighted in a 2012 study which found that 83% of Canadian teenagers have regular access to a computer and they spend an average of three hours

²⁵ See Policy/Program Memorandum 144, "Bullying Prevention and Intervention" (5 December 2012) online: Ministry of Education <<http://www.edu.gov.on.ca/extra/eng/ppm/144.pdf>> at 4.

²⁶ [2012] 2 SCR 567.

²⁷ *Ibid* at para 21.

²⁸ *Parental Responsibility Act*, *supra* note 21.

²⁹ See 2015 ONCA 423 (CanLII), rev'd 2014 ONSC 5243 [*Unifund*].

³⁰ See 2015 ONCA 424 (CanLII).

online each day.³¹ These statistics demonstrate the potential risk that their parents could be exposed to if the minor engages in inappropriate conduct online and the potential risk that the Insurer is exposed to in return.

In *Belair Direct v. Shoup*,³² minors had intentionally caused injury to another minor and a civil suit was commenced against the parents. Relying on *Durham District School Board v. Grodesky*,³³ the Court held that the Insurer underwriting the Homeowners' policy had a duty to defend the parents against a claim of negligent supervision, despite the fact that the child was not protected, due to their intentional act.³⁴

b) Unifund Assurance Company v. D.E.- Change in Coverage for Negligent Parents

The Insurer's duty to defend has come under much scrutiny. The landmark decision, *Unifund*,³⁵ which brought about this change, started with a trial decision upholding the reasoning from *Belair*. Although overturned, a review of the trial decision will be helpful in understanding the rationale of the Court of Appeal.

i) D.E. v. Unifund Assurance Company - the Superior Court Decision

At trial level, the Applicant parents sought a declaration that Unifund Assurance Company had a duty to defend and indemnify them under a Comprehensive Homeowner's Property and Liability Insurance Policy ("the Policy").³⁶ The Statement of Claim alleged that the Applicants' child, and two other student Defendants bullied, threatened, hit and physically assaulted the victim. In the Claim, the following specific allegations of negligence were alleged as against the Applicant parents:

- a. they knew or ought to have known that the minor defendants were bullying K.S. and failed to investigate same;*

³¹ See "The Ipsos Canadian Inter@active Reid Report 2012 Fact Guide: The Definitive Resource on Canadians and the Internet" (2012), online: Ipsos Reid <www.ipsos.ca/common/dl/pdf/ipsos_InteractiveReidReport_FactGuide_2012.pdf>

³² See 2012 CanLII 98690 (ON SC)[*Belair*].

³³ See 2012 ONCA 270 (CanLII).

³⁴ *Belair*, supra note 31 at para 17.

³⁵ *Unifund*, supra note 29.

³⁶ *D.E. v. Unifund Assurance Company*, 2014 ONSC 5243 [*D.E.*].

- b. *they knew or ought to have known that the minor defendants were bullying K.S. and failed to take steps to remedy the bullying;*
- c. *they failed to take reasonable care to prevent the bullying and harassment of K.S. by the minor defendants of which they were aware;*
- d. *they failed to take disciplinary actions against the minor defendants;*
and,
- e. *they failed to discharge their duty to prevent the continuous physical and psychological harassment by the minor defendants for whom they are responsible in law.*

In considering whether coverage ought to be extended, the Court noted the terms within the exclusion clause, which stated:

We do not insure claims arising from:

- 6. *bodily injury or property damage caused by an intentional or criminal act or failure to act by:*
 - a. *any person insured by this policy; or*
 - b. *any other person at the discretion of any person insured by this policy;*
- 7. (a) *sexual, physical, psychological or emotional abuse, molestation or harassment, including corporal punishment by, at the direction of, or with the knowledge of any person insured by this policy; or*
(b) *failure of any person insured by this policy to take steps to prevent sexual, physical, psychological or emotional abuse, molestation or harassment or corporal punishment;*³⁷

The Court found that where multiple theories of liability were advanced to support the same claim for damages, an Insurer may be ordered to defend the entire action even if some of the claims were excluded by the Policy.³⁸ The fact that the Policy may not respond to intentional acts committed by the child did not preclude coverage being

³⁷ *Ibid* at para 7.

³⁸ *Ibid* at para 16.

triggered in favour of the parents where liability was sought to be imposed on a theory of negligence.

The Court relied on the three step approach established in *Scalera*,³⁹ to determine whether the claims against the Applicant could trigger indemnity. The three steps are as follows:

1. Which of the Plaintiffs' allegations as pleaded could trigger coverage under the Policy which requires an analysis of the true nature of the claims;
2. Whether the claims are entirely derivative; and,
3. Whether any of the properly pleaded non-derivative claims could potentially trigger the Insurer's duty to defend.⁴⁰

In reviewing the issue, the Court noted that the elements of the intentional tort claim against the minor and the negligence claim against the parents were entirely distinct. Accordingly, the Court found that the negligence claim was not derivative of the intentional tort claim. As there was no allegation that the Applicants' actions were intentional, the Court held that coverage should not be excluded on this ground.

The Court then considered the effect of the exclusion clause. The Court held that the clause was silent as to whether the exclusion applied only to intentional or unintentional failure to take steps to prevent physical abuse or harassment. The Court concluded that if the Insurer had intended to exclude liability for either intentional or negligent failure to prevent physical abuse or molestation, it could have included express language to that effect. The Court found that the provision was ambiguous. The Court then proceeded to apply the concept of *contra proferentem* and the principle that exclusion clauses were to be interpreted narrowly. The Court concluded that the proper interpretation was that the provision should be limited to the intentional failure to take steps to prevent physical abuse through molestation. The Court held that this interpretation was consistent with the notion that the Policy was a comprehensive policy

³⁹ *Scalera*, *supra* note 24.

⁴⁰ *D.E.*, *supra* note 36 at para 17.

intended to provide coverage for legal liability arising out of the Applicants' personal actions worldwide.

ii) Unifund Assurance Company v. D.E. – the Court of Appeal Decision

However, as mentioned above, this decision was successfully appealed by Unifund. The Ontario Court of Appeal ruled that the parents were not covered for their negligent supervision under their home insurance policy.⁴¹ Justice MacPherson, writing for the Court of Appeal, relied on the three part test set out in *Scalera*,⁴² and referenced in the application judge's decision, regarding an Insurer's duty to defend and indemnify.

Justice MacPherson found that the first two criteria were easily met, which were; whether the legal allegations are properly pleaded, and whether the claims were entirely derivative in nature. Justice MacPherson focused on the third part of the test, which was whether the properly pleaded, non-derivative claims against the parents triggered Unifund's duty to defend. The Court of Appeal noted that the claims against the parents were described in terms such as "failure to take disciplinary action" and "failure to discharge their duty to prevent the continuous physical and psychological harassment." When compared with the dictionary definition of negligence, which includes "failure to take proper care over something", the Court of Appeal found that the claims against the parents were squarely grounded in negligence. Justice MacPherson found that the application judge did not err in concluding that the Plaintiffs' claim against the Applicant parents was not derivative of the intentional tort claim against the child.

Justice MacPherson then analyzed one of the two exclusion clauses in the policy, which precluded coverage for:

*Failure of any person insured by this policy to take steps to prevent sexual, physical, psychological or emotional abuse, molestation or harassment or corporal punishment.*⁴³

⁴¹ *Unifund*, supra note 29.

⁴² *Scalera*, supra note 24.

⁴³ *Unifund*, supra note 29 at para 24.

The Court of Appeal noted that the Statement of Claim alleged numerous failures by the parents to prevent the actions of their child. The exclusion clause unambiguously precluded coverage for a failure to take steps to prevent physical, psychological or emotional abuse or harassment. He dismissed the lower Court's finding of ambiguity, which was based on the lack of "express language" addressing whether "negligent failure to prevent physical abuse or molestation" was excluded under the policy. In support of this finding, Justice MacPherson referred to a similar decision, where it was held that the policy excluded coverage for the same exact type of claim made against a babysitter for negligent supervision.⁴⁴

Justice MacPherson concluded that the exclusion clause was clear on its face and it applied to the claims as pleaded against the parents. As a result, he declared that Unifund did not have a duty to defend or indemnify the parents in the underlying lawsuit.

The Court of Appeal's decision sends a clear message that children and parents of children accused of bullying will not be covered under a Homeowners' insurance policy that contains this type of exclusion clause. As bullying, and now particularly cyberbullying, remains an issue at large for many Canadian schools, this decision will likely have a precedential effect on similar claims. Even though Insurers are entitled to determine what they do and do not cover, this case raises the question as to whether an insurance policy can really be called comprehensive when it does not cover the failure to take action, otherwise known as negligence. With Leave to Appeal sought and submitted for this decision, there will likely be much further debate, and even possibly an argument based on public policy grounds that a comprehensive policy cannot be interpreted so narrowly to exclude coverage for failure to act.

This decision has a significant impact on the scope of litigation surrounding cyberbullying for both Plaintiff Counsel and Counsel for the Insurer. It is obviously to the advantage of the Plaintiff, for coverage to be afforded to the Insured, as the chance of collecting judgment and the amount collected is likely much higher when covered by an Insurer. Additionally, it is also to the advantage of the Insured to have coverage, to

⁴⁴ See *D.J.F. v. B.L.*, 2008 CanLII 39786 (ONSC).

avoid having to pay legal fees and any judgment against them out of their own pocket. Therefore, it is important for Plaintiff Counsel to be extremely careful in choosing their wording when drafting the pleadings, just as it is important that Counsel for the Insurer carefully select the wording of their defence. These are important considerations for Counsel to review in an attempt to ensure coverage.

Part 2: Coverage Provided by Homeowners' Insurance Policies and Commercial General Liability Policies – Sexual Assault

a) Cyber Sexual Violence vs. Sexual Assault

The use of the Internet has expanded the scope, nature and impact of sexual violence. While there is no one accepted definition of cyber sexual violence, it can be described as using social media and communication technologies for the following:

- any unwanted sexual act;
- an attempt to obtain a sexual act;
- sexual comments or advances; or,
- sexual coercion.⁴⁵

It is important to note that the use of the internet can extend a physical act of sexual violence into the online context, or it can enable new online acts of violence.⁴⁶ Tactics include posting an intimate photo without consent, spreading rumours, or sending text messages of a sexual nature. These can have a detrimental impact on the victim's feelings, self-esteem, reputation and mental health.⁴⁷ As this is an emerging phenomenon, there are very few Canadian statistics on the frequency and intensity of such violence. However, the awareness of cyber sexual violence has grown because of

⁴⁵ "Sexual Violence Research Initiative" (2013), online: Sexual violence research agenda <www.svri.org/agenda.pdf>.

⁴⁶ See "Cyber Sexual Violence in Canada" (2 April 2014), online: Parliament of Canada

<<http://www.parl.gc.ca/Content/LOP/ResearchPublications/2014-15-e.htm>>.

⁴⁷ *Ibid.*

a number of cases, such as Amanda Todd and Rehtah Parson, have received significant media attention.⁴⁸

Cyber sexual violence is often included under cyberbullying because the same underlying intention to hurt or embarrass the person is present; however the type of embarrassment is of a sexual nature. Cyber sexual violence can occur in several ways. Common forms of sexual violence include the distribution; without consent, of sexual images, messages or videos; harassing an individual with messages of a sexual nature; or posting messages in a public manner with the intent of shaming the individual.⁴⁹ Sharing nude images/videos of another person without their consent is also seen as a form of cyberbullying.⁵⁰ Celebrities are often targets of this type of sexual violence and victims have included the likes of Jennifer Lawrence and Kate Upton.⁵¹

Although cyber sexual violence is often seen as a form of cyberbullying, an emerging concept is virtual sexual assault. This occurs when a targeted individual, often a woman, is the victim of constant messaging containing threats of sexual assault, either from a single harasser or as a “mob-style” attack, as well as the posting of intimate images. Just recently, the Ontario Superior Court likened the posting of an intimate image online to a sexual assault.⁵² The Defendant was ordered to pay \$100,000.00 plus \$41,708 in Court costs and interest to his former girlfriend. Justice Stinson held, “It is appropriate to regard this as tantamount to multiple assaults on [the woman’s] dignity... In many ways, it is analogous to a sexual assault...”.⁵³ Although this is the first decision of its kind in Canada, as these cases become more prevalent, the concept of sexual assault occurring online will become more pronounced.⁵⁴ However, until this occurs, the current case law regarding insurance coverage for sexual assault liability is restricted to sexual assault in the physical sense.

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ See Catherine A. Korte & Anthony H. Gatensby, “No Man’s Land: Cyberbullying and the Canadian Legal Landscape” online: <<http://clcnw.com/uploads/articles/75/no-mans-land.pdf?1428588648>>.

⁵¹ See “Jennifer Lawrence Among Celebrity Victims in Leak of Nude Photos” (1 September 2014), online: CBC News <<http://www.cbc.ca/news/world/jennifer-lawrence-among-celebrity-victims-in-leak-of-nude-photos-1.2752256>>.

⁵² See *Doe 464533 v. N.D.*, 2016 ONSC 541.

⁵³ *Ibid.*

⁵⁴ See Sean Fine, “Ontario Man Ordered to Pay for Posting Intimate Video of Ex-Girlfriend” online: The Globe and Mail <http://www.theglobeandmail.com/news/national/ontario-man-fined-for-posting-intimate-video-of-ex-girlfriend/article28406273/?cmpid=rss1&click=sf_globe>.

b) Homeowners' Policies

Typically, Homeowners' policies exclude sexual, physical, psychological or emotional abuse, molestation or harassment or the failure of any person to take steps to prevent such abuse. This is due to the intentional nature of the act.⁵⁵

Whether or not an intentional act could possibly trigger coverage under a Homeowner's policy is based on the particular words used in the policy. Additionally, further consideration needs to be given as to whether the Homeowner's policy is supplemented with a Personal Liability Umbrella Policy ("PLUP"). The purpose of this umbrella policy is to provide an additional layer of insurance for circumstances that may exceed the limits of the underlying coverage of the homeowner's policy, or to provide a broader base of coverage, such that it can drop down and provide defence and indemnity for circumstances that are not otherwise covered by the underlying insurance.

The extended coverage provided by a PLUP could certainly open opportunities for intentional actions to be afforded coverage. This issue was reviewed in *Royal & Sun Alliance Insurance Co. of Canada v. Thorne*,⁵⁶ where a policy which incorporated self-defence wording was held to potentially offer indemnity, thereby creating a duty to defend. In the context of sexual assault, the defence of consent would likely be akin to the defence of self-defence, as there is an explanation for the intentional action. However, in *Meadows et al. v. Meloche Monnex Insurance Brokers Inc.*,⁵⁷ the Ontario Court of Appeal was critical of the reasoning in *Royal*, finding that there was no duty to defend. The Court of Appeal distinguished the Meloche Monnex policy from the Royal & Sun Alliance policy, stating that it did not contain any self-defence wording, whereas the Royal & Sun Alliance policy did.

Therefore it is imperative that Counsel always consider whether their client obtained a PLUP in addition to their Homeowner's policy, as it may extend coverage that may not have been afforded if it was just the Homeowner's policy. Further, Counsel should also be careful in reviewing the language of both the Homeowner's policy and the PLUP to

⁵⁵ See *Scalera*, *supra* note 24.

⁵⁶ (2003), NBCA 61 (CanLII) [*Royal*].

⁵⁷ [2010] 12 OR (3d) 312 (ONCA) [*Meadows*].

determine which line of reasoning, whether *Royal* or *Meadows*, their claim may fall under.

c) Commercial Policies

There are two principle types of insurances that are typically implicated in cases involving sexual assault allegations against businesses or institutions. These are Commercial General Liability (CGL) policies and professional errors and omissions (E&O) policies. Both the CGL and E&O policies are potential sources of insurance coverage for claims involving alleged acts of sexual assault.

In *Scalera*, the Supreme Court of Canada resolved the issue of whether an allegation of sexual abuse would constitute an intentional act, and therefore barring coverage. The Supreme Court of Canada held that it must be inferred that such an individual intended to cause harm, as a matter of law. The Supreme Court of Canada held that the Insured would be unable to compel his or her Insurer to defend the action on his or her behalf.

In reaching this conclusion, Madam Justice McLachlin stated:

*In other words, where there is an allegation of sexual battery, Courts will conclude as a matter of legal inference that the defendant intended harm for the purpose of construing exemptions of insurance coverage for intentional injury.*⁵⁸

Additionally, in reaching this conclusion, the Supreme Court of Canada was careful to note that the Insurer will not be subjected to providing coverage where Plaintiffs have gotten creative with their pleadings to frame the Insured's actions as a matter of negligence rather than an intentional act. The Court pointed out that in the sexual assault context, it was common for allegations of abuse or assault to be cast as negligence in an attempt to trigger coverage. Although this was attempted in *Scalera*, the Court held that they are to look beyond the mere words of the pleading in order to determine the true nature and substance of the allegations. Therefore, in determining

⁵⁸ *Ibid* at para 38.

whether coverage was afforded to the Insured, it would not be triggered simply because a Plaintiff used the word negligence.⁵⁹

The three step test from *Scalera* could also be used in determining whether a sexual abuse claim could trigger a duty to defend. To refresh what those steps are, they are:

- 1) Which of the plaintiff's legal allegations are properly pleaded?
- 2) Are any of the claims entirely derivative?
- 3) Can any of the properly pleaded non-derivative claims potentially trigger the insurer's duty to defend?⁶⁰

In *Scalera*, the Court discussed the issue of intent in the context of sexual assault. The Court was clear that a perpetrator's defence that he or she negligently believed there was consent was not relevant to the coverage issue. The Court found that if the pleading alleged lack of consent, then intent to harm can be inferred. The Court held:

*The logic is simply that either the act must have been consensual or not consensual. If it was not consensual, the policy does not apply because neither the insured nor the insurer contemplated coverage for non-consensual sexual activities. If it was consensual, then there is no battery and no claim for recovery.*⁶¹

It is quite clear that where there are allegations of a sexual assault, the accused is not provided coverage, as the Insurer did not contemplate coverage for non-consensual sexual activities. In other words, if there was no consent to the sexual act, then intent to harm the person can be implied, and most insurance policies will not apply if the act was intentional.

However, an Insurer should not rely on the proposition that a criminal act will not attract coverage, as *E.M. v. Reed*⁶² highlights the risks that are present when an insurance

⁵⁹ *Ibid* at para 50.

⁶⁰ *Ibid* at para 17.

⁶¹ *Ibid* at para 39.

⁶² [2000] OJ No 4791; affirmed in [2003] OJ No. 1791 (ONCA) [*Reed*].

policy is too broad. In this case, a priest was accused of sexual assault and the Insurer argued that they did not have a duty to defend liability against a criminal action. Justice Wilkins determined that the policy was broad enough to offer protection against acts of assault and other criminal acts. The Insurer argued that it would be against public policy to require an Insurer to defend against liability resulting from criminal actions, relying on *Sansalone v. The Wawanesa Mutual Insurance Co.*,⁶³ and *Scalera* to make this argument. The Insurer also argued that, by reason of the breaches of fiduciary duty vitiating consent, the Insured's conduct constituted criminal actions, for which no policy of insurance could be asked to afford indemnity.

However, Justice Wilkins differentiated the decisions of *Sansalone* and *Scalera* stating that the insurance policies in those cases did not afford any coverage for sexual assault or battery. In reviewing the two Supreme Court of Canada decisions, Justice Wilkins explained:

*In commenting that insurance is presumed to cover only negligent and not intentional injuries, the Court was not dealing with a specific term within the policy definition of coverage which contractually identified losses arising from intentional acts and afforded indemnity for them. The policy at bar does precisely this.*⁶⁴

Justice Wilkins went further to explain that there was no independent tort of sexual battery known to common law. The Court explained that the Insured's actions although sexual in nature, would still be deemed battery. Therefore, if the policy included coverage for battery, allegations of sexual battery would invoke a duty for the Insurer to defend the Insured. Justice Wilkins acknowledged that it may go against public policy to insure criminal acts. Nevertheless, the fact that the policy included coverage for battery was a sufficient enough reason to hold that the Insurer had a duty to defend.

This decision provides significant support for Counsel for the Insured and Counsel for the Plaintiff. Where broad terms like assault and battery are included in the insurance policy, criminal actions may be covered by the policy, as the language of the policy itself

⁶³ (2000) 185 DLR (4th) 57 (S.C.C.) [*Sansalone*].

⁶⁴ *Reed*, *supra* note 62 at para 103.

prevails over public policy arguments. It is important for Counsel to always consider the implication of broad terminology in any form of agreement, especially when this language opens the door to an argument that coverage should be extended to the Insured. Finally, this decision obviously presents challenges for Counsel for the Insurer, as arguments that criminal actions should not be extended coverage due to basic public policy will likely not succeed when broad terms are used in the language of the policy.

d) Coverage for Innocent Third Parties

When conducting an analysis of coverage to determine whether a co-insured is covered for a sexual abuse allegation, Ontario Courts tend to review the policy language strictly against the Insurer.⁶⁵ Most policies will contain severability language which necessitates a separate coverage analysis for each Insured. Therefore, a determination that an Insured perpetrator is not covered by the policy does not necessarily prevent an innocent co-insured from obtaining coverage. Rather, an analysis of the wording of the policy will determine whether there is a finding of coverage for the co-insured. The most common debate in this context is whether the intentional act exclusion refers to acts committed by an Insured or the Insured.

In *W. V(T) v. W.(K.R.J.)*,⁶⁶ the daughter alleged she was sexually assaulted by stepfather. She sued her stepfather for the assaults and her mother for not preventing the assaults. There was no debate that the father was excluded from coverage, however there was a question as to whether the mother was covered. There were a series of policies over the period of time of the assaults. The first one said: “bodily injury caused intentionally by or at the direction of an insured” The second one said: “bodily injury caused intentionally by or at the direction of the insured.”

The Court held that under the first policy the mother was not owed a defence. The Court concluded, however, that under the second policy she was entitled to a defence.

Justice Reilly reviewed the issue and clarified the distinction between “an” and “the” stating:

⁶⁵ *Zurich Insurance Co. v. 686234 Ontario Ltd.*, 2002 CanLII 33365 (ONCA).

⁶⁶ 1996 CanLII 8005 (ONSC).

I conclude that “an insured” must be given its ordinary, common sense meaning. “An” is an indefinite article, and it means “any” insured. Therefore, intentional conduct by W. or “an” other insured excludes the obligations to indemnify on the part of the insurer.

However “the” is a definite article, and does not mean, nor can it be equated with the indefinite article “an” nor with the adjective “any” both of which are used to modify “insured” in other paragraphs of the exclusion clause in the policy. Reference to “the insured” in an exclusion clause has generally been held in the American Jurisprudence to mean “the insured making the claim” or at the every least, to be ambiguous.⁶⁷

Recent case law has further assessed this issue. In *Thompson v. Warriner*,⁶⁸ the exclusion clause in the policy used the indefinite article “any”. The Court held that the policy clearly excluded liability and therefore, the innocent third party was not afforded coverage. Whereas, in *Godonoaga v. Khatambakhsh*,⁶⁹ the definite article “the” was used in the exclusion clause, and the Court found that there was coverage for the innocent co-insured. Therefore, in Ontario the use of “the Insured” in an exclusion clause has been held to mean the Insured making the claim, and affords the innocent third party coverage. Additionally, this understanding was reinforced in *E.M. v. Reed*, where Justice Wilkins stated:

The difference between an insured and the insured is that the insured is the named insured under the policy, whereas an insured includes someone who may be an unnamed insured, or someone for whom coverages is afforded other than the named insured itself.⁷⁰

These decisions reinforce the importance of Counsel reviewing the language within the insurance policy, particularly the exclusion clause, right down to the determining if a definite or indefinite article is used to expand the class of Insured who are excluded from coverage.

⁶⁷ *Ibid* at 11 (QL).

⁶⁸ 2002 CanLII 44923 (ONCA).

⁶⁹ 2000 CanLII 5737 (ON CA) [*Godonoaga*].

⁷⁰ *Reed*, *supra* note 62.

Additionally, the Insurers are making further efforts to exclude all harm arising from intentional acts, regardless of which Insured commits the act. This has resulted in the use of even stronger language in their policies to broaden the exclusion clause. An example of a broader exclusion clause now being used in Homeowners' policies is the following:

We do not insure claims arising from:

Bodily injury or property damage resulting directly or indirectly from any intentional or criminal acts or failure to act by:

a) any person insured by this policy; or

b) any other person at the direction of any person insured by this policy;

This exclusion applies to persons insured under this policy even though the intentional or criminal act or failure to act is by only or more of any other person or persons insured under this policy.

This broadened exclusion clause clearly presents greater challenges for Counsel for the Insured and Counsel for the Plaintiff, looking to have access to the insurance policy limits. The use of terms like “any” creates a larger group of people who are excluded from relying on the policy. Based on the Court’s current interpretation of the impact of an indefinite article in an insurance policy, it becomes more important for Counsel to consider the language used in the policy prior to commencing an action and drafting pleadings. Insurers are better preparing themselves for any potential legal battle. As a result, it is prudent that Counsel review the policy in great length before taking any steps as the only proper instrument to determine the liability of each Insurer is the policy itself.⁷¹

Part 3: The Cost Consequences of Refusing to Defend a Claim Against the Insured

⁷¹ *Family Insurance Corp. v. Lombard Canada Ltd.*, [2002] 2 SCR 695 at para 16.

Recent case law has demonstrated how quickly an understood principle can change, and how much the wording of an exclusion clause in the insurance policy affects whether or not the Insurer has a duty to defend. With increased claims for bullying, sexual violence, or sexual assault, there will likely be more incentive for the Insurer to deny a request to defend the Insured. It is therefore imperative for Counsel for the Insured to have an understanding of costs that may be available to them, if they are successful in establishing that the Insurer had the obligation to defend their client.

Additionally, in representing the Insurer, it is also important that Counsel have a general sense of the cost consequences for not defending an Insured, so that they can explain this to their client, the Insurer. Where the Insurer has denied coverage, it may be advisable to bring an Application to determine coverage at the outset of a claim to minimize any cost exposure if coverage is found to be owed at a later point. Furthermore, Counsel should be mindful of section 132 of the *Insurance Act*⁷² and the impact it may have on the Insurer, Insured, and the Plaintiff. This section states:

Right of claimant against insurer where execution against insured returned unsatisfied

*132. (1) 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.*⁷³

Therefore, if an Insurer denies coverage and the Insurer is ultimately held to have owed a duty to defend, the Insurer is bound by whatever decision the Court makes regarding the Plaintiff's claim, no matter how little effort the Insured puts into their defence. Given the severe consequences this poses for the Insurer, it is important that Counsel

⁷² RSO 1990, c. I.8, s. 132.

⁷³ *Ibid.*

determine coverage as soon as possible by bringing an Application at the outset of a claim.

In *Godonoaga*, the Court held that the Insured was entitled to a defence by the Insurer without expense to them. It was determined that the Insurer had a duty to defend the Insured. The Court held that the Insured should have their costs on a substantial indemnity basis, for the defence of the main action and cross-claims until the Insurer served and filed a notice of change of solicitors and took over the defence. The costs included the motion and the appeal.⁷⁴

This approach was again upheld in *Reed*,⁷⁵ where the Appellants cross-appealed on the issue of costs. They argued that the trial judge erred in failing to order the Insurer to pay the Insured their costs of the third party proceedings on a substantial indemnity basis. Relying on *Godonoaga*, Justice Gillese held that entitlement to substantial indemnity costs in the third party proceeding flows directly from the unique nature of the insurance contract which entailed a duty to defend at no expense to the Insured.

*Thus, in my view, the trial judge erred in awarding costs of the third party proceedings against Great American on a party-and-party basis. Accordingly, the cross-appeal is allowed in part. Paragraph 4 of the judgment of Wilkins J. dated December 15, 2000 and September 7, 2001, shall be altered to provide that Great American shall pay to the Diocese and Father Reed their costs of the third party proceedings as against Great American, from commencement to resolution, on a solicitor-and-client basis.*⁷⁶

The decision in *Reed*, demonstrates that the obligation to save the Insured from the costs of defending the action is sufficiently broad to encompass third party proceedings. In explaining the legal foundation for awarding substantial indemnity costs, Justice Gillese explained that it is the contractual basis for the claim to solicitor-and-client costs that justifies the award and therefore constitutes an exception to the usual rule that solicitor-and-client costs will not be awarded except in unusual circumstances.

⁷⁴ *Godonoaga*, supra note 69.

⁷⁵ *Reed*, supra note 62.

⁷⁶ *Ibid* at para 25.

These cases illustrate the cost incentive for Counsel to challenge the Insurer's decision to not defend an Insured. It is crucial that Counsel for the Insured is aware of the potential costs available to them if they are successful in challenging the Insurers position that they do not have to defend.

Conclusion

As the law continues to evolve and the use of technology grows, we will likely start to see more cases on the issue of cyberbullying, sexual violence and virtual sexual assault. At this point in time, Homeowners' exclusion clauses seem to have the same effect on bullying whether it is in person or online. Additionally, at this juncture, the Court has often treated sexual violence in the same manner as cyberbullying, often categorizing it as a form of cyberbullying. After reviewing the law on bullying and sexual assault, it is quite clear that the nature of the act is intentional and therefore insurance coverage is not afforded to the bully. However, where the water begins to get murky is where third parties are brought into the legal equation, for example parents in the bullying context, and employers in the sexual assault context. Recent case law is quite clear, that under a Homeowners' Liability Policy, the parent will not be covered for failure to prevent their minor's actions. This is also the case for sexual assault under a Homeowners' policy, as again, failure to prevent the perpetrator's actions would likely exclude the third party from coverage.

The recent decisions have magnified the importance of Counsel carefully selecting their wording when drafting pleadings to ensure that insurance coverage for the Insured does not become an issue. Further, the recent change in the law opens up the door for Counsel for the Insurer to avoid having to enter litigation on behalf of their Insured, if fatal language can be found in the policy to indicate no coverage is afforded. It will be interesting to see how this area continues to develop, as leave to appeal was sought and submitted for the decision in *Unifund*. This decision will also likely raise the debate between the majors players in the insurance industry as to whether comprehensive insurance, really is comprehensive, if it does not provide coverage for "failure to act" or otherwise known as negligence.

In reviewing the current state of Commercial General Liability policies, it appears that there is far more flexibility for coverage when an Insured is accused of sexual assault. Case law under this type of policy has held that the language of the policy trumps public policy and will afford coverage to an Insured for a criminal act. This certainly opens the door for Counsel for the Insured to explore asserting that their Insurer has the duty to defend, as broad terms like “battery” and “assault” being included in the policy have resulted in the Court finding coverage for the Insured.

Additionally, recent case law has shown the importance of Counsel reviewing the language of the policy right down to the definite and indefinite articles. With Counsel attempting to argue that there should be coverage for an innocent third party, they should be cognizant of the language used in the exclusion clause. An exclusion clause which relies on an indefinite article, such as “an” or “any”, can have a debilitating effect on Counsel’s ability to advance a claim for coverage for their innocent third party client. Further, these cases have highlighted the importance for Counsel for the Insurer to also be aware of the exclusion clauses used by their client, as less ambiguous language used in the exclusion clause, is more likely to result in successful litigation regarding their obligation to defend.

Finally, in considering whether Counsel for an Insurer should provide advice on whether their client should deny coverage, it is extremely important that Counsel is familiar with recent case law awarding costs on a substantial indemnity basis against Insurers who have inappropriately denied coverage. These decisions have upheld the principle that the Insurer is responsible for paying costs on a substantial indemnity basis for the entire period of time up until the Insurer serves a notice of change in representation to take over the defence. This is extremely encouraging for Counsel for the Insured who is considering whether to pursue litigation regarding their client’s right to coverage.

Overall, the law regarding insurance coverage will continue to change as technology and society continues to advance, however Counsel should be weary of the recent developments which may affect how they draft their pleadings, respond to a claim, or even whether they advise their client to pursue an action.