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## THE FAILURE TO PREVENT CLAUSE: INSURER HAS NO DUTY TO DEFEND PARENTS NAMED IN NEGLIGENCE CLAIM

By: RBS

In the recent case of *Reeves v. Co-Operators General Insurance Company*, 2022 BCSC 2258 [Reeves], the Supreme Court of British Columbia found that an insurer was not under a duty to defend parents in a lawsuit, which alleged they failed to prevent their minor son from assaulting another student.

### Factual Background

Zarina Salehian filed an action in the Supreme Court of British Columbia alleging that she was assaulted by Isaac Reeves, while at school in September 2019 (the “Personal Injury Action”). Ms. Salehian sued Isaac, his parents, the school district, and some school district employees, for injuries she sustained from the alleged assault.

The parents held a home insurance policy, which included coverage for personal liability because of unintentional bodily injury damage arising out of personal actions (the “Policy”).

The parents sought coverage from the insurer pursuant to the Policy.

The claims against the parents were in negligence, and in particular, that they failed to properly supervise, adequately discipline, and take reasonable steps to avoid a reoccurrence of violence from Isaac.

The insurer denied coverage to the parents on the basis of the following exclusion referred to by the court as the Failure to Prevent Exclusion:

- We do not insure claims made against you, nor do we provide voluntary payments under this policy, arising from or in relation to:
- ...failure of any insured to take steps to prevent sexual, physical, psychological or emotional abuse, assault, molestation, harassment or corporal punishment.

### The Ruling

The court started its analysis with the three part test, for interpreting insurance policies in the context of a duty to defend and right to indemnify, set out by the Supreme Court of Canada in *Non-Marine Underwriters*,





*Lloyd's of London, v. Scalera*, 2000 SCC 24 [*Non-Marine Underwriters*].

The first stage of the *Non-Marine Underwriters* test was met, as the court found the claims were properly plead in the Personal Injury Action. The claim against the son was for battery, and the action against the plaintiff parents was in negligence.

The second part of the test involved determining whether the claims were derivative in nature, and the court found they were not. The actions of the parents, and the son, did not arise out of the same actions, and were clearly separable. While the alleged assault by the son was an intentional tort, the same could not be said of the alleged negligence of the parents.

The court noted a number of analogous cases which treated claims against parents as distinct causes of action in negligence: *Durham District School Board v. Godesky*, 2012 ONCA 270, R.C. and J.M. v. *Western Assurance Company*, 2022 ONSC 100, *Unifund Assurance Company v. D.E.*, 2015 ONCA 423 [*Unifund*].

The third part of the *Non-Marine Underwriters* test required determining whether any of the properly plead, non-derivative claims, could potentially trigger the insurer's duty to defend, followed by determining whether the Failure to Prevent Exclusion applied.

The court held that the terms of the Failure to Prevent Exclusion were "clear, and unambiguous even if using the lens of an ordinary and reasonable person". The court held that the allegations against the plaintiff parents were "that they failed to take various steps such as: the failure of the parents to anticipate another occurrence of violence, to take reasonable steps to avoid a reoccurrence of violence, and to supervise and discipline their son." The court found that these allegations fell within the concept of being a "measure or action".

Ultimately, the court found that the Failure to Prevent Exclusion applied, and denied coverage, adopting the approach taken in *Unifund* and *Dube v. BCAA Insurance Corporation*, 2012 BCSC 1958, where a similar exclusion clause applied in the context of negligently failing to prevent abuse.

### **Practical Implications for Insurers and Insureds**

Reeves reminds us of the importance of the methodical step by step approach to determining coverage the "pith and substance" of a claim, as set out in *Non-Marine Underwriters*:

- (a) Determine whether a claim can trigger indemnity requires an examination of the substance of the allegations contained in the pleadings. It goes beyond a superficial readings of the words selected by the plaintiff, to determine the true nature of the claims;





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- (b) Determine whether the claims are entirely derivative; and
- (c) Determine whether any of the properly plead non-derivative claims could potentially trigger the duty to defend, and whether an exclusion applies.

Reeves also reminds of the high hurdles faced by insureds in obtaining coverage for negligent supervision allegations, particularly when facing an exclusion similar to the Failure to Prevent Exclusion.



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