Date of Release: June l7, l994.

No. C911377
New Westminster Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:	
JOAN CAROL LANDRY	
PLAINTIFF	
AND:	
NANCY ELIZABETH FENTON THE CORPORATION OF THE CITY OF WHITE ROCK KAREN VERVILLE	**REASONS FOR JUDGMENT** **OF THE HONOURABLE** **MR. JUSTICE D.A. HOGARTH**
DEFENDANTS	
AND:	
EVELYN WILSON SAFECO INSURANCE COMPANY OF AMERICA COMMERCIAL UNION ASSURANCE COMPANY OF CANADA KAREN VERVILLE	
THIRD PARTIES	

Counsel for the Third Party (Evelyn Wilson):	Angela E. Thiele
Counsel for the Third Party (Safeco Insurance Co. of America):	Andrea Finch
Counsel for the Third Party (Commercial Union Assurance Company of Canada):	Brian Crawford

DATE OF HEARING: May l8, l994.

This matter concerns a dispute between Karen Verville, a Third Party who is also a Defendant, ("Verville"), and two of the remaining Third Parties, Safeco Insurance Company of America ("Safeco") and Commercial Union Company of Canada, ("Commercial Union"), as a prelude to a determination of the Plaintiff's claim.

The amended Statement of Claim in the action alleges that the Defendant, Fenton, is the owner of a dwelling house situate at 905 Habgood St., and upon a lot adjacent to property owned by the Defendant City of White Rock. Verville owned the dwelling house in 1983 and while she owned it, it is alleged, she negligently constructed an access walkway which traversed the lot and went onto the property of the City. It is further pleaded that, as a consequence of the negligence on the 3rd of November 1990, the Plaintiff slipped and fell while leaving the residence and suffered compensatable injuries. Verville and all other Defendants have been joined for relief claimed under the **Occupiers Liability Act**.

In 1983 Verville had taken out "household" insurance with Safeco which expired in 1984. By 1990 Verville was living in different premises, 15131 Buena Vista Avenue, and had taken out a similar policy with Commercial Union covering these premises. Under each policy the companies were called upon to defend the

insured from certain specified legal claims as well as indemnify the insured for certain loss occasioned during the periods the policies were in force. The issue I have to resolve is whether in the circumstances, either or both, can be called upon to defend Verville under the terms of their respective policies. I note that the companies inter se have not claimed indemnity from each other.

Dealing firstly with the liability of Safeco. Safeco takes the position that the policy it had in effect expired on the 10th of May 1984, and it is not liable to defend or indemnify Verville for any claim of this nature after that date.

In determining this issue it is to be noted that the Safeco policy provided, inter alia, for comprehensive personal liability for all sums that the insured was liable to pay resulting from bodily injury and that the company would defend the insured from any suit alleging same. Of great importance, however, is the proviso at the outset of the section of the policy dealing with public liability.

The specific provision is set out as follows:

"SECTION II

Coverage under the liability portion of this policy will apply only to accidents or occurrences which take place during the policy period."

It is common ground that the alleged injuries to the Plaintiff did not occur during the "policy period" but the Statement of Claim alleges that the negligent act of Verville which eventually caused the injuries did.

There can be no doubt on the authorities cited by counsel for Ms. Verville, that the duty to defend is broader than the duty to indemnify for loss payable, as the former is determined by the allegations in the Statement of Claim and the latter by the ultimate determination of the facts that may or may not bring the loss within the scope of the policy. See American Home Assurance Co. et al v. Nichols (1990) 45 C.C.L.I. 153.

So the question to determine, qua Safeco, is whether the allegations as set out in the Statement of Claim describe an "accident or occurrence" that took place within the policy period. I have no difficulty in concluding that the injuries of the Plaintiff, as alleged in the Statement of Claim, did not occur as a consequence of an "accident" that took place within the policy period but whether the matter was an "occurrence" requires more careful consideration.

A specific dictionary definition of the word does not assist to any great extent as it becomes somewhat tautological. Similarly,

several American authorities are of little assistance as the word "occurrence" is specifically defined in the policy.

Of some assistance is the citation from Hilliker, Liability Insurance Law in Canada 1991 at pp. 132 - 135, wherein it is suggested that this type of policy is called an "occurrence" policy because coverage depends on the date that the injury or damage occurs and is not triggered by the act or omission that gives rise to the claim nor when the claim is advanced. This concept was adopted and applied in the Superior Court of New Jersey in Deodato v. Hartford Insurance Company (1976) 363 Atlantic Reporter (2d) 361. It is to be noted that some of the authorities, however, have had policy defined definitions to assist them.

This characterization was extensively considered by McLachlin J. in the Supreme Court of Canada in Reid Crowther v. Simcoe and Erie General Insurance Co (1993) 13 C.C.L.I. (2d) 161.

The facts of this case are important. Reid Crowther was an engineering firm that had a liability policy issued by Erie General. Reid Crowther was responsible for the supervision of the installation of certain utility services. A claim for damages arose during the period that the policy was in effect, notice of the claim was given and the claim was paid. A second claim arose for problems that were discovered after the policy had expired.

The issue before the Court was whether the policy covered both claims and it was held that it did.

It is clear that the nature of the policy in the Reid Crowther case was somewhat different than the policy in the case at bar but the extensive consideration given to aspects of liability policies generally is of importance.

McLachlin J., for the Court, pointed out that public liability policies of this kind have been characterized as "claims made" or alternatively, "occurrence" policies. Generally, the first provide coverage for losses arising during the period the policy is in force; the latter for events that arise afterwards as a consequence of actions of the insured that took place during the policy period. McLachlin J. pointed out that there is disagreement among the experts with regard to such characterizations and suggested a third category that is a "hybrid" of each. She eventually concluded that the distinction as above noted does not particularly resolve the question and stated that in each case the Court must examine the provisions of the particular policy at issue (and surrounding circumstances) to determine if the events in question fall within the terms of coverage. In doing so, she held the Court is to consider:

1. the contra proferentem rule;

2. the principle that coverage provisions should be construed broadly and exclusion clauses narrowly; and

3. the desirability, at least where the policy is ambiguous, of giving effect to the reasonable expectations of the parties.

Applying the above principles, I have come to the conclusion on the reading of the policy involved in this case that Safeco was responsible for any loss to Verville that arose during the policy period and loss in this respect means a claim for compensatable injuries that are occasioned at least in part during the policy period. I leave open for another day a point that Commercial Union does not argue, as to whether the negligent act that gives rise to the loss must be within the period but certainly in my view the loss itself must arise during that time as it is for a loss during that time that the insurance is provided. In my view the company cannot be held responsible for losses that arise and commence after the period for which the premium was paid. No loss occurred or was alleged to have occurred during the term and therefore nothing occurred during that span of time with respect to which Verville could claim indemnification.

Thus I have concluded that there must be an allegation in the Statement of Claim that the injury, in whole or in part, took place

during that time regardless of when the act or omission causing it was alleged to have happened before Safeco can be compelled to defend or indemnify.

To rule otherwise would impose upon insurers the responsibility of forever waiting for the other shoe to drop: i.e. every policy of insurance would not only insure the insured from claims during the tenure of the policy but for any number of years thereafter with respect to acts or omissions that the insured might not even recall. In my view neither party to the contract expected such a result.

Therefore, there being no claim in the Statement of Claim alleging an "accident" or "occurrence" that gave rise to injuries within the policy period, there is no liability on Safeco to indemnify, or defend.

I shall now consider the position of Commercial Union. A more extensive review of this policy is required. The company issued to Verville a policy which it called the "Ideal Home" policy. Commercial Union is not concerned with the definition of "occurrence" in its policy and is prepared to deal with the matter on the basis that the contract provides for coverage even though the negligent act is alleged to have taken place before the contract period commenced.

However, the company has raised an alternative point, to the effect that by its policy it undertook to indemnify Ms. Verville pertaining to the Buena Vista property she purchased in 1990, and if it has to defend her re the Habgood St. property, this means that the policy is being extended to cover premises totally out of the picture at the time it was taken out.

The argument can be fleshed out as follows. The policy covered the period from July ll, 1990, to the same day and month in 1991, and thus was in effect on the day that the Plaintiff was alleged to have been injured, November 3, 1990.

The contract is divided into two separate and distinct sections, each of which provides for indemnification from loss arising as a result of different risks. Section 1 is stated to describe the insurance on the property of the insured and Section 2 describes "the insurance for your legal liability to others because of bodily injury and property damage."

As there is no claim by Ms. Verville involving any loss of her personal property, the appropriate part of the policy to consider is Section 2.

This section is very similar in its aspects to the Safeco policy. It provides coverage for accidents or occurrences that

take place during the term of the policy and extends coverage for claims made against the insured arising from the following specifically enumerated situations:

1. Legal liability for unintentional bodily injury or property damage arising out of the personal actions of the insured anywhere in the world: excepting vehicular use: damage to the property of the insured, property in the care of the insured, or bodily injury to the insured or any person residing with the insured other than an employee.

2. Legal liability arising from the ownership of the premises specifically named in the policy with similar exceptions for damage to the property of the insured, property in the care of the insured or bodily injury to persons living with the insured:

3. Legal liability for unintentional property damage to the premises being rented by the insured caused by fire and similar causes.

4. Legal liability for unintentional bodily injury to residence employees arising out of the course of their employment with some exceptions.

Similar to the Safeco policy, it is provided that the company defend the insured from any suits advanced under any of the above headings.

Verville argues that the suit of the Plaintiff is a claim for damages arising from, or alleged to arise from, legal liability for unintentional injury arising out of her personal actions in the City of White Rock which arose during the period of the policy and, as such, was an "occurrence" which has taken place within the term of the policy and thus is a claim under Paragraph 1.

But the company says that the above enumerated provisions cannot be considered disjunctively and out of context. The company asserts that the Personal Liability coverage provided in Paragraph 1. cannot be read so broadly as to extend coverage to claims arising out of the use of "premises" by the insured which are not "premises" covered by the policy, as to do so would mean that not only were claims arising out of the use of the premises mentioned and defined in the policy covered, but also any other premises occupied or once occupied by the insured with respect to the occupation and use of which a claim might be made against the insured under the **Occupiers Liability Act** or otherwise.

Put another way, the company says that with respect to claims arising out of the use and occupation of property we have insured with respect to the use and occupation of the defined premises, not every piece of property that the insured might occupy or might have occupied. Premises liability, the company says, is provided in Paragraph 2 and to that extent it qualifies and limits the coverage extended under Paragraph 1.

Although I do not have to decide the point, I would be inclined to agree with the company if it could be said that the tortious act which has brought about the claim of the Plaintiff had been something done to the premises, or upon the premises earlier occupied by Verville by someone other than the insured and the claim advanced by the Plaintiff was solely by virtue of Section 3 of the **Occupiers Liability Act**, i.e. a failure to take reasonable care to see that the premises were safe. But in the case at bar the act complained of was the negligent construction of a walkway specifically by the insured either on her property or that of the Defendant, White Rock, and I cannot see the company's liability limited merely because that act or omission occurred on such property or with respect to same.

Accordingly, I hold that those paragraphs are to be disjunctively read under the contra proferentum rule and the

insured is to be defended by Commercial Union. Indemnity as a separate issue might well be later considered if it is determined that the walkway in question was constructed by someone other than the insured and the insured held vicariously liable under the provisions of the Statute and I do not want anything that I might have observed in this judgment to preclude a full and complete consideration of that issue should it occur.

There will be judgment accordingly.

Verville will have her costs to date as against Commercial Union and Safeco may speak to costs in due course if such is necessary.

"HOGARTH, J."

NEW WESTMINSTER, B.C.

June 14, l994.