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CASE SUMMARY: RULING ON DUTY TO DEFEND VS DUTY TO INDEMNIFY: TIMING MATTERS

Both insurers had a duty to defend where allegations against the insureds clearly fell within the coverage of each policy; however, it was premature to determine the duty to indemnify.

Insurance law – Homeowner’s insurance – Commercial general liability insurance – Duty to defend – Duties and liabilities of insurer – Duties and liabilities of insured

Security National Insurance Co. v. Gore Mutual Insurance Co., [2022] O.J. No. 1603, 2022 ONSC 2083, Ontario Superior Court of Justice, April 4, 2022, J.M. Fragomeni J.

The insured owned a property on which they resided and operated a business. They had comprehensive homeowners’ insurance with Security National Insurance Company (“Security National”). They also had a commercial insurance policy with Gore Mutual Insurance Company (“Gore Mutual”). The plaintiff in the underlying action slipped on ice and fell on the insureds’ driveway. After she had filed her claim, a dispute arose over coverage.

Security National took the position that the allegations against the insureds fell within the coverage provided by each of the two policies, and sought a declaration that, at very least, Gore Mutual had a concurrent duty to defend and indemnify the insureds together with Security National.

With respect to the duty to defend, the Court relied on the pleadings rule articulated by the Supreme Court of Canada in *Monenco Ltd v. Commonwealth Insurance Co*, 2001 SCC 49. The Court also noted that there need only be a “mere possibility” that a claim within the remit of the policy may succeed in order to trigger a duty to defend, citing *Nichols v. American Home Assurance Co.*, [1990] 1 SCR 801.

In this case there was plenty of evidence that the plaintiff’s allegations against the insureds fell within the coverage provided by each of the two policies. Having regard to that, and giving the nod to principles of fairness, equity and good conscience, the Court ruled that both policies were triggered and therefore both Security National and Gore Mutual had a duty to defend, and that duty was to be borne equally.

The Court was not, however, prepared at that point in the underlying action to rule on the question whether there was a duty to indemnify, noting that the two types of duties each deal with different obligations that may be owed by an insurer to an insured, and that “issues relating to the duty to indemnify are left to be determined at the end of the trial, if and when the allegations made by the Plaintiff and the underlying facts to support the allegations are proven at trial.”

This case was digested by [Siobhan Sams](#), and first published in the LexisNexis® Harper Grey Insurance Law Netletter and the Harper Grey Insurance Law Newsletter. If you would like to discuss this case further, please contact Siobhan Sams at ssams@harpergrey.com.