

Case Brief: *Lombard Insurance v. Crosbie*
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In the Newfoundland Court of Appeal's recent decision, *Lombard General Insurance Company v. Crosbie Industrial Services Limited* (2006 NLCA 55), an explosion occurred while the Insured subcontractor was cleaning a fuel storage tank, which resulted in the tank being destroyed. The Insured, Crosbie, denied that the explosion occurred as a result of any negligence on their part, and issued Third Party proceedings against their Insurer, Lombard Insurance, as Lombard denied coverage. Crosbie's Third Party proceedings were commenced to enforce both coverage and the duty to defend.

The Insurer denied coverage to the Insured based upon the "work-performed" exclusions which provided that the policy did not apply to "property damage," which was defined as including:

- that particular part of real property on which you or any contractor or subcontractor working directly or indirectly on your behalf is performing operations, if the "property damage" arises out of these operations; or
- that particular part of any property that must be restored, repaired or replaced because "your work" was incorrectly performed on it.

Lombard conceded that if any of the above exclusion clauses did not apply to the incident, then it did indeed have a duty to defend the Insured, Crosbie Industrial.

The Court of Appeal indicated that fundamental coverage under the "Commercial General Liability Form (Occurrence Basis)" does require the Insurer to pay amounts that the Insured is "legally obligated to pay as damages because of "property damage" to which the insurance applies." The Court stated that the policy extended coverage for property damage that occurred as a result of an "occurrence."

The Court went on to examine the definition of “occurrence” and defined it as an “accident.” The Court indicated that if the Insurer’s intention was to exclude coverage for property damage that was caused by an “occurrence” then the insurance contract had to be clear.

The Court determined that in this case, the explosion and resulting damages were indeed an accident, and therefore clearly came within the ambit of “an occurrence”, as defined within the policy. Moreover, the exclusion did not make any reference to any “occurrence” or “accident” and therefore caused the question to be asked if indeed there was a difference between damage that was a result of an “occurrence” and damage that was a result of “operations” or “incorrectly performed work.” The Court indicated that while the exclusions may preclude coverage for certain types of poor workmanship composing of those things that are commonly known as “business risks”, a catastrophic failure of the sort which occurred in this case, could clearly be considered an “occurrence/accident” and therefore could not fall into the category of excluded “business risks”. Furthermore, the failure of the exclusion to address the link between an “accident” and a “business risk” created ambiguity, requiring the exclusion clause to be narrowly interpreted, leading to the conclusion that property damage in the nature of a “business risk” was excluded, but not damage that occurred as result of an “occurrence”. Therefore, the duty to defend in this instance was triggered.

Crosbie Industrial also submitted that regardless of the way in which the exclusion clauses were interpreted, the Insurer, Lombard Insurance, was estopped from denying its duty to defend, due to a similar incident that had occurred a couple of years earlier.

The incident that Crosbie was referring to was a previous explosion that occurred a couple of years earlier while Crosbie’s employees were cleaning the inside of another large petroleum storage tank. This also resulted in the tank being destroyed, and the incident was reported to Lombard as required by the policy. Lombard undertook to investigate the incident, and established a reserve for the anticipated liability claim.

Additionally, one of its adjusters concluded that the resulting liability claim would likely be covered due to the sudden and accidental nature of the event.

Lombard did not inform Crosbie that any resulting liability claim would be covered, and Crosbie was also not informed that Lombard had established a reserve in anticipation of such a claim. Nonetheless, the Court of Appeal held that the manner in which Lombard had handled this earlier incident amounted to a representation to its Insured that there was coverage for this type of loss and therefore this in turn, prevented Lombard from later denying coverage for a similar incident. The Court came to this conclusion, as the doctrine of “estoppel” can apply where a person is silent or fails to act, which can be considered a “representation” and such occurred in circumstances where some sort of duty was owed to make a disclosure or to take certain action. Moreover, the Court stated that insurance policies are complex and difficult for the layperson, and therefore as the Insurer’s representatives were trained to understand such complexities, it was reasonable for them to be responsible to provide such information and advice.

The Court also stated that in the context of CGL coverage, the Insured providing notice of an occurrence or loss is an important first step, which leads to the insurance company undertaking at least a preliminary assessment of the incident. Additionally, in the absence of any advice from the Insurer that the incident was indeed not covered or that the coverage may be questionable, it was reasonable for the Insured to assume that coverage was indeed available, if a liability claim were to ultimately come up. In these circumstances, the Insurer’s failure to advise of coverage difficulties amounted to being “representation by silence” that the claim would indeed be covered.

The Court went on to further state that if the Insured had been told that coverage did not exist for this type of loss, then it would have posed significant challenges for its business and would have likely taken action to seek alternative insurance. As Crosbie relied on Lombard’s representation by silence, Lombard was indeed “estopped” from denying Crosbie coverage for a similar incident which occurred at a later date.

In conclusion, it is clear that this case suggests that if there is the possibility of difficulties with coverage for any sort of claim, then the Insurer has a duty to notify the Insured. If the Insurer fails to notify the Insured and remains silent, it may be at risk of having to provide coverage for similar claims in the future.