

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Surrey (City) v. Co-operators General Insurance Company*,
2023 BCSC 955

Date: 20230605
Docket: S238421
Registry: New Westminster

Between:

City of Surrey

Plaintiff

And

Co-operators General Insurance Company

Defendant

Before: The Honourable Madam Justice Walkem

Reasons for Judgment

Counsel for the Plaintiff:

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Counsel for Defendant:

S.A. Besanger

Place and Date of Trial/Hearing:

New Westminster, B.C.
May 5, 2023

Place and Date of Judgment:

Registry, B.C.
June 5, 2023

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INTRODUCTION

[1] The City of Surrey (“Surrey”) brings an action by way of summary trial seeking to compel the defendant (the “Co-operators”) to defend them in Kamloops Registry Number S57811 (the “Underlying Action”). In particular, Surrey seeks an order that:

- a. The defendant must defend the City in the Underlying Action, pursuant to the Policy and its application to the pleadings, and
- b. That the duty arose at the latest, with the defendant's denial in June 23, 2020.

UNDERLYING ACTION

[2] The Underlying Action that Surrey seeks to have the Co-operators represent them in is a personal injury claim.

[3] In the Underlying Action, a Mr. Lanki has brought a claim against Surrey for damages that arise out of an incident where he was injured while using a leg press machine at the Surrey Recreation and Leisure Centre. Mr. Lanki alleges that a pin inserted into the leg press machine fell out, injuring him, and that the pin was not designed for the leg press machine it was placed in.

SERVICE AGREEMENT WITH ELK

[4] Surrey contracted with Roland Cerf, Dorothy Cerf, and Elk Fitness Repair (collectively “Elk”) through a Service Agreement, originally entered in November 2015 and renewed annually, up to and including, in November 2017. Elk provided both weekly maintenance and repair services, and preventative maintenance every four months at Surrey’s fitness facilities. The agreement required Elk to provide insurance to Surrey against any negligence on their behalf.

[5] Under the Service Agreement, Elk agrees to, per Surrey’s pleadings:

- a. ...obtain and maintain, throughout the Contract's term, commercial general liability insurance on an occurrence basis, naming the City as an additional insured, in an amount not less than \$5 million per occurrence against death, bodily injury, and property damage arising directly or indirectly out of the work or operations of Elk, its employees, and agents;

- b. ...undertake all preventative maintenance inspections ("PMI") and repairs to various pieces of strength and cardio equipment scheduled in the Contract (including the Machine);
- c. ...provide preventative and remedial on-site maintenance and parts as recommended by the original equipment manufacturer (the "OEM");
- d. ...provide PMIs to ensure that the Equipment performed in accordance with OEM performance standards including inspection of parts for wear, alignment, and maladjustment impending breakdown; replacement of same where required; cleaning, calibration and lubrication; and such additional repairs and maintenance as required so as to return equipment to full operating condition;
- e. ...the services provided by Elk were intended to ensure safe and dependable operation of the equipment at all times; and
- f. ...[accept] responsibility for the equipment on an "as is" basis.

[6] Elk took out an insurance policy with Co-operators (Policy Number 3622551) from September 24, 2016 to September 24, 2017. That policy lists Surrey as an additional named insured. The insurance policy contained an exclusion clause for any bodily injury arising out of any act or omission of Surrey or its employees.

[7] Elk argues they did not do inspections on all machines, but were told what machines to work on and which machines needed to be repaired. Elk says they replaced the pin on the leg press machine, and that the pin in the leg press machine when the accident occurred was not placed there by them.

[8] If liability regarding improper pin placement is found, the question of who was responsible for placing the wrong pin in the leg press machine will be an issue at trial in the Underlying Action.

[9] Mr. Lanki's original Notice of Civil Claim, filed July 23, 2019, alleged the following acts or omissions on the part of Surrey and their servants, employees, or agents:

- a. failure to warn him of the danger posed by an insufficient pin in the Machine when the City knew or ought to have known an incorrect pin was in the Machine;
- b. failure to ensure he would be safe from injury in using the premises in a reasonable manner when the City knew, or ought to have known, that an incorrect pin was in the Machine;

- c. failure to ensure that a proper pin was in the Machine when the City knew or ought to have known an incorrect pin was in the Machine;
- d. failure to cordon off or otherwise prevent use of the Machine when the City knew, or ought to have known, an incorrect pin was in the Machine;
- e. failure to take any care, or any reasonable care, to ensure that he would be reasonably safe in using the Premises;
- f. exposing him to a risk of damage or injury from an incorrect pin in the Machine which the City knew or ought to have known about;
- g. causing or permitting an incorrect pin in the Machine to remain a danger and injure a person, including himself; and
- h. failure to take care, or any reasonable care, to prevent his injury and damage, suffered as a result of an incorrect pin in the Machine which the City knew or ought to have known about.

[10] An Amended Notice of Civil Claim in the Underlying Action, filed by Mr. Lanki on September 20, 2022, added a claim directly against Elk on similar terms as set out against Surrey above.

[11] It also includes a claim that:

- a. In the alternative, the Plaintiff's injuries occurred solely as a result of the negligence of the Defendants Elk Fitness Repair, Dorothy Cerf and Roland Cerf, who entered into an agreement with the Defendant, the City of Surrey, wherein the Defendants Elk Fitness Repair, Dorothy Cerf and Roland Cerf were responsible for the maintenance and repair of fitness equipment on the Premises.
- b. The Defendants Elk Fitness Repair, Dorothy Cerf and Roland Cerf owed a duty of care to the Plaintiff. The Plaintiff was a user of the equipment on the Premises and it was reasonably foreseeable that the negligence of the Defendants Elk Fitness Repair, Dorothy Cerf and Roland Cerf would lead to harm to the Plaintiff and other users of the equipment on the Premises.

DEMAND FOR DEFENCE

[12] When Surrey demanded coverage for potential liability and made a demand for defence in the Underlying Action, the Co-operators denied coverage. The letter from counsel for the Co-operators denying coverage read, in part, as follows (I set out the Co-operators response extensively as it recites the insurance and contract terms relevant to this dispute):

...the Preventative Maintenance and Repair Services for Fitness Equipment Agreement between the City of Surrey and Elk Fitness Repair dated November 16, 2015 contains the following provision:

12. INSURANCE AND DAMAGES

12.1 The Contractor with [sic] indemnify and save harmless the Indemnities from and against all claims, demands, causes of action, suits, losses, damages and costs, liabilities, expenses and judgements (including all actual legal costs) for damages to or destruction or loss of property, including loss of use, and injury to or death of any person or persons which any of the Indemnitees incur, suffer or are put to arising out of or in connection with any failure, breach or non-performance by the Contractor of any obligation of this Agreement, or any wrongful or negligent act or omission of the Contractor or any employee or agent of the Contractor.

Paragraph 12.1 of the Agreement is a qualified indemnity clause requiring that an injury arise out of or in connection with an act or omission of the Contractor for the indemnity and hold harmless provisions to apply. In other words, a breach of contract or non-performance of the contract by Elk Fitness Repair is not sufficient to require indemnity according to the words of the indemnity clause. The injury must arise out of that breach or non-performance.

Further, the Additional Insured Endorsement contained in the Co-operators Insurance policy provides the following:

Section II – Who is an Insured is amended to include as an additional Insured, the party or parties designated in the “Certificate of Insurance” or on file as an additional Insured, but only with respect to liability arising out of the operations of the Insured as stated in the “Certificate of Insurance” and subject to the following additional exclusions:

This endorsement does not apply to:

1. “Bodily Injury” or “Property Damage” arising out of any act or omission of the additional insured or any of its employees;
2. “Property Damage” to property owned, used, occupied or rented to the additional insured.

Except as otherwise provided in this endorsement, all terms, provisions and conditions, of the Policy shall have full force and effect.

This endorsement excludes bodily injury arising out of any act or omission of the additional insured [Surrey] or any of its employees.

The evidence produced to date could support a finding of negligence against the City of Surrey which would fall under the exclusions of the Additional Insured Endorsement in the Co-operators policy.

DEFENDANT’S SUBMISSIONS

[13] The defendant opposes this application on the basis that it has brought a separate action, returnable on the week of June 5, 2023, for a summary trial dismissal, brought on the basis that Elk has no liability in the Underlying Action because the missing pin was not placed there by Elk. Their argument is that Elk, or its employees, replaced the pin with a proper pin. They say that if the wrong pin was in the machine, this is not their responsibility, but rather the result of actions of Surrey or other, unknown, third parties.

[14] The defendant says Elk’s application should be heard before this action. They argue that a determination that they were not responsible for the pin placement would, in effect, mean that their insurance does not cover Surrey. They point out that the insurance coverage requires an act or omission on the behalf of Elk or its employees, and does not extend to bodily injury arising out of any act or omission on the part of the additional insured (Surrey) or any of its employees.

[15] If Elk is successful in its summary trial dismissal application, the defendant argues it is relieved of its duty to defend Surrey on allegations of negligence arising from Elk’s actions or inactions. The defendant further argues that this issue is not suitable for disposition by way of summary trial, as their pending application will be dispositive of this action.

PLAINTIFF’S SUBMISSIONS

[16] Surrey says the Underlying Action is one alleging negligence regarding the maintenance and operation of the leg-press machine, in which Elk was contracted to perform maintenance of the machine as per the Service Agreement they had signed with Surrey.

[17] Surrey seeks orders compelling the Co-operators to defend it in the Underlying Action under the Policy, and pay its defence costs pertaining to the Underlying Action incurred since it made the demand for defence. Surrey argues the test for a demand for defence is met. They argue the exclusion clause which states

the Co-operators is not liable for bodily injury arising out of the acts or omissions of Surrey or any of its employees does not operate to bar the Co-operators duty to defend Surrey in the Underlying Action as the pleadings allege negligence in the maintenance and condition of the leg press machine, for which they say Elk was at least partly responsible.

[18] Further, they argue that because Surrey and Elk are adverse in interest in the Underlying Action, the Co-operators must appoint counsel to Surrey that is separate to that defending Elk.

AT ISSUE BETWEEN THE PARTIES

[19] The parties agree the allegations of negligence as against Surrey meet the "mere possibility" test of arising out of Elk's operations, and if true, Surrey would be covered under the Policy. Surrey argues it is irrelevant whether in fact the allegations are eventually proven. The Co-operators argue that if they can successfully prove that it was not Elk's negligence that caused damage to Mr. Lanki, then the conditions will not be met for the insurance policy to indemnify Surrey.

IS THIS MATTER SUITABLE FOR DISPOSITION BY WAY OF SUMMARY TRIAL?

[20] There was disagreement between the parties about whether this was suitable for disposition by way of summary trial.

[21] The test for whether a matter is suitable for summary trial is set out in *Gichuru v. Pallai*, 2013 BCCA 60, as follows:

[29] The scope of a summary trial application is set out in R. 9-7(15) of the *Supreme Court Civil Rules*:

- (15) On the hearing of a summary trial application, the court may
 - (a) grant judgment in favour of any party, either on an issue or generally, unless
 - (i) the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or

- (ii) the court is of the opinion that it would be unjust to decide the issues on the application,
- (b) impose terms respecting enforcement of the judgment, including a stay of execution, and
- (c) award costs.

[30] In *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 1989 CanLII 229 (BC CA), 36 B.C.L.R. (2d) 202 (C.A.), the court confirmed that the court under this rule “tries the issues raised by the pleadings on affidavits”, that “a triable issue or arguable defence will not always defeat a summary trial application”, and that “cases will be decided summarily if the court is able to find the facts necessary for that purpose, even though there may be disputed issues of fact and law” provided that the judge does not find “it is unjust to do so” (p. 211). In determining the latter issue (whether it would be unjust to proceed summarily), the Chief Justice identified a number of relevant factors to consider (at p. 215):

In deciding whether it will be unjust to give judgment the chambers judge is entitled to consider, inter alia, the amount involved, the complexity of the matter, its urgency, any prejudice likely to arise by reason of delay, the cost of taking the case forward to a conventional trial in relation to the amount involved, the course of the proceedings and any other matters which arise for consideration on this important question.

[31] To this list has been added other factors including the cost of the litigation and the time of the summary trial, whether credibility is a critical factor in the determination of the dispute, whether the summary trial may create an unnecessary complexity in the resolution of the dispute, and whether the application would result in litigating in slices: *Dahl v. Royal Bank of Canada et al.*, 2005 BCSC 1263 at para. 12, upheld on appeal at 2006 BCCA 369.

[22] Elk has an insurance policy which names Surrey as an additional insured. The insurance policy specifies it only applies where the bodily injury was caused by the negligence of Elk, not the negligence of the additional insured or its employees. Liability in the Underlying Action is yet to be determined.

[23] Here, I find the demand for defence is an issue suitable for determination by summary trial.

IS THERE A DUTY TO DEFEND OWED?**Test**

[24] The plaintiff cites *Co-operators General Insurance Company v Kane*, 2017 BCSC 1720 [*Kane*], in which Justice Fitzpatrick set out the general principles to be applied in interpreting insurance contracts and the duty to defend at paras. 19-20:

[19] These well-known principles relating to the interpretation of insurance policies can be summarized as follows:

- a) the general purpose of insurance is to protect an insured against losses arising from unforeseen and accidental actions: *Non-Marine Underwriters, Lloyd's of London v. Scalera*, 2000 SCC 24 at paras. 68-69;
- b) it is necessary to interpret insurance contracts as they would be understood by the average person applying for insurance, and not as they might be perceived by persons versed in the niceties of insurance law: *National Bank of Greece v. Katsikonouris*, 1990 CanLII 92 (SCC), [1990] 2 S.C.R. 1029 at 1043;
- c) courts should interpret a contract of insurance as a whole: *Progressive Homes Ltd. v. Lombard General Insurance Company of Canada*, 2010 SCC 33 at para. 22, citing *Scalera* at para. 71;
- d) as contracts of adhesion, courts should prefer interpretations that are consistent with the reasonable expectations of the parties, and avoid interpretations that would give rise to an unrealistic result or that which would not have been in their contemplation at the time the policy was concluded: *Progressive Homes* at para. 23; *Scalera* at para. 71; and
- e) as contracts of adhesion, where there is an ambiguity which the rules of construction fail to resolve, courts will construe the policy *contra proferentem* against the insurer. A corollary of the *contra proferentem* rule is that coverage provisions are interpreted broadly, and exclusion clauses narrowly: *Progressive Homes* at para. 24; *Scalera* at para. 70.

[20] These general interpretation principles apply equally to the duty to defend and exclusion clauses: *Derksen v. 539938 Ontario Ltd.*, 2001 SCC 72 at para. 49. Other general principles that apply in relation to the duty to defend and exclusion clauses are:

- a) an insurer is only required to defend a claim where the facts alleged in the pleadings, if proven, would require the insurer to indemnify the insured (i.e. the "pleadings rule"): *Monenco Ltd. v. Commonwealth Insurance Co.*, 2001 SCC 49 at para. 28; *Progressive Homes* at para. 19; *Lombard General*

Insurance Company of Canada v. 328354 B.C. Ltd., 2012 BCSC 431 at para. 21; *Canadian Northern Shield Insurance Company v. Intact Insurance Company*, 2015 BCSC 767 at para. 18;

- b) all that is necessary, in order to trigger the duty to defend, is the mere possibility that a claim falls within coverage under the insurance policy based on a review of the pleadings: *Monenco* at paras. 29-30; *Progressive Homes* at para. 19; *Lombard* at para. 23; *Johnson v. Aviva Insurance Company of Canada*, 2014 ABQB 688 at paras. 33-35;
- c) where pleadings are not framed with sufficient precision to determine whether claims are covered by the policy, the duty to defend will be triggered where, on a reasonable reading of the pleadings, coverage can be inferred: *Monenco* at para. 31;
- d) "the widest latitude should be given to the allegations in the pleadings in determining whether they raise a claim within the policy": *Scalera* at para. 75, citing *Nichols v. American Home Assurance Co.*, 1990 CanLII 144 (SCC), [1990] 1 S.C.R. 801. This is consistent with resolving any ambiguity in favour of the insured: *Monenco* at paras. 31-32; *Lombard* at para. 24; *Johnson* at para. 33.

[25] *Monenco Ltd. v. Commonwealth Insurance Co.*, 2001 SCC 49 set out the test for triggering a duty to defend as being grounded in the pleadings, commonly referred to as the "pleadings rule":

[28] The starting premise for assessing whether an insurer's duty to defend has been triggered rests in the traditional "pleadings rule". Whether an insurer is bound to defend a particular claim has been conventionally addressed by relying on the allegations made in the pleadings filed against the insured, usually in the form of a statement of claim. If the pleadings allege facts which, if true, would require the insurer to indemnify the insured for the claim, then the insurer is obliged to provide a defence. This remains so even though the actual facts may differ from the allegations pleaded. The "pleadings rule" was articulated by the British Columbia Supreme Court in *Bacon v. McBride* (1984), 1984 CanLII 692 (BC SC), 5 C.C.L.I. 146, where Wallace J. stated, at p. 151:

The pleadings govern the duty to defend - not the insurer's view of the validity or nature of the claim or by the possible outcome of the litigation. If the claim alleges a state of facts which, if proven, would fall within the coverage of the policy the insurer is obliged to defend the suit regardless of the truth or falsity of such allegations. If the allegations do not come within the policy coverage the insurer has no such obligation....

[26] Courts have further found the pleadings rule also permits of a consideration of the underlying facts surrounding the claim, as discussed in *Monenco* at paras. 36-37:

[36] While these principles are instructive for the purposes of the present case, one important question arising in this appeal has been left open by the jurisprudence to date. That is, whether, in seeking to determine the “substance” and “true nature” of a claim, a court is entitled to go beyond the pleadings and consider extrinsic evidence. Without wishing to decide the extent to which extrinsic evidence can be considered, I am of the view that extrinsic evidence that has been explicitly referred to within the pleadings may be considered to determine the substance and true nature of the allegations, and thus, to appreciate the nature and scope of an insurer’s duty to defend.

[37] It should be recalled that the question whether an insurer is bound to provide defence coverage in an action taken against the insured arises as a preliminary matter. Of course, after trial, it may turn out that there is no liability on the insurer, and thus, no indemnity triggered. But that is not the issue when deciding the duty to defend. Consequently, we cannot advocate an approach that will cause the duty to defend application to become “a trial within a trial”. In that connection, a court considering such an application may not look to “premature” evidence, that is, evidence which, if considered, would require findings to be made before trial that would affect the underlying litigation.

[27] *Monenco* makes it clear that while the court may look beyond the pleadings to extrinsic evidence, it may only go as far as that which is “explicitly referred to in the pleadings” as necessary to assist the court in assessing the “true nature and scope” of the insurers duty to defend.

[28] At the core of a consideration of the exclusion clause is the question of whether the act or omissions of Elk caused the injury to Mr. Lanki. The Co-operators say the injury was not caused the acts or omissions of Elk, and therefore argue the exclusion clause creates no duty to defend Surrey in the Underlying Action.

[29] In *Vernon Vipers Hockey Club v. Canadian Recreation Excellence (Vernon) Corporation*, 2012 BCCA 291 the defendants (“Vernon”) in an underlying action were named as additional insured on an insurance policy held by the Vernon Vipers Hockey Club. There, an attendee at a hockey game left the arena to find food at another location and injured themselves outside on the property. Vernon claimed the

insurer had a duty to defend it in the underlying action as the injury had “aris[en] out of the [Vernon Vipers] operations” as the plaintiff was an attendee at the hockey game. The Court of Appeal reviewed the jurisprudence and considered how the term “arising out of” was to be interpreted in insurance contracts. Chief Justice Finch found:

[52] I conclude that the contractual term “arising out of the Named Insured’s operations”, as written in the Hockey Club’s policy endorsement, imposes a causal requirement greater than a simple “but for” test. Borrowing from the cases discussed above, the phrase “arising out of” should be construed as requiring “an unbroken chain of causation” and a connection that is more than “merely incidental or fortuitous.”

[30] The Court of Appeal held it could not be found there was an unbroken chain of causation between the actions of the Vernon Vipers hosting a hockey game at the arena, the injured plaintiff leaving for other food elsewhere and subsequently injuring himself in the parking lot. As there was no unbroken chain of causation, the insurer was held to not have a duty to defend.

[31] The “unbroken chain of causation” standard was set out by Justice Saunders in *Saanich (District) v. Aviva Insurance Company of Canada*, 2011 BCCA 391. In *Saanich*, the plaintiff in the underlying action was struck by a lacrosse ball while attending the recreation center for another purpose and sued *Saanich*. *Saanich* was named as an additional insured on the lacrosse club’s insurance policy. Justice Saunders considered the causal link necessary to determine whether an additional insured’s liability “arises from” the activities of the primary insured, stating:

[22] In looking at the pleadings, one must look not only to the particular passages that advance a claim against a specific party, but also to the balance of the pleadings relating the events said by the plaintiff to have resulted in the injury which is the subject of the action. This broad view must be taken in the context of the contract of insurance binding the parties.

And:

[32] I conclude there is, in the pleadings, a causation link between the alleged delict of *Saanich* and the injury to Mr. Wright; the unbroken chain of causation, alleged in the pleadings encompasses both the actions of the unknown lacrosse player and the actions of *Saanich* that placed Mr. Wright in a position to be struck by the lacrosse ball. The true nature of the substance of the claim is a claim arising from the lacrosse associations’ activities, in the context of *Saanich*’s role in facilitating them, whether or not liability attaches

to the lacrosse associations. In other words, the pleadings contain allegations of the requisite unbroken chain of causation; there is no independent fault alleged against Saanich which would support an action in negligence absent the activities of the lacrosse associations. Consideration of the “errant” aspect of the lacrosse ball intimately implicates the actions of Saanich.

[32] This aspect of the analysis requires the court to consider, on thorough review of the pleadings, whether there is independent fault alleged against Surrey that may support an action in negligence absent the activities of Elk. Here, there is. But that alone is not determinative—“unless *all* occurrences which potentially caused or contributed to the loss or damage are clearly and unambiguously excluded, coverage for the duty to defend will not be ousted”: *Kane* at para. 22.

[33] In *Kane*, the pleadings alleged several causes of action, some of which fell within the insurance policy and others, if proven to be true, fell within the exclusion clause. There the court stated:

[72] Again, in order for an exclusion clause to oust the duty to defend, it must clearly and unambiguously apply to *all* of the claims made against the insured: *Progressive Homes* at paras. 54, 67. If the loss or damage may have been caused or contributed to by covered, as well as excluded, occurrences, the latter will not oust coverage for the former, absent such clear and unambiguous language. If there is any ambiguity in that respect, the principle of *contra proferentum* is such that the issue will be resolved in favour of the insured.

[34] Where there is a possibility of coverage under the insurance policy, the duty to defend is triggered. Matters of specific causation are to be determined at trial: *Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada*, 2010 SCC 33, at paras. 67, 70. The duty to defend is not dependent on the liability of the insured or any requirement of the insurer to indemnify. All that is required is the mere possibility the claim falls within the policy: *Progressive Homes* at para. 19.

ANALYSIS

[35] First, I look at the pleadings in the Underlying Action to determine whether the insurer has a duty to defend, the court must review and determine whether the pleadings, if proven, would require the insurer to indemnify the insured: *Monenco* at

paras. 36-37. Here the Amended Notice of Civil Claim contains allegations, which, if proven, would be payable under the insurance policy.

[36] Co-operators would be bound to defend Surrey based on the allegations contained within the pleadings.

[37] The conditions of the provisions of the insurance policy and contract that Co-operators is bound to defend Surrey Arising from any *failure, breach or non-performance, or wrongful or negligent act*, of Elk regarding the maintenance and repair of the fitness equipment.

[38] As in *Kane*, based on the pleadings, it cannot be said that all claims against Surrey are divisible from those which are covered within the insurance policy thus the exclusion clause does not oust the Co-operators duty to defend.

[39] Courts have frequently stated that "[t]he pleadings govern the duty to defend": *Bacon v. McBride*, 1984 CanLII 692 (BC SC), 6 D.L.R. (4th) 96, at para. 10. Where it is clear from the pleadings that the suit falls outside of the coverage of the policy by reason of an exclusion clause, the duty to defend has been held not to arise: *Opron Maritimes Construction Ltd. v. Canadian Indemnity Co.*, 1986 CanLII 89 (NB CA), 19 C.C.L.I. 168, leave to appeal to the S.C.C. refused, [1987] 1 S.C.R. xi.

[40] At the same time, it is not necessary to prove that the obligation to indemnify will in fact arise in order to trigger the duty to defend. The mere possibility that a claim within the policy may succeed is sufficient to trigger the duty to defend. The duty to defend is broader than the duty to indemnify. This was discussed by Justice O'Sullivan in *Prudential Life Insurance Co. v. Manitoba Public Insurance Corp.*, 1976 CanLII 1099 (MB CA), 67 D.L.R. (3d) 521, at p. 524:

Furthermore, the duty to indemnify against the costs of an action and to defend does not depend on the judgment obtained in the action. The existence of the duty to defend depends on the nature of the claim made, not on the judgment that results from the claim. The duty to defend is normally much broader than the duty to indemnify against a judgment.

[Emphasis added.]

[41] In *Prudential Life* it was unclear whether the insurer might be liable to indemnify under the policy, so the duty to defend was held to apply. In the court's view it would have been unjust for the insurers to be able to assert that "the claim is probably groundless, or will probably end up falling outside of the indemnity coverage. Since we have no proof that we owe an indemnity in this case, we take the position that we owe no duty to defend."

[42] That is the position taken by the Co-operators in citing the following from *Consumers' Gas v. Peterborough*, 1981 CanLII 66 (SCC), [1981] 2 SCR 613 at 615:

“...we know of no authority which allows a party to be indemnified for its own negligence in the absence of a contractual right thereto and we were referred to none.”

[43] It is the burden of the Co-operators to show the exclusion clause applies to oust their duty to defend. I find they have not done so.

[44] The Co-operators seek to have me rely on extrinsic evidence regarding the pin in the machine and who may have placed it there. This evidence was put before me by way of affidavit appended to the pleadings in this matter. For the court to review and make findings on this evidence at this stage would amount to a trial within a trial, as discussed in *Monenco* at para. 37 (cited in full above). Only that extrinsic evidence which has been expressly referred to in the pleadings, and which may assist me in determining the substance and true nature of the allegations is permitted: *Monenco* at para. 36.

[45] The question regarding whether a duty to defend exists in cases such as this is determined in a review of the pleadings themselves—that is, the pleadings in the Underlying Action. It would potentially create a legal morass if a party who was entitled to a defence under an insurance policy first had to establish (or wait for other parties to bring actions to establish) that the conditions exist for that coverage to operate, when, on the face of the pleadings themselves, the matter falls within the ambit of that coverage.

[46] The question is whether the Co-operators would be bound to defend Surrey based on the allegations contained within the pleadings. For the reasons outlined above, I find that they would. Surrey is granted an order on the terms sought.

[47] I note the statement of this court in *Kane* regarding costs in a similar situation to this:

[88] There is British Columbia authority for the proposition that where an insured is required to litigate the issue as to whether [their] insurer is required to defend [them], solicitor and own client costs may follow: *Gore Mutual Insurance Company v. Paterson* (30 September 2011), Vancouver S110676 (B.C.S.C.); *Williams v. Canales*, 2016 BCSC 1811. Both of these cases, and other authorities across Canada, were recently and extensively discussed and applied by Justice N. Brown in *Tanious v. Empire Life insurance Co.*, 2017 BCSC 85 at paras. 33-43.

See also: *Kane* at paras. 89-91.

[48] Following that reasoning, I award costs to Surrey on a solicitor and own client basis.

“A. Walkem J”