CITATION: Soczek v. Allstate Insurance Co., 2017 ONSC 2262
COURT FILE NO.: CV-11-426002
DATE: 20170413

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Wieslawa Soczek, Plaintiff

AND:

Jan Soczek and Allstate Insurance Company of Canada, Defendants

BEFORE: E.M. Morgan J.

COUNSEL: *Alfred M. Kwinter and Veroica S. Marson*, for the Plaintiff (Responding party)

Sheldon A. Gilbert, QC, for the Defendant, Allstate Insurance Company of Canada (Moving party)

HEARD: April 10, 2017

REASONS FOR JUDGMENT

[1] H.L.A. Hart once observed that formally legal rules can be "unfortunately compatible with very great iniquity": Hart, *The Concept of Law* (2d ed, 1994) 207. This case may prove his point.

I. Nature of the claim

[2] The Defendant, Allstate Insurance Company of Canada ("Allstate"), brings a motion under Rule 20 of the *Rules of Civil Procedure* for summary judgment. It seeks to dismiss the Plaintiff's claim for compensation for property damage incurred in a house fire. The Defendant submits that the claim falls with an exclusion clause in the Plaintiff's home insurance policy with respect to property damage caused by any intentional or criminal act done by a person insured under the policy.

[3] The Plaintiff's husband, the Defendant, Jan Soczek ("Soczek"), burned down their house when he poured gasoline on the Plaintiff and lit her on fire in an attempt to kill her. The Plaintiff suffered grievous injuries, including burns over a large percentage of her body. Soczek has been convicted of attempted murder and is currently serving a 12 year prison sentence.

[4] In addition to causing terrible physical harm to the Plaintiff, the fire started by Soczek caused substantial damage to the house that he and the Plaintiff co-owned. The Plaintiff has

obtained default judgment against Soczek in this action. The remaining part of her claim is against their insurer, Allstate.

[5] The Plaintiff and Allstate agree that there is no insurance coverage for the bodily injuries suffered by the Plaintiff. The present case relates solely to the damage done to the house. As co-owners of the property, the Plaintiff and Soczek were co-insureds under the Allstate homeowners' policy, and the Plaintiff brings this claim against Allstate under its policy for the value of the damages to the house.

[6] The policy contains a standard form exclusionary clause for intentionally inflicted damage. It provides, in relevant part:

> We do not insure loss or damage: …
>
> 21. Resulting from any intentional or criminal act or failure to act by:
>
> (a) Any person insured by this policy…
>
> 29. Due to vandalism or malicious act caused by you or any resident of your household.

[7] Counsel for Allstate points out that the exclusionary clause, by its terms, is applicable to both co-insureds. He submits that both co-insureds had the benefit of being included in the policy coverage and, as a corollary, both co-insureds bear the burden of having the exclusionary clauses apply to each other's acts.

[8] In response, counsel for the Plaintiff contends that applying the exclusionary clause here would be entirely unfair. He submits that the purpose of the exclusionary clause is to prevent insured persons from benefitting from their own intentional wrongdoing, but that here it is self-evident that the Plaintiff is not a wrongdoer but rather is a victim of the wrongdoer. La Forest J. made this very point in his dissent in *Scott v Wawanesa Mutual Insurance Co* [1989] 1 SCR 1445, at para 14:

> As I see it, reasonable persons, unversed in the niceties of insurance law, would, in purchasing fire insurance, expect that a policy naming them as an insured without qualification would insure them to the extent of their interest. Moreover, reasonable persons would expect that they would lose the right to recover for their own wilful destruction. But the same persons would find it an anomalous result if informed that they stood to lose all if their spouse burned down their house.

[9] It is impossible for Allstate to deny that the Plaintiff did not cause the damage to the property and is, in any ordinary understanding of the phrase, an innocent party. With this in mind, it would of course be within Allstate's discretion to interpret the exclusionary clause in the policy in a way that would exclude Soczek, but not the Plaintiff, from a claim. However, the company is standing strictly on what it sees as its rights under the contract of insurance.

II. Allstate's response to the claim

[10] Allstate's position is fivefold: a) the Plaintiff's claim represents an abuse of process in the face of Soczek's criminal conviction; b) there is nothing inherently ambiguous about the exclusionary clause and it is enforceable on its literal terms; c) the evidence establishes that Soczek's acts were indeed intentional and even pre-meditated; d) the 'new evidence' presented by Plaintiff's counsel – a psychologist's report on Soczek's mental state – is not reliable; and e) in any case, the psychologist's report and the Plaintiff's current position regarding Soczek's mental capacity is contrary to the position taken by the Plaintiff as against Soczek. These will each be addressed in turn.

a) Abuse of process

[11] Plaintiff's counsel's main point in this motion is that in burning the house, Soczek may not have had the mental capacity to be acting intentionally. If that is the case, he submits, then Soczek's acts do not fall within the exclusionary clause as that clause covers losses that are caused intentionally.

[12] In response, counsel for Allstate relies on the Court of Appeal's judgment in *Demeter v British Pacific Life Insurance Co*, [1984] OJ No 3363. There, a convicted murderer who had killed his spouse sued the insurance company from whom he and his spouse had purchased a life insurance policy which promised to the surviving party – i.e. either the plaintiff/murderer or his spouse/victim – the proceeds of insurance upon the death of the other party.

[13] The Court of Appeal was unimpressed with the claim. Although the civil claim did not, strictly speaking, raise a question of issue estoppel since the parties were not the same in the two actions, it was considered close enough to the issue covered in the criminal case to be an abusive action. As the court put it, at para 7: "We are equally of the view that the use of a civil action to initiate a collateral attack on a final decision of a criminal court of competent jurisdiction in an attempt to relitigate an issue already tried, is an abuse of the process of the court."

[14] In the present situation, Sozcek has pleaded guilty to the charge of attempted murder under section 239 of the *Criminal Code*. Counsel for Allstate contends that since the guilty plea is final, the Plaintiff's argument that Sozcek may have lacked capacity to act intentionally is comparable to *Demeter* and amounts to a collateral attack on the criminal court verdict.

[15] The Supreme Court of Canada has expressly stated that, "In pleading guilty an accused admits having done that with which he is charged": *Adgey v The Queen* [1975] 2 SCR 426, 432. This admission by an accused does not distinguish between the physical and mental elements of the offense. Section 606(1.1) of the *Criminal Code* provides:

> 606(1.1) A court may accept a plea of guilty only if it is satisfied that the accused
>
> (a) is making the plea voluntarily; and
>
> (b) understands

> (i) that the plea is an admission of the *essential elements of the offence*… [emphasis added]

[16] Accordingly, Soczek's guilty plea for attempted murder can be read as containing an admission by Soczek that he intended to light the fire and to kill, or attempt to kill, his spouse.

[17] That said, the Plaintiff's argument here is not a collateral attack on the criminal process analogous to the insurance claim in *Demeter*. Unlike *Demeter*, where the subsequent civil action was brought by the convicted defendant himself, the Plaintiff was not a party to the previous criminal proceedings. She is not attempting to relitigate here matters that she already litigated there. Nothing in her submissions or in the evidence she presents in this motion runs contrary to anything she said or had an opportunity to present at her spouse's criminal trial.

[18] It is understandable that the Court in *Demeter* held that a person convicted of a crime cannot take a position in subsequent civil proceedings that is contrary to a finding about him made by the criminal court, all in an effort to profit from his own criminal wrongdoing. It is quite another thing to apply this logic to the Plaintiff; she played no part in the criminal proceedings, and is seeking compensation for losses she suffered not as a result of her own wrongdoing. To draw this analogy is to not only mischaracterize the personal tragedy that has befallen the Plaintiff, but to misapprehend the profoundly different position of a victim of crime from that of a perpetrator of crime.

[19] The Plaintiff's claim must be analyzed as a matter of interpreting the insurance policy. It is not a collateral attack on the criminal trial in which Soczek was defendant. Accordingly, it is not an abuse of process.

b) The exclusionary clause

[20] As La Forest J. suggested in *Scott*, enforcement of the exclusionary clause under the present circumstances leads to a harsh result for the Plaintiff. Leaving aside for the moment the strict wording of the policy, she cannot be blamed for wondering, "I had nothing to do with that act of arson so why am I being punished for it?" *Scott*, at para 14. For that reason, La Forest J. strained to interpret the exclusionary clause away, finding that it did not apply because it would take most people by surprise.

[21] For similar reasons of basic economic fairness to an innocent party, the Alberta legislature has enacted a bar to this very type of exclusionary clause in policies of insurance: See *Haraba v Wawanesa Mutual Insurance Co* [2017] AJ No 274, para 17. British Columbia has also amended its insurance legislation to prohibit insurance policies from denying compensation to innocent co-insureds up to their percentage ownership of the property: See *Insurance Amendment Act* (BC), 2009, section 28.6(1). Likewise, Québec law allows the innocent co-insured to recover under an insurance policy despite the criminal wrongdoing of the other co-insured: *Goulet v Transamerica Life Insurance Co. of Canada*, [2002] 1 SCR 719, at para 54.

[22] Unfortunately for the Plaintiff, Ontario has not followed the lead taken by those other provinces in remedying a fundamental inequity that exists in many insurance policies. The

standard form of exclusionary clause at issue in the present case is virtually the same clause as was at issue three decades ago in *Scott*. Equally unfortunate for the Plaintiff's case, in *Scott* Justice La Forest was writing for the minority, not the majority of the Supreme Court. L'Heureux-Dubé J., writing for a 5-4 majority, indicated that the words of the exclusionary clause can be applied literally as written. She considered that there would only be reason to re-interpret the clause in favour of the insured who was challenging it the exclusion from coverage was worded in an ambiguous way.

[23] When La Forest J. indicated that the result of the exclusionary clause would surprise people not schooled in the "niceties" of insurance law, what he appears to have meant was not so much that the meaning of the clause as written would take people by surprise, but that it would surprise most people that a clause barring recovery to an innocent co-insured exists at all. As drafted, the phrase 'We do not insure loss or damage resulting from any intentional or criminal act or failure to act by any person insured by this policy' is not ambiguous. It is a paradigmatic case of an inequitable clause spelled out in what is commonly labeled the 'fine print' of the contract. I hasten to add that the label 'fine print' here does not signify anything about the actual font used to print the exclusionary clause, but rather refers to what Justice La Forest noted is its surprising existence as a provision to which most insurance purchasers would not turn their attention. Allstate's position is to stand firmly on this 'fine print'.

[24] It is trite to say that the Supreme Court of Canada majority, not the minority, expresses the governing legal principle in any given case. Much as it would surprise the uninformed, the risk of loss occasioned by an intentional act of a co-insured was, to use Justice L'Heureux-Dubé's words in *Scott*, "specifically excluded. The wording of the exclusion clause for the purposes of the present case is unambiguous." Contrary to Justice La Forest's view, the Supreme Court majority held that the exclusionary clause attracts no *contra preferentum* or other special interpretive rule pushing toward any application of the exclusionary clause other than that which is plain on its face.

c) An intentional act caused the damage

[25] In *Gerigs v Rose* [1979] OJ No 40, at para 68, Eberle J. indicated that, "In the phrasing of the test, 'was the defendant able to appreciate the nature and consequence of his act?' it appears to me that the word 'nature' focuses on the physical aspects of the act. 'Consequence' focuses on what may follow from it, in this sense; that is; what will a bullet do if it is fired from a gun and hits someone, what will it do to that person?" In order for Soczek not to have comprehended, and therefore not to have intended, his act, he would have to have lost control of his faculties. As in Justice Eberle's bullet example, it is otherwise apparent that setting fire to a person inside a house will also result in setting fire to the house.

[26] The Plaintiff stated in her examination for discovery that Soczek waited until her daughter and granddaughter left the house, and that he then went out to the garage to retrieve a jerry can of gasoline, went to the basement of the house and got two water bottles, emptied the water bottles and poured in the gasoline into them before dousing her with the fluid in the water

bottles and setting it alight. There is also evidence in the record that the smoke alarm in the house had been disarmed, presumably in preparation for this attack.

[27] Counsel for Allstate observes that this evidence conveys a series of goal-oriented steps that occurred before the damage was inflicted. It signifies Soczek's intentional causation of the damage. As Lack J. put it in *Darch Estate v Farmers' Mutual Insurance Co*, 2011 ONSC 3696, at para 77, a case whose facts are remarkably similar to those at issue here, "…when [the defendant] got the gasoline, poured the gasoline, and lit the matches he knew that he was setting the house on fire. He also agreed that [the defendant] took several steps to attain his goal."

[28] Allstate's position is that it is this evidence that triggers the exclusionary clause. Counsel for Allstate submits that the theory that Soczek acted without the requisite consciousness, and that he did not therefore intentionally commit the act of setting the fire, is not only contrary to the guilty plea, it is contrary to the evidentiary record. He points out that Soczek's attack on the Plaintiff appears to have not only been done intentionally, but was done with some pre-meditation.

[29] Counsel for the Plaintiff asks, rhetorically, whether the fact that Soczek intended to murder his spouse necessarily infers that he intended to burn their jointly owned property. After all, counsel asks, why would someone want to burn down their own home?

[30] I understand why counsel for the Plaintiff makes this argument. Most of the cases involving this exclusionary clause and the position of innocent co-insureds are, like the *Scott* case itself, cases of arson. There, the specific intent of the culpable co-insured was to cause property damage. Here, the Plaintiff was the specific target of her spouse's actions, and the fact that property damage ensued was a by-product of those actions.

[31] Much as this may be an identifiable factual distinction, for present purposes it is a distinction without a difference. From a legal point of view, it seems to combine motive with intent. Soczek must be taken to have intended the natural consequences of his act. He poured gasoline and intentionally set fire to a person inside his house; the inevitable and foreseeable consequence was that the house itself would burn.

d) The psychologists' report

[32] The Plaintiff has adduced into evidence on this motion a report dated February 20, 2015 prepared by psychologist Peter Jaffe. In this report, Dr. Jaffe opines that Soczek may not have had the mental capacity to intend his actions when he attacked his spouse and burned his house. Counsel for Allstate submits that Dr. Jaffe's report is unreliable as he did not examine Soczek. The report is apparently based on Dr. Jaffe's *ex post facto* reading and hearing about the incident and on second hand information obtained years after the events in question.

[33] Allstate's counsel also points out that there exists a reliable psychiatric assessment of Soczek prepared by psychiatrist John W. O'Riordan on February 6, 2010, a mere three days after the incident. Dr. O'Riordan, who had an opportunity to examine Soczek first hand, found that there are no psychiatric barriers to the criminal case proceeding against Soczek, and that no

psychiatric treatment was required for him. His professional view was that Soczek exhibited no psychotic symptoms.

[34] The Plaintiff's commissioning of the Jaffe report strikes me as an understandable effort by her to come to grips with the senseless injuries and losses she has suffered. The report does not, however, follow established methodology for a psychological assessment of a person, as it is not based on any actual examination of the person. It is therefore not evidence on which this court can rely, and does not counter the reliable evidence or the criminal court's confirmation that Soczek intentionally set the fire.

e) The Plaintiff's contradictory positions

[35] Finally, counsel for Allstate points out that the Plaintiff has taken opposing positions in the two parts of the present litigation. On June 3, 2016, a trial of damages ensuing from the default judgment against Soczek was held before Faieta J. The Plaintiff pursued, and was awarded, $75,000 in punitive damages. Allstate contends that it is evident that the position taken by the Plaintiff before Faieta J. was that Soczek's act of setting the Plaintiff, and consequently the house, alight, was intentional and willful. Although that finding is not specified by Faieta J. in his judgment on damages, Allstate contends that no other explanation of the punitive damages claim and its award is possible.

[36] Counsel for Allstate also points out that the report issued by Dr. Jaffe was obtained by the Plaintiff several years prior to the proceedings before Faieta J., but that report was apparently not disclosed in those proceedings. Allstate's counsel submits that Justice Faieta would doubtless have had a different view of the punitive damages issue if he had known about the Jaffe report.

[37] I am not sure what Faieta J. would have made of the Jaffe report; he may have simply concluded, as counsel for Allstate urges and as I have concluded here, that the report cannot be relied upon as it does not reflect an in-person examination of Soczek. That is, it may not have changed anything.

[38] On the other hand, I do take Allstate's counsel's point that Justice Faieta would have been perplexed if the Jaffe report had been submitted along with a claim for punitive damages. That is, he would have wondered how and why the Plaintiff would make the arguments about Soczek's willfulness necessary to support a punitive damages claim, and at the same time proffer a report suggesting that Soczek's acts were somehow not intentional at all.

[39] I view the Plaintiff's conflicted arguments as reflecting the type of impossible position that a wholly inequitable legal rule might prompt an otherwise innocent party to take. The exclusionary clause in issue here, which excludes from insurance coverage the losses suffered by an innocent property owner whose co-insured intentionally damaged the property and who was herself an inteded victim of that conduct, has been characterized as "unjust and unreasonable": *Walsh v Canadian General Insurance Co* (1988) 70 Nfld & PEI Rep 89, at para 23 (NL SC). It is little surprise that a person in the position of the Plaintiff would reach, and perhaps overreach, in seeking to argue their way around it.

III. Disposition

[40] The exclusionary clause in the Allstate insurance policy has been interpreted by the majority of the Supreme Court of Canada in *Scott* as excluding from coverage the claim of an innocent co-insured in the position of the Plaintiff. Moreover, the factual matters and 'new evidence' raised by the Plaintiff are insufficient to change the criminal court's conclusion that Soczek acted intentionally and criminally in starting the fire that burned the house. Accordingly, I am able to determine the case on its legal merits in this motion and there is no genuine issue requiring a trial: *Hyrniak v Mauldin* [2014] 1 SCR 87, at para 49.

[41] With that, I have little choice but to apply the exclusionary clause in Allstate's favour. Summary judgment is granted dismissing the Plaintiff's claim against Allstate.

[42] Given my dismissal of the claim, in most contexts I would say that Allstate, as the successful party, is entitled to costs. Much as Allstate's counsel has made a successful legal argument, however, it must be said that Allstate's corporate conduct is less than admirable. At least since the publication of the *Scott* decision in 1989, with its strongly worded criticism by Justice La Forest, Allstate has been aware that its exclusionary clause, while technically legal, is unfair to its innocent customers.

[43] Several provinces have intervened to protect innocent co-insureds and have legislated this type of exclusionary clause out of existence. And yet, Allstate continues to capitalize on it in those jurisdictions that have not seen fit to extend legislative protection to an innocent consumer such as the Plaintiff. This case graphically illustrates the compounding of injuries which Allstate's policy imposes on victims of domestic violence.

[44] The fixing of costs is a discretionary decision under section 131 of the *Courts of Justice Act*. That discretion is generally to be exercised in accordance with the factors listed in Rule 57.01. That said, the Court of Appeal has directed that as an overriding concern courts should consider what is "fair and reasonable" in fixing costs, and that in doing so to take into account the prevailing policy of access to justice: *Boucher v Public Accountants Council (Ontario)* (2004), 71 OR (3d) 291 (Ont CA), at paras 26, 37.

[45] The Plaintiff has suffered enormously through no fault of her own. Although the legal interpretation of the exclusionary clause is against her, the questions of fairness and fundamental decency raised by Justice La Forest in his dissent in *Scott* are fair questions which a litigant in the Plaintiff's position cannot be blamed for raising. I will accordingly exercise my discretion to dispense with costs.

[46] No costs are payable for or against either party to this motion.

Morgan J.

Date: April 13, 2017