(72) The first policy, in force from May 1, 1957 to May 1, 1960 and issued by Canadian General Insurance Company (CGIC) as GPL #6S7988, includes the following insuring agreement:

> TO PAY on behalf of the Insured all sums which the Insured shall become obligated to pay by reason of the liability imposed upon the Insured by law, or assumed by the Insured under contract, for damages because of bodily injury, sickness or disease, including death at any time resulting therefrom, caused by events occurring within the Policy Period and suffered or alleged to have been suffered by any person or persons.

(73) The policies issued by CGIC as GPL #6S7988 to the Diocese from May 1, 1960 to May 1, 1967 are incomplete and do not include the insuring agreement. The policies issued by CGIC collectively as GPL #6S7988, from October 19, 1965 to May 1, 1972, contain the same insuring agreement as the policy in force from May 1, 1957 to May 1, 1960.

(74) The policy issued by CGIC from January 10, 1973 to June 1, 1975 includes the following insuring agreement:

> Responsabilité publique avec les limites de $... (intérêts et frais non compris) pour pertes ou dommages résultant de blessures corporelles à une seule personne ou de son décès et, sous réserve de cette limite pour une seule personne blessée ou tuée.

(75) The policies issued, collectively, from May 31, 1980 to June 30, 1983 contain the following insuring agreement:

> Aux conditions du présent avenant et du contrat auquel il se rattache, et sur la base des déclarations consignées aux Conditions particulières, l'Assureur garantit l'Assuré contre les conséquences pécuniaires de la Responsabilité civile incombant à l'Assuré, ou assumé par lui par contrat, en raison de :

> a) Dommages corporels subis par toute personne, y compris le préjudice donnant droit aux dommages-intérets, définis à l'article 4 ci-dessus;

(76) Essentially, although different policies may have used different words or languages, the operative words for the coverages being provided under the terms of the various policies, where the wording has been located and subject to the applicable limits of the policies and exclusions, can be distilled down to or summarized to say in the context of this case that the insurer would pay on behalf of the insured all sums for which:

> *"the insured shall become obligated to pay by reason of the liability imposed upon the insured by law ... for damages because of bodily injury ... caused by events occurring within the policy period and suffered or alleged to have been suffered by any person or persons".*

(77) There is no issue that the policies exclude coverage for intentional acts but once again, the policy documents are incomplete. The exclusion in the policy issued from May 1, 1957 to May 1, 1960 reads as follows:

> This policy shall have no application with respect to and shall not extend to nor cover any claim arising or existing by reason of any of the following matters:
>
> 2. Bodily injury, sickness or disease, including death at any time resulting therefrom, caused intentionally by or at the direction of the Insured...

(78) The language of the exclusion is not available for the policies issued from May 1, 1960 to October 19, 1965. The language of the exclusion in the policy issued from October 19, 1965 to May 1, 1967 is the same as that in force from May 1, 1957 to May 1, 1960. The language of the exclusion is not available for the policy issued from May 1, 1967 to June 1, 1970. The language of the exclusion in the policy issued from May 1, 1969 to May 1, 1972 is the same as that in force from May 1, 1957 to May 1, 1960.

(79) The policies issued from May 31, 1980 to May 31, 1981 and from June 30, 1982 to June 30, 1983 contain the following exclusion:

> La garantie du présent avenant ne couvre pas :
>
> 1. La responsabilité découlant :
>
> f) Des dommages corporels causés intentionnellement par l'Assuré ou à son instigation.

(80) The language of the exclusion is not available for the policy issued from June 20, 1981 to June 30, 1982.

(81) The policies provided general public liability coverage, with liability limits endorsed as follows:

CGIC

May 1, 1957 to May 1, 1960	$200,000.00
May 1, 1960 to May 1, 1961	$200,000.00
May 1, 1961 to May 1, 1962	missing
May 1, 1962 to May 1, 1963	missing
May 1, 1963 to May 1, 1964	missing
May 1, 1964 to May 1, 1967	missing
October 19, 1965 to May 1, 1967	$200,000.00
May 1, 1967 to May 1, 1970	missing
May 1, 1969 to May 1, 1972	$1,000,000.00
January 10, 1973 to June 1, 1975	$1,000,000.00

CUAC

May 31, 1980 to May 31, 1981	$1,000,000.00
June 30, 1981 to June 30, 1982	$1,000,000.00+$4,000,000.00 umbrella
June 30, 1982 to June 30, 1983	$1,000,000.00 +$4,000,000.00 umbrella

(82) Each of the settlements which are the subject of this action falls within the limits of insurance from 1957 to 1983.

(83) In addition to the actual terms and conditions of the policies, section 127 of the *Insurance Act* sets out statutory conditions which are deemed to be part of every contract in force in the Province. This section has been in force in New Brunswick throughout the entirety of the policy periods involved in this case. Statutory conditions 1 and 4 provide:

> Misrepresentation
>
> 1. If any person applying for insurance falsely describes the property to the prejudice of the insurer, or misrepresents or fraudulently omits to communicate any circumstance which is material to be made known to the insurer in order to enable it to judge of the risk to be undertaken, the contract shall be void as to any property in relation to which the misrepresentation or omission is material.
>
> . . .
>
> Material Change
>
> 4. Any change material to the risk and within the control and knowledge of the insured shall avoid the contract as to the part affected thereby, unless the change is promptly notified in writing to the insurer or its local agent; and the insurer when so notified may return the unearned portion, if any, of the premium paid and cancel the contract, or may notify the insured in writing that, if he desires the contract to continue in force, he must, within fifteen days of the receipt of the notice, pay to the insurer an additional premium; and in default of such payment the contract shall no longer be in force and the insurer shall return the unearned portion, if any, of the premium paid.

Issues

(84) The issues sought to be decided in this case at this stage are:

1. A Determination of the Wording of the Policies – Grant of Coverage & Exclusions
2. The Burden of Proof
3. Claims for Damages for Sexual Abuse – Within or Outside the Grant of Coverage?
4. Intentional Acts Exclusion
5. Obligation to Pay by Reason of Liability Imposed by Law

6. Non-disclosure of Material Risk
7. Limits of Coverage – Per Occurrence or Aggregate for Policy Period
8. Damages
9. Punitive Damages

Wording of the Policies

(85) It does not appear that there is any real dispute between the parties with respect to the wording of the grant of coverage provided in the policies of insurance, including those policies where the actual wording has been located and produced as well as those policies where the wording was not available. In any event, with respect to the period where coverage wording was unavailable for CGIC policy #6S7988 between May 1, 1960 and May 1, 1967, I am satisfied that it is more likely than not, the same wording found in policy #6S7988 that was available and has been produced for the policies issued to the Diocese from May 1, 1957 to May 1, 1960 and from October 19, 1965 to May 1, 1972 which are identical, and sandwiched the period where the wording was not available. The grant of coverage provided that CGIC agreed:

> TO PAY on behalf of the Insured all sums which the Insured shall become obligated to pay by reason of the liability imposed upon the Insured by law, or assumed by the Insured under contract, for damages because of bodily injury, sickness or disease, including death at any time resulting therefrom, caused by events occurring within the Policy Period and suffered or alleged to have been suffered by any person or persons.

(86) The wording of the grant of coverage in all of the remaining policies of insurance issued by CGIC and CUAC were produced. Essentially, they all provided for the same grant of coverage. With respect to the missing wording for the Exclusions, I come to the same conclusion.

Burden of Proof

(87) Although there is no issue between the parties with respect to the applicable rules relating to the burden of proof in insurance cases, it is an opportune time to revisit these

rules which are summarized by Gordon G. Hilliker in his text *Liability Insurance Law in Canada*, 5th Edition, 2011, Lexis Nexis at page 42:

> The rules relating to the burden of proof in insurance cases are as laid down by Bailhache J. in *Munro, Brice & Co. v War Risks Assn*:
>
> 1. The plaintiff must prove such facts as bring him *prima facie* within the terms of the promise.
>
> 2. When the promise is qualified by exceptions, the question whether the plaintiff need prove facts which negative their application does not depend upon whether the exceptions are to be found in a separate clause or not. The question depends upon an entirely different consideration, namely, whether the exception is as wide as the promise, and thus qualifies the whole of the promise, or whether it merely excludes from the operation of the promise particular classes of cases which but for the exception would fall within it, leaving some part of the general scope of the promise unqualified. If so, it is sufficient for the plaintiff to bring himself prima facie within the terms of the promise, leaving it to the defendant to prove that, although prima facie within its terms, the plaintiff's case is in fact within the excluded exceptional class. ...
>
> 3. When a promise is qualified by an exception which covers the whole scope of the promise, a plaintiff cannot make out a prima facie case unless he brings himself within the promise as qualified. There is *ex hypothesi* no unqualified part of the promise for the sole of his foot to stand upon. ...
>
> 4. Whether a promise is a promise with exceptions or whether it is a qualified promise is in every case a question of construction of the instrument as a whole. ...
>
> 5. In construing a contract with exceptions it must be borne in mind that a promise with exceptions can generally be turned by an alteration of phraseology into a qualified promise. The form in which the contract is expressed is therefore material.

Although initially formulated for policies of marine insurance, it is well established that these rules apply generally to all classes of insurance.

Applying these rules to liability policies, the burden, as a general rule, will be on the insured to show that the claim falls within the insuring agreement, on the insurer to show that a claim falls within an exclusion and on the insured to show that it falls within an exception to an exclusion.

Claims for Damages for Sexual Abuse – Within or Outside the Grant of Coverage?

(88) Turning now to the question of whether claims for damages because of bodily injury due to sexual assault would generally fall within the grant of coverage provided under the policies it is useful to begin with a review of the relevant principles that apply to the interpretation of insurance policies. These interpretative principles were summarized by Rothstein, J. in writing for a unanimous Supreme Court of Canada in *Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada*, [2010] 2 S.C.R. 245 (S.C.C.) at paras. 21-24:

> *B. General Principles of Insurance Policy Interpretation*
>
> 21 Principles of insurance policy interpretation have been canvassed by this Court many times and I do not intend to give a comprehensive review here (see, e.g., *Co-operators Life Insurance Co. v. Gibbens*, 2009 SCC 59, [2009] 3 S.C.R. 605, at paras. 20-28; *Jesuit Fathers*, at paras. 27-30; *Scalera*, at paras. 67-71; *Brissette Estate v. Westbury Life Insurance Co.*, [1992] 3 S.C.R. 87, at pp. 92-93; *Consolidated-Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co.*, [1980] 1 S.C.R. 888, at pp. 899-902). However, a brief review of the relevant principles may be a useful introduction to the interpretation of the CGL policies that follow.
>
> 22 The primary interpretive principle is that when the language of the policy is unambiguous, the court should give effect to clear language, reading the contract as a whole (*Scalera*, at para. 71).
>
> 23 Where the language of the insurance policy is ambiguous, the courts rely on general rules of contract construction (*Consolidated-Bathurst*, at pp. 900-902). For example, courts should prefer interpretations that are consistent with the reasonable expectations of the parties (*Gibbens*, at para. 26; *Scalera*, at para. 71; Consolidated-Bathurst, at p. 901), so long as such an interpretation can be supported by the text of the policy. Courts should avoid interpretations that would give rise to an unrealistic result or that would not have been in the contemplation of the parties at the time the policy was concluded (*Scalera*, at para. 71; *Consolidated-Bathurst*, at p. 901). Courts should also strive to ensure that similar insurance policies are construed consistently (*Gibbens*, at para. 27). These rules of construction are applied to resolve ambiguity. They do not operate to create ambiguity where there is none in the first place.

> 24 When these rules of construction fail to resolve the ambiguity, courts will construe the policy *contra proferentem* - against the insurer (*Gibbens*, at para. 25; *Scalera*, at para. 70; *Consolidated-Bathurst*, at pp. 899-901). One corollary of the *contra proferentem* rule is that coverage provisions are interpreted broadly, and exclusion clauses narrowly (*Jesuit Fathers*, at para. 28).

(89) Again, subject to the applicable limits of the policies and exclusions, all of the policies essentially provided that "the insurer would pay on behalf of the insured all sums for which the insured shall become obligated to pay by reason of the liability imposed upon the insured by law ... for damages because of bodily injury ... caused by events occurring within the policy period and suffered or alleged to have been suffered by any person or persons".

(90) There is no issue that the physical and/or psychological or emotional damages suffered by victims of abusive priests would constitute "damages ... because of bodily injury ... caused by events occurring within the policy period and suffered or alleged to have been suffered by any person or persons.

(91) The policy language does not specifically provide coverage for sexual assault claims. Nor does it specifically exclude coverage for such claims. Indeed, the policies provide general public liability coverage necessarily using very broad and expansive language to capture both foreseen and unforeseen future risks and future events. In the looseleaf edition of *Annotated Commercial General Liability Policy*, Snowden and Lichty, Canada Law Book the authors discuss at s. 6-10, the breadth of the similarly worded coverage contained in the standard commercial general liability policy:

> Form 2100 was drafted by design with broad Insuring Agreements. Commentators agree that the new policy and its predecessors have been structured so that the Insuring Agreements provide relatively broad and expansive coverage. The policy Exclusions and Conditions are employed to take away or limit that coverage. However, while some commentators have suggested that the policy is essentially an all-risk contract indemnifying against a virtually unlimited variety of events, the policy does not provide indemnity to the policyholder for all losses it may sustain.
>
> No coverage exists unless the policy holder can bring itself within the requirements of the Insuring Agreements. None of the Insuring Agreements of a

> CGL policy provide an unlimited or unrestricted right to defence and indemnity. Rather the onus falls to the policyholder to establish that the facts giving rise to liability or alleged liability involve, among other things, claims for damages arising as a result of the bodily injury or property damage (as defined) or personal injury.

(92) In *M.(E.) v. Reed*, [2003] 171 O.A.C. 145, the Ontario Court of Appeal considered wording similar to the wording of the policy in the present case. Father Reed was an insured priest who developed a sexual relationship with a young parishioner who eventually sued him and the Diocese for damages for negligence, assault, battery, breach of fiduciary duty and vicarious liability. The Ontario Court of Appeal concluded that the policy did provide coverage for sexual assault or battery committed by a priest and stated at para. 9:

> 9. Third, the appellants submit that coverage ought to be precluded as the risk of assault or battery by a priest was neither contemplated nor reasonably anticipated at the time that the insurance policy was issued. I disagree. The point of an insurance policy is to transfer the risk of future events, foreseen and unforeseen. Had Great American intended to limit coverage to certain types of events, it ought to have used express words to that effect in the policy. Instead it chose to use words that are remarkably broad and expansive.

(93) The same reasoning applies to the sexual assault claims forming the basis of the claims raised in the instant case. Although broad, the language of the insurance policies is not ambiguous and, in my view, the claims of the victims for damages against the Diocese for bodily injury occasioned to them by the commission of sexual assaults by its priests fall clearly within the plain and ordinary meaning of the language defining the scope of the coverage provided in the policies, whether brought against the Diocese as a direct liability claim or by vicarious liability, subject of course to any applicable exclusions. That being the case, there is no need to proceed with a consideration of the other principles of interpretation in relation to ambiguous policy wording.

(94) This finding that the victims' claims for damages for sexual assault fall within the plain and ordinary meaning of the language defining the scope of coverage, however, is not determinative of whether or not the particular claims in the instant case fall within the

coverage provided in the policy language. There must also be an obligation on the Diocese to pay damages to the victims by reason of liability imposed upon it by law and that the coverage provided in the general coverage clause is not subject to a specific exclusion of coverage in the policy. I will address the intentional acts exclusion first.

Intentional Acts Exclusion

(95) There is no issue that each policy of insurance contained an exclusion clause stipulating that it did not cover claims arising from "bodily injury . . . caused intentionally by or at the direction of the Insured".

(96) Nor is there any issue that bodily injury suffered by the victims as a result of the acts of sexual abuse were caused intentionally by the priests involved and that insurance coverage for the individual priests would be excluded under an intentional acts exclusion such as the one in this case. In *Lloyds, London, Non-Marine Underwriters v. Scalera*, [2000] 1 S.C.R. 551 (S.C.C.) McLachlin, J. stated at para. 38: *". . . where there is an allegation of sexual battery, courts will conclude as a matter of legal inference that the defendant intended harm for the purpose of construing exemptions of insurance coverage for intentional injury."* The issue in the instant case, however, is whether, or not, the bodily injury occasioned to the victims as a result of the sexual assaults of the priests was also caused "intentionally by or at the direction" of the Diocese thereby triggering the applicability of the intentional acts exclusion in relation to the Diocese's claim for indemnification.

(97) In closing submissions, counsel for Aviva confirmed Aviva's concession that there was no direction from the Diocese to individual priests to intentionally cause harm to young parishioners. Aviva argues, however, that by the Diocese choosing to transfer Father Noel with actual and full knowledge of his repeated sexual abuse and expectation that he was likely to re-offend, this constituted the intentional act to cause harm to his victims and was criminal conduct thereby excluding coverage to the Diocese under the policies as well.

(98) In support of this submission, Aviva cites and relies upon the decision of the Supreme Court of Canada in *Sirois v. Saindon*, [1976] 1 S.C.R. 735, a case involving a dispute between neighbours where the insured raised the blades of a running lawnmower to his neighbour's face to scare him, the neighbour raised his hands to his face in response and when the mower tipped, the blades severed several of the neighbour's fingers. The insured's policy of insurance contained an exclusion of coverage for liability in relation to "bodily injury … caused intentionally by or at the direction of the insured". Although the insured's stated intention was merely to scare his neighbour and not to cause him injury, the Court ruled that the exclusion applied and there was no coverage for the loss.

(99) Aviva submits that based on Father Noel's history, and the Diocese's knowledge of his history of abusing children, it was eminently foreseeable that he would continue to do so and thereby cause injury to his victims despite being admonished by the Bishop and transferred from parish to parish. Indeed, Aviva submits that the transfers enabled and assisted in facilitating Father Noel's continued abuse and relies on the comments of Ritchie, J. who wrote the decision for the majority in *Sirois*:

> The respondent's action did indeed have the result of "scaring" Sirois to such extent that he raised his hands in an automatic gesture to shield his face. The fact that the lawnmower tipped when put to such an unnatural use **was an eminently foreseeable development and one which the respondent ought to have known to be a part of the danger to which he was exposing his neighbour.** The immediate cause of Sirois' injury was a combination of his gesture of self protection and the tipping of the lawnmower but, in my opinion, **these two circumstances flowed directly from the respondent's deliberate act in raising the lawnmower as he did,** which was the dominant cause of the occurrence. I agree with the learned trial judge that this constituted criminal conduct which caused damage and the fact that the "scare" intended by the respondent had more serious consequences than he may have anticipated does not alter the fact that it was his threatening gesture which caused the damage. I am accordingly of opinion that the respondent's actions were in breach of the public policy rule as expressed in s. 2 of the New Brunswick Insurance Act.
>
> [Emphasis added]

(100) Aviva submits that subjecting the victims to "eminently foreseeable outcomes" (the continuation by Father Noel of sexually assaulting children) constitutes intention on the part of the Diocese to injure the victims within the terms of the exclusion clause in the policies of insurance. In support of this proposition Aviva relies on the decision of *Diocese of Winona v. Interstate Fire & Casualty Company*, [1996] 89 F. 3d 1386 (US Court of Appeals, 8th Circuit) where the facts were quite similar to those in the instant case. A priest served in the Diocese of Winona from the late 1950s until the 1980s. During that period the Diocese became aware that he was sexually abusing boys and in addition to various attempts at treatment for the priest it regularly transferred him from parish to parish to serve in situations where he was able to reoffend. The Diocese was later sued by a victim who alleged negligence and recklessness on the part of the Diocese in supervising the priest and the Diocese sought coverage under its policy of insurance. The policy only extended liability coverage for an occurrence relating to a claim for injuries sustained by a third party if such injuries were "neither expected nor intended from the standpoint of the insured".

(101) In the circumstances in *Winona*, the US Court of Appeals, 8th Circuit concluded that coverage was not available as it was not an "occurrence" as defined in the policy. In doing so, however, it did not conclude that the Diocese intended that the victims be injured. Indeed, the insurer did not base the denial of the claim on an intention on the part of the Diocese to injure the victims. Rather the denial of the insurer and the appeal was argued and decided, as I read the case, on the basis of the assertion that the Diocese would have "expected" the abuse of the priest to continue considering the history of his abuse, the Diocese's knowledge of his abuse over the many years as well as its knowledge that treatment for the priest was not effective. In *State Farm Fire and Casualty Co. v. Hackendorn*, [1991] 605 A. 2d 3 the Delaware Superior Court recognized the distinction between "expectation" and "intent" and noted that the terms were not intended to be synonymous. It stated:

> In this Court's opinion, there is a difference between intentional injury and expected injury. The words are prefaced by "either" and "or". They are not thereby happenstance. Further, the word expected is not an unusual word. It is

used in everyday language. The definitions accorded to it by the courts are not in "legalese" or parlance not comprehended by lay persons. Even if the injuries were unintended, where they were the natural, foreseeable and expected and anticipatory result of the insured's intentional act, they would fall under the "expected" exclusionary language. There is nothing ambiguous about this wording. The Supreme Court in *Farmer in the Dell Ent.* did not address the distinction between "intentional" and "expected", nor did it seek to define "expected". However, the distinction and definition noted herein were presaged by that court when it said "... it is the intentional but foreseeable, scope of the intentional act which controls".

The issue not present in *Farmer in the Dell Ent.* is where the intentional act is directed at one person or item of property but injury or damage results to a third party or property. However, the language noted above, coupled with its logical extension to the separate definition of "expected", would potentially govern Hackendorn's conduct.

(102) In the instant case, the exclusion clause is confined to intentional injury and does not speak of "expected" injury, unlike the situations in *Winona* and *Hackendorn*.

(103) I agree that the Diocese of Bathurst, through its Bishops over the years, was aware of the abuse being committed upon children by Father Noel, that it was a recurring problem despite some efforts made by the Bishops to stop it through instruction, imposed periods of reflection, prayer and even referral for psychiatric treatment to Dr. Michel. In short, Father Noel had proven to be incorrigible and I am satisfied that this would have been apparent to the Diocese by the early to mid-1960s. I also agree that by continuing to allow Father Noel to minister and facilitating this continuation by moving him from parish to parish where the Diocese knew he would continue to be in contact with children as part of his ministry, the Diocese could reasonably expect that his abusive conduct towards young boys would continue. This is eminently clear from the words of Bishop Godin when he asked rhetorically if he could in conscience continue to expose children to these scandals.

(104) Although the Bishops apparently could never bring themselves to put to paper the specifics or exact nature of these "scandals" or inappropriate conduct being alluded to, I am satisfied that they knew full well of what they spoke and this was the sexually abusive

conduct of Father Noel towards young boys. The extent of his abusive conduct at the time is confirmed by the information of the victims provided to Mr. Bastarache through the conciliation process. Despite the couching of the records and vague words being used to record events in the Diocese's files, on the totality of all of the evidence presented, I am satisfied that the Bishops knew that Father Noel was sexually abusing young boys and that, based on his history and the failed efforts to curb him over the years, it would be reasonable to expect or reasonably foreseeable that his abuse would continue. Again, despite that knowledge the Bishops continued to allow, and indeed facilitated Father Noel to minister and to be in contact with young children as part of that ministry.

(105) I acknowledge that these Bishops have not had an opportunity to be heard on these issues and it might seem unfair to come to such conclusions absent an opportunity for them to be heard. But on the other hand, who is responsible for this lack of clarity and transparency. It was these same Bishops who did not disclose these scandalous facts at the time when they first came to light. It was also these same Bishops who never did reveal the full extent of their knowledge of the events in the records that they kept for the Diocese when they had the opportunity to do so. Further, what little recording of the events they did keep was couched in extremely vague terms and not disclosed outside of the Diocese's office until this litigation arose over some thirty to fifty years after the events occurred. In the final analysis, I must make my findings and assess the issues in this case on the basis of the evidence presented with all its deficiencies.

(106) Do the actions or inaction taken by the Bishop in response to their knowledge of Father Noel's proclivity to abuse young boys constitute an intention to cause the victims bodily injury? The Bishops did not commit the actual sexual assaults in this case. Ultimately it was Father Noel who made the choices to sexually assault his victims. In that sense, the Bishops of the day were removed from the direct actions of Father Noel and, unlike the defendant in the *Sirois* case, not directly involved or a party to the choices Father Noel made in that regard or to his actions in committing the actual sexual assaults.

(107) The Bishops may have been unsophisticated in relation to the causes, characteristics and phenomena of sexual assault at the time. They may have been naïve

with regard to their power of counselling, instruction and directions to Father Noel and the power of prayer. They may have been negligent, grossly negligent or reckless in regards to transferring him and allowing him to continue to minister and they would have reasonably expected that he would continue to abuse children.

(108) The majority decision in *Sirois* stands for the proposition, as I understand it, that where the insured takes some action for the purpose of causing some loss, harm or injury, even if he or she did not intend the extent of the loss that actually occurred, the loss is "intentionally caused". In that case the insured, Mr. Saindon, intended to cause some harm to Mr. Sirois by scaring him with the lawnmower but caused much more significant harm and loss than was specifically intended. Nevertheless, the Court determined that the loss was intentionally caused.

(109) In *Scalera* the Supreme Court rejected the proposition that the intentional loss exclusion in the policy of insurance applied to all losses caused by the deliberate acts of the insured. Iacobucci, J. stated at paras. 91 and 92:

> 91 There is no dispute in this case that the plaintiff's allegations fall within the general coverage provisions of the policy. All that is at stake is whether the exclusion clause applies. That clause states that the appellant is "not insured for claims arising from: ... bodily injury or property damage caused by any intentional or criminal act or failure to act" by the insured.
>
> 92 At the outset, the wording of this clause presents a threshold issue. **The respondent argues that the clause requires only an intentional act, not an intent to injure. The majority below agreed with this interpretation. However, I agree with Finch J.A.'s dissent on this point. If the respondent were correct, almost any act of negligence could be excluded under this clause. After all, most every act of negligence can be traced back to an "intentional ... act or failure to act".** As this Court made clear in Canadian Indemnity Co. v. Walkem Machinery & Equipment Ltd., [1976] 1 S.C.R. 309, "negligence is by far the most frequent source of exceptional liability which [an insured] has to contend with. Therefore, a policy which would not cover liability due to negligence could not properly be called 'comprehensive'" (pp. 316-17). Consistent with this decision, the purpose of insurance, and the doctrines of reasonable expectations and contra proferentem referred to above, **I believe the exclusion clause must be read to require that the injuries be intentionally caused, in that they are the product of an intentional tort and not of negligence**. [Emphasis added]

(110) Justice Iacobucci was writing for three members of the panel in rendering his decision, however, his comments on this issue were adopted and concurred in by the remaining members of the panel.

(111) Having considered all of the evidence, the times in which the Bishops lived, the little general public knowledge of the pervasiveness of sexual abuse at the time, and their likely lack of knowledge regarding the difficulty in effectively treating it, I do not believe that the Bishops by their actions or lack of action, no matter how negligent or reckless they may have been, intended to cause any injury to any of the victims of Father Noel or any of the victims of any other priests.

(112) In my view, coverage under the policy is not excluded pursuant to the intentional act exclusion as it has not been established that the Bishops or the Diocese intentionally caused injury to the victims or that the injuries they suffered were caused at the Diocese's direction. It goes without saying that it has not been established that the Bishops acted in any way in a criminal manner or with any intent to commit a crime in this regard or with intent to bring about loss or damage such that coverage would be excluded or unenforceable.

Obligation to Pay by Reason of Liability Imposed by Law

(113) The claims against the Diocese allege that it is vicariously liable for the acts of the priests who committed the sexual assaults and that the Diocese was negligent in the manner in which it supervised its priests (direct liability). Although no Notices of Action with Statement of Claim Attached in relation to the actions against the Diocese were submitted into evidence I understand that the claims referred to include actions that were formally commenced against the Diocese and individual priests, some of which have been settled and some of which are still pending. There is no evidence to suggest that any of the actions proceeded to trial as of the date of trial. Claims were also advanced and settled with individual claimants through the Conciliation Process undertaken by Mr. Bastarache.

(114) There is no issue that liability need not be confirmed by a final court judgment in all cases to establish "liability imposed by law" and that a reasonable settlement of a claim can also meet this requirement where an insurer wrongly denies coverage. In *Wright Engineers Ltd. v. United States Fire Insurance Co.*, [1986] B.C.J. No. 129, the British Columbia Court of Appeal explained the principle in the following terms:

> The third submission is that the payment made by WEL to Minero Peru in respect of the second claim was a mere voluntary payment. On this issue, the appellant accepts that, because it denied coverage for this claim and thus repudiated its contractual obligations in respect of this loss, it cannot rely upon the policy conditions which provide that the insured's obligation to pay must be finally determined either by judgment after trial or a written agreement joined in by U.S. Fire. It left the insured to its own devices in dealing with the risks of litigation against which U.S. Fire had insured it. It is well settled that, in these circumstances, the insured is not required to fight to the end and sustain a judgment against it. If it chooses to settle, and if the settlement is in all the circumstances a reasonable one, it is entitled to be indemnified by its insurer if it turns out that the denial of coverage was wrong.
>
> > Reliance Petroleum Limited v. Stevenson; Reliance Petroleum Limited v. Canadian General Insurance Company [1953] O.R. 807; Rev. in part on other ground [1954] 4 D.L.R. 730, [1954] O.R. 846; Aff. [1956] S.C.R. 936, 5 D.L.R. (2d) 673
> >
> > Shore Boat Builders Limited v. Canadian Indemnity Company, [1975] 2 W.W.R. 91 (B.C.S.C.)

(115) In *Annotated Commercial General Liability Policy*, the authors expand on this principle at section 7:20.4 page 7-23:

> The overwhelming majority of cases indicate that a settlement, provided that it is reasonable, renders the insured legally obligated to pay the amount of the settlement. There is no need to proceed to judgment.
>
> As the *Moore (Township)* case reminds us, however, the claim must be an otherwise covered event in order for the policyholder to recover. This raises one related issue that should be addressed. Courts have repeatedly stated that once an insurer unjustifiably refuses to defend an action, it is no longer entitled to require the insured to comply with conditions of the insurance contract. In particular, an insurer is not in such circumstances entitled to argue that an insured has, in settling, breached a contractual condition prohibiting settlement without the prior

> consent of the insurer (often referred to as a "no-action" clause). Indeed, the insurer in such a situation is said to have waived its right to insist on the fulfillment of this condition. As a result, the insured is free to negotiate a reasonable settlement of the claim without concern that by so doing it will lose its right to sue the insurer to recover what it has paid in settlement.
>
> Even where an insurer unjustifiably refuses to defend an action brought against its insured, however, it generally maintains the right to refuse to pay the insured based on the failure of the claim made against the latter to fall within the terms of the Insuring Agreement, including the requirement that the insured be under a legal obligation to pay. Thus, there is an important distinction as to the consequences of an insurer's refusal to defend its insured depending on whether the insurer later seeks to insist on compliance with a condition of the insurance contract such as the "no-action" clause or whether, alternatively, the insurer seeks to rely on the requirement in the insuring Agreement that the insured be legally obligated to pay.
>
> As one author points out, the insurer's refusal to defend cannot change the nature of the claim made in that if it was outside of coverage before the refusal to defend, it must remain so even in the face of the refusal. In this regard, the insurer maintains its right to argue that the insured's settlement was purely voluntary (*i.e.*, was not entered into pursuant to a legal obligation to pay) and, consequently, does not give rise to any indemnity obligation.

(116) As previously stated, Monsignor Vienneau determined to pursue the Conciliation Process in or about 2010 by which time he had become aware of approximately three or four actual claimants who stated an intention to make claims against the Diocese and after it became apparent that plaintiff lawyers from Ontario and Nova Scotia were seeking out other potential claimants in the area. Monsignor Vienneau's objectives in instituting the process were multi-faceted and no one suggests the objectives were not genuine or indeed, commendable. After inviting Aviva to participate in the process, which Aviva declined, Monsignor Vienneau decided to proceed with the conciliation process, retained Mr. Bastarache and announced it to the public.

(117) Further publicity arose when the Diocese sought court permission to access trust funds relating to donations made by parishioners over the years for the purpose of funding the education of priests for the Diocese and to use those funds for the purpose of compensating the victims of the priests. This publicity brought about a second wave of claimants. Once the application to access the trust/endowment funds was approved by

the court, there was more money available to pay victims. Mr. Bastarache had asked victims in the second wave why they had not come forward initially and many responded that they felt that all the money was gone. Others advised that they were not sure that the process made sense as they were under the impression that he was the lawyer for the bishop but after they talked to some of the people involved in the first wave they were told it was a genuine and fair process.

(118) Mr. Bastarache originally felt that the conciliation process was in competition with the legal process as he knew that there was not enough money for all of the victims and the legal proceedings would drag on for years. He felt that was not the right approach and as long as the diocese admitted liability there would be no need to go through a complicated and lengthy process requiring victims to try to prove all of these events, their damages, etc.

(119) He felt that if the Diocese were to vigorously defend legal actions, each action would be long and protracted. If trials were required they could each take up to ten days or more just for the trial. Court proceedings reported in the press would only create larger problems for the church and he felt it was not in the interest of the church and certainly not in the interests of the victims to go through the legal process as many were afraid of losing their anonymity. Many feared being labelled homosexuals.

(120) Mr. Bastarache explained the features of the conciliation process he designed to achieve the objectives set by the Diocese. Again, it was built upon the premise that the Diocese was admitting liability for the abuse of its clerics. Consequently, there was no need for an adversarial or even a confrontational process. The victims were largely given the benefit of the doubt on many issues unless there was something apparent or obvious that contradicted their story. As I understood his testimony, one of his main objectives was to get each victim's story out as fully as possible so that their claims could be assessed, quantified and fairly compensated within the aggressive timelines he and the Diocese set for doing so. The telling of their stories was also apparently very helpful for the victims, of which approximately 80% told him he was the first person they ever told of the abuse and half of those told him he would also be the last person to hear of it.

(121) That being said, the process did explore aspects of issues that commonly arise when legal action is commenced. For instance, the amount of compensation to be paid to the victims was to be similar to what had been and was being awarded by the courts to victims in similar circumstances who suffered similar abuse and experienced similar consequences. Basic facts were confirmed such as the dates of the abuse, the priest involved and whether the particular priest was in the parish at that time. Causation was another issue addressed and Mr. Bastarache questioned whether the victims had been abused by others in addition to the priest. He also explored other potential causes of problems being experienced by the victims, this in an effort to be fair not only to the victims but also to the Diocese who would be paying the claims.

(122) During the conciliation process, many of the victims advised Mr. Bastarache that prior to speaking to him they never disclosed the abuse they suffered to anyone else and that if not for the Conciliation Process and the confidentiality it offered they never would have gone through the litigation process.

(123) By the end of the process, the number of thirty or so anticipated claimants rose to one-hundred and fourteen with over $7,163,179.00 paid in compensation for all cases settled within and outside of the conciliation process up to the date of trial.

(124) Aviva does not complain that the Diocese settled the claims without its consent. It does not allege that the Diocese's action in establishing the Conciliation Process caused it any prejudice. Nor does it contest the reasonableness of the amounts paid to claimants by the Diocese in settling the claims through the Conciliation Process. Quite simply, it states that the claims generated, brought, settled and paid as a result of the open and public invitation to victims to bring their claims forward to be paid by the Diocese in a confidential and non-adversarial forum constitute truly voluntary payments that the Diocese was entitled to make for its own purposes, but they do not constitute payments for which the Diocese was obligated to pay due to liability imposed upon it by law.

(125) Despite the good intentions and efforts of all who were involved in the design and implementation of this very novel and commendable Conciliation Process which sought

Click here to go to Part THREE