

Case Name:

Darch Estate v. Farmers' Mutual Insurance Co.

Between

The Estate of E. Brenton Darch, deceased and John Darch and David Darch, Executors of the Estate of E. Brenton Darch, deceased and the Estate of Joyce Darch, deceased and John Darch and David Darch, Executors of the Estate of Joye Darch, deceased, Plaintiffs, and Farmers' Mutual Insurance Company (Lindsay), Defendant

[2011] O.J. No. 2971

2011 ONSC 3696

Court File No. 41634/05

Ontario Superior Court of Justice

M.L. Lack J.

Heard: November 30, December 1, 3, 2010; January 4-7, 2011.

Judgment: June 13, 2011.

(84 paras.)

Counsel:

Alastair H. Simeson, for the Plaintiffs.

Martin P. Forget, for the Defendant.

1 M.L. LACK J.:-- On January 16, 2005 Donald Darch set his parents' home on fire, resulting in the total destruction of the premises. He was charged with arson and two weapons offences. He was found "not criminally responsible" for the offences in the criminal proceedings. The home, which Donald Darch burned down, was insured by the defendant Farmers' Mutual Insurance Company under a homeowner's policy of insurance Mr. Darch's parents are dead now Their legal representatives claim damages for the parents' loss in this proceeding. The issue is whether exclusionary provisions

in the insurance policy apply so that farmers' Mutual is not required to compensate the plaintiffs for the losses. Liability is the sole issue at this stage of the proceedings.

The Facts

2 There is little dispute about the facts.

3 Farmer's Mutual issued a homeowner's insurance policy to E. Brenton Darch (Brenton Sr.) on the property located at 2767 Concession Road #4, Bowmanville for the period from September 26, 2004 to September 26, 2006. The property was owned jointly by Brenton Sr. and his wife Joye. At the time the policy was issued, Brenton Sr., Joye and their adult son Donald lived in the home. Brenton Sr. and Joye had three other adult children, John, David, and Brenton.

4 Brenton Sr. died in September 2004. Joye continued to live at the property with Donald after Brenton Sr.'s death. Her health deteriorated. She was suffering from cancer.

5 David Darch, Donald's older brother, testified at trial. He said that Donald was injured in a car accident in 1978. Donald suffered a head injury and was in a coma. He spent months recovering at Sunnybrook Hospital. David said that after the accident Donald returned to live with their parents. He was a different person after the accident. He acted like a juvenile. He was possessive and greedy. He was a social misfit. He did not get along with people and had few friends. He smoked marijuana daily. He was violent. He bullied his parents. He was supposed to pay rent to his parents but he never did. Instead he charged them for work he did around the farm. He did not have a job but received O.D.S.P. (Ontario Disability Support Program). As his parents became older and sicker, his behavior toward them worsened. It got to the point where David could not go into the house. After Brenton Sr. passed away, Donald's behaviour became even worse. Joye tolerated him. She was ill with a brain tumour. Donald would not co-operate with the rest of the family. When the family came around, he sent them away. Finally, Joye went to stay with her son John and his wife Pam who lived next door. David said that she did so to get away from Donald. That happened around Christmas 2004. Donald remained alone in the family home. He was 51 years old.

The Events of January 16, 2005

6 By January 16, 2005 Joye had decided that she wanted to sell her house. Donald probably knew it. On that day Donald became involved in a disagreement with other members of the family. Joye wanted Donald to bring the dog to John's house. Donald refused. He wanted the car and he wanted some money for cigarettes. The details are not important. What is important is that police were called, probably by both Donald and his brother John.

Police Reports

7 A joint documents brief was filed. It was agreed that I was to consider the documents in it as evidence in the proceeding without the necessity of the parties calling the authors to testify.

8 The brief contained incident reports prepared by one of the attending officers, P.C. Kevin Stuart. What follows is a summary of relevant parts of the reports.

9 The officers first went to John's house and spoke to Joye, John and John's son Paul. The family told them that Donald was "slightly MI" [slightly mentally ill]. The family gave them a summary of Donald's background. Joye told them that since her husband's death Donald's behavior had become more bizarre. P.C. Stuart asked Joye if she wanted Donald removed from the home. She said that it was hard because he was her son and she did not know where he could go. Essentially, P.C. Stuart

offered to help arrange an agreement and suggested that Joye make her decision after he spoke to Donald.

10 The officers then went to Joye's home and spoke to Donald. P.C. Stuart noted in his report that Donald showed "signs of some type of physical disability" -- described as "loud speech, crosses into personal space, animated hand and arm gestures". However, Donald was relatively calm and able to voice his concerns. Donald said that he felt that the farm was his place and he had promised his father to care for it and his mother. He said that his brother was brainwashing" his mother, trying to get him kicked out and not allowing him to speak to her. He said that the house was in a poor state of repair and could just burn down. The family had told the officers about similar comments from Donald in the past. P.C. Stuart cautioned Donald not to make any threats to damage or burn personal property. Donald dropped the subject.

11 P.C. Stuart then spoke to Donald about moving out. Donald became angry but said that if his mother wanted him to leave he would go "today". The officer calmed Donald and told him that his mother did not want him kicked into the street that day but she wanted him to realize that he needed to start making arrangements to find a place of his own. Donald calmed down.

12 The officers then returned to Joye and told her about the conversation. She asked them to retrieve her pets from her home. They returned to the farm to do that and spoke to Donald again. Donald was very cooperative. He said that he was going to contact Disability Housing on Monday morning to make arrangements to find a place of his own. The officers returned to Joye with the pets. They told her that Donald was cooperative and appeared calm.

13 The reports show that later that evening a house fire was reported at 2767 Concession Rd. P.C. Stuart and P.C. Harding went on the call because of their prior involvement. They found the house engulfed in flames. They met John's son Paul there. He told them that Donald was in the garage, armed with a knife. They saw Donald sitting in the garage with a knife. They identified themselves and told him to come out. He put down the knife, came out, got on the ground as ordered, and was arrested for arson and assault with a weapon. P.C. Stuart asked Donald if he understood and Donald said yes. P.C. Stuart learned from Paul that earlier Paul had arrived at the fire and approached Donald who was watching the fire from the garage. Paul said that Donald ran at him with the knife and said: "You stay out of this."

14 P.C. Stuart put Donald in his cruiser and went through the formalities of reading Donald his rights and cautioning him. After he read Donald his rights to counsel, he asked Donald if he understood. Donald said "Yes". He asked Donald if he wanted to speak to counsel. Donald said: "Na I don't need to talk to anyone". On the way to the station Donald said that he felt that he should be in jail. He said that he had nowhere to go. He then said that he would just plead insanity. He spoke about his bad accident and his brain injury. P.C. Stuart thanked Donald for being cooperative with police by putting down the knife and leaving the garage. Donald said: "I didn't want anyone to get hurt." Donald said again that he did not trust his brothers.

15 Other reports in the brief showed that fire officials found that someone had tampered with the control valve on the furnace oil tank with the result that a large quantity of furnace oil had escaped on to the basement floor.

Police Interview

16 On January 17, 2005 Detective Geoff Ingram interviewed Donald. The interview was videotaped. The videotape was an exhibit at the trial. It was agreed that I was to watch it and consider it as evidence without the necessity of the participants being called.

17 In the interview Donald explained that it all started when he was threatened by his brother. His brother is in charge of the farm and told him that it was going to be sold and that he would have to move out. Donald could not believe that his mother was going to do that to him. He had lived there since his car accident in 1978 when he was thrown out of a car, leaving him disabled ever since.

18 Donald said that after the officers left he got thinking: "What can I do, what can I do," He went out to the garage. He saw the gas can. It had a little bit of gas in it. He went to the old Ford tractor and turned the gas on and half filled the gallon can with gas. It had methanol in it. He went to the house and poured it over everything. He went to the back porch and tried to spark it. It wouldn't start. He thought "what's wrong with this gas". So he got a rag burning and shook it around and it started going a bit. He backed up because he expected it to really "whoosh". It didn't hum the stuff. He whooshed it around (meaning he used a shovel to push it around) and finally he got it going and he just went out to the garage and "watched her burn."

19 Donald said that he did not want to be in the house when it started because he expected it to go "whoosh" so he went out on the porch. When it got going he went to the garage and when he was there he "got thinking maybe the power would go out" so he got a candle.

20 Donald was asked what his idea was in burning it. He said that he and his father talked about it many times. His father said it should be burned. It's good for nothing. Wires are crossed. Pipes leak. It is not fit to live in.

21 He used matches to start the fire.

22 Donald said that he knew what he was doing. He knew there was nobody there and no animals.

23 Donald knew that his brother would come over to see what was going on. He told his nephew (Paul) to get out of there when he came over. He admitted to having the knife then. It was an old German knife that had belonged to his father.

24 Donald admitted that he was in the basement before he poured gas around on the main floor. He said that he knocked the oil cap off the furnace tank. He hoped the floor would fail down and catch fire -- "I thought I'd burn her good." He was asked if he knocked the filter off before he started spraying the gas around. He said: "Oh yeah, I'm not stupid, I don't want to be trapped in the basement with a fire going above my head." He was asked if he tried to light the oil downstairs first. He said: "No I just told you. I may be crazy but I'm not stupid."

25 Donald was asked to draw a diagram of the house and he did so. He pointed out where he poured the gas in the house and the back shed. He said he poured it around the main floor and rear porch. He did not pour it in the kitchen. He poured gas on the furniture. The reason that he did that was because his family is greedy and they would want all of the furniture.

26 Donald said that he had told his mother in the past that he would do this.

Subsequent Events

27 On January 17, 2005 John Darch notified Farmers' Mutual of the loss.

28 Joye died on February 5, 2005 from cancer.

29 John and David Darch were appointed executors of Brenton Sr. and Joye's estates.

30 On behalf of the estates, John and David Darch submitted a Proof of Loss to Farmer's Mutual on May 24, 2005.

31 Farmers' Mutual denied coverage on the basis that loss for the damage was excluded under the policy. On December 23, 2005 the plaintiffs commenced this action claiming damages for breach of contract and failing to honour a fire claim submitted under the policy of insurance.

The Criminal Proceedings

32 As a consequence of the events of January 16, Donald Darch was charged with a number of criminal offences, including arson. Since his mental health was at issue, he was remanded to the Whitby Mental Health Centre. Dr. Z. Waisman, a forensic psychiatrist, assessed him and reported to the criminal court.

33 Section 16 of the Criminal Code describes the extent of exemption from criminal responsibility due to mental disorder. It provides: "No person is criminally responsible for an act committed or an omission made while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong."

34 On March 22, 2005, in the criminal proceedings, Donald Darch was found not criminally responsible ("NCR") in setting the fire at the property on January 16, 2005.

The Psychiatric Evidence at the Civil Trial Dr. Waisman

35 The plaintiffs called Dr. Waisman to testify in this proceeding. Dr. Waisman is an expert in forensic psychiatry. Dr. Waisman's only involvement with Mr. Darch was in conducting the assessment in 2005, his task being to consider whether Mr. Darch suffered from a mental disorder and give his opinion relative to the factors in s. 16 of the Criminal Code that focus on criminal responsibility. In all, Dr. Waisman and his team had about 5 weeks to observe and assess Mr. Darch. When he testified before me, Dr. Waisman had little recollection of his involvement with Mr. Darch. He referred extensively to his report to the criminal court.

36 Dr. Waisman described Mr. Darch as difficult to interact with and a poor historian. He had a history of a serious motor vehicle injury about 1978. Dr. Waisman obtained the records relating to the injury after he wrote his report, but before he testified in the criminal court. In the motor vehicle accident Mr. Darch sustained a traumatic brain injury. He was comatose for 13 days following the accident. As well, Mr. Darch had an emergency room visit in 2002 when he presented with depression and anxiety and received medical attention and left the hospital. He experimented with recreational drugs, LSD, mescaline and angel dust, but not for 30 years before the arson. Up to 1998 he drank heavily but then reduced his alcohol intake. He smoked about 2 or 3 joints of marijuana a day and that continued right up to the arson.

37 Mr. Darch was a very difficult man to talk to. He had memory lapses and was sometimes incoherent. He told the staff that he had heard voices over the years since he was a teenager. The voices got particularly strong when he used marijuana. He said that sometimes he found it difficult to resist their instructions. He had anger feelings toward his brothers and family.

38 Dr. Waisman testified that his team (a forensic nurse, psychologist, social worker and himself) did not provide a specific diagnosis of Mr. Darch but provided what he called a differential diagno-

sis. It was their view that Mr. Darch suffered from a psychotic disorder in existence for many years - potentially schizophrenia. He suffered from a substance abuse problem. He could have developed psychotic symptoms secondary to the extensive use of marijuana. He suffered from a brain injury, but it was uncorroborated. They could not engage Mr. Darch in testing because he was uncooperative and because of his mental state at the time. He was certifiable under the Mental Health Act.

39 Referring to the report, which he provided to the criminal court, Dr. Waisman testified as follows:

"I opined ... with respect to criminal responsibility, that at the time of the index offence he was obsessed with delusions and impulses ... which were the product of his mental illness and the product of a possible cognitive disorder and a product of the substance abuse issue that rendered him incapable of bringing his mind to bear on what he was doing, and rendering [him] incapable of considering what normal people would see as distinguishing a right act from a wrong act."

"I opined that he was unable to appreciate the nature and quality of his actions."

"At the time ... he was unable to appreciate the nature of his actions."

"I felt that he was incapable of making that distinction [knowing that his actions were right or wrong] at the time of the index offence."

40 On cross-examination, Dr. Waisman agreed that Mr. Darch had been fit to stand trial in the criminal proceedings. It was put to Dr. Waisman that if a person who sets a fire knows that there will be a fire from lighting a match and knows the consequences of that conduct, he could not be found incapable of appreciating the nature and quality of his actions. Dr. Waisman disagreed. He said that it depends on why the person proceeded. If he did so based on his belief that he is being harmed in some way, is under the influence of a delusion or under the influence of an impulse such as hearing voices commanding him, then he is not capable of appreciating his acts.

41 Dr. Waisman said that in coming to his opinion, he took into account the various steps that Mr. Darch took in setting the fire -- getting the gasoline, pouring the gasoline around, lighting five matches, knowing that he was setting the house on fire and being intent on burning the house down.

42 Dr. Waisman admitted that in coming to his opinion he did not have the benefit of talking to family members, nor had he watched the video-tape of Donald speaking to the detective.

Dr. Michael Ross

43 The defendant called Dr. Michael Ross to testify in these proceedings. Dr. Ross is a psychiatrist but not a forensic psychiatrist.

44 Dr. Ross was asked by the defence to review the brief in this case, including the police reports, witness statements and Mr. Darch's video-taped interview with police and comment on whether irrespective of mental illness Donald was aware that his actions would cause a fire in his home.

45 Dr. Ross testified that it was his opinion that Donald Darch's mental illness did not rob him of the ability to understand that his actions were directed toward starting a fire. It did not prevent him

from understanding that there was an extremely high likelihood that a fire would result. It did not prevent him from knowing the foreseeable destructive consequences of a fire.

46 Dr. Ross noted that when confronted with his mother's wish for him to vacate Mr. Darch exhibited adaptive behavior by talking about disability housing. When he was arrested he talked about pleading insanity. Dr. Ross said this showed that he was coping. He did not seem out of touch with reality. Dr. Ross noted that he had the advantage of seeing Mr. Darch's earliest explanation for what had happened in the form of the video-taped statement to police which took place about 12 hours after the fire. He said that Mr. Darch's affect during the interview was appropriate. His responses were congruent with what was being discussed. Mr. Darch talked about what he had been thinking at the time he set the fire. What he said showed that he was acting in a logical, goal-oriented fashion. He had a clear and specific idea of what he wanted to do and understood what the outcome would be. In all, Mr. Darch outlined about 10 steps in his plan to set the fire. He knew his brothers would find out and be angry so he took steps to protect himself. He said nothing about acting under delusions or hearing voices at the time. Mr. Darch said that he knew what he was doing.

47 Dr. Ross said that in his view there was no causal connection between Mr. Darch's mental illness and the fire, nor could he see that in his report Dr. Waisman had made any direct link between delusions or hallucinations and the setting of the fire.

48 On cross-examination Dr. Ross admitted that he had never met Mr. Darch. He admitted that it is generally preferable to have done so before rendering an opinion, however, that was ameliorated by the fact that in these circumstances any assessment is taking place after the fact. Moreover, he had the advantage of seeing the interview with police and Dr. Waisman did not.

The Exclusion Clause

49 The clause in the policy on the basis of which the defendant denies coverage is as follows -- under the heading "Loss and damage not insured":

We do not insure loss or damage: caused by or resulting from wrongful conversion, secretion, intentional, wilful, criminal acts, infidelity or any other dishonest act or omission by you, your tenants, employees or other persons to whom the property insured may be loaned, rented or entrusted (carriers for hire excepted).

50 "You" is defined in the definition section of the policy as follows:

"You" and "Your" means the person(s) named as insured on the Policy Declaration pages(s) and, while living in the same household, his or her spouse, the relatives of either or any person under the age of 21 in their care."

51 The person named as insured on the Policy Declaration is E. Brenton Darch.

The Issues

52 The issues in this case are:

- (a) Does the exclusion clause in the policy apply;
- (b) Was Donald Darch an "insured" as defined in the policy;
- (c) Was the fire loss the result of an act excluded under the policy.

Positions of the Parties

53 It is the position of the plaintiffs that the exclusionary clause has no application in the circumstances since Donald Darch was not an insured and the damage was not caused by an intentional, wilful, criminal act.

54 It is the position of the defendant that Donald Darch was an insured under the policy, intentionally set the fire and the resulting damage is excluded from coverage under the exclusion provisions of the policy.

Principles of Interpreting Insurance Contracts

55 In *Non-Marine Underwriters, Lloyd's of London v. Scakra*, [2000] 1 S.C.R. 551 (S.C.C.) para. 67-71, Justice Iacobucci discussed principles relevant to the interpretation of insurance contracts. He noted that it is important in interpreting insurance contracts to keep in mind the underlying rationale for insurance. Insurance is a mechanism for transferring fortuitous contingent risks. It usually makes economic sense only where the losses covered are unforeseen or accidental. Thus, loss from the intentional actions of the insured is generally not covered.

56 The standard practice is to construe ambiguities in insurance policies against the insurer. A corollary of this principle is that coverage provisions should be construed broadly and exclusion clauses narrowly. Where the contract is unambiguous a court should give effect to the clear language, reading the contract as a whole. Literal meaning should not be applied where to do so would bring about an unrealistic result or one which would not have been contemplated in the commercial atmosphere in which the insurance was contracted. Where there is ambiguity, the construction that produces a fair result must be taken as the one that promotes the intention of the parties. An interpretation which defeats the intentions of the parties and their objective in entering into the commercial transaction in the first place should be discarded in favour of an interpretation of the policy which promotes a sensible commercial result.

57 The parties agree that the onus is on the insurer to persuade the court that it is entitled to the benefit of the exclusionary clause.

Was Donald Darch an "insured" as defined in the policy?

58 It is the position of the plaintiffs that the definition of "insured" for purposes of the exclusionary clause should be narrowly construed. They say that the clause is ambiguous about whether or not an individual who has been asked to vacate a residence continues to be an insured. The ambiguity should be strictly construed against the insurer. Joye was an insured. Since the police had conveyed Joye's request to Donald to leave the premises, Donald was no longer living in her household and therefore was not an insured, so the exclusion clause does not apply.

59 In my view, the phrase "living in the same household" is not ambiguous. Donald Darch had lived in his parents' home since 1978. While the police officer did tell Mr. Darch that Joye wanted him to leave, he also told him that she did not want to kick him into the street that day. He also told him that she wanted him to realize that he needed to start making arrangements to find a place of his own. There is no issue that is what the officer said to Mr. Darch. There is also no issue that is the gist of what Joye wanted the officer to convey to Mr. Darch. Implicit in the actions of all of the interested parties leading up to and on the day in question is a recognition that Donald Darch was, in fact, living in Joye Darch's household on the day of the fire. I find that he was. I find that Donald Darch was an insured.

60 Since Joye was staying with her son John at the time, I also find that Donald Darch was a person to whom the property had been "entrusted" within the meaning of the policy.

Was the fire loss the result of an act excluded under the policy?

61 The policy excludes loss or damage "caused by or resulting from wrongful conversion, intentional, wilful, criminal acts, infidelity, or any other dishonest act or admission by [an insured] or other persons to whom the property insured may be loaned, rented or entrusted."

62 It is the position of the plaintiffs that for the exclusion clause to apply Donald Darch's acts must have been wilful, intentional and criminal. Since Donald was found NCR for his acts in setting the fire the exclusion does not apply. On this interpretation of the exclusion clause "wilful, intentional, criminal" are conjunctive and modify "acts".

63 The defendant argues that in *Eichnzanis v. Wawanesa Mutual Insurance Co.* (2007), 278 D.L.R. (4th) 15 (Ont. C.A.) the court held that the criminal act exclusion is not ambiguous and a finding that the act is intentional is not required for the criminal exclusion to apply.

64 The exclusion clause under consideration in *Eichmanis* read "any intentional or criminal act." Borins J.A. gave two reasons for the court's finding. They were summarized at para. 27 where he quoted from C. Brown, *Insurance Law in Canada*, looseleaf, 4th ed. (Toronto; Carswell, 2002) at 18-181 and 18-182: "First, the word "or" is disjunctive: the word "intentional" does not modify "criminal". The second reason is even more compelling. If the criminal act had to be intentional, there would be no need to include the "criminal act" wording. The intentional act portion of the exclusion would apply, and the criminal act wording would be superfluous. An insurance contract is not to be interpreted so as to render terms meaningless."

65 In the present case, the clause is different. There is no "or" between intentional and criminal. However, it is obvious from a reading of the exclusion clause as a whole that the words are used disjunctively. They modify the word "acts". But it is not "acts" but "an act" that is excluded, as is evident from the words "or any other dishonest act", which immediately follow "intentional, wilful, criminal acts, infidelity". I interpret the phrase to mean "intentional act, wilful act or criminal act". Each is an act that is excluded. That interpretation makes sense in the context in which the words appear. Moreover, it is an interpretation which does not render the terms of the insurance contract meaningless.

66 For these reasons, I conclude that if Donald Darch's act in burning down the house was an intentional act the policy excludes coverage for the loss or damage.

The Definition of "Intentional Act"

67 The first issue is how to define "intentional act" in the insurance policy.

68 Donald Darch was found not criminally responsible for the crime of arson. As noted, for an accused person to be found not criminally responsible of a crime the criminal court must be satisfied that at the time the accused committed the act he suffered from a mental disorder that rendered him incapable of appreciating the nature and quality of the act or he suffered from a mental disorder that rendered him incapable of knowing that the act was wrong.

69 The test for determining whether an individual suffering from a mental disorder is not responsible for his tortuous act in a civil case is a different test from the s. 16 Criminal Code test for lack of criminal responsibility.

70 In *Gergis v. Rose* (Guardian ad litem of), [1979] O.J. No. 40 (Ont. H.C.J.), the plaintiff, a police officer, sued the defendant for damages after the defendant shot him. The officer was responding to a complaint that the defendant was threatening another person with a gun. The tort in question, assault, is the intentional application of force to the person of another. The issue was whether the defendant's mental state at the time was a defence to the claim that he had intentionally shot the officer.

71 Eberle J. found that s. 16 of the Criminal Code was not the test. Instead, he found that the test in a civil proceeding is: "Was the defendant able to appreciate the nature and consequence of his act?" He defined those terms at para. 68 as follows:

... [I]t appears to me that the word "nature" focuses on the physical aspects of the act. "Consequences" 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 my view, the word "consequences" does not refer directly to the moral aspect of the act (i.e. whether the acts are right or wrong), for that is the other branch of the test for criminal cases in Section 16 of the Code. I say we are not concerned, in civil cases with that branch of Section 16.

72 Eberle J. noted that there was evidence in the case that the defendant had delusions about people wanting to come and attack him. He said that the defendant may have had delusions but that was aside from the issue in the case. He found that the defendant clearly intended to fire a high-powered gun at anyone who came through the door to the kitchen. The defendant was fully aware that if he did so, and unless his aim was very bad, that person would be injured. No matter whom the person was the defendant was intending to apply force to that person. That being so, the tort was made out and the defence of insanity failed.

73 In *Whaley v. Cartusiano*, [1987] O.J. No. 2688 (Ont. H.C.J.) Holland J. considered "an intentional act exclusion in an insurance policy. He found that the word "intent" in the policy should be given its ordinary and popular meaning in the context of a civil action, as defined in the texts and authorities he referred to. One such reference was to the judgment of Eberle J. in *Gergis*.

74 In *Whaky* the defendant argued with his wife. He then walked across the street and shot his neighbor who he did not even know. He was found not guilty of attempted murder by reason of insanity. Holland J. found that there was no question of issue estoppel arising from the decision in the criminal trial because the tests in the criminal court and civil court are different and the insurer was not a party to the criminal proceedings.

75 A psychiatrist testified that the defendant was not capable of appreciating the nature and quality of his act at the time he shot the plaintiff. However, on cross-examination, he said that the defendant intended to shoot the plaintiff and would have known that if he fired the gun at the plaintiff it was likely to cause the plaintiff injury. Holland J. found that the defendant acted intentionally. The exclusion clause applied so that the third party insurer was not responsible for the damage. Mr. Justice Holland's decision in *Whaley v. Cartusiano* was affirmed by the Ontario Court of Appeal: (1990), 72 O.R. (2d) 523.

Did Donald parch act intentionally in setting the house on fire?

76 Dr. Waisman's opinion in the criminal proceedings, re-iterated in this civil case, was that at the time that Donald Darch set the fire he was obsessed with delusions and impulses that rendered him

incapable of distinguishing a right act from a wrong act. He was also unable to appreciate the nature and quality of his actions.

77 Despite his opinion that Donald Darch was not criminally responsible for his actions, Dr. Waisman agreed on cross-examination that when Donald got the gasoline, poured the gasoline, and lit the matches he knew that he was setting the house on fire. He also agreed that Donald took several steps to attain his goal. He also agreed that Donald's intent when he took those steps was to burn down the house.

78 Dr. Ross, based his opinion solely on his review of the record provided to him and watching Donald's interview with the detective. He never met Donald Darch. He is a psychiatrist but not a forensic psychiatrist. I have taken all of that into consideration in my assessment of his evidence. His opinion was that Donald's statements shortly after the fire showed that he acted in a logical, goal-oriented fashion in setting the fire. It was his opinion that there was no causal connection between Mr. Darch's mental illness and the fire.

79 The test, as I have explained, in these civil proceedings is whether Donald Darch appreciated the nature and consequence of his act, in the sense that he knew the physical aspects of what he was doing and knew what would follow from them.

80 Donald Darch had an argument with his brother. He knew that he was going to have to move out of home. He was angry. He thought about what he could do and he concluded that he would burn the house down. He took a number of steps to effect his purpose. He got an accelerant He knew that the floor would cave in after he started the fire, so he drained the oil tank before he started the fire. He did that to "to bum her good". He lit matches to start the fire. He made several attempts to get the fire going. He knew the power would go out and got a candle for himself He knew there would be repercussions so he armed himself with a knife. There was no evidence that at the time that he set the fire Donald was under any delusion that prevented him from realizing that he was setting a fire and the result of his actions would be that the house would bum down.

81 In the circumstances, Donald Darch knew that what he was doing was setting a fire and he knew that the consequences would be that the house would burn down. On all of the evidence, the conclusion is inescapable, and I find, that the fire was caused by the intentional act of Donald Darch.

Criminal Act Exclusion

82 In light of my finding that the intentional act exclusion applies, it is unnecessary for me to consider whether the criminal act exclusion also applies.

Conclusion

83 For these reasons, I find that the damage for which the plaintiffs seek compensation from the defendant arose from the intentional act of an insured within the meaning of the exclusion in the policy. Coverage for the loss is excluded. The plaintiffs' action is therefore dismissed.

Costs

84 If the parties are unable to agree on costs, they may obtain a date from the trial co-ordinator to make submissions.

M.L. LACK J.

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