

Date: 20020607
Docket: CA 177303

NOVA SCOTIA COURT OF APPEAL
[Cite as: **Emeneau v. Lombard Canada Ltd., 2002 NSCA 83**]

Glube, C.J.N.S.; Bateman and Cromwell, J.J.A.

BETWEEN:

DAVID CREIGHTON EMENEAU

Appellant

- and -

LOMBARD CANADA LIMITED

Respondent

REASONS FOR JUDGMENT

Counsel: W. Augustus Richardson for the appellant
Carman G. McCormick, Q.C. for the respondent

Appeal Heard: June 3, 2002

Judgment Delivered: June 7, 2002

THE COURT: Appeal dismissed per reasons for judgment of Bateman, J.A.;
Glube, C.J.N.S. and Cromwell, J.A. concurring.

BATEMAN, J.A.:

[1] This is an appeal from a decision of Justice Peter Richard of the Supreme Court of Nova Scotia. Justice Richard held that the respondent insurer, Lombard Canada Limited (“Lombard”), was not required to indemnify the appellant David Emeneau for money judgments obtained by third parties against Mr. Emeneau (trial decision reported as **Emeneau v. Lombard Canada Ltd.** (2002), 200 N.S.R. (2d) 168; N.S.J. No. 24 (Q.L.)). Mr. Emeneau appeals.

[2] This matter arises out of a fire that occurred in May 1994 in Lunenburg, Nova Scotia. At the time of the fire Mr. Emeneau was insured by Lombard under a Homeowner’s policy of insurance. Mr. Emeneau and his daughter owned a contracting company called Emeneau Construction Limited. He also had a majority interest in a company called Atlantis Company Limited. Intent on committing suicide, he drove a company pickup truck to a warehouse owned by Atlantis and which was partially occupied by Emeneau Construction as a garage and for storage of construction materials. The balance of the building was leased to two tenants, Bruce Holbrook operating under the name of "Best Print", and Castlerock Entertainment Inc. and Needful Productions (“Castlerock”). Castlerock used its leased portion for the storage of filming materials and also as a movie set.

[3] Mr. Emeneau backed his truck into the garage, partially closing the door. He poured gasoline on the seat and floor of the truck cab and on the floor of the garage under the truck. His plan was to ignite the gasoline with the resulting explosion rendering him unconscious while the fire caused his death.

[4] Contrary to his plan, he did not lose consciousness in the explosion. The inside of the truck cab began to burn intensely. Mr. Emeneau’s clothing caught fire and the heat drove him from the truck. He ran outside of the building where the duty fire watchman ran to assist him. The fire was extinguished but not before it had caused serious burns to Mr. Emeneau and substantial destruction of property, including that of the tenants.

[5] Castlerock and Holdbrook commenced actions against Mr. Emeneau. Lombard refused to defend on Mr. Emeneau’s behalf, saying that the claims were excluded under the terms of the policy. Judgment was entered against Mr. Emeneau in favour of Castlerock (\$491,535) and Holdbrook (\$155,220). Mr. Emeneau sued Lombard claiming indemnification under the policy.

[6] In resisting indemnification Lombard relied, in part, upon the Homeowner's Policy provision titled "Loss or Damage Not Insured" to avoid indemnity. This provides that "[Y]ou are not insured for claims arising from ... (5) bodily injury or property damage caused by any intentional or criminal act or failure to act by (a) any person insured by this wording." (Emphasis added)

[7] The trial judge accepted that Mr. Emeneau's conduct fell within the exclusion clause. In dismissing the claim he said:

¶ 6 Emeneau said that he did not think of the building - only suicide. He said his "only thought was to take my life". The evidence is clear that Emeneau intended to cause an explosion of such intensity as to render himself unconscious and he also intended that the ensuing fire would kill him.

...

¶ 11 This case comes squarely within the Supreme Court of Canada case of **Cooperative Fire and Casualty Company v. Saindon et al** [1976] 1 SCR 735 ...

...

¶ 13 In applying these principles [from **Saindon**] to the instant case one could say - the two fires flowed directly from Emeneau's deliberate act of setting the fire in the manner in which he did. The fact that the fire had more serious consequences than he may have anticipated does not alter the fact that it was his intentional act of setting the fire which caused the damage to the property of the tenants of the building.

[8] The appellant argued at trial, as he does here, that he was thinking only of suicide thus the "intentional act" exclusion does not apply because the damage or loss to the tenants' property was not intended by him.

[9] There is considerable case law addressing the relevant issues. The significant legal debate in this area centres upon whether, in order for the exclusionary clause to apply, there must be proof of intent to cause injury as distinct from proof of intent to do the act which caused the injury. If the requirement is that there be intent to cause injury, the secondary issue is in what circumstances that intent can be inferred.

[10] The many cases cited do little to clarify these issues. The result in each is driven by the unique facts of the case. Particularly important to resolution is the precise wording of the insurance policy under consideration and the nature of the act which produced the damage. There is legitimate concern that “intentional act” not be construed so broadly as to exempt insurers from indemnity for damage resulting from negligence. McLachlin J., as she then was, wrote in **Non-Marine Underwriters, Lloyd’s of London v. Scalera**, [2000] 1 S.C.R. 551; S.C.J. No. 26 (Q.L.)(S.C.C.), “[a]fter all, most every act of negligence can be traced back to an ‘intentional ... act or failure to act’” (at para. 92).

[11] The key cases in this area are **Scalera**, cited above, and **Co-operative Fire & Casualty Co. v. Saindon**, [1976] 1 S.C.R. 735.

[12] It is not necessary here to develop a generally applicable description of the intent required to engage an exclusion clause. On these facts, there can be no doubt that Mr. Emeneau intended to cause damage to property by fire within the meaning of this exclusion clause.

[13] Intent, in this context, is not synonymous with “desired end” or “objective”. In **Neville v. Brace** (1978), 28 N.S.R. (2d) 387; CarswellNS 157 (N.S.S.C.) Hallett J., as he then was, said:

¶50 The intention that must be proven to cause loss or damage need not be that the wrongdoer intended to cause the specific loss or damage that in fact occurred, but a general intention to cause loss or damage. The intention can be inferred from the conduct of the wrongdoer; . . .

[14] Similarly, in **Thomas v. Wawanesa Mutual Ins. Co.** (1982), 52 N.S.R. (2d) 86 (N.S.C.A.), Macdonald J.A. said:

52 Whether a certain result was courted or looked for on the one hand or unexpected or unusual on the other hand cannot be determined in the abstract. Such determination of necessity involves the concept of foreseeability not in the sense it is usually employed, *i.e.*, as an aid to determine whether certain conduct was negligent but rather, simply as an assisting factor in the ascertainment of whether the result that flowed from certain conduct was courted or looked for.

[15] Mr. Emeneau prepared and ignited an explosive fire in a confined space knowing that damage by fire would result. He knew that the warehouse contained

flammable material and that the adjoining tenant space was separated from the site of the fire by only a wood frame wall. Mr. Emeneau admittedly intended to cause damage by explosive fire to himself, the truck and the area of the warehouse floor where he poured the gasoline. As the trial judge found and the cases support, that the actual damage was more extensive than he contemplated does not entitle him to indemnity. Causing damage by fire in the warehouse is exactly what Mr. Emeneau set out to do. The trial judge did not err in finding that he was not entitled to indemnity.

[16] I would dismiss the appeal with costs to the respondent in the amount of \$6800 inclusive of disbursements which is 40% of the costs at trial.

Bateman, J.A.

Concurred in:

Glube, C.J.N.S.

Cromwell, J.A.