

Court holds liability insurer not obligated to defend massage therapist from proposed class actions alleging voyeurism

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Blaney McMurtry's [Jason Mangano](#) was successful before the New Brunswick Court of King's Bench with respect to a duty to defend application brought by The Estate of Pierre Wüst in connection with two proposed class actions brought by the former female massage therapy patients that alleged among other things they were filmed by their massage therapist without their consent.

In [The Estate of Pierre Wüst v Novex Insurance Company, 2023 NBKB 062](#), The Estate of Pierre Wüst was named in two proposed class actions. The Moxton Action was brought on behalf of 99 female patients. The trust of the allegations in this proposed class action was that Mr. Wüst took videos of the female patients in his massage treatment room without their knowledge or consent. He was alleged to have breached his fiduciary duty, committed assault and battery and was negligent.

The second proposed class action was the Boyce Action. The Boyce Action was brought on behalf of 101 former clients of Mr. Wüst who alleged to have been photographed and/or videotaped by him while they were dressing and undressing in the massage therapy treatment room without their knowledge or consent. Damages were sought for negligence, breach of contract, breach of fiduciary duty and intrusion upon seclusion.

In Justice Terrence J. Morrison's decision, released April 18, 2023, he held that Novex Insurance Company did not have a duty to defend The Estate of Pierre Wüst from either of the class actions. Justice Morrison held that Novex did not have an obligation to defend the proposed class actions under a Miscellaneous Malpractice Liability policy, nor did Novex have a defence obligation under a Commercial General Liability policy. Justice Morrison applies the true nature and substance of a claim test, as set out by the Supreme Court of Canada, in holding that the true nature of the claims against Mr. Wüst are intentional conduct and the claims of negligence were entirely derivative.

With respect to the Miscellaneous Malpractice Liability policy the New Brunswick Court of King's Bench noted that it was "inconceivable that a patient would consent to the recordings as a part of a professional service" notwithstanding the term was undefined. Consequently, the Policy's insuring agreement was not satisfied. Although the "professional service" issue was dispositive, the Court of King's Bench also held the abuse exclusion was not ambiguous and encompassed the harm alleged; and, that physical interaction was not a requirement for the exclusion to apply.

With respect to the Commercial General Liability (or CGL) coverage, the Court disagreed with policyholder's argument that the pleadings sounding in negligence and therefore satisfied the "occurrence" requirement. The Court noted "the substance of the claims against Mr. Wüst is that he surreptitiously recorded his female patients at various stages of undress, some minors, stored the images, and later viewed them for his own sexual gratification." The Court held that this could not "reasonably be considered an accident and therefore is not an "occurrence" under the CGL Coverage." The Court also held that the CGL Abuse Exclusion and Expected or Intentional Act Exclusions would exclude coverage in any event.

PEOPLE

- Jason Mangano

PRACTICES

- Insurance Coverage Counsel