March 2019

BRIEFING NOTE

Guild Yule LLP
BARRISTERS AND SOLICITORS
2100 – 1075 Georgia Street
Vancouver, BC V6E 3C9
www.guildyule.com
P 604 688 1221
F 604 688 1315
E feedback@guildyule.com

A prudent reminder for brokers; drone injury fell within CGL exclusion for aircraft.

In what is said to be the first decision on the issue, a California Court was called on to decide cover under a Commercial General Liability policy for an injury alleged to be due to the operation of a drone.

Philadelphia Indemnity Insurance Company v. Hollycal Production, Inc.[1] concerned a Summary Judgment motion by the plaintiff insurer to determine whether an injury to a guest at a wedding, was covered under a policy issued to the wedding photographer, its insured. It was alleged that an employee of the defendant negligently operated a drone fitted with a camera, and caused it to collide with the guest's eye, inflicting serious injury.

The CGL policy contained the following, standard ISO exclusion providing that the policy did not apply to:

> *"Bodily injury" or "property damage" arising out of the ownership, maintenance, use or entrustment to others of any aircraft, "auto" or watercraft owned or operated by or rented or loaned to any insured. Use includes operation and "loading or unloading." ...*

The injured plaintiff commenced a separate action, which Philadelphia Indemnity agreed to defend under a reservation of rights. It commenced the present action seeking a number of orders, essentially to determine whether or not the pleadings in that underlying action gave rise to a duty to defend and/or indemnify.

In accordance with the standard ISO wording, "aircraft" was not defined in the policy. Counsel for the injured wedding guest argued that the drone did not fall within the exclusion as an aircraft because a *"drone equipped with a camera is not capable of transporting persons or cargo,... but rather is ... unmanned and operated remotely."* He therefore argued that the drone was "*a piece of equipment* [and not] *an aircraft or vehicle*."

Unfortunately, that argument did not fly. The court held:

> *While the policy does not define the term "*aircraft*," the term "*aircraft*" is unambiguous and its ordinary meaning, as defined by Merriam–Webster's Collegiate Dictionary, is "*a vehicle (such as an airplane or balloon) for traveling through the air.*" ...*

[1] United States District Court, C.D. California
(Westlaw cite 2018 WL 6520412; Case No. ED CV 18-768 PA (SPx); decision:12.07.18)

> *A drone, as a "*vehicle ... for traveling through the air*" is an aircraft under the term's ordinary and plain definition. The ordinary definition of an aircraft does not require the carrying of passengers or cargo. Additionally, that a drone is unmanned and operated remotely does not make it any less of an aircraft.*

Although this is a US decision, the approach to interpretation is consistent with that of the Supreme Court of Canada as most recently laid out in ***Sabean v. Portage La Prairie Mutual Insurance Co.*** :[2]

> *...The overriding principle is that where the language of the disputed clause is unambiguous, reading the contract as a whole, effect should be given to that clear language ... Only where the disputed language in the policy is found to be ambiguous, should general rules of contract construction be employed to resolve that ambiguity ... Finally, if these general rules of construction fail to resolve the ambiguity, courts will construe the contract contra proferentem, ...*
>
> *At the first step of the analysis for standard form contracts of insurance, the words used must be given their ordinary meaning, "as they would be understood by the average person applying for insurance, and not as they might be perceived by persons versed in the niceties of insurance law"...*

While the finding that a drone fell squarely within the aircraft exclusion may not be surprising, the lesson may lie in the nature of the insured's business and whether the liability coverage negotiated by its broker was adequate. In Canada, the duty of care of a broker is still that as set out in ***Fine's Flowers Ltd. et al. v. General Accident Assurance Co. of Canada et al***:[3]

> *The solution lies in the intelligent insurance agent who inspects the risks when he insures them, knows what his insurer is providing, discovers the areas that may give rise to dispute and either arranges for the coverage or makes certain the purchaser is aware of the exclusion.*
>
> *I do not think this is too high a standard to impose upon an agent who knows that his client is relying upon him to see that he is protected against all foreseeable, insurable risks.*

Here, the policy was issued to the National Association of Mobile Entertainers; Hollycal Production being added as an insured certificate holder. Given the insured's business, it is surprising that there was no endorsement dealing with coverage for drone use. In Canada, failure to address this risk by a broker (either by securing coverage through an endorsement, or making the insured aware of the absence of coverage for this element of the enterprise) is likely to give rise to a claim against that broker by his/her insured.

Therefore, this is a reminder to brokers that care must be taken when considering the adequacy of liability coverage for their clients engaged in many types of enterprises - by including the obvious liability risks posed by the use of drones.

Adam Howden-Duke (ahd@guildyule.com)

[2] 2017 SCC 7, [2017] 1 S.C.R. 121 (January 27, 2017) @ paras 12 & 13
[3] [1977] O.J. No. 2435 @ para 35; 17 O.R. (2d) 529

Guild Yule LLP
BARRISTERS AND SOLICITORS
2100 – 1075 Georgia Street
Vancouver, BC V6E 3C9
www.guildyule.com
P 604 688 1221
F 604 688 1315
E feedback@guildyule.com

BRIEFING NOTE

Guild Yule LLP
BARRISTERS AND SOLICITORS
2100 – 1075 Georgia Street
Vancouver, BC V6E 3C9
www.guildyule.com
P 604 688 1221
F 604 688 1315
E feedback@guildyule.com