Lawyered – Episode 79
Insurance Law ft. Dennis Ong
Episode Transcript

[00:01] HUSEIN: This is Episode 79 of Lawyered. I'm Husein Panju. And on this podcast episode, we're speaking about current issues in Insurance law with Dennis Ong, an insurance defense litigator and small claims court judge. First off, we'll be speaking about a monumental Court of Appeal case relating to contract interpretation. This Insurance law decision is providing some helpful commentary on how to interpret contracts objectively and the role of surrounding contexts. We will also speak about the first appeal of position to address the role of the pandemic on jury notices, as well as some additional appellate guidance on third-party litigation funding. And in our Ask-Me-Anything segment, we will cover a bunch of topics, including the duty to defend and how lawyers can practically provide risk-based legal advice. All that a lot more is coming up in just a bit. This is Lawyered.

[Music Break]

[01:02] HUSEIN: Hello, everyone, and welcome to another episode of Lawyered. I appreciate you joining us again. As you can tell by the intro, we are on Episode 79, which means that we are somehow one more episode away from our season eight finale. We are very excited about that and very proud of this season that we've curated so far. And one thing I just want to flag as a reminder is that one of the new things that we were doing this season in particular, is that we've been using our Patreon funds in part to generate verbatim transcripts of every episode that we've been publishing this year.

Those are available on the podcast app and the show notes. They're also available on the website as well. So, it is a great way to follow the show. I know not everyone is an audio learner, although many are and this is a great way to ensure that you're getting the content of the episodes, it also makes the episode a bit more shareable. If that's something you're interested in. The whole point of the show is you're trying to make this content and the law more accessible to more people. So, we appreciate it if you could check out the transcripts if that is something that would be helpful for you. And also share the transcripts of the episodes with people who you may find will get value from this, whether they are lawyers or not lawyers or whoever.

Another thing I just wanted to mention is, our last episode was about the area of class actions law. our guest was sakina babwani, who is employed by the class actions group at Bennett Jones, which is a very reputable firm, particularly in this area. And we spoke about a number of topics, including some new cases that provide some guidance on compensatory damages, and what amounts to a proper pleading. And although those discussions were in the context of

Class Action, I think that there are a lot of transferable aspects that would equally apply to other areas of law.

My favorite part of that episode was actually a discussion about the shooting in Toronto's Danforth neighborhood from a couple of years ago. I'm sure if you live in Toronto, or follow these types of things, this is a very relevant topic that's top of mind. And in that discussion, we spoke about how some of the victims have filed a class actions matter against the gun manufacturer. And while the full resolution is still yet to be decided, there was some interesting discussion there in the episode and in the court decision about the duty of care that is owed by gun manufacturers and other providers or manufacturers of dangerous products. It was a really interesting discussion and it reminded me of my early days in law school and Torts class, as I'm sure many of you experienced as well learning about the duty of care.

It's interesting how these concepts that are many decades old in terms of who your "neighbor" is, and to who you owe a duty to. These concepts are very much still evolving. And so it was really interesting to see that evolution. And I will really encourage you to check out that episode, whether or not you have an expensive class action law, because the guest did a great job of breaking down some of the core aspects and explaining what this area looks like. And also some of the current issues in that field as well. So, if you want to check that out, that's Episode 78 in our archive about class actions law.

[04:25] Well, today's Episode is going to be really interesting as well. It's in the area of Insurance law. And as I spoke about in the introduction, it's an area that I think a lot of us have dealt with, in passing or tangentially in our lives, whether you've had any issues with your house or condo or your residence, or your car. A lot of us have insurance policies that we may have had to use from time to time, but rarely do we actually participate in the litigation aspect of it. so, the guest here is very experienced both as a judge, and as a lawyer as well, and I'm really looking forward to sharing this session with you today. so, without further ado, here is our insurance law episode featuring our guest, Dennis Ong.

[05:15] HUSEIN: Dennis is a senior litigation counsel at the downtown Toronto office of Aviva Trial Lawyers. And his area of practice has always been exclusively in the area of insurance defensive litigation. With a specialized focus on commercial, general liability, occupiers liability, property and casualty, motor vehicle accidents, property damage, municipal liability, sporting liability, and insurance coverage litigation. Dennis has litigated both jury and non-jury cases and has conducted trials, and appeals, and argued numerous complex coverage applications both in-person and virtually.

[05:50] And he has also successfully appeared before the Court of Appeal of Ontario, the Divisional Court, the Superior Court of Justice, the Ontario Court of Justice, the Small Claims Court, the Financial Services Commission of Ontario, and the Workplace Safety Insurance Appeals Tribunal. Dennis holds the position of Chair of the OBA Insurance law Executive. And he has been recognized through the Federation of Asian Canadian lawyers, also known as FACL for his dedication to mentoring junior lawyers in their profession.

[06:17] Dennis is a frequent speaker and moderator of CBD programming in the profession in the areas of substantive law, professionalism, and diversity. And he's always served as a substantive legal author whose recent work has been published in the annual review of Civil Litigation in the year 2021. Also in the year 2021, Dennis was appointed as a deputy judge of the Small Claims Court for the Central East region of the Superior Court of Justice. So, Dennis, thanks so much for joining us on the show today.

[06:44] DENNIS: Thanks, Husein. I really appreciate it.

[06:46] HUSEIN: Yeah, of course. I'm just curious, before we get into the questions, managing a litigation practice, is hard enough, but also having this additional role as a deputy judge of the Small Claims Court must be an additional load as well. So, how do you find the time and the capacity to do those things as well as everything else?

[07:07] DENNIS: Well, I should add, the big one is that I'm married, and I have three daughters, who are all six years old and under. And my family and my daughters are obviously very, very important to me. I don't know, I mean, I look at it like this, with all the different things you balance, you have to find that energy, and you have to really prioritize. You don't have a lot of time. And with the time that you do have, you have to make good use of it. So, with a factor or things that you have to draft, you may only have three, or four hours to do it. So, you work with the time you have.

And getting home on time at a reasonable time or doing those things is obviously difficult. But I think the inspiring words simply this, when you push yourself, you'd be surprised what you can do. So, that's my answer there for you, Husein.

[08:08] HUSEIN: Yeah, that sounds about right. It must take a lot of deliberate time management to get everything was done that needs to be a priority as well. So, we have a number of interesting cases to speak about in the area of Insurance law that I would say a lot of

people, anecdotally and personally may have some tangential interaction with Insurance law. Whether they get in a car collision or have property damage or whatnot. But I would say… at least speaking for myself that a lot of the litigation and the specific legal issues are not very well known. So, I'm curious to actually get an insider's perspective from you about what these cases mean, and how this air of law is changing.

[08:57] So, the first is we're going to speak about is a case called *MDS Inc. v. Factory Mutual Insurance Company*. We will have the cases with the citations on our show notes. And in late 2021, the Ontario Court of Appeal issued a major insurance-related decision related to the meaning of the word corrosion in an insurance policy. And the court interpretation provides some helpful guidance in terms of contract interpretation and upholding the plain and ordinary meaning of a contract. So, Dennis, I know that the underlying facts here are quite technical, but can you start by walking us through a very basic version of what the issue was in terms of the underlying dispute for this case.

[09:36] DENNIS: Yeah, no problem, Husein. So, basically, the MDS and Factory Mutual case is essentially a high-stakes insurance dispute between a very large high-tech health sciences company, MDS Inc., and its own insurance company, which is FM Global. MDS had a $25 million all-risks insurance policy, which is a type of commercial insurance, and had that with FM Insurance. Now, with respect to what MDS was doing, MDS had bought radioactive isotopes from a third-party supplier and a nuclear reactor. But suddenly this nuclear reactor shut down for 15 months. So, basically, MDS sought from FM Mutual its payment of indemnity arising from these lost profits because MDS could not manufacture its products. And the loss was about $121 million. But the policy was only for 25 million.

[10:48[But look, MDS has to recover its monies from somewhere. So, it seeks it from FM Global. However, contained within that insurance policy was an exclusion for the very thing that shut down the nuclear reactor, which was an exclusion against corrosion. The insurance company tried to exclude payment of the 25 million, saying that the corrosion exclusion applied, but at the trial, the trial judge said no, the corrosion exclusion as drafted was ambiguous, and said it didn't apply. So, basically ordered that the insurance company paid the full monies. And there was one other thing which is the corrosion, if MDS – the insured – could prove that physical damage occurred from corrosion, then the physical damage could be paid for.

[11:44] HUSEIN: I know that this got appealed all the way up to the Ontario Court of Appeal. So, when it got to that level, how did the Ontario Court of Appeal interpret these provisions?

[11:52] DENNIS: The Court of Appeal essentially ruled that "physical damage" means exactly that, physical damage. It doesn't mean physical damage plus paying for resulting economic losses, or anything consequential after that. So, the Court of Appeal essentially reverted back to its simplified contractual interpretation, which is, when you read the policy, the key is, the "physical damage" does not include loss of market use or loss of use. And that was specifically included. So, the Court of Appeal encouraged us to go back to the contract and the policy to see what it actually says, as opposed to reading in a broad interpretation.

[12:43] HUSEIN: So, on the face of it, it seems like going back to first-year contracts in terms of you look at what the parties intended. But is there a reason why this case is particularly important?

[12:58] DENNIS: Yeah, I think that's part of it. It's important because it follows a history of contractual interpretation from the Supreme Court. So, if we look at Classic commercial cases, like Sattva Capital, the Supreme Court tells us that courts should not deviate from the text of an actual contract. You can look at surrounding circumstances, but not so much that a separate contract is created. There are other contractual cases that are in the insurance context, but still, again, relate to generalize commercial negotiation in contract formations.

[13:40] HUSEIN: In some of the cases you cited, says that contract interpretation is an objective exercise. But what do you think about the contradiction between that statement and then, later on, the court, in this case, saying that one should always consider a sensible commercial result that reflected the parties' intentions at that time. So, how do you reconcile these two ideas how with an objective standard, but always you can factor in these commercial realities?

[14:06] DENNIS: Well, what the court is trying to say is that the contract itself should be objective. However, you have to take into account obviously, the party's positions, and visa vie with each other in obtaining this contract. It's not to say that an objective review of the contract and taking into account commercial realities are two contrary things, I think it's simply more suggesting that the contract itself and its plain meaning should be objective, and that essentially gives us it gives us predictability. It gives us predictability, because certainly after litigation hits, the party starts saying and giving evidence and opinions. "Well, that's not what I meant". And that's sort of subjectivity is exactly what causes disasters when it comes to litigation and maybe to get to the dispute, to begin with. The point being is the one thing that should be predictable and reliable are the words of the policy itself.

[15:19] HUSEIN: Yeah, that makes sense. So, it's a pretty consequential case from that particular appeal for this specific area of Insurance law. I was curious, for members of your bar, specifically of the Insurance law area, are there specific things that you think ought to be factored into their consideration?

[15:37] DENNIS: The court is telling us to look at what the policy actually says. I mean, I say that in jest, because it's obviously never that simple. I find in any kind of contractual interpretation exercise, especially in insurance, I find you're either on one of two sides, you're either on the side where you want evidence, you want evidence of surrounding circumstances, and context, you want extrinsic evidence, and you're saying the contract is ambiguous. Or you're on the other side, where you want strict contractual wording, you're arguing for ambiguity. And you just want to keep it simple. You want to exclude all that extrinsic evidence. And I guess all I can say is that, even though this is a reversion, back to basic principles, we're always going to have these arguments, because it really depends on the loss, depends on how much money is at stake. And it depends on the facts, and also the records that are before the court.

[16:38] HUSEIN: So, what are lawyers to do in light of a decision like that? I mean, as a non-insurance lawyer, I would imagine that you, try to add a bit more clarity to your insurance policies. But I imagine that's something that is easier said than done.

[16:55] DENNIS: The litigation lawyers, we're not often the ones that draft the contracts whatsoever. I think that's the same with any kind of commercial litigator as well. They don't draft the contract; they just argue them. Before embarking on any kind of dispute over contractual or insurance policy interpretation, you really have to look at the policy, you have to think about all the potential different interpretations of it. Really ask yourself the question, is it ambiguous? Look at the case law, look at the different guidance from the supreme and the appellate courts. But I really think at the end of the day, it really depends on what your evidence is, if there really is some good evidence, which goes to the contracting or factual matrix, and you believe that that could assist in the interpretation of the contract, well, then you've got to take a look at it depends on who it's coming from.

[Music Break]

[17:58] HUSEIN: During the onset of the pandemic, many trial courts were required to prioritize criminal and family law cases to the detriment of civil law cases, which resulted in significant delays. And in 2021, the Ontario Court of Appeal released a first appeal decision to specifically address the impact of the pandemic on a motion to strike a jury notice. And this outcome may

signal a culture change to allow for more expeditious and timely justice as well. So, Dennis we're going to be speaking about involves these jury notices. Actually, before we get into the facts, can you just explain to the people who may be unfamiliar? When we're talking about jury notices, what does this concept even mean?

[18:38] DENNIS: So, a jury notice is simply a notice that you serve that's allowable under the rules of civil procedure that essentially gives a party a choice to have a jury trial. But that's what you have to serve in order to have the possibility of a jury trial.

[18:57] HUSEIN: Is it accurate to say that if the judge grants a motion to strike a jury notice then there is not going to be a jury trial or just be heard by a judge alone? Is that right?

[19:05] DENNIS: Exactly. Yeah. Basically, in the world of Personal Injury and Insurance law in at least the last 20 years or so. Personal Injury lawyers have often preferred judge-alone trials. While insurance company batch defendants have often preferred trials by jury. And I'm not going to get into this further, except that it's a trend with both parties seeing more requisites success for their preferred mode of trial. Not a hard fast rule. It's just somewhat of a general statistic. So, the second issue to is that dogged us during COVID is in around the summer of 2020. Our Attorney General Doug Downey had inquired about the possibility of abolishing civil jury trials, in an attempt to end the civil backlog that got tabled. But third, this is now where we're talking about the background of striking the civil jury notices. So, if parties were bringing it, it was actually seen as tactical in nature, because of that generalized success that you've seen before from plaintiffs.

[20:09] HUSEIN: So, let's get into the facts. So, the case we're speaking about is called *Louis v. Poitras*. And I know that the facts are in 2013, but could you give us a very brief summary of the procedural history that led to this getting all the way up to the Court of Appeal?

[20:25] DENNIS: There were a number of different cases at the time where there were motions to strike all across Ontario. There is nothing particularly interesting about this case in particular. It is one that was in Ottawa and the motor vehicle accident, I believe, was at least, it was quite a long time. And the plaintiff brought a motion to strike and the defense resisted this. And there was actually, in the motions decision, there was quite a lot of detail, detailing many different cases that had struck the jury notice and others that hadn't. But the local motions judge decision of Ottawa, the judge in Ottawa was actually overturned by the Divisional Court.

[21:15] So, the Divisional Court overturned the motion judge's decision for essentially three reasons. Just simply saying that delay was not enough of a reason to strike and that there needed to be more evidence of prejudice to the parties. And that the right to a jury trial… I guess what the Divisional Court was somewhat stating here was that there was an overriding interest with respect to the administration of justice, to keep the jury trial there. So, it very much looked at the evidence and the Divisional Court indicate that there needs to be more than just a delay to strike the jury notice. So, what will we call this is the wait-and-see approach. So, during COVID, Divisional Court said, now, let's not strike the jury notice, let's wait and see.

[22:05] HUSEIN: So, I know that this got appealed up to the Court of Appeal. And how did that court fight in terms of its review of the Divisional Court decision?

[22:14] DENNIS: So, the Court of Appeal obviously overturned the Divisional Court. And it compared the underlying decision of the motion judge and the Divisional Court, to ships passing in the night. The Court of Appeal basically indicated that the appellate court can only overturn a motion to strike a decision if the underlying decision was exercised arbitrarily or capriciously.

[22:40] HUSEIN: Okay. So, now that there are some specific findings that the Court of Appeal found in relation to the lower court's review, and I know that one of the important issues is this whole issue of the role of delay in obtaining a date for civil trials. Can you tell us a bit more about this issue?

[23:03] DENNIS: Well, the decision of the Court of Appeal and all the underlying decisions about striking the civil jury, clearly show us that the situation with civil jury trials, and delay is extremely bad. We have civil cases that haven't seen a trial where the circumstances underlying took place 10 years or more ago. We're not necessarily seeing civil jury trials across the province, even today running forward. So, the difficult thing is, if you're a party or a lawyer that hasn't seen a civil jury trial in some time, you may be forced to bring such a motion to strike the civil jury, because you think you'll get a trial faster.

[23:50] HUSEIN: Is delay enough to strike the jury notice? Or do you need to show some specific prejudice?

[23:56] DENNIS: Well, it's quite clear that the Court of Appeal indicated that delay alone is enough to strike the jury notice. And this is specifically referred to in a separate decision from Justice Brown, where he essentially forwarded the expedited panel decision that we have in

this specific case. So, it is enough. And the Court of Appeal was disagreeing with the Divisional Court's reliance, that there be evidence of that prejudice.

[24:26] HUSEIN: Another thing that I was curious to get your thoughts on is, I know that the court made some comments about the role of local judges and local circumstances in terms of their resource allocations. Tell us a bit more about that and the implication that that might have for lawyers going forward.

[24:44] DENNIS: I think this is the main point of this decision, which is essentially that the Court of Appeal is indicating that local judges are best positions to understand the availability of resources and the appropriate approaches for each circumstance in any given case. So, local judges are given essentially judicial discretion to use and understand their knowledge of the differing local circumstances. So, the court of appeal was essentially, I suppose, telling the entire province that Appellate courts should respect the discretion of each of the local courthouses. They shouldn't second guess the local courts' discretionary case management decisions. That's essentially what this case is about.

[25:37] HUSEIN: What are your thoughts on this specific issue? Do you think that approach makes sense in terms of more deference to local courts in terms of their resource management? Or does it need to be some overarching pressure in terms of getting these cases moving,

[25:53] DENNIS: We're really at a time where things are really being turned on their head. So, I really think what we're seeing is an overall trend with respect to a decentralization of the Superior Courts' functions. I find it's very difficult now, especially from a post-COVID realm, to have centralization of all superior court functions. I mean, anyone who has litigated in this province as a lawyer or even as a party, if you've looked for practice directions that match what happens in Windsor versus Hamilton, Toronto, Thunder Bay, or otherwise, you're going to find different pages of the factum, you're going to find different filing procedures, some have the portal, some have case line, some don't and it's very, very different. So, this decentralization, generally speaking of admin functions, is now being reflected in this court of appeal decision with respect to whether or not you can get a civil jury.

[26:53] HUSEIN: So, given that, what impact do you think a case like this might have on the civil procedure or court proceedings going forward?

[27:00] DENNIS: Yeah, so this is a huge case, in terms of whether you can have a civil jury or not, and where you can have one. Most of the cases were already commenced before this decision. But I think in the future if a plaintiff is commencing a case, they have to think about this now. If you want a civil jury, and you're commencing a case, you have to think about that jurisdiction, you should think about the local conditions there. For defendants, however, in the insurance defense context, who wants a civil jury, they're not the ones that commenced the case. So, it's really the plaintiff that started the case. So, I think at the end of the day, all this means is this, we're moving towards possibly a more judicial forum, shopping culture. If you want a civil jury, you may have to think about where you're starting that case and whether a civil jury is even possible in that specific jurisdiction.

[Music Break]

[28:01] HUSEIN: As litigation becomes more and more expensive, there's also been a corresponding rise in the use of third-party lenders in order to finance these projects. And a recent Ontario court decision provides an analysis of some of the logistical issues involved, including whether non-party lenders would have to pay costs. So, Dennis, I know that class actions has a lot of this as well. But can you explain at a high level, like when we talk about third-party litigation funding, what does this mean exactly?

[28:32] DENNIS: So, third-party litigation funding is essentially a third party who is usually funding the weaker party. So, usually, a plaintiff might not have resources under some kind of contract for interest in any other terms. Defendants usually won't have something like this in the insurance context, because the defendants are indemnified by an insurance company.

[28:55] HUSEIN: Some practitioners have referred to third-party lenders as almost like a Catch-22 in a sense, in that, sometimes the plaintiffs need this funding to pursue the claim. But then as the loan gets bigger and bigger, it sometimes limits their ability. But can you tell us a bit more about this paradigm or this concept?

[29:15] DENNIS: I mean, in the world of classic personal injury and insurance, we don't often see third-party funding like this, in its classic case, as much as Class Actions might you mentioned that. We often see it in the form of adverse costs insurance, which is reverse in the sense that if there is an adverse cost made against the plaintiff, there's a third party, it's almost an insurance company that indemnifies the plaintiff for that. So, that's something more that we see. But in terms of the Catch-22, it is exactly that because usually, you have a plaintiff that is of

limited means and needs this third-party funding or adverse cost funding, or indemnity to proceed.

[30:00] The problem though is that this becomes an impediment to settlement, because either those terms are not put out forward. So, the defendant can really understand or the court can understand what the deal is. But also at the same time, it becomes difficult because if it's a classic third-party funding situation, the interest can rack up so high that the cost of the loan is higher than what the plaintiff is even seeking.

[30:24] HUSEIN: Right, like a critical mass at a certain point.

[30:26] DENNIS: Yeah, absolutely. And for adverse costs, the only thing is that indemnity might be triggered upon certain results in the trial.

[30:35] HUSEIN: Now, I know that the case we're interested in is *Davies v. Clarington*. It's almost like a saga, in that there are a number of cases that have this style of cause because it went on for so long and involved so many issues. But just for the purpose of clarity for the show, what are the relevant facts that people need to know about for this particular issue?

[30:56] DENNIS: This is probably the longest personal injury case in history. So, it arises via a trail derailment in November 1999. There was a class action lawsuit. And this one plaintiff, Mr. Zuber, continued his lawsuit despite the fact that all the other class members settled their lawsuits. So, Mr. Zuber, obtain the assistance of litigation loan providers, and it was about a $500,000 loan in total, but with interest charges, which were about 18% to 29%, some of which were compounding monthly. It seemed to be that he owed about $6 million in litigation loans to those parties. Now the trial occurred…

[31:43] HUSEIN: And that's just to his lender, that wouldn't be to the other party even, right?

[31:49] DENNIS: No, that's just to his lenders, right? So, at the trial, he only got $50,000 in damages awarded to him. But the defendants, there are many of them had rule 49 offers to settle which he rejected. So, essentially, there was a ruling for costs and the costs to the defendants were $3,400,000 in costs. So, one of the most important and interesting motions arising out of the saga was that the defendants sought a costs award directly against the litigation loan providers in principle because they were arguing that those litigation loan providers with their terms, onerous terms were in fact the ones that were impeding on meaningful settlement. So, that's what this latest chapter of the saga is all about.

[32:42] HUSEIN: And so just to be clear, so it was the plaintiff who had engaged this lender, but it was the defendant who wanted costs to be rendered against the lender. Is that right?

[32:56] DENNIS: Exactly. The defendants who had this $3.4 million cost award were essentially saying that the litigation loan providers were in fact the ones fronting the case, but the man of straw was in fact, the plaintiff.

[33:11] HUSEIN: What was an important finding coming out of this decision?

[33:12] DENNIS: Well, this decision was drafted by Regional Senior Justice Mark Edwards, who obviously has a great understanding of these complicated issues. But he refrained from making an order against the litigation loan providers, citing that section 131 of the Courts of Justice Act gives the court the discretion to not award against a nonparty. And essentially, here the defendants wanted the RSJ to develop an area of law citing the English and Wales case law precedent, which did in fact follow the approach that nonparty litigation loan providers should be penalized. But his honor just simply did not follow that precedent.

[34:06] HUSEIN: Based on your review of the case, do you think there are any scenarios in which a court would issue costs against a lender in a case either like this or something else?

[34:20] DENNIS: Well, it's difficult to say. I mean, they're not a party. They're not a party to the actual action itself. Again, I believe one of the things that RSJ Edward, said and looked through as well is the production of the actual loans themselves and the terms were not made until very late in the game. So, it's very difficult for the court to make a ruling when it doesn't actually have the terms and really understand how it could have played into this cost decision. Again, this is a cost decision, it's a discretionary power. So, it's hard to say, because, at this point, the court is being asked to make a cost ruling, based on the outcome of all the trials. So, I think the RSJ Edwards approach was correct, in the sense that he deferred saying that this issue should be dealt with potentially at the civil rules committee discussion, in a legislative format versus a case law-created precedent.

[35:33] HUSEIN: Now, we're rolling out this episode at the end of September and I know that the Ontario Court of Appeal is hearing an appeal of the same issue quite soon. But regardless of how the court finds, what impact will this case might have on insurance lawyers going forward?

[35:50] DENNIS: This is quite a rare case. This is a case that started out as a Class Action. As I said, we don't often find third-party funding in this format in classic Insurance law. I think what this essentially means, though, is it's more of a development with respect to whether or not the court should be penalizing or including third-party funders. So, that could be a classic third-party funding party, it could be an adverse costs provider. I think the hesitance of the court here really is case-by-case specific. This is a very late addition in the game, revealing of the terms of the loan. Again, this is a cost ruling, so there's great deference given, there should be great deference given to the judge for the costs award. But it's hard to say what this will mean, except that this discussion about any kind of award against a non-party certainly requires a lot of discussions, just as the Regional Justice has indicated.

[Music Break]

[37:18] HUSEIN: And as always, our final segment for the show is our Ask-Me-Anything segment. And we're going to be doing this with Dennis to speak about some of the exciting issues in Insurance law, as members of our show will know, one of the bonus rewards for members of our patron crowdfunding community is the opportunity to submit questions that they want to hear answered on the show. These can be questions on anything at all, as long as they are not asking for legal advice. We usually call out for these questions a week or so before each episode. If you want to learn more about how you can become a patron and submit your own questions and get some other rewards in addition, you can check out our crowdfunding website, which is www.lawyeredpodcast.com/pateron for more information. Okay, so Dennis, we got a bunch of questions in the mailbag for this week. The first question we have that came out was: How does Insurance law differ from, "conventional civil litigation"?

[38:15] DENNIS: Well, insurance law is civil litigation, I think the only difference is that generally speaking, the defendant is being defended and indemnified by an insurance company. So that's the main difference, visa vies party to party, conventional civil litigation. There's also within insurance law, a sub-sect of insurance called insurance coverage litigation, which is essentially contract law or commercial litigation or contractual interpretation litigation, really. But there are certain statutes that do apply to insurance companies specifically. So, obviously, that includes the world of motor vehicle accident litigation, which is all governed by the Insurance Act.

[39:05] And there are other areas of law that are often litigated such as occupier's liability. Again, this doesn't have to be in the sub-set of insurance litigation, but it often is because many

parties, large institutions that have commercial insurance, their policies of insurance, usually defend and indemnify for a slip and fall lawsuit, for example.

[39:31] HUSEIN: Okay, so the next question that we have is: What are some of the considerations for lawyers who are retained by an insurance company, as opposed to by another institutional client? And again, I'll note that you are employed by Aviva, but we're not asking you to speak on behalf of them.

[39:50] DENNIS: So, obviously, insurance companies are institutional clients or generally larger institutional clients. But one of the main differences between insurance company for the lawyers, usually, insurance companies are extremely familiar with litigation. You can have junior lawyers that can start an in-house organization or be exclusively retained by insurance companies, that firm, for example. And the client from the insurance company who could be an insurance adjuster is essentially an expert in litigation. They are someone who is an expert in risk management and has instructed other lawyers on numerous litigation files, and they're familiar with it simple as that.

[40:37] I think you might even find sometimes that some of the insurance adjusters know the rules of civil procedure better than some lawyers. But the point being is that they are familiar, they have attended pre-trials, and they're familiar with the process. So, I think that's the thing that's different. For example, in another institutional organization, you might have a risk manager who maybe dabbles in being familiar with the process, but it's not, for example, their full-time job.

[41:06] HUSEIN: So, how does that impact the actual dynamics of what litigation is implied? Does that make it easier than the lawyer has a client who is more attuned to these things?

[41:15] DENNIS: I think it's no different than a typical lawyer/client relationship. You have a client who is an individual, you have a lawyer who is an individual, and you have both of them essentially doing their jobs. And you have a lawyer who is communicating advice based on his or her education. And then you have the client who is looking to the lawyer for advice. Either way, the client is usually not someone who is a lawyer. So, the point being is, it's your classic lawyer/client relationship.

[41:47] HUSEIN: Well put. Another question we have is: What are the practical meaning and implications of the "duty to defend"? And maybe you can start by explaining what this term means and then also know the relevance of it.

[42:02] DENNIS: Yeah, the words, the duty to defend is actually a creature of contract, it actually is something that's contained directly within an insurance policy. So, this duty to defend arises from an insurance company's obligation to its customer – an insured – in exchange for the premium. So, if an insured customer is sued for usually third-party liability or negligence, the insurer will defend that customer in a lawsuit. And that includes assigning defense counsel, it includes paying for that counsel, instructing that counsel, and also defending its customer in good faith in relation to the allegations pleaded in the lawsuit.

[42:47] HUSEIN: Is there a typical scenario in which a dispute like this comes up in terms of a duty to defend?

[42:54] DENNIS: Absolutely. I'll give you a typical example. So, you have an owner of a commercial premises, and he hires a subcontractor to do anything, let's say winter maintenance. As part of that contract, the owner says to the subcontractor, you have to make me an additional insured onto your insurance policy. And let's say the winter maintenance company says, "Okay, no problem". So, they do that. And then what ends up happening is, if both of them are sued in a slip and fall lawsuit, the owner will turn to the winter maintenance contractors' insurance company and say, "Hey, you owe us full defense costs for the slip and fall lawsuit".

[43:42] The insurance company could take a position that that coverage was limited. There's an exception, they could take any kind of position to that, and then hence you have this separate litigation that occurs. And that's even before we figure out who the heck is responsible for the lawsuit. So, it's almost like a lawsuit within a lawsuit. So, it's extremely common now, especially with our increasingly expensive civil litigation world. Nobody wants to pay for their legal fees.

[44:16] HUSEIN: Seems like it. Okay, the next question we have is: How have the amendments to Rule 76 of the Rules of Civil Procedure impacted the Insurance law bar? So, again, can you start by explaining, what are these amendments and also then the corresponding impact?

[44:35] DENNIS: The new changes to Rule 76 took place on January 1st, 2020. And there was an increase in the previous limits from 100,000 to the new monetary ceiling of 200,000. Another feature of Rule 76 was that there were no jury trials. And that costs could not be more than 50,000 and disbursements couldn't exceed 25,000, not including interest.

[45:03] HUSEIN: It seems like on the face of it, we're just changing one of the digits. But I know that can be quite a substantial amount of monetary difference. But is this having any particular impact on the lawyers that practice in the area?

[45:17] DENNIS: Yeah. So, I can answer the question with respect to the insurance law bar. So, I remember when these changes were anticipated. I remember that a lot of the defense lawyers were expecting this huge plethora of an increase in Rule 76 claims. With Rule 76, there's no jury, you have this lower number of costs, etc. And there's this hope that you can get files quicker to trial. The other thing too is that I believe that trials are limited to five days. But the evidence must all be led by affidavit alone, and you only have the right to cross exams, not full in-chief testimony that accounts for the lower trial time.

[45:04] But what happened was, we just didn't see this influx, we braced for it, but we just didn't see it. And I can't explain that other than that, perhaps these restrictive aspects such as evidence only by affidavit, etc., the costs not being more than 50,000. Perhaps that just was not attractive to whoever was bringing the claims. So, the point being is, has Rule 76 impacted the Insurance law bar significantly? I would say – just my personal opinion – I would say no, it hasn't, just because we're not seeing it being used significantly. Now, there still are claims, and people can still play into them. But again, I think what this has to do with is the fact that personal injury litigation has gotten so expensive that having $25,000 in disbursements just isn't cutting it in terms of being able to prove your case. So, maybe the lawyers might have an interest in not proceeding with this procedure.

[47:09] HUSEIN: Interesting. In terms of the last question that I think the conduct, I would say is that, I think famously, insurance is mostly about risk. And the question that's been submitted is: What are some tactical approaches for lawyers in terms of providing risk-based advice?

[47:26] DENNIS: First of all, as a lawyer, you certainly don't know what's going to happen in your case. So, if you're advising on risk, the first thing to do is just know that you have absolutely no idea what's going to happen in court. And if you even give that advice to someone who's a risk manager, they should understand that. But part of it too is that you believe that you don't know what's going to happen. I think now, especially in a post-COVID world, where everything seems like it's upside down now with rules and getting court dates, and civil resources, just not being there for the civil… forget insurance, just talking about civil litigation in general. We don't know what's going to happen whatsoever. So, I think that's the first tactical approach.

[48:32] The second thing about approaching risk is that if you're giving your client, let's say, a risk assessment, you really have to give your client a number. You've got to say, is it 50/50? Is it 25/75? Is it 75/25? Is it 33/66? You have to do that because your clients have to make a decision. The second thing that I would say you have to do within this – this is like a two sub-A – you have to really consider whether this risk assessment survives if you're at the brink of trial. You can't just say, oh, 50/50, and that stays the way it is. One thing we always deal with is the availability of witnesses before trial, I have a case that's supposed to go to trial, but I'm not sure if one of my key witnesses is going to be alive by the time I get a jury trial, or whatever trial it's going to be. So, that assessment consistently changes. So, that's the second thing.

[49:22] HUSEIN: It is all dynamic aspects of litigation, generally, right? Sometimes new facts come up, that you weren't expecting. In every litigation that I've done, there's always at least one thing that was wildly unexpected that I could not have predicted

[49:37] DENNIS: It happens all the time. There can be – even though the rules dissuade against it – there can be surprised witnesses, surprise evidence, new things that occur, or most importantly, one thing that we often see is that when parties are at trial, and this includes counsel, they've been approaching the case a very different way. And once they see that they're actually at trial, they rethink it. So, again, you have to really consider what it's going to be like when you really actually put your money where your mouth is, I guess.

[50:08] So, the third thing, and I guess, I'll just end the question with this is, the best tactical approach to providing risk-based advice is to be nice to your opponent. Because you just don't know what's going to happen. And most importantly, if you get caught on the losing end of a case, you don't know if your position will actually unveil itself in court. And I think that civility, and understanding each other's risk and proceeding with any kind of court date is important, because you've been in court enough, should I say, you'll understand that the case is that you thought you'd win, you'll lose and vice versa. So, I think that's good advice in terms of providing that risk, because it's all risk. It always is. And I think that's one of the hardest things about being a litigator is, you're just constantly on the brink of winning or losing, you don't know what it's going to be.

[51:16] HUSEIN: Dennis, speaking of professionalism, and civility, I want to thank you for your professionalism during the course of this interview. You've done a great job of breaking down these complex issues and cases into a very digestible way that's very understandable for lawyers and non-lawyers. And as I've said, a lot of these cases are changing as recently as today, even. So, it'll be interesting to see how these issues and cases evolve over time. And we

appreciate your time and walking us through them. So, we really thank you again for your time and looking forward to staying in touch in the future as well.

[51:52] DENNIS: Thanks, Husein, I really appreciate being on the show.

[Music Break]

[52:01] HUSEIN: And that's going to be a wrap on this episode for today. Thanks for listening. On today's episode, our guest was Dennis Ong. You can learn more about him and his work at Aviva at their website, which is www.avivatriallawyers.com. And please know that although Dennis also serves as the deputy judge with Small Claims court, those comments on this episode do not reflect those of the bench or those of his employers. And for more about today's show and links to all the cases that we spoke about in our episode, you can find those on our website, which is www.lawyeredpodcast.com. And on our next episode, we're going to be airing our Season eight finale. And to close out the year, we're going to be speaking about the era of Arbitration Law with our guest, Alexandra Mitretodis.

[52:45] Solomon Krause-Imlach Solomon Krause-Imlach Solomon Krause-Imlach Alexandra is a leading expert in insurance law issues from the Fasken office on the West Coast. And we're going to be speaking about a range of arbitration-related topics, including new developments in consumer protection, and some potential new issues in the area of artificial intelligence. And if you want to help to improve our show, and get some neat and affordable legal rewards, including the opportunity to submit questions for our show, it would be really helpful if you could become a patron of our show and join our crowdfunding community. You can learn more about that on our crowdfunding website, which is www.lawyeredpodcast.com/patreon.

[53:25] We want to give a shout-out to a number of patrons including Sajjad and Farhana Kassamali, Saad Baig, and Samantha Chen. So, thanks to all of you for supporting this show and keeping this momentum going. We really appreciate it. As always, make sure that you never miss another episode of our show by subscribing to our podcast for free on iTunes or wherever you get your podcasts. You can also follow us on LinkedIn or on Twitter, and our Twitter handle is @lawyeredpodcast.

[53:53] Our sound editing work is assisted by Solomon Krause-Imlach. The theme music is provided by Ben Swirsky and the website is maintained by Steve Demelo. And, of course, please be advised while the show is aimed to be helpful and informative, that is not legal advice. However, if you do want legal advice, please reach out to a lawyer directly to help you with

your particular situation. And with that we'll see you in two weeks for our Season 8 finale. And until then, keep it legal!