Incerto v. Landry et al.; Lombard Canada Ltd. et al., Third Parties

[Indexed as: Incerto v. Landry]

47 O.R. (3d) 622
[2000] O.J. No. 861
Court File No. 98-CV-159733-CM A

Ontario Superior Court of Justice
Lax J.
March 15, 2000

Insurance -- Insurer's obligation to defend -- Motor vehicle operated but not owned by defendant becoming stuck in ditch -- Passenger attempting to push vehicle out of ditch -- Defendant standing beside car giving directions to another person in driver's seat -- Car rolling over passenger and killing him -- Automobile insurance policy insuring "owner, driver or occupant" against liability imposed by law for loss or damage "arising from the ownership or directly or indirectly from the use or operation of any such automobile" -- Defendant insured under homeowner's policy which excluded coverage for claims arising from ownership, use or operation of motor vehicle -- Possibility existing that claims against defendant could succeed on basis of both auto-related and non-auto-related causes -- Both insurers having duty to defend defendant.

A motor vehicle operated by, but not owned by, the defendant became stuck in a ditch. The defendant and both of his passengers exited the vehicle. One of the passengers, I, went into the ditch intending to push the vehicle. The other passenger, H, got behind the wheel of the car. The defendant stood beside the open driver's door giving directions. On instruction from the defendant, H put the car into neutral. The

vehicle rolled over I, killing him. I's family brought an action for damages under the Family Law Act, R.S.O. 1990, c. F.3. The vehicle was insured under an automobile policy which insured an owner, driver or occupant against liability imposed by law for loss or damage "arising from the ownership or directly or indirectly from the use or operation of any such automobile". The automobile insurer took the position that the defendant was neither the driver nor an occupant of the vehicle when I was killed. The defendant was insured under a homeowner's policy which indemnified an insured for l egal liability arising out of an insured's personal actions anywhere in the world, but excluded coverage for claims arising from the ownership, use or operation of a motor vehicle. The insurer took the position that the loss or damage here resulted from the vehicle being driven into a ditch and therefore arose from the use or operation of the vehicle. The defendant brought a motion for an order compelling either or both insurers to defend him.

Held, the motion should be granted.

The accident resulted from the ordinary and well-known activity of an automobile, namely, that the defendant drove the car off the road and into a ditch. The injury that resulted was not incidental or fortuitous. It arose, at least indirectly, from the activity of attempting to extricate the vehicle from the ditch. There was some nexus between I's death and the use or operation of the motor vehicle. The defendant's operation of the vehicle contributed in some manner to the injury. The defendant was entitled to coverage from the automobile insurer and the insurer had a duty to defend.

The pleadings and agreed facts in this case gave rise to the possibility that I's death was caused by the defendant's instruction to H to put the car into neutral. At the time, the defendant was standing outside the vehicle giving directions. The weight of authority is that this is not the kind of activity that involves the use or operation of a motor vehicle. There was a possibility that the claims against the defendant might succeed on the basis of both auto-related and non-auto-related causes. Therefore, there was coverage under both

policies and both insurers had a duty to defend the claims against the defendant.

Amos v. Insurance Corp. of British Columbia, [1995] 3 S.C.R. 405, 10 B.C.L.R. (3d) 1, 127 D.L.R. (4th) 618, 186 N.R. 150, [1995] 9 W.W.R. 305, [1995] I.L.R. 1-3232, 13 M.V.R. (3d) 302, apld

Derksen v. 539938 Ontario Ltd. (1999), 45 M.V.R. (3d) 6, [1999] O.J. No. 2743 (C.A.), affg (1998), 37 M.V.R. (3d) 59, [1998] O.J. No. 3723 (Gen. Div.), consd

Other cases referred to

Cella v. McLean (1997), 34 O.R. (3d) 327, 148 D.L.R. (4th) 514, [1997] I.L.R. 1-3465, 29 M.V.R. (3d) 292 (C.A.); Co-operators General Insurance Co. v. Marshall, [1999] S.J. No. 718 (Q.B.); Kyriazis v. Royal Insurance Co. of Canada (1993), 107 D.L.R. (4th) 288, [1994] I.L.R. 1-3051 (Ont. C.A.), affg (1991), 82 D.L.R. (4th) 691, [1992] I.L.R. 1-2786, 31 M.V.R. (2d) 238 (Ont. Gen. Div.); Laurencine v. Jardine (1988), 64 O.R. (2d) 336, [1988] I.L.R. 1-2292 (H.C.J.); Milligan v. Dryburgh, [1985] I.L.R. 1-1960 (Ont. S.C.); Nichols v. American Home Assurance Co., [1990] 1 S.C.R. 801, 72 O.R. (2d) 799n, 39 O.A.C. 63, 68 D.L.R. (4th) 321, 107 N.R. 321, [1990] I.L.R. 1-2583; Rose v. Beaven (1998), 41 O.R. (3d) 256n, [1998] O.J. No. 4840 (C.A.), affg (1998), 39 O.R. (3d) 476 (Gen. Div.); State Farm Mutual Automobile Insurance Co. v. Partridge, 10 Cal.3d 94 (Cal. S.C. 1973)

Statutes referred to

Family Law Act, R.S.O. 1990, c. F.3
Insurance Act, R.S.O. 1990, c. I.8, s. 239(1)

MOTION for an order that the insurers had duty to defend the defendant.

Samantha E. Richmond, for defendant, Brian Landry.
Mark L.J. Edwards, for third party, Lombard Canada Ltd.
Thomas J. Hanrahan, for third party, The Economical Insurance Group.

[1] LAX J.: -- This is a motion by the defendant, Brian Landry, for an order compelling the third party, Lombard Canada Ltd. and/or the third party, The Economical Insurance Group, to defend and indemnify Landry in a action arising from a single car motor vehicle accident which occurred on September 6, 1998. In that accident, James Incerto was killed and his family seeks damages against the defendants pursuant to the Family Law Act, R.S.O. 1990, c. F.3. On this motion, Landry also seeks an order permitting him to appoint solicitors of his own choosing and ancillary orders relating to the conduct of his defence and costs.

[2] Lombard insured the vehicle pursuant to a valid standard Ontario Automobile Insurance Policy. This is the only automobile insurance potentially available to Landry as he did not own a car of his own, nor was he insured under his parents' automobile policy. Landry was an insured under a homeowner's policy with the Economical Insurance Group. Landry has commenced third party claims against both insurers alleging that Lombard and Economical have a duty to defend and indemnify Landry. This motion is concerned only with the duty to defend.

[3] The motion proceeded on agreed facts and the relevant paragraphs of the agreed statement of facts are set out below:

> 3. At the relevant time, Brian Landry, was operating the motor vehicle with the consent of James Incerto, and with James Incerto and Tanya Heald as passengers. The group had been out socially and were on their way home. When the vehicle reached the intersection of 30 Sideroad and Sunset Boulevard in the Town of the Blue Mountains, the vehicle became imbedded in a gravel rut at the side of the roadway. Brian Landry was unable to free the vehicle from the ruts in the roadway.

4. Brian Landry, James Incerto and Tanya Heald exited the vehicle.

5. Tanya Heald got behind the wheel of the vehicle and Brian Landry and James Incerto intended to push the vehicle, James Incerto went down in the ditch and put his hands on the hood of the vehicle in preparation to push. Mr. Landry was standing beside the open drivers [sic] door giving directions.

6. On instruction from Brian Landry, Tanya Heald put the vehicle into neutral.

7. The vehicle rolled over James Incerto, resulting in his death.

The Claims

[4] The allegations of negligence against Landry in the claim and cross-claim of Heald fall into two categories: (1) those relating to his operation of the motor vehicle up until the time it became imbedded in the rut; and (2) those relating to his communications from outside the vehicle with Incerto and with the new driver, Heald.

[5] As to the first category, the allegations are:

(a) he attempted to operate a motor vehicle when he was incapable of doing so;

(b) he was operating the motor vehicle at an excessive rate of speed;

(c) he failed to keep a proper lookout for hazardous road conditions;

(d) he created a situation of emergency; and

(e) he was operating a motor vehicle while his ability to do so was impaired as a consequence of the consumption of alcohol.

[6] As to the second category, the allegations are:

(f) having placed the motor vehicle in a place of danger, he failed to warn the deceased to keep clear; and

(g) he offered advice to the operator of the motor vehicle which would imperil the safety of the deceased.

The Policies of Insurance

[7] In this case, there are two policies of insurance potentially available to Landry. The Lombard policy, a standard automobile policy, insures an owner, driver or occupant against liability imposed by law for loss or damage, "arising from the ownership or directly or indirectly from the use or operation of any such automobile": Insurance Act, R.S.O. 1990, c. I.8, s. 239(1).

[8] In asserting that the Lombard policy afforded no coverage for this accident, counsel for the automobile insurer emphasized that the agreed facts refer to two distinct points in time with respect to the accident that resulted in Incerto's death. It is Lombard's position that Landry was neither the driver, nor an occupant of the vehicle when Incerto was killed. It is submitted that at that point in time, Heald was the driver and Lombard's duty to defend can only arise if it is determined on the agreed facts and the pleadings that Landry was an occupant of the vehicle.

[9] The Economical Policy indemnifies an insured for legal liability arising out of an insured's personal actions anywhere in the world. It is an agreed fact that Landry was an insured person under the Economical's homeowner's policy at the time of the accident. However, Section E of the policy excludes coverage for claims arising from the ownership, use or operation of a motor vehicle. It is Economical's position that the loss or damage here resulted from the vehicle being driven into a ditch and therefore arose from the use or operation of the vehicle. It submits that coverage is therefore excluded under its policy and there is no duty to defend.

Analysis

[10] The resolution of the coverage issues which are raised on this motion turn on the following three propositions. First, the duty to defend is governed by the pleadings. The mere possibility that a claim within the policy may succeed is sufficient to give rise to the insurer's duty: Nichols v. American Home Assurance Co., [1990] 1 S.C.R. 801, 68 D.L.R. (4th) 321. Second, coverage provisions in policies of insurance are interpreted broadly in favour of the insured; exclusions are interpreted strictly and narrowly against the insurer: Amos v. Insurance Corp. of British Columbia, [1995] 3 S.C.R. 405 at p. 414, 127 D.L.R. (4th) 618 at p. 624. Third, more than one insurer may be liable to defend and to indemnify the insured: Derksen v. 539938 Ontario Ltd., [1998] O.J. No. 3723, 37 M.V.R. (3d) 59 (Gen. Div.), affirmed [1999] O.J. No. 2743, 45 M.V.R. (3d) 6 (C.A.).

[11] Loss or damage will be found to arise out of the ownership, use or operation of a vehicle if it meets the two-part test in Amos v. Insurance Corp. of British Columbia, supra, at p. 415 S.C.R., p. 624 D.L.R. The test is:

1. Did the accident result from the ordinary and well-known activities to which automobiles are put?

2. Is there some nexus or causal relationship (not necessarily a direct or proximate causal relationship) between the appellant's injuries and the ownership, use or operation of his vehicle, or is the connection between the injuries and the ownership, use or operation of the vehicle merely incidental or fortuitous?

[12] It is clear from Amos that it is the injury that must be caused by or arise out of the use of the vehicle. However, negligence or fault in the use or operation of a motor vehicle does not need to be the cause of the injury. The liability for the injury may arise from a tortious act other than the negligent use of a motor vehicle: Amos, supra, at pp. 418-19

S.C.R., p. 627 D.L.R. Moreover, "where the use or operation of a motor vehicle in some manner contributes to the injury", there is an entitlement to coverage: Amos, supra, at pp. 419-20 S.C.R., p. 628 D.L.R. (emphasis added).

[13] Counsel for Lombard referred me to the definition of "occupant" in the standard automobile policy and to case that have considered this: Kyriazis v. Royal Insurance Co. of Canada (1991), 82 D.L.R. (4th) 691, 31 M.V.R. (2d) 238 (Ont. Gen. Div.), appeal dismissed (1993), 107 D.L.R. (4th) 288, [1994] I.L.R. 1-3501 (Ont. C.A.); Rose v. Beaven (1998), 38 O.R. (3d) 476 (Gen. Div.), appeal dismissed (1998), 41 O.R. (3d) 256n, [1998] O.J. No. 4840 (C.A.). In referring me to these cases, counsel placed importance on the activities of Landry at the time the car struck and killed Incerto. The difficulty I have with this submission is that it fails to address both parts of the test in Amos.

[14] On the first part of the Amos test, this accident resulted from an ordinary and well-known activity of an automobile, namely that Landry drove the car off the road and into a ditch. The injury that resulted was not incidental or fortuitous. It arose, at least indirectly, from the activity of attempting to extricate the vehicle from the ditch. On the pleadings and the agreed facts, there is some nexus between the death of Incerto and the use or operation of the motor vehicle. Landry's operation of the vehicle contributed in some manner to the injury. This is sufficient to satisfy the second part of the Amos test. Landry is therefore entitled to coverage from Lombard and it has a duty to defend.

[15] I turn then to the homeowner's policy under which Landry is insured by Economical. In Derksen, Stach J. considered issues that are similar to those before me. In that case, a heavy metal plate that had been used in roadside construction work was placed on a compressor unit that was being towed by a truck. The plate flew off along a rough patch of highway and came through the windshield of a school bus, killing one student and seriously injuring three others. There were three policies of insurance: an automobile policy, a comprehensive general liability policy, and an umbrella liability policy. The

comprehensive general liability policy contained an exclusion of coverage for injury arising out of the use or operation of a motor vehicle.

[16] In Derksen, counsel for the CGL insurer focused upon the exclusionary language of the CGL policy, while all other counsel focused on the argument that the injuries to the plaintiffs were the result of two causes operating concurrently. Stach J. concluded, on the authority of Amos, that there was an auto-related cause for the accident in that the contractor's driver set the vehicle in motion without ensuring that the metal plate was adequately secured. He also concluded that there was a non-auto-related cause for the accident consisting of the driver's failure to properly clean-up the work site and store the metal plate.

[17] In resisting coverage under its policy, counsel for the CGL insurer in Derksen relied on the breadth of the Supreme Court of Canada's decision in Amos. The same argument is made here. It is submitted that the injury to Incerto arose from the use and operation of a motor vehicle, namely extricating the vehicle from the ditch.

[18] It is true that the automobile was driven into the ditch and that this injury occurred during the process of attempting to extricate it. However, it is also true that the pleadings and agreed facts give rise to the possibility that Incerto's death was caused by Landry's instruction to Heald to put the car into neutral. At this time, Landry was standing outside the vehicle giving directions. The weight of authority is that this is not the kind of activity that involves the use or operation of a motor vehicle.

[19] In Milligan v. Dryburgh, [1985] I.L.R. 1-1960, p. 7543 (Ont. S.C.), the court found that a passenger who grabs the steering wheel is not involved with the "use and operation" of the vehicle. In Co-operators General Insurance Co. v. Marshall, [1999] S.J. No. 718 (Q.B.), it was found that a passenger giving instructions and acting as a lookout for the driver was not using or operating the vehicle. Where the allegations against the defendant relate to activities outside the "use and

operation" of a motor vehicle, the exclusionary cause in the homeowner's policy is inapplicable: Cella v. McLean (1997), 34 O.R. (3d) 327, 148 D.L.R. (4th) 514 (C.A.).

[20] In upholding the conclusion reached by Stach J. Derksen that there were concurrent causes for the accident, the Ontario Court of Appeal made the following comment at para. 12 of its endorsement:

> Cases in which there are two or more concurrent causes of a plaintiff's damage are more easily decided when multiple causation is brought about by several parties. If Roy's Electric (the contractor) had put the plate on the compressor frame and another entity had transported it, there would be much less room for arguing that the loss was not brought about by two separate causes, the first work-site related and the second automobile-use related. The fact that one person was both loader and driver in the instant cases, should not alter the coverage consequences.

[21] In this case, Landry was both driver and adviser. He alleged acts and omissions caused or contributed to the loss. His alleged negligent instructions to Heald constitute an additional cause of injury.

[22] In his extensive reason in Derksen, Stach J. discusses concurrent causation at paras. 51 to 68. Although each case will turn on its own facts, I can find little to distinguish Derksen from the case at bar and I agree with the analysis and the conclusion that was reached. This is summarized in Justice Stach's review of the decision in State Farm Mutual Automobile Insurance Co. v. Partridge, 10 Cal.3d 94 (Cal. S.C. 1973) at para. 63:

> The propositions which emerge from Partridge can be briefly stated as follows:
>
> 1. An entirely different rule of construction applies to exclusionary clauses as distinguished from coverage clauses; while coverage clauses are interpreted broadly so as to afford the greatest possible protection to the

insured, exclusionary clauses are interpreted narrowly against the insurer.

2. Even though a homeowner's policy contains language excluding "injuries arising out of the use of an automobile", such an exclusion does not preclude coverage where the accident results from the concurrence of a non-auto-related and auto-related causes. Coverage cannot be defeated simply because a separate risk constitutes an additional cause of injury.

3. Where an insured risk and an excluded risk constitute concurrent proximate cause of the accident a liability insurer is liable so long as one of the causes is covered by the policy.

4. Insured risks need not constitute the prime, moving or efficient cause of the accident. The fact that multiple causes may have effectuated the loss does not negate any single cause; the fact that multiple acts concurred in infliction of injury does not nullify any single contributory act.

[23] It is my conclusion that on the agreed facts and the pleadings, there is a possibility that the claims against Landry may succeed on the basis of both auto-related and non-auto-related clauses. Accordingly, there is coverage under both policies of insurance and Lombard and Economical each have a duty to defend the claims against Landry.

[24] The remaining issue is whether Landry is entitled to appoint solicitors of his own choosing to defend him in this action. Both insurers denied that they had a duty to defend and both deny that they have a duty to indemnify. I have concluded that both insurers must defend, but the issue of indemnity is left open and will be determined at some later time. I am of the view that this presents at least a potential for conflict and any doubt should be resolved in favour of the insured: Laurencine v. Jardine (1988), 64 O.R. (2d) 336, [1988] I.L.R. 1-2292 (H.C.J.). An order will therefore go as requested in

paras. 1 to 6 of the notice of motion, except that paras. 1, 3 and 5 are amended to reflect that Lombard Canada Ltd. and The Economical Insurance Group is each subject to the orders therein.

Motion granted.