SUPREME COURT OF NOVA SCOTIA
Citation: *MacLellan v. Intact Insurance Company*, 2017 NSSC 58

Date: 2017-03-13
Docket: Tru. No. 449203
Registry: Halifax

Between:

Ryan MacLellan

Applicant

v.

Intact Insurance Company

Respondent

Decision

Judge: The Honourable Justice Denise M. Boudreau

Heard: February 17, 2017, in Truro, Nova Scotia

Counsel: Myer Rabin, for the Applicant
Tara A. Miller, for the Respondent

By the Court:

[1] The applicant seeks an order requiring the respondent:

(a) to defend him in an action (and against cross-claims brought against the applicant) bearing court file 2013 Tru: No. 412326 (the "Grue Action");

(b) to appoint an independent counsel to conduct such defenses or, alternatively, to allow the applicant to retain and instruct independent counsel of his own choosing;

(c) indemnify the applicant for all costs and expenses incurred to date, in his defense in the Grue Action.

Facts

[2] The Grue Action is an action filed by plaintiff Holly Elizabeth Grue, as a result of an accident which occurred on or about January 1, 2012. The Defendants in the Grue Action are: the applicant, who was driving a 1997 Jeep motor vehicle ("the vehicle") involved in the accident with plaintiff Grue; and Gregory McLaughlin, who was the registered owner of the vehicle.

[3] The vehicle was insured by the respondent. The policy provided for coverage while the owner (MacLaughlin) was driving the vehicle, and further provided coverage to anyone driving the vehicle with the consent of the owner (MacLaughlin).

[4] There has arisen a dispute as to whether this applicant was, in fact, driving the vehicle with the consent of the owner at the time the accident happened. The applicant has alleged that he had such consent; the owner has denied this fact. That question is a crucial issue at the upcoming trial of the Grue Action, which is presently scheduled to be heard in June.

[5] For the purpose of the application before me, the parties have agreed that the ultimate issue of consent, is to be left for the trial judge. I have been asked to rule solely on whether the respondent has a duty to defend the applicant at the June trial, and if so, what further relief would flow from that duty to defend.

[6] The respondent submits that, in the present case, they have no duty to defend the applicant at this trial. They note that the duty to defend is/is not triggered by a review of the pleadings; that is to say, there could only be a duty to defend by an insurer when the pleadings raise the “possibility” that the claim is covered by that policy. In this case, they submit that the pleadings do not raise such a possibility,

because the consent of the owner is not alleged. Therefore, they claim, their policy is not engaged.

[7] In the alternative, the respondent argues that if there is a duty to defend found in the pleadings, they still should not be ordered to provide the applicant with a defense, as he breached a mandatory condition of the policy, in that he drove the vehicle without a valid driver's license.

Duty to defend

[8] Section 114 of the *Insurance Act*, R.S.N.S. 1989, c. 239 provides:

> 114 (1) Every contract evidenced by an owner's policy insures the person named therein, and every other person who with his consent personally drives an automobile owned by the insured named in the contract and within the description or definition thereof in the contract, against liability imposed by law upon the insured named in the contract or that other person for loss or damage
>
> (a) Arising from the ownership, use or operation of any such automobile; and
>
> (b) resulting from bodily injury to or the death of any person, and damage to property.

[9] The insurance policy relating to the vehicle, provides at para. 1, Section A:

> The insurer agrees to indemnify the insured and, in the same manner and to the same extent as is named herein as the insured, every other person who with the insured's consent personally drives the automobile, or personally operates any part thereof, against the liability imposed by law upon the insured or upon any such person for loss of damage arising from the ownership, use or operation of the automobile and resulting from bodily injury to or death of any person or damage to property.

[10] It is well settled in the case law, and the parties agree, that the test as to whether an insurer has a duty to defend a claim, is different than the question as to whether an insurer has a duty to indemnify:

> [6] The obligation to defend must be addressed when the action is brought, but before liability and the basis for it have been determined by a court. When an application is made for an order that an insurer defend the insured, the court is confined to an examination of the insurance coverage and the pleadings in resolving the application. No external evidence can be resorted to in this process. The search by the court at this stage is to determine the potential for coverage based on the facts as pleaded and the insurance coverage provided, taking into account any exclusions from that coverage found in the policy. It is not necessary for the insured to prove that an obligation to indemnify will arise the end of the day. **The duty to defend, unlike the duty to indemnify, is triggered not by actual acts or omissions of the insured but by allegations against the insured. The mere possibility of a claim within the policy may succeed is enough. Thus it has been said that the duty to defend is broader than the duty to indemnify**. (*Neary v. Wawanesa Mutual Insurance Company* (2003) NSCA 66).
>
> The threshold whether an insurer has a duty to defend is rather low. **The insurer will have a duty to defend if there is a "mere possibility" the claim is covered by the policy.** (*Trafalgar Insurance Company of Canada v. Imperial Oil* [2001] OJ No. 4936). (emphasis added)

[11] This same test ("mere possibility") was cited with approval by the Supreme Court of Canada in *Nichols v. American Home Assurance Co.* [1990] 1 SCR 801.

[12] In the case before me, as I have already articulated, one crucial question will be whether the applicant was driving with the consent of the owner. This is the only way that the applicant could possibly be covered by this policy of insurance. It follows that, in order for this policy to even be engaged by the Grue Action, the pleadings in the Grue Action must at least allege that this consent existed.

Otherwise, there would not even be potential for coverage pursuant to this policy. As explained by the Supreme Court in *Nichols (supra)*:

> I conclude that considerations related to insurance law and practice, as well as the authorities, overwhelmingly support the view that the duty to defend should, unless the contract of insurance indicates otherwise, be confined to the defence of claims which may be argued to fall under the policy. That said, the widest latitude should be given to the allegations in the pleadings in determining whether they raise a claim within the policy. (*Nichols*, page 329)

[13] It was the further and starting submission of the respondent that, in order for a pleading to fall within this definition, it should explicitly contain the word "consent". Upon further discussion, counsel for the respondent acknowledged that perhaps some similar word would be acceptable; however, maintained that in cases where a duty to defend were found, the actual word "consent" was used.

[14] In *Cummings v. Budget Car Rentals Toronto Limited* [1996] OJ No. 2179 (Ont. C.A.), a duty to defend was found. The court's decision notes that the Statement of Claim alleged that the driver was operating the vehicle with the consent of the owner. However, the court does not quote directly from the Statement of Claim; it merely paraphrased the relevant sections of the document. I am unclear as to the exact word/words used in the pleading.

[15] In *MacKinnon v. MacKinnon* [1999] PEIJ No. 12, again the Court paraphrased:

> 22. The plaintiffs further allege in the statement of claim that at the time of leaving his residence and at all subsequent material times the defendant Irwin MacKinnon was in possession of and operated the motor vehicle with the expressed and/or implied consent of the owner, the defendant Mark MacPhail…

[16] In *Mong v. Shea* [2012] N.J. No 390, the word "consent" was explicitly used:

> 3. Mong is claiming damages against both Shea and Whitten. In the statement of claim he alleged that "… the Second Defendant was in possession and control of the Defendant's motor vehicle with the consent of the First Defendant, express or implied…"

[17] Having reviewed these cases, I cannot confirm whether the exact word "consent" appeared in the pleadings in all these cases.

[18] Even if it had, I remain unconvinced that, unless that exact word "consent" appears in the pleadings, there can be no potential for coverage. In my view, there is no magic in that word; particularly given the Supreme Court of Canada's comments in *Nichols,* that allegations in pleadings must be given their widest latitude. As I discussed with counsel during oral submissions, for example, if the allegation was that "the driver drove with the permission of the owner", that would surely also meet this same test, despite no mention of the word "consent".

[19] In my view, so long as the pleadings provide the allegation, in some form, that the owner voluntarily allowed his vehicle to be driven by the driver, such would satisfy the requirements of this test.

[20] In the case at bar, the Statement of Claim in the Grue Action provides the following allegations as to the negligence of the owner and the driver:

> 6. The aforementioned collision was caused by the negligence of the defendant, Ryan MacLellan, in the operation of the defendant's motor vehicle, particulars of which negligence include the following:
>
> (a) failure to keep the vehicle in its own proper lane of the highway;
>
> (b) failure to keep the vehicle under control;
>
> (c) failure to drive in a careful and prudent manner and rate of speed having regard to all existing circumstances;
>
> (d) operation of the motor vehicle while his ability to do so was impaired by his physical or emotional condition, alcohol or drugs;
>
> (e) failure to take proper or any steps to avoid the plaintiff;
>
> (f) operation of an improperly equipped or maintained motor vehicle;
>
> (g) failure to keep a proper or any lookout;
>
> (h) failure to apply the brakes when a collision was imminent;
>
> (i) failure to have regard to the governing traffic control signals and signs;
>
> (j) operation of the vehicle while his vision was obstructed or impaired;
>
> (k) operation of the motor vehicle contrary to the provisions of the *Motor Vehicle Act*, R.S.N.S. 1989, c. 293, as amended, in particular sections 97, 100, 101, 110, 111;
>
> (l) such other negligence as may appear.
>
> 7. The aforementioned collision was caused by the negligence of the defendant, Gregory McLaughlin, particulars of which negligence include the following:
>
> (a) entrusting his motor vehicle to an incompetent, or impaired or inexperienced driver, namely Ryan MacLellan; (emphasis is mine)
>
> (b) failure to properly instruct the defendant Ryan MacLellan in the proper operation of the defendant's motor vehicle; (emphasis is mine)
>
> (c) failure to properly equip and maintain the vehicle; and
>
> (d) such other negligence as may appear.

[21] The word "consent" does not appear in the body of this document. However, in my view, the pleadings read as a whole, and in particular the sections which I

have underlined, clearly allege that the applicant was driving the vehicle with the permission of the owner. If an owner "entrusts" his vehicle to "an incompetent, impaired or inexperienced driver", without "proper instruction as to the operation of that vehicle", in the context of a negligence claim against that owner, it is clear to me this refers to allowing that person, to operate/drive that vehicle. Again, in making this decision, I take guidance from the principle that we must give "wide latitude" to allegations in pleadings, as noted in *Nichols (supra).*

[22] Therefore, I find that the Statement of Claim in the Grue Action does trigger the "possibility" that the claim is covered by the owner's policy with the respondent. As a result, the respondent has a duty to defend the applicant in the Grue action.

Breach of mandatory condition

[23] The respondent has further argued that, even if I find that the applicant has shown a duty to defend, his application must still fail, because he breached a mandatory condition of the policy. He has therefore disentitled himself from coverage under the policy.

[24] More particularly, the applicant acknowledges that on the date of the accident (January 1, 2012), his driver's license was suspended.

[25] Section 111 of the *Insurance Act* states:

> 111 (1) Where
>
> …
>
> (b) the insured contravenes a term of the contract or commits a fraud, a claim by the insured is invalid and the right of the insured to recover indemnity is forfeited.

[26] I also note the relevant sections of the Policy:

> SECTION F – MANDATORY CONDITIONS
>
> In these Mandatory Conditions, unless the context otherwise requires, the word "insured" means a person insured by this contract whether named or not.
>
> …
>
> 2 Prohibited Use by Insured
>
> (1) The insured shall not drive or operate the automobile
>
> (a) unless he is for the time being either authorized by law or qualified to drive or operate the automobile;
>
> (b) while his license to drive or operate an automobile is suspended or while his right to obtain a license is suspended or while he is prohibited under order of any court from driving or operating an automobile; (emphasis is mine)
>
> (c) while he is under the age of sixteen years or under such other age as is prescribed by law of the province in which he resides at the time this contract is made as being the minimum age at which a license or permit to drive an automobile may be issued to him;
>
> (d) for any illicit or prohibited trade or transportation; or
>
> (e) in any race or speed test.
>
> (2) Prohibited Use by others
>
> The insured shall not permit, suffer, allow or connive at the use of the automobile
>
> (a) by any person
>
> (i) unless that person is for the time being either authorized by law or qualified to drive or operate the automobile;

> (ii) while that person is under the age of sixteen years or under such other age as is prescribed by the law of the province in which he resides at the time this contract is made as being the minimum age at which a license or permit to drive an automobile may be issued to him;
>
> (b) by any person who is a member of the household of the insured while his license to drive or operate an automobile is suspended or while his right to obtain a license is suspended or while he is prohibited under order of any court from driving or operating an automobile;
>
> (c) for any illicit or prohibited trade or transportation; or
>
> (d) in any race or speed test.

[27] The respondent submits that, assuming I have found a duty to defend the applicant on the basis of the pleadings, the applicant then falls into the definition of "insured" under the policy, Section A, para. 1 (para. 9 hereinabove) and Section F.

[28] Section F provides that the word "insured" means a person insured, whether named or not. The applicant would, according to the respondent, fall within ss. 2(1), and be subject to its prohibitions as contained in (a) – (e). The applicant's license to drive was suspended, which is listed as a prohibited use under 2(1)(b).

[29] The applicant disagrees. He submits that he falls within ss. (2)(2), as a person allowed by the named insured to drive the vehicle. He notes that within ss. 2(2), there is no prohibition from driving while suspended; rather, ss. 2(a)(i) speaks of being either "authorized to drive" or "qualified to drive". While the applicant acknowledges that he was formally suspended from driving, he submit that he was still "qualified to drive", in that he was a person capable of performing the act of

driving. He submits that this should entitle him to a defence by the respondent, with indemnity to be later determined.

[30] Which subsection of Section F, 2(1) or 2(2), applies to the applicant? I have been provided with no caselaw that answers this question one way or the other. Having considered the matter, it is my view that the applicant has to properly fall under ss. 2(1).

[31] Within this policy, the applicant is not a named insured. He can only be deemed to be “insured”, if he had consent to drive from the owner.

[32] If the applicant had consent, he is an unnamed insured (Section A, para. 1). Section F makes it clear that its use of the word “insured”, includes both named and unnamed persons. Therefore, the applicant must fall under 2(1), which refers to prohibitions for “insured” persons. In my view, that is the only logical reading of those sections. Ss. 2(2) would only apply to those insured persons who had permitted others to drive the vehicle (in this scenario, perhaps the owner).

[33] On the other hand, if the applicant did not have consent, this policy does not cover him at all; the statutory conditions would only apply to the named insured, the owner. Since the owner was not driving the vehicle, nor (in this scenario) did

he permit anyone to drive, neither ss. 2(1) or ss. 2(2) would affect the owner whatsoever.

[34] The applicant acknowledges that his driver's license was suspended at the time of this accident. Assuming he had consent of the owner, (and therefore was an unnamed insured), he has clearly and unequivocally breached statutory condition 2(1)(b).

[35] What does this mean in the context of his application to be defended by the respondent? I was referred to *Longo v. Maciorowski* (2000) CanLII 16897 (Ont. C.A.):

> The Duty to Defend: Generally
>
> [14] Generally speaking, where there is a question of coverage under an insurance policy but no question of a breach of condition by an insured, the insurer's duty to defend is triggered by allegations made in the statement of claim that, if proven, would fall within the scope of coverage provided by the policy: *Nichols v. American Home Assurance Co*…; *Cummings v. Budget Car Rentals Toronto*….However, although the duty to defend is broader than the duty to indemnify, the insurer is not obliged to defend where the policy contains an exclusion that pertains to the acts that gave rise to the claims against the insured: *Nichols*, at p. 812 S.C.R.; *Cummings*, at p. 12 O.R. The threshold condition - that the allegations fall within the policy coverage - is satisfied where the action claims damages which might be payable under the policy and, where it is unclear whether the insurance policy affords coverage, the insurer is obliged to defend…
>
> The Duty to Defend: where Breach of Conditions is Alleged
>
> [15] In the present case, unlike as in *Nichols*, *Cummings* or *Slough Estates*, the insurer takes the position that the insured was in breach of a condition in the insurance policy. The significance of that distinction is that, where a breach of a policy condition is unchallenged by the insured and there are no grounds for raising estoppel or relief from forfeiture, the insured is disentitled both to indemnity under the policy and to the costs of a defense: Brown and Menezes,

> Insurance Law in Canada, A Treatise on the Principles of Indemnity Insurance as Applied in the Common Law Provinces of Canada, 2d ed. (Toronto: Carswell, 1999) para. 12:5:5 at p. 252. (emphasis added)

[36] These passages were quoted with approval by the NBCA in *Drane v. Optimum Frontier Insurance* [2004] N.B.J. No. 251.

[37] In cases where an insured seeks to be defended in a claim by an insurer, but it is alleged that a mandatory condition has been breached, the case law suggests flexibility. In those circumstances, it may be necessary for a court to consider the relative strengths of each party's claim, in order to determine whether a defense should be provided (*Longo*, supra):

> [33] Suppose, for example, that the rule would be that the insurer is never obliged to defend in any case upon the mere allegation of breach of condition. Assume, as well, an insured person who is without income and without assets. It cannot be of much comfort to that insured to be told that, while his insurer cannot be compelled to defend him and that he must provide and finance his own defense, he can - if the alleged breach of condition is not proven or if estoppel is established or relief from forfeiture is granted - sue his insurer later to recoup the costs of his defense and perhaps damages for breach of his insurer's obligation to him.
>
> [34] Suppose, conversely, that the rule would be that the insurer is always obliged to defend, notwithstanding its allegation of breach of condition, so long as the plaintiff's claims fall within the policy coverage. Assume, again, an impecunious insured. It cannot be of much comfort to the insurer to be told that, while it is obliged to provide its insured with a defense, it can - if the alleged breach of condition is proven and if estoppel is rejected and relief from forfeiture is denied - sue its insured later to recover the costs of that defense.

[38] Having said this, the "flexible approach" would not apply to the case at bar. Such an approach would clearly be appropriate where an alleged breach of

condition was simply that: an allegation, unproven, and/or unacknowledged. In such cases, there are valid questions of fairness to both sides, until the allegation can be either proven or dismissed.

[39] Here, however, there is no debate. The applicant acknowledges and admits that he was suspended from driving at the time of the accident. There is nothing more to be discovered or decided. The applicant has breached a statutory term of this contract. The applicant has not raised estoppel, nor any reason for relief from forfeiture.

[40] To use the language of *Longo* (supra), if the respondent were required to provide the applicant with a defence under these circumstances, the applicant would owe those costs back to the respondent, for having breached their contract. If the applicant did not reimburse the respondent for those costs, the latter would be entitled to sue him for recovery of those costs. I see no reason why should the respondent should be put through that process.

[41] I recognize that, typically, these disputes arise in situations where an insurer is made a third party in an action, pursuant to s. 133 (14) of the *Insurance Act*:

> Where an insurer denies liability under a contract evidenced by a motor vehicle liability policy, it shall, upon application to the court, be made a third party in any action to which the insured is a party and in which a claim is made against the insured by any party to the

> action in which it is or might be asserted that indemnity is provided by the contract, whether or not the insured files a defence in the action.

[42] In my view, this is a procedural matter: it is a process by which the insurer gains standing in an action, and provides it with a means by which to participate in the action and dispute the insured's request for coverage.

[43] In the case at bar, a different process has unfolded: the applicant has brought this interlocutory application against the respondent insurer, seeking that this Court order it to fund his defence, in the Grue Action. The question of the respondent's "duty to defend" is therefore squarely before this Court for a decision, despite the respondent not being a formal party to the Grue Action.

[44] In conclusion:

(a) I have found, on the basis of the Grue Action pleadings, that there is a possibility that this claim is covered by this policy, and that therefore, there would exist a duty on the part of the respondent to defend the applicant as an "insured"; however,

(b) I further find that as a result of the clear breach of the mandatory condition contained at 2(1)(b), the applicant has disentitled himself from coverage for the costs of his defence. The respondent is <u>not</u> required to provide the applicant with a defence in the Grue action.

[45] I recognize that this is a very unfortunate circumstance for the applicant. I am aware that he will be now forced to undertake the cost of his legal defence on his own, or represent himself, neither of which, I assume, are attractive options. However, I find the law on this issue clear and persuasive.

[46] Should the parties wish to make submissions as to costs, I would ask that they do so in writing within 30 days of this decision.

Boudreau, J.