

SUPREME COURT OF NOVA SCOTIA

Citation: *Kayter v. Personal Insurance Company*, 2018 NSSC 79

Date: 20180403

Docket: Ant No. 468037

Registry: Antigonish

Between:

Thomas Joseph Kayter

- Plaintiff

v.

Personal Insurance Company / LaPersonelle, Compagnie D'assurance

- Defendant

Judge: The Honourable Justice Jamie Campbell

Heard: March 27, 2018, in Antigonish, Nova Scotia

Counsel: Thomas Joseph Kayter, self-represented Plaintiff
Scott Campbell, for the Defendant

By the Court:

[1] When he was three years old Tommy Kayter's mother accidentally backed over him with a ride-on lawnmower. As a result of the accident part of Tommy's foot had to be amputated. Four days after the accident Tommy's father, Thomas Kayter opened a claim under his insurance policy with Personal Insurance Company. A little more than a week later the insurance company denied the claim. There was an exclusion in the policy. The policy says it doesn't cover claims arising from bodily injury to the insured or any person residing in the household, other than a "residence employee". Tommy lived with his mother and father and of course was not a residence employee. So, the company denied coverage. Thomas Kayter disputes the company's interpretation of the policy. He has made a motion under *Civil Procedure Rule 38.07(5)* seeking a Declaration of Coverage.

[2] The issue is whether the exclusion clause applies in these circumstances.

[3] Mr. Kayter represented himself. He has provided a comprehensive brief containing arguments why the exclusion should not apply. He maintains that the company could deny a claim made directly by him for a loss, or a claim that was still in the form of a demand from a third party, but the exclusion in the policy does not apply to a judgment ordered against him. The insurer is not obligated to pay a claim but is obligated to pay a legal liability. Tommy could have a litigation guardian appointed and take action against his father and mother under the *Occupier's Liability Act*. Mr. Kayter says that there would be no duty to defend at that point because of the exclusion. But once Tommy had a judgment against one or both of his parents the insurance company would be required to indemnify them as policyholders.

[4] An exclusion provision like the one involved here should be interpreted using the approach set out in *Sabean v. Portage La Prairie Mutual Insurance Co.*¹ If the clause is clear and unambiguous it should be given effect. If the clause is not clear and unambiguous then the clause has to be analyzed contextually having regard to the purpose of the clause, legal precedents, and the reasonable expectations of the parties. If there is still ambiguity the *contra proferentem* rule is applied against the insurance company that drafted the policy so that coverage provisions are interpreted broadly and exclusions from coverage are narrowly construed.

¹ 2017 SCC 7

Ordinary Meaning

[5] The Liability Coverages in the policy read in part as follows:

1.1 Coverage E - Legal Liability

We will pay all sums which you become legally liable to pay as compensatory damages because of bodily injury or property damage. We will not pay any fines, penalties, punitive damages, exemplary damages or any other sum over and above actual compensatory damages.

The amount of insurance is the maximum amount we will pay under one or more sections of Coverage E for all compensatory damages in respect of one accident or occurrence other than as provided under Defence, Settlement, Supplementary Payments.

1.1.1 Personal Liability

You are insured for claims made against you arising from legal liability for unintentional bodily injury or property damage arising out of your personal actions anywhere in the world, including legal liability arising out of your ownership of an animal.

...

You are not insured for claims made against you arising from:

...

- bodily injury to you or to any person residing in your household other than a residence employee. **(emphasis in the original)**

[6] Mr. Kayter notes the difference in the wording between the coverage and the exclusion. The coverage sections use the terms “all sums which you become legally liable to pay”, or “claims made against you arising from legal liability” while the exclusion refers to “claims made against you”. The policy defines a “legal liability” as a “responsibility which courts recognize and enforce between persons who sue one another”. He argues the use of the term “legally liable to pay” in the grant of coverage means that if a judgment is obtained against him, the insurer is obliged to pay. The exclusion uses the undefined term “claims” which Mr. Kayter says means something quite different. The word “claim” means an assertion or a demand for compensation. So, the coverage is for any judgment or legally enforceable liability but the exclusion is for claims or demands that have not yet become legally enforceable. So, while the exclusion means that the policy does not cover the “claim” that Tommy would make against his parents as the insured parties, the wording of the coverage section provides that if he gets a legally enforceable judgment, the insurer is obligated to pay.

[7] Mr. Kayter asserts that the contract is unambiguous in its meaning. Ambiguity arises when there are two reasonable interpretations. Here, he says that there is no reasonable interpretation of the term “claim” that contemplates a legal liability. A claim and a liability are different things. The coverage is for liabilities and the exclusion is for claims made by members of the household. Once a claim becomes a liability the insurer is obligated to pay.

[8] Words in insurance policies must be give their ordinary meaning. In *Sabean* the Supreme Court noted that provisions should be interpreted as they would be understood by the average person and “not as they might be perceived by persons versed in the niceties of insurance law”. That statement would normally apply to the favour of the policyholder who bought the product based on wording that clearly meant one thing to someone who was not an expert in insurance law. It was likely never intended to limit the ability of the policyholder to advance a more nuanced interpretation of an insurance policy. At the same time, “ordinary meaning” does not involve a tortuous interpretation of the wording. Mr. Kayter has not relied on the “niceties of insurance law” and nor for that matter has Personal Insurance. What Mr. Kayter puts forward is an interpretation of the policy that is not reasonable founded on the ordinary meaning of the words in the exclusion.

[9] Claims and legal liabilities are not the same thing. In that regard, Mr. Kayter is right. But they are closely related. The exclusion is with respect to all claims arising from bodily injury to the insured or a person residing in the same residence, like Tommy. There can be no liability established without a claim being made first. When a claim is made in those circumstances, the exclusion applies. Any judgment obtained would be a result of a claim first having been made. The insured cannot “skip” the claim step, leaving the insurer out of the process, have the judgment awarded against him and then seek recovery. If claims are excluded, the judgments or legal liabilities that would arise from such claims must also be excluded.

[10] The interpretation proposed by Mr. Kayter is not supported by the wording of the policy itself. Excluding claims that have yet to become judgments or orders is essentially granting an exemption from the insurer’s duty to defend in those cases, but also would keep the insurer out of the process until a judgment had been entered against the insured. It would have the effect of allowing the insured to settle a case for any amount, without the involvement of the insurance company, and permitting the insured to demand payment up to policy limits. The policy does not provide coverage for legal liabilities while the claims that would be necessary to give rise to those liabilities are excluded.

[11] There is no ambiguity in the insurance policy. It is clear. There is no requirement in this case to consider the interpretation of the policy based on general rules of construction that are used when the wording is not clear. “Courts must be cautious against searching for or creating ambiguity where none exists”.²

[12] Mr. Kayter also argues however that the exclusion is overbroad and ambiguous and should not be enforced. One of the insured parties, Kathleen Trainor does not live in the “household”. He says that the exclusion as written would purport to exclude anyone who lives in Kathleen Trainor’s household as well. He says that that is an outcome that would not have been reasonably expected by any of the parties to the insurance contract. “Premises” is a defined term but “household” is not. The form contract was unable to recognize that not all the named insured would be “residing in your household”.

[13] This is a case of contract interpretation. The court does not have the authority to disallow an exclusion clause because on some other fact situation it may be argued to be unfair or overbroad. What is relevant here is the interpretation of this exclusion clause on the facts of this case. In that regard, its meaning is clear and unambiguous.

[14] Because the exclusion clause is unambiguous there is no authority then to analyze whether other parts of the policy are ambiguous or whether Mr. Kayter had other reasonable expectations. Reasonable expectations cannot alter the unambiguous terms of the policy in any event. When the terms are unambiguous, as they are here, any expectation to the contrary would not be reasonable. A person who read the exclusion in this case would understand immediately what it meant. Coming up with an alternative explanation requires a very creative and in my view, tortured and unreasonable reading of the document.

Public Policy

[15] Mr. Kayter has argued in the alternative that it would be inequitable to enforce the household exclusion and that the exclusion is contrary public policy.

[16] Even when a clause is clear and ambiguous the court may refuse to give effect to it in some limited circumstances. The clause has to virtually nullify the coverage provided and the application of the clause must be contrary to the reasonable expectations of an ordinary person as to the coverage purchased. Here

² *Gill v. Economical Mutual Insurance Company* 2017 BCCA 351, para. 28

the policy does not nullify coverage. The coverage is with respect to third party liability and the exclusion clause only provides that there is no coverage for claims arising from bodily injury to the insured or members of the household. The reasonable expectation of a person who read the policy would be met. The interpretation argued by Mr. Kayter requires a more forced reading that is not reasonable.

[17] Mr. Kayter argues that s. 171 of the *Insurance Act* provides that an exclusion that is “held to be unjust or unreasonable” will not be enforced. That applies to fire insurance. This was not a fire insurance case but a liability insurance case. But Mr. Kayter says that it is “illustrative of the codification of the trend in the jurisprudence...whereby superior courts are becoming statutorily justified in refusing the application of unjust or unreasonable exclusion clauses.” There is no statutory authority in Nova Scotia to allow for an assessment of the general reasonableness or fairness of an exclusion clause that relates to the liability coverages in a property insurance policy.

[18] Even if there were such an authority it would involve a consideration of fairness in a broader context. The concern expressed by Mr. Kayter is with respect to the household exclusion in general. It would be difficult to establish that the exclusion was “unfair” in that larger sense. The exclusion operates to limit the exposure of the insurer. It is reflected in the wording of the policy and in the price of the insurance product. A determination that a household exclusion is unfair and should not be enforced would mean that the product at that price could then not be made available for those who wanted to buy it.

[19] Mr. Kayter suggested that consumers could potentially purchase coverage for members of the household by paying higher premiums. That suggests that the issue is not with the fairness or the unjustness of the exclusion of coverage for members of the household generally. The concern is with the application of the exclusion in this case, and placing an obligation on the insurer to clearly point out to the consumer that liability claims cannot be made for damages suffered by members of the insured’s household. But that is precisely what the policy says.

[20] The argument comes full circle. The wording of the policy is unambiguous. The exclusion applies in this case.

[21] The motion is denied. The respondent has waived any order for costs in the event that it was successful.

Campbell, J.