Date: 20010209
Docket No.: CA 165035

NOVA SCOTIA COURT OF APPEAL

[Cite as: Williams v. Pictou County Farmers' Mutual Fire Insurance Company 2001 NSCA 33]

Freeman, Hallett and Flinn, JJ.A.

BETWEEN:

PICTOU COUNTY FARMERS' MUTUAL FIRE INSURANCE COMPANY

Appellant

- and -

GRANT WILLIAMS and CONNIE WILLIAMS

Respondents

REASONS FOR JUDGMENT

Counsel:	Kevin Latimer and Jennifer Schofield, for the appellant John Kulik and Jane O'Neill, for the respondents
Appeal Heard:	January 15, 2001
Judgment Delivered:	February 9, 2001
THE COURT:	Appeal dismissed with costs and disbursements as per reasons for judgment of Freeman, J.A.; Hallett and Flinn, JJ.A. concurring.

FREEMAN, J.A.:

[1] This appeal is from an interlocutory judgment by Justice Gordon A. Tidman of the Supreme Court of Nova Scotia requiring the appellant, Pictou County Farmers' Mutual Fire Insurance Company, to defend the respondents against a claim for negligent supervision, under a liability rider to the fire insurance policy on their residence. The action against the respondents was brought by a friend of their daughter's who was injured, while a passenger, on a motorcycle driven by the daughter.

[2] Katherine Jolene MacIsaac had been staying with Lisa Williams as a weekend guest when the accident occurred June 25, 1995. Both girls were under the age of majority. Lisa had taken Katherine for a ride along an abandoned CNR right-of-way on an unregistered, uninsured motorcycle she had acquired from her uncle. They were struck by a vehicle driven by Russell Hiltz while crossing a public highway.

[3] The action brought by Katherine by her father and litigation guardian, William MacIsaac, against Lisa and her parents alleged (1) negligence by Lisa in the operation of a motor vehicle and (2) negligent supervision of Katherine by the parents, Grant Williams and Connie Williams. The parents claimed the right to be defended and indemnified under the personal liability rider to their home insurance policy

[4] The appellant insurer argued that the rider specifically excluded liability for "bodily injury or property damage arising out of the ownership, maintenance, operation, use, loading or unloading of any motor vehicle owned or operated by, or rented or loaned to any insured." It was admitted in an agreed statement of facts that Lisa was an insured under the policy. The policy requires the insurer both to defend and indemnity the insured for liability claims which are not excluded.

[5] In **Non-Marine Underwriters, Lloyd's of London v. Scalera**, [2000] S.C.J. No. 26 in § 50-52 the Supreme Court of Canada proposed a three-stage test for determining whether a given claim could trigger indemnity. First, "a court must look beyond labels and determine the substance of the allegations contained in the pleadings. This does not involve deciding whether the claims have any merit; all a court must do is decide, based on the pleadings, the true nature of the

claims." Second, a claim that is entirely derivative, such as a claim in negligence masking an excluded intentional tort, will not allow an insured to avoid an exclusion clause. Third, the court must decide whether any of the properly pleaded, non-derivative claims "could potentially trigger the insured's duty to defend."

[6] In the present case the tort of negligent supervision is properly pleaded and could trigger the insured's duty to defend. While only one injury was involved, the breach of the Williams' duty of care to Katherine and her parents rests on separate and entirely different legal principles from Lisa's operation of the motorcycle and does not, in my view, derive from it. If Lisa is found to be without negligence in the accident, the Williams could still face liability for negligently failing to protect Katherine from foreseeable risk.

[7] Justice Tidman found that the appellant was not required to defend the cause of action alleging negligence by Lisa in the operation of a motor vehicle. It was, however, ordered to defend the respondents under the second cause of action raised in the statement of claim, which alleges that the respondents, Connie and Grant Williams, stood in *loco parentis* to Katherine as her weekend hosts, and that they were negligent in their supervision of both Lisa and Katherine. In particular the statement of claim alleged that Grant Williams was under a "separate, enhanced and very high duty of care to Katherine" because William MacIsaac had specifically informed him that Katherine was not permitted to ride on Lisa's motorcycle.

[8] In brief oral reasons on January 26, 2000, Justice Tidman determined these latter allegations introduced another *actus reus* outside the motor vehicle exclusion in the Pictou County Farmers' policy. Asked by the appellant's counsel to expand as to the scope of the appellant's duty to defend, he filed a written decision April 18, 2000, in which he quoted McLachlin, J., as she then was, in **Nichols v. American Home Assurance Company**, [1990] 1 S.C.R. 801 at p 812:

> . . . the practice is for the insurer to defend only those claims which potentially fall under the policy, while calling upon the insured to obtain independent counsel with respect to those which clearly fall outside its terms.
>
> 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. [Emphasis added.]

[9] Justice Tidman stated:

> Although it may be expedient to have only one counsel defend a party in an action the trial is still manageable where the unusual situation develops that two separate counsel are required to defend the same defendant.
>
> Consequently, I would limit the scope of the applicant's duty to defend to those allegations in the statement of claim dealing with the defendants alleged obligation to properly care for the plaintiff.

[10] The appellant has argued forcefully that the chambers judge erred in deciding that the plaintiff's allegations of negligent supervision brought the claim within the coverage of the policy. The appellant submits that the allegations of negligence against Mr. and Mrs. Williams are irrelevant because the bodily injury or damages arose out of the "ownership, maintenance, operation or use" of a motor vehicle by Mr. and Mrs. Williams' daughter, an insured under the policy. I do not accept that submission. In considering whether the exclusion applies, bodily injury or damages arising out of the "ownership, maintenance, operation or use" of a motor vehicle cannot be looked at in isolation from the negligence which is alleged against Mr. and Mrs. Williams. That is clear from the decision of the Ontario Court of Appeal in **Cella v. McLean** (1997), 148 D.L.R. (4th) 514.

[11] In the United States, where insurance law and policies are similar to ours, the argument is frequently made that liability insurers are not obliged to defend homeowners with coverage exclusions such as that in the Williams' policy when they are sued for the tort of negligent entrustment of a motor vehicle to a minor or incompetent driver. Success varies from state to state, depending on whether the exclusion is liberally or strictly construed in a particular jurisdiction. (See *Construction and effect of provision excluding liability for automobile-related injuries or damage from coverage of homeowner's or personal liability policy* - 6 ALR 4th 555.).

[12] In **Frazier v. State Farm Mutual Automobile Insurance Company** La.App., 347 So. 2d 1275, for example, a case involving a factual situation much

like the present one, the Louisiana Court of Appeal reversed the trial court and held, as summarized in the headnote:

> Where petition alleged distinct causes of action for negligence of insured and his wife in not properly attending while baby-sitting child, who was allegedly injured when run over by automobile driven by insured's daughter, and for negligent operation of motor vehicle by insured's daughter, homeowners insurer could be held liable for alleged negligence of insured and his wife even though, under exclusionary clause, homeowners policy did not afford coverage for operation of motor vehicle.

[13] The apparent purpose of the exclusion clause in question in the present appeal is to require the insured to have claims for bodily injury arising out of the use of an automobile to be dealt with by a motor vehicle insurance policy and not the personal liability insurance rider. It is also apparent that a standard motor vehicle insurance policy, insuring either Mr. and Mrs. Williams or their daughter, would not respond to the claim against Mr. and Mrs. Williams for negligent supervision of Katherine MacIsaac. Therefore, if the insurer is correct - that it does not have to respond under the personal liability insurance rider in this case -the Williams would have no coverage for this potential liability for negligent supervision of Katherine MacIsaac.

[14] In **Chilton et al. v. Co-operators General Insurance Company** (1997), 143 D.L.R. (4th) 647 (Ont. C.A.) Justice Laskin said the following concerning the general principles which courts apply in interpreting the provisions of insurance policies:

> As a general rule, clauses in an insurance policy providing coverage are interpreted liberally or broadly in favour of the insured and those clauses excluding coverage are construed strictly against the insurer: **Madill v. Chu**, [1977] 2 S.C.R. 400.

[15] In my opinion, the proper interpretation of the exclusion clause in the policy, which is the subject of this appeal, is that it does not exempt the insurer at this stage of proceedings. The claim for negligent supervision of Katherine MacIsaac against Mr. and Mrs. Williams is not based directly, or necessarily, upon the ownership, maintenance, operation and use of a motor vehicle, and no such basis for that claim against Mr. and Mrs. Williams is alleged in the statement of claim.

[16] There is the potential for liability of Mr. and Mrs. Williams on the basis of negligent supervision, and for that reason the appellant insurer is obligated to defend that particular claim in their name and on their behalf.

[17] The concern at this preliminary stage, is the "defence of claims which may be argued to fall under the policy." [**Nichols**, *supra*.] Provided that the threshold of arguability is made out, the merits of the arguments are for a later day. In my view Justice Tidman properly identified negligent supervision as a cause of action arguably separate from any motor vehicle liability claim, particularly in light of the allegation of the specific instructions by Katherine's father to Lisa's father.

[18] I would dismiss the appeal and fix costs to the respondents at $2,000 plus disbursements.

Freeman, J.A.

Concurred in:

Hallett, J.A.

Flinn, J.A.