C.A. No. 128831

NOVA SCOTIA COURT OF APPEAL

Cite as: Commercial Union Assurance Company v. Judgment Recovery (N.S.) Ltd., 1996 NSCA 193

Chipman, Freeman and Flinn, JJ.A.

BETWEEN:	)	
	)	
COMMERCIAL UNION ASSURANCE COMPANY OF CANADA	)	Robert L. Barnes, Q.C. and Leanne M. Wrathall
Appellant	)	for the Appellant
	)	
- and -	)	
	)	
JUDGMENT RECOVERY (N.S.) LTD.	)	John Kulik and Paul McLean
Respondent	)	for the Respondent
	)	
	)	Appeal Heard: October 16, 1996
	)	
	)	Judgment Delivered: November 6, 1996

THE COURT: The appeal is allowed and the cross-appeal is dismissed, both with costs, as per reasons for judgment of Chipman, J.A.; Freeman and Flinn, JJ.A., concurring.

CHIPMAN J.A.:

This is an appeal by Commercial Union Assurance Company of Canada

and a cross-appeal by Judgment Recovery (N.S.) Limited from an Order in the Supreme Court made upon the application of Judgment Recovery pursuant to s. 216 of the **Motor Vehicle Act** for a pre-trial determination of insurance coverage.

This proceeding arose out of an accident which occurred on the evening of August 11, 1993, near Tidnish, N.S. The plaintiff Andrew Warren suffered leg injuries while a passenger on a 1987 Honda 600 motorcycle operated by the defendant Ashe and owned by the defendant Colin Martin. This vehicle was insured by Commercial Union in the name of Colin Martin. The defendant Richard Martin is the son of Colin Martin.

On the night of the accident Ashe was at a cottage with Richard Martin, the plaintiff and a number of friends. Richard had Colin's motorcycle with the latter's permission. The group decided it needed some barbecue sauce from a nearby store. Since Richard Martin and the plaintiff were drinking, they did not want to drive. Richard Martin permitted Ashe to take the motorcycle but did not tell Ashe that he had been forbidden by his father to lend it to other people. Ashe thought the motorcycle was owned by Richard. The plaintiff asked to go to the store with Ashe and while Richard at first refused, he eventually agreed.

Ashe and the plaintiff drove to the store and found it closed. Ashe then drove around looking for another store. After proceeding a short distance he decided to return to the cottage. On the way the motorcycle left the road and the plaintiff was injured.

The plaintiff's action was commenced on January 19, 1994. The statement of claim, as subsequently amended, claimed damages against Ashe on the basis of negligent operation of the motorcycle, Colin Martin on the basis of his ownership thereof and Richard Martin on the basis of negligence in lending it to Ashe, an unlicensed and inexperienced driver, whom he knew or ought to have known was not capable of properly operating it.

Judgment Recovery's application to determine whether Commercial Union should respond to the plaintiff's claim was heard in Supreme Court on May 2 and 3, 1996. Commercial Union and Judgment Recovery appeared through counsel and witnesses were called on their behalf. By decision dated May 14, 1996, and the order based thereon, the trial judge ordered that Judgment Recovery must respond to the claims of the plaintiff against Ashe only, and that Commercial Union was obligated to defend the defendant Richard Martin and respond to the claim of the plaintiff against him based on negligent entrustment.

The trial judge found that the motorcycle was registered to and owned by Colin Martin. The applicant for insurance to Commercial Union was Colin Martin. Richard Martin was named in the application as the principal driver. The policy, issued in consideration of the premium and the answers to questions in the application, named Colin Martin as the insured.

The trial judge found that Colin Martin had a rule that the motorcycle was not to be driven by anyone except Richard. Richard was aware of the rule but ignored it on the night in question.

The trial judge resolved three issues before him as follows:

1. In view of the rule laid down by Colin Martin and the absence of any knowledge on his part that it had not always been followed, there was no consent by him, express or implied, to the operation by Ashe of the motorcycle. There was no evidence to suggest that Colin Martin had delegated any authority to Richard Martin to use his judgment in authorizing others to drive it.

2. The consent of Richard Martin was not sufficient to require Commercial Union to respond to the plaintiff's claim against Ashe. Richard Martin was not the named insured in the policy; he was merely named in the application as

principal driver. The mere fact that he was the principal driver did not constitute him a named insured whose consent to Ashe driving the motorcycle rendered the latter an unnamed insured. The insurer could not be put in a position of insuring persons the owner had expressly prohibited from driving.

3. Commercial Union was obliged to respond to the claim against Richard Martin for negligent entrustment with respect to his lending of the motorcycle to Ashe. The insurer was liable to indemnify with respect to use and operation of the motorcycle by Richard Martin. Richard had the consent of Colin Martin to use the vehicle and his act of lending it came within the meaning of the term "use" of the vehicle as set out in the policy.

On the appeal Commercial Union's position is that the trial judge erred in holding that the policy issued by it provided defence or liability coverage to a person other than the owner respecting negligent entrustment.

On the cross-appeal, Judgment Recovery's position is that the trial judge erred in ruling that Ashe was not an insured under Commercial Union's policy because, while he did not have the consent of the owner, he had the consent of Richard Martin who was listed in the application for the policy as the principal driver of the vehicle. Richard Martin was, therefore, an insured who could give consent in the circumstances.

Appeal

The issue is whether the Standard Automobile Policy (Owner's Form) provides a defence or liability coverage to a person other than the owner who negligently entrusts the described automobile.

Both counsel appear to be in agreement that it is implicit in the trial judge's ruling that if Richard Martin is found negligent in lending the motorcycle to Ashe,

Commercial Union must indemnify him with respect to such negligence.

The **Insurance Act**, R.S.N.S. 1989, c. 231 and the Standard Owner's Policy identify the parties to whom coverage is extended and establish the scope of that coverage.

Section 114(1) of the **Act** provides:

> 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.

The policy provides:

> The Insurer agrees to indemnify the insured and, in the same manner and to the same extent as if named herein as the insured, every other person who with his consent personally drives the automobile, or personally operates any part thereof, against the liability imposed by law upon the insured or upon any such other person for loss or 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.

The trial judge's reasoning in support of his conclusion is:

> . . . I do not accept that the duty to indemnify against negligent entrustment and the issue of indemnification of a person driving without the consent of the owner are a singular issue. I have already indicated that the insurer is not bound to respond to any action against the driver as there was no actual or implied consent by the owner. There is potentially a

> separate cause of action against Richard Martin for negligent entrustment. The decision by Richard to lend the motorcycle was within the meaning of the term "use" of the vehicle as set out in the policy. Richard had the consent of his father and is an insured person under the terms of the policy. If Richard was negligent in his "use" of the motorcycle, then the insurer is bound under the terms of the policy to respond to that claim against Richard Martin.

With respect, this analysis confuses the identity of the persons insured by the policy with the scope of the coverage thereby afforded.

Those covered by the policy are the insured and every other person who, with his consent, personally drives the automobile or personally operates any part thereof. The liability for which they are indemnified is for loss or damage arising out of the ownership, use or operation of the automobile. The term "use" is wider than mere ownership or operation. See **Stevenson v. Reliance Petroleum Ltd.** (1956), 5 D.L.R. (2d) 673 (S.C.C.); **Law, Union & Rock Insurance Co. Ltd. v. Moore's Taxi Ltd.** (1959), 22 D.L.R. (2d) 264 (S.C.C.); **Amos v. Insurance Corp. of British Columbia** (1995), 127 D.L.R. (4th) 618 (S.C.C.); **Perkull v. Gilbert** (1993), 86 B.C.L.R. (2d) 346 (B.C.S.C.). This term, however, relates to the coverage and not to the description of the unnamed insured.

The unnamed insured must personally drive the automobile or personally operate any part thereof. At the material time, Richard Martin was doing neither. I agree with the appellant's submission that the trial judge's conclusion defeats the clear legislative intent of requiring the owner's consent to the use or operation of the automobile. The unnamed insured is a person who personally drives the automobile or personally operates any part thereof, with the consent of the owner. Such personal operation is an essential element in the description of the unnamed insured. See

Jacques v. Stewart and Wright et al. (1990), 96 N.S.R. (2d) 333 (N.S.C.A.). To provide unnamed insured coverage to Richard Martin in these circumstances would broaden the coverage to a person not personally driving or operating any part of the vehicle at the material time.

I would allow the appeal and set aside the finding of the trial judge that Richard Martin was an unnamed insured under the Commercial Union policy with respect to the subject accident.

Cross-Appeal

Judgment Recovery submits that Ashe was insured under the Commercial Union policy while operating the motorcycle with Richard Martin's consent. It is submitted that Richard Martin was a named insured under the policy, considering that (i) he was listed in the application as the principal operator; (ii) he was the person whose driving record formed the basis of Commercial Union's rating; (iii) he was the only member of his family with a motorcycle license; and, (iv) he was, to all intents and purposes, the only operator of the motorcycle.

The motorcycle was registered to and owned by Colin Martin. He did not drive it. Richard was the only person in his family who ever did. Colin Martin first made the application for insurance, and Richard was named therein as the principal driver. Richard had initially signed the application but Colin also signed it after it was returned to him by the agent with a request from the Company that he do so. The last signed application prior to the accident was signed by Colin alone. The trial judge found that Colin was the registered and actual owner of the motorcycle, as known to Commercial Union. Colin had owned a number of motorcycles over the years prior to the accident. They were used seasonally. In each case, when they were brought back into operation

Colin would repeat the longstanding rule that the motorcycle was not to be driven by anyone other than Richard. The trial judge was satisfied that Richard was aware of this rule but ignored it on the night of the accident.

In advancing its contention that Richard Martin's consent was sufficient to require Commercial Union to respond to the claim, Judgment Recovery concedes that he was not, in fact, named in the policy as the insured. The Certificate of Insurance clearly refers to Commercial Union as the "insurer" and Colin Martin as the "insured". However, Judgment Recovery says that by virtue of his being named as principal driver in the application, Richard Martin is, in fact, a named insured in the policy. Judgment Recovery relies on **Crawford et al. v. The Employers Mutual Liability Insurance Company of Wisconsin** (1981), 35 N.B.R. (2d) 109 (N.B.Q.B.); and **Blair et al. v. Royal Exchange Assurance** (1968), 67 D.L.R. (2d) 420. In both those cases, persons other than the owner had been actually named in the policy or an endorsement thereto as insureds. They are, therefore, distinguishable.

The trial judge then asked himself whether the fact that Richard was named in the application as principal driver was sufficient to make him a named insured. In passing, the trial judge again noted that the policy was rated on the basis that Richard was the principal driver and that Commercial Union collected a premium based on such a risk. He observed that had Colin Martin not imposed a rule against lending the vehicle, Commercial Union would be bound to defend Ashe as an unnamed insured on the basis that Richard could be said to be entitled to use reasonable judgment in determining who could drive. The trial judge concluded however:

> I am not satisfied that when a person is identified as a principal driver it makes the person a named insured. The insurer based its assessment of risk on the fact that the principal driver was not the owner and that the owner could consent to unnamed drivers

> operating the motorcycle. I cannot accept that the insurer can be put in the position of insuring persons the owner prohibited from driving . . .

I agree. In **Collins et al. v. Wright et al.** (1988), I.L.R. 1-2319 (Ont. H.C.) affirmed, unreported (1989) O.J. No. 2416 and in **Phinney v. Economical Mutual Insurance Company** (1986), 76 N.B.R. (2d) 1 (Q.B.), the courts concluded that the mere fact that a person's name was shown in the application for insurance as an operator did not serve to make that person an insured. As was pointed out in **Yi et al. v. Boyes et al.** (1996), 29 O.R. (3d) 89 (Ont. Ct.) being insured under a policy is one thing; being "the insured" in the language of the contract is another. Put simply, Richard Martin was neither the insured named in the contract nor "the person named therein" within the meaning of s. 114(1) of the **Act** for the purpose of giving consent. Therefore his consent alone is not sufficient to constitute Ashe an unnamed insured.

In the alternative, Judgment Recovery submits that if Richard Martin is not a named insured, he is nevertheless elevated to the same status by the operation of s. 118 of the **Act**:

> 118 Any person insured by but not named in a contract to which Section 114 or 115 applies may recover indemnity, in the same manner and to the same extent as if named therein as the insured, and for that purpose shall be deemed to be a party to the contract and to have given consideration therefor.

Judgment Recovery submits that in order to give this section meaning, it must be construed as giving an unnamed insured the same status as the named insured - presumably with all the rights and obligations attendant thereto, including the right to give consent to other operators. I have already concluded that with respect to the subject accident, Richard Martin is not an unnamed insured. Moreover, I accept Commercial Union's submission that s. 118 is simply a statutory device to overcome

the absence of a contractual privity between the unnamed insured and the insurer, which might otherwise prevent the unnamed insured from enforcing the rights conferred by the statute and the policy against the insurer.

I would therefore dismiss the cross-appeal.

Disposition

I would allow the appeal and set aside that portion of the trial judge's order requiring Commercial Union to defend Richard Martin and respond to claims made by the plaintiff against him for damages arising out of the accident and order that Judgment Recovery respond to such claims. The trial judge's conclusion that "use" of a motor vehicle included such lending thereof as Richard made at the relevant time was not challenged on the appeal. Pursuant to s. 216(7) of the **Act** where a finding is made that the insurer is not obligated to respond to the claim, Judgment Recovery shall do so.

I would dismiss the cross-appeal.

As to costs, s. 216(8) of the **Act** is not applicable to an appeal, and I would therefore fix costs of the appeal and cross-appeal in the total amount of $1,500, plus disbursements to be taxed, such costs to be paid by Judgment Recovery to Commercial Union.

Chipman, J.A.

Concurred in:

Freeman, J.A.

Flinn, J.A.

C.A. No. 128831

NOVA SCOTIA COURT OF APPEAL

BETWEEN:		
COMMERCIAL UNION ASSURANCE COMPANY OF CANADA	)	REASONS FOR JUDGMENT BY:
Appellant	)	
- and -	)	CHIPMAN, J.A.
JUDGMENT RECOVERY (N.S.) LTD.	)	
Respondent	)	