

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: *Wawanesa Insurance v. Laybolt*, 2013 NSSC 230

Date: 20130711

Docket: Pic No. 412297

Registry: Pictou

Between:

Wawanesa Insurance

Appellant

v.

Morgan Farrell Laybolt

Respondent

Judge: The Honourable Justice N. M. Scaravelli

Heard: July 11th, 2013, in Pictou, Nova Scotia

Written Decision: July 12th, 2013

Counsel: Jeremy P. Smith, for the Appellant
Hector MacIsaac, for the Respondent

By the Court:

[1] This is an appeal from a decision of a small claims court adjudicator allowing the claim of the respondent for coverage under the terms of her automobile policy of insurance with the appellant as insurer.

BACKGROUND

[2] The matter stems from a motor vehicle accident which occurred on May 8, 2012 on Highway 104 near Valley, Nova Scotia. The respondent's husband, who did not have a driver's license, took the respondents vehicle, a 2011 Honda Civic without her permission or consent. While on route to Truro the respondent's husband lost control of the vehicle resulting in single vehicle roll over which destroyed the Honda Civic. The respondent subsequently charged her husband with theft. The adjudicator, R. E. O'Brien allowed the respondent's claim for coverage under the collision or upset provisions of the insurance policy for the replacement cost of the vehicle. He also allowed total coverage to the respondent's mother who is not a party to the proceedings.

[3] In the Notice of Appeal the appellant set out six grounds of appeal four being error of law and one being error of jurisdiction. The grounds were summarized as follows: **Error of Law:** Section 6 (2) excluding damage caused by theft is the applicable policy provision, not Section C Subsection 2 covering damage caused by collision or upset as found by the adjudicator. **Error of Jurisdiction:** the adjudicator did not have the jurisdiction to make a finding in favour of the respondent's mother who was not named as a party to the proceeding.

STANDARD OF REVIEW

[4] The standard of review for questions of law and jurisdiction in this appeal is that of correctness.

[5] The standard of review is restricted by the absence of a transcript of evidence adduced before the small claims court adjudicator. On appeal I must accept the facts as found by the adjudicator and, therefore, cannot entertain submissions by parties as to whether the findings are supported by the evidence adduced at the hearing.

ANALYSIS

[6] The policy of the insurance contains the following relevant provisions:

Section C - Loss of Or Damage to Insured Automobile

Subsection 2 - Collision or Upset

The Insurer agrees to indemnify the insured against direct and accidental loss of or damage to the automobile, including its equipment caused by collision with another object or by upset.

Subsection 3 - Comprehensive

(1) The Insurer agrees to indemnify the insured against direct and accidental loss of or damage to the automobile, including its equipment from any peril other than by collision with another object or by upset.

(2) The words “another object” as used in this subsection 3 shall be deemed to include (a) a vehicle to which the automobile is attached and (b) the surface of the ground and any object therein or thereon.

(3) Loss or damage caused by missiles, falling or flying objects, fire, theft, explosion, earthquake, windstorm, hail, rising water, malicious mischief, riot or civil commotion shall be deemed loss or damage caused by perils for which insurance is provided under this subsection 3. . .

[7] Subsection 4 provides coverage for specified perils.

. . . 6. Exclusions

The Insurer shall not be liable

(1) under any subsection of section c for loss or damage.

(2) under subsections 3 (Comprehensive) and 4 (Specified Perils) only, for loss or damage caused by theft by any person or persons residing in the same dwelling premises as the insured, or by any employee of the insured engaged in the operation, maintenance or repair of the automobile whether the theft occurs during the hours of such service or employment or not [emphasis added]

[8] The respondent's position at hearing was that the exclusion provision in Section 6 (2) applied only to "comprehensive" and "specified perils" coverage and not the "collision or upset" coverage. The appellant's position at the hearing was that Section 6 (2) excluded coverage as the cause of the accident was the theft of the motor vehicle.

[9] The adjudicator's summary report of findings states in part:

12. I further found that sub-section 2 is unclear as to whether the exclusion applies to Sub-section 3 (Comprehensive) and 5 (Specific Perils) only or

to Sub-section 2–Collision or Upset. I found that contra proferentum rule thus applies and any ambiguity was in favor of the respondent insured.

13. I found as fact the vehicle was upset and destroyed and that under Sub-section 2 of the Section 3, the vehicle is covered for upset and collision.
14. I found that therefore s 6(2) does not apply to sub-section 2-Collision or Upset and the exclusionary clause did not apply.
15. In the alternative, I found if there was no ambiguity to the wording in section 6(2), I found sub-section 2-Collision-or Upset provided coverage for the loss.
17. I found as a fact the second insured party under the policy was Mary Laybolt, mother of the respondent. I found as a fact she did not reside in the same household as the respondent or her husband, Michael Laybolt.
18. I found that in the event the exclusionary clause applied to the respondent, it did not apply to Mary Laybolt and therefore the appellant was obligated to honour the loss.

[10] I can find no ambiguity in Section 6 (2) of the policy. By its explicit terms it excludes liability under Subsection 3 (comprehensive) and Subsection 4 (specified perils) where the damage is caused by theft by a person living in the same residence as the insured. Unlike Section 6 (1) providing exclusions under “any” Subsection of Section C, Section 6 (2) does not exclude liability under

Subsection 2 (collision or upset). Nor does Section 6 (2), as the appellant suggests, create an absolute exclusion for damage caused by theft.

[11] Having found as a fact that the damage was caused by upset, where theft occurred by a member of the respondent's household, the adjudicator interpreted the policy correctly. The reference to *contra proferentem* appears unnecessary. In any event I can find no way to read an exclusion of Subsection 2, (collision or upset) claims into Section 6 (2).

[12] Although the ground of appeal regarding the respondent's mother is now moot, the respondent's mother was not a party to the small claims court proceeding nor was she added as a party during the course of the proceedings. As a result the adjudicator's finding that the appellant would be obligated to cover the loss on this ground was not within his jurisdiction.

[13] As a result the appeal is dismissed.