IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Weeks v. Aviva Canada Inc., 2006 NSSC 83

Date: 20060427
Docket: SAT. No. 257177
Registry: Antigonish

Between:

Marjorie Weeks and Ernest Weeks

-and-

Aviva Canada Inc.

Decision

Judge: The Honourable Justice Robert W. Wright

Heard: March 8, 2006 in Chambers at Antigonish, Nova Scotia

Written Decision: April 27, 2006

Counsel: Counsel for the Applicants - Lindsay McDonald
Counsel for the Respondent - D. Kevin Burke

Wright J.

INTRODUCTION

[1] This is an application by Marjorie Weeks and Ernest Weeks ("the applicants") for an order requiring Aviva Canada Inc. ("Aviva") to defend them under a homeowner's insurance policy against a personal injury claim at the suit of Mr. Michael White in a separate action. The named defendants in that action are Marjorie Weeks, Ernest Weeks and their son Robert Weeks, all of whom are insureds under the homeowner's policy issued by Aviva.

[2] Although the personal injury action was commenced on September 5, 2001, for some reason the applicants were not formally served with it until May 13, 2005. Aviva's refusal to defend that action on behalf of the applicants and their son precipitated the filing of this application on October 24, 2005.

FACTS

[3] The essential facts surrounding this application are not in dispute. In the Statement of Claim filed in the personal injury action, it is pleaded that on December 6, 1999 at about 12:00 a.m., the plaintiff Michael White was run down and severely injured by an all-terrain vehicle ("ATV") which was then owned by the applicants and being operated by their son Robert with their knowledge and consent. It is further pleaded that Robert Weeks at all material times was under the applicants' care, custody and control in the operation of the ATV from which it is to be inferred (and indeed is an acknowledged fact) that Robert was then a minor.

[4] The Statement of Claim goes on to particularize the negligence claim against

all three defendants. The chief allegations as against Robert Weeks are that he operated the ATV in a careless manner, failed to keep a proper lookout, drove at an excessive rate of speed, drove without headlights, and drove on a public road contrary to the *Motor Vehicle Act*. Added to these particulars of negligence at the end is a subclause which reads "such other negligence as may appear".

[5] The specific allegations made against the applicant parents are that they failed to exercise proper care, guidance and control over their son Robert, failed to maintain the ATV in proper working order, and permitted their son Robert to operate the ATV on a public road, contrary to the *Motor Vehicle Act*. Similarly, there is a subclause added at the end which also alleges "such other negligence as may appear at trial".

[6] The Statement of Claim then recites particulars of multiple bodily injuries sustained by the plaintiff for which compensatory damages are sought.

[7] It is acknowledged that at the time of the accident, the ATV owned by the applicants was not covered by a policy of motor vehicle insurance. Once notified of the claim, the applicants reported it to Aviva, asserting their entitlement to coverage under the personal liability rider contained in their homeowner's policy and the corresponding duty to defend.

ISSUE

[8] The only issue to be decided on this application is whether or not Aviva has

a duty to defend their insureds under the homeowner's policy against the claim for damages brought against them by Mr. White.

POSITIONS OF THE PARTIES

[9] In asserting Aviva's duty to defend, the applicants rely on the following provisions in their homeowner's policy:

> **COVERAGE E - PERSONAL LIABILITY**
> We will pay all sums which you become legally liable to pay as compensatory damages because of unintentional bodily injury, or property damage.
> ...
> You are insured for claims made against you arising from:
> 1. **Personal Liability** - legal liability for unintentional Bodily Injury or Property Damage arising out of your personal actions anywhere in the world.

[10] The policy later goes on to provide that:

> We will defend you against any suit which makes claims against you for which you are insured under Coverage E and which alleges bodily injury or property damage and seeks compensatory damages, even if it is groundless, false or fraudulent.

[11] Aviva, on the other hand, relies upon the exclusion clause in COVERAGE E which immediately follows the above recited personal liability rider. The exclusion clause reads as follows:

> You are not insured for claims made against you arising from:
> (a) the ownership, use or operation of any motorized vehicle, trailer or watercraft, except those for which coverage is shown in this policy; [none are shown as being covered].

[12] The applicants nonetheless contend that there are two aspects of the Statement of Claim which are broadly enough pleaded to invoke Aviva's duty to

defend. First, as recited earlier, the Statement of Claim pleads negligent supervision on the part of the applicants over their son Robert in the operation of the ATV which is said to represent a distinct and concurrent cause of action against them outside of the exclusion clause. Secondly, they refer to the last subclause of the particulars of negligence pleaded as against all three defendants which reads "such other negligence as may appear".

[13] The applicants argue that the broadness and general nature of these claims could encompass possible scenarios of liability beyond or independent of the ownership, use or operation of their ATV which may emerge on the facts established at discovery or trial. Counsel for the applicants urges that her clients may be at risk for liability under other scenarios which do not fall within the exclusion clause in the policy and for which coverage may hence be provided. Because of that possibility, it is argued that Aviva is obligated to defend the bodily injury claim against the applicants under the personal liability rider in their homeowner's policy.

[14] The position of Aviva, simply put, is that it is not under any duty to defend because the homeowner's policy excludes all claims arising from the ownership, use or operation of any motorized vehicle. Aviva argues that the claim of negligent supervision against the applicant parents cannot be separated from the allegations related to the ownership, use and operation of the ATV. In Aviva's submissions, none of the possible scenarios within the Statement of Claim involve a concurrent non-vehicle related cause.

[15] Similarly, it is argued that the bald pleading of "such other negligence as may appear" in and of itself is insufficient to give rise to the duty to defend, as it does not identify a separate or concurrent non-vehicle related claim within the policy coverage that might possibly succeed. It is urged that to hold as a matter of law that such a bald assertion founds a duty to defend in such cases would lead to many unreasonable and absurd results.

[16] Aviva maintains that in order to protect themselves against the risk of liability such as has arisen here, the applicants ought to have obtained coverage for the ownership, use and operation of their ATV under a policy of motor vehicle insurance.

LEGAL ANALYSIS AND CONCLUSIONS

[17] There are several legal principles to be borne in mind in the duty to defend analysis required in this case. First of all, I refer to a summary of principles of general application articulated by Chipman, J.A., in *Neary v. Wawanesa Mutual Insurance Co.* (2003) 216 N.S.R. (2d) 219 which reads as follows (at para. 6):

> ...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 at 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 that 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. See Nichols v. American Home Assurance Co., [1990] 1 S.C.R. 801 at paras. 14, 16 and 17; and Kirkpatrick v. Budget Rent-A-Car of Victoria, [1998] B.C.J. No. 1428 (Q.L.) (B.C.S.C.),

[18] It is also well established by the case authorities that as a general rule, clauses in an insurance policy providing coverage are to be interpreted liberally or broadly in favour of the insured and those clauses excluding coverage are to be construed narrowly against the insurer. Any doubt as to whether the pleadings bring the incident within the coverage of the policy ought to be resolved in favour of the insured. Conversely, if the insurer can prove that there is no possibility that the policy provides an indemnity for the claim against the insured, then there is no obligation upon the insurer to defend the claim (see, for example, *Amherst (Town) et al. v. Coronation Insurance Co. et al.* (1995) 138 N.S.R. (2d) 68 (N.S.C.A.).

[19] As many of the reported cases indicate, a question that is often litigated is whether the Statement of Claim contains a concurrent cause of action which is different from, or in addition to, a pleaded cause of action clearly within the exclusion clause. That question is at the forefront of the present application. The governing principle to be applied is that where there are two concurrent causes of action alleged in a Statement of Claim and there is a possibility that one of them falls within the coverage of an insurance policy, the insurer under that policy has a duty to defend that claim. This principle was clearly expounded by the Supreme Court of Canada in *Derksen v. 539938 Ontario Ltd.* [2001] 3 S.C.R. 398.

[20] The foregoing principle is easily stated but is often difficult to apply based, as it must be, on a bare reading of the Statement of Claim (many of which are

creatively drafted by plaintiffs' counsel). The approach to be taken in such cases was set out by the Supreme Court of Canada in *Scalera v. Lloyd's of London* [2000] S.C.J. No. 26. That case was concisely summarized by Freeman, J.A., in *Pictou County Farmers' Mutual Fire Insurance Co. v. Williams* (2001) 191 N.S.R. (2d) 390 as follows (at para. 5):

> In *Scalera v. Lloyd's of London* [2000] S.C.J. No. 26 in [paragraph] 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 insurer's duty to defend."

[21] In *Scalera*, the Supreme Court of Canada had to analyse the Statement of Claim to determine whether, in substance, it alleged more than one cause of action. The plaintiff in that case alleged that she was the victim of various sexual assaults by the defendant which were pleaded as intentional torts, negligence and breach of fiduciary duty. The defendant looked to his homeowner's insurance policy for coverage, which policy excluded coverage for bodily injury caused by any intentional or criminal act. The insurer denied coverage, maintaining that all of the allegations in substance were allegations of intentional acts and hence outside the grant of coverage in the policy.

[22] The court ultimately held in favour of the insurer by finding that the claims pleaded in negligence and breach of fiduciary duty were simply derivative to the

pleading of intentional torts which were an excluded risk under the policy. The court stated that "A claim should only be treated as "derivative" for the purposes of this analysis, if it is an ostensibly separate claim which nonetheless is clearly inseparable from a claim of intentional tort".

[23] *Scalera* also stands for the proposition (as does *Nichols v. American Home Assurance Co.* [1990] 1 S.C.R. 801 and *Monenco Ltd. v. Commonwealth Insurance Co.* [2001] 2 S.C.R. 699), that where the insurer relies on an exclusion clause to avoid any duty to defend, the onus is on the insurer to demonstrate that all of the claims made against the insured are clearly excluded from coverage by the exclusion clause relied on by the insurer.

[24] Bearing these principles in mind, the sole issue to be decided on this application is whether or not Aviva has a duty to defend the applicant parents and their son Robert against the claims pleaded in the Statement of Claim on behalf of Mr. White.

[25] Having regard to the Nova Scotia Court of Appeal decision in *Pictou County Farmers' Mutual Fire Insurance Co. v. Williams*, *supra*, which extended the *Scalera* analysis to a fact situation involving allegations of negligent supervision, I begin that same analysis by examining the true nature of the claims pleaded.

[26] The Statement of Claim is largely in typical form for a personal injury action in this province. After identifying the parties, it describes the occurrence of the

accident, and alleges the negligence of the defendants as the cause of that accident, whereby the plaintiff suffered bodily injury. The particulars of negligence pleaded as against the son Robert are careless operation, improper lookout, imprudent speed, failure to avoid collision with an object on the roadway, operating an improperly maintained vehicle (including failure to use proper headlights), operating an ATV on a public street, and such other negligence as may appear. The particulars of negligence pleaded as against the parents are failure to exercise proper care, guidance and control over their son Robert (i.e., negligent supervision), failure to maintain the ATV in proper working order, permitting their son to operate the ATV on a public street, and such other negligence as may appear.

[27] As noted earlier, counsel for the applicants maintains that these pleadings are broad enough to invoke the duty to defend in two respects, namely, the allegation of negligent supervision made against the parents as well as the catchall pleading of "such other negligence as may appear" made against all three defendants. I will deal with the latter argument first in this analysis.

[28] It is commonplace, at least in this province, for plaintiffs' solicitors to add such wording at the end of the paragraph setting forth particulars of negligence. It is essentially boilerplate drafting and adds nothing to the substance of the pleadings. There is not even an inkling that such rote wording as used here might possibly encompass a scenario that is not related to the use or operation of the vehicle distinct from the allegations which precede it. As counsel for the insurer points out, to permit such a bald assertion to found a duty to defend would lead to

many unreasonable and absurd results. The example given is that there would thereby be potential coverage and corresponding duties to defend under homeowners' policies in every motor vehicle accident case.

[29] In the result, I find that in substance, all of the allegations made in the Statement of Claim as against Robert Weeks relate to his use or operation of the ATV. Those allegations fall within the exclusion clause in the policy above recited and are therefore not covered by the homeowner's policy. Aviva accordingly has no duty to defend Robert Weeks in the White action.

[30] For the same reasons, I find that the use of this rote wording is not sufficient to found a duty to defend the applicant parents where it adds nothing of substance to the other allegations pleaded against them.

[31] The more delicate question is whether or not the pleading of negligent supervision over their son Robert raises a concurrent but discrete claim against the applicant parents that might possibly succeed within the policy coverage. Counsel for the applicants relies on three Nova Scotia decisions which illustrate fact scenarios where such a concurrent cause of action within the policy coverage was found to exist, thereby invoking the insurer's duty to defend. The first one is *Neary* above mentioned. The other two, both of which involve concurrent claims of negligent supervision of a minor in the operation of a vehicle, are *Williams, supra*, and *Fitzgerald v. Co-operators Insurance Co.* (2003) 214 N.S.R. (2d) 358.

[32] Very briefly, the facts in *Williams* were that the plaintiff stayed with the

Williams family as a weekend guest. The plaintiff was injured while driving with the Williams' daughter, her friend, on an unlicensed, uninsured motorcycle. The plaintiff sued the Williams' daughter and her parents, alleging negligent operation of the motorcycle by the daughter and negligent supervision of the plaintiff by the parents. The parents sought to have the action defended by their insurer under a personal liability rider in their homeowner's policy which the insurer refused to do.

[33] A key allegation in the Statement of Claim was that Mr. Williams, the father, had been told by the plaintiff's father that she was not permitted to ride on the motorcycle. The Court of Appeal ruled that the parents' duty of care towards the visitor (the plaintiff) rested on separate and entirely different legal principles from those concerning negligent operation of the motorcycle by the daughter. The court found that the chambers judge 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 to Mr. Williams by the plaintiff's father. The Court of Appeal therefore concluded that the claim of negligent supervision was not derivative under the claim of negligent operation of the vehicle and could potentially trigger the insurer's duty to defend.

[34] In *Fitzgerald*, the facts briefly were that the insureds' 12 year old son was driving the family ATV when it collided with an ATV being driven by the plaintiff. The plaintiff sued the insureds, claiming that the son was negligent in operating the ATV and that the parents were negligent in supervising the son and in maintaining the ATV. The insureds' homeowner's policy, under the heading

"Vehicles You Do Not Own", provided liability coverage arising from "your use or operation" of certain vehicles. The insureds applied for an order compelling the insurer to defend the action.

[35] In following the *Scalera* analysis, the court ruled that neither the claim of negligent operation against the son, nor the claim of negligent supervision against the insured parents, was derivative under the other in the sense of *Scalera*. Without going into any unnecessary detail, the case ultimately turned on a finding of the court under the third part of the *Scalera* analysis that because of an inconsistency in the pleadings over the ownership of the ATV, and an ambiguity in the policy to be taken into account, it had been demonstrated that a duty to indemnify was reasonably possible. The duty to defend the insureds was thereby invoked.

[36] These cases illustrate specific fact situations where the court was able to conclude, using the Scalera analysis, that the pleading of negligent supervision against the insured parents in respect of the operation of a motor vehicle raised a concurrent and discrete cause of action that might possibly succeed on its own within the policy coverage. It is impossible, however, to lay down any definitive rule as to when such a finding can be made. Each case will turn on a close examination of the Statement of Claim at play, recognizing that the factual allegations pleaded are assumed to be true for purposes of a duty to defend application.

[37] In the present case, all of the allegations in the White Statement of Claim are founded in negligence. The lead allegation made against the applicant parents is that they failed to exercise proper care, guidance and control over their son Robert. Implicitly, that allegation refers to negligent supervision over their son Robert in the use or operation of the family ATV. It was the ATV that was the instrumentality of the accident. In other words, the allegation of negligent supervision is made in respect of the use or operation of the ATV by their son Robert.

[38] Moreover, unlike the unique situation in *Williams*, it is difficult to see how there is any realistic possibility that the applicant parents could be found liable for negligent supervision while at the same time their son Robert was absolved of any finding of negligence in his operation of the ATV. I conclude, therefore, that the pleading of negligent supervision made against the applicant parents is not an independent and discrete cause of action that could potentially trigger the insurer's duty to defend.

[39] I find reinforcement in this conclusion by the reasoning in the Ontario Court of Appeal decision in *Unger (Litigation guardian of)* v. *Unger* (2004) 68 O.R. (3d) 257. In that case, the plaintiffs were injured in an accident involving a truck driven by the defendant in the course of his employment. In addition to a motor vehicle insurance policy, the employer was also covered by a commercial general liability policy whose underwriter took the position that none of the claims fell within its coverage. The part of the Statement of Claim pertaining to the employer as a co-defendant included allegations of negligent business practices. More specifically,

the Statement of Claim alleged that the employer was negligent in the hiring, training and supervision of his employee as well as in the entrustment of the vehicle to him.

[40] The Ontario Court of Appeal concluded that all of the allegations made in the Statement of Claim related to the ownership, use or operation of the vehicle; that they therefore fell within the exclusion clause relied on by the insurer; and accordingly, were not covered by the policy. As Doherty, J.A., stated (at para. 24):

> These allegations are not discrete causes of action in the sense identified in *Derksen*. Were the Ungers to establish any of these allegations, but fail to establish that the vehicle was used or operated in a negligent manner at the time of accident, they would not succeed in their claim. While allegations of negligent training, supervision and entrustment may well be germane to whether Matthews and/or his employee were negligent in the ownership, use or operation of the motor vehicle, they do not provide a stand alone ground for recovery by the Ungers.

[41] Although the allegations of negligent supervision and entrustment contained in the Statement of Claim in *Unger* were made in the context of an employer/employee relationship, I find the same reasoning to be persuasive in the outcome of the present application. I find the three Nova Scotia cases relied on by the applicants to be distinguishable on their specific fact situations.

[42] In the overall result, I am led to the conclusion that none of the claims pleaded in the White Statement of Claim, even if successful, could potentially fall within the Aviva policy coverage. It follows that Aviva has no duty to defend the insureds in the personal injury action brought against them by Mr. White. This application is therefore dismissed.

COSTS

[43] In keeping with the general rule that costs follow the event, Aviva shall be entitled to costs of this application which are fixed at $500 under Tariff C of Civil Procedure Rule 63.

J.