CITATION: Adams v. Pineland Amusements Ltd., 2007 ONCA 844
DATE: 20071205
DOCKET: C46535

COURT OF APPEAL FOR ONTARIO

LASKIN, JURIANSZ and LANG JJ.A.

BETWEEN:

BARBARA ADAMS

Plaintiff (Respondent)

and

PINELAND AMUSEMENTS LTD. and ROLAND POTVIN

Defendants (Respondents)

and

KINGSWAY GENERAL INSURANCE COMPANY

Third Party (Appellant)

Patricia Lawson for the appellant

Frank McNally for the respondent Roland Potvin

HEARD: October 31, 2007

On appeal from the judgment of Justice Roydon J. Kealey of the Superior Court of Justice, dated December 22, 2006, with reasons reported at (2006), 85 O.R. (3d) 147.

JURIANSZ J.A.:

[1] This appeal decides that a go-kart operated on a private track is not an "automobile" within the meaning of the standard Ontario automobile insurance contract.

[2] Denis Potvin was injured while driving a go-kart on a track owned and operated by Pineland Amusements Ltd. ("Pineland"). He lost control of his go-kart, he alleges, after colliding with a go-kart driven by his father, Roland Potvin. Denis Potvin's mother and Litigation Guardian, Barbara Adams, commenced this action against Pineland and her husband for damages related to the injuries suffered by Denis. Pineland filed a cross-claim also alleging that Roland caused or contributed to the injuries of his son.

[3] Roland Potvin had an automobile insurance policy with Kingsway General Insurance Company ("Kingsway"). Roland issued a third party claim against Kingsway stating that Kingsway had the duty to defend and indemnify him in the main action and in the cross-claim by Pineland. Kingsway issued a statement of defence to the third party claim alleging that Roland's automobile insurance policy did not cover the go-kart.

[4] Kingsway brought a motion seeking determination, prior to trial, whether the automobile insurance issued to Roland covered damages for injuries from the go-kart accident, and whether it had the duty to defend Roland in the main action or in the cross-claim by Pineland. The determination of both questions turns on whether a go-kart is an "automobile".

[5] The motion judge answered both questions in the affirmative. For the reasons that follow, I would set aside his decision, answer both questions in the negative, and dismiss Roland's third-party claim against Pineland.

[6] No issue is taken with this court's jurisdiction. The parties agree that the motion judge's order was final because it deprived Kingsway of a substantive right (i.e. to deny coverage under its insurance policy). Nor is there any dispute that the motion judge decided questions of law, which are subject to review on the correctness standard.

[7] The parties are also agreed that the question whether the go-kart is an automobile must be decided by the three-part test set out in *Grummet v. Federation Insurance Co. of Canada* (1999), 46 O.R. (3d) 340 (Sup. Ct.), at para. 14:

> (i) Is the vehicle an "automobile" in ordinary parlance?
>
> If not, then,
>
> (ii) Is the vehicle defined as an "automobile" in the wording of the insurance policy?
>
> If not, then,
>
> (iii) Does the vehicle falls within any enlarged definition of "automobile" in any relevant statute?

[8] An affirmative answer to any of these questions leads to the conclusion that the vehicle is insured by the standard Ontario automobile insurance contract. In this case, the motion judge decided that a go-kart was not an automobile in ordinary parlance and that the definition of "automobile" in the Kingsway insurance policy did not include go-karts. These findings are not challenged, and the only issue is whether the vehicle falls within any enlarged definition of "automobile" in any relevant statute.

The Enlarged Definition of "Automobile" in Any Relevant Statute

[9] The motion judge correctly recognized that the governing definition was that set out in s. 224(1) in Part VI of the *Insurance Act*, R.S.O. 1990, c. I.8. Part VI deals with automobile insurance. Section 224(1) defines "automobile":

> "automobile" includes,
>
> (a) a motor vehicle required under any Act to be insured under a motor vehicle liability policy, and
>
> (b) a vehicle prescribed by regulation to be an automobile.

[10] It is common ground that s. 224(1)(b) is inapplicable. Under s. 224(1)(a) a vehicle that is neither an automobile in ordinary parlance nor specifically defined to be one under the policy will be an "automobile" if it is required to be insured under a motor vehicle liability policy.

[11] The requirement that a motor vehicle be insured under a motor vehicle liability policy is imposed by the *Compulsory Automobile Insurance Act*, R.S.O. 1990, c. C.25. The motion judge observed that s. 1(1) of this Act defines "motor vehicles" as having the same meaning as in the *Highway Traffic Act*, R.S.O. 1990, c. H.8. The *Highway Traffic Act* includes in its definition of "motor vehicle" in s. 1(1) any vehicle that is "propelled or driven otherwise than by muscular power". A go-kart is a motor vehicle propelled otherwise than by muscular power. Hence, as the motion judge recognized, the question boils down to whether a go-kart is required to be insured under a motor vehicle liability policy.

[12] Section 2 of the *Compulsory Automobile Insurance Act* prohibits the operation of a motor vehicle "on a highway unless the motor vehicle is insured under a contract of automobile insurance". As I discuss further below, a go-kart cannot be registered as a motor vehicle and cannot be legally driven on a highway. However, it is physically possible to drive a go-kart on a highway, and the motion judge rested his conclusion on this physical fact at para. 24:

> Therefore, it follows that a motor vehicle (which includes a go-kart), if operated on a highway, would have to be insured, unless regulations under the CAIA exempt such an insurance obligation. However, they do not. It cannot be disputed that a

> go-kart is a motor vehicle, which is capable of being operated on a highway. The question of whether it is lawful to do so is irrelevant. If operated on a highway, being a motor vehicle, a go-kart would require insurance under s. 2(1) of the CAIA. Therefore, it is an automobile in my opinion.

[13] The appellant pointed out that any self-propelled vehicle, such as a taxiing airplane or a motorized wheelchair, is physically capable of being driven on a highway. The appellant argued that the motion judge erred by considering it irrelevant that a go-kart could not be legally operated on a highway.

[14] In the appellant's submission, the point is not that it is illegal to drive a go-kart on a highway, but rather that a go-kart cannot meet the legal requirements of the *Highway Traffic Act* relating to registration, licensing, and the equipment of motor vehicles. Since a go-kart cannot meet the prescribed regulatory requirements, it is not possible in law to obtain a motor vehicle permit, numbered plates, and evidence of validation for a go-kart under s. 7(7) of the *Highway Traffic Act*. Consequently the appellant argues that s. 2(1) of the *Compulsory Automobile Insurance Act*, read in context purposively, cannot and does not require that a go-kart be insured by a motor vehicle policy.

[15] The principle, however, does not apply to this case: there is a difference between an illegal act not obviating the motor vehicle insurance regime where it already applies and an illegal act invoking the application of the motor vehicle insurance regime in the first place. Put another way, by performing an illegal act, an individual cannot make the motor vehicle insurance regime apply to him or her to where it would not otherwise.

[16] That said, this case can be resolved on a narrower basis in light of this court's decision in *Copley v. Kerr Farms Ltd.* (2002), 59 O.R. (3d) 346 (C.A.). *Copley* addressed whether a "tomato wagon", which fits the definition of "motor vehicle" under the *Highway Traffic Act*, was an "automobile" within the meaning of s. 267.1(1) of the *Insurance Act*. In that case, as here, the question boiled down to whether s. 2(1) of the *Compulsory Automobile Insurance Act* required that the tomato wagon be insured by a motor vehicle policy. While the tomato wagon was regularly taken out on highways, and in fact the plaintiff intended to take it on a highway later on the day of the accident, the accident occurred in the defendant farmer's field. The court found at para. 32 that there was no requirement for the defendant to have it insured "at the time and place where the accident occurred".

[17] *Copley* makes evident that the motion judge erred in basing his conclusion on the possibility that a go-kart could conceptually be driven on a highway. This particular go-kart was operated not on a highway, but on a private go-kart track. The question whether the go-kart would require motor vehicle insurance if it were illegally driven on a highway did not arise. The proper question was whether it required motor vehicle insurance at the time and in the circumstances of the accident. It did not, and therefore was not an "automobile" within the scope of Roland's automobile insurance policy.

Conclusion

[18] I would allow the appeal, set aside the decision of the motion judge, and replace it with the following:

(i) an order determining the questions of law as follows:

> (a) that the automobile insurance policy issued by Kingsway to Roland Potvin does not cover the claim made by Barbara Adams in that it does not cover damages for injuries resulting from a go-kart accident in the circumstances of this case; and
>
> (b) that Kingsway does not have the duty to defend Roland Potvin in the main action or in the cross claim by Pineland Amusements Ltd.

(ii) an order dismissing the third-party claim, with costs throughout.

[19] I would fix costs of the appeal and of the motion below in favour of Kingsway against Roland Potvin on a partial indemnity scale in the amount of $12,500 inclusive of disbursements and GST.

"R.G. Juriansz J.A."
"I agree J.I. Laskin J.A."
"I agree S.E. Lang J.A."

RELEASED: December 5, 2007