CITATION: CUMIS General Insurance Company v. 1319273 Ontario Ltd. (Done Right Roofing), 2008 ONCA 249
DATE: 20080407
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COURT OF APPEAL FOR ONTARIO

LASKIN, LANG and JURIANSZ JJ.A.

BETWEEN:

CUMIS GENERAL INSURANCE COMPANY

Applicant (Respondent)

and

1319273 ONTARIO LTD. carrying on business as DONE RIGHT ROOFING

Respondent (Appellant)

Joseph Y. Obagi for the appellant

Marcus B. Snowden and W. Colin Empke for the respondent

Heard: November 1, 2007

On appeal from the judgment of Justice David M. Brown of the Superior Court of Justice, dated November 22, 2006.

LASKIN J.A.:

A. OVERVIEW

[1] The appellant, Done Right Roofing, a roofing repair company, is insured by the respondent, CUMIS General Insurance Company, under a commercial general liability

policy. The issue on the appeal is whether CUMIS has a duty to defend Done Right in an action brought by a motorcyclist for damages for personal injuries.

[2] The motorcyclist, Ewen MacMillan, was struck by a ladder when it flew off a Done Right truck being driven along a country road in South Glengarry, Ontario. MacMillan claims that the ladder knocked him off his motorcycle and seriously injured him. He has sued Done Right, alleging that in cleaning up a work site, one of Done Right's employees negligently loaded and stored the ladder on the truck.

[3] Done Right asked CUMIS to defend the MacMillan action on its behalf. CUMIS refused, contending that MacMillan suffered an automobile-related injury and that CUMIS's policy with Done Right excludes coverage for automobile-related risks.

[4] CUMIS brought an application for a declaration that it has no duty to defend MacMillan's action. The application judge, D. Brown J., granted the declaration. In doing so, he relied principally on an exclusion from coverage in the "G.L. Plus" rider, which amended the original policy.

[5] Done Right makes three submissions on its appeal:

> (i) CUMIS cannot rely on the G.L. Plus rider to exclude coverage otherwise available to its insured because to do so would defeat Done Right's reasonable expectations;
>
> (ii) The CUMIS commercial general liability policy does not exclude coverage for bodily injuries arising from the "loading or unloading" of an automobile; and
>
> (iii) MacMillan's statement of Claim alleges non-automobile-related negligence, which imposes a duty to defend.

[6] I would not give effect to any of these three submissions. I substantially agree with the reasons of the application judge. I add my own brief reasons, partly to address Done Right's first submission, which was not made to the application judge.

B. MacMILLAN'S CLAIMS IN THE UNDERLYING ACTION

[7] As the application judge correctly stated at para. 8 of his reasons, "[t]he specific pleadings in an action serve as the benchmark against which a court must assess an insurer's obligation to defend." The basic principle is that "an insurer has a duty to

defend where on the facts as pleaded there is a possibility that one or more of the claims made against the insured are covered by the policy." See *Unger (Litigation Guardian of) v. Unger* (2003), 68 O.R. (3d) 257 (C.A.) at para. 9. I will therefore briefly summarize MacMillan's allegations of negligence against Done Right (and its employees) in his statement of claim.

[8] The statement of claim makes a number of allegations of negligent driving. These are not in issue on this appeal. What are in issue are the allegations of negligence concerning the cleanup of the worksite and the loading and storage of the ladder on the truck. Stripped to its essentials, the statement of claim alleges that Done Right:

- failed to properly store the ladder "in the course of cleaning up the worksite and prior to leaving the worksite";

- failed to implement a system for instructing its employees on how to clean up a worksite, on how to properly load, store and secure work equipment onto trucks, and on how to properly inspect a truck before using it;

- failed to properly secure and store the ladder on the truck and failed to keep the ladder "under proper care and control";

- failed to properly supervise its employees during the "loading, storing and securing of cargo on their vehicles"; and

- failed to provide the "necessary tools, equipment and vehicles which would permit the safe loading, storage and transportation of work equipment and cargo."

[9] Might one or more of these claims against Done Right be covered by the policy, so as to trigger CUMIS's duty to defend? The answer turns on the wording of the policy.

C. THE RELEVANT TERMS OF THE CUMIS COMMERCIAL GENERAL LIABILITY POLICY

[10] The policy contains both coverage provisions and exclusions from coverage. Two coverage provisions are relevant. First, under the policy, CUMIS agrees to pay on behalf

of its insured Done Right "all sums which the Insured shall become legally obligated to pay as compensatory damages because of bodily injury." Second, "as respects insurance afforded by this policy," CUMIS agrees to defend at its cost any civil action for bodily injury brought against Done Right.

[11] However, the scope of "insurance afforded by this policy," and thus the duty to defend, turns on the scope of the exclusions from coverage. The original policy lists a number of exclusions, of which only one, the automobile exclusion, exclusion (b), is in question on this appeal. Exclusion (b) reads:

> This insurance does not apply to …
>
> (b) bodily injury or property damage arising out of the ownership, maintenance, use or operation by or on behalf of the Insured of any automobile.

The definition of automobile under the policy includes the truck driven by Done Right's employee.

[12] The G.L. Plus rider amended the automobile exclusion in the original policy by deleting exclusion (b) and replacing it with a two-pronged exclusion – O(b)(1) and O(b)(2). The relevant parts of the replacement exclusion "O. Broad Form Automobile" read as follows:

> (b)(1) bodily injury or property damage arising out or the ownership, use or operation by or on behalf of any Insured of:
>
> (i) any automobile …
>
> (b)(2) bodily injury or property damage with respect to which any motor vehicle liability policy:
>
> (i) is in effect, or
>
> (ii) would be in effect but for its termination upon exhaustion of its limits of liability, or
>
> (iii) is required by law to be in effect

O(b)(1) in substance duplicates exclusion (b) in the original policy. O(b)(2), however, was a new exclusion. In granting the declaration that CUMIS had no duty to defend, the application judge relied on O(b)(2).

D. ANALYSIS

1. Can CUMIS rely on the G.L. Plus rider to exclude coverage otherwise available to its insured?

[13] As I have said, the application judge relied on exclusion O(b)(2) in the G.L. Plus rider to hold that CUMIS does not have a duty to defend the MacMillan action. O(b)(2) excludes coverage for bodily injury "with respect to which any motor vehicle liability policy (i) is in effect, or … (iii) is required by law to be in effect." Section 239 of Ontario's *Insurance Act*, R.S.O. 1990, c.I-8, required that Done Right insure its trucks "against liability … arising from the ownership or directly or indirectly from the use or operation of any such automobile."

[14] As the application judge pointed out, case law under s. 239 or its equivalent has established that the loading and storage of the ladder on the truck – which is at the heart of the claim in the underlying action – comes within the scope of the "use or operation" of a truck because it is one of the "ordinary and well-known activities" to which trucks are put. See, e.g., *Stevenson v. Reliance Petroleum.*, [1956] S.C.R. 936.

[15] The application judge therefore concluded at para. 29 of his reasons:

> In light of these authorities, I conclude that the loading and storing of a ladder onto the truck constitute the direct or indirect use or operation of an automobile under the terms of a motor vehicle liability policy that "is in effect, or…is required by law to be in effect" for the Respondent's truck. As a result, Exclusion O(b)(2) of the Policy excludes from coverage the negligent acts of loading and storing the ladder onto the truck which lie at the heart of the MacMillan Action. CUMIS therefore does not owe the Respondent a duty to defend the MacMillan Action.

[16] Counsel for Done Right candidly conceded that the application judge's conclusion is correct. If, then, CUMIS is entitled to rely on the G.L. Plus rider, apart from its third submission (allegations of non-automobile-related negligence) Done Right cannot succeed on its appeal.

[17] Done Right, however, argues that the G.L. Plus rider does not apply because CUMIS's reliance on it would defeat the reasonable expectations of its insured. This argument was not put to the application judge.

[18] In substance, the argument is that the G.L. Plus rider claimed to provide extended liability coverage, but in fact did the opposite: it reduced the insurance coverage provided in the original policy. A prime example of the reduction in coverage is the automobile exclusion, which was broadened to include the very exclusion the application judge relied on, O(b)(2). According to Done Right, reducing coverage when the rider professes to extend coverage, does not accord with an insured's reasonable expectations. In essence, Done Right says that it was misled, and the G.L Plus rider itself is misleading.

[19] This argument takes on significance, Done Right further contends, because if CUMIS cannot rely on the exclusions in the G.L. Plus rider it must rely on exclusion (b) in the original policy. And Done Right submits that although the loading and storage of the ladder on the truck falls within the scope of the "use or operation" of an automobile in the *Insurance Act*, it does not fall within the scope of the "use or operation" of an automobile in exclusion (b).

[20] I do not accept Done Right's argument that the application of the rider would defeat its reasonable expectations. In addition, as I discuss in the next section of these reasons, in my view, the loading and storage of the ladder on the truck comes within the scope of exclusion (b).

[21] Done Right led no evidence of its actual expectations, on how the G.L. Plus rider was marketed, or on what representations CUMIS made to it. Without any evidence on these matters Done Right's argument that it was misled must fail.

[22] Moreover, Canadian courts have typically used the reasonable expectations principle to resolve ambiguities in a policy. See *Chilton v. Co-Operators General Insurance Co.* (1997), 32 O.R. (3d) 161 (C.A.); Craig Brown & Julio Menezes, *Insurance Law in Canada*, looseleaf, 4th ed. (Toronto: Carswell, 2002) at 8-13. The O(b)(2) exclusion is unambiguous.

[23] And even if the reasonable expectations principle had a broader scope it would not apply in this case because the G.L. Plus rider is not misleading. The rider does not narrow coverage under the guise of extending it.

[24] The G.L. Plus rider contains provisions both extending coverage and broadening exclusions. A reasonable insured should not expect one without the other. The rider extends coverage, for example, by defining bodily injury to include injury arising out of false arrest, malicious prosecution, libel, slander, defamation and invasion of privacy, as well as by specifically providing for advertising liability.

[25] A rider extending coverage may also be reasonably expected to modify exclusions. The rider states repeatedly in bold letters, "Amended Exclusion". The automobile exclusion itself has the effect of both narrowing and extending coverage. It narrows coverage by adding O(b)(2) to the exclusion in the original policy. But it also extends coverage by restricting the definition of automobile.

[26] In the original policy, automobile is defined to mean (subject to certain exception) any self-propelled land motor vehicle other than a land motor vehicle used solely on the premises of the insured. In the G.L. Plus rider, automobile is defined more restrictively to mean "any self-propelled land motor vehicle…which is principally designed for the transportation of persons or property on public roads." So arguably, under the G.L. Plus rider CUMIS may be required to indemnify Done Right for an accident caused by one of its vehicles that, though not used solely on its premises, was nonetheless not principally designed for the transportation of people or property on public roads.

[27] I agree with CUMIS that it would not be reasonable for Done Right to accept the benefits of the extension of coverage without also accepting the corresponding restrictions, restrictions that are set out in clear, plain language in the rider. I would not give effect to this ground of appeal.

2. Does the original policy exclude coverage for bodily injuries arising from the loading and unloading of an automobile?

[28] Even if the G.L. Plus rider does not apply and CUMIS must rely on exclusion (b) in the original policy, in my view, injuries arising from the loading or unloading of an automobile come within the scope of "use or operation" of an automobile in that exclusion. Done Right's submission that coverage is not excluded rests on comparing the wording of the automobile exclusion (b) with the wording of the watercraft and aircraft exclusions, both of which expressly exclude bodily injury arising out of the "loading or unloading" of any watercraft or aircraft. As exclusion (b) does not expressly exclude the loading or unloading of an automobile, Done Right contends that MacMillan's injuries resulting from the negligent loading and storage of the ladder on the truck are covered by the policy. This contention relies on the implied exclusion maxim, *expressio unius est exclusio alterius*: to express one thing is to exclude another.

[29] The application judge found Done Right's submission "an attractive one". Relying on American authority, he rejected CUMIS's argument that the implied exclusion maxim cannot apply to exclusion clauses in an insurance policy. Instead he acknowledged "some merit" in Done Right's contention that the interpretation of one exclusion clause can take account of similar language used in another exclusion clause. However, he did not resolve Done Right's submission because he concluded that exclusion O(b)(2) in the G.L. Plus rider precluded coverage.

[30] In my view, the implied exclusion maxim does not assist Done Right because it does not apply to the automobile exclusion (b) in the original policy (or to the similarly worded exclusion O(b)(1) in the G.L. Plus rider). It does not do so because the context for the automobile exclusion differs from the context for the watercraft and aircraft exclusions. The intent of the automobile exclusion is that automobile-related risks are to be insured against under an automobile insurance policy, which is required by the *Insurance Act*. Well-established automobile insurance law recognizes that the use or operation of an automobile includes the loading or unloading of that automobile. Express reference in the automobile exclusion to loading or unloading is therefore unnecessary.

[31] By contrast, watercraft and aircraft are not subject to a mandatory insurance regime. Moreover, there is no acknowledged case law establishing that the use or operation of a boat or an airplane includes the loading and unloading of it. Thus, the watercraft and aircraft exclusions contain the words that the automobile exclusion does not to capture this broader liability. Accordingly, I conclude that the automobile exclusion (b) in the original policy and exclusion O(b)(1) in the G.L. Plus rider exclude coverage for bodily injuries arising from the negligent loading and storage of the ladder on Done Right's truck. As CUMIS's policy does not impose a duty to defend for automobile-related negligence, the remaining question is whether the MacMillan's statement of claim alleges non-automobile-related negligence, which does not fall under the exclusions and therefore triggers CUMIS's duty to defend.

3. Does MacMillan's statement of claim allege non-automobile related negligence, which imposes a duty to defend?

[32] Done Right submits that MacMillan's claim alleges a concurrent cause of action in negligence unrelated to the use and operation of an automobile, thus imposing on CUMIS a duty to defend the underlying action. According to Done Right, MacMillan's allegations of non-automobile-related negligence include failing to properly store the ladder in the course of cleaning up the worksite, failing to properly instruct its employees on how to cleanup a worksite, and failing to supervise its employees.

[33] Done Right's submission relies on the judgment of the Supreme Court of Canada in *Derksen v. 539938 Ontario Ltd.*, [2001] 3 S.C.R. 398. *Derksen* dealt with whether a comprehensive general liability insurance policy provided coverage for damages caused when a steel base plate flew off a tow bar attached to the back of a supply truck, killing one child and severely injuring three others. During a workplace clean up, an employee had left the base plate on the tow bar instead of storing it in the truck.

[34] The exclusion clause in issue in *Dersken* was identical to exclusions O(b)(1) and (2) in the CUMIS G.L. Plus rider. In *Derksen* the Supreme Court concluded that the plaintiffs had alleged two concurrent causes of action: negligent cleanup of the work site,

which was not part of the loading of the automobile, and was therefore non-automobile-related negligence covered by the comprehensive general liability policy; and negligence in the operation of the truck, which was automobile-related negligence, and therefore covered by the automobile policy. Similarly, here, Done Right argues, the allegation of non-automobile-related negligence requires CUMIS to defend MacMillan's action.

[35] The application judge did not agree with Done Right's submission. He distinguished *Derksen* on the basis that all MacMillan's allegations of negligence at the work site relate to loading the ladder on the truck and failing to secure it. He said at para. 15:

> On a reasonable reading of the Statement of Claim in the MacMillan Action I cannot reach a similar conclusion. In my view the "the substance and true nature" of the claim is that the Respondent's employee failed to load and properly secure the ladder to the company's vehicle (Statement of Claim, paragraph 11). Unlike *Derksen* this is not a "failure to load" case. The Statement of Claim clearly suggests that the employee intended to clean up the work site by loading the ladder onto the truck and that he did so, but failed to secure the ladder properly to the truck. Those portions of the Statement of Claim that plead facts relating to the clean up of the work site (Statement of Claim, paras. 10, 24(e), 24(g) and 24(n)) all link the act of cleaning up inextricably to the act of loading the ladder onto the truck and failing to secure it.

[36] The application judge, therefore, concluded that the underlying action "does not plead a concurrent cause of action regarding the negligent clean-up of the work site." The 'substance and true nature' of the claim involves the allegation of negligently loading and storing of the ladder on the truck". I agree with the application judge's analysis of the issue and with his conclusion. I therefore would not give effect to this ground of appeal.

E. CONCLUSION

[37] I would dismiss Done Right's appeal and uphold the declaration granted by the application judge that CUMIS has no duty to defend.

[38] CUMIS is entitled to rely on the automobile exclusion in its G.L. Plus rider. However, even if were it not entitled to rely on the rider, the automobile exclusion in the original policy precludes a duty to defend. Finally, the statement of claim in the

underlying action does not allege non-automobile-related negligence, which would trigger a duty to defend.

[39] CUMIS is entitled to its costs of the appeal in the amount agreed to by the parties, $9,500, inclusive of disbursements and G.S.T.

RELEASED: April 7, 2008
"JIL"

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