CITATION: Loftus v. Security National Insurance Company, 2009 ONCA 618
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COURT OF APPEAL FOR ONTARIO

Winkler C.J.O., Simmons and Armstrong JJ.A.

BETWEEN:

Elizabeth Loftus

Plaintiff (Respondent)

and

Christian Robertson, Security National Insurance Company, and Certas Direct Insurance Company

Defendants (Appellant)

and

The Corporation of the City of Peterborough, Peterborough Lakefield Police Services Board and the Peterborough Lakefield Community Police Service Chief of Police Terrence McLaren

Third Parties (Respondents)

David Silverstone and Suzanne Courtlander, for the appellant

John R. McCarthy, for the respondent Elizabeth Loftus

Russell Wm. Palin, for the third-party respondents

Heard: March 4, 2009

On appeal from the order of Justice Barry G. A. MacDougall of the Superior Court of Justice dated July 25, 2008.

By the Court:

I. Overview

[1] The issue on this appeal concerns the scope of the uninsured automobile insurance coverage under O.A.P. 1, the standard automobile insurance policy in use between 2001 and 2003.[1]

[2] Ms. Loftus was injured in a car accident in 2001. She was insured at the time under a standard automobile insurance policy issued by Security National Insurance Company. Following the accident, she sued the uninsured driver and Security National under the uninsured coverage provisions of her policy. Security National claimed contribution and indemnity against the third parties. For the purposes of a Rule 22 motion, the third parties consented to a question that assumes their negligence. The motion judge concluded that Security National is obliged to compensate Ms. Loftus even though she failed to sue the third parties.

[3] For the reasons that follow, we conclude that Security National is liable to pay Ms. Loftus under the uninsured coverage provisions of her policy unless the third parties admit they are obliged to pay her or she obtains judgment against them.

[1] O.A.P. 1—Ontario Automobile Policy was approved by the Superintendent of Financial Services for use as the standard Owner's Policy on or after January 1, 2001 and remained in effect until September 30, 2003.

II. Background

[4] This appeal arises out of a motion under Rule 22 heard by MacDougall J. to determine a question of law based on an agreed statement of facts.

[5] The essence of the agreed facts is as follows.

[6] Ms. Loftus was injured in a car accident on June 1, 2001. While stopped at a red light, her car was struck by a car driven by the defendant, Mr. Robertson. Mr. Robertson was the owner and operator of an uninsured automobile as defined in the *Insurance Act*, R.S.O. 1990, c. I-8. After being chased by the police, Mr. Robertson entered the intersection at a high rate of speed, lost control of his vehicle and collided with Ms. Loftus's car.

[7] In addition to suing Mr. Robertson, Ms. Loftus sued her own insurer, Security National, under the uninsured coverage provisions of her policy for damages for bodily injuries arising from the accident.

[8] Mr. Robertson has not defended Ms. Loftus's action.

[9] In addition to defending the action, Security National brought third party proceedings against the police chief, the police services board and the municipality (the "third parties"), alleging they were negligent with respect to the pursuit and apprehension of Mr. Robertson.

[10] For the purposes of the special case, the parties agreed that:

- Mr. Robertson was negligent and therefore responsible for some or all of Ms. Loftus's damages.
- Ms. Loftus was not negligent.
- Ms. Loftus is legally entitled to recover damages from Mr. Robertson for the injuries she suffered in the accident.
- In accordance with s. 265 of the *Insurance Act*, the insurance policy issued to Ms. Loftus by Security National provides for payment of all sums she is legally entitled to recover from Mr. Robertson as damages for bodily injury, subject to prescribed limits and exclusions.
- The third parties were insured under a commercial general liability insurance policy for any damages for bodily injury that may have been awarded against them arising from the accident (meaning that, had Ms. Loftus successfully sued the third parties she would have been entitled to recover money under the third parties' policy).
- Ms. Loftus did not sue the third parties.

[11] The question for determination under Rule 22 was framed as follows:

> Assuming negligence on the part of the third parties … caused or contributed to the injuries and damages sustained by [Ms. Loftus], is Security National liable to make any payment to [Ms. Loftus] pursuant to the coverage required under section 265 of [the *Act*]?

[12] Relying primarily on policy considerations, the motion judge answered the question in the affirmative.

III. Relevant Statutory Provisions and Regulations

[13] Section 265(1) of the *Insurance Act* sets out the parameters of the uninsured coverage to be provided in all motor vehicle insurance policies in Ontario. Such coverage became mandatory in Ontario in 1980. According to the agreed facts, there is no dispute that Ms. Loftus's case falls within the language of s. 265(1)(a):

> 265.(1) Every contract evidenced by a motor vehicle liability policy shall provide for payment of all sums that,
>
> (a) a person insured under the contract is legally entitled to recover from the owner or driver of an uninsured automobile or unidentified automobile as damages for bodily injuries resulting from an accident involving an automobile;
>
> ...
>
> subject to the terms, conditions, provisions, exclusions and limits as are prescribed by the regulations.

[14] Section 265(6) provides a statutory right of subrogation to the injured party's insurer against "persons responsible for the use or operation of the uninsured... automobile":

> 265.(6) Where an amount is paid under subsection (1), the insurer is subrogated to the rights of the person to whom such amount is paid and the insurer may maintain an action in its name or in the name of such person against any other person or persons responsible for the use or operation of the uninsured or unidentified automobile.

[15] The limits and exclusions on uninsured coverage are set out in the Uninsured Automobile Coverage Schedule ("the Schedule") contained in R.R.O. 1990, Reg. 676.

[16] Section 2(1)(a) of the Schedule provides that uninsured coverage is limited to the minimum limits for automobile liability insurance in the jurisdiction in which the accident occurs. In Ontario, this limit is $200,000.

[17] Sections 2(1)(b) and (c) of the Schedule set out the exclusions on which Security National relies. Section 2(1)(b) was revoked in 2003 by O. Reg 276/03. While in force, ss. 2(1)(b) effectively permitted an insurer to deduct from its obligations certain payments made to the injured party under a valid insurance policy. Section 2(1)(c) provides that the insurer is not obliged to make payment where the injured party "is entitled to recover money under the third party liability section of the motor vehicle liability policy." These sections read as follows:

> 2. (1) The insurer shall not be liable to make any payment,
>
> (b) where a person insured under the contract is entitled to recover money under any valid policy of insurance other than money payable on death, except for the difference between such entitlement and the relevant minimum limits determined under clause (a);

> (c) where the person insured under the contract is entitled to recover money under the third party liability section of a motor vehicle liability policy;

IV. Relevant Provisions of O.A.P. 1

[18] Security National also relies on certain provisions of O.AP. 1 as excluding coverage in this case. The relevant provisions are as follows:

> **5.1 Introduction – 5.1.1 Uninsured Automobile Schedule –** This Section of the policy describes the terms and conditions of the coverage set out in the Uninsured Automobile Schedule under the *Insurance Act* (Ontario). If there is a difference between the interpretation of the wording of this Section and the interpretation of the wording in the Schedule, the Schedule prevails. However, 5.3.3 in this Section is in addition to the coverage provided by the Schedule.
>
> ...
>
> **5.7 Limitations and Exceptions – 5.7.1 Payment Limits –**
>
> …
>
> 2. We will not pay:
>
> any amount, if you or other insured persons can make a valid claim under the liability section of a motor vehicle liability policy.

V. Security National's Position on Appeal

[19] Security National submits that, on the facts of this case, the motion judge's decision is clearly wrong because the third parties have admitted negligence. On appeal, it advanced a number of arguments in support of this position.

[20] First, relying on s. 265 of the *Insurance Act* and s. 2(1)(c) of the Schedule, Security National submitted that there is no cause of action for uninsured coverage where the admitted negligence of an insured motorist contributed to the accident.

[21] Security National pointed out that s. 265(1) makes no reference to the existence of an insured joint tortfeasor. Further, s. 265(6) creates no rights of subrogation in favour of the insurer against an insured motorist whose negligence contributed to the accident. According to Security National, these factors suggest that s. 265 simply does not apply where the admitted negligence of an insured motorist contributed to the accident. Moreover, s. 2(1)(c) specifically excludes the insurer's obligation to pay where the injured party "is entitled to recover money under the third party liability section of a motor vehicle liability policy."

[22] In the alternative, Security National relied on s. 2(1)(b) of the Schedule, which permits the insurer to deduct from its obligations certain payments made to the injured party under a valid insurance policy. It argued that even if an injured party has a cause of action for uninsured coverage, where there is an insured joint tortfeasor who admits negligence, the regulation excludes the insurer's obligation to pay to the extent of the insured joint tortfeasor's insurer's obligation.

[23] Security National also relied on s. 5.7 of O.A.P. 1, which states in plain language that the insurer will not pay where the injured party "can make a valid claim under the liability section of a motor vehicle liability policy."

[24] Finally, Security National relied on a series of decisions that it says make it clear that an injured party cannot recover from his or her insurer on the uninsured or underinsured coverage when there is an insured joint tortfeasor. For example, see *Barton v. Aitchison*, (1982), 39 O.R. (2d) 282 (C.A.).

[25] Security National does not say that an injured party has a duty to pursue every conceivable joint tortfeasor before claiming recovery against his or her own insurer under the uninsured coverage provisions of O.A.P. 1. However, Security National does contend that an injured party is not entitled to claim under the uninsured coverage where, as here, an insured joint tortfeasor admits negligence.

VI. Analysis

1. Issues concerning the availability of the Rule 22 Procedure

[26] During oral submissions, we expressed reservations about the availability of the Rule 22 procedure in this case and our ability to address the issues raised on appeal for several reasons.

[27] First, although Security National claims contribution and indemnity against the third parties, it submits that it cannot recover against them under either the *Negligence Act*, R.S.O. 1990, c. N. 1 (because it is not a tortfeasor) or by way of a subrogated claim (because s. 265(6) of the *Insurance Act* only provides for subrogation against the uninsured owner/driver). Further, although the third parties consented to a question being presented to the court "assuming" they are negligent, they have not admitted either

negligence or liability to pay for the purposes of the third-party proceeding. As a result of these factors, we expressed concerns that the question presented is purely hypothetical.

[28] Second, on the face of the pleadings filed as part of the motion record, it appeared to us that the limitation period for Ms. Loftus to sue the third parties has expired.[2] Although counsel for Ms. Loftus said he was relying on the expiry of the limitation period, Security National objected, saying that is not an agreed fact and does not form part of the question to be decided.

[29] Third, although it appears that Security National relied solely on s. 2(1)(b) of the Schedule in the court below, on appeal, Security National made submissions concerning both ss. 2(1)(b) and 2(1)(c) of the Schedule.

[30] Fourth, the agreed statement of facts does not address whether the commercial general liability policy under which the third parties are insured is a motor vehicle policy within the meaning of s. 2(1)(c) of the Schedule.

[31] However, because of our conclusion about the statutory interpretation issue and our view of the limited effect of the third parties' admission, we have determined that we can respond to the question presented without relying on disputed facts and in a manner

[2] Ms. Loftus commenced her action on May 21, 2003. Security National issued its third party claim on October 21, 2004. The Rule 22 motion is dated March 6, 2008. Whether the limitation period for Ms. Loftus to sue a third party is six months or two years, even assuming she did not discover her potential claim against the third parties until October 21, 2004, the limitation period has long since expired.

that addresses the real issue between Ms. Loftus and Security National, namely, whether she was required to sue the third parties.

2. Discussion

[32] In the context of the question presented, the key to the statutory interpretation issue is determining the meaning of the phrase "entitled to recover money" as it appears in ss. 2(1)(b) and (c) of the Schedule.

[33] The starting point for determining this issue is the modern principle of statutory interpretation as set out in Elmer A. Driedger's *Construction of Statutes*, 2nd. ed. (Toronto: Butterworth, 1983), at p. 87:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[34] However, because the Schedule is a regulation it must also be read with its enabling Act in mind. In *Bristol-Myers Squib Co. v. Canada (Attorney General)*, [2005] 1 S.C.R. 533, after citing the modern principle of statutory interpretation, Binnie J. said, at para. 38:

> The same edition of Driedger adds that in the case of regulations, attention must be paid to the terms of any enabling statute:

> It is not enough to ascertain the meaning of a regulation when read in light of its own object and the facts surrounding its making; it is also necessary to read the words conferring the power in the whole context of the authorizing statute. The intent of the statute transcends and governs the intent of the regulation.

[35] Reading s. 265 of the *Insurance Act* and ss. 2(1)(b) and (c) of the Schedule in context, we conclude that the phrase "entitled to recover" as it appears in ss. 2(1)(b) and (c) of the Schedule means entitled to recover in fact. Moreover, in our view, on a proper reading of these provisions, there is no requirement that an injured insured sue insured potential joint tortfeasor(s) in order to resort to the uninsured coverage. Rather, an injured insured will be disentitled from recovery under the uninsured coverage in O.A.P. 1 based on the negligence of an insured joint tortfeasor only where the joint tortfeasor's insurer admits liability to pay or where the injured insured obtains a judgment against the joint tortfeasor. We reach these conclusions for several reasons.

[36] First, s. 265(1)(a) creates a broad entitlement to uninsured coverage for "all sums …[the insured] is *legally entitled to recover*" from the uninsured owner or driver "subject to the terms, conditions, provisions, exclusions and limits" in the regulations (emphasis added).

[37] The phrase "legally entitled to recover" in s. 265 of the *Insurance Act* (which is essentially a coverage provision) has been interpreted as permitting a right of direct action against the insurer and as requiring only that an insured person establish fault on the part of the uninsured driver and prove the amount of his or her damages: see *Johnson*

v. Wunderlich (1986), 57 O.R. (2d) 600 (C.A.); *Chambo v. Musseau* (1993), 15 O.R. (3d) 305 (C.A.).

[38] Significantly, there is no reference in s. 265 of the *Insurance Act* to an insured person being disentitled to uninsured coverage because of the existence of an insured joint tortfeasor.

[39] Second, the difference in language between the phrase "legally entitled to recover" in s. 265 of the *Insurance Act* and the phrase "entitled to recover" in s. 2(1)(b) and (c) of the Schedule is, in our view, very important. The omission of the word "legally" in the latter phrase suggests that, for the exclusion to apply, a person must be entitled to recover in fact rather than simply being entitled to recover as a matter of law.

[40] An injured insured is entitled to recover in fact only where a potential joint tortfeasor's insurer admits liability to pay or where the injured insured obtains judgment against the insured joint tortfeasor. Moreover, liability to pay involves something more than a mere admission or finding of negligence. As the contested facts in this case illustrate, a joint tortfeasor may admit negligence but still defend successfully based on a limitation defence. On our interpretation of ss. 2(1)(b) and (c) of the Schedule, an injured insured will be precluded from recovery under the uninsured coverage in O.A.P. 1 only where there is an admission or finding of liability to pay.

[41] Third, case law interpreting s. 265 of the *Insurance Act* has noted that the section was enacted to alleviate "the plight of motorists injured by drivers of uninsured automobiles" and that the purpose of this section is to provide "'a safety net' for victims injured by the actions of uninsured motorists" and at the same time "internalize costs to the activity (driving a motor vehicle) which created them": *Barton v. Aitchison*, at p. 287; *Gignac v. Neufeld* (1999), 43 O.R. (3d) 741 (C.A.), at p. 750; *Chambo v. Musseau*, at p. 308.

[42] We see no indication in the language of s. 265 of the *Insurance Act* or of the Schedule that it was the intention of the legislature to require victims of uninsured drivers to engage in potentially speculative and costly litigation against potential joint tortfeasors who may be insured rather than relying on the coverage paid for in their own policies of insurance.

[43] In our view, s. 7(3) of the *Motor Vehicle Accident Claims Act*, R.S.O. 1990, c. M. 41 and s. 7 of the Family Protection Coverage Endorsement (OPCF-44R) contained in Ms. Loftus's policy support our interpretation. Both of these provisions make it clear that an injured party may resort to the protection or coverage provided only as a matter of last resort. Had the legislature intended a similar result with respect to the uninsured coverage required by s. 265 of the *Insurance Act*, it could have said so. The relevant provisions read as follows:

> Section 7(3) of the *Motor Vehicle Accident Claims Act*
>
> 7(3) *The Minister shall not pay* out of the Fund any amount in respect of a judgment *unless the judgment was given in an action brought against all persons against whom the applicant might reasonably be considered as having a cause of action* in respect of the damages in question and prosecuted against every such person to judgment or dismissal. [Emphasis added.]
>
> Section 7 of the Family Protection Coverage Endorsement
>
> 7. *The amount payable under this change form* to an eligible claimant is excess to an amount received by the eligible claimant from any source, other than money payable on death under a policy of insurance, and *is excess to amounts that were available to the eligible claimant from*
>
> ...
>
> (b) *the insurers of a person jointly liable with the inadequately insured motorist for the damages sustained by an injured person.* [Emphasis added.]

[44] Fourth, case law interpreting s. 2(1)(b) of the Schedule has indicated that one of the primary purposes of that section is to prevent double recovery by the injured insured: *Kosanovic v. Wawanesa Mutual Insurance Co.* (2004), 70 0. R. (3d) 161 (C.A.). Our interpretation of the phrase "entitled to recover" will prevent double recovery and at the same time preserve the safety net for injured insured but without imposing a burden of pursuing potentially costly and speculative litigation.

[45] In this regard, we reject Security National's argument that our interpretation will allow double recovery by permitting injured insured to obtain judgment against their own

insurer on the uninsured coverage and to then pursue insured tortfeasors when, according to Security National, the clear intention of ss. 2(1)(b) and (c) of the Schedule is to provide the minimum level of coverage when no insurance is available.

[46] In our view, the language of ss. 2(1)(b) and (c) of the Schedule makes it clear that recovery under the uninsured coverage is an alternative to recovery under the insurance referred to in those sections. We repeat these sections for ease of reference.

> 2. (1) The insurer shall not be liable to make any payment,
>
> (b) where a person insured under the contract is entitled to recover money under any valid policy of insurance other than money payable on death, except for the difference between such entitlement and the relevant minimum limits determined under clause (a);
>
> (c) where the person insured under the contract is entitled to recover money under the third party liability section of a motor vehicle liability policy. [Emphasis added.]

[47] An injured insured is entitled to pursue alternative claims against its own insurer and other potential joint tortfeasors in the same action: see *July v. Neal* (1986), 57 O.R. (2d) 129 (C.A.), per Morden J.A. However, based on the language of ss. 2(1)(b) and (c) of the Schedule, judgment against the insurer on the uninsured coverage is not available where the insured recovers judgment against an insured joint tortfeasor. If an injured insured chooses to obtain judgment against his or her own insurer under the uninsured coverage in an action that does not include other potential joint tortfeasor(s), in our view, that choice signifies an election. It signifies that the insured has elected not to

subsequently pursue a claim against the potential joint tortfeasor(s) to the extent that a judgment on the claim would have barred recovery under the uninsured coverage if brought in the same proceeding as the claim on the uninsured coverage. In these circumstances, in our view, any attempt to pursue such a claim would constitute an abuse of process.

[48] Fifth, the nature of the insurance regime in place under O.A.P. 1 also supports our interpretation. The post-November 1, 1996 insurance regime (Bill 59) provides statutory accident benefits as compensation for pecuniary losses. The regime permits accident victims to sue in tort for some pecuniary losses and non-pecuniary losses only where their injuries meet a high threshold *i.e.*, where the victim has died or has suffered permanent serious disfigurement or permanent serious impairment of an important bodily function caused by continuing injury which is physical in nature.

[49] Given the high threshold, many claims will be for amounts well in excess of the $200,000 minimum coverage provided under s. 265 of the *Insurance Act*. Claimants with claims in excess of $200,000 are likely to sue insured potential joint tortfeasors if there is any reasonable prospect of success. If the claimant also sues his or her insurer under the uninsured provisions of the policy, the insurer will only be liable if the claimant does not recover against the insured potential joint tortfeasor.

[50] However, where the claim is for less than the $200,000 minimum coverage provided under s. 265 of the *Insurance Act*, we see no indication that it was the intention

of the legislature to require insured claimants to pursue potentially costly and speculative litigation before seeking recovery against their insurer. On the other hand, depending on the facts of the case, claimants may choose to pursue an insured potential joint tortfeasor where the liability of an uninsured motorist is questionable.

[51] Sixth, we reject Security National's argument that the language of s. 5.7 of O.A.P. 1 supports its position. Section 5.7 of O.A.P. 1 states, in part:

> 2. We will not pay:
>
> - any amount, if you or other insured persons can make a valid claim under the liability section of a motor vehicle liability policy.

[52] However, s. 5.1 of O.A.P. 1 provides that "[i]f there is a difference between the interpretation of the wording of [the uninsured coverage provisions of the policy] and the interpretation of the wording in the Schedule, the Schedule prevails." Even if the wording of the exclusion as set out in the policy might otherwise support Security National's position, s. 5.1 of O.A.P. 1 makes it clear that the Schedule prevails over the policy.

[53] Seventh, we reject Security National's argument that the lack of remedies available to an uninsured coverage insurer against insured potential joint tortfeasors supports its interpretation. Even assuming that Security National is correct in saying that uninsured coverage insurers have no remedies against insured joint tortfeasors, the cost of providing uninsured coverage in such circumstances can be built into the cost of the insurance.

[54] Finally, we reject Security National's argument that various decisions make it clear that an injured party cannot recover from his or her insurer on the uninsured coverage when there is an insured joint tortfeasor. None of the decisions on which Security National relies address the situation of the injured insured failing to sue an insured admitted joint tortfeasor or an insured potential joint tortfeasor.[3]

VI. Conclusion

[55] As Ms. Loftus did not sue the third parties and as the third parties have admitted negligence but not liability to pay, like the motion judge, we would answer the question presented in the affirmative.

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[3] For example, in *July v. Neal*, the issue was whether the limitation period for adding the unidentified driver coverage insurer to an existing action against uninsured potential joint tortfeasor had expired. This court held that the discoverability rule applied and that it would be for the trial judge to decide whether the limitation period had expired. *July v. Neal* did not involve a situation where the injured party failed to sue an insured potential joint tortfeasor.

Further, in *Barton v. Aitchison*, the issue was whether an injured party had to await the outcome of the liquidation of the insurer of the motorist who caused an accident before proceeding against his own insurer on the uninsured coverage. In holding that the predecessor to s. 2(1)(c) of the Schedule did not apply in that situation, this court made the following comments *in obiter* concerning the purpose of s. 2(1)(c) of the Schedule:

> Counsel for the minister agrees that the Motions Court judge was in error in attributing to the word "entitled" the same meaning as "collectible". He submits that cl. 3(1)(c) refers to the "1%" rule found in the *Motor Vehicle Accident Claims Act*, R.S.O. 1980, c. 298, such as where three or more vehicles are involved in an accident. He cites as an example, the plaintiff is in vehicle A; vehicle B is at fault but uninsured; vehicle C is at fault but insured. Clause 3(1)(c) has the effect of preventing the plaintiff from suing his own insurer under his uninsured automobile coverage just because vehicle B is uninsured. He must, because of cl. 3(1)(c), obtain his recovery from the third party liability insurer of vehicle C. Clause 1(d) standing alone would permit, in the above example, plaintiff A to recover against his own insurer under the uninsured motorist coverage, but the exclusion covered by cl. 3(1)(c) prevents that from happening when one joint tortfeasor is insurer, even if the tortfeasor *is found* to be only one per cent to blame. We agree that this is the meaning and effect that must be given to that clause. [Emphasis added.]

Significantly, this court was referring to a situation where the joint tortfeasor "is found" to blame. Accordingly, we do not interpret these comments as referring to a situation where the injured party fails to sue a potential tortfeasor. However, even if they do, as we have said, the comments were made *in obiter* and therefore do not constitute binding authority.

[56] The appeal is therefore dismissed with costs to the plaintiff (respondent) in the amount of $5,000 inclusive of disbursements and G.S.T. and to the third parties (respondents) in the amount of $5,000 inclusive of disbursements and G.S.T.

RELEASED: August 21, 2009 "WKW"

"W. K. Winkler C.J.O."
"Janet Simmons J.A."
"Robert P. Armstrong J.A."