CITATION: Tut v. RBC General Insurance Company, 2011 ONCA 644
DATE: 20111017
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COURT OF APPEAL FOR ONTARIO

Weiler, Cronk and Watt JJ.A.

BETWEEN

Nagraj Singh Tut and Gurmeet Kaur Tut

Applicants (Respondents)

and

RBC General Insurance Company

Respondent (Appellant)

and

Coseco Insurance Company

Intervenor (Intervener)

John D. Dean and Amber Small, for the appellant

David A. Zuber and Joseph Villeneuve, for the respondents

Kerri Kamra, for the intervener

Heard: September 6, 2011

On appeal from the order of Justice E. Eva Frank of the Superior Court of Justice, dated February 1, 2011, with reasons reported at 2011 ONSC 823.

Weiler J.A.:

BACKGROUND

[1] The overarching issue in this appeal is whether the application judge erred in granting a declaration that the appellant, RBC General Insurance Company ("RBC"), has a duty to defend and indemnify the respondents, Nagraj Singh Tut ("Nagraj") and Gurmeet Kaur Tut ("Gurmeet"), in two actions arising out of a motor vehicle accident. A brief contextual description is warranted to appreciate the arguments.

[2] On the morning of June 23, 2007, Nagraj asked his mother, Gurmeet, if he could use her car to drive some friends home. The friends had spent the previous night at the Tut family's house celebrating Nagraj's 20th birthday with him.

[3] The accident occurred while Nagraj was driving on the highway that morning. At approximately 8:51 a.m., the car went off the road as Nagraj was attempting to pass another car using the gravel shoulder.

[4] Although no charges were laid as a result of the accident, the St. Michael's Hospital Laboratory Results Report indicated that Nagraj had a blood alcohol concentration of 26.8 mmol/L at approximately 10:45 a.m. on the date of the accident. Nagraj, the holder of a G2 driver's licence, was not permitted to operate a motor vehicle with a blood alcohol concentration greater than zero: see *Drivers' Licences*, O. Reg.

340/94, s. 6(1), enacted pursuant to the *Highway Traffic Act*, R.S.O. 1990, c. H.8 ("*HTA*").

[5] The passengers in Gurmeet's car subsequently sued Nagraj and Gurmeet in two actions for damages for the injuries they sustained in the accident.

[6] Both Nagraj and Gurmeet were covered by an RBC automobile insurance policy. However, their coverage was subject to a statutory condition that states, "The insured shall not drive or operate or permit any other person to drive or operate the automobile unless the insured or other person is authorized by law to drive or operate it": see *Statutory Conditions - Automobile Insurance*, O. Reg. 777/93, s. 4(1), enacted pursuant to the *Insurance Act*, R.S.O. 1990, c. I.8.

[7] RBC denied coverage to Nagraj because, at the time of the accident, he was not "authorized by law to drive" as his blood alcohol content was greater than zero. RBC denied coverage to Gurmeet because she permitted Nagraj to drive on the morning of the accident when she knew or ought to have known that he was not authorized by law to do so. Thus, RBC was not obliged to provide counsel to defend them in the damages actions.

[8] The respondents successfully brought an application for insurance coverage. The application judge agreed that RBC could not deny coverage to the respondents on the basis of statutory condition 4(1). As all the subsidiary grounds of appeal arise from the

application judge's reasons, I will summarize them before turning to the issues and my analysis of them.

THE APPLICATION JUDGE'S REASONS

[9] The essence of the application judge's reasons is as follows. Statutory condition 4(1) precludes insurance coverage for Nagraj if he was not authorized by law to drive. Nagraj would not be authorized by law to drive if he contravened s. 6(1) when he drove with a blood alcohol concentration greater than zero. Section 6(1) creates a strict liability offence, so will not be contravened if Nagraj took all reasonable care in the circumstances. Accordingly, if reasonable care is established, statutory condition 4(1) will not apply to preclude insurance coverage for Nagraj.

[10] Although the respondents admitted that Nagraj *prima facie* contravened s. 6(1) by driving with a blood alcohol content greater than zero, the application judge found that Nagraj had a reasonable and honest belief that his blood alcohol content was zero when he awoke the morning after his party. On the basis of the evidence of those at the party, Nagraj had six to nine hours of sleep that night. His belief that he was qualified to drive was a reasonable mistake of fact.

[11] RBC relied on the report of the toxicology expert, Dr. Kalant, to support the conclusion that, based on Nagraj's height and weight, it would not have been reasonable for Nagraj to believe that his blood alcohol level did not exceed zero per cent that

morning. However, the application judge discounted the report on the basis that Dr. Kalant used the wrong height and weight for Nagraj in his calculations and based his calculations on Nagraj having had "several" hours of sleep instead of the six to nine hours he did have.

[12] In the case of Gurmeet, statutory condition 4(1) precludes insurance coverage if Gurmeet permitted Nagraj to drive when he was not authorized by law to do so. The application judge held that Gurmeet was not in breach of the statutory condition. RBC did not establish that Gurmeet knew or ought to have known, under the circumstances, that she was permitting Nagraj to drive when he was not authorized by law to do so. Gurmeet questioned Nagraj about the party and confirmed that he had slept that night. She had previously instructed him not to drive after drinking and there is no evidence that he ever failed to comply with that rule. She saw nothing either in the house or in her son's manner that would make it necessary for her to question him regarding the amount of alcohol he had consumed the night before. The application judge held that Gurmeet acted reasonably in the circumstances.

[13] Overall, the application judge held that the respondents were not excluded from coverage under the RBC automobile insurance policy.

THE ISSUES

[14] RBC's appeal seeks to have the application judge's decision set aside and the application for coverage dismissed with costs or, alternatively, requests a new hearing. RBC alleges that the application judge made the following errors:

> (a) She applied a test of strict liability rather than absolute liability to determine whether Nagraj breached s. 6(1).
>
> (b) In the event s. 6(1) is a strict liability offence, she placed the onus of proof on RBC rather than Nagraj after RBC established a *prima facie* case.
>
> (c) She placed the onus of proof on RBC rather than Gurmeet after RBC established a *prima facie* case.
>
> (d) She misapprehended and, consequently, discounted the expert opinion of Dr. Kalant.
>
> (e) She misapprehended the evidence of Gurmeet.

[15] For the reasons that follow, I would dismiss the appeal.

DISCUSSION AND ANALYSIS

1. Did the application judge err in applying a test of strict liability rather than absolute liability to determine whether Nagraj breached s. 6(1)?

[16] RBC acknowledges that there is a presumption that public welfare offences are strict liability offences. That is, once a contravention of the legislation has been proven, a defence of due diligence, that the person took all reasonable steps to avoid the contravention, is available. While it is essential for society to maintain high standards of

public safety through effective enforcement, there is general revulsion against punishing the morally innocent.

[17] As set out in *R. v. Kanda* (2008), 88 O.R. (3d) 732 (C.A.), at para. 19, four factors must be considered in determining whether an offence is one of absolute liability, for which only the contravening act need be proven, or of strict liability: (1) the overall regulatory pattern; (2) the penalty; (3) the precision of the language used; and (4) the subject-matter.

[18] RBC argues that s. 6(1) is an absolute liability offence based on the four *Kanda* factors:

1. The overall regulatory scheme is to limit and prevent impaired driving.

2. The penalty is not imprisonment, which would exclude the possibility of the offence being an absolute liability offence, but a suspension of the driver's licence.

3. Section 6(1) uses the word "must" in the first of its conditions: "The novice driver's blood alcohol concentration *must* be zero at all times" (emphasis added). The language in s. 6(1) is similar to the "no person shall" or "every driver shall" phraseology used in some absolute liability offences.

4. The subject matter – preventing inexperienced drivers from drinking and driving – and legislative intent of zero tolerance are consistent with absolute liability offences.

[19] In *Kanda*, MacPherson J.A. held that the offence of failing to ensure that a passenger under 16 years old properly wears a seat belt under s. 106(6) of the *HTA* was a strict liability, and not an absolute liability, offence. In that case, a child passenger was involved in creating the violation by undoing his seat belt. In concluding that the offence was one of strict liability, a factor the court considered was that the violation may not result directly from the driver's own conduct.

[20] RBC submits that a violation of the s. 6(1) requirement for a blood alcohol content of zero can only arise from the driver's own conduct and that, consequently, s. 6(1) ought to be an absolute liability offence. That is simply not the case. For example, in *R. v. Maharaj* (2010), 98 M.V.R. (5th) 316 (Ont. C.J.), the accused probationary driver consumed a soft drink that, unknown to him, had been adulterated with vodka. Thus, conduct other than that of the driver can contribute to a violation of the zero blood alcohol content requirement.

[21] RBC relies on two recent cases which held that s. 6(1) is an absolute liability offence. Neither case assists RBC.

[22] The first case, *Maharaj*, refers to this court's decision in *Kanda*, but does not correctly apply it. The court in *Maharaj* takes into consideration the public safety goal of the legislation without engaging in any real weighing of society's revulsion against punishing the morally innocent. The latter is why the law recognizes a presumption against absolute liability. Instead, *Maharaj* places emphasis on the fact that driving is a

privilege, and on ease and efficiency of enforcement. In my opinion, it is wrongly decided.

[23] The second case RBC relies on, *R. v. Nyaata*, 2005 ONCJ 454, states that the offence of having a blood alcohol content greater than zero is an absolute liability offence. However, the court also held that the evidence of a strong odour of alcohol on the accused's breath and the fact he held a G2 licence constituted a *prima facie* case that was rebuttable but, as the defence had called no evidence, a conviction would be registered. Holding that the violation of s. 6(1) can be rebutted is inconsistent with the offence being one of absolute liability. This case, too, is of no assistance to RBC.

[24] Applying the factors in *Kanda* to this case, I make the following observations:

1. In *Kanda*, this court was concerned with the same overall legislative scheme as here, namely, the *HTA*, and it held that the overall regulatory pattern of the *HTA* is neutral.

2. The penalty for a violation of s. 6(1) is a suspension of the offending driver's licence. This penalty is more severe than the penalty of a modest fine for the seat belt infraction in *Kanda*. This factor tilts more in favour of the offence in this case being one of strict liability as compared to *Kanda*.

3. Some of the sections in the *HTA* create an absolute liability offence by specifically excluding a due diligence defence. The language of s. 6(1) does not specifically preclude a due diligence defence. Section 6(1) also uses the mandatory word "must" but, as noted at para. 38 of *Kanda*, the case law does not

> support the conclusion that mandatory language necessarily results in absolute liability.
>
> 4. The important public purpose in *Kanda* was, as here, road safety and protection of users of the road. The court in *Kanda* held that classification of the offence as one of strict liability was an appropriate balance between encouraging drivers to be vigilant about safety and not punishing those who exercise due diligence. I would reach the same conclusion in this case.

[25] Thus, the application of the four *Kanda* factors leads me to conclude that the presumption against the offence being one of absolute liability has not been rebutted. The offence is one of strict liability.

[26] My conclusion is supported by the decision in *R. v. Sault Ste Marie,* [1978] 2 S.C.R. 1299. At pp. 1316-17, the Supreme Court of Canada commented favourably on a decision holding that careless driving is an offence of strict liability where it is open to an accused to show that he had a reasonable belief in facts which, if true, would have rendered the act innocent.

[27] The application judge did not err in characterizing the offence as one of strict liability.

2. Did the application judge err in placing the onus of proof on RBC rather than Nagraj after RBC established a *prima facie* case? Did the application judge err in misapprehending and improperly discounting the evidence of Dr. Kalant? Did Nagraj satisfy the onus on him?

[28] RBC had the onus of proving a violation of the statutory conditions of the insurance policy. Once a violation of s. 6(1) was established, the onus then shifted to Nagraj to show that he had a reasonable belief that his blood alcohol content was zero. RBC submits that Nagraj failed to satisfy this onus given that he had no recollection of the morning of the accident, he stated to the adjuster that he intended to consume more alcohol on the night of his birthday than he normally would and, when tested approximately two hours after the accident, he had a blood alcohol content of 1.5 times the legal limit.

[29] This submission ignores the deference due to the application judge's finding that Nagraj had a reasonable belief that his blood alcohol content was zero. That finding is supported by the witnesses who observed Nagraj on the morning of the accident and who saw no evidence that he was impaired by alcohol, as well as by the fact that Nagraj had slept for a number of hours before driving.

[30] RBC also relies on the report of Dr. Kalant, a toxicologist, and submits that the application judge misapprehended the report in discounting Dr. Kalant's opinion. Dr. Kalant's opinion was that, based on the St. Michael's Hospital laboratory results, Nagraj probably had at least 10 standard drinks over the course of his birthday party and that,

notwithstanding “several hours of sleep”, he would still have exhibited signs of alcohol in his system, such as an odour on his breath and a tired appearance.

[31] Dr. Kalant’s report was based on Nagraj being 5’9” and 160 pounds, whereas in his cross-examination Nagraj testified he was 5’11” and about 200 pounds, a little heavier than at the time of the accident. Besides the discrepancy in height and weight, the application judge found the amount of sleep Nagraj had was between six and nine hours, and observed that this was less than the amount normally understood by a reference to “several hours”. RBC takes issue with this latter finding and submits that the application judge ought to have preferred other evidence that would lead to the conclusion that the range was between five to eight hours. Overall, RBC submits that there was no basis for the application judge to take judicial notice that these differences would have substantially impacted the opinion of Dr. Kalant.

[32] The evidentiary point RBC wished to gain from Dr. Kalant’s report was that signs of alcohol in Nagraj’s system would have been observable to a casual observer. Dr. Kalant agreed, both in his report and in his cross-examination, that it was difficult to offer an opinion on this point.

[33] Dr. Kalant’s concession makes sense. There are a number of factors that could have affected Nagraj’s breath or appearance of alertness about which there was no evidence, such as whether Nagraj had used mouthwash, showered, or consumed coffee on the morning of the accident.

[34] It is trite law that a court is entitled to accept all, some, or none of an expert opinion. Dr. Kalant was working with an inaccurate and incomplete set of facts. Once that was established, the application judge was certainly entitled to place less weight on his opinion. More importantly, Dr. Kalant's report was inconclusive. It failed to establish that it would have been apparent to a reasonable person that Nagraj had so much to drink the night before that he could not drive in the morning. The question of whether Nagraj's ability to drive was impaired by alcohol is one of fact and non-expert witnesses may give evidence as to the degree of a person's impairment: *R. v. Graat*, [1982] 2 S.C.R. 819. The application judge was entitled, as she did, to prefer the evidence of witnesses who had seen and spoken with Nagraj on the morning of the accident.

[35] The application judge found as a fact that Nagraj had a reasonable belief he had zero blood alcohol content. This finding was not based on any material misapprehension of the evidence and is entitled to deference. This finding discharged the onus on Nagraj. Accordingly, after making this finding in para. 12 of her reasons, the application judge was entitled to comment, as she did in the next paragraph of her reasons, that RBC had not met the onus of establishing that coverage for Nagraj was excluded.

3. Did the application judge err in placing the onus of proof on RBC rather than Gurmeet after RBC established a *prima facie* case? If the onus was on Gurmeet, did she satisfy this onus?

[36] RBC submits that by simply allowing Nagraj to drive her car, Gurmeet was *prima facie* in breach of statutory condition 4(1) when Nagraj drove the car with a blood alcohol

content greater than zero, and that the onus then shifted to her to show that she had taken all reasonable steps to see that the statutory condition was not contravened. Referring to paras. 18 and 25 of the application judge's reasons, RBC submits that the application judge improperly shifted the onus to RBC.

[37] RBC's submission assumes it made out a *prima facie* case against Gurmeet. A *prima facie* breach by Nagraj, as the driver, was not an automatic *prima facie* breach by Gurmeet, as the owner of the car. As counsel for RBC agreed in oral argument, whether the driver is in breach of statutory condition 4(1) is a separate question from whether the owner of the car is in breach. See, for example, *Campos v. Aviva Canada Inc.* (2006), 38 C.C.L.I. (4th) 218 (Ont. S.C.), at paras. 14-15. As indicated, statutory condition 4(1) requires that the insured "not drive or operate or permit any other person to drive or operate the automobile unless the insured or other person is authorized by law to drive or operate it." Nagraj was *prima facie* in breach by driving with a blood alcohol content greater than zero. For Gurmeet to be *prima facie* in breach, RBC must prove that Gurmeet permitted Nagraj to drive with a blood alcohol content greater than zero.

[38] In *Co-Operative Fire & Casualty Co. v. Ritchie*, [1983] 2 S.C.R. 36, the Supreme Court considered the predecessor to statutory condition 4(1), which also used the word "permit". The Supreme Court held, at pp. 44-45, "[I]f an insured who has given someone an unqualified permission to drive his car *has no reason to expect that the car will be driven...in contravention of the policy terms*, then...he cannot be said to have permitted

[the contravening] use within the meaning of the statutory condition and he cannot therefore be made liable to his insurer" (emphasis added). The word "permits" in the context of statutory condition 4(1) "connotes knowledge, willful blindness, or at least a failure to take reasonable steps to inform one's self of the relevant facts": *Miller v. Carluccio* (2008), 91 O.R. (3d) 638 (C.A.) at para. 6.

[39] The Supreme Court held, at pp. 43-44 of *Co-Operative Fire*, that the proper test to be applied to determine whether an insured permitted his or her vehicle to be operated in breach of the statutory condition is what the insured knew, or ought to have known, under all the circumstances. In the context of this case, the test is whether Gurmeet knew or ought to have known under all the circumstances that Nagraj was not authorized to operate her car because he had a blood alcohol content greater than zero.

[40] RBC had the onus of establishing that this test for *prima facie* breach was met. At para. 25 of her reasons, the application judge held that RBC did not discharge its onus. There is no basis on which to interfere with this conclusion.

[41] The application judge found that Gurmeet acted reasonably in the circumstances. RBC submits she misapprehended Gurmeet's evidence. Gurmeet's evidence on cross-examination was that she and her husband did not see anyone drinking, or any alcoholic beverages at all, before they left the house around 9:30 or 10 p.m. on the night of the party. She and her husband returned to the house the morning after Nagraj's birthday party and she started to clean up the kitchen. At that point, she saw no alcohol bottles or

shot glasses. She spoke with Nagraj at some point in the morning from a distance of between six to eight feet. (Dr. Kalant's evidence was that she would have had to have been within three feet to smell alcohol on Nagraj.) Her evidence was that her son did not smell of alcohol and did not look tired; his hands were not shaking, his voice was not hoarse, and his speech was not impaired. Although Nagraj said that he intended to drink more than usual on the night of the party, there is no evidence that he conveyed this intention to his mother. None of the other witnesses observed any signs of alcohol in Nagraj on the morning after his party. The application judge did not misapprehend Gurmeet's evidence. Her finding that Gurmeet acted reasonably in the circumstances is entitled to deference.

[42] RBC also submits that Gurmeet was required to make further inquiries of her son and the fact she did not do so means she failed to take all reasonable steps to see that the statutory condition was not contravened. In the factual circumstances of this case, Gurmeet had no reason to make further inquiry than she did. The application judge found, in para. 21 of her reasons, that before Nagraj asked whether he could use Gurmeet's car to drop off his friends, Gurmeet asked him about his party and confirmed that he had slept the night before. There was no evidence that Nagraj had ever disobeyed her previous instructions about not drinking and driving. In the circumstances, that Gurmeet did not make further inquiry was not a failure to take all reasonable steps on her part. Nothing in Nagraj's manner and nothing Gurmeet saw gave her reason to expect that the car would be driven in contravention of the insurance policy.

CONCLUSION AND COSTS

[43] For the reasons given, I would dismiss the appeal. I would award costs of the appeal to the respondents, without reference to any costs respecting the underlying actions, in the amount of $15,000, inclusive of all applicable taxes and disbursements. I would award no costs to the intervener.

RELEASED: Oct. 17, 2011
"KMW"

"Karen M. Weiler J.A."
"I agree E.A. Cronk J.A."
"I agree David Watt J.A."