Bilg v. Unifund Assurance, [2016] I.L.R. para. I-5828

Canadian Insurance Law Reporter Cases

Court of Queen's Bench of Alberta

Before: Pentelechuk J

Decision: December 8, 2015.

Docket No. 1303 09989

[2016] I.L.R. para. I-5828 | *[2015] A.J. No. 1348* | *2015 ABQB 779*

Gurchet Singh Bilg, Harkamal Singh Rasode, Sukhsimrit Singh, and Mandeep Kaur Bilg v. Unifund Assurance Company

Case Summary

Automobile insurance — Coverage — Interpretation of policy - - Family protection plan — Dependent relative — Plaintiffs H, G, M, and S were injured in motor vehicle accident in July 2008 — G was M's husband and M was living in Ontario but was in process of moving to Alberta to join G — G was living in rental property with H and S — H was G and M's brother-in-law — H had policy with State Farm, including SEF 44 Family Protection Endorsement with $1 million limit — Action against State Farm was dismissed, as tortfeasors' underlying policy limits were $1 million — Plaintiffs brought action against defendant Unifund, which was M's Ontario insurer and whose policy included family protection policy with $2 million limit — Unifund applied for summary judgment against H and S, claiming family protection policy did not extend to them — Court found H and S could be "relatives" of G and M, as there was connection through marriage — H and S had to qualify as "dependent relative" of M and G by living in same dwelling as or being financially dependent on named insured — H and S did not live with M, who was in Ontario — Evidence did not show either G or M provided any financial assistance to H or S — Court dismissed H and S's action against Unifund — Application allowed.

Facts: The plaintiffs H, G, M, and S were injured in a motor vehicle accident in July 2008. G was M's husband. At the time of the accident, M was living in Ontario but was in the process of moving to Alberta to join G. G was living in a rental property with H and S, who were brothers. H was G and M's brother-in-law. The plaintiffs commenced a tort action for damages. They also commenced an action against State Farm Insurance ("State Farm"), which was H's insurer for the vehicle involved in the accident. The State Farm policy contained an SEF 44 Family Protection Endorsement with a policy limit of $1 million. The action against State Farm was dismissed, as the tortfeasors' underlying policy limits were $1 million and the State Farm SEF 44 was therefore not triggered. The plaintiffs brought an action against the defendant Unifund Assurance Company ("Unifund"), which had issued an Ontario auto insurance policy to the plaintiff M. The Unifund policy had OPCF 44R Family Protection Coverage (the "family protection policy") and limits of $2 million. Unifund applied for summary judgment against the plaintiffs H and S and claimed that the family protection policy did not extend to them.

HELD: The application was allowed.

The named insured under the Unifund policy was M. The Court considered the definition of "relative," which was not

defined in the policy. The Court applied a broad and liberal approach and found that H and S could be considered relatives of G and M, as there was a connection between them by virtue of marriage. Under the policy, H and S each had to qualify as a "dependent relative" of M and G in order to qualify as an insured person. Specifically, they had to be "principally dependent" financially on or residing in the same dwelling as the named insured. At the time of the accident, M was still living in Ontario and H and S were thus not physically living in the same residence as her. With regard to the financial dependence clause, the evidence did not show that either G or M provided any financial assistance to H or S. There was no evidence of financial dependence of any degree. H was married and had a child. S was 22 years old and employed. Having regard to the above, the Court dismissed H and S's action against Unifund.

Counsel

B. Mohan for the plaintiffs; W. Hanson for the defendant

Reasons for Judgment

D. PENTELECHUK J.

I. Introduction

1 The Defendant Unifund applies for summary judgment against the Plaintiffs/Respondents Harkamal Singh Rasode (hereinafter "Harkamal") and Sukhsimrit Singh (hereinafter "Sukhsimrit").

2 The Plaintiffs Gurchet Bilg (hereinafter "Gurchet"), Harkamal and Sukhsimrit were injured in a motor vehicle accident on July 2, 2008 (hereinafter "the Accident"). They commenced action 0903 14544 against Stephanie Korzan, Kenneth Korzan and Maureen Korzan for damages arising from these injuries. Herinafter, this action will be referred to as "the tort action". A fourth Plaintiff in the tort action, Mandeep Bilg (hereinafter "Mandeep"), was not involved in the accident, but claims damages for loss of consortium.

3 The Plaintiffs also commenced action 0403 14542 against State Farm Insurance, which issued a policy of automobile insurance to Harkamal for the Honda Civic involved in the Accident. The State Farm policy contained an SEF 44 Family Protection Endorsement with policy limits of $1,000.000.00.

4 It was later determined that the tortfeasors' underlying policy limits were $1,000.000.00, therefore the State Farm SEF 44 was not triggered. An Order was granted in March 2015 that dismissed the action against State Farm.

5 In the within action, the Plaintiffs claim indemnification from Unifund pursuant to Ontario OPCF 44R Family Protection Coverage (hereinafter "the Family Protection Policy"), which is similar to the SEF 44 Family Protection Endorsement issued in Alberta.

6 Unifund issued to Mandeep an Ontario policy of auto insurance, effective at the time of this Accident. The vehicle insured was a 1999 Pontiac Sunfire.

7 The Unifund Family Protection policy has limits of $2,000,000.00. In the event the Pliantiffs' claims exceed the torfeasors' policy limits of $1,000,000.00, the Family Protection Policy would provide additional coverage to eligible claimants.

8 The tort action was ordered to be tried together with this action. The actions are set for 15 days of trial to commence on February 22, 2016.

9 Unifund now applies for summary judgment against the Respondents, Harkamal and Suksimrit, arguing that it is clear that the wording of the Family Protection Policy does not extend coverage to the Respondents.

10 In support of the Application, Unifund relies on the Affidavit of Daniel Clague sworn October 29, 2015. The Respondents have not provided Affidavit evidence in opposition to the Application. Rather, they rely on the Affidavit of Sukhminder Kalkat, affirmed November 5, 2015. Mr. Kalkat is a lawyer at the office of Brij Mohan & Associates, counsel for the Respondents. In addition, both parties rely on excerpts from the Questioning of various Plaintiffs. Although the *Alberta Rules of Court, Alta Reg 124/2010* [the "*Rules*", or individually a "*Rule*"] do not provide for reference to a party's own Questioning evidence, the Applicant takes no issue with this procedure.

II. Issue

11 The issue before me is whether on the evidentiary record, a disposition that is fair and just to both parties can be made without the need for a trial. Framed another way, is there any issue of merit that genuinely requires a trial or conversely, is the claim or defence so compelling that there is a high likelihood it will succeed such that it should be determined summarily: ***W.P. v Alberta***, *2014 ABCA 404* at para 26, *378 DLR (4th) 629*, leave refused *[2015] SCCA No 41*.

III. Facts

12 I make the following findings of fact based on the evidence before me:

13 Gurchet is the husband of Mandeep. At the time of the Accident, Mandeep was still living in Ontario with her brother. She and Gurchet had sold their home in May or June of 2008 and she was in the process of moving to Alberta to join Gurchet.

14 Gurchet moved to Edmonton on May 7, 2008. At the time of the Accident, Gurchet was living in a rental property with Harkamal, Harkamal's wife Jagdip and their daughter, as well as Harkamal's parents and Suksimrit.

15 Harkamal's wife Jagdip is Gurchet's sister and, therefore, Harkamal is Gurchet and Mandeep's brother in law. Suksimrit is Harkamal's brother.

16 The Accident occurred while Gurchet, Harkamal and Suksimrit were on their way to work. Gurchet was driving a Honda Civic owned by Harkamal. The Honda Civic was insured with State Farm Insurance.

17 The Unifund policy was issued to Mandeep as the named insured, for a 1999 Pontiac Sunfire. This policy was in effect at the time of the Accident.

18 Prior to the Accident, no financial assistance was provided by either Mandeep or Gurchet to either Harkamal, Jagdip or Suksimrit.

19 At the time of the Accident, Harkamal and his wife had one child and he was employed as a gravel truck driver.

20 At the time of the Accident, Suksimrit was 22 and employed as a pre-board screening officer at the Edmonton International Airport.

21 Following the Accident, Mandeep came to Edmonton. Mandeep, Gurchet and their son moved into their own home in October or November of 2008.

IV. Summary Judgment

22 *Rule* 7.3 of the *Rules*, reads in part as follows:

> 7.3(1) A party may apply to the Court for summary judgment in respect of all or part of a claim on one or more of the following grounds:
>
> (a) there is no defence to a claim or part of it;
>
> (b) there is no merit to a claim or part of it;
>
> (c) the only real issue is the amount to be awarded.

23 The Applicant has complied with *Rule* 7.3(2) as Mr. Clague swears positively that he believes there is no merit to the claim of Harkamal and Suksimrit.

24 Since the Supreme Court of Canada's decision in ***Hryniak v Mauldin***, *2014 SCC 7*, *[2014] 1 SCR 87*, and our Court of Appeal's subsequent decision in ***Windsor v Canadian Pacific Railway Ltd.***, *2014 ABCA 108*, *371 DLR (4th) 339* ["***Hryniak***"], the modern test for summary judgment is to determine, based on the record, if a disposition that is fair and just to both parties can be made without the need for a trial. The Court in ***Hyrniak*** at para 2 spoke of the necessity of a "cultural shift" because resolving issues through trial is, in the majority of cases, an overly protracted and expensive process. The Court process should allow for resolution of matters well before they are ready for trial. As a consequence, the court said summary judgment rules should be interpreted broadly, with a focus on proportionality, and affordable, efficient and just resolution: para 72.

25 Traditionally, the bar on a motion for summary judgment was high. The party seeking summary judgment had to show no genuine issue of material fact requiring trial. It had to be plain and obvious or beyond doubt that no genuine issue for trial existed.

26 The test for summary judgment is now less stringent.

27 A consequence of the "culture shift" is that the authorities provided by the Respondents which speak to the test for summary judgment, and which pre-date ***Hyrniak***, must be viewed with caution. Other principles emerging from pre-***Hryniak*** authorities remain valid.

28 For example, summary judgment is likely inappropriate where there are questions of fact or credibility. This procedure is much better suited to a question of law based on uncontested facts.

29 Each party must put its "best foot forward" on a summary judgment application and "a motion must be judged on the basis of the pleadings, and materials actually before the judge not on suppositions about what might be pleaded or proved in the future." ***Milavsky v Milavsky***, *2011 ABCA 231* at para 16, *513 AR 282*; ***Beier v Proper Cat Construction Ltd***, *2013 ABQB 351*, *564 AR 357*.

30 The parties' respective evidentiary burdens were succinctly summarized in ***Rai v 1294477 Alberta Ltd***, *2015 ABQB 349* at paras 25-27. The Applicant bares the initial evidentiary burden of proving its defense on a balance of probabilities. The evidentiary burden then shifts to the Respondents. The Respondents take a risk if they choose not to adduce evidence. The ultimate legal burden remains on the Applicant throughout.

V. The Unifund Family Protection Policy

31 Section 3 of the Family Protection Policy provides that Unifund will:

> . . . indemnify an eligible claimant for the amount that he or she is legally entitled to recover from an inadequately insured motorist as compensatory damages in respect of bodily injury or death of an insured person arising directly or indirectly from the use or operation of an automobile. [Emphasis added].

32 "Eligible Claimant" is defined in section 1.3 of the Family Protection Policy as:

a) the insured person who sustains bodily injury; and

b) any other person who, in the jurisdiction in which as accident occurs, is entitled to maintain an action against the inadequately insured motorist for damages because of bodily injury to or death of an insured person.

33 "Insured Person" is defined for an individual in section 1.6(a) of the Family Protection Policy as:

a) the named insured and his or her spouse and any dependent relative of the name [*sic*] insured and his or her spouse, while

i. an occupant of the described automobile, a newly acquired automobile or a temporary substitute automobile as defined in the Policy;

ii. an occupant of any other automobile except where the person leases the other automobile for a period in excess of 30 days or owns the other automobile unless family protection coverage is in force in respect of the other automobile; or

iii. not an occupant of an automobile who is struck by an automobile.

[Emphasis added.]

34 I agree that the Respondents are not the named insured or a spouse of the named insured.

VI. Are the Respondents Dependent Relatives?

35 The Respondents must qualify as a Dependent Relative of Mandeep and Gurchet in order to qualify as an Insured Person and have coverage under the Family Protection Policy.

36 A "Dependant Relative" is defined in section 1.2 of the Family Protection Policy as:

> (a) a person who is principally dependent for financial support upon the named insured or his or her spouse, and who is:
>
> (i) under the age of 18 years;
>
> (ii) 18 years or over and is mentally or physically incapacitated;
>
> (iii) 18 years or over and in full time attendance at a school, college or university;
>
> (b) a relative of the named insured or of his or her spouse, who is principally dependant on the named insured or his or her spouse for financial support
>
> (c) a relative of the named insured or of his or her spouse who resides in the same dwelling premises as the named insured; and
>
> (d) a relative of the named insured or of his or her spouse, while an occupant of the described automobile, a newly acquired automobile, or a temporary automobile, as defined in the policy.
>
> **BUT** 1.3(c) and 1.3(d) apply only where the person injured or killed is not an insured person as defined in the family protection coverage of any other policy of insurance or does not own or lease for more than 30 days, an automobile which is licensed in any jurisdiction of Canada where family protection coverage is available.

VII. Position of the Parties

37 The Applicant argues that the Respondents cannot fall within any of the definitions of Dependent Relative under the Family Protection Policy, as there is no evidence that they were "principally dependent" on the named insured or his or her spouse for financial support, nor were they residing in the same dwelling premises as the named insured.

38 The Respondents argue that the Applicant has not met its evidentiary burden. Further, they argue that the Respondents were residing as a family unit with Gurchet and Mandeep at the time of the Accident. Mandeep Bilg was in the process of joining them when the Accident occurred. The Respondents argue that the reference to "dependency" in the Family Protection Policy should be interpreted broadly to encompass not only financial dependency, but social and cultural dependency. Finally, they argue the law of equity and the doctrine of marshalling have application to these facts and determination of this novel issue should defeat the application for summary judgment.

VIII. Analysis

39 The first issue is whether or not the Respondents are relatives of either Gurchet or Mandeep. Relative is not defined in the policy. In ***Taggart v Simmons***, *197 DLR (4th) 522*, *141 OAC 315* (Ont CA), leave denied *[2001] SCCA No 206*, the Ontario Court of Appeal considered the definition of "Dependant Relative" under the Ontario Family Protection Policy. In a motion for summary judgment, the trial judge held that the term should be given its ordinary meaning and held that the term provides coverage only to a person connected by blood, marriage or adoption. Summary judgment was granted to the insurer on the basis coverage did not extend to a person in a *de facto* parent-child relationship. In allowing the appeal,

the Ontario Court of Appeal noted the well-established principal that when evaluating an endorsement that extends coverage "... a provision is to be interpreted liberally or broadly in favour of the insured.": ***Taggart v Simmons***, at para 35, citing ***Lloyd's London Nonmarine Underwriters v Chu***, *[1977] 2 SCR 400*, *71 DLR (3d) 295*.

40 In ***Taggart v Simmons*** the child of a common law step-father was "a relative" for the purposes of the insurance policy, despite the absence of marriage, blood relations, or adoption. The Ontario Court of Appeal rejected that limitation and at para 37 explained:

> Given these considerations I think, a liberal approach to the term "relative" requires that the coverage extend to someone with whom the named insured has a de facto parent-child relationship. In this case, Mr. Tessier regarded John Taggart as his son and vice versa. John's natural father has not been around for many years. Mr. Tessier and John Taggart have been living together as family with Mr. Tessier supporting him, looking after him and seeing to his education as any father would.

41 The test was functional on how the adult and child interacted. The step-father operated as a relative, so he was a relative. As neither counsel cited any authority that settles the issue of whether the Respondents are relatives of Gurchet and Mandeep, and applying the broad and liberal approach adopted in ***Taggart v Simmon***, I conclude that both the Respondents may well be considered relatives of Gurchet and Mandeep as there is indeed a connection by virtue of marriage. On this basis then, summary judgment cannot be granted.

42 The section 1.2 definition of Dependant Relative has four distinct scenarios. The parties agree that the only possible scenarios that apply to the Respondents are subsections 1.2(b) and 1.2(c).

43 I will first address 1.2(c), which defines a Dependant Relative as a relative of the named insured or of his or her spouse who resided in the same dwelling premises as the named insured. However, the policy wording goes on to say that this subsection applies only where the person injured is not an insured person as defined in the family protection coverage of any other policy of insurance, or does not own an automobile licensed in any jurisdiction of Canada where family protection coverage is available.

44 The Court in ***Gardiner v MacDonald Estate***, *2015 ONSC 227* at para 39, *248 ACWS (3d) 678* and in ***Graham v Ontario*** *2010 ONSC 7129*, *103 OR (3d) 793* noted that this subsection does not require an inquiry into *financial* dependence.

45 I find the reasoning in ***Gardiner v MacDonald Estate*** at paras 35-40 particularly persuasive. Smith J, in comparing the language of the current Family Protection Policy and the SEF 44 endorsement with the predecessor SEF 42 endorsement, illustrates that when these provisions were drafted, financial dependency was omitted as a relevant consideration in section 1.2(c) and is not necessary to trigger coverage:

> ... This factor alone is very strong evidence that the intent of the insurance industry, in drafting this provision, was to provide coverage to relatives residing with the named insured, regardless of whether that relative is financially dependent on an insured.

I agree. What is required is that the Respondents cohabit with the named insured.

46 Harkamal did own a vehicle at the time of the loss and this vehicle was involved in the Accident. His policy of insurance with State Farm contained an SEF 44 Family Protection Endorsement. The

Respondents argue that because it had the same limits as the tortfeaors' policy of insurance, the coverage was rendered null and void.

47 I reject this argument. The limits placed on a policy of insurance are within the control of the insured. Harkamal chose to put limits of $1,000,000.00 on his policy and cannot argue that the tortfeasors, with the same policy limits, are underinsured. On this basis alone, he would not qualify as a Dependant Relative under this subsection. The record before me does not allow a determination of whether Suksimrit would have qualified as an Insured Person under the State Farm Family Protection Endorsement and is thereby precluded from claiming under the Unifund Family Protection Policy.

48 However, for this subsection to apply, the Respondents must reside in the same dwelling premises as the named insured. I have determined the named insured under the Unifund policy is Mandeep. The evidence before me is clear that at the time of the Accident Mandeep was still living in Ontario and was in the process of moving to Edmonton.

49 General principles of insurance interpretation are set out in ***Progressive Homes v Lombard***, *2010 SCC 33*, *[2010] 2 SCR 245*. If the language of the policy is ambiguous, courts rely on the general rules of construction which prefer interpretations consistent with the reasonable expectations of the parties: para 23. If the rules of construction fail to resolve the ambiguity, the policy will be interpreted *contra proferentum* against the insurer: para 24.

50 While I acknowledge that coverage provisions are to be interpreted broadly, the words "residing with the named insured" suggests physically living in the same residence. The applicable period for analysis is at the date of loss or the date of the Accident. The Respondents were not living with Mandeep when the Accident occurred.

51 Mandeep flew to Edmonton after the Accident. Gurchet was in the hospital. The evidence as to where she was living after flying to Edmonton is not clear. At Questioning, she testified that she stayed at the hospital for a few days and then went to Gurchet's sister's home after that. Presumably this refers to the rental unit, but there is no evidence of when she intended to come to Edmonton, had the Accident not occurred, or where she and her family intended on staying. Things were simply in transition as Mandeep flew out, leaving their three year old son in the care of relatives. Applying the broadest possible interpretation to the words within this section, there is no evidentiary basis to suggest that Mandeep was in the process of moving to the rental unit where the Respondents were living when the Accident occurred, and therefore should be considered to have been living with the Respondents.

52 I conclude that it is clear on the record that coverage is not afforded to the Respondents under subsection 1.2(c).

53 That leaves subsection 1.2(b) for consideration and whether the Respondents were *principally* dependant on Mandeep or Gurchet for financial support.

54 As stated previously, the evidence shows neither Gurchet nor Mandeep provided any financial assistance to the Respondents, let alone that the Respondents were *principally* dependant on them for financial support.

55 The Respondents argue the term "dependency "should be interpreted broadly, to include social or culture dependency and argue that the Plaintiffs essentially lived as a family unit supporting each other culturally, financially and emotionally.

56 In support of their argument, the Respondents rely on ***Pagliarella v Di Biase Brothers***, *71 OR (2d) 193*, *64 DLR (4th) 519* (Ont HCJ). That case, however interpreted the SEF 42 endorsement, the predecessor to the SEF 44 and the Family Protection Policy at issue in this application. Notably, restrictions based on age of the dependant and that the dependant must be principally dependant for financial support were not contained in the SEF 42 endorsement before the court in ***Pagliarella***. Further, in that case the evidence established a clear financial link between the insured parent and the injured daughter; the daughter's considerable savings were a consequence of her reliance on her father's support and household infrastructure.

57 The words "principally dependant for financial support" have been interpreted to mean more dependant on the named insured (in this case Mandeep or her husband) than on any other source (***Lewandowska v GAN Canada*** *(1996), 42 CCLI (2d) 8* at para 8, *71 ACWS (3d) 557* (Ont Ct J (Gen Div)), and requiring that the Respondents receive at least 51% of their financial support from the named insured (***The Dominion of Canada Insurance Company v Intact Insurance***, *2015 ONSC 3689* at para 10).

58 In the case before me, there is no evidence that the Respondents were principally dependant on Mandeep or Gurchet for financial support, nor is there any evidence before me that the Respondents were financially dependant on them to any degree. Harkamal was married with a child of his own. He and his wife owned at least one car. Suksimrit gave evidence that if he was financially dependant on anyone, it would be his brother Harkamal or his parents.

59 While the Respondents' counsel alluded to additional evidence that may be forthcoming at the upcoming trial, each party must put his or her best foot forward in a summary judgment application.

60 In conclusion, I am satisfied that the evidentiary record before me permits a determination that is fair and just to both parties. Unifund's application for summary judgment against Harkamal and Suksinrit is granted.

61 Counsel for the Respondents raised a novel argument that the equitable doctrine of marshalling should prevent summary judgment. In my view, this doctrine, if applicable, does not result in coverage where none otherwise exists.

62 The Plaintiffs are expressly permitted to raise this doctrine at trial and to argue that in the event of inadequate limits, the Plaintiffs Mandeep and Gurchet should turn first to their coverage under the Unifund policy.

IX. Conclusion

63 The Applicant is successful and summary judgment is ordered in relation to Harkamal Singh Rasode and Sukhsimrit Singh.

Dated at the City of Edmonton, Alberta this 8th day of December, 2015.

D. PENTELECHUK J.