Silverthorne v. Gore Mutual Insurance Co.

[2001] I.L.R. I-3996

Ontario
Ontario Court of Appeal

February 14, 2001

Duty to defend -- Homeowner's insurance -- Exclusionary clause -- Use of motor vehicle -- Son allowing friend to drive mother's car -- Friend causing accident -- Action against son alleging negligence in allowing friend to drive -- Exclusionary clause applying.

This was an appeal from a decision finding the insurer was obliged to provide a defence to S. S had driven his mother's car with her consent. Without her consent, he had allowed B, an unlicensed driver, to drive the car, and while driving, B caused injury to the plaintiff. The plaintiff's insurer commenced a third party action against B and S. S argued that his parents' homeowner's insurer was obliged to defend the action against him, and sought a declaration to that effect. He was an insured person under the policy, but the insurer relied on an exclusion in the policy for claims arising from the use or operation of a motor vehicle. The motions judge had declined to grant the declaration sought by S, stating that it could not be determined at a preliminary stage. On appeal, the insurer sought a declaration that it was not required to defend the action.

Held: The appeal was allowed. The issue of duty to defend was addressed at this stage on agreement of the parties. The Court found that the allegations against S in this case did relate to the use of the motor vehicle by S. He had control of the vehicle, and exercised that control by permitting B to drive. The exclusion in the homeowner's policy applied, and S was not covered.

Counsel: Arthur Camporese for the appellant;
Paul Amey for the respondent.

Before: Catzman, Doherty and Simmons JJ.A.

Doherty J.A.: [1] This appeal concerns an insurer's obligation under a homeowner's policy to defend an action arising out of a car accident where the driver of the car was not insured under the homeowner's policy, but was driving the vehicle with the permission of a person who was insured under that policy.

[2] The insured, Christopher Silverthorne (Mr. Silverthorne), brought an application for a declaration that the insurer, Gore Mutual Insurance Company (Gore Mutual), was obliged to defend a third party claim brought against him. The motion judge concluded that she could not determine whether Gore Mutual was obliged to defend until the facts were more fully developed. She declined to grant the declaration sought by Mr. Silverthorne, but did order that Gore Mutual's duty to defend Mr. Silverthorne should not be terminated at that stage of the proceedings.

[3] Gore Mutual appeals, seeking a declaration that it is not required to defend the action. Gore Mutual did not seek any declaratory relief before the motion judge. Mr. Silverthorne has not cross-appealed but asks the court to declare that Gore Mutual is obliged to defend the action.

[4] At the outset of the appeal, the court questioned Gore Mutual's entitlement to declaratory relief on appeal when none was requested on the motion. The court also questioned Mr. Silverthorne's right to declaratory relief in the absence of any cross-appeal.

[5] Both counsel urged the court to reach the merits of the appeal. They submitted that all material facts were before the motion court and that Gore Mutual's obligation to defend depended on whether those facts so clearly fell within an exception to coverage in the policy so as to negate any possibility that the claim could be covered by the policy: Nichols v. American Home Assurance Co. (1990), 68 D.L.R. (4th) 321 (S.C.C.). Counsel submitted that depending on the court's interpretation of the relevant clause, either Mr. Silverthorne or Gore Mutual was entitled to declaratory relief. They submitted that it was in everyone's best interest to have the matter determined now.

[6] In the light of the position taken by the parties, we are prepared to address the merits of the appeal despite any shortcomings which may exist in the procedures used to initiate the appeal.

[7] Marianne Willson was in a car accident in March 1994. Her vehicle was struck by a car driven by Jennifer Bachelor. The vehicle was owned by Linda Silverthorne, Mr. Silverthorne's mother. He was 20 years of age in March 1994, attended university and lived with his mother. Mrs. Silverthorne had given her son permission to use the vehicle. Mr. Silverthorne, without his mother's permission, allowed Ms. Bachelor to drive the vehicle. She was driving the vehicle with Mr. Silverthorne's consent when she hit Ms. Willson's vehicle.

[8] Ms. Willson sued Mrs. Silverthorne and Ms. Bachelor. The action was dismissed against Mrs. Silverthorne on the basis that Ms. Bachelor did not have her consent to operate the motor vehicle. Ms. Willson obtained default judgment against Ms. Bachelor. Ms. Bachelor was not insured. Ms. Willson then commenced an action against her own automobile insurer relying in part on the uninsured motorist coverage provided pursuant to the Insurance Act, R.S.O. 1990, c. I.8.

[9] Ms. Willson's insurance company defended the action brought by Ms. Willson. It also commenced a third party action against Ms. Bachelor and Mr. Silverthorne. The third party action contained the following allegations:

> 10. No action has been commenced by the Plaintiff against CHRISTOPHER SILVERTHORNE, who had the care and custody of the Silverthorne vehicle and who authorized its use by the Third Party JENNIFER JOYCE BACHELOR.

...

> 12. In addition, THE DOMINION OF CANADA GENERAL INSURANCE COMPANY, states that the Third Party, JENNIFER JOYCE BACHELOR was an unlicensed, inexperienced and incompetent driver at the time who ought not to have been in control of a motor vehicle. With respect to the negligence of the Third Party, CHRISTOPHER SILVERTHORNE, THE DOMINION OF CANADA GENERAL INSURANCE COMPANY states that such negligence includes but is not limited to the following:
>
> (a) he knew or ought to have known that the Third Party, JENNIFER JOYCE BACHELOR, was a [sic] unlicensed, inexperienced driver who was not capable of safely operating the Silverthorne vehicle;
> (b) he negligently entrusted the custody, use and operation of the Silverthorne motor vehicle to an unqualified, unlicensed and inexperienced operator;
> (c) he knew or ought to have known that entrusting the Silverthorne vehicle to an inexperienced, unqualified and unlicensed operator would expose other users of the highway, and in particular, the Plaintiff, MARIANNE WILLSON, to injuries, loss and damage.

[10] Mr. Silverthorne contends that Gore Mutual is obliged to defend the third party action on his behalf. He relies on the homeowner's policy issued to his parents. In oral argument, it was conceded by Gore Mutual that as Mr. Silverthorne lived with his parents, he was an insured person under the terms of the homeowner's policy issued by Gore Mutual.

[11] Gore Mutual contends that any claim that Ms. Willson may have against Mr. Silverthorne arising out of the car accident is not covered by the homeowner's policy, but is specifically exempted from coverage by the policy. The relevant part of the policy is set out below:

> You are insured for claims made against you arising from:
>
> 1. Personal Liability -- legal liability arising out of your unintentional personal actions anywhere in the world. You are not insured for claims made against you arising from:
>
> (a) the ownership, use or operation of any motorized vehicle, trailer or watercraft, except those for which coverage is shown in this form;

[Emphasis added.]

[12] The clause relied on by Gore Mutual was considered in Cella v. McLean (1997), 34 O.R. (3d) 327, 148 D.L.R. (4th) 514 (C.A.), affirming (1994), 20 O.R. (3d) 357 (Gen. Div.). In Cella, the plaintiff who had been injured in a car accident, alleged that the defendant who was a passenger in the vehicle that struck the plaintiff was negligent in that he permitted the driver to operate the vehicle while impaired. The defendant was not the owner of the car, had no connection to the owner, and no connection to the vehicle save that he was a passenger in the vehicle.

[13] The defendant in Cella contended that his insurer was obligated to defend the action under the terms of the homeowner's policy which the defendant had with the insurer. Relying on an exemption clause identical to the clause set out above in para. 11, the insurer contended that the claim

arose out of "the ownership, use or operation of any motorized vehicle" and was not covered by the policy.

[14] Weiler J.A., for the court, rejected the insurer's contention. She said, at p. 331:

> This is because the words "ownership", "use", and "operation" in the exclusion clause all connote some aspect of control in relation to a vehicle by the person insured. That is not the allegation here. Here, the allegations in the claim relate to responsibility or control over the acts of another person without suggesting that David Sole [the insured] had any control over the vehicle driven by that person. Liability for a negligent act or omission will be imposed in situations where there is a sufficient relationship between the injured party and another person, which makes it reasonable to conclude that the other person owed a duty towards the injured party and should have foreseen that he would be injured. This liability does not depend on any aspect of control in relation to a motor vehicle. Chadwick J. [the motion judge] was correct in concluding that the negligence alleged against Sole was outside the exclusionary clause in the policy.

[Emphasis added.]

[15] Counsel accept the principle set down in Cella. They also acknowledge that the facts in Cella are different than the facts in this case. They disagree, however, on whether those factual differences compel a different result.

[16] In the present case, unlike Cella, it is alleged that Mr. Silverthorne had control over the vehicle. His alleged negligence arises out of the exercise of that control by way of permitting Ms. Bachelor to drive the vehicle.

[17] Mr. Silverthorne, unlike the defendant in Cella, had possession and control of the vehicle by virtue of the consent given to him by his mother, the owner. In the exercise of that control, he permitted Ms. Bachelor to operate the motor vehicle. Mr. Silverthorne was in control of the vehicle and he chose to exercise that control by putting the vehicle to a particular use, that is, the operation of the vehicle by Ms. Bachelor.

[18] Applying the principle set down in Cella, supra, I conclude that the allegations do relate to the use of the motor vehicle by Mr. Silverthorne. Consequently, any claim that Ms. Willson may have against Mr. Silverthorne is not covered by the homeowner's policy issued by Gore Mutual.

[19] I am fortified in my conclusion by Warren v. Martin, [1998] N.S.J. No. 373 (QL) (S.C.) [reported [1999] I.L.R. 1-693]. In Warren, supra, Martin had permission to use a motorcycle owned by his father. He allowed his friend to give another friend a ride on the motorcycle. An accident occurred and the passenger sued Martin for negligence alleging that he should not have allowed an inexperienced operator to drive the motor vehicle. Martin claimed that he was covered by his parents' homeowner's insurance policy. The insurer relied on an exemption to coverage framed in the same language as the exemption relied on in this case. Hall J. distinguished Cella on the basis described above, and ruled in favour of the insurer, stating at para. 9 [P. 5707 I.L.R.]:

> In the present case there is no question that Richard Martin had control of the motorcycle as demonstrated by his being in possession of it, by consenting to

> Germaine Ashe driving it and by first refusing to permit the plaintiff to ride on it and then consenting.

[20] In reaching the conclusion that Gore Mutual is not obliged to defend the third party action brought against Mr. Silverthorne, I have considered Mr. Amey's forceful arguments that any ambiguity in the insurance policy must be resolved against the insurer and that interpretations of insurance contracts which result in gaps in coverage should be resisted. Both arguments have force and may play a role in interpreting an insurance policy where the language is unclear or ambiguous. I find no ambiguity in the word "use" as it appears in the exemption relied on by Gore Mutual as it applies in the circumstances of this case.

[21] I would allow the appeal, set aside the order below and make an order declaring that Gore Mutual does not owe a duty to defend the third party action brought against Mr. Silverthorne. Gore Mutual is entitled to its costs here and below.