CITATION: Wawanesa v. SC Construction Ltd., 2012 ONSC 353
COURT FILE NO.: CV-11-418542
DATE: 20120126

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Wawanesa Mutual Insurance Company / Applicant

AND:

S.C. Construction Ltd. / Respondent

BEFORE: Justice E. P. Belobaba

COUNSEL: Ryan J. Coughlin for the Applicant, Wawanesa

James V. Leone for the Respondent, SC Construction Ltd.

Martin E. Tiidus for the Intervener, State Farm

Emily Schatzker for the Intervener, Caribbean Heat Family Restaurant

HEARD: January 9, 2012

ENDORSEMENT

[1] A friend or co-worker asks if he can borrow your car to run an errand. His car is being repaired. You let him do so. You've seen him drive his own car many times. You assume he has a driver's licence. You don't ask him to produce it for your inspection. You just hand over the keys. We've all done this.

[2] Most of us are aware of the provision in our automobile insurance policy that promises coverage if we allow someone else to drive our car with our consent.[1] However, we may not be as familiar with Statutory Condition 4(1) that says we cannot "permit" any other person to drive the insured automobile "unless the ... other person is authorized by law to drive it."

[3] So to return to our narrative: while driving your car with your permission, your friend or co-worker is involved in a personal injury accident. The injured party sues you as the insured owner. Unfortunately, as it turns out, your friend or co-worker does not have a valid driver's licence.

---

[1] *Ontario Automobile Policy* (OAP 1), section 3.2.

[4] Your insurer refuses to provide full coverage because you "permitted" your friend to drive without first making sure that he was "authorized by law" to do so and thus breached Statutory Condition 4(1) in your policy. Is your insurer entitled to deny coverage on these facts? Does the law require that you always check for a valid driver's licence before letting anyone borrow your car? These are the questions that are raised in this application.

The facts in brief

[5] Jason worked as a general labourer for SC Construction, a small family-owned carpentry company. He drove his car to and from work almost every day. One day his car didn't work. His boss Giuseppe, one of the two brothers who ran the company, let him take the company van home and drive it back the next morning. He didn't ask to see Jason's driver's licence. That evening while driving the van, Jason was involved in a personal injury accident.[2] He grew up and was licensed to drive in Trinidad. He did not have an Ontario driver's licence. After being interviewed by Wawanesa's investigator, Jason disappeared. He has not defended the personal injury action, has not filed a notice of intent in this application and cannot be located.

The application

[6] Wawanesa asks for a declaration that the insured, SC Construction, breached Statutory Condition 4(1) by letting Jason drive the company van when he was unauthorized by law to do so, and Statutory Condition 1(1) by failing to notify the insurer of a material change in risk. Wawanesa also asks for a declaration that it does not have a duty to defend or indemnify or pay any costs or disbursements relating to SC's defence of the civil action that has been commenced as a result of the employee's involvement in the personal injury accident.

[7] If SC is found in breach of either of the Statutory Conditions, Wawanesa's coverage would drop from the $1 million policy limit to the $200,000 minimum limit under s. 258 of the *Insurance Act*.[3] The injured plaintiff in the personal injury action would also be entitled to indemnification from the intervener State Farm as his underinsured insurer if the losses are greater than $200,000 and damages, if proven, from the intervener Caribbean Heat Family Restaurant. SC would be liable to repay Wawanesa and State Farm for any monies paid out by them to the injured plaintiff.

---

[2] Rather than going home and parking the van as Giuseppe told him to do, Jason drove to the Caribbean Heat Family Restaurant where he had dinner and drank two beers and a whisky. After the accident, he was charged with impaired driving. I don't know if he was convicted. In any event, the alleged DUI is not before me. There is no suggestion that SC should have known that Jason would drive the van after having several drinks. The only issue before me is whether SC should have known that Jason did not have an Ontario driver's licence or should have asked him to produce it before letting him drive the van home that evening.

[3] R.S.O. 1990, c.I.8

[8] Needless to say, if SC is found to have "permitted" Jason to drive its van in breach of the Statutory Conditions, the liability implications for the company would be significant. Nonetheless, my obligation is to apply the law as it applies to the facts in this case whatever the outcome.

The applicable law

[9] The applicable law, in a nutshell, is this: an insured will not be in breach of Statutory Condition 4(1) if he acts reasonably in all the circumstances. Unless the insured knew or should have known that the driver didn't have a valid driver's licence, or unless in the circumstances he should have asked to see the actual licence, it cannot be said that he "permitted" the driver to in breach of the Statutory Condition.

[10] The basis for the 'reasonable person' test as it applies to Statutory Condition 4(1) and this particular understanding of the word "permit" can be traced to the Supreme Court of Canada's decision in *Sault Ste. Marie*[4] and its recognition of a 'due diligence' defence in strict liability cases. Justice Dickson, as he then was, noted that the key question was whether the accused took reasonable care and "what a reasonable man would have done in the circumstances."[5]

[11] Five years later, in *Co-Operative Fire & Casualty*[6] the Supreme Court specifically considered the predecessor to Statutory Condition 4(1) which also used the word "permit." The Supreme Court held that "if 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." [7]

[12] Last year, in *Tut v. RBC General Insurance*[8] the Court of Appeal explained and expanded on the decision in *Co-operative Fire* as follows:

> 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' … the proper test to be applied to determine whether an insured permitted his or her vehicle to be

[4] [1978] 2 S.C.R. 1299.

[5] *Ibid*., at para. 60.

[6] *Co-operative Fire & Casualty Co. v. Ritchie*, [1983] 2 S.C.R. 36 at 44-45.

[7] *Ibid*., at 44-45. (Emphasis added).

[8] (2011) 107 O.R. (3d) 481 (C.A.).

> operated in breach of the statutory condition is what the insured knew, or ought to have known, under all the circumstances.[9]

[13] Whether there has been a breach of Statutory Condition 4(1) - that is whether the insured acted reasonably in all the circumstances - is a question of fact in each case. The case law provides some guidance in this regard, particularly with regard to situations involving an employer who permits an employee to drive the employer's automobile:

- Where the employee was hired as a driver and a valid driver's licence is thus a necessity, it is reasonable and prudent that the employer take proper precautions to avoid a contravention of the Statutory Condition – such as having a proper system or policy in place to ensure that employees hired as drivers have the required driver's licence or asking to see the actual licence.[10]

- Where the employee was not hired as a driver and a valid driver's licence is not necessary and there are good reasons to believe that he or she has a driver's licence, it is not unreasonable to let the employee drive the employer's vehicle occasionally without first demanding to see the actual licence.[11]

[14] The question here is whether Giuseppe (a directing mind of SC) acted reasonably in all the circumstances when he let Jason take the van home without first checking to see if he had a valid Ontario driver's licence.

Decision

[15] In my view, on the facts herein, Giuseppe and SC did not act unreasonably in letting Jason take the van home that evening without first checking his driver's licence. Wawanesa has not established a breach of Statutory Condition 4(1).

Analysis

(1) Statutory Condition 4(1)

---

[9] *Ibid*., at paras. 38-39.

[10] *Miller v Carluccio,* [2008] O.J. No. 1830 (C.A.); *Peters v. Saskatchewan Government Insurance Office*, (1956) 2 D.L.R. (2d) 589 (Sask. C.A.); *Circle M. Freightlines Ltd. v. Insurance Corporation of British Columbia,* [1979] B.C.J. No. 779 (B.C.S.C); *Lawrence Campbell Trucking Ltd. v. Insurance Corp. of British Columbia,* [1993] B.C.J. No. 114 (B.C.S.C.)

[11] *Chilcotin Holidays v. ICBC*, 1997 CarswellBC 869 (B.C.S.C.)

[16] First, consider the employer, SC Construction. SC is a small, family run carpentry business. Started by the father Carmelo Salpietro, SC is run today by his two sons, Giuseppe and Attilio, with part-time office help being provided by his daughter Mimma (who works out of her home office).[12] Giuseppe and Attilio hire employees as needed. They usually have about six to eight employees who work under their direction at the job-sites.

[17] SC has five vehicles on its insurance policy, three of which are used in the carpentry business.[13] Only the six members of the Salpietro family are listed as drivers – the father and mother, the two sons and two daughters. As Mimma explained, all of the family members were listed because when they first took out the policy, they were all still living together in the family home. I find that it was reasonable to list all of the family members as potential drivers.

[18] The employees made their own way to the job-sites. Some came by car; others took public transit. Joe, or another employee using his own car, would sometimes pick them up at the closest subway station. The employees were hired as labourers. None of them was hired to drive a company vehicle. None of them ever drove a company vehicle during work hours. "We weren't supposed to," said employee G. St. Hilaire. Only Giuseppe and Attilio drove the SC vehicles. There was thus no need for any policy or procedure about employees driving a company truck or van. As Mimma put it: "There was no need to ask for licences because we don't hire drivers. We don't need drivers, so I wouldn't ask any employees for a driver's licence." I find this to be a completely reasonable explanation. There was no "failure" to take reasonable steps to verify an employee's driver's licence because there was no need to do so.

[19] Next, consider what Giuseppe or SC knew about Jason. Jason had worked for SC for about ten years. He drove an older model Honda to and from work. He would often drive to Giuseppe's house, leave the car and go with Giuseppe in the van to the job-site. (Giuseppe had exclusive use of the SC van in question.) Jason's car had Ontario licence plates and children's car-seats. On several occasions, Giuseppe saw Jason driving with his wife and two young children who were sitting in the back in the car-seats. Jason referred to the car as his vehicle.

[20] Several other employees and a client provided affidavit evidence supporting these observations: that Jason drove the Honda to and from work; that he was often seen driving with his spouse and two children who were in the car-seats in the back; and that they all assumed he had a licence.

[21] Giuseppe's evidence was that he believed that Jason had a driver's licence. He would never have given the van to Jason that night to drive home if he thought otherwise. Before the

---

[12] Mimma also runs a restaurant.

[13] The insurance policy only shows four vehicles but Mimma, who is responsible for the insurance, says there were five.

night in question, and over the nine or ten years of his employment, Giuseppe let Jason take the van home three or four times – always at night, and only when his car was not working. Jason was allowed to drive home and return in the morning to pick up Giuseppe who would then drive them to the job-site.

[22] On the day in question, May 4, 2008, Jason's car wasn't working, so Giuseppe picked him up that morning at a coffee shop and they drove to the job-site. They worked together all day on a home renovation. Giuseppe let Jason drop him off at his house and take the van home. Jason was to return in the morning and they would drive to the job-site.

[23] I find that there was nothing unreasonable in Giuseppe's conduct. Giuseppe and SC had good reason to believe that Jason had a valid driver's licence - the many years of seeing Jason drive the Honda to and from work; having him drive Giuseppe home; seeing Jason driving with his wife and kids. Giuseppe was not permitting Jason to drive the van during work hours for purely work-related purposes. He was doing Jason a favour - something that any friend or co-worker would have done in similar circumstances.

[24] Jason was not employed by the insured as a driver. He was very well known to the insured. He appeared to all who saw him or spoke with him to be driving his own vehicle on a regular basis. He was allowed to take the van home on the evening in question because his car wasn't working. In my view, it was reasonable for the insured to assume, on the facts herein and without verifying, that the driver had a valid license as required by the Statutory Condition.

[25] I therefore conclude that SC acted reasonably in allowing Jason to drive the company van on May 4, 2008. Or, to make the point more precisely, the insurer Wawanesa has failed to prove that the insured SC knew or ought to have known, in these particular circumstances, that Jason was not authorized to drive.

(2) Statutory Condition 1(1)

[26] The insurer has also failed to prove that the insured breached Statutory Condition 1(1) which requires that the insured promptly notify the insurer in writing of any material change in risk to the contract and within the insured's knowledge.

[27] The case law is clear that when a driver becomes a regular or habitual user of an insured's automobile, he or she must be added to the policy.[14] This would be a material change in risk. Jason, however, did not have regular or habitual use of the company van. As I have already found, over the nine or ten years of employment he was only allowed to use the van to drive himself home on the four or five occasions that his own car wasn't working or was being

[14] *Canadian General Insurance v. State Farm Mutual* [1957] O.R. 257 (C.A.) at para. 16; *Campos v. Aviva Canada Inc.*, 2006 CarswellOnt 3512 (S.C.J.) at para. 16.

repaired - about once every two years.[15] This was not a regular, habitual or even remotely predictable use. There was no breach of Statutory Condition 1(1).

Disposition

[28] Wawanesa's application is dismissed. The insurer has not established a breach of either Statutory Condition 4(1) or 1(1). It follows from this that the insurer, Wawanesa has a duty to defend and indemnify its insured, SC Construction, with regard to Action No. CV-09-380441.

[29] If a formal declaration is needed making it clear that Wawanesa does have this duty to defend and indemnity, I am granting the alternative relief sought by SC and lifting the stay imposed by Justice Low in action number CV-09-380441-00A1.

[30] The appropriate costs award on this application was discussed with counsel before the hearing began. Based on these discussions, I find it fair and reasonable to fix costs, on a partial indemnity basis, at $17,000 all-inclusive, payable by Wawanesa to SC Construction within 30 days.

[31] I am obliged to counsel for their co-operation and assistance.

Belobaba J.

Date: January 26, 2012

[15] Counsel for Wawanesa asked Giuseppe in cross-examination if he could recall over what period of time the four or five car-lending incidents occurred. Giuseppe's response was "Oh, I don't remember. The whole time he was working with us, like within, I don't know, three years." This seems to suggest that all the car-lending incidents had taken place over the last three years of employment. I prefer to rely on Giuseppe's affidavit evidence that provided a much broader timespan: that the four or five times Jason was allowed to take the van home occurred over the entire nine or ten years of employment. In any event, nothing really turns on this. In either scenario, whether once every seven months or once every two years, Jason was not a regular or habitual driver. More importantly, the "next usage" was not something that could be foreseen or predicted.