Docket.:CA160678
Date: 20000407

NOVA SCOTIA COURT OF APPEAL

[Cite as: *Holdbrook v. Emeneau* , 2000 NSCA 48]

Chipman, Pugsley and Bateman, JJ.A.

BETWEEN:

BRUCE HOLDBROOK, operating as Best Print Appellant - and - **DAVID EMENEAU, TRIDENT CONSTRUCTION COMPANY LIMITED**, **EMENEAU CONSTRUCTION LIMITED**, **CASTLEROCK ENTERTAINMENT INC**. and **NEEDFUL PRODUCTIONS LTD**. Respondents	)	R. Malcolm Macleod, Q.C. for Holdbrook (Appellant) W. Augustus Richardson for Castlerock and Needful (Respondents) George W. MacDonald, Q.C. for Emeneau Construction (Respondent) Appeal Heard: March 30, 2000 Judgment Delivered: April 7, 2000

THE COURT: The appeal is dismissed, per reasons for judgment of Pugsley, J.A.; Chipman and Bateman, JJ.A., concurring.

Pugsley, J.A.:

[1] The central issue in this appeal is the interpretation to be placed on the words "loss or damage arising from the ownership, use or operation of [the described] automobile", which appear in Section A of the standard motor vehicle liability policy in use in Nova Scotia, as mandated by s. 114(1)(a) of the **Insurance Act**, R.S.C. 231 (1989).

Background:

[2] The plaintiff/appellant, Bruce Holdbrook, operating as Best Print (hereinafter called Best Print) was a tenant, carrying on printing operations in a commercial warehouse, located at 39 Starr Street, Lunenburg.

[3] The plaintiffs/respondents, Castlerock Entertainment Inc., and Needful Productions Ltd., (hereinafter called Castlerock) were also tenants in the same premises, storing materials to be used in the production of the film "Delores Claiborne".

[4] The warehouse was owned in part by the defendant David Emeneau.

[5] On May 31, 1994, the warehouse, and contents, were destroyed by fire resulting from an explosion arising from an unsuccessful attempt by Mr. Emeneau to commit suicide while sitting in the driver's seat of a motor vehicle (the Truck), parked in the warehouse. The Truck was owned by Emeneau Construction Limited, a company controlled by Emeneau (the Company).

[6] Best Print was paid approximately $129,000.00, and Castlerock approximately $403,000.00, by their respective fire insurers, for the loss and damage resulting from the fire.

[7] The two fire insurers, initially represented by the same counsel, commenced a joint subrogated action on November 21, 1995, against Mr. Emeneau, and a separate company, also a part owner of the warehouse. The Company was later added as a party defendant.

[8] Shortly after the statement of claim was served, the insurer of Best Print discovered that it also issued a policy to Mr. Emeneau and as a result obtained new counsel, who then amended the statement of claim to add a paragraph alleging that the damages suffered by Best Print occurred "as a result of the ownership, use or operation" of the Truck.

[9] In the defence filed on behalf of the Company by its auto insurers, it is stated in part:

> The actions by Emeneau in attempting to commit suicide by setting fire to himself while seated in the cab of a pickup truck owned by Emeneau Construction was not the result of the ordinary and well-known activities to which the pickup truck was put and further then there was no causal relationship between the damages suffered by .... (Best Print) and Emeneau and the ownership, use or operation of the pickup truck.

[10] Mr. Emeneau had given, and signed, on August 16, 1994, a ten-page statement respecting the circumstances surrounding the loss to an insurance adjuster. In 1996, Mr. Emeneau suffered a head injury in a motor vehicle accident which left him unable to remember anything respecting the fire that occurred on May 31, 1994.

[11] At the commencement of trial in June, 1999, Mr. Emeneau's statement of August 16, 1994, was introduced without objection. Mr. Emeneau's counsel conceded that his client had no sustainable defence to the claim advanced, and judgment was entered on behalf of Best Print and Castlerock against Mr. Emeneau personally for the amounts of the losses sustained.

[12] All parties finessed the procedural shortcomings by consent, and agreed that the trial judge should adjudicate the sole remaining issue, i.e.:

> Whether or not the loss sustained by Best Print arose from the ownership, use or operation of the Chevrolet pick-up truck which had burned in the fire.

[13] We have been advised by counsel for Mr. Emeneau that Mr. Emeneau "takes no position in this matter". He was not represented at the appeal.

The Statement of August 16, 1994

[14] Mr. Emeneau stated in part:

> When I had breakfast Tuesday morning, May 31, 1994, I woke up around 5:00 a.m. It was in the next 1 1/2 hours that I decided to take my own life with the last 1/2 hour before I left, the critical time when I thought I was going to explode .

> I was upset about many things, mostly my work. . . I was concerned about my financial situation . . .
>
> I went to the warehouse, opened the door, which is a sliding type door, backed the vehicle into the warehouse and partially closed the door.
>
> . . .
>
> I then found a red plastic container that had gas in it.
>
> . . .
>
> I then poured gas on the seat of the truck passenger side and some of the concrete floor, I believe.
>
> . . .
>
> I put the container on the concrete floor beside the driver's door when I was finished and closed the driver's door.
>
> . . .
>
> . . . I got back in the truck, took a wooden match from my pocket, and lit it with my thumbnail. There was an explosion.
>
> . . .
>
> I guess the heat was so great that my reaction was to get out. . . . I did not go to the Starr Street building with the intention of setting the vehicle on fire. I went there to take my life by putting myself in the cab and setting the cab on fire . . . I didn't think about what might happen to the truck. . . I didn't think about what might happen to the building. I was only thinking about taking my life, nothing else... There was no other purpose for my going to the building that morning. . . Fire just came to my mind. That was the only thing that came to mind. The only other thought I had was in the fall of '93 when I thought of crashing my truck.

[15] Mr. Emeneau confirmed that the keys were in the ignition, that he was "almost certain" that the ignition switch was off, and that he was not in the process of turning the switch on or off when the fire started.

[16] After the explosion, Mr. Emeneau ran outside the warehouse, and was taken by a night watchman to the local hospital where his injuries were satisfactorily treated.

Decision of the Trial Judge (now reported at (2000), 13 C.C.L.I. (3d) 259), and (2000), 179 N.S.R. (2d) 233)

[17] After referring to the two-part test set forth by the Supreme Court of Canada in **Amos v. Insurance Corp. of British Columbia**, [1995] 3 S.C.R. 405, Justice Wright, of the Supreme Court, stated:

> In applying the *Amos* test to the facts of this case, it must first be determined whether the loss of the plaintiff Best Print resulted from the ordinary and well- known activities to which vehicles are put. In my judgment, the circumstance that Mr. Emeneau was momentarily sitting behind the wheel in the cab of the parked truck before triggering this explosive fire does not reflect the proper analysis. The fact of the matter is that Mr. Emeneau was, as evidenced by his own statement, setting out to utilize the truck as a funeral pyre without any thought whatsoever of its consequences beyond ending his life. Far from being an ordinary and well-known activity to which vehicles are put, Mr. Emeneau's actions so characterized can only be said to have been highly extraordinary. Accordingly, I find that the first branch of the *Amos* test has not been satisfied.
>
> Even if I am incorrect in that finding, given the liberal interpretation that is to be afforded to the subject wording of the policy emanating from the *Insurance Act* . . neither am I satisfied that the second branch of the *Amos* test has been met. . . .
>
> The proximate cause of Best Print's loss was obviously the overt act of Mr. Emeneau of pouring gasoline in and under the truck and igniting it with a match. In my view, this was an intervening act, independent of the ownership, use or operation of the vehicle, which broke the chain of causation. ... The truck was merely the situs of that act of destruction which sets this case apart from many of the others. In my view, the connection between Best Print's loss and the ownership, use or operation of the Emeneau vehicle is more aptly characterized as merely incidental and not one where the use or operation of the vehicle can be said to have contributed to or added to the loss in any causative sense.
>
> In the result, I find that Best Print's loss did not arise from the ownership, use or operation of the Emeneau vehicle within the meaning of the policy. Neither the purpose test nor the causation test has been satisfied and the action of Best Print against Emeneau Construction Limited is dismissed accordingly.

Analysis

[18] Justice Wright employed the two-part test laid down by the Supreme Court of Canada in **Amos** and referred in particular to the following passage of the judgment of Major, J., speaking for the court, at p. 415:

> The two-part test to be applied to interpreting this section is:
>
> 1. Did the accident result from the ordinary and well-known activities to which automobiles are put?
>
> 2. Is there some nexus or causal relationship (not necessarily a direct or proximate causal relationship) between the appellant's injuries and the ownership, use or operation of his vehicle, or is the connection between the injuries and the ownership, use or operation of the vehicle merely incidental or fortuitous?
>
> This two-part test summarizes the case law interpreting the phrase "arising out of the ownership, use or operation of a vehicle", and encompasses both the "purpose" and "causation" tests posited in the jurisprudence.

[19] Both parts of the test must be met in order for Best Print to succeed on this appeal. (**Jenkins (litigation guardian of) v. Zurich Insurance Canada** (1998) 193 N.B.R. (2d) 135, at 141.)

[20] It is helpful to consider the facts in **Amos**. The plaintiff, a Canadian citizen residing in Vancouver, was driving his van in East Palo Alto, California, in August of 1991.

[21] After proceeding through an intersection, he slowed down and steered to his right to avoid three men crossing directly into his path. Three other men emerged from the bushes on the right side of the street. Mr. Amos was then surrounded by six men. He locked the doors of the van and kept moving slowly ahead. The assailants pounded on the windows and sides of the van, and one pointed a gun and shot Mr. Amos, the bullet

lodging in his spinal cord. While he escaped, Mr. Amos sustained disabling and permanent injuries. He was insured by the Insurance Corporation of British Columbia under a standard automobile insurance policy. His application for medical and other benefits pursuant to the policy were denied. The decision of the trial court to dismiss his action was confirmed on appeal.

[22] On further appeal to the Supreme Court of Canada, the appeal was allowed.

[23] Justice Major had no difficulty in concluding that Mr. Amos had satisfied the first, or purpose, test.

> The appellant here was driving his van down the street; the accident clearly resulted "from the ordinary and well-known activities to which automobiles are put". (p. 415-416)

[24] Justice Major used the words "result from", rather than "arise from", or "arising out of", in formulating the purpose test. ("Did the accident result from the ordinary and well-known activities to which automobiles are put?")

[25] In his comments on the causation test, Justice Major noted at p. 417:

> The phrase "arising out of" is broader than "caused by" and must be interpreted in a more liberal manner.

[26] In **Amos** the court was called upon to interpret Section 79(1) of the Revised Regulations (1984) under the **Insurance (Motor Vehicle) Act of British Columbia**, which reads, in part:

> ...the corporation shall pay benefits to an insured in respect of death or injury caused by an accident that arises out of the ownership, use or operation of the vehicle, and that occurs in Canada or the United States of America . . . (emphasis added)

[27] Here we are asked to interpret Section A of the standard automobile policy which reads as follows:

> The insurer agrees to indemnify the insured and, in the same manner and to the same extent as if named herein as the insured, the other person who with his consent personally drives the automobile or personally operates any part thereof, against the liability imposed by law upon the insured or upon any such other person for loss or damage arising from the ownership, use or operation of the automobile and resulting from .... (emphasis added)

[28] It is not necessary to decide in this case whether the phrase "result from" is equivalent to the phrase "caused by", as all counsel have agreed that the test set out by Major, J., in **Amos** should be adopted. In view of my conclusion respecting this appeal, the difference in wording between Section 79(1) and Section A is not determinative.

[29] The interpretation of the phrase "ownership, use or operation" is the central issue.

[30] I conclude that consideration of the word "ownership" does not assist Best Print's position.

[31] The ownership of the Truck was not a sufficient connecting factor, nor did it, in the circumstances of this case, serve to broaden the activities of Mr. Emeneau to enable Best Print to fulfill the requirements of the purpose test.

[32] The words “use or operation” connote different activities. (**Stevenson v. Reliance Petroleum Ltd.**, [1956] S.C.R. 936).

[33] In order to meet the purpose test, Best Print need only establish that the "accident" resulted from either the use, or operation, of the Truck. (See comments of Laskin, J.A. on behalf of the Ontario Court of Appeal in **Vijeyekumar et al. v. State Farm Mutual Automobile Insurance Co.** (1999), 175 D.L.R. (4th) 154, at 162. An application for leave to appeal to the Supreme Court of Canada, filed on behalf of State Farm on September 15, 1999 (S.C.C.A. 438), is presently outstanding.)

[34] Counsel for Best Print submits the words "use or operation" should be interpreted broadly, as mandated by **Amos**, and refers us to the definition of the word “use” as found in the *Random House College Dictionary* (New York: Random House Inc., 1984) as:

> To employ for some purpose, put into service, make use of.

[35] Counsel for Best Print submits we should frame Mr. Emeneau’s activities by characterizing his individual actions with respect to the employment of the gasoline, and its ignition, more generally, as a use of the Truck to commit suicide.

[36] Counsel's position is expressed in his factum in this way:

> Using a motor vehicle to commit suicide is a recognized activity to which motor vehicles are sometimes put. Indeed, it is common knowledge that motor vehicles are used to commit suicides in various ways.
>
> Sometimes the suicide is accomplished by carbon monoxide poisoning, as in *Vijeyekumar*. Perhaps even more frequent is a suicide accomplished by driving the vehicle into a stationary object or into oncoming traffic. Sometimes the vehicle is set afire. Whatever method is used, the motor vehicle is not merely the situs of act. On the contrary, the motor vehicle is used because it is a motor vehicle and as such is suited in a certain way to accomplishing the suicide.

[37] I do not agree with this submission.

[38] Even if we framed the activities as simply an innovative mode of committing suicide, they most certainly do not constitute "ordinary" activity.

[39] The word "ordinary" is defined in the *Random House Dictionary* (1971) as:

> . . . of the usual kind, not exceptional; common place. . . something regular, customary, or usual . . .

[40] I agree with Justice Wright's characterization of Mr. Emeneau's activities as "highly extraordinary".

[41] I further agree with Justice Wright's conclusion that:

> The truck was merely the situs of that act of destruction which sets this case apart from any of the others.

[42] Any confined space would have served Mr. Emeneau's objective. (I note that counsel were in agreement that the "explosion" described in the 1994 statement, which

led to the fire, resulted from the ignition of the match in the volatile atmosphere of the Truck's cab, not from an explosion of the gas tank.)

[43] Here the Truck was not "used" as an automobile but as a receptacle to accumulate and store gas fumes.

[44] The case of **Vijeyekumar et al. v. State Farm** (1998), 38 O.R. (3d) 590 is relevant. The insured's widow and daughter sued his insurer to recover death benefits pursuant to his automobile insurance policy. The insured died of asphyxiation from carbon monoxide poisoning. He was found unconscious in the front seat of his vehicle, which was located in the garage behind a closed door. The engine was running and the doors and windows of the vehicle closed. A flexible hose attached to the exhaust pipe led through the closed trunk into the back of the car. The head of the hose rested on the front centre console where the insured was seated.

[45] Justice Molloy of the Ontario Court (General Division) concluded, at p. 623:

> . . . I find that the manner of [the insured's] death was not an ordinary "use" of an automobile.

[46] As noted, her decision was upheld on appeal.

[47] Justice Molloy did, however, find that the insured's activities fell within the ordinary operation of a motor vehicle. She stated, at 623:

> A car is being operated if it is being driven or if it is merely sitting idle with its engine running.

[48] Justice Wright appropriately concluded:

> The distinction to be made between the *Vijeyekumar* case and the case at bar is that in the former, it was the running of the car's engine which produced the carbon monoxide fumes that directly caused the death of the insured. There was nothing external about it. In the present case, however, the evidence was that the engine of the truck was not running after it was parked in the warehouse, nor was the mechanical operation of the truck otherwise a factor in any way.

[49] We are directed by counsel for Best Print to an article written by David M. Shoemaker, entitled "Arising out of the Ownership, Use or Operation" (1997), 76 Can. Bar Rev., 428.

[50] After reviewing Canadian cases, both before and after **Amos**, Mr. Shoemaker writes, at pp. 434-435:

> Now, almost any activity involving a motor vehicle and not just those which are "ordinary and well-known", tend to fall within the statutory coverage. . . Therefore, in applying the "purpose test", it would be far more accurate to ask: Did the accident result from a recognized activity to which a vehicle might be put?

[51] Mr. Shoemaker concludes, at p. 447:

> Now, as long as it can be said that the accident arose from an activity to which the vehicles are occasionally or might be put, the "purpose test" is satisfied.

[52] In a similar vein, Prof. James Rendall writes in his comments on **Amos** (1996), 31 C.C.L.I. 1, at p. 8:

> Perhaps what we are seeing in the recent development of this area of insurance law is that "arising out of ownership, use or operation" is being read to mean that the phrase "is satisfied" so long as use of the vehicle can be identified as a "contributing" or "facilitating" cause, even though its contribution is somewhat marginal.

[53] Support for this position, counsel argues, is found in the decision of Justice Warren, in **Chan v. ICBC** (1994), 30 C.C.L.I. (2d) 60 (SCBC), at p. 65:

> In my view, where the injuries result from action taken by a person who was in the car or motor vehicle, that satisfies the purpose test.

[54] These comments should be viewed in light of the factual situation in **Chan**. Ms. Chan was a passenger in a motor vehicle operated by her boyfriend in the early morning hours. While asleep, she was struck in the arm and torso, by a brick that came through the windshield, that was lobbed by a person in a passing motor vehicle. The critical act occurred while the assailant's truck was being operated on a highway.

[55] Justice Warren's decision preceded the decision of the Supreme Court of Canada, in **Amos**.

[56] Some three months after Justice Major's decision was handed down, the **Chan** appeal was considered by the British Columbia Court of Appeal. Justice Finch, speaking for the court, in dismissing the appeal, (1996) 33 C.C.L.I. 1 (2d) 226, would appear to have narrowed the generality of Justice Warren's comments, in light of Justice Major's description of the purpose test, at p. 237:

> Operation of this unidentified vehicle on a highway was an ordinary and well-known use for a vehicle, and that operation was part and parcel of the venture in which the assailants were engaged.

[57] Justice Finch made these further comments at p. 230:

> It is implicit in the judgment therefore that either the driver of the unidentified vehicle threw the brick, or a passenger did so with the driver's knowledge and consent. If more than one person was involved, the irresistible inference is that the driver was engaged in a common enterprise with the person who actually threw the brick and that the driver had prior knowledge of the passenger's intention to throw a brick at another vehicle. I think one may also reasonably infer that the unidentified vehicle was being driven on a highway for that purpose, that is to say, to locate a target in circumstances where, after the assault with the brick, escape would be quick and identification next to impossible. (emphasis added)

[58] Justice Finch's closing comments at p. 240 place a particular perspective on the matter:

> Section 23 is remedial legislation. It was enacted to afford redress to motorists and their passengers who might otherwise suffer losses for which no remedy would exist. As with all such remedial legislation, it should be given a fair, large and liberal interpretation. It is obvious that if the Legislature had intended a more restrictive scope for its application, it could have chosen language apt for that purpose.

[59] We are referred to several classes of case involving stationary vehicles, as was the case here, where, it is submitted by counsel for Best Print, that the court gave "meaning and definition" to the purpose test.

[60] Those classes include:

- the repair and maintenance cases (including **Gramak Ltd. v. State Farm Mutual Automobile Insurance Co.** (1975), 10 O.R. (2d) 518, aff'd (1976), 12 O.R. (2d) 553 (Ont. C.A.); **Shelton v. I.C.B.C.** (1991) 7 C.C.L.I. (2d) 48 (B.C.S.C.) aff'd (1993) 15 C.C.L.I. (2d) 161 (B.C.C.A.));

- the in transit cases, including cases involving the actions of animals or children located in parked cars (such as **Boell v. Schinkel** (1991), 5 C.C.L.I. (2d) 189 (Ont. Gen. Div.); **Dickinson, et al. v. Motor Vehicle Insurance Trust** (1987), 71 A.L.J.R. 533, (High Court of Australia)).

[61] They cases are, in my opinion, all distinguishable.

[62] In each of the repair cases, the courts justifiably concluded that the activities carried on were "ordinary and well-known activities to which automobiles could be put".

[63] While the vehicles were stationary in the "in transit" cases, it was relevant that in each instance the driver intended to resume the operation once his task was completed.

[64] Of particular interest is the **Dickinson** case, to which Justice Major referred in **Amos**.

[65] The defendant father had parked his car temporarily in order to buy some records at a nearby record store. He left his two-year-old daughter and four-and-a-half-year old son in the vehicle. While the father was absent, the son began to play with a box of matches which he found between the two bucket seats. A floor mat was ignited, the fire spread, and the daughter, who was asleep, suffered significant injury before she was rescued by a passer-by.

[66] The five judges sitting on the High Court concluded at paragraph 12:

> There can, in our view, be no doubt that the motor car was being used within the meaning of the Act at the time in which the appellant sustained her injuries. It was in use to carry the appellant and her brother as passengers in the course of a journey which was interrupted to enable the father to do some shopping. There is no suggestion that the interruption was other than temporary. "Use" for the purposes of the Act extends to everything that fairly falls within the conception of the use of a motor vehicle and may include a use which does not involve locomotion. . .

[67] I have no difficulty in concluding that the use to which Mr. Emeneau put the Truck did not "fairly fall within the conception of the use of a motor vehicle".

[68] I do not accept the conclusions reached by Mr. Shoemaker in his article respecting the demise of the "purpose test". It is contrary to the very clear direction given by the Supreme Court in **Amos** and, in my view, if adopted, would extend coverage to "extreme and unpredictable lengths" (to quote Prof. Rendall, in another context, at p. 4 of his article).

Conclusion

[69] This accident did not arise, let alone result, from the ordinary and well known activities to which automobiles are put.

[70] As both components of the **Amos** test must be satisfied before coverage results, and as I have concluded that the loss sustained by Best Print does not satisfy the purpose test, it is not necessary to consider whether there is some nexus or causal

relationship between the loss suffered by Best Print and the ownership, use or operation of the Truck.

[71] I would accordingly dismiss the appeal, with costs to each of the respondents in the amount of $1,000.00, together with disbursements.

Pugsley, J.A.

Concurred in:

Chipman, J.A.

Bateman, J.A.