NOVA SCOTIA COURT OF APPEAL

Citation: *Aviva Insurance v. PK Construction Ltd.*, 2021 NSCA 66

Date: 20210909
Docket: CA 499918
Registry: Halifax

Between:

Aviva Insurance

Appellant

v.

PK Construction Ltd.

Respondent

Judge:	The Honourable Justice Duncan R. Beveridge
Appeal Heard:	April 13, 2021, in Halifax, Nova Scotia
Subject:	Insurance: interpretation of the Nova Scotia standard form automobile policy
Summary:	The insured had fleet insurance placed with the appellant. On a Saturday, the insured purchased a used school bus that had been modified. It intended to use it to replace its smaller "Van" bus. Early on Sunday morning, a company employee, who was a named driver under the policy, had an accident with the bus. A handful of friends were passengers at the time. The insured notified the appellant about the new acquisition and the accident on Monday. The insured did not believe there would be any claims by the passengers arising out of the accident. Because the bus was inoperable, the insured asked it not be added to the policy. Claims ensued. The appellant refused to defend the claims. A motions judge determined as a question of law under *Rule* 12 the bus was covered as a "newly acquired automobile" under the policy because it was not so dramatically different as to sever the reasonable expectations of the parties.

Issues: Did the motions judge err in his formulation of the test for coverage for a newly acquired vehicle?

Result: There was no need to devise a legal test that depended on findings of material change in risk or the reasonable expectations of the parties, and then apply that test to the facts to arrive at a conclusion on coverage.

There was no ambiguity in the terms of the standard form policy—hence no need to refer to the reasonable expectations of the parties. If anything, the test developed and applied by the motions judge was too beneficial to the insurer, but the resulting order was correct. The insurer was required to defend and indemnify against the third party claims. The bus was an automobile as defined by the *Insurance Act*. The parties agreed that all of the other pre-conditions stipulated in the policy had been met. The appeal was therefore dismissed.

NOVA SCOTIA COURT OF APPEAL

Citation: *Aviva Insurance v. PK Construction Ltd.*, 2021 NSCA 66

Date: 20210909
Docket: CA 499918
Registry: Halifax

Between:

Aviva Insurance

Appellant

v.

PK Construction Ltd.

Respondent

Judges:	Beveridge, Fichaud and Van den Eynden, JJ.A.
Appeal Heard:	April 13, 2021, in Halifax, Nova Scotia
Held:	Appeal dismissed, per reasons for judgment of Beveridge, J.A.; Fichaud and Van den Eynden, JJ.A. concurring
Counsel:	Nadia MacPhee, for the appellant George MacDonald, Q.C. and George Franklin, for the respondent

Reasons for judgment:

INTRODUCTION

[1] This case is essentially about the proper interpretation of Nova Scotia's Standard Automobile Policy (SAP). Specifically, whether the Bus acquired by the insured was a "newly acquired automobile" within the meaning of the SAP. A motions judge found that it was.

[2] The appellant insurer says the motions judge applied the wrong test, which led to an incorrect outcome. For the reasons that follow, I would respectfully disagree. The motions judge, based on the record before him, made no reversible error in his ultimate conclusion, but I would arrive at the same result by a different route. I would therefore dismiss the appeal.

[3] I will set out sufficient background to provide context for the motions judge's reasons and why I would dismiss the appeal.

BACKGROUND

[4] The parties tendered an Agreed Statement of Facts. They asked the motions judge to determine whether, as a matter of law under *Civil Procedure Rule* 12, Aviva Insurance was obligated to defend and indemnify its insured, PK Construction Ltd. for a May 8, 2016 accident.

[5] Given the Agreed Statement, the factual background was not in dispute. Nonetheless, Aviva appears to advance on appeal an issue that is essentially one of fact or mixed law and fact. I will comment on this issue later. The essential facts follow.

[6] Peter Kalkman owns and operates PK Construction Ltd. The company carries on business in construction, excavation, property maintenance and septic tank installation.

[7] For a number of years, PK Construction had a commercial fleet insurance policy with Aviva, arranged through a broker, and all its vehicles were insured by Aviva under that policy.

[8] One of those vehicles was an 18-person 1994 Ford E350 Van, also described as a Ford Cutaway Van (Bus). This vehicle was used as a work vehicle to

transport employees and tools to job sites. It also served as a dry and clean-off site location for meetings and for employees to eat lunch. It was not to be used as a paid passenger bus; it was used for company purposes and Mr. Kalkman's personal use.

[9] Late Saturday May 7, 2016, Mr. Kalkman purchased for the company a 1997 Bluebird school bus. It had been modified to open at the rear to accommodate a vehicle. Bench seating and a kitchen table had been installed. The company intended to use the bus in a similar fashion as the Ford Cutaway Van (Bus)—that is to transport employees, tools, materials and equipment to job sites, for meetings and a lunch location.

[10] Mr. Kalkman also intended to use the vehicle for personal use to haul race cars. PK Construction already insured a 1993 International "Tilt Deck" truck used to transport cars and equipment.

[11] PK Construction understood from their insurance broker that it had two weeks to add vehicles to their Aviva policy. It therefore believed the Bus would be covered by their Aviva policy for up to two weeks from the date of purchase.

[12] Mr. Kalkman was unable to notify PK Construction's insurance broker on May 7 about the purchase of the Bus as it was the weekend and after hours when he brought it to the company premises.

[13] Early on Sunday May 8, 2016, the Bus was involved in a single-vehicle accident. The driver was Raymond Gates, a PK Construction employee who was named as an insured driver on the Aviva policy. Some of Mr. Kalkman's friends were passengers at the time of the accident.

[14] On Monday, May 9, 2016, a PK Construction employee requested the insurance broker to add the Bus to the Aviva policy and told the broker of the accident. Moments later, Mr. Kalkman called the broker to advise he did not want the Bus added to the policy as it was no longer usable, and he believed none of the passengers from the May 8 accident would be making a claim.

[15] It turns out he was wrong. Three of the passengers subsequently advanced claims against Raymond Gates, Peter Kalkman and PK Construction Ltd. Aviva declined to defend or indemnify these claims. It took the position the Bus was not covered by the policy. Its May 31, 2017 letter explained:

> Your Insurance policy does not provide coverage for this type of claim as our investigation of this incident determined that at the time of the accident, the vehicle in question was not insured by your Aviva policy. It would not be considered a "newly acquired vehicle". If we had been requested to add it to the policy, we would have refused because it would have involved a material change to the risk insured by your policy.

[16] Litigation ensued. The litigation mechanism is noteworthy. PK Construction filed a Notice of Action against Aviva. The accompanying Statement of Claim requested a declaration that the Bus was within the policy coverage and Aviva was obligated to defend and pay any valid claims arising out of the May 8, 2016 accident.

[17] Aviva's Statement of Defence admitted newly acquired automobiles were covered by the insurance policy, and it had provided coverage for such vehicles on other occasions, but those vehicles had either replaced existing vehicles or were of a similar nature to the vehicles already insured. By contrast, Aviva asserted the Bus was of a different nature and character and as such constituted a material change of risk, and they would not have insured it.

[18] I commented that the litigation mechanism was noteworthy because a Notice of Action puts the litigation on a path to a trial with attendant document production and discoveries. It is usually reserved for matters that are expected to require adjudication of disputed credibility or reliability of evidence. The trier of fact is then called on to make findings of fact.

[19] Yet, as evidenced by the Agreed Statement of Facts, there turned out to be no need for a trial to resolve disputed facts. The parties adopted the view that a motions judge could resolve the litigation by deciding a question of law.

[20] PK Construction moved pursuant to *Rule* 12 for an Order that as of May 7, 2016, the Bus was insured by Aviva and as a consequence, Aviva was required to defend its insured and pay any valid claims arising from the May 8, 2016 accident.

[21] The parties filed Briefs. Oral argument followed on February 26, 2020 before Justice John A. Keith of the Nova Scotia Supreme Court.

[22] By way of overview, PK Construction argued the Bus was automatically covered during the 14-day period it had to notify its insurer of a "newly acquired automobile". Furthermore, it was Aviva's burden to establish the Bus was not within coverage.

[23] PK Construction addressed Aviva's position there was no coverage because: the insurer would not have insured the Bus given the nature of the vehicle was fundamentally different than the insured's other vehicles; PK Construction was going to use the Bus in a manner fundamentally different than their other business vehicles; and, the Bus constituted a material change in risk.

[24] Aviva accepted it bore the burden to demonstrate there was no coverage. Its policy with PK Construction was a Nova Scotia automobile policy that insured all of its vehicles (a fleet policy). Under Section A – Third Party Liability, the insurer "… agrees to indemnify the insured ... against the liability imposed by law upon the insured ... for loss or damage arising from the ownership, use or operation of the automobile and resulting from bodily injury to or death of any person ...".

[25] The automobile insurance industry is regulated by the government in Nova Scotia through a combination of the office of the Superintendent of Insurance and the Governor in Council. The Governor in Council has the power to enact regulations, including the mandatory conditions for every automobile contract[1]. The Superintendent is responsible for approving the Standard Automobile Policy (SAP).

[26] Section 5 of the SAP defines "automobile":

> **5. Automobile Defined**
>
> In this policy except where stated to the contrary the words "the automobile" mean:
>
> (1) …
>
> (a) the "described automobile" which is an automobile, and trailer or semitrailer specifically described in this policy or within the description of insured automobiles set forth therein;
>
> (b) a "newly acquired automobile" which is an automobile, ownership of which is acquired by the insured and, within fourteen days following the date of its delivery to him, notified to the insurer in respect of which the insured has no other valid insurance, if either it replaces an automobile described in the application or the Insurer insures (in respect of the section or subsection of the Insuring Agreements under which claim is made) all automobiles owned by the insured at such delivery date and in respect of which the insured pays any additional

[1] s. 112; Automobile Insurance Contract Mandatory Conditions Regulations, NS Reg 226/2018, s. 2.

> premium required; provide however, that insurance hereunder shall not apply if the insured is engaged in the business of selling automobiles;

[27] The parties made no suggestion any language to the contrary existed in the policy. They agreed the Bus was not a named automobile. Hence, the sole avenue the Bus could be covered as "the automobile" is if it were a "newly acquired automobile" within the meaning of s. 5(1)(b).

[28] Aviva admits that it insured all automobiles owned by PK Construction and the Bus was an automobile purchased by its insured for use, at least in part, in its business. Nonetheless, Aviva says the Bus did not qualify as a newly acquired automobile because the risk to the insurer was fundamentally different from the other vehicles covered by the policy. Aviva would not have merely charged a higher premium, but, like any reasonable insurer, it would have refused to add the Bus to the policy.

[29] The motions judge reserved. His comprehensive and well-written reasons were released on July 30, 2020 (reported as 2020 NSSC 209).

[30] The parties could find no caselaw on point. Justice Keith canvassed related decisions from Nova Scotia and across the country to inform his analysis. Almost all of those decisions involved an insured who had purchased a "replacement" vehicle and the consequences where the insured had not notified the insurer within the specified 14 days of acquisition. I will comment on some of these later.

[31] The motions judge defined the issue he had to decide as follows:

> **ISSUE**
>
> [12] The issue is whether the Vehicle is a "newly acquired vehicle" under the terms of the Policy and, as such, would be automatically insured within 14 days of acquisition – regardless of whether the insurer had either notice, or an opportunity to deny coverage, or an opportunity to charge additional premium for any increased risk.

[32] Justice Keith offered his conclusion:

> **BRIEF CONCLUSION**
>
> [16] The parties concede that the question of law under consideration revolves around the meaning and scope of the phrase "newly acquired vehicle" as found in Nova Scotia's Standard Automobile Policy.
>
> [17] Accepting the agreed facts jointly submitted as accurate:

1. The Vehicle meets the definition of a "newly acquired vehicle" and was automatically covered under the Policy as at the date of the accident on Sunday, May 8, 2018 – which, for clarity, was within the 14-day period immediately following delivery to the insured on Saturday, May 7, 2016; and

2. The Defendant insurer has a duty to defend and pay any valid claims arising out of the accident on May 8, 2016 in accordance with the terms of the Policy.

[33] Justice Keith proceeded to carefully review the nature of insurance, the leading Supreme Court of Canada decisions on interpretation of insurance contracts, and decisions that had wrestled with insurance coverage for newly acquired vehicles. He synthesized the conditions that must be met before an additional, as opposed to a replacement vehicle is covered, as follows:

> [90] In my view, coverage is available for an additional (as opposed to replacement) vehicle under the terms of the Policy if all of the following conditions are met:
>
> 1. The insured insures all vehicles owned by the insured as at the date the insured acquired and took delivery of the additional vehicle in question;
>
> 2. The accident (or date of loss) is within 14 days of the date of delivery of the additional vehicle acquired by the insured. Pausing here, I emphasize that coverage may also be available *beyond* 14 days from the date of delivery to the insured, assuming all other conditions for coverage are met. The availability and scope of coverage for an additional vehicle after 14 days from the date of delivery raises issues of notice by the insured to the insurer. On this, I refer to *Lane in obiter* and MacKeigan, CJNS's distinction between claims by the insured for collision costs, on the one hand, and claims by third parties for personal injuries, on the other. However, it is not necessary to consider these sorts of distinctions and how the failure to provide timely notice may compromise coverage in the circumstances of this case. Here, the additional Vehicle was acquired, delivered, and then involved in an accident all within 48 hours, over the same weekend, and certainly within the first 14 days of the date of delivery. In my view, coverage is not dependent upon the insured providing notice within the first 14 days of an additional vehicle being acquired and delivered. I note that this is subject to all other conditions for coverage being met (e.g. all of the insured's vehicles being insured by the insurer and the obligation to act reasonably, which obligation is described below in greater detail below).

> 3. The insured acts reasonably in the circumstances; or in a manner that reflects the reasonable expectations of the parties (*Jesuit Fathers of Upper Canada*). That said, the reasonable expectations of the parties are circumscribed by the express terms of the Policy and, if necessary, the application of the *contra proferentem* rule (*Ledcor Construction*). Thus, for example, an insured must only pay any additional premium reasonably required and within a reasonable period of time (*Rodriguez* and *Sage*).
>
> [Emphasis in original]

[34] The motions judge identified Aviva's concerns that the Bus could not be considered a "newly acquired automobile" because it materially increased the risk which the insurer could reasonably be expected to cover. He accepted the issue of risk was relevant to the coverage issue. The motions judge concluded it would be informed by the reasonable expectation of the parties.

[35] He reasoned the nature of the newly acquired automobile would only become legitimate grounds to deny coverage in "rare and exceptional circumstances". This would require the new automobile to be so dramatically different and unique as to sever any reasonable expectation of coverage. The motions judge's conclusion was as follows:

> [94] Having said all that, in my view, the nature of a "newly acquired vehicle" only becomes legitimate grounds for denying coverage in rare and exceptional circumstances. The nature of the "newly acquired vehicle" must be so dramatically different and unique as to sever any reasonable expectation of coverage.

[36] I will set out later the judge's reasons that informed his conclusion about the appropriate test.

[37] The motions judge then applied the test to the facts found in the Agreed Statement of Facts and found that the insured met the reasonable expectation of the parties under the policy. In his view, this was not a rare and exceptional case for exclusion of the additional vehicle because: although the Bus was larger, it was similar in function to the Ford Van (Bus); the Bus's primary function of transporting people was rationally connected to the insured's business; and, the insurer had previously insured several modified vehicles including trucks refitted for snow removal and a "stretched" Lincoln Town Car which accommodated additional passengers.

[38] He reasoned as follows:

> [96] […]
>
> A rare and exceptional case may arise where the nature or purpose of the additional vehicle is so dramatically different or unique as to preclude coverage. However, this is *not* such a case. My reasons include:
>
> i. The Vehicle was larger but similar in function to the Ford which the insurer clearly covered under the Policy;
>
> ii. As with the Ford, the additional Vehicle's nature and primary function (transporting larger numbers of people) was rationally connected to the insured's construction business and was not so different so as to compromise the insured's coverage; and certainly not during the first 14 days of acquiring and taking possession of the Vehicle;
>
> iii. The Agreed Statement of Facts confirms that the insurer knew the Ford would be used, from time to time, for personal purposes. This fact did not preclude coverage under the Policy and, to that extent, is somewhat similar to the circumstances in *Hogan* where the vehicle in question was insured under the family's gravel trucking business called Melodies but also served as a family car. This fact was not determinative of coverage in the circumstances of that case;
>
> iv. The insurer previously insured several modified vehicles including trucks which were refitted to remove snow and a Lincoln Town Car that was lengthened (or "stretched") to accommodate additional passengers.
>
> [Emphasis in original]

ISSUES

[39] The appellant advances two grounds of appeal:

1. The motions judge erred in formulating the test for coverage for a newly acquired automobile.
2. The motions judge erred in finding that there is coverage for all newly acquired automobiles on a fleet policy unless the newly acquired automobile is so dramatically different and unique as to sever any reasonable expectation of coverage.

[40] Before I address these issues, I will briefly discuss the applicable standard of review.

STANDARD OF REVIEW

[41] The parties are not entirely in agreement on this issue. The appellant suggests both grounds of appeal engage correctness as the standard of review—either because the identification and application of the proper legal test is a question of law; or, because the interpretation of a standard form insurance contract is a question of law subject to a correctness standard of review.

[42] If the appellant's complaints were limited to these issues, I would agree (see: *Aliant Inc. v. Ellph.com Solutions Inc.,* 2012 NSCA 89 at para. 37; *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.,* 2016 SCC 37 at para. 4).

[43] The respondent agrees the motions judge's determination of the appropriate legal analysis is a pure question of law and would attract a correctness standard of review.

[44] However, to the extent the appellant complains the motions judge erred when he concluded the nature and purpose of the Bus was not so dramatically different as to sever any reasonable expectation of coverage, this is a conclusion of mixed fact and law and attracts a review standard of clear and material error—an error that is palpable and overriding absent an extricable legal error (see: *Housen v. Nikolaisen*, 2002 SCC 33 at paras. 27-33; 36).

[45] Both parties are correct in their statement of the applicable principles. The real issue is how to properly characterize what the motions judge decided and whether it is appropriate for this Court to intervene.

ANALYSIS

[46] I agree with the motions judge's conclusion the Bus was a "newly acquired automobile" within the meaning of the SAP and his general statement of the conditions to be met as set out in para. 90.

[47] I am troubled by two things. First, I do not see the need to refer to the parties' reasonable expectations to resolve the issue whether a new vehicle is a "newly acquired automobile". Second, the motions judge made his finding within

the scope of a *Rule* 12 motion, which is restricted to determinations of law (see: *Mahoney v. Cumis Life Insurance Company*, 2011 NSCA 31; *Korecki v. Nova Scotia (Justice)*, 2013 NSSC 312).

[48] However, the motions judge did exactly what the parties asked him to do, and the appellant has not requested this Court to intervene due to a potential transgression of the tightly circumscribed boundaries of *Rule* 12. I would therefore decline to do so and would dismiss the appeal.

The test for coverage

[49] Standard form automobile insurance contracts have long provided for 14 day automatic coverage for a newly acquired automobile. However, the caselaw has typically only addressed coverage in the context of a replacement vehicle.

[50] As thoroughly discussed by the motions judge, the early case law was not unanimous on the question of coverage where the insured failed to notify the insurer within 14 days of the acquisition of a replacement automobile. While I need not recanvass all of these authorities, I will refer to some of them.

[51] The first Canadian case to address coverage was *Pascoe v. Provincial Treasurer of the Province of Manitoba* (1958), 16 D.L.R. (2d) 300 (Man. Q.B.), aff'd (1959), 17 D.L.R. (2d) 234 (Man. C.A.). An insured owned a 1948 Pontiac Sedan. He purchased a 1954 Pontiac Coach. Twenty days after purchase, an accident caused damage to one Mr. Pascoe.

[52] The insured never notified the insurer about the acquisition of the replacement vehicle, nor even of the accident. Pascoe sued and obtained a judgment against the insured. He then sought payment from the Province out of the Unsatisfied Judgment Fund. The Fund argued the insurer was liable because the *Insurance Act* mandated the insured's default could not prejudice Pascoe's right of recovery.

[53] Monnin J., as he then was, heard the application. He relied on American authority to the effect that coverage within 14 days is automatic but that failure to notify the insurer within that time frame, caused coverage to lapse:

> [7] This last clause is commonly referred to as the 14-day automatic insurance clause and its purpose is to give coverage to persons who are already insured with the company in question upon acquisition of a new vehicle, provided that notice

> be given to the insurance company within 14 days. I am informed by counsel that there are no Canadian decisions in point but there are a few American ones.
>
> [8] *Jamison v. Phoenix Indemnity Co.* (1941), 40 F. Supp. 87, held as follows [headnote]: "The policy providing automatic coverage for newly purchased automobile replacing automobile described in policy, provided the named assured notified the insurer of replacement within ten days thereof, afforded automatic coverage from date of acquisition of replacing automobile only in event that notice was given insurer within ten days, and, where such notice was not given within the ten-day period, injured party who had obtained judgment against assured could not thereafter recover from insurer on the policy."

[54] This led him to conclude coverage lapsed and the insurer could not be liable:

> [12] At the end of the 14-day period, namely, on December 4, 1956, the insurance on the judgment debtor's vehicle had lapsed and as of that date no person could have a claim against the judgment debtor for which indemnity was provided by a motor vehicle liability policy. Otherwise under Mr. Allen's interpretation there would be no limit of time when an injured person could make a claim against the insurer. If the new vehicle was purchased on the day subsequent to the issue of a policy valid for 365 days, the person having a claim against the insured could come forward and make his claim at any time up to the last day of existence of the policy.
>
> [13] A policy of insurance is a contract and the insurer is entitled to know what vehicle he is insuring or what liability he is undertaking. It is only by virtue of an additional clause to the contract, that for a period of 14 days after the acquisition of the new vehicle by the insured, the insurer holds himself responsible for a vehicle which he does not even know is in existence. This is an addition to the contract for the benefit of the insured and it would be grossly unfair to hold the insurer indefinitely liable upon such circumstances.

[55] The appeal by the Provincial Treasurer was dismissed. Tritschler J.A. wrote detailed reasons to dismiss the appeal. The majority of four agreed with his conclusion but declined to decide whether the newly acquired vehicle was or was not covered by the so-called automatic insurance clause during the 14-day period.

[56] Pigeon J., for the unanimous Court in *General Security Insurance Co. of Canada v. Bélanger et al.*, [1977] 1 S.C.R. 802 dealt with a similar fact situation. A priest owned and insured a 1957 Chevrolet. He replaced it with a 1960 Ford, and later traded it in for a 1963 Chevrolet. The insured had an accident with the 1963 Chevrolet in 1964. The insurer was never notified of the two replacement vehicles.

[57] The injured parties from the 1964 accident sued the insured and obtained a judgment, which they sought to enforce against the insurer or the Highway Victims Indemnity Fund. The Fund was successful throughout. General Security appealed. The policy contained a virtually identical provision extending coverage for a "newly acquired automobile", translated as follows:

> A Newly Acquired Automobile—an automobile, ownership of which is acquired by the Insured and, within fourteen days following the date of its delivery to him, notified to the Insurer in respect of which the Insured has no other valid insurance, if either it replaces an automobile described in the application or the Insurer insures (in respect of sections A, B or subsections 1, 2, 3 or 4 of section C of the Insuring Agreements under which claim is made) all automobiles owned by the Insured at such delivery date and in respect of which the Insured pays any additional premium required; provided however, that insurance hereunder shall not apply if the Insured is engaged in the business of selling automobiles;
>
> pp. 810-11

[58] Pigeon J. explained that because of this provision, the insured had coverage for fourteen days. The insured's breach of the notification condition ceased to protect the insured but continued to protect third party victims:

> It must obviously be conceded that the insured violated the condition in failing to notify the insurer within fourteen days of taking delivery of the new car. Although this violation caused no prejudice to the insurer, since there was no increase in risk nor extra premium due, the insurance necessarily ceased to protect the insured, by virtue of the above quoted condition (*Cauchon v. Fidelity Phenix Insurance Company*). May the same be said towards respondents? I do not think so. In my opinion, General Security was wrong in its contention that there was no insurance. Since fourteen days are allowed for notification of a change of car, this implies that the insurance continues during those fourteen days. Thus it is a "lapse" that occurs at the end of this time, by virtue of the condition.
>
> p. 811

[59] Pigeon J. distinguished *Pascoe* because of the different statutory language found in the Quebec statute which, in more concise language, provided that claims of nullity or lapse by an insured cannot be set up against third party claimants. Article 6 of the Quebec statute provided:

> 6. Subject to the conditions of his contract and up to the amount stipulated, an insurer is directly responsible towards third parties for any damage covered by liability insurance.

> Furthermore, up to the amount, for each automobile, prescribed in section 14, he cannot set up against them the causes of nullity or of lapse that might be set up against the insured.
>
> He cannot be sued by the third parties before final judgment executory against the insured.
>
> He may if necessary intervene in the action taken against the insured.
>
> [p. 805]

[60] Pigeon J. reasoned:

> I did not fail to consider the judgment of Monnin J. sitting as a trial judge in Manitoba, in *Pascoe v. Treasurer of the Province of Manitoba*. He held that the failure to notify the insurer within fourteen days of a change of car could be set up against victims of automobile accidents. The enactment on which this judgment was founded is quite different from that of s.6 of the Act of Quebec where the words which are the basis of the Manitoba judgment are not to be found. In my view, the more concise Act of Quebec is also broader in scope. I see no reason for limiting its effect. Why should the insurer be entitled to set up against the victims the failure to notify him of a change of car, which causes him no prejudice, when he certainly cannot set up the failure to give notification of an accident, which could be extremely prejudicial to him. To differentiate between what occurs previous to an accident and what occurs subsequently is to add to the Act a distinction that it does not make or in any way justify.
>
> p. 812-13

[61] Within a year, the same issue arose in Nova Scotia in *Lane v. Young*, (1977), 20 N.S.R. (2d) 631. Young arranged insurance on a 1969 Pontiac. Between 1974 and 1976 he owned seven different vehicles. On April 5, 1976, he had an accident while driving a 1969 Ford Fairlane. The insurer declined to respond to the plaintiff's claim against Young because the Ford Fairlane was purchased more than 14 days before April 5, 1976 without notice to the insurer. Cowan C.J.T.D. declined to follow *Pascoe*. Instead, he concluded that the words in s. 98(4) of the *Nova Scotia Insurance Act* [now s. 133(4)] were comparable to the Quebec provisions and prevented an insurer from setting up, as against the injured plaintiffs, the failure by Young to notify it of the purchase of the newly acquired automobile.

[62] The Court of Appeal dismissed the appeal (1977), 21 N.S.R. (2d) 420). MacKeigan, C.J.N.S., for the Court, wrote:

> [1] This appeal is on a simple question of law: Does the appellant, insurer under a motor vehicle liability policy, have to respond to the claim of a third party injured by the insured, where the insured had replaced the automobile specified in the policy without notifying the insurer within fourteen days of having done so? The learned trial judge, the Honourable Gordon S. Cowan, Chief Justice of the Trial Division, answered this question in the affirmative, following the reasoning of Pigeon, J., of the Supreme Court of Canada in *Belanger et al. v. General Security Insurance Company of Canada and Highway Victims Indemnity Fund* (1976), 10 N.R. 335 (also reported *sub nom. General Security Insurance Company of Canada et al. v. Highway Victims Indemnity Fund*, [1976] I.L.R. 1-785). He declined to follow *Pascoe v. Provincial Treasurer of Manitoba* (1949), 16 D.L.R. (2d) 300 (Monnin, J.), aff'd by (1959), 17 D.L.R. (2d) 234 (Man. C.A.).
>
> [2] Chief Justice Cowan concluded:
>
> > ... I see no reason why the insurer in this case should be entitled to set up, against the victims, the failure of the insured to notify it of a change of vehicle, where no prejudice is caused to the insurer, when the insurer cannot set up the failure to give notification of an accident which could be extremely prejudicial to it. ...
> >
> > ... I adopt the reasoning of Pigeon, J., in the *General Security* case, (supra), and find that the effect of s. 98(4) of the *Insurance Act* is to prevent the insurer from setting up, as against the injured plaintiffs, the failure of the defendant, Young, to notify it of the purchase of the newly-acquired automobile.
>
> [3] I respectfully agree with Chief Justice Cowan's conclusion and with his reasons for so concluding, but wish to restate them with slightly different emphasis.

[63] Consistent with *Bélanger*, MacKeigan C.J.N.S. explained that the failure to give notice within 14 days would cause a lapse in the collision coverage, but the insurer cannot resist coverage against third parties:

> [8] If, as I think to be the case, it is not a condition upon the entire risk attaching or continuing, the notice clause must then be merely a term of the policy which, if the insured failed to observe it by giving the insurer notice within fourteen days of acquiring the replacement car, would cause a lapse in the collision coverage on that car which began the moment it replaced the previous car. Non-compliance with that term would give the insurer a good defence in an action against it by the insured in respect of an accident after the fourteen-day period had expired.

See, to similar effect: *Ministry of Consumer and Commercial Relations v. Waterloo Mutual Insurance Co. et al.* (1979), 25 O.R. (2d) 355 (H.C.J.); *Hogan v. Kolinsnyk*, [1983] A.J. No. 846 (Q.B.).

[64] In *General Security Insurance Co. of Canada v. Bélanger, Lane v. Young, Ministry of Consumer and Commercial Relations v. Waterloo Mutual Insurance Co. et al.* and *Hogan v. Kolinsnyk*, the risk to the insurer remained essentially the same. In all of these cases, the newly acquired automobile was of the same type as the described automobile and replaced it.

[65] Where the "newly acquired automobile" does not replace the described automobile, the insurer's risk increases and different considerations may govern. For example, in *Canada West Insurance Co. v. Weiss*, [1996] A.J. No. 692 (Q.B.), Mrs. Weiss owned a 1983 Plymouth Turismo. In July 1993, she bought a Chevrolet Malibu. She did not notify her insurer of the new acquisition. The Malibu remained parked until December 1993 when they started driving it because the Turismo was not running well.

[66] Mrs. Weiss' daughter drove the Malibu with her consent. She had an accident. Canada West denied coverage. Lomas J. issued a declaration the Malibu was not a newly acquired automobile because the Turismo was neither sold nor inoperable (see also: *Fraser v. Travelers Indemnity Company of Canada* (1981), 33 A.R. 559, aff'd [1983] A.J. No. 1070 (C.A.); *Hicks v. Sinclair* (2000), 187 N.S.R. (2d) 117 (S.C.)).

[67] Although in the context of a replacement vehicle, the comments by Miller J. in *Hogan v. Kolinsnyk* are helpful. The insureds traded in their station wagon for a truck on August 25, 1980. On August 28, 1980, they were involved in an accident. They did not think the accident to be serious and did not notify their insurer as they intended to get cheaper insurance with a different insurer as of September 1, 1980.

[68] The insureds notified their insurer of the acquisition and accident on September 25 when they were served with a statement of claim. Miller J. concluded coverage was in place for the newly acquired vehicle for the following reasons:

> 47 In considering these two different and opposing points of view, I am of the opinion that there are a few general observations which seem pertinent. The first is that there must have been something tangible intended by the insertion in the standard automobile policy of the 14 day notice clause. In my view, this clause is

> a pragmatic recognition of a business fact that many purchasers of new vehicles would not immediately think of notifying their insurers of the existence of a replacement vehicle and is an obvious intent to give them some leeway in the matter without losing coverage. To deny automatic coverage on the replacement vehicle negates this concept completely. **A second observation is that the insurer has collected a premium for bearing the risk of protecting the insured during the full term of the policy. To deny coverage for anything less than the full term would be to confer an advantage, not contemplated, upon the insurer. A third observation is that the risk itself is determined more by reference to the driver or drivers who are expected to use the vehicle than to the actual vehicle itself**. For example, young drivers and accident prone drivers are assessed significantly higher premiums than others for driving the same kind of a vehicle. Where the only change in the situation relates to the replacement of one similar type of vehicle for another, there is little or no alteration in the risk factor to the insured. This is further bolstered, in the case at bar, by my finding of fact that the replacement vehicle was to be used for basically the same purposes and principally by the same drivers as the original vehicle.
>
> [Emphasis added]

[69] None of these cases dictate the outcome in this case, but they do provide guidance for when an insured acquires an additional vehicle in the context of a fleet policy.

[70] In my view, the motions judge incorrectly focussed on the reasonable expectation of the parties. The SAP, although its wording is approved by the Superintendent, is nonetheless a contract. Interpretation of its terms is to be guided by the well-known principles of interpretation.

[71] In *Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada*, 2010 SCC 33, Rothstein J. summarized the rules: courts should give effect to clear language, reading the contract as a whole; if the policy language is ambiguous, general contract construction rules come into play, where interpretations consistent with the parties' reasonable expectations are to be preferred; courts should avoid interpretations that would give rise to an unrealistic result; and lastly, if these rules do not resolve ambiguity, then the *contra proferentem* policy applies. He explained:

> 22 The primary interpretive principle is that when the language of the policy is unambiguous, the court should give effect to clear language, reading the contract as a whole (*Scalera*, at para. 71).
>
> 23 Where the language of the insurance policy is ambiguous, the courts rely on general rules of contract construction (*Consolidated-Bathurst*, at pp. 900-902).

> For example, courts should prefer interpretations that are consistent with the reasonable expectations of the parties (*Gibbens*, at para. 26; *Scalera*, at para. 71; *Consolidated-Bathurst*, at p. 901), so long as such an interpretation can be supported by the text of the policy. Courts should avoid interpretations that would give rise to an unrealistic result or that would not have been in the contemplation of the parties at the time the policy was concluded (*Scalera*, at para. 71; *Consolidated-Bathurst*, at p. 901). Courts should also strive to ensure that similar insurance policies are construed consistently (*Gibbens*, at para. 27). These rules of construction are applied to resolve ambiguity. They do not operate to create ambiguity where there is none in the first place.
>
> 24 When these rules of construction fail to resolve the ambiguity, courts will construe the policy *contra proferentem* - against the insurer (*Gibbens*, at para. 25; *Scalera*, at para. 70; Consolidated-Bathurst, at pp. 899-901). One corollary of the *contra proferentem* rule is that coverage provisions are interpreted broadly, and exclusion clauses narrowly (*Jesuit Fathers*, at para. 28).

See also *Ledcor Construction*, *supra* at paras. 49 *et seq*.

[72] One of the earliest cases to consider the potential role for the reasonable expectation of the parties was *Wigle et al. v. Allstate Insurance Co. of Canada* (1984), 49 O.R. (2d) 101 (C.A.) (leave to appeal to S.C.C. refused, [1985] S.C.C.A. No. 136) where Cory J.A., as he then was, considered the interpretative principles of standard form automobile policies. If ambiguous, they are to be construed against the insurer even though the terms may not be directly scribed by the insurer. Cory J.A. reasoned as follows:

> 39. It is difficult to conceive of an individual bargaining with a general insurer, either as to the terms of a standard policy of automobile insurance or with regard to the standard form of an endorsement added to that policy. Can it really be said that the average individual is capable of understanding the provisions of such a contract himself or is likely to engage his solicitor to review the terms, advise him of the dangers and complexities of the contract, what is included and what excluded from the coverage, and to then submit an amended contract to the insurer? The very concept of a standard form of insurance policy argues against this vision of equality of bargaining. The individual can do no more than accept or reject the policy. A standard form contract may have benefits for the insured by reducing the amount of his premium and for the insurer by setting out the contractual terms without the necessity of bargaining with each individual applicant.
>
> 40. Given these characteristics of the standard form contract, I think that it is reasonable and equitable to conclude that if the standard form is ambiguous, any ambiguity should be construed against the insurer. Surely it is the insurer who has more control of the writing of the contract. It is the insurers who will make

> submissions to the Superintendent of Insurance and who will accept the final standard form or determine that they will not offer that standard form of endorsement to their clientele. It would not be reasonable for the insurer to say that it did not draw up the contract, that it was really the Superintendent of Insurance who is responsible for its wording. That, I think, would be an unrealistic and unwarranted approach to the situation. Without knowing what is included and what is excluded from the coverage when the terms are ambiguous, the ordinary member of the public cannot make an informed decision as to whether he should accept or reject the standard form presented to him.

[73] With respect to the American "reasonable expectations" approach, he commented:

> 41 The American courts have adopted a policy with regard to the interpretation of standard forms of insurance contract known as the "reasonable expectations" doctrine. Following this doctrine, courts have consistently accepted the argument that they should honour the reasonable expectations of an insured in situations where the policy is ambiguous despite the presence of policy provisions which would appear to negate coverage.
>
> […]
>
> 46 The doctrine has been extended to give effect to the reasonable expectations of policyholders to cases which did not involve ambiguous provisions in the policy. For our purposes it is necessary only to consider situations where there is ambiguity in the contract. I am of the opinion that the first three rules of construction, above, are appropriate to the interpretation of standard form motor vehicle insurance contracts in Ontario. Their application is equitable for it is the insurer that has the only real opportunity to settle upon the wording of the coverage, whether it will offer such coverage and to explain it to their clients who can only accept or reject the coverage.

[74] With respect, I fail to see any ambiguity in the terms of the standard form policy. Aviva offered fleet insurance to PK Construction which included coverage for a "newly acquired automobile". The motions judge correctly identified the policy conditions that needed to be met to trigger coverage (at para. 90). The parties stipulated through the Agreed Statement of Facts all of those conditions were met.

[75] The appellant nonetheless argued the Bus was not an automobile within the terms of the standard form policy because it was different. However, even if it was different, that begs the question, was it an automobile within the meaning of the SAP?

[76] The SAP does not define "automobile". Under the General Provisions, Definitions, and Exclusions Section (Section E), both "described automobile", "newly acquired automobile" and "temporary substitute automobile" are defined, but not "automobile" in isolation.

[77] The *Insurance Act* defines "automobile". The definition is broad. It not only includes a trolley bus, but a self-propelled vehicle, except railway rolling stock, watercraft and aircraft. Section 104(b) provides as follows:

> "automobile" includes a trolley bus and a self-propelled vehicle, and the trailers, accessories, and equipment of any of them but does not include railway rolling stock that runs on rails, or watercraft, or aircraft of any kind;

[78] Unfortunately, the parties did not refer to this definition before the motions judge or in this Court. The SAP does not directly import the statutory definitions, nor does the *Act* explicitly say they apply to every policy.

[79] However, this Court applied the *Act's* "automobile" definition to a standard form automobile policy in *Slaunwhite v. Wellington Insurance Co.* (1993), 125 N.S.R. (2d) 220. An infant plaintiff was a passenger on an ATV. She suffered injuries when it collided with a truck. If she was injured while an occupant of any other automobile she would be an "insured person" and entitled to Section B benefits from Wellington, her father's insurer; if not, those benefits would be payable by insurance coverage on the truck.

[80] Saunders J., as he then was, concluded that even though an ATV is not registered under the *Motor Vehicle Act*, it is nonetheless an "automobile" within the meaning of the SAP given the statutory definition. This Court dismissed the appeal. Chipman J.A., in oral reasons for the Court, said:

> [9] The case, therefore, turned on whether the all terrain vehicle was an automobile within the meaning of the coverage set out above. Mr. Justice Saunders concluded that it was and we agree with him for the reasons set out in his decision.
>
> [10] The word "automobile" is not defined in the insurance policies but it is defined in the *Insurance Act* by s. 104(b):
>
> > "'Automobile' includes a trolley bus and a self-propelled vehicle, and the trailers, accessories, and equipment of any of them but does not include railway rolling stock that runs on rails, or water craft or aircraft of any kind."

> [11] We agree with Mr. Justice Saunders that the definitions of motor vehicle and vehicle in the *Motor Vehicle Act* in no way restrict the scope of this definition or of the policy of insurance. We also agree with him that the reasoning of the New Brunswick Court of Appeal in *Terriault v. General Accident Insurance Co. of Canada,* 110 N.B.R. (2d) 4 applies.
>
> [12] This very clear definition of automobile in the *Act* is not clouded in any way by the definition of "the automobile" in the General Provisions Definitions and Exclusions of the standard form of automobile policy. That definition relates to the vehicle insured by the policy, being the described automobile and such additional types of automobile as are defined at length in the definition.

[81] Our Court adopted the reasoning of the New Brunswick Court of Appeal in *Thériault v. General Accident Insurance Co. of Canada*, 110 N.B.R. (2d) 4. In oral reasons, that Court concluded that in the absence of a descriptive definition of "automobile" in the policy, the statutory definition applied.

[82] The Bus is a self-propelled vehicle. It is an automobile. Hence coverage was automatic for 14 days as all of the other conditions for being a newly acquired automobile were met. Recall the unambiguous definition in the standard form automobile policy (removing the irrelevant words):

> (b) a "newly acquired automobile" … is an **automobile**, ownership of which is acquired by the insured and, within fourteen days following the date of its delivery to him, notified to the insurer in respect of which the insured has not other valid insurance, if either it replaces an automobile described in the application or the Insurer insures (in respect of the section or subsection of the Insuring Agreements under which claim is made) all automobiles owned by the insured at such delivery date and in respect of which the insured pays any additional premium required; provided however, that insurance hereunder shall not apply if the insured is engaged in the business of selling automobiles;
>
> [Emphasis added]

[83] As for the appellant's concern about risk, when an additional vehicle is acquired, there will usually be additional risk for the insurer because of the potential for it to be on the road at the same time as the other vehicles. Yet the standard form insurance policy clearly contemplates an insured's ability to acquire an additional automobile, and for at least 14 days, enjoy insurance coverage, provided the insured is not in the business of selling automobiles and all of the insured's vehicles are already insured with the same provider.

[84] These preconditions were considered in *Hunter Estate v. Thompson* (2003), 65 O.R. (3d) 413 (C.A.) in the context of the plain language Standard Ontario Policy. Section 2.2.1 provided:

> [2] […]
>
> A newly acquired automobile is an automobile or trailer that you acquire as owner and that is not covered under any other policy. It can either be a replacement or an additional automobile. The replacement automobile will have the same coverage as the described automobile it replaces. We will cover an additional automobile as long as:
>
> we insure all automobiles you own, and
>
> any claim you make for the additional automobile is made against a coverage we provide for all your other automobiles.
>
> Your newly acquired automobile(s) will be insured as long as you inform us within 14 days from the time of delivery and pay any additional premium required.

[85] Ms. Kozowy owned and insured with Kingsway General Insurance a 1988 Ford Aerostar mini van. She also owned a 1991 Ford half-ton pick-up truck which the parties agreed was "parked" and not insured by any company. On August 22, 1996, she purchased a 1992 GMC pick-up truck.

[86] On September 1, 1996, one Bruce Thompson was driving the 1992 GMC pick-up with Ms. Kozowy's consent when he was involved in an accident causing injuries and Mr. Hunter's death. The 1992 GMC was not a replacement vehicle. Ms. Kozowy intended to keep the Ford Aerostar on the road and insured.

[87] The application judge refused to draw an inference the 1991 Ford half-ton pick-up truck was driveable. Hence, he concluded the 1992 GMC pick-up was covered for the initial 14 days.

[88] On appeal, the parties agreed on new facts not before the application judge. This included the fact the 1991 Ford half-ton pick-up was in operable condition and not insured by Kingsway nor by any other insurance company. The Court allowed the appeal because:

> [8] On the facts we have now, the plain words of s. 2.2.1 require that the owner insure with the insurer all of the automobiles he owns. If the insured owns automobiles that he insures with another insurer or that he leaves uninsured, the precondition is not met.

> [9] There is nothing in the language of s. 2.2.1 to confine it to circumstances whether there is another insurer. Because the 1991 Ford is operable it is an "automobile" owned by the insured. (We do not know if the vehicle was withdrawn from use so American authority to the effect that such a vehicle is not an automobile for insurance liability purposes is inapplicable.) Since that vehicle was not insured by the appellant the precondition in s. 2.2.1 was not satisfied, and there is no insurance coverage on the newly acquired vehicle. The Motor Vehicle Accident Claims Fund must respond to the claim.

[89] However, the Court observed that if the precondition is met, an additional vehicle is automatically insured for 14 days:

> [10] We would not give effect to the argument that, if the precondition is met, the automobile is not automatically insured for 14 days under the policy. Again, on the plain wording of s. 2.2.1, it is automatically insured for 14 days.
>
> [11] The purpose of the precondition that all other vehicles be insured by the same insurer is not entirely clear. It may be that if all other vehicles are insured by the same insurer, there is a statutory inference that the insured will also likely insure the newly acquired or replacement vehicle with the same insurer thereby justifying the granting of a 14-day period of coverage under the existing policy.

[90] The Nova Scotia SAP stipulates 14 days as the period for an insured to notify the insurer of a newly acquired automobile. Once notified, the insurer has an opportunity to assess the additional risk, if any, and charge additional premiums in order to maintain the insured's coverage.

[91] An insurer has the statutory duty to investigate and defend (s. 119 of the *Act*). Third party liability coverage is in place despite the failure of an insured to notify the insurer within that period of the newly acquired vehicle (s. 133(4) of the *Act*; *Bélanger*, *supra*; *Lane v. Young*, *supra*).

[92] On the other hand, if an insured fails to notify its insurer of the acquisition of the newly acquired automobile or pay within a reasonable time the additional premium, it may be in breach of its contract. In which case, the insurer may be relieved of its duty to defend and it may have recourse against its insured.

[93] As observed earlier, in the case of an additional vehicle on a fleet policy, the newly acquired vehicle usually always adds to the insurer's risk. The extent of that risk is ameliorated by the fact that the insured must not be in the business of selling vehicles.

[94] To assist in compensating the insurer for the increased risk, the policy requires that all of the insured's vehicles be insured with the insurer—presumably generating additional premium revenue as a result. In addition, the insurer knew of the likelihood of an increased risk from the potential of a newly acquired automobile at the time it set the fleet insurance premium.

[95] The appellant admits the parties anticipated a newly acquired vehicle may increase risk and it would then have the opportunity to quote an additional premium. Nonetheless, it proposes the test should be the vehicle does not qualify as a "newly acquired automobile" if it would constitute a "material change in risk". With respect, I am unable to agree. If this were the test, there would be no need for the insurer to charge, and the insured to pay, any additional required premium to compensate for the added risk.

[96] The motions judge reasoned that risk to the insurer is a legitimate factor, but that insurance policies reflect and are informed by the parties' reasonable expectations (para. 93). He concluded that if all of the other pre-conditions were met, the nature of a newly acquired automobile can only be legitimate grounds to deny coverage when its nature is so dramatically different and unique as to sever any reasonable expectation of coverage. I will repeat his conclusion on the test:

> [94] Having said all that, in my view, the nature of a "newly acquired vehicle" only becomes legitimate grounds for denying coverage in rare and exceptional circumstances. The nature of the "newly acquired vehicle" must be so dramatically different and unique as to sever any reasonable expectation of coverage. […]

[97] I do not endorse that coverage can be denied in "rare and exceptional circumstances" where the nature of the new automobile is so different as to sever any reasonable expectation of coverage. This introduces an exclusion in the standard form policy that cannot be implied from its terms or on any other basis.

[98] I am not persuaded by the appellant's complaints of legal error as outlined in its Notice of Appeal. If anything, the test developed by the motions judge is too beneficial to the insurer, but the resulting order is correct.

Application of the test

[99] Even if I were to endorse the motions judge's test, the appellant also appears to complain the motions judge erred in his finding the Bus was not so

fundamentally different from the other vehicles it insured that it could not be a "newly acquired automobile".

[100] The appellant points to: the size of the Bus; its capacity to carry dozens of passengers without seatbelts; the modifications; and, it was an unregistered vehicle. There are a number of problems with the appellant's submissions.

[101] First, there was no evidence of the actual number of passenger seats, nor whether they were equipped with seatbelts. Second, whether the Bus posed a material change in risk is in essence a factual issue (see, for example: *Henwood v. Prudential Insurance Co. of America*, [1967] S.C.R. 720; *Aviva Insurance Company of Canada v. Thomas*, 2011 NBCA 96; *Ken Murphy Enterprises Ltd. v. Commercial Union Assurance Co. of Canada*, 2005 NSCA 53 at para. 17). Furthermore, I would add that an insured, pursuant to the Mandatory Conditions of the Standard Automobile Policy, is required to promptly notify the insurer or its agent of any change in the risk material to the contract and within its knowledge. Breach of that condition may have consequences for an insured, but not for the insurer's obligation to injured third parties. In any event, the insured in this case notified the insurer's broker about the Bus on the first business day after he had acquired it.

[102] The motions judge's test focussed on risk from the point of view whether the nature of the vehicle was so different as to sever the reasonable expectation of the parties, not just the reasonable expectations of the insurer. The respondent points out the inherent similarities between the motions judge's test and the one proposed by the appellant insurer:

> 39. There appears to be little daylight between the framework proposed by the Appellant and the analysis set out in the Decision Below. The Appellant couches the analysis of risk in whether a reasonable insurer would provide coverage for a vehicle given the heightened risk created by an additional vehicle, whereas the Motion Judge expressed this analysis as whether the heightened risk created by an additional vehicle severs the reasonable expectation of the parties regarding coverage. These articulations of the proper analysis both touch on the same principle, whether the risk inherent in the nature or purpose of the Vehicle is such that the parties would not reasonably expect the Policy to extend coverage to the Vehicle.
>
> 40. In the Respondent's view, the only distinguishing factor between the Appellant's proposed analysis and the Motion Judge's analysis is that the Appellant fails to take into account the reasonable expectations of the insured.

[103] In essence, the appellant argues the motions judge erred when he concluded the nature of the vehicle was not so different from the others as to sever the reasonable expectation of the parties. On this question, the standard of review would be deferential. I would have to be satisfied there was either an extricable legal error or the motions judge's conclusion was tainted by clear and material error. I am not satisfied of either.

[104] The goal of the administration of justice is to determine every proceeding in a just, speedy and inexpensive manner. This is reflected in the stated object of the former *Civil Procedure Rules* (*Rule* 1.03, *Nova Scotia Civil Procedure Rules* (1972)) as well as the current *Nova Scotia Civil Procedure Rules* (*Rule* 1.01). Parties should be commended for their efforts to fulfill these laudable goals by resort to the various procedures available.

[105] Here, the appellant and respondent entered into an Agreed Statement of Facts and sought a ruling whether the Bus was a "newly acquired automobile" within the meaning of the Standard Automobile Policy. I have earlier set out why I conclude it comes within that definition.

[106] However, the parties' approach attracted the motions judge to resolve two distinct matters: what is the appropriate legal test; and, what is the outcome of the application of the legal test to the facts. The first is a question of law and is a suitable question to be resolved by resort to *Rule* 12. The second is usually a question of mixed fact and law (*Housen*, *supra* at para. 36).

[107] Fichaud J.A., in *Mahoney v. Cumis Life Insurance*, *supra*, explained the proper boundaries of *Rule* 12:

> [16] The new *Rule* 12 does not require an agreed statement for the determination of a preliminary question of law. This is clear from *Rule* 12.01(1) -- a party may "in limited circumstances, seek the determination of a question of law ... even though the parties disagree about the facts relevant to the question".
>
> [17] *Rule* 12.02 recites those "limited circumstances": (a) "the facts necessary to determine the question can be found without the trial or hearing", (b) the determination will reduce the length or expense of the proceeding, and (c) "no facts to be found in order to answer the question will remain in issue after the determination". Conditions (a) and (c) contemplate that the Chambers judge, on a *Rule* 12 motion, may find facts, but only (1) the facts necessary to determine the pure legal question before him and (2) if all those facts, necessary to decide the pure legal question, can be determined without a trial.

> [18] So the first step with *Rule* 12 is to identify the pure legal question to be determined. *Rule* 12.01(1) permits a motion for determination of "a question of law". *Rule* 12.03(1) permits the judge either to determine "the question of law" or appoint a time to determine that question of law. **The *Rule* does not authorize a determination of a question of fact or mixed fact and law, excepting only those facts that scaffold the point of pure law under *Rule* 12.02(a) as I have discussed**.
>
> [Emphasis added]

[108] As I have outlined above, the motions judge determined the legal test. He then applied the test to the facts as follows:

> APPLICATION TO THE FACTS
>
> [96] Applying the conditions listed in paragraphs 90 95 above, I conclude that the Vehicle is a "newly insured automobile" under the terms of the Policy and, as such, would be automatically insured within 14 days of acquisition. In particular:
>
> 1. The Agreed Statement of Facts confirms that the Policy was effective as of June 16, 2013 and continued in force until after the accident. On this point, I note:
>
> a. The insured acquired and took possession of the Vehicle on Saturday, May 7, 2016;
>
> b. The single vehicle accident giving rise to the third-party claims occurred on the next day, Sunday, May 8, 2016;
>
> c. An employee of the insured contacted the insurer on Monday, May 9, 2016 to add the Vehicle to the Policy and notify the insurer of the accident. The parties agree that the owner of the insured called the insurer a few minutes later to clarify that he did not want the Vehicle added to the Policy "*on a going forward basis* as the Vehicle was no longer usable" (emphasis added). The insurer neither alleged nor argued that this subsequent call from the owner either invalidated the notice or constituted a waiver of coverage. I accept the parties' agreement that this call from the owner only clarified that the insured did not require insurance on the Vehicle from that point (i.e. the date of the call) forward as the Vehicle was no longer operable.
>
> 2. The insured paid all premiums changed by the insurer. There is no evidence that either:
>
> a. The insurer at any time demanded additional premium for the short period of time when the Vehicle was in the insured's possession prior to the accident (May 7 - 8, 2016); or

b. The insured failed to pay any premiums reasonably charged by the insurer; bearing in mind that the insured would be given a reasonable period of time to pay any such additional premium.

3. The parties agree that "All vehicles PK Construction used in the operation of its business were insured under the Policy" (Agreed Statement of Facts, para 3);

4. The accident occurred within 14 days of the insured acquiring and taking delivery of the Vehicle. Indeed, the accident occurred within a day of acquisition – and both the acquisition and the accident occurred over the same weekend (Saturday, May 7, 2016 – Sunday, May 8, 2016). In my view, coverage is automatic during those 14 days irrespective of notice and would have been in place as at the time of the accident but, to be clear, still subject to the remaining conditions set out in paragraphs 90 – 95 above;

5. The insured otherwise met the reasonable expectations of the parties under the Policy. In particular:

a. On the question of notice, the issue is somewhat of a red herring because of the unusual facts in this case. Again, the acquisition of the Vehicle, the accident and ultimately notice to the insurer all occurred within a few days of one another; and within the first 14 days following acquisition when, in my view, coverage is automatic subject to satisfying the remaining conditions. There may be a future case in which any delay in providing notice outside the 14 days following acquisition affects coverage. However, it is not necessary to consider that hypothetical scenario as the facts at bar are decidedly different (see footnote 3 above);

b. A rare and exceptional case may arise where the nature or purpose of the additional vehicle is so dramatically different or unique as to preclude coverage. However, this is not such a case. My reasons include:

i. The Vehicle was larger but similar in function to the Ford which the insurer clearly covered under the Policy;

ii. As with the Ford, the additional Vehicle's nature and primary function (transporting larger numbers of people) was rationally connected to the insured's construction business and was not so different so as to compromise the insured's coverage; and certainly not during the first 14 days of acquiring and taking possession of the Vehicle;

iii. The Agreed Statement of Facts confirms that the insurer knew the Ford would be used, from time to time, for personal purposes. This fact did not preclude coverage

> under the Policy and, to that extent, is somewhat similar to the circumstances in *Hogan* where the vehicle in question was insured under the family's gravel trucking business called Melodies but also served as a family car. This fact was not determinative of coverage in the circumstances of that case;
>
> iv. The insurer previously insured several modified vehicles including trucks which were refitted to remove snow and a Lincoln Town Car that was lengthened (or "stretched") to accommodate additional passengers.
>
> [Emphasis in original]

[109] In my view, the question whether the Bus was a newly acquired automobile within the meaning of the policy was a question of interpretation of the policy and hence a question of law. There was no need to devise a test. The Bus was an automobile within the meaning of the standard form policy. Coverage was automatic for 14 days.

[110] While I do not endorse the motions judge's test which would exclude coverage if the nature of the vehicle is so dramatically different as to sever the reasonable expectation of the parties, the correct result was reached.

[111] I would dismiss the appeal with costs to the respondent in the amount of $5,000.00, inclusive of disbursements.

Beveridge, J.A.

Concurred in:

Fichaud, J.A.

Van den Eynden, J.A.