

NOVA SCOTIA COURT OF APPEAL

Matthews, Chipman and Roscoe, JJ.A.

Cite as: Wellington Insurance Company v. Wawanesa Mutual Insurance Company, 1993 NSCA 117

BETWEEN:

WELLINGTON INSURANCE COMPANY,
a body corporate

Appellant

) Gordon F. Proudfoot
) for the Appellant
)

- and -

WAWANESA MUTUAL INSURANCE
COMPANY, a body corporate and
THERESA ANN SLAUNWHITE, by her
Guardian Ad Litem, BARRY SLAUNWHITE,
STEPHEN MICHAEL LITTLE and WILLIAM
LESLIE SLAUNWHITE

Respondents

)
)
) Peter M. Rogers
) for the Respondent,
) Wawanesa Mutual
) Insurance Company
)

)
) Appeal Heard:
) June 17, 1993
)

) Judgment Delivered:
) June 17, 1993

THE COURT: The appeal is dismissed with costs to the respondent Wawanesa to be paid by Wellington in the amount of \$1,000.00, plus disbursements as per oral reasons for judgment of Chipman, J.A.; Matthews and Roscoe, J.J.A., concurring.

The reasons for judgment of the Court were delivered orally by

CHIPMAN, J.A.:

This is an appeal by Wellington Insurance Company (Wellington) from a decision of Saunders J. in the Supreme Court in Chambers granting an application seeking a declaration on a relevant question of law or fact or both. The application was made by the plaintiffs for a declaration that the infant plaintiff Theresa Ann Slaunwhite is an insured person under Section B of the standard automobile policy issued by Wellington to her father, the plaintiff, Barry Slaunwhite or under Section B of the Standard Automobile Policy issued by Wawanesa Mutual Insurance Company (Wawanesa) to the defendant William Slaunwhite.

The proceedings were commenced by originating notice (action) issued December 17, 1992. The claim of the plaintiffs arose out of a collision occurring November 14, 1991, between a Dodge car owned and operated by the defendant William Slaunwhite and a three wheel all terrain vehicle owned and operated by the defendant Little. The infant plaintiff was a passenger on the all terrain vehicle. As a result of the collision the infant plaintiff was thrown off the all terrain vehicle and sustained serious head injuries.

The plaintiffs brought the action against Stephen Little and William Slaunwhite and against the defendant Wellington Insurance Company for payment pursuant to the Section B coverage of that policy. Wellington's policy had been issued to the adult plaintiff with respect to his own motor vehicle, a Ford pick-up truck, which was not in any way involved in the collision.

Subsequent to the commencement of the proceedings Wawanesa applied for and was granted intervenor status in the proceedings. Wawanesa insured the defendant William Slaunwhite with respect to the Dodge car, the policy period including November 14, 1991. Wawanesa's concern was whether it might be called upon to respond to a claim for Section B accident benefits under the policy at the instance of the infant plaintiff.

The plaintiffs brought the application before Saunders, J. pursuant to **Rule 25** seeking a declaration respecting the entitlement of the infant plaintiff to benefits under Section B of

Wellington's coverage or under Section B of Wawanesa's coverage.

For the purposes of the application, the parties agreed to the following statement of facts:

"1. The Plaintiff, Theresa Ann Slaunwhite, was born on March 12, 1975. Throughout her life, except for vacation periods or periods of hospitalization, the Plaintiff has resided with her parents and has been financially dependent upon her parents for her necessities. The Plaintiff's father is Barry Slaunwhite. Barry Slaunwhite obtained insurance coverage through a Standard Automobile Policy (Owner's Form) issued by Wellington Insurance and bearing Policy No. PA1786210 ("the Wellington Policy"). The policy period included November 14, 1991. The described automobile on this policy is a Ford Ranger pick-up truck, owned by Barry Slaunwhite.

2. The Defendant, William Leslie Slaunwhite, is insured by the Wawanesa Mutual Insurance Company under Policy No. 0763840, a Standard Automobile Policy ("the Wawanesa Policy"). The described automobile on this policy is a 1985 Dodge Charger, Serial No. 402544. The policy period included November 14, 1991. William Leslie Slaunwhite was the owner of the described automobile ("the Dodge").

3. The Defendant, Stephen Michael Little, was on November 14, 1991 the owner of a 3-wheel, gasoline powered, all-terrain vehicle, being a 1986 Honda ATC 350X ("the ATV"). The ATV was not registered under the Motor Vehicle Act.

4. On November 14, 1991, near Terence Bay, Nova Scotia, the ATV and the Dodge collided. The ATV was being driven by Stephen Michael Little. The Dodge was being driven by William Leslie Slaunwhite. Theresa Ann Slaunwhite was a passenger on the ATV.

5. As a result of the impact of the collision, Theresa Ann Slaunwhite was thrown from the ATV and suffered injuries, including a severe head injury, from the impact of hitting the ground. Theresa Ann Slaunwhite would be entitled to benefits under Subsection 1 and/or Subsection 2 of Section B in the event that she was an "insured person" under Section B of either the Wawanesa Policy or the Wellington Policy.

6. Wawanesa Mutual Insurance Company and Wellington Insurance Company each deny primary responsibility for Section B coverage for the Plaintiff. An interim arrangement was worked out between Wawanesa Mutual Insurance Company and the Plaintiff pending judicial determination of responsibility for Section B coverage, a copy of correspondence outlining the terms of the arrangement is

attached."

After hearing counsel Saunders J. concluded that the infant plaintiff was an insured person under Section B of the Wellington policy and was not an insured under the Wawanesa policy.

Both policies contain the standard Section B - Accident Benefits wording; the relevant provisions of which are as follows:

Indemnity

"The insurer agrees to pay to or with respect to each insured person as defined in this Section who sustains bodily injury or death by an accident arising out of the use or operation of an automobile."

[emphasis added]

Definition of Insured Person

"In this Section, the words 'insured person' mean,

. . .

(b) the insured and, if residing in the same dwelling premises as the insured, his or her spouse and any dependent relative of either while an occupant of any other automobile;

(c) in Subsections 1, 2 and 2A of this section only, any person, not the occupant of an automobile or of railway rolling-stock that runs on rails, who is struck, in Canada, by the described automobile or a newly acquired or temporary substitute automobile as defined in the policy;

(d) in Subsections 1, 2 and 2A of this Section only, the named insured, if an individual and his or her spouse and any dependent relative residing in the same dwelling premises as the named insured, not the occupant of an automobile or of railway rolling stock that runs on rails, who is struck by any other automobile;"

. . .

[emphasis added]

It was the position of Wellington that the all-terrain vehicle of which the infant plaintiff was an occupant was not an automobile within the meaning of that term in the definition of "insured person". Thus, although she was a dependent relative of the adult plaintiff, the insured, residing in his dwelling she was not at the material time an occupant of any other automobile. It was Wellington's position that if she was covered at all, it was under the Wawanesa policy by virtue of clause (c) because, not being the occupant of an automobile, she was nevertheless struck by another automobile, i.e., the Slaunwhite Dodge.

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.

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."

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.

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.

It follows then that the infant plaintiff was insured under the Wellington policy as she was an occupant of an automobile. Because she was such an occupant, she is not insured by the Wawanesa policy. Under the Wawanesa policy, the definitions of "insured person" in paragraphs

(b) and (d) set out above do not apply to her as she is not a relative of the Wawanesa insured, William Leslie Slaunwhite. Nor does she meet the requirements of clause (c) of the definition section set out above because she was the occupant of an automobile. It is not necessary to address the issue whether she was struck within the meaning of that clause.

We dismiss the appeal with costs to the respondent Wawanesa to be paid by Wellington in the amount of \$1,000.00, plus disbursements to be taxed.

J.A.

Concurred in:

Matthews, J.A.

Roscoe, J.A.