NOVA SCOTIA COURT OF APPEAL

Citation: *LeBlanc v. Wawanesa Mutual Insurance Company*, 2006 NSCA 138

Date: 20061218
Docket: CA 267938
Registry: Halifax

Between:

Joseph Gerard LeBlanc

Appellant

v.

Wawanesa Mutual Insurance Company

Respondent

Judges:	MacDonald, C.J.N.S.; Bateman and Saunders, JJ.A.
Appeal Heard:	November 27, 2006, in Halifax, Nova Scotia
Held:	Appeal dismissed with costs payable to the respondent in the amount of $1,000.00, per reasons for judgment of MacDonald, C.J.N.S.; Bateman and Saunders, JJ.A. concurring.
Counsel:	John Kulik and Christopher Wilson, for the appellant Robert M. Purdy, Q.C., for the respondent

Reasons for judgment:

OVERVIEW

[1] In this appeal we are asked to consider a narrow legal issue. It involves the extent of an insurer's liability under Nova Scotia's mandatory *Section D - Uninsured Automobile and Unidentified Automobile Coverage*.

[2] The facts of this case are tragic. On the evening of June 27, 2002, young Jonathan Hartling and his cousin, Alicia Hartling, were riding their bicycles along a rural highway in Pictou County. Suddenly Jonathan was struck and killed by a passing motor vehicle operated by Joseph Gerard LeBlanc.

[3] As a result of witnessing this horrible incident, Alicia suffered nervous shock and accordingly advanced a claim against Mr. LeBlanc who was uninsured at the time.

[4] There was never any question that Mr. LeBlanc was obliged to compensate Ms. Hartling for this loss. However, he was in no position financially to respond so the funds would have to come from one of two sources - either from automobile coverage Jonathan's stepfather, Reginald Brightman, held with the respondent Wawanesa, or failing that, from Nova Scotia's Uninsured Motorist Claims Fund maintained by its Facility Association.

[5] To avoid having Ms. Hartling embroiled in this issue, to their credit, Wawanesa and the Facility Association agreed to compensate her by way of equal contributions. They then asked the Nova Scotia Supreme Court to resolve which of the two bore ultimate responsibility.

[6] Thus by way of an agreed statement of facts, Haliburton, J. of the Supreme Court was asked to determine the issue which boiled down to whether this loss was covered under Wawanesa's policy. If it was not then, as noted, the Facility Association would ultimately have to pay. Haliburton, J. resolved the issue in Wawanesa's favour by declaring that its coverage did not extend to this type of loss.

[7] The Facility Association now appeals to this court.

THE ISSUE AND STANDARD OF REVIEW

[8] Every automobile policy issued in this Province must contain an endorsement that will compensate the policy holder and certain family members for losses involving uninsured third parties. Furthermore, not only is this coverage mandatory, the **Insurance Act**, R.S.N.S. 1989, c. 231, prescribes the exact language that each policy must contain. Wawanesa's coverage was no exception. Thus when considering whether this particular loss was covered, Haliburton, J. was essentially involved in an exercise of statutory interpretation. With all facts agreed upon, his task involved a pure question of law which we are to now review on a *correctness* standard. See **Housen v. Nikolaisen**, [2002] 2 S.C.R. 235, 2002 SCC 33. In other words it is now for us to independently consider the following legal question. *Does Mr. Brightman's policy cover Ms. Hartling's claim for mental shock?* To answer this question, the policy's language as prescribed by statute must be carefully analyzed.

[9] Section 139(2)(b) directs the mandatory coverage. Entitlement falls into three potential categories:

> 139 (2) Every contract evidenced by a motor vehicle liability policy shall provide for payment by the insurer of all sums that
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> (a) *a person insured under the contract* is legally entitled to recover from the owner or driver of an uninsured automobile or unidentified automobile as damages for bodily injuries resulting from an accident involving an automobile;
>
> (b) a person is legally entitled to recover from the owner or driver of an uninsured automobile or unidentified automobile as damages for bodily injury to or the death of *a person insured under the contract* resulting from an accident involving an automobile; and
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> (c) *a person insured under the contract* is legally entitled to recover from the identified owner or driver of an uninsured automobile as damages for accidental damage to the insured automobile or its contents, or to both the insured automobile and its contents, resulting from an accident involving an automobile,
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> subject to the terms, conditions, provisions, exclusions and limits prescribed by regulation.

[Emphasis added.]

[10] It is noteworthy that all three categories refer to a "person insured under the contract," albeit in different contexts. This term is also defined in the statute:

> 139 (1) In this Section,
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> . . .
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> (b) "person insured under the contract" means
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> . . .
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> (iii) in respect of a claim for bodily injury or death,
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> . . .
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> (B) the insured named in the contract and, if *residing in the same dwelling premises as the insured named* in the contract, the insured's spouse and *any dependent relative,*
>
> . . .
>
> (II) who is struck by an uninsured or unidentified automobile, but does not include a person struck while driving, being carried in or upon or entering or getting on to or alighting from railway rolling stock that runs on rails,

[Emphasis added.]

[11] The parties agree that Jonathan met this definition under his stepfather's policy because he was "residing in the same dwelling premises," and was also a "dependent relative".

[12] However, by applying the same definition, the parties further acknowledge that as a non-dependent cousin, Ms. Hartling did not meet this definition.

[13] With these acknowledgments, our analysis therefore becomes more focused. Sections 139(2) (a) and (c) provide recovery only to “person[s] insured under the

contract". Thus they would not benefit Ms. Hartling. This leaves s. 139(2)(b) as Ms. Hartling's only potential avenue of recourse because it may apply to a "person" generally. I reproduce it here for ease of reference:

> (b) a person is legally entitled to recover from the owner or driver of an uninsured automobile or unidentified automobile as damages for bodily injury to or the death of a person insured under the contract resulting from an accident involving an automobile;

[14] To narrow the issue even further, it is acknowledged that by virtue of her nervous shock claim, Alicia Hartling is in fact "a person ... legally entitled to recover from [Joseph Gerard LeBlanc]". Thus the ultimate question can be distilled to this. *In these circumstances, does Alicia Hartling's claim for nervous shock represent "damages for...the death of [Jonathan Hartling]"?*

ANALYSIS

[15] In ruling for Wawanesa, the trial judge reasoned:

> ... Once again, I would point out that a loss to be recoverable must pass the test of foreseeability. The prospect of a person, even a family member suffering "mental shock" from hearing of the death of a relative is surely too remote to be compensable under this contract. I conclude that the emotional injury of an uninjured person is not covered under the "Section D" provisions by reason of the fact that it is too remote from the original contract contemplated. It was not contemplated by the contracting parties to the insurance policy. It was not contemplated by the legislature when they passed the legislation.

[16] While I would follow a different reasoning path, I agree with the outcome reached by the trial judge. Thus, for the following reasons, I would dismiss the appeal.

[17] The key word in the phrase *damages for .... the death of [Jonathan Hartling]* is the preposition "for". In its written and oral arguments the appellant asserted that this word in effect means "caused by" or "resulting from". In this light, the phrase would provide coverage for all losses *caused by* or *resulting from* Jonathan Hartling's death. Thus, the appellant in its factum urges:

> [14] The nervous shock claim made by Alicia Hartling was *caused by* the death of Jonathan Hartling, who is a person insured under the contract. It is for this reason that Alicia Hartling's claim falls squarely under s. 139(2)(b) of the Insurance Act, which requires the Respondent to respond to the loss under its Section D coverage. It is submitted that by failing to find that Alicia Hartling's claim was covered by Section 139(2)(b) of the Insurance Act, the Learned Trial Judge simply misapplied the provision in question to the facts of this case and, as a result, erred in law.
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> [Emphasis added.]

[18] Respectfully I disagree with this approach. Again, the phrase does not say "damages ... *caused by* or *resulting from* the death ...". It says "damages ... *for* the death ...". In other words, by this phrase one must ask: What is the loss for which compensation flows? The answer is clear. Jonathan Hartling's death is the loss targeted by the statute. In my mind, this wording could not be fairly interpreted to cover some separate and distinct loss such as nervous shock that may have been directly or indirectly *caused by* Jonathan Hartling's death.

[19] For example both parties acknowledge that claims under the **Fatal Injuries Act**, R.S.N.S. 1989, c. 163 would be covered under this provision. This is understandable because such claims represent compensation flowing directly *for* the loss of life.

[20] To enhance my explanation, let me turn to a hypothetical question. Let us assume that Ms. Hartling was somehow physically injured in this accident (perhaps by also being struck by the car or by perhaps falling off her bicycle). The appellant acknowledges that such a claim would not be covered under this provision because the injury clearly would not have *resulted from* or been *caused by* Jonathan Hartling's death. Thus, for the appellant, coverage would hinge on the type of injury suffered. Physical injuries would be excluded - nervous shock claims would be included. This to me represents an artificial distinction. This point was aptly made by the respondent in its factum:

> [14] Alicia Hartling suffered psychological injuries that can be classified as "nervous shock". It is respectfully submitted that this nervous shock claim is in a different category than a claim brought under the *Fatal Injuries Act*. Alicia Hartling's nervous shock claim cannot be said to be "damages for bodily injury to or the death of a person insured under the contract" (Jonathan Hartling). Alicia Hartling's nervous shock claim is an independent tort claim that has a separate

> foundation from the claims brought through Jonathan Hartling or his representative under the *Fatal Injuries Act*. The motor vehicle accident involving the Appellant's motor vehicle and Jonathan Hartling, riding his bicycle, contributed to the cause of the nervous shock tort but the damages to be claimed by Alicia Hartling arise from her injury and not from Jonathan Hartling's death.
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> [15] The Respondent submits that if the Appellant's motor vehicle had struck Alicia Hartling's bicycle, resulting in personal injury to her, clearly the Facility Association would be required to respond to such claim. Further, if Jonathan Hartling's bicycle had been thrown up and had struck Alicia Hartling's bicycle, causing her to fall, or if she had simply lost her balance upon hearing the crash and had fallen, the Facility Association would be required to respond to her claim. Mr. Kulik conceded this point during argument before the Learned Trial Judge (Appeal Book - Part 11, Tab 12, p. 100). *In that event, such physical injury sustained by Alicia Hartling would not give rise to "damages for bodily injury to or the death of a person insured under the contract" (Jonathan Hartling). Why should a psychological injury such as nervous shock be treated any differently than a physical injury? The Respondent respectfully submits they should be treated in the same way.*
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> [Emphasis added.]

[21] I agree with this submission. I see no legitimate basis for coverage to hinge on the arbitrary and irrational distinction between psychological injuries which the appellant says would be covered and physical injuries which the appellant concedes would not be covered. Such an interpretation would lead to an absurd result; something our courts strive to avoid. For example, Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Markham: Butterworths, 2002), says this about interpretations that may lead to irrational distinctions:

> ... Under the modern principle, however, the chief duty of the courts is not to give effect to textual meaning, but to what the legislature most likely intended. The courts must harmonize the text as written with other indicators of legislative intent, including presumed intent. The modern principle justifies the presumption against absurdity by integrating it into the analysis through which the intention of the legislature is constructed.
>
> . . .
>
> Irrational distinctions. A proposed interpretation is likely to be labelled absurd if it would result in persons or things receiving different treatment for inadequate

> reasons or for no reason at all. This is one of the most frequently recognized forms of absurdity.

[22] Furthermore, applying basic tort principles, Ms. Hartling's claim for nervous shock would not be triggered by Jonathan Hartling's death. Instead, recovery would be traced back to Mr. LeBlanc's negligence and premised on the principle of reasonable foreseeability. See Cooper-Stephenson, *Personal Injury Damages in Canada,* 2nd ed. (Carswell, 1996), at pp. 843-844. See also **Rhodes v. Canadian National Railway** (1990), 75 D.LR. (4th) 248 (B.C.C.A.).

[23] In short, the phrase we are scrutinizing covers losses "for" an insured's death. It provides compensation "for" that loss specifically. If the legislature intended to impose coverage for separate and distinct losses that may have been *caused by* or *resulted from* an insured's death, it could have easily selected such language. Otherwise I am content to rely on what I view as the phrase's ordinary meaning. For example, see **Sullivan**, *supra*, at p. 20:

> The ordinary meaning rule. In interpreting any text, the meaning understood by the reader is assumed to correspond with the meaning intended by the writer. As Frederick Bowers writes, it is a fundamental principle of all public communication that words are assumed to bear their ordinary meaning unless and until this assumption becomes untenable:
>
> > Our first assumption in reading the words of any text is that the author is using them in their ordinary sense, and only if, after reading some way into the text, we have a growing suspicion that he is using words in a different from ordinary sense, with each succeeding word systematically tending in the same direction, do we retrace our steps and start to interpret those words anew.
>
> This principle is the foundation for the ordinary meaning rule, which is the starting point of statutory interpretation.

[24] Finally, even had I accepted the appellant's interpretation of this clause, I would still dismiss this appeal. In other words, even if the policy could be interpreted so as to cover all losses *caused by* Jonathan Hartling's death, there would still be no factual basis to support the claim. Let me explain.

[25] Ms. Hartling's claim as plead is one of negligence against Mr. LeBlanc for "mental shock or trauma". Her amended statement of claim provides in part:

> ¶ 12 The Plaintiff, Alicia Hartling repeats the foregoing and states that as a result of the negligence of the Defendant, Joseph Gerard Leblanc, she has suffered mental shock or trauma.

[26] By their agreed statement of facts, the parties did no more than acknowledge that Ms. Hartling's claim for "nervous shock" against Mr. LeBlanc is valid. The relevant paragraph provides:

> 2. The Plaintiff Alicia Hartling was Jonathan Hartling's cousin. She was present, although she did not suffer any physical injuries and was not directly involved in the accident, she commenced this action to advance a claim for nervous shock. It is admitted that the Plaintiff is entitled to recover damages for nervous shock from the Defendant LeBlanc.

[27] As respondent's counsel pointed out in oral submissions, there is no evidentiary basis in the agreed facts from which to conclude that Jonathan's death caused this injury. On the record before us it can only be inferred that the nervous shock resulted from the global effects of the accident, including, for example, the sights and sounds of the horrible crash and grim reminder that Ms. Hartling as well could have been killed. The facts do not establish that Ms. Hartling's nervous shock resulted from the fact of Jonathan Hartling's tragic death.

[28] For all these reasons, I would dismiss the appeal with costs of $1,000.00, payable to the respondent.

MacDonald, C.J.N.S.

Concurred in:

Bateman, J.A.

Saunders, J.A.