

Oliveira et al. v. Mullings et al.

[Indexed as: Oliveira v. Mullings]

94 O.R. (3d) 751

Ontario Superior Court of Justice,
J. Kelly J.
January 29, 2009

Insurance -- Automobile insurance -- Uninsured automobile coverage -- Plaintiff injured in motor vehicle collision with uninsured automobile while driving vehicle provided by his employer -- Employer insured by insurer A and plaintiff's personal vehicles insured by insurer B -- Insurer A required to respond to uninsured portion of plaintiff's claims -- Note following s. 5.3.1 of O.A.P. 1 not applying as plaintiff was not occupant of uninsured automobile at time of collision.

The plaintiff was injured in a collision with an uninsured vehicle. He was driving a vehicle owned by his employer and provided to him for his regular use. That vehicle was insured by Dominion. The plaintiff's own vehicles were insured by ING. The insurers brought a motion to determine which of them was obliged to respond to the plaintiff's claim pursuant to s. 5.2 of the Ontario Automobile Policy ("O.A.P. 1").

Held, Dominion should respond.

The note following s. 5.3.1 of the O.A.P. 1, which states "If the ... employee ... is the owner of an automobile that is insured, this policy does not apply. The policy of that automobile will provide coverage", only applies if the two preceding bullet points preceding it apply. Because the plaintiff was in an insured automobile as opposed to an

"uninsured automobile", the note did not apply.

Cases referred to

Maddalena v. Crouse (1996), 30 O.R. (3d) 578, [1996] O.J. No. 4296, 39 C.C.L.I. (2d) 167, 67 A.C.W.S. (3d) 562 (C.A.), affg (1996), 28 O.R. (3d) 474, [1996] O.J. No. 1195, [1996] I.L.R. I-3368, 62 A.C.W.S. (3d) 363 (Gen. Div.), apld

Statutes referred to

Insurance Act, R.S.O. 1990, c. I.8, s. 265 [as am.]

Rules and regulations referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rule 22

Authorities referred to

Financial Services Commission of Ontario, Ontario Automobile Policy (Effective on or after January 1, 2007), ss. 5, 5.2.1, 5.3.1

MOTION for the determination of a question of law. [page752]

Joseph Lin, for moving party/defendant ING Insurance Company of Canada.

Tim Bates and T. Agopian, for the respondent/defendant Dominion of Canada General Insurance Company.

[1] Endorsement of J. KELLY J.: -- This is a motion that was brought before the court pursuant to Rule 22 of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194. Dominion of Canada General Insurance Company ("Dominion") and ING Insurance Company of Canada ("ING") have stated the following question of law as a special case:

Which insurer, ING or Dominion, both of which provide uninsured coverage to the plaintiff pursuant to their respective policies, is obliged to pay to the plaintiff amounts which the plaintiff is entitled to recover as damages

from Mullings, the driver of the uninsured automobile, for bodily injury, pursuant to Section 5.2 of the O.A.P. 1?

[2] The Agreed Statement of Facts, filed with the court, states as follows:

- (a) This claim arises from a motor vehicle accident which occurred on September 25, 2003 (the "Accident"). The plaintiff, Victor Oliveira, was driving in a motor vehicle ("truck") owned by his employer, Drivers & Wheels in Motion and Rocket Freight Services Inc. when he was involved in an Accident with a motor vehicle driven by Philip Mullings and owned by Claudia James. The Accident occurred on the Northbound lanes of Highway 427 and Derry Road in the City of Toronto.
- (b) The truck driven by Victor Oliveira was provided to him for his regular use by his employer. Victor Oliveira had been driving this particular truck since around the year 2000.
- (c) The truck was insured under a valid policy of insurance with Dominion of Canada General Insurance Company under Policy No. 6923082DK and was a described automobile. The named insureds on the policy are Drivers & Wheels in Motion and Rocket Freight Services Inc. This policy of insurance carried third party liability limits of \$2 million. This policy of insurance also included the OPCF-44R endorsement coverage.
- (d) Victor Oliveira also had a valid policy of insurance with ING Insurance Company of Canada under Policy No. 742517938 which insured two of his personal vehicles. This policy of insurance carried third party liability limits of \$500,000. This policy of insurance also included the OPCF-44R endorsement coverage.
- (e) On May 29, 2007, Lederer J. determined that the motor vehicle driven by Phillip Mullings was uninsured at the time of the Accident. The claim was dismissed as against the defendant, Claudia James at that time.
- (f) The co-defendant, Phillip Mullings, has been noted in default. There is no insurance company responding to this claim on his behalf. [page753]

[3] It is agreed that coverage for an insured in cases where

an uninsured automobile is involved is governed by s. 5 of the Ontario Automobile Policy ("O.A.P. 1").

[4] Section 5.2.1 of the O.A.P. 1 states that an insurer (such as Dominion) will pay any amount their insured has a legal right to recover as damages from the operator of the uninsured automobile (Mr. Mullings) for bodily injury resulting from an accident.

[5] Section 5.3.1 of the O.A.P. 1 sets out who is covered in claims for bodily injury or death. Section 5.3.1 reads as follows:

5.3 Claims for Bodily Injury or Death

5.3.1 Who is Covered?

The following are insured persons for bodily injury or death:

- Any person who is an occupant of the automobile.
- You, your spouse, and any dependent relative of you or your spouse,
 - when an occupant of an uninsured automobile, or
 - when not in an automobile, streetcar or railway vehicle if hit by an unidentified or uninsured automobile.
- If you are a corporation, unincorporated association or partnership, any director, officer, employee or partner for whose regular use the described automobile is provided, their spouse, and any dependent relative of you or your spouse,
 - when occupants of an uninsured automobile; or
 - when not in an automobile, streetcar or railway vehicle if hit by an unidentified or uninsured automobile.

Note: If the director, officer, employee or partner, or their spouse is the owner of an automobile that is insured, this policy does not apply. The policy of that automobile will provide coverage.

[6] The operative Note came into effect in O.A.P. 1 on or after March 31, 1994 and has remained unchanged throughout the various subsequent changes to the O.A.P. 1. To date, the effect of the Note has not been judicially considered.

[7] Dominion states that while Victor Oliveira is "an occupant of an automobile" and "an employee for whose regular use the described automobile is provided", the Note following s. 5.3.1 clearly states that if Mr. Oliveira is an owner of an insured automobile (in this case with ING), then that policy (ING) will provide coverage for Mr. Oliveira for any damages he can recover from the uninsured automobile operator (Mr. Mullings). [page754]

[8] Dominion submits that the case of Maddalena v. Crouse (1996), 28 O.R. (3d) 474, [1996] O.J. No. 1195 (Gen. Div.) confirmed in the Court of Appeal at (1996), 30 O.R. (3d) 578, [1996] O.J. No. 4296 (C.A.) does not apply because the O.A.P. 1 policy at issue in that decision predates the inception of the Note and therefore its reasoning is not "wholly" applicable in determining the issue in this case.

[9] ING submits that s. 5.3.1 of the O.A.P. 1 is dispositive of the issue together with the case of Maddalena v. Crouse, supra.

[10] ING submits that if you apply s. 5.3.1 of the O.A.P. 1, then Dominion should be providing coverage to Mr. Oliveira. The basis for this submission is that Mr. Oliveira is an employee of a corporation for whose regular use the described automobile is provided (the truck). Mr. Oliveira was not the occupant of an uninsured vehicle because the vehicle that he was occupying at the time of the accident was insured by Dominion. In those circumstances, Dominion should compensate Mr. Oliveira.

[11] ING further submits that the Note only applies if the two preceding bullet points preceding it apply. Because Mr. Oliveira was in an insured automobile as opposed to an "uninsured automobile", the Note does not apply.

[12] With respect and despite the capable submissions of counsel for Dominion, it is my view that the position put forward by counsel for ING is preferable. I accept the submissions made by counsel for ING with respect to the interpretation of s. 5.3.1 of the O.A.P. 1 and I am of the belief that the reasoning in *Maddalena v. Crouse*, supra, is both applicable and persuasive.

[13] The facts in *Maddalena v. Crouse*, supra, are identical to the facts before me save and except that the court was interpreting s. 265 of the Insurance Act, R.S.O. 1990, c. I.8. In that particular case, the plaintiff was driving a van owned by his employer and insured by Gore Mutual Insurance Company ("Gore"). When stopped at the stop sign, the plaintiff was struck from behind by the defendant. The van had been provided to the plaintiff for his regular use. The plaintiff personally owned two vehicles that were insured by Axa Home Insurance Company ("Axa"). Axa's policies covered the plaintiff in the event of an accident with a driver who was unidentified, uninsured or under-insured. The defendant and his vehicle were uninsured at the time of the accident. Axa maintained that it was not responsible for the uninsured motorist coverage because the plaintiff was not driving one of the vehicles insured under Axa's policies. Gore took the position that its policy did not apply to employees who owned automobiles insured under their own policy. Gore submitted that because the plaintiff could not collect under the [page755] Gore policy, the plaintiff was considered to be the occupant of an uninsured automobile and was entitled to claim under Axa's policy.

[14] Lofchik J. interpreted s. 265 of the Insurance Act and held [at para. 12]:

. . . the wording of s. 265(2)(c)(i) which defines "person insured under the contract, in respect of a claim for bodily injuries or death" as any person while an occupant of the insured automobile", is broad enough to include an employee of any corporation, unincorporated association or partnership for whose regular use the insured automobile is furnished and if the legislature had intended to limit the coverage of an employee while an occupant of an insured vehicle owned by a

corporation, unincorporated association or partnership to only those employees who are not the owners of an automobile insured a contract, it would have included in the listing under s. 265(2)(c)(iii) the words "while an occupant of the insured automobile". Section 265(2)(c)(iii) provides that if the insured is a corporation, an employee for whose regular use the insured automobile is provided is covered while an occupant of an insured automobile. A plain reading of this subsection leads one to conclude that the insured automobile is not the same vehicle "an uninsured automobile" referred to in the same subsection. To read the subsection in that manner would be absurd.

(Emphasis added)

[15] The Court of Appeal *Maddalena v. Crouse*, supra, case upheld the decision of Lofchik J. and stated that "There was no indication that the legislature intended to limit employee coverage to those employees who did not own vehicles covered by other policies. A plain reading of the statute led to the conclusion that the insured automobile could not be the same vehicle as the uninsured vehicle" (emphasis added).

[16] For me to adopt the submissions of counsel for Dominion, I would have to find that Mr. Oliveira was the occupant of an uninsured vehicle at the time of the accident which, in my view, would lead to an absurd result. There was no question that Mr. Oliveira was the occupant of an insured vehicle provided by his employer for his regular use.

[17] Accordingly, I am granting an order declaring that Dominion must respond to the uninsured portion of the plaintiff's claims. There will be a dismissal of the claims against ING on a without costs basis.

Order accordingly.