Tut et al. v. RBC General Insurance Company; Coseco Insurance Company, Inervenor

[Indexed as: Tut v. RBC General Insurance Co.]

104 O.R. (3d) 793

2011 ONSC 823

Ontario Superior Court of Justice,
Frank J.
February 1, 2011

Insurance -- Automobile insurance -- Insurer's duty to defend -- Insured's son sleeping for at least six hours and possibly for as many as nine hours after spending night drinking at party -- Insured's son driving her car with her consent on morning after party and involved in accident -- Son contravening O. Reg. 340/94 at time of accident as he held Class G2 driver's licence and had blood alcohol concentration in excess of 0 per cent -- Son having no memory of his state of mind at time of driving because of injuries suffered in accident -- Policy excluding coverage where insured operates or permits other person to operate motor vehicle when not authorized by law to do so -- Exclusion not applying as son took all reasonable care in circumstances -- Son having reasonable and honest belief that he had 0 per cent blood alcohol concentration when he awoke on morning after party -- Insurer not establishing that insured should have realized that her son was not authorized to drive -- Insurer having duty to defend actions against insured and son.

NT was the driver of a car involved in an accident. His mother, GT, was the owner of the car. At the time of the

accident, NT was in breach of O. Reg. 340/94 [page794] as he held a Class G2 driver's licence and had a blood alcohol concentration in excess of 0 per cent. The insurer of the vehicle took the position that coverage was excluded pursuant to Statutory Condition 4(1), which provides that an insured shall not operate, or permit any other person to operate, a motor vehicle unless the person is authorized by law to operate it. NT and GT brought an application for a declaration that the insurer had a duty to defend them in two actions arising out of the accident.

Held, the application should be granted.

For the purposes of the motion, the insurer accepted that the regulation creates a strict liability offence, with the result that the exclusion would not apply to NT if he could establish that he took all reasonable care in the circumstances. NT admitted drinking at his birthday party the night before the accident. He was unable to recall the morning of the accident because of injuries sustained in the accident, but testified that he would never knowingly drive with a blood alcohol concentration of more than 0 per cent. He had at least six and possibly as much as nine hours' sleep before driving. NT had a reasonable and honest belief that he had a blood alcohol concentration of 0 per cent when he awoke the morning after the party. The insurer had not met the onus of establishing that coverage for NT was excluded under the policy. GT testified that she detected no signs of alcohol consumption on NT when she spoke to him on the morning of the accident. The evidence of friends of NT who saw him before he spoke to GT was consistent with him not exhibiting any signs of intoxication. The insurer had not met the onus of establishing that GT knew or ought to have known that NT was not authorized to drive.

Cases referred to

Brampton (City) v. Kanda (2008), 88 O.R. (3d) 732, [2008] O.J. No. 80, 2008 ONCA 22, 227 C.C.C. (3d) 417, 56 M.V.R. (5th) 1, 41 M.P.L.R. (4th) 199, 53 C.R. (6th) 331, 289 D.L.R. (4th) 304, 233 O.A.C. 118, 76 W.C.B. (2d) 398; Co-operative Fire & Casualty Co. v. Ritchie, [1983] 2 S.C.R. 36, [1983] S.C.J. No. 61, 150 D.L.R. (3d) 1, 50 N.R. 106, 61 N.S.R. (2d) 437, 2 C.C.L.I. 215, [1983] I.L.R. 1-1697 at 6530, 22 A.C.W.S. (2d)

5; Longo v. Maciorowski (2000), 50 O.R. (3d) 595, [2000] O.J. No. 3632, 193 D.L.R. (4th) 371, 137 O.A.C. 159, 23 C.C.L.I. (3d) 1, [2001] I.L.R. I-3917, 6 M.V.R. (4th) 209, 99 A.C.W.S. (3d) 1050 (C.A.); R. v. Raham (2010), 99 O.R. (3d) 241, [2010] O.J. No. 1091, 2010 ONCA 206, 213 C.R.R. (2d) 336, 260 O.A.C. 143, 92 M.V.R. (5th) 195, 74 C.R. (6th) 96; R. v. Sault Ste. Marie, [1978] 2 S.C.R. 1299, [1978] S.C.J. No. 59, 85 D.L.R. (3d) 161, 21 N.R. 295, 40 C.C.C. (2d) 353, 7 C.E.L.R. 53, 3 C.R. (3d) 30, 2 W.C.B. 321

Statutes referred to

Highway Traffic Act, R.S.O. 1990, c. H.8 [as am.]

Rules and regulations referred to

O. Reg. 340/94 (Highway Traffic Act) [as am.]

APPLICATION by the insured for a declaration that the insurer had a duty to defend them.

Joseph Villeneuve, for applicants.

John Dean and Amber Small, for respondent.

Kerri Kamra, for intervenor. [page795]

Endorsement of FRANK J.: --

Background

[1] The applicants seek a declaration that the respondent, RBC General Insurance Company, owes them a duty to defend the allegations of negligence made against them in two actions arising out of a car accident that occurred on June 23, 2007.

[2] The intervenor, Coseco Insurance Company, by way of counter-application, seeks an order that RBC owes a duty to indemnify the applicants with respect to the claims advanced in one of the two actions.

[3] The applicant, Nagraj Singh Tut, was the driver of the car involved in the accident. His mother, the applicant Gurmeet

Kaur Tut, was the owner of the car.

[4] RBC acknowledges that the allegations in the statements of claim engage the coverage provided by its policy of insurance issued to Mrs. Tut. It submits, however, that coverage is excluded pursuant to Statutory Condition 4(1) that provides that an insured shall not operate, or permit any other person to operate, a motor vehicle unless the person is authorized by law to operate it.

[5] After investigating the accident, RBC denied coverage to both applicants. It takes the position with respect to Mr. Tut that he contravened O. Reg. 340/94 enacted pursuant to the Highway Traffic Act, [See Note 1 below] prohibiting holders of Class G2 driver's licence from driving with a blood alcohol concentration in excess of 0 per cent. As a result, he was not authorized to drive when he drove his mother's car and was involved in the accident. RBC takes the position with respect to Mrs. Tut that she consented to her son driving that morning when she knew or ought to have known that he was not permitted by law to do so.

Does the Exclusion Apply to Mr. Tut?

[6] It is admitted that Mr. Tut did contravene the regulation that he not have a concentration of greater than 0 per cent alcohol in his blood. Mr. Tut, along with his passengers, was hospitalized as a result of the accident. St. Michael's Hospital laboratory blood test results show Mr. Tut to have had a blood alcohol concentration of 26.8 mmol/l, or over one and a half times the legal limit for driving, roughly two hours after the accident. [page796]

[7] For the purposes of this motion, RBC accepts the regulation creates a strict liability offence with the result that the exclusion will not apply to Mr. Tut if he can establish that he took all reasonable care in the circumstances. [See Note 2 below] As the court stated in Brampton (City) v. Kanda ((2008), 88 O.R. (3d) 732, [2008] O.J. No. 80 (C.A.), at para. 17, quoting Dickson J. in R. v. Sault Ste. Marie, [1978] 2 S.C.R. 1299, [1978] S.C.J. No. 59), "[a] defence will be available if the accused reasonably believed in a mistaken set

of facts which, if true, would render the act or omission innocent . . .".

[8] Mr. Tut has no recollection of the morning of the accident because of the injuries he sustained in it. He admits to drinking the night before. He and a large number of his friends were at his parents' home that night celebrating his 20th birthday. As planned, some of his friends spent the night. His parents were at the house only at the beginning of the party and the next morning.

[9] Mr. Tut admitted to the RBC adjuster who questioned him during the course of its investigation into the accident to having drunk some hard liquor and some beer and having drunk more alcohol than he normally drinks. Its position is that the fact that Mr. Tut cannot provide any evidence as to how he felt or what his thought process was [that] morning makes it impossible for Mr. Tut to meet the onus of demonstrating that he did not knowingly contravene the regulation. I do not agree.

[10] Mr. Tut's evidence is that he would never knowingly drive with a more than 0 per cent blood alcohol concentration. His parents told him that he was not to drive after drinking. He relies on the fact that his mother approved of his taking the car after seeing and speaking with him that morning, and knowing of the regulation governing his licence. She permitted him to drive in circumstances in which there were alternatives to his taking the car. This is consistent with neither of them realizing that he still had a greater than zero percentage concentration of alcohol in his blood.

[11] RBC submits that it would not have been reasonable for Mr. Tut to believe that he had so little alcohol in his bloodstream that it did not exceed 0 per cent. It relies on the report of Dr. Harold Kalant, a professor emeritus of pharmacology at the University of Toronto and research director emeritus at the CAMH retained by RBC. It is Dr. Kalant's opinion that Mr. Tut [page797] probably had at least ten standard drinks over the course of his birthday party based on the St. Michael's Hospital laboratory results. However, this opinion must be considered in light of Dr. Kalant's

calculations being based on misinformation regarding Mr. Tut's height and weight. Mr. Tut weighed notably more and was taller than what Dr. Kalant was told. Dr. Kalant's report fails to establish that it would have been apparent to Mr. Tut, or a reasonable person in his circumstances, that he had had so much to drink the night before that he could not drive in the morning.

[12] I find that Mr. Tut had a reasonable and honest [belief] that he had 0 per cent blood alcohol concentration when he awoke the morning after his party. On the basis of the evidence that warrants consideration of those who were at the party, Mr. Tut had a minimum of six hours' sleep and possibly as much as nine hours that night. His belief that he was qualified to drive was a reasonable mistake of fact. (R. v. Raham (2010), 99 O.R. (3d) 241, [2010] O.J. No. 1091 (C.A.), at para. 47.)

[13] I find that RBC has not met the onus of establishing that coverage for Mr. Tut is excluded under the policy.

Does the Exclusion Apply to Mrs. Tut?

[14] Mrs. Tut's evidence is that based on her observations there was no reason for her to believe that her son would be in breach of the 0 per cent condition of his licence if he drove that morning. She saw him for the first time that morning when he stepped out of the washroom. She was a distance of six to eight feet from him as they spoke to each other. She detected no signs of alcohol consumption on him.

[15] RBC submits, relying on Dr. Kalant's report, that Mrs. Tut was either willfully blind to her son's condition or irresponsible in assessing it. Dr. Kalant's opinion, again based on the laboratory results of Mr. Tut's blood test following the accident, is that if he had had several hours' sleep that night, Mr. Tut would have had considerably less marked signs of intoxication than if he had had no sleep. He would not have shown common signs of intoxication but would probably have shown "residual signs of fatigue, slowness of thought and responses, some tremor of the hands and some pallor and clamminess of the skin, as well as an odor of alcohol on the breath".

[16] However, as I have stated, the evidence is that Mr. Tut had a minimum of six hours' sleep and as much as nine hours. Even at the minimum, that would be more than several, as that word is generally understood. The evidence of Mr. Tut's friends who saw him before he spoke with his mother is consistent with [page798] his not exhibiting any signs of intoxication that morning. So, too, is the evidence of one of his passengers. She has no recollection of the events leading up to the accident, but insists that she would not have gotten into the car with Mr. Tut as driver if she thought he was impaired.

[17] As for the smell of alcohol, based on Dr. Kalant's evidence, Mrs. Tut would have had to be standing closer to her son to be able to detect it on his breath. And, her ability to do so in any event would have been influenced by what he had done prior to speaking with his mother and the presence of other smells.

[18] RBC has not established that Mrs. Tut should have realized that her son had had a large amount of alcohol the night before. Mrs. Tut's evidence is that while she was at the party, she did not see anyone drinking. She and her husband left between 9:30 p.m. and 10:00 p.m. that night. When she returned early the next morning, she did not notice alcohol bottles or the plastic shot glasses that had been used.

[19] In responding to the questions of RBC's adjuster, Mrs. Tut said that she knew that "the effect of alcohol is present for two to three days". RBC submits that this knowledge is inconsistent with her not realizing that her son was at risk of being in breach of his licence condition if he drove and required her to do more to assess his state. In my view, that places an unwarranted weight on her statement -- a statement the meaning of which is unclear and the reliability of which is unknown, at best.

[20] RBC submits that I should reject Mrs. Tut's evidence on the basis of it being "tailored to her advantage". Evidence of this, it submits, is her statement to RBC's adjuster that her son had not been drinking, as if he had, she "would have come

to know", which is inconsistent with her son's evidence that he told her that he would be drinking. However, in my view, this is only inconsistent if one assumes that Mrs. Tut was referring to drinking the night before the accident rather when she gave her statement to the adjuster. The more likely interpretation is that Mrs. Tut was referring to drinking on the morning of the accident.

[21] Before her son asked if he could drop off his friends, Mrs. Tut asked him about his party and confirmed that he had slept that night. She had previously instructed him not to drive after drinking and there is no evidence that he had ever failed to comply with that rule. She saw nothing either in the house or in her son's manner that would make it necessary for her to question him regarding the amount of alcohol he had drunk the night before. These things are consistent with it having been [page799] reasonable for Mrs. Tut to permit her son to drive without making any further enquiry of him regarding his condition.

[22] The cases on which RBC relies are cases in which the court found that the driver or person giving permission to drive knew or ought to have known that the driver was not qualified to drive. Those cases are distinguishable based on my finding that it was reasonable for Mr. Tut to believe that he could drive without being in breach of his licence or the policy and my finding that Mrs. Tut acted reasonably in the circumstances.

[23] It was submitted on behalf of Mr. Tut that I should assume from the fact that Mr. Tut was not charged with any alcohol-related offence as a result of this accident that, in spite of the laboratory results, the police concluded that there was no basis for charging Mr. Tut with a drinking and driving offence. However, there can be any number of reasons unrelated to whether there was a basis for a charge for not charging Mr. Tut.

[24] Bearing in mind that the onus is on RBC, what I view as noteworthy is not the absence of a charge, but rather the absence of any evidence from the paramedics or police who dealt

with Mr. Tut at the scene of the accident regarding what they observed. It may be that Mr. Tut was unconscious, given that he was in a coma for some period of time following the accident. However, that would not have prevented the detection of alcohol on his breath at the scene.

[25] I find that RBC has not met the onus of establishing that Mrs. Tut knew or ought to have known, under the circumstances, that in permitting her son to drive, she was permitting him to drive when he was not authorized to do so. [See Note 3 below]
Are the Applicants Entitled to Appoint Counsel of their Choice to Defend the Actions for Which Coverage is Provided?

[26] As the applicants submitted, whether an insured is entitled to choose counsel will depend on the circumstances. [See Note 4 below] I see no circumstance in this case that would warrant denying RBC its right to appoint counsel and thereby control the defences.

[27] RBC acknowledges that if it is not entitled to rely on the exclusion it raised, the applicants are entitled to coverage. There is, therefore, no conflict between them as relates to the defence [page800] of the claims and no potential prejudice to the applicants that would result from their defences being controlled by RBC.

[28] I find that the applicants are not entitled to appoint counsel.
Summary

[29] The applicants are entitled to a declaration that RBC policy no. 01706102 is a valid policy binding RBC to defend and indemnify the applicants in relation to actions commenced under court file numbers CV-08-369020 and CV-09-389505.

[30] The applicants are also entitled to reimbursement of the legal costs they have incurred in defending the actions to date. The applicants and RBC have agreed to the amount of those costs in the total of $16,500.

[31] RBC is entitled to control the defence of the actions.

Costs

[32] The applicants and RBC have agreed that, if successful, the applicants will be entitled to costs of this motion in the amount of $22,500, all inclusive.

[33] The applicant was successful in all but its request to appoint counsel. The submissions with respect to this portion of the application took very few minutes; the written submissions were half a page in length in an 11-page factum. RBC did not address the issue in its factum and was not required to make oral submissions with respect to it. I see no basis for reducing the agreed to costs in spite of the applicants not having succeeded in this aspect of the application.

[34] The costs of the intervenor have not been agreed to. If the parties continue to be unable to reach an agreement, they may make written submissions to me with respect to those costs. The intervenor is to provide its submissions within 20 days of receipt of this endorsement, with RBC's submissions to follow within ten days.

Application granted.

Notes

Note 1: R.S.O. 1990, c. H.8.

Note 2: Mr. Tut was not charged criminally with any alcohol related offence as a result of the accident.

Note 3: Co-operative Fire & Casualty Co. v. Ritchie, [1983] 2 S.C.R. 36, [1983] S.C.J. No. 61, at para. 16.

Note 4: Longo v. Maciorowski (2000), 50 O.R. (3d) 595, [2000] O.J. No. 3632 (C.A.), at para. 32.
