Baird et al. v. Abouibrahim et al.; Lombard General Insurance Company of Canada

[Indexed as: Baird v. Abouibrahim]

110 O.R. (3d) 600

2012 ONSC 859

Ontario Superior Court of Justice,
Gilmore J.
February 16, 2012

Insurance -- Automobile insurance -- Interpretation and construction -- Purchasers returning recently purchased vehicle to dealer for repairs -- Dealer giving them replacement vehicle to use until repairs were completed -- Purchaser signing "loaner agreement" -- Dealer not in car rental business -- Dealer not placing any significant restrictions on use of vehicle -- Vehicle not a leased vehicle -- Dealer's insurance policy being first loss insurance for purposes of s. 277 of Insurance Act -- Insurance Act, R.S.O. 1990, c. I.8, s. 277.

NYC sold motor vehicles and also leased vehicles on a long-term basis. It was not involved in short-term rentals. M and D purchased a vehicle from NYC in D's name. It had mechanical problems and was returned to NYC for repairs. NYC provided M and D with a replacement vehicle to use until the repairs were completed. D signed a "loaner agreement". The replacement vehicle struck B while M was driving and D was a front-seat passenger. B sued M, D and NYC. M and D had automobile insurance through Personal in relation to a vehicle not

involved in the accident. Lombard was NYC's insurer. Personal and its insured brought a motion for summary judgment seeking a determination that the Lombard policy stood in priority to the Personal policy. Lombard brought a cross-motion for an order dismissing the third party claim against it and a declaration that the Personal policy stood in priority to the Lombard policy.

Held, the motion should be granted; the cross-motion should be dismissed. [page601]

Neither NYC nor M and D considered that they were within the ambit of a rental agreement. The following considerations distinguished the arrangement from a lease or rental: (1) the agreement was specifically entitled a "loaner agreement"; (2) M and D did not pay for the use of the vehicle; (3) the agreement was not reviewed by a salesperson with either M or D; (4) NYC was not in the business of providing rental vehicles, leases were generally for 48 months or more, and NYC did not advertise itself as a rental car agency; (5) there were no significant restrictions on the use of the vehicle; (6) section 7.14(1)(ii) of the Lombard Dealer's Choice Policy excluded liability for Lombard where a vehicle was rented or leased unless a vehicle owned by NYC was used by a customer pending the return of a vehicle left with them for servicing or repairs. The vehicle was not a leased vehicle. Rather, it was a temporary substitute vehicle. The Lombard policy was an owner's policy under s. 277(1) of the Insurance Act. NYC consented to D having possession of the vehicle, and D consented to M driving the vehicle. The Lombard policy was first loss insurance for the purposes of s. 277 of the Act, and Lombard was required to provide M and D with a defence and indemnity in relation to the claims against them in the main action.

Cases referred to

Avis Rent-A-Car System Inc. v. Certas Direct Insurance Co. (2005), 75 O.R. (3d) 421, [2005] O.J. No. 1951, 197 O.A.C. 214, 22 C.C.L.I. (4th) 159, [2005] I.L.R. I-4413, 18 M.V.R. (5th) 61, 139 A.C.W.S. (3d) 359 (C.A.); Coachman Insurance Co. v. Lombard General Insurance Co. of Canada (2011), 105 O.R. (3d) 475, [2011] O.J. No. 1236, 2011 ONSC 1655, [2011] I.L.R. I-5125, 19 M.V.R. (6th) 312, 96 C.C.L.I. (4th) 113

(S.C.J.); ING Halifax v. Guardian Insurance Co. of Canada, [2002] O.J. No. 4302, [2002] O.T.C. 879, 43 C.C.L.I. (3d) 246, [2003] I.L.R. I-4134, 118 A.C.W.S. (3d) 126 (S.C.J.); Thompson v. Bourchier, [1933] O.R. 525, [1933] O.J. No. 356, [1933] 3 D.L.R. 119 (C.A.), consd

Other cases referred to

Combined Air Mechanical Services Inc. v. Flesch (2011), 108 O.R. (3d) 1, [2011] O.J. No. 5431, 2011 ONCA 764, 286 O.A.C. 3, 97 C.C.E.L. (3d) 25, 14 C.P.C. (7th) 242, 13 R.P.R. (5th) 167, 211 A.C.W.S. (3d) 845, 93 B.L.R. (4th) 1; Enterprise Rent-A-Car Canada Ltd. v. Meloche Monnex Financial Services Inc. (2010), 102 O.R. (3d) 87, [2010] O.J. No. 1498, 2010 ONCA 277, 93 M.V.R. (5th) 15, 261 O.A.C. 7, [2010] I.L.R. I-4971, 319 D.L.R. (4th) 176

Statutes referred to

Highway Traffic Act, R.S.O. 1990, c. H.8, s. 192 [as am.]

Insurance Act, R.S.O. 1990, c. I.8, ss. 1 [as am.], 267.12, 277 [as am.], (1), (1.1), 1, (4)

Rules and regulations referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rule 20

MOTION for summary judgment; CROSS-MOTION for an order dismissing the third party claim.

Michael Burgar, for moving party defendants Melham Abouibrahim and Danielle Hendry.

David N. Delagran, for third party. [page602]

GILMORE J.: --

Overview

[1] This is a Rule 20 [of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194] motion for summary judgment in the third-party claim related to the priority of motor vehicle insurance coverage. A motor vehicle owned by North York Chevrolet Limited ("North York Chevrolet") and driven by Melham Abouibrahim ("Melham") was involved in a collision with the

plaintiff Cynthia Baird ("Cynthia"), a mentally disabled adult, while she and her mother crossed the street on their way to a shopping plaza. Melham's fianc, Danielle Hendry ("Danielle"), was a front-seat passenger in the vehicle.

[2] Melham and Danielle have motor vehicle insurance through The Personal Insurance Company ("The Personal") in relation to their ownership of a vehicle not involved in the accident. The Personal has defended Melham and Danielle pursuant to "temporary substitute vehicle" coverage.

[3] Melham, Danielle and The Personal seek a determination that the "owner's policy" provided to North York Chevrolet by Lombard General Insurance Company of Canada ("Lombard") stands in priority of their The Personal policy. They do so on the following grounds:

(a) section 277 of the Insurance Act, R.S.O. 1990, c. I.8 applies to dictate that the Lombard policy is first loss insurance in these circumstances;
(b) the language used in the Lombard policy indicates that it was intended to stand in priority when a customer provided by North York Chevrolet with a "loaner" vehicle is involved in an accident causing injury while the customer's vehicle is left with North York Chevrolet for repairs; and
(c) there is no need for a trial on the question of whether the vehicle in the accident was leased or rented. It was obviously a "loaner vehicle" owned by North York Chevrolet and fully insured by Lombard.

[4] The third party, Lombard, brings a cross-motion for an order dismissing the third-party claim and a declaration that the policy of insurance issued by The Personal must respond and defend and indemnify the defendants Melham, Danielle and North York Chevrolet in priority to the policy of insurance issued by Lombard. [page603]

[5] Lombard argues that

(a) the garage policy issued by Lombard to North York Chevrolet is not an "owner's policy" within the meaning of s. 277 of the Insurance Act and does not therefore respond until the limits of The Personal policy held by Danielle and Melham

are exhausted;

(b) the temporary substitute vehicle that is the subject of this action was a "leased vehicle" within the meaning of s. 277(1.1) of the Insurance Act, and therefore The Personal policy must respond first; and

(c) the defendant Melham, who was driving the vehicle, did not have the consent of North York Chevrolet to drive the temporary substitute vehicle as he was under the age of 25.

The Facts

[6] The facts in this case are not substantially in dispute. In early December 2006, Melham and Danielle attended the North York Chevrolet dealership and purchased a 2003 Hyundai Tiburon. The vehicle was purchased in Danielle's name because Melham had credit problems. Shortly after taking possession of the vehicle, the vehicle had mechanical problems and was returned to the dealership for repairs.

[7] Melham and Danielle discussed the vehicle repairs with the used car sales manager, Michael Bailey. Mr. Bailey presented a "loaner agreement" to Danielle, asked her to sign it and gave the keys to Melham. Melham did not sign the loaner agreement. The loaner agreement was not explained to Danielle. She did not read the agreement and believed she was signing it as a pre-condition to receiving the vehicle.

[8] Mr. Bailey's only instruction to Melham and Danielle was that there was to be no smoking in the vehicle. It was understood that Melham and Danielle would use the loaner vehicle until their vehicle was repaired. Melham and Danielle were not charged for the loaner vehicle even though the agreement indicated a nominal user fee of $20 plus tax would be charged. The couple were never under the impression that they were renting or leasing the vehicle as it was a "loaner to be used while their vehicle was being repaired".

[9] North York Chevrolet does lease vehicles for longer terms, typically for 48 months. North York Chevrolet is not in the short-term rental car business. The standard practice at the dealership is to provide loaner vehicles to customers on a discretionary [page604] basis when the customer's vehicle is

kept at the dealership for service or repairs.

[10] The loaner agreement in this case was signed by Danielle. The terms of the agreement were contained in a form generated by North York Chevrolet. The agreement does not indicate any contractual intention to transfer insurance requirements away from the Lombard policy to the customer's policy. Specifically, part 4 of the agreement states:

> I understand the insurance carried by Kia of Newmarket is subject to a deductible amount of $500.00 and I agree to pay Kia of Newmarket such deductible amount against my credit card.

[11] Lombard admits in its third-party defence that North York Chevrolet owned the vehicle involved in the accident and that Lombard insured North York Chevrolet and the vehicle pursuant to a standard Ontario Garage Automobile Policy (OAP4) (Toronto: Financial Services Commission of Ontario) with $2 million limits, and umbrella and standard excess automobile coverage ("SPF7") with a further $19 million limit.

[12] The "loaner agreement" signed by Danielle on December 9, 2006 contains specific terms, including

(1) that a charge of $20 would be levied as a "user fee";
(2) that the driver must be at least 25 years old;
(3) that the vehicle would not be operated by anyone other than "myself and/or any other driver authorized by Kia of Newmarket";
(4) that "I shall indemnify Kia of Newmarket against all other liabilities, losses, costs, damages and expenses arising while the vehicle is used by me or is in my custody";
(5) that smoking is strictly prohibited;
(6) that the person taking the vehicle is responsible for any fines, parking tickets, insurance deductibles and fuel; and
(7) the vehicle would be returned "at the time and date agreed upon or forthwith upon demand".

[13] The agreement is entitled "loaner agreement". [page605]

Issues and the Law

Issue 1: Is the loaner vehicle a leased vehicle?

[14] The parties agree that if the loaner vehicle is a leased vehicle within the meaning of s. 277(1.1)1 of the Insurance Act, then the policy of the lessee of the automobile is the policy which must respond in priority. In this case, that policy is issued by The Personal.

[15] Amendments to s. 277, effective March 1, 2006, provide that the s. 277(1) owner's policy priority rule does not apply to rented or leased vehicles where the lessee or renter of the vehicle has obtained insurance for the vehicle involved in the accident. Section 277(4) defines a lessee as a "person who is leasing or renting the automobile for any amount of time". The Insurance Act does not provide a definition of the words "leasing" or "renting".

[16] Counsel for The Personal requests that the court interpret the term "lessee" narrowly. Lombard disagrees and submits that the term is not ambiguous and therefore need not be interpreted restrictively. Lombard argues that the amendments to ss. 277 and 267.12 were meant to shift the burden of first loss insurance from the owner of the rented vehicle to the insurance available to the driver or renter of the rented vehicle: see Enterprise Rent-A-Car Canada Ltd. v. Meloche Monnex Financial Services Inc. (2010), 102 O.R. (3d) 87, [2010] O.J. No. 1498 (C.A.), at para. 4.

[17] Lombard further argues that even if the personal defendants are found to be lessees, they would still have access to coverage as unnamed insureds under The Lombard garage policy. Therefore, The Personal is incorrect in arguing that s. 267.12 would restrict coverage for Melham and Danielle if they are found to be renters or lessees.

[18] Section 277 as amended does not indicate any change to the priority rules for loaner vehicles which may be subject to coverage as "temporary substitute vehicles". Lombard argues that the case of ING Halifax v. Guardian Insurance Co. of Canada, [2002] O.J. No. 4302, [2002] O.T.C. 879 (S.C.J.) applies. In that case, the personal defendant had taken his

vehicle to the dealership for repairs and was given a loaner vehicle which he permitted his son to operate without consent. An application was brought to determine priority as between the garage policy and the driver's owner's policy. Justice Browne held that the owner's policy and not the garage policy was first loss insurance. Justice Browne set out criteria for determining whether a vehicle was leased as follows: [page606]

(a) whether there was written agreement relating to the use of the vehicle. The terms of the use of the vehicle (i.e., a requirement to pay for gas and parking violations);
(b) payment of insurance deductible;
(c) length of use of the vehicle;
(d) permission to drive and prohibitions; and
(e) consideration for the use of the vehicle.

[19] The moving parties submit that ING should not be followed because it has been overturned by the Court of Appeal's decision in Avis Rent-a-Car System Inc. v. Certas Direct Insurance Co. (2005), 75 O.R. (3d) 421, [2005] O.J. No. 1951 (C.A.). ING was decided before the March 2006 amendments to s. 277 and is distinguishable on its facts.

[20] Lombard argues that the test for the criteria for determining whether the loaner vehicle in this case was leased has been satisfied since

(a) there was a written and signed agreement pertaining to the use of the vehicle;
(b) the parties agreed that a fee was to be charged for the use of the vehicle;
(c) other terms of use included a requirement to pay for gas and parking violations and a prohibition against smoking in the vehicle;
(d) there was a requirement to pay insurance deductibles;
(e) the vehicle was not to be operated by anyone under the age of 25 or anyone except as authorized by North York Chevrolet; and
(f) the vehicle was to be returned "at the time and date agreed upon or upon demand".

[21] The moving parties argue that doubt or ambiguity about the application of the Lombard coverage to a loaner vehicle

should be resolved by the terms of the Lombard policy. The Lombard policy indicates a contractual intention between Lombard and North York Chevrolet that the drivers and occupants of motor vehicles would be covered and the Lombard policy was intended to respond as "first loss" insurance. [page607]

[22] Further, the recent authority of Coachman Insurance Co. v. Lombard General Insurance Co. of Canada (2011), 105 O.R. (3d) 475, [2011] O.J. No. 1236 (S.C.J.) held that a loaner vehicle is not a rented or leased vehicle for the purposes of s. 277 of the Insurance Act and that the owner's policy purchased by the dealership stands first in line and is "first loss insurance" for the purpose of the defence and indemnification of claims.

[23] In Coachman, the court held that the loaner vehicle was not leased as there was no written agreement between the personal defendant and the dealership, no restriction on the use of the vehicle other than a vague instruction that the personal defendant could "use it around town", no specific date for the return of the vehicle and the dealership did not consider the loaner vehicle to be a rental: see para. 17.

[24] In the case at bar, there are indicia that the loaner vehicle in question could conform to the criteria set out in ING. However, close examination of the parties' intentions and actions indicate that neither party considered that they were within the ambit of a rental agreement. Considerations that would distinguish the arrangement between the dealership and the defendants from a lease or rental are as follows:

(1) The agreement is specifically entitled a "loaner agreement". The title of the agreement on its face provides guidance as to the parties' mutual understanding of the arrangement;

(2) although some consideration (the payment of $20) was indicated in the agreement, no such demand for payment was made nor was there a discussion about the collection of such a payment. A lease or rental arrangement never involves the gratuitous use of a vehicle. The use is premised on payment;

(3) the agreement was not reviewed by the salesperson with

either Melham or Danielle. The only provision which was highlighted was the dealer's insistence that there be no smoking in the vehicle;

(4) North York Chevrolet was not in the business of providing rental vehicles. It was well known that vehicles available from North York Chevrolet were available either by purchase or lease. Leases were generally for 48 months or more. North York Chevrolet did not advertise itself as a rental car agency;

(5) although the user of the vehicle was required to pay for gas and parking violations, there were no significant restrictions [page608] on the use of the vehicle such as geographic or mileage restrictions; and

(6) section 7.14(a)(ii) of the Lombard Dealer's Choice Policy excludes liability for Lombard where a vehicle is rented or leased unless a vehicle owned by North York Chevrolet is used by a customer pending the return of a vehicle left with them for servicing or repairs.

[25] This was a different arrangement from one where a rental vehicle is required as a result of an accident or business use. The intention in this case was to provide the customer with the complimentary use of a vehicle because her recently purchased vehicle was not in working order. That is quite different from what would otherwise be a typical rental arrangement.

[26] For all of the above reasons, I find, as per Coachman, that the mere fact that both parties derived some benefit or convenience as a result of the loan of the vehicle does not result in a rental situation. Notwithstanding that there was more indicia of the possibility of a rental arrangement in the case at bar than in Coachman, I find that the loaner agreement and its terms are still insufficient to "transform" the arrangement from one of a loaner to a rental.

Issue 2: Is the garage policy owned by North York Chevrolet an owner's policy under s. 277(1) of the Insurance Act?

[27] Since the vehicle is not a leased vehicle, it is a temporary substitute vehicle and coverage may be available under The Personal policy unless the garage policy owned by

North York Chevrolet is not an owner's policy.

[28] The moving parties argue that the Lombard policy is first loss insurance not only because the vehicle was not leased but because the garage policy is an owner's policy within the meaning of s. 277(1).

[29] In support of this, the moving party argues that the express terms of the Lombard auto coverage make plain that the coverage was first loss insurance. More specifically, s. 1 of the policy indicates as follows:

> [T]he insurer agrees to pay on behalf of the insured, and in the same manner and to the same extent as if named in this policy as the insured, every other person who with the consent of the insured, drives or operates, or is an occupant of any automobile owner by the insured, all sums which the insured or other person is legally obligated to pay in respect of loss or damage arising from the ownership use or operation of any automobile owned by the insured and resulting from bodily injury to or death of any person[.] [page609]

[30] Section 7.13 of the Lombard policy indicates that insurance under s. 1 of the policy is first loss insurance with respect to a customer's automobile and any other valid motor vehicle liability insurance is excess insurance only.

[31] The moving parties argue that any ambiguity about the application of the Lombard policy should be resolved by the terms of the policy itself (see quoted portions above) which indicate a contractual intention between Lombard and North York Chevrolet that the drivers and occupants of loaner vehicles would be covered in the Lombard policy which was intended to respond as first loss insurance.

[32] The moving parties rely on Avis Rent-a-Car, supra. Although decided prior to the 2006 amendments, the case provides a clear roadmap regarding rented vehicles. In that case, the court found that the Avis $25 million umbrella policy was an "owner's policy" because it insured Avis in respect of

automobiles that it owned that came within the description or definition of automobiles within the policy. As an "owner's policy", the consequence is that it becomes first loss insurance unless it falls within the exception of a leased or rented vehicle.

[33] I reject the argument of Lombard that the policy in this case was a garage policy and not an owner's policy as defined by s. 1 of the Insurance Act. As evidenced by North York Chevrolet's contract of insurance with Lombard, North York Chevrolet was the owner of the vehicle in question and, by the terms of its policy, clearly intended to provide coverage through that policy for loaner vehicles.

Issue 3: Does the lack of consent affect any of the above rulings?

[34] Lombard argues that since Melham did not have the consent of North York Chevrolet to drive, he is not insured under the Lombard policy but would be insured under The Personal policy. It is Lombard's position that there is no coverage for either Melham or Danielle as the latter was in breach of the provisions of the loaner agreement prohibiting the vehicle from being operated by anyone under the age of 25. Melham did not have the consent of the owner dealership to drive and was therefore not covered under the garage policy. Specifically, s. 1.1 of the garage policy extends third-party liability coverage to North York Chevrolet and "every other person who with the consent of the insured, drives or operates any automobile owned by the insured".

[35] Lombard also relies on s. 192 of the Highway Traffic Act, R.S.O. 1990, c. H.8 (the "HTA"), with respect to the driver being liable for loss or damage sustained by any person by reason of [page610] negligence in the operation of the motor vehicle. Danielle's breach of the agreement by allowing Melham to drive contrary to the terms of the agreement while under 25 means that the dealership is not liable to the plaintiff for damages. However, Melham and Danielle are covered by The Personal policy as named insured's and therefore, by virtue of s. 277(1), The Personal policy must respond in priority.

[36] The moving parties argue that the terms and conditions related to the operation of a vehicle as between the owner and person charged with possession of the vehicle by the owner are irrelevant to the application of s. 192 of the HTA and the insurance coverage provisions that relate to automobile policy as mandated by the Insurance Act. A vehicle owner's vicarious liability under s. 192 of the HTA is based on possession as opposed to operation.

[37] In Thompson v. Bourchier, [1933] O.R. 525, [1933] O.J. No. 356 (C.A.), at para. 4, the Ontario Court of Appeal considered the distinction between operation and possession of a motor vehicle. It is clear from that case that a person may operate a vehicle while possession remains with another. The fact that the person in possession consents to operation by another does not change their status as the person in possession. Clearly, that was the case here, where Danielle was in the front seat and allowed Melham to drive with her full knowledge and consent.

[38] In line with Thompson, there are important public policy considerations which reinforce the distinction between consent to possession and consent to operate. The moving parties argue there is no possibility of North York Chevrolet or Lombard succeeding at trial on the issue of consent because

(a) North York Chevrolet provided consent to possession to Danielle;
(b) she was sitting in the front seat of the vehicle when the accident occurred; and
(c) there is no evidence of any dispute between Danielle and Melham as to whether or not she consented to the use of the vehicle by Melham.

[39] As such, Lombard's duty to indemnify is governed by the evidence, and the evidence indicates no issue between Danielle and Melham about possession of the vehicle at the time of the accident. North York Chevrolet gave consent and possession to Danielle, who in turn gave Melham consent to drive. This is all [page611] that is necessary to conclude that consent is not an issue, even if the loaner agreement was breached.

Issue 4: Considerations relating to Rule 20

[40] This is a case where the factual issues raised on the motion are appropriately dealt with under the amended Rule 20.

[41] The evidence provided on these motions is sufficient to meet the "full appreciation test" set out in Combined Air Mechanical Services Inc. v. Flesch (2011), 108 O.R. (3d) 1, [2011] O.J. No. 5431 (C.A.). That is, the factual underpinnings of this case are not in dispute. Making findings of fact on the basis of conflicting evidence from multiple witnesses was not required. Dispositive findings on the motions related to interpretation which could be achieved without a trial. This is an appropriate case for summary judgment under Rule 20.

Orders on Ruling

[42] Given all of the above, I order as follows:

(1) The Lombard policy is first loss insurance for the purposes of s. 277 of the Insurance Act;
(2) the moving party defendants Melham and Danielle are owed a defence and indemnity from Lombard in relation to the main action claims against them; and
(3) the third party's motion is dismissed.

[43] If the parties cannot agree on costs, I will receive written submission of no more than three pages in length, exclusive of any offers to settle and bills of costs. Costs shall be provided on a seven-day turnaround basis commencing March 1, 2012.

Motion granted; cross-motion dismissed.