

Kakish v. Bruce

71 O.R. (3d) 483  
[2004] O.J. No. 2616  
Court File No. 00-CV-192240

Ontario Superior Court of Justice,  
T. Ducharme J.  
June 17, 2004

Insurance -- Automobile insurance -- Section 267.6(1) of Insurance Act barring recovery of damages for bodily injury arising from use or operation of automobile by person contravening s. 2(1) of Compulsory Automobile Insurance Act -- Section 2(1) of Compulsory Automobile Insurance Act providing that no owner or lessee of motor vehicle shall operate vehicle on highway unless vehicle is insured under contract of automobile insurance -- Plaintiff driving son's automobile -- Plaintiff not owner or lessee of automobile -- Plaintiff unaware that automobile uninsured -- Plaintiff involved in motor vehicle accident and suing for personal injuries -- Plaintiff's claim not barred -- Compulsory Automobile Insurance Act, R.S.O. 1990, c. C.25, s. 2(1) -- Insurance Act, R.S.O. 1990, c. I.8, s. 267.6(1).

Section 2(1) of the Compulsory Automobile Insurance Act ("CAIA") provides that no owner or lessee of a motor vehicle shall operate the motor vehicle on a highway unless the motor vehicle is insured under a contract of automobile insurance. Section 267.6(1) of the Insurance Act provides that a person is not entitled in an action in Ontario to recover any loss or damage from bodily injury or death arising directly or indirectly from the use or operation of an automobile if, at the time of the accident, the person was contravening subsection 2(1) of the CAIA. [page484]

In an action for damages for personal injuries, the plaintiff IK alleged that the automobile that he was driving was rear-ended by the defendant DB. It was not disputed that IK was not the owner or lessee of the vehicle he was driving; the vehicle was owned by IK's son, and IK assumed without inquiry that the vehicle was insured, which was not the case. In a summary judgment motion to have IK's action dismissed, DB argued that the action was barred by s. 276.6(1) of the Insurance Act.

Held, the motion for summary judgment should be dismissed.

It is not correct that all persons operating an uninsured vehicle are barred from commencing an action for personal injuries arising directly or indirectly from the use or operation of an automobile. IK was not the owner or lessee of his son's vehicle. Thus, his action was not barred by s. 267.6(1) of the Insurance Act.

#### Cases referred to

Bigley v. Sanders, [2004] O.J. No. 1032, 8 C.C.L.I. (4th) 316, [2004] O.T.C. 233 (S.C.J.); Budd v. Paterson (2002), 62 O.R. (3d) 715, [2002] O.J. No. 4883, 33 M.V.R. (4th) 1, 28 C.P.C. (5th) 1, [2002] O.J. No. 4883 (C.A.), revg (2002), 58 O.R. (3d) 611, 25 M.V.R. (4th) 278, 21 C.P.C. (5th) 343 (S.C.J.); Hernandez v. 1206625 Ontario Inc. (2002), 61 O.R. (3d) 584, 218 D.L.R. (4th) 456, 32 M.V.R. (4th) 64, [2002] O.J. No. 3667 (C.A.); Langford v. Oleksiuk, [2003] O.J. No. 3785 (S.C.J.); R. v. Zwicker (1994), 17 O.R. (3d) 171, [1994] O.J. No. 197, [1994] I.L.R. 1-3032, 1 M.V.R. (3d) 1 (C.A.)

#### Statutes referred to

Compulsory Automobile Insurance Act, R.S.O. 1990, c. C.25, s. 2

Family Law Act, R.S.O. 1990, c. F.3

Insurance Act, R.S.O. 1990, c. I.8, s. 267.6

Rules and regulations referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rule 20.06

MOTION for a summary judgment.

David R. Richmon, for plaintiff.

Fiona M. Brown, for defendant.

[1] Endorsement by DUCHARME J.: -- The defendant applies for an order for summary judgment dismissing the plaintiff's claims. This matter arises out of a motor vehicle collision in which it is alleged that the defendant rear-ended the plaintiff. There is no dispute between the parties that: (1) the plaintiff was not the owner or lessee of the vehicle he was driving which was owned by his son; (2) the plaintiff assumed the vehicle was insured but made no inquiries in this regard; (3) the vehicle driven by the plaintiff was not insured at the time of the collision.

[2] The defendant argues that the plaintiff's action is barred by s. 267.6(1) of the Insurance Act, R.S.O. 1990, c. I.8, as amended, which provides: [page485]

267.6(1) No action by uninsured owner or lessee -- Despite any other Act, a person is not entitled in an action in Ontario to recover any loss or damage from bodily injury or death arising directly or indirectly from the use or operation of an automobile if, at the time of the incident, the person was contravening subsection 2(1) of the Compulsory Automobile Insurance Act, in respect of that automobile.

[3] Section 267.6(2) of the Insurance Act provides:

267.6(2) Subsection (1) applies whether or not the person was prosecuted for or convicted of an offence under the Compulsory Automobile Insurance Act.

[4] Section 2(1) of the Compulsory Automobile Insurance Act, R.S.O. 1990, c. C.25, as amended, provides:

2(1) Compulsory Automobile Insurance. Subject to the regulations, no owner or lessee of a motor vehicle shall,

(a) operate the motor vehicle; or

(b) cause or permit the motor vehicle to be operated,

on a highway unless the motor vehicle is insured under a contract of automobile insurance.

(Emphasis added)

[5] The plaintiff argues that the plaintiff did not contravene s. 2(1) of the Compulsory Automobile Insurance Act as he was neither the owner or the lessee of his son's vehicle. Thus, the plaintiff's action is not barred by s. 267.6(1) of the Insurance Act. In the alternative, the plaintiff argues that if he is caught by s. 2(1) of the Compulsory Automobile Insurance Act, a strict liability offence, he can advance a defence of mistake of fact. The plaintiff argues that the determination of whether or not such a defence can be made out is something properly left to the trier of fact.

[6] With respect to the first issue the defendant relies upon *R. v. Zwicker* (1994), 17 O.R. (3d) 171, [1994] O.J. No. 197 (C.A.); *Budd v. Paterson* (2002), 62 O.R. (3d) 715, [2002] O.J. No. 4883 (C.A.); *Hernandez v. 1206625 Ontario Inc.* (2002), 61 O.R. (3d) 584, [2002] O.J. No. 3667 (C.A.); and *Langford v. Oleksiuk*, [2003] O.J. No. 3785 (S.C.J.). Counsel for the defendant has also provided the court with *Bigley v. Sanders*, [2004] O.J. No. 1032, 8 C.C.L.I. (4th) 316 (S.C.J.). In my view, none of these cases support the proposition that the plaintiff was contravening section 2(1) of the Compulsory Automobile Insurance Act by driving the uninsured vehicle even though he was neither the "owner or lessee" of the vehicle.

[7] In *Zwicker*, Robins J.A. found that "owner" in this section encompassed the common law owner as well as the registered owner. However, implicit in the final two paragraphs of that [page486] judgment was an apparent recognition that, if the appellant had not been the common law owner of the vehicle she was driving, she would not have contravened the Act.

[8] In *Langford*, the driver of the uninsured vehicle was the owner of the vehicle. Consequently, Fragomeni J. found that the driver, if he had survived, was not entitled to commence an action and that therefore, his surviving wife and children should not be able to bring a derivative action pursuant to the Family Law Act, R.S.O. 1990, c. F.3. Despite some general language in paras. 18 and 23 of his judgment, I do not accept the defendant's submission that Fragomeni J. meant that all persons operating an uninsured motor vehicle are barred from commencing an action because of the combined effect of s. 267.6 of the Insurance Act and s. 2(1) of the Compulsory Automobile Insurance Act. Similarly, the first paragraph of Justice Weiler's judgment in *Budd v. Paterson*, while phrased quite generally, should not be taken, as the defendant suggests, to mean that s. 267.6 of the Insurance Act bars all drivers of uninsured vehicles from recovering "loss or damage from bodily injury . . . arising directly or indirectly from the use or operation of a motor vehicle". Certainly, the interpretation advanced by the defendant would appear inconsistent with the plain language of s. 2(1) of the Compulsory Automobile Insurance Act.

[9] *Hernandez* is of no further assistance to the defendant. Indeed, in para. 5 of that judgment, MacPherson J.A. noted that "Section 2(1) of the Compulsory Automobile Insurance Act, R.S.O. 1990, c. C.25 requires all motor vehicle owners to obtain automobile insurance"

(emphasis added).

[10] *Bigley v. Sanders* also dealt with an accident involving an uninsured vehicle owned by the driver. In that case, McLean J., noting the provisions of s. 267.6(2) of the Insurance Act, concluded with respect to s. 2(1) of the Compulsory Automobile

Insurance Act, "This seems to indicate that a contravention, not lack of insurance per se, is the key to the court's determination." This focus on the contravention of the act, in my view, is correct and supports the position advanced by the plaintiff.

[11] In conclusion, on the record before it, the court is not satisfied that the plaintiff's actions contravened s. 2(1) of the Compulsory Automobile Insurance Act, and concludes therefore that his action is not barred by s. 276.6 of the Insurance Act. Consequently, it cannot be said that there is no genuine issue for trial with respect to the plaintiff's claim. Therefore, the motion for summary judgment is dismissed. In light of this conclusion, it is not necessary to deal with the alternative argument advanced by the plaintiff. [page487]

[12] The plaintiff is entitled to costs. If the parties are unable to agree as to the scale and quantum of costs, the plaintiff shall provide written submissions with respect to costs within seven days of the release of this judgment, and the defendant shall provide written submissions within seven days of the receipt of the plaintiff's written submissions. Both parties are asked to address the applicability of rule 20.06(1) [Rules of Civil Procedure, R.R.O. 1990, Reg. 194].

Motion dismissed.