

ONTARIO SUPERIOR COURT OF JUSTICE

**PAGONIS et al**

v.

**LONG et al**

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REASONS FOR JUDGMENT

BEFORE THE HONOURABLE MR. JUSTICE H. SPIEGEL

On Tuesday, February 3, 2004 at TORONTO, Ontario

393 University Avenue, Courtroom 1905

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**APPEARANCES**

Counsel for the Plaintiffs

Bogoroch, R. Mr.

Counsel for the Plaintiffs

Regan, J. Mr.

**SPIEGEL, J. (Orally):**

5 The agreed Statement of Facts admits that the owner of the vehicle in question was identified as Terry Long. There is a dispute between the parties as to whether the driver of the vehicle was identified.

10 The issue before me is, whether under those circumstances Terry Long is an inadequately insured motorist within the meaning of Section 1.5 of the OPCF Family Protection (OPCF 44) Coverage of the automobile policy of the plaintiffs issued by the defendant insurer.

15 Section 1.5 provides that an inadequately insured motorist means, ..."the identified owner or identified driver of an uninsured automobile as defined in Section 5 of the Uninsured Automobile Coverage of the policy".

20 The policy in question is the OAP1 Owners policy. Section 5 deals with the Uninsured Automobile coverage. An uninsured automobile is defined in Paragraph 5.1.2 of that Section as: "An uninsured automobile is one for which neither the owner nor the driver has liability insurance to cover bodily injury or property damage arising out of its ownership use or operation ---". It is admitted that the Long vehicle is an uninsured vehicle.

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30 The submission of the defendant insurer is that the word "or" in Section 1.5 of the OPCF 44 should be interpreted conjunctively. In other words, it is submitted that both the owner and driver of the motor vehicle must be identified in order for there to be an "inadequately

insured motorist". This submission has no merit. The plain meaning of the word "or" in the context of the 1.5(b) is that if either the owner or the driver is identified they fall within the definition of an inadequately insured motorist, provided that an uninsured automobile is involved.

This conclusion is bolstered when one looks at the insuring agreement which limits recovery to the amount that the eligible claimant, "is legally entitled to recover from an adequately insured motorist". If there is both an unidentified driver and an unidentified owner, the claimant would not be able to recover against either.

It is implicit in the reasoning of the Court of Appeal in *Chilton et al v. Co-operators* 32 O.R. (3d)161 that if the vehicle had not been stolen and therefore, driven without the consent of the identified owner, that the court would have found that the family Protection Endorsement coverage applied.

Where the court finds that the vehicle in question was being driven without the consent of the owner, the vicarious liability provision of the Highway Traffic Act, Section 193, does not impose liability on the owner. The eligible claimant would have no right to recover from the identified owner and therefore would not fall within the terms of the insuring agreement.

Mr. Regan alternatively submits that the court should find that whoever the driver was, he was not driving with the consent of Terry Long. The simple answer to that submission is that the evidence does not lead me to that conclusion.

The agreed Statement of Facts states that a person who identified himself as Wayne Long called in to the police some thirty five minutes or so after the accident to say that the vehicle had been stolen. Wayne Long is the brother of Terry Long and is alleged by the plaintiffs to be the driver of the vehicle. This does not in my view support the conclusion that Terry Long, the owner, did no consent to the use of the motor vehicle at the time of the accident.

If the motor vehicle had been reported stolen before the accident, I might have had to spend some more time in analyzing the situation and I might have had more difficulty with the defendant's submission. However, the inference I draw is that Wayne Long by reporting that the vehicle was stolen, was trying to cover himself from the legal consequences of the accident. I don't have to make that finding in this case but I do find that there is no evidence to support the conclusion that the driver was driving without the consent of the owner Terry Long. We have an identified owner who's been sued. He has not defended. The plaintiffs are clearly legally entitled to recover their assessed damages against the owner Terry Long who is an inadequately Insured Motorist within the meaning of the endorsement.

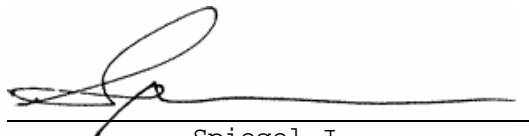
My conclusion is bolstered by the fact that when both the owner and the driver are unidentified that the subrogation rights of the insurer provided for in the endorsement would be illusory. That is not the situation here.

Pursuant to s. 20 of OPCF 44 a claim having been made under the endorsement, the insurer is subrogated to the rights of the plaintiffs. Also S. 21 provides that if the insurer makes a payment pursuant to OPCF 44 it is entitled to an assignment from the eligible claimant of all rights of action including any judgment recovered against Terry Long.

In the result, I find that the limit of coverage available to the plaintiff under OPCF 44 endorsement is in the amount set out in the agreed Statement of Facts, namely one million dollars.

Costs to the plaintiffs in the Cause.

Released by:

  
Spiegel J.

Date:

February 18 2004