

Noteworthy

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HUGHES AMYS^{LLP}
BARRISTERS & SOLICITORS

by Michael Teitelbaum

In the recent decision of *Hernandez v. 1206625 Ontario Inc. (c.o.b. as Mr. Biggs Sports Bar & Eatery)* [2002] O.J. No. 3667, delivered by MacPherson J.A., the Court of Appeal ruled that the right of a plaintiff to sue for “Taverner’s negligence” is not affected by the operation of Section 267.6(1) of the Insurance Act, R.S.O. 1990, c. I.8.

Section 267.6(1) prevents uninsured drivers from recovering “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.” Subsection 2(1) requires all motor vehicle owners to obtain insurance.

Facts and Background

The plaintiff had become intoxicated while drinking at the defendant’s establishment. Upon leaving, he attempted to drive his car but struck a light standard and sustained very serious physical and psychological injuries. He did not have automobile insurance.

The plaintiff therefore sued the defendant bar, alleging that it was

negligent in allowing him to leave when he was intoxicated. Justice Rogin of the Superior Court of Justice dismissed the bar’s motion which sought a declaration that the plaintiff was precluded from recovering damages from it and finding that the use of the motor vehicle was incidental to the defendant’s negligence.

Issue

Does Section 267.6(1) of the Insurance Act preclude uninsured drivers from bringing an action for “Taverner’s negligence?”

Legal Analysis

The Appeal Court considered the tests set out in *Amos v. Insurance Corp. of British Columbia* [1995] 3 S.C.R. and *Vijeyekumar v. State Farm Mutual Automobile Insurance Co.* (1999), 44 O.R. (3d) 545, and had little trouble concluding that the plaintiff’s injuries were caused directly or indirectly by the operation of his vehicle. However, the Court found that this was not determinative of the issue.

The Court’s analysis of the wording of Section 267.6(1) was central to this decision. The appellant bar argued that Section 267.6(1) should be interpreted such that no

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recovery is possible where a vehicle plays a role in causing the injury. The respondent submitted that this provision could be interpreted so that any bar to recovery is only applicable to loss or damage caused by the use or operation of a vehicle. On the latter interpretation, any portion of the loss that is attributable to a cause, other than the use of a vehicle, would not be caught by the section.

In accepting the argument of the respondent and holding that the section only applied to damages attributable to the use of a vehicle, the Court applied the approach taken in the recent decisions of the Supreme Court of Canada in *Heredi v. Fensom* [2002] S.C.J. No.48 and *Derksen v. 539938 Ontario Ltd.* [2001] S.C.J. No. 27.

The Court noted the “dominant feature” requirement enunciated in *Heredi*; that the presence of a motor vehicle must be the dominant feature, or constitute the “true nature” of the claim in order for there to be damages occasioned by a motor vehicle. The Court reviewed the cases of *Clost et al. v. Colautti Construction Ltd. et al.* (1985), 52 O.R. (2d) 339 (H.C.J.) and *Clark v. 449136 Ontario Inc.* (1996), 27 O.R. (3d) 658 (Gen. Div.), aff’d. (1997), 34 O.R. (3d) 742 (C.A.) for specific examples of how this determination is to be made.

In *Derksen*, a decision relating to Section 267.1 of the Insurance Act, the language of which closely resembles Section 267.6(1), the Supreme Court

ruled that there were two concurrent causes of action, and that the bar to recovery operative there, would not apply to any portion of the claim in which the damage did not result from the operation of an automobile; in other words, where the use of the motor vehicle was not the dominant feature of the claim.

The Court also took a purposeful approach to the interpretation of Section 267.6(1), and found that the section existed to limit recovery from automobile insurers to those who had paid automobile insurance premiums, and that read in conjunc-

“Courts...should look to the nature of the cause of action and the purpose of the legislative provision”

tion with the Automobile Insurance Rate Stability Act, R.S.O. 1996, c.21, the ultimate purpose of the section was to stabilize automobile insurance premiums. A ruling that Section 267.6(1) applies only to vehicular negligence would be consistent with the purpose of the provision, as any judgment for “Taverner’s negligence” would not be payable by automobile insurers and thus would not

impact on insurance premiums.

The panel further held that any ruling which left the plaintiff with no recourse against the tavern would be an “absurd” result. The Court reasoned that if the purpose of the subject provision was to protect the public by keeping uninsured drivers off the road, this would not be achieved if taverns are absolved from liability respecting uninsured and intoxicated drivers.

The Court concluded that a proper interpretation of Section 267.6(1) is that it applies only to preclude the recovery of damages for vehicular negligence, and not for Taverner’s negligence. Moreover, while the facts and statutory provisions in the cases relied upon differed from those in issue in this appeal, the significance of those decisions was in their endorsement of a, “substantive approach to limitation and exclusion provisions in an automobile insurance context that is of general application.” They stand for the proposition that “courts should not rigidly apply past interpretations of a given legislative phrase, but rather should look to the nature of the cause of action and the purpose of the legislative provision and determine whether the provision should be applied to the facts of the case.”

It can be anticipated that this purposeful approach to statutory interpretation will be used more frequently, given the Court’s observation that it is “perfectly in keeping with the principles of statutory interpre-

Wills And Estate Planning

by Lloyd Harlock

Not surprisingly, many of us object to spending our valuable free time contemplating how we wish to distribute our estate in the event of an unexpected and untimely demise. Notwithstanding, it is extremely important that you execute a comprehensible Will, to ensure that your wishes and final decisions regarding the distribution of your estate can be undertaken and completed satisfactorily and without major legal expenses being incurred by your executors.

If you do not execute a Will, then upon your death there is a very good probability that the distribution of your estate will be challenged by a relative, resulting in major court costs and legal fees. If this were to occur, the court would likely award legal costs and fees to be paid to any successful litigant out of the proceeds of the estate.

Those costs would include any legal fees payable to the solicitor who represented the executor of the estate at the trial, even though the court's decision was of very little concern to the executor. In such a case, the court would ensure that the executor would never be personally liable for legal costs and all costs and expenses relating to the litigation would be paid by the estate.

Accordingly, those court costs

and legal fees could substantially reduce the value of the estate. Thus, the amount of monies available for distribution to those persons entitled to receive a share of the estate could be seriously affected.

Furthermore, it is essential that the Will should contain all of the testator's relevant wishes.

If you do not execute a Will, then upon your death there is a very good probability that the distribution of your estate will be challenged

If the Will fails to include relevant matters or if it is difficult to interpret the testator's intentions, the Will could be challenged by a named beneficiary or by a relative whose name has been omitted as a beneficiary under the Will. This can frequently happen with a holograph will, prepared by the testator themselves.

It is disturbing to read the multitude of cases that have been subjected to lengthy trials involving the interpretation of the contents of a Will, which as previously noted, will result

in a reduction in the amount of the funds that are available for distribution to the beneficiaries.

Holograph or Will Kits

There are two major problems that are associated with both holograph Wills and pre-printed form Wills:

1. Ambiguities in the language of the Will;
2. The requirement in most Provincial Legislation that holograph Wills be wholly in the testator's writing.

In many of the reported decisions regarding holograph Wills, the courts have noted that there is a tendency for the language to be ambiguous and subject therefore to challenge when the Will is presented for Probate. Since holograph Wills are usually made without legal advice, testators may not be aware that the language they are using may be interpreted in different ways, making the administration of the Will much more difficult.

In some instances, the testator in a holograph Will has made a specific bequest but does not properly specify the beneficiaries in enough detail so that they can be identified at the time the will is executed. Ac-

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cordingly if the court is unable to identify the beneficiaries, it is likely that the testator's intentions will not be given effect.

In addition to the preparation of Wills, there are additional matters that one should consider to ensure that one's future lifestyle will not result in some form of controversy among family members.

It is recommended that you execute Powers of Attorney in order to permit your spouse or another family member or friend to ensure that you are cared for personally and financially in accordance with your wishes.

It is important for you to ensure that your attorney has knowledge as to the manner in which you wish to be cared for. This could include such mat-

ters as your preference for the type of residence that you would like to live in, as well as for the type of medical care you receive and your personal hygiene.

Lastly, many persons have executed a "Living Will", which will grant you the opportunity to die with dignity.