

## FINDING A DEFENCE DUTY NOTWITHSTANDING AN AUTOMOBILE EXCLUSION

by Michael Teitelbaum

The Ontario Court of Appeal in *Djepic v. Kuburovic* [2006] O.J. No. 97, has interpreted certain of the allegations in a Statement of Claim, and used the reasonable expectations doctrine, to find a defence obligation in a homeowners' policy which contained an automobile exclusion.

The Court also sought to clarify the scope of comments made in its earlier decision (*Axa Insurance v. Dominion of Canada General Insurance Co.* (2004), 73 O.R. (3d) 391) regarding the application of the phrase "arising from the use of a motorized vehicle", which was found in both a coverage clause and an exclusion clause of insurance policies from which a defence was being sought for the same accident.

### Background Facts and Decision

Djepic was blinded in the right eye when he and Kuburovic were attempting to secure a mattress to the roof of Djepic's vehicle. As they were about to secure the mattress to the van using bungee cords, one of the cords came loose, striking Djepic. Djepic sued Kuburovic who sought a defence under his homeowners' policy, issued by Belair, and Djepic's automobile policy, underwritten by Dominion.

At first instance, Justice Spiegel

found that neither insurer was obliged to defend, as Kuburovic was not insured under the Dominion policy and no coverage was available under the Belair policy because of the automobile exclusion.

Although the Court of Appeal upheld the decision relating to Dominion's policy, it reversed Justice Spiegel as regards the Belair policy, notwithstanding the exclusion for "claims made against you arising from: the ownership, use or operation of any motorized vehicle . . .".

The Court disagreed with the Motion Judge's conclusion that all of the allegations against Kuburovic fell within the exclusion clause. While five of the seven allegations made in the Statement of Claim clearly involve the use of Djepic's van, the Court was of the view that the remaining two allegations did not necessarily relate to the use of the motor vehicle. Those allegations were that Kuburovic "did not provide proper warning to the Plaintiff of the state and condition of the cord" and "failed to test the strength of the cord to ensure that it would not come loose". The Motion Judge also concluded that these two allegations did not make out a concurrent non-auto related basis of negligence because negligence

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would only be made out once the unsafe bungee cord was used along with the van and injury resulted.

The Court disagreed in respect of both points.

Regarding the question of whether these allegations constituted “claims arising from the use of an automobile”, the Court found that based on the pleadings only, the two allegations in issue “amount, in effect, to a claim that Kuburovic supplied or used a defective or damaged bungee cord or a bungee cord that he knew was not fit for the purpose”. Therefore, it is possible that the injury occurred as a result of the cord breaking or coming loose before Kuburovic secured it to the van. Together with the assumption that Kuburovic had no intention of entering or himself using Djepic’s van, the court found that this scenario was “at best ambiguous as to whether the claim would ‘arise from the use of a motorized vehicle’”.

The Court then goes on to observe that in such circumstances, it is “appropriate to consider the insured’s reasonable expectation and, in that regard, it is not unreasonable to conclude that an insured might expect that his homeowners’ policy covers him for negligence occurring while he is on his property helping someone move and load a mattress onto that person’s car”. Accordingly, based on this scenario, a claim within the

pleading does not “arise from the use of a motorized vehicle”.

The Court then addresses the assumption that all scenarios encompass a claim arising from the use of a motorized vehicle and holds that “some may also involve an independent act of alleged negligence by Kuburovic that constitutes a concurrent non-auto related cause”. The Court states: “Specifically, it is possible that the claim against Kuburovic may succeed on the basis of a scenario that has both auto related claims involving the negligent loading of the mattress on the van and non-auto related claims involving the negligent supply or use of a defective bungee cord”. On this basis, the court found “little to distinguish this case from the *Derksen* decision”.<sup>1</sup>

In *Derksen*, where a steel plate had been improperly loaded onto a truck at a work site, the Supreme Court of Canada held that the accident had two concurrent causes; namely, the failure to safely clean up the work site and the failure to safely operate the truck. Here, to the extent that Kuburovic may have supplied the cord and is alleged to have failed to test the strength of the cord or warn of the state of the cord, Kuburovic “may be liable on the basis of negligent supply, a non-auto related cause, as well as his negligence in loading the van”.

In the result, the Court reversed the Motion Judge’s findings based on a different interpretation of the allegations and an application of the

reasonable expectations doctrine, and found that “a claim within coverage of the Belair policy can be inferred” and, therefore, Belair had a duty to defend.

### Addressing *Axa v. Dominion*

The Court was confronted with the comments made by another panel in *Axa*, which dealt with the phrase “arising from the use of a motorized vehicle”. The *Axa* court had stated that the rules of interpretation cannot result in the same phrase being interpreted differently in the same case when dealing with a coverage provision and an exclusion clause.

The Court did not directly quote the comment by the *Axa* court which used strong language in addressing the submission of a boat insurer. That insurer had argued that the accident in that case, which also involved a bungee cord which was being used to secure a boat to an automobile, arose out of the ownership, use or operation of a motor vehicle for the purpose of interpreting the coverage clause in an automobile policy, while for the purpose of interpreting the exclusion clause in the homeowners’ policy, the same accident did not arise out of the ownership, use or operation of a motor vehicle. The *Axa* court stated:

*“This is sophistry. Although the case law supports the general proposition that coverage clauses should be interpreted generously and exclusion clauses strictly, the*

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<sup>1</sup>*Derksen v. 539938 Ontario Ltd.*, [2001] 3 S.C.R. 398.

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*distinction cannot be stretched to provide two completely opposite interpretations to the same words in two insurance policies applying to the same accident.”*

The Court disagreed that the *Axa* decision applied here saying that it was “factually quite different and does not stand for the broad proposition suggested”.

The Court concluded that as the reasonable expectation of the parties should be given effect where the policy is ambiguous, in the present case, it “appears that the insured’s alleged negligence did not involve his own vehicle or a vehicle he was using or was about to use and occurred in his driveway. These circumstances are very different from *Axa* and may well lead a court to conclude that the insured would reasonably have expected that the exclusion clause in his home policy would not apply”.

### Analysis

The Court’s decision appears to indicate a willingness to take as expansive an approach as possible in determining whether a defence obligation exists. Arguably, the Court gave the broadest interpretation possible to the allegations that might attract a defence duty, finding that they were unrelated to the use or operation of the vehicle itself, something they found was not the case in *Unger v. Unger*.<sup>2</sup>

The Court also used the “reasonable expectations” principle to support its findings, indicating that a person insured under a homeowners policy might reasonably expect that his policy would cover him while he was helping to load a van located on his property.

Given the law is that allegations are to be read generously and afforded the “widest latitude”,<sup>3</sup> the Court’s efforts in respect of the two allegations it found were covered, is understandable. And, at least for the purposes of a defence duty, there is some degree of logic to the proposition that these allegations, taken separately from the use of the vehicle, might lead to an independent finding of liability, unlike the allegations of negligent supervision and training made in the *Unger* case, which still required the operation of the vehicle in order to lead to liability.

Notwithstanding this, the Court decided it also needed to invoke the “reasonable expectations” doctrine, while suggesting that the policy language might be ambiguous when doing so, in order to support its finding.<sup>4</sup>

Decisions like this will also accelerate the frequency of the apportionment debate, given that the Court appears to have found a full defence obligation when only two of the seven allegations are potentially covered.

Even more interesting, however,

were the efforts to which the Court felt it had to go to distinguish and explain the comments made in the *Axa* decision. This panel appears to have felt that the clear assertion made by the earlier panel might be overly restrictive, and needed to be qualified and indeed negated. One of the distinctions the Court noted was that the *Axa* court had concluded different interpretive approaches could not lead to different interpretations based on the facts and similarly worded clauses. This seems curious given what we perceive to be the clear declaration by the *Axa* court in the above quotation.

In any event, we query whether the Court needed to address the *Axa* decision for two reasons. First, the Court decided there was no coverage under the automobile policy because Kuburovic was not an insured. Without a coverage finding, was it necessary to deal here with the issue of whether there could be coverage under both policies for the same accident?

Nevertheless, if the Court felt compelled to do so given the argument was raised, and in order to pre-empt its being raised in future cases, would another approach have been for the *Djepic* panel to say that it interprets the *Axa* panel as meaning that there cannot be coverage under both policies, except in the case where it can be said there might be concurrent causes, as was the situation here?

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<sup>2</sup> *Unger v. Unger* (2003), 68 O.R. (3d) 257 (C.A.).

<sup>3</sup> See *Nichols v. American Home Assurance Co.*, [1990] 1 S.C.R. 801, at p. 812.

<sup>4</sup> The Court of Appeal was able to expansively interpret similar wording, (“arising directly or indirectly from the use or operation of an automobile”), albeit in a different context, and with the words “directly or indirectly” included, without raising the matter of ambiguity, when interpreting the coverage grants in a motor vehicle liability policy in *Herbison v. Lumbermens Mutual Casualty Co.*, 76 O.R. (3d) 81 (2005) and *Vytlingam v. Farmer*, 76 O.R. (3d) 1 (2005).

## LEGISLATURE LIMITS LESSORS' LIABILITY

*by Jamie Trimble*

The Legislature has rationalized and capped at \$1 million the liability of lessors of vehicles, and statutorily imposed a priority with respect to the order in which insurers should respond to losses.

We know from recent decisions that the vicarious liability of owners for the liability of drivers, in the context of leased vehicles, resulted in significant damages being collected from the lessors of vehicles and their insurers.

In amendments to the Compulsory Automobile Insurance Act, the Highway Traffic Act and the Insurance Act, which came into force on MARCH 1, 2006, the following rules now apply to the liability of vehicle lessees and lessors (defined as those involved in a vehicle rental of 30 days or more):

- Lessees must now insure their cars (as well as owners)

- Lessors' exposure is now limited to the greater of \$1 million, the amount of mandatory third party limits required by law, and any amount prescribed by regulations under the Insurance Act;

- the priority of third party liability policies with respect to any accident is established. The lessee's policy is primary. Any other policy under which the driver may be entitled to indemnity is excess of that. The lessor's policy is excess to these policies.

- except in cases where the MVAC fund is involved, the obligation to pay under the lessor's policy is reduced by the amount that the plaintiff RECOVERS from any other motor vehicle liability insurer. Therefore, if the lessee carries \$1 million of insurance and that policy responds to the

loss, then the lessor's policy, if limited to \$1 million, ought not to respond. The lessor's policy would only respond where its limits were higher than the lessee's, or where the lessee and driver are denied coverage or have no collectible insurance.

It should be noted that short term rentals are treated differently.

The purpose of these amendments is to place the financial consequence of an accident on the individual (and insurer) that has control and regular use and operation of the vehicle, and who creates and can minimize the risk: the lessee.

A word of caution; regulations and changes to policy wordings are not yet available. No doubt there will be some difficult questions which will arise once the courts are called upon to interpret these legislative changes.