



**IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR**

Citation: *Liberty Mutual Insurance v. Intact Insurance*,
2019 NLCA 76

Date: December 20, 2019

Docket Number: 201801H0067

BETWEEN:

LIBERTY MUTUAL INSURANCE

APPELLANT

AND:

INTACT INSURANCE

FIRST RESPONDENT

AND:

MERVIN BRIDLE

SECOND RESPONDENT

Coram: Welsh, Hoegg and Goodridge JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador
General Division 201801G0993

Appeal Heard: October 9, 2019

Judgment Rendered: December 20, 2019

Reasons for Judgment by: Welsh J.A.

Concurred in by: Hoegg and Goodridge JJ.A.

Counsel for the Appellant: Philip J. Buckingham

Counsel for the First Respondent: Andrew Rowe

Counsel for the Second Respondent: Not Participating

Welsh J.A.:

[1] This appeal arises from a tragic motor vehicle accident in which Mervin Bridle lost his legs when he was crushed between two vehicles. At issue is which of the insurers is liable in the first instance for payment of the accident insurance benefits, the insurer of the employer's vehicle, which Mr. Bridle was using, or the insurer of the vehicle that caused the accident.

BACKGROUND

[2] The circumstances of the accident are set out in the applications judge's oral decision:

On 13 April, 2017, the plaintiff, Mervin Bridle, was standing behind his employer's vehicle, a 2008 Chevrolet HHR putting some equipment into its rear when he heard the beep-beep sound of another vehicle in reverse. He turned just in time to see a Chevrolet Silverado reversing in his direction. In a desperate attempt to avoid the impact, he attempted to clamber into the rear of the HRR. He was unsuccessful with tragic consequences. Mr. Bridle was struck by the Silverado resulting in the amputation of both of his legs above the knee.

Both the HRR and the Silverado carried Section B no fault insurance benefits with the First Defendant, Intact Insurance, and the Second Defendant, Liberty Mutual Insurance, respectively. At issue is which insurance policy is obliged to respond as primary. The answer depends on whether Mr. Bridle was an occupant of the HRR at the time of the collision or a non-occupant; in other words, a pedestrian. If an occupant, the Intact policy is primary. If a pedestrian, the Liberty policy is primary.
...

(Emphasis added.)

[3] The applications judge concluded that Mr. Bridle was not an occupant of his employer's vehicle with the result that Liberty was liable under its policy for Mr. Bridle's accident insurance benefits.

ISSUES

[4] At issue is whether the applications judge erred in concluding that Mr. Bridle was not an occupant of his employer's vehicle within the meaning of the insurance policy and the relevant legislation.

ANALYSIS

The Legislation and the Policy

[5] Section 35 of the *Automobile Insurance Act*, RSNL 1990, c. A-22, provides:

(1) Where in a contract an insurer provides accident insurance benefits in respect of the death of or injury to an insured person arising out of an accident involving an automobile, the insurance applies only in respect of

(a) a person who sustains bodily injury or death while driving or being carried in or upon or entering or getting on to or alighting from ... as a result of being struck by an automobile owned by the insured named in the contract in respect of which insurance against liability arising out of bodily injury to, or the death of, a person caused by an automobile or the use or operation of an automobile is provided under the contract; ...

(Emphasis added.)

[6] Section 38 of the *Act* addresses the issue of insurance in respect of an occupant of a vehicle:

(1) Where a person entitled to benefits provided by insurance under section 34 or 35

- (a) is an occupant of a motor vehicle involved in an accident, the insurer of the owner of the motor vehicle shall, in the first instance, be liable for payment of the benefits provided by the insurance; or
- (b) is a pedestrian and is struck by a motor vehicle, the insurer of the owner of the motor vehicle shall, in the first instance, be liable for the payment of the benefits provided by the insurance.

[7] The Standard Automobile Policy (the “Policy”), under “Special Provisions, Definitions, and Exclusions of Section B”, provides, in relevant parts:

(1) In this Section, the words “insured person” mean

(a) any person while an occupant of the described automobile ...;

...

(c) any person, not the occupant of an automobile ... who is struck, in Canada, by the described automobile ...;

Pursuant to clause (8) in the same section of the Policy, a person entitled to benefits may “recover only an amount equal to one benefit”.

[8] The effect of these provisions is that, if a person who is injured is an occupant of a vehicle, the insurer of that vehicle has first instance liability for the specified accident insurance benefits. If the injured person is not an occupant of a vehicle, then the insurer of the vehicle that struck the person has first instance liability.

[9] Whether a person is an occupant of a vehicle requires consideration of the definition found in the Policy under “General Provisions, Definitions and Exclusions”:

In this Policy the word “occupant” means a person driving, being carried in or upon or entering or getting on to or alighting from an automobile.

That definition mirrors the language in section 35(1)(a) of the *Act*.

Standard of Review

[10] This appeal involves the interpretation of a standard form insurance contract. As discussed in *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 S.C.R. 23, the applicable standard of appellate review is correctness:

[4] In my opinion, the appropriate standard of review in this case is correctness. Where, like here, the appeal involves the interpretation of a standard form contract, the interpretation at issue is of precedential value, and there is no meaningful factual matrix that is specific to the particular parties to assist the interpretation process, this interpretation is better characterized as a question of law subject to correctness review.

[11] Applying these considerations, interpretation of the language of the insurance contract, together with the legislation, engages the correctness standard of review. Whether a particular action fits within the meaning of the language will depend on whether it falls within the scope of application of the language as interpreted.

Contractual Interpretation – General Principles

[12] In determining the meaning of “occupant” for purposes of interpreting the Policy, I begin with a discussion regarding contractual interpretation in *Resolute FP Canada Inc. v. Ontario (Attorney General)*, 2019 SCC 60. Further consideration of the decision in *Ledcor* regarding contractual interpretation was

undertaken by three of the seven Justices, with the majority not commenting on the Court's earlier decision in *Ledcor*. Côté and Brown JJ., dissenting in part, Rowe J. concurring, wrote:

[76] Contractual interpretation begins with reading the words of the contract. A legitimate interpretation will be consistent with the language that the parties employed to express their agreement (G.R. Hall, *Canadian Contractual Interpretation Law* (3rd. ed. 2016), at p. 11). As this Court stated in *Sattva* [2014 SCC 53, [2014] 2 S.C.R. 633], the meaning of a contract is rooted in the actual language used by the parties (para. 57). A meaning that strays too far from the actual words fails to give effect to the way in which the parties chose to define their obligations (*Canadian Contractual Interpretation Law*, at p. 9).

[77] This is not to say that the words of the contract are to be read in isolation. ... Put simply, contractual text derives its meaning, in part, from the context.

[78] We stress that text derives its meaning from context *in part*. This leads to an important caveat: the context – that is, the factual matrix – cannot “overwhelm the words” of the contract or support an interpretation that “deviate[s] from the text such that the court effectively creates a new agreement” (*Sattva*, at para. 57). The factual matrix assists in *discerning the meaning* of the words that the parties chose to express their agreement; it is not a means by which to *change* the words of the contract in a manner that would modify the rights and obligations that the parties assumed thereunder (*Canadian Contractual Interpretation Law*, at pp. 33-34).

(Italics in original.)

The Meaning of “Occupant”

[13] The language that defines when a person is an occupant of a vehicle is broad in scope: “while driving or being carried in or upon or entering or getting on to or alighting from” an automobile (section 35(1)(a) of the *Act*); and “driving, being carried in or upon or entering or getting on to or alighting from an automobile” (definition in the *Policy*). The specified situations contemplate a person being in the course of certain action.

[14] In determining whether a person satisfies the definition of occupant, relevant factors must be considered. Intention may be of assistance. For example, the fact that a person has a hand on the door handle may be evidence that he or she is entering a vehicle because that action is part of the series of actions necessary to enter a vehicle. That conclusion may be inferred or may be reinforced by testimony of the injured person that he or she was in the process of entering the vehicle.

[15] Further, an attempt to enter a vehicle, even if unsuccessful, would satisfy the requirements of the language. What is required is that the individual has commenced taking the series of actions necessary in order to complete entry.

[16] Because the focus is on the individual's actions, the reason for entering a vehicle is not a component of the analysis. It does not matter whether the reason is to avoid an accident or to travel to a destination. Similarly, there is nothing in the definition to indicate that a person must enter a vehicle by means of the passenger doors. While it would be unusual to enter through a hatchback, there is nothing in the *Act* or *Policy* to prevent that being a point of entry.

[17] In this case, Mr. Bridle was putting an item into his employer's vehicle through the hatchback. However, Mr. Bridle testified that, just before he was struck by the Silverado, he attempted to clamber or try to get into the rear of the vehicle to avoid being struck. Unfortunately, he was not able to get his legs into the vehicle. He was, however, in the process of clambering, that is, taking action to enter the vehicle. The applications judge referred to Mr. Bridle's examination for discovery where he explained that, "I couldn't get my feet up for to get – well, I got in far enough that when it hit it just hit on the legs". The fact that he did not have time to lift his legs into the vehicle does not alter the fact that he was injured while entering the vehicle, though he was unable to complete the entry.

[18] In assessing Mr. Bridle's situation and explaining the result, it may be helpful to consider a slightly different scenario, such as if he had been located at a passenger door rather than at the open hatchback when the Silverado backed up. That location may, but not necessarily would, have given him more opportunity to take action in order to enter the vehicle successfully. However, difficulty in entering the vehicle is not a component of the test to determine whether a person qualifies as an occupant. In my view, the same result obtains regardless of the point of entry.

[19] Further, in a case such as this, where the injured person's actions may be ambiguous, testimony as to the intention to enter the vehicle may be necessary. Just prior to the impact, Mr. Bridle had been placing an item into the vehicle. However, his testimony clarified that, at the time he was injured, he was in the process of entering the vehicle in an attempt to avoid injury. At the critical time, he was no longer simply putting an item into the vehicle. He was injured while taking steps to get into the vehicle.

[20] The analysis undertaken by the applications judge approached the case from the perspective of an “objective common sense test” and what a person would do in the ordinary course. He explained:

... The question then is whether Mr. Bridle’s status changed by virtue of his leaning into the vehicle to place the bird screen. However, the question is not whether Mr. Bridle’s torso was in the back of the HRR and hence in a physical way occupied space within the vehicle, but whether Mr. Bridle was entering or getting into the vehicle at the time of the collision. Applying an objective common sense test, is a person who reaches in to place something in a vehicle entering that vehicle within the meaning of the policy? The answer may well depend on the circumstance, but to suggest that the minute a portion of one’s body is physically inside the vehicle, however minute, that that person has then been transformed into an occupant is to strain impermissibly the definition of entering or getting in to or on to.

[21] The judge erred first by asking the wrong question. He failed to consider Mr. Bridle’s testimony regarding his actions immediately prior to the accident. At that time Mr. Bridle was not just leaning or placing something into the vehicle. Rather, he was moving to get into the vehicle, as evidenced by his testimony, “I tried to get into the car.”

[22] Further, this case demonstrates the error in applying an “objective common sense test”. Rather, as discussed above, it is necessary to consider whether Mr. Bridle was injured “while entering” the vehicle. That phrase contemplates continuous action and does not require completion. Finally, there is nothing in the phrase "while entering" that would require the individual to enter by a particular or even an ordinary place of entry.

Costs

[23] Regarding costs, in the court appealed from, the applications judge concluded:

Turning to the question of costs. The plaintiff, Mr. Bridle, was forced to bring this action as a means to resolve a dispute between the two insurers. He was and remains a totally innocent party and should not be out of pocket as a consequence. Accordingly, Intact and Liberty shall share jointly in the payment of Mr. Bridle’s solicitor and own client costs. As the successful party, Intact shall be entitled to its costs from Liberty on a party-party basis pursuant to Column 3.

[24] On appeal, Liberty does not request a change to the order regarding Mr. Bridle’s costs. However, if successful on the appeal, Liberty requests its costs as against Intact Insurance.

SUMMARY AND DISPOSITION

[25] In summary, the applications judge erred in concluding that Mr. Bridle was not an occupant of his employer’s vehicle within the meaning of the insurance policy and the relevant legislation. Mr. Bridle was injured while taking steps to enter the vehicle. His action was sufficient to satisfy the meaning of “occupant” since he was a person injured while entering the vehicle. It follows that Intact Insurance, which insured the employer’s vehicle, which Mr. Bridle was using, has first instance liability for payment of the relevant accident insurance benefits.

[26] Accordingly, I would allow the appeal, with costs to Liberty as against Intact Insurance under column 3 of the scale of costs in this Court and in the court appealed from, except that the order as to Mr. Bridle’s costs in the court appealed from remains in effect.

B. G. Welsh J.A.

I Concur: _____

L. R. Hoegg J.A.

I Concur: _____

W. H. Goodridge JA.