

McArdle v. Bugler

[2007] I.L.R. I-4643

Ontario
Court of Appeal

September 25, 2007

Insurance law -- Automobile insurance -- Underinsured coverage -- Plaintiff was a passenger in an uninsured motor vehicle that was involved in an accident -- Plaintiff brought an action for coverage under the other vehicle's insurance policy, and the action was dismissed -- Appeal allowed -- Insurance Act, R.S.O. 1990, c. I 8, ss. 224, 265.

This was an appeal on behalf of the named defendant pursuant to a claim under the *Motor Vehicle Claims Act*. The plaintiff had been a passenger in an uninsured vehicle that was involved in an accident with another vehicle. The plaintiff sought coverage under the insurance policy of the other driver's vehicle based on the *Taggart* decision. The insurer of that vehicle claimed that the *Taggart* decision was distinguishable on its facts because it had considered a different policy of insurance. The judge agreed, and the plaintiff's claim for insurance was dismissed.

Held: The appeal was allowed and the decision allowing the motion for an order dismissing the action was set aside. Precedent law was applicable and not to be overruled. Application of the precedent decision *Taggart* could not be limited to the narrower issue of the meaning of the term "relative". Also, it was not and could not be demonstrated that the panel who decided the *Taggart* decision did not advert to judicial or statutory authority binding on it, nor that, had the panel considered that authority, they would have decided any differently.

Counsel: H. W. Sterling for the appellant, the Minister of Finance;

I. Charney for the respondents, Coseco Insurance Company et. al.

Before: Rosenberg, Rouleau, and Killeen JJ A.

Rosenberg J.A.: [1] This case concerns entitlement to uninsured motorist coverage under the Standard Automobile Policy. The plaintiff, Ms. McArdle was a passenger in a vehicle (the Bugler vehicle) that collided with another vehicle (the Emmons vehicle) in September 1999. Bugler was not insured. [FOOTNOTE "1": The appeal is brought by the Minister of Finance on behalf of and in the name of the defendant Brian Bugler pursuant to the *Motor Vehicle Accident Claims Act*, R.S.O. 1990, c. M.41.] As a result, the plaintiff sought coverage under the Emmons insurance policy. The appellant Bugler submits that based on this court's decision in *Taggart (Litigation Guardian of) v. Simmons* (2001), 52 O.R. (3d) 704, Ms. McArdle is entitled to uninsured motorist coverage contained in the Emmons policy. Coseco Insurance Company insures the Emmons vehicle. It argued before the motion judge that *Taggart* was distinguishable because the standard automobile insurance policy considered in *Taggart* was different than the policy at issue in this case. In the alternative, Coseco argued that, properly understood, *Taggart* did not intend to expand eligibility of uninsured motorist coverage beyond the limited group of persons traditionally entitled to such coverage -- the insured, the insured's spouse and dependants and occupants of the insured vehicle.

[2] The motion judge accepted the first argument. He then went on to consider whether Ms. McArdle was entitled to uninsured motor vehicle coverage under the Coseco policy. He accepted Coseco's argument that she was not entitled to coverage and dismissed the claim against Coseco. It is common ground that the trial judge erred in distinguishing *Taggart*

on the basis that the policy had changed. Due to an innocent mistake, the motion judge was led to believe that the policy involved in this case and the policy considered in *Taggart* were different. In fact, the relevant provisions are the same. Coseco, however, seeks to uphold the motion judge's decision by arguing that *Taggart* should not be extended to this case or, in the alternative, that *Taggart* was wrongly decided.

[3] For the following reasons, I would allow the appeal. In my view, the holding in *Taggart* applies to this case and it should not be overruled.

THE ISSUE

[4] Entitlement to uninsured motorist coverage is governed by statute, regulation and the terms of the applicable motor vehicle policy. Section 265 of the *Insurance Act*, R.S.O. 1990, c. I.8 requires that every motor vehicle insurance contract provide uninsured motorist coverage. As a result, an individual entitled to coverage is entitled to recover from the insured all sums that could have been recovered from the owner or driver of the uninsured vehicle. The issue in this case is who is entitled to coverage. Under s. 265, the contract must provide coverage to "a person insured under the contract". "Person insured under the contract" is defined in s. 265, in part, as "the insured and his or her spouse and any dependant relative of either, ... while an occupant of an uninsured automobile". Coseco submits that since the plaintiff does not fall within this definition -- because she was not the insured (Emmons) or the spouse or dependent of the insured -- she is not covered by the Emmons policy.

[5] The appellant, however, relies upon the extended definition of "insured" in s. 224 of the Act. That section defines "insured" for Part VI (Automobile Insurance) to mean "a person insured by a contract whether named or not *and includes every person who is entitled to statutory accident benefits* under the contract whether or not described therein as an insured person" [emphasis added]. To discover if someone is entitled to statutory accident benefits, it is necessary to look to the definition of "insured person" in O. Reg. 403/96, the Statutory Accident Benefits Schedule for accidents on or after November 1, 1996. This definition includes "in respect of accidents in Ontario, a person who is involved in an accident involving the insured automobile". Since the Emmons vehicle was an insured automobile, it is common ground that the plaintiff is entitled to statutory accident benefits from Coseco under the Emmons policy (and in fact Coseco has been paying those benefits). The plaintiff therefore fits within the s. 224 definition of "insured".

[6] At issue, then, is whether the broader definition of "insured" in s. 224 informs the narrower s. 265 definition of "person insured under the contract", thereby entitling the plaintiff to uninsured motorist coverage.

THE TAGGART DECISION

[7] The *Taggart* decision concerned a single vehicle collision in September 1995 in which Mr. Taggart suffered a catastrophic injury. Mr. Taggart was a passenger in a vehicle driven by a person who had no insurance and which was owned by a person who had no insurance. At the time, Mr. Taggart was living with a Mr. Tessier. The relationship between Mr. Taggart, Mr. Tessier and Mr. Taggart's parents was somewhat complex. Suffice it to say that Mr. Tessier had for many years acted as a surrogate father for Mr. Taggart. Mr. Tessier had an automobile insurance policy with Pilot Insurance and Mr. Taggart accordingly sought coverage under that policy. Writing for the court, Goudge J.A. considered the matter as essentially one turning on the statutory and regulatory provisions. Regulation 776/93, the Statutory Accident Benefits Schedule for accidents after December 31, 1993 and before November 1, 1996 (the precursor to O. Reg. 403/96), defined "insured person" to include "any dependent of the named insured" (O. Reg. 776/93). Goudge J.A. held that it would be open to a court to find that Mr. Taggart was a dependent of the named insured Mr. Tessier. If found to be a dependent, Mr. Taggart would be entitled to statutory accident benefits, bringing him within the definition of "insured" in s. 224. Goudge J.A. held that to be sufficient to qualify Mr. Taggart as a "person insured under the contract" in s. 265, even though that section's definition would, on its face, disqualify a dependant who was not also a "relative". He relied on basic principles of statutory interpretation to reach this conclusion:

Section 265(1) mandates uninsured automobile coverage for "a person insured under the contract". The definition in s. 265(2) (c)(ii) of a "person insured under the contract" includes the "insured". While "insured" is not further defined in s. 265, it is defined in s. 224(1), which explicitly defines the term for the purposes of Part VI of the Act. That part governs automobile insurance and includes s. 265. There is nothing in s. 265 to negate the clear legislative intention that the definition of "insured" in s. 224(1)

applies to s. 265(2) (c)(ii). The phrase at the beginning of s. 265(2) "for the purposes of this section" cannot be read as "for the purposes of this section and without regard to s. 224(1)." Para. 19.

[8] The appellant argues that *Taggart* offers a clear answer to the central question in this case: the expanded definition of "insured" in s. 224 informs the narrower definition of "person insured under the contract" in s. 265. If a plaintiff is entitled to statutory accident benefits, then he or she is also entitled to uninsured motorist coverage. Thus, through a straightforward application of *Taggart*, Ms. McArdle being entitled to statutory accident benefits under the Emmons policy is similarly entitled to the additional uninsured motor vehicle coverage under the Emmons policy. In an interesting argument, Mr. Charney, counsel for Cosco, resists that conclusion. I will now turn to those submissions.

THE ARGUMENT AGAINST APPLYING *TAGGART*

[9] The argument against applying *Taggart* to the facts of this case turns on the theory that uninsured motor vehicle coverage and statutory accident benefit entitlement have proceeded on different tracks. While statutory accident benefit coverage has been broad, uninsured coverage has been relatively narrow and has depended on the wording of the policy and regulation more than the statute. Mr. Charney points out that *Taggart* involved a dependent of the named insured, someone within the traditional scope of UIM coverage. This case, however, goes well beyond that to attempt to extend coverage to a stranger to the named insured. In this part of the reasons, I will briefly sketch out the basis for the argument to limit the scope of *Taggart*.

[10] There have been some changes in terminology in respect of statutory accident benefits. For the sake of clarity, I will refer to statutory accident benefits as SABs and uninsured motor vehicle coverage as UIM. SABs were first introduced into the Ontario automobile insurance scheme in 1971. At that time, there was no statutory provision mandating UIM. With the introduction of SABs, the *Insurance Act*, R.S.O. 1970, c. 224 was amended to broaden the definition of "insured":

"insured" means a person insured by a contract whether named or not and includes any person who is stated in a contract to be entitled to benefits payable under the insurance mentioned in subsection 1 of section 226b [medical and rehabilitation benefits] and subsection 1 of section 226c [accident benefits], whether described therein as an insured person or not. *Insurance Amendment Act, 1971*, S.O. 1971, c. 84, s. 10(b).

[11] In 1980, the Act for the first time mandated UIM coverage. Regulation 535 was to be attached to or included in every motor vehicle liability policy as a Schedule to the policy (R.R.O. 1980, Reg. 535). It applied to payments under s. 231(1) of the 1980 Act, which mandated UIM coverage. Cosco particularly relies upon s. 10 of the regulation, which has remained materially unchanged since 1980 (and is now s. 10 of R.R.O. 1990, Reg. 676) and provides as follows:

10. In so far as applicable the general provisions, definitions, exclusions and statutory conditions *as contained in a motor vehicle policy* also apply to payments under the contract under subsection 231(1) of the Act. [emphasis added]

[12] Cosco argues that this provision gives primacy to the policy and that in order to understand who is eligible for UIM coverage it is necessary to look to the wording of the policy. The policy in force in 1980 was the Ontario Standard Automobile Policy S.P.F. 1. The UIM coverage was found in clause 3 of Part B of the Policy and required the insurer to pay all sums that "a person insured under the contract" was "legally entitled to recover from the owner or driver of an uninsured automobile". "Person insured under the contract" insofar as is relevant to this case is defined to mean any person while an occupant of the insured automobile or:

the insured and, if residing in the same dwelling premises as the insured, his or her spouse and any dependent relative of either,

(1) while an occupant of an uninsured automobile, or

(2) while not the occupant of an automobile ... who is struck by an uninsured ... automobile. ...

[13] If this definition fully defined eligibility for UIM coverage then a person in the place of Ms. McArdle would not have been covered. Coseco argues that in view of s. 10 of the Regulation, this definition is exhaustive as to coverage for UIM and that the legislature did not intend to expand coverage by resort to the definition of "insured" in [now] s. 224 of the Act, which had been broadened to account for SABs.

[14] Section 10 of the regulations has been carried forward in all subsequent iterations. There is no reference in *Taggart* to the UIM regulations.

[15] The next legislative development comes with the replacement of Reg. 535 with R.R.O. 1990, Reg. 676 which adds s. 11 and provides as follows:

In this Schedule, "person insured under the contract," "unidentified automobile" and "uninsured automobile" have the same meaning as in subsection 265(2) of the Act.

[16] Coseco argues that this section reinforces the view that there was no intention to provide broad coverage as would be the case if the s. 224 definition applied. It points to the consistency between the definition in the policy and the definition in s. 265 as manifesting a legislative intent to limit UIM coverage.

[17] In June 1990, the O.P.F. 1 policy came into force. Part D of the policy dealt with UIM coverage and defined "person insured under the policy" in a similar fashion to the S.P.F. 1 policy except that it removed the qualification that the spouse or dependent relative be residing with the insured. The motion judge was innocently misled into believing that this was the policy in force at the time of *Taggart*. On that basis he distinguished *Taggart* from this case and held that the result in *Taggart* did not apply.

[18] In 1994, the O.A.P. 1 came into force. This is the policy that was in force at the time of the accident considered in *Taggart* and ushered in the era of the plain language policy: *David Polowin Real Estate Ltd. v. The Dominion of Canada General Insurance Co.* (2005), 76 O.R. (3d) 161 (C.A.) at para. 26. The policy, for example, uses terms like "you" and "us" rather than "the insured" and "the insurer", but does contain reference to terms such as the "named insured", being the person to whom the Certificate of Automobile Insurance is issued. Section 4 of the policy entitled "Accident Benefits Coverage" deals with SABs. The broad definition of "Who Is Covered" in s. 4.1 includes Ms. McArdle as a person "who is injured ... in an automobile accident involving the automobile and is not the named insured, or the spouse or dependant of a named insured, under any other motor vehicle liability policy, and is not covered under the policy of an automobile in which they were an occupant or which struck them".

[19] Section 5 of the policy is entitled "Uninsured Automobile Coverage". The description of "Who is Covered?" in s. 5.3 is narrower than under s. 4 and is limited to any occupant of the automobile and "You, your spouse and any dependant relative of either, when an occupant of an uninsured automobile". As worded, the policy would not extend to Ms. McArdle.

[20] The appellant makes the point that there would be no need to refer to anyone other than the insured and his or her family since the policy is describing coverage in plain language for the insured; the fact that the Act or Regulations might extend coverage to strangers is of no moment to the insured. While there is some merit to this submission, I note that Section 4, which deals with SABs, contains a definition of who is covered that includes individuals who would be strangers to the named insured.

[21] The O.A.P. 1 was revised in November 1996. It is this form of the policy that was in place at the time of the accident in this case. There is no material difference between this version of the policy and the policy considered in *Taggart* regarding UIM coverage. As I have indicated, Coseco concedes that the motion judge was inadvertently misled into believing that the policies were different, since he erroneously believed that the policy in place at the time of *Taggart* was the O.P.F. 1.

[22] Coseco has also referred us to legislation in force in other provinces. This legislation defines "person insured under the contract" for the purposes of UIM in terms that are similar to s. 265(2) of the Ontario act. In *David Polowin Real Estate Ltd.* at para. 137, this court pointed out the desirability of consistency among provincial appellate courts in

interpreting essentially identical provisions of statutory automobile insurance regimes. Coseco makes the submission that in all of the other common law provinces, the various insurance statutes restrict UIM coverage to the named insured, his or her spouse and dependent relatives.

[23] As I have said, Coseco concedes that it was not open to the motion judge to distinguish *Taggart* on the basis that the provisions of the policies were different. It argues, however, that *Taggart* should be restricted to its facts, namely dealing with whether a dependent of a named insured was entitled to UIM coverage. I cannot accept this submission. There were two issues in *Taggart*. First, whether Mr. Taggart was entitled to UIM coverage under s. 265 and second, whether he was entitled to coverage under the Family Protection Coverage endorsement in the Tessier policy. Justice Goudge dealt with the first issue by referring to the definition of insured in s. 224. He held that if Mr. Taggart could show he was a dependant of Mr. Tessier, he was entitled to UIM coverage for the reasons set out above. As I have said, eligibility for SABs did not depend upon Mr. Taggart showing he was a relative of Mr. Tessier, only that he was a dependent. Paragraph 20 of the *Taggart* reasons makes this clear:

The s. 224(1) definition of "insured" includes every person who is entitled to statutory accident benefits under the policy. If John Taggart was a dependant of the named insured Mr. Tessier (an issue which would be litigated at trial), then he was clearly entitled to statutory accident benefits under the Pilot policy pursuant to s. 1 of Reg. 776/93 of the Act. On this basis, John Taggart would be an "insured" and therefore, a "person insured under the contract" for the purposes of s. 265. He would therefore be entitled to uninsured coverage under the Pilot policy if he can prove dependency.

[24] Only when Goudge J.A. came to deal with Mr. Taggart's eligibility for coverage under the Family Protection Coverage endorsement, did he deal with the question of whether Mr. Taggart was a relative of Mr. Tessier. This is because the definition of "insured" in s. 224 does not apply to the endorsement. Rather, coverage depended entirely on the wording of the endorsement, which limited coverage to *inter alia* a "dependent relative", which itself is defined in the endorsement. For reasons that are not material to this case, Goudge J.A. held that Mr. Taggart was a relative of Mr. Tessier if he could demonstrate the requisite degree of dependency.

[25] In summary, a step to finding that Mr. Taggart was entitled to UIM coverage was that he could fall within the definition of "insured" in s. 224 as a person entitled to SABs. The application of that part of *Taggart* cannot be limited as suggested by Coseco to the narrower issue of the meaning of "relative" in s. 265. Accordingly, it seems to me that for Coseco to succeed in this appeal, it must show that *Taggart* should be overruled.

SHOULD TAGGART BE OVERRULED?

[26] There is a convention in this court that where a party seeks to have this court overrule one of its decisions, it should apply to the Chief Justice to appoint a five-person panel. Coseco did not ask to do so until the day of the oral hearing. Given all the circumstances and especially the lateness of the request, we declined to adjourn the case so that Coseco could apply to the Chief Justice.

[27] There is at least one exception to the five-person convention. If the party can show that the earlier decision was reached *per incuriam*, *stare decisis* does not apply. Laskin J.A. explained the *per incuriam* exception to *stare decisis* in *David Polowin Real Estate Ltd* at para. 111. In short, it must be shown that the panel deciding the earlier case did not advert to judicial or statutory authority binding on it and, had the panel considered this authority, it would have decided the case differently. In my view, neither condition is satisfied in this case. There is no binding [FOOTNOTE "2": In *Warwick v. Gore Mutual Insurance Co.* (1997), 32 O.R. (3d) 76 (C.A.), this court was considering eligibility for no fault benefits and at p. 84 stated that s. 224(1) could not be cited to expand the definition in s. 265. This comment was obiter in the case, which was not concerned with the s. 265 definition or UIM coverage.] judicial or statutory authority that was ignored in *Taggart*, and this court has followed *Taggart* in *Foster v Young*, [2002] O.J. No. 3774. [FOOTNOTE "3": Although the brief report of the case makes it difficult to determine how *Taggart* applied on the facts.] While the *Taggart* court did not expressly advert to the schedule in the UIM regulation, it did refer to the SABs regulation; evidently, it was not oblivious to the *Insurance Act* regulations. In any event, I doubt whether it would have decided the case differently. Section 11 of the schedule provides that "person insured under the contract" has the same meaning as in s. 265(2) of the Act. The meaning of the term in s. 265(2) was the very issue dealt with in *Taggart* and, as described above, Goudge J.A. makes it clear that "insured" in s. 265 must be interpreted having regard to s. 224.

[28] As Laskin J.A. explains in *David Polowin Real Estate Ltd.* at para. 113, the *per incuriam* exception to *stare decisis* does not apply simply because the earlier case might have been argued differently or better. It also does not apply because the court sitting on the later case would have reached a different conclusion. None of the other reasons for not applying *stare decisis* as discussed in *David Polowin Real Estate Ltd.* apply.

DISPOSITION

[29] Accordingly, I would allow the appeal, set aside the order of the motion judge and dismiss the motion brought by Coseco dismissing the action against it. The appellant is entitled to costs of the motion and the appeal fixed in total at \$20,000 inclusive of G.S.T. and disbursements.

[Concurring Opinions]

Rouleau J.A. : I Concur.

Killeen J.A. : I Concur.