

Case Name:

McArdle v. Bugler

Between

Maureen McArdle, Plaintiff, and
Brian D. Bugler, Ronald G. Emmons, Christopher
J. Emmons and Cosesco Insurance Company, Defendants

[2006] O.J. No. 3508
Court File No. 37647/01

Ontario Superior Court of Justice
R.J. Haines J.

Heard: April 12, 2006.
Judgment: August 31, 2006.
(14 paras.)

Insurance law — Automobile insurance — Uninsured or underinsured motorist coverage — Party injured in motor vehicle accident while passenger in car of uninsured driver not entitled to recover under uninsured coverage of other driver — Party already received accident benefits from other driver's insurer — Party not insured person within meaning of applicable standard policy — Insurance Act, ss. 224(1), 265, 270.

Action by McArdle, claiming entitlement to uninsured motorists coverage under Emmons' automobile insurance policy — McArdle was passenger in vehicle owned and operated by Bugler, uninsured — McArdle injured when Bugler's vehicle collided with vehicle owned by Christopher Emmons and operated by Ronald Emmons — Emmons' insurer paid accident benefits to McArdle as insured — HELD Action dismissed — McArdle was not insured person within meaning of applicable standard automobile insurance policy.

Statutes, Regulations and Rules Cited:

Insurance Act, R.S.O. 1990, c. I-8, s. 224(1), s. 265, s. 265(1), s. 270

Reg. 676, s. 10, s. 11

Reg. 776/93, s. 1

Counsel:

No one appearing, for the plaintiff.

Robert E. Seabrook, for the defendant.

Theodore P. Charney, for the defendant, Cosesco Insurance Company.

¶ 1 **R.J. HAINES J.**— The plaintiff, Maureen McArdle, was a passenger in a motor vehicle owned and operated by the defendant, Brian Bugler, on September 3, 1999. She was injured when that vehicle collided with a vehicle that was operated by the defendant, Ronald Emmons, and owned by the defendant, Christopher Emmons. Mr. Bugler was not insured. The defendant Coseco Insurance Company ("Coseco") was the insurer of the Emmons vehicle pursuant to a standard automobile policy of insurance and has paid accident benefits to the plaintiff as an insured pursuant to s. 224(1) of the *Insurance Act*, R.S.O. 1990, c. I-8, as amended.

¶ 2 The plaintiff relies on *Taggart (litigation guardian of) v. Simmons* (2001), 52 O.R. (3d) 704 (C.A.) and claims she is also entitled to uninsured motorists coverage ("UIM coverage") under the Coseco policy. It is submitted that *Taggart* stands for the proposition that anyone who qualifies as an insured for statutory benefits is also an insured for UIM coverage. Coseco contends that *Taggart* is distinguishable for two reasons;

- (i) The accident in *Taggart* occurred on September 3, 1995 at which time O.A.F. 1. Ontario Automobile Policy Form 1 - was the standard policy of insurance, whereas this accident occurred on September 3, 1999 at which time the standard automobile policy was O.A.P. 1. The definition of "insured" for uninsured motorists coverage is materially different in O.A.P. 1
- (ii) When *Taggart* is read in its proper context, the court did not intend to expand eligibility for uninsured motorist coverage beyond the limited group of persons who have traditionally been entitled to UIM coverage in all provinces, ie, the named insured/spouse/defendants and occupants of the insured vehicle.

For the reasons that follow I agree with Coseco's first contention, conclude that *Taggart* is distinguishable for that reason and find that the plaintiff is not an insured person within the meaning of the applicable standard automobile policy of insurance. Having reached that conclusion it is not necessary to address Coseco's second contention

¶ 3 John Taggart was catastrophically injured on September 3, 1995 when the motor vehicle in which he was a passenger went off the road. He sued the owner and operator as well as Pilot Insurance Company ("Pilot"), the insurers of Thomas Tessier, with whom Mr. Taggart was residing in a relationship described by the court as "close to a child-parent relationship."

¶ 4 The motions court judge, [2000] O.J. No. 355, granted Pilot summary judgment on the basis Mr. Taggart was not a "person insured under the contract" pursuant to s. 265 of the *Insurance Act* and found he was also not a "relative so as to fall within the UIM coverage in Mr. Tessier's policy. The Court of Appeal disagreed with the findings of the motions judge, allowed the appeal and dismissed Pilot's motion for summary judgment.

¶ 5 Gouge, J.A. identified the following issues in para. 11 of the reasons:

... First, was [the motions judge] correct in finding that John Taggart had no claim to the coverage mandated by s. 265 of the *Act*? Second, was [the motions judge] correct in finding that John Taggart had no claim to coverage under the OPCF 44-Family Protection Coverage endorsement in Mr. Tessier's policy?

¶ 6 In addressing those issues the court referred to the relevant portions of ss. 265(1) and 224(1) of the *Insurance Act* as well as Reg 776/93:

265(1) Uninsured automobile coverage - Every contract evidenced by a motor vehicle

liability policy shall provide for payment of all sums that,

- (a) a person insured under the contract is legally entitled to recover from the owner or driver of an uninsured automobile or unidentified automobile as damages for bodily injuries resulting from an accident involving an automobile.

subject to the terms, conditions, provisions, exclusions and limits as are prescribed by the regulations.

(2) Definitions - For the purposes of this section,

"person insured under the contract" means,

- (c) in respect of a claim for bodily injuries or death,
- (ii) the insured and his or her spouse or same-sex partner and any dependent relative of either,

(A.) while an occupant of an uninsured automobile,

224(1) Definitions - In this Part,

"insured" means 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;

Reg 776/93

1. In this Regulation,

"insured person", in respect of a particular motor vehicle liability policy, means,

- (a) the named insured, any person specified in the policy as a driver of the insured automobile, the spouse of the named insured, and any dependent of the named insured or spouse, if the named insured, specified driver, spouse or dependent
 - (i) is involved in an accident in or outside of Ontario that involves the insured automobile or another automobile, ..."

¶ 7 Gouge, J.A. then concludes at para. 19 of *Taggart*:

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)"

¶ 8 Coseco maintains that the apparent unequivocal findings in *Taggart* should not be applied in this case because there has been a material change in the standard form automobile insurance policy since *Taggart* was decided. The policy now contains a definition of insured person and the persons designated

as eligible for UIM coverage in O.A.P. 1, are listed in s. 5.3.1 of the policy:

5.3 Claims for bodily injury or death - 5.3.1 Who is covered? - the following are insured persons for bodily injury or death:

- Any person who is an occupant of the automobile
- You, your spouse and any dependent relative of either
- When an occupant of an uninsured automobile, or
- When not in an automobile, streetcar or railway vehicle if hit by an unidentified or uninsured automobile

The expression "you, your spouse and any dependent relative of either" engages section 1.3 of the policy:

We and you

Throughout this policy, the words you and your refer to the person or organization shown on the Certificate of Automobile Insurance as the named insured.

Other people may also be covered under certain conditions. We call both them and you insured persons.

We, our and us, mean the company providing the insurance.

¶ 9 Section 10 of Reg. 676, which is entitled, Uninsured Automobile Coverage, reads as follows:

In so far as applicable, the general provisions, definitions, exclusions and statutory conditions as contained in a motor vehicle liability policy also apply to payments under the contract under 265(1) of the Act.

¶ 10 Although the plaintiff and the defendant Bugler maintain that s. 224(1) of the *Insurance Act* establishes the plaintiff as an insured under the subject policy because she is entitled to receive statutory accident benefits from Coseco, counsel for Coseco submits that her insured status is not established for UIM coverage because such coverage is, pursuant to s. 265, "subject to the terms, conditions, provisions, exclusions and limits as are prescribed by the regulations" The words "subject to" connote an exception to or pave the way for a qualification to the rest of the provision. see *David Polowin Real Estate Ltd v Dominion of Canada General Insurance Company* (2005), 76 O.R. (3d) 161 (C.A.), at para. 17. The court held in *Polowin*, at para. 63, that when interpreting the words of a statutory provision the court should take into account all relevant and admissible indicators of legislative meaning and "adopt an interpretation that complies with the legislative text, promotes the legislative purpose, and produces a reasonable and sensible meaning." Relevant regulations and policy provisions must therefore, be considered in determining whether the plaintiff is entitled to UIM coverage under the Coseco policy.

¶ 11 The plaintiff accepts this proposition but submits that its application does not support Coseco's position. The plaintiff refers to s. 5 of the policy and para. 11 of Reg 676:

5. This section of the policy describes the terms and conditions of the coverage set out in the Uninsured Automobile Schedule under the *Insurance Act* (Ontario). If there is a difference between the interpretation of the wording of this section and the interpretation of the wording in the schedule, the schedule prevails.
11. 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*.

¶ 12 The plaintiff therefore submits that the reasoning in *Taggart* prevails. I disagree. It appears to me

that the path prescribed by those provisions does no more than bring the argument full circle where it ultimately founders on the analysis proffered by counsel for Coseco. When all the relevant, admissible indicators of legislative meaning are taken into account it is apparent that even though the plaintiff, as a "person who is entitled to statutory accident benefits," is, pursuant to s. 224(1), an insured under the Coseco, policy, she is not, "a person insured under the contract" for the purposes of s. 265 and does not qualify for UIM coverage, because she is not, by operation of s. 5.3.1, a person who is covered by the policy.

¶ 13 The plaintiff also submits that even if the insurer's interpretation of s. 265 is accepted she is still entitled to UIM coverage by operation of s. 270 of the *Insurance Act* which provides:

Any person insured by but not named in a contract to which section 265 or 268 applies may recover under the contract in the same manner and to the same extent as if named therein as the insured and for that purpose shall be deemed to be a party to the contract and to have given consideration therefore.

This provision gives a person who is entitled to indemnity but not named in the policy the right to pursue recovery as if they were named. As explained by Borins, J (as he then was), in *Yu v. St Paul Fire and Marine Ins. Co.* [1996] O.J. No. 127 at para. 4, at common law a person who derives a benefit under a contract of insurance but is not a party to it has no legal right to enforce the contract. Section 270 permits recourse by an unnamed insured where the Policy provides for coverage but there is no privity of contract. However, in the circumstances of this case, I do not see that s. 270 assists the plaintiff because it is not demonstrated that she is entitled to the UIM coverage she is claiming. As a result she is not, for UIM coverage purposes, a "person insured by but not named in a contract" of insurance.

Disposition

¶ 14 The motion is granted Paragraphs 4(a), 11(a), 11(b), 11(c), 11(d) and 11(e) are struck and an order will go dismissing the action as against the defendant Coseco. Counsel may make written submissions with respect to costs within 30 days.

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