

Case Name:

Trainor v. Barker

Between

**Patricia Trainor, David Bruce Trainor, Carl Phillip
Trainor and Deanna Rachael Trainor by her litigation
guardian Patricia Trainor, Plaintiffs, and
Aaron Gary Barker and Gary Thomas Barker and Q.S.C.
Incorporated and Carey Mahon, Defendants**

[2006] O.J. No. 3858

42 C.C.L.I. (4th) 102

151 A.C.W.S. (3d) 692

2006 CarswellOnt 5796

Court File No. 21286/95

Ontario Superior Court of Justice

P.B. Hockin J.

Heard: May 26 and 31, 2005; written submissions, July 8 and
25, 2005.

Judgment: July 10, 2006.

(16 paras.)

Insurance law -- Co-insurance -- Primary or excess insurance -- The plaintiff insured Trainor was injured in a motor vehicle accident with Barker while he was on an errand for work in his parent's car -- Coseco was the defendant's parent's insurer; Halifax Insurance was the insurer of the employer -- Coseco Insurance settled with the plaintiff; it sought indemnity from Halifax Insurance for all or part of the settlement -- The Halifax policy, as a non-owner's policy, was excess insurance; the Coseco policy was the primary policy -- Halifax was not liable to indemnify Coseco for the settlement -- Insurance Act, s. 1, s. 277(1).

Insurance law -- Automobile insurance -- Insurers, settlement agreements -- The plaintiff insured

Trainor was injured in a motor vehicle accident with Barker while he was on an errand for work in his parent's car -- Coseco was the defendant's parent's insurer; Halifax Insurance was the insurer of the employer -- Coseco Insurance settled with the plaintiff; it sought indemnity from Halifax Insurance for all or part of the settlement -- The Halifax policy, as a non-owner's policy, was excess insurance; the Coseco policy was the primary policy -- Halifax was not liable to indemnify Coseco for the settlement -- Insurance Act, s. 1, s. 277(1).

Statutes, Regulations and Rules Cited:

Highway Traffic Act, R.S.O. 1990, c. H.8., s. 192(2)

Insurance Act, c. I-8, s. 1, s. 1, s. 277(1)

Counsel:

T.P. Charney, for the Defendants Aaron Gary Barker, Gary Thomas Barker and Coseco Insurance Company

J.M. Dillon for the Defendants Q.S.C. Incorporated, Carey Mahon and Halifax Insurance Company

1 P.B. HOCKIN J.:-- This is the trial of an insurance issue.

2 The dispute is a dispute between insurers which arises after a settlement by one insurer with the plaintiff Patricia Trainor. This insurer, Coseco Insurance Company, by this proceeding, seeks to pass off or obtain contribution from the Halifax Insurance Company all or part of the settlement. Both insurers are motor vehicle insurers. The dispute is a dispute between an "owner's policy" and a "non-owner's policy" as defined by the *Insurance Act* c. I-8, s. 1. The relevant section of the *Act* is s. 277(1) which reads:

Subject to section 255, insurance under a contract evidenced by a valid owner's policy of the kind mentioned in the definition of "owner's policy" in section 1 is, in respect of liability arising from or occurring in connection with the ownership or directly or indirectly with the use or operation of an automobile owned by the insured named in the contract and within the description or definition thereof in the policy, a first loss insurance, and insurance attaching under any other valid motor vehicle liability policy is excess insurance only.

3 The history of the action is as follows:

4 On October 31, 1993, the defendant Aaron Gary Barker was 17 years of age. He lived with his

parents, attended high school and like many teenagers, he had a part-time job. He was employed as a cook at the Wharncliffe Road Burger King restaurant. Aaron's father, the defendant Gary Barker, let his son drive the family car to the restaurant from time to time. That was the case on this date. At some point during his shift, his supervisor, the defendant, Carey Mahon, asked him to drive to the Wellington Road Burger King restaurant to pick up buns to replenish the supply at its Wharncliffe Road restaurant. Young Barker agreed. It was on this trip that the accident occurred. While alone in his father's car, Aaron Gary Barker crossed the centre line of the road after losing control of his father's vehicle and in the opposite bound lane there was a collision between his vehicle and the vehicle owned and driven by the plaintiff, Patricia Trainor. The accident was caused by the negligence of the defendant, Aaron Gary Barker. At the time, Aaron was acting in the course of his employment with the defendant Q.S.C. Incorporated, ("Q.S.C."). Q.S.C. was Burger King's franchisee at its Wharncliffe Road and Wellington Road locations in London.

5 Patricia Trainor, by Statement of Claim, commenced this action September 20, 1995. The Barkers delivered separate defences. By order of January 5, 2000, the Statement of Claim was amended to add as defendants Q.S.C. and Carey Mahon.

6 Separate defences were delivered by father and son because the father, through his insurer, Coseco, took the position, at least initially, that the father's vehicle was being operated by his son without his consent. However, by full and final release, Coseco settled with the plaintiff upon payment to her the sum of \$312,391.38 and coincidentally, as a term of the settlement, received from the plaintiff, by assignment, her claim against Q.S.C. and its employee, Carey Mahon. The operative language of the assignment reads as follows:

I, PATRICIA TRAINOR, hereby assign all claims I have or may hereinafter have against the defendants, Q.S.C. INCORPORATED and CAREY MAHON, in these proceedings, action number 21286/95 to COSECO INSURANCE COMPANY, and hereby agree that COSECO INSURANCE COMPANY shall assume my causes of action against these defendants and is entitled to appoint counsel to prosecute this action on my behalf.

7 It is the case that the trial or proceeding before me was at the behest of Coseco and is accomplished under its assignment from the plaintiff. Coseco seeks reimbursement from Halifax through the mechanism of a judgment, which will impose, by law, liability on the defendants arising out of the operation of the Barker vehicle and Aaron Gary Barker's employment with Q.S.C. The issue is whether the priority rule set out in s. 277(1) of the *Insurance Act* applies in spite of the judgment.

8 The following findings and conclusions will found the result in this case:

1. The defendant Aaron Gary Barker is liable to the plaintiff Patricia Trainor to the full extent of the settlement or \$312,391.38. He lost control of his father's motor vehicle and was solely responsible for the injuries, which

Patricia Trainor sustained.

2. The defendant Gary Barker is liable to the plaintiff as owner of the motor vehicle pursuant to s. 192(2) of the *Highway Traffic Act*, R.S.O. 1990, c. H.8. His liability is a joint and several liability to the plaintiff pursuant to s. 192(6) of the *Act*. The issue of no consent was abandoned at some point before Coseco settled with the plaintiff.
3. The defendant Aaron Gary Barker was operating his father's motor vehicle at the time of the accident for the defendant Q.S.C. in the course of his employment and on behalf of Q.S.C. He had been dispatched to the Wellington Road store to pick up buns by his supervisor, the defendant Carey Mahon. Q.S.C. is vicariously liable to the plaintiff for the negligence of its employee.
4. Coseco insured Gary Barker and Aaron Gary Barker. They were insured under a valid "owner's policy" as defined by the *Insurance Act*. Q.S.C. was insured under a valid "non-owner's policy" by Halifax.
5. Aaron Gary Barker is not an "additional insured" under the Halifax policy. Although he was an employee of Q.S.C., the extension of coverage offered by the definition of "additional insured" does not attach to young Barker because the vehicle he was driving at the time was owned by a person (his father) "residing in the same dwelling premises as the additional insured person."
6. On the basis of these reasons, liability will be imposed, by judgment, on Aaron Gary Barker as driver, on his father Gary Barker, as owner and on Q.S.C., as Aaron's employer.
7. The obligation of each insurer under the insuring agreement of each policy is to indemnify them "against liability arising out of bodily injury ... caused by an automobile or the use or operation thereof"¹ Insurance under both policies will therefore attach to indemnify them in respect of their liability under the judgment. In the case of Coseco, this is a straightforward application of the insuring agreement. Indeed this has already taken place. In the case of Halifax, it matters not that the mechanism by which liability is imposed on Q.S.C. is *respondeat superior* because it is imposed nonetheless by reason of the "use or operation" of an automobile. Halifax does not take a contrary position. For example, Halifax does not say that Q.S.C.'s comprehensive general liability policy is involved; it is the auto policy which will respond.

9 Before I turn to a determination of the issue, I should say something about the suggestion of Coseco that s. 277(1) of the *Insurance Act* does not provide Halifax with an answer to Coseco's claim because there did not exist at the material time an enforceable non-owner's policy for Q.S.C. with Halifax. The evidence was that Q.S.C. through its broker had purchased such coverage but through the inadvertence of the broker, the endorsement was left out of a renewal. Halifax chose to

extend coverage despite the slip-up and have defended Q.S.C. on the basis of the statutory and contractual coverage of a non-owner's form. I do not understand how it can lie in the mouth of counsel for Coseco to say through these reasons that Q.S.C. is not covered. Halifax chose to defend and so there is coverage. Beyond this, I do not understand how Coseco's interests are advanced at all if these reasons should establish Q.S.C. is uninsured. This was an issue which counsel for Coseco raised for the first time at the trial. No steps had been taken to put Q.S.C. on notice that in this proceeding Coseco sought a declaration or finding that it was not insured for this loss, this despite Halifax's reasonable acceptance of coverage. The fact that Halifax agreed to defend and to extend cover means that there was coverage at the material time. It was always there. All that happened was that a clerk forgot to include the endorsement.

10 The findings and the relief sought by Gary and Aaron Gary Barker/Coseco are set out at paragraph 74 of Coseco's Factum as follows:

In conclusion, the defendants, Gary Barker and Aaron Barker request judgment against Q.S.C. on the crossclaim based on the application of equitable principles of indemnity, the direct negligence of Q.S.C. and the application of *McFee v. Joss*. To the extent the Court's findings in support of the judgment on the crossclaim against Q.S.C. relate to coverage which is provided under non-owned automobile protection endorsement, these defendants request a finding that the endorsement was not in place at the material time and therefore *Section 277* cannot apply, or alternatively, the insurance offered by Halifax as reflected in the endorsement does not attach within the meaning of *Section 277*.

11 I have found that at the time of the accident, Q.S.C. was insured by Halifax under a non-owner's policy. Therefore, s. 277(1) may apply. There was a great deal of time taken up in argument and later in Coseco's Factum to establish findings of liability against Q.S.C. in favour of the Barkers beyond the simple finding that Q.S.C. was vicariously responsible for the negligence of its employee, Aaron Gary Barker. For example, Q.S.C. (Halifax), on the basis of *McFee v. Joss* [1925] 2 D.L.R. 1059, Q.S.C. should indemnify Gary Barker for liability imposed by virtue of the negligence of its employee, Aaron Gary Barker. To the same effect, there is the implied promise to pay in *Eastern Shipping Co. Ltd. v. Kee* [1924] A.C. 177. I do not agree that the theories of liability advanced apply with the facility suggested by counsel for Coseco but even if one were to accept favourable findings for the Barkers against Q.S.C. on one or all of the theories advanced to support a crossclaim against Q.S.C., it does not oust the simple language of the insuring agreements (which trigger the application of the insurance) and s. 277(1).

12 The language of the insuring agreements under the two policies is the same. Any person insured under either policy is insured against "liability arising out of bodily injury ... caused by an automobile." This language is the language of the definition of a "motor vehicle liability policy" in s. 1 of the *Insurance Act*. The actual wording of the insuring agreement is set out under Section A - Third Party Liability in each policy as follows:

The insurer agrees to indemnify the insured against *liability imposed by law* upon the insured for loss or damage arising from the use or operation of the automobile (in the case of the owner's policy) or not owned (in the case of the non-owner's policy).

13 There is no qualification or restriction on the manner in which liability is imposed under the insuring agreement save that it must arise from the use or operation of an automobile. The vicarious liability which is imposed on Q.S.C. arises from the operation of an automobile by its employee during the course of his employment. The insurance with Halifax attaches. The language of s. 277(1) clearly provides that in this circumstance, the primary policy is the Coseco policy and the Halifax is excess insurance only. The limits of the Coseco policy are sufficient. There is no need to call on the Halifax policy. Coseco will accept entirely the burden of its settlement with the Trainor family. This result is consistent with the results in *Felix v. Corbett* (1999), 44 O.R. (3d) 791 and *Guardian Insurance Co. of Canada v. York Fire and Casualty Insurance Co.*, [1989] O.J. No. 2233.

14 The issue in this case is whether s. 277(1) applies to establish priority. It does. There is no point to making specific findings on the allegations of Coseco that Q.S.C. was guilty of direct negligence or Aaron Gary Barker is entitled to be indemnified by Q.S.C. In my view, it does not matter.

15 Costs to Halifax. Absent agreement on scale or quantum, I will fix the costs.

16 The trial record has been endorsed as follows:

For written reasons, I declare that the Coseco policy is first loss and that the Halifax policy is excess insurance only. The main action has been settled. Costs of this to Halifax. Absent agreement, I will fix the costs.

P.B. HOCKIN J.

cp/e/qw/qlmxf/qlcem