

CITATION: Tompros v. Ravitharan et al., 2015 ONSC 3998
COURT FILE NO.: CV-11-104182
DATE: 20150619

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

ANTHONY TOMPROS, DOMENIC)
TOMPROS, a minor by his litigation)
guardian, ANTHONY TOMPROS,)
GEORGE ANTHONY TOMPROS, a minor)
by his litigation guardian, ANTHONY)
TOMPROS, NICHOLAS TOMPROS,) Deanna S. Gilbert, for the Plaintiffs
GEORGE TOMPROS, and)
CONSTANTINA TOMPROS, also known)
as DINA TOMPROS)
- and -)
)
) Don Rollo and Brandon Straitman, for
) Western Assurance Company
)
THIYAGARAJAH RAVITHARAN,) Todd J. McCarthy, for Desjardins General
WESTERN ASSURANCE COMPANY and) Insurance Group
THE DOMINION OF CANADA)
GENERAL INSURANCE COMPANY) Tim Alexander, for the Defendants in related
) action
)
)
)
)
)
) **HEARD:** June 10, 2015

REASONS FOR JUDGMENT

EDWARDS J.:

Overview

[1] On March 27, 2007, Thiyagarajah Ravitharan (“Ravitharan”) purportedly signed a document entitled OPCF 28A Excluded Driver (“the Form”). His signature was not

witnessed. The form provides that if Ravitharan was in an accident the insurance policy would not provide:

- (1) the insurance required by law;
 - (2) coverage for damage or injuries caused by the excluded driver i.e. Ravitharan;
 - (3) Both the automobile owner and the excluded driver i.e. Ravitharan, may be personally responsible for damage or injuries caused by the excluded driver.
- [2] The form does not specify which automobile or automobiles were subject to the provisions of the form. On October 6, 2010 the plaintiff, Anthony Tompros (“Tompros”), was injured in a motor vehicle accident that on all accounts appears to have been the responsibility of Ravitharan. There is no real dispute that the injuries suffered by Tompros (incomplete quadriplegia) will result in a damages award that will exceed the maximum policy limits of one million dollars that may be available to respond to Tompros’s claims.
- [3] Ravitharan was insured by the Personal Insurance Company (“The Personal”). Through various corporate changes, Desjardins General Insurance Company (“Desjardins”) has now assumed the position of the Personal. The insurance policy with Desjardins has one million dollars in policy limits. Desjardins takes the position that Ravitharan is an excluded driver and, as such, Desjardins has taken an off-coverage position.
- [4] The defendant, Dominion of Canada General Insurance Company (“Dominion”), insured the vehicle that Tompros had been driving at the time of the accident, which was owned by his friend Jacqueline Jelinek (“Jelinek”). The defendant, Western Assurance Company (“Western Assurance”), was Tompros’s own automobile insurance carrier.
- [5] Dominion has already tendered to the plaintiff \$200,000 plus costs as its contribution towards Tompros’ damages based upon what it views as its maximum potential liability. Western Assurance will have to pay the balance, up to \$800,000 plus costs, if its one million dollar family protection endorsement is available to the plaintiffs. In the event the Excluded Driver Endorsement is not enforceable, then Desjardins will become the primary source of coverage for Tompros’ claims with the result that neither Western Assurance nor Dominion would likely have any further exposure to Tompros.
- [6] Ravitharan was noted in default with no statement of defence having been filed. As such, Ravitharan is deemed to admit that he was operating the motor vehicle which struck Tompros. Ravitharan was also the owner of the vehicle.
- [7] Desjardins sought intervener status to bring a motion that would determine if its coverage position was correct. The preliminary motion seeking intervener status was initially opposed by the responding parties, particularly the plaintiff, as there was a concern that

any decision I might make on the coverage dispute could result in an appeal which could delay the trial of this action scheduled for November of this year.

- [8] Everyone agrees that the coverage dispute will have to be decided by this court – whether it is now, or whether it is after a trial when the plaintiff would have to pursue an action against Desjardins under Section 258 of the *Insurance Act* to recover any damage award made at trial. It makes sense to have the coverage issue determined prior to trial so that the parties will know, subject to any appellate decision to the contrary, what policy limits are available to respond to the plaintiffs’ claims and which insurer will have to respond. Such a determination should not, however, impact on the timing of the trial and, as such, all counsel have agreed that regardless of any appeal from my decision no one will seek an adjournment of the trial on the basis of any pending appeal.

The Facts

- [9] Filed as part of Desjardins motion for summary judgment with respect to the issue of coverage was an affidavit of Remo Moretto, who is described as an underwriter with Desjardins. Attached to Mr. Moretto’s affidavit was a copy of the certificate of automobile insurance covering a policy period from November 1, 2009 through November 1, 2010. This certificate of insurance provided insurance coverage for a 2001 BMW, a 2003 Honda Odyssey and a 2003 Chevrolet truck. The Certificate of insurance referred to various additional agreements applicable to the policy, one of which referenced an OPCF 28A “Excluded Driver Thiyagarajah Ravitharan”. The principle driver referenced on the Certificate of insurance was Pathmaneela Ravitharan, with a date of birth of June 30, 1971.
- [10] Also included as an exhibit to the affidavit of Mr. Moretto were the diary notes from the underwriting file for the Personal covering a time period from July 2003 through April 2012.
- [11] This court did not have the benefit of any affidavit evidence from the various individuals referenced in the underwriting notes who actually participated in the telephone discussions with Ravitharan with respect to the Form. This court also did not have the benefit of any evidence from Ravitharan, which is perhaps understandable given that no defence was filed by Ravitharan and, according to counsel, they have not been able to locate him.
- [12] A review of the underwriting notes appended to the affidavit of Mr. Moretto suggest that there were a number of discussions with Ravitharan recorded in relation to the requirement by The Personal for Ravitharan to execute an OPCF 28. The requirement by The Personal for Ravitharan to sign an OPCF 28 appears to have been precipitated as a result of Ravitharan’s driving record, which revealed that he had two at fault accidents and two driving infractions that put him into what is described as a “Facility” risk. The Personal apparently was not prepared to underwrite Ravitharan as a liability risk and therefore required that he sign the OPCF 28 as an excluded driver.

- [13] The discussions with respect to the requirement for Ravitharan to sign the form appear to have begun in February 2007. On March 15, 2007, there is a diary note which would suggest that The Personal had received a signed OPCF 28 from Ravitharan, which generated another request from The Personal to sign another Form 28 as the one that Ravitharan had sent to The Personal, and received on March 15, 2007, was not valid because Ravitharan was both the registered owner and the excluded driver. This then generated a request for a second OPCF 28 to be signed by Ravitharan. The OPCF 28 that was signed by Ravitharan and received by The Personal on March 3, 2007 has not been produced.
- [14] The OPCF 28 which was entered into evidence on this motion was signed by Ravitharan on March 27, 2007. The diary notes would suggest that it was received by The Personal on March 29, 2007. The OPCF 28 appears to have been added to the policy as reflected in the diary notes on May 18, 2007. The Certificate of insurance for the 2007 year, as well as for the years 2008 and 2009, have not been produced.
- [15] The diary notes reveal that there were a number of other occasions when someone from The Personal's underwriting department had discussions with Ravitharan. Some of these discussions would appear to relate to renewals of the policy. Some of the discussions also relate to additions and deletions of vehicles insured under the policy. On November 29, 2008, the diary notes reflect a discussion with Ravitharan that would appear to relate to the addition of a new vehicle. There is nothing then reflected in the diary notes of any discussion concerning Ravitharan and his status as an excluded driver. A further discussion took place on June 5, 2010 with respect to the addition of a new vehicle, a 2007 Chevrolet truck. Again, there does not appear to have been any discussion with Ravitharan concerning his status as an excluded driver.
- [16] Section 227 of the *Insurance Act* provides that the various forms that may be used by an insurance company in connection with the issuance of a policy of motor vehicle insurance has to be approved by the Superintendent for the Financial Services Commission of Ontario ("FSCO").
- [17] Pursuant to the provisions of section 249 of the *Insurance Act*, a named insured may stipulate by endorsement that any person named in the endorsement is an excluded driver under an automobile insurance policy. The OPCF 28A and O.E.F. 78A are the endorsements which are approved for use in accordance with section 249(a). The OPCF 28A is the form which was in use for conjunction with the Standard Automobile Owners Policy – the O.A.P. 1. The approved OPCF 28A form is appended to these Reasons, together with a copy of the OPCF 28A, which was signed by Ravitharan on March 27, 2007. There are, in my view, obvious material differences between the approved form and the form which was signed by Ravitharan.
- [18] On Mr. Moretto's cross-examination he was asked questions with respect to the Form signed by Ravitharan. In re-examination Mr. Moretto stated that the form signed by Ravitharan had in fact been approved by the Superintendent. Other than Mr. Moretto's

sworn evidence in this regard, no confirmatory evidence was filed establishing the Form used by The Personal and signed by Ravitharan had in fact been approved by FSCO.

- [19] It is important to note that while the form of a standard policy is required to be published in the Ontario Gazette, it is not necessary to publish endorsement forms like an OPCF 28A. There is no dispute that the OPCF 28A, which is appended to these Reasons as Appendix A, has been approved by the Superintendent as per the requirements of section 227 of the *Insurance Act*.
- [20] Other than the sworn evidence of Mr. Moretto, there is no evidence from FSCO to confirm that Appendix B (“the Form”) has ever been approved by the Superintendent to meet the requirements of section 227 of the *Insurance Act*. While not determinative of the ultimate result in this case, in my view if an insurer wishes to rely on the Excluded Driver Endorsement form then the insurer must put before the court evidence from FSCO that the Superintendent has in fact approved the form relied upon.

Position of Desjardins

- [21] As between the form signed by Ravitharan and the form approved by FSCO, the OPCF 28A, Desjardins is suggesting that there are only minor and insignificant differences between these two forms.
- [22] The OPCF 28A approved by the Superintendent contains an area in which the excluded vehicles are to be listed. The form signed by Ravitharan does not contain a section for excluded vehicles. Desjardins argues that the form simply indicates all vehicles under the relevant policy and the Certificate of insurance lists those vehicles. Section 2 of the OPCF 28A merely incorporates the information required in section 2 of the FSCO Form 28A by reference to the O.A.P. Desjardins notes that the OPCF 28A is specifically for use in conjunction with the O.A.P 1. Mr. Moretto, in his affidavit and cross-examination, confirms that the modified OPCF 28A signed by Ravitharan was acceptable for use even after the FSCO Form 28A was modified.
- [23] Desjardins further argues that there is no requirement that on each renewal of a policy of insurance that a fresh OPCF 28A be signed by an insured and the excluded party. Once an insured signs an OPCF 28A and wishes to be put on coverage, Desjardins argues that an insured has a positive obligation to take proactive steps to get the excluded party back on coverage once an OPCF 28A is signed. See *Hunter v. Economical Insurance Group*, [2004] 75 O.R. (3d) 124.
- [24] Specifically, Desjardins relies on that part of the decision of MacKinnon J. in *Hunter*, supra, where at paragraph seven the following commentary is found:

...the provisions of Endorsement O.P.C.F. 28A are written such that an average person is capable of understanding them. They are written in plain language and contain an acknowledgment from all three parties that ensures that all understood the full impact of the exclusion. There is no

evidence the plaintiff misunderstood any of its terms. The terms are not time limited...

- [25] Dealing with any argument that might be raised by the responding parties with respect to the absence of a fresh OPCF 28A whenever the policy of insurance was renewed, Desjardins relies on the following extract from *Hunter*:

There is no obligation in law on an insurer to insist that on each renewal a fresh O.P.C.F. 28A be signed by the insured and the excluded party. Rather, an insured has a positive obligation to take proactive steps to get the excluded party back on coverage. The obligation is on the insured if he wishes a change. The terms of the Excluded Driver Endorsement in this case were fully brought to the attention of the insured at the time it was signed. There is no ongoing obligation on the insurer to continue to remind an insured in these circumstances that the Excluded Driver Endorsement remains in effect.,.

Position of the Plaintiff

- [26] Counsel for the plaintiff argues, in my view correctly, that Desjardins bears the onus of establishing the enforceability of the form signed by Ravitharan. In that regard, in reliance on the decision of Sharpe J.A. in *GMAC Leaseco Corp.v. Lombard Insurance* 2007 O.J. No. 3652, it is argued that where an insurer seeks the protection of the 28A Excluded Driver Endorsement the insurer must “take appropriate steps to ensure that it is brought to the insured’s attention”.
- [27] While on its face the form appears to be signed by someone purportedly bearing the name Thiagarajah Ravitharan, the signature is not witnessed and there is no evidence proffered by Desjardins to confirm that the signature on the form is in fact that of Ravitharan who is named as a defendant in this action.
- [28] The diary notes of The Personal were entered into evidence as an exhibit to the affidavit of Mr. Moretto, filed as part of the evidence on behalf of Desjardins. These diary notes, on their face, would suggest that there were discussions between the claims person at The Personal and someone who appears to identify themselves as Ravitharan. Absent the evidence of Ravitharan to the contrary and absent the evidence of the individual preparing the diary notes, the diary notes are at this point in time the best evidence with respect to what transpired in February and March of 2007 as it relates to the necessity for the execution of a OPCF 28A as a precondition for Ravitharan becoming an insured.
- [29] While Desjardins does bear the onus on this motion, my decision is not ultimately governed by the absence of any direct evidence as to whether or not the signature on the form is that of Ravitharan. It goes without saying, however, that the best evidence in that regard certainly would be made fundamentally more probative if the OPCF 28A required

a space for a witness to sign witnessing the signature of the person seeking excluded driver status.

- [30] Counsel for the plaintiff argues that the form signed by Ravitharan is not a form approved by the Superintendent of FSCO. In that regard, reliance is placed on the decision of Karakatsanis J. in *Gore Mutual Insurance Co. v. 1443249 Ontario Ltd.* [2004] O.J. No. 712, where at paragraph 17 Karakatsanis J. emphasized the importance of compliance with the FSCO 28A as follows:

The approval of the form by the Superintendent ensures implementation of the legal requirements but also permits consistency and the reflection of sound policy and practical considerations. The fact that the form is written in plain language and requires the written acknowledgment of the insurer and the excluded driver are prudent policies that ensure the insured and excluded driver understand the serious impact of the exclusion...

- [31] While there are a number of differences between the form and the standard form 28A approved by the Superintendent, the most critical distinction between the two forms is the fact that the form utilized by Desjardins does not list the vehicles to which the endorsement would apply. This is particularly telling given that the diary notes, attached to the affidavit of Mr. Moretto, make it clear that there were a number of additions and deletions to the policy after the signing of the form by Ravitharan in March 2007.
- [32] In support of the differences between the OPSC 28A and the form signed by Ravitharan, counsel for the plaintiff referred to a number of extracts from the cross examination of Mr. Moretto where he conceded that an insurer that departs from the FSCO approved endorsement does so at its own peril. As well, Mr. Moretto confirmed that anyone reading the Desjardins endorsement would need both the endorsement and the Certificate of Automobile Insurance to fully appreciate which vehicles fell under the umbrella of the endorsement.
- [33] Fundamentally, counsel for the plaintiff argues that an insured in receipt of the Certificate of insurance would find it difficult to know which vehicles would be excluded if they were not listed on the form.
- [34] Counsel for the plaintiff also relies on section 232(3) and section 232(5) of the *Insurance Act*, which requires an insurer to deliver or mail to its insured the policy or a certificate in an approved form **and every endorsement**. There is no evidence, so says counsel for the plaintiff, confirming that prior to the accident in question that Desjardins had sent to Ravitharan both a certificate in an approved form and a copy of the Excluded Driver Endorsement. This was confirmed by Mr. Moretto in his cross examination on a review of the diary notes.

- [35] I did not have any expert evidence with respect to the industry standard expected of an insurer relying on an Excluded Driver Endorsement where there were additions and deletions of vehicles made to the policy subsequent to the signing of the Excluded Driver Endorsement by the insured. Nonetheless, counsel for the plaintiff did refer me to the evidence of the witness produced on behalf of Western Assurance who stated on cross examination:

It's my understanding that the 28A form used industry wide should list the vehicles excluded and that a new one would be required each time a new vehicle is added or substituted to the policy. So I would say that the fact that this vehicle seems to have been registered to the insured after the date that this was signed, in my opinion would render this invalid.

Position of Western Assurance

- [36] Without minimizing any of the arguments made by Mr. Rollo on behalf of Western Assurance, they essentially were the same arguments covered by counsel for the plaintiff set forth above.

Analysis

- [37] I agree with the position taken by the plaintiff and Western Assurance that Desjardins bears the onus of establishing in every respect the validity of the endorsement relied upon to exclude coverage for Ravitharan. I do not, however, need to decide this case on the basis of the failure of Desjardins to establish that the signature on the form is that of Ravitharan. There is enough evidence in the diary notes to at least raise a genuine issue, or at least the necessity of a mini-trial, as it relates to this question. That said, as I have already noted above, while even the approved OPCF 28A does not provide for the signature of a witness to that of the signature of the excluded driver it would be a relatively simple task to require such a witness and thereby improve the ability of the insurer relying on the Excluded Driver Endorsement to establish that the signature on the endorsement is that, in fact, of the excluded driver.
- [38] I agree with the position taken by counsel for Desjardins that there is no obligation on the part of the insurer to draw to the attention of an insured the ongoing applicability of an Excluded Driver Endorsement where a policy of insurance is renewed on an annual basis. I agree with the following comments in *Hunter*, supra, where beginning at paragraph 10 MacKinnon J. stated:

The plaintiff's policy that contained that Endorsement existed in 1997 and was renewed in its entirety without changes up to the time of the accident except for the addition of the all-terrain vehicle in the year 2000. There was never a change to the excluded driver Endorsement. At all times the insurance contract included those terms...

Paragraph 12:

Endorsement forms 28A and 32 are not contradictory. The addition of the ATV to the automotive policy did nothing to amend the excluded driver provision. There is no obligation in law on an insurer to remind an insured to execute a new form 28A on each renewal...

- [39] There is nothing in the reasons of MacKinnon J. to suggest that the OPCF 28 that was in issue before MacKinnon J. was anything other than a form that had been approved by the Superintendent in compliance with the provisions of the *Insurance Act*. In the case before me, however, there is a serious issue as to whether or not the form that was signed by Ravitharan had in fact been approved by the Superintendent. While Mr. Moretto, in his re-examination, took the position for the first time that the form had in fact been approved, there is no confirmatory evidence filed with this court to support that conclusion. In my view, if an insurer seeks to rely on a form to exclude coverage, there has to be strict compliance with the provisions of section 227(1) of the *Insurance Act* which provides:

Approval of forms

An insurer **shall not use** a form of any of the following documents in respect of automobile insurance **unless** the form has been approved by the Superintendent:

1. An application for insurance
2. A policy, **endorsement** or renewal. [My emphasis]

- [40] While section 227(6) of the *Insurance Act* does not require the publication of an endorsement in the Ontario Gazette, in my view something more than the oral evidence of someone like Mr. Moretto is required to satisfy the requirements of section 227(1). It would have been a simple task for Desjardins to have attached to the affidavit of Mr. Moretto, documentary evidence from the Superintendent confirming that the type of form signed by Ravitharan had in fact been approved by the Superintendent. In the absence of that approval there has been non-compliance by Desjardins with section 227.
- [41] It is particularly noteworthy that the form relied upon in this case does not have any provision for the vehicles that would be caught by the Excluded Driver Endorsement. The approved form on the other hand, does make specific provision for the vehicles that are caught by the Excluded Driver Endorsement. This makes imminent sense so that anyone signing the excluded driver form would know that if the excluded driver drives any vehicle described in the endorsement there would be no coverage for that individual.
- [42] Even if the failure by Desjardins to put before this court evidence confirming that the form had been approved by the Superintendent was not the determining factor in this case, there still remains the failure by Desjardins to put evidence before the court that

when the policy of insurance was renewed, not only did Ravitharan receive a copy of the certificate but also a copy of the Excluded Driver Endorsement form. Section 232(3) of the *Insurance Act* provides:

Subject to subsection (5), the insurer **shall deliver or mail** to the insured named in the policy, or to the agent for delivery or mailing to the insured, **the policy or a true copy thereof and every endorsement** or other amendment to the contract.
[My emphasis]

- [43] In this regard, in reliance on the decision of the Ontario Court of Appeal in *GMAC*, supra, there has been a failure on the part of Desjardins to establish that the insured, Ravitharan, was at the time of the annual renewal of the policy provided with not only a copy of the certificate of insurance but also a copy of every endorsement, i.e. the OPCF 28A.
- [44] The only certificate of insurance which was entered into evidence on behalf of Desjardins was a certificate of insurance which covered the time period November 1, 2009 through November 1, 2010. This certificate of insurance, as previously noted, related to a 2001 BMW, a 2003 Chevrolet truck and the subject automobile, a 2003 Honda Odyssey, which was involved in the subject motor vehicle accident. The certificate of insurance, as previously noted, indicates that it is subject to an OPCF 28A excluded driver.
- [45] The form signed by Ravitharan makes no provision for which, if any vehicles, are caught by the Excluded Driver Endorsement signed by Ravitharan. This becomes particularly important where there have been additions and deletions made to the policy, as is evident from the evidence in this case. Not only was there non-compliance with section 232(3) of the *Insurance Act*, there was absolutely no way anyone reading the certificate of insurance and the OPCF 28A signed by Ravitharan would know which vehicles were caught by the Excluded Driver Endorsement.
- [46] While there is no obligation, as confirmed by the comments of MacKinnon J. in *Hunter*, to bring to the attention of an insured the continuing applicability of an Excluded Driver Endorsement upon a renewal of a policy of insurance, there is a requirement to ensure that the Excluded Driver Endorsement fully complies with the obligations imposed on an insurer to draw to the attention of an insured the applicability of the endorsement itself. The endorsement must be approved by the Superintendent of insurance. The approved form of endorsement provides for a list of automobiles caught by the endorsement. The failure on the part of Desjardins, or in this case The Personal, to have made provision for which vehicles were caught by the endorsement, in my view is fatal to the applicability of the Form in this case.
- [47] With the result that Desjardins cannot rely on the form signed by Ravitharan, it follows that subject to any other positions taken by Desjardins, that Desjardins has an obligation to defend Ravitharan and, as such, respond to any judgment that might be rendered in this matter.

[48] If the parties are unable to resolve the issue of costs they may submit written submissions limited to three pages in length, to be received within 10 days of the receipt of these reasons.

Justice M.L. Edwards

Released: June 19, 2015