BRITISH EMPIRE UNDERWRITERS AGENCY OF THE BRITISH AMERICA ASSURANCE COMPANY (DEFENDANT) ..... APPELLANT;

1921

*Nov. 3, 4.
*Dec. 9.

AND

PAUL WAMPLER (PLAINTIFF) .....RESPONDENT.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

*Insurance—Automobile policy—Construction—Conveyance on ferry—Special risk.*

A policy insuring an automobile provided that "this policy is extended to cover the insured" while on a "ferry or inland steamer" subject to the condition "while being transported in any conveyance by land or water—stranding, sinking, collision, burning or derailment of such conveyance, including the general average and salvage charges for which the insured is legally liable."

*Held*, reversing the judgment of the Appellate Division (48 Ont. L. R. 428) Davies C. J. and Idington J. dissenting, that the liability of the insurer only attached in the case of loss or injury from one of the specified causes, stranding, sinking, etc., and did not extend to the case where the automobile was damaged by falling into the water between the end of a ferry-boat and the wharf.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1), reversing the judgment on the trial (2), in favour of the appellant.

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*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin and Mignault JJ.

(1) 48 Ont. L.R. 428. (2) 48 Ont. L.R. 13.

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The main question raised on this appeal is the construction of the condition of the policy set out in the head-note. The appellant claims that its liability was limited to loss from the causes specified in that condition. The respondent that there was a general liability including a liability in special cases. There is a subsidiary question as to the power of the adjuster sent to settle the loss to bind the company by directing that the automobile be repaired and the salvage expenses ascertained.

*Heighington K.C.* for the appellant.

*Tilley K.C.* for the respondent.

THE CHIEF JUSTICE (dissenting).—This is an appeal from the Appellate Division of the Supreme Court of Ontario reversing a judgment of the trial judge (who had dismissed the action) and holding that the plaintiff respondent was entitled to recover from the appellant herein $1,781.47 on his policy of insurance covering his automobile.

The judgment of the Appellate Division was delivered by Mr. Justice Masten speaking for the whole court.

The circumstances under which the loss was sustained are fully set out in the judgment of Mr. Justice Orde, the trial judge, and need not here be repeated.

The question to be determined in this appeal is whether the loss is or is not covered by the terms of the policy of insurance.

I may say that I agree generally with the reasons stated by Mr. Justice Masten for holding that this question should be answered in the affirmative.

This question must be determined under the opening words of the policy which are as follows:—

Automobile.

In consideration of twenty-eight and five cents dollars ($28.05) premium and the declaration of the insured, it is hereby understood and agreed that this policy is intended to cover the insured to an amount not exceeding seventeen hundred dollars ($1,700.00) on the body, machinery and equipment, while within the limits of the Dominion of Canada and the United States (exclusive of Alaska, the Hawaiian Islands and Porto Rico) including while in building, on road, on railroad car, or other conveyance, ferry or inland steamer, or coastwise steamer between ports within the said limits, subject to the conditions before mentioned and as follows:

(A) Fire, arising from any cause whatsoever and lightning.

(B) While being transported in any conveyance by land or water—stranding, sinking, collision, burning or derailment of such conveyance including the general average and salvage charges for which the insured is legally liable.

It appears to me that the answer to the question of defendant appellant's liability turns upon the proper construction of condition "(B)". Does this condition mean that defendant's liability, by the insertion after the dash (—) of the words "stranding, sinking, collision, burning or derailment of such conveyance," is strictly limited to damages caused by one or more of these specified facts of "stranding, etc.," or are they stated merely as examples of that liability? In other language do these words following the dash (—) mean including damages caused by "stranding, etc.," or must they be read as defining and limiting the company's liability to accidents arising from any of these facts.

I think these causes of possible damage explicitly enumerated are only given as examples of the company's liability, but do not exclude other causes, and that the fair and reasonable way of construing the clause is to read in after the dash (—) the word "including" or the words "such as," but not the words "but only in case of" or "or only if caused by" as contended by the company.

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Idington J.

At the very worst these words seem to be ambiguous and should therefore, in case of doubt as to their meaning, be construed against the company if capable of such construction.

For the reasons, therefore, stated by Mr. Justice Masten in delivering the unanimous judgment of the Appellate Division, and the additional reason above stated by me, I would dismiss the appeal with costs.

IDINGTON J. (dissenting).—This is an appeal from the unanimous judgment of the Appellate Division of the Supreme Court of Ontario reversing the judgment of the learned trial judge, and turns only upon the construction of an insurance policy issued by appellant to respondent covering risks of loss by the latter arising from his ownership of an automobile.

I agree with the reasoning of the said court of appeal unless in the minor suggestion therein that the contract prepared by the appellant is not ambiguous. I find it so ambiguous that we are entitled to construe it most strongly against appellant.

And if we do so there is ample ground for holding that if the company ever intended to limit its liability in the way contended for on its behalf its limitation thereof should have been so expressed as to take it clearly out of the risk its general terms had clearly expressed.

This it clearly did not do and therefore is bound by the general terms used.

It rather clearly intended to extend its liability to contribute to general average marine terms used.

The appellants' factum appeals to our general knowledge of such a subject. My limited share of such general knowledge clearly shews that such an ambiguously worded contract is not universal and that some other companies do not use such ambiguous language.

Indeed it looks rather like a trap for the unwary compared with what I know.

I conclude that the general comprehensive terms of the contract cover just such a loss as in question and that the pretended limitation does not effectively except the loss in question therefrom.

There is another ground of appeal claimed and that is from the exercise of discretion on the part of the courts below which clearly falls within those questions of practice and procedure with which this court has uniformly refused to interfere.

A point was taken by counsel for the respondent that the acts of the adjuster for appellant were such and so reasonably relied upon by respondent that appellant cannot now be heard to set up its present pretensions.

I am unable to take that view but the extent to which the adjuster, presumably well acquainted with his business and the facts he had to deal with, went shewed that those directing him certainly never imagined the policy was so limited and restricted as now contended for but acted upon the construction which has been upheld by the Appellate Division.

It is illuminating to find that the appellant never considered its contract otherwise than as the Appellate Division finds it.

It certainly is the view which any one presented with such a contract would take of his rights if acting thereon.

Beyond that I do not think the contention of respondent arising out of that incident is of any value.

I would dismiss the appeal with costs.

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DUFF J.—I find myself unable to accept the view of the court below as to the construction of this policy. I concur in the view of the trial judge and mainly for his reasons. There is not, I think, any satisfactory evidence of authority reposed in the adjuster to enter into a contract to pay and it appears to me to be more than doubtful whether the facts relied upon establish a contract even assuming such authority. As to the construction of the policy, with great respect to the court below, I confess I am unable to read sub-paragraph B otherwise than as describing the conditions out of which liability is to arise when the automobile is in course of transport "in any conveyance by land or water." These conditions include and are limited to "stranding, sinking, collision, burning or derailment" and it is undeniable that on this construction the respondent must fail. The word "extended" which was the subject of some discussion during the course of the argument is no doubt used in a not uncommon sense of the word "extend"—to "write out (in legal instruments) in proper form." Oxford Dict.

ANGLIN J.—For the reasons stated by Mr. Justice Orde in giving judgment dismissing this action after the trial I am of the opinion that the cause of loss sustained by the plaintiff was not within the risk covered by the insurance policy which he held with the defendant company. While the restriction upon the risk assumed during transit certainly might have been better expressed, it is stated in terms which I think admit of no doubt and seem sufficiently clear to preclude misunderstanding of its scope by an ordinary person taking insurance.

The form of policy is one intended for general use to cover risks of many different kinds. The nature and the extent of the risk under each individual policy is intended to be defined by an indorsement or indorsements attached to it. The policy on its face says so. The insurance is expressed to be

> as respects loss * * * covered by indorsement or indorsements attached hereto.

through

> fire, theft and transit * * * while in building, on road, or railroad car or other conveyance, ferry or inland steamer, subject * * * as follows:
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> * * * * *
>
> (B) While being transported in any conveyance by land or water—stranding, sinking, collision, burning or derailment of such conveyance, including general average and salvage charges for which the insured is legally liable.

If every case of loss during transit was meant to be covered, the first phrase of (B), just quoted, would have been left unqualified. The only possible office of the words following the dash is to restrict this otherwise general risk by particularizing and defining what the insurer means shall be the limitation of its responsibility. I am, with great respect, unable to accept the construction put upon this clause in the Appellate Division.

In the absence of any proof that the insured was misled, or that he did not get precisely the insurance for which he bargained and paid, I can see no ground for extending the company's responsibility beyond the limits which the policy, in my opinion, evidences its intention to set.

Nor do I find anything in what the adjuster Marsh did that should estop the defendant from raising the defence that the plaintiff's loss was not covered

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by his policy. In the absence of express authority enabling an employee such as Marsh was to commit the company to a liability not covered by its policy I cannot conceive that it is within the scope of his powers to do so. *Atlas Assurance Co.* v. *Brownell* (1); *Commercial Union Assurance Co.* v. *Margeson* (2). There is nothing to shew that any such authority was in fact given to Marsh. Nor does it appear that any action was taken by the company's directors or executive officers or by any general agent representing them after the circumstances of the loss were known at all inconsistent with their present defence. The policy expressly provides that no acts or proceedings of the company relating to appraisal or any examination shall operate as a waiver of any provision or condition of the policy. Marsh's duties as I view them, were confined to investigating and appraising the amount of the plaintiff's loss. The company when apprised of all the material circumstances appears promptly to have repudiated liability and advised the insured that it would be useless for him to put in proofs of loss.

I would allow the appeal with costs here and in the Appellate Division and would restore the judgment of the learned trial judge.

MIGNAULT J. concurs.

*Appeal allowed with costs.*

Solicitors for the appellant: *Symons, Heighington & Shaver.*

Solicitors for the respondent: *Kerr, McNevin & Kerr.*

(1) [1899] 29 Can. S.C.R. 537. (2) 29 Can. S.C.R. 601.