Court of King's Bench of Alberta

Citation: Welyk v. Intact Insurance Company, 2024 ABKB 663

Date: 20241113
Docket: 2001 16944
Registry: Calgary

Between:

Mari-Lynn Welyk

Plaintiff

- and -

Intact Insurance Company/Intact Compagnie D'Assurance doing business as Intact Insurance

Defendant

Memorandum of Decision
of the
Honourable Applications Judge J.R. Farrington

---

[1] I heard this matter as a special chambers application on November 5, 2024.

[2] There are two related actions. The first is an action by Mari-Lynn Welyk against Jennifer Ann Van Den Elzen, several John Does, and the Administrator of the Motor Vehicle Accident Claims Act. That action is the "tort action". The second action is an action by Ms. Welyk against her insurer under the SEF 44 provisions of her own policy.

[3] The SEF 44 endorsement is a feature to effectively provide coverage similar to tort compensation for an insured under their own policy coverage if they are injured by an underinsured or unidentified driver.

[4] Ms. Welyk was driving her motorcycle with friends in a group ride. She was in the lead position at the time of the accident. Ms. Van Den Elzen, in second position, was hit from behind by an unidentified black truck. The impact drove she and her motorcycle forward, and her motorcycle struck Ms. Welyk's motorcycle. Ms. Welyk suffered significant injuries.

[5] The operator of the black truck fled the scene and was not identified and the Motor Vehicle Accident Claims fund was engaged. Ms. Welyk's injuries resulted in higher damages than the Administrator's limits, and Ms. Welyk started this action on her SEF 44 policy for additional coverage.

[6] The SEF 44 insurer Intact Insurance Company moves for summary dismissal in the SEF 44 action.

[7] The insurer argues that the application is determined by the case of ***Funk v. Wawanesa Mutual Insurance Company***, 2018 ABCA 200. It argues that the case is binding on me, and that it is determinative of this application.

[8] In ***Funk***, the unidentified driver was one that created a perilous situation, but there was no contact between the unidentified driver's vehicle and any other vehicles. The plaintiff swerved to avoid contact and suffered injuries in an accident as a result of the evasive maneuver. The applicable definition for an unidentified driver in the SCF 44 policy required physical contact between the unidentified vehicle and the vehicle for which the SCF 44 policy was granted.

[9] The definition of an "Unidentified automobile" in the policy in this case is:

> An "Unidentified" automobile under this section means an automobile which causes bodily injury or death to an insured person arising ***out of physical contact of such automobile with the automobile of which the insured person is an occupant as the time of the accident***…" (Emphasis added)

[10] The same wording applied in ***Funk***. The SEF 44 insurer argues that the ***Funk*** case is binding in this case and that it dictates the result and that the SEF 44 action should be dismissed.

[11] There was significant argument in ***Funk*** about whether the requirement for actual contact was unfair or unjust and whether the court could relieve against that requirement. In ***Funk***, the Chambers justice felt that it was, and he granted relief. The Court of Appeal allowed the appeal and held that a conclusion that the contract was unfair or unjust was not open for the Court to make given the wording of the policy, and among other things, that the extent to which insurance contracts and their form are regulated in the insurance industry discourages such an approach.

[12] Subsequent to the facts in ***Funk***, but prior to the decision in ***Funk***, section 545(1) of the ***Insurance Act***, RSA 2000, c I-3, came into force. It provides:

> 545(1) If a contract contains a stipulation, condition, term, proviso or warranty, other than a prescribed exclusion referred to in subsection (3)(a), that is or may be material to the risk, including, but not restricted to, a provision in respect of the use, condition, location or maintenance of the insured property, the stipulation, condition, term, proviso or warranty is not binding on the insured if it is held to be unjust or unreasonable by the Court before which a question relating to it is tried.

[13] The Court of Appeal reminded that s. 545(1) was not retrospective. As a result, ***Funk*** contains an extensive analysis of many issues, but against a backdrop that is without section 545(1) powers of intervention.

[14] At paragraph 23 of ***Funk*** the Court of Appeal held:

> [23] The chambers judge concluded, however, that the Endorsement was unreasonable and contrary to public policy. As noted, the reasoning was that ". . . the insured who avoids physical contact has no coverage under the endorsement, but the insured who takes no evasive action and physically contacts the unidentified vehicle has coverage". This merely describes the scope of the coverage. Coverage is only extended under the SEF No. 44 Endorsement if damage is caused by an unidentified vehicle, the driver of that vehicle was negligent, and there is physical contact between the two vehicles.

[15] At paragraph 27 of ***Funk*** the Court of Appeal held:

> [27] Further, there is very little room for finding that a provision of an automobile insurance policy issued in Alberta is "unjust or unreasonable" or contrary to public policy. The terms of automobile insurance policies are highly regulated. The rates charged for basic or additional coverage are controlled by the Automobile Insurance Rate Board under s. 602 of the ***Insurance Act***. Mandatory statutory conditions are prescribed by s. 556. Section 551(1) prevents the use of any form of policy or endorsement not approved by the Superintendent of Insurance. Section 551(3) enables the Superintendent to reject any provision in a policy that is "wholly or partly inappropriate to the requirements of a contract". The Superintendent has approved the form of the SEF No. 44 Endorsement and published it as required by s. 551(1): (1999), 95 Alberta Gazette, Part 1, No. 8, p. 855. Given that the Superintendent has approved the requirement in the SEF No. 44 Endorsement that there be physical contact between the insured vehicle and the unidentified vehicle, and corroborating evidence, there is little if any room for holding those provisions to be unreasonable or unenforceable.

[16] A significant theme throughout the entire ***Funk*** decision is the importance of certainty in the interpretation and application of insurance policies (see paragraph 29).

[17] At paragraph 30 of ***Funk*** the Court of Appeal went on to hold:

> [30] The approach of stepping around the terms of an insurance policy on the basis of "unjust or unreasonable" terms, "public policy", or "relief from forfeiture" runs the risk of throwing any semblance of certainty out the window. While these concepts are recognized in law, they must be applied with caution with respect to standard form, statutorily mandated insurance policies. There is the danger that the wording of insurance policies would become meaningless. Insurance policies would come down to providing the kind of coverage that some future court found to be "fair", even though the insured never contracted for that coverage, and the insurer never priced the risk accordingly. As it was put in ***Progressive Homes*** at para. 23: "Courts should avoid interpretations that would give rise to an unrealistic result or that would not have been in the contemplation of the parties at the time the policy was concluded." Given that the definition specifically requires "physical contact" it could not have been in the reasonable contemplation of either party that physical contact was not required.

[18] In my respectful view, there is a significant difference between the ability of a trial court to relieve against what may or may not be perceived as a harsh policy requirement when there is no legislated power to intervene and which only allows the Court to consider traditional

common-law contact contractual interpretation principles, and a legislated environment where there is an express power and authority for the Court to intervene in discretionary circumstances. The former is the pre-section 545(1) environment. The latter is the present section 545(1) environment.

[19] In ***Funk***, it is easier to see that there is a significant difference in the risk undertaken by an insurer when the hazard is avoiding an alleged unidentified reckless driver with no contact being made, than in one where actual contact is made with the reckless driver's vehicle.

[20] The facts here are different. I have had some difficulty in seeing a difference in the risk undertaken by an insurer as between a direct collision between the black truck and the lead motorcycle, and a collision as here where the black truck drives the second motorcycle into the lead motorcycle. They both involve the application of an impact force from the same recklessly operated black truck as the injury causing application of force. There is no worry of an untold number of alleged phantom vehicles causing accidents when there is an actual collision as here. In ***Funk*** it was argued that it seems unfair that the person who crashed while taking evasive action should have no SEF 44 coverage while the person who took no evasive action should have SEF 44 coverage. One could make a similar argument here that it is odd that the issue of whether a vehicle is struck as the first or second vehicle in a chain makes a difference to whether they have SEF 44 coverage or not, when the cause of the accident is the same recklessly operated trailing vehicle. There does not seem to be any difference in the risk assumed by the insurer.

[21] I do not need to make any of those findings here. I only need to decide whether those questions should fairly be left for the trial judge in a post section 545(1) environment. Actually, leaving those issues to a trial judge is what the legislation expressly seems to contemplate.

[22] Paragraph 31 of ***Funk*** illustrates some of the constraints that the Court felt that it was facing:

> [31] It follows that this appeal must be decided based on the wording of the SEF No. 44 Endorsement. The respondent is not entitled to coverage under the wording of the Endorsement, ***and there is no residual public policy or equitable jurisdiction that would enable the court to extend coverage any further than for what the Endorsement provides***. (Emphasis added)

[23] This case is distinguishable from ***Funk*** on both the applicable law and the facts. There is an express legislative provision permitting Court intervention that was not available in ***Funk***, and the mechanism of the collision is not a "collision avoidance" situation as was the case in ***Funk***. While I do not go so far as to say that section 545(1) necessitates that all issues about its application be determined at a trial, in my view, and considering the facts and legislative framework here, I find that the addition of section 545(1) to the legal background under which liability under the SCF 44 policy will be determined makes for a sufficient difference between this case and the ***Funk*** case such that I am not able to summarily dismiss the action as requested by the insurer. Accordingly, the application for summary dismissal is dismissed.

[24] I commend counsel for their helpful materials and focused submissions. Costs would normally follow the event. I would be inclined to order standard Schedule C costs unless there are settlement offers or any other factors that the parties would like to bring to my attention. If the parties find that they need to speak to costs, they may contact the Applications Judges'

Assistant to set up a time at the end of one of my chambers lists within four months of release of this decision.

Heard on the 5th day of November, 2024.
Dated at the City of Calgary, Alberta this 13th day of November, 2024.

J.R. Farrington
A.J.C.K.B.A.

Appearances:

Steven D. Grover
S. Saegh (Student at law)
Grover Law Firm
for the Plaintiff

Daniel A. Downe, K.C.
H. Pourriahi (Student at law)
Field LLP
for the Defendant