THE WAWANESA MUTUAL INSURANCE COMPANY (*Defendant*) ..... APPELLANT;

AND

FLORENCE BELL AND ALLEN BELL (*Plaintiffs*) ..... RESPONDENTS.

1957

*Mar. 25
June 26

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Insurance—Automobile liability insurance—Special extension of meaning of "automobile"—Whether automobile owned by "person of the household" of insured—The Insurance Act, R.S.O. 1950, c. 183, ss. 207, 212(b), 214.

One M was the holder of an owner's policy within the meaning of s. 207 of *The Insurance Act*, covering his liability in respect of his own automobile or "an automobile not owned by the Insured nor by any person or persons of the household of which the Insured is a member, while temporarily used as a substitute for an automobile described in this policy". M's automobile being disabled, he took and drove a car belonging to his brother J, with whom he lived, on terms set out in the reasons for judgment. While driving this car, M was involved in an accident as a result of which he was killed and the respondents sustained serious injuries. The respondents obtained judgment against M's estate and then sued M's insurer under s. 214 of *The Insurance Act*.

1957

WAWANESA MUTUAL INS. CO. v. F. BELL et al.

Held: The insurer was liable. In the circumstances, it could not be said that M was "a member of" J's household and the policy accordingly extended to the risk.

APPEAL from a judgment of the Court of Appeal for Ontario (1) affirming a judgment of Aylen J. (2). Appeal dismissed.

D. A. Keith, Q.C., and *D. R. K. Rose*, for the defendant, appellant.

G. L. Mitchell, Q.C., and *A. L. McKenzie*, for the plaintiffs, respondents.

The judgment of Kerwin C. J. and Taschereau J. was delivered by

THE CHIEF JUSTICE:—It is impossible to define the phrase "any person or persons of the household of which the insured is a member" so as to cover all possible cases. In the present appeal the evidence discloses:

(1) Murley Milley paid board.
(2) His stay with his brother was of a temporary character.
(3) He was not a member of the family in the sense that children of the brother would be.
(4) Murley was not under the control of his brother.
(5) While Murley helped to some extent, it cannot be said that he shared any responsibility of a householder.

In view of these circumstances, I am unable to say that both Courts were wrong in the conclusion at which they arrived.

The appeal should be dismissed with costs.

The judgment of Rand and Cartwright JJ. was delivered by

RAND J.:—The issue here is on the interpretation of the phrase of an exception "not owned by . . . any person or persons of the household of which the Insured is a member" as it applies to a substitute automobile in a liability insurance policy. The driver of a car involved in a collision in which the respondents were injured was the insured and the car belonged to a brother and had been

(1) [1956] O.W.N. 809, [1956] I.L.R. 1-241, 5 D.L.R. (2d) 759.
(2) [1956] O.W.N. 733, [1956] I.L.R. 1-241.

taken by the insured without permission; and the appellant's contention is that by reason of the exception it was excluded from the coverage of the policy.

Both the Oxford and the Century dictionaries make it clear that the term "household" is of flexible meaning. In the general understanding it is associated and at times identical with what is connoted by "family" or "domestic establishment". The characteristics of the relations between members of a household are so varied and of such different degree or significance that it is quite impossible to define the word in detailed terms applicable to all cases; and to come to a conclusion as to its scope as it is used in the policy requires that we resort to the ordinary aids to interpretation. The exception is in the language of the company, and if it is ambiguous the ambiguity must be resolved in favour of the insured; and a material consideration to be taken into account is the purpose intended to be served by it.

That purpose must be sought. The insurance here is of an owner in relation to a described automobile, but this is only one of a number of forms which automobile insurance may take. The automobile as described may extend, as here, but with exceptions, to a substituted machine; the policy may insure persons other than the owner, also with exceptions; and the insurance against theft, for example, may as here except members of a specified group. This does not exhaust the special forms or provisions, but the examples point one direction which experience has led insurance companies to take. These particular exceptions seem clearly to be aimed at persons living in close relations with the owner and against automobiles conveniently available for interchangeable use; slight differences in the language used seem to reflect similar differences in the nature or scope of the membership and to be referable significantly to special features of the particular risk being dealt with. The precise language used, then, may be of controlling importance.

In the case before us the reason for the exception of the substituted car where it is owned by a person "of the household" of which the insured is a member seems to be the tendency of and the opportunity afforded to the members of such a group to make common use of their

1957

WAWANESA MUTUAL INS. CO. v. F. BELL et al.

Rand J.

cars and thus to limit the insurance taken out. In other ways more or less freedom in the common use of cars tends to be prejudicial to the insurance business, such as by creating favourable conditions for collusion on claims; and the exception against theft clearly regards the special opportunities furnished for that offence.

The "household", in the broad sense of a family, is a collective group living in a home, acknowledging the authority of a head, the members of which, with few exceptions, are bound by marriage, blood, affinity or other bond, between whom there is an intimacy and by whom there is felt a concern with and an interest in the life of all that gives it a unity. It may, for example, include such persons as domestic servants, and distant relatives permanently residing within it. To some degree they are all admitted and submit to the collective body, its unity and its conditions, particularly that of the general discipline of the family head. They do not share fully in the more restricted family intimacy or interest or concern, but they participate to a substantial degree in the general life of the household and form part of it.

These are persons "of" the household. A distinction between being "of" and "in" a household is made in the policy itself. In the case of theft the insured is not protected when it is committed by a person "in" the household. On the argument my first impression was that one "in" the household is necessarily "of" it, but further consideration has led me to a different view. The circle of those "in" is larger than those "of", a good example of which is furnished by the case of *Home Ins. Co. v. Pettit* (1). There the exception was of theft by a person "in" the household of the insured and an uncle, temporarily a guest of the insured's father, was held to be of that description.

With this distinction in mind, the purpose of the exemption here, to guard against the use by the insured of another automobile either his own or that of one "of" the household of which he is a member, is against one who bears such a relation to the owner as to make easy and readily at hand the use by him of the other's car, which otherwise the latter might be interested in seeing

(1) (1932), 143 S. 839.

insured. By the exception the business objectionableness of the extension of one insurance to cover more than one car—obvious in the case of the owner himself—is so far avoided.

The insured was a younger brother of the owner, in whose home he was a boarder. The details of his position in the household have been given in other reasons and I will not repeat them. From them I do not draw the inference that makes him "of" the household. He was paying his board and working; his stay, though indefinite, was not intended to be longer than to enable him to become started in a home of his own. He had no permission whatever to use the brother's car. His interests and concerns were primarily his own and not more related to the family life of his brother than if he had been living apart. The mere occasional extension to him of minor household accommodations or participation on special occasions in more intimate family activities does not overbear the dominant and distinct individual interests of his own. That separate identity of life he maintained and in no substantial way was it merged in that of the family. It may be said that he was a person "in" the household of his brother but not "of" it.

That was the view taken by Laidlaw J. A., speaking for the Court of Appeal (1), and I am quite unable to say that it was not the right view.

The appeal must, then, be dismissed with costs.

LOCKE J.:—The policy which, it was found, had been issued by the appellant company to the late Murley Milley was an owner's policy, within the meaning of that expression in s. 207 of *The Insurance Act,* R.S.O. 1950, c. 183.

The insured vehicle described in it was a Studebaker sedan. While the third party liability insured against by the policy was, on the face of it, in respect of the operation of the Studebaker car, by a clause appearing under

(1) [1956] O.W.N. 809, [1956] I.L.R. 1-241, 5 D.L.R. (2d) 759.

1957

WAWANESA MUTUAL INS. CO. v. F. BELL et al.

Locke J.

a heading "Additional Agreements" following the main insuring clauses, the word "automobile", where used in the policy, was defined to include

> an automobile not owned by the Insured nor by any person or persons of the household of which the Insured is a member, while temporarily used as the substitute for an automobile described in this Policy which is withdrawn from normal use because of its breakdown, repair, servicing, loss or destruction.

At the time of the accident giving rise to these claims, the Studebaker sedan owned by Murley Milley was apparently out of commission and he was driving a Vauxhall car, the property of his brother, John Milley, at whose home he resided. He appears to have taken his brother's car without the latter's permission, but this circumstance does not affect the question to be determined. The respondents were severely injured in the accident and Murley Milley was killed.

In an action brought against John Milley and George Stewart Nash, administrator *ad litem* of the estate of Murley Milley, deceased, damages were awarded to the respondent Florence Bell in the sum of $6,000 and to the respondent Allen Bell in the sum of $48,228.05. The action against the present appellant under the provisions of s. 214 of *The Insurance Act* followed.

The deceased was a younger brother of John Milley who lived with his wife and family in Sarnia. The Milleys were natives of Newfoundland and some 3 years prior to the accident, at the invitation of John Milley, Murley Milley had come from there to Sarnia to obtain work. He was unmarried and, except during a comparatively short period of time when he was employed on a steamer on the Great Lakes, he lived with his brother, being provided with both room and board and, as would appear from the evidence, was treated as one of the family. When working he paid board but when, as at times happened, he was unemployed he paid nothing, though apparently he was expected to pay for any such period when he became able to do so. During the last year of his life he had become engaged to be married and at times his fiancee had stayed at his brother's house, being treated as a guest and no payment being made for either her food or lodging. On the day of his death he had been going to

Goderich to see her and I gather from the evidence that he contemplated marriage and leaving his brother's home as soon as he was able to do so.

During the latter part of Murley Milley's life, a cousin of the brothers was also living in John Milley's house and, during part of the time, a younger brother had lived there, the cousin and younger brother each paying for their board and lodging.

Murley Milley was 27 years old at the time of his death on February 12, 1955. While being treated as if he were a member of his brother's family, it is not suggested that he regarded himself in any sense as being subject to the latter's orders or directions and while he at times helped around the premises by doing odd jobs, such as cutting the lawn, they formed no part of the arrangement between the brothers.

Section 212(*b*) of *The Insurance Act* permits an insurer, by an endorsement on the policy, to extend the coverage in the case of an owner's policy to include "the operation or use of automobiles not owned by nor registered in the name of the insured". While this would permit an extension of the coverage to any automobile other than that described in the policy in certain circumstances, the present insurer limited the risk by excluding, *inter alia,* other automobiles owned by a person of the household of which the insured was a member.

There is much to be said, in my opinion, for the view advanced by the appellant that, in the circumstances described, Murley Milley was a member of the household of his brother. The interpretation which has commended itself to the learned trial judge is, however, that the word "household" should be construed as synonymous with the word "family" and that the relation existing between the parties must be permanent and not temporary. While undoubtedly a resident in the household, the learned judge considered that he was not a member of it in the sense the expression was used in the policy.

1957

WAWANESA MUTUAL INS. CO. v. F. BELL et al.

Locke J.

The judgment of the Court of Appeal delivered by Mr. Justice Laidlaw and concurred in by Aylesworth and Schroeder J.J.A. agreed with the reasons for judgment delivered at the trial, adding that (1):

there was not that intimate relationship, that domestic *nexus*, between the late Everett Murley Milley and John Milley, as head of a household and other members of it, that would make him . . . a member of it.

After pointing out that he was simply a temporary inmate, the learned judge added:

he did not have those duties and responsibilities and those privileges of the kind and nature reciprocal to the head and other members that would make him a member of the household of John Milley.

To entitle the insurer in the present case to the benefit of what may be called either language restricting the risk or an exemption of certain vehicles from the protection granted by the clause, it was necessary for it to satisfy the Court that Murley Milley was a member of the household of which his brother John was the head.

While the provision now appearing as para. (*b*) of s. 212 of *The Insurance Act* was introduced into the statute as s. 183f(*b*) by 1932, c. 25, the point to be determined here has not been dealt with in any Canadian case to which we have been referred.

The language of this portion of the clause is, in my opinion, ambiguous, due to the uncertainty of the meaning to be ascribed to the word "household". The word has been interpreted in several American cases construing policies of insurance as bearing the same meaning as "family". But, again, that word is one which has various meanings dependent upon the context in which it is found. In *The King v. The Inhabitants of Darlington* (2), construing a provision in one of the poor laws, Lord Kenyon C.J. said that in common parlance

the family consists of those who live under the same roof with the paterfamilias: those who form (if I may use the expression) his fireside.

In the New Oxford Dictionary, one of the definitions of the word "household" reads:

The inmates of a house collectively; an organized family, including servants or attendants, dwelling in a house; a domestic establishment.

(1) [1956] O.W.N. at p. 809.

(2) (1792), 4 T.R. 797 at 800, 100 E.R. 1308.

In the same work, the definitions of "family" include one which reads:

> The body of persons who live in one house or under one head, including parents, children, servants, etc.

In *English v. Western* (1), a policy of insurance taken out by a boy of 17, living with and dependent on his father, provided that the underwriter should indemnify the insured against liability for bodily injury to any person arising out of the use of the car but excluding injury to any member of the insured's household. While the boy was driving in the car with his sister, who also lived with his father, an accident occurred in which she was injured. The claim was resisted on the ground that she was a member of the insured's household, which was given effect to by Branson J. at the trial. On appeal, the judgment was reversed by a majority of the Court, Slesser and Clauson L.JJ. holding that the expression "any member of the assured's household" was just as capable of being construed as meaning any member of a household of which the assured was the head as it was of meaning any member of the same household of which the assured was a member and, being ambiguous, it must be construed *contra proferentes* and that, since the assured was not the head of the household, the exception did not apply.

I think it may be said with equal force that the household referred to in the clause in question in this action may consist of only the head of the house, his wife and children, or may include, in addition, relatives rooming in the house, even though they pay for their lodging. Some slight indication that the word should be construed in the former sense is afforded by the fact that, in the insuring clause against theft, liability is excluded for theft by any person *in* the household while the clause we are considering refers to a member *of* the household.

The language of the insuring clause, unlike the statutory conditions, is the language of the insurer. In *Anderson v. Fitzgerald* (2), Lord St. Leonards, referring to a policy of life insurance, said that, as it was prepared by the company, if there should be any ambiguity in it it must be

(1) [1940] 2 K.B. 156, [1940] 2 All E.R. 515.
(2) [1853], 4 H.L. Cas. 484 at 507, 10 E.R. 551.

1957

WAWANESA MUTUAL INS. CO. v. F. BELL et al.

Locke J.

taken more strongly against the person who prepared it. In a more recent case, the law was stated to the same effect in the House of Lords by Viscount Sumner in *Lake v. Simmons* (1). The result of the authorities appears to me to be accurately summarized in MacGillivray on Insurance Law, 4th ed. 1953, s. 708.

In the circumstances of the present case, I think the language in question is to be construed in the manner most favourable to the insured person and that the respondents as judgment creditors are entitled to the same rights against the company as the insured might have asserted. For these reasons, I would dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitors for the defendant, appellant: Bell, Keith, Ganong & Griffiths, Toronto.

Solicitors for the plaintiffs, respondents: Mitchell & Hockin, London.

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*PRESENT: Kerwin C.J. and Taschereau, Locke, Cartwright and Fauteux JJ.

(1) [1927] A.C. 487 at 508-9.