1959
May 25, 26
*Jun. 25

THE CANADIAN INDEMNITY COMPANY (*Defendant*) ..... APPELLANT;

AND

EVELYN DORIS ERICKSON and ALFRED S. COEY (*Plaintiffs*) ..... RESPONDENTS.

ON APPEAL FROM THE COURT FOR APPEAL FOR MANITOBA

Insurance—Automobile—Policy providing for extended coverage—Claim by injured passenger against insurer—Right of insurer to set up defences available against insured—Breach of statutory condition by insured—Whether forfeiture—Whether passenger entitled to relief denied to insured—The Insurance Act, R.S.M. 1954, c. 126, ss. 6, 123, 215, 227—Statutory condition 6.

The infant plaintiff, a gratuitous passenger in a car owned and driven by Z, was injured when the car overturned. She brought action by her father against Z and obtained judgment. The plaintiffs then brought an action against the defendant insurance company under s. 227 of *The Insurance Act,* R.S.M. 1954, c. 126, to have the insurance moneys applied towards satisfaction of the judgment. The defendant refused to pay on the ground that the rights of the insured had been forfeited by a violation of statutory condition 6. The trial judge granted partial relief from the forfeiture and this judgment was affirmed by the Court of Appeal.

Held: The appeal should be allowed and the action dismissed.

The insured did not comply with statutory condition 6(2) because he failed to co-operate with the insurer after the accident and, contrary to s. 215 of *The Insurance Act,* made wilfully false statements about the claim. Under s. 227(6), the insurer has a right to avail itself of any defences that it would have been able to set up against the insured. This could only be overcome by relief granted by the Court under s. 123 of the Act. In this case, where extended coverage was provided, there was no room for relieving the insured against forfeiture under s. 123, and, therefore, the plaintiffs could not succeed.

APPEAL from a judgment of the Court of Appeal for Manitoba[1], affirming a judgment of DuVal J. Appeal allowed.

J. N. McLachlan, for the defendant, appellant.

R. D. Guy, Jr., Q.C., for the plaintiffs, respondents.

The judgment of the Court was delivered by

*PRESENT: Kerwin C.J., and Taschereau, Cartwright, Abbott and Martland JJ.

[1] (1958), 14 D.L.R. (2d) 769, [1958] I.L.R. 1447.

1959

CDN. INDEMNITY CO. v. ERICKSON et al.

THE CHIEF JUSTICE:—By leave of the Court of Appeal for Manitoba The Canadian Indemnity Company appeals from a judgment of that Court[1] affirming by a majority the judgment at the trial. Under a motor vehicle liability policy of insurance the appellant had agreed to indemnify one Zatylny (hereafter called the insured) against direct and accidental loss of or damage to his automobile caused by collision with another object and against legal liability for bodily injury or death or damage to the property of others, including, in consideration of an additional premium, passenger hazard. Although at one stage there was a dispute as to whether the insured or Evelyn Doris Coey (now the respondent Evelyn Doris Erickson) was driving the former's automobile on October 29, 1955, it is now accepted that the insured was the driver and that Evelyn was a gratuitous passenger. The car overturned and she was injured. An action was brought by Evelyn by her next friend, her father, Alfred S. Coey, and said Alfred S. Coey in his personal capacity against the insured, and under the provisions of subs. 9 of s. 227 of *The Insurance Act*, R.S.M. 1954 c. 126, the present appellant was added as a third party. That action resulted in a judgment in favour of the plaintiffs against the insured which was affirmed by the Court of Appeal but no disposition was made in that action of the third party proceedings. The Canadian Indemnity Company declining to pay the amount of the judgment or any part thereof, an action was brought by the infant and her father against the company to recover the damages and costs awarded them in the first action and it is the judgment of the Court of Appeal affirming that at the trial which granted part of the relief sought that is before us for consideration.

The present action was brought pursuant to subs. (1) of s. 227 of The Insurance Act:

> 227. (1) Any person having a claim against an insured, for which indemnity is provided by a motor vehicle liability policy, shall, notwithstanding that such person is not a party to the contract, be entitled, upon recovering a judgment therefor against the insured, to have the insurance money payable under the policy applied in or towards satisfaction of his judgment and of any other judgments or claims against the insured covered

[1] (1958), 14 D.L.R. (2d) 769, [1958] I.L.R. 1447.

1959

CDN. INDEMNITY CO. v. ERICKSON et al.

Kerwin C.J.

by the indemnity and may, on behalf of himself and all persons having such judgments or claims, maintain an action against the insurer to have the insurance money so applied.

* * *

It is admitted that there are no other judgments or claims against the insured for which indemnity was provided by the motor vehicle liability policy.

Subsections 3 and 6 of s. 227 read:

227. . . .

(3) (i) No assignment, waiver, surrender, cancellation or discharge of the policy, or of any interest therein, or of the proceeds thereof, made by the insured after the happening of the event giving rise to a claim under the policy; and

(ii) no act or default of the insured before or after such event in violation of the provisions of this Act or of the terms of the contract; and

(iii) no violation of the Criminal Code or of any law or statute of any province, state or country, by the owner or driver of the automobile;

shall prejudice the right of any person, entitled under subsection (1), to have the insurance money applied upon his judgment or claim, or be available to the insurer as a defence to such action.

* * *

(6) Subject to subsection (7), where a policy provides, or if more than one policy, the policies provide, for coverage in excess of the limits mentioned in section 222 or for extended coverage in pursuance of subsections (1), (2) and (4) of section 223, nothing in this section shall, with respect to such excess coverage or extended coverage, prevent an insurer from availing itself, as against a claimant, of any defence that the insurer is entitled to set up against the insured.

Subsection (7) does not apply and it is agreed that the policy provided for extended coverage in accordance with subs. (2) of s. 223:

223. . . .

* * *

(2) The insurer may, by an endorsement on the policy or by provision in the policy and in consideration of an additional stated premium, and not otherwise, extend the coverage in whole or in part in the case of an owner's policy or driver's policy in respect to the matter mentioned in clause (*d*) of section 221.

Clause (d) of s. 221 refers to coverage "for any loss or damage resulting from bodily injury to or the death of any person being carried in or upon entering or getting on to

or alighting from the automobile". Therefore, under subs. (6) of s. 227, there is nothing to prevent the company from availing itself as against the respondents of any defence that it was entitled to set up against the insured. To overcome this effect of that subsection the respondents rely on s. 123, but, before considering the latter, it is necessary to advert to other provisions of *The Insurance Act* and to the actions of the assured which the appellant argues entitles it to raise defences against him.

I do not attach importance to the words in subs. (1) of s. 227 "payable under the policy" but the only rights given the respondents by that subsection are subject to the qualification thereof spelled out in subs. (6) of s. 227. Furthermore, by subs. (1) of s. 215:

> 215. (1) Where an applicant for a contract gives false particulars of the described automobile to be insured, to the prejudice of the insurer, or knowingly misrepresents or fails to disclose in the application any fact required to be stated therein or where the insured violates a term or condition of the policy or commits a fraud, or makes a wilfully false statement with respect to a claim under the policy, a claim by the insured shall be invalid and the right of the insured to recover indemnity shall be forfeited.

and by no. 6(2) of the statutory conditions of every contract of automobile insurance:

> 6. (2) The insured shall not voluntarily assume any liability or settle any claim except at his own cost. The insured shall not interfere in any negotiations for settlement or in any legal proceeding, but, whenever requested by the insurer, shall aid in securing information and evidence and the attendance of any witness, and shall co-operate with the insurer, except in a pecuniary way, in the defence of any action or proceeding or in the proceeding or in the prosecution of any appeal.

On the evidence it is clear that the insured did not comply with statutory conditions 6(2) because he failed to cooperate with the company and in contravention of subs. (1) of s. 215 he made a wilfully false statement with respect to a claim under the policy. It is true that on the night of the accident or in the early morning thereafter, at the hospital, he said that he had been travelling at seventy miles per hour. However, shortly thereafter, he changed his story and in a written statement to the police claimed he was travelling only forty miles an hour and that a deer had suddenly jumped into the middle of the road before him while he was driving. On the same day, he also gave

1959

CDN. INDEMNITY CO. v. ERICKSON et al.

Kerwin C.J.

a statement to the appellant's insurance adjuster in somewhat the same terms. About ten days later, he had an interview with the solicitor for the respondents in the latter's office and accepting, as the trial judge did, the solicitor's version of what occurred there is no doubt that on that occasion the insured stated he had been driving at seventy miles per hour. He gave the police a statement to this effect. These latter steps were taken without the knowledge of and without consultation with the appellant. The insured was interviewed by solicitors retained on behalf of the appellant and as a consequence thereof a non-waiver agreement was obtained and liability was denied and it was suggested that the insured obtain independent legal advice. On April 3, 1956, the insured filed proofs of loss for damage to his automobile in which he stated that "a deer jumped in front of the car causing the car to swerve and finally roll on the road—resulting in the damage". On November 19, 1956, on his examination for discovery in the first action he stated that he was not driving the car at the time of the accident, but that the infant respondent was driving and that he was sitting beside her playing a guitar and singing. He also stated that there was no deer involved in the accident.

Under these circumstances there is no room for any relief to the insured against forfeiture under s. 123 of the Act, which reads as follows:

> 123. Where there has been imperfect compliance with a statutory condition as to proof of loss to be given by the insured or other matter or thing required to be done or omitted by the insured with respect to the loss insured against and a consequent forfeiture or avoidance of the insurance, in whole or in part, and the court deems it inequitable that the insurance be forfeited or avoided on that ground, the court may relieve against the forfeiture or avoidance on such terms as it deems just.

In fact the trial judge so found, but he then proceeded to hold that he had a discretion to relieve the respondents against forfeiture to the extent of $5,000 and costs of the first action with interest. In so doing I agree with Tritschler J. A. that the learned trial judge was in error in two respects:—firstly, in stating that immediately following the accident the respondents had the right to collect from the company under the policy to the extent of $5,000 and costs, because any rights the respondents might have arose

according to subs. (1) of s. 227 "upon recovering a judgment thereafter against the insured"; and, secondly, in stating that the company was primarily liable under its policy,—if he meant thereby that it was so liable to the respondents.

The majority of the Court of Appeal held that the trial judge came to the right conclusion, although, as the Chief Justice of Manitoba pointed out, the trial judge after saying that "under the circumstances in this case the insured is not entitled to any relief", that is precisely what he granted. In the view of the majority of the Court of Appeal the trial judge should have said that the insured was entitled under s. 123 to relief from forfeiture to the extent of $5,000 and costs which shall go to the plaintiffs. With respect I am unable to agree that the insured was entitled to any relief and that being so the respondents cannot succeed. In fact, as Tritschler J. A. points out, s. 227 creates a distinction between ordinary coverage and extended coverage and if under s. 123 the respondents could be relieved from forfeiture in a case where the insured was not entitled to relief, there would be very little practical difference between the two cases.

The appeal should be allowed, the judgments below set aside and the action dismissed. In accordance with the terms of the order of the Court of Appeal granting leave to appeal, the appellant shall pay the respondents' costs as between solicitor and client in this Court; the other terms of the order have been complied with.

Appeal allowed.

Solicitors for the defendant, appellant: Fillmore, Riley, McLachlan, Norton & Yarnell, Winnipeg.

Solicitors for the plaintiffs, respondents: Guy, Chappell, Guy, Wilson & Coghlin, Winnipeg.