Notes and Comments

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Interpretation of Restriction of Risk Clauses In Automobile Insurance Policies

A recent British Columbia case, *Sabell et al.* v. *Liberty Mutual Insurance Company* has attempted a definition of the standard automobile insurance policy restriction against "driving in connection with the business of selling automobiles".[1] This judgment by Ruttan, J. is mildly surprising for a number of reasons. It places a generous interpretation on a clause used by an insurer to restrict its risk and, in the result, recovery is denied to a third party claimant. Thus, the judgment represents something of a departure from the usual judicial treatment of exclusion clauses which are most commonly construed rather strictly against the insurer; more especially, having in mind the elaborate statutory scheme for the protection of victims of automobile accidents, strict construction may be expected in any case in which the insurer relies on its exclusion clause as a defence to the victim's claim.

The plaintiffs recovered judgment against Ernest Agutter for damages which resulted from Agutter's negligent operation of a 1961 M.G. automobile. Agutter was insured by defendant, Liberty Mutual, under a Quebec automobile insurance policy, owner's form. The "described automobile" in the policy was a 1957 Volkswagen registered in Agutter's name. Being in standard form, the policy extended cover also to any other vehicle of the private passenger type while personally driven by the insured or the insured's spouse, subject to this critically important restriction:

> "4(c) Provided that neither the Insured nor his or her spouse is driving such automobile in connection with the business of selling, repairing, servicing, storing or parking automobiles;"

The M.G. belonged to Montreal Auto Delivery Service which had its own insurance on the automobile. In the ordinary course of events this policy would have been a first loss insurance and Liberty

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1. [1973] 5 W.W.R. 248; 38 D.L.R. (3d) 113; [1973] I.L.R. 1-540 (B.C.).

Mutual an excess insurer only. Unhappily for the plaintiffs, and for Agutter, and for Liberty Mutual, Montreal Auto Delivery's insurer had become insolvent. Accordingly, after obtaining judgment against Agutter the plaintiffs turned to Liberty Mutual.

Liberty Mutual raised several arguments challenging the jurisdiction of the British Columbia courts and the operation of the provision of the B.C. Insurance Act conferring the third party direct right of action. All of these issues having been resolved in favour of the plaintiffs, the case was reduced to a question whether the plaintiffs' loss was within the cover given by the Liberty Mutual policy; more specifically, the issue was whether the M.G. was being driven by Agutter "in connection with the business of selling automobiles".

The arrangement pursuant to which Agutter was driving the M.G. was stated by Ruttan, J., as follows:

> . . . . he was engaged to drive from Montreal to Vancouver to deliver to the purchasers, Hillcrest Auto Sales Ltd. He had been hired by Montreal Auto Delivery Service to effect delivery of the car. He paid a deposit of $107 to Montreal Auto Delivery and was to be refunded $87 at the other end. He was to bear the operating expenses. It was not an uncommon practice for vehicles to be transported to Vancouver from Montreal in this manner.[2]
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> . . . .
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> The act of transporting the car was not the normal occupation of the insured who was a student returning to university, and using this means of securing transportation across the country.[3]

Thus, despite Ruttan, J.'s reference to Agutter having been "hired" by Montreal Auto Delivery, it is plain that he was not an employee in any ordinary sense. This is important, for it is well understood in the insurance industry that the exclusion in respect of "driving in connection with the business of selling, repairing, servicing, storing or parking automobiles" is directed at employees of garages, parking lots and other businesses whose employees will be driving many vehicles. The risk that such an employee will inflict injury on a third person, while driving a vehicle other than the one described in his own insurance policy, is obviously much greater than average. The theory in the industry is that the most satisfactory way of dealing with this kind of risk is by way of a "garage policy" written for the entrepreneur and covering the risk of liability to third

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2. [1973] 5 W.W.R. at 250; 38 D.L.R. (3d) at 115; [1973] I.L.R. at 1773.
3. Id., at 254-5, at 119, and at 1776 respectively.

parties as a result of the driving of any employee. This focusses the insurance cover, and the cost, on the business activity; the corollary is an exclusion in the owner's policy which any employee may have on his personal automobile.

Quite apart from its superiority from the point of view of the business' customers whose cars may be involved, and from the point of view of potential victims of negligent driving by the employees of the business, this system is also preferred by the insurance industry which feels that the risk should be underwritten as a risk of the business activity rather than allowing the entrepreneur to parasite on the individual policies of its changing cast of employees. It is consistent with this position to insert in the standard owner's form the exclusion which was contained in Agutter's policy; thus, the higher than average risk of third party liability is borne by the insurer of the business and is specifically excluded from the risk assumed by the various insurers of the employees in their individual capacities.

The competing arguments as to the application of this exclusion in the circumstances of the arrangement between Agutter and Montreal Auto Delivery are well stated in this passage from the trial judgment:

> The plaintiffs submitted that the exclusion . . . . was directed to the individual, and not to the purpose for which the car was used. The exclusion would apply only if the insured was in the course of his normal employment in driving this car.
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> The defendant submits that it is the vehicle and not the driver that is significant, and that the question is whether or not the vehicle is being employed in connection with automobile business.[4]

Ruttan, J. accepted the defendant's contention that the exclusion "is directed solely to the use to which the particular non-owned vehicle is being put" and that the "normal occupation or status of the driver was not involved".[5] He concluded that the exclusion clause was unambiguous and that quite clearly Agutter was driving the M.G. "in connection with the business of selling automobiles". As a literal interpretation of the exclusion clause this is undoubtedly correct. The car was being driven to Vancouver for delivery to a purchaser, and Agutter's driving was "in connection" with that transaction.

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4. Id., at 255, at 119 and at 1776 respectively.
5. Id., at 256, at 121, and at 1776-7 respectively.

However, looking at Agutter, and at his conduct in driving the M.G. from Montreal to Vancouver, and at what he and Liberty Mutual may have had in mind when they contracted, the literal interpretation operates very harshly. Can it possibly be said that by driving the M.G. to Vancouver Agutter exposed himself and his insurer to any higher risk of third party liability than he and it would have faced had he driven his own Volkswagen? Would not the risk have been the same if he had driven a friend's car, or had rented a car from one of the car hire companies?

This case nicely illustrates the conflict which frequently arises between two basic rules of insurance contract interpretation — the rule that effect is to be given to the intentions of the parties, and the "plain meaning" rule. In *Pense* v. *Northern Life Assur. Co.* Meredith, J. A. essayed to combine these two rules into a single guiding statement, ". . . . effect must be given to the intention of the parties, to be gathered from the words they have used."[6] This statement implies that, though the intention of the parties is the object to be sought, it can be defeated by inaptly chosen language of plain meaning. *Heagle* v. *Great West Life Assur. Co.*[7] is a good example of the harsh operation of plain language. In that case the insurer refused to pay disability benefits for a seven month period. Insured suffered such a severe heart attack in April that his physicians ordered absolute rest and forbade any consideration of business matters. In the result, the insured gave notice of his disability in October. The insurer began payment of the disability benefits in November. Although there was no evidence of any prejudice to the insurer from the delay, and although he found that the insured's condition was such that he should be excused for having failed to give earlier notice, Stanbury, J. concluded that the matter was foreclosed by a policy requirement for notification and proof of disability as a prerequisite to the insured's claim.

There are two major objections to the "plain meaning" rule and to Meredith, J. A.'s proposition that the parties' intention must be extracted from the language they have used. The first is that the language is not in fact chosen by the two parties; it is the language of the insurer. Indeed, it has been said "policies are drawn by the legal advisors of the Company who study with care the decisions of the courts and, with those in mind, attempt to limit as narrowly as

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6. (1907), 15 O.L.R. 131, at 137.
7. (1938), 5 I.L.R. 57 (Ont. Cty. Ct.).

possible the scope of the insurance."[8] Judicial recognition of this reality has prompted frequent resort to the maxim *contra proferentem* in construction of policy language. Taft, J.'s observation is particularly apt in its application to exclusion clauses, as to which there are encouraging signs of a judicial concern to prevent the insurer from appearing to give with one hand a very large range of cover which it takes away with the other hand by using numerous and broadly worded exclusions.[9]

In *Sabell* Ruttan, J. found no necessity to consider the *contra proferentem* maxim. He found no ambiguity in Liberty Mutual's exclusion clause; indeed, he distinguished the only case cited to him which was virtually identical on the facts, on the ground that the policy language in that case had been found ambiguous. Nor did Ruttan, J. make any reference to the special judicial treatment of exclusion clauses.

The second major objection to the "plain meaning" rule was well expressed by Rand, J. in the following passage from *The Canadian Indemnity Co.* v. *Andrews & George Co. Ltd.*: ". . . . 'meaning' itself has rather shadowy boundaries, and even ordinary language must, for a true understanding of what the parties meant by it, be construed in the context and the circumstances out of which it has arisen."[10]

There may be an invariable "plain meaning" to the clause at issue in the *Heagle* case,

> If the company shall be furnished with proof that . . . . the insured . . . . became totally and permanently disabled . . . . the company will then grant the following disability benefit:
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> a sum equal to $10 for each $1,000 of the amount of this policy on the first day of each calendar month following the approval of such proof . . . .

Harsh as it was in the circumstances of Heagle's case, the "plain

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8. This observation was offered by Taft, J. in *Manufacturers' Accident Indemnity Co.* v. *Dorgan* (1893), 58 F. 945, at 956, and has been quoted with approval by several Canadian judges. For example, *see:*Lennox, J. in *Graham* v. *London Guarantee and Accident Co.* (1925), 56 O.L.R. 494, at 506; Schroeder, J. (as he then was) in *Metal Stampings Ltd. and Lush* v. *The Standard Life Assur. Co.*, [1951] O.W.N. 625, at 628; [1951] I.L.R. 1-038, at 194; Tavender, J. in *Tested Truss Systems Inc.* v. *Canadian Indemnity Co.*, [1973] I.L.R. 1-552, at 1818.

9. For a recent case on this point, see: *Tested Truss Systems Inc.* v. *Canadian Indemnity Co.*, [1973] I.L.R. 1-552 (Alta. Dist. Ct.).

10. [1953] 1 S.C.R. 19, at 24; [1952] 4 D.L.R. 690, at 694; [1952] I.L.R. 1-089, at 371.

meaning'' is that disability benefits begin with the month following the giving and approval of proof of disability; the policy provided for no relief against failure to give the notice, and there was no relief in the Insurance Act.

No doubt it is tempting to say that ''in connection with the business of selling automobiles'' similarly has a plain meaning even though it operates harshly on Sabell and Agutter.

I submit, however, that the two provisions are dissimilar in the extent to which their meaning is plain and that for this reason, as well as for very important reasons of public policy, it is imperative, when attempting a construction of the exclusion against ''driving in connection with the business of selling automobiles'', to bear in mind Rand, J.'s caution concerning the importance of the context in which the parties adopted the language, and their purpose in agreeing to the restriction.

First as to its ''plain meaning'', if Agutter offended the clause by virtue of the fact that he was assisting in the delivery of the M.G. to a Vancouver purchaser, would the clause apply equally plainly (and with equal harshness) to the very common situation of ''test driving'' by a prospective purchaser? It is virtually a universal practice for an auto sales business to allow a potential customer to take the car of his choice for a drive. Is the intending purchaser then outside the cover in his insurance policy by reason of ''driving in connection with the business of selling automobiles''? There is certainly a connection between his driving and the business of selling automobiles, and if the connection is more remote than Agutter's it is a matter of degree only, and a very slight degree at that. Nor would the situation be saved by the ''temporary substitute automobile'' or the ''newly acquired automobile'' language.

In the normal situation, of course, the auto sales business will have an insurance policy to cover any third party liability which results from an accident during the ''test drive''. The point of the *Sabell* case is that abnormal situations arise: the auto dealer's policy is invalid, or his insurer is insolvent, or the damages exceed the policy limits.

I doubt that Ruttan, J., or another judge, would be prepared to say that in this situation there is no recovery under the standard owner's policy of the ''test driver'' now turned tortfeasor, and that the insured (tortfeasor, ''test driver'' etc.) is deprived of his indemnity and his victim is deprived of an insurance fund to answer his claim. If I am wrong in this assessment of likely judicial

attitude, I submit that we require action by the legislatures or by the Superintendents, for in that event the situation is worse than I feared and the standard owner's policy is truly a snare and a delusion.

Leaving aside the question of cases more extreme than *Sabell* and the problems of logical consistency and line-drawing, let us return briefly to the facts of *Sabell* and consider whether Agutter was "driving in connection with the business of selling automobiles" without reference now to whether that phrase has a "plain meaning" in all circumstances, but considering only its application to Agutter.

We have already noted the rationale for focussing on the high risk business activity and underwriting the risk as a risk of that activity rather than attempting to meet the problem by an underwriting assessment of the extra risk faced by each employee of the business so that the premium cost of each may be appropriately adjusted. Thus, the standard exclusion against "driving in connection with" the high risk business is really motivated by a desire to eliminate from the standard owner's policy the extra risk which the insured will face as an employee or in some other capacity related to the business.

There is no fundamental necessity to construe the exclusion as applying in every case in which the insured comes into contact with the high risk business; it is really designed to guard against such participation as increases the insured's risk. It seems quite plain that Agutter's contact with the auto sales business in no way increased his risk and that, according to basic theory, the exclusion clause need not be applied to persons such as Agutter.

However, there may be a large number of people, not employees or proprietors, whose contact with the high risk business does increase their risk. I doubt that there really are many such, but let us concede the possibility. No doubt insurers encounter difficulty in drafting exclusion clauses which will eliminate all the extra risks sought to be eliminated. An exclusion framed specifically for employees or proprietors of "the business of selling, repairing, maintaining, servicing, storing, or parking automobiles" might be defeated by that hypothetical mass of shadowy personalities who are not employees or proprietors but whose contact with the business renders each of them a higher insurance risk.

People such as Agutter do not pose this threat. If they are subject to the exclusion it is because the clause is worded so very broadly in the hope of avoiding definitional difficulties concerning who is or is

not an employee. The result in *Sabell* appears harsh precisely because there is no fundamental reason to apply the exclusion to someone such as Agutter, save for the problem of drawing a line somewhere. I have already suggested that even the extremely broad language adopted does not obviate the line-drawing problem — that "in connection with" does not include *every* act of driving however remotely connected to the high risk business.

The suggestion, then, is that Ruttan, J. has drawn the line in the wrong place and has given the exclusion a broader effect than it needs or was intended to have. It may be said that *Sabell* is a very unusual case, that Sabell and Agutter are victims of the insolvency of the auto delivery company's insurer, and that these harsh results will occasionally occur despite the best and most careful of insurance schemes.

There are really two objections to apologizing for the result by pointing to the "garage policy" as the insurance which should have covered and to its worthlessness as the cause of the hardship.

In the first place, there is no dominant principle dictating that the "garage policy" and the standard owner's policy must be exactly co-terminous. There are many situations in which different policies overlap in their coverage and there is no reason in principle for saying that Agutter's policy, which would clearly be an excess insurance if Agutter were driving a friend's private passenger vehicle, should not also overlap with a "garage policy" and provide cover excess thereto. Indeed, as discussed above, we may all suppose that our owner's policies overlap, to some extent at least, with the standard "garage policy" and we may quite properly be unsettled by any implication that the two are completely mutually exclusive.

In any event, it is quite obvious that there should be no gap in coverage between the two policies. At the very least, the standard owner's policy should cover whatever the "garage policy" leaves uncovered. And so it is that the second serious objection to fobbing off *Sabell* as merely an unfortunate example of the hardship which results when the policy which should provide the cover is worthless, is the possibility that Agutter was never covered by the insurance policy issued to Montreal Auto Delivery Service. This possibility derives from the following exclusion in the standard "garage policy":

EXCLUDED AUTOMOBILES

The insurer shall not be liable under this policy for loss, damage, injury

> or death arising from the ownership, use or operation of any automobile
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> . . . .
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> furnished by the Insured to any person, except an active partner or active executive officer or a full-time employee of the business . . . . for his regular or frequent use . . . .

Clearly Agutter was not an active partner, an active executive officer nor a full time employee of Montreal Auto Delivery Service. Can it be said that the M.G. was furnished for his "regular or frequent use"? Agutter's use of the car was not recurrent over a long period of time. However, the drive-way arrangements frequently allow as much as three weeks for delivery and the total mileage may well approach one-third the annual mileage of the average privately-owned automobile. Though perhaps not "regular" or "frequent" as one would normally construe those words, Agutter's use of the M.G. could fit within the phrase if it were given the kind of large interpretation which Ruttan, J. has given "driving in connection with the business of selling automobiles".

In summary, Ruttan, J's interpretation of the exclusion clause raises the possibility that Agutter had no insurance cover while he was driving the M.G.[11]; at any rate, at best he had no cover under his own policy and was completely dependent upon the auto delivery company's policy. Neither of these positions is satisfactory either to Agutter or to his victim. This case illustrates the difficulties of literal interpretation and the dangers which beset such an approach to construction even of the simplest language.

It is submitted that Ruttan, J. should have accepted the plaintiff's proposition that the exclusion against "driving in connection with the business of selling automobiles" is directed to the Insured and not to the automobile. The exclusion appears in the individual's policy and is required only to regulate the risk assumed under that policy. If his driving does not involve any increase in the risk there is no need for the exclusion clause to operate. If the individual drives an automobile belonging to someone else his insurer automatically has the benefit of the provision constituting the driver's policy an excess insurance. So long as the driving is of the same order and does not affect the risk, it should matter not whether the borrowed vehicle belongs to a friend, to a car rental business or to a business involved in the sale of automobiles. In the first two

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11. That is, quite apart from the problem of insolvency of the auto delivery company's insurer.

situations, the driver does not lose the benefit of his own insurance; his policy is constituted an excess insurance by statutory prescription but does not purport to exclude him from cover by reason of driving the borrowed or rented vehicle. The third situation should not be treated differently so long as the insurance risk is unaffected.

The decision in *Sabell* represents an unnecessary and disturbing erosion of the insurance protection extended by the standard owner's policy, and it shows the importance of construing policy language in the context of the intentions and expectations of the parties. There are very few phrases which have an obvious and invariable meaning and which, therefore, lend themselves to a purely literal interpretation. It is submitted that "driving in connection with the business of selling automobiles" is not one of those few.