

CITATION: Becamon v. Wawanesa Mutual Insurance Company, 2009 ONCA 113
DATE: 20090206
DOCKET: C47337

COURT OF APPEAL FOR ONTARIO

Laskin, MacPherson and Armstrong JJ.A.

BETWEEN:

Mian Daud Shah, Mian Sa'ad Shah, Mian Asad Shah, Zarlasht Shah, Mian Yusuf Shah,
Farhana Shah, Mian Farooq Shah and Almas Chinoy

Plaintiffs

and

Bethily Becamon, Leon Kornbluth, Gilda Kornbluth and World Bagel Limited

Defendants (Respondent)

and

Wawanesa Mutual Insurance Company

Third Party (Appellant)

Donald G. Cormack and Derek V. Abreu for the appellant

Donald J. Ross and Heather Gray for the respondent

Heard: January 5, 2009

On appeal from the judgment of Justice Peter G. Jarvis of the Superior Court of Justice
dated June 8, 2007.

MacPherson J.A.:

A. INTRODUCTION

[1] The *Highway Traffic Act*, R.S.O. 1990, c.H8 (“*HTA*”), is a comprehensive statute regulating drivers and vehicles in Ontario. The anchor of the statute is, as its title suggests, “highways”. The purpose of the statute is the regulation of drivers and vehicles with a view to protecting the travelling public who use the highways.

[2] This appeal poses two questions relating to the interpretation of the *HTA*. Is a parking lot in a small strip mall a “highway” within the definition set out in s. 1(1) of the *HTA*? If a person pleads guilty to offences under the *HTA*, do the factual admissions that ground the pleas bind a court, in a subsequent civil trial, on the basis of issue estoppel or *res judicata*? Justice Peter Jarvis of the Superior Court of Justice answered both questions ‘No’. The appellant insurance company appeals from his judgment.

B. FACTS

(1) The parties and events

[3] On December 19, 2000, Bethily Becamon drove from her home to a small strip mall located at 336 Wilson Avenue in Toronto. Becamon possessed a G1 licence. A condition of the licence was that she had to be accompanied by a fully licensed driver with at least four years’ driving experience in the seat beside her.

[4] Becamon chose (for the first time) to drive alone, in clear contravention of her licence. She drove several kilometres on Toronto streets and eventually entered the strip mall. She attempted to park her vehicle, but stepped on the gas pedal instead of the brake. The vehicle mounted the sidewalk and hit a pedestrian, Mian Daud Shah, in front of the Bagel World store.

[5] Shah sued Becamon for damages resulting from injuries sustained in the accident.

[6] Prior to the accident, Becamon obtained automobile insurance from Wawanesa Mutual Insurance Company (“Wawanesa”) pursuant to a standard Ontario Automobile Policy. *Ontario Regulation 777/93* under the *Insurance Act*, R.S.O. 1990, c. I. 8, sets out statutory conditions that are a part of every insurance policy. Statutory Condition 4(1) provides:

4(1) The insured shall not drive or operate or permit any other person to drive or operate the automobile unless the insured or other person is *authorized by law* to drive or operate it. [Emphasis added.]

[7] At the scene of the accident, Becamon was charged under the *HTA* with the offences of driving in contravention of conditions (she was not wearing her prescription glasses) and driving without being accompanied by a qualified driver. She pleaded guilty to these charges on January 8, 2001 and paid a \$105 fine for each offence.

[8] In the civil action, Wawanesa refused to defend or indemnify Becamon on the basis that she had violated her G1 licence restriction by driving alone, which in turn amounted to a breach of the “authorized by law” component of Statutory Condition 4(1). Thus Wawanesa’s position was that the limit of its policy coverage for the accident caused by its client Becamon was \$200,000, not the \$1,000,000 that would have been in play had Becamon been authorized to drive alone when the accident occurred.

[9] Becamon brought a third party action against Wawanesa seeking a declaration that Wawanesa had a duty to defend and indemnify her in the main action.

(2) The trial judgment

[10] The trial judge granted the declaration sought by Becamon. In so doing, he rejected Wawanesa’s two main arguments.

[11] First, Wawanesa contended that Becamon’s guilty plea to the *HTA* charge of violating her G1 licence restriction by driving alone constituted an admission that her conduct was not authorized by law on the day of the accident. It followed that the doctrines of issue estoppel and *res judicata* precluded Becamon from arguing to the contrary in the civil trial with respect to the words “authorized by law” in Statutory Condition 4(1) of the insurance policy.

[12] The trial judge did not accept this submission. He stated:

There was no evidence to show whether Ms. Becamon was represented by counsel. In addition, Ms. Becamon has obvious problems with the English language. It would be unfair for me to assign weight to guilty pleas in determining the coverage and statutory condition issue.

[13] Second, Wawanesa argued that the strip mall was a “highway” within the definition set out in s. 1(1) of the *HTA*, thus triggering Becamon’s non-compliance with

the “authorized by law” component of Statutory Condition 4(1) of the insurance policy. Section 1(1) of the *HTA* provides:

1(1) In the Act,

“highway” includes a common and public highway, street, avenue, parkway, driveway, square, place, bridge, viaduct or trestle, any part of which is intended for or used by the general public for the passage of vehicles and includes the area between the lateral property lines thereof; (“voie publique”)

[14] The trial judge rejected this argument. He reasoned:

Ms. Becamon entered the mall deliberately and loss of control or negligence occurred entirely on private property and the *Highway Traffic Act* can have no application. That is to say Ms. Becamon did not require the authority in law to drive in that place at that time, therefore, it cannot be said to have been a breach of the statutory condition.

[15] Wawanesa appeals the trial judge’s judgment.

C. ISSUES

[16] The appellant advances two issues on the appeal:

- (1) The trial judge erred by concluding that Becamon’s guilty pleas to the *HTA* offences did not constitute issue estoppel or *res judicata* in the civil action relating to the accident; and
- (2) The trial judge erred by concluding that the accident did not take place on a “highway” as currently defined in the *Highway Traffic Act*.

D. ANALYSIS

(1) The issue estoppel/ *res judicata* issue

[17] Becamon pleaded guilty to two offences under the *HTA*, one of which was violating her G1 licence restriction by driving alone. The appellant submits that in light of these guilty pleas, Becamon admitted that she was not authorized by law to drive. Accordingly, she was estopped from taking a contrary position at the trial in this civil action.

[18] Evidence of a prior conviction affords only *prima facie* proof of guilt in subsequent civil proceedings: see *Re Del Core and Ontario College of Pharmacists* (1985), 51 O.R. (2d) 1 (C.A.). The presumption is rebuttable in the civil proceeding where relitigation of the issue that gave rise to the guilty plea in the criminal proceeding does not constitute an abuse of process: see *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77 (“*C.U.P.E.*”).

[19] In *C.U.P.E.*, Arbour J. enunciated the need to strike a balance between finality and fairness and provided illustrations pointing towards the fairness side of the scales, at paras. 52 and 53:

[F]rom the system’s point of view, relitigation carries serious detrimental effects and should be avoided unless the circumstances dictate that relitigation is in fact necessary to enhance the credibility and the effectiveness of the adjudicative process as a whole. *There may be instances where relitigation will enhance, rather than impeach, the integrity of the judicial system, for example: ... (3) where fairness dictates that the original result should not be binding in the new context.*

...

The discretionary factors that apply to prevent the doctrine of issue estoppel from operating in an unjust or unfair way are equally available to prevent the doctrine of abuse of process from achieving a similar undesirable result. There are many circumstances in which the bar against relitigation, either through the doctrine of *res judicata* or that of abuse of process, would create unfairness. *If, for instance, the stakes of the original proceeding were too minor to generate a full and robust response, while the subsequent stakes were considerable, fairness would dictate that the administration of justice would be better served by permitting the second proceeding to go forward than by insisting that finality should prevail.* [Emphasis added.]

[20] The two emphasized sentences in this passage support the trial judge’s decision not to apply the doctrines of issue estoppel and *res judicata* in this case. The stakes in Becamon’s guilty pleas for the two *HTA* offences were not high; she did not have to become involved in protracted legal proceedings and she paid relatively small fines. On

the other hand, the stakes in the present civil action, which will probably be long, complex and costly, are much greater – compensation potentially in the hundreds of thousands of dollars for an innocent pedestrian. In my view, this dichotomy of process and consequences suggests that, in the words of Arbour J. in *C.U.P.E.*, “fairness dictates that the original result should not be binding in the new context.”

[21] In addition, I record my agreement with two of the factors mentioned by the trial judge – the likelihood that Becamon was not represented by counsel in relation to her guilty pleas on the *HTA* charges and her difficulties with the English language.

[22] The appellant contends that the latter point was an unsubstantiated inference. I disagree. The trial record discloses that Becamon testified with the assistance of a Tagalog interpreter. Moreover, when the interpreter did not show up on the second day of the trial, counsel were concerned and worked cooperatively to place a proper record of testimony and documents before the trial judge. Thus the trial judge’s conclusion was supported by both his own observation and the circumstances surrounding Becamon’s testimony.

(2) The parking lot as a “highway”

[23] The entire *HTA*, including the graduated licensing system, is limited to “highways”. Thus the essential question on this appeal, in terms of determining whether Becamon’s driving in the strip mall was “authorized by law”, is whether or not, when the accident occurred, Becamon was driving on a “highway”.

[24] For convenience, I set out again the definition of “highway” in the *HTA*:

“highway” includes a *common and public* highway, street, avenue, parkway, driveway, square, place, bridge, viaduct or trestle, *any part of which* is intended for or used by the general public for the passage of vehicles and includes the area between the lateral property lines thereof; (“voie publique”) [Emphasis added.]

[25] The trial judge concluded that the accident took place on private property, not a highway. In so doing, he relied extensively on two decisions, *Gill v. Elwood*, [1970] 2 O.R. 59, and *R. v. Mansour*, [1979] 2 S.C.R. 916.

[26] *Gill v. Elwood* is a case very similar to the present appeal. It involved a small mall with an entrance, exit and marked parking spaces. This court held that the premises were not a highway. Aylesworth J.A. said, at pp. 59-60:

Something first we think should be said about the nature of the premises which it is sought to be made a highway or part of the highway and the use thereof. The premises involved consist of a large area upon which are delineated ways or routes, including an exit and an entrance and in which are delineated spaces for parking of vehicles. The people invited to park are not the public as a whole, but the people who have business to transact with the stores surrounding the parking space. Thus the premises involved are of a composite nature and in our view in deciding the applicability or non-applicability to those premises of the Act, *one is not permitted to cut up the premises as it were into various parcels and minutely analyse the particular uses of the particular parcels*. On the contrary, in our view, and realistically the premises must be viewed as a whole and so viewing the premises *the paramount use* thereof will emerge as a parking lot with ingress and egress to and fro and with passages within it, but all subordinate to *the paramount use* of parking vehicles. [Emphasis added.]

[27] In *Mansour*, the Supreme Court of Canada embarked upon a similar analysis and reached a parallel conclusion. Estey J.A. stated, at p. 921:

I conclude that the term “highway” in its ordinary and popular sense and as illustrated by the words employed in s. 1(1)11 of the Act does not embrace the concept of a parking lot, and particularly, a parking lot adjacent to an apartment building, and presumably one which was *established primarily for* the provision of parking to its inhabitants. [Emphasis added.]

[28] There is no doubt that “the paramount use” test from *Gill v. Elwood* and the “established primarily for” formulation in *Mansour* support the trial judge’s conclusion that the strip mall parking lot, although used for some thru-traffic from Wilson Avenue to Bathurst Street, was essentially a private parking lot for the customers of the stores in the mall.

[29] On appeal, the appellant attempts to overcome the trial judge’s conclusion with three submissions.

[30] First, the appellant submits that *Gill v. Elwood* and *Mansour* should not govern because these cases were decided under a different definition of “highway” in the *HTA*.

Unlike the definition in the *HTA* in force when these cases were decided in the 1970s, the current definition, after listing the various locations which can be a highway, including “square” and “place”, continues with the new words “any part of which” is intended for or used by the general public for the passage of vehicles. The appellant contends that “a part” of the strip mall traffic area is regularly used by some drivers as a shortcut from Wilson Avenue to Bathurst Street; accordingly, this area is “a highway”.

[31] I do not accept this interpretation. All of the locations that constitute a “highway” according to the definition found in the *HTA* are qualified by the adjectival phrase “common and public”. These words govern the analysis, whether the location is being considered in its entirety or in part. In the present case, the evidence was clear; although the parking lot was used by some drivers as a shortcut, both the intended use and actual use were overwhelmingly as a parking area for customers. Accordingly, the trial judge was correct to state near the end of his reasons: “I am not convinced that *Gill* and *Mansour* are no longer the law of this province by virtue of the amendments to the definition of [“highway” in the] *Highway Traffic Act* in 1983.”

[32] The appellant’s second submission is that the public had acquired prescriptive rights to the parking lot in the strip mall, thereby making it a “highway”.

[33] I disagree. The threshold for meeting the criteria for establishing a prescriptive right is high: see *Henderson et al. v. Volk et al.* (1982), 35 O.R. (2d) 379 (C.A.) and *Ebare v. Winter* (2005), 26 R.P.R. (4th) 220 (On. C.A.). The evidence in this case does not come close to meeting this high threshold. I agree with the trial judge’s analysis and conclusion that the strip mall parking lot was the private property of the various store owners.

[34] The appellant’s third submission is that the trial judge’s decision does not strike a proper balance between the “authorized by law” provision in its insurance policy and the intent of the legislature to promote public safety through the graduated licensing scheme. As expressed in its factum (para. 87): “The law should not be interpreted in a way where a driver can drive in [on Wilson Avenue] and out [the strip mall parking lot] of coverage through the course of the same trip.”

[35] I disagree. The legislature has struck the balance explicitly – the graduated licensing scheme applies to the operation of a motor vehicle on a “highway”. Indeed, not surprisingly, the entire *HTA* applies to what its title foreshadows, highways.

E. DISPOSITION

[36] I would dismiss the appeal. The respondent is entitled to its costs of the appeal which I would fix at \$20,000 inclusive of disbursements and GST.

RELEASED: February 6, 2009 (“J.I.L.”)

“J.C. MacPherson J.A.”

“I agree J.I. Laskin J.A.”

“I agree Robert Armstrong J.A.”