Hoang v. Vincentini: The "Conflict" Between Insurer and Insured

By Stephen G. Ross
Hoang v. Vincentini 2015 ONCA 780

Introduction

This is an interesting decision from the Court of Appeal that has become a fairly well known case in the insurance industry. While based on a rather specific fact scenario that gave rise to an apparent conflict of interest, it raises important questions for insurers when it comes to issues of coverage and the control of litigation.

Overview and facts

The plaintiffs, a father and his young son, brought an action against the driver of a car which struck the son, who had run out into traffic. The plaintiff son also sued his father on the basis of negligent supervision/instruction regarding pedestrian safety. The jury dismissed the action against the defendant driver, but found liability on the father for failure to supervise his son. One of the grounds of negligence found as against the father was that he picked an unsafe spot to drop his son off, as the son had only just exited his father's car prior to running out onto the roadway.

The plaintiffs appealed the jury's finding on damages and on liability as it relates to the defendant motorist. The father cross-appealed on the finding of negligence against him.

There was an underlying coverage issue with respect to the father's entitlement to insurance. He applied for coverage in this matter under his automobile policy, and entered into a non-waiver agreement and/or a reservation of rights letter. It appears essentially conceded that the only allegation against the father that might attract coverage from his automobile insurer is the allegation that he picked an unsafe spot to drop his son off; the claims for negligent supervision or instruction would not be covered under his automobile policy.

As a result, there arose an apparent conflict of interest between the father's insurer's interest in appealing the jury verdict on liability (which attracted coverage under the father's auto insurance) and the father's own interest in maintaining the finding so as to attract coverage from his insurer. The father wanted there to be coverage, and as such did not want to appeal the finding that he is liable with respect to the unsafe dropping off of his son in an unsafe area, as that potentially attracted coverage under the auto policy.

This motion was brought by the plaintiffs and the father in his personal capacity to remove the father's current counsel (as appointed by the insurer) as counsel of record for the father in light of the apparent conflict of interest. The argument is that the father does not want to appeal the finding, because the worst possible outcome for him would be a finding which upholds liability with respect to the allegations of negligent supervision but does not uphold the finding with respect to the unsafe location for drop off an outcome that would lead to the father being found liable and without the possibility of coverage.

Decision

The Court of Appeal agreed and found that, given this coverage situation that had been complicated by the ongoing nature of a reservation of rights/non-waiver agreement, there is the appearance of a conflict as between the insurer and the insured. The court confirmed that counsel appointed by the insurer, while having duties to both the insurer and the insured, has a primary duty to the insured should those duties conflict in any way.

Accordingly, the Court of Appeal ordered new counsel to represent the father and permitted the new counsel to file an amended notice of cross-appeal, wherein they will presumably drop the appeal of the jury's finding with respect to the negligent operation of the vehicle as it relates to allowing son to exit the car in an unsafe area.

Discussion

This case raises very interesting issues with respect to the control of litigation and the conflicts which can arise when there are covered and uncovered claims in an action. The finding that counsel cannot take a position, while advancing covered claims, which can have an adverse effect on uncovered claims is understandable.

It is surprising, though, that an insurer can be essentially forced to abandon a ground of appeal and is thereby forced to accept an outcome on liability. This suggests that, if the insured wanted to not contest liability in the first place on covered grounds, it could force the insurer to essentially make those admissions where there are also uncovered grounds in the mix. This does not seem right in law.

Perhaps this is uniquely factually dependent such that it will not have a great deal of precedential value going forward; however, it does seem to at least potentially give rise to a number of concerning implications.

This is certainly an interesting case for the industry at large to keep an eye on. Perhaps a further appeal is coming.