COURT OF APPEAL FOR ONTARIO

CITATION: Sam's Auto Wrecking Co. Ltd. (Wentworth Metal) v. Lombard General Insurance Company of Canada, 2013 ONCA 186
DATE: 20130328
DOCKET: C54634

Laskin, Rosenberg and Tulloch JJ.A.

BETWEEN

Sam's Auto Wrecking Co. Ltd., c.o.b. as Wentworth Metal

Plaintiff (Appellant)

and

Lombard General Insurance Company of Canada, Dalton Timmis Insurance Group Inc., and George McCarter

Defendants (Appellants/Respondent)

Mark M. O'Donnell, for the appellants

Jack F. Fitch and Jason Arcuri, for the respondent

Heard: September 10, 2012

On appeal from the judgment of Justice Alan C.R. Whitten of the Superior Court of Justice, dated October 28, 2011, with reasons reported at 2011 ONSC 6441.

Laskin J.A.:

A. OVERVIEW

[1] The question on this appeal is whether Lombard General Insurance Company is required to indemnify its insured, Wentworth Metal, and Wentworth's insurance broker, Dalton Timmis Insurance Group Inc., for money they paid to

settle a personal injury claim brought by Wentworth's former operations manager, John Ferber.

[2] Ferber was badly injured in a workplace accident caused by one of Wentworth's employees, Bill Cooper. At the time, Ferber was an executive officer of Wentworth and was not covered by Workers' Compensation. He sued Wentworth and Cooper for damages for his injuries. Wentworth then sued Lombard, Dalton, and Dalton's broker, George McCarter, who had secured Wentworth's insurance. Dalton and McCarter in turn cross-claimed against Lombard. Wentworth alleged that Ferber's claim was covered by its commercial general liability policy with Lombard and, in the alternative, that Lombard, Dalton, and McCarter were negligent in failing to provide insurance if it was sued by an employee not covered by Workers' Compensation.

[3] Ferber's action was settled. Wentworth and Dalton contributed to the settlement. Wentworth then discontinued its action against Dalton and McCarter, and proceeded against Lombard. After a trial, Whitten J. dismissed Wentworth's claim. He held that at the time of the accident, Ferber was an employee of Wentworth and was working in the course of his employment. Therefore insurance coverage was unavailable because of the "employee injury exclusion" in Lombard's commercial general liability policy.

[4] Wentworth, Dalton, and McCarter appeal. The main issue on the appeal is whether the trial judge erred in holding that the employee injury exclusion applied. The appellants say that he erred because the exclusion did not apply to executive officers. Lombard says that the trial judge was correct because the exclusion applied to all employees, including executive officers like Ferber.

[5] The appellants also raise three other grounds of appeal. They submit:

- The umbrella policy later purchased by Wentworth provides coverage for Ferber's injuries;
- Lombard is obligated to indemnify Wentworth's employee Cooper; and
- Lombard is vicariously liable for Dalton's negligence.

B. BACKGROUND FACTS

(1) Wentworth

[6] Sam's Auto Wrecking Co. Ltd., c.o.b. as Wentworth Metal, has operated a scrap metal business in Hamilton for over 90 years. When this litigation took place, Wentworth's principal owners were two brothers, Ken and Lorne Rochwerg.

[7] All of Wentworth's employees were covered by Workers' Compensation, as required by Ontario law. However, in 1989 or 1990, Wentworth purchased disability insurance for its management team and removed these employees

from Workers' Compensation coverage. Wentworth determined that the disability insurance was less expensive than Workers' Compensation premiums. Lorne Rochwerg testified he did not appreciate the relationship between Workers' Compensation and the coverage purchased from Lombard.

(2) John Ferber

[8] In October 1989, John Ferber was hired by Wentworth as its operations manager. He signed an employment contract, which described him as an "employee". His responsibilities included overseeing the operation of the plant and acting as safety coordinator. Ken Rochwerg called him an "excellent employee".

[9] Ferber was one member of the management team Wentworth removed from Workers' Compensation and for whom it purchased disability insurance. In 1990, Ferber was made an executive officer: he was appointed vice-president of Wentworth's parent company. The appointment was necessary because Workers' Compensation coverage is automatic and mandatory for workers but optional for executive officers.

[10] Ferber stopped working for Wentworth after he sued the company for injuries caused by his workplace accident. On his termination, he was paid all of his outstanding vacation pay in accordance with the *Employment Standards Act*,

R.S.O. 1990, c. E.14[1]. Also, Wentworth prepared and issued a Record of Employment, as it was required to do for all of its terminated employees.

(3) Wentworth's insurance policies with Lombard

[11] Lombard is a commercial liability insurer. It first insured Wentworth in April 1997, several years after Ferber had been removed from Workers' Compensation coverage. Lombard sold Wentworth a comprehensive business policy with a one-year term, which was later extended. The policy included commercial general liability (CGL) insurance of $2 million.

[12] The CGL insuring agreement provided broad coverage for bodily injury and property damage liability. It also contained exclusions. One exclusion was the employee injury exclusion: the insurance coverage did not apply to "'bodily injury' to an employee of the Insured arising out of and in the course of employment by the Insured". The scope of this exclusion is at the heart of this appeal.

[13] In February 1998, Wentworth amended its insurance policy to include umbrella liability coverage, which provided an additional $3 million in liability insurance. The umbrella policy similarly included an employer's liability exclusion endorsement, which stipulated that this insurance did not apply to personal injury to an employee of the Insured arising out of and in the course of employment by the Insured.

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[1] This act has been superseded. The reference here reflects the version that was in force until 2001.

(4) The role of Dalton and McCarter

[14] Dalton was an insurance brokerage firm in Hamilton. McCarter was one of its insurance brokers. Wentworth relied on McCarter to secure the insurance coverage that it needed. Wentworth had no direct dealings with Lombard. McCarter acknowledged that Wentworth relied on his expertise.

[15] McCarter arranged with Lombard for both the initial comprehensive business policy, which included CGL coverage, and the amending umbrella liability policy. However, Wentworth did not tell McCarter and he did not know that Wentworth had purchased disability insurance for Ferber and a few other employees and had removed those employees from Workers' Compensation coverage. Wentworth also did not tell Lombard that it had done so.

(5) The workplace accident

[16] On May 26, 1998, Ferber was seriously injured in a workplace accident. He was supervising the unloading of a truck. Wentworth was using one of its crawler cranes to do the unloading. Cooper operated the crane. Unfortunately, the crane struck Ferber and ran over him. His foot and leg were badly injured.

(6) The litigation

(a) Ferber's action

[17] In May 2000, Ferber sued Wentworth and Cooper for damages for the injuries he sustained in the workplace accident. Lombard denied coverage.

(b) Wentworth's action

[18] In September 2000, Wentworth started the present action against Lombard, Dalton, and McCarter. It sought coverage and indemnity for Ferber's claims against it. And it alleged negligence for failing to provide insurance coverage for claims by an employee not covered by Workers' Compensation.

[19] Dalton and McCarter cross-claimed against Lombard. Lombard, however, did not assert a cross-claim.

(c) The settlement of Ferber's action and its aftermath

[20] In September 2003, the Ferber action settled. Ferber received $950,000: $200,000 was paid by or on behalf of Wentworth and Cooper; and $750,000 was paid by or on behalf of Dalton and McCarter.

[21] After the settlement, Wentworth discontinued its action against Dalton and McCarter but continued its claim against Lombard. Dalton and McCarter continued their cross-claim against Lombard.

[22] In addition, after the settlement, Wentworth amended its statement of claim. In the amendment, it pleaded that Ferber was an executive officer and not its employee. Therefore it alleged that the employee injury exclusion in the CGL coverage did not apply.

[23] After the settlement and the amendment, Dalton and McCarter became, in effect, co-plaintiffs with Wentworth. They all sought indemnification from Lombard for the money they had paid to settle the Ferber action.

C. ANALYSIS

Issue 1 – Did the trial judge err in holding that the employee injury exclusion in the CGL coverage disentitled Wentworth to indemnification?

[24] This is the main issue on the appeal. To frame the issue, it is necessary to consider the wording of the relevant provisions of the CGL coverage in Wentworth's insurance policy. Two provisions are relevant: Section I on coverage and Section II on who is an insured.

[25] Section I contains a broad grant of coverage and certain listed exclusions, including (d) the employee injury exclusion:

> SECTION I – COVERAGES
>
> COVERAGE A. BODILY INJURY AND PROPERTY DAMAGE LIABILITY
>
> 1. Insuring Agreement
>
> a. We will pay those sums that the Insured becomes legally obligated to pay as compensatory damages because of "bodily injury" or "property damage" to which this insurance applies…
>
> 2. Exclusions.
>
> This insurance does not apply to:
>
> …

> d. "Bodily injury" to an employee of the Insured arising out of and in the course of employment by the Insured.
>
> This exclusion applies:
>
> 1) Whether the Insured may be liable as an employer or in any other capacity; and
>
> 2) To any obligation to share compensatory damages with or repay someone else who must pay compensatory damages because of the injury.
>
> This exclusion does not apply:
>
> 1) To liability assumed by the Insured under an "Insured contract"; or
>
> 2) To employees on whose behalf contributions are made by or required to be made by the Insured under the provisions of any workers compensation law.
>
> …

[26] The employee injury exclusion in commercial general liability policies has a sound rationale. Commercial general liability coverage is intended to protect the insured against losses to third parties or to the public arising out of the operation of the insured's business: see *Alie v. Bertrand & Frere Construction Co. Ltd.* (2002), 62 O.R. (3d) 345 (C.A.), at para. 27. The coverage is not intended to protect the insured against losses to its own employees from workplace injuries.

[27] Turning to the language of the exclusion, it is evident from its wording that it does not refer to executive officers. It simply says, in substance, that Wentworth is not covered for bodily injury to one of its employees arising out of and in the course of employment with it.

[28] However, Section II, on who is an insured, appears to distinguish between employees and executive officers:

> SECTION II – WHO IS AN INSURED
>
> 1. If you are designated in the Schedule of Part VI as:
>
> …
>
> c. An organization other than a partnership or joint venture, you are an Insured. Your executive officers and directors are Insureds, but only with respect to their duties as your officers or directors…
>
> 2. Each of the following is also an Insured:
>
> a. Your employees, other than your executive officers, but only for acts within the scope of their employment by you. However, none of these employees is an Insured for:
>
> 1) "Bodily injury" or "personal injury" to you or to a co-employee while in the course of his or her employment…

[29] Ferber was undoubtedly an executive officer at the time he was injured. Although the insurance policy does not define "executive officer", the Procedure Manual of the former Workmen's Compensation Board defined executive officers to include among others, vice-presidents: see *Ryan v. Ontario (Workmen's Compensation Board)* (1984), 6 O.A.C. 33. Similarly the Ontario Workplace Safety and Insurance Appeals Tribunal has defined an executive officer as

anyone holding the position, among others, of vice-president: see *Decision No. 14/98*, [1999] O.W.S.I.A.T.D. No. 199 (Ont. W.S.I.A.T.).

[30] Ferber's injuries undoubtedly arose out of and in the course of his employment with Wentworth. He was injured while supervising the unloading of a truck. The trial judge concluded that the employee injury exclusion disentitled Wentworth to coverage. He found that Ferber was an employee of Wentworth. However, in his view, any distinction between employee and executive officer was "academic". Wentworth had no coverage for Ferber's injury, no matter how Ferber was classified. The trial judge wrote at, para. 68 of his reasons:

> There was no coverage for the personal injury to Mr. Ferber either as an employee or an executive officer. The distinction between the two terms is academic. If it were not, the court would be inclined to say that Mr. Ferber was within the classic definition of an "employee." He was not an independent contractor. He was an employee subject to the terms of his employment contract and the appreciation of the Rochwergs. He was described as such by the latter.

[31] Wentworth challenges the trial judge's holding on two grounds: first, it argues that Ferber was not an "employee"; second, it argues that even if he was an "employee", the employee injury exclusion does not extend to employees who are also executive officers. Lombard says in response that the evidence amply supports the trial judge's finding that Ferber was an employee and that the employee injury exclusion applies to all employees whether or not they are

executive officers. I agree with the trial judge's conclusion, though my reasons differ somewhat.

[32] In my view, this ground of appeal raises two questions. One, was Ferber an employee of Wentworth? And two, if he was, does the employee injury exclusion apply to employees who were also executive officers?

(1) Was Ferber an employee of Wentworth?

[33] Ferber was an executive officer of Wentworth. However, as the trial judge noted, there is no inconsistency in being both an executive officer and an employee. Neither the insurance policy nor the *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Sched. A, states that an employee does not include an executive officer. Compare: *Berger v. Willowdale A.M.C.* (1983), 41 O.R. (2d) 89 (C.A.). Executive officers who work for a company typically will also be employees of the company. American courts have so held, and their holdings seem to me to be reasonable. It accords with commercial and business reality: see *Fontana v. Zurich Insurance Company*, 430 So.2d 718 (1983) (Court of Appeal of Louisiana) and *Zaiontz v. Trinity Universal Insurance Company*, 87 S.W. 3d. 565 (2002) (Court of Appeals of Texas).

[34] Whether a person is an employee is largely a question of fact. The evidence at trial reasonably – indeed, overwhelmingly – supports the trial judge's

factual finding that Ferber was an employee when he was injured. Some of that evidence is the following:

- Ferber's employment contract referred to him as an "employee";
- Ferber's employment contract prescribed his hours of employment;
- Ferber did not have an ownership interest in Wentworth;
- Ken Rochwerg, one of Wentworth's owners, called Ferber an "excellent employee";
- Ferber was part of Wentworth's management team, but Ken Rochwerg testified that management "had titles for the sake of titles";
- Ken Rochwerg also testified that though Ferber was an executive officer, he was "like all of them" a salaried employee of the company;
- Ferber was not a signing officer of Wentworth and had no authority to sign cheques;
- When his employment ended, Ferber was paid his outstanding vacation pay under the *Employment Standards Act*;
- When he stopped working for Wentworth, the company issued a Record of Employment, as it was required to do for all of its employees whose employment was terminated.

[35] Thus, I see no basis to interfere with the trial judge's finding that Ferber was an employee of Wentworth. Ferber was, therefore, both an employee and an executive officer of Wentworth when he sustained a workplace injury.

(2) Did the employee injury exclusion apply to employees who were also executive officers?

[36] This is a question of contract interpretation. The employee injury exclusion provides:

> This insurance does not apply to:
>
> …
>
> d. "Bodily injury" to an employee of the Insured arising out of and in the course of employment by the Insured….
>
> This exclusion does not apply: …
>
> (2) To employees on whose behalf contributions are made by or required to be made by the Insured under the provisions of any workers compensation law.

[37] The principles for interpreting insurance policies, and in particular exclusion clauses, are well-established. The policy should be interpreted to promote a reasonable commercial result; provisions granting coverage ought to be construed broadly; provisions excluding coverage ought to be construed narrowly; in the case of ambiguity, the interpretation most favourable to the insured should be adopted; and even a clear and unambiguous clause should not be given effect if to do so would nullify the coverage provided by the policy.

[38] The trial judge considered these various principles. He concluded, at para. 62, that there was no ambiguity in the insuring agreement or the employee injury exclusion and that the exclusion did not nullify coverage:

> There is no ambiguity in subsections 1 and 2. The Insuring Agreement and Exclusions (specifically subsection (d)), Personal Injury to the public described above is covered. However, what is exempted is personal injury to an employee working in the course of his or her employment. Given the nature of the business, that exemption could be anticipated to be covered by the WSIB regime. That exception is understandable in such coverage and is a function of the existence of the WSIB scheme and the need to avoid double indemnification. The exemption per se does not render the coverage a nullity or a departure from reasonable commercial expectations.

[39] Wentworth submits that the trial judge erred in two ways: first, he failed to consider the interplay between Sections I and II of the CGL coverage – between the insuring agreement and who is an insured; and second, he erred by not at least finding ambiguity in the interpretation of the employee injury exclusion. I do not agree with Wentworth's submission.

[40] Wentworth says that because Section II of the CGL coverage differentiates between employees and executive officers, then logically that differentiation should also apply to Section I, absent contrary language. Thus, according to Wentworth's argument, the employee injury exclusion should apply only to employees, not to executive officers even if they are also employees, because executive officers are not expressly referred to in Section I. At worst, Wentworth argues, the interpretation of the exclusion is ambiguous and so should not apply to Ferber's injury.

[41] I reach the opposite conclusion. In my opinion, the employee injury exclusion is unambiguous and applied to all employees including those, like Ferber, who were also executive officers. Section II of the CGL coverage differentiates between employees who are not executive officers and those who are solely for the purpose of determining who is an insured and in what circumstances. A person sued as an executive officer is treated differently from a person sued as an employee. And, presumably, a person can be an insured in both capacities.

[42] However, Section I of the CGL coverage, and in particular the employee injury exclusion, does not distinguish executive officer employees from non-executive officer employees. As Section II does differentiate between these two types of employees, one can reasonably infer that the lack of differentiation in Section I was intended. All employees, including those who are executive officers, come within the exclusion. To give effect to Wentworth's position would require reading words into the exclusion. The exclusion would have to read:

> …
>
> d. "Bodily injury" to an employee of the Insured <u>other than an employee who is also an executive officer</u> …

[43] Reading words into a provision that is unambiguous in its scope is not justified. Wentworth is not entitled to insurance coverage for the workplace injury

to Ferber because Ferber was an employee of Wentworth at the time, yet not covered by Workers' Compensation.

[44] I acknowledge that my interpretation of the exclusion seems to produce an odd result, perhaps because the language of the policy is drawn from American usage. The exclusion takes away coverage where an Ontario employer might wish to have it: for a workplace injury not covered by workers compensation legislation. The exception to the exclusion brings back into coverage claims by employees for whom the employer paid or was required to pay workers compensation premiums: that is, for a workplace injury where insurance coverage is not needed because of Workers' Compensation.

[45] Ferber's claim does not fall within the exception to the exclusion because Wentworth did not pay nor was it required to pay Workers' Compensation premiums on his behalf. Thus, his claim is one of an undoubtedly small group of workplace injuries for which the employer has neither workers compensation nor insurance coverage. In short, there is a "coverage gap." See Mark G. Lichty and Marcus B. Snowden, *Annotated Commercial General Liability Policy*, Loose Leaf Edition (Aurora: Canada Law Book, 2006), pp. 16-02 – 16-17.

[46] Wentworth, however, had at least one and likely two ways to eliminate this coverage gap, one through Workers' Compensation and the other through insurance.

[47] One certain way to have provided coverage would have been to have had Ferber covered by Workers' Compensation. Section 12(2) of the *Workplace Safety and Insurance Act*, allows a company to have its executive officers covered by Workers' Compensation:

> Upon the application of a Schedule 1 or Schedule 2 employer who is a corporation, the Board may declare that an executive officer of the corporation is deemed to be a worker to whom the insurance plan applies. The Board may make the declaration only if the executive officer consents to the application. [2]

[48] Wentworth elected not to do this. Instead, to save money, it decided to take Ferber and its other executive officers out of Workers' Compensation and pay for a private disability insurance policy. It was, of course, entitled to do so, but its decision had the consequences that have led to this litigation.

[49] The second way Wentworth could have eliminated the coverage gap would have been by buying an employer's bodily injury liability coverage extension endorsement. Wentworth did not purchase this endorsement before Ferber's injury. There appears to be conflicting evidence in the record on whether Wentworth could have obtained this endorsement from Lombard. It also appears, however, that neither Wentworth itself nor McCarter on its behalf tried to purchase this endorsement. But the existence of this endorsement combined with Wentworth's decision to take Ferber out of Workers' Compensation

[2] This version of s. 12(2) was in force until December 31, 2012. On January 1, 2013, an amended version came into force.

coverage shows that in this litigation, Wentworth is seeking a benefit it never paid for: insurance coverage for an employee not covered by Workers' Compensation.

[50] I would not give effect to this ground of appeal.

Issue 2 – Did the umbrella policy provide coverage for Ferber's claim?

[51] The umbrella policy amended the comprehensive business policy, which Lombard had sold to Wentworth in April 1997. It provided an additional layer of liability insurance above the primary liability insurance in the CGL coverage. McCarter testified that umbrella liability insurance would provide primary coverage for defence costs and indemnity if the primary policy does not provide coverage or if the limits under the primary policy are exhausted.

[52] The umbrella policy was added to Wentworth's liability insurance by a Change Endorsement, which Dalton received from Lombard in February 1998. The Change Endorsement listed a schedule of coverages. One of the coverages was the Employer's Liability Exclusion endorsement which provided:

> This Insurance shall not apply to "personal injury" to:
>
> 1. An employee of the insured arising out of and in the course of employment by the Insured;…
>
> This exclusion applies:
>
> 1. Whether the Insured may be liable as an employer or in any other capacity; and
>
> 2. To any obligation to share damages with or repay someone else who must pay damages because of injury.

[53] On its face, this exclusion endorsement, like the employee injury exclusion in the CGL coverage in the original policy, would disentitle Wentworth to coverage for Ferber's injury. However, Wentworth submits that Lombard is not entitled to rely on this exclusion endorsement because it was not "delivered" to Wentworth in accordance with Section 124.(1) of the *Insurance Act*, R.S.O. 1990 c. I.8. I do not accept this submission.

[54] Section 124.(1) of the *Insurance Act* states:

> All the terms and conditions of the contract of insurance shall be set out in full in the policy or by writing securely attached to it when issued, and, unless so set out, no term of the contract or condition, stipulation, warranty or proviso modifying or impairing its effect is valid or admissible in evidence to the prejudice of the insured or beneficiary.

[55] The delivery of the umbrella policy, including the exclusion endorsement, complied with s. 124.(1). The terms and conditions of the umbrella policy were set out in policy forms. Those forms were specified in the schedule of coverages listed on the Change Endorsement and were in Dalton's possession in Lombard's forms book. This book was available to McCarter, who accepted the umbrella policy for Wentworth.

[56] McCarter did not forward the policy forms to Wentworth. However, I do not think his failure to do so matters. He was Wentworth's agent, at least for the purpose of accepting delivery of the umbrella policy. Wentworth's past practice shows this to be so. All of the communications for its insurance were between

McCarter and Lombard. Wentworth had no direct dealings with Lombard. It relied on McCarter to take care of its insurance needs. Implicitly, if not explicitly, Wentworth authorized McCarter to accept delivery of the umbrella policy on its behalf. See *Barnet Properties Ltd. v. Commonwealth Insurance Co.* (1998), 113 B.C.A.C. 31. Indeed, Lorne Rochwerg testified that he would not have looked at the policy forms even if they had been sent to him.

[57] Thus, I am satisfied that when Lombard delivered the Change Endorsement to Wentworth's agent, McCarter, it complied with its obligation under s. 124.(1) of the *Insurance Act* to provide the policy wordings to Wentworth. McCarter had the policy wording. And when he received the Change Endorsement listing the coverages and referencing the policy forms, he must be taken to have known what coverages were provided and what exclusions applied. Wentworth does not suggest otherwise. I would not give effect to this ground of appeal.

Issue 3 – Is Wentworth obligated to indemnify Wentworth's employee Cooper?

[58] Wentworth submits that Lombard is obligated to indemnify Cooper. Wentworth points out that Cooper was a defendant in Ferber's action and claims that it contributed $200,000 to settlement on Cooper's behalf as well as on its own behalf. Wentworth submits that the employee injury exclusion does not apply in respect of claims against an employee. Even without considering

whether the exclusion applied to a claim against a co-employee, I would not give effect to this ground of appeal.

[59] Wentworth never asserted before the trial judge or at any time in the eight year period between the settlement of the Ferber action and the trial that Lombard was obligated to defend or indemnify Cooper. Wentworth is the sole plaintiff in this action. Cooper is not a plaintiff. The amended statement of claim makes no claim on behalf of Cooper. In it, Wentworth does not allege: that it made a payment on behalf of Cooper; that Cooper incurred any costs to defend Ferber's action; or that Cooper contributed any money to the settlement of that action. Moreover, no evidence was led at trial that he did so. As there is no allegation or evidence that Cooper sustained a monetary loss or that Wentworth sustained a loss on his behalf, Lombard cannot be required to indemnify him.

[60] For these reasons I would not give effect to this ground of appeal. It is therefore unnecessary to consider whether the exclusion applied to Cooper.

Issue 4 – Is Lombard vicariously liable for Dalton's negligence?

[61] Wentworth submits that Lombard is vicariously liable for Dalton's negligence. It contends that Dalton was Lombard's agent and thus legally responsible for Dalton's acts and omissions. Its contention of agency rests on an admission in Lombard's pleadings. In paragraph 4 of its amended statement of claim, Wentworth alleges that at all material times Dalton was an agent of

Lombard. In paragraph 1 of its statement of defence, Lombard admits the allegations in paragraph 4 of the amended statement of claim.

[62] Lombard's admission in paragraph 1 of its statement of defence is obviously an unintended slip. It is inconsistent with its overall position and with express allegations in other paragraphs of its pleading. For example, in paragraph 5 of its statement of defence, Lombard expressly denies that McCarter was its employee, servant, or agent. In paragraph 23, Lombard pleads that "at all material times", Dalton and McCarter were Wentworth's insurance brokers. Thus, I would hold that the so-called "admission" in paragraph 1 of Lombard's pleading is not determinative of whether Dalton was Lombard's agent.

[63] In my opinion, Wentworth's submission of vicarious liability cannot succeed for either of two reasons. First, Wentworth did not pursue its negligence claim against Dalton and McCarter. Thus, there is nothing for which Lombard could be vicariously liable.

[64] Second, no evidence was led at trial to support Wentworth's contention that Dalton was Lombard's agent. At trial, McCarter called himself a "property and casualty insurance broker" for Dalton, a "Tier 2" insurance brokerage. He marketed himself as an independent broker, entitled to sell the products of various insurance companies. He acted quite differently from the insurance agent of a particular insurer. He was not beholden to Lombard or any other

insurance company. If anything, as I have said earlier, he was Wentworth's agent. He certainly was not Lombard's agent. See *Keddie v. Canada Life Assurance Co.*, 1999 BCCA 541, 179 D.L.R. (4th) 1, especially at paras. 41-43.

[65] I would not give effect to this ground of appeal.

D. CONCLUSION

[66] I have concluded that the appellants are not entitled to be indemnified for the money they paid to settle Ferber's personal injury claim. I would, therefore, dismiss the appeal with costs in the agreed-upon amount of $20,000, inclusive of disbursements and applicable taxes.

Released: Mar 28, 2013
"JL"

"John Laskin J.A."
"I agree M. Rosenberg J.A."
"I agree M.H. Tulloch J.A."