

Unger v. Unger: Liability of the Owner-Employer for Allegations of Negligent Hiring, Supervision and Entrustment of a Vehicle to the Driver-Employee

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by *Mario Pietrangeli*

The recent decision of the Ontario Court of Appeal in *Unger v. Unger*, released December 1, 2003, will hopefully bring clarity to a recurrent and troublesome issue in motor vehicle and insurance law: namely, the implications arising from the potential liability of an employer for negligent hiring, supervision and entrustment of the employer's vehicle to an employee whose negligent driving causes accident-related injury or death.

In its narrowest sense, *Unger* involved the determination of the duty to defend as between the owner/employer's automobile and general liability insurers: the court found that allegations of negligent hiring, supervision and entrustment of the vehicle (characterized as "negligent business conduct" by the judge at first instance) fell within the coverage of the auto policy, rather than the CGL policy. The importance of *Unger*, however, is potentially much broader. In deciding the coverage question before it, the court concluded that the

cause of action for negligent hiring, supervision and entrustment arose from the "ownership, use or operation" of a vehicle. This determination may have implications beyond the narrow coverage question in *Unger*, and accordingly, as will be seen below, the decision may be significant in respect of a number of issues.

In *Unger*, the plaintiffs were passengers in a vehicle involved in an accident with a truck operated by Riccia, an employee of Matthews or his business. Matthews and Riccia were covered by an automobile policy issued by Pilot Insurance Co., and also by a commercial general liability policy issued by Co-operators General Ins. Company. Pilot acknowledged a duty to defend, but sought to obtain a contribution from Co-operators, which took the position that none of the claims fell within its coverage.

The issue was the application of an exclusion in the Co-operators policy which excluded coverage for damages arising out of the ownership, use or operation of a

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vehicle, and in particular, whether the allegations of negligent hiring, supervision and entrustment fell within the meaning of the exclusion.

Following *Monenco* and *Scalera*, the court expressly looked beyond the “descriptive labels”¹ to the “substance” of the cause of action and concluded that the allegations of negligent hiring, supervision and entrustment did not constitute an independent basis of liability separate and distinct from the employer/owner’s vicarious liability for the negligence of the employee/driver. The court concluded that negligent hiring, training, supervision and entrustment arose out of the “ownership, use or operation of the vehicle”:

“The remaining allegation in par. 37 allege that Matthews was negligent in the way he hired, trained and supervised the employee Mr. Riccia. They also contend that Matthews was negligent in entrusting the vehicle to Riccia. These allegations are not discrete causes of action in the sense identified in *Derksen*. Were the Ungers to establish any of these allegations,

but fail to establish that the vehicle was used or operated in a negligent manner at the time of the accident, they would not succeed in their claim. *While allegations of negligent training supervision and entrustment may well be germane to whether Matthews and/or his employee were negligent in the ownership, use or operation of the motor vehicle, they do not provide a stand alone ground for recovery by the Ungers.*” (At par. 24. Emphasis added)

The court distinguished *Derksen*. It observed that in *Derksen*, the negligence with regard to the placing of the equipment on the rear of the vehicle constituted a separate, independent actionable cause of the damages, independent from the negligence of the driver-employee. In *Unger*, the court held that allegations of negligent hiring, supervision and entrustment were not separate from the driver’s negligence, but arose out of the ownership, use or operation of the vehicle.

The court referred to American authorities, including (at

par. 26) the following passage from *Oakley Transport v. Zurich Insurance* 648 N.E. (2d) 1099 (1995) (Ill.App.Ct. 5th Div.):

“[T]he gravamen of negligent supervision is that one party (the supervisor) acted unreasonably in allowing another party (the supervisee) over whom he or she had a duty to control to commit some wrong against a third party. The supervisee’s conduct which ultimately results in injuries cannot be viewed as an intervening act of negligence. Indeed, *the negligence of the supervisor, is by definition, derivative of the negligence of the supervisee.*” (Emphasis added)

The court concluded:

“I find the American authorities persuasive. They confirm my view that *the allegations contained in the Ungers’ statement of claim all involve allegations of negligence in the use, operation or ownership of the Matthews’ vehicle.*”

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1. The allegations of “negligent business conduct” in par. 36 and 37 of the Statement of Claim allege various conduct that was said to be “independent of liability” of Matthews as owner of the vehicle involved in the accident.

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The Co-operators CGL policy excluded claims arising from the ownership, use or operation of a vehicle, and accordingly, the duty to defend rested solely with the motor vehicle liability insurer, Pilot.

On a strict reading, *Unger* is only about the duty to defend. However, the finding that the claims arose from the ownership, use or operation of a vehicle was carefully reasoned and articulated, and was central to the court's determination of the case. It is not mere *obiter dicta*, and it may therefore impact on the interpretation of the words, "ownership, use or operation" of a vehicle, which appear in a number of statutory provisions in several different contexts.

For example, s. 267.5 of the *Insurance Act* immunizes "... the owner of an automobile, the occupants of the automobile and any present at the incident" from liability for damages "arising directly or indirectly from the use or operation of the automobile", unless the exception from immunity (or "threshold") is met. The section also restricts the heads of damage recoverable, and quantum. In *Hechavarria v. Reale* (2000), 51 O.R. (3d) 364 (Ont. S.C.), Nordheimer, J., considered the immunity provisions of

Bill 59 in a case where the owner of a vehicle was also the employer of the driver of that vehicle. The court held that the owner/employer was a protected defendant, and further held that it should be protected even though it was vicariously liable for the negligence on the driver. The court held that it could not distinguish between the defendant as protected owner, and as unprotected employer, where the negligent act for which the employer was sought to be held vicariously liable arises from the actual operation of the vehicle for which the employer is owner. Justice Nordheimer stated that to hold the employer liable in such a case would defeat the fundamental purpose of the no-fault legislation. However, in *Pugsley v. Rahmar*, [2002] O. J. No. 2779, Justice Molloy held that the plaintiff was entitled to sue the owner of the vehicle for its vicarious liability as employer of the negligent driver, and recover all of the damages (i.e., without any of the restrictions which would apply to a "protected" defendant).

While not directly on point, *Unger* may lend additional support to the approach taken by Justice Nordheimer in *Hechavarria*, rather than the approach taken in *Pugsley*. As the result of *Unger*, it can be argued that the liability of the employer— whether

vicarious, or whether based on "independent" allegations of negligent hiring and supervision— arises out of the "use or operation" of the vehicle, and cannot be distinguished from its liability as owner of the vehicle for the negligence of the driver, and that the employer is therefore a "protected" defendant under s. 267.5 of the Act.

Similar considerations may also apply to the statutory bar created by s. 267.6 of the *Insurance Act*, which precludes action to recover damages "for bodily injury or death arising directly or indirectly from the use or operation of an automobile" if the plaintiff was operating a vehicle without insurance.

It remains to be seen whether the courts will limit *Unger* to coverage issues and the duty to defend, or whether it will be interpreted as applying more broadly to claims against employers for damages arising out of the ownership, use or operation of a vehicle. While the issue is not free from doubt, there appear to be good grounds to argue that *Unger* has altered aspects of the law governing the potential liability of an owner-employer for the negligence of its driver-employee in cases involving allegations of negligent hiring, supervision and entrustment.

Ontario Insurance Law and Commentary

Hughes Amys LLP is delighted to congratulate Michael Teitelbaum on the publication of Butterworths' 2004 Edition of **Ontario Insurance Law and Commentary** for which he is the consulting editor. Michael, with the assistance of Laila Brabander, also prepared the insightful analysis of recent insurance law trends and developments found in the commentary section of the volume.

Congratulations Michael and Laila on this stellar achievement.

Firm News

Jamie Trimble will be chairing the Civil Litigation Sections program entitled "10 Secrets to a Successful Trial" at the OBA's Annual Institute of C.L.E. on January, 29, 2004

Jack Fitch will be speaking about juries, at the Institute on the same date.

Michael Teitelbaum will be speaking about Product Liability Coverage Issues at a program sponsored by Osgoode Hall Law School on Thursday March 4, 2004.

Mario Pietrangeli participated in a panel discussion regarding the changes in automobile insurance pursuant to Bill 198, at an Insight conference held on December 13, 2003