VERGATA v. *VERGATA AND THE MANITOBA PUBLIC INSURANCE CORP.*†

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On April 22, 1974, Benito Vergata was the driver of a motor vehicle which was involved in a collision in Manitoba. Benito's brother, Antonio, who was a passenger and the registered owner of the automobile was killed in the collision. When the estate of Antonio Vergata sued Benito Vergata for gross negligence, the insurer, Autopac, denied liability to provide indemnification, if needed, on a technical construction of the exclusion found in Section 31(3)(h) of the regulations: "The Corporation shall not pay insurance monies under this part. . .(h) for loss or damages resulting from bodily injury to, or the death of, an insured."[1]

Benito Vergata brought an action by way of Originating Notice for a Declaration that Autopac was obligated to take up his defence and, if necessary, pay any sums that would result from a possible Judgment against him. Benito Vergata was successful in the Court of Queen's Bench.[2] However, an appeal was successfully taken to the Court of Appeal by Autopac.[3] The Supreme Court, having granted leave to appeal, divided 5 to 4 and allowed the appeal with the result that the insurance coverage was intact.[4]

The problem now is the legacy of the decision of the Supreme Court; at best, the decision is confusing. Argument for the appellant Benito resolved itself upon two major grounds. The first ground was that there were two insureds involved, the driver and the passenger (the latter being the owner of the vehicle), and that the exclusion only applied to the relevant insured. This was in accord with the approach taken by the Manitoba Court of Appeal in *Hinds* v. *Dominion of Canada General Insurance Company.*[5] At the hearing in the Manitoba Court of Appeal,[6] Mr. Justice Hall held that the *Hinds* case was overruled by the Supreme Court of Canada in *Murray Bay Motors* v. *Compagnie D'Assurance Belair.*[7] (Certainly the writer does not agree with the proposition that *Hinds* was overruled by *Murray Bay.*) It is interesting to note that Mr. Justice Hall had been

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† [1976] 3 W.W.R. 544 (Man. Q.B.); rev'd. (1976), 67 D.L.R. (3d) 527, [1976] 4 W.W.R. 373 (Man. C.A.); rev'd. [1978] 1 S.C.R. 289, 76 D.L.R. (3d) 470, [1977] 4 W.W.R. 491.

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1. A Regulation under *The Manitoba Public Insurance Corporation Act*, Man. Reg. 333/74; as amended by Man. Reg. 10/75 and Man. Reg. 45/75 (hereinafter referred to as Man. Reg. 333/74).
2. [1976] 3 W.W.R. 544 (Man. Q.B.).
3. (1976), 67 D.L.R. (3d) 527; [1976] 4 W.W.R. 373 (Man. C.A.).
4. [1978] 1 S.C.R. 289, 76 D.L.R. (3d) 470, [1977] 4 W.W.R. 491.
5. [1953] 3 D.L.R. 113; 9 W.W.R. (N.S.) 39 (Man. C.A.).
6. *Supra* n. 3.
7. [1975] 1 S.C.R. 68; (1973), 42 D.L.R. (3d) 588.

counsel for the unsuccessful party in the *Hinds* case. The major difference between the two cases was that in the *Murray Bay* case the exclusion contained the words "any person insured by this policy."[8] In *Hinds* the relevant words were "the insured."[9] The exclusion applied, in this case, to "an insured." It was submitted by the appellant that "an insured" was the relevant insured in the particular case. The relevant insured in this case was the driver Benito and he was not seeking the insurance coverage in respect of his own bodily injury or death but rather in respect of the death of a passenger. The fact that the passenger was coincidentally another insured should not cause the exclusion provision to be applicable.

The second argument put forward by the appellant flowed from the driver's policy provision and was noticeably weaker in force. The argument was that if the exclusion did apply, the vehicle became uninsured in the event that the owner was only a passenger and that therefore the driver was covered. If, of course, the driver was covered, it was a separate policy of insurance and therefore the exclusion would only apply to it and not to the owner of another policy of insurance.

The Supreme Court appears to have resolved the case on the strength of these two arguments. The confusion, it is respectfully submitted, flows from that. Unfortunately, the argument did not proceed at the hearing of the appeal, in quite so simple a fashion. There were two other major points raised by the appellant that are not reflected in the decision. They tie together. First, public policy was argued in the sense that Autopac was a universal, compulsory monopoly and if a person had absolutely no choice in the type of insurance that he could buy in the free market, it should be interpreted in such a way to insure him in every possible context of common driving experience. Certainly, the argument continues, driving a friend's vehicle with the friend as a passenger is not unusual.

The second argument, which flows from the first, entails the doctrine of *contra proferentum*. It applied with full force to the suggestion that the structure of the Autopac regulations permitted of the interpretation that there were three contracts of insurance available. The first was an owner driving an owner insured vehicle. The second was a driver driving a vehicle which was uninsured but nevertheless coverage was extended under the driver's policy provisions as defined therein. The interesting contract was the third one; the appellant argued that it flowed from the definition of "insured" in Section 30(a)[10] which defined insured to include the operator of a motor vehi-

8. *Id.*, at 70; 42 D.L.R., at 589.
9. *Supra* n. 5, at 114; 9 W.W.R., at 40.
10. Man. Reg. 333/74, s. 30(a).

cle in the circumstance of which he was not the owner. This third type of contract flowed from the contract of insurance arising out of the ownership of the vehicle and was nevertheless separate and distinct from the insurance of the owner. Conjunctively, if there were ambiguity in this regard, and in specific regard to the separation of the contract in law, said ambiguity ought to be resolved in favour of Benito Vergata.

It is submitted that the judgment of the majority as written by Mr. Justice Pigeon bears out this argument.[11] With great deference to those who hold a contrary view, the writer does not agree that Mr. Justice Pigeon found liability on behalf of the insurer in the driver's policy section. The writer's respectful submission is that the majority decision was to the effect that a separate contract of insurance arose out of the owner's coverage by virtue of the definition of the word "insured." Support may be garnered for this proposition by Mr. Justice Pigeon's reference to *Digby* v. *General Accident Fire and Life Assurance Corporation.*[12] Mr. Justice Pigeon referred to that case, which had a stipulation in favour of other drivers as is the case here, and Lord Wright referred to it as creating a new contract.[13] Undoubtedly some confusion arises from the Judgment of Mr. Justice Pigeon because he follows this reference to the *Digby* case with the following: "*A Fortiori* must it be so when there is a separate driver's certificate involving a distinct coverage called a 'DRIVER'S POLICY' for which a separate premium is collected and in the case of a bad driving record, an additional premium is charged."[14]

This ought not to be seen as charging the liability to Section 31(2) of the Regulations, the driver's policy section.[15] The sentence ought to be viewed in the context of the previous paragraph of Mr. Justice Pigeon's decision which referred to the driver's policy as an extension by virtue of the opening words "coverage under Subsection 1 is extended. . . ." He said that there, "it would not be an extension unless there was already primary coverage under Section 31(1) by virtue of the definition of 'insured' in Section 30(a)."[16] With respect, it is submitted that that sentence contains the *ratio decidendi* of the case.

In a cogent dissenting opinion, Mr. Justice deGrandpré argues that this approach renders the exclusion meaningless.[17] Mr. Justice Pigeon disagrees and says that the exclusion is meant to apply to

11. *Supra* n. 4.
12. [1943] A.C. 121 (H.L.).
13. *Id.*, at 142.
14. *Supra* n. 4 at 296; 76 D.L.R., at 475; [1977] 4 W.W.R., at 496.
15. Man. Reg. 333/74, s. 31(2).
16. *Supra* n. 4, at 296; 76 D.L.R., at 474-75; [1977] 4 W.W.R., at 496.
17. *Id.*, at 303; 76 D.L.R., at 479, [1977] 4 W.W.R., at 501.

drivers from other jurisdictions.[18] This latter interpretation is extremely arguable and the writer's personal opinion is that Mr. Justice deGrandpré is likely right. Indeed the writer would think that Autopac would be hard pressed to find any single circumstance in which they could rely upon this exclusion. However, that does not militate towards the approach of interpretation taken by Mr. Justice deGrandpré. In the writer's respectful view, and as he represented to the Supreme Court on behalf of the appellant, the regulations were poorly drafted and confusing in themselves; this was the fault of the delegates of the Legislature who drafted the regulations. They are easily corrected. *Contra proferentum* applies in these circumstances with the result that the exclusion cannot be applied to the individual involved, notwithstanding that it may well be the result that the exclusion can never apply to anyone.

For the foregoing reasons, the writer concludes that the majority decision of the Supreme Court is that where an individual is driving the vehicle of another, with that other person as a passenger, the exclusion provision found in Section 31(3)(h) of the Regulations[19] does not apply by virtue of the fact that there are two "insureds" arising out of the same policy of insurance and only the relevant insured is excluded.[20] The major force of the dissenting judgment in the Supreme Court is that this interpretation leads to a meaningless result that an individual can never sue himself for injuries or death and that an exclusion would not be enacted to cover such an obvious situation. The writer's answer to this objection is found in the opening words of the exclusion section: "the corporation shall not pay insurance monies under *this* part."[21] The word "this" could be interpreted to differentiate Part IV of the regulations from Part II of the regulations where an individual can claim in respect of his own bodily injury or death.

Again, the writer must admit that there is attractiveness to the dissenting opinion that this approach is somewhat lacking in common sense. Were it viewed in a vacuum, the writer would concede the proposition. However, the case was viewed within the context of a universal compulsory monopoly on insurance within the Province of Manitoba. While it is not so stated in the decision, it is the writer's view that this background of social policy argument led the court to apply the doctrine of *contra proferentum* to resolving very serious ambiguities in the regulations in favour of Benito Vergata.

18. *Id.*, at 297; 76 D.L.R., at 475; [1977] 4 W.W.R., at 497.
19. Man. Reg. 333/74, s. 31(3)(h).
20. *See Supra* n. 5.
21. Man. Reg. 333/74, s. 31(3).