

## News

## Court's 'broader' reading results in damages award

MICHAEL BENEDICT

Designated drivers in British Columbia can now be indemnified against injuries caused by a drunken passenger, but the reasoning behind the B.C. Court of Appeal decision's balancing of statutory interpretation and legislative intent in its ruling could be challenged at the Supreme Court of Canada.

The appeal court's Sept. 23 decision in *Felix v. Insurance Corp. of British Columbia* [2015] B.C.J. No. 2024 involves a fatal automobile accident where the driver survived. On July 8, 2006, Marnetta Felix and her boyfriend Kevin Hearne participated in a soccer tournament. After his last game, Hearne began drinking and became intoxicated. Felix then decided to drive him home in her car.

The couple began arguing before setting off. The argument continued while driving. Twice, Hearne briefly grabbed the steering wheel, acts that Felix later testified were attempts to scare her. When Hearne grabbed the wheel for the third time, he did not let go, and the car went off the highway, overturning and killing Hearne and seriously injuring Felix.

She sued Hearne's estate and was awarded more than \$800,000 in damages and costs. She then sued the Insurance Corporation of British Columbia (ICBC), a provincial Crown corporation with a monopoly on mandatory basic automobile insurance, for indemnification.

At trial, the judge sympathized with Felix's plight but dismissed her claim, finding that Hearne, as a passenger, was not an insured under the B.C. *Insurance (Motor Vehicle) Act*. He reasoned that to consider the passenger's actions a "use" of a motor vehicle under the legislation would be incompatible with other provisions of the act.

However, the Court of Appeal disagreed and ruled that Felix is entitled to full indemnification.

"The trial judge erred when he excluded Mr. Hearne as a 'user' and therefore not an



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David Bilkey  
Bilkey Law

insured," wrote Justice Elizabeth Bennett for a unanimous three-member panel.

"While a passenger, or user, in a moving automobile, Mr. Hearne grabbed the steering wheel causing the accident that led to Ms. Felix's injuries," said Justice Bennett. "It matters not for these purposes that he did not intend to take control of the car. He intentionally (and negligently) grabbed the wheel while he was 'using' the vehicle."

The court reasoned that changes to the *Insurance Act* over a 25-year period, culminating in the 2001 introduction of the word "use." At the time, the legal definition of a motor vehicle operator was amended from someone who "operates" a vehicle to an individual who "uses or operates" a vehicle. That change, the high court said, was "clearly to add broader coverage."

The judgment's reasoning, according to insurance lawyer David Bilkey of Bilkey Law in Kamloops, B.C., is "very encouraging because the court is bravely applying its legislative function, rather than a constrained statutory interpretation."

Bilkey, who also teaches insurance law at Thompson Rivers University Faculty of Law, added that "determining that a passenger is in use of a vehicle is a generous reading that reflects the legislature's attempt to afford compensation for accident victims."

However, Bilkey said that when a court ventures into legislative intent, it can lend uncertainty for lawyers who rely on the basic rules of statutory interpretation to offer client advice.

"The Supreme Court could help sort out how these standard interpretive rules co-exist with legislative intent," he said.

Personal injury lawyer Scott Stanley of Murphy Battista in Vancouver does not think the country's highest court will be interested in hearing a case involving a B.C. insurance scheme. "I don't think it is of national significance," he says.

Nonetheless, Stanley said the case is important because it shows that insurance contracts are so complex that even learned trial judges can fall into error.

"It's another illustration that consumers have no chance of understanding the coverage when they purchase a product."

Felix's lawyer, Douglas MacAdams of MacAdams Law Firm in Abbotsford, B.C., said the deci-

sion is significant because it clarifies that "misbehaving passengers can be considered as users," at least under the ICBC. MacAdams added that he believes the case will resonate in other jurisdictions because the word "use" is common in insurance documents.

MacAdams said that he was surprised the ICBC was not involved at trial when it conceivably could have argued contributory negligence, or challenged some of the evidence.

Meanwhile, ICBC's counsel, Guy Brown of Harper Grey in Vancouver, declined comment on the judgment, saying it is "currently under review by my client." ICBC has until the end of November to request leave to appeal to the Supreme Court.

As for the judgment's possible wider impact, a spokesperson for the Insurance Bureau of Canada said: "The legislation in this case is unique to British Columbia. As such, we will have to see whether courts in other provinces and territories come to the same conclusion for their auto policies."

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