

Mallory v. Werkmann Estate

Appeal court weighs in on duties of counsel appointed by insurers

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For Law Times

Chief Justice George Strathy of the Ontario Court of Appeal has ordered a veteran litigator removed as counsel for a defendant in a personal injury case on the grounds of conflict of interest between the interests of the insured and those of the insurer.

In the normal course, defendants' insurers appoint and pay for their counsel. But it's trite law that counsel's client is the insured to whom the lawyer owes a duty of loyalty and good faith.

Generally speaking, the bifurcated nature of the retainer doesn't create a problem.

"It doesn't come up very frequently because lawyers tend to be pretty good about understanding their position," says Nina Bombier of Lenczner Slaght Royce Smith Griffin LLP in Toronto.

But things can get complicated, especially where coverage is an issue, as they did in *Mallory v. Werkmann Estate*.

The case arose after Robert Mallory was severely injured and a passenger died when his car was hit by a motorcyclist, Gabor Werkmann, who himself died in the crash.

Mallory sued Werkmann's estate and two other motorcyclists not directly involved in the collision. He also sued his own insurer, Security National Insurance Co., for coverage in case any of the defendants didn't have sufficient insurance.

As it turned out, one of the defendants not involved in the collision, Istivan Mihali, had a policy with Royal & Sun Alliance Insurance Co. The policy limits were \$1 million with liability restricted to \$200,000 if the insured had engaged in a "race" or "speed test." Because coverage issues had arisen during Royal & Sun Alliance's

investigation, Mihali signed a non-waiver agreement that gave the company the authority to defend and settle the action while preserving the insurer's right to continue investigating the claim and dispute coverage.

Royal & Sun Alliance retained Nestor Kostyniuk, a veteran litigator at Kostyniuk & Greystone in Toronto and a former president of the Toronto Lawyers Association, to defend Mihali. The company also retained Mark O'Donnell of O'Donnell Robertson & Sanfilippo in Toronto to advise on coverage issues. But while Security National, as a named defendant, had independent counsel at trial, Royal & Sun Alliance didn't.

The trial judge found Mihali was partly responsible for the accident because he and the third rider had participated in a joint venture with Werkmann in which they "incited and encouraged each other to drive in excess of the speed limit and break the rules of the road."

Additionally, the trial judge dismissed the claims against Security National "since Mr. Mihali was insured at the time of the collision." But O'Donnell says the judge erred in so ruling.

"How can you find coverage where the insurer was not involved at the trial on the merits and had no right to appear until the trial and the appeal were concluded?" he asks.

However that may be, Kostyniuk filed an appeal on Mihali's behalf. The appeal cited eight grounds for reversal, including two that related to coverage issues. The latter alleged that the trial judge had erred by addressing the coverage issue in her decision.

Kostyniuk's factum also pursued the coverage issue in the following terms: "Justice Lack in paragraph 33 of her decision stated 'Mr. Mihali was insured at the time of the collision,' al-



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though the issue of coverage was not before the court in these proceedings.

"The notice of appeal at paragraph 8 highlighted this issue. O'Donnell Robertson & Sanfilippo Barristers & Solicitors, separate coverage legal counsel for Royal & Sun Alliance, will be promptly filing a motion to the Court of Appeal for further direction on this matter although the issue of coverage was not properly before the court in these proceedings and RSA was not even a party. This is not an issue dealt with in this factum and it is Mr. Mihali's position that his coverage was not an issue properly before the court in these proceedings."

Before the hearing of the appeal on the merits, Security National brought a motion before Strathy to remove Kostyniuk as counsel. Royal & Sun Alliance also moved to intervene at the appeal on the merits.

In argument before Strathy, Kostyniuk acknowledged it was inappropriate to raise a ground of appeal that dealt with coverage. Strathy agreed.

"It was not in the appellant's interest to include the issue of his own insurance coverage as a ground of appeal," he wrote in his endorsement.

"The inclusion of [the grounds of appeal relating to coverage] gives rise to a clear

conflict between the interests of the appellant on the one hand and the interests of his insurer on the other."

As Strathy saw it, the inclusion of these grounds gave rise to an "inescapable conclusion that defence counsel was acting on the instruction of the insurer to advance a ground of appeal contrary to the interests of the insured."

The fact that Mihali wanted Kostyniuk to continue as his lawyer was, in these circumstances, not determinative of the motion.

"Where there is an appearance of impropriety, the removal of counsel may still be necessary to protect the repute of the administration of justice," wrote Strathy.

Here, allowing Kostyniuk to continue to act would do just that, he found. Mihali was free to retain counsel of his own choice with Royal & Sun Alliance responsible for legal fees and disbursements.

Kostyniuk says he was in a difficult position, although he acknowledged again that, in retrospect, he ought not to have included the grounds relating to coverage in the notice of appeal or the factum.

"It came up at trial several times that there might be issues between the two insurers, but the trial judge seemed to have forgotten about that when writing her decision," he says. "I was stuck between the two insurers but I made it clear that any coverage issue would be dealt with by O'Donnell on behalf of RSA."

Still, Kostyniuk notes, the message from the court is absolutely clear.

"What we in the defence bar all have to consider and remember is that the insured is No. 1 and that we can't raise anything, particularly coverage issues, that might create a semblance of conflict," he says. **LT**