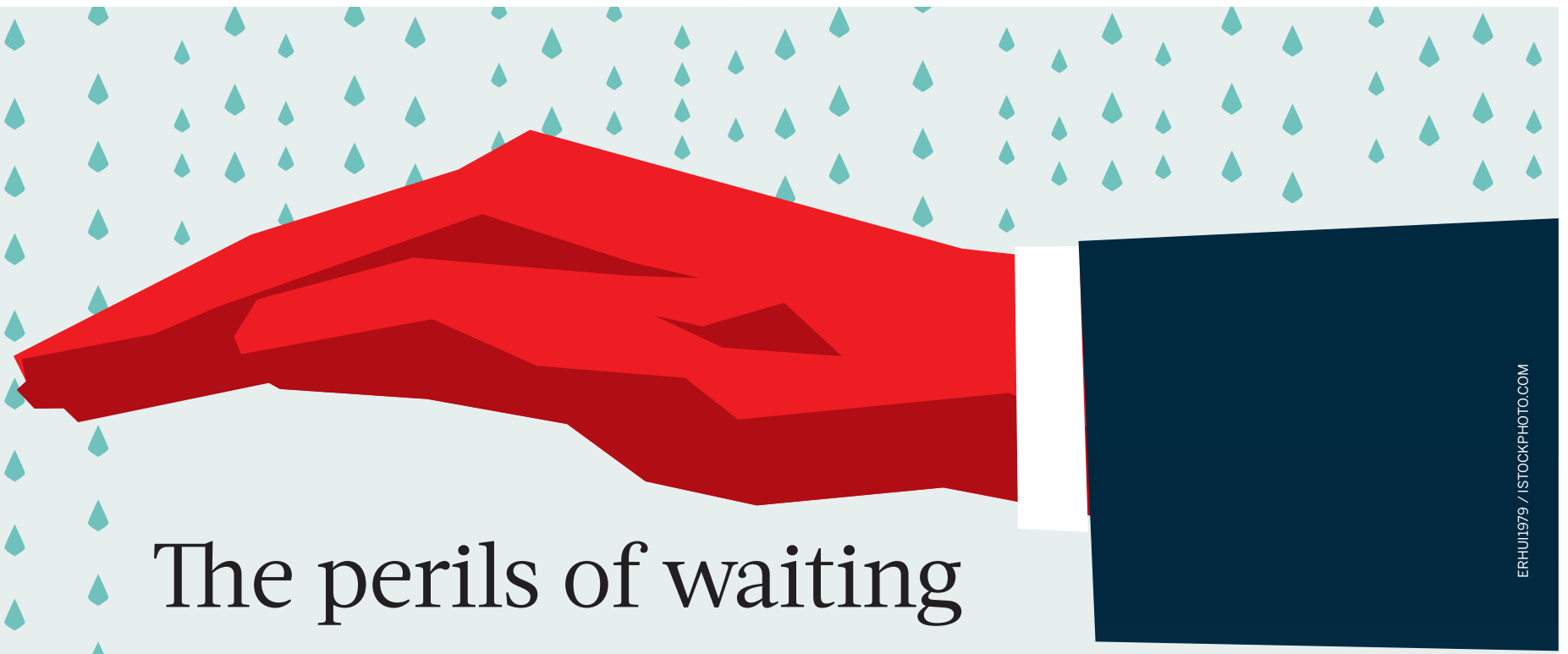
Focus INSURANCE



The perils of waiting

Early determination of coverage issues can be essential, appeal court ruling shows


Nina Bombier
Jaclyn Greenberg

It is common practice for an insurer to appoint counsel to defend an insured in litigation, and simultaneously reserve its right to dispute coverage later. The Court of Appeal's decision in *Mallory v. Werkmann Estate* [2015] O.J. No. 462, underscores that addressing coverage issues cannot always wait.

The Feb. 2 decision serves as a strong reminder to counsel to consider early the extent to which findings in the underlying litigation could impact the question of coverage. In some circumstances, coverage issues cannot await the outcome of such litigation, and some form of participation is required, even if it is just to ensure that the issues are properly delineated.

In *Mallory*, the insurer's failure to do so resulted in serious consequences for insurer and insured. The insured lost his lawyer of choice, as defence counsel was removed from the record for a conflict of interest. After all, an insurer cannot expect defence counsel to advance its interests instead of his client's. The insurer, meanwhile, was denied the opportunity to intervene on appeal and contest the trial judge's finding of coverage.

Underlying *Mallory* was an accident from a high-speed motorcycle ride involving three motorcyclists, including the insured, Mihali. Another cyclist lost control and crashed into the plaintiff's car, killing the driver's passenger and himself. The driver sued the motorcyclists and his own insurer, Security National Insurance Company, to cover for the possibility that the defendants were not liable or had limited insurance.

Mihali held a $1 million insurance policy with Royal & Sun Alliance Insurance Company (RSA). Insurer and insured executed a non-waiver agreement which authorized RSA to defend and settle the action on behalf of Mihali, while preserving RSA's right to continue investigating the claim and dispute coverage. The policy was subject to statutory conditions limiting coverage to $200,000, if Mihali was found to have engaged in a "race" or "speed test."

At trial, Mihali was found partially responsible for the collision, as he was part of a joint venture where the motorcyclists incited and encouraged one another to speed and break the rules of the road. Significantly, the trial judge also dismissed the claim against Security National as "Mr. Mihali was insured at the time of the collision." The problem was that RSA's coverage was not directly in issue at trial.

RSA disputed the finding, and wrote to the trial judge shortly after release of her reasons inquiring about the process to seek an amendment. The judge's secretary advised RSA that it was inappropriate to correspond directly with a judge with respect to an outstanding matter, and counsel should consult the rules and address outstanding matters through the trial co-ordinator. RSA did neither, and instead raised coverage issues through defence counsel, who filed a notice of appeal on behalf of Mihali. Specifically, it argued that the trial judge erred by addressing the issue of coverage in her decision.

Two motions to the Court of Appeal followed this notice of appeal. Security National brought a motion to remove counsel for conflict of interest, and RSA brought a motion to intervene. Chief Justice George Strathy granted the former, and denied the latter.

As to the motion to remove counsel, the advancement of the coverage-related grounds were clearly not in the interest of Mihali and raised a conflict of interest. Counsel had advanced grounds that were irrelevant to Mihali's defence of the plaintiff's case and which challenged a favourable finding for the client. This led the Chief Justice to the "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."

Racing, Page 15

Focus INSURANCE

Big difference between possession and operation

Determining vicarious liability for owners under the Highway Traffic Act

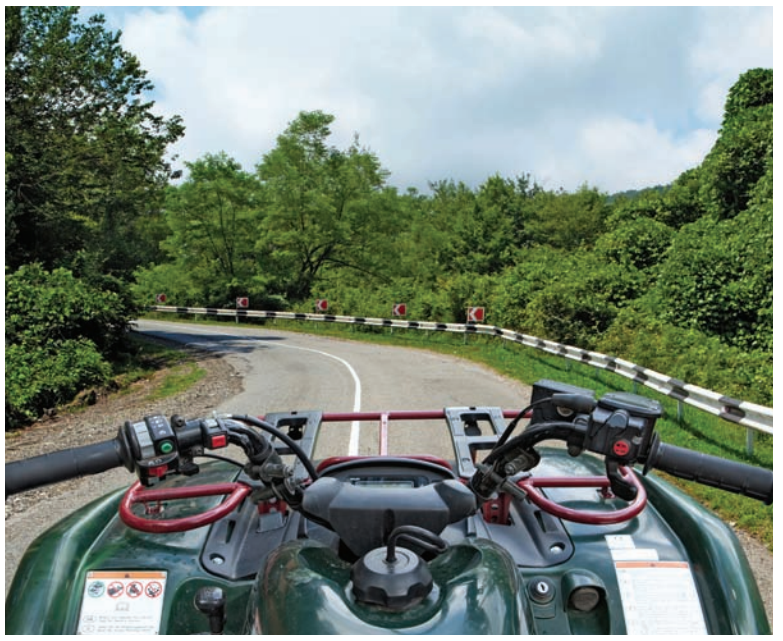
Stacey Stevens

In his ruling last Nov. 4 in *Fernandes v. Araujo* [2014] O.J. No. 5248, Justice Paul Perell held that a motor vehicle owner's vicarious liability, imposed under sections 192(1) and (2) of the *Highway Traffic Act* for the loss or damage sustained by any person by reason of negligence in the operation of the motor vehicle, is triggered once consent to possession of the vehicle is given, as opposed to consent to operate.

In the case, Sara Fernandes was injured on May 26, 2007, after the driver of an all-terrain vehicle (ATV) in which she was a passenger lost control while driving on a highway. There is no dispute that the owner of the ATV consented to the driver's possession of the vehicle and permitted its operation on his farm property. There was no evidence the owner expressly prohibited the driver from taking the ATV off his property.

Section 192(1) of the HTA provides that an owner of a motor vehicle is not vicariously liable for negligence in the operation of his/her motor vehicle on a highway, unless the motor vehicle was, without the owner's consent, in the possession of some person other than the owner.

Section 192(1) has been interpreted in two arguably conflicting Court of Appeal decisions: *Newman and Newman v. Terdik* [1952] O.J. No. 477, and *Finlayson v. GMAC Leaseco Ltd.* [2007] O.J. No. 3020.



KRIVOSHEEVV / ISTOCKPHOTO.COM

> Justice Perell referred to a similar line of reasoning taken by Justice Anne Mullins in Case v. Coseco Insurance Co. [2011] O.J. No. 3233, where the owner of a school bus was held to be vicariously liable for an accident caused by an employee who was driving the bus after hours and against the owner's express instructions not to do so.
>
> **Stacey Stevens**
> Thomson Rogers

In *Newman,* the defendant Terdik owned a tobacco farm. He gave his employee Perkinson possession of his farm truck for the sole purpose of driving it on the farm, with express instructions not to take it on the highway. Perkinson took the truck on the highway and subsequently injured the plaintiff Newman. The trial judge and the Court of Appeal held that given Terdik expressly forbade Perkinson from driving the truck on the highway, there was no consent to Perkinson's possession, and therefore Terdik was not vicariously liable.

The *Finlayson* decision follows a line of authority that began with *Thompson v. Bourchier* [1933] O.R. 525 (C.A.), wherein the Court of Appeal held that vicarious liability under 192(1) of the *Highway Traffic Act* is based on possession, not operation, of the vehicle. In *Finlayson,* the defendant GMAC leased a motor vehicle to John Simon and Theresa Jefferies. Section 18 of the lease expressly prohibited Simon from operating the vehicle. Simon and Jefferies each signed an acknowledgement to that effect. On March 3, 2000, Simon was operating the vehicle when it was involved in a single-vehicle collision. His passengers were injured and commenced an action against him and GMAC. GMAC subsequently brought a motion for summary judgment, arguing that its vicarious liability under section 192(1) was limited by the terms of the contract. The motion judge agreed. The plaintiff appealed. The Court of Appeal overturned the lower court's decision and in doing so, ruled that consent to possession is the triggering event for owner's liability.

Justice Eileen Gillese interpreted the triggering event in section 192(2) of the HTA is based on possession, not use of the vehicle, and public policy dictates that a motor vehicle owner cannot escape vicarious liability simply because the person he trusted with possession of the vehicle breaches some condition attached to it. In her opinion, public policy requires that an owner must be held responsible for the careful management of whom he entrusts possession of his vehicle to.

Justice Perell followed the reasoning in *Thompson v. Bourchier* and *Finlayson*. He distinguished *Fernandes f*rom the *Newman* case for three reasons. First, in his view, the owner in *Fernandes* consented to the possession and driving of his ATV. Secondly, he held that in *Newman,* Justice John Mackay did not properly consider *Thompson v. Bourchier*, and therefore it may have been wrongly decided. Thirdly, Justice Perell reasoned it is possible that the finding in *Newman* can be distinguished from the case at hand because Terdik had never consented to Perkinson having legal possession of the automobile on the highway — in *Fernandes*, the owner did not place any restrictions on the driver's use of his ATV.

Justice Perell referred to a similar line of reasoning taken by Justice Anne Mullins in *Case v. Coseco Insurance Co.* [2011] O.J. No. 3233, where the owner of a school bus was held to be vicariously liable for an accident caused by an employee who was driving the bus after hours and against the owner's express instructions not to do so. At the conclusion of her reasons, Justice Mullins followed the reasoning in *Finlayson,* ruling that an owner's vicarious liability under s. 192 is based on possession, as opposed to the use of the vehicle, rather than that in *Newman,* as the Court of Appeal did not consider the difference between consent to possession and consent to use.

The defendant in *Fernandes* has filed a notice of appeal. The issue of a motor vehicle owner's vicarious liability under s. 192 of the *Highway Traffic Act,* and in particular whether it is triggered by possession or use of the vehicle, remains unsettled. The appeal is scheduled to be heard in June.

Stacey Stevens is a partner with Thomson Rogers in Toronto.

Racing: Insurer couldn't intervene, insured lost lawyer of choice

Continued from page 14

Despite defence counsel acknowledging that his actions were inappropriate and Mihali's preference that counsel continue to act, the Chief Justice decided that it was necessary to remove counsel from the record. Counsel breached his duty of loyalty and good faith to the client. The removal order was required "to protect the integrity of the administration of justice and avoid the appearance of impropriety."

In the second motion, RSA sought to intervene in the appeal as an added party on the basis that the finding of coverage may adversely affect its interests, relying on Rule 13.01(1)(b) of the *Rules of Civil Procedure* which authorizes intervention if the non-party is adversely affected by a judgment in the proceeding. The minor distinction aside, Chief Justice Strathy did not accept that RSA would be affected by the trial judge's finding.

In any event, even to the extent that this finding could adversely affect RSA's interests, Justice Strathy found that the insurer was partially to blame for the situation it found itself in. He noted that the trial judge had attempted to clarify the scope of issues to determine, including coverage, at the opening of trial. Counsel failed to delineate the boundaries of the trial, despite the fact that there were coverage issues in the background and the appellant was being defended under a non-waiver agreement.

Indeed, the trial judge specifically addressed the question of coverage with defence counsel, who responded that absent a finding that the defendants had been racing or engaging in a speed test, RSA would provide coverage and the claim against Security National could be dismissed. As the trial judge made no finding of racing or a speed test, Justice Strathy held it was understandable why she concluded that Mihali had coverage from RSA.

It was incumbent on RSA to ensure that its coverage position was properly communicated and the scope of trial clearly defined for the trial judge. It took no steps prior to the judgment being released to clarify these points. It did not contact the trial co-ordinator as suggested, while the trial judge remained seized. It did not avail itself of the right to be added as a statutory third party under the *Insurance Act*. Therefore, the Chief Justice held that RSA bore some responsibility for the resulting confusion surrounding coverage, and could not complain about this on appeal.

Nina Bombier is a partner at Lenczner Slaght whose litigation practice focuses on commercial, insurance, professional negligence and regulatory matters. Jaclyn Greenberg is an associate with a focus on corporate-commercial disputes, professional liability and regulation, insurance litigation and estate litigation matters.