

COURT OF APPEAL FOR ONTARIO

CHARRON, ROSENBERG AND GOUDGE J.J.A.

B E T W E E N:)	
)	
KINGSWAY GENERAL INSURANCE)	Peter H. Griffin
COMPANY)	for the appellant
)	
Applicant)	
(Respondent))	
)	
- and -)	
)	
)	
CANADA LIFE ASSURANCE)	Vance H. Cooper
COMPANY AND GLOBAL CLAIMS)	for the respondent
MANAGEMENT INC.)	
)	
Respondents)	
(Appellants))	
)	
)	Heard: April 3, 2001

On appeal from the judgment of Justice James M. Spence dated June 7, 2000.

GOUDGE J.A.:

[1] On January 31, 1998, Shirley Stoesser was seriously injured in a motorcycle accident while on vacation in Florida. Pursuant to her out-of-province emergency medical insurance policy, her insurer, Canada Life Assurance Company (“Canada Life”) paid \$392,523.77 Cdn for the medical treatment she received in Florida. The question in this appeal is whether Canada Life can assert a subrogated claim for this amount against Kingsway General Insurance Company (“Kingsway”) the insurer of the driver said to be responsible for the accident.

[2] Spence J. held that Canada Life has no such right because of the terms of its policy. For the reasons that follow, I agree.

[3] I would therefore dismiss the appeal.

FACTS

[4] The relevant facts are essentially undisputed. Shirley Stoesser and her husband, Ronald Stoesser were residents of Ontario. Prior to leaving on vacation for Florida in the winter of 1998, they purchased an emergency hospital/medical travel insurance policy from Canada Life, an insurance company incorporated pursuant to the laws of Canada, with its head office in Toronto. The policy was issued in Ontario and provided coverage for emergency hospitalization or medical treatment required while travelling outside the insured's province of ordinary residence.

[5] Central to this appeal are two provisions found in the general conditions of that policy. They are as follows:

8.3 Subrogation – If the Insured Person shall acquire any right of action against any person, firm or organization for loss covered hereunder, the Insured Person shall, if requested by the Company, assign and transfer such a claim or right of action to the Company and will permit suit to be brought in the Insured Person's name under the direction and expense of the Company. The Insured Person shall do nothing after a loss to prejudice such rights.

8.4 If any of the terms or conditions of this policy are in conflict with the statutes of the province or territory wherein this policy is issued the terms and conditions are hereby amended to conform to such statutes.

[6] The accident on January 31, 1998 occurred when the motorcycle driven by Ronald Stoesser went off the road in Florida. Mr. Stoesser was killed in the accident and Shirley Stoesser, his passenger on the motorcycle, was seriously injured. Before returning to Canada she required extensive medical treatment in Florida, which was paid for by Canada Life pursuant to the travel insurance policy.

[7] The motorcycle was registered in Ontario and was insured under a policy issued in Ontario by Kingsway.

[8] Canada Life notified Kingsway of its intention to make a subrogated claim against Kingsway, as Ronald Stoesser's insurer, for the payment of Shirley Stoesser's medical expenses. Canada Life's position was that Ronald Stoesser was at fault in the accident. However, before Canada Life commenced proceedings, Kingsway launched an application to determine whether Canada Life could assert this right of subrogation, and stand in the shoes of its insured Shirley Stoesser.

[9] The application was heard by Spence J. In addition to these facts, Spence J. received an expert opinion tendered on behalf of Canada Life on a number of aspects of Florida law. The opinion noted that Florida has long recognized the subrogation rights of an insurer to recover payments made to an insured for injuries caused to the insured by a tortfeasor. However, the opinion also makes clear that in construing restrictions in an insurance policy a Florida court would look to Canadian statutory and common law where the policy in question was issued in Canada. Spence J. concluded that Canada Life was not entitled to assert a subrogated claim in respect of the medical expenses which it had paid on behalf of Shirley Stoesser. He found that the issue was not one to be determined by the Florida law before him, but by an interpretation of the Canada Life policy, particularly paragraphs 8.3 and 8.4. He determined that the provision for subrogation in paragraph 8.3 conflicted with s. 267.8(17) of the *Insurance Act*, R.S.O. 1990, c. I.8, which excludes the right of subrogation for the payment of health care expenses. As a result, paragraph 8.4 required the Canada Life policy to be read as excluding the right of subrogation sought by Canada Life. He therefore allowed the Kingsway application.

Analysis

[10] In this court, Canada Life raised two issues in argument. First, it said that Spence J. erred in failing to find that, as the law of the place where the accident occurred, the law of Florida applied, thus permitting the insurer the right of subrogation to recover the payments made on behalf of its insured. Second, it argued that Spence J. erred in according any benefit to Kingsway pursuant to the Canada Life insurance policy since Kingsway was not a party to that policy. I will deal with each of these in turn.

[11] In arguing for the applicability of Florida law to determine whether Canada Life has a right of subrogation the appellant relied on the jurisprudence exemplified by *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022. In that case La Forest J. for the majority of the Supreme Court of Canada held that the rule of private international law that should generally be applied in torts is the law of the place where the accident occurred.

[12] In my view, it does not follow from this that because the accident in this case happened in Florida, Florida law is applied to determine whether Canada Life has a right of subrogation. It may be that the determination of whether the driver of the motorcycle

was at fault for the accident is to be determined according to Florida law. However, the right of Canada Life to subrogate to the position of its insured depends not on tort law but on its contract with its insured. The question is whether Canada Life has contracted away its right of subrogation in the circumstances of this case. That question is one of contract law not tort law.

[13] I do not think there is any doubt that the policy issued by Canada Life must be interpreted according to Ontario law, not Florida law. The policy was issued to residents of Ontario by a Canadian company headquartered in Ontario. The clear implication of paragraph 8.4 is that the policy is to conform to the statutes of Ontario. There is no suggestion in the language of the policy that it is to be interpreted according to Florida law. Hence I think Spence J. was correct in concluding that the evidence of Florida law tendered before him was not relevant to his task of interpreting the contract between Canada life and its insured Shirley Stoesser.

[14] Moreover, I think Spence J. was correct in finding that this contract precluded Canada Life's right of subrogation in the circumstances of this case. I have reached this conclusion as follows.

[15] It is not disputed that the payment by Canada Life of Shirley Stoesser's Florida medical bill comes within the scope of health care expenses described in s. 267.8(4) of the *Insurance Act*. It is, of course, this payment which Canada Life says accords it a right of subrogation.

[16] However, s. 267.8(17) makes clear that a person making such a payment on behalf of another person has no right of subrogation in respect of that payment. This subsection reads as follows:

Limitation on subrogation

(17) A person who has made a payment described in subsection (1), (4) or (6) is not subrogated to a right of recovery of the insured against another person in respect of that payment.

[17] Moreover, s. 267.4 of the *Insurance Act* makes clear that these provisions apply to damage claims for bodily injury arising from the use of an automobile in Canada or the United States.

[18] These three statutory provisions of the province where the Canada Life policy was issued, when read together, provide no right of subrogation in respect of the payment

made by Canada Life on behalf of its insured Shirley Stoesser. They are in conflict with the right of subrogation provided in paragraph 8.3 of the Canada Life policy. Paragraph 8.4 of the policy therefore requires that the policy be amended to conform to this legislation. The policy therefore must be interpreted to provide that Canada Life has no right of subrogation in respect of this payment.

[19] The second issue advanced by the appellant is that even if the Canada Life policy, properly interpreted, provides that the insurer has no right of subrogation, Kingsway and its insured (the alleged tortfeasor) cannot take the benefit of this because they are not parties to the contract.

[20] I disagree. I think the principles enunciated in *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.*, [1999] 3 S.C.R. 108 are a full answer to this argument.

[21] That case establishes that a third party can claim the benefit of a waiver of subrogation clause in a contract to which it is not a party if the contracting parties intended to extend the benefit to the third party and if the activities of the third party are those contemplated as coming within the scope of that clause.

[22] Both factors exist here. The Canada Life policy provides no right of subrogation to the insured's right of recovery in an action in respect of health care expenses arising from the use of an automobile. This must have reference to proceedings against third parties (and their insurers) who are alleged to have necessitated the expenses incurred by the insured. The policy must also encompass claims for such expenses based on the alleged tortious activities of those third parties. The parties to the Canada Life policy must therefore have intended to extend the benefit of the waiver of subrogation clause to third parties in the position of the alleged tortfeasor Ronald Stoesser and his insurer, Kingsway.

[23] I would therefore dismiss the appeal with costs.

Released: August 14, 2001 "LC"

"S.T. Goudge J.A."

"I agree Louise Charron J.A."

"I agree M. Rosenberg J.A."