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COURT OF APPEAL FOR ONTARIO

CATZMAN, LASKIN and ARMSTRONG JJ.A.

B E T W E E N :	)	
	)	
ROBERT J. TUTTLE and R & R TUTTLE TRUCKING	)	Thomas G. Andrews for the plaintiffs (appellants)
Plaintiffs (Appellants)	)	
- and -	)	
THE TRAVELERS INDEMNITY COMPANY, SHARON BATEMAN as Litigation Administrator on behalf of the Estate of JOHN HAROLD BATEMAN, MILL CREEK EQUIPMENT LTD. and THE CONNECTICUT INDEMNITY COMPANY	)	Todd J. McCarthy and James M. Flaherty for the respondent The Travelers Indemnity Company
Defendants (Respondents)	)	
	)	Heard: February 11, 2005

On appeal from the judgment of Justice Ellen M. Macdonald of the Superior Court of Justice dated August 13, 2004, reported at [2004] O.J. No. 5019.

LASKIN J.A.:

I. INTRODUCTION

[1] This appeal turns on the interpretation of s. 263 of the *Insurance Act*, R.S.O. 1990, c.I.8, which deals with compensation for damage to an automobile caused by a motor vehicle accident. Under this section, an automobile owner's own motor vehicle liability

insurer must pay for the damage to the extent that its insured was not at fault for the accident.

[2] In this case, the damaged vehicle was insured under two policies: a collision insurance policy issued by The Associates Insurance Company, and a liability insurance policy issued by The Travelers Indemnity Company. Associates paid for the damage to the vehicle. It then launched a subrogated claim against Travelers.

[3] The sole issue on this appeal is whether s. 263(5) of the *Insurance Act* bars Associates' subrogated claim. Section 263(5) provides that if the section applies, "an insurer…has no right of indemnification from or subrogation against any person for payments made to its insured under this section." On a motion for summary judgment, the motions judge held that s. 263(5) applied, thus barring Associates' claim. I disagree. Section 263(5) only applies if the insurer paid for the damage to its insured's automobile under a motor vehicle liability policy. Because the Associates policy is not a motor vehicle liability policy, s. 263 does not apply to it and Associates is therefore not precluded from exercising its right of subrogation.

II. RELEVANT FACTS

(a) The Accident

[4] On June 14, 2000, Robert Tuttle was driving his tractor-trailer on the Queen Elizabeth Way near Fort Erie when he was rear-ended by a truck driven by John Bateman. Tragically, Mr. Bateman died as a result of the accident. The damage to Mr. Tuttle's tractor-trailer amounted to $95,542.33 (U.S.). All parties agree that Mr. Bateman was 100% at fault for the accident.

(b) The Insurance

[5] At the time of the accident, Mr. Tuttle lived in New York State. Both of the insurance policies on his tractor-trailer were issued in the United States. The Associates policy insured for collision damage only; it was not a motor vehicle liability policy. (The Associates policy could not have been issued in Ontario, because third party liability coverage is mandatory under the Ontario automobile insurance regime.) However, the Travelers policy was a motor vehicle liability policy; and moreover, in 1999 Travelers had filed an undertaking with Ontario's Superintendent of Insurance to be bound by s. 263. Mr. Bateman's truck was insured under a motor vehicle liability policy issued by Markel Insurance, which was licensed to sell automobile insurance in Ontario.

[6] Associates paid Mr. Tuttle for the damage to his tractor-trailer, less a $2,000 (U.S.) deductible. It then began a subrogated action against Travelers. Mr. Tuttle also made a personal claim against Travelers to recover his deductible. Both Associates and Mr. Tuttle moved for summary judgment on their claims against Travelers.

(c) The Motion

[7] The motions judge dismissed the motion for summary judgment on a number of grounds. She held that because Travelers had signed an undertaking to be bound by s. 263(5), Associates was barred from bringing a subrogated claim against Travelers. In addition, she held that Travelers' Statement of Defence raised triable issues relating to the quantum of damages, liability, and the applicability of the one-year limitation period in s. 9(4) of the statutory conditions in the *Insurance Act*.

[8] At the beginning of oral argument, the panel expressed its concern that the motions judge's order was interlocutory and that therefore this court had no jurisdiction to entertain the appeal. Counsel for both parties, however, persuaded us that although the motions judge's order was interlocutory, her holding on the application of s. 263(5) was a final determination, appealable as of right to this court. It was on this determination alone that we heard oral argument.

III. DISCUSSION

(a) The Statutory Regime: s. 263

[9] Before the enactment of what is now s. 263 of the *Insurance Act*, automobile damage claims were largely governed by the tort system. When an insured's vehicle was damaged as a result of a car accident, the insured would claim against the tortfeasor's insurer, or, if the insured had purchased optional collision coverage, against his or her own insurer. The insured's insurer would then bring a subrogated claim against the tortfeasor's insurer. This regime often required not one, but two insurers to settle a single claim; it caused unnecessary delays; and it produced unnecessary increases in transaction costs, resulting in higher premiums.

[10] By contrast, under the current regime, even if a car owner does not purchase collision coverage, the insured's insurer – not the tortfeasor's insurer – pays for the damage to the insured's car to the extent that the insured was not at fault for the accident. The insurer pays for the damage under the third party liability section of the insured's own motor vehicle liability policy. And the insurer has no right of subrogation for the payments made to its own insured. Moreover, an insured can no longer sue the tortfeasor for damage to his or her car. The insured can recover the at-fault portion of the damages only by buying collision coverage. This system works on the law of averages: the losses even out for automobile insurers, and at the same time, transaction costs are substantially reduced.

[11] In *Automobile Insurance in Ontario* (Toronto: Butterworths, 1991) at 51, Allan O'Donnell explained the rationale for precluding subrogated claims by one insurer against another:

> Under the previous system insurers subrogated against each other when they paid their insured for automobile damage in circumstances where their insured was not wholly responsible for the accident. Even though most insurers were signatories to a settlement agreement which cut down on the number of disputes as to liability, that system still cost money. On average a given insurer would pay out approximately $10 million a year to all other insurers for such subrogated claims and would collect the same amount from all other insurers. All that was happening was that moneys were changing hands and incurring substantial transaction costs along the way. In effect, there were transaction costs in the system which produced no savings to insurers or insureds. Thus, under the new system… subrogation has been abolished. Thus, we have a "knock for knock" system whereby each insurer absorbs most of its policyholders' property damage claims without attempting to recover same from the insurers of tortfeasors causing such claims. In any individual case, the result can be unfair to the insurer but in the totality of such claims, the result is fair to all insurers. Insureds are not affected because they are not surcharged in premium for accidents that are not their fault.

See also Sharpe J. in *McCourt Cartage Ltd. v. Fleming Estate* (1997), 35 O.R. (3d) 795 at 798 (Gen. Div.).

[12] The current regime is codified in s. 263 of the *Insurance Act*. For it to apply, s. 263(1) prescribes that three conditions must be met:

> **263.** (1) This section applies if,
>
> (a) an automobile or its contents, or both, suffers damage arising directly or indirectly from the use or operation in Ontario of one or more other automobiles;
>
> (b) the automobile that suffers the damage or in respect of which the contents suffer damage is insured under a contract evidenced by a motor vehicle liability policy issued by an insurer that is licensed to undertake automobile insurance in Ontario or that has filed with the Superintendent, in the form provided by the Superintendent, an undertaking to be bound by this section; and

> (c) at least one other automobile involved in the accident is insured under a contract evidenced by a motor vehicle liability policy issued by an insurer that is licensed to undertake automobile insurance in Ontario or that has filed with the Superintendent, in the form provided by the Superintendent, an undertaking to be bound by this section.

[13] If these conditions are met, s. 263(2) stipulates that the insured's own insurer pays for the damage under the third party liability section of the policy to the extent that its insured is not at fault for the accident:

> (2) If this section applies, an insured is entitled to recover for the damages to the insured's automobile and its contents and for loss of use from the insured's insurer under the coverage described in subsection 239(1) as though the insured were a third party.

[14] If the s. 263 regime applies, s. 263(5)(a) prevents insureds from suing anyone other than their own insurer for damages to their car:

> (5) If this section applies,
>
> (a) an insured has no right of action against any person involved in the incident other than the insured's insurer for damages to the insured's automobile or its contents or for loss of use…

[15] Finally, s. 263(5)(b), which is central to this appeal, prevents an insurer from advancing a subrogated claim for payments made to its insured, except as permitted by regulation:

> (5) If this section applies,
>
> (b) an insurer, except as permitted by the regulations, has no right of indemnification from or subrogation against any person for payments made to its insured under this section.

No regulations have been passed under s. 263(5)(b) that affect this litigation.

(b) Application of s. 263 to this case

[16] The motions judge held that, because Travelers had signed an undertaking under s. 263, s. 263(5)(b) prevented Associates from bringing a subrogated claim against Travelers. However, s. 263(5)(b) only prevents an insurer's subrogated claim for a payment made to its insured "under this section". Therefore, the sole question on this appeal is whether Associates' payment to Mr. Tuttle was a payment under s. 263. In my view, it was not because Associates did not insure Mr. Tuttle under a motor vehicle liability policy.

[17] As set out above, s. 263 only applies if: (i) an automobile is damaged in a motor vehicle accident involving at least two automobiles; (ii) the damaged automobile is insured under a motor vehicle liability policy; and (iii) at least one other automobile involved in the accident is insured under a motor vehicle liability policy. Where those three conditions are met, insureds can, under s. 263(2), recover for damage to their automobile from their own insurer under the third party liability coverage in their policy.

[18] Because Associates did not insure Mr. Tuttle under a motor vehicle liability policy, its payment to him was not made under s. 263(2). Therefore, Associates is not bound by the prohibition against subrogation in s. 263(5)(b). It may bring a subrogated claim against Travelers. This claim is authorized by s. 278(1) of the *Insurance Act*.

> **278.** (1) An insurer who makes any payment or assumes liability therefor under a contract is subrogated to all rights of recovery of the insured against any person and may bring action in the name of the insured to enforce those rights.

Mr. Tuttle is also entitled to assert a personal claim against Travelers for his $2,000 (U.S.) deductible, which may be offset by any applicable deductible in his policy with Travelers.

[19] Travelers, on the other hand, is bound by s. 263. It issued a motor vehicle liability policy to insure Mr. Tuttle's tractor-trailer, and it filed an undertaking with the Superintendent to be so bound. The other vehicle involved in the accident – Mr. Bateman's truck – was also insured under a motor vehicle liability policy. Therefore, if Travelers is liable to Associates, Travelers has no right of subrogation against Mr. Bateman's motor vehicle liability insurer, Markel.

[20] I make two other comments. First, Travelers submitted that because Associates, the collision insurer, extracted a premium from Mr. Tuttle, it should pay for the damage to the tractor-trailer. At first blush, this seems to produce a fair result, but this seemingly fair result has been overtaken by the statutory regime in s. 263. Under that regime, the third party liability coverage in a motor vehicle liability policy must respond to a claim for damage to an automobile. Therefore, subject to the other issues the motions judge

ordered to be tried, requiring Travelers to pay for the damage to Mr. Tuttle's tractor-trailer is consistent with the purpose of s. 263.

[21] Second, this is a highly unusual case involving the applicability of an Ontario statute to an insurance policy that could not have been issued in Ontario. Because such a policy could not be sold in Ontario, it is unlikely that similar cases will arise in the future.

IV. CONCLUSION

[22] I would set aside the motions judge's holding that Associates is precluded from asserting a subrogated claim against Travelers and hold that it is entitled to do so. However, my holding does not entitle Associates to summary judgment. The motions judge found that there were other triable issues. Accordingly, I would not disturb either her dismissal of the motion for summary judgment or her costs order. The appellants are entitled to their costs of the appeal, in the agreed amount of $5,000, inclusive of disbursements and G.S.T.

Released: MAC APR 20 2005

Signed: "John Laskin J.A."
"I agree: M.A. Catzman J.A."
"I agree Robert P. Armstrong J.A."