CITATION: Clarendon National Insurance v. Candow, 2007 ONCA 680
DATE: 20071005
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COURT OF APPEAL FOR ONTARIO

MACPHERSON, SHARPE and JURIANSZ JJ.A.

BETWEEN:

CLARENDON NATIONAL INSURANCE and SIGNOTHAHACK BOUNTHAI

Respondents (Plaintiffs)

and

AMANDA A. CANDOW and JOAN CANDOW

Appellants (Defendants)

Derek V. Abreu for the appellants (defendants)

No one present for the respondents (plaintiffs)

Heard: September 12, 2007

On appeal from the order of Justice H. Sachs of the Superior Court of Justice dated January 15, 2007, with reasons reported at (2007), 45 C.C.L.I. (4th) 58.

JURIANSZ J.A.:

[1] This appeal raises the question whether there are circumstances in which Ontario's "no-fault" insurance regime permits a tort action for recovery of property damage against a negligent party. I conclude that the "no-fault" regime prohibits all tort actions for recovery of property damage against a negligent party. This prohibition applies not only to claims of individuals, but also to subrogated claims brought by insurers.

[2] In this case, the motion judge considered herself bound by this court's judgment in *Tuttle v. Travelers Indemnity Co.* (2005), 75 O.R. (3d) 184 to permit the individual plaintiff and his subrogated insurer to maintain their tort action in negligence against the appellants on the basis that the property damage payments that the insurer paid to the insured were not made under s. 263 of the *Insurance Act*, R.S.O. 1990, c. I.8. In my view, *Tuttle* is distinguishable and s. 263 bars the respondents' tort claim.

The Facts

[3] The individual plaintiff in the action, Signothahack Bounthai, resides in Brampton, Ontario. He is an owner-operator for an American trucking company located in Texas. As is common with trucks that travel through various jurisdictions, his tractor was insured by double policies of insurance. Clarendon National Insurance provided the physical damage coverage and American Home Assurance provided the liability coverage. Clarendon is a national insurance company located in and governed by the laws of the United States. It is not a licensed insurance carrier under the provisions of the *Insurance Act* and did not file with the Superintendent of Financial Services an undertaking to be bound by the provisions of s. 263 of the *Insurance Act*. American Home is also an American insurance company. However, American Home has filed an undertaking under s. 263.

[4] Mr. Bounthai was involved in a collision with the appellants on Highway 401 in Toronto. His tractor suffered physical damage and Clarendon, subject to the policy's deductible, paid for that damage. Mr. Bounthai and Clarendon commenced an action in Ontario alleging that the collision was caused by the appellants' negligence and seeking reimbursement of the amounts paid to repair the tractor together with interest and costs.

[5] The appellants filed a statement of defence claiming that the respondents' action was barred by s. 263 of the *Insurance Act*. Consequently, the respondents brought a motion under Rule 21 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, for an order that s. 263 did not bar their action and for an order striking the paragraphs of the statement of defence that asserted that such a statutory bar existed.

[6] The motion judge granted the orders and the appellants brought this appeal. Her reasons and the issues raised by the appeal must be considered in the context of the statutory no-fault regime.

The Statutory No-Fault Regime

[7] Section 263 of the *Insurance Act* replaced the tort system that resolved automobile damage claims prior to its enactment. In the new statutory scheme, insureds can no longer sue the tortfeasor driver whose negligence has caused damage to their cars. Rather, their own liability insurer pays for the damage, to the extent that they were not at

fault, under the third party liability section of their motor vehicle liability policies. Insureds can recover the at-fault portion of their damage by purchasing collision coverage. Insurers have no right of subrogation for payments to their own insureds, but, on the other hand, do not have to pay the subrogated claims previously brought by other insurers in the tort system. The result is that the statutory regime eliminates the transactions costs that were inherent in the tort system.

[8] Section 263 is the heart of the regime. The section applies when three criteria are 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
>
> I 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.

[9] When the section applies, s. 263(2) provides that the insured is entitled to recover property damage from his or her own insurer:

> (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.

[10] Key to the regime is the insured's inability to recover property damage from anyone other than his or her own insurer, except in the very limited circumstances described in s. 263(5)(a.1):

> (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;
>
> (a.1) an insured has no right of action against a person under an agreement, other than a contract of automobile insurance, in respect of damages to the insured's automobile or its contents or loss of use, except to the extent that the person is at fault or negligent in respect of those damages or that loss.

[11] In addition, s. 263(5)(b) prevents insurers from advancing subrogated claims for payments they have made to their insureds:

> (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.

[12] Insurers from other jurisdictions can opt to participate in Ontario's regime by filing an undertaking with the Superintendent under s. 226.1:

> 226.1 An insurer that issues motor vehicle liability policies in another province or territory of Canada, the United States of America or a jurisdiction designated in the Statutory Accident Benefits Schedule may file an undertaking with the Superintendent, in the form provided by the Superintendent, providing that the insurer's motor vehicle liability policies will provide at least the coverage described in sections 251, 265 and 268 when the insured automobiles are operated in Ontario.

[13] Foreign insurers who file undertakings derive the advantages of being part of the regime, but s. 226.1 obligates them to provide certain benefits to their insureds. These

benefits include, for example, statutory accident benefits pursuant to s. 268 and damage coverage to the insured's automobile pursuant to s. 265(1)I.

Decision of the Motion Judge

[14] The motion judge began by recognizing that s. 263 of the *Insurance Act* establishes a regime for the payment of compensation for automobile damage claims. However, relying on this court's decision in *Tuttle*, she concluded that the s. 263 regime did not apply to prevent the plaintiffs from proceeding with their claim.

[15] In *Tuttle*, the damaged vehicle, also a truck, was insured under two policies: a collision insurance policy issued by The Associates Insurance Co., an American insurance company that was not licensed to undertake automobile insurance in Ontario and that had not filed an undertaking pursuant to s. 263, and a motor vehicle liability policy also issued in the United States by The Travelers Indemnity Company, an insurance company that had filed an undertaking to be bound by s. 263. The accident was entirely the fault of the driver of the other vehicle. The collision insurer paid Mr. Tuttle for his property damage and then brought a subrogated claim against Mr. Tuttle's liability insurer. This court in *Tuttle* decided that this claim was not barred by s. 263(5)(b).

[16] The motion judge understood this court's decision in *Tuttle* to be based on a reading of s. 263(5)(b) alone, and particularly on the fact that the insurer's payment to its insured was not made "under this section". She quoted and relied upon the following comment Laskin J.A. made at paragraph 3:

> 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 rights of subrogation.

[17] The motion judge did note that one of the purposes of the s. 263 regime is to prevent actions in negligence for property damage to automobiles, but she considered herself bound by this court's decision in *Tuttle*. Therefore, because Clarendon had not paid for the damage to Mr. Bounthai's vehicle under s. 263, she concluded that the plaintiffs were not barred by s. 263 from pursuing their claim against the defendants.

Discussion

[18] Two questions arise in this appeal. First, is the individual plaintiff entitled to maintain a tort action in negligence against the individual tortfeasors? Second, does the

insurer have a subrogated claim against the individual tortfeasors? As will be seen the first question determines the second.

Can the individual plaintiff maintain a tort action in negligence against the individual tortfeasors?

[19] In this case, Mr. Bounthai's liability insurer, American Home, was statutorily required to provide coverage for his property damage because it had filed an undertaking under s. 226.1. Because the undertaking was filed, all three criteria of s. 263(1) are met: Mr. Bounthai's vehicle suffered damage from an accident in Ontario, his vehicle was insured by an insurer that had filed an undertaking with the Superintendent, and another vehicle involved in the accident (i.e. the appellants') was insured by a domestic insurer licensed to undertake automobile insurance in Ontario. Consequently, Mr. Bounthai is entitled to recover for the physical damage to his tractor from his liability insurer, American Home.

[20] As the statutory regime applies, Mr. Bounthai's ability to sue in tort is restricted by the provisions of s. 263. Mr. Bounthai cannot maintain a tort action in negligence against the Candows. Section 263(5)(a) prevents him from suing anyone other than his own insurer for damages to his car. Sections 263(5)(a)'s general rule is subject to the exception set out in s. 263(5)(a.1). This exception permits a right of action where an action is brought "*under an agreement, other than a contract of automobile insurance*". It permits an action in contract and does not permit an action in tort.

[21] The exception would apply, for example, where a provision of a lease agreement requires that the lessee return the vehicle to the lessor in an undamaged state. Where the lessee fails to do so, the lessor can bring an action against the lessee in contract: *583809 Ontario Ltd. v. Kay* (1995), 24 O.R. (3d) 445 (Gen. Div.), *A Plus Car & Truck Rental v. Pun*, [1999] O.J. No. 1291 (Div. Ct.). The exception in s. 263(5)(a.1) has been applied also to situations where the defendant has agreed to pay for the damage to the plaintiff's vehicle without the parties resorting to their insurance – in effect a claim on an oral contract. In *Harpeet v. Markham (Town of)*, [2006] O.J. No. 2439 (S.C.J.), P. Gollom Deputy J. observed at para. 17 that the exception in 263(5)(a.1) "expands causes of action against a person involved in the incident provided the person has entered into a contract, and the person is at fault or negligent." *McClinton v. Estien*, [2003] O.J. No. 5680 (S.C.J.), is another such case.

[22] In this case, however, Mr. Bounthai's action is not brought "under an agreement". Mr. Bounthai's claim is a tort claim that falls within the general rule of s. 263(5) so it is statutorily barred.

Does the insurer have a subrogated claim against the individual tortfeasors?

[23] An insurer's right to bring a subrogated action is dependent on the existence of a cause of action by the insured. This is so both under the common law and under the

statute. Justice Sharpe explained the common law principle in *McCourt Cartage Ltd. v. Fleming Estate* (1997), 35 O.R. (3d) 795 at 799 (Gen. Div.):

> If the insured has no right of action, then the foundation of the insurer's right to bring a subrogated action is removed. It is clear that at common law, an insurer's right to bring a subrogated action is derivative of and dependent upon the existence of a cause of action by the insured.

[24] The *Insurance Act* is entirely consistent with this common-law principle by providing an insurer is subrogated "to all rights of recovery of the insured". Section 278 (1) of the Act provides:

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

[25] Section 263(5)(b) does not disturb this common-law and statutory principle. The import of s. 263(5)(b) is to eliminate any rights of subrogation an insurer may have for payments it has statutorily been compelled to make to the insured "under this section". Where the insurer has made the payment other than "under this section", the insurer is subrogated to whatever rights of recovery that the insured has otherwise.

[26] Since, as discussed above, s. 263(5)(a) extinguishes an insured's right to recover property damage from a tortfeasor, his or her insurer cannot have a subrogated right to recover property damage from a tortfeasor. Therefore, Clarendon has no right to bring a subrogated tort claim in this case.

[27] The motion judge, following *Tuttle*, resisted this conclusion. In particular, she relied on Laskin J.A.'s comment quote above that "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 rights of subrogation." This observation, however, must be read as applying to the particular facts before the court in *Tuttle*.

[28] The facts in *Tuttle w*ere different because it did not involve a tort claim, but rather an action by one insurance company against another, and his property damage insurer had existing subrogation rights. Mr. Tuttle was entitled to recover his property damage from his liability insurer, which had filed an undertaking to be bound by s. 263, under s. 263(2). His property damage insurer, which had not filed an undertaking, had paid for the damage and brought an action against the liability insurer for payments it had made. As Mr. Tuttle, personally, had a right of recovery against his liability insurer, his property

damage insurer was subrogated to that right of recovery under s. 278(1) and could bring an action in his name to enforce that right. The property damage insurer's right to bring a subrogated claim was not extinguished by s. 263(b) because the payment it made was not "under this section".

[29] Section 263(5)(b) is not a provision that creates rights where they do not already exist. Rather it is a provision that eliminates rights. The fact it eliminates the subrogation rights of an insurer that makes payments to its insured "under this section" does not mean an insurer that made payments not "under this section" has subrogation rights. The subrogation rights of such an insurer must exist otherwise, as they did in *Tuttle*, in order for an action for reimbursement of the payment to proceed.

Conclusion

[30] In this case, Mr. Bounthai's tort action against the Candows was barred by statute, and consequently Clarendon could not have the subrogated right to bring such an action. I would allow the appeal, set aside the orders of the motion judge, and replace it with an order dismissing the respondents' motion.

[31] There will be no order for costs as the appellants did not seek costs of this appeal.

"R.G. Juriansz J.A."
"I agree J.C. MacPherson J.A."
"I agree Robert J. Sharpe J.A."

RELEASED: October 5, 2007