The Right To Subrogate: Court Finds Bailment As An Exception To S. 263 Of The Insurance Act

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Overview

When certain statutory criteria are met, s. 263 of the *Insurance Act*, R.S.O. 1990, c. I.8 (the Act) bars tort claims for property damage following a motor vehicle accident.

On January 9, 2018, the Divisional Court released a decision in the case of *Burridge v. Hardy*, 2018 ONSC 202 (*Burridge*) dismissing an appeal from the 2016 small claims court decision. Burridge stands for the proposition that "a right of action against a person under an agreement" for the purpose of s. 263(5)(a.1) of the Act – an important exception to the subrogation bar in a motor vehicle accident context – includes a right of action in bailment.

Facts

Hardy asked to borrow Burridge's automobile for a weekend in order to attend a wedding. In response to the request, Burridge answered "there's the keys, go for it." Burridge gave Hardy his permission. It was understood that Hardy was to return the automobile "whenever he was done with it," and while no payment or compensation was expected, Hardy was expected to "just leave the gas in it that was there." After leaving the wedding, while impaired, Hardy turned left into an oncoming vehicle. Hardy was 100 per cent at fault for the collision. Hardy was subsequently convicted of impaired driving causing bodily harm and his license was suspended.

Court's Decision

The court determined that the right of action in bailment constituted "a right of action under an agreement" for the purpose of s. 263(5)(a.1) of the Act.

However, the court provided limits to this determination by way of establishing four criteria that must be satisfied:(1)The bailee is partially or wholly at fault for the collision in accordance with the fault determination rules;(2)At the time of the collision, the bailor

is insured under optional “collision” or “all perils” coverage pursuant to s. 7 of the Ontario Automobile Policy 1 (OAP 1) with regards to the bailed automobile;(3)The bailee either*(a)*has possession of the insured’s automobile in connection with a commercial purpose set out in s. 7.4.1 of the OAP 1;*(b)*violates the terms of the policy; or*(c)*uses the automobile in any of the circumstances included in s. 7.2.2 of the OAP 1 (illegal use provisions); and(4)The bailee is insured for third party liability under the provisions of a separate contract of automobile insurance, in circumstances where such coverage is available to respond to the property damage claim asserted by the subrogated insurer.

Applying the criteria, the court concluded that Hardy was in possession of the automobile as a gratuitous bailee and was obligated to return it in the same condition. The failure to do so resulted in a breach of Hardy’s bailment obligations. Secondly, Hardy was at fault for the collision that resulted in damage to Burridge’s automobile which the insurer paid out pursuant to s. 7 of the OAP 1. Finally, Hardy’s use of the automobile was within s. 7.2.2 of the OAP 1 with respect to “illegal use.”

Implications

As noted above, *Burridge*, in circumstances where specific criteria are satisfied, will be an important decision for insurers seeking to bring subrogated actions in motor vehicle property damage cases, as it creates an exception to the bar against subrogation set out in the direct compensation scheme, as prescribed by s. 263 of the Act.

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