

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

November 22, 2018

## 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 Burrige’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, Burrige, 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.

By

[Larry Elliot, Matthew Sherman](#)

Expertise

[Insurance Claim Defence](#)

---

## BLG | Canada’s Law Firm

As the largest, truly full-service Canadian law firm, Borden Ladner Gervais LLP (BLG) delivers practical legal advice for domestic and international clients across more practices and industries than any Canadian firm. With over 725 lawyers, intellectual property agents and other professionals, BLG serves the legal needs of businesses and institutions across Canada and beyond – from M&A and capital markets, to disputes, financing, and trademark & patent registration.

[blg.com](http://blg.com)

### BLG Offices

#### Calgary

Centennial Place, East Tower  
520 3rd Avenue S.W.  
Calgary, AB, Canada  
T2P 0R3

T 403.232.9500  
F 403.266.1395

#### Ottawa

World Exchange Plaza  
100 Queen Street  
Ottawa, ON, Canada  
K1P 1J9

T 613.237.5160  
F 613.230.8842

#### Vancouver

1200 Waterfront Centre  
200 Burrard Street  
Vancouver, BC, Canada  
V7X 1T2

T 604.687.5744  
F 604.687.1415

**Montréal**

1000 De La Gauchetière Street West  
Suite 900  
Montréal, QC, Canada  
H3B 5H4

T 514.954.2555  
F 514.879.9015

**Toronto**

Bay Adelaide Centre, East Tower  
22 Adelaide Street West  
Toronto, ON, Canada  
M5H 4E3

T 416.367.6000  
F 416.367.6749

The information contained herein is of a general nature and is not intended to constitute legal advice, a complete statement of the law, or an opinion on any subject. No one should act upon it or refrain from acting without a thorough examination of the law after the facts of a specific situation are considered. You are urged to consult your legal adviser in cases of specific questions or concerns. BLG does not warrant or guarantee the accuracy, currency or completeness of this publication. No part of this publication may be reproduced without prior written permission of Borden Ladner Gervais LLP. If this publication was sent to you by BLG and you do not wish to receive further publications from BLG, you may ask to remove your contact information from our mailing lists by emailing [unsubscribe@blg.com](mailto:unsubscribe@blg.com) or manage your subscription preferences at [blg.com/MyPreferences](http://blg.com/MyPreferences). If you feel you have received this message in error please contact [communications@blg.com](mailto:communications@blg.com). BLG's privacy policy for publications may be found at [blg.com/en/privacy](http://blg.com/en/privacy).

© 2024 Borden Ladner Gervais LLP. Borden Ladner Gervais LLP is an Ontario Limited Liability Partnership.