

Friday, April 25, 2014

Homeowner's vs Car Insurer > Subrogation Re: Ontario Car Accident

The Issue: With [homeowner's insurance](#), if you suffer property damage due to the negligence / fault of someone or their actions, then your homeowner's insurance has the contractual right, in your insurance policy, to seek recovery of the monies they pay to fix your house from the negligent party; this is called subrogation.

What if your homeowner's insurance forgets and fails to start a lawsuit, seeking reimbursement of their monies paid to fix your house, within the 2 year limitation period? Can the homeowner's insurer piggyback their subrogation claim within the Statement of Claim that you issued, seeking damages and monies for the injuries and loss you suffered as a result of that same accident? Can your lawsuit for personal injury damages include your homeowner's claim for property damage payments: ***Gu v. Choi, 2014 ONSC 1028 (CanLII)***

The Problem Here

In this Gu action, a driver drove into the backyard of the plaintiffs, injuring them while they were gardening and also causing \$50,000 worth of property damage to their home. The plaintiff's homeowner's insurance paid for their property damage and then did not promptly start an action against the negligent driver, subrogating their claim to seek reimbursement of the \$50,000.

After the homeowner's insurer re-discovered this outstanding issue, the 2 year limitation period had passed. So instead of trying to start their own lawsuit for this \$50,000 - which would presumably have been subject to an immediate summary judgment motion challenge - the homeowner's insurer sought to sneak their claim within the ambit of the Statement of Claim of the injured plaintiffs who were seeking damages for their personal injuries and resulting loss.

The homeowner's insurer's primary argument was that their claim fit under the plaintiff's Statement of Claim pleadings as follows:

[7] The Statement of Claim makes no specific reference to the damages sustained to the plaintiffs' property and home. In describing the accident, it simply says that the defendant Emily Asmar "... recklessly drove through their backyard and hit Ms. Gu, and Mr. Choi, causing Ms. Gu to fall unconscious and Mr. Choi to get hit by the Defendant's motor vehicle, before the vehicle came to rest." It also says:

- 1. The Plaintiff CHEN GU ... claims from the Defendant (sic) as follows: ... (b) Special damages including costs of future care in the amount of \$750,000.00;*
- 2. The Plaintiff KIN CHOI ... claims from the Defendant (sic) as follows: ... (b) Special damages including costs of future care in the amount of \$500,000.00[.]*

The homeowner's insurer's alternate argument was to seek an Order allowing them to amend the plaintiff's Statement of Claim, as follows:

[16] As noted Allstate sought in the alternative to amend the Statement of Claim to include the property damages, and to then obtain summary judgment on the amended claim.

[17] The amendments it seeks are to change paragraphs 1(b) and 2(b) of the existing Statement of Claim (see para. 7 above) so that they read "Special damages including costs of future care and property damages in the amount of ...", and to add the following new heading and paragraph:

Special Damages - Property Damage

32(a). Following the accident, the plaintiffs spent a total of \$53,692.89 in order to repair the damage to their fence, backyard, the structure of their home and the contents therein, all of which were caused by the motor vehicle accident and the negligence of the defendants, as hereinbefore described. Full particulars of all the said property losses will be provided to the defendants prior to trial.

The Result

Although this was creative thinking by the homeowner's insurance, however, Mr. Justice Minnema dismissed the homeowner's claim was dismissed on this summary judgment motion. Key factors included the internal notes of the homeowner's insurance adjuster indicating that they thought they no longer had a claim due to the missed limitation period, as well as the awkwardness and lack of intention in the plaintiff's Statement of Claim to seek recovery for property damage to their house.

The Court held:

Analysis

[28] The plaintiffs argue that when Personal through its representative indicated to the Allstate adjuster that it could waive its deductible, it was admitting liability. However, as noted further in Maracle in para. 16, an admission of liability is not sufficient on its own to be considered a promise or assurance that meets the first part of the test:

There must be something more for an admission of liability to extend to a limitation period. The principles of promissory estoppel require that the promisor, by words or conduct, intend to affect legal relations. Accordingly, an admission of liability which is to be taken as a promise not to rely on the limitation period must be such that the trier of fact can infer that it was so intended. There must be words or conduct from which it can be inferred that the admission was to apply whether the case was settled or not, and that the only issue between the parties, should litigation ensue, is the issue of quantum. Whether this inference can be drawn is an issue of fact.

[29] Other than the deductible being waived and a request for details of the property claim, no further communication occurred between Allstate's adjuster and Personal before the prescription period passed. The plaintiffs argue that the words or conduct of Personal after the lapse of the prescriptive period support the inference that Personal had promised not to rely on the limitation period. They note that Personal's adjuster still sought information from Allstate's lawyer pertaining to the age of the plaintiffs' home, and that the defendants' counsel requested copies of supporting documentation

regarding the subrogated property damages claim, both after the limitation period expired.

[30] I cannot accept that these requests for information establish previous intent by Personal not to rely on the limitation period. An associate in Allstate's lawyer's firm indicated in his affidavit that "[a]s the matter progressed, I made contact with Mr. Switzer, counsel of record for the defendants, and confirmed that Allstate would be pursuing its subrogated interests through the [existing] Claim." In the context of the property damages still being pursued, the defendants' insurer and the defendants' counsel would need to know the extent of those damages. One could expect them to make inquiries regardless of their position on the limitation period.

[31] I note that the words of Allstate's own representatives after the expiry of the prescription period are not consistent with the inference that it now wishes me to draw. On the day he discovered the missed limitation period, the Allstate adjuster commented in the company's 'internal diary notes': "TO DO: CHECK IF STILL ABLE TO GET SUBRO AS PRESCRIPTION HAS PASSED." The file then went internally to Allstate's subrogation department, and on July 20, 2011 the representative who took over the file summarized it as follows:

REC'D IN SUBRO - TP LOST CONTROL OF VEH & CAME ONTO INS'D PROPERTY CAUSING DMGS IN THE AMOUNT OF \$53,645.26 & ALSO HIT MRS. INS'D WHO WAS IN THE YARD - POTENTIAL FOR RECOVERY NOT VERY GOOD AT PRESENT AS WE HAVE PASSED THE STATUTE OF LIMITATIONS WHICH WAS JUNE 2/11 NOTES ON FILE INDICATE THAT TP ADJ AT AN03 HAD BEEN CONTACTED & THAT SUBRO DOCUMENTS FOR THE DAMAGE TO THE HOUSE HAS BEEN SENT TO TP ADJ AS REQUESTED & TP ADJ HAD ACCEPTED LIAB. & ADVISED THAT WE COULD WAIVE OUR INS'D DED - CALLED TP ADJ & LMTCB REGARDING STATUS - WE WILL AWAIT HIS RESPONSE & TRY TO NEGOTIATE SOME TYPE OF SETTLEMENT IF POSSIBLE BUT DOES NOT APPEAR THAT WE HAD MADE AN AGREEMENT WITH TP ADJ TO WAIVE STATUTE OF LIMITATIONS OR EXTEND THE PERIOD.

[32] Despite what it is arguing on this motion, Allstate itself did not believe that Personal had waived the limitation period.



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[33] Given the above, I find that Allstate has not established that it received a promise or assurance that satisfies the first part of the test.

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