Car Alarms: Bad Faith

litigation to proceed against Canadian auto insurers

BY MEGAN GOODISON AND SIMON MCGREGOR, MELBOURNE

Insurers who capriciously deny benefits owed to captive market 'clients' without justification have been given cause to rethink such tactics.

On 16 September, 1999, Justice Cavarzan from the Superior Court of Ontario ruled in the matter of *Spiers v Zurich Insurance Company & Ors.* that "Bad Faith" insurer conduct is an independent tort, separate from the contractual duty of good faith, and dismissed an interlocutory motion from insurers claiming no cause of action was revealed by the pleadings.

The case is relevant in Australia because the Counsels for the Plaintiff, Robert B. Munroe and Andrew J. Spurgeon, relied on the NSW case *Gibson v Parkes District Hospital*, and although the case was not cited, its reasoning has been implicitly followed.

Background

The plaintiff, Mary Ann Spiers, a full time employee at Zurich Insurance Company, is seeking to recover "no fault" motor vehicle accident benefits from Zurich and their in-house adjusters. Spiers claims that these benefits have been unlawfully withheld and is seeking aggravated, exemplary and punitive damages.

Legal Issues

The case raises the following significant legal issues:

- Is there a duty of good faith owed by the insurer to the insured?
- Do adjusters owe a duty to the insured?
- Can an insurer's sub-contractor be held liable individually?
- Does the proximity in the relationship between the adjuster and the insured give rise to a new and separate cause of action?

The Defence Case

The Defendants relied upon the law set forth in a trilogy of cases for the propositions that only the insurer owes a duty of good faith to the insured, that that duty arises as an implied term of the contract between the insurer and the insured, and that, accordingly, an employee of the insurer cannot be held liable individually. The cases referred to were *Sulzinger v C.K. Alexander Ltd. et al.* [1972] 1 O.R. 720 (Ont. C.A.), *Bullock v Trafalgar Insurance Co. of Canada* [1996] O.J. No. 2566 (Ont. Cr. Gen. Div.), and *Hamilton v Chris Marion Holdings Limited et al.* [1981] I.L.R. 1-1398 (Ont. H.Ct.).

Although the claim against the adjuster in the *Bullock* case was dismissed, it recognised that the adjuster could, in appropriate circumstances, be held liable in tort. Cavarzan J. acknowledged that this case clearly set a precedent which the Defence Counsel had failed to recognise.

The "Bad Faith" Tort exists

In reaching his decision, the Judge relied on *Syrtash v Provident Life and Accident Insurance C. et al.* [1996] O.J. No. 1782. where insurance company employee defendants brought a motion to dismiss the action against them. In that case White J. granted the relief sought by the individual defendants on the basis that the statement of claim contained no assertion of facts which, if proved, could be found to establish the existence of a duty in law owed to the plaintiff by these defendants.

As the current pleadings did not suffer from this fatal flaw, Cavarzan J. disallowed the strike out motion.

At para.17, Cavarzan J. held;-

"There is binding authority supporting the proposition that a common law duty of care may be created by a relationship of proximity that would not have arisen but for a contract. See Central Trust Co. v Rafuse [1986]."

Rafuse was approved in *Whiten v Pilot Insurance Co.* [1999] O.J. No. 237 by Laskin J.A. who held at para. 28 that,

"A strong argument can be made for finding that the relationship between insurer and insured is of sufficient proximity to give rise to a concurrent duty in tort alongside the insurer's implied contractual obligation to act in good faith.

[para.24] A contract of insurance between an insurer and its insured is one of utmost good faith. Although the insurer is not a fiduciary, it holds a position of power over an insured; conversely, the insured is in a vulnerable position, entirely dependent on the insurer when a loss occurs. For these reasons, in every insurance contract an insurer has an implied obligation to deal with the claims of its insureds in good faith. That obligation to act in good faith is separate from the insurer's obligation to compensate its insured for a loss covered by the policy."

Cavarzan J. also ruled that in certain circumstances the duty in tort can be owed not only by the corporation, but also by its employees. [See Iacobucci J. in *London Drugs Ltd. v Kuehne & Nagel International Ltd* (1992) 3 S.C.R. 299].

The allegations in the *Spiers* statement of claim suggest that the individual defendants were not acting *bona fide* within the scope of their authority. They

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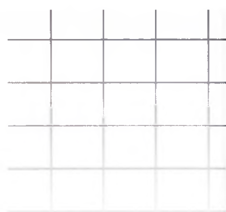

were parties with the insurance company, their employer, in dealings intended to frustrate the just claims of the plaintiff. Accordingly, the pleading disclosed a valid cause of action.

Conclusion

Cavarzan J. held that there is a duty of good faith owed by the insurer to the insured. That duty not only emanates from the contract of insurance but also as an independent and concurrent existence arising out of the principles of tort law. Adjusters, too, owe a duty of good faith to the insured and can be held liable to the insured for breach of that duty. Although the proximity of the relationship between the adjuster and the insured results from the contractual arrangement between the adjuster's employer and the insured, the duty owed to the insured by the adjuster originates in tort law. This can give rise to a new and separate cause of action.

The insurers require leave to appeal, and no application has yet been made. PL

Benkovic v Dr Tan

BY JD WATTS, SYDNEY

On 5 February 1999 His Honour Judge Mahoney DCJ awarded damages in favour of Mrs Benkovic against Dr Tan arising out of a failed plastic surgery procedure. The Defendant is a specialist plastic surgeon.

The case is interesting because in addition to compensatory damages His Honour awarded $40,000 as aggravated damages and $60,000 for exemplary damages.

In his judgment His Honour said as follows:

"The Plaintiff attended the Defendant's surgery accompanying her son in 1991. The son's nose had been damaged by a blow from a cricket ball and he had gone to the Defendant for treatment. Whilst she was at the Defendant's surgery with her son, the Defendant suggested that she too should undergo plastic surgery. He and the Plaintiff discussed whether he should submit to what is generally known as a "facelift operation". She was then 51 years of age".

The Plaintiff had inquired of Dr Tan whether the operation would make her look like a "Mummy" and Dr Tan replied that he had a new technique, that he did not make mistakes and that he would make her look younger. On the basis of those assurances, Mrs Benkovic decided to go on with the operation.

His Honour found that the Defendant assured the Plaintiff in three (3) respects which were:

1. That it was possible for her to look 20 years younger;
2. That it was his mission on earth to make people look beautiful; and
3. That facelifting was his specialty.

The Defendant performed a facelift operation on Mrs Benkovic on 11 September 1995. On 30 January 1996 Dr Tan performed laser surgery on Mrs Benkovic and on 19 March 1996 carried out a mouth revision on her. On 30 May 1996 Dr Tan performed corrective facial surgery free of charge.

Dr Tan gave evidence of warnings allegedly given to Mrs Benkovic before the operation.

At the trial the Plaintiff's legal advisors abandoned any allegation that the plastic surgery had been carelessly or unskilfully performed.

His Honour found that the Defendant did furnish some warnings to the Plaintiff concerning possible outcomes but found that those warnings were inadequate, both as to their effective communication and as to their scope.

His Honour awarded general damages as compensation in the sum of $30,000.

As to *aggravated* damages, His Honour said as follows:

"Bearing in mind that the tort involved was not one of mere inadvertence and that it was significantly different from momentary inattention, and bearing in mind that the blandishments and enticements amounted to contumelious disregard for the doctor/patient relationship obligations the Defendant owed to the Plaintiff, under this heading of aggravated damages, $40,000 is compensation."

As to *exemplary* damages His Honour said as follows:

"Bearing in mind what the High Court has said about the nature of the surgeon's duty, and in view of the primacy of the need for sound wise and carefully considered medical advice, and in view of the opinion expressed by Dr Arnold Mann that this surgery was unnecessary - a view which, with respect and on the limited basis of the evidence before me, I unreservedly share - and to mark what I hold to be an egregious error on the part of the Defendant in talking the Plaintiff into consenting to a facelift operation plus the need to stamp the Defendant's conduct with a mark of opprobrium, $60,000 is fair exemplary damages".

The matter is presently on appeal as to both exemplary and aggravated damages. PL

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