

[Azad v. Dekran, \[2013\] O.J. No. 1633](#)

Ontario Judgments

Ontario Superior Court of Justice

E.M. Macdonald J.

Heard: October 26, 2012.

Judgment: April 4, 2013.

Court File No. CV-11-442323

[2013] O.J. No. 1633 | *2013 ONSC 1830* | *[2013] I.L.R. 1-5421* | *20 C.C.L.I. (5th) 247* | *2013 CarswellOnt 4165* | *227 A.C.W.S. (3d) 362*

Between The Personal Insurance Company added by Order Pursuant to Section 258(14) of the Insurance Act, R.S.O. 1990, c. I.8, Statutory Third Party (Appellant), and Alice Azad, Plaintiff (Respondent), and Ara Dekran, Defendant (Respondent), and Salvatore Canzolino, Defendant (Respondent)

(36 paras.)

Case Summary

Civil litigation — Civil procedure — Parties — Adding or substituting — Necessary or proper — On own motion — Third party procedure — Striking out or setting aside — Appeals — From Masters' decisions — Interlocutory or final orders — Appeal by insurer from Master's interlocutory decision it could not be added as intervenor and had to be added as statutory third party allowed — Plaintiff claimed he was rear-ended by defendant — Defendant's insurer denied coverage and alleged accident was staged — Duty to insured under statutory third party provisions would prevent insurer from fully contesting liability and adducing evidence of fraud, which could result in multiplicity of proceedings — Insurer would have little hope of recovery against defendant to compensate erroneous award to plaintiff — Master's decision varied to add insurer as party defendant.

Insurance law — Insurers — Duties — Duty to defend — Liability — Appeal by insurer from Master's interlocutory decision it could not be added as intervenor and had to be added as statutory third party allowed — Plaintiff claimed he was rear-ended by defendant — Defendant's insurer denied coverage and alleged accident was staged — Duty to insured under statutory third party provisions would prevent insurer from fully contesting liability and adducing evidence of fraud, which could result in multiplicity of proceedings — Insurer would have little hope of recovery against defendant to compensate erroneous award to plaintiff — Master's decision varied to add insurer as party defendant.

Insurance law — Actions — Defences — Fraud — Practice and procedure — Parties — Appeals and judicial review — Of interim or interlocutory orders — Appeal by insurer from Master's interlocutory decision it could not be added as an intervenor and had to be added as statutory third party allowed — Plaintiff claimed he was rear-ended by defendant — Defendant's insurer denied coverage and alleged accident was staged — Duty to insured under statutory third party provisions would prevent insurer from fully contesting liability and adducing evidence of fraud, which could result in multiplicity of proceedings — Insurer would have little hope of recovery against defendant to compensate erroneous award to plaintiff — Master's decision varied to add insurer as party defendant.

Insurance law — Automobile insurance — Compulsory government schemes — Rights and duties of

insurer — Appeal by insurer from Master's interlocutory decision it could not be added as intervenor and had to be added as statutory third party allowed — Plaintiff claimed he was rear-ended by defendant — Defendant's insured denied coverage and alleged accident was staged — Duty to insured under statutory third party provisions would prevent insurer from fully contesting liability and adducing evidence of fraud, which could result in multiplicity of proceedings — Insurer would have little hope of recovery against defendant to compensate erroneous award to plaintiff — Master's decision varied to add insurer as party defendant.

Appeal by the insurer from the Master's interlocutory decision that it was not appropriate to allow the insurer to intervene and it had to be added as a statutory third party. The plaintiff claimed to have been rear-ended by the defendant, who was insured by the insurer. The insurer investigated and concluded the accident had been staged. The insurer denied coverage to the defendant. The insurer argued that, where fraud went to the root of the accident at issue, the statutory third party provisions under the Insurance Act were insufficient to address the conflict between the insurer and insured. The insurer argued the limitations imposed by the statutory third party provisions prevented it from fully contesting liability and would create irreconcilable differences between the insurer's duty to the insured and duty to the court. The insurer would be unable to adduce evidence the defendant staged the accident or cross-examine the defendant. The insurer argued the Master failed to properly consider the conflict of interest and the decision could result in multiplicity of proceedings.

HELD: Appeal allowed.

The insurer's submissions were correct. Given the allegations the accident was staged, the plaintiff, insurer and defendant should be bound by the same findings of fact in the same action. The insurer would have little hope of recovery against the defendant to compensate for an erroneous award to the plaintiff. The Master's decision was varied to add the insurer as a party defendant.

Statutes, Regulations and Rules Cited:

Courts of Justice Act, [R.S.O. 1990, c. C.43, s. 138](#)

Insurance Act, [R.S.O. 1990, c. I.8, s. 258](#)(14)

Counsel

John P. Desjardins, for the Appellant.

Plaintiff (Respondent): Unrepresented.

Defendant (Respondent): Unrepresented.

Julie N. Singh, for the Respondent.

REASONS FOR DECISION

E.M. MACDONALD J.

1 This is an appeal from the interlocutory order of Master Dash dated July 18, 2012 in Toronto. The learned Master held as follows

- (a) It is not appropriate use of Rule 13.01 of the *Rules of Civil Procedure* to allow an insurer to be added as an intervenor in an action against their insured, even where fraud by the insured against the insurer is alleged.
- (b) The Personal Insurance Company ("The Personal") must be added to the proceeding against its insured, Ara Dekran, as a Statutory Third Party pursuant to Section 258(14) of the *Insurance Act, R.S.O. 1990, c. 1.8*, rather than as an intervenor pursuant to Rule 13.01 of the *Rules of Civil Procedure*.

2 By way of background, The Personal brought a motion on July 18, 2012 to be added to the proceedings as a party Defendant pursuant to Rule 13.01 of the *Rules of Civil Procedure*. The Personal also sought the alternative relief to be added as a Statutory Third Party pursuant to Section 258(14) of the *Insurance Act, R.S.O. 1990, c. 1.8* ("*Insurance Act*")

3 Counsel for The Personal appeared before Master Dash on July 18, 2012. No one appeared for the Plaintiff or the Defendants Ara Dekran or Salvatore Canzolino. Master Dash granted the alternative relief, adding The Personal as Statutory Third Party, but refused the primary relief of adding The Personal as a party Defendant.

4 The relevant facts are that the Plaintiff's action arises out of a motor vehicle accident ("the accident") that occurred on February 8, 2010.

5 The Plaintiff was a passenger in a 1999 Chrysler vehicle travelling northbound on Highway 27 near Highway 407 when it was struck from the rear by a 1997 Pontiac owned and operated by the Defendant Ara Dekran (the "Dekran Vehicle").

6 At the time of the accident, The Dekran Vehicle was insured by The Personal pursuant to an Ontario Automobile Policy (OAP-1) bearing policy number K3866167 (the "Personal Policy"). The Personal investigated and concluded that the accident was staged and/or did not occur as alleged by the parties involved. The court was informed that five days prior to the accident The Personal Policy was issued. Both of the involved vehicles were older models, and all occupants were claiming Statutory Accident Benefits.

7 The Personal commissioned an accident reconstructionist to prepare an Accident Reconstruction Report with regard to the accident. This reconstruction concluded that the profile, elevation, and extent of damage on the front the Plaintiff Vehicle was not consistent with the profile, elevation and extent of damage on the rear of the Dekran Vehicle, and inconsistent with the collision sequence of events as reported.

8 The Accident Reconstruction Report also found that there was no evidence of paint transfer between the Plaintiff Vehicle and the Dekran Vehicle, and that the rear of the Dekran Vehicle did not display any marks corresponding to the Plaintiff Vehicle's license plate.

9 The Personal denied coverage to the insured, Ara Dekran, by correspondence dated April 14, 2011.

10 The grounds of this appeal are that Master Dash erred in law at paragraph 2 of his decision, in concluding that an insurer alleging a staged accident by its insured must do so as a Statutory Third Party pursuant to Section 258(14) of the *Insurance Act*, rather than as an intervenor pursuant to Rule 13.01 of the *Rules of Civil Procedure*.

11 The Personal submits that where fraud, going to the root or existence of the accident at issue, is alleged against

the insured by the insurer, the Statutory Third Party provisions of the *Insurance Act* are insufficient to address the conflict of interest that arises between that insured and insurer. It is alleged that the learned Master has erred in law by dismissing the applicability of Rule 13.01 to add an insurer as party Defendant under these circumstances.

12 Master Dash' prior decision in *Kapileshwar v. Sivarajah*, [2008 CanLII 58154](#) (ON SC) ("*Kapileshwar*"), stands for the proposition that an insurer, as Statutory Third Party, "cannot take a position contrary to the interests of its insured and in fact must act in the best interests of its insured."

13 At para. 13 of his reasons in *Kapileshwar*, Master Dash stated:

[...] the right of the statutory third party is to contest the liability of their insured to the plaintiff and to contest the amount of the claim made by the plaintiff against their insured [...] in effect the insurer takes over [...] the defence of its insured with respect to the claim of the plaintiff.

14 *Kapileshwar* adopts similar reasoning to that of the New Brunswick Court of Appeal in *Parlee v. Pembridge Insurance Co.*, [2005 NBCA 49](#), [22 C.C.L.I. \(4th\) 223](#) ("*Pembridge*"). This was an appeal as to whether the insurer, Pembridge, could plead as a Statutory Third Party that one of their insured had made misrepresentations regarding the automobile accident. The Court concluded that the insurer could not do so, at para. 19:

[...] Counsel appointed and paid by the insurer after it has been added as a Third Party under the *Act* must be in exactly the same position as one appointed where there are no issues of coverage or breach of a condition of the policy. That is, counsel must act in the best interests of the defendant insured and cannot take a position that is incongruent with the interest of the defendant in any way. The insurer's participation as a Third Party under the *Act*, through counsel, is limited by the cause of action before the court. In that context, **the Third Party is not entitled to file a statement of defence or take a position at trial that is incompatible with the interests of the defendant insured.** [Emphasis added.]

15 At para. 6 in *Azad v. Dekran*, [2012 ONSC 4257](#), [13 C.C.L.I. \(5th\) 90](#) ("*Azad*"), Master Dash observed as follows:

The insurer, as statutory third party, can do everything it could do as defendant to defeat the plaintiff's claim for liability and damages, on the basis of staged accident or otherwise. **The only thing it cannot do is plead as against its insured in the plaintiff's action, or to allege that the defendant acted in concert with the plaintiff** (although clearly that would be the implication), **but it is not prejudiced by this prohibition since it has all the rights against the insured to seek indemnification in a subsequent proceeding.** [Emphasis in original; emphasis added.]

16 The Personal submits that the limitations imposed upon the insurer as Statutory Third Party are of utmost significance. An insurer, as a Statutory Third Party, cannot fully and effectively contest liability in cases where it has evidence of fraud by its insured going to the root or existence of the accident. This cannot be correct.

17 The Personal challenged Master Dash's reasoning in that his reasoning would prevent an insurer from pleading a proper defence. As a Statutory Third Party, the insurer may be aware of the insured's possible complicity in the Plaintiff's action, but will be unable to put that before the Court due to its inability to plead against the insured. This creates an irreconcilable contradiction between the insurer and its counsel's duty to defend the claim against the insured by pleading a full defence, and their duty to the Court to lead all relevant facts and evidence. I accept these submissions as being correct.

18 The Personal also submitted that the insurer, as Statutory Third Party, cannot put all evidence before the Court, where there is evidence that the insured participated in staging the accident. For example, the insured could not introduce an Accident Reconstruction Report, or a transcript of an Examination under Oath of the insured.

19 The Personal submitted that the insurer, as Statutory Third Party could not cross-examine the insured. In *Pembridge*, it was emphasized that counsel appointed to represent the insurer as Statutory Third Party must treat

the insured in exactly the same fashion as if he or she were defending the insured directly, and that counsel "is not expected to protect the interests of the insurer to the detriment of the defendant insured." For these reasons, the insurer would be prohibited from cross-examining the insured.

20 The Personal drew the Court's attention to the fact that the restrictions on pleadings and evidence imposed upon the insurer as Statutory Third Party creates a hazard in that the Court may be "unwitting dupe" to the insured's fraud, which may cause the Court to make an erroneous award to the Plaintiff that would not have been made if the Court was apprised of all of the available facts.

21 The Personal submitted that Master Dash did not properly consider the inherent conflict of interest between insurer and insured that arises where the insurer has evidence and believes that the insured has committed a fraud going to the very root or existence of the accident at issue. The Decision of Master Abrams in *Esho v. Dekran*, 2012 ONSC 3638 (Unreported) ("*Esho*"), at paras. 2, 3, and 5, properly addresses this heightened conflict of interest. In this case, Desjardins General Insurance moved to be added as Party Defendant to the proceedings against its insured, after denying coverage to that insured due to an alleged fraud. Master Abrams found that the insurer in this scenario should be permitted to take an adverse position against the insured as a Party Defendant. I quote from Master Abrams:

Desjardins [the insurer] has reason to believe that the motor vehicle accident that is the subject matter of this action was staged and/or did not occur, as alleged by the plaintiff. It has denied coverage to its insured, the defendant, on the basis of fraud and/or wilful false statement. Desjardins' interests are, it asserts, opposite to those of its insured; **Desjardins is in a conflict of interest position vis-à-vis its insured.**

The insurer, in defending the plaintiff's claim in its capacity as statutory third party, "... must act in the best interests of the defendant insured and cannot take a position that is incongruent with the interest of the defendant in any way" (*Kapileshwar v. Sivarajah* (2008), 75 C.P.C. (6th) 336). [...] **I am prepared to give Desjardins greater latitude.** To permit Desjardins to be added as a defendant is to permit it to discover the defendant and, if so inclined, cross-claim against the defendant.

[...]

To add Desjardins as a defendant, here, is the most certain manner of safeguarding its interests and ensuring that it does not run afoul of its obligations towards its insured. [Emphasis added.]

22 Rule 13.01 of the *Rules of civil Procedure* provides:

- (1) A person who is not a party to a proceeding may move for leave to intervene as an added party if the person claims,
 - (a) An interest in the subject matter of the proceedings;
 - (b) That the person may be adversely affected by a judgment in the proceeding; or
 - (c) That there exists between the person and one or more of the parties to the proceeding a question of law or fact in common with one or more of the questions in issue in the proceeding.
- (2) On the motion, the court shall consider whether the intervention will unduly delay or prejudice the determination of the rights of the parties to the proceeding and the court may add the person as a party to the proceeding and may make such order as is just.

23 The Personal submitted that the present case is factually similar to that in *Esho* where Master Abrams found that Desjardins satisfied all parts of the test in Rule 13.01 to intervene as an added party. As in *Esho*, no defence has been delivered. Her decision continues as follows:

Desjardins meets the tests set out in R. 13.01(1) and has satisfied me that its intervention will not unduly delay or prejudice the determination of the rights of the plaintiff and defendant. The action is in its nascent stages, with no defence having been delivered.

24 There is an issue of multiplicity of proceedings. The Personal submitted that Master Dash's decision in the present case will encourage and result in multiplicity of proceedings and subsequent re-litigation of issues. Specifically pointed to paragraphs 3, 5, and 6 of Master Dash's decision, The Personal submitted that in holding that The Personal could find adequate remedy for any loss sustained by the restrictions imposed on a Statutory Third Party as opposed to a party Defendant by subsequently commencing additional proceedings against the insured.

25 In *Azad*, Master Dash observed as follows, at paras. 3, 6:

[...] **issues between the insurer and insured [...] may be decided in subsequent proceedings** between insurer and insured, including a proceeding to recover the statutory minimum if paid out to the plaintiff [...]

[...]

The insurer [...] is not prejudiced by this prohibition since it has all the rights against the insured to **seek indemnification in a subsequent proceeding**. [Emphasis added.]

26 Section 138 of the *Courts of Justice Act, R.S.O. 1990, c. C.43* states that a multiplicity of proceedings must be avoided:

138. As far as possible, multiplicity of legal proceedings shall be avoided.

27 The Personal also reminded the court that the guiding rule of interpretation in the *Rules of Civil Procedure*, is as stated in Rule 1.04:

These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

28 The Supreme Court of Canada dealt with the issue of why multiple proceedings, and subsequent re-litigation of issues, is undesirable. In *Danyluk v. Ainsworth Technologies Inc.*, [2001 SCC 44](#), [\[2001\] 2 S.C.R. 460](#), the Court held that while the Court in that case did permit re-litigation of a tribunal decision in the Superior Court, it emphasized that this is an exception from the general rule. At para. 18, the Court reasoned:

The law rightly seeks a finality to litigation. To advance that objective, it requires litigants to put their best foot forward to establish the truth of their allegations when first called upon to do so. A litigant, to use the vernacular, is only entitled to one bite at the cherry. [...] An issue, once decided, should not generally be re-litigated to the benefit of the losing party and the harassment of the winner. A person should only be vexed once in the same cause. **Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided**. [Emphasis added.]

29 The Supreme Court of Canada also discussed the general undesirability of re-litigation, particularly where inconsistent results are obtained. See para. 51 reproduced from: *Toronto (City) v. C.U.P.E., Local 79*, [2003 SCC 63](#), [\[2003\] 3 S.C.R. 77](#):

[...] First, there can be no assumption that relitigation will yield a more accurate result than the original proceeding. Second, if the same result is reached in the subsequent proceeding, the relitigation will prove to have been a waste of judicial resources as well as an unnecessary expense for the parties and possibly an additional hardship for some witnesses. Finally, if the result in the subsequent proceeding is different from the conclusion reached in the first on the very same issue, **the inconsistency, in and of itself, will**

undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality. [Emphasis added.]

30 The Personal further submitted that it is of no consequence that the parties would be slightly difference in the insurer's subsequent action against the insured. The Personal submitted that the present different situation is analogous to Master Sproat's application of Rule 6.01 in *Segal & Partners Inc. v. Infolink Technologies Ltd.* (2009), 82 C.P.C. (6th) 282 (Ont. S.C.). There, at paras. 31, 45, it was decided that two trials should be joined, notwithstanding that the parties were slightly different, for the following reasons:

There is no requirement that the parties be identical in the pending proceedings but rather, it is sufficient if there are common questions of law or fact, the relief claimed arises out of the same transaction or occurrence or for any other reason.

[...]

[...] In my view, it is desirable that all of these matters proceed before the same forum, consistent with the approach in *Rauscher v. Roltdford Developments Ltd.* (1989), 69 O.R. (2d) 749 (Ont. H.C.). It is clear from this case **that the overarching principle is to facilitate the proper administration of justice, having regard to rule 1.04 and to avoid multiplicity of proceedings so far as possible** (see section 138 of the Courts of Justice Act, R.S.O. 1990, c. C.43 (the "CJA")). **Scarce judicial resources must be utilized fully and wisely.** [Emphasis added.]

31 I agree with The Personal's submission that in the present case, the Learned Master's decision would require the insurer to obtain in two or more proceedings, between similar parties, and in respect of the same subject matter, what could and should be dealt with in a single proceeding.

32 I also agree with The Personal's submission that if an award is erroneously made to a Plaintiff due to the insurer's inability to plead against the insured Defendant, the insurer must then bring an action against their insured for indemnity. This amounts to re-litigation of the issues and runs the risk of inconsistent results, increased costs, inconvenience for all the parties, and the possibility of diminishment of the credibility of the judicial system.

33 Given that the allegation that the accident in question was staged, the Plaintiff, the insured, and the insurer should be bound by the same findings of fact conducted in the same action.

34 The reality is that as a practical matter, an insurer would have little hope of actual recovery against their insured following subsequent litigation against them to compensate for an erroneous award to the Plaintiff. There would be a significant chance that the insured would be judgment-proof, and therefore subsequent litigation would not be a viable option or practical option.

35 Accordingly, this appeal is allowed to the extent that the decision of Master Dash is varied as follows:

- (a) The Personal Insurance Company be added as a party Defendant to this action pursuant to Rule 13.01 of the *Rules of Civil Procedure*, and that The Personal Insurance Company be added to the title of the proceedings from the date of this Order and be described as follows:

THE PERSONAL INSURANCE COMPANY

Defendant

and that the title of proceedings in this action be amended accordingly,

- (b) The costs of the appeal in favour of The Personal, if the appeal is opposed;
- (c) Such further and other relief as counsel may advise and this Honourable Court may deem just.

COSTS

36 I will make myself available to hear submissions on costs.

E.M. MACDONALD J.

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