

[Iafolla v. Top Rank Motors Ltd., \[2001\] O.J. No. 863](#)

Ontario Judgments

Ontario Superior Court of Justice

Juriansz J.

Heard: February 9, 2001.

Judgment: March 9, 2001.

Court File No. 97-CV-129273

[2001] O.J. No. 863 | [2001] O.T.C. 157 | 27 C.C.L.I. (3d) 285 | 10 M.V.R. (4th) 292 | 103 A.C.W.S. (3d) 1049

Between Enrico Iafolla, plaintiff, and Top Rank Motors Ltd., Mohamed Salim Salhia and Traders General Insurance Company, defendant

(31 paras.)

Case Summary

Motor vehicles — Vehicle dealers — Obligations — Indemnification of owner of stolen vehicle sold by dealer — Insurance — Automobile insurance — Requirement of insurable interest — Liability policy, scope of coverage.

Subrogated action by the Motor Vehicle Dealers' Compensation Fund for recovery of an amount paid out by the Fund to a claimant. The claimant purchased a car from Top Rank Motors. When it was stolen, he made a claim to his insurer, Traders, for the cost of the vehicle. It was then discovered that the claimant had purchased a stolen vehicle. Traders refused to pay the claim on the ground that the claimant had no insurable interest. The claimant then filed a claim with the Compensation Fund and was awarded \$15,000. The Compensation Fund sought that amount from Traders on the ground that Traders had wrongly denied coverage.

HELD: Action dismissed.

The Compensation Fund was meant to cover losses incurred after a motor vehicle dealer refused to pay a claim. The loss covered by the Compensation Fund was fundamentally different from the loss that Traders insured. Traders insured the vehicle against theft, whereas the claim from the Compensation Fund was in respect of a motor vehicle dealer's fraudulent sale of a vehicle. The Standard Policy of Insurance did not insure against the possibility of the purchaser of a motor vehicle not receiving good title to the vehicle. The claim for indemnity from Traders was not connected to the claim made to the Compensation Fund. There was no right of indemnity against Traders.

Statutes, Regulations and Rules Cited:

Motor Vehicle Dealers Act.

Regulation 801 made under the Motor Vehicle Dealers' Act, ss. 2, 12(1), 12(2), 12(3), 12(8), 14(3), 24.

Counsel

Larry Banack, for the moving party/plaintiff. John Desjardins, for the responding party/defendant, Traders General Insurance Company.

JURIANSZ J.

1 In September 1996 the plaintiff purchased a used 1996 Jeep Grand Cherokee from the defendant Top Rank Motors Ltd. He purchased automobile insurance for the jeep from defendant Traders General Insurance Company for loss or damage from theft, fire, or collision. After he had driven the vehicle for some three weeks it was stolen. Traders learned that the vehicle had previously been stolen before the plaintiff bought it from Top Rank and refused coverage on the basis that the plaintiff had no insurable interest in the vehicle.

2 The plaintiff commenced this action on July 31, 1997 against Traders, Top Rank and the salesperson who sold him the vehicle. He has obtained judgment against Top Rank and the salesperson. This is a motion for judgment upon a special case agreed to by the plaintiff and the defendant Traders General Insurance Company.

3 After Traders refused coverage, the plaintiff submitted a claim to the Motor Vehicle Dealers' Compensation Fund pursuant to the Motor Vehicle Dealers' Act and regulations. He executed subrogation forms dated December 17, 1997 and April 10, 2000 in favor of the Fund. The Fund allowed his claim and paid him \$15,000, which is the maximum amount available under the Fund.

4 The special case originally posed two questions:

- i) does the plaintiff have an insurable interest in the vehicle? and
- ii) is the Board of Trustees of the Motor Vehicle Dealers' Compensation Fund subrogated to the amount of \$15,000 it paid to the plaintiff and is it entitled to receive the payment of \$15,000 from Traders?

5 On December 15, 2000 the Divisional Court released its decision in *Assaad v. Economical Mutual Insurance Group*, [2000] O.J. No. 4786, and consequently Traders conceded that the plaintiff had an insurable interest in the vehicle and was entitled to recover indemnity as a result of the theft of the vehicle.

6 Counsel for the plaintiff argued that the Courts have been vigilant to insure that insurers do not profit at the expense of a public fund. He pointed out that in this case, if the insurer had not initially taken the position the plaintiff's loss due to the theft was uninsurable, it would have paid out the entire loss. It was only because the insurer failed to indemnify the plaintiff promptly that the fund was called upon to pay out the claim the plaintiff made to it. He argued that public policy dictates that funds such as this one are entitled to subrogate all claims belonging to those who receive payment out of the fund, including those claims against private insurance companies. He said that the public policy behind the establishment of a legislated compensation fund is to promptly reimburse innocent victims who may otherwise be without recourse. He submitted the insurer in this case should not profit from its delay in recognizing the plaintiff's claim. He argued that limiting the rights of subrogation of claims against private insurance companies would provide a windfall to insurers. In support of these submissions he cited *Miller v. Gibbons* (1976), 10 O.R. (2d) 301 (Ont. C.A.), *Re Merkur v. Wilson's Transport Ltd.*, [1955] O.R. 883 (Ont. C.A.),

and Minister of Consumer and Commercial Relations v. Employers Mutual Liability Insurance Company of Wisconsin ([1980](#), [28 O.R. \(2d\) 397](#) (Ont. C.A.)).

7 In the Miller case, the appellant had recovered judgment for damages sustained in a motor vehicle accident that included, without deduction, the amount of disability benefits she had received under her insurance policy. Subsequently, she applied for payment of the full amount of the judgment out of the Motor Vehicle Accident Claims Fund. Section 21 of the Motor Vehicle Accident Claims Act, R.S.O. 1970, and c. 281, provided in part.

No payment shall be made out of the Fund in respect of a claim or judgment for damages ... an amount paid or payable by an insurer by reason of the existence of a policy of insurance ... other than a policy of life insurance, and no amount sought to be paid out of the Fund shall be sought in lieu of making a claim or receiving a payment that is payable by reason all the existence of a policy of insurance ...

8 The Court held that the amount of the disability benefits was properly deducted from the amount paid out from that fund because the language of section 21 was broad enough to prohibit payment from the fund of all amounts covered by insurance other than life insurance, regardless of subrogation.

9 In *Re Merkur*, an insurance company had indemnified its insured for damage done to his building by a motor vehicle, had obtained judgment in its insured's name against the person responsible, and then applied for an order for payment out of the Unsatisfied Judgment Fund. Section 98(2)(f) of The Highway Traffic Act, R.S.O. 1950, c. 167, provided that the application for payment out of that fund could not be made by or on behalf of any insurer "in respect of any amount paid or payable by the insurer by reason on the existence of a policy of automobile insurance within the meaning of The Insurance Act and that no part of the amount sought to be paid out of the fund is sought in lieu of making a claim or receiving a payment which is payable by reason of the existence of a policy of automobile insurance within the meaning of The Insurance Act and that no part of the amount so sought will be paid to an insurer by reason of the existence of a policy of automobile insurance within the meaning of The Insurance Act."

10 The Insurance Act defined "automobile insurance" to mean insurance "against liability for loss or damage to persons or property caused by an automobile or the use or operation thereof ..." It was argued that while Merkur was insured against direct loss or damage to his property, the policy did not insure him against "liability for damage to his property" within the plain meaning of the defined term "automobile insurance". The Court did not deal with this argument, but decided the case on a completely different basis. The Court decided that the insurance company was not an "applicant" who could seek payment out of the Unsatisfied Judgment Fund.

11 In the Ministry of Consumer and Commercial Relations case a payment had been made from the Motor Vehicle Accident Claims Fund to a claimant who had recovered judgment against a driver who was thought to be uninsured. It was later discovered that the driver was in fact insured, and the Ministry, as assignee of the judgment, brought an action to recover the amount of the judgment from the insurer. Section 21 of the Motor Vehicle Accident Claims Act, R.S.O. 1970, c. 281 provided in part "No payment shall be made out of the Fund in respect of a claim or judgment for damages ... of an amount paid or payable by an insurer by reason of the existence of a policy of insurance ..."

12 The insurance company argued that since the claim was "payable" out of the insurance policy in force at the time of the accident, the payment out of the fund was illegal and therefore the Ministry could not claim reimbursement for the illegal payment. This argument was rejected. The Court decided, at page 401, that "The test of payability under section 21 is practical and not theoretical." The Court said, at page 402, "It is clear that the Legislature intended that payments from the Fund should not be delayed until disputes about insurance coverage are judicially resolved or every possibility of the discovery of the insurance coverage has been eliminated. If this were not so, the public would be deprived of the protection afforded by the statute because prompt settlement of claims against the Fund would be impeded."

13 These cases pertain to different legislated funds created and administered pursuant to different statutory

schemes. While they may well illustrate the attitude of the Courts to the relationship of legislated funds and losses covered by insurance, the decisions were based on the language of the legislation that applied in each case.

14 The clear objective of the legislation at issue in this case is the "regulation and control of motor vehicle dealers for the protection of consumers from unscrupulous practices in the sale of motor vehicles" as noted by Abella J.A. in 731771 Ontario Ltd. v. Ontario, [\[1997\] O.J. No. 4562](#) (Ontario Court of Appeal) at paragraph 34. The Act as a whole is almost entirely devoted to regulation, registration, and inspection of motor vehicle dealers. The Fund, itself, is mentioned only in the regulation making power in section 24.

15 The Fund is established by s. 2 to the Schedule to Regulation 801. The plaintiff's characterization of the Motor Vehicle Dealers' Compensation Fund as a public fund must be qualified by the observation that, as provided by section 9 of the Schedule, the capital of the Fund is composed of payments made by registered motor vehicle dealers, and not the public at large. The Schedule defines registered motor vehicle dealers who participate in the Fund to be "participants".

16 Section 12(1) of the Schedule states that the Fund is established "to stand in the place of a participant for the payment out of the Fund of claims of customers of the participant where the transactions occurred during the period when the participant was registered under the Act and where the participant has refused after demand or is unable to pay the claims."

17 Section 12(2) provides that a "customer" may make a "claim" against the Fund. The Schedule defines a "claim" as "a claim for pecuniary loss arising out of a transaction involving a trade in a motor vehicle". (emphasis added)

18 Subsection 12(2) provides the claim must meet one of the requirements set out in subsection (3). The wording of subsections 12(2) and (3) makes apparent that a claim is in respect to a motor vehicle dealer and that a claim may be made only where the motor vehicle dealer has refused or failed to pay the claim. The requirements that a claim must meet, which are set out in the subparagraphs of subsection 12(3), are all consistent with the definition of "claim" as pecuniary loss arising out of a transaction involving a trade in a motor vehicle.

19 The plaintiff argues that subsection 12(8) requires a claimant to assign to the Fund any judgment or right of any kind that the claimant has against "any other person", and that subsection 14(3) gives Fund a general right of subrogation for the amount of any payment to any rights or remedies the claimant has.

20 Subsection 12(8) provides:

No amount shall be paid out of the Fund until the claimant assigns to the Fund any judgment or other right of any kind that the claimant has against the participant or any other person in respect of the claimant's claim." (emphasis added)

21 As I read it, what the claimant is required to assign to the Fund by this subsection is limited to those rights that the claimant has against any person "in respect of the claimant's claim," which by definition must arise out of a transaction involving a trade in a motor vehicle.

22 Subsection 14(3) also has a similar focus. It provides:

Where a payment is made out of the Fund, the Board is subrogated for the amount of the payment, to any and all rights or remedies to which the person receiving the payment is entitled in respect of the claim for which the payment was made, including rights and remedies as judgment creditor or execution creditor in respect of any judgment that has been assigned under subsection 12(8) of this Schedule against the participant or any other person or in the event of the death, insolvency, bankruptcy or other disability of the participant or other person, against the personal representative or other person administering the estate of the participant. (emphasis added)

Under this subsection the Board is subrogated to all rights the claimant has "in respect of the claim."

23 At the time he made his claim to the Fund, the plaintiff signed what appears to be a standard subrogation form that provides that the "Fund is hereby subrogated in the place of, and to all rights of recovery, claims and demands of the undersigned against Top Rank Motors Ltd. to the extent of the payment made." This application of this form is limited to the motor vehicle dealer. I presume that this form reflects the requirements of s. 12(8) of the Schedule.

24 In April 2000 the plaintiff executed another subrogation form, which provides that "in consideration of the payment of the claim ... and such other good and valuable consideration", the Fund is subrogated, to the extent of \$15,000, "to any and all rights or remedies to which I am entitled in respect of the claim for which the payment was made against Traders General Insurance Company" (emphasis added). It seems to me that this subrogation form does not add anything to the analysis, as the subrogation rights both under it and the legislation are limited to rights in respect of the claim to the Fund.

25 Counsel for the defendant argued that the loss covered by the Fund was fundamentally different to the loss that the defendant insured. The defendant insured the plaintiff against theft of the vehicle, whereas the plaintiff's claim from the Fund was in respect of a motor vehicle dealer's fraudulent sale of a vehicle to him. He submitted that the Standard Policy of Insurance does not insure that a purchaser of a motor vehicle will receive good title to the vehicle. He argued that factual context is different from the cases relied on by the plaintiff, as the payments made out of the Unsatisfied Judgment Fund and the Motor Vehicle Accident Claims Fund are in respect of the same damage that was insured by the insurer.

26 I am persuaded that this is correct. I find that the plaintiff's right to claim indemnity from Traders is not in respect of his claim to the Fund. His claim against Traders is not a claim for pecuniary loss arising out of the transaction involving a trade in a motor vehicle. It has nothing to do with his status as a customer of a motor vehicle dealer. His claim against Traders arises out of an event that took place after his dealings with the motor vehicle dealer were complete, namely, the subsequent theft of the auto. If the plaintiff had himself discovered the vehicle he bought from Top Rank had been stolen and had he, acting in good conscience, returned it to its rightful owner, his claim against the Fund would be unaffected but he would have no claim against the insurance company. The situation in this case is no different than if the policy issued by Traders was for damage by fire only, and the car burned after the plaintiff purchased it from the dealer. It is readily apparent that the damage covered by the insurance is not in respect of the claim to the Fund.

27 This is not a case where an insurer is trying to use the Fund as a form of free re-insurance of the damage covered by the policy it has issued. It is true that had Traders immediately indemnified the plaintiff for his loss from the theft, the Fund would not have paid out his claim to it. There is no evidence or suggestion that Traders acted other than in good faith based on its view of the jurisprudence at the time.

28 The plaintiff's invocation of public policy, no matter how attractive, must be grounded in the legislative language governing the Fund. I was not persuaded that it was.

29 I would answer the questions posed on the Special Case as follows:

- i) Yes, on consent.
- ii) No.

30 Judgment in accordance with these reasons.

31 Counsel may write to me regarding costs.

JURIANSZ J.

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