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CASE SUMMARY: ONTARIO JUDGE DISMISSES LIABILITY INSURANCE CLAIM DETERMINING THAT POSSESSORY RIGHTS TO CHATTELS DO NOT CONSTITUTE PROPERTY

**Insurance law – Liability insurance – Practice and procedure – Underlying action –
Summary judgments**

Benedict v. Continental Casualty Co.

Possessory rights to chattels do not constitute property within the meaning of section 132(1), R.S.O. 1990, c. I.8.

[2016] O.J. No. 6016

2016 ONSC 7205

Ontario Superior Court of Justice

November 23, 2016

F. Kristjanson J.

This action arose out of a coverage dispute triggered by an underlying action for conversion. The plaintiff initially brought an action against the insured lending corporation, alleging that it had illegally seized equipment which he owned. The plaintiff succeeded at trial and on appeal, and eventually sought to collect damages from the insured. Prior to satisfying the judgment, the insured declared bankruptcy. The plaintiff brought an action against the defendant insurers pursuant to s. 132(1) of the Insurance Act, R.S.O. 1990, c. I.8. Section 132(1) of the Insurance Act states,

132. (1) Where a person incurs a liability for injury or damage to the person or property of another, and is insured against such liability, and fails to satisfy a judgment awarding damages against the person in respect of the person's liability, and an execution against the person in respect thereof is returned unsatisfied, the person entitled to the damages may recover by action against the insurer the amount of the judgment up to the face value of the policy, but subject to the same equities as the insurer would have if the judgment had been satisfied.

The plaintiff took the position that the insured's liability for the tort of conversion constituted "liability for damage or injury to property" within the meaning of section 132(1). He argued that his losses were a consequence of the insured's conversion of his equipment, and thus his claim was not for pure economic loss, but a claim for injury to property. More specifically, he claimed injury to his intangible possessory rights in his property.

After considering several cases, the Court concluded that possessory rights were not property. In doing so, it distinguished the case of *Tycows.com Co. v. Lojas Renner S.A.*, 2011 ONCA 548 (“Tycows”), which had determined that an internet domain name constituted property. The plaintiff relied on a passage in *Tycows* which stated that ‘property’ was comprised of, inter alia, ownership and quasi-ownership interests in intangible or ideational things. The Judge agreed with the *Tycows* decision, but found that the ownership interests were attributes of property, rather than property itself. He concluded that the plaintiff’s equipment was property, but that the plaintiff’s right to that equipment was not.

Based on this reasoning, the Judge concluded that possessory rights to chattels do not constitute property within the meaning of section 132(1). He further noted that the fact that the Judge in the underlying action awarded damages based on the value of the plaintiff’s equipment did not change his conclusion. In light of this decision, the Judge declined to consider the other coverage defenses put forward by the insurer, and dismissed the claim.

This case was digested by [Raylene M. Smith](#) and edited by [David W. Pilley](#) of Harper Grey LLP. If you would like to discuss this case further, please feel free to contact them directly at rsmith@harpergrey.com or dpilley@harpergrey.com or review their biographies at <https://www.harpergrey.com>.