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CASE SUMMARY: ONTARIO COURT OF APPEAL GRANTED RELIEF FROM FORFEITURE TO INSUREDS FROM NON-COMPLIANCE WITH STATUTORY REPORTING REQUIREMENTS

Insurance law – Automobile insurance – Policies and insurance contracts – Uninsured motorist – Statutory provisions – Notice and proof of loss – Non-compliance with policy – Discretion of court – Relief against forfeiture – Statutory conditions

Dams v. TD Home and Auto Insurance Co.

Statutory reporting requirements under Ontario's Uninsured Automobile Coverage Regulation are not conditions precedent akin to limitation periods. The Courts may grant relief from forfeiture to insureds who have failed to comply with these requirements.

[2016] O.J. No. 26

2016 ONCA 4

Ontario Court of Appeal

January 6, 2016

R.A. Blair, C.W. Hourigan, and D.M. Brown

The action arose out of a collision between the plaintiff motorcyclist and an unknown vehicle (the "Accident"). The Accident occurred on July 26, 2009, while the plaintiff was making a right-hand turn onto a four-lane highway. Prior to making the turn, the plaintiff recalled seeing two vehicles approaching, but determining that it was safe to turn. As the plaintiff began to move forward onto the highway, he suddenly saw a third vehicle (the "Vehicle"). The plaintiff braked abruptly in order to avoid a collision. The sudden braking caused the plaintiff's motorcycle to fall on top of him and injure his ankle.

At the time of the accident, the plaintiff had an automobile policy with the defendant insurer (the "Policy"). The plaintiff applied for accident benefits in October 2009, which he received. Several months later, in May 2009, the plaintiff commenced a tort action against his insurer, pursuant to the Uninsured Automobile Coverage provisions of the Policy.

The insurer took the position that the plaintiff could not succeed in his action because he had failed to comply with two notice provisions under the *Uninsured Automobile Coverage Regulation*, R.R.O. 1990, Reg. 676 (the "Regulation"). In particular, the plaintiff had failed to report the accident to the police within 24 hours and to provide written notice to the insurer within 30 days (the "Reporting Requirements"). Both of the Reporting Requirements were also incorporated into the Policy.

At the trial of the action, the Mr. Justice Sloan found that the plaintiff had failed to comply with the Reporting Requirements. However, he granted the plaintiff relief from forfeiture pursuant to section 129 of the *Insurance Act*, R.S.O. 1990, c. I.8, and section 98 of the *Courts of Justice Act*, R.S.O. 1990, c. C43. Mr. Justice Sloan also apportioned liability 60% to the plaintiff and 40% to the unknown driver. The insurer appealed both of these rulings, and the plaintiff cross-appealed the apportionment of liability decision.

The Ontario Court of Appeal upheld the Judge's decision. With respect to forfeiture, the Court rejected the insurer's argument that the Reporting Requirements were akin to a limitation period. The Court considered the Supreme Court of Canada's decision in *Falk Bros Industries Ltd. v. Elance Steel Fabricating Co.* [1989] 2 SCR 778 ("*Falks*"), stating:

[16] The Supreme Court [of Canada] observed, at p. 782, that sections like s. 129 are remedial in nature and "as such should be given an appropriately broad interpretation". The purpose of allowing relief from forfeiture in insurance cases "is to prevent hardship to beneficiaries where there has been a failure to comply with a condition for receipt of insurance proceeds and where leniency in respect of strict compliance with the condition will not result in prejudice to the insurer": at p. 783. However, the court's power under provisions like s. 129 only extends to cases "of such statutory conditions as to proof of loss or other matters or things that are required to be done or omitted with respect to the loss": at p. 786.

[17] The [Supreme Court of Canada] then addressed the question of whether the failure to give notice of a claim under an insurance policy amounted to "imperfect compliance with a statutory condition as to the proof of loss", in which case relief under the statutory provision would be available, or whether it was non-compliance or breach of a condition precedent, in which case there could be no relief. It concluded, at pp. 785-786, that the failure to give notice of a claim in a timely fashion constitutes "imperfect compliance with a statutory condition as to the proof of loss" and falls within the terms of the relief provision. By contrast, the failure to institute an action within the prescribed time period would be a more serious breach, akin to non-compliance. Because Elance's failure to give notice of its claim within the prescribed time constituted imperfect compliance rather than non-compliance, Elance was eligible to claim relief from forfeiture.

The Ontario Court of Appeal found that the Reporting Requirements were functionally similar to those in the *Falks* case. It ruled that the plaintiff's failures amounted to non-compliances, rather than a serious breach.

The Court also rejected the insurer's argument that section 8(1) of the *Regulation* operated to make the Reporting Requirements a condition-precedent. Section 8(1) bars a party from bringing an action "unless the requirements of this Schedule with respect to the claim have been complied with". The Court considered the whole of the statutory scheme and found that section 129 specifically contemplated providing relief from forfeiture for other requirements within the Schedule. As such, the language of section 8(1) did not preclude a Judge from granting relief from forfeiture.

The Court also upheld Mr. Justice Sloan's decision with respect to the apportionment of damages. It concluded that it was open to Mr. Justice Sloan to make the findings that he did, based on the evidence that was put before him.

As such, the Court dismissed the appeal and cross appeal, with costs to the respondent.

This case was digested by [Raylene M. Smith](#) of Harper Grey LLP. If you would like to discuss this case further, please feel free to contact her directly at rsmith@harpergrey.com or review her biography at <http://www.harpergrey.com>.