HARPER GREY LLP
3200 – 650 West Georgia Street
Vancouver, British Columbia, V6B 4P7
Canada

Tel: 604 687 0411
Fax: 604 669 9385

CASE SUMMARY: DAMAGES FOR ACCELERATED DEPRECIATION FROM TORTFEASOR ARE NOT RECOVERABLE UNDER ONTARIO'S NO-FAULT INSURANCE SCHEME

Insurance law – Automobile insurance – Policies and insurance contracts – No-fault coverage – Statutory provisions – Damages – Accelerated depreciation – Bailment – Derivative claims

Keyhani v. Downsview Chrysler Toronto

Ontario's no-fault insurance scheme precludes a vehicle owner from recovering damages for accelerated depreciation from the tortfeasor who is responsible for damaging the said vehicle. A party cannot rely on the law of bailment to circumvent the no-fault scheme where the true cause of action is in tort.

[2016] O.J. No. 20

Court File No. SC-13-24083-0000

Ontario Superior Court of Justice – Small Claims Court

Toronto, Ontario

January 4, 2014

J.C.F. Hunt Deputy J.

The action arises out of a claim for diminution in market value of a 2004 Dodge Viper SRT-10 Mamba Edition (the "Vehicle"). The Vehicle was damaged while it was at the Defendant's automobile repair shop. The defendant took responsibility for the damages and repaired the Vehicle. However, the plaintiff further sought to recover the Vehicle's depreciation in market value, and relied upon, inter alia, the principles of bailment. The defendant argued that sections 263 and 278 of the *Insurance Act*, RSO 1990 c I.8 ("Insurance Act") precluded the plaintiff from recovering.

After careful consideration, Justice Hunt accepted the defendant's position, and found that the no-fault scheme set out by the *Insurance Act* prevented the plaintiff from succeeding in his claim. In doing so, he considered subsection 263(5) of the *Insurance Act*, which provides:

> Restrictions on other recovery
>
> (5) If this section applies,
>
> (a) an insured has no right of action against any person involved in the incident other than the insured's insurer for damages to the insured's automobile or its contents or for loss of use;

> (a.1) an insured has no right of action against a person under an agreement, other than a contract of automobile insurance, in respect of damages to the insured's automobile or its contents or loss of use, except to the extent that the person is at fault or negligent in respect of those damages or that loss;
>
> …

In conjunction with provision, Justice Hunt cited the Ontario Court of Appeal in *Clarendon National Insurance v. Candow*, 2007 ONCA 680 for the following comments:

> [7] Section 263 of the Insurance Act replaced the tort system that resolved automobile damage claims prior to its enactment. In the new statutory scheme, insureds can no longer sue the tortfeasor driver whose negligence has caused damage to their cars. Rather, their own liability insurer pays for the damage, to the extent that they were not at fault, under the third party liability section of their motor vehicle liability policies. Insureds can recover the at-fault portion of their damage by purchasing collision coverage. Insurers have no right of subrogation for payments to their own insureds, but, on the other hand, do not have to pay the subrogated claims previously brought by other insurers in the tort system. The result is that the statutory regime eliminates the transactions costs that were inherent in the tort system.

In light of this law, Justice Hunt rejected the plaintiff's assertion that a claim in bailment could succeed independently of the Insurance Act's no-fault scheme. He found that, as a matter of law, the true damage and civil wrong in this case was a tort, in the form of a motor vehicle accident. He further found that bailment was merely a derivative cause of action of the tort in this case, and that allowing the plaintiff's claim on this basis would subvert the legislative scheme that exists to address such situations. With respect to these principles, he cited the Supreme Court of Canada in *Heredi v. Fensom*, 2002 SCC 50 (a case involving limitation periods) at paragraph 37:

> [37] In the light of the substantive approach herein adopted, it can also be seen that there will be some claims in contract that the statute will bar. Where a claim brought in contract is, essentially, an attempt to frame what is really a tort action in terms that mean to evade the operation of the limitation period, the period will operate nevertheless … Where the framing of the action in contract is a tendentious characterization of this sort, a court must not be afraid to interfere with alleged contract rights … this is no license to frame actions in a less than natural manner merely to avoid the section's operation.

As such, Justice Hunt dismissed the plaintiff's case, and awarded the defendant nominal damages.

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.